Avoiding Overrides: Judicial Review Following Congressional Court-Curbing

Lisa Hager, PhD
Assistant Professor of Political Science
South Dakota State University
Department of History, Political Science, Philosophy, and Religion
West Hall 216
Brookings, SD 57007
Email: lisa.hager@sdstate.edu

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Abstract

Court-curbing legislation, or bills that seek to limit judicial power, is not considered a threat to how the Supreme Court is structured and functions because Congress rarely enacts the bills. Yet, the existing literature demonstrates that following the introduction of Court-curbing bills the Court invalidates fewer federal laws in an effort to protect its institutional legitimacy. As such, an important and underexplored research question in the study of Court-Congress relations is whether Supreme Court responses to congressional Court-curbing legislation can be explained by ideological policy preferences and attempts to avoid legislative reversals of judicial decisions. This study draws on two key conclusions from descriptive and case study analyses: (1) the content of Court-curbing proposals differs based on whether Congress is attacking the Court’s institutional legitimacy or seeking to manipulate the ideological content of judicial decisions; and, (2) Court-curbing legislation is considered a fairly quick and efficient way to express ideological disagreement with judicial decisions as compared to the more arduous process of proposing and pursuing override legislation. Taken collectively, these findings suggest that Congress also uses Court-curbing bills to signal legislative policy preferences and manipulate judicial decision making before reversing judicial decisions. Thus, this research is juxtaposed against prior studies that treat all Court-curbing proposals similarly and do not explain when the Court responds to these bills to avoid legislative overrides.

Accordingly, this study analyzes Supreme Court decision making following the introduction of Court-curbing legislation by Congress during 1975-2008 (94th-110th Congresses). Using Poisson regression analysis, this study first tests if Court-curbing legislation, ideological disagreement with Congress, and institutional conditions signaling the legislature’s ability to override decisions—specifically legislative gridlock— influence how many federal laws are invalidated by the Court. It is likely that these factors impact the Court’s willingness to strike down federal laws if the justices anticipate congressional overrides following the decisions. Second, the model is re-estimated to determine how the likelihood of a reversal influences the Court’s response to Court-curbing legislation. Specifically, when these bills are introduced during periods of ideological divergence with Congress and low levels of legislative gridlock, the Court is expected to be most responsive by striking down fewer federal laws. The study also explores how these results differ when examining the two types of Court-curbing bills: those that attempt to change the ideological content of judicial decisions and those that attack the Court’s institutional legitimacy. Here, the Court should declare fewer laws unconstitutional to protect its policy preferences and avoid overrides after Congress introduces Court-curbing legislation that seeks to influence case outcomes. In contrast, alternative explanations for changes in judicial decision making following the sponsorship of Court-curbing legislation, namely waning public support, should increase the Court’s responsiveness to bills that attack its institutional legitimacy. Overall, the analyses contribute to the existing literature by providing a better understanding of judicial behavior within Court-Congress relations and the conditions under which Congress can constrain the Supreme Court through Court-curbing proposals.
The United States Supreme Court’s landmark decision in *Lawrence v. Texas* (2003), a case that invalidated sodomy laws in Texas and thirteen other states by legalizing consensual homosexual sexual activity, returned LGBT rights to the forefront of American politics and generated hostility towards the judiciary among conservative members of Congress. Republicans feared that *Lawrence* signaled that the Defense of Marriage Act (DOMA) of 1996 would not withstand constitutional scrutiny if it came before the Court. DOMA defines marriage as “a legal union between one man and one woman as husband and wife,” so for all federal purposes (i.e., filing joint tax returns, receiving federal death benefits, etc.), a spouse refers to a heterosexual partner. Furthermore, DOMA allows the states to choose whether to recognize same-sex marriages performed in other states.

In an effort to avoid DOMA from being declared unconstitutional, Representative John Hostettler (R-IN) introduced the Marriage Protection Act (MPA) of 2003 that would strip the federal courts of jurisdiction over constitutional challenges to DOMA (Perine 2004). Despite passing the House, the MPA was rejected by the Senate in September of 2004 (Fellow 2006; Stern 2004). The MPA has been reintroduced in each Congressional session since it was first introduced by Hostettler in 2003—once again by Hostettler in 2005 and by Representative Dan Burton (R-IN) in 2007, 2009, and 2011—but it died in committee each time.

The MPA and other similar jurisdiction stripping proposals that Congress introduces are examples of bills considered Court-curbing legislation. In addition to removing the Court’s jurisdiction over certain Acts of Congress or issue areas, the bills often seek to alter the composition of the bench (i.e., mandatory retirement) or place restrictions or limitations on the exercise of judicial review (i.e., requiring a supermajority of justices to agree before striking down legislation) (see Clark 2011). Although the exact purpose of the proposals differs, each bill
similarly attempts to influence judicial decision making and restrict judicial power. Additionally, the bills rarely receive committee hearings (let alone pass); but, the literature demonstrates that the Court responds to these proposals by striking down fewer federal laws or changing the ideological content of decisions to protect its institutional legitimacy (e.g., Clark 2009, 2011; Rosenberg 1992). The alternative explanation for this change in judicial behavior is that the Court attempts to safeguard its policy preferences; but, this possibility is often dismissed because Court-curbing legislation does not alter the structure and functions of the judiciary when the bills are rarely passed into law.

Although members of Congress, and scholars alike, anticipate that Court-curbing legislation impacts judicial decision making, Republican attempts to urge the Supreme Court to uphold DOMA and prevent the expansion of LGBT rights through the MPA were ultimately unsuccessful in *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015). In the 5-4 decision in *Windsor*, the Court found Section 3 of DOMA—the definition of marriage being only between a man and a woman—unconstitutional under the Fifth Amendment’s Due Process Clause. However, since *Windsor* did not address the constitutionality of bans on same-sex marriage in 37 states it remained unclear whether same-sex couples must reside in a state that recognizes gay marriage in order to receive federal benefits (Peters 2013). Yet, two years later in *Obergefell*, and in another 5-4 decision, the Court ruled that the Fourteenth Amendment’s Due Process and Equal Protection Clauses included a fundamental right to marry for same-sex couples.

The political failure of Congress to influence judicial decision making with the MPA highlights an important but underexplored issue in the Court-Congress relations literature: how does the introduction of Court-curbing legislation constrain judicial independence? Since the
bills are rarely enacted, most studies focus on the conditions under which the Court responds to Court-curbing legislation to protect and regain its institutional legitimacy (e.g., Clark 2009, 2011; Rosenberg 1992). By doing so, there is relatively little discussion of when the Court attempts to safeguard and pursue its ideological policy preferences following the introduction of these bills. As such, a key research question is whether judicial responses to congressional Court-curbing legislation can be explained by judicial policy preferences and the Court’s strategic attempt to avoid legislative reversals of judicial decisions.

Descriptive and case study analyses indicate that Congress uses general Court-curbing proposals (i.e., lowering the Court’s budget or changing its composition) to attack the Court’s institutional legitimacy and more specific policy-oriented measures to pursue legislative policy preferences in an attempt to harness judicial power, or put differently, manipulate the ideological content of judicial decisions (Engel 2011). Furthermore, Congress proposes both Court-curbing bills and override legislation to express ideological disagreement with judicial decisions (Blackstone 2013). In general, Court-curbing legislation is considered a fairly quick and efficient tactic, as opposed to undertaking the more arduous task of using override legislation, to accomplish its ideological goals (e.g., Blackstone 2013). Collectively, these findings suggest that Court-curbing bills signal legislative policy preferences and that Congress attempts to manipulate judicial decision making with these bills before taking the more difficult step of actually reversing judicial decisions. Thus, this research is juxtaposed against prior studies that treat all Court-curbing proposals similarly and do not explain when the Court responds to these bills to avoid legislative overrides.

Accordingly, this chapter analyzes the Supreme Court’s response to the introduction of Court-curbing legislation by Congress during 1975-2008 (94th-110th Congresses) to determine
whether the justices engage in strategic decision-making to avoid legislative reversals of rulings. Using Poisson regression analysis, this study first tests if three factors—Court-curbing legislation, ideological disagreement with legislative preferences, and Congress’s ability to override a specific decision, or level of legislative gridlock—influence how many federal laws are invalidated by the Court. It is hypothesized that these variables impact the Court’s decision to strike down federal laws if the justices anticipate congressional overrides after their rulings. Second, the model is re-estimated to determine the likelihood of whether a reversal influences the Court’s response to Court-curbing legislation. Specifically, the analysis explores whether the Court is most responsive by striking down fewer federal laws when Court-curbing bills are introduced during periods of ideological divergence with Congress and low levels of legislative gridlock. Lastly, the study investigates how these results differ when examining the two types of Court-curbing bills: those that attempt to harness judicial power and others that attack the Court’s institutional legitimacy. Here, it is expected that the Court declares fewer laws unconstitutional in response to bills that seek to harness judicial power in order to protect its policy preferences and avoid overrides. In contrast, the existing literature provides explanations for the Court’s responsiveness to bills that attack its institutional legitimacy. Specifically, these bills should elicit a change in judicial decision making when public support for the Court is in decline. Overall, the analyses contribute to the existing literature by providing a better understanding of judicial behavior in relation to congressional attempts to constrain the Supreme Court with Court-curbing proposals.

I. Judicial Preferences and Responses to Congressional Criticism

Studies examining whether Congress can constrain judicial decision making have identified two reasons for why the Supreme Court would respond to legislative preferences: (1)
the possibility of a decision being reversed; and, (2) concerns relating to the judiciary’s institutional legitimacy and judicial independence. As a result, two separate, but inter-related, bodies of literature have developed around each explanation that can provide insight into judicial decisions that deviate from the Court’s ideological policy preferences. Specifically, research is focused on identifying factors that serve as signals to the Court that it should engage in strategic decision-making because a ruling could be reversed or there is a threat to its institutional legitimacy.

With respect to Court-curbing legislation, scholars argue that these bills indicate that the Court’s reputation is in jeopardy by signaling congressional or public disagreement with the judiciary (Clark 2009, 2011; Handberg and Hill 1980; Nagel 1965; Rosenberg 1992; Segal, Westerland, and Lindquist 2011). It is because these bills rarely pass that they are not considered a threat to the Court’s policy preferences on judicial organization and operations. This assumption is supported by findings that the Court strikes down fewer federal laws in response to Court-curbing legislation when public support for the judiciary is relatively low and the bills are sponsored by ideologically sympathetic legislators who are signaling judicial legitimacy is in decline (Clark 2009, 2011). In contrast, the Court defers to legislative preferences to avoid overrides when there is a substantial difference in the ideological composition of the two branches (e.g., Sala and Spriggs 2004; Segal and Westerland 2005; Segal, Westerland, and Lindquist 2011). Since the literature tends to focus on when the Court attempts to protect its reputation or impact on public policy, little is known about whether ideological policy preferences influence the judiciary’s response to Court-curbing legislation. Before exploring this possibility, the next two sections will expand on the theoretical and empirical findings of these two bodies of literature.
A. Foreseeing and Avoiding Legislative Reversals

Studies examining whether the Supreme Court defers to legislative preferences to avoid overrides are based on the single-dimensional spatial model initially developed by Marks (1989). For Marks, and as one would expect, whether Congress can override a given decision depends on the ideological composition of both chambers of Congress. Interestingly, in his study of congressional attempts to override *Grove City College v. Bell* (1984), Marks observed that the justices were relatively unconcerned about Congress’s preferences when deciding the case. At issue was how Title IX should be interpreted in cases dealing with colleges and universities losing federal funding because of gender discrimination. This led to the conclusion that the Supreme Court rarely considers congressional preferences and most decisions reflect the ideology of the justices. However, other scholars contend that the justices do take into account legislative preferences when making decisions because an override would completely erase the judiciary’s influence on the policy and create a new statute that the Court severely dislikes (Ferejohn and Shipan 1990; Gely and Spiller 1990). The justices avoid overrides by making decisions that reflect their preferences as much as possible but also those of a substantial number of legislators to prevent them from proposing and pursuing an alternative policy (e.g., Epstein and Knight 1998; Epstein, Knight, and Martin 2001).

The strategic SOP model was initially used in studies analyzing the Court’s statutory decisions. Scholars asserted that Congress is much more likely to overturn a statutory ruling because ordinary legislation can be used; whereas, constitutional amendments needed to override constitutional decisions are difficult to pass as they require a supermajority (two-thirds) (e.g., Eskridge 1991; Hettinger and Zorn 2005; Segal 1997; Spiller and Gely 1992). Empirical studies testing whether the SOP model explains the Court’s decision making in statutory cases have
produced mixed results. Some studies find that Congress constrains the Court in statutory decisions while others do not (e.g., Bergara, Richman, and Spiller 2003; Hansford and Damore 2000; Segal 1997; Uribe, Spriggs, and Hansford 2014). Consequently, criticisms have been levied against the SOP model and the methods used to test it. The issues identified range from the data sources used (e.g., Bergara, Richman, and Spiller 2003) to whether the Court is always aware of legislative preferences and adjusts its decision making across all issue areas (e.g., Spiller and Gely 1992; Segal 1997).

Although the SOP model is generally used to determine whether the Court defers to congressional preferences in statutory cases, scholars have also examined whether the model applies to constitutional decision making. Congress rarely passes constitutional amendments to reverse the Court’s constitutional decisions, but it is relatively common for the legislature to enact ordinary legislation to limit the impact of these rulings (e.g., Blackstone 2013; Dahl 1957; Devins and Fisher 2004; Meernik and Ignagni 1997; Pickerill 2004). Furthermore, various case studies have identified instances in which the Court adjusts the ideological content of its decisions in constitutional cases to avoid a policy-based response from Congress that would limit the impact of the ruling and diminish the judiciary’s institutional legitimacy (Epstein et al. 2005; Epstein, Knight, and Martin 2001; Epstein and Walker 1995; Knight and Epstein 1996). Some empirical studies have validated these findings (Epstein, Knight, and Martin 2001; Harvey and Friedman 2006; Lindquist and Spill Solberg 2007) while others have not found that the Court consistently engages in strategic decision-making to avoid legislative reversals (Sala and Spriggs 2004; Segal and Westerland 2005; Segal, Westerland, and Lindquist 2011). Consequently, many of the criticisms identified by the literature examining statutory decision making also apply to the Court’s constitutional decisions. In addition to issues pertaining to the model itself and how it is
tested, there is substantial variation in how studies determine whether the Court’s decision was influenced by Congress’s opinion on the issue at stake in the case (e.g., Segal, Westerland, and Lindquist 2011).

B. Attempts to Maintain Institutional Legitimacy and Judicial Independence

Instead of focusing on the possibility of Congress overturning a decision and impeding judicial policymaking, the second area of research on the SOP model examines how legislators can manipulate judicial decision making with Court-curbing legislation that threatens the Court’s institutional legitimacy. Court-curbing bills seek to limit judicial power through such tactics as changing the Court’s composition, jurisdiction, or procedures. Initial descriptive studies sought to determine whether these bills encouraged the justices to defer to legislative preferences—or in other words, make sophisticated decisions—in an effort to avoid changes to the structures and functions of the judiciary (Handberg and Hill 1980; Nagel 1965; Rosenberg 1992). Although Congress rarely enacts these bills, the results indicated that periods of increased Court-curbing bill sponsorship resulted in more decisions that reflected legislative preferences (Handberg and Hill 1980; Nagel 1965; Rosenberg 1992). Building on these findings, researchers sought to determine why the Court would respond to Court-curbing bills if it was unlikely the proposed changes would come to fruition. Most scholars concluded that the introduction of Court-curbing legislation damages the Court’s institutional legitimacy, so the justices defer to legislative preferences to regain its reputation (Epstein, Knight, and Martin 2001; Rosenberg 1992).

Clark’s (2009, 2011) conditional self-restraint model formalizes the idea that the Court responds to Court-curbing legislation because the bills question institutional legitimacy, not for legitimately threatening the judiciary’s organization or operations. Additionally, these proposals are said to signal waning public support for the Court. In order to build this theory of Court-
Congress relations within the context of Court-curbing legislation, Clark makes assumptions about both legislative and judicial behavior. For members of Congress, Court-curbing legislation serves as a position-taking endeavor that expresses constituent disagreement with judicial behavior. As briefly mentioned, the justices are expected to respond to these bills because political criticism and waning public support diminishes the Court’s institutional legitimacy and increases the likelihood that government officials may not implement decisions.

Empirical results support the conditional self-restraint model in which the Court is most responsive to these proposals when they are sponsored by legislators with similar ideological views as the justices and there is less public support for the judiciary (Clark 2009, 2011). It is under these conditions that fewer federal laws are invalidated because Court-curbing bills are credible signals that its institutional legitimacy is threatened because the public dislikes the Court. Furthermore, because the Court’s ideological allies in Congress generally agree with the Court’s decisions, these legislators are less apt to criticize judicial behavior in an effort to manipulate the ideological content of decisions. Additional empirical results reported by Marshall, Curry, and Pacelle (2014) support the conclusion that concerns relating to institutional legitimacy drive judicial responses to Court-curbing legislation. In their study spanning 1953-2000, these authors find that following the introduction of jurisdiction stripping Court-curbing bills, the Court is more likely to alter the ideological content of constitutional decisions than in statutory decisions in which institutional legitimacy is less of a concern. In contrast to these findings and those of Clark (2009, 2011), Segal, Westerland, and Lindquist (2011) do not find that Court-curbing legislation has a constraining effect on judicial decision making in constitutional or statutory cases. Regardless of these findings, there appears to be more scholarly
evidence that the Court defers to legislative preferences in response to Court-curbing legislation to protect its institutional legitimacy rather than avoid an override.

C. Concerns for Overrides, Institutional Legitimacy, or Both?

In sum, the two areas of literature analyzing the constraining effect of legislative preferences on judicial behavior within a separation of powers framework focus on whether the Court is responding to Congress to avoid an override or protect its institutional legitimacy. Although both case studies and descriptive studies have identified instances when the Court has deferred to legislative preferences after Congress sponsors Court-curbing bills or threatens to reverse decisions, empirical results question whether these changes in judicial decision making are consistent. Since these two areas of literature have developed separately, neither has considered if the Court is concerned about overrides following the introduction of Court-curbing legislation. This leads to the question of whether the Court responds to Court-curbing bills to avoid overrides or other policy-based responses. The next section explores the possibility that Court-curbing bills serve as signals to the Court of potential legislative overrides and develops testable hypotheses relating to when the justices are most responsive to these proposals because they are considered a legitimate threat to the Court’s ability to influence public policy.

II. The Dynamics of Court-Curbing

A. Describing Judicial Responses to Congressional Preferences

Theories of Court-Congress interactions typically explain whether Congress can constrain judicial behavior, and if so, the conditions under which the Court will defer to legislative preferences (see Devins 1996; Fisher 1985; Ferejohn and Shiman 1990; Gely and Spiller 1990; Marks 1989; Segal and Spaeth 1993, 2002). Most theories do not find the threat of an override sufficient to elicit change in judicial behavior. In the case of the attitudinal model,
this is because Congress rarely overrides judicial decisions (Segal and Spaeth 1993, 2002); whereas, the Court expects policy-based responses under the coordinate construction view of Court-Congress relations because decisions spark a constitutional dialogue in Congress (Blackstone 2013; Devins 1996; Fisher 1985; Pickerill 2004). Furthermore, the only model relating specifically to Court-curbing legislation, Clark’s (2009, 2011) conditional self-restraint model, considers judicial responsiveness to the bills a product of concerns relating to institutional legitimacy and public support, not overrides.

The separation of powers (SOP) model is the only theoretical framework that predicts that the justices will make decisions that do not accord with their personal policy preferences in order to avoid a reversal that would eliminate any influence the ruling had on the policy (e.g., Ferejohn and Shaping 1990; Gely and Spiller 1990; Marks 1989). Although empirical studies have not found consistent support for the SOP model (e.g., Bergara Richman, and Spiller 2003; Eskridge 1991; Hansford and Damore 2000; Segal 1997), it is well established that both legislative and judicial behavior is dictated by ideological policy preferences (e.g., Aldrich and Rohde 2000; Baum 2006; Cox and McCubbins 2005, 2007; Eskridge 1991; Epstein, Knight, and Martin 2001; Fenno 1973; Krehbiel 1998; Poole and Rosenthal 1997). As a result, the integral role of policy preferences makes the SOP model the ideal theory for examining when the Supreme Court responds to Court-curbing legislation to protect its policy preferences and avoid legislative overrides.

**B. The Supreme Court in the Separation of Powers Framework**

A wealth of scholarship has demonstrated that the Supreme Court’s decision making is driven by policy preferences (e.g., Epstein, Knight, and Martin 2001; Segal and Spaeth 1993, 2002). However, studies that have used the SOP model to examine the extent to which the Court
engages in strategic decision-making to prevent Congress from overriding decisions has produced mixed support for the model (e.g., Eskridge 1991; Epstein, Knight, and Martin 2001; Sala and Spriggs 2004; Segal 1997; Segal, Westerland, and Lindquist 2011; Spiller and Gely 1992). The behavior expected from the Court in both constitutional and statutory decisions by these studies is summarized in Figure 1. In the first example, the Court can set policy at its ideal point because the decision is reversal-proof in that it is located within the gridlock interval. In other words, neither the House nor the Senate would be able to agree on an alternative policy that would move policy closer to the ideal point of either chamber. In the second example, the Court’s decision will be reversed if policy is set at its ideal point because both chambers of Congress would prefer a policy set at the override point. As a result, a forward-looking Court should choose to set policy at the reversal-proof policy that is closest to its ideal point to avoid a legislative override that could move the policy even further away from the Court and make it even worse off (Epstein and Knight 1998; Epstein, Knight, and Martin 2001). In the second example, the Court should set policy within the gridlock interval near the Senate’s ideal point.

[Insert Figure 1 here.]

Since some studies were unable to find that the Court consistently engaged in strategic behavior to avoid legislative overrides (e.g., Hansford and Damore 2000; Segal 1997; Spriggs and Hansford 2001), the model was criticized for making assumptions about the Court’s knowledge of legislative preferences. Primarily, critics maintain that the Court is expected to be aware of Congress’s preferences and that any change in those preferences is accompanied by an equivalent change in judicial decision making across all cases and issues (Bergara, Richman, and Spiller 2003; Segal 1997; Spiller and Gely 1992). Similarly, prior studies have found that the Court does not appear to respond to Court-curbing legislation in an effort to protect its policy
preferences (Clark 2009, 2011; Marshall, Curry, and Pacelle 2014; Segal, Westerland, and Lindquist 2011). This is because Court-curbing was found to elicit a response from the Court that was consistent with protecting its institutional legitimacy—in constitutional cases or when the bill was sponsored by ideological allies (Clark 2009, 2011; Marshall, Curry, and Pacelle 2014; Segal, Westerland, and Lindquist 2011). However, such results do not necessarily indicate that the Court does not respond to Court-curbing legislation to protect its policy preferences and avoid overrides.

Assuming that all Court-curbing legislation is introduced with the same purpose and that the Court only responds for one reason fails to take into account the findings of recent studies on congressional behavior. First, Court-curbing bills and override legislation are often introduced at the same time; yet, Congress sponsors slightly more bills that attempt to curb the Court than those to reverse judicial decisions (Blackstone 2013). Fewer override proposals is to be expected as Court-curbing legislation (even without the threat of enactment) has been found to elicit judicial decisions that accord with legislative preferences (e.g., Nagel 1965; Rosenberg 1992). However, it is unlikely that the Court responds to each and every Court-curbing bill, but this supports the assumption that sponsoring these bills is a quick and efficient way for Congress to attempt to manipulate judicial decision making before moving on to the more time-consuming task of reversing the Court’s rulings (e.g., Blackstone 2013). Second, this assumption is also supported by the findings of Uribe, Spriggs, and Hansford (2014) that found Congress does override the Court’s constitutional and statutory decisions. Taken collectively, it is plausible that the Court responds to Court-curbing legislation to avoid legislative overrides.

Although the Court likely responds to Court-curbing legislation to protect its policy preferences, this does not mean that the Court does not also respond because of concerns relating
to institutional legitimacy as suggested by previous studies (e.g., Clark 2009, 2011; Marshall, Pacelle, and Curry 2014; Segal, Westerland, and Lindquist 2011). Building on the findings of Engel (2011) that Congress uses different types of Court-curbing bills to attack the Court’s institutional legitimacy or harness judicial power as a way to pursue legislative policy preferences within the judiciary, it is reasonable to expect that the Court responds to these two types of proposals for different reasons. In particular, the justices likely attempt to protect their policy preferences when Congress introduces Court-curbing legislation that harnesses the Court’s power; whereas, the Court will attempt to protect its institutional legitimacy when Congress introduces bills that attack the judiciary. Thus, the subject matter of the Court-curbing bill and the political climate at the time the bill is introduced is expected to explain the Court’s response to Court-curbing in general, and each of the two types of these bills. With respect to the existing literature, it is likely that the Court responds to bills that attack its institutional legitimacy when public support is waning and the legislation is sponsored by ideological allies (Clark 2009, 2011). However, as already noted, very little is known about the conditions under which the Court responds to Court-curbing bills, particularly those that attempt to harness its power, to avoid overrides.

The following section addresses this gap in the literature by first developing hypotheses relating to the effect that Court-curbing legislation, the level of ideological divergence with Congress, and whether the legislature can override a decision (i.e., level of gridlock) has on the Court’s decision making in constitutional cases. Of particular interest is the Court’s willingness to strike down federal legislation. Second, it is posited that ideological divergence and the likelihood of an override dictates the Court’s responsiveness to Court-curbing legislation, especially bills that attempt to harness the judiciary’s power.
C. Constitutional Decision Making and Judicial Responses to Court-Curbing Legislation

The prevailing literature suggests that the Court responds to Court-curbing bills because they signal waning institutional legitimacy (e.g., Clark 2009, 2011; Marshall, Pacelle, and Curry 2014; Rosenberg 1992). The empirical findings demonstrate that the Court strikes down fewer federal laws when the bills are sponsored by ideological allies in Congress and when public support for the Court is relatively low (Clark 2009, 2011). These findings alone provide the basis for predicting that the Court responds to Court-curbing legislation. However, this study seeks to explain judicial responses to Court-curbing legislation as motivated by policy preferences and attempts to avoid legislative overrides.

As previously discussed, Court-curbing legislation is often considered a way for Congress to express ideological disagreement with the Court’s decisions. Additionally, Court-curbing bills serve as a quick and efficient way for Congress to attempt to manipulate judicial decision making before resorting to the more arduous task of overriding decisions (Blackstone 2013). Since increases in Court-curbing bill sponsorship coincide with upswings in reversal proposals (e.g., Blackstone 2013), it is likely the bills signal the possibility of future overrides, particularly bills that attempt to harness judicial power. Despite mixed support for the SOP model that predicts that the Court responds to legislative preferences to avoid overrides, subsequent research has found that the threat of a reversal is credible as Congress does overturn judicial decisions it dislikes (Uribe, Spriggs, and Hansford 2014). Consequently, the SOP model is not necessarily an inaccurate depiction of Court-Congress relations. Using the SOP model to explain Court-curbing bills as a signal of congressional disagreement with judicial decisions and potential overrides leads to the corresponding expectation that the Court responds to these
proposals to prevent Congress from reversing rulings. In sum, these expectations lead to the following hypotheses:

**H1:** An increase in the number of Court-curbing bills, especially those that harness judicial power, introduced leads to a decrease in the number of federal laws the Court declares unconstitutional.

As previously discussed, if Court-curbing bills serves as a signal of legislative preferences and the possibility of an override then it is plausible to assume that these bills are introduced when judicial preferences are considerably different from those of Congress. If judicial decisions reflect the Court’s preferences during periods of ideological divergence, it is expected under the SOP model that Congress would move to override decisions in favor of a policy more in line with the legislature’s preferences (Epstein, Knight, and Martin 2001; Marks 1989; Ferejohn and Shiman 1990; Gely and Spiller 1990; Spiller and Gely 1992). Thus, ideological divergence can encourage the Court to engage in sophisticated decision-making (i.e., striking down fewer laws) to prevent Congress from undermining judicial policy preferences. This expectation is reflected in the following hypothesis:

**H2a:** Increased ideological divergence leads to a decrease in the number of federal laws the Court strikes down.

Although ideological divergence with Congress may generally indicate to the Court that Congress will disagree with decisions that reflect judicial preferences, signaling legislative preferences through Court-curbing legislation is a more effective mechanism for attempting to elicit changes in judicial decision making. Moreover, it is possible that Congress does not disagree with the Court’s decision based on the age or saliency of the statute under review. Older statutes or those not related to the dominant policy interests of members are less likely to elicit a
response from members than newer, more salient statutes (Ignagni and Meernik 1994; Pickerill 2004; Whittington 2003). Thus, the Court should be more responsive to legislative preferences during periods of ideological divergence when Court-curbing legislation has been introduced because it signals that Congress disagrees with decisions and will actually override decisions.

The latter expectation runs counter to Clark’s (2009, 2011) hypothesis that the constraining effect of Court-curbing should decrease as ideological divergence increases. Clark’s hypothesis is not based on SOP models because he argues that Court-curbing legislation does not need to be enacted for it to be a credible threat to the Court’s institutional legitimacy or have a constraining effect on judicial decision making. Furthermore, unlike the Court’s ideological opponents, its allies do not have a greater incentive to attack the Court. The Court is then more responsive to Court-curbing proposals introduced by its ideological allies because these bills are viewed as credible signals of waning public support and institutional legitimacy. The hypothesis just posited does not dispute Clark’s claim; however, during ideological divergence, it is plausible to assert that there is a higher likelihood that proposals to override a decision will gain support and pass. In contrast, Congress will not focus on passing Court-curbing legislation because members do not want to permanently alter the structure and functions of the judiciary (Engel 2011). Instead, Court-curbing bills are a way to signal overall displeasure with a particular decision and are likely used as a way to manipulate judicial decision making before resorting to the more time-consuming task of overriding decisions. Therefore, in an effort to avoid legislative overrides, the Court is likely to respond to Court-curbing legislation by engaging in strategic decision-making. However, striking down fewer laws following the introduction of Court-curbing does not necessarily indicate that the Court is attempting to protect its policy preferences and avoid legislative reversals of decisions. The possibility still exists that
the Court could still be responding to rebuild its institutional legitimacy. It is when the Court is responding to Court-curbing legislation when there is a substantial difference in the preferences of the two branches that the Court is likely responding for ideological policy reasons, and not concerns relating to institutional legitimacy because an override is much more likely to be passed into law.

As briefly mentioned earlier, the type of Court-curbing bill may also influence the Court’s response and be a contributing factor to Clark’s (2009, 2011) finding that the Court is responsive to Court-curbing legislation sponsored by its ideological allies in Congress. Some Court-curbing bills are used for position-taking while others are used to pursue ideological policy preferences (Engel 2011). It is possible that the Court is aware that general bills and those proposed as constitutional amendments attacking the Court’s institutional legitimacy are used as position-taking endeavors that signal current levels of public support. Thus, it is plausible to assume that the Court would be more likely to respond to these types of endeavors if sponsored by its ideological allies, or when there is little ideological divergence with Congress. Similarly, the Court should be most responsive to Court-curbing bills that signal legislative preferences and the likelihood of an override during periods of ideological divergence with Congress. In this scenario, specific Court-curbing bills, which typically seek to alter the Court’s jurisdiction, that are sponsored by the Court’s ideological opponents during periods of ideological divergence credibly threaten the Court’s policy preferences because Congress will move to override future judicial decisions if the Court does not practice judicial deference. These relationships are summarized in the following hypothesis:

\[ H2b: \text{The constraining effect of Court-curbing, especially bills that harness judicial power, on judicial decision making should increase as ideological divergence increases.} \]
Up until this point, the assumption has been that Court-curbing legislation accurately signals legislative preferences and that Congress can override judicial decisions. However, even when Congress cannot reverse judicial decisions, Court-curbing legislation can be used as a tactic to harness judicial power and to encourage judicial decision making that helps Congress pursue its policy agenda within the judiciary (Engel 2011; Whittington 2003). Although Congress will attempt to influence judicial decision making during periods of legislative gridlock, Congress cannot credibly threaten the Court with an override. As a result, the Court should be able to set policy at its ideal point during periods of legislative gridlock. Even when Court-curbing legislation is introduced, the Court will still be unconstrained from pursuing its policy preferences because the legislation does not sincerely represent the legislature’s ability to override decisions. Since Congress also sponsors Court-curbing legislation to position-take and/or signal waning institutional legitimacy (e.g., Clark 2009, 2011; Engel 2011), the Court should be less responsive to the Court-curbing bills that Congress uses in an attempt to harness judicial power during legislative gridlock because an override is unlikely (Engel 2011). These expectations are summarized in the following hypotheses:

**H3a:** As legislative gridlock increases in Congress, the Court will declare more laws unconstitutional.

**H3b:** The constraining effect of Court-curbing legislation, especially bills that harness judicial power, decreases as legislative gridlock increases.

### III. Data and Methods

The aforementioned hypotheses will be empirically tested in two stages. First, an additive model will be introduced to assess if each factor influences judicial decision making as expected. Second, an interactive model will be created to analyze the Court’s responsiveness to Court-
curbing legislation under certain political and institutional conditions. The empirical models are largely based off those used by Clark (2009, 2011) because his research is the first, and most recent, to analyze systematically how Court-curbing legislation acts as a constraint on judicial behavior. As a result, the analysis covers the same time frame as Clark’s contemporary analyses of how the Supreme Court reacts to Court-curbing legislation: 1975-2008. This time period is also ideal for a couple of other reasons. First, it includes Congresses in which both parties have been in control and two documented periods of intensified Court-curbing bill sponsorship: 1975-1982 and 2001-2008 (see Clark 2011). Second, additional considerations regarding the institutional organization of Congress do not need to be taken into account because the study begins after the reforms in the early 1970s that increased the power of the majority party (Aldrich and Rohde 2001). This section will proceed by discussing the data and methods used in the forthcoming empirical analyses.

A. Dependent Variable

The concept of interest in this study is the extent to which judicial decision making is constrained, particularly by congressional preferences expressed through Court-curbing legislation. Previous studies have posited that Court-curbing bills threaten the Court’s institutional legitimacy and independence (e.g., Clark 2009, 2011; Marshall, Curry, and Pacelle 2014; Segal, Westerland, and Lindquist 2011). This body of literature states that these concerns are at the forefront of constitutional decision making because overrides are unlikely given that Congress would have to pass a constitutional amendment. In other words, congressional criticism diminishes the judiciary’s institutional legitimacy following constitutional decisions because it questions the Court’s authority as the final arbiter on questions arising under the Constitution. However, recent scholarship indicates that Congress often overrides or limits the scope of
constitutional decisions that it disagrees with by passing constitutional amendments or ordinary legislation (e.g., Blackstone 2013; Uribe, Spriggs, and Hansford 2014). Furthermore, not all Court-curbing bills are considered attacks on the Court’s institutional legitimacy; instead, some proposals attempt to harness the Court’s power as a way to pursue the legislative policy agenda through the judiciary (Engel 2011).

This study builds on this literature by positing that Congress uses Court-curbing bills, especially those that harness judicial power, in an attempt to manipulate judicial decision making before resorting to override legislation. Thus, the Court’s concerns for institutional legitimacy and legislative reversals operate simultaneously. Since both concerns are at stake during constitutional decision-making, and these rulings have been the focus of previous studies, the aforementioned hypotheses will also be tested by examining outcomes in these cases.

In general, the assumption in constitutional decision-making is that striking down federal laws upsets Congress. Although there are a few instances when legislators favor judicial review (see Whittington 2005a), a constrained Court will strike down fewer federal statutes in order to avoid congressional reprisal (Clark 2009, 2011; Segal and Westerland 2005). Clark (2009) argues that this assumption is valid because invalidations undermine congressional power and destroy recent bipartisan efforts to reform the status quo.

There is debate about whether the number of invalidated laws or a proportion based on all cases questioning the constitutionality of a federal law is the appropriate measure of constrained judicial decision making. Clark (2009) argues that a proportional measure is inappropriate because the number of laws upheld can also be affected by various political and institutional factors—such as Court-curbing legislation—that encourages the Court to utilize the “constitutional avoidance” doctrine in which the Court chooses to interpret statutes in a manner
that would not render them unconstitutional or produce constitutional concerns (see Justice Louis Brandeis’ concurring opinion in *Ashwander v. Tennessee Valley Authority* [1936]). Additionally, current datasets do not distinguish between when the Court chooses to uphold a decision nor does so through use of the avoidance doctrine. For these reasons, and to maintain continuity in the literature, the number of invalidated federal laws will be used as the dependent variable.

The number of laws held unconstitutional for each year spanning 1975-2008 (94th - 110th Congresses) is obtained from the list maintained by the Congressional Research Service (CRS). This measure differs slightly from that used by Clark (2009, 2011). Despite criticisms that the CRS list is incomplete and some omissions are systematic in nature (Clark and Whittington 2007; Graber 2007; Whittington 2005b; Zeppos 1993), Clark’s data that corrects for these issues is only available through 2006. The two sets of data are highly correlated (r = .72), so the unavailability of Clark’s data for more recent years is less problematic.

**B. Independent Variables**

**Court-Curbing.** The number of Court-curbing bills introduced is acquired from Clark’s (2011) dataset and includes all Court-curbing initiatives, even those proposed as constitutional amendments and resolutions. The measure used here differs slightly from that used by Clark (2009, 2011). Clark takes a logistic transformation\(^1\) of the number of Court-curbing bills introduced because his conditional self-restraint model predicts that the Court responds differently to “high” and “low” signals of public opinion expressed through Court-curbing bills. Conversely, the argument advanced in this study is that the Court responds to Court-curbing legislation that represents congressional preferences only when a bill foreshadows congressional attempts to override judicial decisions. As the number of Court-curbing bills rises, the Court perceives Congress as more hostile and apt to override decisions; and thus, becomes more likely

\(^1\) Clark’s transformation is: \(1/(1 + \exp(-\text{Court-Curbing}_t/2)) - .5\), where \(t\) indicates year.
to defer to their preferences. The number of Court-curbing bills introduced is also an appropriate measure because other studies have reported robust results using transformed and non-transformed versions of the variable (Clark 2009, 2011; Segal, Westerland, and Lindquist 2011). After testing the effect that all Court-curbing bills have on judicial decision making, the model is re-estimated to then examine the number of bills that harness judicial power and those that attack the Court’s institutional legitimacy. The categories Clark (2011) uses to classify the purpose of Court-curbing bills—judicial review, composition, procedure, jurisdiction, remedy, and other—can be condensed into Engel’s two categories. As discussed in Appendix A, Court-curbing bills that attack the Court’s institutional legitimacy are those classified by Clark (2011) as procedure, judicial review, and other. Conversely, Court-curbing bills that harness judicial power are those Clark categorizes as composition, jurisdiction, and remedy.

This study is in agreement with Clark where Court-curbing legislation may not have an immediate effect on judicial behavior. First, there can be a relatively long period of time between when a case is chosen, heard, and voted on and when the decision is announced; and, second, it takes a while for cases questioning the constitutionality of a federal law to reach the Court. Consequently, in accordance with Clark (2009), a one year lag is applied to the number of Court-curbing bills introduced.

2 The following are examples of the types of bills included in each category developed by Clark (2011, 37-42). Judicial review: bills that aim to limit or remove the Court’s power of judicial review (e.g., banning the Court from declaring Acts of Congress unconstitutional, providing Congress with an override over laws deemed unconstitutional, or requiring a supermajority voting bloc when invalidating legislation). Composition: bills designed to alter the number of justices on the bench (e.g., mandatory retirement). Procedure: bills that attempt to alter judicial procedures (e.g., changing administrative appeals procedures, setting requirements for recusal, and specifying conditions under which the Court must follow stare decisis). Jurisdiction: bills that seek to limit or eliminate the Court’s jurisdiction over certain areas of the law or types of cases (e.g., prohibiting the Court from hearing cases relating to specific Acts of Congress or on controversial issues, such as flag burning). Remedy: bills intending to restrict how the Court resolves disputes (e.g., proscribing conditions for the issuance of injunctions in labor-business disputes or forbidding forced busing in cases regarding school desegregation). Other: bills that do not target judicial power but voice displeasure with a specific decision or behavior displayed by the Court (e.g., citing foreign law and forbidding cameras in the courtroom).
Ideological Divergence. There are a variety of options—ranging from relatively simplistic to fairly complex—for measuring the level of ideological disagreement between the Supreme Court and Congress. A more sophisticated measure will be utilized here that is created from the first dimension Common Space scores for each member of Congress and the Supreme Court (Epstein, Martin et al. 2007; Poole 1998; Poole and Rosenthal 1997) that range from very liberal (-1) to very conservative (+1). Consequently, the ideological divergence variable is constructed by calculating the absolute difference between the median Supreme Court justice and the closest of the House and Senate medians. When the median Justice is located in between the two chamber medians, this variable is coded as zero.

Legislative Gridlock. Krehbiel’s (1998) veto filibuster model is a preference-based measure of legislative gridlock that considers partisanship and the likelihood of a presidential veto. The model (see Figure 2) is often preferred over alternative models (i.e., the chamber median and party gatekeeping models) because it estimates the largest gridlock interval and suggests that Congress only overrides Supreme Court decisions occasionally. The latter is particularly important as it accords well with the proposition that Congress attempts to encourage the Court to practice legislative deference before attempting to reverse the Court’s rulings. For Krehbiel (1996, 1998), the pivotal players are those legislators who determine whether Congress overrides a presidential veto or invokes cloture. Aptly named the veto and filibuster pivots, these two members impede Congress from enacting moderate policy change, and it is between their two ideal points that the legislative gridlock interval is located on a standard liberal-conservative continuum (see Figure 2). For this study, legislative gridlock is measured as the absolute difference between the Common Space scores of whichever veto pivot is the most extreme between the House or the Senate and the filibuster pivot.


C. Control Variables

Public Support. The alternative explanation most often used to explain why the Court responds to Court-curbing legislation is that the justices are concerned about the judiciary’s institutional legitimacy (e.g., Clark 2011; Rosenberg 1992). The Court’s relatively weak institutional position makes it imperative that the Court avoids handing down decisions that will evoke widespread public criticism because the public can help the Court overcome its implementation problem (Caldeira 1986; Hall 2011; McGuire and Stimson 2004; Murphy and Tanenhaus 1990; Stephenson 2004; Weingast 1997) and avoid congressional attacks that undermine judicial legitimacy (Caldeira and Gibson 1992; Gibson and Caldeira 1995, 1998, 2003; Gibson, Caldeira, and Baird 1998). Additionally, as Clark (2009, 2011) argues, the introduction of Court-curbing legislation in conjunction with low levels of public support for the Court can help the justices determine whether the legislation is a credible threat that should not be ignored. In order to assess how the Court responds to Court-curbing legislation to avoid overrides, it is important to control for the possibility that public opinion impacts constitutional decision making and dictates judicial responsiveness to these bills. These two possibilities are controlled for by measuring public support for the Court and constructing an interaction term between that variable and Court-curbing bill sponsorship.

Data on public opinion towards the Court is relatively scarce (Caldeira 1987; Durr, Martin, and Wolbrecht 2000). For instance, the General Social Survey often asks how much confidence respondents have in the Supreme Court; but, this question is not always included in the survey. This lack of data has led researchers to develop alternative measures of public support for the Court. For example, Durr, Martin, and Wolbrecht (2000) created an index based on the
ideological preferences of the public in comparison to the ideological content of the decisions handed down by the Court. This study opts for this measure because it is available for each year under analysis, and it is constructed by multiplying Stimson’s (1999) public mood measure of how liberal the public is with the percentage of judicial decisions coded as conservative in the Supreme Court Database. Larger values on the variable indicate that the Court is handing down decisions that do not accord with the public’s preferences. In other words, more conservative decisions when the public is more liberal and vice versa.

Court Composition. In accordance with previous research (Clark 2009, 2011), natural court fixed effects—dummy variables indicating when the Court’s composition does not change—are included to control for possible idiosyncratic relationships effecting the number of invalidated laws. For example, there may be periods in history where judicial review occurred more frequently or certain Courts tended to strike down more laws. The data on natural courts is obtained from Epstein, Segal, et al. (2007) and separate dummy variables are created for each. The years the natural court was active are coded one and all others zero.

D. Methods

This study uses the standard Poisson regression model to test the aforementioned hypotheses because the dependent variable is a count of the number of laws invalidated by the Court, and several diagnostics (see Tables 1 and 2) reveal that this is the appropriate method for testing the aforementioned hypotheses (Brandt, et al. 2000; Cameron and Trivedi 1998). The data is not overdispersed as indicated by the results of the likelihood-ratio test. It is unlikely that the data exhibits time-series dynamics as serially correlated data is typically overdispersed

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3 Interactive relationships hypothesizing that the effect of Court-curbing legislation—regardless of type—on the number of federal laws held unconstitutional depends on levels of legislative gridlock in Congress and the amount of ideological divergence between the two branches are tested by constructing a variable that multiplies the Court-curbing variable with the ideological divergence variable and legislative gridlock variable, respectively.
(Johansson 1995). Finding that the current and lagged residuals are not correlated confirm this expectation (Cameron and Trivedi 1998). The lack of time-series dynamics is further confirmed by the results of the augmented Dickey-Fuller test \((Z(t) = -3.10)\). Additionally, this outcome also verifies that the dependent variable is not a unit root, or has a mean and variance that changes over time (Chatfield 2003). With respect to whether the models adequately describe patterns of judicial decision making in constitutional cases, the fit statistics reveal moderate explanatory power. Overall, the results of these diagnostics verify that Poisson regression analysis is the correct method for analyzing the data. Since observations across many of the variables—particularly ideological divergence and public support—are similar until the Court’s composition changes, standard errors are clustered on the natural court.

IV. Results

A. The Constraining Factors of Judicial Decision Making: Additive Model Results

The results presented in Table 1 reveal that very few factors influence the number of laws held unconstitutional. The same conclusion can be reached by examining the number of invalidated laws over time in relation to patterns of Court-curbing bill sponsorship, ideological divergence between Congress and the Court, and legislative gridlock in Congress (see Figure 3). Beginning with Court-curbing legislation, a positive, rather than an inverse, relationship is

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4 Diagnostic tests for multicollinearity are performed and the results demonstrate there are no issues because the tolerance level for each variable is well above .2 (Menard 1995). See Appendix B for descriptive statistics.

5 These results are based on a relatively small number of observations \((n=34)\). Small samples often produce results that over or under estimate actual effect sizes, which limits the conclusions that can be drawn from the data. Whether the results in Table 1 are biased is unclear because the small sample properties of Poisson models fitted using maximum likelihood estimators (MLE) are unknown (e.g., Hart and Clark 1999). Similar to Clark (2011), assessing the extent of the bias present in the results is determined by fitting the models as linear models and using ordinary least squares (OLS) regression analysis. OLS is selected because it penalizes large errors more than small errors when analyzing small samples (e.g., Heji et al. 2004). In other words, OLS is more likely to produce estimates with large error terms that fail to achieve standard levels of statistical significance than MLE models. The OLS model results are similar to those reported in Table 1, so the findings discussed in this section are valid.
evidenced between the number of these bills introduced and the number of laws held unconstitutional by the Supreme Court; however, this relationship is not statistically significant (*rejects H1*). A similar relationship exists between Court-curbing bills that attempt to harness judicial power (*rejects H1*). Interestingly, the results indicate that the Court strikes down fewer federal laws when Congress introduces Court-curbing legislation that attacks judicial institutional legitimacy; but, as was the case in the previous two models, this relationship is statistically insignificant.

[Insert Figure 3 here.]

The results for the remaining variables are consistent regardless of the type of Court-curbing legislation under analysis. As expected, an increase in ideological divergence between Congress and the Supreme Court is associated with a decrease in the number of laws declared unconstitutional (*supports H2a*). As can be seen in Figure 4, at low levels of ideological divergence, the Court will invalidate nearly four laws per year, but at even moderate levels of disagreement between the two branches, this decreases to roughly two laws. When there is substantial disagreement between the Congress and the Court, the justices are not expected to invalidate even one law per year. These findings in the model analyzing both types of Court-curbing legislation together are nearly identical to the results obtained in the models only examining proposals that harness judicial power or attack the Court’s institutional legitimacy.

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6 It is important to note that the results for the model examining Court-curbing bills that attack the Court’s institutional legitimacy are statistically significant at the .1 level. There is debate as to whether coefficients significant at the .1 level should be reported as statistically significant because the conventional cutoff in the social sciences is .05. However, coefficients with p values between .05 and .1 can be considered “approaching” significance (e.g., Samprit, Hadi, and Prince 2000) and are increasingly being reported as statistically significant results in political science research (e.g., Goldstein 2010).

7 The predicted rate of invalidated laws is calculated using SPost in Stata 14 (Long and Freese 2005). Since nearly all the variables in the model are continuous, variables not of interest when calculating a given predicted probability are set at the mean. The Rehnquist Court from 1994-2005 is the natural court that was in power the longest for the time period included in this dataset. Consequently, the predicted rates reported in this section are those for this natural court.
The only difference is that in the model examining bills that attack the Court, the justices will invalidate roughly three laws at low levels of ideological divergence. When examining the impact that legislative gridlock has on the Supreme Court’s decision-making in constitutional cases, the justices do strike down more laws as legislative gridlock increases. However, the relationship between these two variables is statistically insignificant (rejects H3a).

[Insert Figure 4 here.]

Before examining the results from the interactive model that shows how these aforementioned factors influence judicial responses to Court-curbing legislation, it is important to discuss the results relating to public support. Across each of the three models, the Court strikes down more federal laws as its public support declines. This outcome fails to support the findings of the previous literature that found the opposite in which diminished public support for the Court leads to fewer invalidated laws (Clark 2009, 2011). Thus far, it does not appear that Court-curbing legislation nor concerns relating to institutional legitimacy influence judicial decision making in constitutional cases. Instead, the Court appears to be most responsive to legislative preferences when there is substantial disagreement with Congress, or when reversals are likely.

**B. Judicial Responsiveness to Court-Curbing Legislation: Interactive Model Results**

Table 2 shows the results from the interactive model. The constitutive terms provide little insight into the effect that Court-curbing legislation, ideological divergence, and legislative gridlock have on judicial behavior in constitutional cases because the model includes interactions. Thus, the results displayed in Table 2 refer to the effect that each variable has on the number of laws the Court holds unconstitutional when the other variables are zero. These findings are substantively meaningless because zero is outside the range of values for the

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8 Since there are relatively few observations (n=34), these models are also fitted using OLS regression analysis (e.g., Clark 2011; Hart and Clark 1999). Similar to the additive model, the results in Table 2 are comparable to those obtained using OLS and ensures the findings reported in this section are valid.
variable measuring legislative gridlock and total Court-curbing bills. In order to assess whether the results from the additive model persist in this model, the predicted number of invalidated laws is calculated for each variable across each of the three models. Here, whether the confidence intervals for each estimate overlap dictate whether the relationships are statistically significant.

[Insert Table 2 here.]

The findings for these variables in the interactive model are comparable to those reported in the additive model. Again, across each of the three models, there is little support for the hypothesis that Court-curbing legislation leads to fewer invalidated laws (rejects H1). As was the case in the additive model, an inverse relationship exists between the variables measuring ideological divergence and Court-curbing legislation; however, this relationship is now statistically insignificant (rejects H2a). The findings with respect to legislative gridlock are also similar to those from the additive model. In the models analyzing all Court-curbing bills and those that attack the Court’s institutional legitimacy, the results still indicate that a positive, statistically insignificant relationship exists between legislative gridlock and the number of laws held unconstitutional (rejects H3a). Unlike the results obtained from the additive model, an inverse relationship is seen between legislative gridlock and the number of laws struck down by the Court in the model examining Court-curbing bills that harness judicial power. However, this relationship does not achieve standard levels of statistical significance (rejects H3a).

Before examining how judicial responses to Court-curbing legislation differs based on various political factors, it is important to examine the effect of public support as it is an

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9 See Brambor, Clark, and Golder (2006) for a full discussion of the interpretation of constitutive terms in interaction models.
10 See n7 for a description of how the predicted rate of invalidated laws is calculated. The only difference is that interactive terms not involving the constitutive term of interest are set by multiplying the means of the two variables together.
alternative explanation behind the Court’s judicial decision making in constitutional decisions. Similar to the findings from the additive model, decreased levels of public support for the Court increases, rather than decreases, the number of laws held unconstitutional in the models examining Court-curbing legislation in general and bills that harness judicial behavior; however, these relationships are statistically insignificant. Although waning public support for the Court decreases the number of laws the Court strikes down in the model examining Court-curbing bills that attack the Court’s institutional legitimacy, this relationship is still statistically insignificant. Despite these slight changes in the results relating to the effect these factors have on judicial decision making in constitutional decisions, the results continue to indicate that none of these variables tend to urge the Court to protect its policy preferences or institutional legitimacy. Regardless, how these factors dictate judicial responses to congressional Court-curbing legislation is of primary importance to this study and will examined next.

In general, the findings demonstrate that there is not a statistically significant difference in the constraining effect of Court-curbing legislation across levels of ideological divergence and legislative gridlock (rejects H2b & H3b). Beginning with ideological divergence, the results for the model examining all types of Court-curbing legislation indicates that an increase in these bills, regardless of how many Congress introduces, leads to fewer invalidated laws. The results are fairly similar when examining Court-curbing bills that attack the Court’s institutional legitimacy. In general, more of these bills lead to fewer invalidated laws, but this relationship is also statistically insignificant. The results are somewhat different for Court-curbing bills that attempt to harness judicial power. Specifically, the findings indicate that there is a statistically insignificant inverse relationship between ideological divergence and the number of invalidated laws under low and average levels of Court-curbing bill sponsorship. When Congress has
sponsored quite a few of these bills that attempt to harness the Court’s power, there is actually an increase in the number of invalidated laws. However, this relationship is also statistically insignificant.

The results for the effect of Court-curbing legislation over levels of legislative gridlock are comparable to those just discussed pertaining to the interaction between these bills and ideological divergence. When examining both kinds of Court-curbing legislation, low and average numbers of these bills produces a statistically insignificant positive relationship between legislative gridlock and the number of invalidated laws. In other words, an increase in legislative gridlock causes the Court to strike down more federal laws. However, under high levels of Court-curbing legislation, the relationship runs in the opposite direction in which more gridlock leads to fewer invalidated laws. Despite these results, the relationship is statistically insignificant.

Again, the inconsistent direction of this relationship and the lack of statistical significance is still evident when examining the two types of Court-curbing legislation separately. In regard to bills that attempt to harness the Court’s power for political purposes, average and low levels of these bills leads to fewer, rather than more invalidated laws as legislative gridlock increases in Congress; however, this relationship is statistically insignificant at low to moderate levels of gridlock. Conversely, when Congress has introduced quite a few Court-curbing bills there is a positive, albeit insignificant, relationship between legislative gridlock and the Court’s willingness to strike down legislation. A similar positive relationship is evidenced when Congress sponsors low to average amounts of Court-curbing bills that attack the Court’s institutional legitimacy. At high levels of this type of Court-curbing bill sponsorship, a
statistically insignificant inverse relationship is evidenced in which the Court invalidates fewer laws during legislative gridlock.

Before moving on to discussion of the findings of this study in light of the current literature, it is important to address the results of the control variables testing the primary alternative explanation behind judicial responses to these bills. Across each of the three models, public support for the Court does not appear to impact the number of laws the Court invalidates in a given year. In contrast to expectations, a positive relationship is evidenced for the models examining all Court-curbing bills and only those that attempt to harness the Court’s power in which less support for the Court results in more invalidated laws. Although this relationship is in the opposite direction as anticipated, less public support for the Court does lead to fewer invalidated laws in the model analyzing bills that attack the Court’s institutional legitimacy. However, neither relationship achieves statistical significance.

There is also minimal support for the expectation that Court-curbing legislation is more constraining as public support for the Court declines. Broadly speaking, judicial responses to Court-curbing legislation, regardless of type, do not differ given current levels of support the Court enjoys. When examining both types of bills together, the results indicate that under average and high levels of Court-curbing bill sponsorship, the Court invalidates more, rather than less, Court-curbing bills as the public becomes less supportive of the judiciary. When Congress introduces very few Court-curbing bills, the Court will invalidate more laws as public support declines. The results are fairly similar when examining Court-curbing bills that harness judicial power in which a positive, albeit statistically insignificant, relationship is evidenced between diminished public support for the Court and the number of laws struck down in a given year regardless of how many Court-curbing bills are introduced by Congress. As expected, this
relationship does run in the correct direction for the model examining Court-curbing bills that attack the Court’s institutional legitimacy. Although Congress invalidates fewer laws as public support declines regardless of the amount of Court-curbing legislation introduced, this relationship is not statistically significant. Overall, the results reported here are unable to support the conclusions of prior studies in which judicial responses to Court-curbing legislation is affected by current levels of public support and concerns for institutional legitimacy. Additionally, the results provide little support for the hypothesized relationships advanced in this study. The next section will expound upon these conclusions in light of the existing literature on Court-Congress relations within the context of Court-curbing.

V. Discussion

Most of the prior literature on the constraining effects of congressional Court-curbing legislation on Supreme Court decision making has assumed that each bill is a credible threat to the Court that encourages judicial deference to legislative preferences (e.g., Handberg and Hill 1980; Nagel 1965; Rosenberg 1992), and only recently have studies begun to explore the circumstances under which the Court is less responsive to the initiatives (e.g., Clark 2009, 2011). This study builds upon the existing theoretical and empirical literature by investigating how ideological policy preferences, not concerns for institutional legitimacy, influence whether the Supreme Court responds to Court-curbing legislation. Of particular interest, is exploring the conditions under which the justices view the bills as signals of potential legislative overrides. Furthermore, the research in this chapter diverges from the existing body of work on Court-Congress relations with respect to Court-curbing legislation by testing how the content of these bills dictate the Court’s response and willingness to defer to legislative preferences. In sum, this study posits that the Court will strike down fewer federal laws after Congress introduces Court-
curbing legislation, particularly those that attempt to harness its power for policy purposes, when it is likely that members will move to override the Court’s decision(s).

The theoretical basis for this expectation is derived from separation of powers models in which the Court engages in sophisticated decision-making to avoid overrides (Dahl 1957; Epstein, Knight, and Martin 2001; Ferejohn and Shapin 1990; Gely and Spiller 1990; Meernik and Ignagni 1997). Consequently, this research diverges from previous studies focusing solely on the Court’s efforts to protect its institutional legitimacy following the introduction of Court-curbing legislation (Clark 2009, 2011; Handberg and Hill 1980; Marshall, Curry, and Pacelle 2014; Rosenberg 1992). The underlying assumption is that ideological disagreement with a decision motivates Congress to introduce Court-curbing legislation or override a decision and both will occur more frequently as judicial decisions diverge from congressional preferences. This leads to the main difference between this study and Clark’s conditional self-restraint model that theorizes that Court-curbing bills sponsored by ideological allies, not ideological opponents, of the Court have more of an impact on judicial decision making.

The results reported here are quite different than those of Clark’s (2009, 2011). Beginning with the factors that constrain judicial behavior, he finds that Court-curbing and waning public support results in fewer invalidated laws. This study does not find that either of those factors have an influence on the Court’s constitutional decision making. With respect to ideological divergence, Clark does not report this factor having a statistically significant effect on the Court. In contrast to these findings, the results shown in Table 1 indicate that increasing ideological divergence between Congress and the Supreme Court leads to fewer invalidated laws. Consequently, it does appear that the separation of powers model is able to describe judicial decision making in constitutional cases. In other words, if the Court is concerned about
the possibility of Congress reversing its decisions, it would strike down fewer laws as legislative preferences become vastly different from those of the judiciary. However, this conclusion is not strengthened by the results relating to legislative gridlock in which whether Congress can override a decision does not appear to factor into the Court’s decision-making calculus. Regardless, thus far, the results provide more support for the separation of powers model as congressional preferences are able to constrain the Court.

When it comes to the constraining effect that Court-curbing legislation has on the Court’s decision making given different levels of public support, ideological divergence, or legislative gridlock, this study finds very little support for the hypothesized relationships nor are the results able to verify the findings of the existing literature. Clark (2009, 2011) finds that Court-curbing legislation constrains judicial behavior the most when public opinion is waning and there is little ideological divergence with Congress; but, this study does not. Instead, the results here show that in general, the Court’s response to Court-curbing legislation (both types) does not differ based on varying levels of public opinion, ideological divergence, or legislative gridlock. Overall, the results indicate that the Court is relatively unresponsive to Court-curbing legislation in general and when the bills coincide with factors signaling a potential legislative override or waning institutional legitimacy.

In addition to the substantive effects of these results and how they compare to findings reported by previous findings, there are implications for the theoretical literature as well. It does not appear that concerns regarding the possibility of legislative overrides or diminished institutional legitimacy influence judicial decision making. Thus, strategic models of judicial decision making such as the separation of power (SOP) model fail to adequately describe judicial responses to Court-curbing legislation. In other words, the Supreme Court does not view Court-
curbing bills as a signal of possible legislative overrides, and it is not concerned about decisions being overturned as the justices do not consistently defer to legislative preferences under conditions in which reversals are likely—low levels of legislative gridlock and ideological divergence between the two branches. Additionally, there is no support for Clark’s (2009, 2011) conditional self-restraint model in which the Court’s response to Court-curbing legislation should be dictated by current levels of diffuse public support because the justices respond when the judiciary’s institutional legitimacy is in decline. Again, the results of the interactive model appear to be described best by the attitudinal model of judicial decision making in which the justices are unconstrained by various institutional and political factors. Although the Court is not found to be influenced by Court-curbing legislation, this is a fairly common result as previous studies have found that these bills do not consistently elicit a noticeable change in judicial behavior (e.g., Nagel 1965; Rosenberg 1992; Segal, Westerland, and Lindquist 2011). The next section will return to the example from the beginning of this study on Court-curbing legislation and judicial decisions relating to same-sex marriage and discuss what these mixed findings mean for the literature by highlighting additional opportunities for future research in an effort to better explain inconsistent responses by the Court to these bills.

VI. Conclusion

The Supreme Court’s disregard for the Marriage Protection Act in the *Windsor* and *Obergefell* decisions accords well with arguments that the Court seeks to protect its institutional legitimacy. In an effort to avoid widespread criticism, the Republican-controlled Court ruled in favor of the preferences of the Democratically-controlled Senate and President Obama in *Windsor*. Since partisan control of each chamber of Congress was split and legislative gridlock is relatively common, the Court had little reason to anticipate that the decision would be reversed.
However, the likely disapproval that would come from the dominant political majority, led by President Obama, would be much more harmful to the Court’s institutional legitimacy and independence. Any backlash from the Republicans following the decision would to be expected but they lacked the political power to credibly threaten the Court’s institutional legitimacy, especially since public opinion sided with the Democrats (Cohen 2013).

The Republicans controlled Congress when the *Obergefell* decision was handed down, so the conservative Court could have handed down a decision that did *not* legalize same-sex marriage. If this would have been the case, the Democrats in Congress would have been unable to override the decision. However, the Court handed down a decision that went against the dominant majority in Congress and expanded rights for same-sex couples. There are two likely reasons for this. First, the Court had little reason to expect an override. President Obama would veto such a bill if it was enacted into law and the Republicans would not be able to override the presidential veto because they do not hold a supermajority (two-thirds) in either chamber. Second, roughly 60% of Americans supported same-sex marriage at the time the decision was announced (McCarthy 2015). Thus, the criticism that would likely be levied against the Court from the public, President Obama, and Democrats in Congress for failing to follow public opinion and existing precedent established in decisions that supported LGBT rights (i.e., *Lawrence* and *Windsor*) would substantially diminish the judiciary’s institutional legitimacy.

These two examples of the effect of Court-curbing legislation on judicial review suggest that the partisan affiliation or ideology of the sponsor in relation to the dominant majority in Congress or public opinion influences whether the Court responds to the legislation. Prior research has generally assumed that all Court-curbing legislation threatens judicial legitimacy

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11 According to a March 2013 Washington Post-ABC News Poll, 58% of Americans were supportive of same-sex marriage (Cohen 2013).
and elicits a response from the Court (e.g., Clark 2009, 2011; Handberg and Hill 1980; Nagel 1965; Rosenberg 1992), but this is not what occurred with the MPA in Windsor or Obergefell. In other words, all Court-curbing legislation is typically expected to be a credible threat to the Court, but this may not always be the case when the bill is sponsored by a member outside of the ruling majority or goes against prevailing public opinion. Whether the Court’s behavior in Windsor or Obergefell is the norm or the exception should be explored by future research to gain a better understanding of the dynamics of Court-curbing.

Another area unexplored by this study and the prior literature on Court-curbing is how the different types of initiatives influence the Court’s behavior. For example, the MPA was introduced prior to Windsor, but not all Court-curbing bills directly relate to specific cases or topic areas. It is unlikely the MPA would have a discernible effect on constitutional decision making in cases other than those relating to gay marriage. It is possible that Court-curbing bills relating to specific issue areas, such as those attempting to strip the Court’s jurisdiction or alter the remedies that can be prescribed, have little effect on judicial decision making except for cases directly involving the policy area. Overall, this study’s finding that the Supreme Court is relatively unresponsive to Court-curbing legislation provides numerous opportunities for additional research to better understand the effects that these bills can and do have on judicial behavior.
Appendix A: Categorizing Court-Curbing Bills as Harnessing Judicial Power or Attacking the Court’s Institutional Legitimacy

First off, it is important to note that Engel (2011, 35) states that his categories of Court-curbing proposals are not definitive and illustrates this point by placing initiatives on a spectrum ranging from those attacking institutional legitimacy to harnessing judicial power. For example, restricting judicial review undermines judicial legitimacy and altering the Court’s jurisdiction harnesses judicial power, but lowering the judiciary’s budget is somewhere in between these two extremes. However, most of the categories used by Clark (2011) can be classified as either attacks on the Court or efforts to harness judicial power. With respect to attacks on the Court, Engel provides examples of proposals that Clark categorizes as judicial review and procedure bills, such as those that allow for congressional overrides of judicial decisions or alter decision rules. Although Engel does not mention bills that Clark classifies as “other,” proposals criticizing judicial decisions or practices of the Court, such as citing foreign law, are commonly considered attacks on the Court’s institutional legitimacy. This conclusion is supported further by the fact that these proposals are often introduced as simple or concurrent resolutions. Resolutions cannot be used to create law, and within the context of Court-curbing, allow legislators to focus on voicing a specific opinion about judicial behavior without proposing substantive policy change to the structure or functions of the judiciary. In sum, all bills classified by Clark as procedure, judicial review, and other can be coded as proposals that attack the Court.

The types of Court-curbing bills that Engel states harness judicial power are those that manipulate the Court’s jurisdiction and attempt to limit the Court’s influence in a particular policy area. It is apparent that bills classified by Clark as jurisdiction stripping proposals can be coded as those that harness judicial power, but it is unclear whether “remedy” bills constitute bills seeking to restrict judicial power in cases pertaining to public policy. Although Engel does
not discuss bills that would be considered examples of “remedy” bills, Clark states that these bills are commonly introduced in tandem with jurisdiction stripping legislation. Therefore, “remedy” bills can be coded as legislation that attempts to harness judicial power. Engel also categorizes bills that alter the number of judges on the bench or institute mandatory retirement as those that harness judicial power; yet, bills designed to impeach justices are considered proposals that attack the Court. Since most bills relating to the size of the Court are considered proposals that harness judicial power, all bills classified as “composition” by Clark are coded in this category. This allows for continuity in how the Court-curbing bills are coded into the two categories proposed by Engel and makes replicating this method straightforward.

In addition to classifying Court-curbing bills as either attacking the Court or harnessing judicial power based on what the proposal specifically seeks to accomplish, Engel states that whether the initiative is introduced as a statute or an amendment can also be used to categorize the proposal. Since Court-curbing initiatives introduced as amendments require a supermajority to be enacted, they have a lesser likelihood of being enacted than measures introduced as ordinary legislation. As a result, Court-curbing amendments can be considered attacks on the Court because members use them as position-taking endeavors to voice opinions relating to judicial behavior to gain short-term electoral benefits without the possibility of damaging a long-term interest in an independent judiciary.

Coding all amendments as proposals attacking the Court was considered; however, 87% of the “composition” proposals, 1.2% of “jurisdiction” proposals, and 24% of the “remedy” proposals are introduced as amendments and would eliminate the majority of the proposals coded as harnessing judicial power. Furthermore, coding the bulk of the Court-curbing proposals as attacking the Court contradicts Engel’s observations that legislators began focusing more on
harnessing judicial power during the mid-twentieth century and these proposals were introduced at a higher rate than those that attempt to undermine the Court’s institutional legitimacy. As a result, this study codes Court-curbing bills as those that harness judicial power or attack the Court based on the purpose of the bill, not whether it was introduced as an amendment or ordinary legislation. This decision is also supported by Clark’s discussion of “composition” Court-curbing bills in which it is noted that most of these bills are introduced as amendments. This is because most of these bills attempt to alter judicial tenure, which is constitutionally protected, and can only be accomplished with an amendment.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Standard Deviation</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Invalidated Laws</td>
<td>1.882</td>
<td>1.513</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Court-Curbing Bills</td>
<td>8.706</td>
<td>8.376</td>
<td>1</td>
<td>32</td>
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<td>Harness Court-Curbing Bills</td>
<td>6.088</td>
<td>7.171</td>
<td>0</td>
<td>30</td>
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<tr>
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<td>4.120</td>
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<tr>
<td>Ideological Divergence</td>
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<td>.120</td>
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<td>.343</td>
</tr>
<tr>
<td>Legislative Gridlock</td>
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<td>.114</td>
<td>.275</td>
<td>.637</td>
</tr>
<tr>
<td>Public Support</td>
<td>3,341.077</td>
<td>327.083</td>
<td>2,671.876</td>
<td>4,063.440</td>
</tr>
</tbody>
</table>

N 34


Obergefell v. Hodges. 2015. 576 U.S. ___.


*United States v. Windsor.* 2013. 570 U.S. ____.


Table 1: The Constraining Factors of Constitutional Decision Making

<table>
<thead>
<tr>
<th>Variable</th>
<th>Court-Curbing Bills</th>
<th>Court-Curbing Bills: Harnesses Judicial Power</th>
<th>Court-Curbing Bills: Attacks the Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Coefficient</td>
<td>Robust SE</td>
<td>Coefficient</td>
</tr>
<tr>
<td>Court-Curbing_{t-1}</td>
<td>.014</td>
<td>.009</td>
<td>.018</td>
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<tr>
<td>Ideological Divergence</td>
<td>-5.487*</td>
<td>2.779</td>
<td>-5.424*</td>
</tr>
<tr>
<td>Legislative Gridlock</td>
<td>.101</td>
<td>3.471</td>
<td>.428</td>
</tr>
<tr>
<td>Public Support</td>
<td>.0002</td>
<td>.0002</td>
<td>.0002</td>
</tr>
<tr>
<td>Constant</td>
<td>-.570</td>
<td>1.803</td>
<td>-.465</td>
</tr>
</tbody>
</table>

† p < .1, *p < .05, **p<.01 (two tailed tests)

| N                             | 34                  | 34                                          | 34          |
| Overdispersion                | \(\chi^2_{[1]} = 0.00\) | \(\chi^2_{[1]} = 0.00\)                    | \(\chi^2_{[1]} = 0.00\) |
| Serial Correlation            | \(\beta = .071, p \leq .697\) | \(\beta = .058, p \leq .751\)              | \(\beta = .149, p \leq .411\) |
| Unit Root                     | \(Z(t) = -3.100\)   | \(Z(t) = -3.100\)                           | \(Z(t) = -3.100\) |
| Model Chi-Square              | 20.379†             | 20.568†                                     | 20.088†     |
| Nagelkerke R-Square           | .465                | .469                                        | .461        |

Note: Natural court fixed effects not shown.
Table 2: Judicial Responsiveness to Court-Curbing in Constitutional Decisions

<table>
<thead>
<tr>
<th>Variable</th>
<th>Court-Curbing Bills</th>
<th>Court-Curbing Bills: Harnesses Judicial Power</th>
<th>Court-Curbing Bills: Attacks the Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Coefficient</td>
<td>Robust SE</td>
<td>Coefficient</td>
</tr>
<tr>
<td>Court-Curbing&lt;sub&gt;t-1&lt;/sub&gt;</td>
<td>-.045</td>
<td>.034</td>
<td>-.092&lt;sup&gt;†&lt;/sup&gt;</td>
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<tr>
<td>Ideological Divergence</td>
<td>-5.718</td>
<td>3.820</td>
<td>-7.901**</td>
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<tr>
<td>Legislative Gridlock</td>
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<td>4.532</td>
<td>-.964</td>
</tr>
<tr>
<td>Court-Curbing&lt;sub&gt;t-1&lt;/sub&gt; * Ideological Divergence</td>
<td>-.001</td>
<td>.202</td>
<td>.311&lt;sup&gt;*&lt;/sup&gt;</td>
</tr>
<tr>
<td>Court-Curbing&lt;sub&gt;t-1&lt;/sub&gt; * Legislative Gridlock</td>
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<td>.082</td>
<td>.121</td>
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<tr>
<td>Public Support</td>
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<td>.0002</td>
<td>3.43E-06</td>
</tr>
<tr>
<td>Court-Curbing&lt;sub&gt;t-1&lt;/sub&gt; * Public Support</td>
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<td>.00001</td>
<td>9.61E-06</td>
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<tr>
<td>Constant</td>
<td>.189</td>
<td>2.437</td>
<td>.880</td>
</tr>
</tbody>
</table>

<sup>†</sup> p < .1, <sup>*</sup>p < .05, **p<.01 (two tailed tests)

<table>
<thead>
<tr>
<th>N</th>
<th>34</th>
<th>34</th>
<th>34</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overdispersion</td>
<td>χ²[1]= 0.00</td>
<td>χ²[1]= 0.00</td>
<td>χ²[1]= 0.00</td>
</tr>
<tr>
<td>Serial Correlation</td>
<td>β = .074, p ≤ .686</td>
<td>β = -.016, p ≤ .928</td>
<td>β = .057, p ≤ .752</td>
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<tr>
<td>Unit Root</td>
<td>Z(t) = -3.100</td>
<td>Z(t) = -3.100</td>
<td>Z(t) = -3.100</td>
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<tr>
<td>Model Chi-Square</td>
<td>20.690&lt;sup&gt;†&lt;/sup&gt;</td>
<td>21.805</td>
<td>23.227&lt;sup&gt;†&lt;/sup&gt;</td>
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<tr>
<td>Nagelkerke R-Square</td>
<td>.471</td>
<td>.489</td>
<td>.511</td>
</tr>
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</table>

Note: Natural court fixed effects not shown.
Figure 1: Judicial-Legislative Interactions in the Separation of Powers

Liberal

House  Supreme Court  Senate  Conservative

Liberal

House  Override  Senate  Supreme Court  Conservative
Figure 2: Legislative Gridlock in the Veto Filibuster Model

- President
- Median Voter
- Filibuster Pivot
- Veto Pivot

- Liberal
- Conservative

- $< \frac{1}{3}$
- $\geq \frac{2}{3}$
- $\geq \frac{3}{5}$
- $< \frac{2}{5}$
- $\geq \frac{2}{3}$
- $< \frac{1}{3}$
Figure 3: Patterns of Invalidated Laws, Court-Curbing Bill Sponsorship, Ideological Divergence, and Legislative Gridlock During 1975-2008

- Court-Curbing Bills (t-1)
- Invalidated Laws
- Ideological Divergence
- Legislative Gridlock
Figure 4: The Effect of Ideological Divergence on Judicial Invalidations of Federal Laws (1975-2008)