**Presidents, Legislatures, and Majoritarian Judicial Review**

Abstract: Scholars theorize that constitutional courts often behave in a majoritarian manner, striking or upholding laws in ways that advance the policy goals of elected officials. These explanations usually focuses on a court's relationship with a single branch of government, whether a legislature or an executive. In most countries with constitutional courts, however, lawmaking authority is separated between multiple branches of government. Given that different branches can have competing policy preferences yet still look towards a constitutional court to advance their policy goals, which branch does a court support? I study majoritarian judicial review in presidential systems by analyzing both executive-focused and legislative-focused judicial review in U.S. Supreme Court decision-making. I find evidence for both executive-focused and legislative-focused judicial review, albeit for different majoritarian mechanisms.

Word Count: 9073

Political scientists have argued that the U.S. Supreme Court is a majoritarian institution in nature since at least Dahl's seminal work on the matter (1957). Dahl originally argued this because the Court rarely invalidates laws passed by current elected officials, instead choosing to uphold laws or invalidate laws passed by previous administrations. This line of thought has since been extended by scholars who argue that judicial review itself can be majoritarian: elected officials sometimes prefer the Court to invalidate their laws rather than uphold them (Rogers 2001, Whittington 2005, 2007, Fox and Stephenson 2011). While there are many mechanism by which judicial review can be majoritarian, the underlying argument in the literature is the same: elected officials can achieve their policy goals by relying on the constitutional court's ability to invalidate statutes rather than pursue policy change.

Within the scholarship on majoritarian judicial review, however, there are two distinct strands. The first focuses on the benefits judicial review can provide to legislatures (Rogers 2001, Fox and Stephenson 2011). Legislatures are usually vested with policymaking authority in democracies, making them the most obvious beneficiaries of majoritarian judicial review. Importantly, these studies normally treat legislatures as if they were unitary institutions with sole policymaking authority. They often rely on game-theoretic analysis in order to elucidate their arguments.

The second strand of scholarship, primarily advanced by Whittington (2005, 2007) explicitly focuses on the benefits judicial review can provide to executives. In particular, he argues that U.S. presidents, as elected officials with considerable interest and influence in policy outcomes, can benefit from majoritarian judicial review as well. Importantly, he advances a number of claims as why the Supreme Court might be motivated to advance the policy goals of

the president, some of which are unique to that office. This strand of scholarship is usually supported by case studies.

These two strands of scholarship are not necessarily competitive. Constitutional courts can generally support both legislators and executives when using judicial review, especially when there is policy agreement between the two branches on a particular issue. But policy agreement between branches of government is far from guaranteed in presidential systems. Furthermore, there are unique reasons why a constitutional court might support one branch over another driven by the design of those institutions. Legislatures provide material incentives and better represent public opinion; in contrast, the executive's unilateral control over the varied functions of its office allow for more targeted persuasion on a given issue. Given these differing incentives constitutional courts face when considering majoritarian judicial review, which branch of government does a court support?

This papers joins these two separate strands of the literature into a comprehensive account of majoritarian judicial review that focuses on the structure of political institutions. I start by reviewing the general principals of majoritarian judicial review while also identifying the specific mechanisms in the literature. I next distinguish between legislative-focused and executive-focused majoritarian judicial review in presidential systems, highlighting why a constitutional court might prefer to advance the policy goals of legislators rather than the executive and vice versa. During this, I survey the evidence supporting majoritarian judicial review for each branch within the American context. I then craft a couple of hypotheses about how majoritarian judicial review should function and test them using a set of U.S. Supreme Court constitutional decisions on important federal statutes from 1951-2011. The analysis finds evidence for both executive-focused and legislative-focused judicial review, albeit for different

majoritarian mechanisms. I close by discussing some limitations of the study and areas of future research.

**Motivations for Majoritarian Judicial Review**

Majoritarian theories of judicial review developed as a response to the long-standing criticism that the U.S. Supreme Court is a countermajoritarian institution (Bickel 1986). Because unelected judges can use judicial review to invalidate the actions of elected officials, judicial review is illegitimate in a democratic society. This has led many positive scholars to study judicial independence; if judicial review is countermajoritarian, only independent courts can exercise it (Vanberg 2001, Stephenson 2003). Majoritarian theories of judicial review argue that while the constitutional courts may issue the occasional countermajoritarian decision, elected officials tolerate them because of the benefits judicial review provides in advancing their policy goals. Elected officials, of course, have other tools to create policy change. In the right circumstances, however, the prospect of a friendly court invalidating undesirable legislation may be preferable to direct action.

There are a number of mechanisms by which elected officials can benefit from judicial review. Rogers (2001) argues that uncertainty in the political environment can make judicial review desirable for elected officials. When there is a large degree of uncertainty about the true policy consequences of a statute, legislatures will defer to the judgement of more informed, ideologically congruent constitutional courts. Courts can generally be thought of as having better information because it has access to the same information as elected officials plus the additional information gathered through the legal process, such as the post-enactment information gathered because of the "standing" doctrine in common law courts.

Other majoritarian theories argue that elected officials might desire judicial review on divisive topics. Graber (1993) argues that party leaders would support judicial review on cross-cutting issues. Such issues threaten to tear apart the governing party if it came to blows, encouraging them to allow a constitutional court to make a decision instead even if it means allowing the court to strike down a statute. This can occur by either refusing to pass new legislation in favor of judicial action or nominally passing legislation with the expectation that the court will have the final say on the matter.

Elected officials may also desire constitutional courts to use judicial review to address situations in which different officials disagree on a policy area. During times of divided government, politicians may look to a constitutional court to overcome entrenched interests preventing new legislation or to undo the policy compromises necessary to achieve legislation. Similarly, dominant national coalitions may look to a court to enforce its policy agenda onto subnational entities with diverging preferences (Whittington 2005, 2007). Judicial review may provide a valuable means of policymaking when traditional means are unavailable.

Judicial review can also create a moral hazard for elected officials (Salzberger 1993, Whittington 2005, Fox and Stephenson 2011). Politicians in democracies are highly concerned with public opinion, with some going as far as to describe them as "single-minded re-election seekers" (Mayhew 1974). Sometimes, however, politicians may desire to veto bills or repeal statutes that are politically popular. In order to do so, they may instead rely on a constitutional court to strike a law, shifting the blame from themselves to an institution that is relatively insulated from public opinion.

While the theoretical motivations for each of these mechanisms are distinct, they share a common, conditional structure. Specifically, judicial review has majoritarian benefits only when

elected officials and a constitutional court share similar ideological preferences (Rogers 2001, Whittington 2005, Fox and Stephenson 2011, but see Graber 1993). Because a constitutional court functionally has the final say on the fate of a particular piece of legislation, elected officials must be able to trust that the court will make a decision with their best intentions at heart. Otherwise, elected officials will either forgo passing legislation or threaten the independence of courts so that they will not do anything but validate the constitutionality of laws. Therefore, we should only observe a constitutional court striking laws in a majoritarian manner when it shares similar preferences with elected officials.

**Majoritarian Judicial Review in Presidential Systems**

In most presentations of majoritarian judicial review, elected officials are treated as if they occupy a unitary branch of government (Salzberger 1993, Rogers 2001, Fox and Stephenson 2011). This occurs for a number of reasons. Scholars may desire to focus on legislative-judicial politics, a worthy area on study, and omit the executive for expository purposes (Salzberger 1993, Rogers 2001). Scholars might also create formal models that use a unitary elected official as a simplifying tool to make solutions more tractable (Rogers 2001, Fox and Stephenson 2011).

Regardless of the reason why elected officials are treated as monoliths, this approach is problematic. Democratic governments that are functionally unitary actors are rarely subject to judicial review from a constitutional court. While the policymaking authority in the United Kingdom is largely dominated by the House of Commons, for example, subsequent legislation is not subject to judicial review because there is no formal constitution and its constitutional court is subservient to parliament. Rather, policymaking authority in most countries with independent constitutional courts is formally separated to different branches of government that are separately

survivable. While the German Federal Constitutional Court, the Bundesverfassungsgericht, can evaluate the constitutionality of hypothetical and actual legislation, such legislation must be approved by both of the national legislatures of Germany, the Bundestag and the Bundesrat, whose members are selected independently of each other.

One of the most common political systems with split policymaking authority are presidential systems. The executive and the legislature are independently selected and share authority to create law, a separation of powers designed to check tyranny. These systems can have a dominant national coalition, as the U.S. Democratic Party had through much of the twentieth century. But these systems can also have different branches controlled by different political parties. Even copartisans can face severe disagreements, as was the case with Jimmy Carter and Democrats in Congress during the 1970's. Scholars must take into account this potential for disunity when promoting theories of majoritarian judicial review.

In contrast to much of the literature, Whittington (2007) focuses on majoritarian judicial review from a presidential perspective rather than a legislative one. He argues that the president has a number of tools to incentivize courts to help promote a policy agenda, some of which are unique to the president; this, in turn, leads to him finding evidence consistent with executive-focused judicial review. But while his coverage of executive-judicial relations is robust, parallel coverage of legislative-judicial relations is largely absent. No consideration is given to unique mechanisms supporting legislative-focused majoritarian judicial review. Likewise, there is no attempt to find evidence either supporting or failing to support legislative-focused judicial review. This, in turn, undermines his evidence of executive-focused majoritarian judicial review, as it is equally possible that such evidence merely supports the existence of some general form of majoritarian judicial review.

How does the separation of powers influence majoritarian judicial review in presidential systems? Both the executive and the legislative branches are driven by policy goals. Both can substantially influence policy.[1] And both may prefer judicial action over direct action in certain circumstances, as previously described. Given the possibility of conflicting preferences, which branch does a constitutional court support in practice? To answer this question, I look at the American context to interrogate distinct reasons why the U.S. Supreme Court might support a particular branch.

**Congress – The Purse and Public Opinion**

As the legislature, Congress has the final say on whether potential legislation becomes law. Within its broad authority of "the purse", Congress can pass legislation that serves either as a carrot or a stick to judicial efforts. Congress can grant pay increases, resources and support, and docket discretion all through ordinary legislation. On the flip side, Congress can limit financial resources, increase judicial workloads, and, outside of the legislation, even impeach justices (Rosenberg 1992). And while the president can veto legislation, a determined Congress can override a veto. If Congress can exercise these powers, a forward looking Court has substantial incentive to do Congress favors including striking undesirable laws for Congress

Whether Congress can exercise these powers, however, is a different question. Most court-curbing legislation stalls in a committee (Clark 2009, 2010). Those that do gain substantial traction and even pass are historically supported by the president (Whittington 2007). And while Congress can override a presidential veto, the onerous supermajority requirements to do so may

[1] While the legislature has formal authority over policymaking, presidents have both formal and informal powers that can be used to influence policy as well.

prove impossible for most court-curbing efforts. While in theory Congress has a number of tools to punish the Court, in practice Congress may not be able to use them to garner any meaningful influence.

More likely, court-curbing measures may be a valuable signal of public opinion to the Court. Popular election requires Members of Congress to know a great deal about public opinion; Mayhew describes them as "single-minded reelection seekers" (1974). Clark (2009, 2010) argues that this electoral connection leads to Congress being relatively more informed about public opinion that the Court. A number of studies indicate that the Court is sensitive to public opinion, due to its effect on legitimacy (Bryan and Kromphardt 2016, Casillas, Enns, and Wohlfarth 2011, McGuire and Stimpson 2004). If Congress prefers the Court to invalidate a statute under review, the Court may interpret this as a signal of the public's desires as well.

Of course, the president is also an elected official. But presidential elections are less frequent than congressional ones, leading the president's preferences to be more out of line than Congress'. In addition, presidents are term limited; the actions of a lame duck president may not reflect public opinion because the president will not be up for reelection. In contrast, Members of Congress are not term limited and face consistent pressures to follow public opinion. Thus while presidential actions may also signal public opinion, that signal is almost certainly weaker.

None of the preceding discussion is to suggest that Congress is itself a unitary actor. Congress is a bicameral institution with independently elected houses that can also have competing preferences. It is possible that each house could also have distinct influence of majoritarian judicial review, a fact not lost on scholars. Harvey (2013) argues that the Court should be sensitive to the preferences of the House of Representatives rather than the Senate. Because the House controls the beginning of the appropriations and impeachment process, it has

more control over the tools used to influence judicial decision-making. The entire membership of the House is also up for reelection every two years, while the Senate is fully replaced over a six year cycle; this greater frequency of election likely makes House action more representative of public opinion (Clark 2010). Thus any account that distinguishes between the president and congressional influence, at minimum, consider the differences in the influence of the House of Representatives and the Senate.

There are notable examples of legislative-focused majoritarian judicial review. Congress has historically deferred to the courts on the divisive issues of slavery, antitrust law, and abortion in order to avoid political infighting that could damage majority coalitions (Graber 1993). Congress also relied on the Court to sort out the complex and competing property rights claims during the settlement of the Louisiana Purchase in the beginning of the nineteenth century rather than reconcile complex and contradictory federal statutes on the matter (Whittington 2007). And Congress engaged in blatant political posturing when passing the Flag Protection Act by a near unanimous margin in the late 1980's; the statute, which contradicted the case *Texas v. Johnson* (1989) that was decided just a few months prior to passage, was subsequently invalidated (Whittington 2007). While these examples are certainly illustrative of majoritarian judicial review, it is unclear whether they are part of a systematic effort by the Court to invalidate statutes to aid Congress or simply idiosyncratic outliers.[2]

**The President – Executive without Equal**

[2] The exception is Lindquist and Corley (2012), which shows that the U.S. Supreme Court strikes state laws more often when Congress opposes those laws. This is consistent with the Court enforcing the will of national coalitions on the states.

One of the primary advantages of the executive branch is its hierarchical nature. The president controls almost every aspect of the executive branch and its powers, both formal and informal. And because of this unified control, the Court can easily understand the preferences of the president concerning legislation that the Court. Presidents have regularly vetoed legislation since the founding on constitutional grounds, usually with written or oral statements saying as much. Expanding beyond vetoes, presidents have increasingly issued signing statements to indicate constitutional concerns with a statute that is nonetheless enacted into law. As Whittington argues, these statements "are generally offered for later judicial consumption, in the hopes that the courts will either use the presidential statement as part of the legislative history of the statute that might guide its interpretation or take its signal to review the legislation and authoritatively settle any constitutional issues raised" (2007).

Of course, such messages are not exclusive to the president; Members of Congress can also publicly voice constitutional concerns with pieces of legislation. But such voices can be drowned by proponents of legislation supporting its constitutional grounds or suffocated by the indifference of their peers. While some Members of Congress are certainly more influential than others – such as the Speaker of the House and the Senate Majority leader – their objection to a bill might not be shared by their colleagues and thus either ignored by the Justices or not expressed whatsoever. And even if an important plurality of Members share the same views, it still may not be enough to overcome congressional inertia. Compared to his peers in Congress, the president may be in a unique position to prime the Court to exercise judicial review on its behalf.

Beyond the ability to express views on legislation, the president also has ample capacity to persuade the Court using traditional legal means. The president controls the Solicitor

General's office, described by many as "the finest law firm in the nation" (Black and Owens 2012). Using its unmatched resources and expertise, the Solicitor General is highly effective at convincing the Court to support the president's position when a party in a case. The president may refuse to defend a law, such as Obama did when the Defense of Marriage Act was challenged, which undermines the chances of that law surviving. Even when not directly a party, the Solicitor General's office regularly influence outcomes by filing amicus briefs. And the president can use the Department of Justice's resources to support litigation when it does not take an official stance on a case, as Franklin D. Roosevelt's Civil Rights Section of the Department of Justice did when supporting the NAACP's efforts in *Smith v. Allwright* (1944) (McMahon 2004). Congress has no clear analogue to the Department of Justice and, as a result, is gravely behind in their ability to persuade the Court using legal means.

The president's opinion may also have a psychological sway on the Court. While the Senate must confirm nominees to the Court, the president's power of nomination grants the president large control over who does and does not become a justice. Sitting justices may feel loyalty to the president who nominated them, privileging their views over other elected officials and even sound legal doctrine. Epstein and Posner (2016) find that justices of both parties are more loyal to appointing presidents than their successors, which they attribute to the gratitude the justices feel for being nominated to the bench. This psychological attachment, even if only relevant for a single justice in a given case, may be enough for the Court to ultimately strike a law not favored by the president.

The executive branch also implements statutes and Court decisions (Whittington 2007). This responsibility can be shirked when implementation runs counter to the president's goals. In particular, a president's refusal to implement a statute on constitutional grounds has spurred a

significant legal scholarship debating the subject (see Burgess 1993, Johnsen 2000, Prakash 2008). The refusal to implement a law may remove any policy incentive the Court has to uphold a law the president opposes; if there are legal and political incentives to strike a law, those incentives may now be decisive in judicial decision-making. Similarly, the Court may not decide a case according to its sincere preferences, legal or ideological, if the president is unlikely to implement them. Hall (2014) shows that when implementation of a decision falls outside of the judiciary, the Court more strongly values the preferences of elected officials and the public.

Of course, Congress can also interfere with the Court's incentives by refusing to implement decisions. Congress has routinely passed veto-proof legislation designed to contradict Supreme Court decisions, as the Religious Freedom Restoration Act of 1993 did to *Employment Division v. Smith* (1990). Congress also regularly ignores previous Court rulings when drafting new legislation. When the Court invalidated the one-house legislative veto in *Immigration and Naturalization Service v. Chadha* (1983), Congress did not seem to notice. It refused to amend existing laws including such a provision and continued to pass new laws containing them (Epstein and Knight 1998). Thus while the president has power to influence the Court via nonimplementation, that power is far from unique.

Whittington (2007) provides a number of examples for executive-focused judicial review as he argues that the Court caters to presidential preferences. Democratic Presidents Truman and Kennedy avoided an intraparty split on civil rights issues by deferring to Court rulings on these issues. President Cleveland relied on judicial review to undo policy compromises on the income tax; President Clinton did the same on obscenity laws. And presidents have historically looked to the Court to buttress executive authority over defense and foreign policy during times of divided government. But while Whittington supports his argument with case studies, there has yet to be a

systematic demonstration of majoritarian judicial review on behalf of the president or an absence of majoritarian judicial review on behalf of Congress.

**Research Design**

There are two distinct interpretations of majoritarian judicial review in presidential systems. One interpretation would focus the relationship between the judiciary and the legislature, while the other would focus on the relationship between the judiciary and the executive. These interpretations are not necessarily mutually exclusive; a constitutional court can attempt to advance the policy goals of both branches, although it cannot do both in every case. But the motivations for assisting either branch of government are largely unique and inspire separate hypotheses about judicial behavior, especially since these branches of government can have conflicted policy preferences. Thus, there are two distinct hypotheses to consider:

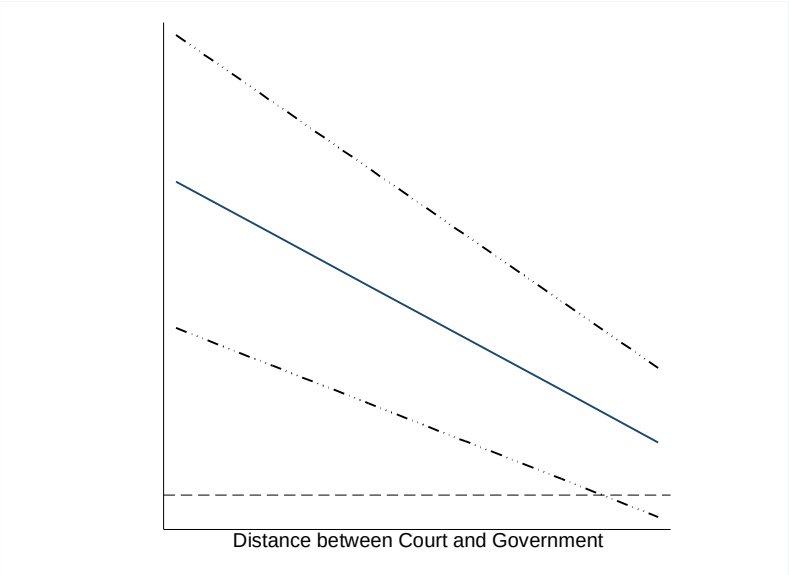
*Legislative-Focused Majoritarian Judicial Review*: There is a positive relationship between a constitutional court's probability of striking a statute and political circumstances in which the legislature prefers judicial review over direct policy action when the two branches have similar policy preferences. This relationship should decline as the distance between the preferences of the court and the legislature increase.

*Executive-Focused Majoritarian Judicial Review*: There is a positive relationship between a constitutional court's probability of striking a statute and political circumstances in which the executive prefers judicial review over direct policy action when the two branches have similar policy preferences. This relationship should decline as the distance between the preferences of the court and the executive increase.

As a conditional hypothesis, the most straightforward test would be to use multiplicative interactions and plot the conditional marginal effects (Brambor, Clark, and Golder 2006). An

example of a marginal effect plot that supports these hypotheses is presented in Figure 1. When the Court and elected officials have identical preferences – or when the distance between their preferences is minimized at zero – political circumstances that favor majoritarian judicial review increase the probability that a law is invalidated. But as preferences becoming increasing dissimilar – or the distance between the two grows – the marginal effect declines until it becomes statistically indistinguishable from zero.

**Figure 1: Example of Marginal Effect Plot Supportive of Hypotheses**




In order to test these two hypotheses, I need to analyze a set of constitutional court decisions in a presidential system with measures of both the distance between the court's ideological preferences and those of elected officials as well as measures of political contexts in which elected officials may rely upon majoritarian judicial review. U.S. Supreme Court decisions, which are made in the context of a presidential system of government, are ideal for at least two reasons. First, significant scholarly attention has been given to the ideal point measures of Supreme Court justices, Members of Congress, and the president in the same ideological space (Epstein, Martin, Segal, and Westerland 2007, Bailey 2007). Second, all of the majoritarian theories described were written with the Supreme Court in mind, as all of the

qualitative evidence supporting these claims comes from it; it thus provides the natural test case. For these reason, I analyze a subset of U.S. Supreme Court decisions from 1951-2011.

Rather than solely focusing on U.S. Supreme Court decisions, however, this analysis draws on a statute-centered approach of previous studies (Hall and Ura 2015, Harvey and Friedman 2006, 2009). The study of judicial review inevitably leads to studying court decisions. Solely studying them in presence of a discretionary docket, however, can lead to a selection bias as strategic interactions may happen at the certiorari stage. This can negatively impact our ability to make inferences, meaning we must go beyond simply looking at decisions and look at the statutes which the decisions are about. Thus, the unit of observation in this analysis are federal statutes. Of course, there are difficulties with looking at all federal statutes. Collection of the data is prohibitively costly and would thus limit analysis to a small time period. As a middle ground, I analyze a subset of statutes enacted between 1951 and 2011. The subset is whether a law is landmark legislation, as defined by Mayhew's "Sweep 1" process (2005) for a total of 357 laws.

To identify whether the Court decided on the constitutionality of a statute, I consult both the Supreme Court Database (Spaeth et al 2016) and the Judicial Review of Congress Database (Whittington 2019). Each database was searched for cases where the Court decided on the constitutionality of one of the important statutes. When using the Supreme Court Database, only cases in which the Court used judicial review on a federal statute are examined. All cases were hand-coded as to which statute a case focused on, even those cases that had specific references to statutes in their data.[3] Cases in which the Court was asked to decide on the constitutionality of a

[3] In both databases, there were errors when associating cases with statutes that were revealed during initial data examination that prompted the hand-coding.

statute but did not were excluded, including cases that were not justiciable and cases in which the Court avoided a constitutional question and instead answered a statutory question. This search resulted in 201 cases on important federal statutes, including 60 where the Court invalidated at least one provision of a statute.

In order to account for potential selection effects in the merits stage, as well as examine interesting relationships at the certiorari stage, the model used in this analysis is a Heckman probit model. The first stage is a model of the Court's decision to decide the constitutionality of an important statute in a given year. The second stage is a model of the Court's decision to invalidate, in part or in whole, the statute on constitutional grounds. This model allows us to control for potential sample selection bias at the merits stage, though it does not allow for us to disentangle what social processes are governing whether a statute is granted a constitutional challenge.[4] It also allows for a robustness check of findings at the decision stage: if the Court is more likely to invalidate laws in a majoritarian manner in certain political circumstances, it should also be more likely to hear challenges to those laws in the same set of circumstances. In order to both help with model convergence and control for duration dependence, I include cubic polynomials of years since the statute was enacted or the Court previously decided its constitutionality (Carter and Signorino 2010). Standard errors are clustered by statute as the Court often decides multiple cases on a given statute, leading to correlated observations (Box-Steffensmeier and Zorn 2002).

[4] The certiorari process is influenced by a number of actors, including litigants, lower court judges, political elites, and the justices themselves.

In 17 instances, there were two cases decided on a single statute in a single year. Given this unusual data structure for a duration model, two different approaches were used. The first approach, which is reported in the paper, simply included the case decided earliest in the year and dropped the latter case. This approach preserves the statute-year structure of the data while excluding cases in an arbitrary manner. As a drawback, however, it increases inefficiency because it discards observations and may even bias inferences if the date of the decision is somehow correlated with the dependent variable.

As an alternative to this approach, I devise a method for including all observations that purposefully breaks the statute-year observation set-up in the data. For every statute-year that saw the Court decide on the constitutionality of a statute, a duplicate observation was created that was coded as not being subject to a challenge and in which the years since the statute was enacted or previously decided upon was set to zero. For a statute-year with multiple cases, only one duplicated observation was created. These additional represent the time after the Court has decided on a case but before the end of the year.[5] Because they represent a subset of time rather than an entire year, they can accommodate more than one case being decided in a given year by simply inserting a later case in between earlier case and this duplicate observation. The results from this approach can be found in the replication file; the substantive inferences from the two approaches are virtually identical.

[5] Such an approach is not without precedent. For a given statute, the first year it enters the data is the year it was passed and signed into law. But statutes are not passed only at the beginning of the year; rather, they are created at many different points of time. These initial observations, then, do not represent a full year but randomly represent shorter periods of time.

In order to test my hypotheses, I construct four measures that capture the circumstances in which elected officials might desire majoritarian judicial review. Elected officials do not always take positions on cases before the Court, such as explicitly advocating for federal statutes to be upheld or invalidated using judicial review. Even when they do, such positions might be a result of position-taking rather than a reflection of sincere policy preferences (Fox and Stephenson 2011). Instead of directly measuring whether elected officials announce their desire for the Court to strike a statute, I instead measure circumstances in which one would expect elected officials to desire majoritarian judicial review. If the Court does engage in majoritarian judicial review, it should be more likely to strike laws in these circumstances when it shares policy preferences with another branch of government. The four measures I construct reflect the four mechanisms of majoritarian judicial review described earlier in the paper.

Rogers' (2001) model of informative judicial review posits that a legislature will defer to an ideologically similar court when an issue is of sufficient complexity. To code complexity, I adapt Vanberg's (2001) complexity measure to this analysis. It is a binary measure with any statute whose subject matter dealt with economic regulation, state-mandated social insurance, civil servant compensation, taxation, federal budget issues, or campaign finance is coded as hard and given a 0. All others are coded as easy and given a 1. While Vanberg originally meant for the measure to represent an issue that may have less political transparency, he agrees that these issues "tend to involve technical regulatory questions." These questions are the ones that policymakers may not understand the full impact a statute has when passing it, precisely the types of issues Rogers describes in his theory.

Graber (1993) argues that politically divisive issues should be ones that the president and Congress defer to Court to resolve the issue. This theory can be tested simultaneously with a

measure of the divisiveness of a party on an issue. This is calculated using the votes in the House of Representatives on the statute under review. First I calculated the proportion of individuals in a party who voted for the particular statute.[6] For legislative-focused majoritarian judicial review, this is the majority party in the House; for executive-focused judicial review, it is the president's party. For all voice votes, the value is coded as 1. In order to remove the distinction between unanimous support and unanimous opposition to a bill, I folded this measure. To do this, I subtracted 0.5 from this measure, so that the range was -0.5 to 0.5, and then took the absolute value of the result. Finally, I multiply the resulting number by 2 and subtract this value from 1. The new range of the measure is from 0 to 1, where a value of 1 indicates a perfect split in the party's vote on a statute and a value of 0 unanimity.[7]

**Equation 1**: $Fractiousness = 1 - 2 * |\frac{PartyYeas}{PartyVotes} - 0.5|$

Whittington (2007) also argues that when entrenched interests in the status quo prevent the passage of new legislation, elected officials may look to the Court to strike less desirable laws. The American system is notably marked by separation of powers, but there is variation in whether those powers are unified under a single political party. To account for a governing party's inability to pass a law, I include a dummy measure of in which a 1 indicates the partisan composition of the U.S. Congress and the president is divided and a 0 indicates unified.

[6] Data was gathered from Mayhew's (2005) original data files and updates for his book and supplemented with information from the Congressional Quarterly Almanac.

[7] Again, I calculate this for both the president's party and the majority party to accommodate for differences in opinion regarding whose preferences should matter.

Fox and Stephenson (2011) argue that majoritarian judicial review creates a moral hazard, where politicians pass constitutionally questionable laws to pander to the public with the expectation that the Court will strike the law down if necessary. There is not a currently defined measure of the constitutional soundness of a statute, at least one that can be scaled up quickly. The real world examples used for this theoretical story, however, always feature bills passed by a unanimous or near-unanimous legislature. Thus, I operationalize statutes as pandering to the public as a dummy variable, where a 1 indicates that a statute had 90% or greater support in both houses of Congress and signed by the president and 0 otherwise.

I also must construct a measure of the ideological similarity between the U.S. Supreme Court and elected officials. To do so, I employ Bailey's (2013) ideal point estimates and construct a measure of the absolute distance between the median justice on the Supreme Court's ideal point and the ideal point of the respective branch of government. This construction reflects the choice that elected officials have to make between direct policy action and relying on the Court to influence policy. For the executive branch, I simply use the president's ideal point. For the legislative branch, I use the average of the House median and the Senate median to reflect the institution's bicameral nature. In the replication materials, I also divide Congress into the House median and Senate median and rerun the analysis. The results are largely the same but are not shown because they are more complex than the ones contained here.

There is some debate about which elected officials' ideal points I should use: the officials in office at the time of a statute's passage or the officials in office at the time of the Court's decision. This decision is made on a case-by-case basis depending on the exact majoritarian mechanism tested. Uncertain policy environments make it difficult to forecast the future impact of legislation. For this mechanism, then, I use elected officials at the time of passage. Similarly,

the moral hazard to pass unconstitutional legislation in order to pander to voters is necessarily a conflict for those creating such legislation; I also use elected officials at the time of passage for this mechanism.[8] In contrast, divided government makes it difficult to fight entrenched interests on existing legislation. For this mechanism, I use elected officials at the time of the Court's decision. Finally, divisiveness within a party can reasonably affect both elected officials attempts at passing new legislation and repealing existing ones; both sets of ideal points seem plausible. I present the results for current elected officials in this manuscript while also mentioning the results for elected officials at the time of legislature passage, which can be found in the supplementary materials.

To test my hypotheses, I estimate four models using the four different mechanisms of majoritarian judicial review and jointly examining the effect of presidential and congressional preferences. More specifically, I create a multiplicative interaction of one of the majoritarian mechanisms and both the ideological distance between the Court and the president and the ideological distance between the Court and Congress. If the hypotheses are correct, we should expect a few outcomes. First, the constitutive term of the majoritarian mechanism should be positive and statistically significant. As a multiplicative interaction, this constitutive term can be roughly interpreted as the effect that these majoritarian mechanisms have when the Court and elected officials have identical policy preferences (or the distance between them is zero)

[8] When using the ideal points of the enacting officials in a model, I exclude those statutes subject to a presidential veto and subsequent override. Such cases cannot be examples of majoritarian judicial review, as the president is taking direct action rather than relying on the Court to achieve a policy outcome.

(Brambor, Clark, and Golder 2006). A positive effect reflects the first part of both hypotheses. Second, the constitutive term of the distance between the Court and elected officials should be positive and statistically significant. This term can be interpreted as the effect of ideological distance when there is no reason for the Court to strike down a law for elected officials. Finally, the interaction terms should be negative and statistically significant. As the ideological distance grows between the Court and elected officials, the effect of these majoritarian mechanisms should decline until it is statistically indistinguishable from zero.

In addition to my variables of interest, I also control for competing explanations of judicial review with a number of control variables. To control for the attitudinal model of U.S. Supreme Court decision-making (Segal and Spaeth 2002), I use a combination of Bailey's (2013) ideal point estimates of justices' ideology and the direction of the decision classification from the Supreme Court Database. If striking a statute was consistent with the median member of the court's ideological predisposition, then the observation is assigned the absolute value of the median member's ideal point. If not, then the observation is assigned the negative of the absolute value of the median member's ideal point. All cases where the ideological implications of a decision were unclear were coded as zero. This results in a measure of the court's attitudes towards the case where positive values indicate the court is ideologically inclined to striking and negative values indicate the court is ideologically opposed to striking.

The complexity of an issue area is also correlated with the salience of the issue area; less complex issues tend to be more salient ones (Vanberg 2001). This creates a complication in our models, as a particularly salient case is likely to result in the Court being protected from court-curbing and thus more likely to strike down a statute as unconstitutional. In order to control for the effect of salience, I include a measure of case salience created by Epstein and Segal's (2000)

measure of case salience. It is a binary measure where a 1 indicates that the decision was reported on the front page of the New York Times the day after the decision and 0 otherwise; a 1 is an indicator of case saliency.

**Analysis**

The results of my analysis are contained in Table 1. As one can see, the coefficients of interest are only sometimes correctly signed and almost never statistically significant in either stage of the model. At the invalidation stage, the only exception is in the model of complexity where the constitutive term on ideological distance between the Court and the president is positive and statistically significant. Increasing ideological distance between the Court and the president on easy to understand issues results in an increased probability of the Court striking down the statute. At the certiorari stage, the coefficients are also not statistically significant. While initially disappointing, the hypotheses are about marginal effects and not coefficients.

To aid in the interpretation of the multiplicative interactions as well as more fully test the hypotheses, I calculate the average marginal effect in the sample of each majoritarian mechanism in the invalidation stage across the empirical range of the ideological distance between the Court and elected officials. The legislative-focused results are in Figure 2. In order to be consistent with legislative-focused majoritarian judicial review, the marginal effect should be positive and statistically significant when the ideological distance between the Court and Congress is at zero and decline as the distance grows. This pattern is largely absent from the figure. The sole exception, however, is for divided government. When Congress and the Court have identical preferences, a transition to divided government increases the probability the Court will strike a statute by 25%. This effect quickly declines and becomes statistically indistinguishable from zero. This provides some evidence of legislative-focused majoritarian judicial review.

**Table 1: Legislative-Focused and Executive-Focused Majoritarian Judicial Review**

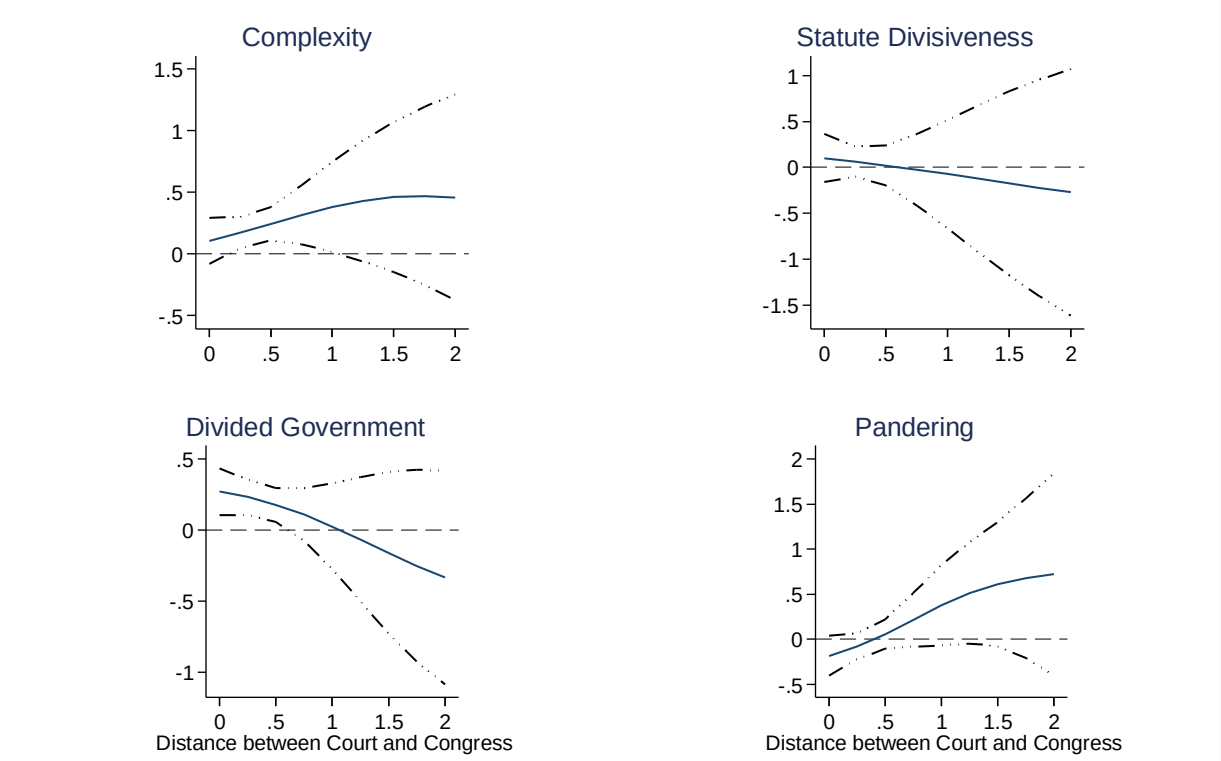
| Stage 2: Invalidations of important federal statutes | Complexity | Statute Divisiveness | Divided Government | Pandering |
|---|---|---|---|---|
| Majoritarian Mechanism - Congress[+] | 0.94 | 0.26 | 0.15 | -2.27 |
| | (0.82) | (0.52) | (0.78) | (0.88) |
| Distance to Congress | 0.68 | 0.60 | 1.08 | 0.60 |
| | (0.89) | (0.85) | (0.76) | (0.56) |
| Majoritarian Mechanism* | 0.59 | -0.56 | -0.96 | 2.04 |
| Distance to Congress | (1.10) | (1.32) | (0.85) | (1.33) |
| Majoritarian Mechanism - President | - | 0.12 | - | - |
| | | (0.99) | | |
| Distance to President | 0.95* | 0.72 | 0.02 | -0.12 |
| | (0.50) | (0.54) | (0.55) | (0.29) |
| Majoritarian Mechanism* | -0.64 | -0.33 | 1.06 | 1.89 |
| Distance to President | (0.66) | (1.27) | (0.69) | (0.76) |
| Court Ideology | 0.06 | 0.43* | 0.44* | 0.31 |
| | (0.31) | (0.29) | (0.24) | (0.27) |
| Salience | 0.76* | - | - | - |
| | (0.25) | | | |
| Constant | -1.77 | -0.77 | -0.96 | -0.94 |
| | (1.29) | (1.04) | (1.07) | (1.00) |
| Stage 1: Challenges to important federal statutes | | | | |
| Majoritarian Mechanism - Congress[+] | 0.16 | 0.27 | -0.03 | 0.17 |
| | (0.22) | (0.22) | (0.23) | (0.21) |
| Distance to Congress | -0.52 | -0.49 | -0.40 | -0.47 |
| | (0.15) | (0.20) | (0.21) | (0.18) |
| Majoritarian Mechanism* | 0.13 | 0.25 | 0.11 | -0.00 |
| Distance to Congress | (0.26) | (0.45) | (0.27) | (0.26) |
| Majoritarian Mechanism - President | - | 0.38 | - | - |
| | | (0.30) | | |
| Distance to President | 0.01 | 0.16 | -0.02 | 0.00 |
| | (0.14) | (0.14) | (0.15) | (0.10) |
| Majoritarian Mechanism* | -0.21 | -0.48 | 0.08 | -0.38 |
| Distance to President | (0.19) | (0.31) | (0.19) | (0.24) |
| Years without challenge | -0.05* | -0.06* | -0.06* | -0.05* |
| | (0.02) | (0.03) | (0.03) | (0.03) |
| Years without challenge$^2$ | 0.00 | 0.00 | 0.00 | 0.00 |
| | (0.00) | (0.00) | (0.00) | (0.00) |
| Years without challenge$^3$ | 0.00 | 0.00 | 0.00 | 0.00 |
| | (0.00) | (0.00) | (0.00) | (0.00) |
| Constant | -1.45* | 1.61* | -1.48* | -1.42* |
| | (0.18) | (0.16) | (0.22) | (0.16) |
| LR Test of Independent Equations | 0.19 | 0.28 | 0.21 | 0.14 |
| N Stage 1 | 10679 | 10997 | 10997 | 10679 |
| N Stage 2 | 166 | 184 | 184 | 166 |

*p<.05, one-tailed tests

[+] In most models, the majoritarian mechanism for both branches will be the same variable.

Standard errors clustered by statute

**Figure 2: Average Marginal Effect of Mechanisms of Majoritarian Judicial Review on the Probability of the Court Invalidating a Statute by the Ideological Distance between the Court and Congress.**



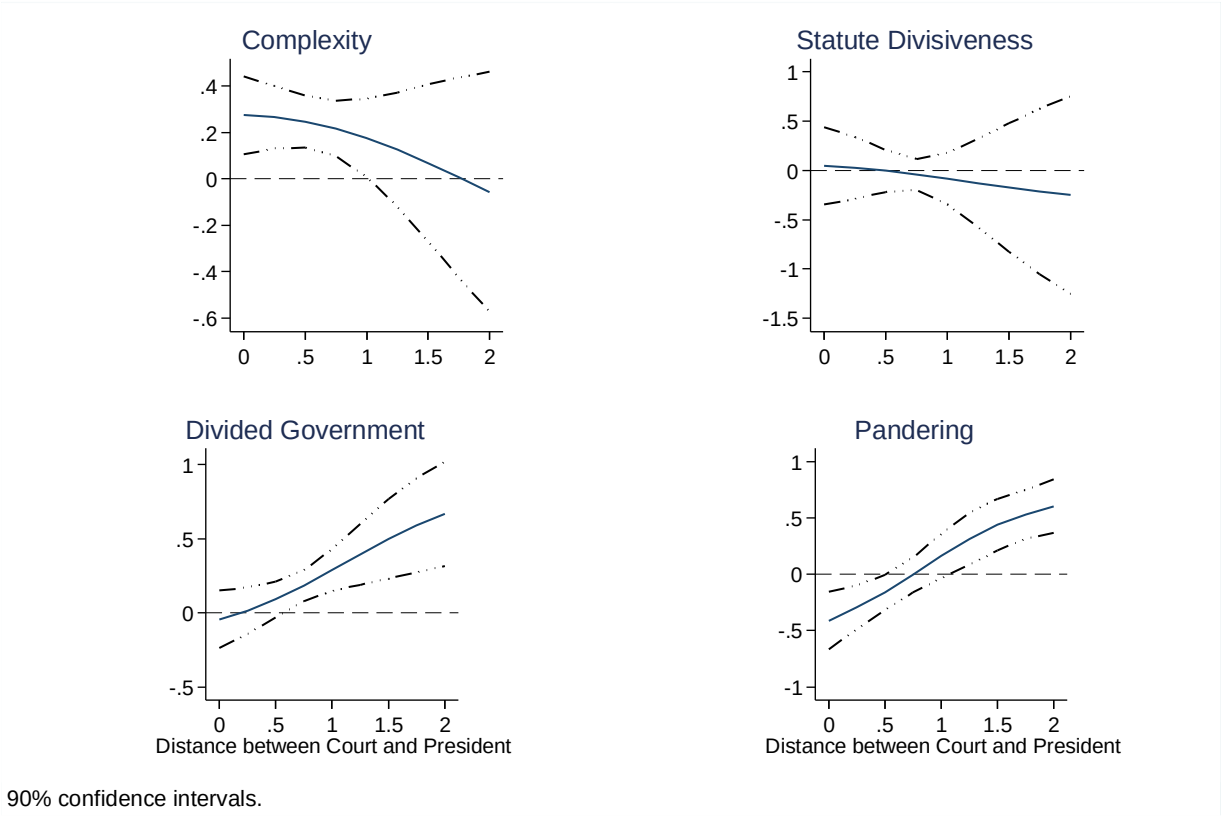

90% confidence intervals.

Turning now to the executive-focused results in Figure 3, we see strong evidence for the complexity model. When the Court and the president have identical ideology, the Court is 30% more likely to invalidate a complex statute than a noncomplex one. This marginal effect declines until it is statistically insignificant. Like the last models, we do not see support for the other three models.

In the divided government and pandering models, however, there are strong results in the opposite direction. The Court is more likely to strike statutes in circumstances that favor majoritarian judicial review only when its preferences are dissimilar from the president's. The divided government result, while unexpected, may have an intuitive explanation: if the Court favors Congress during times of divided government, then it likely disfavors the president. The

pandering result is more puzzling. While this result is viewed as a null from this paper's perspective, as it does not support either of the hypotheses, it might mask a different theoretical mechanism. Such a mechanism should be compelling for future scholars.

**Figure 3: Average Marginal Effect of Mechanisms of Majoritarian Judicial Review on the Probability of the Court Invalidating a Statute by the Ideological Distance between the Court and the president.**




90% confidence intervals.

Beyond the variables of interest, the models controls perform largely as expected. The coefficients of the Court's ideological disposition in the case are mostly positive and statistically significant. As the Court becomes more ideologically inclined to strike a law, the probability that the Court strikes a law under review increases. Additionally, the cubic polynomials are jointly statistically significant and the first term is independently statistically significant in all of the models. After a law is passed or previously challenged, a subsequent challenge is most likely in years immediately afterward and quickly declines to zero.

Prior to concluding, I note here the results concerning sample selection bias. None of the models have a Wald test of independent equations that are statistically significant at or near conventional levels. This gives little support to concerns about sample selection bias, a phenomena scholars have long feared to be the case but never directly reported (Harvey and Friedman 2006, 2009, Hall and Ura 2015). Of course, the failure to find such evidence does not necessarily indicate that sample selection bias is not a problem when studying judicial decisionmaking. Rather, such a claim could only be supported by repeated null findings along with appropriate model specifications. Scholars, then, should strive to report these tests of sample selection when using Heckman models.

**Discussion**

This study examines majoritarian judicial review in presidential systems, comparing and contrasting the incentives constitutional courts have to exercise judicial review to advance the policy goals of legislatures and presidents. I then test distinct predictions about majoritarian judicial review by analyzing U.S. Supreme Court decisions during the post-War period. I find evidence for both executive-focused and legislative-focused judicial review, though the stronger evidence is certainly for the presidency. The Court invalidates laws for the president in complex policy areas, where the Court might have greater expertise. The Court also invalidates laws for Congress during times of divided government, when pursuing legislative change might be impossible.

This study is not without limitations. There is concern about the generalizability of the findings. The research design focuses on statutes that are regarded as salient at the time of passage. Many are also considered landmark statutes in retrospective review. But the focus on important statutes excludes statutes with low political salience. In these cases, it is entirely

possible that the results would differ. Whittington (2007) argues that elected officials are more likely to support majoritarian judicial review in cases with low political salience. If true, then we would expect to find stronger evidence of majoritarian judicial review in statutes with low political salience. Conversely, the results presented here represent a conservative test of majoritarian judicial review, making the evidence all the more compelling.

Additionally, the analysis focuses exclusively on U.S. Supreme Court data. While this is done because existing research on majoritarian judicial review focuses on the Court, these theories may well describe judicial decision-making on subnational and international courts. Additionally, this paper suggests that majoritarian judicial review functions differently in presidential and parliamentary systems. Future research should investigate these theories function in other political contexts.

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