

**External Constraints and Internal Norms on  
the U.S. Supreme Court**

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# Abstract

Chapter 1 is an introduction. In Chapter 2, I examine the norm of consensus, the normative expectation that justices come to unanimous decisions without dissenting votes. Specifically, I tackle the tension between justices' pursuit of ideological objectives and institutional ones. In other words, I address the questions why the Court can come to consensus at all and why do individual justices join the majority coalition against their sincere policy preferences. Drawing from scholarship on the Court's maintenance of its institutional legitimacy, I posit that external constraints on judicial legitimacy motivate the justices to abide by the norm of consensus – even at the expense of their ideological goals. I find that, both at the Court level and individual justice levels, the norm of consensus exerts a stronger influence on judicial behaviors when public and congressional opposition increases *and* when case is politically salient.

Chapter 3 looks at the norm of *stare decisis* and the influence of precedent on the Court's policy-making. I argue that citations of precedents signal that the opinions are deeply grounded in the law and not in justices' personal policy preferences. Justices expend more efforts to send such signals when they sense heightened external constraints on the integrity of the Court as an institution. Using citation data of the Court between the 1957 and 2005 terms, I find that precedents are more likely

to be cited when public opinion or congressional opposition to the Court increases. Further, since not all precedents are created equal, the analysis suggests that legal relevance or authority of a precedent interact with external conditions facing the Court in determining which precedent is cited in the Court's majority opinion.

Chapter 4 focuses on the norm of collegiality during the Court's oral arguments, the most open and transparent part of the U.S. Supreme Court decision-making process, which deservedly receive their fair share of attention from actors beyond the Court. News media, Court scholars, and legal professionals attempt to gain insights into the internal dynamics among the justices through their behavior during oral arguments. While extant literature focuses on predicting justices' merits votes based on their oral argument behavior, it is plausible that these actions are partly shaped by the justices' desire to maintain the legitimacy of the Court. Given the relatively high profile of oral arguments, justices should be aware of the external scrutiny they receive and the consequences of their behaviors beyond the law and policy entailed in the immediate case. To test my expectations, I analyzed the transcripts of Supreme Court oral arguments between 1957 and 2012 terms and show that public and elite constraints on judicial legitimacy affects justices' propensity to interrupt each other.

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# Chapter 1

## Introduction

In a noteworthy inter-branch clash, President Donald J. Trump publicly argued with Chief Justice John G. Roberts about whether “Obama justices” and “Clinton justices” exist. As troubling as Trump’s partisan denouncement of federal judges is on a normative level, it is also indicative of a prevailing sentiment today that Supreme Court justices are merely “politicians in robes” who make decisions based on ideological considerations rather than based on the law. Public support for the Court, albeit highly relative to the other branches in the aggregate, is also divided along ideological lines. Indeed, justices today often find themselves perfectly aligned along ideological, or even partisan, lines when deciding salient cases. All these developments call into question the legitimacy of the supposedly apolitical institution. My overarching question focuses on how the justices deal with this scenario. Specifically: In the context of partisan polarization and declining democratic norms, how do the justices strike a balance between their policy objectives and maintaining institutional legitimacy for the Court?

Existing literature suggests that the Court’s lack of power to implement its own

decisions makes institutional legitimacy essential political capital for the Court. I argue that in the age of partisan polarization, when the Court faces heightened risks of politicization, justices still perceive strong needs for legitimacy in order to retain their policy efficacy and to safeguard their commitment to the rule of law. To do so, justices must make legally and morally compelling decisions. My theory posits that justices abide by internal legal norms to shroud their decisions with legitimacy.

The norms I investigate include consensus (voting unanimously and not writing separate opinions), *stare decisis* (respecting past Court precedents), and collegiality (treating colleagues with respect). These norms represent unique expectations of judicial behavior deeply rooted in American law and founding ideals. To wit, they help perpetuate the critical notion that justices make legal rather than political decisions which, in turn, undergirds public acceptance of judicial legitimacy.

This research contributes to existing scholarship in several ways. First, past literature focuses on the Court's propensity to invalidate federal statutes as a function of a perceived legitimacy deficit. I shift the attention from what the justices decide (whether they strike down a congressional law) to how they decide it (what coalitions they form, how they use legal precedents, and how they interact other during oral arguments). Hence, my dissertation examines all the Court decisions made since the 1950s rather than a small number of cases involving the constitutionality of federal law. In so doing, it develops the theoretical and empirical understanding of the limits of judicial independence in the U.S., shedding contemporary light on the Court's conventional status as the "least dangerous branch."

Second, by examining the relationship between the Court's external political conditions and justices' conformity to internal norms, my dissertation serves as an important step toward unifying the long isolated external and internal-based strategic

accounts of judicial behavior. Existing literature treats the Court as a monolithic unit in its interaction with outside actors (Clark 2009) while analyses of interactions among the justices do not consider conditions external to the Court (Maltzman, Spriggs and Wahlbeck 2000). Melding these two views offers a much more complete picture of how the justices decide.

Third, my theoretical argument is inter-disciplinary. I apply political-psychological theory of judicial legitimacy to studying justices' behavior. In particular, I show that justices modify their behavior to perpetuate the myth of impartiality which is essential to mass psychological acceptance of judicial legitimacy. This perspective complements the literature that tends equate judicial legitimacy maintenance with the Court's restraint in striking down congressional laws.

Fourth, I contribute to the enduring scholarly debate over whether law effectively constrains justices. Past research centers on whether legal doctrines dictate what justices decide (a liberal or conservative decision) with mixed result. Since I frame legal norms as instruments of legitimacy maintenance, I offer a new perspective that law constrains how justices decide. When the Court lacks legitimacy, justices rely more heavily on precedents to shore up their authority.

Finally, and normatively, my dissertation is a timely one as political scientists and observers alike debate the impact of three major trends in contemporary American politics: increased partisan polarization, polarized views of the Supreme Court, and declining democratic norms. My findings thus far demonstrate the Court remains a guardian of the rule of law as its decision-making is largely norm-based. Yet my research also suggests that only heightened external constraints discourage justices from pursuing their ideological goals. This means that only by maintaining the strength of checks and balances and by increasing public engagement in the political and legal

processes can we ensure that justices adhere to norm-based decision making in an era of political contentiousness.

# Chapter 2

## Norm of Consensus

### Introduction

On January 21, 2010, the U.S. Supreme Court's five conservative justices formed the majority in *Citizens United v. FEC*, ruling in favor of protection of corporate political speech. The four liberal justices dissented. Within a week, President Obama, during his State of the Union Address, unprecedentedly excoriated the decision in front of the Supreme Court justices and urged Congress to overturn the decision. Justice Samuel Alito Jr., a member of the Court's conservative majority in this case, seemed to mouth the words "not true" on live TV in response (Liptak 2010).

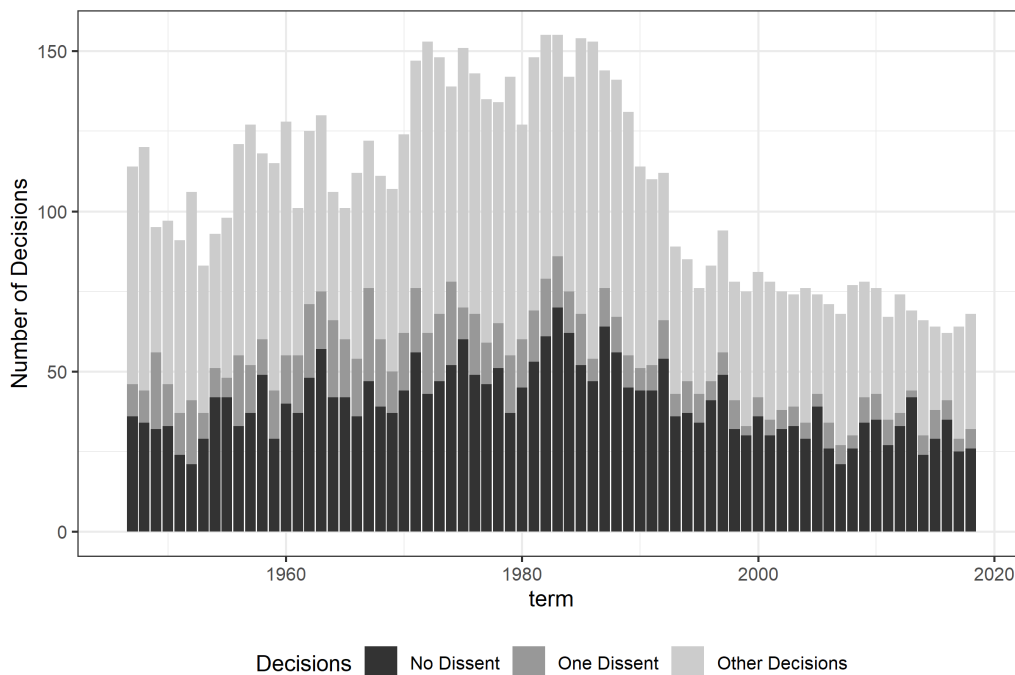
The Supreme Court often finds itself in such tense confrontations with the elected branches and American people more broadly as the justices intervene in the country's most controversial and politically salient issues. This is especially true since such decisions tend to thrust the Court into the heart of partisan politics of the day, calling into question the legitimacy of this, supposedly, apolitical and impartial institution.

In contrast to the popular notion that justices are partisan and the media de-

fiction perpetuating this belief (Denison, Wedeking and Zilis 2020), scholars have long recognized the norm of consensus on the Court (Walker, Epstein and Dixon 1988). Established by Chief Justice John Marshall as part of his efforts to bolster the Court's institutional position in American politics, the norm stresses the need for justices to speak uniformly on behalf of the Court and discourages justices from publicly airing disagreements with the majority opinion (O'Brien 1999). Yet the norm of consensus, as other social norms, evolves. The sharp rise of the dissenting and concurring opinions in the early 1940s severely strained the norm and constituted a major structural change to the Court's decision-making regime (Walker, Epstein and Dixon 1988; Caldeira and Zorn 1998). An observer of today's Court can readily tell that this structural break is essentially permanent, as no one expects the Court to regain the levels of consensus of the by-gone era. While higher levels of dissensus seem to have become the new normal for the Court, as Figures 2.1a and 2.1b show, the Court has maintained a steady level of decisional consensus and the decline in the number of consensual decisions from the mid-1980s seems to have happened in tandem with the overall decline of the Court's caseload (Owens and Simon 2011).

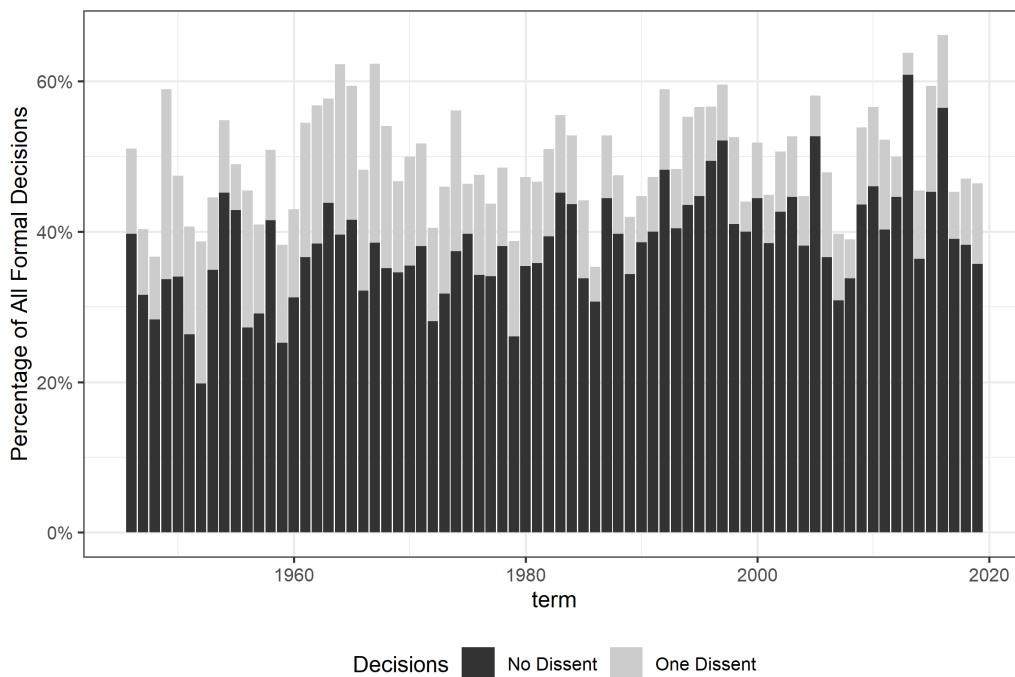
The puzzle is why – now that the norm of consensus is unlikely to govern the Court as it used to, does the Court decide a decent number of cases in a highly consensual or even unanimous way? How can we explain the term-to-term variation in the levels of consensus? Why and when do individual justices join majority coalitions, despite their ideological disagreements with the majority opinion? The puzzle is an important one because consensus matters a great deal to the Court's image as a non-political institution, particularly in the age of political polarization. The puzzle is also at the heart of judicial politics research. Specifically, why would ideologically driven justices come to so many agreements at all (Segal and Spaeth 2002)? Why are the

Voting Consensus on the U.S. Supreme Court (1946-2019 Terms)



(a) Number of formally decided cases with no, one, or more than one dissenting vote

Voting Consensus on the U.S. Supreme Court (1946-2019 Terms)



(b) Percentage of formally cases with no, one, or more than one dissenting vote

Figure 2.1: Level of voting consensus at the U.S. Supreme Court, 1946-2019 terms

strategically minded justices willing to compromise in order to claim a larger majority coalition (Epstein and Knight 1997)? If law is a constraint and higher legal certainty allows greater consensus (Corley, Steigerwalt and Ward 2013), how does that dovetail with the Court's role as the arbiter of the nation's most complicated legal issues?

To solve this puzzle, I bring scholarship on judicial legitimacy to bear on the Court's internal norm of consensus. Since external constraints on judicial legitimacy constitutes the most potent limits on judicial independence and the conformity to the norm of consensus has major implications for how the Court stands as a legitimate institution, I posit that external influences can impact whether the Court abides by its internal norm of consensus.

To test this broad claim, I take advantage of the rich body of scholarship that focuses on the Court's maintenance of institutional legitimacy within the Separation-of-Powers (SOP) system. I argue that justices take cues about judicial legitimacy from their perception of public opinion and their interactions with Congress, which then affects the justices' propensity to make unanimous decisions. The reason, I posit, is because consensual behaviors advance the Court's goals of institutional legitimacy. Having identified these mechanisms of external constraints on consensual behaviors, I suggest a conditional argument of judicial independence. Specifically, I expect that these external constraints should be more effective in inducing the conformity to the norm of consensus over cases where the Court's institutional vulnerability is accentuated.

This chapter develops as follows. First, I develop my theory that legitimacy-maintenance motivates justices to abide by the norm of consensus. Following that, I derive hypotheses regarding when and how the Court as a whole and individual justices abide by the norm of consensus. These hypotheses are put to test in two

separate analyses. The first examines the Court's overall propensity toward unanimity and the second focuses on individual justices' decision to join the majority. Finally, I discuss the results and their implications for judicial politics literature.

## Judicial Legitimacy and the Norm of Consensus

While the power and prestige enjoyed by the contemporary Court would perhaps amaze the Framers of the Constitution, it remains true that the Court is the "least dangerous branch." That is, the Court still lacks the institutional power to enforce its own decisions, which makes it dependent on external support for its policy efficacy and power. The support, at its most fundamental level, refers to the public acceptance of the Court's legitimate position as a coequal branch of the U.S. government. Scholars refer to such support as diffuse support, or institutional legitimacy (Gibson and Nelson 2014). As Justice O'Connor observed, "The Court's power lies... in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands" (*Planned Parenthood v. Casey* (1992), 505 U.S. 833). A plethora of empirical and normative scholarship documents the Court's perpetual need for such public acceptance. Often compared to the "reservoir of goodwill," the Court's legitimacy provides the incentives for acceptance and implementation of judicial decisions, especially unpopular ones. Some scholars offer insights from political and social psychology, pointing to justices' need to be perceived positively by their legal and political audiences as well as by the public at large (e.g., Baum 2009; Posner 2010).

Then, the question is, how do justices maintain the Court's legitimacy? In other

words, what aspects of the judicial decision-making process do the justices believe are conducive to fostering the Court's positive image? A main focus of the literature is on the promotion of majoritarian policy preferences, partly in an attempt to assuage the normative concern over the "countermajoritarian" role in an otherwise democratic polity (Bickel 1962). This is not surprising. A wealth of research suggests the congruence between Court policy output (particularly salient cases in the aggregate) and external preferences predict the Court's institutional standing. This applies to the public evaluation of the Court (Bartels and Johnston 2013, 2020) and to congressional attempts to curtail judicial power (Clark 2011). Indeed, scholars find evidence that the Court does indeed respond to public opinion (Giles, Blackstone and Vining 2008; Bryan and Kromphardt 2016; Casillas, Enns and Wohlfarth 2011) or elite preference (Hall 2014; Devins and Baum 2019; Bailey and Maltzman 2011). A long line of research also indicates that the Court rarely uses constitutional invalidation to challenge Congress (Dahl 1957; Clark 2009; Hall and Ura 2015; Mark and Zilis 2018), a critical sign that legitimacy consideration motivates the Court to promote majoritarian will.

Another important, yet understudied, way in which justices uphold the Court's legitimacy is to alter the way they make decisions without necessarily changing the ideological direction of their decisions. Along this line of thinking, many scholars used text analysis of various persuasions to study the strategic way in which justices defend their decisions in their opinions. Some find that justices strengthen their legal arguments or change their authoritative source when they perceive difficulty in promulgating individual decisions as legitimate (e.g., Walsh 1997; Corley, Howard and Nixon 2005). Hume (2006), for instance, finds that justices are more likely to invoke founding documents or respected jurists when their decisions plausibly

lack legitimacy, including those involving alteration of precedent, judicial review, or multiple separate opinions. Relatedly, Cross et al. (2010) find that the Court strategically cites precedents in majority opinions to legitimize the decisions that exercises constitutional invalidation or are politically salient.

Building on these works that put an emphasis on individual decision legitimation, I posit justices abide by the norm of consensus with the goal of conforming to the normative expectation as to how justices should behave in the American constitutional system. To develop my argument, I establish two premises. First, justices perceive greater consensus on case merits make the decision more acceptable, more likely to be followed, and ultimately more legitimate. Court scholars are most familiar with Chief Justices Warren’s efforts to obtain (and maintain) unanimity in *Brown v. Board of Education* (1954) and subsequent school integration cases since these decisions were foreseen to meet fierce opposition in the South (Rehnquist 2001; Rosenberg 2008). Warren’s rationale, as many would agree, is his belief that acceptance of Court decisions, especially unpopular ones, is built on the public perception of the neutrality and impartiality of the Court’s decision-making process (Tyler and Mitchell 1994; Scheb, Lyons et al. 2000; Baird and Gangl 2006). Beyond this famous anecdote, Li (2020) provides systematic evidence that chief justices are more likely to assign opinions to ideologically distant justices in to solidify, or even to enlarge, the majority coalition to cope with a decline in judicial legitimacy.

Justices’ own remarks corroborate the linkage between the norm of consensus and the Court’s legitimacy. Justice Steven Breyer’s dissenting opinion in *Bush v. Gore* (2000) is a case in point – “And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public’s confidence in the Court itself ” (531 U.S. 98, at 157–58, Breyer, J., dissenting). Similarly, Jus-

tices Sandra Day O'Connor, David Souter, and Anthony Kennedy wrote in *Planned Parenthood v. Casey* (1992) that the Supreme Court “must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as truly grounded in principle...” These examples indicate the justices heed Hamilton’s argument that requires the Court to render “judgment” rather than “will” (Hamilton and Jay 2009, 391). And it is arguable that a split decision belies the impartial judgement the Court claims to be handing down, opening up criticisms of ideological decision-making of the justices.

Second, a key theoretical innovation of this paper is that justices should strategically abide by the norm of consensus to shore up judicial legitimacy as they perceive higher levels of external threats to the Court that warrant such behavior. Hence the Court’s internal deliberation is connected to its external institutional standing. Further, I posit that justices perceive their voting coalitions on the merits as possibly observable by outside actors, especially those who can affect the institutional standing of the Court. This position is supported in the literature. At the elite level, research suggests that Congress pay attentions to the Court’s consensual behaviors and responds to them. Salamone (2018), for instance, suggests that members of Congress publicly challenge the legal authority of closely divided cases. Indeed, decisions failing to marshal unanimity are more susceptible to legislative-judicial conflicts. For instance, Congress is more likely to overturn non-unanimous judicial statutory decisions (Hettinger and Zorn 2005; Ignagni and Meernik 1994). Members of Congress also express their concern over the legitimacy of a divided Court. For instance, during the Senate confirmation hearings of John Roberts, Senator Arlen Specter (D-PA) expressed his hope that the confirmation “would present a very unique opportunity for a new Chief Justice to rebuild the image of the Court away from what many believe

it has become, a super-legislature, and to bring consensus to the Court with the hallmark of the Court being 5–4 decisions. . . .” In fact, during the entire hearing, senators on the Committee mentioned the phrase “5-4” more than 30 times, indicating their doubt on the legal authority of such decisions handed down by the Court.

At the mass public level, many scholars point out that media coverage serves as an important bridge between the Court’s relationship with the usually disengaged public (Denison, Wedeking and Zilis 2020). And justices seem to be aware of this fact. Glennon and Strother (2019) document that justices devote the bulk of their TV interview time emphasizing the legitimacy of the Court, and Krewson (2019)’s experimental studies suggest that such “public relations” work of the Court does improve people’s institutional loyalty toward the Court. More specifically, research indicates media coverage treats consensual decisions differently from divided ones as the latter tend to receive more negative coverage (Zilis 2017; Salamone 2018; Zilis, Wedeking and Denison 2017). Additionally, scathing dissents (those employing negative language) is also associated with increased media coverage of a case (Bryan and Ringsmuth 2016). Such media focus on the Court’s disagreements, in turn, could lead to potential erosion of public acceptance of Court decisions and even a decrease in the public’s confidence in the Court (Hitt and Searles 2018). After all, as Hibbing and Theiss-Morse (2002) suggest, the relative invisibility of inter-justice disagreements is a key reason why the Court is consistently extended more support than Congress. Indeed, Ramirez (2008) directly tests this possibility and finds that media portrayal of whether or not the Court’s decision-making lacks procedural fairness significantly influences an individual’s support for the Court as an institution.

Whether or to what extent abiding by the norm of consensus directly increases the Court’s diffuse support, especially against such counteracting forces as motivated

reasoning and partisan polarization (Bartels and Johnston 2020; Badas 2016), is beyond the scope of this paper. This paper is about what justices perceive as normative expectations for behaviors shape the way in which they make the decisions. Ultimately, making unanimous decisions falls within the proper boundaries of how the Court should decide and helps portray the Court's image as above the fray of party politics. This is especially important as the Court navigates an increased partisan and polarized political context. As Chief Justice Roberts commented, "when you live in a politically polarized environment, people tend to see everything in those terms. That's not how we at the court function, and the results in our cases do not suggest otherwise" (Liptak 2019).

## **External Constraints on Judicial Legitimacy: Public Opinion and Separation-of-Powers**

My theoretical argument is that the Court is more motivated to abide by the norm of consensus as justices perceive greater need to maintain the institutional standing of the Court. The question then arises is how do justices gauge when they are perceived as more or less legitimate? In other words, what constitutes a constraints on judicial legitimacy?

First and foremost, institutional legitimacy, or diffuse support, refers to the public's evaluation of the Court's position as a legitimate policymaker in the democracy. Without public confidence in the Court, justices risk losing the independence of decision-making and witnessing their policy pronouncements ignored or defied outright. As Clark points out, "the most effective limit on judicial independence is the need for institutional support from those who really wield power in a democracy –

the people” (2011, 4).

Critically, the literature has provided support for the notion that the Court, albeit nominally insulated from the public, maintains an evaluation of their image among the public. This stems from justices strategic pursuit of institutional legitimacy. Using objective measures of macro-public support for the Court as proxies for the justices’ perception of judicial legitimacy, scholars find that lower public confidence leads to less frequent invalidation of federal statutes (Clark 2009), higher attentiveness to public policy mood (Bryan and Kromphardt 2016; Bryan 2020), and more active inquiry about congressional preferences during oral arguments (Ringsmuth and Johnson 2013).

However, the Court is not as closely connected with the constituents as the elected branches of government, especially Congress (Mayhew 1974). Since Congress possesses the potent tools to curtail of judicial independence (Rosenberg 1992) and has closer connections with the public, members of Congress strategically use these tools to “manipulate” the Supreme Court’s perception of how much public support it enjoys (Clark 2011, 15). In other words, in order to maintain judicial legitimacy, justices must navigate their relationship with the public through the mediation of Congress. In Clark (2011)’s formalization of Court-Congress interactions, he emphasizes the informational value of these tools, known as Court-curbing. Congress proposes these legislative measures as a way of position taking under the pressure of their constituents who are dissatisfied with the Court. Even when members of Congress are grandstanding, Clark (2011) cites a justice as worrying that these proposals could shape public opinion against judicial integrity by “politicizing” the Court. Consequently, we should expect that the Court assesses its public support partly through the medium of congressional Court-curbing. Empirically, as Clark (2009) finds, more

pessimistic judicial perception of public support, reinforced by higher Court-curbing activities, significantly reduces the chance that justices will invalidate federal statutes.

The contributions of Clark (2011, 2009) to the scholarship of separation-of-powers (SOP) span beyond theorizing a way in which the public opinion could define inter-institutional relations. More broadly, his theoretical account and empirical findings join hands with some other scholars in developing the theory of SOP constraints on judicial independence (Segal, Westerland and Lindquist 2011; Ura and Wohlfarth 2010). Evidence of the Court making decisions strategically in anticipation of possible congressional overrides has long eluded scholars of the SOP (e.g., Owens 2010; Sala and Spriggs 2004). Instead, scholars have found much stronger evidence of SOP constraints on the Court as a result of the Court's desire to maintain its legitimacy which is subject to attacks from elected officials, Congress in particular (Segal, Westerland and Lindquist 2011; Ura and Wohlfarth 2010; Mark and Zilis 2018).

This line of SOP research, known as the “institutional maintenance model,” stresses the possibility of systematic institutional assaults to the Court over that of specific policy override. Hence, instead of examining the locations of relevant pivotal players in a policy space over a specific case or law, scholars find that the Court examines its institutional standing by gauging its overall ideological compatibility with Congress. The underlying assumption is that when the Court faces an ideologically hostile Congress, it will avoid confrontational behaviors and spend more energy enhancing its institutional legitimacy. Empirical evidence on constitutional invalidation of federal statutes suggests that the Court senses greater needs to maintain its legitimacy when it is out of sync with the prevailing policy preferences in Congress. This model resonates with Dahl (1957) seminal study of how constitutional invalidation often serves to promote the interest of the current governing majority by removing

policies from the previous majority. An implied insight from Dahl's finding is that the ideological bent of the legislative majority, represents the policy inclination of the elites in power, and also, to some extent, represents the dominant policy preferences of American electorate. The bottom line is that an ideologically incompatible Court should sense its shakier institutional position while facing such a majority in Congress. Empirically, scholars find that judicial maintenance of institutional legitimacy not only shows itself in constitutional invalidations (Segal, Westerland and Lindquist 2011; Hall and Ura 2015), justices are also more prone to using ambiguous language in their opinions to evade congressional rebukes (Owens, Wedeking and Wohlfarth 2013). Such institutional maintenance behaviors probably happen even prior to the merits stage. At the agenda-setting stage, justices tend to avoid certain cases altogether when they sense a hostile political environment (Lane 2021; Moffett et al. 2016; Harvey 2013).

Relatedly, Ringsmuth and Johnson (2013) show that the overall ideological divergence between Court and Congress also makes justices more willing to actively inquiry about Congress and its preferences during oral arguments.

To the extent that justices tend to use their time and energy strategically (Murphy 1964; Epstein and Knight 1997), they should be more aware of the external reactions to their dissensual decisions when outside actors are more engaged. A key to understanding this dynamic, then, is the political salience of Supreme Court cases. Despite the generally low knowledge people possess about the Supreme Court, justices should be more concerned with public reactions to more politically salient cases. Indeed, as Hoekstra (2000) demonstrates, people acquire information of and form opinions about the Court if they have access to relevant information and that the decision is perceived to be important. As a Court justice observed, "we read the newspapers

and see what is being said – probably more than most people do... we have to be careful not to reach too far” (Clark 2009, 973). This sentiment is no outlier as many empirical works establish stronger connection between public opinion and judicial decision-making over politically salient decisions (Bryan 2020; Strother 2019; Collins and Cooper 2016; Bryan and Kromphardt 2016; Giles, Blackstone and Vining 2008). The theoretical incentive for justices to follow more closely the public sentiment over politically salient cases is to foster public support and institutional legitimacy. Indeed, empirical evidence suggests that lower public approval of the Court is associated with the divergence between public policy mood and the Court’s decisions in salient cases (Durr, Martin and Wolbrecht 2000).

In addition to moderating the relations between the Court and the public, case salience also conditions the mechanisms of SOP influence on judicial decision-making. The literature on institutional maintenance primarily deals with judicial review of federal laws, which tend to be highly salient. More generally, as Hall (2014) demonstrates, judicial decisions are more responsive to congressional preference over salient decisions. Salient cases not only tend to contain more important policy issues interesting to members of Congress; the fact that people are more tuned in over these cases and are more likely to make their preferences known to their members of Congress, indicates that the Court must heed its congressional constraints more closely as case salience increases. As Clark (2011) observes, “when the judiciary is very politically salient, then attacking the Court (either by sponsoring a bill or just voting for one) should generate a large and positive electoral benefit for legislators.” (2011, 85) Therefore, either for public opinion, Congress, or the interaction of both, the Court should engage in sophisticated decision-making more in politically salient cases than non-salient ones.

Taken together, to the extent that the Court’s institutional integrity is constrained by the public and their representatives in Congress, it is imperative for the justices to heed congressional as well as public opposition. If they do, then greater judicial efforts to bolster legitimacy should manifest themselves when these external constraints increase, especially when it comes to politically salient cases.

## Hypotheses

I argue that legitimacy-minded justices understand that external actors, primarily the public and members of Congress, can affect the institutional legitimacy the Court. Therefore, their behavior, such as whether they abide by the norm of consensus, should vary based on different signals sent by Congress and the public. As Caldeira and Zorn (1998) observe, while norms “represent an equilibrium among the participants,” external actors’ sanctions can induce greater compliance (876).

The conformity to the norm of consensus should have somewhat different empirical manifestations at different levels of analysis. At the Court level, I expect the Court to reach unanimity, represented by decisions with no dissenting vote (Corley, Steigerwalt and Ward 2013). At the individual justice level, I expect individual justices’ to join the majority coalition (Epstein, Segal and Spaeth 2001). My hypotheses focus on both levels of analysis. Specifically, I expect the Court’s outlook of its public support to affect its behaviors, since public trust in or support of the Court is fundamental to the Court’s legitimate position in American politics. While the levels of diffuse support among the public is considered highly stable, we should not assume that public attitudes toward the Court has no impact on the Court. In my theoretical arguments, consistent with Clark (2009), I posit that the Court should be sensitive

enough even to short-term decline in its specific support for fear of long-term erosion of diffuse support. The distinction between the two types of support, as Bryan and Kromphardt (2016) argue, is perhaps more important to scholars than to the justices who seek all forms of public support available to function as a legitimate institution. Therefore, I expect a positive relationship between norm of consensus and public opposition.

Further, as stated above, a key component to my argument is the political salience of a case. Recently, Strother (2019) takes stock of the literature on external constraints and salience and indicates that “Court is sometimes constrained in its decisions in salient cases, but not. . . in its decisions in non-salient cases” (144). Specifically, I suspect that political salience moderates the effects of external constraints on the Court’s propensity to abide by the norm of consensus. The visibility of internal norms to the outside actors is key to establishing a causal relationship between external constraints and internal norm conformity. Therefore, I condition my empirical expectations on the political salience of a decision. Specifically, I hypothesize:

**Public Support and Political Salience:** *The marginal effect of public support on the conformity of the norm of consensus will increase as the political salience of a case increases.*

The Court also operates in the SOP system where Congress mediates the Court’s relationship with the public. Therefore, I expect that the constraining effects of public opposition to rise as congressional Court-curbing rises as well.

**Public Support, Political Salience, and Court-Curbing:** *The marginal effect of public support on the conformity of the norm of consensus is higher as the political salience of a case increases, and even more so if the Court-curbing activities in Congress increase.*

Institutional maintenance literature suggests that distance between the Court and Congress can directly lead to constrained judicial behaviors, such as less frequent constitutional invalidation (Hall and Ura 2015; Segal, Westerland and Lindquist 2011). I argue the constrained judicial behaviors should include also conformity the norm of consensus. And, I expect the constraining effect of congressional ideological constraint to be stronger over more politically salient cases as well.

The ideological compatibility between the Court and the president should also play role in constraining judicial decisions. Particularly, I expect that when an ideologically hostile Congress is accompanied by a president of similar ideological predisposition, the Court should sense even stronger needs to maintain its institutional integrity. Conversely, if the president is on the opposite of Congress, the effect of ideological constraint from Congress might be undermined. Therefore, I expect the interaction between congressional ideological constraint and political salience to vary under a divided government versus a unified government.

**Congressional Constraint and Unified Government:** *As the ideological distance between the Court and Congress increases, the Court and individual justices are more likely to abide by the norm of consensus, and the marginal effect of congressional ideological constraint on the norm conformity should increase as the political salience of a case increases, even more so if there is a unified government.*

Finally, the scholarship of institutional maintenance also suggests that the Court promotes majoritarian policy preferences in its effort to bolster its institutional standing. These preferences might include public policy preferences (e.g., Bryan and Kromphardt 2016) and elite preferences (Hall and Ura 2015; Hall 2014). While my focus is on how the Court exercises the norm of consensus, it is essential to bear in

mind consensual decisions vary in their ideological directions. In other words, some consensual decisions promote majority interest and some do not. To the extent that I theorize the Court's propensity to reach unanimity to shroud its decisions with legitimacy, justices must juggle between the decision's substantive popularity and its level of consensus. In fact, if a unanimous decision is supposed to be more legitimate, the value of decisional legitimacy should be more needed when the decision's ideological direction runs counter to external preferences. Stated differently, speaking in a united voice creates a cushion for the potential blow to the Court's public standing resulting from an unpopular decision. Again, this argument hearkens to Chief Justice Warren's efforts to build consensus on *Brown* as he anticipated Southern resistance to school integration. I expect *Brown* to be representative in that decisions running counter to public preference are more likely to be unanimous. Moreover, I expect the above-stated relationship to vary at different levels of public support for the Court. Compared to "the reservoir of goodwill," institutional legitimacy is precious political capital that the Court preserves in anticipation of potential blows to its public support from unpopular decisions. Put differently, when the Court is lacking public support and the decision is expected to be unpopular with most American voters, the Court should be even more likely to use consensus to compel the acceptance of its decisions. Therefore, I hypothesize:

**Public Opinion and Public Support Hypothesis:** *The more the majority opinion deviates from the public policy preference, the more likely Court and the justices will abide by the norm of consensus, particularly if the public support for the Court is low.*

Similarly, I expect that potential adverse reactions from Congress motivates the Court to abide by the norm of consensus.

**Congressional Preference Hypothesis:** *The more the majority opinion deviates from the congressional policy preference, the more likely Court and the justices will abide by the norm of consensus.*

To test these hypotheses, I conduct two separate analyses. In the first, I treat the Court's decisions as units of analysis and examine whether the decision is unanimous or not. In the second, I take a micro fine-tuned view of the norm by examining whether individual justices follow the norm of consensus by joining majority coalitions.

## Court-Level Analysis

In this aggregate analysis, the unit of analysis is the Court's majority coalition in individual decisions. The dependent variable is *Unanimity*, namely whether the Court reaches a complete consensus (coded as 1, no dissenting vote) or not (coded as 0, at least one dissenting vote) based on the majority votes and minority votes recorded in 2019 release of the Supreme Court Database (SCDB)(Spaeth, Epstein et al. 2018). I estimate a logistic regression model for this binary dependent variable.

A representative and extensive survey of Americans' attitudes toward the Court has long eluded scholars of the Court. A commonly used measure is General Social Survey (GSS) which asks respondents about their confidence in the Court on a 3-point scale, namely "a great deal of confidence," "some confidence", or "hardly any confidence." The drawbacks of the GSS measure are twofold. First, it is only available from 1973. Second, it is not available for every calendar year.

Hence, I obtained the updated version of the of the public support measure adopted in Durr, Martin and Wolbrecht (2000) and extended in Bryan and Kromphardt (2016). To oversimplify the method, Durr, Martin and Wolbrecht (2000) identify

all the regularly administered survey questions archived at Roper Center for Public Opinion Research asking respondents' attitudes toward the Court. They then use the Stimson (1991) algorithm to extract from these multiple survey series a single dynamic series representing the underlying construct of public support for the Court. Given the availability of such survey questions archived at the Roper Center, this series of public support for the Court is available from 1956. The series is plotted in Figure 2.2. Greater values indicate greater support. I follow Clark (2009) and create a prior two-year moving average of the support data to ensure its exogeneity<sup>1</sup>. I then reverse the sign of the variable and name it *Public Opposition* to facilitate model interpretation. Namely, the higher the value of my operationalization of the variable, the greater the public opposition (or lower public support) for the Court. I expect a positive relationship between this variable and the Court's propensity to reach consensus.

For *Court-Curbing*, I use the Clark (2011) data as updated by Mark and Zilis (2018). The coding scheme is, simply put, to count all congressional legislative proposals intended to curtail the power of the Supreme Court from 1878 to 2017. Specifically, these bills might intend to impeach sitting justices, strip the Court's jurisdiction, slack its budget, change the number of justices, propose term limits on the justice, etc. I follow the previous works by adopting the logistic transformation of the raw counts of such bills. Such operationalization allows the estimated effect of Court-curing to be much larger when there are more than 10 bills introduced than when there are fewer than 10 (Clark 2009, 979). I note that the model estimates reported in this paper are robust to using the simple raw counts of bills.

To measure the *Ideological Constraint* imposed by Congress, I follow the existing

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<sup>1</sup>My results reported in the rest of the paper are robust to using a one-year lag of public support measure.

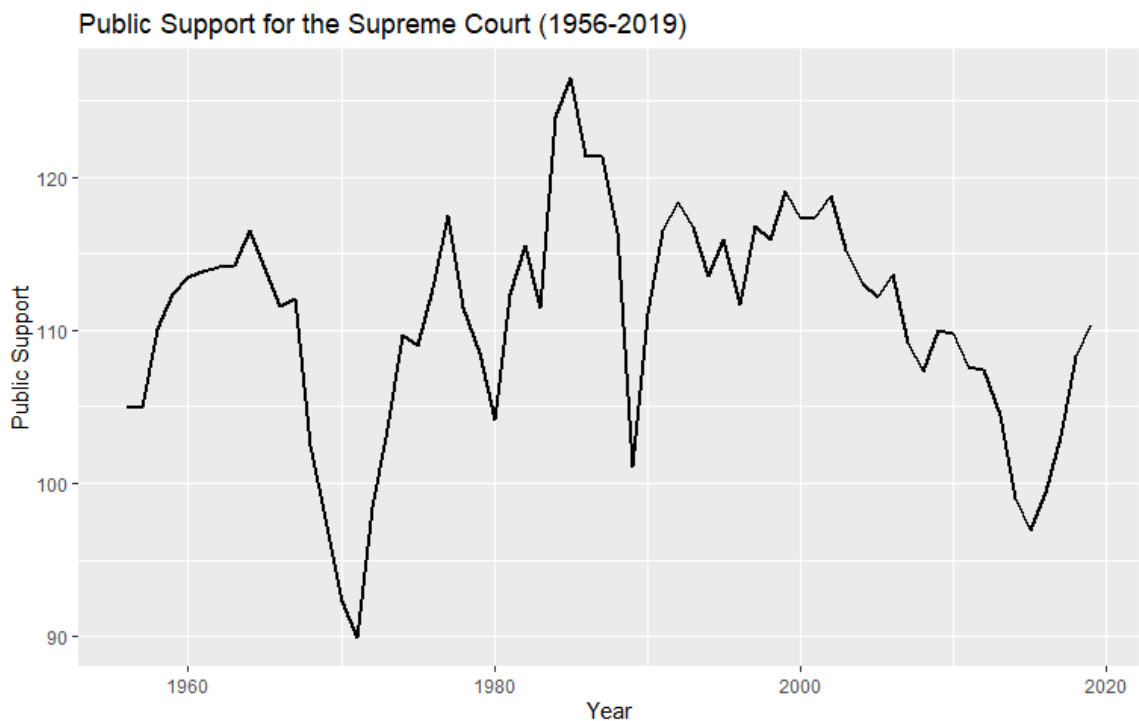


Figure 2.2: Public support for the United States Supreme Court (1956-2019).

*Note: The measure is constructed using multiple survey series archived at the Roper Center that tap into people’s confidence in, support for, or approval of the Supreme Court. More technical details can be found in Durr, Martin and Wolbrecht (2000) and Stimson (1991).*

literature of institutional maintenance and analyze the regime in which the Court is located. In the unconstrained regime, the Court’s median justice’s preferences fall at, or in between, the median members of the House and Senate. In this regime the Court is theoretically more moderate than either one chamber and hence faces reduced chances of institutional retribution from Congress. The congressional constraint in this case is coded as 0. In the alternative regime, I calculate the absolute distance between the median justice on the Court and the closest chamber median as the amount of congressional constraint. The congressional constraint calculated

for this regime is a proxy for the degree to which the Court’s predominant ideological preference deviates from the prevailing ideology in Congress. For ideal points of relevant players, I use the updated Bailey (2013) estimates specifically designed to compare preferences of actors in different institutions.

My theory suggests that the constraining effects of external constraints are moderated by the political salience of a case. I use the Clark, Lax and Rice (2015) measure of pre-decision political salience of a case. The authors use a latent factor analysis to capture the underlying political salience of a case based on a newspaper coverage of a case prior to its decision issuance. Specifically, the researchers look at a diverse set of newspapers, *The New York Times*, *The Washington Post*, and *The Los Angeles Times*, and use an automated approach to detect the mention of Supreme Court cases in the first sections of these newspapers (see Clark, Lax and Rice 2015, 47-48). A key advantage is that it mitigates the endogenous concern that the division of a decision itself (or other attributes of the decision) might increase media coverage and hence increasing decision salience. Instead, it could serve as a reliable proxy for justice’s perception of how closely a case is being watched before they finally announce the decision.

I control for the policy preferences of external actors and examine the varying propensity to consensus over decisions in line with versus against external policy preferences. The Stimson (1991) algorithm mentioned above was initially used to construct another important dynamic series, the public’s policy sentiment, or public liberalism. It is the most reliable measure of the general policy mood of the American public and is widely used in judicial literature (e.g., Strother 2019; Black, Owens, Wedeking and Wohlfarth 2016*a*; Casillas, Enns and Wohlfarth 2011). I use this measure to determine if the Court’s decision is in line with or against public policy

sentiment. This is made possible by the coding of the Supreme Court Database of the ideological direction of a decision’s majority opinion.<sup>2</sup> I follow the literature by lagging the policy mood measure by one year to allow the measure to be exogenous to the Court’s behaviors. Greater values of the variable *public liberalism* indicate more liberal policy preferences of the mass public in general.

I construct a measure of *Congressional Liberalism* to represent the policy preference of Congress using the *Ideological Constraint* of Congress measure. When the Court is in an unconstrained regime where *Ideological Constraint* is coded 0, one chamber of Congress is more liberal than the Court and the other is more conservative. There is no *Ideological Constraint* from Congress or a prevailing policy preference distinct from the Court. In the constrained regimes, there are two scenarios. When the Court median is more conservative than both chambers of Congress, I code *Congressional Liberalism* as the *Ideological Constraint* from Congress, indicating how much more liberal the closest congressional median is relative to the Court. Conversely, in the scenario where the Court median is more liberal than both chamber medians, I code *Congressional Liberalism* as the *Ideological Constraint* times  $-1$ , indicating how much less liberal the closest congressional median is relative to the Court.<sup>3</sup> I then interact this variable with the aforementioned SCDB coding of decision ideological directions.

The model controls for a series of factors tapping into the Court’s ideological, legal, and strategic considerations that might affect whether a unanimity can be reached. Decades of judicial literature emphasizes the importance of justices’ ideology (Segal and Spaeth 2002). I control for *ideological polarization* on the Court which might

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<sup>2</sup>I exclude Supreme Court decisions whose ideological direction cannot be ascertained by the SCDB.

<sup>3</sup>An alternative is to use the mean of House and Senate median and multiply that by  $-1$ , per Hall (2014). My results in the two analyses are robust to this alternative coding.

explain whether it can reach unanimity (Devins and Baum 2019, 2017). To do so I update the issue-specific Martin-Quinn scores (Martin and Quinn 2002) constructed by Enns and Wohlfarth (2013). When the decision majority is coded liberal by the SCDB (Spaeth, Epstein et al. 2018), I measure ideological polarization as the distance between the median justice and the most conservative justice. Conversely, when the majority decision is coded conservative, ideological polarization is measured as the distance between the Court median and the most liberal justice <sup>4</sup>.

The scholarship also suggests that law constrains justices (Bartels 2009; Bailey and Maltzman 2011; Black and Owens 2009) to a certain degree. Applying this intuition to the study of consensus, Corley, Steigerwalt and Ward (2013) show that legal complexity of a case influences the degree to which justices can freely pursue their policy goals. Their findings suggest that high legal complexity reduces the constraining effect of law, allowing greater room for justices to be guided by their policy preference and making it less likely for justices to reach unanimity. Hence, I follow the past literature by constructing an index of *legal complexity* by factor-analyzing three indicators in the SCDB, the number of legal provisions under consideration, the number of issues, and the number of opinions issued (Bailey, Kamoie and Maltzman 2005; Maltzman, Spriggs and Wahlbeck 2000).

Further, salience of a decision might include a legal as well as political dimension (Bailey, Kamoie and Maltzman 2005). Hence, I follow the literature's practice by creating a dummy variable of *Legal Importance*, taking on the value of 1 if the decision either overturns a precedent or declares a federal or state law unconstitutional. It takes on the value of 0 otherwise.

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<sup>4</sup>Two alternatives are measuring the standard deviation and the Interquartile Range of the justices' issue-specific ideological scores. The results are substantively indistinguishable from the model estimates in the paper

To account for the Court’s strategic interaction with the executive branch, I control for voluntary participation in cases by the Solicitor General (SG)’s Office. A wealth of works show that the Solicitor General plays a critical role in the justice’s decision-making given the office’s unique legal and institutional credibility (e.g., Black and Owens 2012; Johnson 2003). It is possible that since the Court is more likely to defer to the position of the SG, justices can more easily come to an agreement. Hence, I control for *SG Participation*, coded as either when the SG office voluntarily files an *amicus* brief or when the SG is a party to the case.

Interest group participation also matters to the strategic behaviors of the Court as they signal case significance and provide justices with valuable information. Past literature shows that higher levels of *amicus curiae* briefs influence the Court’s agenda-setting process (Caldeira and Wright 1988), decision disposition (Collins Jr 2004), and opinion writing (Collins Jr, Corley and Hamner 2015). In particular, Collins Jr (2008) show that amicus briefs provide new information to the justices, thus increasing the legal and policy complexity embedded in the case and the justices’ propensity to write separate opinions. In light of this line of research, I follow Maltzman, Spriggs and Wahlbeck (2000) and generate a term-specific standardized score to control the rise of interest group participation in the Court over the recent decades. The data of amicus briefs is obtained through the The Amicus Curiae Networks Project (Box-Steffensmeier and Christenson 2012).

Existing literature attribute the level of consensus on the Court partly to the leadership of chief justices (Haynie 1992; Corley, Steigerwalt and Ward 2013; Epstein, Segal and Spaeth 2001; Ura and Flink 2016; Li 2020). To account for the different leadership and management capacities of various chief justices, I include a chief justice fixed effect.

Finally, I count the days between a case’s oral argument date and July 31st of each year. Past literature suggests that justices are more reluctant to dissent or write separate opinions toward the end of each term due to time crunch.<sup>5</sup>

In my model specification, I use the the SCDB coding of a decision’s ideological direction to determine whether the decision’s content is in line with the public and elite policy preferences and the degree of ideological polarization on the Court. In other words, I consider a decision coded liberal in the SCDB as a decision containing a liberal policy. Past scholarship has identified an “affirmation bias” resulting from the change of Court’s docket and strategic behaviors of litigants and justices (McGuire et al. 2009). Empirically, scholars observe a negative correlation between the Court’s ideological bent and its policy output in decisions affirming lower court decisions. Hence, I follow the literature’s practice by only modeling decisions where the Court reverses a lower court decision (Casillas, Enns and Wohlfarth 2011; Bryan and Kromphardt 2016)<sup>6</sup>. I also exclude in my model cases that did not receive an oral argument, decrees, and equally divided votes.

To account for the possible unexplained heterogeneity of different Court terms and issue areas, I estimate a multi-level logistic regression model with random effects for every Court terms and a fixed-effect for issue areas<sup>7</sup>.

Given the multiple interaction terms in the model and unreliability of directly interpreting statistical and substantive significance of interaction terms in binary response models (Berry, DeMeritt and Esarey 2010), I plot a series of predicted prob-

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<sup>5</sup>Yet there is also evidence suggesting that the Court tends to announce more salient cases toward the end of each term, which might be more divided than non-salient cases (Epstein, Landes and Posner 2014).

<sup>6</sup>The results for both levels of analysis remain unchanged when I model both reversal and affirmation decisions.

<sup>7</sup>I use the eight-category issue coding consistent with the issue-specific ideological score used in the model

abilities to show the findings from the model estimates <sup>8</sup>.

First consider *Hypothesis 1* and Figure 2.3. For low-salience cases (10th percentile in the sample, represented by the solid line), the predicted probability of consensus does not vary much as the Court faces mounting public discontent. In contrast, for cases of greater political salience (90th percentile in the sample, represented by the dashed line), greater public opposition to the Court is positively and significantly associated with higher probability of consensus. To be specific, the predicted probability increases from 0.26 to 0.48 as the public discontent with the Court increases from sample minimum to maximum, which is a relative increase of 84.62%. This finding is consistent with *Hypothesis 1* in that public attitude toward the Court is associated with the Court's conformity to the norm of consensus, but the condition is that the political salience of the case has to be sufficiently high.

Now consider *Hypothesis 2* and 2.4 regarding the three-way interaction between *Public Opposition*, *Salience*, and *Court-curbing*. The left panel shows the two-way interaction between public opposition and political salience while holding the Court-curbing values at a low level (10th percentile in the sample). In this scenario, the predicted probability of consensus rises as the public dissatisfaction with the Court increases, and more so if the case is more politically salient. When the Court-curbing level is high (90th percentile in the sample), as the right panel of 2.4 illustrates, the marginal effect of public support on the probability of consensus varies more dramatically with case salience. When the case is salient, the predicted probability increases from 0.24 to 0.48, a relative increase of 100%, as the public discontent with the Court increases from sample minimum to maximum. In contrast, for low-salience cases, the predicted probability *decreases* slightly, from 0.39 to 0.31. Comparing

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<sup>8</sup>The full regression estimates are in Table 6.1 in the Appendix.

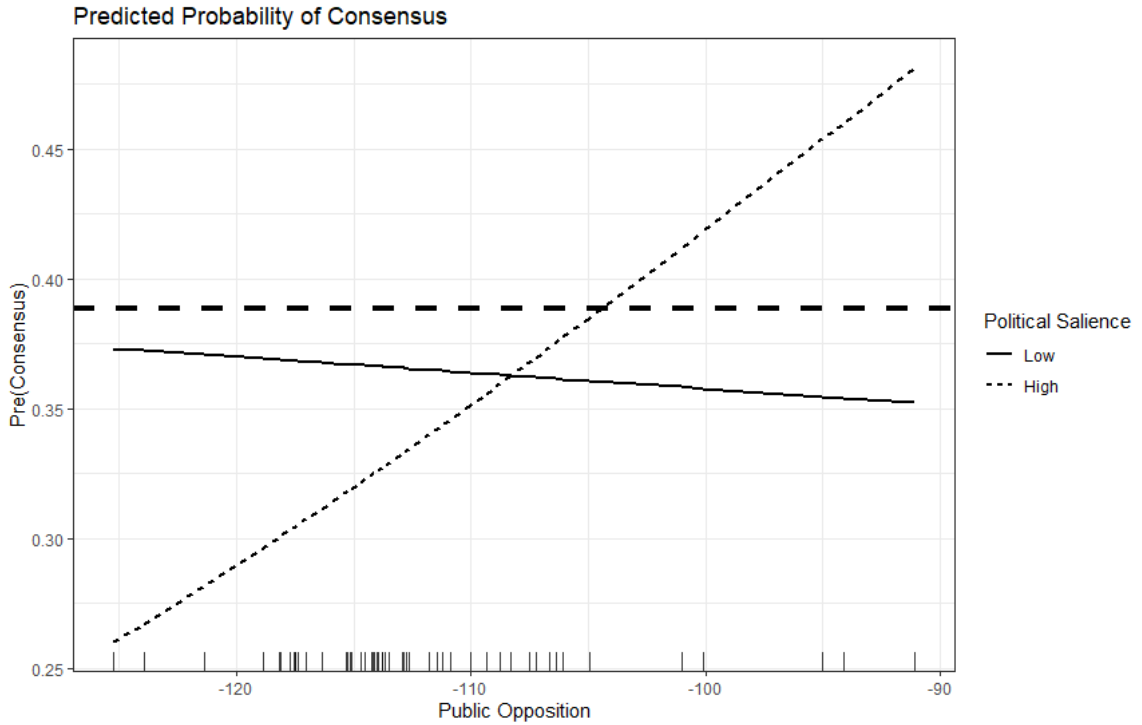


Figure 2.3: Predicted probabilities of consensus of Supreme Court decisions

*Note: The low and high levels of political salience are represented by the 10th and 90th and percentiles in the sample respectively. The horizontal dashed line represents the average probability of consensus in the sample, namely 0.3883. All other covariates are held at the mean or modal values.*

high-salient cases under low Court-curbing with those under high Court-curbing, the relative change of predicted probability of the former is 65% and that of the latter is 100%.

These findings support *Hypothesis 2* in that Court-curbing mediates the public support's constraints on the Court, in line with the theoretical argument of Clark (2009). Further, my findings show that the mediating effect is reinforced by higher political salience of a case. In other words, for cases receiving high media attention, the Court is more likely to respond to lowering public support by deciding unani-

mously, and the relationship is even stronger when Congress sends reinforcing signals of waning judicial legitimacy.

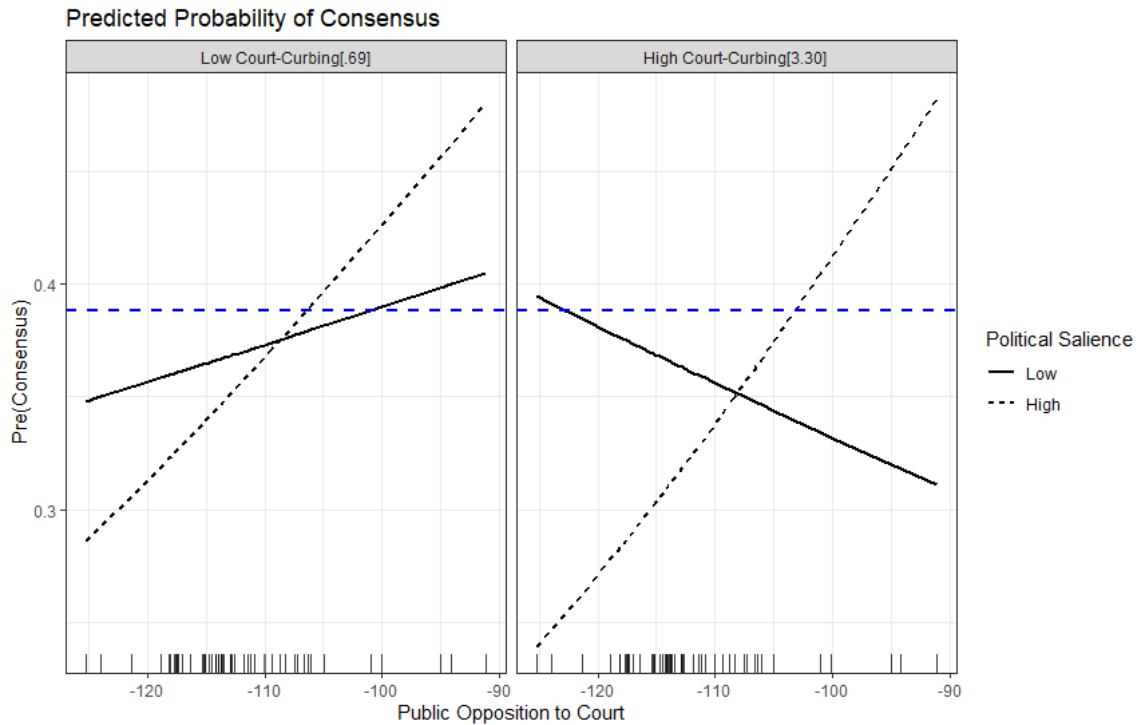


Figure 2.4: Predicted probabilities of consensus of Supreme Court decisions

*Note: Values conditioned on various levels of public opposition to the Court, political salience, and Court-curbing. The low and high levels of political salience and Court-curbing are represented by the 10th and 90th and percentiles in the sample respectively. The horizontal dashed line represents the average probability of consensus in the sample, namely 0.3883. All other covariates are held at the mean or modal values.*

The finding regarding *Hypothesis 3*, congressional ideological constraint and party control, is illustrated in Figure 2.5. In the left panel where the government is divided, an ideologically hostile Congress does not seem to impose enough constraints on the Court to bring about greater consensus. This is true with respect to both lower and higher salience cases. On the other hand, as the right panel of unified government

suggests, a more ideologically distant Congress is associated with greater propensity of consensus over salient cases. As the Court moves from ideologically unconstrained to maximally constrained, the predicted probability of consensus over high-salient cases rises from 0.28 to 0.44, a relative increase of 57.14%. Yet the effect over low-salient cases is not statistically significant ( $p = 0.824$ , two-tailed Wald test).

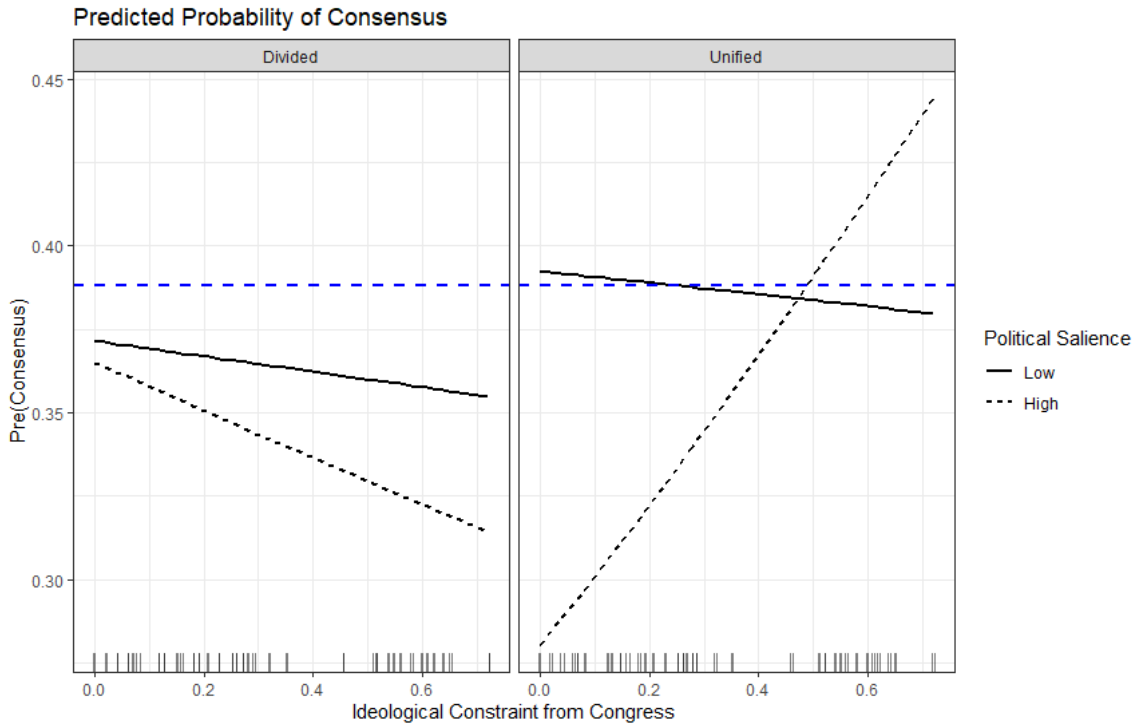


Figure 2.5: Predicted probabilities of consensus of Supreme Court decisions

*Note: Values conditioned on various levels of ideological constraint of Congress, political salience and divided/unified government. The left panel shows the divided government and the right panel shows the unified government. The low and high levels of political salience are represented by the 10th and 90th and percentiles in the sample respectively. The horizontal dashed line represents the average probability of consensus in the sample, namely 0.3883. All other covariates are held at the mean or modal values.*

What this finding informs is that congressional ideological constraint is also taken into account when justices perceive the external levels of constraints to judicial legit-

imacy, consistent with the institutional maintenance model (e.g, Segal, Westerland and Lindquist 2011). Further, my analysis furthers the understanding of this line of inquiry. Not only does my analysis incorporate the ideological stance of the president in relation to the Court along side of the position of Congress. It also implicitly considers the interaction between Congress and the presidency. In other words, I find that Congress poses a genuine threat perceived by the Court if the president is on the side of Congress. However, when Congress and the presidency are on opposite of the spectrum, the Court is not constrained by congressional ideological constraint.

Besides external constraints, I also expect that decisions contradicting external policy preferences are more likely to be decided unanimously. My analysis suggests that the opposite is the case. First consider public policy preference. In the left panel of Figure 2.6 where I set the public opposition at a lower level (10th percentile), the marginal effect of *Public Liberalism* is not statistically significant different between liberal and conservative decisions ( $p = 0.16$ , one-tailed Wald test). To the contrary, when public opposition to the Court is high (90th percentile), the marginal effect of *public liberalism* is statistically significantly different between liberal and conservative decision. For liberal decisions, the Court is not statistically significantly more likely to reach a consensus ( $p = 0.16$  one-tailed Wald test). For conservative decisions, the Court is much less likely to come to a consensus as the public prefers more liberal public policies. The predicted probability decreases from 0.31 to 0.15, a relative decrease of 51.61%. What this finding shows is that when the Court's majority policy contravenes public policy mood *and* when the Court is suffering from a low public esteem, justices are more likely to be divided. Stated differently, as public opinion constrains judicial decisions to a certain degree, justices are more likely to vote in line with the public opinion at the cost of departing from the majority. In

this case, the utility of following public opinion trumps that of abiding by the norm of consensus.

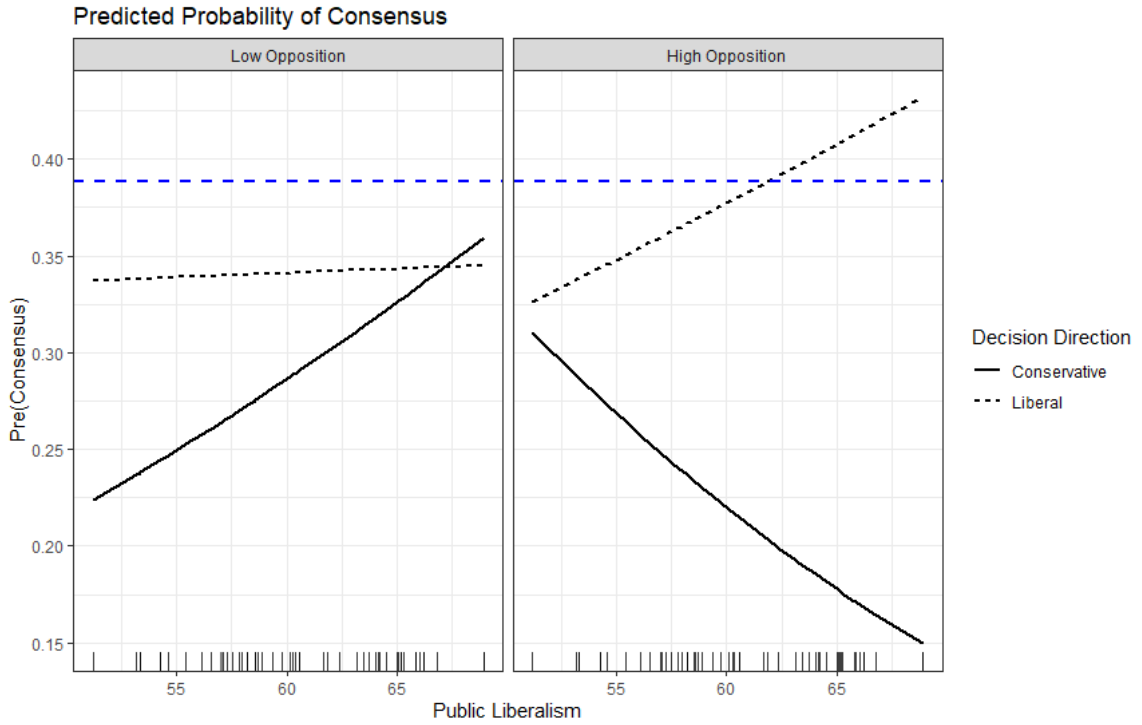


Figure 2.6: Predicted probabilities of consensus of Supreme Court decisions

*Note: Values conditioned on various levels of public policy sentiment (liberalism), decision direction and public opposition to the Court. The left panel shows the low public opposition and the right panel shows the high public opposition. The low and high levels of political public opposition are represented by the 10th and 90th and percentiles in the sample respectively. The horizontal dashed line represents the average probability of consensus in the sample, namely 0.3883. All other covariates are held at the mean or modal values.*

Congressional policy preference plays a similar role. See Figure 2.7. As Congress becomes more liberal, the Court’s propensity to reach a consensus over liberal decisions does not change much. For conservative decisions, however, the predicted probability reduces significantly, from 0.35 to 0.2, a relative decrease of 42.86%. Again, similar to the finding regarding public policy sentiment, the Court faces a much harder

time marshalling unanimity when the decision is expected to go against the prevailing policy preference in Congress. Again, the utility of not offending Congress over policy trumps the utility of abiding by the norm of consensus.

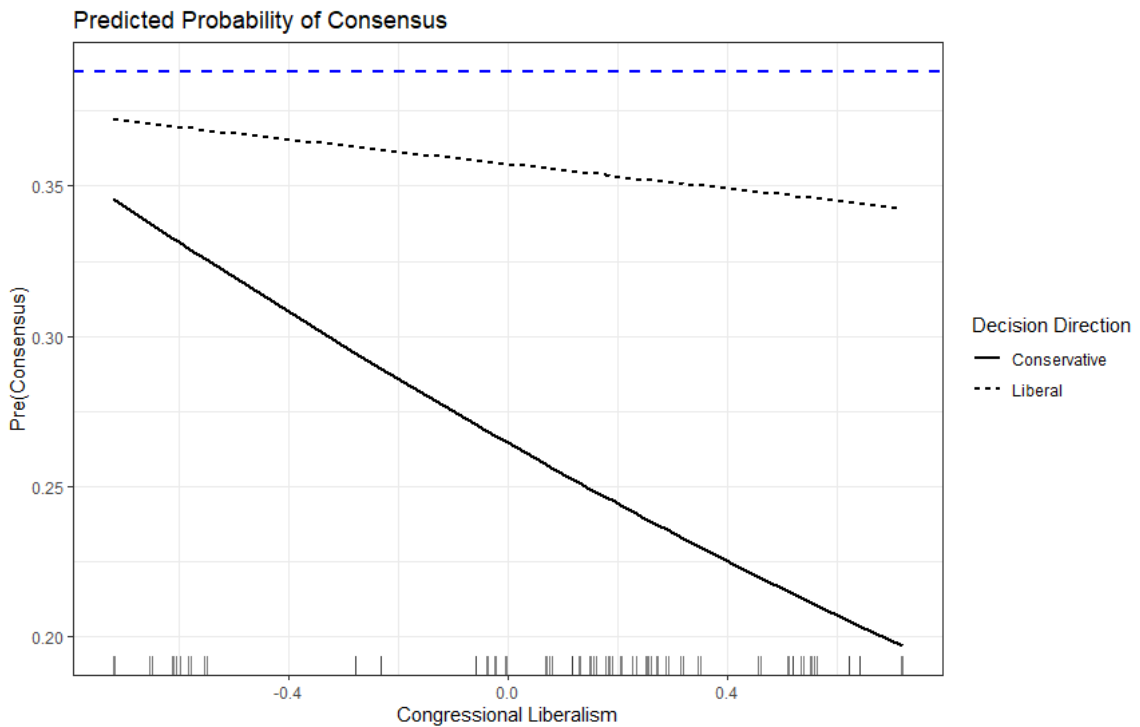


Figure 2.7: Predicted probabilities of consensus of Supreme Court decisions

*Note: Values conditioned on various levels of congressional policy preference (greater positive value indicates greater liberalism and smaller negative values indicate greater conservatism), and the ideological direction of a decision. The horizontal dashed line represents the average probability of consensus in the sample, namely 0.3883. All other covariates are held at the mean or modal values.*

Many of the control variables are informative. Ideological polarization makes it harder to for the justices to reach full unanimity. Legal complexity seems to lower the probability of consensus, consistent with Corley, Steigerwalt and Ward (2013). As more time is left before the end of the term, the Court is less likely to reach consensus.

Solicitor general participation and amicus briefs does not seem to make the justices more prone to unanimity, although the coefficient estimate is in the expected direction.

## Justice-level Analysis

The Court-level analysis informs that the Court, at the aggregate level, conforms to the norm of consensus by deciding unanimously in the face of external constraints on its institutional legitimacy. Further, the norm of consensus cannot always constrain the whole Court – justices are only willing to speak in one unified voice when the case is closely watched by outside actors.

This analysis is, however, limited. The dependent variable only takes on a value of 1 in unanimous decisions, which constitutes 38.83% of the sample. In all the remaining cases, it is possible that *some but not all* justices' behaviors are consistent with my theory, leading me to code these cases as dissensual in the aggregate analysis. For instance, in 2020, the Supreme Court made a landmark ruling that under Title II of the Civil Rights Act of 1964, employers cannot discriminate against employees based on their sexual orientation or transgender identity (*Altitude Express v. Zarda & Bostock v. Clayton County*, 2020). Justice Gorsuch, normally considered part of the Court's conservative wing, joined his liberal colleagues of the Court in making this liberal decision. Why would individual justices cast counter-attitudinal votes? More specifically, do they do so to join the majority coalition as they believe doing so is conducive to the Court's institutional image? This is the question I am addressing in the justice-level analysis. The purpose is to provide a micro-view of how external constraints could change individual justices' behavior in the Court's internal deliberation.

The dependent variable is majority voting, namely voting with the majority (1) or voting with the minority (0), regardless of whether the majority decision claims support from the entire Court. Critically, to parse out the effects of external constraints on legitimacy and overcome observational equivalence, I limit my analysis to the justices whose usual ideological propensity indicates that they are unlikely to join the majority. For example, in *Bostock v. Clayton County* (2020), the Court's five most liberal justices (according to their Martin-Quinn scores of the previous term (Martin and Quinn 2002)) could have carried the day in making their statutory interpretation law of the land, without any support from the rest of the justices. However, justice Gorsuch joined them, leading the coalition to be 6-3 in the end. It is kind of behavior like Justice Gorsuch in this particular case that I am modeling.

More specifically, my empirical strategy is to rank justices by their general ideological predisposition and find out, for a standard case with 9 participating justices, the four least likely to join the majority.<sup>9</sup> To accomplish this task, I follow Enns and Wohlfarth (2013) in estimating the issue-specific Martin-Quinn scores (Martin and Quinn 2002) of each justice. Enns and Wohlfarth (2013) use these scores to rank justices and find out the 5th pivotal vote in each 5-4 decision. For my analysis, for instance, for a liberal decision as coded by SCDB, I model the 4 most conservative justices per the ranking. This empirical approach is a variant of that adopted by a line of literature on counter-attitudinal voting of justices exploring non-attitudinal motives for justices' merit votes. Past literature tends to use justices' initial conference vote as the proxy of their sincere ideological preferences and compares those votes with their final merit votes (Epstein, Segal and Spaeth 2001; Maltzman and Wahlbeck 1996; Ringsmuth, Bryan and Johnson 2013; Lax and Rader 2015). With the issue-specific

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<sup>9</sup>For cases with 8 or 7 participating justices, I look for the 3 least likely justices. For cases with 6 or 5 participating justices, I look for the 2 least likely. These scenarios are rare.

ideological ranking measure, scholars can now approximate justices' sincere beliefs in a given case. It is worth noting that this strategy excludes the issue-specific median justice in every case, allowing a more stringent test for my theory.

I control for many attitudinal, legal, and strategic factors I did for the Court-level analysis. Some important distinctions are worthy of discussions though. To account for the role of individual justices' ideology, I use the Segal-Cover score (Segal and Cover 1989) and calculate the distance between each justice and the opinion author.<sup>10</sup> The scholarship on the Court's internal deliberation suggests the central role of the opinion author in shaping opinion policies and predicting other justices' behaviors (Maltzman, Spriggs and Wahlbeck 2000; Wahlbeck, Spriggs and Maltzman 1999; Bonneau et al. 2007; Lax and Rader 2015). Moreover, I control for if a justice is the Chief Justice knowing his attention to the Court's legitimacy (Ura and Flink 2016; Li 2020). I also control for freshmen justice given the "freshmen effect" identified in the literature and expect the freshmen justices to be more constrained by the norm as they tend to be more deferential (Hagle 1993). I code as freshman the justices serving their first two terms.

To account for the internal strategic interaction among the justices, I follow the literature in controlling for a justice's past *Past Cooperation* with the opinion author (Maltzman, Spriggs and Wahlbeck 2000). Specifically, I calculate the percentage of separate opinions written by Justice A joined by Justice B in the previous term. I then regress the percentage on the two justices' Martin-Quinn score distance and save the residuals, representing the level of collegiality between the two justices unaccounted for by their ideological affinity.<sup>11</sup>

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<sup>10</sup>Hence, my analysis excludes *per curiam* decisions where no individual justice author is identified.

<sup>11</sup>Since there is no *Past Cooperation* score between a justice and herself in the past term, my sample does not include the justice tapped to write the majority opinion. I claim that this makes my analysis a more stringent test as the assigned author is invested in maintaining in the majority.

Finally, Instead of using the distance between individual justices and congressional medians, I maintain the measure of *Congressional Ideological Constraint* and Congressional Liberalism used in the Court-level analysis. The reason is that my theoretical argument is about institutional maintenance. Hence, I expect individual justices to be cognizant of the Court’s overall institutional standing with respect to Congress.

I follow the Court-level analysis in using only decisions where the Court reverses a lower court ruling to avoid the “affirmation bias” (McGuire et al. 2009). I estimate a multi-level logistic regression model with robust standard errors and random effects for individual cases to account for unexplained case-level heterogeneity. The model estimates are reported in Table 6.2 in the appendix.

First, consider the role of public opposition and the mediating role of Court-curbing, as illustrated in Figure 2.8. On the left panel, as public opposition grows from sample minimum to maximum, justices are much more likely to join the majority coalition over high-salience cases, whereas the effect is not significant over low-salience cases. Further, as the right panel suggests, the distinction between the marginal effect of public opposition over salient cases and the marginal effect over low-salience cases is even greater if the Court-curbing activities in Congress are higher. Again, consistent with the Court-level analysis, public opposition constrains the Court over salient cases, especially if the public sentiment is reinforced by congressional attempts to curb judicial legitimacy.

Next, consider the ideological constraint of Congress, conditioned on case salience and whether there is unified control of the U.S. government. When there is divided control of Congress and the White House, ideological constraint from Congress, measured by the ideological distance between Court median and its closest chamber

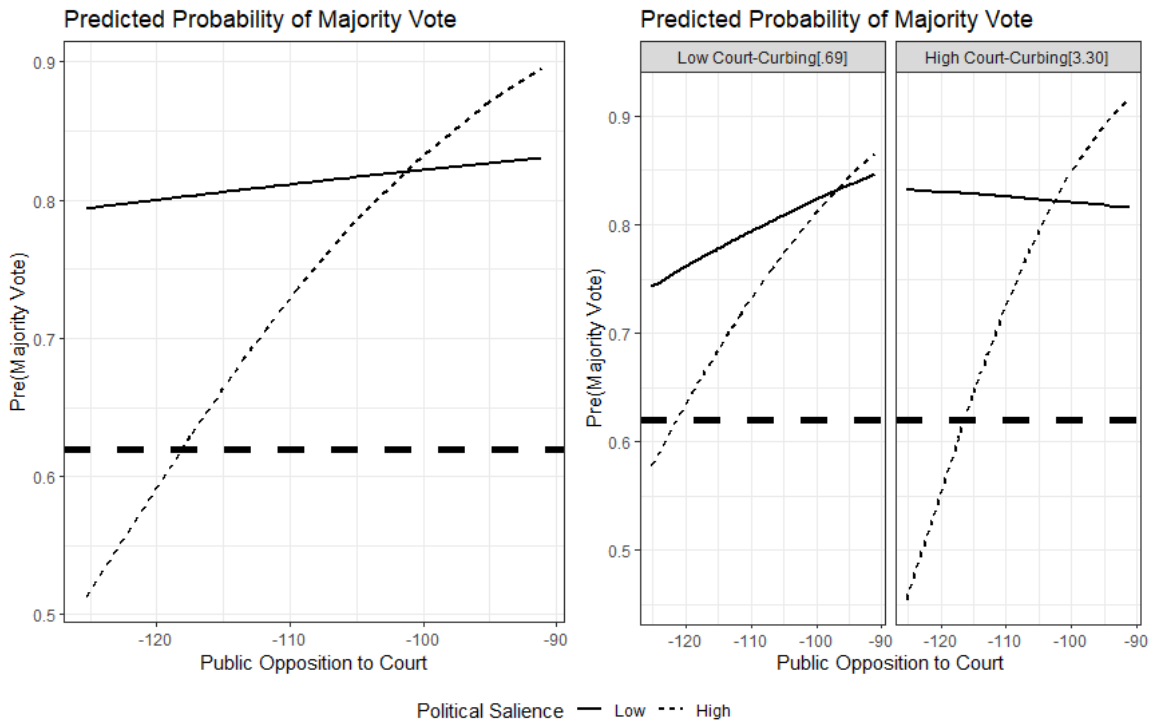


Figure 2.8: Predicted probabilities of justices' majority vote

*Note: Values conditioned on various levels of public opposition to the Court, political salience, and Court-curbing. The low and high levels of political salience and Court-curbing are represented by the 10th and 90th and percentiles in the sample respectively. The horizontal dashed line represents the average probability of majority vote in the sample, namely 0.62. All other covariates are held at the mean or modal values.*

median in Congress, is moderately associated with higher propensity of justices joining the majority coalition, for cases of both lower and higher political salience. And the probability for cases of low salience is consistently higher, consistent with the literature's finding that justices are more ideologically-driven when the policy stake is higher (Unah and Hancock 2006; Bartels 2011). In contrast, if the Court faces a unified government which is ideologically incompatible with the Court median, individual justices are much more likely to abide by the norm of consensus by joining

the majority coalition, and the effect is primarily found in salient cases, as the right panel of Figure 2.9 shows.

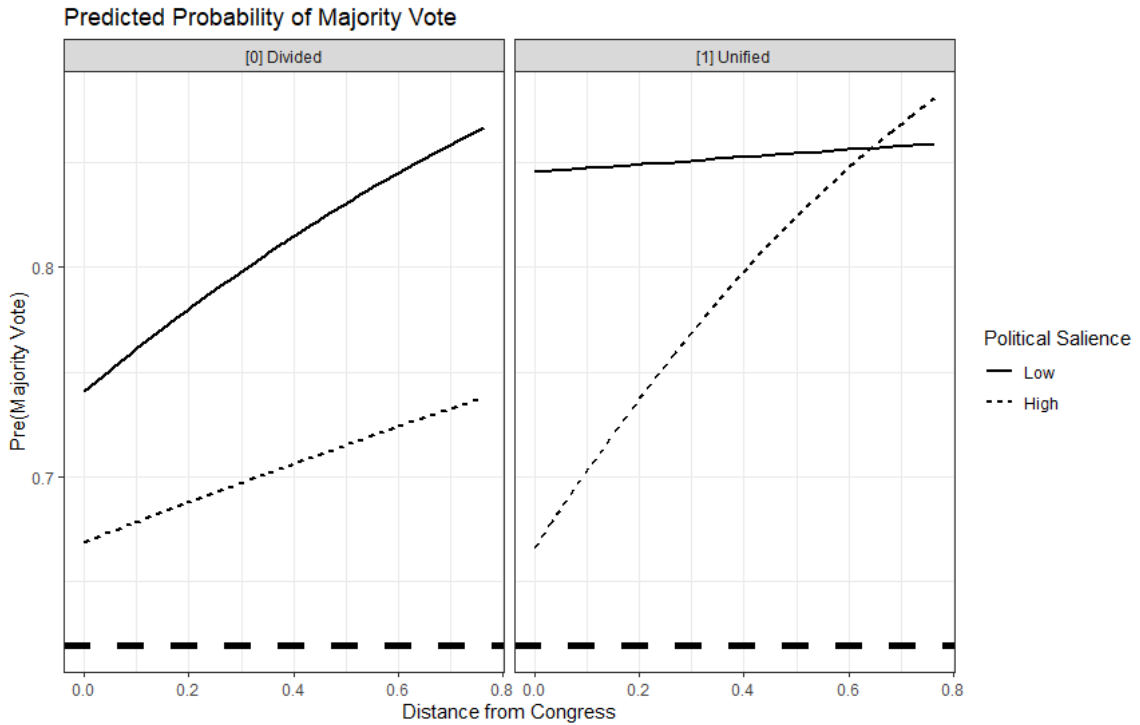


Figure 2.9: Predicted probabilities of justices' majority vote

*Note: Values conditioned on various levels of ideological constraint of Congress, political salience and divided/unified government. The left panel shows the divided government and the right panel shows the unified government. The low and high levels of political salience are represented by the 10th and 90th and percentiles in the sample respectively. The horizontal dashed line represents the average probability of majority vote in the sample, namely 0.62. All other covariates are held at the mean or modal values.*

Finally, I examine if individual justices manifest a similar pattern that supports the finding at the Court-level regarding decisions following or contravening external preferences. First, consider the mass public's policy sentiment, illustrated in Figure 2.10. Similar to the Court-level, as the public becomes more liberal, justices do not seem to be more willing to join a liberal majority coalition. It is when the Court faces

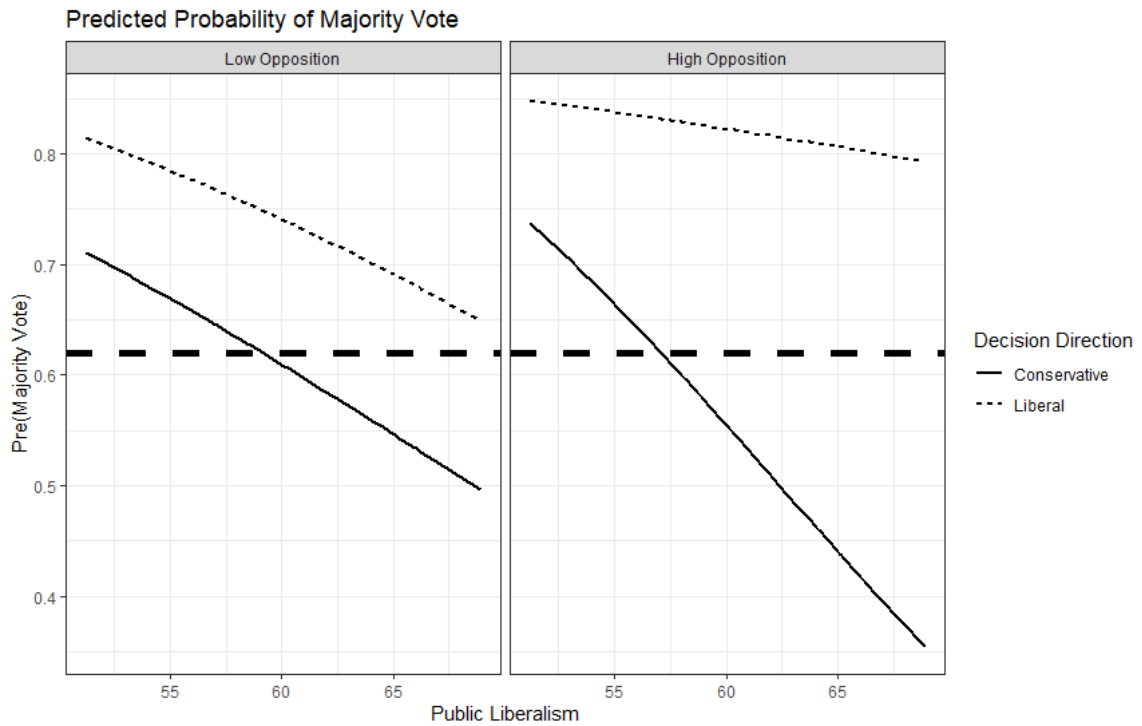


Figure 2.10: Predicted probabilities of justices' majority vote

*Note: Values conditioned on various levels of public policy sentiment (liberalism), decision direction and public opposition to the Court. The left panel shows the low public opposition and the right panel shows the high public opposition. The low and high levels of political public opposition are represented by the 10th and 90th and percentiles in the sample respectively. The horizontal dashed line represents the average probability of majority vote in the sample, namely 0.62. All other covariates are held at the mean or modal values.*

higher public opposition that justices are significantly reluctant to join a conservative coalition. In other words, when the Court faces public dissatisfaction, justices tend to choose being on the side of the public opinion rather than being in the majority.

Individual justices seem to be more responsive to elite preferences. As Figure 2.11 illustrates, facing a more liberal Congress, justices are significantly more likely to join a majority coalition that sets a liberal policy. Conversely, if the majority coalition is conservative, justices are visibly reticent to join the majority. Here, the utility of

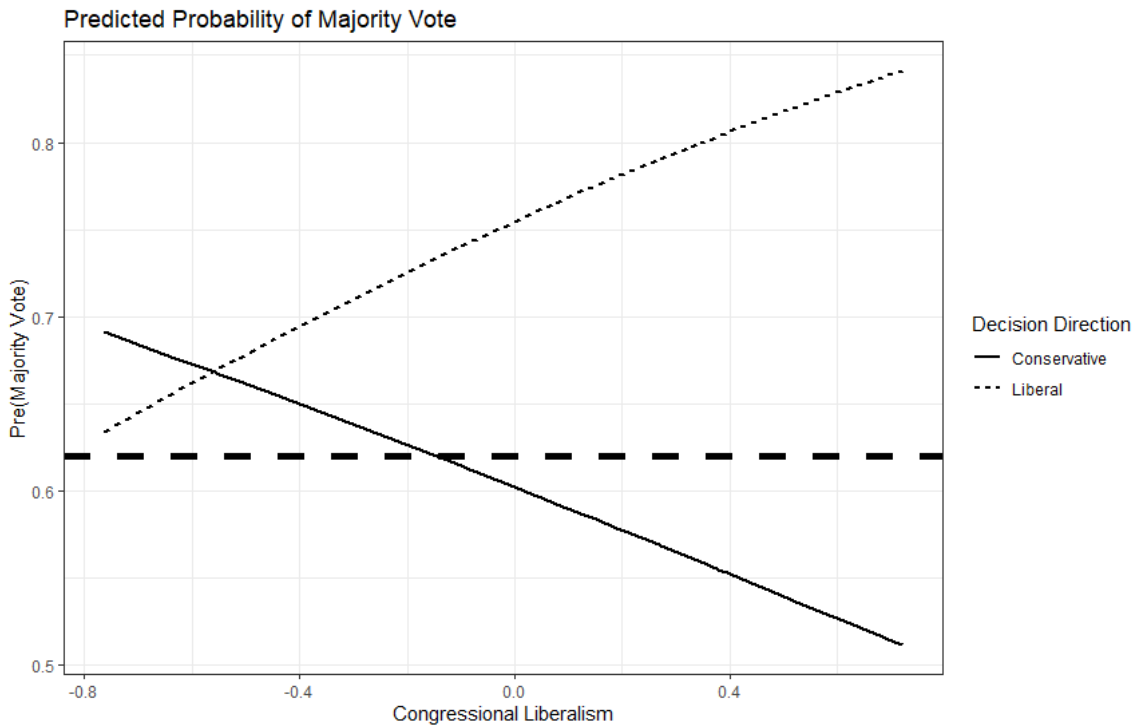


Figure 2.11: Predicted probabilities of justices' majority vote

*Note: Values conditioned on various levels of congressional policy preference (greater positive value indicates greater liberalism and smaller negative values indicate greater conservatism), and the ideological direction of a decision. The horizontal dashed line represents the average probability of majority vote in the sample, namely 0.62. All other covariates are held at the mean or modal values.*

following elite preference and that of abiding by the norm can be mutually reinforcing when they point to the same direction and can undercut each other when they do not.

Finally, many of the control variables perform as expected. Greater ideological distance from the majority opinion author negative predicts the probability of joining the majority. Justices are also less willing to abide by the norm of consensus if the case is of legal salience (overturning a precedent or declaring unconstitutionality a

federal or state statute), the case is complex, or it is far from the end of the Court term. Solicitor General participation makes justices more willing to join the majority. Chief justices and freshman justices are more bound by the norm of consensus. And justices whose separate opinions were joined more often by the current majority opinion author are more likely to join the majority.

## Conclusion

I began my investigation with the question whether the norm of consensus still exists on the U.S. Supreme Court in the modern era which seems to feature more ideologically fractured decisions. Particularly, I was puzzled by the tension between the perception of policy-maximizing judicial decision-making (Segal and Spaeth 2002) and the relative steady level of consensus in merit votes, a phenomenon Bartels (2015) calls the “polarization paradox”.

As past scholarship has pointed out, internal norms of the Court are hard to observe (Epstein, Segal and Spaeth 2001; Caldeira and Zorn 1998). Instead of trying to observe it directly, I take the perspective of external constraints on judicial legitimacy. While justices seek to maximize their policy attainment, they are strategic actors who value the legitimacy of the institution they operate in. Without public trust and congressional approval, the Court cannot give effects to its policies or even sustain its power and prestige as a coequal branch of the U.S. government. Further, I posit that justices should perceive the conformity to the norm of consensus as beneficial to the Court’s institutional legitimacy. Therefore, I expected to observe an increased level of consensus when the Court has a reason to be concerned with its legitimacy.

My analyses lend strong support to my general expectation. Specifically, both at the Court level and at the level of individual justices, signals of waning judicial legitimacy seem to induce greater compliance with the norm of consensus. Additionally, the effects of these signals are conditional. Since the norm of consensus is internal to the Court, external actors can only impact the strength of the norm when departure from it is more likely to be observed by these actors. In other words, justices are highly strategic in that they adhere to the norm to appeal to their intended audience only when their audience is engaged. Hence, political salience of a case, measured by the media coverage of a pending case at the Court, is key to predicting whether the decision will be handed down unanimously or with a large majority coalition.

I also take cue from the institutional ideological constraint literature (Segal, Westerland and Lindquist 2011) that highlights the effect of the Court's general ideological compatibility in constraining judicial behaviors. A key component to the inquiry of judicial legitimacy in the SOP context, congressional constraint measured by ideological distance from the congressional majority affects the decisions justices make as they maintain the Court's legitimacy. My finding suggests that greater ideological distance from the Court's median justice and the closest congressional pivot induces greater observance of the norm of consensus. Similarly, the effect is conditional on the political salience of the case. Further, my analysis departs from the extant literature in examining the dissimilar effect of ideological distance from Congress under a divided versus unified government. As expected, an ideological distant Congress can constrain the Court over salient cases when there is a unified government. Therefore, I incorporate the presidency into the analysis of the Court-Congress relations.

Showing the conditional effectiveness of the norm develops the scholarly understanding of judicial independence. As Clark (2009) observes, judicial independence

is predominantly assumed to correlate with the invalidation of federal statutes. The disproportional scholarly attention assessing judicial independence via the conditions of constitutional invalidation proves his point (Segal, Westerland and Lindquist 2011; Hall and Ura 2015; Mark and Zilis 2018). However, conceptually, judicial independence broadly refers to the extent to which justices make their decisions unaffected by external factors (Clark 2011). Internal norms, such as that of consensus, should also be considered if one can show justices' conformity to them is a function of external constraints, which is what this paper does.

For decades, the strategic model of judicial behaviors has led to a substantial understanding of the Court's internal working and its relations with external actors. A key limitation is the lack of dialogue between the two lines of work. Inquiries of internal deliberation tend focus on the strategic interactions among the justices without considering the Court's broad institutional standing (e.g, Maltzman, Spriggs and Wahlbeck 2000). Research into the Court's decision-making in the SOP tends treat the Court as a monolithic whole (Hall 2014; Sala and Spriggs 2004). By making a theoretical connection between the conformity to the Court's internal norm and external actors' capacity to constrain the Court's institutional legitimacy, this paper provides a new analytical leverage over the impact of external actors on the internal deliberations among the justices.

My study also speaks to the broad literature on whether the Court's decisions are constrained by public policy preferences. While I posit that justices attempt to shroud their decisions with greater authority by deciding unanimously or with a greater majority coalition, it was unknown whether the norm of consensus has a differentiated impact depending on the majority opinion's consistency with the public policy preference. I find that justices are more likely to rally around a popular decision

when the public support for the Court is low. This result seems to suggest that it is justices' willingness to make publicly popular decisions, rather than the norm of consensus, that undergirds the greater accord in these cases.

Since modern Court justices have enormous discretion of their docket and that they care about their decisions' implications on judicial legitimacy, we should observe strategic behavior of institutional maintenance at the agenda-setting stage (Owens 2010; Bryan 2020). Future research should be designed to observe if justices' choice of cases to hear are influenced by their various levels of commitment to the norm of consensus.

In the age of ideological and even partisan polarization, there is an increased scholarly and public interest in judicial legitimacy. Will the justices submit to the trend of polarization, even at the expense of the legitimate image of the Court cultivated over the centuries? This study suggests a negative answer to this important question. It seems that justices still hold dearly onto the hard-won legitimacy of the Court, fundamental to the American faith in the rule of law in general. Despite the propensity of news media to depict the Court as ideologically driven, we can rely on the justices of the high court to behave in a way that allays our concerns of the Court's institutional legitimacy. The decision-making of the Supreme Court, as far as consensus in decisional merit is concerned, is norm-based. However, it is critical that the Court senses the pressure of plausible external constraints.

# Chapter 3

## Norm of *Stare Decisis*

*To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them...*

— Alexander Hamilton *Federalist Papers* No. 78

### Introduction

In Judge Amy Coney Barrett's confirmation hearings, a key focus was whether or not she would join the conservative majority on the Court to overturn *Roe v. Wade* (1973) and *National Federation of Independent Business v. Sebelius* (2012). Underlying this concern is the question whether the norm of *stare decisis* constrains justices' behaviors. Albeit a widely accepted norm in theory, it is reasonable to suspect that justices are not constrained by precedents. Perching at the pinnacle of the federal judiciary, the Supreme Court is not bound by vertical *stare decisis* as are lower

federal courts. Justices serve lifetime appointments and do not seek higher office. These institutional arrangements, according to prominent Court scholars, lead to unfettered judicial discretion (Segal and Spaeth 2002). Following this logic, Coney Barrett, who had expressed her scholarly criticisms of the said decisions (Barrett 2003, 2017), should be able to freely pursue her preferred policy goals, which entails changing the laws with which she disagrees.

Does the norm of *Stare Decisis* constrain justices' behaviors? While answers to that question might be mixed, scholars have started to look beyond the merits of decisions, including whether the decision overturns a precedent. Motivating this line of scholarly enterprise is the argument that *stare decisis* is intimately related to the institutional legitimacy of the Supreme Court, which justices seem to pursue in addition to their policy objectives. Despite having aired her castigation of *Roe* and *Sebelius*, then Judge Barrett assured the members of the Senate Judiciary Committee that she would abide by the norm of *stare decisis*. Regardless of what she would do ascending the bench, assuring senators that one would prioritize precedents over personal views is essential to garner confirmation. This example illustrates two points. First, a nominee must explicitly espouse the norm as to show her commitment to the institutional legitimacy of the Court. Second, which is more central to my argument, is that the institutional legitimacy of the Court is an asset to the Court as it defends its decision-making capacity and integrity when faced with potentially hostile external actors, such as members of Congress in this case. In this paper, I adopt the view that external actors can impact the institutional position of the Court and that justices use citation of precedents to shore up judicial legitimacy. Moreover, I posit and show that justices strategically cite more legally authoritative precedents as they face adverse external conditions. I start by situating the research in the broader literature

of the influence of precedent and then focus on the relationship between precedential citation, *stare decisis*, and legitimating decisions. Further, I argue that given the pressure on judicial legitimacy certain external actors can exert, one should expect these actors and their circumstances influence the citation patterns of the Court. I test this general expectations with five specific hypotheses and find strong empirical support. I conclude by discussing the results and the implications for further research.

## The Role of Precedent in Supreme Court Decision-Making

Does law matter to the Supreme Court decision-making? If so, under what circumstances and how? These are questions of paramount importance to judicial scholars and scholars of institutions more broadly alike. Scholars are thus highly motivated to tease out the influence of the law in the decision-making process of the nation's High Court. At the heart of this line of empirical inquiry is to detect the influence of precedents. In the common law system, deciding cases based on prior decisions with similar circumstantial facts is a central tenant of the legal criteria. Empirically, however, Segal and Spaeth (1996) find little evidence that justices who dissented from an earlier decision would comply with the precedent in subsequent cases<sup>1</sup>. However, by employing bridging techniques to measure relevant actors' ideal points in the same spectrum as precedents, Bailey and Maltzman (2008) provides support for the constraining role of precedents, at least on the part of some justices.

The concept of "jurisprudential regimes" provides a novel way to examine whether justices are constrained by precedents in decisions. "Jurisprudential regime" refers to

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<sup>1</sup>For a discussion of the limits of this research, see Bailey and Maltzman (2008)

“a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area” (Richards and Kritzer 2002, 308). They evince that these regimes structure the justices’ decision-making process by prioritizing certain case factors and setting up standards of review. Comparing decisions pre- and post- regime changes, these researchers found evidence of such important regimes in the Court’s religious establishment cases (Kritzer and Richards 2003) and search-and-seizure cases (Kritzer and Richards 2005)<sup>2</sup>. Focusing on the levels of scrutiny as a legal doctrine, the core constraining component is a potentially applicable precedent, Bartels (2009) shows that strict scrutiny as applied to content-based regulation of expression, significantly limits the extent to which justices vote based on their ideological preferences. This study reminds scholars that precedents containing different legal doctrines might exhibit various levels of constraints and therefore should be viewed in a much more nuanced manner.

Regardless of whether justices abide by the precedents against their sincere preferences, or whether a precedent “dictates” justices’ votes on the merits, Knight and Epstein (1996) find pervasive references to precedents in the private as well as public stages of justices’ decision-making and in attorneys’ legal briefs. In other words, the influence of *stare decisis* might be better illustrated by the central role precedents play in the discourse of all relevant actors on and around the Court. The approach I am taking is a development of Knight and Epstein (1996) in that the effect of *stare decisis* could be observed also in the way in which judicial decisions are made, in addition to what decisions are made.

There is no denying that invoking precedents is a “primary justification...for the

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<sup>2</sup>More recent study by Lax and Rader (2010) provides mixed results.

decisions they reach” (Segal and Spaeth 1996, 972). Extant literature has built a strong connection between *stare decisis* and judicial legitimacy. Justices abide by the norm of *stare decisis* to appeal both the mass public and as well as the elite, who could potentially undercut judicial legitimacy.

The perception that judicial decisions-making is deeply grounded in law and precedents has been connected to procedural fairness, the notion that justices make decisions based solely on neutral and impartial criteria rather than personal proclivity (Sunshine and Tyler 2003). Since precedents theoretically provide existing and authoritative guidance regarding the disposition of a current case which bears semblance to the factual circumstances in the precedents, justices can signal the absence of their personal preferences in making the decisions to the mass public.

Experimental evidence bears out this connection in the mass public. For instance, Zink, Spriggs and Scott (2009) show that when informed that a Supreme Court decision is consistent with the existing case law, the respondent expresses increased willingness to accept the decision as legitimate, even if she disagrees with it. Not only does the perception of legalistic decision-making enhances an individual decision’s legitimacy, research also shows that procedural fairness, as perceived by the public, influences public’s assessment of the Court as an institution (Tyler 2003; Ramirez 2008). Similarly, Farganis (2012)’s experimental study finds that the types of arguments made by the Court in its opinions impact a respondent’s institutional loyalty to the Court. Specifically, the research suggests that legalistic arguments that rely on texts of the Constitution, Framers’ intent, and precedent promote judicial legitimacy.

The principle of *stare decisis* legitimizes judicial decisions in the eyes of the elite because it is conceptually related to the virtue of judicial restraint. Judicial restraint,

the understanding that the Court is a weak and unelected body only solving immediate controversies rather than making sweeping policy proclamation, is considered essential to the Court's legitimacy (Powell Jr 1990). Following precedent as opposed to making fresh new policies is a prerequisite for projecting such an impression of the Court's function. This stands in contrast with the elected officials in a democracy who are explicitly tasked with generating public policy reforms. While the U.S. Supreme Court has had its fair share of landmark decisions with broad policy implications, justices seem to be aware of their inability to enforce their decisions and uphold the principle of *stare decisis* to show their restraint and deference to the elected branches and legitimacy. Merrill (2005) even suggests that *stare decisis* is more effective in promoting judicial restraint than originalism and observes that "no Supreme Court Justice since the days of John Marshall has been able to write constitutional law opinions without giving substantial weight to precedent-and this includes all of the current Justices, no matter how committed they may be in the abstract to originalism." (272)

Promoting the virtue of judicial restraint and thus upholding judicial legitimacy in the eyes of the elite is particularly essential for the Court to navigate the system of separation-of-powers. A main institutional weakness of the Court in the American democracy is its potential "countermajoritarian" nature. In the system of separation-of-powers (SOP), members of Congress can credibly attack the Court's decisions and legitimacy because they are more closely connected to the people. Basing decisions on precedents and showing restraint and deference to the elected branches could mitigate these SOP constraints.

Justices' own remarks explicitly illuminate how essential precedents are to their legitimate role and the country's faith in the rule of law at l. An often-quoted example is Justice O'Connor treatise on the principle of *stare decisis* in her opinion of *Planned*

*Parenthood v. Casey* (1992) where she wrestled with legal and political implications of overturning *Roe v. Wade*. She observed that “...the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.” For anyone trained in the common law tradition in the United States, Justice O’Connor’s sentiment is rather uncontroversial as analogy is a core component of legal reasoning.

Some have also explained justices’ propensity to stress the role of law in their decision-making from a social-psychological perspective. In other words, justices promote judicial legitimacy for some non-instrumental reasons. Justices, like many other professionals, are extensively trained and socialized. A result is that they try to fulfill what they believe to be the society’s expected role for them, namely interpreting the law in a legalistic rather than political fashion (Rubin and Feeley 1995; Sullivan 1992). Baum (2009) suggests that judges interact with other law professionals and care about their legal colleagues’ opinions of their work. In his words, “judges care more about evaluations of their work by other lawyers than they do about the approval of more diffuse group” (98). Hence, it is likely that judges care about precedent citations in their works despite their disagreements with these precedents.

While evidence of precedent dictating the substantive outcome of a case is mixed (e.g., Segal and Spaeth 1996; Richards and Kritzer 2002; Lax and Rader 2010), scholars have come to realize that citations of precedents is also an “operationalization of the practice of stare decisis” (Cross et al. 2010, 493). In other words, the influence of precedent can also be detected as justices invoke precedents in various stages of the decision-making process, including during private conferences (Knight and Epstein 1996). The main reason why justices feel compelled to invoke precedents in their opinions is that precedents serve to justify the policies they set. As Knight and

Epstein (1996) observe, “[t]o the extent that justices are concerned with establishing rules that will engender the compliance of the community, they will take account of the fact that they must establish rules that are legitimate in the eyes of that community. In this way a norm of *stare decisis* can constrain the actions of even those Court members who do not share the view that justices should be constrained by past decisions.”(1022).

Zooming in on Supreme Court’s treatment of precedents (as opposed to mere citation), Hansford and Spriggs (2006) comprehensively study the interaction between justices’ ideological goals and legitimacy constraints. Specifically, their analysis demonstrates that the Court is more likely to positively treat (follow) more legally vital precedents and less likely to undermine these precedents. In other words, the legal vitality of a precedent, measured by its history of treatment by the Court itself, complicates the justices’ pursuit of their ideal legal policies. While high legal vitality precludes the justices from weakening ideologically incongruent precedents, it also provides justices with more potent legal justification for the policies they are making in the current case.

While I concur with the general thesis of Hansford and Spriggs (2006), I join another scholarly argument that even simple string citations also indicate the relevance of *stare decisis* and that negative treatment might not constitute a significant departure from the norm. Many studies have found that the Court has great discretion over which precedents to cite Landes and Posner (1976) and it often ignores precedents brought up by the litigants Manz (2002); Cross (2007). What this behavior implies is that even a simple string citation of a precedent shows the justices’ “a latent judgment by a judge regarding the relevance of the case for helping to resolve a legal dispute.”(Fowler 2002, 326). Even negative treatment, as Cross et al. (2010)

contend, indicates the relevance of a precedent (Cross et al. 2010, 328). One could think of it as an insurmountable barrier to the policy the Court whose legal relevance forces the Court to justify in length its lack of controlling force in the current case. As Judge Posner puts it, negative interpretation of precedents “is motivated by the authority of the previous case, which may have to be deflected or destroyed in order to enable the desired outcome of the current case.” (Posner 2000, 385) Cross et al. (2010) claim that many of the negative treatments result from the Court’s refusal to expand the applicability of a precedent as suggested by the litigants and are thus not a repudiation of the precedents’ existing level of authority.

The legitimation role of precedent citation has found already some empirical support in multivariate analysis of the Court’s citation practices. Cross et al. (2010) and Lupu and Fowler (2013) show that the Court relies more heavily on the authority of precedents when individual decisions need more legitimization due to the exercise of judicial review, overturning a precedent, or high political salience. In other words, certain decisional attributes lead the justices to ground the opinions more securely in the law. Probing into the determinants of a precedent being cited by subsequent Courts, Hansford and Spriggs (2006) indicate that a main function of following precedent is to justify the current policy and legitimation capacity of a precedent is a function of its legal authority. Hence, greater legal authority of a precedent is associated with the probability of future conformity. The key to this finding is that certain attributes of the precedent itself are critical to its future relevance in the law.

# Institutional Maintenance and the Norm of *Stare Decisis*

The argument I advance in this paper is that to the extent that the institutional integrity of the Supreme Court is constrained by various external circumstances, these conditions should correlate with the degree to which justices abide by the norm of *stare decisis* in the form of precedent citations. In other words, I contribute to the scholarship by examining the relationship between the Court's external political conditions and its internal compliance with the norm of *stare decisis*. Further, and critically, I put my argument in dialogue with the existing work by positing that legal authority of the precedent at the point of judicial opinion writing affects the Court's calculations over using citations for institutional maintenance. To state differently, I argue that there should be a positive correlation between the legal authority of a precedent and its likelihood of being cited for the purpose of shoring up the Court's legitimacy.

While *stare decisis* is a norm internal to the Court, there are strong theoretical reasons to suspect that external actors can induce the compliance. A large body of literature on opinion writing and contents suggests the influence of outside forces. Since the Court aspires for legally persuasive, high quality, arguments in their opinions, they tend to borrow such arguments from external sources, such as parties' briefs (Corley 2008), lower court opinions (Corley, Collins Jr and Calvin 2011), and *amicus curiae* briefs (Collins Jr, Corley and Hamner 2015). Adopting these arguments not only strengthen the legal argumentation of the Court opinions, it could enhance the possibility that these arguments are used in lower courts and future Supreme Courts and thus extending the impact of the policies they make.

More directly illuminating the influence of justices' targeted audience on their opinion content, (Black, Owens, Wedeking and Wohlfarth 2016*b*) offer a comprehensive examination of the actors who weigh on justices' minds when they try to "enhance compliance with their decisions and to manage support for the Court" through opinion content (3). Specifically for my purpose, these scholars find that the justices use more clear and concise language if the decision goes against the prevailing public policy mood. This is done because the Court relies on public approval for its legitimacy and integrity and because modifying opinion content could cushion the blow to negative reactions to the Court's potentially unpopular decisions (Black, Owens, Wedeking and Wohlfarth 2016*a,b*).

While explicating the evolution of the norm of consensus on the Supreme Court as a social institution, Caldeira and Zorn (1998) theorize:

Changing external conditions can change the value of particular outcomes, which will have implications for the application of the social institution. Participants may change their view of what is important; a third-party enforcer may disappear or become irrelevant, or the sanctions it metes out may lose force (876).

To the extent that justices seek to set enduring legal policies that will affect the behaviors of various social and political actors, they need to ensure their policies are accepted or at least complied with these actors. Given the legitimating value of precedents, we should expect greater judicial efforts into citing precedents when the Court faces increases external constraints over its policy impact.

The literature on institutional maintenance of the Court provides critical insights into what external factors should weigh in on the Court's calculations. To begin with, the Court's institutional legitimacy ultimately rests with the attitude of the

American people, namely people's diffuse support. The diffuse support, albeit likely durable, is not impervious. Studies show that a major threat to people's diffuse support for the Court is the perception that the Court is yet another "political" institution (Gibson and Caldeira 2009). Not engaging with past decisions and basing decisions on non-legal considerations is a clear deviation from the legal norm of *stare decisis*, and thus risk engendering noncompliance and even eroding public faith in the Court's legitimacy (Scheb and Lyons 2001; Zink, Spriggs and Scott 2009)

As stated above, not all precedents are the same. Hansford and Spriggs (2006) point out that the legitimization effect of precedent treatment is solely determined by precedent vitality. More vital precedents carry on more legal weight and serve as better justifications for the policies in the contemporary decision. Further, external actors, especially public opinion, is arguably less engaged when the Court interprets, either positively or negatively, trivial precedents. Finally, for these less vital precedents, the Court is likely to weigh policy considerations over legitimacy considerations (Hansford and Spriggs 2006). Therefore, I expect that the legal authority of a precedent moderates the relationship between citation and public support for the Court. Specifically:

*H1: When the public support for the Court is lower, the Court is more likely to cite precedents, especially when the precedent is legally authoritative.*

Of course, the Court's relationship with the public entails more than how much general support the public extends to the institution. Another important element is the consistency, or lack thereof, between the Court's policy output and public policy mood (Casillas, Enns and Wohlfarth 2011; McGuire 2004). The Court has an interest in doing so as popular decisions are more likely implemented (Hall 2014) and tend to

shore up public support for the institution as a whole (Durr, Martin and Wolbrecht 2000). Therefore, for the Court to consider the attitudes of the public in precedent citation, it is likely to handle differently based on the public policy attitudes. Again, I suspect that a precedent's legal authority to play a moderating role. If the Court intends to follow public policy mood in precedent citation, it is more likely to do so over vital precedents as the public is likely more engaged. Indeed, many works find that higher policy salience increases the Court's attentiveness to public opinion (Hall 2014; Giles, Blackstone and Vining 2008; Bryan and Kromphardt 2016). Therefore, I expect:

*H2: As the public policy mood becomes more liberal, the Court is more likely to cite liberal precedents, especially when the precedent is legally authoritative.*

The literature also informs that the institutional legitimacy of the Supreme Court must also be understood in the SOP system, particularly its relationship with Congress. Congress possesses a series of tools to systematically undercut the authority of the Court, such as impeaching sitting justices, slashing Court budget, or stripping the Court's appellate jurisdiction Rosenberg (1992). Named together as Court-curbing, these are important congressional signals threatening the institutional integrity of the Court. More critically, as Clark (2009) suggests, the Court takes some Court-curbing bills as signals of waning public support as members of Congress have closer connections with the constituents as the Court (Mayhew 1974). Empirically, therefore, we should observe the Court exercise restraint when congressional Court-curbing rises in intensity. The judicial restraint, or the lack of judicial independence from political influence, is often operationalized as the reluctance to exercise constitutional invalidation of federal statutes Clark (2011); Segal, Westerland and Lindquist (2011);

Hall (2014). Here, I contend that having to behave more within the boundaries of socially and professional acceptable norms is also a reflection of judicial restraint. After all, legal commentators have already proposed the principle of *stare decisis* as a tool for judicial restraint Merrill (2005). For my purpose, I expect to observe a positive correlation between Court-curbing intensity and precedent citation. And, again, this posited relationship should be greater in magnitude when it comes to more authoritative precedents.

*H3: As the congressional Court-curbing increases, the Court is more likely to cite precedents, especially when the precedent is legally authoritative.*

Apart from specific congressional signals of deteriorating Court-Congress relations, empirical works also show the constraining effect of ideological distance between Court and Congress. In particular, scholars illustrate that greater ideological constraint from Congress is associated with the Court's greater willingness to maintain its institutional legitimacy (Segal, Westerland and Lindquist 2011; Hall 2014; Ringsmuth and Johnson 2013). This theory, referred to as the "institutional maintenance model", departs from the traditional "rational anticipation model." While the latter focuses on the Court's rational prevention of congressional overturn of individual decisions, the former suggests that the real constraining power of Congress comes from its general ideological incompatibility with the Court. Confronted with a hostile legislative majority in Congress, the Court fears systematic reduction of its authority, a more potent threat to the Court as an institution than a specific decision override (Segal, Westerland and Lindquist 2011). In light of this line of inquiry, I suspect that Congress' ideological constraint also affects the norm of *stare decisis* as the Court turns to the norm to shore up its institutional standing when faced off with

an ideologically hostile Congress, and it is more prone to cite legally important cases. Therefore, I hypothesize that:

*H4: As the ideological distance between the Court and Congress increases, the Court is more likely to cite precedents, especially when the precedent is legally authoritative.*

Finally, while the dynamic between the Court and the rest of the federal judicial hierarchy does not directly speak to the issue of institutional maintenance, they are highly related given the role the federal lower courts play in interpreting and following Supreme Court precedents. In other words, to the extent that the Court cares about its legitimacy for the purpose of policy compliance, discussions of institutional maintenance should also consider the federal courts of appeals in that they are “one notable subset of decision makers that...should almost always be affected by the Supreme Court treatment of precedent” (Hansford and Spriggs 2006, 109). In order to encourage compliance by the federal courts of appeals with the policies the Supreme Court creates, justices strategically alter their language (Black, Owens, Wedeking and Wohlfarth 2016a). If the circuits courts are more ideologically at odds with the Supreme Court, justices might be compelled to legitimate their decisions more consciously by citing more precedents, especially highly potent ones, just like writing clearer and more concise opinions (Black, Owens, Wedeking and Wohlfarth 2016b).

*H5: As the ideological distance between the Supreme Court and the federal courts of appeals increases, the Court is more likely to cite precedents, especially when the precedent is legally authoritative.*

## Data and Methods

### *Dependent Variables*

I draw on the precedent citation data of Fowler et al. (2007) updated by Bryan (2014). The original data set and the update start with collecting all signed or *per curiam* Supreme Court opinions ever released from 1791 to 2011. After identifying the universe of all Supreme Court opinions, these data sets utilize *Shepard's Citation*, a legal index listing all the authorities, including the Supreme Court itself, referencing an existing Court decision.

Then, following Hansford and Spriggs (2006); Black and Spriggs (2013); Bryan (2014), I collapse the data into a cross-sectional data structure, containing, for each case, one observation for each year since it is decided until 2011. For instance, for *Roe v. Wade*, decided in 1973, the data contains 39 observations from 1973 to 2011. The dependent variable is dichotomous, coded 1 if a decision is cited in a subsequent year by a majority opinion of the Court, and 0 otherwise.<sup>3</sup>

### *Independent Variables*

I measure variables capturing the external constraints on the legitimacy of the Court. The primary one is *Public Opposition*. I use the public support data of Bryan and Kromphardt (2016), which is an update from Durr, Martin and Wolbrecht (2000). The measure of public support uses the algorithm of Stimson (1991) by constructing

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<sup>3</sup>Particularly, *Shepard's Citation* provides an authoritative assessment of how the citing decision treats the precedent. Hansford and Spriggs (2006) characterize the multiple treatment methods identified in *Shepard's* into three broad types, simple citations (a case is cited without substantive discussion), positive treatment, and negative treatment. Positive treatment refers to the cases where *Shepard's* labels the citing case as "Following" the precedent. Negative treatment includes the remainder of the treatment methods, including "Distinguished", "Criticized", "Limited", "Questioned", and "Overruled." While some argue that negative treatment reduces the legal authority of a case (Hansford and Spriggs 2006; ?), I claim that, for the purpose of my argument, engaging with a precedent at all, regardless of the substantive interpretation of the citation, is indicative of the Court's respect for the norm of *stare decisis* (Fowler et al. 2007).

a dynamic series underlying the public survey response data archived at the Roper Center for Public Opinion Research. The advantage is to overcome the lack of a single, frequently-conducted, extensive measure of macro public attitude toward the Supreme Court. To facilitate the interpretation of statistical results, I multiple the measure of public support by  $-1$  so that one unit increase indicates higher public opposition or lower public support <sup>4</sup>.

Aside from broad public attitude toward the Court as an institution, my argument also suggests that the Court must attend to the public's policy mood in dealing with precedents. Specifically, I suspect that the Court is more likely to cite liberal precedents as the public policy mood becomes more liberal, and vice versa. To capture the degree to which the policy content of a precedent is consistent with the prevailing public mood, I construct a measure named *Consistent with Public Mood*. I use the measure of public liberalism compiled and updated by Stimson (1991). Greater value of public liberalism indicates the public is generally more in favor of liberal public policies. For the ideological direction of precedents, I use the coding of decision direction in the Supreme Court Database (SCDB) (Spaeth, Epstein et al. 2018). If the decision is coded as liberal, then the value of *Consistent with Public Mood* is the value of public liberalism. For decisions coded as conservative, in the opposite, *Consistent with Public Mood* is coded as the value of public liberalism times  $-1$ . Hence, I expect

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<sup>4</sup>It can be argued that this measure taps into the short-term change in public specific support for the Court driven by the public's dissatisfaction with the Court's ideological output (Durr, Martin and Wolbrecht 2000). While this might be the case, I echo Clark (2009) that the Court's pursuit of institutional legitimacy motivates justices to be alert to even the short-term decline in public support as it could potentially lead to significant erosion of public confidence. Further, as Clark (2009) shows, even the short-term decline in specific support for the Court drives congressional attempts to curb the Court. Finally, as Bryan and Kromphardt (2016) suggests, the difference between specific and diffuse, short-term and long-term, support for the Court is more important as a public opinion research agenda. For predicting the Court's decisions, one can reasonably assume that the Court does not see the distinction as its non-implementation conundrum should lead it to acquire all public support available.

the value of *Consistent with Public Mood* to have a positive relationship with the probability of a precedent being cited.

As stated above, the Court operates in the system of SOP where Congress has substantial power to curtail the institutional integrity of the Court. To measure congressional hostility, I use the data of Clark (2011) and measure a logistic transformation of the raw number of *Court-curb*ing proposals introduced in Congress in the year preceding to the year under consideration.

Further, I estimate the general ideological constraint imposed by Congress by comparing the ideal points of House median, Senate median, and Court median. If the Court median falls in between the chamber medians, I code the *Congressional Constraint* as 0. If it falls outside the two chamber medians, I code the *Congressional Constraint* as the distance between the Court median and the closest chamber median. For ideal point estimates of House and Senate median and the president, I use the Bailey (2013) estimates that allow cross-institutional comparison of ideological positions.

My last measure of the Court's external condition taps into the ideological compatibility between the Supreme Court and the circuit courts. I follow (Black, Owens, Wedeking and Wohlfarth 2016b) and calculate the median of each court of appeals' median judge ideological score. And then I calculate the absolute distance between this median and the median justice on the Supreme Court in each term. The ideological scores I use are drawn from the Judicial Common Space scores, a set of comparable ideal point estimates for all Supreme Court justices and court of appeals judges in each term (Epstein et al. 2007).

All my hypotheses suggest an interactive relationship between various external constraints and the legal authority of a precedent. Past empirical works have found

that many precedents do not get cited by subsequent Courts at all (Cross et al. 2010; Black and Spriggs 2013). If we take justices as strategic actors who cite precedents to legitimate their decisions, they should do so more often with precedents with more powerful legitimating effect, namely those of greater legal relevance.

In this paper, I employ three existing measures of the legal authority of precedents. The first two are developed by Fowler et al. (2007) using network analysis techniques that treat the each Supreme Court decision as a node and each citation between decisions as a link. Under this framework, these researchers develop the measures of *Inward Relevance* and *Outward Relevance*. *Inward Relevance* captures the centrality of a case in the network measured by how much it continues to be of importance. It also taps into the nuance of what kind of cases are citing the precedent – a precedent cited by more legally important subsequent decision carries more weight in this measure than a precedent cited by a less important subsequent case.

*Outward Relevance* captures how much a decision is “grounded in precedents” by not only considering how much precedents it cites but also how inward relevant these cited cases are at the point of citation. In other words, all else being equal, a decision has greater outward relevance than another if it cites more “landmark” precedents (precedents with greater inward relevance). Hence, both measures of legal relevance are dynamic, varying as the Court cites different precedents at different points in time.

My third measure of legal authority of a precedent is *Vitality*. While the two network-based measures are drawn from all citations identified by the *Shepard's Citation*, the measure of *Vitality*, developed by Hansford and Spriggs (2006) only take into account positive or negative treatment as coded by the *Shepard's Citation*. Assuming that positive treatment of a precedent (those codes as being “followed”) theoretically

enhances a precedent's legal authority and negative interpretation <sup>5</sup> undermines it, a precedent should be more vital, namely legally weighty, if it has been more often positively interpreted than negatively interpreted. The variable *Vitality*, therefore, is measured as the the frequency of positive interpretation minus the frequency negative interpretation. I follow Bryan (2014) by lagging *Vitality* by one year to ensure that the variable is exogenous. To wit, a positive value in year  $T$  indicates a precedent has been more often positively interpreted than negatively interpreted up until term  $T - 1$ .

#### *Control Variables*

In line with Hansford and Spriggs (2006) and Bryan (2014), I control a series of variables that could explain if the Court cites a precedent. A primary determinant is *Ideological Distance*. Decades of scholarship has shown the policy goals of justices, and the statement is true with precedent treatment. Hansford and Spriggs (2006) has shown that the ideological distance between the Court and the policy embedded in a precedent strongly correlates with precedent treatment. In essence, justices are more likely to negate the precedents they disagree with and to follow the ones they agree with. While I remain agnostic as to the validity of distinguishing positive from negative treatments for the purpose of my inquiry, I will maintain the measure of ideology in my model to detect its effect on broadly defined citations of precedents <sup>6</sup>. I measure *Ideological Distance* by updating the issue-specific Martin-Quinn scores (Martin and Quinn 2002) compiled by Enns and Wohlfarth (2013). Specifically, I calculate the absolute difference between the ideological score of the median justice in the precedent's majority coalition and score of the median justice in the subsequent

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<sup>5</sup>Those coded as being "Overrule", "Question", "Limit", "Criticize", "Distinguish."

<sup>6</sup>Black and Spriggs (2013) find that precedents more ideologically congruent with the Court depreciates more slowly in terms of citations

Court term in the corresponding issue area. The identification of precedent’s issue area is based on the eight coarse issue areas identified by the SCDB (Spaeth, Epstein et al. 2018).

Aside from ideology, I follow Hansford and Spriggs (2006) by controlling a series of variables relating to the nature of the precedent itself and the nature of the subsequent Court. First, I control for the presence of *Special Concurrence* and *Vote Margin* of the majority coalition in the precedent, both of which are associated with the legal strength of a precedent. Second, I control for the *Age* of a precedent and its quadratic term<sup>7</sup>. Third, I control for if a precedent has been previously *Overtured*. Fourth, I measure a precedent’s *Legal Breadth* by counting the number of Headnotes identified in LexisNexis<sup>®</sup> as it has been used as a valid indicator of the major legal points made in a Court opinion (Black et al. 2019). Fifth, I measure the political salience of a case by controlling for the number of *Amicus Briefs* filed at the merits stage, whether or not the *Solicitor General* participated, and *Media Coverage* as measured by Clark, Lax and Rice (2015). Finally, I control for the legal salience of a case by controlling whether a precedent is a *Constitutional Interpretation*<sup>8</sup>, whether it is a *Per Curiam* decision, and whether it declares a federal or state statute *Unconstitutional*.

With respect to the Court, I measure *Court Agenda* by counting the number of cases in that issue area on the Court’s docket in the subsequent term. Since the Court agenda is constantly changing (Pacelle 1991), a precedent pertaining to an issue area still active on the Court’s agenda might be more likely to be treated.

Past literature also indicates that the collegial process of opinion writing among

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<sup>7</sup>Hansford and Spriggs (2006)’s analysis of the term-trend of precedent interpretation suggests a non-linear relationship between a precedent’s age and its likelihood of being interpreted. Their experimentation also suggests that a quadratic term is appropriate.

<sup>8</sup>I code case as *Constitutional Interpretation* if its decisional authority is coded as constitutional interpretation at the national or state level by the SCDB.

the justices impacts the citation of precedents in the final published opinion (Cross et al. 2010; Lupu and Fowler 2013). I control for *Ideological Heterogeneity* by calculating the standard deviation of all sitting justices' ideological scores as measured by the Martin-Quinn scores (Martin and Quinn 2002) and expect greater ideological diversity is positively associated with citations. This is due to the greater need to accommodate other justices in the majority coalition (Maltzman, Spriggs and Wahlbeck 2000). Further, I control for the ideology of the term-specific median justice . Lupu and Fowler (2013) finds that more liberal justices “generally prefer to embed their opinions in precedent than more conservative justices do” (160), as the latter tend to be originalists who focus more on the founding documents rather than the changing meaning of the law manifested in precedential development.

## Analyses

With the data and measures accounted for, I proceed to estimate four logistic regression models with robust standard errors clustered around the same precedent to account for the correlation of errors associated with the same precedent over time. In the first baseline model, all variables are introduced as main effects. The purpose is to see if the external constraints have the hypothesized effects on citations. In the rest three models, I directly test the conditionality of my hypotheses, examining if the effects of these external constraints are enhanced as the legal authority of a precedent increases. These three interaction models employ the three measures of legal authority I explicated above respectively, *Inward Relevance*, *Outward Relevance*, and *Vitality*.

The baseline model estimates are reported in Table 4.1. All variables of exter-

nal constraints I hypothesized are statistically significantly associated with greater propensity of precedent citation by the Court and are signed in the expected directions. For their substantive effects, I plot the predicted probabilities of a precedent being cited by the Court in a given year as a function of various values of these external constraints in the sample, while holding all other variables at their means or modes.

First see Figure 3.1, which illustrates the effects of public opposition. As public opposition to the Court increases, the predicted probability of a precedent being cited increases from 0.135 to 0.184, a relative increase of 36.30%.

Then consider the effect of public policy mood as demonstrated by Figure 3.2. Recall this variable is constructed so that a greater value indicates greater consistency between the ideological direction of the precedent and the prevailing public policy mood. As this variable moves from its sample minimum to maximum (precedents most contrary to public opinion and precedents most in line with public opinion), the probability of citation increases from 0.143 to 0.156, a relative increase of 9.10%.

Combined, these results suggest that the Court's proclivity to cite a precedent in a given year is substantially influenced by the public opinion, both in terms of the public's general support for the Court and their policy preference.

The effects of congressional constraints on precedent citation is shown in Figure 3.3. As the ideological distance between the Court and Congress increases from 0 (the Court is theoretically unconstrained) to the sample maximum, the predicted probability of precedent citation increases from 0.145 to 0.159, a relative increase of 9.66%.

The effects of Court-curbing proposals are shown in the bottom panel of Figure 3.4. As the log transformation of the number of Court-curbing bills rises from its

Table 3.1: Baseline Logistic Regression Model of Precedent Citation

Covariates	Precedent Cited in a Year	
	<i>b</i>	<i>S.E.</i>
Ideological Distance	-0.00792	(0.0178)
Vitality	0.0276***	(0.00776)
Public Opposition	0.0126***	(0.00144)
Outward Relevance	1.484***	(0.109)
Inward Relevance	1.915***	(0.0567)
Court-Curbing	0.0215*	(0.00931)
Distance from Congress	0.132***	(0.0379)
Constitutional Issue	-0.0636*	(0.0318)
Special Concurrences	0.0238	(0.0141)
Vote Margin	0.00391	(0.00497)
Court Agenda	0.0173***	(0.00104)
Amicus Briefs	0.119***	(0.0151)
SG Participation	0.0128	(0.0365)
Per Curiam	-0.528***	(0.0805)
Consistency with Public Mood	0.000825***	(0.000234)
Legal Breadth	0.0269***	(0.00297)
Declared Unconstitutional	0.323***	(0.0512)
Age	-0.131***	(0.00258)
Age Squared	0.00154***	(0.0000538)
Overruled Precedent	0.0902	(0.258)
Distance from Courts of Appeals	0.307**	(0.101)
Ideological Heterogeneity	0.0797***	(0.0232)
Median Justice Conservatism	0.0469*	(0.0195)
Constant	-1.934***	(0.209)
<i>N</i>	159749	
Log pseudolikelihood	-68601.047	
AIC	137250.1	
BIC	137489.6	

Robust standard errors clustered around precedents in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

sample minimum to maximum, the predicted probability of a precedent being cited in a given year increases from 0.146 to 0.158 [.15, .17], a relative increase of 8.22%. In short, both the ideological constraint from Congress and congressional legislative

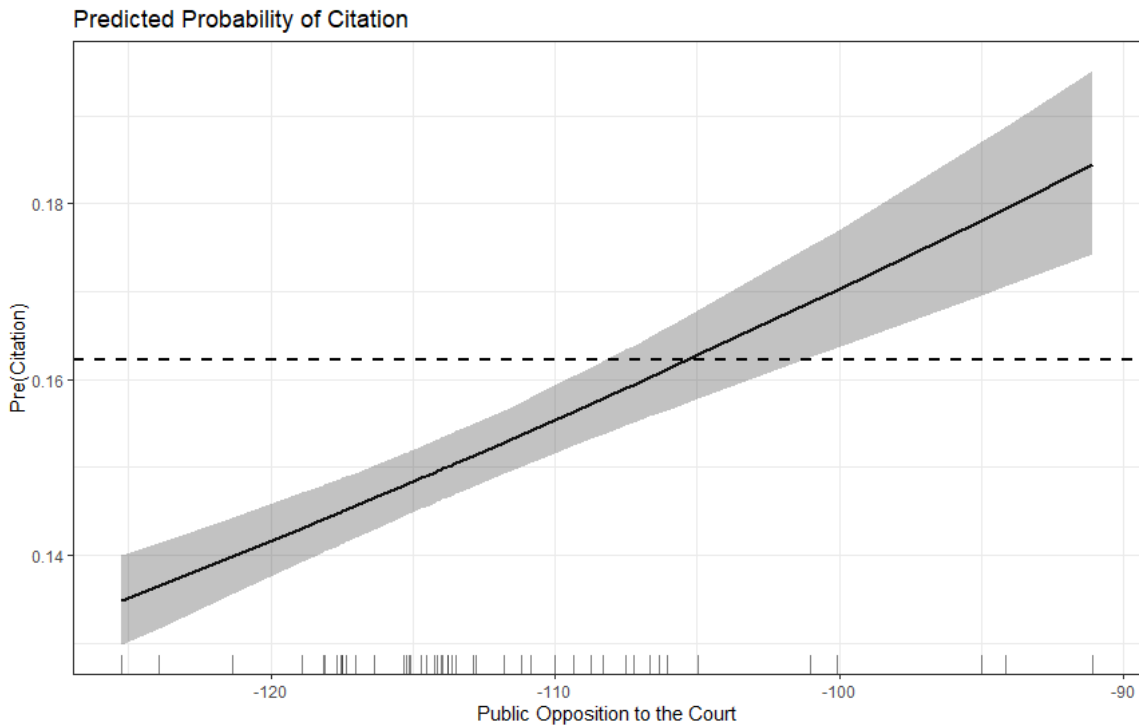


Figure 3.1: Predicted probabilities of precedent citation conditional on public opposition

This figure shows the predicted probabilities that a precedent is cited in a given year conditional on the level of public opposition facing the Court. The shaded area indicates 95% confidence intervals. The horizontal dashed line indicates the sample mean 0.16. The rug on the bottom indicates the distribution of public opposition in the sample. All other covariates in the sample are kept at their sample mean or mode.

proposals aimed at curtailing judicial power have some impact on whether or not a precedent is cited by the Court.

Finally, as Figure 3.5 illustrates, as the ideological distance between the Supreme Court and various circuit courts of appeals increases from 0 to the sample maximum, the predicted probability of precedent citation grows from 0.145 to 0.160, a relative increase of 10.34%.

Taken together, these results above point to the modest yet clear influence of

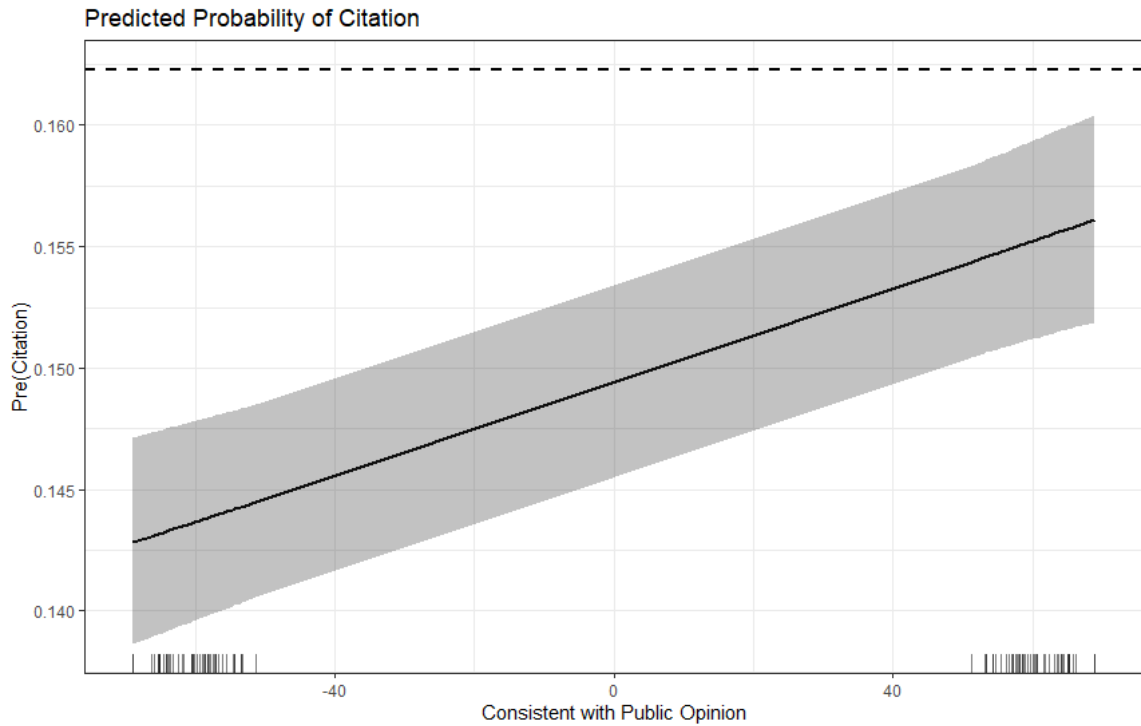


Figure 3.2: Predicted probabilities of precedent citation conditional on public policy mood

These figures shows the predicted probabilities that a precedent is cited in a given year conditional on the level of public policy mood (liberalism). The shaded area indicates 95% confidence intervals. The horizontal dashed line indicates the sample mean 0.16. The rug on the bottom indicates the distribution of consistency of public mood in the sample. All other covariates in the sample are kept at their sample mean or mode.

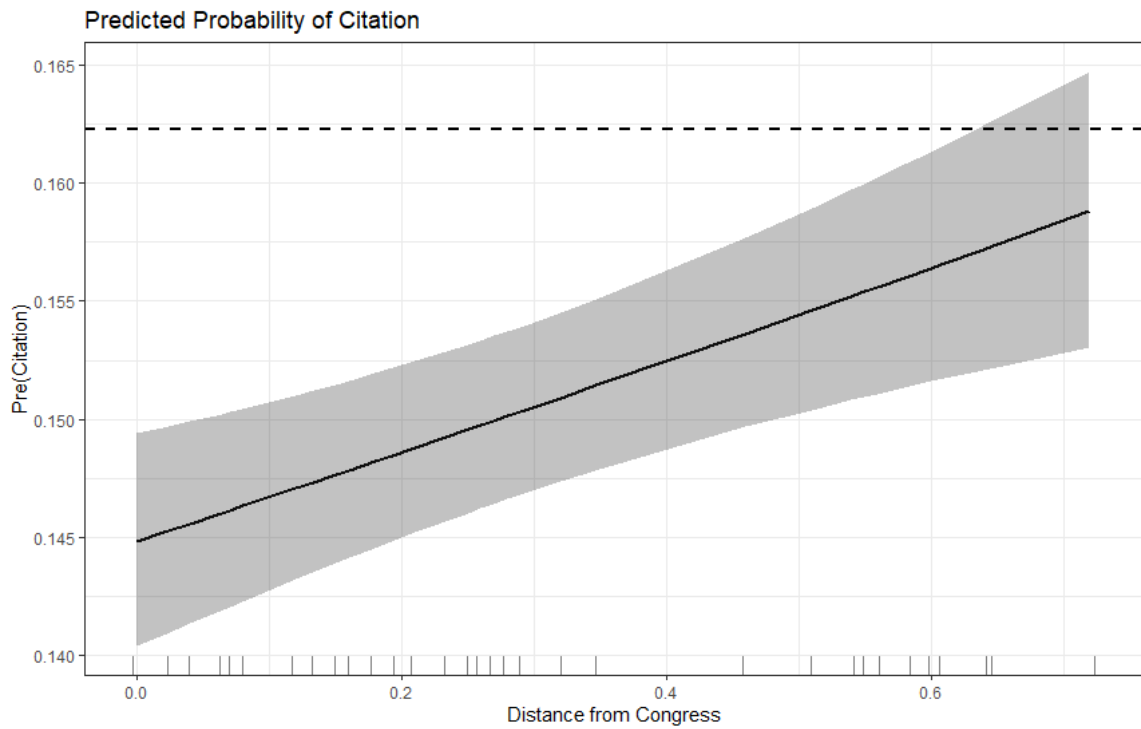


Figure 3.3: Predicted probabilities of precedent citation conditional on distance from Congress

This figure shows the predicted probability that a precedent is cited in a given year conditional on the ideological distance between the Court and Congress. The shaded area indicates 95% confidence intervals. The horizontal dashed line indicates the sample mean 0.16. The rug on the bottom indicates the distribution of distance from Congress in the sample. All other covariates in the sample are kept at their sample mean or mode.

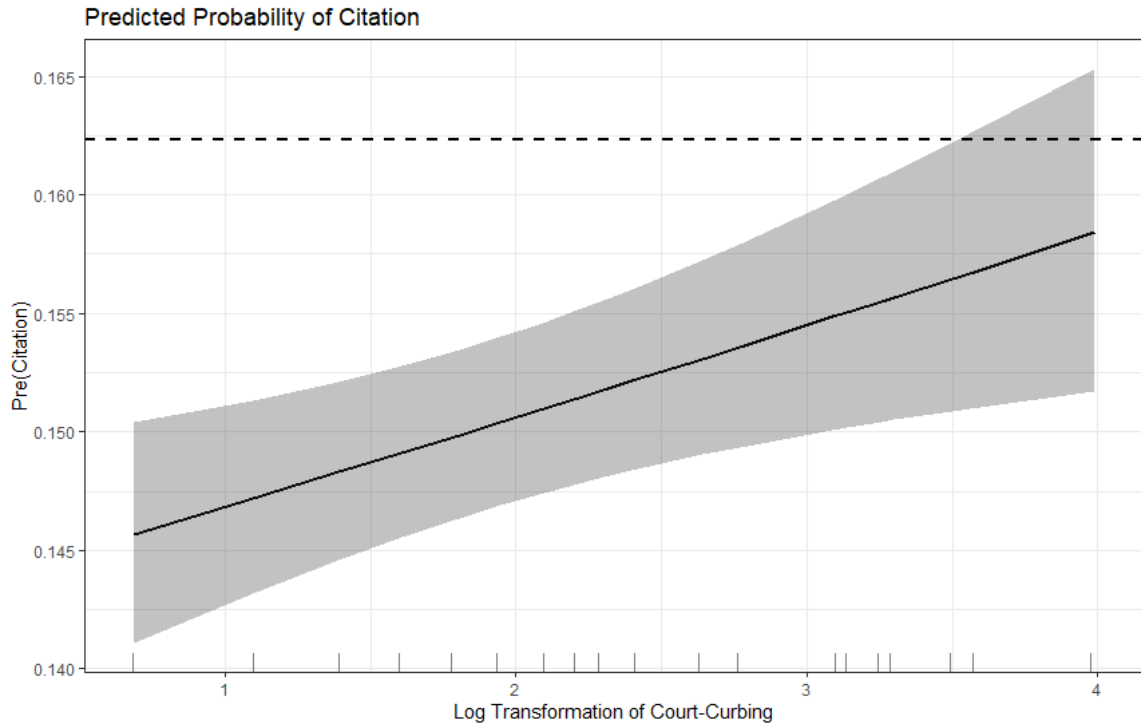


Figure 3.4: Predicted probabilities of precedent citation conditional on Court-Curbing

This figure shows the predicted probability that a precedent is cited in a given year conditional on the the intensity of Court-curbing activities in Congress. The shaded area indicates 95% confidence intervals. The horizontal dashed line indicates the sample mean 0.16. The rug on the bottom indicates the distribution of Court-curbing in the sample. All other covariates in the sample are kept at their sample mean or mode.

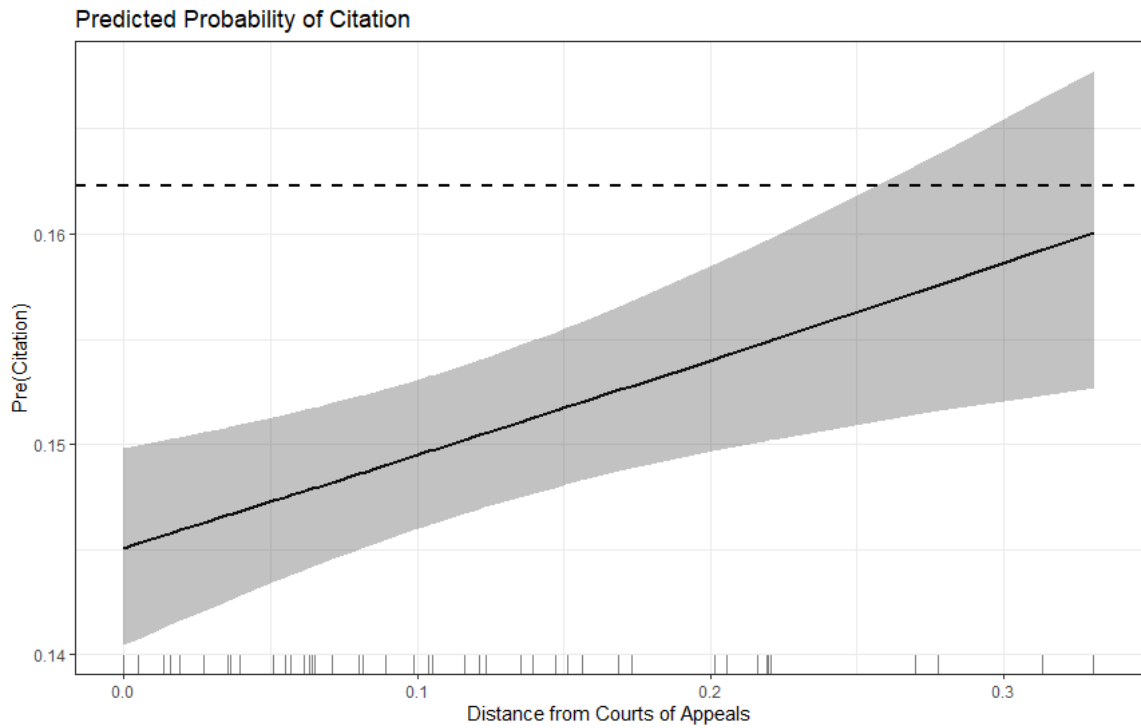


Figure 3.5: Predicted probabilities of precedent citation conditional on distance from circuit courts

This figure shows the predicted probability that a precedent is cited in a given year conditional on the ideological distance between the Supreme Court and the various federal courts of appeals. The shaded area indicates 95% confidence intervals. The horizontal dashed line indicates the sample mean 0.16. The rug on the bottom indicates the distribution of the distance in the sample. All other covariates in the sample are kept at their sample mean or mode.

external constraints on the Court’s propensity to cite precedents in its opinions. These constraints come from the public, members of Congress, and the federal judicial hierarchy. In other words, insofar as the norm of *stare decisis* is internal to the Court, one can expect external constraints on the Court’s legitimacy can also induce greater compliance by the Court.

My argument is an important one not only because these external constraints are influential. It is important also because it is a conditional one in that the influence of external constraints are amplified by the legal authority of precedents. To the extent that not all precedents are the same and that many precedents are not cited by subsequent Court, it is critical to consider legal authority of a case to understand which precedents in particular are more “worthy of” citation if the Court intends to cite them to shore up its legitimacy.

To test this claim, I estimated three separate models with multiple interaction terms where each model uses one measure of precedents’ legal authority. If my argument is born out in the data, we should observe the effect of external constraints to be (1) significantly greater than 0, and (2) increases as the legal authority of a precedent increases. This is exactly what I observe in many of the interaction terms in the three models. The model estimates are reported in Tables A3, A4, A5 respectively in the appendix. In the main paper, I plot the average marginal effects of external constraints conditioned on various measures of precedent’s legal authority. Consider first, the *Inward Citation*, which can be roughly understood as a precedent’s authority score that increases as more important subsequent Court decisions cite it. As Figure 3.6 illustrates, the average marginal effects of public opposition, public policy mood, distance from Congress, congressional Court-curbing, and distance from courts of appeals all follow a similar pattern – they are close to zero or indistinguishable from

0 when *Inward Relevance* is small and they increase substantially as *Inward Relevance* increases. This finding suggests that when external constraints on the Court increase, the Court is no more likely to cite low *Inward Relevance* cases than when these constraints are weak. The impact of these constraints are only significant when for a precedent with sufficient *Inward Relevance*. In other words, when the Court faces external pressure, it is only likely to invoke cases that persist to be influential in the U.S. law, conforming to the some scholars' speculation that "there is a certain degree of path dependency in the law and that the 'history' of a case matters" (Black and Spriggs 2013, 347).

Now consider the moderating effect of a precedent's *Outward Relevance*. Recall that this other network-based measure taps into how embedded in law a precedent is. It is a function of the raw number of precedents cited in a precedent weighted by the legal authority of these cited precedents (Fowler et al. 2007). While there is no statistically significant interactions between *Outward Relevance* and public policy mood and distance from courts of appeals, Figure 3.7 shows the average marginal effects of public opposition, distance from Congress, and congressional Court-curbing, conditioned on various levels of *Outward Relevance*. For these three external constraints, their effects on the probability of citing a precedent is either indistinguishable from 0 or negative when the outward relevance is low. When the outward relevance is large enough, their marginal effects turn positive and significantly increase as outward relevance increases. To put differently, as certain constraints intensify, the Court is significantly more likely to cite precedents that are more embedded in precedents themselves.

Finally, consider the moderating effect of legal vitality of precedents. As Hansford and Spriggs (2006) argue, negative treatment decreases the legal vitality of a

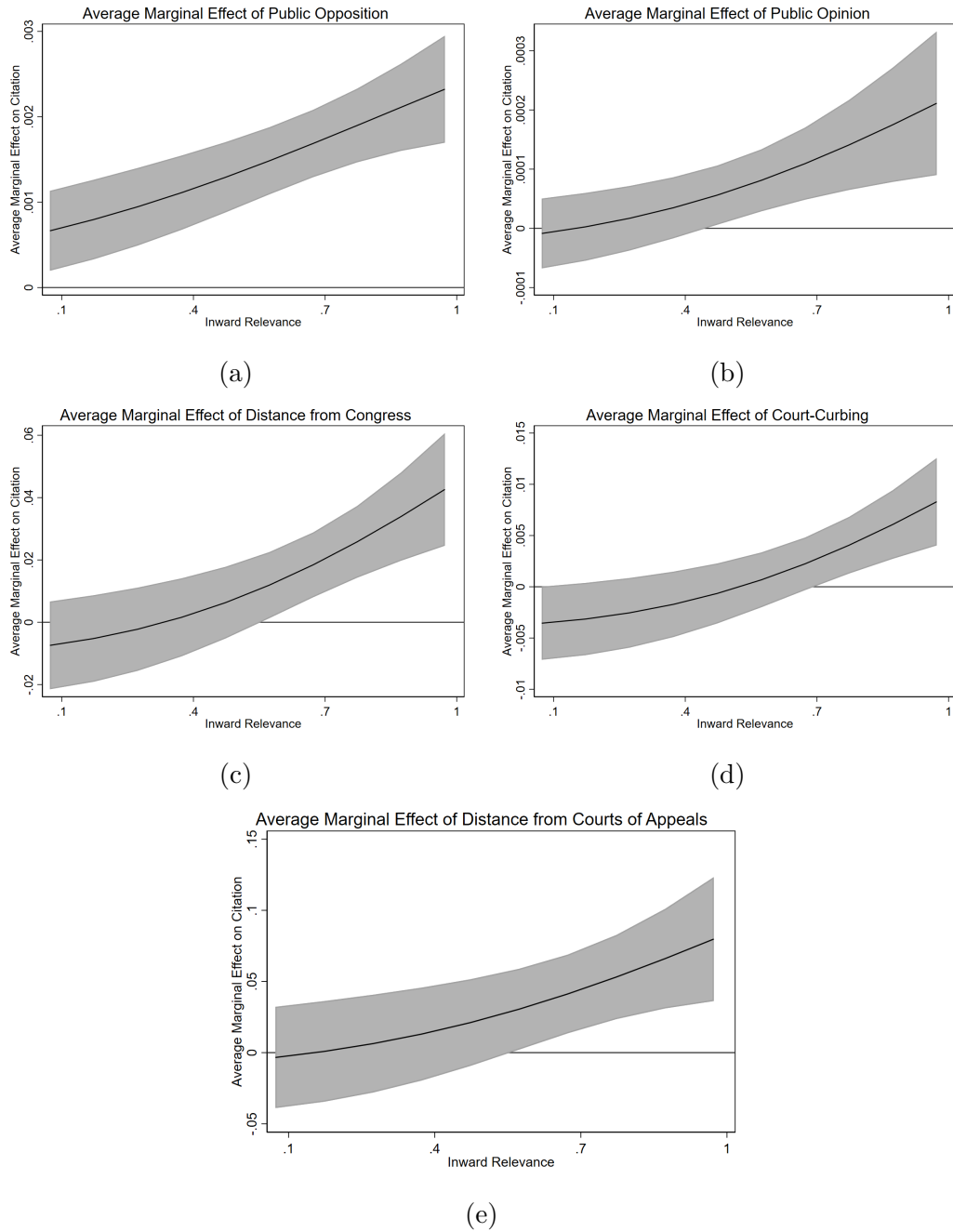


Figure 3.6: Average marginal effects of various external constraints conditioned on precedent's inward relevance

*Note: Average marginal effects are calculated by holding all other covariates at their observed values. The shaded areas indicate 95% confidence intervals. The horizontal line at 0 indicates the lack of statistically significant marginal effect.*

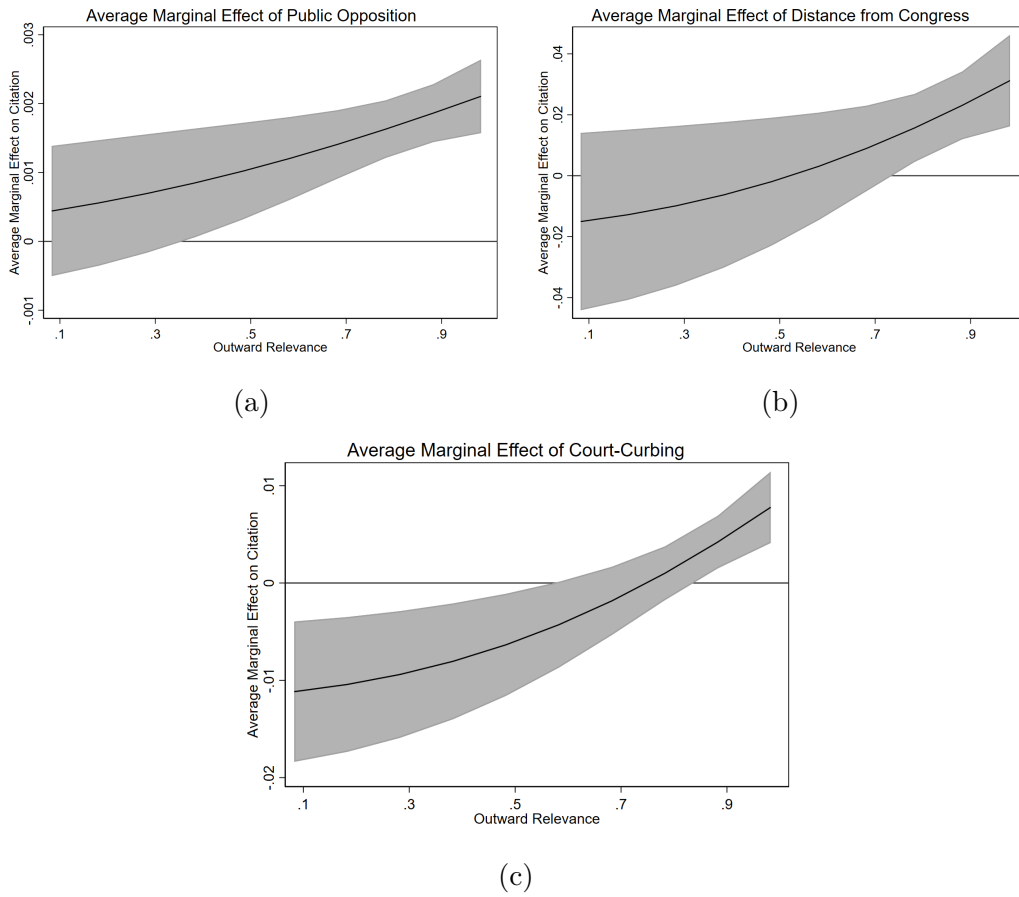


Figure 3.7: Average marginal effects of various external constraints conditioned on precedent's outward relevance

*Note: Average marginal effects are calculated by holding all other covariates at their observed values. The shaded areas indicate 95% confidence intervals. The horizontal line at 0 indicates the lack of statistically significant marginal effect.*

precedent and positive treatment increases it. Vitality sums up the entire history of a precedent's treatment by the Court, with positive values indicating more positive treatment than negative ones, and vice versa. As Figure 3.8 illustrates, only the effects of distance from Congress and distance from the courts of appeals are significantly moderated by a precedent's vitality. While this finding is important in and of itself, the lack of statistically significant interactions between vitality and public opinion and court-curbing might be driven by the different data-generating process of precedent treatment and precedent citation. As I concur with Cross et al. (2010), citations, including treatments and string citations, are driven by legitimating needs, among other things. The legitimation role of legal treatment is more complex. As Hansford and Spriggs (2006) observe from their empirical analyses, it seems that positive treatment is driven more by legitimation than policy goals whereas negative treatment is more strongly motivated by the Court's desire to set its ideal legal policies. Hence, the measure of vitality, which takes into account both positive and negative legal interpretations of a precedent, might not be the most proper measure of legal authority for the purpose of studying citations.

## Conclusion

Legal citation is a central component of legal opinion writing. While there are many reasons why judges cite precedents, a critical one is the conformity to the norm of *stare decisis* by grounding their policies in the existing body of the law. Conforming to the norm not only is time-saving, allowing judges to judge on analogous situations based on past decisions (Lindquist and Cross 2005), it also allows judges to justify their decisions using uniquely legal considerations.

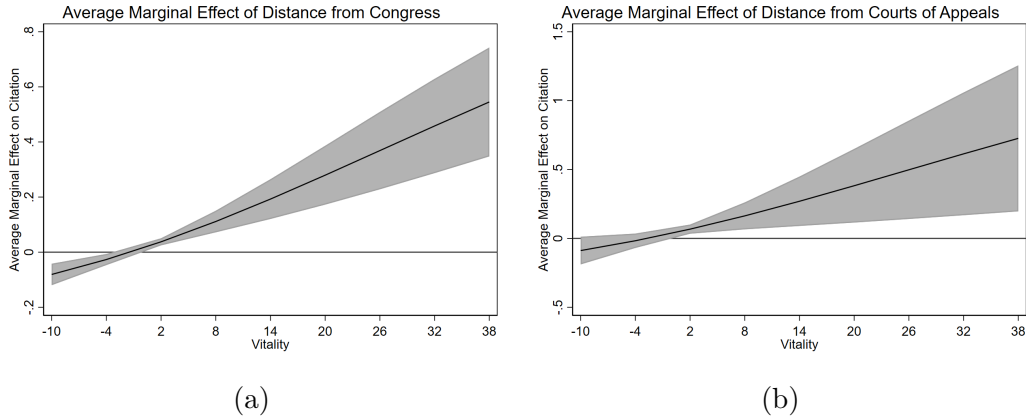


Figure 3.8: Average marginal effects of various external constraints conditioned on precedent’s vitality

*Note: Average marginal effects are calculated by holding all other covariates at their observed values. The shaded areas indicate 95% confidence intervals. The horizontal line at 0 indicates the lack of statistically significant marginal effect.*

The United States Supreme Court justices are unique judges due to the institutional position. One of the on hand, justices enjoy a nearly completely discretionary docket and make decisions with wide-ranging policy implications that cannot be easily overturned. Hence, justices on the High Court are driven to a large extent by their policy goals, motivated to move the legal policy in the country as close to their ideal points as possible (Segal and Spaeth 2002). On the other hand, justices are invested in maintaining the integrity of the institution that allows them to accomplish policy goals. Since the Court is inherently weak as an institution that cannot force compliance of its decisions, justices need to ensure that their decisions are perceived legitimate. What constitutes “legitimate” decisions then? This paper claims, as many scholars have, that embedding the decisions in the law goes a long way toward presenting judicial decisions as legitimate and worthy of acceptance despite disagreements. In other words, conformity to the internal norm of *stare decisis* strengthens

to the Court's projection of its own image as above the political fray so as to avoid damages to its legitimacy. As Black and Owens (2009) observe, "justices must be loathe to trespass on legal norms that require adherence to certain patterns of behavior. Violating them could impugn the Court's legitimacy and provoke damaging repercussions" (1062).

What is new about my research is that I go beyond the attributes of decisions *per se* that might call for greater needs of legitimation (Cross et al. 2010) and make a connection between the external constraints facing the Court and the internal norm of *stare decisis*. Specifically, I look at the constraints from the mass (public opposition to the Court and public policy mood) as well as the elite (Congress). Moreover, I not only examined the dynamic of horizontal, SOP constraints, but also the vertical constraints imposed by ideologically incongruent federal courts of appeals.

My findings also noteworthy because they are conditional as they suggest that the constraining effects of these external constraints grow stronger as a precedent's legal authority increases. To put differently, this indicates that when external pressures are mounting, the Court tends to use very legally authoritative precedents to justify its current decisions. Among the three existing measures of legal authority, the Inward Relevance exhibits the effects most consistent with my expectations. This is not surprising given the latent concept that inward citation theoretically measures is the most closely related to the concept of legal authority in my theoretical argument. As defined by Fowler et al. (2007), "[a]n inwardly relevant case is one that is widely cited by other prestigious decisions, meaning that judges see it as integral part of the law" (330). Hence, the legal authority of precedents are not only enormously informative regarding the position of a decision in the dynamic network of legal citations, they are also predictive of future Court's precedent citation behaviors as a

response to external political circumstances.

This paper's implications are beyond unpacking the relationship between external constraints and the Court's precedent citation patterns. Insofar as precedent citation is a key component of the development of the law, my findings suggest that public opinion, separation-of-powers, and federal judicial hierarchy all have certain impacts on the path of legal development orchestrated by the nation's highest court. Further research on the network of precedent, the depreciation of precedents, and using precedents to model similarities between cases, could benefit from the insight that citation behaviors are not only internal to the Court but that external actors can exert influence on the Court's propensity to cite precedents as well.

# Chapter 4

## Norm of Collegiality

### Introduction

On January 21, 2015, the United States Supreme Court heard oral argument for the case *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (576 U.S. 519). The key issue in this case was whether or not “disparate impact” claims are cognizable under the Fair Housing Act. In this heated argument involving civil rights and discrimination, Justice Antonin Scalia was characteristically active. Not only did he make 27 utterances but 5 of them were interruptions of his colleagues. In fact, all of these five interruptions were directed at his female colleagues: he interrupted Justice Ginsburg twice, Justice Sotomayor twice, and Justice Kagan once.

Is *Texas Department of Housing* an anomaly? This is a complicated question. Overall, justices are civil and respectful of each other in that they rarely interrupt each other. On the other hand, Justice Scalia’s behavior was typical in the sense that it conforms to the pattern of interruptions when they do happen. Prior research has

observed that justices tend to interrupt their ideological foes, female colleagues, and more junior colleagues (Jacobi and Schweers 2017). Ginsburg, Sotomayor, and Kagan were all Scalia’s ideological opponents, and they were all female justices more junior to him.

While overall relatively rare, interruptions like Scalia’s seem to violate the norm of collegiality that the Court faithfully upholds. This norm of collegiality is important to the Court because justices need to form coalitions to further their policy goals (Maltzman, Spriggs and Wahlbeck 2000), and because it is a core element of the Court’s image as a impartial body above the political and partisan fray. In contrast, members of Congress of different parties publicly, and forcefully, display their disagreements. As we enter an age of unprecedented partisan polarization, members of Congress even verbally assault their colleagues or physically harass them <sup>1</sup>. Such behavior, according to Hibbing and Theiss-Morse (2002), is responsible for the low public esteem for Congress. To the contrary, the lack of such public displays of disagreements is essential to the relatively higher approval the Court has consistently enjoyed.

I argue that the Court remains distinct from other branches thanks to justices’ pursuit of institutional legitimacy and reputation. While their vehement disagreements over important constitutional and legal questions might lead them to engage in combative behavior during oral arguments, they refrain from doing so when they know the costs are too high. In other words, when justices sense greater danger to the Court’s legitimacy, they should treat each other better during oral arguments by interrupting less often. While prior research into this phenomenon suggests the norm

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<sup>1</sup>“Rep. Greene aggressively confronts Rep. Ocasio-Cortez, causing New York congresswoman to raise security concerns.” *Washington Post*. [https://www.washingtonpost.com/politics/greene-ocasio-cortez/2021/05/12/fd61d664-b37e-11eb-a3b5-f994536fe84a\\_story.html](https://www.washingtonpost.com/politics/greene-ocasio-cortez/2021/05/12/fd61d664-b37e-11eb-a3b5-f994536fe84a_story.html)

of collegiality discourages justices from interrupting each other, my analysis shows when the norm is more strongly enforced. In line with the previous chapters, I show that the internal norm of collegiality is enforced *externally*. To wit, greater external constraints on judicial legitimacy lead to fewer interruptions.

To test this claim, I use the audio-recognized transcripts of Supreme Court oral arguments between the 1957 term and 2012 term. Specifically, I run a computer script to identify instances where one justice interrupts another justice mid-sentence. With these data, my empirical analyses show that some important external constraints are indeed associated with greater reluctance to interrupt. This lends support to my central claim of external enforcement of internal norm of collegiality.

## **Oral Arguments and Supreme Court Decision Making**

Scholars of the Court no longer debate whether or not oral arguments affect the Court's decisions. A wealth of literature in the recent few decades shows that what transpires during these proceedings matters to how justices vote on the case merits. To the extent that justices are strategic seekers of their ideal policies, they need information about the case and about the positions of their colleagues (Epstein and Knight 1997). In his seminal work on oral arguments, Johnson (2004) makes the vital theoretical contribution that, despite voluminous written documents available to the justices (litigants' briefs and *amicus curiae* briefs for instance), justices still "need information about the policy options available to them, how their immediate colleagues want to decide a case, how other actors...may react to a decision, and whether institutional norms or rules might limit their ability to make a particular decision." Oral

arguments serve to fill this informational void. Johnson (2004) finds that justices ask questions to solicit information ranging from the policy implications, potential reactions from external actors, to institutional constraints. They might even raise new issues not previously addressed in the written briefs (28).

Apart from inquiring attorneys for needed information, justices also indirectly talk to each other during oral arguments to assess the positions of their colleagues. This is particularly true because modern Supreme Court justices hardly discuss the merits of a case when meeting to decide whether to hear a case (Frederick 2003; O'Brien 2020). Using the oral argument notes taken by Justices Blackmun and Powell, Black, Johnson and Wedeking (2012) find that both justices actively seek information from their colleagues with an eye toward increasing the likelihood of these colleagues joining their draft majority opinions. In other words, coalition formation and opinion writing start at oral arguments and prior to conferences where merits of a case are formally discussed.

In addition to information gathering for justices, oral arguments also matter to the case outcome because it provides an opportunity for attorneys to persuade the justices. While there is ample evidence to suggest that attorneys matter to the Court's decision-making process (e.g., McGuire 1995; Black, Hall, Owens and Ringsmuth 2016), Johnson, Wahlbeck and Spriggs (2006) specifically look at the role attorneys play during oral arguments. Using a novel data set of attorney oral argument quality based on Justice Blackmun's grading, these researchers find that presenting a higher quality legal argument is associated with greater litigation success. Comparing the positions taken by Justices Blackmun and Powell, Ringsmuth, Bryan and Johnson (2013) find that higher argument quality leads these justices to change their minds in a significant number of cases. More recently, Black and Owens (2020) suggest that

former law clerks are more capable of winning their former employers' votes compared to an otherwise identical lawyer, arguably due to their personalized knowledge of that justice. Aside from legal persuasion, attorneys can also "influence" justices via extraneous venues. For instance, Li and Pryor (2020) posit that justices might be subconsciously affected by positive stimuli similar to the mass public and find that greater instances of laughter produced by an attorney are associated with greater litigation success.

Finally, oral arguments matter to the decision merits because justices "give away" their true preferences through their behaviors during oral arguments. Recent research taking advantage of the oral argument transcripts and audio recordings find that justices are less likely to vote in favor of a party when they direct more questions toward that party (Johnson et al. 2009), use more negative language toward it (Black et al. 2011), or are more emotionally aroused (Dietrich, Enos and Sen 2019). These studies call for more attention to justices' behaviors during oral arguments, in addition to the role played by arguing attorneys.

## **Interruptions and Judicial Legitimacy**

A key part of justices' behavior during oral arguments is interruptions of each other. In an early study of interruptions, Black, Johnson and Wedeking (2012) theorize that a justice can affect the group decision-making by interrupting her colleagues. Specifically, these scholars contend that an interrupted justice is stopped from expressing her intentions and positions on the case. Instead of keeping the line of inquiry a justice prefers, the interruption forces the conversation between the Court and the attorney to a different angle. Given the unique information-seeking function of oral

arguments (Johnson 2004), the interruption also prevents the justice from gleaning the information she needs. Further, since justices use oral arguments to signal to their colleagues with the intention of forming coalitions, an interruption thwarts their attempts to coordinate with their colleagues to achieve optimal case outcomes. This theory of the nature of interruptions is supported by their empirical analysis. Primarily, Black, Johnson and Wedeking (2012) analyze the transcripts of oral arguments between the 1998 and 2007 terms and find that justices are more likely to interrupt their ideological foes on the Court. This is consistent with the notion that interruptions are motivated by justices' desire to move the conversation away from a direction they dislike. Further, the research suggests that a justice with more issue expertise in a case is more prone to interruptions and that justices are less interruptive when more amicus briefs are filed in a case.

An important finding of Black, Johnson and Wedeking (2012) applicable to my argument is that interruptions are a departure from the norm of collegiality. The researchers find that interruptions do not go unnoticed in that justices interrupt those who are more prone to interruptions earlier in the proceedings as a form of punishment. In other words, the norm of collegiality is enforced internally, not only by the individual justice interrupted earlier but also by the rest of the Court.

The finding that justices interrupt their ideological opponents is reinforced by later research. Jacobi and Schweers (2017) find that interruptions not only happen more frequently between justices with distinct ideological predispositions but justices of various positions on the ideological spectrum also exhibit different interruption behavior. Specifically, they find that conservatives are much more apt to interrupt their liberal colleagues than liberals are to interrupt conservatives. They also add a nuanced finding that ideologically moderate justices are rarely interrupted, suppos-

edly due to their importance in coalition building on the Court. This suggests that interruptions are not only ideologically driven – they are also affected by justices’ strategic calculation regarding how the case would ultimately be disposed.

Building on these earlier works, I argue that justices’ need for maintaining the institutional legitimacy of the Court encourages them to abide by the norm of collegiality and subsequently discourages them from interrupting their colleagues.

To be fair, this paper is not the first to suggest that justices maintain judicial legitimacy via oral arguments. Building on the thesis that oral arguments serve a vital informational role, Ringsmuth and Johnson (2013) posit that justices use oral arguments to glean information regarding the Court’s institutional standing in the separation-of-power system and in regards to the public opinion. Specifically, they build on the growing literature of institutional maintenance and find that justices are more likely to pose questions regarding congressional preferences when they find the Court ideological distant from Congress or when the Court lacks public support. This research is particularly important because it addresses a key assumption in the strategic model of judicial decision-making that justices have full and complete information (Epstein and Knight 1997). Such information is especially lacking when it comes to the Court’s interactions with outside actors. Oral arguments fill this void to a certain extent by allowing justices to ask attorneys (both those representing litigants and those representing amici) for the information needed.

Recently, scholars have argued that how justices behave matters to the public perception of the Court and consequently the Court’s institutional legitimacy. Jacobi et al. (2021) explicitly contend that whether or not the Court shows transparency and fairness is key to whether or not the public perceives the Court as a legitimate institution and argue further that this is particularly true for telephonic oral arguments

in the age of Covid-19 pandemic. These scholars strike an alarming tone as their empirical analysis of Chief Justice Roberts' role in the new oral argument format suggests that he favors his conservative allies on the Court and tends to interrupt female justices more often. Jacobi and colleagues conclude that the chief shows a clear conservative agenda despite his alleged pursuit of judicial legitimacy.

A more systematic study of the changing dynamic of oral arguments against the backdrop of rising political polarization in the United States is Jacobi and Sag (2018). This study suggests that justices have become more assertively in oral arguments since the 1960s as they have become more verbose, more apt to comment or repudiate their colleagues or counsel as opposed to ask real questions, and more prone to interruptions. The authors situate their findings in the broader context of ideological polarization on the Supreme Court (Devins and Baum 2017, 2019). Moreover, Jacobi and Sag (2018) argue that a structural change took place in the 1995 October Term on the Court, arguably in response to the new level of polarization in the elected branches following the Republicans' victory in the 1994 midterm election. Again, the authors suggest that it is detrimental to judicial legitimacy when justices act as advocates rather than impartial arbiters genuinely interested in finding the best legal answer:

*Beyond its informational role, oral argument also plays an important role in the legitimacy of the Supreme Court as an institution. In a narrow sense, the public spectacle of oral argument assures the parties in the case at hand that their arguments have been heard and considered. More broadly, oral argument allows the public to see the Court as an impartial tribunal exploring issues of national importance through a balanced adjudicative process (Jacobi and Sag 2018, 1168).*

I adopt this view. Further, despite the concerns over judicial legitimacy that

Jacobi and Sag (2018) express, I argue that the norm of collegiality remains powerful on the Court in constraining judicial behavior. The caveat is that the norm is not only internally enforced. What I posit is that the norm, however, might also be *externally* enforced. As indicated by Jacobi and Sag (2018), oral argument is not only a tool utilized by the justices for their ideological goals. It is also the most salient aspect of the Supreme Court decision-making process. To the extent that justices care about their image as impartial arbiters of the law and the Court's image as a legitimate institution, they should refrain from interrupting each other when they sense greater needs for institutional maintenance. Viewed in this way, oral argument also serves as an opportunity for justices to develop the Court's "public relations."

Recent scholarship suggests that justices consciously promote the Court's image as an impartial and legitimate institution when facing the public. Glennon and Strother (2019) analyze the justices' televised interviews on conventional TV outlets between 1998 and 2016 and find that a large proportion of justices' remarks are devoted to upholding the Court's institutional image and legitimacy. To be specific, they show that justices often stress their neutrality, reject claims that the Court is "political", and highlight how their decision-making is legalistic and is thus fundamentally different from partisan politics. Given the limited time when justices appear on TV, this finding is very informative. Furthermore, if justices are driven by their pursuit of judicial legitimacy when they are interviewed by news outlets, there is all the more reason to suspect that they are also attentive to judicial legitimacy during their regular public "appearances" at oral arguments.

One might reasonably argue that low public knowledge of and interest in the Supreme Court oral arguments might render it unnecessary for justices to promote "public relations" in these proceedings. Additionally, justices' consistent opposition

to allowing cameras in the Court room indicate that they may not be interested in engaging with the public. There are three reasons why we still could reasonably suspect that they do. First, while diffuse support for the Court remains steady (Gibson and Nelson 2014), a large number of studies find that justices are interested in bolstering judicial legitimacy (Clark 2009; Epstein, Knight and Martin 2001). This might stem from justices' training and socialization as law professionals who are fundamentally dedicated to the rule of law and the maintenance of the Supreme Court as the most authoritative arbiter of the law. Further, justices understand that the "reservoir of goodwill" cannot be taken for granted – consistently losing public support could erode the strong foundations of the Court's legitimacy, especially when the public begins to view the Court as another political institution (Gibson and Caldeira 2009).

Second, unlike the final votes, oral arguments are much less covered in the news. However, these proceedings are closely monitored by legal professionals and journalists, member of Congress, interest groups, and other elites. To the extent that justices care about their image amongst the legal and political elites (Baum 2009), they should be cognizant of the implications of how they conduct themselves during these proceedings.

Finally, while oral arguments are not covered by cameras, reporters are present in the Court room and report on what transpires. As a result of the Court's lack of visibility, media portrayal of the Court serves as a key bridge between the Court and the American public (Wrightsmann 2006). Scholars also find that how media accounts for judicial decision-making has a significant impact on public perception of the Court (Zilis 2015). More importantly, media tend to paint the Court in a light similar to Congress and the president. Indeed, Strother (2017) suggests that cases

with expected legal and political disagreements among the justices tend to receive greater attention. Solberg and Waltenburg (2014) also contend that media depiction of the Court is detrimental to the “myth of legality.” More directly, Hitt and Searles (2018) link the waning specific support for the Court to the media’s growing tendency to report its decisions in the game-theoretical framework. This framework stresses competition and conflict, exposes the political nature of Supreme Court cases, and ultimately politicizes the Court in the public’s eyes. Given these findings, justices might be incentivized to balance their ideological goals against their institutional goals by refraining from interrupting their colleagues.

## Hypotheses

While extant literature suggests that justices’ interruptions of each other might be driven by ideology (Black, Johnson and Wedeking 2012), seniority (Jacobi and Schweers 2017; Houston, Li and Johnson 2021), and gender norms (Feldman and Gill 2019), I argue that justices might also feel constrained when they sense waning judicial legitimacy. My argument is different from those of Jacobi and Sag (2018) and Jacobi et al. (2021) which contend that judicial legitimacy might be in jeopardy now that justices have fallen victims to the rising political and partisan polarization. Instead, I claim that the Supreme Court remains a collegial body because justices are well aware of the needs to uphold judicial legitimacy.

The most fundamental indicator of the Court’s institutional legitimacy is public support. Often compared to “reservoir of goodwill,” diffuse support lays the foundation for the Court’s position in American politics and its policy efficacy (Caldeira 1986; Caldeira and Gibson 1992). While such diffuse support is largely due to a per-

son's commitment to fundamental democratic values and is hence resilient to specific judicial decisions, scholars acknowledge that the greatest threat to public diffuse support stems from the perception that the Court is merely another political institution (Gibson and Nelson 2017; Gibson and Caldeira 2009). Interrupting colleagues at the expense of collegiality might make the Court appear political. As Jacobi and Sag (2018) point out, the Court is becoming increasingly political not only due to ideological polarization among the justices but also because the rise of partisan animosity outside of the Court is engulfing the Court as well, "moving justices further away from their idealized role of neutrality, inquiry, and disinterested distance" (1246). Therefore, I expect that increasing public opposition to the Court could discourage justices from assertive behavior during oral arguments. Even though the rising public opposition might be temporary or merely a change in specific support, legitimacy-minded justices should nevertheless be mindful as consistent rise in public opposition could lead to permanent erosion of diffuse support (Clark 2009). Therefore, I hypothesize:

**H1:** *As public opposition to the Supreme Court increases, justices are less likely to interrupt their colleagues.*

Further, while justices might have limited information about the Court's public standing, scholars have shown that justices closely monitor congressional behavior (Clark 2009; Mark and Zilis 2018). Court-curbing bills are initiated in Congress with the goal of undermining judicial power or politicizing the Court (Clark 2009; Rosenberg 1992). Empirical evidence suggests that these bills, albeit rarely passed, could serve as somewhat credible signals of waning judicial legitimacy to the Court and thus make justices unwilling to strike down federal statutes as unconstitutional (Clark 2009, 2011; Mark and Zilis 2018). A key insight from Clark (2011)'s theoretical framework regarding Court-Congress relationship is that Court-curbing might not be threats *per*

*se.* Rather, they are most potent when they reinforce justices' prior perception of the Court's public standing. Stated differently, when justices notice lowering public support and rising Court-curbing in Congress at the same time, then they would exercise great restraints to boost judicial legitimacy. As a result, I hypothesize:

**H2:** *As public opposition to the Supreme Court increases, justices are less likely to interrupt their colleagues, particularly when Court-curbing in Congress is increasing.*

Finally, apart from reflecting public opposition to the Court via Court-curbing, the ideological composition of Congress itself may constitute a check on judicial legitimacy and independence. Separation-of-powers (SOP) scholars find strong support for the "institutional maintenance" model whereby the general ideological compatibility, or lack thereof, is a strong predictor of judicial propensity to exercise constitutional invalidation (Segal, Westerland and Lindquist 2011; Hall and Ura 2015). The intuition behind the model is that the most effective SOP constraints on the Court come from the Court's perception that it faces an ideologically hostile Congress that is prone to institutional assaults and policy non-implementation. The costs the Court would incur are significant. In the words of Epstein, Knight and Martin (2001), "[I]f an attack succeeds (and the Court does not back down), it effectively removes the Court from the policy game and may seriously or, even irrevocably, harm its reputation, credibility, and legitimacy—thereby imposing a potentially infinite cost on the institution. But even if the attempted attack is unsuccessful, the integrity of the Court may be damaged, for the assault may compromise its ability to make future constitutional decisions and, thus, more long-lasting policy" (599-600). Hence, I expect the general ideological constraint imposed by Congress would also disincentivize justices from interrupting their colleagues.

**H3:** *As the ideological distance between Congress and the Court increases, justices are less likely to interrupt their colleagues.*

## Data and Methods

My primary source of data is the [Oyez.org](http://www.oyez.org)<sup>2</sup> which hosts the audio recordings as well as written transcripts of almost all oral argument sessions of the Supreme Court since the 1955 October Term when the Court initiated the recordings of these proceedings. The temporal scope of my data is from the 1955 term to 2012 term due to the availability of relevant control variables. The raw data contain rows representing each utterance by individual Supreme Court justices and attorneys. An utterance can be a question or a statement, or a combination of both (Black et al. 2011). Its length varies. An utterance stops when the next person identified by [Oyez.org](http://www.oyez.org) transcripts starts speaking.

For my dependent variable, *Interruptions*, I analyze the utterances a justice makes immediately following the utterance of another justice in each oral argument session. Specifically, the preceding justice utterance must end with two dashes, “--”, a rule which Court stenographers follow to indicate an unfinished sentence (Jacobi and Schweers 2017)<sup>3</sup>. As the norm of the oral argument dictates that an attorney always addresses a justice immediately after the justice has spoken, one justice speaking right after another justice stops the previous justice mid-sentence and thus denies the said justice the opportunity to be addressed by the attorney.

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<sup>2</sup><http://www.oyez.org>

<sup>3</sup>An alternative operationalization of an *interruption* is counting any justice utterance that immediately follows another justice’s utterance (Black, Johnson and Wedeking 2012; Houston, Li and Johnson 2021). While I contend that such an operationalization is overinclusive, the results of analysis are robust to this alternative.

As an illustration, Justice Sonia Sotomayor was having an exchange with Scott Keller, the Solicitor General of Texas, over the similarity between the plan in *Texas Department of Housing* and a promotion plan declared unconstitutional in *Ricci v. DeStefano* (557 U.S. 557 2009). In the middle of this exchange, Justice Antonin Scalia interrupted Justice Sotomayor's line of questioning.

**Sonia Sotomayor:** So why is it wrong to have a neutral policy? Because none of the policies that were imposed here and in most -- in all other cases are race-based. They're policies that are race neutral, but happen to have a better impact in terms of integration.

**Scott A. Keller:** Justice Sotomayor, I would disagree that it's completely race-neutral, because at the outset, statistical disparities based on race, racial classifications, are used and this has the potential to subordinate traditional --

**Sonia Sotomayor:** Well, that --

**Antonin Scalia:** Which is not the case for the 10 percent plan that Texas uses.

**Scott A. Keller:** --Absolutely, Justice Scalia.

**Antonin Scalia:** There's no racial thing in that.

If you're in the top 10 percent of your high school class, you go to the State university.

In this excerpt, the attorney was responding to a question posed by Justice Sotomayor. When Sotomayor attempted to raise a follow-up question, Scalia interrupted by posing his own follow-up question, essentially ending the back-and-forth between Scott Keller and Justice Sotomayor and starting his own exchange with Keller<sup>4</sup>.

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<sup>4</sup>Note that Scott Keller was interrupted by Justice Sotomayor as well. But justices often interrupt

Figure 4.1 shows the average number of justice interruptions of fellow justices in each oral argument session from the 1955 Term to the 2016 Term. This figure is illuminating in several ways. First, despite visible variance, justices rarely interrupt their colleagues as it happens less than 1 time per session, on average, in all terms under investigation. This is indicative of the potential effect of the norm of collegiality. Second, justices interrupt each other significantly more in each session than they did in the 1950s through 1970s, which was followed by a 20 years or so of civility between the 1980s and the late 1990s. Starting from the late 1990s and early 2000s, interruptions occur much more often and seem to persist across terms, suggesting that the norm of collegiality might be losing its force.

Figure 4.2 demonstrates individual justices' propensity to interrupt their colleagues. Specifically, it calculates and shows the average number of interruptions per oral argument session during a justice' entire tenure in the sample. Again, most justices hardly ever interrupt their colleagues during oral argument. Even the most "disruptive" justice, Justice Felix Frankfurter, interrupted less than 1 time per oral argument session in the sample. Also at the top of the list are, Chief Justice John Roberts, Justices Elena Kagan and Antonin Scalia. With the exceptions of Frankfurter and Warren, most of the justices on the top of the list are more recent members of the Court, consistent with the temporal trend revealed by 4.1.

Which justices are more likely to be interrupted? Figure 4.3 illustrates the answer. The most striking feature is that among the Top 5 most interrupted justices, three are female. Felix Frankfurter ranks third, probably because justices tend to punish more interruptive colleagues (Black, Johnson and Wedeking 2012). Still, overall, modern justices tend to rank higher, suggesting a more combative atmosphere in the Court's attorneys and such behavior is not considered outside of the norm (Jacobi and Schweers 2017).

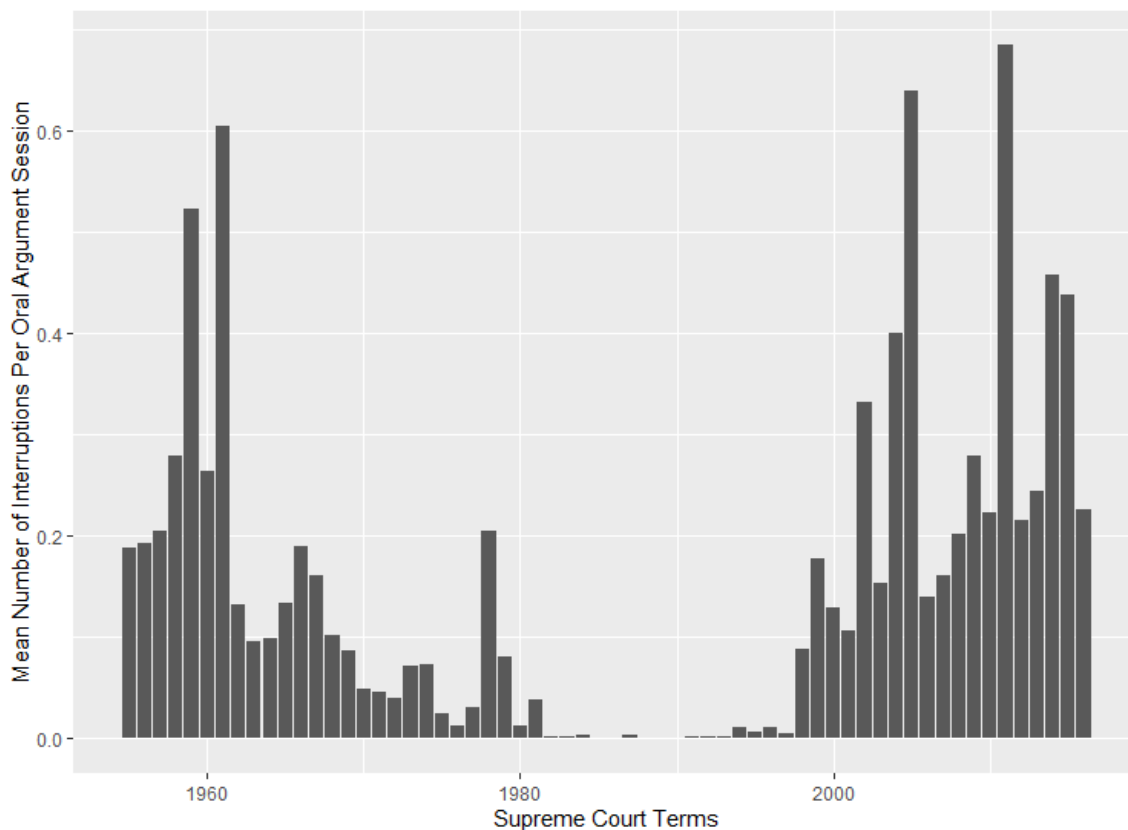


Figure 4.1: Average number of interruptions in each session by Court term (1955-2016).

oral arguments in recent decades.

For my multivariate analysis, the unit of analysis is each speaking justice per oral argument session. As the variable is highly skewed toward 0, I estimate a negative binomial regression model.<sup>5</sup>

My main independent variables tap into the various external constraints on judicial legitimacy. First and foremost, for *Public Opposition* to the Court, I use the public support measure of Durr, Martin and Wolbrecht (2000) as updated by Bryan and Kromphardt (2016). Given the lack of a regularly administered public opinion poll

<sup>5</sup>A likelihood-ratio test rejects the null hypothesis that the dispersion parameter is zero, supporting the use of a negative binomial model

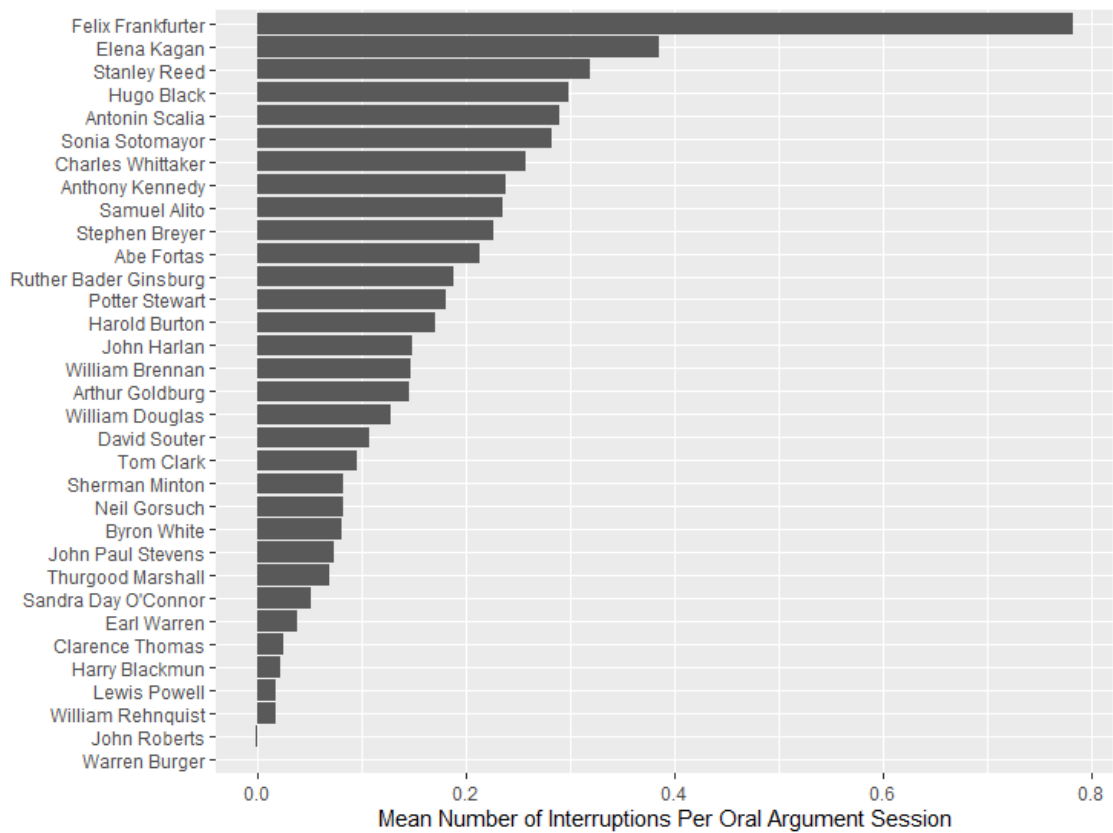


Figure 4.2: Average number of interruptions in each session by justice in descending order (1955-2016).

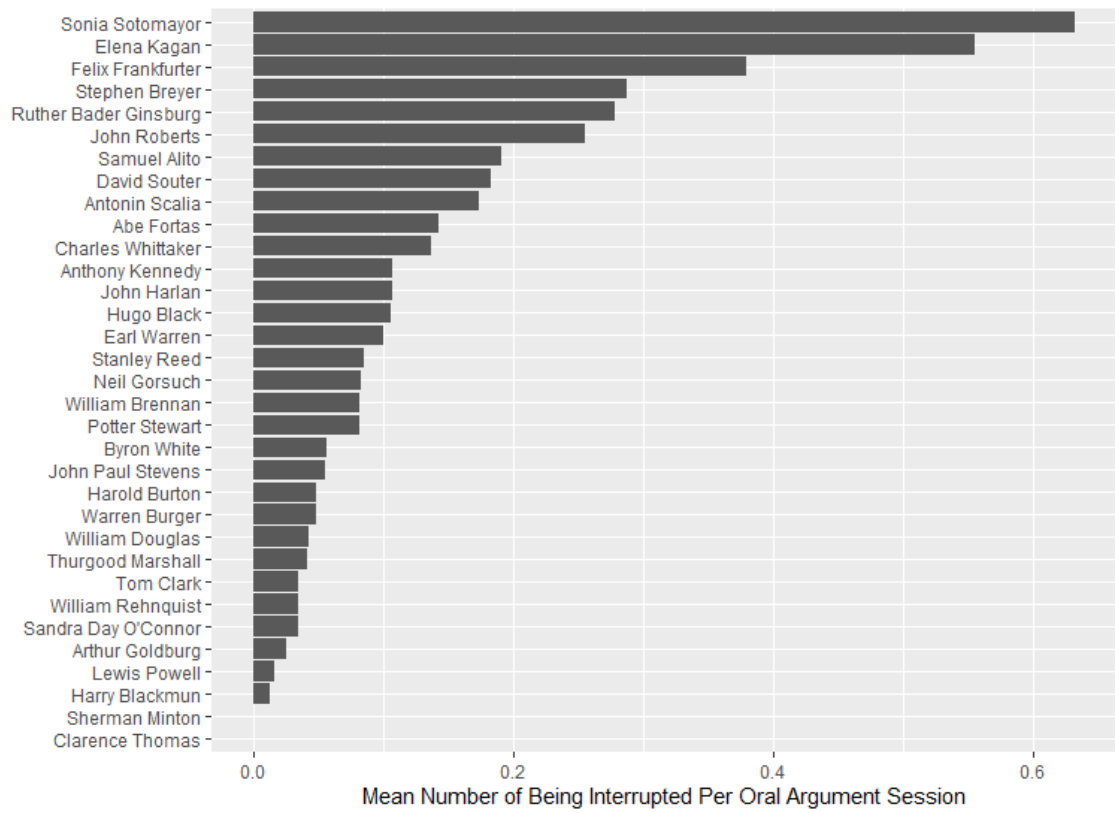


Figure 4.3: Average Number of Times Being Interrupted in Each Session by Court Term (1955-2016).

regarding public attitudes toward the Court over an extended period of time, Durr, Martin and Wolbrecht (2000) utilize the Dyad Ratios Algorithm (Stimson 1991) that extracts the latent shared movement of various survey marginals based on as many applicable public opinion surveys as available at the Roper Center for Public Opinion Research. This measure ranges from 0 to 200 with greater value indicating greater public support. To facilitate interpretation of the model estimates, I reverse the sign of the measure, calling it *Public Opposition*. To allow for justices time to “process” the information and ensure the exogeneity of the measure, I follow Clark (2009) by adopting a two-year prior moving average.

Next, for *Court-curbing*, I use the data of Clark (2011) extended by Mark and Zilis (2018). The data contain the logarithm transformation of yearly counts of bills proposed by members of Congress aimed at undermining or limiting the power and prestige of the U.S. Supreme Court. As discussed earlier, I do not expect *Court-curbing* to independently constrain judicial behavior. Rather, it should serve to reinforce justices’ preexisting belief about judicial legitimacy. In other words, stronger public opposition to the Court as perceived by the justices, will exert a pronounced effect in constraining the justices when Court-curbing in Congress is also more active simultaneously. In light of this, I estimate a multiplicative interaction term between *Public Opposition* and *Court-curbing*.

Finally, I measure *Congressional Constraint* by calculating the ideological distance between the Court and Congress. Specifically, I place the ideal points of Court median, Senate median, and House median on a common spectrum. If the Court median falls in between the Senate and House medians, I code *Congressional Constraint* as 0. Otherwise, I measure *Congressional Constraint* as the distance between the Court median and the closest congressional chamber median. For ideal points estimates, I

use the updated measure from Bailey (2013).<sup>6</sup>

I also include a series of control variables at the level of individual justices. First, I control for justices' *Ideology* using the latest measure of the Martin-Quinn scores (Martin and Quinn 2002).<sup>7</sup> Second, I measure a justice's *Ideological Extremity* by calculating the distance between a justice's ideology and that of the median justice as the literature suggests ideological extremity might affect justices' behavior during oral arguments (Houston, Li and Johnson 2021).

Third, I include a multiplicative term between justices' Martin-Quinn scores and public policy mood. Judicial scholarship suggests that the Court attempts to garner public support and broader institutional legitimacy by responding to the public's policy aspirations (e.g., Casillas, Enns and Wohlfarth 2011; Giles, Blackstone and Vining 2008; Bryan and Kromphardt 2016). Here, I take an individual justice perspective. To the extent that I hypothesize justices refrain from interrupting their colleagues as judicial legitimacy is in jeopardy, individual justices might behave differently as the public policy mood changes. It is possible that as the public becomes more liberal, conservative justices might feel more constrained and subsequently more strongly abide by the norm of collegiality during oral arguments. This interaction term could detect if such heterogeneity among the justices exists. The public policy mood measure I use is the latest measure of public liberalism, initially constructed by Stimson (1991).

Fourth, I follow Zilis and Wedeking (2020) by controlling for an issue area's *Personal Importance* to a justice. To measure that, I calculate the percentage of separate (dissenting or concurring) opinions a justices wrote during her entire time on the Court

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<sup>6</sup>I thank Michael A. Bailey for generously sharing his updated data used in his working paper.

<sup>7</sup>I obtained the measure from <https://mqscores.lsa.umich.edu/measures.php> that includes justices' ideological scores from the 1937 through 2019 October terms.

in each issue area as identified by the Supreme Court Database (Spaeth, Epstein et al. 2018). In light of Zilis and Wedeking (2020), I expect a justice to be more prone to interruptions when the issue contained in the case is of greater personal importance to herself. Finally, I control for *Freshman Justice*, *Female Justice*, and *Chief Justice* with a dummy variable for each.

I introduce a series of controls that tap into the interpersonal dynamic of the sitting justices. First, I control for the overall *Ideological Heterogeneity* among the sitting justices by measuring the standard deviation of justices' Martin-Quinn scores. I suspect that when justices are more ideologically polarized, they are more combative in oral arguments and are less constrained by collegiality. In a similar vein, I control for the number of days the sitting justices have served together. This measure, *Length of Joint Service*, is the number of days elapsed between the starting point of the natural Court and the date of oral argument. This may capture different dynamic of different Court compositions as well as account for erosion or consolidation of the norm of collegiality as a small group of people have served together over a long period of time.

Next, I control for case attributes in the legal and political dimensions. Legally, I control for *Case Complexity* using the novel measure of Goelzhauser, Kassow and Rice (2021) that draws information exogenous to the Court opinion from the legal briefs of parties. Given the important information-gathering role of oral arguments (Johnson 2004; Black, Johnson and Wedeking 2012), I expect that justices are more likely to be interrupt in more legally complex cases. I control for the *Political Salience* of a case using the term-specific z-scores of the total amicus curiae brief filed in a case. I expect that justices are more prone to interruptions when the policy stake in a case is higher.

Finally, I control for heterogeneity across issue areas and justices by estimating a fixed effect for issue areas and robust standard errors clustered around individual justices.

## Results

The model estimates are reported in Table 4.1. The model estimates suggest little support for the *Public Opposition Hypothesis*. The average marginal effect of *Public Opposition* is -0.0004 and is not statistically significant. However, the interaction term between *Public Opposition* and *Court-Curbing* is statistically significant. To illustrate the substantive meaning of this term, I plot the predicted number of interruptions as public opposition changes, conditional on the level of Court-curbing in Figure 4.4. As the figure demonstrates, when Court-curbing activity in Congress is low (10th percentile in the sample), the predicted number of interruptions actually increases as public opposition grows. In contrast, when Court-curbing is high (90th percentile in the sample), the predicted number of interruptions decreases dramatically as public opposition increases. In fact, as public opposition grows from the sample minimum to sample maximum, a justice is, on average, likely to interrupt 73% less (from 0.23 times to 0.07 times).

This finding supports Clark (2009)'s theory that Court-curbing updates the justices' priors about judicial legitimacy. When justices perceive greater public opposition to the Court, higher Court-curbing is a credible signal to the Court of its waning legitimacy and justices should feel compelled to exercise self-restraint. While Clark (2009) focuses on the reluctance to strike down federal statutes as a form of judicial restraint, my finding suggests abiding by the norm of collegiality in oral arguments

Table 4.1: Negative Binomial Regression Model of Number of Justice Interruptions

		<b>Number of Interruptions</b>
Public Opposition		0.063*** (0.010)
Court-curbing		-2.652*** (0.500)
Public Opposition $\times$ Court-curbing		-0.026*** (0.005)
Congressional Constraint		-1.430*** (0.120)
Public Liberalism		0.090*** (0.006)
Martin-Quinn Score		-0.456*** (0.170)
Public Liberalism $\times$ Martin-Quinn Score		0.008*** (0.003)
Legal Complexity		0.638** (0.274)
Amicus Briefs		0.027 (0.025)
Personal Importance		0.425 (0.572)
Chief Justice		-2.865*** (0.212)
Female Justice		-0.362*** (0.079)
Freshman Justice		-0.388*** (0.108)
Ideological Distance from Median		-0.007 (0.019)
Ideological Variance		-0.050 (0.096)
Joint Service		0.0001*** (0.00003)
Post-1995 Term		1.161*** (0.065)
Constant		-1.240 (1.319)
N		32174
Log Likelihood	110	-7381.726
$\theta$		0.449*** (0.036)
AIC		14825.450

\*\*\*p &lt; .01; \*\*p &lt; .05; \*p &lt; .1

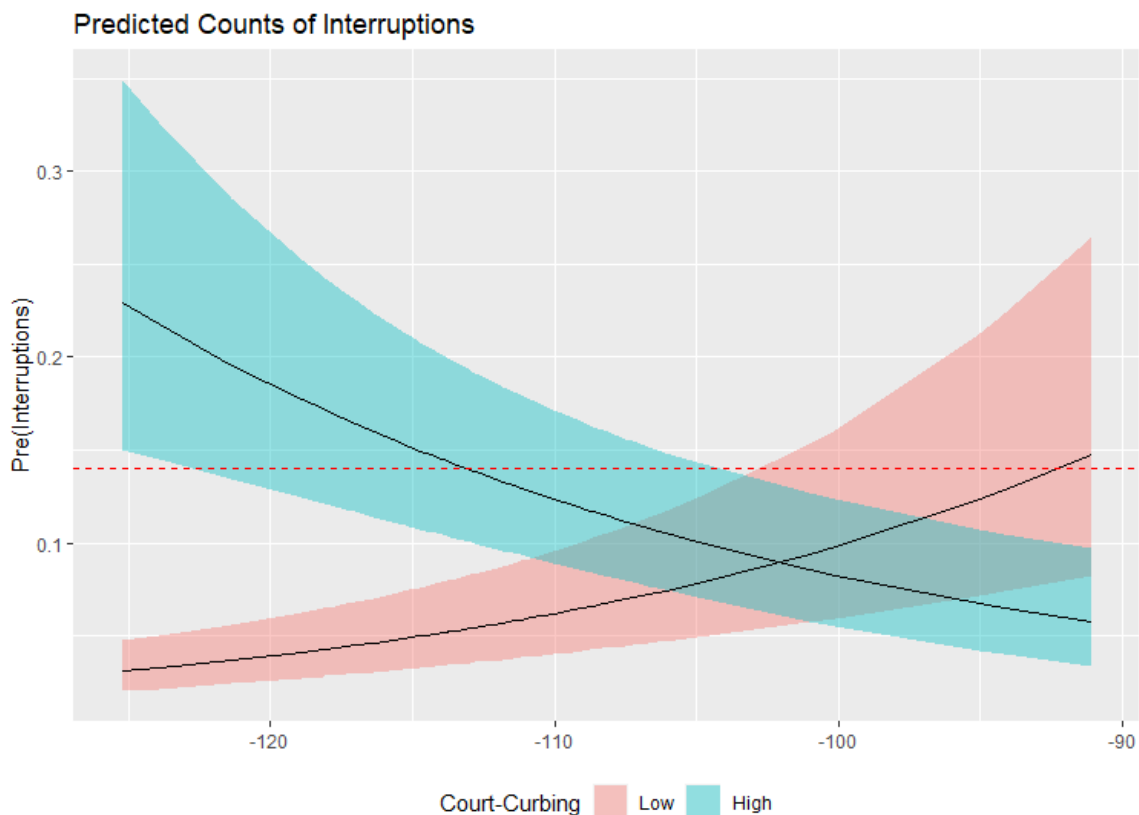


Figure 4.4: Predicted counts of interruptions per oral argument session conditional on public opposition and different levels of Court-curbing.

Note: Low and high levels of Court-curbing refer to 90th and 10th percentiles in the sample respectively. All other covariates are held constant at their means or modes. The dashed horizontal line indicates the sample mean of interruption numbers, which is 0.14.

is also a behavioral implication of judicial restraint.

Further, my third hypothesis regarding ideological constraint imposed by Congress is supported in the model estimates. I plot the predicted number of interruptions a justice engages in during one oral argument session conditional on the ideological distance between the Court and Congress. When the Court is unconstrained, which is the scenario where the Court median falls in between the Senate and House medians, a justice is predicted to interrupt her colleagues 0.14 times. In contrast, when the

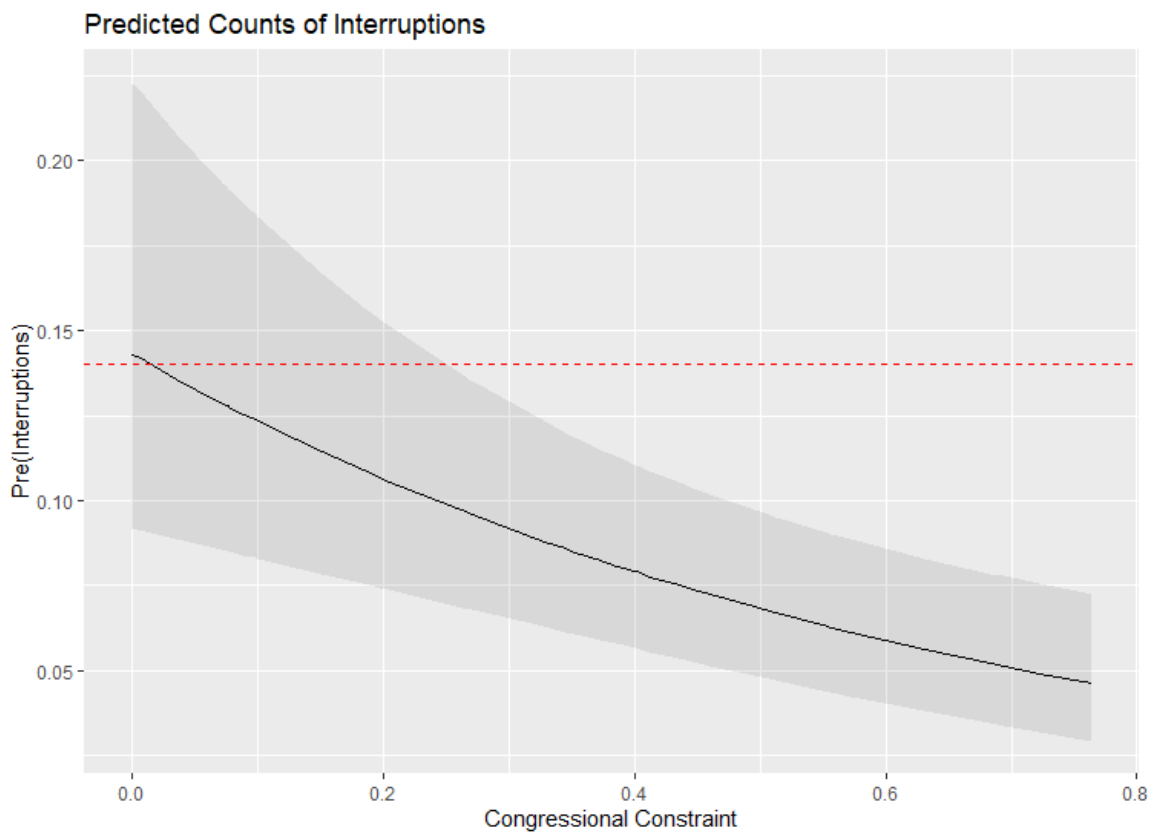


Figure 4.5: Predicted counts of interruptions per oral argument session conditional on congressional constraints.

Note: All other covariates are held constant at their means or modes. The red 0.14.

Court is the farthest from the closest congressional chamber median in the sample (0.72), the predicted number of interruptions falls to 0.05 times, a decrease of 64%.

In addition, the model estimates also yield a number of informative findings. First, institutional role, gender, and seniority of justices play a role, as chief justices, female justices, and freshman justices are less prone to interruptions. These findings suggest the norm of collegiality as far as interruptions are concerned is closely related to other norms on the Court, such as the leadership of the chief (Danelski and Ward 2016), seniority (Houston, Li and Johnson 2021), and gender (Gleason 2020).

Second, the interaction term between *Justice Ideology* and *Public Mood* is interesting. It suggests, as public policy mood becomes more liberal, all justices, regardless of their ideological predispositions, tend to be more interruptive, yet the increase is more pronounced on the part of conservative justices than liberal justices. However, whether a justice is closer or farther away from the median justice ideologically has no bearing on interruptions.

Beyond individual justice attributes, the model shows that justices are more interruptive when they have served together longer. This might stem from the “honeymoon effect” of collegiality that dissipates as justices have served longer together.

Further, case attributes seem to matter as well. Justices are significantly more apt to interrupt each other when cases are more legally complex. This is probably due to the greater needs for justices to engage closely with the oral arguments to elicit information. However, my model estimates do not report a statistically significant association between a case’s political salience and justices’ interruption behaviors.

Finally, consistent with the finding of Jacobi and Sag (2018), justices overall become much more aggressive in oral arguments after the 1995 term, supposedly because the greater level of political polarization in Congress had infiltrated the Court by this point.

## **Discussion**

On February 7th, 2017, Senator Elizabeth Warren (D-MA) was on the Senate floor reading a letter written by Coretta Scott King, widow of Dr. Martin Luther King Jr. that sharply criticized the civil rights record of then-Senator Jeff Sessions (R-AL). Senator Warren’s intention was to shed doubt on the qualification of Sessions

as he was being considered by the Senate to be confirmed Attorney General of the United States. However, in a dramatic move, Senate Republicans led by Majority Leader Mitch McConnell voted to “silence” Warren, invoking Senate Rule XIX that prohibits “imput[ing] to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator” (Flegenheimer 2017). The rule, arguably set in place to promote the collegiality of the Senate as a deliberative body, was invoked in a conspicuously partisan manner to “silence” a female senator of the opposing party that did nothing more than showing the lack of collegiality in the U.S. Senate.

In contrast to Congress, the Supreme Court is supposed to be a truly collegial body where justices respect each other despite jurisprudential disagreements. Justices shake each other’s hands before going to the oral argument as well as at the beginning of each conference (O’Brien 2020). Justices Ruth Bader Ginsburg and Scalia maintained a strong friendship during their joint service on the Court despite the opposing views (Wolf 2010). Recently, in his tribute to late Justice Ginsburg, Justice Thomas wrote: “Justice Ginsburg and I often disagreed, but at no time during our long tenure together were we disagreeable with each other” (Thomas 2021, 9). Such collegiality is key to the Court’s institutional legitimacy because it stands to show that justices are fundamentally different from elected politicians, especially members of Congress. As Hibbing and Theiss-Morse (2002) masterfully put it, in Congress, “[d]isagreements are often public and vocal” whereas those among the justices are “not exposed to the public” (99).

Interruptions among the justices are especially harmful to the Court also because they tend to be driven by ideological animosity and gender bias. Research into the interruption dyads provides strong evidence that justices tend to interrupt their ideological foes and that male justices are more prone to interrupt female justices

(Black, Johnson and Wedeking 2012; Johnson, Black and Wedeking 2009; Jacobi and Schweers 2017; Jacobi et al. 2021). My analysis suggests also that female justices are less likely to interrupt their colleagues. Such public exhibitions of disagreements and traditional gender norm tend to remind people of the behaviors of members of Congress.

Moreover, interruptions among the justices during their most open proceedings might threaten the low-profile the Court attempts to keep. While justices remain opposed to cameras in the Courtroom, more confrontational behavior among themselves might draw more written media reports and social media discussion nevertheless. In the context of ideological polarization inside the Court and beyond (Hasen 2019) as well as the politicization of judicial confirmations (Armaly 2018), news media and the mass public are more likely than before to view the Court and the justices in political lens.

My findings in this chapter suggest justices are nevertheless cognizant of the myriad of harms interruptions during oral arguments might pose to the Court's institutional legitimacy. Public opposition to the Court, coupled with legislative attempts to curtail judicial independence, constitutes a powerful message to the justices. Another powerful constraining factor is whether or not Congress is ideologically aligned with the Court. When these signals are present, justices modify their behaviors in the final decisions they make (Clark 2009; Bryan and Kromphardt 2016), and also in the processes leading up to the final decision, including oral arguments.

Of course, my analyses are limited in several ways that point to directions of future inquiry. First, I do not distinguish between different interruptions. It is possible that external constraints on legitimacy more effectively prevent ideological interruptions and gender-based interruptions. Second, and relatedly, my model does not specify all

possible dyads of interruptions and therefore cannot speak to how justice-to-justice relationships could affect interruptions. For example, do justices serving together longer tend to interrupt each other less? Do justices engage in tit-for-tat more or less if interruptions are generally held back by legitimacy considerations? These questions can only be answered in a dyad-based analysis, which is then much more computationally demanding for a large number of oral arguments. Finally, future research should delve deeper into the consequences of interruptions. Jacobi and Rozema (2018)'s largely descriptive study shows that justices who have interrupted each other are less likely to vote together. Future research could utilize causal inference methods to parse out the impacts of ideology, seniority, and gender which we already know are associated with interruptions.

# Bibliography

- Armaly, Miles T. 2018. "Politicized Nominations and Public Attitudes Toward the Supreme Court in the Polarization Era." *Justice System Journal* 39(3):193–209.
- Badas, Alex. 2016. "The Public's Motivated Response to Supreme Court Decision-Making." *Justice System Journal* 37(4):318–330.
- Bailey, Michael A. 2013. "Is Today's Court the Most Conservative in Sixty Years? Challenges and Opportunities in Measuring Judicial Preferences." *The Journal of Politics* 75(3):821–834.
- Bailey, Michael A., Brian Kamoie and Forrest Maltzman. 2005. "Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making." *American Journal of Political Science* 49(1):72–85.
- Bailey, Michael A and Forrest Maltzman. 2008. "Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court." *American Political Science Review* 102(3):369–384.
- Bailey, Michael A and Forrest Maltzman. 2011. *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton, NJ: Princeton University Press.
- Baird, Vanessa A and Amy Gangl. 2006. "Shattering the myth of legality: The impact

- of the media's framing of Supreme Court procedures on perceptions of fairness." *Political Psychology* 27(4):597–614.
- Barrett, Amy Coney. 2003. "Stare Decisis and Due Process." *University of Colorado Law Review* 74:1011.
- Barrett, Amy Coney. 2017. "Countering the Majoritarian Difficulty."
- Bartels, Brandon L. 2009. "The Constraining Capacity of Legal Doctrine on the U.S. Supreme Court." *American Political Science Review* 103(3):474–495.
- Bartels, Brandon L. 2011. "Choices in Context: How Case-Level Factors Influence the Magnitude of Ideological Voting on the US Supreme Court." *American Politics Research* 39(1):142–175.
- Bartels, Brandon L. 2015. The Sources and Consequences of Polarization in the U.S. Supreme Court. In *American Gridlock*, ed. James Thurber and Antoine Yoshinaka. New York: Cambridge University Press. pp. 171–200.
- Bartels, Brandon L and Christopher D Johnston. 2013. "On the Ideological Foundations of Supreme Court Legitimacy in the American Public." *American Journal of Political Science* 57(1):184–199.
- Bartels, Brandon L and Christopher D Johnston. 2020. *Curbing the Court: Why the Public Constrains Judicial Independence*. Cambridge University Press.
- Baum, Lawrence. 2009. *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton University Press.

- Berry, William D, Jacqueline HR DeMeritt and Justin Esarey. 2010. "Testing for Interaction in Binary Logit and Probit Models: Is A Product Term Essential?" *American Journal of Political Science* 54(1):248–266.
- Bickel, Alexander M. 1962. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. New Haven: Yale University Press.
- Black, Ryan C. and James F. Spriggs. 2013. "The Citation and Depreciation of U.S. Supreme Court Precedent." *Journal of Empirical Legal Studies* 10(2):325–358.
- Black, Ryan C, Matthew EK Hall, Ryan J Owens and Eve M Ringsmuth. 2016. "The Role of Emotional Language in Briefs Before the U.S. Supreme Court." *Journal of Law and Courts* 4(2):377–407.
- Black, Ryan C and Ryan J Owens. 2009. "Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence." *The Journal of Politics* 71(3):1062–1075.
- Black, Ryan C and Ryan J Owens. 2012. *The Solicitor General and the United States Supreme Court: Executive Branch Influence and Judicial Decisions*. New York: Cambridge University Press.
- Black, Ryan C and Ryan J Owens. 2020. "The Influence of Personalized Knowledge at the Supreme Court: How (Some) Former Law Clerks Have the Inside Track." *Political Research Quarterly* p. 1065912920948138.
- Black, Ryan C, Ryan J Owens, Justin Wedeking and Patrick C Wohlfarth. 2016a. "The Influence of Public Sentiment on Supreme Court Opinion Clarity." *Law & Society Review* 50(3):703–732.

- Black, Ryan C, Ryan J Owens, Justin Wedeking and Patrick C Wohlfarth. 2016b. *US Supreme Court Opinions and Their Audiences*. Cambridge University Press.
- Black, Ryan C, Ryan J Owens, Justin Wedeking and Patrick C Wohlfarth. 2019. *The Conscientious Justice: How Supreme Court Justices' Personalities Influence the Law, the High Court, and the Constitution*. New York: Cambridge University Press.
- Black, Ryan C, Sarah A Treul, Timothy R Johnson and Jerry Goldman. 2011. "Emotions, Oral Arguments, and Supreme Court Decision Making." *The Journal of Politics* 73(2):572–581.
- Black, Ryan C, Timothy R Johnson and Justin Wedeking. 2012. *Oral Arguments and Coalition Formation on the US Supreme Court: A Deliberate Dialogue*. Ann Arbor, MI: University of Michigan Press.
- Bonneau, Chris W, Thomas H Hammond, Forrest Maltzman and Paul J Wahlbeck. 2007. "Agenda control, the Median justice, and the Majority Opinion on the U.S. Supreme Court." *American Journal of Political Science* 51(4):890–905.
- Box-Steffensmeier, Janet and Dino P. Christenson. 2012. "Database on Supreme Court Amicus Curiae Briefs." <http://amicinetworks.com>. Accessed: 2020-08-01.
- Bryan, Amanda C. 2014. *Vox Populi, Vox Curiae: Public Opinion and the U.S. Supreme Court* PhD thesis University of Minnesota.
- Bryan, Amanda C. 2020. "Public Opinion and Setting the Agenda on the US Supreme Court." *American Politics Research* 48(3):377–390.

- Bryan, Amanda C and Christopher D Kromphardt. 2016. "Public Opinion, Public Support, and Counter-Attitudinal Voting on the US Supreme Court." *Justice System Journal* 37(4):298–317.
- Bryan, Amanda C and Eve M Ringsmuth. 2016. "Jeremiad or Weapon of Words?: The Power of Emotive Language in Supreme Court Dissents." *Journal of Law and Courts* 4(1):159–185.
- Caldeira, Gregory A. 1986. "Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court." *American Political Science Review* pp. 1209–1226.
- Caldeira, Gregory A and Christopher JW Zorn. 1998. "Of time and consensual norms in the Supreme Court." *American Journal of Political Science* 42(3):874.
- Caldeira, Gregory A. and James L. Gibson. 1992. "The Etiology of Public Support for the Supreme Court." *American Journal of Political Science* 36:635–664.
- Caldeira, Gregory A and John R Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *The American Political Science Review* 82(4):1109–1127.
- Casillas, Christopher J., Peter K. Enns and Patrick C. Wohlfarth. 2011. "How Public Opinion Constrains the U.S. Supreme Court." *American Journal of Political Science* 55(1):74–88.
- Clark, Tom S. 2009. "The Separation of Powers, Court-Curbing and Judicial Legitimacy." *American Journal of Political Science* 53(4):971–989.

- Clark, Tom S. 2011. *The Limits of Judicial Independence*. New York, NY: Cambridge University Press.
- Clark, Tom S, Jeffrey R Lax and Douglas Rice. 2015. "Measuring the Political Salience of Supreme Court Cases." *Journal of Law and Courts* 3(1):37–65.
- Collins Jr, Paul M. 2004. "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation." *Law & Society Review* 38(4):807–832.
- Collins Jr, Paul M. 2008. "Amici curiae and dissensus on the US Supreme Court." *Journal of Empirical Legal Studies* 5(1):143–170.
- Collins Jr, Paul M, Pamela C Corley and Jesse Hamner. 2015. "The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content." *Law & Society Review* 49(4):917–944.
- Collins, Todd A and Christopher A Cooper. 2016. "The Case Salience Index, Public Opinion, and Decision Making on the US Supreme Court." *Justice System Journal* 37(3):232–245.
- Corley, Pamela C. 2008. "The Supreme Court and Opinion Content: The Influence of Parties' Briefs." *Political Research Quarterly* 61(3):468–478.
- Corley, Pamela C, Amy Steigerwalt and Artemus Ward. 2013. *The Puzzle of Unanimity: Consensus on the United States Supreme Court*. Stanford University Press.
- Corley, Pamela C, Paul M Collins Jr and Bryan Calvin. 2011. "Lower Court Influence on U.S. Supreme Court Opinion Content." *The Journal of Politics* 73(1):31–44.

- Corley, Pamela C., Robert M. Howard and David C. Nixon. 2005. "The Supreme Court and Opinion Content: The Use of the Federalist Papers." *Political Research Quarterly* 58(2):329–340.
- Cross, Frank B. 2007. "Chief Justice Roberts and Precedent: A Preliminary Study." *North Carolina Law Review* 86:1251.
- Cross, Frank B., James F Spriggs II, Timothy R. Johnson and Paul J. Wahlbeck. 2010. "Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance." *University of Illinois Law Review* p. 489.
- Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6:279–295.
- Danelski, David J and Artemus Ward. 2016. *The Chief Justice: Appointment and Influence*. University of Michigan Press.
- Denison, Alexander, Justin Wedeking and Michael A Zilis. 2020. "Negative Media Coverage of the Supreme Court: The Interactive Role of Opinion Language, Coalition size, and Ideological Signals." *Social Science Quarterly* 101(1):121–143.
- Devins, Neal and Lawrence Baum. 2017. "Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court." *The Supreme Court Review* 2016(1):301–365.
- Devins, Neal and Lawrence Baum. 2019. *The Company they Keep: How Partisan Divisions Came to the Supreme Court*. Oxford University Press.
- Dietrich, Bryce J, Ryan D Enos and Maya Sen. 2019. "Emotional Arousal Predicts Voting on the U.S. Supreme Court." *Political Analysis* 27(2):237–243.

- Durr, Robert H, D. Andrew Martin and Christina Wolbrecht. 2000. "Ideological Divergence and Public Support for the Supreme Court." *American Journal of Political Science* 44(4):768–776.
- Enns, Peter K and Patrick C Wohlfarth. 2013. "The Swing Justice." *The Journal of Politics* 75(4):1089–1107.
- Epstein, Lee, Andrew D Martin, Jeffrey A Segal and Chad Westerland. 2007. "The Judicial Common Space." *The Journal of Law, Economics, and Organization* 23(2):303–325.
- Epstein, Lee and Jack Knight. 1997. *The Choices Justices Make*. Washington D.C.: CQ Press.
- Epstein, Lee, Jack Knight and Andrew D Martin. 2001. "The Supreme Court as a Strategic National Policymaker." *Emory Law Journal* 50:583.
- Epstein, Lee, Jeffrey A Segal and Harold J Spaeth. 2001. "The Norm of Consensus on the US Supreme Court." *American Journal of Political Science* pp. 362–377.
- Epstein, Lee, William M Landes and Richard A Posner. 2014. "The Best for Last: The Timing of US Supreme Court Decisions." *Duke Law Journal* 64:991.
- Farganis, Dion. 2012. "Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy." *Political Research Quarterly* 65(1):206–216.
- Feldman, Adam and Rebecca D Gill. 2019. "Power Dynamics in Supreme Court Oral arguments: The Relationship between Gender and Justice-to-Justice Interruptions." *Justice System Journal* 40(3):173–195.

- Flegenheimer, Matt. 2017. "Republican Senators Vote to Formally Silence Elizabeth Warren." *New York Times*, 7 Feb 2017 nytimes.com.
- Fowler, Floyd J. Jr. 2002. *Survey Research Methods*. 3rd ed. Thousand Oaks, CA: Sage.
- Fowler, James H., Timothy R. Johnson, James F. Spriggs, Sangick Jeon and Paul J. Wahlbeck. 2007. "Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court." *Political Analysis* 15(3):324–346.
- Frederick, David C. 2003. *Supreme Court and Appellate Advocacy: Mastering Oral Argument*. West Group.
- Gibson, James L. and Gregory A. Caldeira. 2009. *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People*. Princeton, NJ: Princeton University Press.
- Gibson, James L and Michael J Nelson. 2014. "The Legitimacy of the US Supreme Court: Conventional Wisdoms and rRecent Challenges Thereto." *Annual Review of Law and Social Science* 10:201–219.
- Gibson, James L and Michael J Nelson. 2017. "Reconsidering Positivity Theory: What Roles Do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?" *Journal of Empirical Legal Studies* 14(3):592–617.
- Giles, Michael W., Bethany Blackstone and Richard L. Vining. 2008. "The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making." *Journal of Politics* 70(2):293–306.

- Gleason, Shane A. 2020. "Beyond Mere Presence: Gender Norms in Oral Arguments at the U.S. Supreme Court." *Political Research Quarterly* 73(3):596–608.
- Glennon, Colin and Logan Strother. 2019. "The Maintenance of Institutional Legitimacy in Supreme Court Justices' Public Rhetoric." *Journal of Law and Courts* 7(2):241–261.
- Goelzhauser, Greg, Benjamin J Kassow and Douglas Rice. 2021. "Measuring Supreme Court Case Complexity." *The Journal of Law, Economics, and Organization* .
- Hagle, Timothy M. 1993. "'Freshman Effects' for Supreme Court Justices." *American Journal of Political Science* 37(4):1142–1157.
- Hall, Matthew EK. 2014. "The Semiconstrained Court: Public Opinion, the Separation of Powers, and the US Supreme Court's Fear of Nonimplementation." *American Journal of Political Science* 58(2):352–366.
- Hall, Matthew EK and Joseph Daniel Ura. 2015. "Judicial majoritarianism." *The Journal of Politics* 77(3):818–832.
- Hamilton, Alexander, James Madison and John Jay. 2009. *The Federalist Papers*. Yale University Press.
- Hansford, Thomas G and James F Spriggs. 2006. *The Politics of Precedent on the US Supreme Court*. Princeton, NJ: Princeton University Press.
- Harvey, Anna. 2013. *A Mere Machine: the Supreme Court, Congress, and American democracy*. New Haven, CT: Yale University Press.
- Hasen, Richard L. 2019. "Polarization and the Judiciary." *Annual Review of Political Science* 22:261–276.

- Haynie, Stacia L. 1992. "Leadership and Consensus on the US Supreme Court." *The Journal of Politics* 54(4):1158–1169.
- Hettinger, Virginia A and Christopher Zorn. 2005. "Explaining the incidence and timing of congressional responses to the US Supreme Court." *Legislative Studies Quarterly* 30(1):5–28.
- Hibbing, John R and Elizabeth Theiss-Morse. 2002. *Stealth Democracy: Americans' Beliefs about How Government Should Work*. New York: Cambridge University Press.
- Hitt, Matthew P and Kathleen Searles. 2018. "Media Coverage and Public Approval of the US Supreme Court." *Political Communication* 35(4):566–586.
- Hoekstra, Valerie J. 2000. "The Supreme Court and Local Public Opinion." *American Political Science Review* 94(1):89–100.
- Houston, Rachael, Siyu Li and Timothy R Johnson. 2021. "Learning to Speak Up: Acclimation Effects and Supreme Court Oral Argument." *Justice System Journal* pp. 1–19.
- Ignagni, Joseph and James Meernik. 1994. "Explaining Congressional Attempts to Reverse Supreme Court Decisions." *Political Research Quarterly* 47(2):353–371.
- Jacobi, Tonja and Dylan Schweers. 2017. "Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments." *Virginia Law Review* 103:1379.
- Jacobi, Tonja and Kyle Rozema. 2018. "Judicial Conflicts and Voting Agreement: Evidence from Interruptions at Oral Argument." *Boston College Law Review* 59:2259.

- Jacobi, Tonja and Matthew Sag. 2018. "The New Oral Argument: Justices as Advocates." *Notre Dame Law Review* 94:1161.
- Jacobi, Tonja, Timothy R Johnson, Eve Ringsmuth and Matthew Sag. 2021. "Oral Argument in the Time of COVID: The Chief Plays Calvinball." *Southern California Interdisciplinary Law Journal* .
- Johnson, Timothy R. 2003. "The Supreme Court, the Solicitor General, and the Separation of Powers." *American Politics Research* 31(4):426–451.
- Johnson, Timothy R. 2004. *Oral Arguments and Decision Making on the United States Supreme Court*. Albany, NY: SUNY Press.
- Johnson, Timothy R, Paul J Wahlbeck and James F Spriggs. 2006. "The Influence of Oral Arguments on the U.S. Supreme Court." *American Political Science Review* pp. 99–113.
- Johnson, Timothy R, Ryan C Black, Jerry Goldman and Sarah A Treul. 2009. "Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. supreme court." *Washington University Journal of Law and Policy* 29:241.
- Johnson, Timothy R, Ryan C Black and Justin Wedeking. 2009. "Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments." *Loyola Law Review* 55:331.
- Knight, Jack and Lee Epstein. 1996. "The Norm of Stare Decisis." *American Journal of Political Science* 40(4):1018–1035.

- Krewson, Christopher N. 2019. "Save This Honorable Court: Shaping Public Perceptions of the Supreme Court Off the Bench." *Political Research Quarterly* 72(3):686–699.
- Kritzer, Herbert M and Mark J Richards. 2003. "Jurisprudential Regimes and Supreme Court Decisionmaking: The *Lemon* Regime and Establishment Clause Cases." *Law & Society Review* 37(4):827–840.
- Kritzer, Herbert M and Mark J Richards. 2005. "The Influence of Law in the Supreme Court's Search-And-Seizure Jurisprudence." *American Politics Research* 33(1):33–55.
- Landes, William M and Richard A Posner. 1976. "Legal Precedent: A Theoretical and Empirical Analysis." *The Journal of Law and Economics* 19(2):249–307.
- Lane, Elizabeth. 2021. "A Separation-of-Powers Approach to the Supreme Court's Shrinking Caseload." *Journal of Law and Courts* .
- Lax, Jeffrey R and Kelly Rader. 2015. "Bargaining Power in the Supreme Court: Evidence from Opinion Assignment and Vote Switching." *The Journal of Politics* 77(3):648–663.
- Lax, Jeffrey R and Kelly T Rader. 2010. "Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?" *The Journal of Politics* 72(2):273–284.
- Li, Siyu. 2020. "A Separation-of-Powers Model of US Chief Justice Opinion Assignment." *Justice System Journal* 41(1):3–21.

- Li, Siyu and Tom Pryor. 2020. "Humor and Persuasion: The Effects of Laughter during U.S. Supreme Court's Oral Arguments." *Law & Policy* 42(2):162–185.
- Lindquist, Stefanie A and Frank B Cross. 2005. "Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent." *New York University Law Review* 80:1156.
- Liptak, Adam. 2010. "On Speech, Kagan Leaned Toward Conservatives." *New York Times*, 15 May 2010.
- Liptak, Adam. 2019. "Politics Has No Place at the Supreme Court, Chief Justice Roberts Says." <https://www.nytimes.com/2019/09/25/us/politics/chief-justice-john-roberts-interview.html>. Accessed: 2020-09-01.
- Lupu, Yonatan and James H Fowler. 2013. "Strategic Citations to Precedent on the US Supreme Court." *The Journal of Legal Studies* 42(1):151–186.
- Maltzman, Forrest, James F Spriggs and Paul J Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge University Press.
- Maltzman, Forrest and Paul J Wahlbeck. 1996. "Strategic Policy Considerations and Voting Fluidity on the Burger Court." *American Political Science Review* 90(3):581–592.
- Manz, William H. 2002. "Citations in Supreme Court Opinions and Briefs: A Comparative Study." *Law Library Journal* 94:267.
- Mark, Alyx and Michael A Zilis. 2018. "The Conditional Effectiveness of Legislative Threats: How Court Curbing Alters the Behavior of (Some) Supreme Court Justices." *Political Research Quarterly* 72(3):1570–583.

- Martin, Andrew D. and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis* 10:134–153.
- Mayhew, David R. 1974. *Congress: The Electoral Connection*. New Haven, CT: Yale University Press.
- McGuire, Kevin T. 1995. "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success." *The Journal of Politics* 57(1):187–196.
- McGuire, Kevin T. 2004. "The Institutionalization of the U.S. Supreme Court." *Political Analysis* 12(2):128–142.
- McGuire, Kevin T, Georg Vanberg, Charles E Smith Jr and Gregory A Caldeira. 2009. "Measuring Policy Content on the U.S. Supreme Court." *The Journal of Politics* 71(4):1305–1321.
- Merrill, Thomas W. 2005. "Originalism, Stare Decisis and the Promotion of Judicial Restraint." *Constitutional Commentary* 22:271.
- Moffett, Kenneth W, Forrest Maltzman, Karen Miranda and Charles R Shipan. 2016. "Strategic Behavior and Variation in the Supreme Court's Caseload Over Time." *Justice System Journal* 37(1):20–38.
- Murphy, Walter F. 1964. *Elements of Judicial Strategy*. Chicago: University of Chicago Press.
- O'Brien, David M. 1999. Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions. In *Supreme Court Decision-Making:*

- New Institutional Approaches*, ed. Cornell W. Clayton and Howard Gillman. University of Chicago Press pp. 91–113.
- O’Brien, David M. 2020. *Storm Center: The Supreme Court in American Politics*. 12th ed. New York: W. W. Norton & Company.
- Owens, Ryan J. 2010. “The Separation of Powers and Supreme Court Agenda Setting.” *American Journal of Political Science* 54(2):412–427.
- Owens, Ryan J and David A Simon. 2011. “Explaining the Supreme Court’s Shrinking Docket.” *William & Mary Law Review* 53:1219.
- Owens, Ryan J, Justin Wedeking and Patrick C Wohlfarth. 2013. “How the Supreme Court Alters Opinion Language to Evade Congressional Review.” *Journal of Law and Courts* 1(1):35–59.
- Pacelle, Richard L. 1991. *The Transformation of the Supreme Court’s Agenda: From the New Deal to the Reagan Administration*. Boulder, CO: Westview Press.
- Posner, Richard A. 2000. “An Economic Analysis of the Use of Citations in the Law.” *American Law and Economics Review* 2(2):381–406.
- Posner, Richard A. 2010. *How Judges Think*. Cambridge, MA: Harvard University Press.
- Powell Jr, Lewis F. 1990. “Stare Decisis and Judicial Restraint.” *Washington and Lee Law Review* 47(2):281–290.
- Ramirez, Mark D. 2008. “Procedural Perceptions and Support for the U.S. Supreme Court.” *Political Psychology* 29(5):675–698.

- Rehnquist, William H. 2001. *The Supreme Court*. New York: Vintage Books.
- Richards, Mark J. and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96(2):305–320.
- Ringsmuth, Eve M., Amanda C. Bryan and Timothy R. Johnson. 2013. "Voting Fluidity and Oral Argument on the U.S. Supreme Court." *Political Research Quarterly* 66(2):429–440.
- Ringsmuth, Eve M and Timothy R Johnson. 2013. "Supreme Court Oral Arguments and Institutional Maintenance." *American politics research* 41(4):651–673.
- Rosenberg, Gerald N. 1992. "Judicial Independence and the Reality of Political Power." *The Review of Politics* 54(3):369–398.
- Rosenberg, Gerald N. 2008. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago, IL: University of Chicago Press.
- Rubin, Edward and Malcolm Feeley. 1995. "Creating Legal Doctrine." *Southern California Law Review* 69:1989.
- Sala, Brian R and James F Spriggs. 2004. "Designing Tests of the Supreme Court and the Separation of Powers." *Political Research Quarterly* 57(2):197–208.
- Salamone, Michael F. 2018. *Perceptions of a Polarized Court: How Division Among Justices Shapes the Supreme Court's Public Image*. Philadelphia, PA: Temple University Press.

- Scheb, John M and William Lyons. 2001. "Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions." *Political Behavior* 23(2):181–194.
- Scheb, John M, William Lyons et al. 2000. "The Myth of Legality and Public Evaluation of the Supreme Court." *Social Science Quarterly* 81(4):928–941.
- Segal, Jeffrey A. and Albert D. Cover. 1989. "Ideological Values and the Votes of Supreme Court Justices." *American Political Science Review* 83:557–565.
- Segal, Jeffrey A., Chad Westerland and Stephanie Lindquist. 2011. "Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model." *American Journal of Political Science* 55(1):89–104.
- Segal, Jeffrey A. and Harold J. Spaeth. 1996. "The Influence of Stare Decisis on the Votes of United States Supreme Court Justices." *American Journal of Political Science* 40(4):971–1003.
- Segal, Jeffrey A and Harold J Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge University Press.
- Solberg, Rorie Spill and Eric N Waltenburg. 2014. *The Media, the Court, and the Misrepresentation: The New Myth of the Court*. Routledge.
- Spaeth, Harold J., Lee Epstein et al. 2018. "2019 Supreme Court Database, Version 2019 Release 01." <http://Supremecourtdatabase.org>. Accessed: 2020-08-01.
- Stimson, James A. 1991. *Public Opinion in America: Moods, Cycles, and Swings*. Boulder, CO: Westview Press.

- Strother, Logan. 2017. "How Expected Political and Legal Impact Drive Media Coverage of Supreme Court Cases." *Political Communication* 34(4):571–589.
- Strother, Logan. 2019. "Case Salience and the Influence of External Constraints on the Supreme Court." *Journal of Law and Courts* 7(1):129–147.
- Sullivan, Kathleen M. 1992. "Foreword: The Justices of Rules and Standards." *Harvard Law Review* 106:22.
- Sunshine, Jason and Tom R Tyler. 2003. "The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing." *Law & society review* 37(3):513–548.
- Thomas, Clarence. 2021. "Remembering Ruth Bader Ginsburg." *Journal of Supreme Court History* 46(1):7–9.
- Tyler, Tom R. 2003. "Procedural Justice, Legitimacy, and the Effective Rule of Law." *Crime and Justice* 30:283–357.
- Tyler, Tom R and Gregory Mitchell. 1994. "Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights." *Duke Law Journal* 43:703.
- Unah, Isaac and Ange-Marie Hancock. 2006. "US Supreme Court Decision Making, Case Salience, and the Attitudinal Model." *Law & Policy* 28(3):295–320.
- Ura, Joseph Daniel and Carla M Flink. 2016. "Managing the Supreme Court: the Chief justice, Management, and Consensus." *Journal of Public Administration Research and Theory* 26(2):185–196.

- Ura, Joseph Daniel and Patrick C Wohlfarth. 2010. ““An Appeal to the People”:  
Public Opinion and Congressional Support for the Supreme Court.” *The Journal  
of Politics* 72(4):939–956.
- Wahlbeck, Paul J, James F Spriggs and Forrest Maltzman. 1999. “The Politics of  
Dissents and Concurrences on the US Supreme Court.” *American Politics Quarterly*  
27(4):488–514.
- Walker, Thomas G, Lee Epstein and William J Dixon. 1988. “On the mysterious  
demise of consensual norms in the United States Supreme Court.” *The Journal of  
Politics* 50(2):361–389.
- Walsh, David J. 1997. “On the meaning and pattern of legal citations: Evidence from  
state wrongful discharge precedent cases.” *Law & Soc’y Rev.* 31:337.
- Wolf, Richard. 2010. “Opera, travel, food, law: The unlikely friendship of Ruth  
Bader Ginsburg and Antonin Scalia.” *USA Today*, 20 September 2010.  
**URL:** <https://www.usatoday.com/story/news/politics/2020/09/20/supreme-friends-ruth-bader-ginsburg-and-antonin-scalia/5844533002/>
- Wrightsmann, Lawrence S. 2006. *The Psychology of the Supreme Court*. Oxford Uni-  
versity Press.
- Zilis, Michael. 2015. *The limits of legitimacy: Dissenting opinions, media coverage,  
and public responses to Supreme Court decisions*. University of Michigan Press.
- Zilis, Michael A. 2017. “The Political Consequences of Supreme Court Consensus:  
Media Coverage, Public Opinion, and Unanimity as a Public-Facing Strategy.”  
*Wash. UJL & Pol’y* 54:229.

Zilis, Michael A, Justin Wedeking and Alexander Denison. 2017. "Hitting the Bullseye in Supreme Court Coverage: News Quality in the Court's 2014 Term." *Elon Law Review* 9:489.

Zilis, Michael and Justin Wedeking. 2020. "The Sources and Consequences of Political Rhetoric: Issue Importance, Collegial Bargaining, and Disagreeable Rhetoric in Supreme Court Opinions." *Journal of Law and Courts* 8(2):203–227.

Zink, James R, James F Spriggs and John T Scott. 2009. "Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions." *The Journal of Politics* 71(3):909–925.

# Appendices

## Supplemental Tables

Table A1: Multi-Level Logistic Regression of Court Consensus

	Unanimous Decision
Ideological Polarization	-0.134*** (0.032)
Distance from Congress	-0.332(0.300)
Political Salience	-1.527(2.863)
Unified Government	-0.167(0.156)
Public Opposition	0.298*** (0.015)
Court-Curbing	-0.982(0.665)
Public Liberalism	-0.562*** (0.017)
Liberal Majority	-39.085*** (1.521)
Congressional Liberalism	-0.393(0.282)
<i>Amicus Briefs</i>	-0.091** (0.045)
Legal Importance	-0.302** (0.124)
Time Left	-0.002*** (0.0005)
Case Complexity	-0.921 *** (0.068)
SG Participation	0.094 (0.100)
Distance from Congress × Political Salience	0.202(0.423)
Distance from Congress × Unified Government	0.577(0.386)
Political Salience × Unified Government	-0.213(0.261)
Political Salience × Public Opposition	-0.011(0.025)
Public Opposition × Court-Curbing	-0.009(0.006)
Political Salience × Court-Curbing	1.555(1.209)
Public Liberalism × Liberal Majority	0.720*** (0.018)
Public Opposition × Public Liberalism	-0.005*** (0.00003)
Public Opposition × Liberal Majority	-0.348*** (0.011)
Liberal Majority × Congressional Liberalism	0.388* (0.229)
Distance from Congress × Political Salience × Unified Government	0.582(0.589)
Political Salience × Public Opposition × Court-Curbing	0.014(0.011)
Public Opposition × Public Liberalism × Liberal Majority	0.006*** (0.00003)
Constant	32.883*** (2.065)
Chief Justice Fixed Effects?	Yes
Issue-Area Fixed Effects	Yes
Observations	3,472
Log Likelihood	-2,188.501
Akaike Inf. Crit.	4,455.002
Bayesian Inf. Crit.	4,694.949

Note:

\*p<0.1; \*\*p<0.05; \*\*\*p<0.01

Table A2: Multi-Level Logistic Regression of Majority Vote

	Majority Vote
Distance from Author	-1.296*** (0.113)
Congressional Ideological Distance	0.828** (0.386)
Political Salience	0.833(3.665)
Unified Government	0.393** (0.194)
Public Opposition	0.130(0.178)
Court-Curbing	-0.047(0.867)
Public Liberalism	-0.331(0.320)
Liberal Majority	-23.016(28.056)
Congressional Liberalism	-0.511** (0.251)
Amicus Briefs	-0.047(0.052)
Legal Salience	-0.471*** (0.142)
Past Cooperation	0.488* (0.267)
Case Complexity	-0.531*** (0.052)
SG Participation	0.369*** (0.115)
Time Remaining	-0.003*** (0.0004)
Chief Justice	0.393*** (0.097)
Freshman Justice	0.705*** (0.142)
Congressional Ideological Constraint×Political Salience	-0.413(0.556)
Congressional Ideological Constraint×Unified Government	-0.086(0.508)
Political Salience×as.Unified Government	-0.426(0.309)
Political Salience×Public Opposition	0.008(0.032)
Public Opposition×Court-Curbing	-0.001(0.008)
Political Salience×Court-Curbing	1.386(1.608)
Public Liberalism×Liberal Majority	0.472(0.459)
Public Opposition×Public Liberalism	-0.002(0.003)
Public Opposition×Liberal Majority	-0.197(0.252)
Liberal Majority×Congressional Liberalism	1.266*** (0.288)
Congressional Constraint×Political Salience×Unified Government	1.424** (0.715)
Political Salience×Public Opposition×Court-Curbing	0.013(0.014)
Public Opposition×Public Liberalism×Liberal Majority	0.004(0.004)
Constant	19.621(19.858)
Observations	11,609
Log Likelihood	-6,424.370
Akaike Inf. Crit.	12,912.740
Bayesian Inf. Crit.	13,148.250

Note:

\*p<0.1; \*\*p<0.05; \*\*\*p<0.01

Table A3: Logistic Regression Model of Precedent Citation: Inward Relevance

	Precedent Cited in a Year?	
Ideological Distance	-0.0144	(0.0180)
Vitality	0.0284***	(0.00777)
Public Opposition	0.00887*	(0.00364)
Inward Relevance	2.062***	(0.541)
Public Opposition×Inward Relevance	0.00500	(0.00469)
Outward Relevance	1.474***	(0.109)
Court-Curbing	-0.0574*	(0.0277)
Court-Curbing×Inward Relevance	0.109**	(0.0359)
Distance from Congress	-0.132	(0.110)
Distance from Congress×Inward Relevance	0.394**	(0.146)
Constitutional Issue	-0.0610	(0.0319)
Special Concurrence	0.0238	(0.0141)
Vote Margin	0.00278	(0.00499)
Court Agenda	0.0172***	(0.00105)
Amicus Briefs	0.119***	(0.0150)
SG	0.0104	(0.0366)
Per Curiam	-0.524***	(0.0806)
Consistent with Public Mood	-0.000232	(0.000465)
Consistent with Public Mood×Inward Relevance	0.00152*	(0.000733)
Legal Breadth	0.0270***	(0.00297)
Declare Unconstitutional	0.315***	(0.0514)
Age	-0.130***	(0.00259)
Age Squared	0.00153***	(0.0000539)
Overruled Precedent	0.0845	(0.259)
Distance from Courts of Appeals	-0.0892	(0.276)
Distance from Courts of Appeals×Inward Relevance	0.576	(0.352)
Ideological Heterogeneity	0.0882***	(0.0235)
Median Justice Conservatism	0.0364	(0.0198)
Constant	-2.056***	(0.441)
<i>N</i>	159749	

Robust standard errors clustered around precedents in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

Table A4: Logistic Regression Model of Precedent Citation: Outward Relevance

	Precedent Cited in a Year?	
Ideological Distance	-0.0131	(0.0179)
Vitality	0.0281***	(0.00776)
Public Opposition	0.00494	(0.00688)
Outward Relevance	1.792*	(0.901)
Public Opposition×Outward Relevance	0.00884	(0.00787)
Inward Relevance	1.920***	(0.0569)
Court-Curbing	-0.161**	(0.0525)
Court-Curbing×Outward Relevance	0.216***	(0.0604)
Distance from Congress	-0.230	(0.209)
Distance from Congress×Outward Relevance	0.440	(0.242)
Constitutional Issue	-0.0568	(0.0319)
Special Concurrence	0.0240	(0.0140)
Vote Margin	0.00260	(0.00498)
Court Agenda	0.0172***	(0.00105)
Amicus Briefs	0.119***	(0.0150)
SG	0.0134	(0.0365)
Per Curiam	-0.520***	(0.0804)
Consistent with Public Mood	-0.00196	(0.00115)
Consistent with Public Mood×Outward Relevance	0.00331*	(0.00139)
Legal Breadth	0.0271***	(0.00297)
Declare Unconstitutional	0.310***	(0.0517)
Age	-0.130***	(0.00258)
Age Squared	0.00153***	(0.0000538)
Overruled Precedent	0.0836	(0.259)
Distance from Courts of Appeals	-0.0755	(0.512)
Distance from Courts of Appeals×Outward Relevance	0.469	(0.588)
Ideological Heterogeneity	0.0856***	(0.0234)
Median Justice Conservatism	0.0431*	(0.0196)
Constant	-2.218**	(0.797)
<i>N</i>	159749	

Robust standard errors clustered around precedents in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

Table A5: Logistic Regression Model of Precedent Citation: Vitality

	Precedent Cited in a Year?	
Ideological Distance	-0.00750	(0.0178)
Public Opposition	0.0124***	(0.00146)
Vitality	-0.0176	(0.0536)
Public Opposition×Vitality	-0.0000305	(0.000474)
Outward Relevance	1.484***	(0.109)
Court-Curbing	0.0192*	(0.00942)
Court-Curbing×Vitality	0.00500	(0.00321)
Distance from Congress	0.109**	(0.0383)
Distance from Congress×Vitality	0.0787***	(0.0161)
Constitutional Issue	-0.0628*	(0.0318)
Special Concurrence	0.0235	(0.0141)
Vote Margin	0.00371	(0.00497)
Court Agenda	0.0172***	(0.00104)
Amicus Briefs	0.118***	(0.0150)
SG	0.0132	(0.0366)
Per Curiam	-0.528***	(0.0803)
Consistent with Public Mood	0.000789***	(0.000238)
Consistent with Public Mood×Vitality	0.0000966	(0.000122)
Legal Breadth	0.0268***	(0.00297)
Declare Unconstitutional	0.320***	(0.0510)
Age	-0.131***	(0.00258)
Age Squared	0.00154***	(0.0000539)
Overruled Precedent	0.0977	(0.257)
Distance from Courts of Appeals	0.274**	(0.102)
Distance from Courts of Appeals×Vitality	0.101*	(0.0407)
Ideological Heterogeneity	0.0826***	(0.0232)
Median Justice Conservatism	0.0401*	(0.0195)
Inward Relevance	1.917***	(0.0567)
Constant	-1.939***	(0.212)
<i>N</i>	159749	

Robust standard errors clustered around precedents in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

## Robustness Check I for Chapter 3: Negative Binomial Model Specification

While many of the precedents are not cited at all in the sample by the subsequent Courts, some are cited more than once in a given year. In an alternative model specification, I estimate a negative binomial regression model. The results are largely identical, with the exception of *Court-Curbing*, which has a  $p$ -value of 0.130.

Table A6: Negative Binomial Regression Model of Total Number of Precedent Citations in a Year

	Total Citations	
Ideological Distance	-0.0221	(0.0201)
Vitality	0.0349***	(0.00777)
Public Opposition	0.00922***	(0.00143)
Outward Relevance	1.389***	(0.148)
Inward Relevance	1.624***	(0.0545)
Court-Curbing	0.0114	(0.00753)
Distance from Congress	0.142**	(0.0460)
Constitutional Issue	-0.00507	(0.0357)
Special Concurrence	0.0628	(0.0415)
Vote Margin	-0.00204	(0.00628)
Court Agenda	0.0180***	(0.00183)
Amicus Briefs	0.0994***	(0.0121)
SG	0.125	(0.0780)
Per Curiam	-0.419***	(0.0777)
Consistency with Public Mood	0.000589*	(0.000283)
Legal Breadth	0.0287***	(0.00370)
Declare Unconstitutional	0.230***	(0.0480)
Age	-0.109***	(0.00275)
Age Squared	0.00123***	(0.0000581)
Overruled Precedent	0.265	(0.215)
Distance from Courts of Appeals	0.194*	(0.0904)
Ideological Heterogeneity	0.108***	(0.0280)
Median Justice Conservatism	0.0248	(0.0176)
Constant	-2.300***	(0.232)
lnalpha	0.0563	(0.112)
<i>N</i>	159749	

Robust standard errors clustered around precedents in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

## Robustness Check II for Chapter 3: Generalized Estimating Equation Model Specification

Black and Spriggs (2013) suggest that it might be more appropriate to estimate a generalized estimating equation (GEE) model to account for the correlation within

individual precedents over time. I specified a population-average GEE model, following Black and Spriggs (2013), with an autoregressive residual structure of AR(1) and robust standard errors. The results are identical to a more parsimonious logit model with clustered robust standard errors.

Table A7: Generalized Estimating Equation Regression of Precedent Citations

	Citation	
Ideological Distance	-0.00603	(0.0108)
Vitality	0.0289***	(0.00310)
Public Opposition	0.0122***	(0.00143)
Outward Relevance	1.671***	(0.0690)
Inward Relevance	1.691***	(0.0410)
Court-Curbing	0.0163	(0.00909)
Distance from Congress	0.135***	(0.0395)
Constitutional Issue	-0.0487**	(0.0181)
Special Concurrence	0.0263**	(0.00799)
Vote Margin	0.00407	(0.00293)
Court Agenda	0.0178***	(0.000680)
Amicus Briefs	0.121***	(0.00726)
SG	0.0145	(0.0215)
Per Curiam	-0.529***	(0.0454)
Consistency with Public Mood	0.000861***	(0.000139)
Legal Breadth	0.0271***	(0.00154)
Declare Unconstitutional	0.323***	(0.0275)
Age	-0.127***	(0.00232)
Age Squared	0.00148***	(0.0000501)
Overruled Precedent	-0.308	(0.264)
Distance from Courts of Appeals	0.327**	(0.109)
Ideological Heterogeneity	0.0827***	(0.0240)
Median Justice Conservatism	0.0486**	(0.0177)
Constant	-2.044***	(0.207)
<i>N</i>	157882	

Standard errors in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$