The Role of Preferences in Judicial Review

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Abstract: Scholars have long recognized that the ability for a constitutional court to exercise judicial review depends, at least in part, on the court's independence from the other branches of government. A number of mechanisms for securing independence have been identified, both within and outside of a government's structure. At present, the literature states that when a constitutional court is independent, then a constitutional court is more likely to invalidate a statute. But at the heart of these theories – and in the equilibria of many of their formal models – is a slightly different characterization. Rather than having a direct effect on the propensity to strike a law, judicial independence conditions the effect of a court's ideological leanings on striking down a law; when a court is independent, it will use its preferences in determining whether it wants to strike down a law. I test this prediction by analyzing the propensity of the U.S. Supreme Court to strike down important federal statutes over most of the post-War period. The resulting analysis supports this new characterization and helps bridge the gap between the attitudinal and strategic models of U.S. Supreme Court decision-making.

In *Gonzales v. Carhart* (2007), the U.S. Supreme Court upheld the Partial-Birth Abortion Act of 2003 as constitutional. Whatever the legal merits of the case, the 5-4 decision clearly split the justices on ideological grounds. Writing for the conservative members of the Court, Justice Kennedy's majority opinion remarked that "[t]he act expresses respect for the dignity of human life". Justice Ginsburg's dissent, joined by the liberal wing of the Court, called the decision "alarming" and lamented that it "reflects ancient notions of women's place in the family and under the Constitution — ideas that have long since been discredited."

For supporters of the attitudinal model of Supreme Court decisionmaking, the decision reflects the continuing independence of the Court. Supreme Court decisions are almost exclusively the result of the ideological predispositions of the sitting justices, the result of formal protections for the Court and its enduring popularity (Segal and Spaeth 2002). For other scholars of judicial independence, however, the case could easily be viewed a sign of weak judiciary. Judicial independence is most secure when the media environment is transparent, when political competition is high, and when the government is divided on an important issue; in these conditions, constitutional courts should strike down more laws (Vanberg 2001, 2005, Stephenson 2003, Rios-Figueroa 2007). This perfectly describes the environment in which the Court gave its decision: *Gonzales* was widely covered by the media at a time when the U.S. government was divided between a Republican, pro-life President Bush and a Democratic, pro-choice Congress, both of which were controlled by the other party in recent history. But rather than take this opportunity to exercise its independence, the Court instead decided to uphold the statute.

At first glance, *Gonzales* appears to be a puzzling case for many scholars of judicial independence. But a more nuanced understanding of the above theories shows that *Gonzales* is entirely consistent with strategic accounts of judicial independence and judicial review. In each

of the theoretical mechanisms described, the Court is protected from court-curbing attempts that could result from making a politically unpopular decision in *Gonzales*. But rather than encouraging the Court to strike down the law, this protection enables the Court to use its own preferences in determining the outcome of the case. Thus while the Court was empowered to make a wide range of decisions without significant retribution, including striking the statute altogether, it chose to uphold the statute because it was consistent with its preferences.

This paper argues for a more nuanced understanding of judicial independence that recognizes the moderating influence that protection for a constitutional court plays in the relationship between the ideological preferences of the court and the decisions that court makes. I begin by examining the current literature on judicial independence, focusing particularly on how theoretical mechanisms influence a constitutional court's decision to invalidate laws. I then highlight that the common yet underappreciated prediction in these theories that judicial independence does not simply encourage constitutional courts to strike down laws, but rather allows their own ideological predispositions to guide their decisions in constitutional cases. Finally, I support my claims by analyzing U.S. Supreme Court constitutional decisions on important federal statutes from 1949-2011. The analysis reveals that, rather than having an additive effect, the level of protection for courts conditions the effect of ideology on the Court's decision to strike down a statute.

Judicial Independence and its Role in Judicial Review

Judicial independence, broadly defined, is a political construction that allows judges to make decisions free from outside influence. As a latent concept, scholars have struggled to measure the concept in empirical research. Many operationalizations of judicial independence focus either on expert descriptions of courts (Stephenson 2003, Linzer and Staton 2015) or

indicators that would allow judges to make decisions free from influence, such as the real salary of judges or the budgets provided to courts (Hayo and Voight 2007, Ura and Wohlfarth 2010). But many others focus on judicial review, arguing that a constitutional court's invalidation of a statute, order, or other policy decision is indication of its independence from the other branches of government (Vanberg 2001, 2005, Rios-Figueroa 2007, Clark 2009, Carrubba et al 2015).

While many find the concept of judicial independence normatively appealing, independence is far from guaranteed even within a democracy. The U.S. Congress and president, for example, can influence the Supreme Court by ignoring or circumventing previous decisions (Epstein and Knight 1997, Meernik and Ignagni 1997, Dahl 1957), starving the Court of resources like support staff and salary increases (Hayo and Voight 2007; Ura and Wohlfarth 2010), limiting the amount of discretion the Court has in determining its docket (Harvey 2013), pursuing constitutional changes that would damage it, or even impeach the justices (Whittington 2007). The puzzle of why Congress and the president continue to tolerate judicial review of its own actions is particularly intriguing, and this question and others like it have motivated a large literature base explaining judicial independence in general and judicial review in particular.

Perhaps the most important driver of judicial independence is the popularity of a court. Elected officials are mindful of public opinion, with some going as far as to describe them as "single-minded re-election seekers" (Mayhew 1974). They are fearful of engaging in activities that would cause them to lose support, which could threaten their chances in the next election. Courts in modern democracies often have broad support among their publics (Gibson, Caldeira, and Baird 1998, Gibson, Caldiera, and Spence 2003, Gibson and Caldiera 2009). This support may cause voters to abandon officials that engage in court-curbing, which in turn insulates courts from the other branches of government who are fearful of losing their jobs. In turn, constitutional

courts are free to strike down laws regardless of government preferences (Stephenson 2004, Carruba 2009). In the U.S. context, this view is advocated by supporters of the attitudinal model of judicial decision-making, arguing that the "negative political consequences, electoral or otherwise, of limiting judicial independence far outweigh whatever short-run policy gains Congress might gain by reining in the Court," which allows the Court to make decisions solely based on the members' ideological preferences (Segal and Spaeth 2002, pg. 94). Clark (2009), however, argues that even the Supreme Court must be wary of declines in public opinion, invalidating fewer laws when the number of court-curbing bills increases. Additional comparative evidence shows that courts are vulnerable to punishment when support is low (Helmke 2010, Helmke and Staton 2011).

Vanberg (2001, 2005) argues that transparency in the political environment moderates the relationship between popularity and judicial review. Public attention to a particular case makes it more difficult for elected officials to circumvent rulings. If the public is not attentive, however, elected officials do not fear public backlash and are free to act as they wish even if the court is popular, a problem if a court's preferred decision in a case were to bring it in conflict with elected officials. Similarly, if the public is not attentive to a court more generally, executives and legislatures have no incentive to support judicial independence and instead will punish courts that make decisions out-of-step with their preferences. In a number of interviews, Vanberg (2005) shows that both German high court judges and members of parliament are keenly aware of the political nature of their relationship, with members of parliament adding that they are careful to avoid public scrutiny when attempting to evade court decisions. In quantitative analysis, he also shows that the German constitutional court is more likely to strike laws in salient cases, a finding supported by additional analysis in Mexico (Staton 2006, 2010). Cross-

national analysis also finds that countries with higher degrees of press freedom also have more independent judiciaries (Hayo and Voight 2007, Melton and Ginsburg 2014).

Formal protections for constitutional courts, or *de jure* judicial independence, also help secure judicial independence. Formal protections such as salary minimums and guaranteed term length remove tools that can be used to punish a court if it makes a politically unpopular decision. This in turn insulates a court from political pressure and secures judicial independence (Hayo and Voight 2007, Melton and Ginsburg 2014). Supporters of the attitudinal model argue that these formal protections help insulate the Court, allowing it to make decisions solely based on their preferences (Segal 1997). Cross-national evidence also finds that protected constitutional courts are more likely to strike down statutes in politically unfavorable circumstances (Carrubba et al 2015).

Political fragmentation can also provide the independence courts need to exercise judicial review. Modeling the U.S., many modern democracies have a separation-of-powers system in which the ability to govern is divided between multiple political entities, like a separately elected executive and legislature. When these various political bodies are not controlled by the same governing coalition, a government may be unable to retaliate against a court that invalidates its policies and a court is empowered to exercise judicial review (Rios-Figueroa 2007). Evidence supporting the political fragmentation hypothesis is mixed, with observational evidence indicating additive influence, moderating influence, and even no influence whatsoever (Rios-Figueroa 2007, Carruba 2015, Helmke 2010).

In some ways, political fragmentation can be seen as a more basic formulation of Marks' separation of powers model (2015).[1] Marks wanted to explain why Congress would tolerate a

[1] This paper went unpublished for many years, leading to an inconsistent timing of publications.

statutory Supreme Court decision inconsistent with its preferences. Later scholars extended the logic to constitutional decisions (Bergara, Richman, and Spiller 2003; Spiller and Gely 1992, Gely and Spiller 1990). If the pivotal actors in the policy-making process, such as the median member of the House, the median member of the Senate, and the president, all support a law under review, the Court will not try to invalidate it for fear of non-implementation and potential backlash. But if even a single pivotal member opposes the law, the court is free to strike it down so long as doing so would not result in a policy environment more extreme than the ideal policy of the dissenting pivotal member(s). While the model is well understood, there is considerable debate as to whether it has empirical support; proponents of the attitudinal model in particular argue for null findings (Segal 1997, Segal and Spaeth 2002, Owens 2011, Segal, Westerland, and Lindquist 2011, Spiller and Gely 1992, Bergara, Richman, and Spiller 2003, Hall and Ura 2015).

Insurance theory argues that judicial independence will be greater when political competition is high (Stephenson 2003). Competition creates uncertainty for government officials evaluating whether they will be able to keep power. Fearing extreme policies by the opposition, governments support judicial review as an insurance mechanism were they to lose power. This fear of the opposition encourages governments to tolerate judicial review of its own actions and, subsequently, empowers courts to strike laws as they see fit. Insurance theory has considerable empirical support, both qualitative and quantitative (see Vanberg 2015 for a review).

Protection as a Moderator of Preferences

On its own, judicial review is a useful but limited indicator of judicial independence. To be sure, a truly independent court must not be afraid to strike down the decisions of other actors. But despite its correlation with independence, it is by no means a perfect measure. Scholars have long noted that governments may desire for courts to strike down laws under certain conditions

(Rogers 2001, Whittington 2005). Striking down a law, therefore, is not a perfect indicator of an independent court, as it could just as easily be a court bowing to the pressure of another branch of government (Carrubba, Gabel, and Hankla 2008). In a similar vein, failing to strike a law is not necessarily an indication of a weak judiciary. As the introduction illustrates, just because the U.S. Supreme Court is independent does not mean it strikes down every law that comes before its docket; sometimes, they uphold laws that are consistent with the judges' preferences.

This last part is an underappreciated prediction made by a number of formal models of judicial review. Consider Mark's separation of powers model (2015). Many scholars interpret this model to mean that when the elected branches are supportive of a particular law, the Court should be less likely to strike it down (Segal, Westerland, and Lindquist 2011). Conversely, the Court should be more likely to strike down a law when the elected branches are not supportive of it or when the government is divided on the issue. I argue, however, that this characterization of the model omits an important relationship. When the government is opposed to a statute under review or the pivotal actors are in disagreement over it, the court is free to strike down the law as constitutional and move the status quo towards its ideological preferences. But if the law reflects the preferences of the median member of the Court, then the Court can also uphold the law as constitutional and force an opponent to repeal it using normal legislative means. The Court is not forced to strike laws, but rather can "vote its own preferences" (Bergara, Richman, and Spiller 2003).

A similar account can be given for Vanberg's model of political transparency (2001, 2005). A typical description of the model's equilibria states that when a court is sufficiently popular and operates in an environment of political transparency, it is more likely to invalidate legislation (Staton 2006). But this characterization misses an important part of the equilibria.

Assuming that the government supports a statute under review, a court with divergent preferences to the legislature will strike down a statute when both popularity and transparency are high; otherwise, that court will uphold a statute out of fear of court-curbing. A court with convergent preferences to legislature, however, will always uphold a statute under review regardless of whether it is protected or not. The importance of this theoretical prediction is most obvious when the previous predictions are phrased in light of the court's ideological preferences: when a court is sufficiently protected from attempts at court curbing by the other branches of government, the court is free to act upon its preferences. When those constraints are not high, however, a court will ignore its preferences and instead choose to uphold legislation.

I argue that none of the mechanisms of judicial independence discussed above imply simple direct effects on a constitutional court's decision to strike down a statute, as previous studies have assumed in their empirical models. Rather, these mechanisms condition the effect that the court's preferences have on striking a statute; the effect of the court's preferences should be strongest when the court is protected from court curbing and that effect should decline as the court becomes more vulnerable until the court's preferences have no effect at all. Such an observation is in line with larger theoretical views given by those advocating for the strategic model of judicial decision-making, but has yet to be tested empirically (Epstein and Knight 1997). This leads to a general hypothesis:

> Conditional Preference Hypothesis: The relationship between the ideological preferences of a constitutional court towards striking a statute and the probability that the court will strike down a statute is conditioned by the degree of independence that court has from other branches of government, with greater levels of independence leading to a more positive relationship.

This hypothesis stands in contrast to the literature on at least two accounts. While previous studies of judicial independence recognize that the level of protection of a court is influential in its decision to strike down laws, many of them do not explicitly state its role in conditioning the effect of court's preferences in judicial decision-making (Vanberg 2001, 2005, Staton 2006, 2010, Rios-Figueroa 2007, Carruba et al 2015, Stephenson 2003, Segal, Westerland, and Lindquist 2011). Likewise, their empirical models do not account for this conditioning relationship and instead test different measures of independence as if they had an additive effect on a court's decision to strike a law. This implied theoretical approach can be summarized as:

> Additive Independence Hypothesis: There is a positive relationship between the degree of independence of a constitutional court and the probability that the court will strike down a statute.

The attitudinal model of judicial decision-making, as applied to judicial review, makes the opposite omission. Proponents of the attitudinal model recognize the driving role that a court's ideological preferences have in its decision to exercise judicial review (Segal and Spaeth 2002, Segal 1997, Segal, Westerland, and Lindquist 2011). At least for the U.S. Supreme Court, however, they argue that this relationship is constant: because the Court is sufficiently protected, variance in the level of independence is inconsequential to the decision-making of the justices.[2] This leads to an additional hypothesis:

> Additive Preference Hypothesis: There is a positive relationship between the preferences of a constitutional court towards striking a statute and the probability that the court will strike down a statute.

[2] While Segal, Westerland, and Lindquist (2011) recognize a general notion of strategic interaction in their article, their inferences are based upon a model when the Court's support for a statute has a constant effect on its probability to strike.

Research Design

In order to test the above hypotheses, I need to analyze a set of constitutional court decisions with measures of both the court's preferences towards invalidating a particular statute and different mechanisms that secure judicial independence. The U.S. Supreme Court provides an excellent test case because of the wealth of research on all of these measures over a long period of time, with a particular emphasis on the measures of Supreme Court justice ideal points as estimates of justices' ideological preferences (Segal and Cover 1989, Martin and Quinn 2002, Epstein, Martin, Segal, and Westerland 2007, Bailey 2008). While comparative research efforts are growing in their ability to collect case data across countries, comparable ideal point estimates for courts or their judges are still a long way off.

Additionally, the case of the U.S. Supreme Court allows for a rigorous examination of the attitudinal model of judicial decision-making. While the attitudinal model could in theory be applied to all courts, its proponents developed it as an explanation of U.S. Supreme Court decision-making because of its appeared level of protection from court-curbing throughout the post-War era. Attempting to find evidence of strategic decision-making in this context would be a difficult test of my theory and make evidence that supports my theory all the more compelling. For this reason, I analyze a subset of U.S. Supreme Court decisions from 1949-2011.

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 2009, 2006). 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 (Friedman 2006). 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 would be a monumental task and would thus limit analysis to a small time period. As a middle ground, I analyze a subset of statutes enacted between 1949 and 2011. The subset is whether a law is landmark legislation, as defined by Mayhew's "Sweep 1" process (2005).[3] This results in 368 important laws, with writs granted 147 times and invalidations by the Court 52 times.

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 hear a challenge 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 entangle what social processes are governing whether a statute is granted a constitutional challenge.[4] In order to both help with model convergence and control for duration dependence, I include cubic polynomials of years without invalidation in the first stage.

The crucial independent variable in this analysis is the court's preferences towards a law. To measure the court's ideological preferences, 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

[3] I would like to thank Joseph Ura and Matthew Hall for sharing the data that would serve as the groundwork for this project.
[4] The certiorari process is influenced by a number of actors, including litigants, lower court judges, political elites, and the justices themselves.

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 use of the direction of the decision variable from the Supreme Court Database makes for a particularly compelling test of my theory. Harvey (2013) argues that the strong evidence supporting the attitudinal model in the U.S. Supreme Court can be explained, at least in part, by confirmation bias in the coding of the variable. If this is true, my incorporation of this variable biases my subsequent analysis in favor of finding support for the attitudinal model and away from my own theory. Finding evidence that supports the conditional protection hypothesis in the face of such a conservative test, then, would provide compelling support for my theory.

Aside from the court's ideological predispositions, I also need measures of the various mechanisms that secure judicial independence.[5] I include two measures of the Court's popularity in the analysis. First, I include the General Social Survey's measure of confidence in the people running the Supreme Court. First measured in 1973, the item has regularly appeared on the survey.[6] My measure is the percentage of people who indicated that they have a great deal of confidence in the people running the Court in the previous year. Second, Clark (2009) argues that court-curbing bills introduced in Congress is a function of public discontent for the Court. I adopt his measure of the number of court-curbing bills introduced in Congress in the previous year; the data begins in 1973.

[5] One mechanisms of judicial independence could not be operationalized in this dataset. The de jure protections afforded to members of the Court has remained stable over the Post-War era and is thus not included in this analysis.
[6] The measure, however, has not been asked annually. In years where the data is missing, it is imputed using the average of the two most proximate years.

Vanberg (2001, 2005) has a number of measures of political transparency that should protect politically popular courts like the U.S. Supreme Court.[7] An easily understood policy area should be more transparent than more complex ones. To code statute easiness, 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. Additionally, Vanberg argues that whether a case has oral arguments is a good indicator of transparency, as they are more likely to get public scrutiny. While this measure may work in the German context, it is less helpful in America where most Supreme Court cases have oral arguments. Instead, I adopt Epstein and Segal's (2000) measure of case saliency as another measure of transparency. It is a binary measure where a 1 indicates that the decision was reported on the front page of the New York Times and 0 otherwise.

The political fragmentation literature argues that when political power is divided among opposing entities, courts should be protected from court-curbing. 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. In order to test my theory on political fragmentation, I adopt 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.

In order to test Marks' separation of powers model, I need measures that determine whether the current government supports or opposes a given statute under review. I adopt a

[7] One measure Vanberg uses, but is not included in this analysis, is the level of brief participation for a case. Ongoing data collection efforts prevent its inclusion, but it should be noted that this variable is not statistically significant in the original analysis.

measure in the literature that estimates these preferences (Segal, Westerland, and Lindquist 2011, Hall and Ura 2015). I collect the original roll call votes for each public law from VoteView (Lewis et al 2017). Using logit, I then regress these roll call votes on the Common Space Score of Members of Congress and the president (Poole 1998). In order to be consistent with other measures of independence in the study, I run a logit on a vote to oppose the law rather than a vote to support the law. Using the resulting model coefficients, I can then predict the probability that a future Member of Congress opposes a law using their Common Space Score. Note that for those laws passed unanimously or via voice votes in both chambers, there is no variation to run regression models. In these instances, the predicted opposition for all future officials is 0.

To create my measures, I then employ Krehbiel's (1998) notion of pivotal political actors. In American policy-making, the passage of legislation is based upon the support of pivotal actors, such as the median member of each chamber and the president. If a pivotal member opposes a piece of legislation, it cannot be passed; therefore, the measures created are equal to the highest level of opposition for a pivotal member of Congress. I adopt three different pivot models: the floor median model, the Senate filibuster model, and the party gatekeeping model. Each of these models are outlined in Hall and Ura (2015).

Insurance theory argues that political competition protects the court because governments fear extreme legislation from the opposition once they are in power. Unfortunately, it is difficult to test this theory directly when only examining a single political system like the U.S., especially since it has been characterized by competitive elections since the post-War era. By further examining theory, however, an indirect test of this theory is realized even in a single institution. Insurance theory states that fear of opposition legislation constrains current governments to support judicial review. This implies that the current government and opposition government

disagree on a particular policy. But when the government party and opposition party agree on policy matters, however, insurance theory buckles because being supplanted from power will not result in policy change. Thus, the current government should be constrained to respect judicial review in partisan matters but not in bipartisan ones. I thus include a dummy measure of whether a statute is partisan or not, defined as whether the majority of one party voted against the majority of the other party when the statute was passed. A partisan statute is coded as 1.

A growing body of literature shows that court decisions are also influenced by public opinion. To control for this in my analysis, I use a combination of Stimson's (2004) public mood and the direction of the decision from the Supreme Court database. First, I mean-center a year lag of public mood for the time period of my analysis so that positive values indicate a liberal public in that time-period and negative values indicate a conservative public. Then, as with the measure of the court's attitude, I assign an observation the absolute value of the transformed public mood if striking is aligned with the public's ideological predisposition. I assign the negative of the absolute value of the transformed public mood if striking is against the public's ideological interests. Positive values mean the public wants a strike and negative values mean the public does not.

Analysis

The analysis proceeds in two parts. The analysis is first conducted with a simple additive model in which mechanisms that secure judicial independence are included but not interacted with court ideology. The results of this analysis are contained in Tables 1 and 2. The public's ideology is a relatively stable and appreciable predictor of Supreme Court decisions. Additionally, some measures of protection are statistically significant in the first stage of the equation, indicating that they have a net-effect on the certiorari process. Specifically, there is a

robust replication that the level of support for a statute in Congress is negatively related to probability that the Court will grant certiorari to a constitutional challenge to that statute (Hall and Ura 2015). Interesting to note is that complexity also reaches statistical significance, but with an unexpected sign: the Court is less likely to hear challenges to complex statutes. Also worth noting is that the likelihood-ratio test of independent equations are all null, indicating that the sample selection concerns championed by Friedman (2006) are not problematic in this model. Whether or not this is true of all U.S. Supreme Court decisions, however, cannot be concluded.

Importantly, court ideology is a robust and relatively stable predictor of whether the court will strike down a statute in the models: a one-unit increase in the court's ideological predisposition to striking down a statute results in roughly 20% increase in the probability of striking in the sample. To help illustrate this example, Justice O'Connor retired in 2005 as the median justice on the Court. Her replacement, Justice Alito, was decidedly more conservative: on the Bailey ideal point scale, his first ideal point measure in 2006 was roughly one unit larger than O'Connor's in 2005. Thus if Alito had become the median justice after replacing O'Connor, the Court would be 20% more likely to strike down liberal statutes and uphold conservative statutes. This result supports the additive preference hypothesis.

[Table 1 and 2 About Here]

In contrast with court ideology, however, the protection-based variables are not statistically significant with the exception of case salience. In line with the expectations of the additive protection hypothesis, case salience strongly predicts striking: in the sample, the discrete change of moving nonsalient to salient results in a roughly 30% increase in the probability of striking in the sample. The lack of statistical significance among the Court's popularity, statute easiness, political fragmentation, government support for a statute, and the partisan nature of the

statutes, however, cast doubt on the additive protection hypothesis. In addition, the results for statute easiness and political fragmentation are failures to replicate some of the findings of Vanberg (2001) and Rios-Figueroa (2007). Were the analysis to end here, one would question whether the transparency and political fragmentation, for whatever reason, do not hold up as well in American context or if there is a problem with previous or current analysis.

The second stage of analysis estimates the same models as the first, but this time including an interaction term between court ideology and the protection variables. The results are presented in Tables 3 and 4. As in the previous models, public ideology remains a small but significant predictor of striking down a statute, while the effect of protection variables in the certiorari process is relatively unchanged. Sample selection concerns also do not appear to be a problem, as indicated by the likelihood ratio tests. Unlike in the previous models, the coefficient for court ideology has wide variation with the coefficient almost doubling in the political fragmentation model to becoming statistically insignificant in the transparency and separation of powers models. The latter result is consistent with the conditional protection hypothesis. In a multiplicative interaction, the coefficient of a constitutive term is (a transformation of) the marginal effect of a variable when the other variable in the interaction is equal to zero (Brambor, Clark, and Golder 2006). With the exception of the model using court-curbing bills, a zero indicates that the Court is not protected. Thus, the lack of significance in these models indicates that court ideology does not influence the court's decision to strike down a law when the political environment is not transparent.

[Table 3 and 4 About Here]

To aid in interpreting both the probit model and the interaction terms, Tables 5 and 6 present the average marginal effect of court ideology at the minimum and maximum levels of

independence in the data (Hanmer and Kalkan 2013). For both measures of transparency, the results support the conditional protection hypothesis. When the court is unprotected from court-curbing, court ideology does not affect the court's decision to strike a statute. When the court is protected, however, a one-unit increase in court's ideological predisposition to strike translates into roughly a 40% increase in the probability of striking in the sample. A similar story can be told of the government's opposition to a statute. When all pivotal policymaking members support a statute, court ideology does not affect the court's decision to strike a statute. But when a single pivotal member is opposed to a statute, a one-unit increase in the court's ideological predisposition to strike translates into roughly a 70% increase in the probability of striking in the sample. The partisan vote model also provides modest support for the conditional protection hypothesis. While court ideology predicts the court's decision to strike a statute for both bipartisan and partisan statutes, the effect doubles for partisan statutes: the average marginal effect for a one-unit increase in the court's ideological predisposition to strike results in a 25% increase in striking for bipartisan statutes in the sample, but a 50% increase in the probability of striking for partisan statutes. Taken together, these results present strong support for the conditional protection hypothesis and against the additive protection and additive preference hypotheses.

[Table 5 and 6 About Here]

The popularity models, however, do not support the conditional protection hypotheses. Neither of the models' relevant coefficients are statistically significant, and the interaction terms are in the opposite direction as would be expected by theory. The marginal effects are also not statistically significant. This indicates that the Court does not consider its own popularity when making a decision, an unsurprising result given the enduring legitimacy of the Supreme Court

over the post-War era (Gibson, Caldeira, and Baird 1998, Gibson, Caldiera, and Spence 2003, Gibson and Caldiera 2009).

The political fragmentation model also does not support the conditional protection hypothesis. The average marginal effect is positive and statistically significant in unified government, when the court is unprotected, but not statistically significant in divided government, when the court is protected. Because this goes against the direction of the conditional protection hypothesis, this is treated as a null result. This is likely a function of the assumption that divided governments cannot agree to curb a court, which while not regularly observed in the data is nonetheless a possibility.

Discussion

This paper provides evidence that, rather than encouraging a court to strike down a statute or other government policy, higher degrees of independence for a constitutional court enables it to make decisions based on its own ideological predispositions, whether those predispositions support striking a policy or upholding it. This is consistent with prior informal discussion and formal models of these protection-based theories, but represents an improvement in both the clarity of the presentation of these theories and attempts in empirically modelling them.

This analysis makes three notable contributions in the literature. First, it helps resolve a debate about the validity of Marks' separation of powers model. Segal and his coauthors have consistently found that the separation of powers model has no explanatory power on U.S. Supreme Court constitutional decisions (Segal and Spaeth 2002, Segal, Westerland, and Lindquist 2011, see also Hall and Ura 2015). But this seems to be due to empirical tests that restrict the government's preferences over statutes under review to having a direct effect on the

decision to strike a law. When the government's preferences are allowed to condition the effects of the Court's ideological preferences, as the theory implies, then there are strong results consistent with both the theory and other research (Bergara, Richman, and Spiller 2003).

Second, it provides consistent evidence for strategic models of judicial decision-making (Epstein and Knight 1997). Oftentimes, proponents of the attitudinal model have used the consistent findings of a strong, positive relationship between the ideological preferences of the Court and the ideological direction of U.S. Supreme Court decisions as a means of discrediting strategic accounts of U.S. Supreme Court behavior (Segal and Spaeth 2002). But these consistent results seem to be, at least in part, the result of not conditioning that relationship on other relevant factors. Surprisingly, its proponents credit these findings to the enduring popularity of the Court and the formal protections afforded it in the Constitution, both of which are noted as parts of strategic accounts of judicial behavior. If either of these factors had been missing, it is reasonable to believe these findings would disappear. This is consistent with the historical record, which reveals that the Court was much more constrained in its decision-making in the early years of the U.S. when its popularity was lower (Kramer 2004).

Third, it provides additional insight into the nature of political fragmentation. The analysis does not provide evidence that political fragmentation influences the Supreme Court's decision to strike a law. It does, however, provide evidence that government opposition to a statute does influence the Court's decision to strike. These two arguments are similar but have important differences. Implicit within the theory of political fragmentation is the idea that different political parties disagree and should be unable to cooperate to punish a constitutional court. While it is true in the U.S. that the parties have, to varying degrees, always had marked differences in ideology, this does not preclude their ability to agree on some issues and work

together. Indeed, the majority of public laws considered in my empirical examination were passed by strong, bipartisan majorities, which is reflected in the measures of government support for a statute. Political fragmentation does not seem to be either a necessary or a sufficient condition for a court to be protected. It is not necessary in that a party may disagree internally about an issue when it has full control of government, like the Democrats were on race-based issues in the civil rights era, and it is not sufficient in that two opposing parties may agree on a particular issue and punish a constitutional court if it invalidates statutes on that issue.

This study is not without limitations. As mentioned in a footnote, not all of the mechanisms for judicial independence are tested. The de jure protection afforded to members of the Court has remained relatively stable over the Post-War era. This lack of variation prevents analysis of these theories in light of the arguments in this paper. Comparative analysis must be conducted in order to fully evaluate these theories.

There is also a concern about the generalizability of the findings. The research design focuses on statutes that are regarded as important at the time of passage. For the most part, many are also considered landmark statutes in retrospective review. But the focus on important statutes excludes statutes with moderate to minor importance. In these cases, it's entirely possible that the additive preference hypothesis would hold because a government simply would not care about whether a minor statute was struck down. This would be consistent with some models of judicial independence, in which the cost of retaliating against a constitutional court is greater than the benefit received from reenacting a statute (Vanberg 2005). Still, the comparison of statutes with varying degrees of importance would be an interesting avenue for future research.

Additional research should also be conducted on political competition and judicial review. This paper suggests a more nuanced understanding of insurance theory: political

competition empowers judicial review of partisan statutes but not bipartisan ones. A crucial assumption made in insurance theory is that political parties have opposing policy desires. While true in many policy areas, it is not difficult to imagine values opposing political parties in democracies might share: democracy, capitalism, a strong national defense, etc. In these areas, governments may be less inclined to tolerate judicial review of its actions. Analysis of the American context supports this claim. However, additional comparative analysis over a wider range of political contexts would provide more robust support for this argument.

Tables

Table 1: Additive Models of Judicial Review

Stage 2: Invalidations of important federal statutes that are challenged	Court Popularity	Court-Curbing Bills	Statute Easiness	Case Salience
Court Ideology	-0.10	-0.09	0.64*	0.61*
	(0.39)	(0.39)	(0.29)	(0.29)
Independence	-1.34	0.00	-0.20	0.73**
	(4.38)	(0.01)	(0.25)	(0.26)
Public Ideology	0.05*	0.05*	0.06*	0.05*
	(0.03)	(0.03)	(0.03)	(0.03)
Constant	1.11	0.68	0.80	0.37
	(1.50)	(1.15)	(1.08)	(1.16)
Stage 1: Challenges to important federal statutes				
Protection	-0.73	-0.00	-0.15*	-
	(1.32)	(0.00)	(0.07)	
Years without invalidation	-0.02	-0.02	-0.03	-0.03
	(0.03)	(0.03)	(0.02)	(0.02)
Years without invalidation^2	-0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)
Years without invalidation^3	-0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)
Constant	-1.63**	-1.81**	-1.80**	-1.87**
	(0.42)	(0.11)	(0.09)	(0.08)
LR Test of Independent Equations	0.59	0.66	0.59	0.76
N Stage 1	10406	10406	12051	12051
N Stage 2	116	116	146	146

*p<.05, **p<.01, one-tailed tests
Standard Errors are in Parentheses

Table 2: Additive Models of Judicial Review, Continued

Stage 2: Invalidations of important federal statutes that are challenged	Floor Median Model	Senate Filibuster Model	Party Gatekeeping Model	Political Fragmentation	Partisan Statute
Court Ideology	0.62*	0.62*	0.62*	0.66**	0.63*
	(0.29)	(0.29)	(0.29)	(0.30)	(0.30)
Independence	-0.12	-0.15	0.07	0.22	0.09
	(0.45)	(0.43)	(0.43)	(0.25)	(0.25)
Public Ideology	0.06*	0.06*	0.06*	0.06*	0.06*
	(0.03)	(0.03)	(0.03)	(0.03)	(0.03)
Constant	0.91	0.97	0.76	0.65	0.84
	(0.93)	(1.05)	(1.14)	(1.16)	(1.07)
Stage 1: Challenges to important federal statutes					

Independence	0.26*	0.22*	0.24*	0.08	-0.10
	(0.13)	(0.12)	(0.12)	(0.07)	(0.08)
Years without invalidation	-0.03	-0.03	-0.03	-0.03	-0.03
	(0.02)	(0.02)	(0.02)	(0.02)	(0.02)
Years without invalidation^2	0.00	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)	(0.00)
Years without invalidation^3	0.00	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)	(0.00)
Constant	-1.91**	-1.91**	-1.93**	-1.92**	-1.84**
	(0.09)	(0.09)	(0.11)	(0.09)	(0.08)
LR Test of Independent Equations	0.97	1.00	0.75	0.75	0.82
N Stage 1	11972	11972	11972	12051	12051
N Stage 2	143	143	143	146	146

*p<.05, **p<.01, one-tailed tests
Standard Errors are in Parentheses

Table 3: Multiplicative Models of Judicial Review

Stage 2: Invalidations of important federal statutes that are challenged	Court Popularity	Court-Curbing Bills	Statute Easiness	Case Salience
Court Ideology	6.16	-0.54	0.15	-0.01
	(7.02)	(0.61)	(0.40)	(0.43)
Independence	-2.65	0.01	-0.23	0.76**
	(4.60)	(0.02)	(0.26)	(0.26)
Court Ideology*Independence	-19.84	0.07	0.96	1.04*
	(22.18)	(0.08)	(0.61)	(0.61)
Public Ideology	0.04	0.05*	0.07**	0.05*
	(0.03)	(0.03)	(0.03)	(0.03)
Constant	1.57	0.56	0.62	0.55
	(1.51)	(1.26)	(1.18)	(1.15)
Stage 1: Challenges to important federal statutes				
Independence	-0.65	0.00	-0.15*	-
	(1.32)	(0.00)	(0.07)	
Years without invalidation	-0.02	-0.02	-0.03	-0.03
	(0.03)	(0.03)	(0.02)	(0.02)
Years without invalidation^2	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)
Years without invalidation^3	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)
Constant	-1.90**	-1.83**	-1.80**	-1.88**
	(0.44)	(0.11)	(0.09)	(0.08)
LR Test of Independent Equations	0.45	0.25	0.37	0.83
N Stage 1	10406	10406	12051	12051
N Stage 2	116	116	146	146

*p<.05, **p<.01, one-tailed tests
Standard Errors are in Parentheses

Table 4: Multiplicative Models of Judicial Review, Continued

Stage 2: Invalidations of important federal statutes that are challenged	Floor Median Model	Senate Filibuster Model	Party Gatekeeping Model	Political Fragmentation	Partisan Vote
Court Ideology	-0.02	-0.25	-0.55	1.38	0.48
	(0.46)	(0.48)	(0.51)	(0.55)	(0.31)
Protection	0.04	0.06	0.33	0.26	0.19
	(0.49)	(0.48)	(0.48)	(0.27)	(0.27)
Court Ideology*Independence	2.17	2.70*	3.27**	-1.32	0.94
	(1.41)	(1.45)	(1.40)	(0.66)	(0.78)
Public Ideology	0.06*	0.06*	0.06*	0.05*	0.06*
	(0.03)	(0.03)	(0.03)	(0.03)	(0.03)

Constant	0.92	0.93	0.77	0.55	0.78
	(1.05)	(1.07)	(1.14)	(1.23)	(1.12)
Stage 1: Challenges to important federal statutes					
Independence	0.26*	0.22*	0.24*	0.08	-0.10
	(0.13)	(0.13)	(0.12)	(0.07)	(0.08)
Years without invalidation	-0.03	-0.03	-0.03	-0.03	-0.03
	(0.02)	(0.02)	(0.02)	(0.02)	(0.02)
Years without invalidation^2	0.00	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)	(0.00)
Years without invalidation^3	0.00	0.00	0.00	0.00	0.00
	(0.00)	(0.00)	(0.00)	(0.00)	(0.00)
Constant	-1.91**	-1.91**	-1.93**	-1.92**	-1.84**
	(0.09)	(0.09)	(0.09)	(0.09)	(0.08)
LR Test of Independent Equations	1.02	1.01	0.89	0.65	0.70
N Stage 1	11972	11972	11972	12051	12051
N Stage 2	143	143	143	146	146

*p<.05, **p<.01, one-tailed tests
Standard Errors are in Parentheses

Table 5: Average Marginal Effect of Court Ideology of Table 3, at Maximum and Minimum Levels of Independence in the data

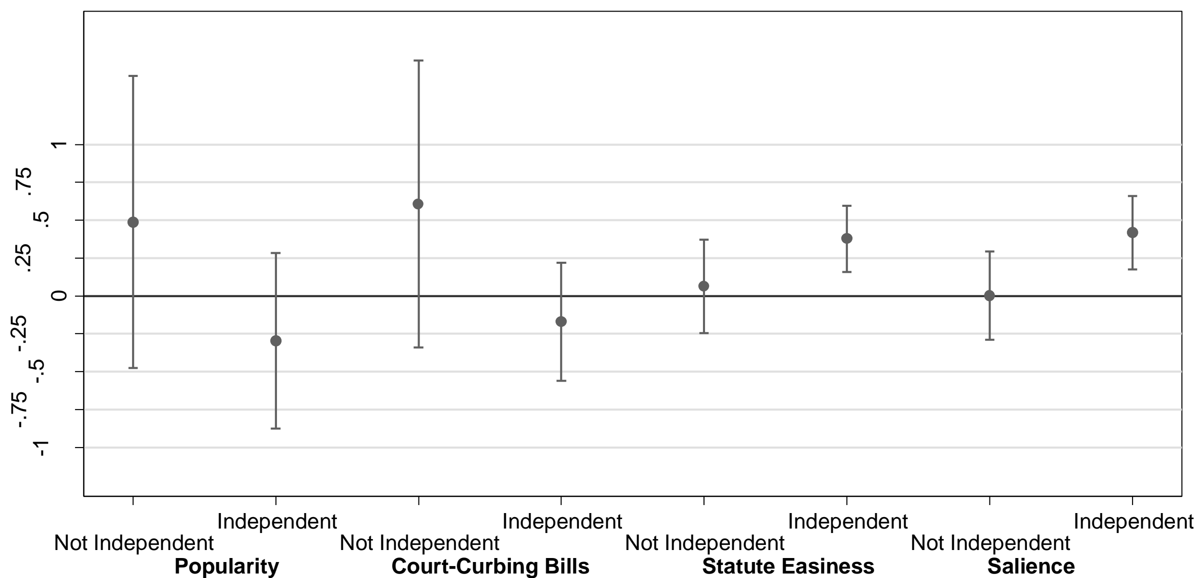

Table 6: Average Marginal Effect of Court Ideology of Table 4, at Maximum and Minimum Levels of Independence in the data

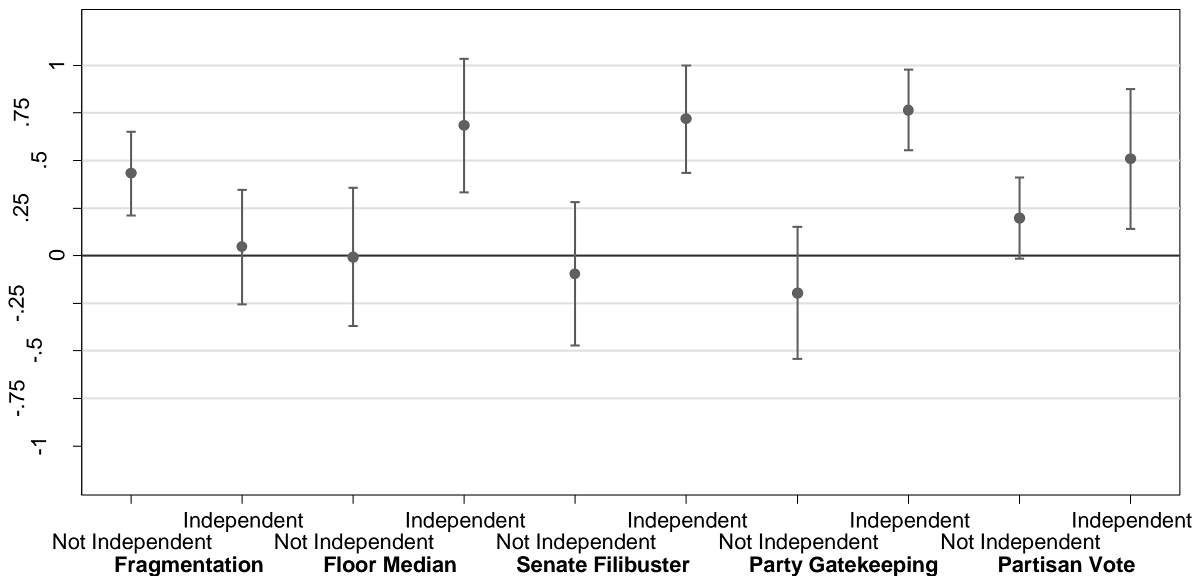

Table 5: Average Marginal Effect of Court Ideology of Table 3

	Court Popularity	Court-Curbing Bills	Statute Easiness	Case Salience
Dependent	0.46	0.68	0.06	-0.00
	(0.51)	(0.14)	(0.16)	(0.15)
Independent	-0.29	0.19	0.36**	0.39**
	(0.30)	(0.12)	(0.11)	(0.13)

Table 6: Average Marginal Effect of Court Ideology of Table 4

	Floor Median Model	Senate Filibuster Model	Party Gatekeeping Model	Political Fragmentation	Partisan Vote
Dependent	-0.01	-0.10	-0.21	0.43**	0.18*
	(0.18)	(0.19)	(0.17)	(0.11)	(0.11)
Independent	0.66**	0.70**	0.75**	0.02	0.50**
	(0.19)	(0.15)	(0.11)	(0.15)	(0.19)

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