Presidential Constraints on Supreme Court Decision-Making

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Separation-of-powers studies of judicial decision-making largely focus on congressional influences. Less attention is given to the role of presidents, which is surprising given their vast policy-making powers. Accordingly, we develop a new theory of how presidents influence the Supreme Court's review of statutes through potential legislative and administrative action. Using a data set of all federal laws passed between 1948 and 2015, we find, like others, that judicial review is less likely to occur when the court faces an ideologically hostile Congress. Unlike previous work, we reveal that such constraint is only effective when Congress is aligned with the president, who is less inclined to veto court-curbing legislation. We also find that the court's distance to the president is constraining given threats of nonenforcement, but only when the law is salient, the president and public align, and the president exerts more control over implementation.

Alexander Hamilton argued in *Federalist* 78 that the judicial branch would be the "weakest of the three departments" and "in continual jeopardy of being overpowered . . . by its co-ordinate branches." These contentions were used to justify the design of the federal judiciary to be independent from the other branches of government, through lifetime appointments. Hamilton further advocated that judges should review and overturn unconstitutional laws to protect individual liberties, a power later solidified in *Marbury v. Madison* (1803). Despite these politically insulating measures, many still fear contemporary courts are being unduly influenced.

Modern scholarship has examined the extent to which the elected branches in fact constrain the court, with the preponderance focusing on congressional rather than executive influences. Scholars have noted a variety of court-curbing tools employed by Congress to keep judicial behavior in line by diminishing its institutional power, like court packing and passing laws to defund or strip jurisdiction away from the courts (Clark 2010). Indeed, many studies find that congressional preferences affect the Supreme Court's decisions to review and overturn legislation (Clark 2010; Epstein, Segal, and Victor 2002; Harvey and Friedman 2006, 2009), because of perceived threats of statutory retaliation. Yet, presidents should also be influential in shaping judicial decision-making, given their importance and visibility in the separation-of-powers system, as well as the increasing prevalence of congressional gridlock and inaction. Furthermore, presidents have many powerful tools that might affect judicial decisions, such as nonenforcement and their role in motivating or approving court-curbing laws.

Accordingly, this article develops a new theory of the judicial review of federal statutes that gives prominence to presidents. Consistent with previous findings, we contend that Supreme Court justices anticipate negative political reactions to their decisions and temper their behavior accordingly, especially through certiorari decisions (Clark 2010; Harvey and Friedman 2006; Murphy 1964). Unlike much of this work, we argue that presidents can likewise affect judicial review in two primary ways. First, they maintain influence in any policy-making context in which Congress would constrain the court, through vetoes of court-curbing legislation and

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other lawmaking powers. Thus, congressional constraint on judicial behavior is itself moderated by the ideological alignment between Congress and the president.

Second, executive nonenforcement is also a significant threat to judicial power (Adamany 1973; Murphy 1964; Rosenberg 1991). If the court cannot expect its decisions to be carried out, judicial supremacy over constitutional interpretation is less meaningful. As Murphy (1964) argues, when the preferences of the president and court diverge, a "justice may calculate that it would be most prudent [to] avoid for the time being any decisions involving the contrary policy. In extreme situations he might find it necessary to accommodate his policy goals to those of the President" (169). Furthermore, we argue that presidential threats of nonenforcement will be most relevant when the issue is salient, public opinion aligns with presidents' preferences, and when they have greater authority over bureaucratic activity.

To test our theoretical predictions, we assemble a data set of all legislation passed between 1948 and 2015 (Comparative Agendas Project) to determine whether and when each law is reviewed in the Supreme Court (Whittington 2019). We focus on decisions of review, rather than invalidation, because of justices' considerable latitude in the former. Facing less constraint from the law and precedent, justices can more easily avoid conflict with the president through certiorari. In contrast to much of the previous literature, our analysis focuses on the constitutional decisions of the court and thus challenges the prominent idea that justices are unconstrained in this domain.

Overall, our study demonstrates presidents' powerful role in judicial decision-making, contributing to a literature mostly centered on congressional constraints. Although Congress can sanction the judiciary with court-curbing legislation, as highlighted in previous studies (e.g., Clark 2010), such threats are only credible with presidential support. More broadly, we call attention to the importance of studying the interactions between all three branches of government over policy making, contrary to most studies examining just one or two at a time. Our findings have implications for understanding the true nature of separation-of-powers dynamics and the scope of presidential power in various political arenas.

BACKGROUND

A perennial question in the separation-of-powers literature is the extent to which the judicial branch exercises power in the policy-making realm. Both normative and empirical scholars justify the courts' power in a democratic society (e.g., Bickel 1962; Ely 1980) and recognize the growth of judicial supremacy (e.g., Graber 1993; Whittington 2007). Others fear that courts are unduly constrained by the other branches of government. Strategic accounts of judicial decision-making adopt the latter posture, arguing courts avoid actions that garner political retaliation, rather than being generally unconstrained in their constitutional decisions (e.g., Segal and Spaeth 2002). Consequently, a long-standing question in the judicial politics literature is: How and when is the Supreme Court constrained by external actors in its constitutional decision-making?

Certainly, a profusion of theoretical work advances separation-of-powers models (Gely and Spiller 1992; Hansford and Damore 2000; Murphy 1964), especially in the context of statutory interpretation in which Congress has clear authority to overrule Supreme Court decisions (Eskridge 1991; Gely and Spiller 1990). Most importantly, these studies show that justices moderate their behavior to avoid congressional overrides. But whether elected branches can exert the same influence over constitutional decisions remains contested, because of the court's independence and presumed supremacy in interpreting the Constitution (e.g., Segal and Cover 1989; Segal and Spaeth 2002).

Judicial scholarship recognizes that Congress has plenary authority over statutory meaning and can thus override statutory decisions through the legislative process when it disagrees with judicial interpretations (Eskridge 1991). Overriding unfavorable constitutional decisions, however, necessitates a constitutional amendment, which requires both supermajority approval in Congress and ratification from three-fourths of state governments. Given that this process is exceedingly difficult, conventional wisdom holds that Congress is powerless in influencing constitutional decisions. Beyond direct congressional overrides, however, we argue that the elected branches can sanction the court through avenues like court-curbing laws (e.g., that defund or strip judicial power) or executive branch nonenforcement. Moreover, constitutional cases are often the most salient and controversial decisions, thus more likely to draw the ire of other political actors.

Several studies find that justices decide constitutional cases on the basis of their ideological views (Owens 2010; Sala and Spriggs 2004; Segal and Spaeth 2002). Other work, however, uncovers evidence of congressional constraints on these decisions. Epstein, Knight, and Martin (2001), for instance, show that moderate justices change their behavior to accommodate the preferences of pivotal senators. Clark (2010) finds that the volume of court-curbing bills proposed in the previous year decreases both the number of laws invalidated and the probability that any given law is overturned. Similarly, some studies discover that the court is less likely to review or overturn legislation when facing ideologically distant congresses, who have the greatest incentive to retaliate against judicial opponents (Harvey and Friedman 2006, 2009). Using a composite measure of institutional preferences across the three branches, Hall (2014) finds that interbranch constraints are

present but does not explain the individual impact of either Congress or the executive. Others reveal inconsistent support for congressional influence (Hansford and Damore 2000; Segal, Westerland, and Lindquist 2011).

Taken together, the evidence is mixed on whether justices are responsive to the elected branches on constitutional cases—which is, in part, due to the overwhelming scholarly focus on the merits stage of review. We argue that attention to which cases are reviewed is necessary. Once a litigant has petitioned the court to hear a case, the justices can choose to grant certiorari at their complete discretion, with rare exceptions.[1] Thus, justices seeking to avoid interbranch conflict can simply do so by not reviewing cases that might induce costly retaliation from the other branches of government. The few studies that do examine the agenda-setting stage primarily spotlight Congress, rather than the president, and yield conflicting results (Harvey and Friedman 2009; Owens 2010).

This literature largely centers on congressional influence for a few reasons. First, Congress has explicit institutional tools to constrain the court, including control over judicial budgets, salaries, jurisdiction, and administrative organization. These constitutional powers, moreover, lend themselves to discrete court-curbing actions that are easily observed. Conversely, presidential tools to constrain courts—nonenforcement, underenforcement, and soapbox rhetoric—are powerful but difficult to quantify. Finally, many separation-of-powers models of judicial decision-making intellectually originate from theories of legislative behavior and thus rarely consider the executive-judicial relationship as their primary subject.

Studies that do incorporate the executive branch mostly examine advocacy by the solicitor general (SG) through support briefs. For example, some scholars find that the court is more likely to adopt the position of an SG amicus brief when justices are ideologically aligned with the executive office—as proxied by the president's preferences (Bailey, Kamoie, and Maltzman 2005; Bailey and Maltzman 2011).[2] Others reveal that the court follows SG recommendations for certiorari when the court solicits her views as amicus (Black and Owens 2012). Solely focusing on amicus briefs, however, excludes those cases in which the government is a party (including those involving review of statute), when presidential interests are most likely to be implicated. Furthermore, we argue that these studies do not capture the breadth of executive influence on court policy making, especially for judicial review of federal laws. Instead, SG advocacy is but one tool presidents can use to influence Supreme Court behavior. As such, we build a theory of how presidents affect judicial review of statutes through both legislative and administrative processes.

THEORY

Following an extensive policy-making literature, we assume that Congress, the president, and the court all hold policy preferences that (at least partially) motivate their actions in the policy-making process and are known by one another.[3] Although policy making is readily associated with legislative, presidential, or bureaucratic actions, the court likewise has the ability to influence outcomes by reviewing these actions and wants to move policy as close to its preferences as possible (e.g., Bailey and Maltzman 2011; Ferejohn and Shipan 1990).

Judicial review, however, is costly, and the court may be constrained for several reasons. First, adjudicating a case requires time and resources. Hearing arguments, reviewing amicus briefs, and writing opinions takes several months. Given finite resources, each case considered represents another one not pursued. Therefore, the justices will be motivated to ensure that the cases they select to review have greater policy impact.

Additionally, the court is limited in its ability to implement policy (Rosenberg 1991) and requires cooperation from the elected branches for its policy goals to be realized. Particularly, the president can decline to implement judicial rulings with which she disagrees, resulting in policy outcomes no closer to the court's preferred position than if it chose not to review the law. Such unfavorable outcomes might impel the court to avoid judicial review in the first place, particularly in light of resource constraints and opportunity costs. Instead, it could expend resources on cases that achieve more favorable policies and would be supported by other political actors.

Furthermore, acts of interbranch retribution are costly to the court in terms of degrading its institutional position. Previous scholarship (e.g., Hall 2014; Segal et al. 2011) argues that the court engages in "institutional maintenance," where it seeks to avoid both backlash to (e.g., court curbing) and

1. Litigant behavior has been shown to affect the cases justices examine (Caldeira and Wright 1988; Perry 1991), but the probability of any given case being reviewed remains low. Judicial review may also be influenced by litigant decisions to initiate court cases and certiorari petitions, which we address in the appendix to show it is not driving our main results.

2. Indeed, these and other studies view the SG's office as being an agent of the president, especially since it has become increasingly politicized (Pacelle 2003; Wohlfarth 2009), given the president's power to appoint like-minded individuals or remove them for noncompliance.

3. Following several previous studies, our theory assumes that Congress, the president, and the court can each be conceptualized as a unitary actor. We conduct robustness checks that relax this assumption by considering the preferences of other actors in these institutions, as noted later in the empirical analyses. See the appendix for further discussion.

nonimplementation of its decisions that "might reduce its power and degrade its legitimacy over time" (Hall 2014, 354). Hall further notes that while such responses can be costly for the elected branches, it is "comparatively easy for them to ignore [the court's] decisions" (354).

Several other studies suggest that justices are concerned with the maintenance of their institutional power. A substantial judicial politics literature demonstrates the importance that the court places on its legitimacy among the public (e.g., Gibson, Caldeira, and Spence 2003; Mishler and Sheehan 1993; Zink, Spriggs, and Scott 2009). Legitimacy, however, can be undermined by perceptions that the court is less important or powerful than other branches of government or diminished by nonlegalistic framings of judicial decisions (Christenson and Glick 2014).

The court is thus cognizant of the ways its decisions draw negative responses from its elected counterparts on Capitol Hill and in the White House. Glick (2009), for example, argues the court strategically retreats from its preferences when the government has a strong interest in the outcome. Interbranch backlash and nonenforcement threatens the court's institutional position because it diminishes its public image, curtails its power, and decreases the likelihood that its preferred policy outcomes will be realized.[4] Given that the president can regularly capture the public's attention as the nation's most visible political figure and holds a vast array of policy-making tools, she serves as a potentially potent threat to the court's reputation and power through both legislative and administrative processes—as detailed in the following sections.

The president and legislative politics

As previously mentioned, separation-of-powers scholarship has largely underplayed the role presidents play in curtailing Congress's ability to pass retaliatory laws that constrain judicial review. Chief executives, however, have several ways to significantly limit congressional action. Informally, as leader of their party, presidents can shape the party's agenda and introduce legislative proposals from their own agenda. They can also formally veto bills, which requires a supermajority to overcome—a particularly challenging feat in an increasingly polarized era.

To recall, justices have the task of predicting whether their decisions will provoke backlash from Congress (Murphy 1964), which could threaten their institutional power. They are therefore unlikely to view court curbing as a credible threat if the president is ideologically distant from Congress. In these cases, it becomes difficult for legislators to pass any new laws given the increased likelihood of being blocked by an opposing president, who holds the power to veto and set the agenda. To the extent that court curbing is a rhetorical device, the president can provide countermessaging in favor of preferred decisions. Such rhetoric might sway public opinion against court-curbing measures, which may likewise deter electorally motivated legislators. In sum, the effectiveness of Congress in constraining judicial decisions is dependent on its alignment with the president. Thus, our first hypothesis is as follows.

> **H1** (Legislative Politics Hypothesis). Conditional on low ideological distance between Congress and the president, the likelihood a law is reviewed will decrease as the ideological distance between the court and Congress increases.

Executive nonenforcement

Beyond their role in the legislative process, presidents can influence judicial decision-making through their ability to enforce (or not enforce) court rulings. While somewhat uncommon, some of the most crushing blows to the court's institutional power nonetheless came from the president's refusal to enforce judicial decisions, such as Eisenhower's initial reluctance to implement desegregation mandates following *Brown v. Board of Education* (Rosenberg 1991). Whittington (2007) describes several more cases, especially for "reconstructive" presidents with substantial political support and departmentalist understandings of constitutional interpretation.

For instance, Andrew Jackson declined to recharter the Second National Bank on constitutional grounds, despite the court's acceptance of the bank in *McCulloch v. Maryland* (1819). He also publicly stated his intention to not enforce the court's decisions in the Cherokee cases. Abraham Lincoln likewise questioned the authority of the court, famously denying the precedential value of *Dred Scott v. Sandford* (1857) and refusing to comply with *Ex parte Merryman* (1861). Franklin Roosevelt's perception of the constitutional inadequacies of the court's decisions infamously led to his court-packing plan (Whittington 2007). Yet, executive compliance has often bolstered the court's claim to be the sole arbiter of the Constitution's meaning (Murphy 1964; Whittington 2007). As such, the court generally avoids making decisions presidents would fail to enforce.

Rather than alter the substance of its decisions, the court can simply decline to hear cases that would risk nonenforcement, which would be costly to its institutional power and other opportunities to favorably affect policy. Presidents have the greatest incentive to not enforce those rulings that produce

4. Furthermore, some argue that justices care about maintaining their personal relationships with the Washington elite and thus avoid rulings that might jeopardize their reputations or those relationships (e.g., Bailey and Maltzman 2011; Baum and Devins 2009).

outcomes counter to their preferred policies, which is more likely to occur when the judiciary holds ideologically opposing views. Consequently, the court should avoid reviewing cases for which oppositional presidents might retaliate with nonenforcement.

> **H2** (Nonenforcement Hypothesis). The likelihood a law is reviewed will decrease as the ideological distance between the court and the president increases.

Public preferences and nonenforcement

We argue that threats of nonenforcement are most effective in constraining judicial decisions when two conditions hold: (1) the public agrees with the position of the president, and (2) the issue is salient with the public. Given presidents' incentives for reelection for themselves and their copartisans, they are more willing to engage in nonenforcement if they expect to be supported by the public. Here, nonenforcement results in fewer negative electoral consequences for presidents opposing unpopular decisions of the court (Hall 2014). Consequently, justices are less likely to rule against presidential desires when those preferences align with public opinion (Howell 2003), and they can avoid hearing such cases altogether. Conversely, if the public opposes the president's position, she might be punished electorally for nonenforcement, and the court may be more empowered to engage in judicial review.

President-public issue agreement, however, will only affect the prospects of nonenforcement on high-salience issues. Public opinion is stronger and more cohesive on these issues, thus better facilitating presidential catering to public desires. Presidents likewise have the most electoral incentives to respond to the public when it is paying the most attention and is thus more likely to reward or punish presidents for nonenforcement. Furthermore, high-salience decisions are more likely to affect public evaluations of the court (Christenson and Glick 2014; Hoekstra 2000), therefore posing a greater threat to its institutional power if unenforced.

For low-salience issues, however, presidents have little to gain from challenging judicial authority through nonenforcement given comparatively low payoffs from nonattentive publics. Even when the president disagrees with a nonsalient judicial decision, her sincere or strategic commitment to judicial authority may compel her to comply with the decision rather than challenge the court.[5] When cases are unlikely to draw public attention, moreover, the court can counter presidential preferences with less risk of retribution. In the unusual case in which the president fails to enforce a decision in a low-salience domain, nonenforcement is unlikely to garner public attention and thus is less threatening to judicial authority.

In sum, if the court's decision is popular or the salience of the issue is low, then the threat of nonenforcement is minor or nonexistent, and presidential influence should be curtailed. But when the public both agrees with the president's position and believes the issue to be important, the court should be particularly reticent to challenge presidential authority through judicial review.

> **H3** (Public Opinion Hypothesis). When the public and president are ideologically aligned, the ideological distance between the court and president decreases judicial review—but only for high-salience laws. When the public and president are not aligned or when the salience of the issue is low, the ideological distance between the court and the president will not affect judicial review.

Agency independence and nonenforcement

Although presidents can vow to not enforce judicial rulings, they are better able to follow through with these threats when they have greater control over the bureaucracy. Agencies often have their own ideological preferences they wish to pursue when implementing the law (Hollibaugh and Rothenberg 2018), often conflicting with presidential goals. However, their ability to inhibit administrative goals is dependent on presidents' control over them. Presidents can induce agency compliance by appointing loyalists, centralizing agency actions through the White House, or imposing punishments for unfavorable behavior (Moe 1985).

When the agency responsible for implementing the law is strongly commanded by the president, we expect her threats of nonenforcement to be more credible and thus more influential for judicial review. Here, presidential ideology should serve as a reasonable proxy for potential executive branch behavior since it is more responsive to the president. Yet, when the responsible agency is independent from the president's control, we expect the court will be less likely to consider presidential preferences when deciding to review a statute. Taken together, the final hypothesis is as follows.

5. Presidents regularly use language of deference to the Supreme Court, even when criticizing its decisions (Collins and Eshbaugh-Soha 2019). This may reflect a sincere belief in the value of judicial constitutional interpretation. However, scholars have also noted that presidents' procedural commitment to judicial review is bolstered by expected support from the court for their political agenda (e.g., Graber 1993; Whittington 2007). Indiscriminate noncompliance may impose future policy costs on elected officials. Accordingly, we argue that procedural support for judicial review may outweigh policy commitments when policy salience is low.

H4 (Agency Independence Hypothesis). When the agency responsible for implementing the law is more controlled by the president, the likelihood of judicial review will decrease as the ideological distance between the court and the president increases. When the agency responsible for implementing the law is less controlled by the president, the ideological distance between the court and the president should not affect judicial review.

DATA AND METHOD

To test these predictions, we collect data from the Comparative Agendas Project (CAP), an online archive of various policy outcomes from several countries. Among its many strengths, one advantage of using CAP data is that they are uniformly coded by policy area—corresponding to 21 major topics (e.g., macroeconomics, health, labor) and 220 subtopics. This universal coding scheme allow us to easily match legislation with other variables of interest—like salience or public mood—based on policy area, as detailed later in this section.

To construct our data set, we use the CAP list of all laws passed between 1948 and 2015.[6] To assess the fate of a law at a given moment in time, we expand these data sets by year so that law-year is the unit of analysis. Our dependent variable is the probability of review, coded as 1 in the year the law is reviewed and 0 otherwise. If a law is upheld or only partially invalidated, it remains in the data set until it is fully invalidated and then drops out in the following years.

To determine whether a law is reviewed, we rely on a data set collected by Whittington (2019), which is the most comprehensive list of "deliberately defined and enforced constitutional limits on the legislative authority of Congress." This list includes all instances in which an act of Congress is reviewed by the Supreme Court. Of the 20,735 laws that were passed between 1948 and 2015, only 1.9% were reviewed. Of those reviewed, 45% were struck down.

To test the probability a law is reviewed in any given year, we use logit regression models. Logit analysis assumes that observations are independent, which may be violated in the case of grouped duration data such as ours and can consequently lead to incorrect estimates (Beck, Katz, and Tucker 1998). In other words, we do not believe that the likelihood of review in a given year is independent of whether a law is reviewed in previous years. Following Beck et al. (1998) we adjust our models to account for temporal dependence.[7] First, each model includes a natural cubic spline, which fits piecewise cubic polynomials to subintervals of a law's duration over time. These dummy variables for certain ages of the law's life allow the baseline hazard rates (i.e., the probability that a law is reviewed in a given year) to take a nonlinear form, thus accounting for temporal dependence by permitting these probabilities to naturally change over the course of a law's existence. Second, we include a variable counting the number of times a law has been previously reviewed (Times Previously Reviewed) in each model to control for the fact that multiple reviews in previous time periods can influence the probability of review in the current year.

Overall, a law only exits out of the data set when it is fully struck down—which only occurs eight times between 1948 and 2015. The vast majority of laws that are invalidated are done so partially only (95%). In fact, 27% (21%) of laws reviewed (invalidated) were done so in multiple years over time, which can be accounted for with the logit analysis.

Covariates of interest

We examine whether the court is constrained by Congress, by using the absolute ideological distance between the current medians of Congress, averaged across chambers, and the court (D(Current Congress, Current Court)).[8] All distance measures employed in this analysis are constructed using the Bailey (2007) ideal point estimates, which change from year to year unlike alternative measures (e.g., partisanship). This variable in particular captures the current level of policy disagreement between these two institutions and serves as a proxy for the court's perceived threat of congressional retaliation, primarily through court-curbing legislation.

To test the Legislative Politics Hypothesis, we measure the ideological distance between the chamber-averaged median of the current Congress and the current president (D(Current President, Current Congress)); we then interact this variable with D(Current Congress, Current Court). For the Nonenforcement Hypothesis, D(Current President, Current Court) is measured as the absolute distance between the ideal point of the president and court median.

To test the Public Opinion Hypothesis, we use public opinion on issue salience by gathering Gallup Poll data from

6. We omit laws the CAP identified as exclusively commemorative, about 15%. In the appendix, we analyze the main models using a sample of significant laws based on mentions in the *Congressional Quarterly Almanac*. We find that the results are nearly identical to those presented in the article.

7. Indeed, diagnostics of the log-likelihood ratios suggest time dependence in the data.

8. The results are robust when using alternative legislative actors like the filibuster and override pivots or party and committee medians. The results are robust when controlling for the chief justice's ideology or fixed effects and legislative fragmentation (e.g., polarization, majority party size, and interchamber distance).

the "most important problem" question.[9] The CAP aggregates the annual survey responses from this question by each of their major topic codes, yielding the percentage of respondents who deemed each issue as the most important problem within a given year. We then match these percentages to each piece of legislation by major topic code, using CAP's assignment, and log this measure given its skewed distribution. For ease of interpretation, we create an indicator for whether the law is in an issue area that the public views as relatively important, based on whether survey responses in that area are above the mean (High Public Salience). For instance, laws related to the economy, health care, education, law and crime, and defense were considered salient in 2010, while only the economy, civil rights, defense, and international affairs were coded as salient in 1990. We interact this measure with D(Current President, Current Court).[10]

To fully test the Public Opinion Hypothesis, we explore the effect of the interaction on different subsets of the analysis based on whether the president and public are ideologically aligned (President-Public Alignment). We first create an indicator for whether the president is liberal (conservative) based on her Bailey score being below (above) the median. We likewise create an indicator for whether the public is liberal by relying on the Stimson's (1991) measure of public liberalism. Specifically, we use CAP's data to match public liberalism to the issue area of each law in the data set. We code the public as being liberal (conservative) on a particular issue if the liberalism score is above (below) the median for the CAP major topic code corresponding to the law. Our measure of President-Public Alignment is coded as 1 if the president and public are either both liberal or both conservative and 0 if they have differing ideologies.

Finally, we measure agency independence by using Thrower's (2020) data set that identifies the primary agency responsible for implementing a particular piece of legislation, for all laws passed between 1981 and 2012. Following this analysis, we match these agencies to both dimensions of Selin's (2015) measure of agency independence, which respectively correspond to the concepts of politicization and centralization. The first dimension is estimated on the basis of how much presidents can control agency personnel (Decision Maker Independence), while the second dimension captures the degree agency actions are centralized under White House control (Policy Decisions Independence). We interact both measures with D(Current President, Current Court) in separate models to test the Agency Independence Hypothesis.

9. Gallup asks "What do you think is the most important problem facing the country today?"

10. The results are similar when using a logged count of this measure.

Control variables

We include numerous control variables that could likewise influence judicial review. First, we measure the ideological distance between the current Congress and the Congress that originally passed the law (D(Current Congress, Issuing Congress)).[11] Harvey and Friedman (2006, 2009) argue that the ideal point of the current Congress should proxy for where the court—constrained by its legislative counterparts—can move policy, while the ideal point of the issuing Congress should serve as a proxy for the location of the law under review. They find that the greater the distance between these two congresses, the more policy gains the court can achieve, and thus the probability of review or invalidation increases.[12]

Second, we include an indicator for whether the law is on Mayhew's (1991) updated list of landmark legislation (Landmark Law),[13] to account for the possibility that the most consequential laws are more susceptible to legal challenges. Third, we use a proxy for the complexity of the law by taking the natural log of the number of pages of the law. Following previous studies (e.g., Maltzman and Shipan 2008; Thrower 2017), longer text should correspond to more complex policies given the amount of detail contained therein. The complexity of a law might increase the chances of judicial review, since there is more content to challenge. Fourth, presidents and congresses serving during a strong economy and with public support may be more empowered to retaliate against the judiciary. As such, we measure the annual unemployment rate from the Bureau of Labor Statistics (Unemployment). To control for the president's political capital, we use the president's public approval rating, as aggregated annually by weekly Gallup Poll responses (Presidential Approval). Next, we measure the degree of liberalism the public maintains by the issue area of the law, retrieved from a database maintained by CAP (Public Mood). Finally, we include fixed effects for the issue area of the law, using CAP's major policy codes, to control for the differences in the way the court or president may treat these areas.[14] Summary statistics are reported in the appendix.

11. The correlations of these distance measures range from −0.133 to 0.129.

12. The results hold when including the distance between the current court and issuing Congress.

13. See http://campuspress.yale.edu/davidmayhew/datasets-divided-we-govern/.

14. The analysis holds when including a trend variable that might capture over time dynamics, such as the changing costs of nonenforcement to the president. The results are also robust when excluding any one or all of the control variables.

RESULTS

Tables 1–4 report the regression coefficients from logit models with standard errors clustered by law to account for the possibility that within-cluster (i.e., the statute) errors may be correlated (across time). Each table corresponds to an empirical test of each hypothesis. We begin by evaluating the degree to which the court is constrained by Congress (the Legislative Politics Hypothesis), conditional on presidential support, in table 1.

We interpret these interactive effects in figure 1, which depicts the marginal effects of D(Current Congress, Current Court) at varying levels of D(Current President, Current Congress). When the president and Congress are the most ideologically aligned, legislative-judicial distance reduces the probability of a law being reviewed. Here, a 1 unit increase in D(Current Congress, Current Court) corresponds to a 0.14% decrease in the chances of judicial review. Although these effects are seemingly small, it is fitting when considering that the likelihood of any legislation being reviewed at any point in time is only 0.05%. Another way to interpret these coefficients is to consider the odds the law is reviewed when Congress-court distance is low in relation to the odds of review when this distance is high. Particularly, an increase from the 25th to the 75th percentile of D(Current Congress, Current Court) corresponds to a 48% reduction in the odds of review.

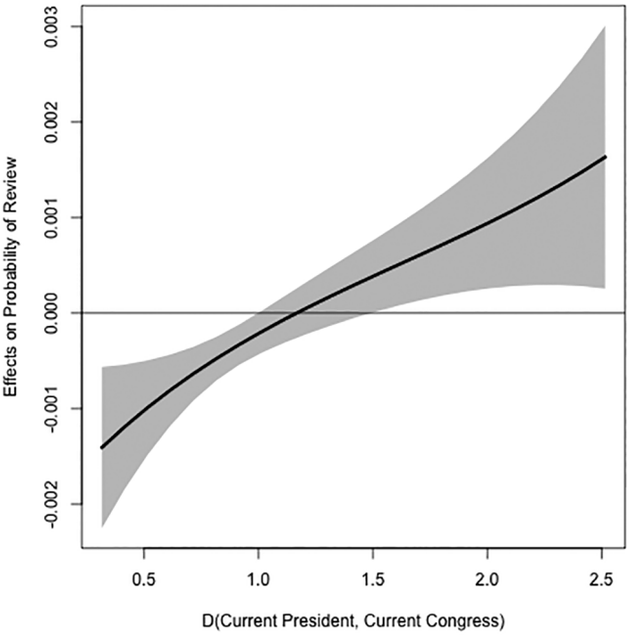

Figure 1. Marginal effects of D(Current Congress, Current Court) on the probability of review (*Y*-axis), at varying levels of D(Current President, Current Congress) along the *X*-axis.

As Congress's distance from the president increases, however, its threat to the judiciary lessens. The effect of Congress-court distance on judicial review first shifts to insignificant and then becomes positive and significant at increasingly higher values of presidential-congressional distance. Indeed, at the peak level of D(Current President, Current Congress), an expansion in D(Current Congress, Current Court) from the 25th to 75th percentile increases by 3.08 times the odds of judicial review. Unlike previous literature (Harvey and Friedman 2006, 2009), we find that threats of statutory retaliation are only influential when Congress has an ideologically friendly president in its corner; otherwise the judiciary is unfazed.

Across these models, Time Previously Reviewed is consistently positive, demonstrating that the likelihood of review rises for laws that have been previously reviewed more often—as expected. Additionally, D(Current Congress, Issuing Congress) has a positive and statistically significant coefficient, consistent with the idea that the court has more latitude when there is wide potential for policy gains. Further, the analysis reveals that the most consequential and complex laws are more likely to be reviewed. Interestingly, review is more likely to occur during periods when the current president has high public approval, although this effect may be contingent on other factors such as her relationship with the courts.

Table 1. Legislative Politics Hypothesis

	(1)
D(Current Congress, Current Court)	−2.68 (.68)***
D(Current President, Current Congress)	−1.23 (.50)**
D(Current Congress, Current Court) × D(Current President, Current Congress)	2.30 (.72)***
D(Current Congress, Issuing Congress)	.68 (.41)*
Times Previously Reviewed	.44 (.11)***
Landmark Law	2.08 (.32)***
Ln(Law Length)	.58 (.09)***
Unemployment	.01 (.04)
Presidential Approval	.02 (.01)***
Public Mood	−.01 (.01)
Age cubic spline	Yes
Policy area fixed effects	Yes
Constant	−7.50 (.89)***
N	514,690
Log likelihood	−1,883.29

Note. Coefficients from logit regression, with robust standard errors clustered by law in parentheses. The dependent variable is the probability a law is reviewed in a given year. Two-tailed significance tests.
* $p < .1$.
** $p < .05$.
*** $p < .01$.

Table 2. Nonenforcement Hypothesis

	(1)
D(Current President, Current Court)	−.80 (.23)***
D(Current Congress, Current Court)	−.93 (.23)***
D(Current President, Current Congress)	−.12 (.23)
Controls	Yes
Age cubic spline	Yes
Policy area fixed effects	Yes
Constant	−7.73 (.85)***
N	514,690
Log likelihood	−1,880.28

Note. Coefficients from logit regression, with robust standard errors clustered by law in parentheses. The dependent variable is the probability a law is reviewed in a given year. Two-tailed significance tests.
* $p < .1$.
** $p < .05$.
*** $p < .01$.

Presidents can likewise influence judicial decision-making if the court perceives threats of executive nonenforcement, as measured by their diverging policy preferences. Table 2 examines the effect of D(Current President, Current Court) on the probability of review. Consistent with the Nonenforcement Hypothesis, this distance has a negative and significant impact. As the distance between the current president and judiciary widens, the probability that a law is reviewed declines. More precisely, the odds of review decrease by 30% at the 75th percentile of D(Current President, Current Court), as compared to the 25th percentile.[15]

Specifically, our findings suggest that the court fears executive branch nonenforcement when faced with an ideologically distant president and thus tempers its behavior.[16] We argue, however, that such fears of nonenforcement are particularly influential to judicial decision-making when the court's authority is more susceptible to being compromised. As articulated in the Public Opinion Hypothesis, its authority should be most vulnerable if the case is salient and public opinion aligns with the president.

We test this hypothesis by interacting D(Current President, Current Court) with High Public Salience (table 3). Column 1 shows the analysis for when the public and president are ideologically aligned (President-Public Alignment is 1), while column 2 analyzes conditions under which they are not aligned (President-Public Alignment is 0). For ease of interpretation, we plot the estimated effects of D(Current President, Current Court) at varying levels of salience in figure 2. For low-salience issues, the court's ideological distance to the president does not significantly affect its decision to review that particular law. If public attention for the policy area is high, the court's odds of reviewing it significantly decrease by 100%, when increasing D(Current President, Current Court) from the 25th to 75th percentile.

Yet, this relationship only holds if the president is ideologically aligned with the public. When public opinion differs from presidential preferences, the effect of D(Current President, Current Court) is statistically insignificant, regardless of the level of salience. Overall then, the court is only responsive to the threat of nonenforcement from an ideologically distant president when the salience of the issue is high and she is aligned with public opinion. Consistent with the Public Opinion Hypothesis, these are the times in which the court's authority is most likely to be threatened by nonenforcement.[17] We find a comparable interactive relationship when considering issues salient to the president's agenda in the appendix.

Similarly, we argue that presidents' threats of nonenforcement are more credible when they have greater control over the agency responsible for enforcing the law (the Agency Independence Hypothesis). We test this argument in table 4, where we interact D(Current President, Current Court) with both dimensions of agency independence: Decision Maker Independence (col. 1) and Policy Decisions Independence (col. 2). Interestingly, only the latter measure has a significant effect on judicial review, as evidenced by the negative and significant coefficient on the interaction term in column 2.

We interpret these interactive effects in figure 3, by showing the marginal effects of D(Current President, Current Court) on the probability of review along varying levels of Policy Decisions Independence. At the lowest levels of agency independence, when presidents exert the greatest control over the

15. In the appendix, we show that the interaction between D(Current President, Current Court) and D(Current President, Current Congress) is insignificant, providing support for our claim that presidential threats of nonenforcement do not depend on congressional support.

16. We find that the court's distance to the implementing agency, using various ideological measures, does not have a significant impact on review. This supports the notion that the court cares most about presidents' (not agencies') nonenforcement threats given their public platform.

17. We show in the appendix that there is no significant conditional relationship between Congress-court distance, Congress-public alignment, and public salience, thus supporting our claim that it is the president's position with the public, rather than that of Congress, that serves as a greater threat to judicial power.

Table 3. Public Opinion Hypothesis

	(1)	(2)
D(Current President, Current Court)	.01 (.37)	−.83 (.33)**
High Public Salience	1.21 (.54)**	−.42 (.41)
High Public Salience × D(Current President, Current Court)	−1.94 (.56)***	.32 (.46)
D(Current Congress, Current Court)	−1.26 (.38)***	−.64 (.31)**
D(Current President, Current Congress)	−.54 (.34)	.11 (.33)
President-Public Alignment	Yes	No
Controls	Yes	Yes
Age cubic spline	Yes	Yes
Policy area fixed effects	Yes	Yes
Constant	−8.29 (1.21)***	−8.68 (1.29)***
N	252,423	257,049
Log likelihood	−866.43	−969.45

Note. Coefficients from logit regression, with robust standard errors clustered by law in parentheses. The dependent variable is the probability a law is reviewed in a given year. Column 1 shows the analysis when the president and public are aligned. Column 2 shows the analysis when the president and public are not aligned. Two-tailed significance tests.

* $p < .1$.

** $p < .05$.

*** $p < .01$.

agency responsible for implementing the law, presidential ideology is constraining on judicial decision-making. In other words, the court is less likely to review a law being enforced by an agency controlled by the president. Here, the likelihood of review decreases by 2.13 times as president-court distance increases from the 25th to the 75th percentile of the measure.

This effect becomes smaller and insignificant for agencies that are only moderately centralized. Yet when agencies are the least centralized under White House control, threats of non-enforcement become less plausible to the courts, and thus presidential ideology is likewise less constraining to judicial behavior. In fact, at the highest levels of agency independence, the court is more likely to review a law in the face of an oppositional president. Particularly, an increase in D(Current President, Current Court) from the 25th to the 75th percentile corresponds to a 37% increase in the odds of judicial review.

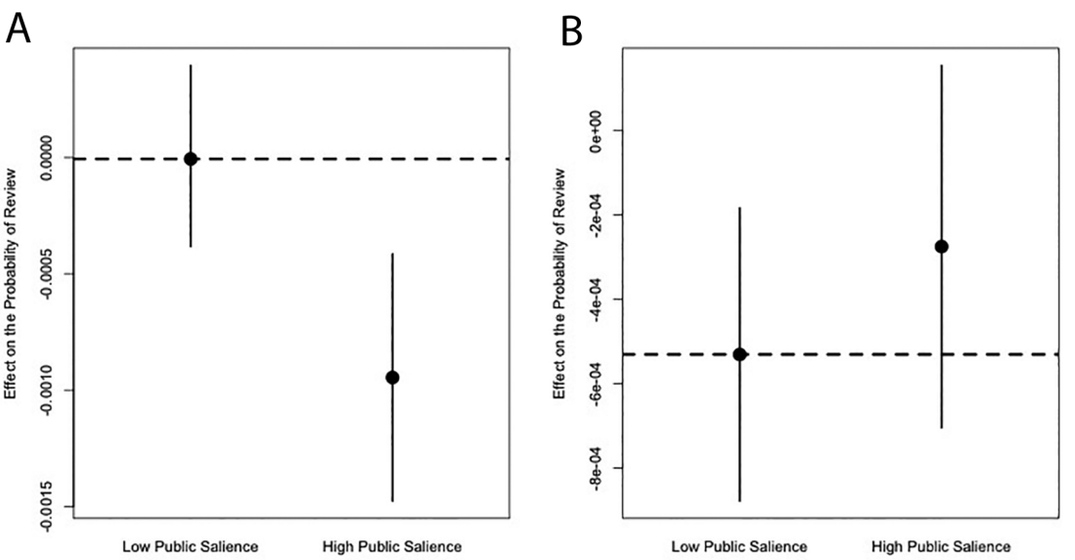

Figure 2. Marginal effects of D(Current President, Current Court) on the probability of review (*Y*-axis), at varying levels of salience along the *X*-axis. *A*, President and public are aligned. *B*, President and public are not aligned.

Table 4. Agency Independence Hypothesis

	(1)	(2)
D(Current President, Current Court)	−.61 (.75)	−2.00 (.91)**
Decision Maker Independence	−.99 (1.00)	
Decision Maker Independence × D(Current President, Current Court)	1.19 (.97)	
Policy Decisions Independence		−2.05 (.87)**
Policy Decisions Independence × D(Current President, Current Court)		2.20 (.82)***
D(Current Congress, Current Court)	−.10 (.61)	−.15 (.59)
D(Current President, Current Congress)	−.02 (.63)	−.03 (.63)
Controls	Yes	Yes
Age cubic spline	Yes	Yes
Policy area fixed effects	Yes	Yes
Constant	−3.95 (2.11)*	−2.64 (2.27)
N	56,659	56,659
Log likelihood	−435.73	−433.39

Note. Coefficients from logit regression, with robust standard errors clustered by law in parentheses. The dependent variable is the probability a law is reviewed in a given year. Column 1 uses the Decision Maker Independence variable as the measure of agency independence from presidential control, which captures politicization. Column 2 uses the Policy Decisions Independence variable as the measure of agency independence from presidential control, which captures centralization. Two-tailed significance tests.
* $p < .1$.
** $p < .05$.
*** $p < .01$.

Once again, these results demonstrate that presidential threats are only influential when they are credible—because either the issue is salient or the president has greater control over nonenforcement.

While the statute-based approach we employ is used elsewhere (Harvey and Friedman 2006, 2009), Owens (2010) argues that not every statute is susceptible to review. Instead, he relies on a sample of cert petitions that the justices include on the Supreme Court discuss list. This approach has its own risks, since it assumes that discuss list decisions are not strategic and relies on the justices' own identification of the questions presented on appeal. Taken together, these methodological differences mean that scholars struggle to parse whether conflicting findings in the literature are the result of the substantive questions examined or the data used.

As a robustness check, we analyze models using the US Courts of Appeals Database (Kuersten and Songer 2001; Spill Solberg 2010) to produce a sample of public laws (1953–2002) meeting two criteria: (1) a party has raised a challenge to the constitutionality of the statute in a lower court, and (2) the losing party in the court of appeals has petitioned for certiorari to the Supreme Court. Here, we exclude all laws that are never subject to constitutional litigation, while only including ones for which the Supreme Court is given the opportunity to review. This approach addresses concerns about risk of review and the impact of litigant strategy but avoids the pitfalls of only sampling from the discuss list. In the appendix, we further discuss the merits of this approach and find the results of our analyses do not substantively change when using this sample,

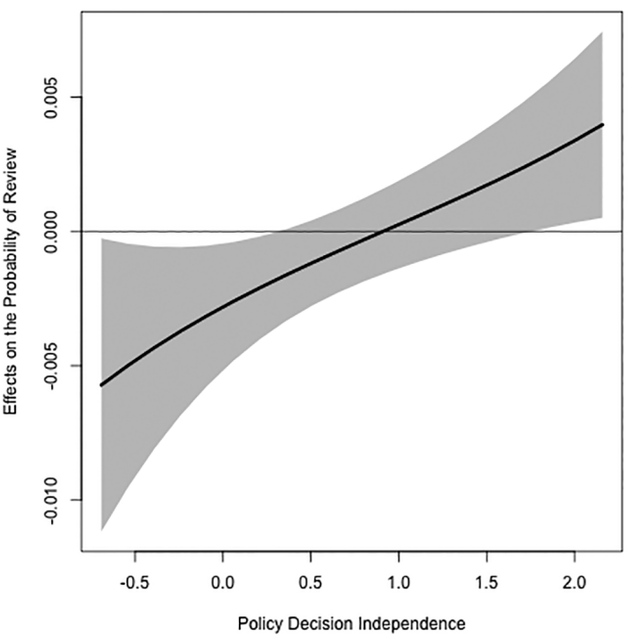

Figure 3. Marginal effects of D(Current President, Current Court) on the probability of review (*Y*-axis), at varying levels of Policy Decisions Independence along the *X*-axis.

thus providing additional validation of our theory and empirical analyses. We also control for litigant activity with other measures (e.g., interest group activity and district court lawsuits) and once again find our main results to be robust.

DISCUSSION AND CONCLUSION

From its conception, the federal judiciary was designed to be the most independent of all government branches, driven by judgment, law, and precedent rather than individual will, preferences, or politics. Yet, a more powerful force has come to dictate the court's behavior—that is, its desire to protect its own institutional authority. Even without the power to remove judges from office, presidents and Congress have found other ways to influence judicial behavior through tactics such as court-curbing legislation and executive branch nonenforcement.

Although political commentators have long recognized the power of these tactics to influence judicial behavior—from threats of court packing to ignoring desegregation mandates—political scientists have repeatedly downplayed constraints imposed by the separation-of-powers system onto the courts. Some recent studies have demonstrated the ways in which Congress can influence court decisions through retaliatory actions (Clark 2010; Harvey and Friedman 2006, 2009). Yet, comparatively little scholarly attention has been given to the role of presidents, who themselves serve as powerful threats to judicial power.

As such, we have demonstrated how presidents influence judicial decision-making through two avenues. First, the president is a roadblock to any court-curbing threat that Congress can impose on the court. Ideologically distant congresses, with greater incentives to statutorily sanction the court, only decrease the likelihood of judicial review when they have a presidential ally, and thus court curbing is credible. Second, perceived threats of presidential nonenforcement can deter judicial review. Particularly, we find that the court is less likely to review a statute when it faces an ideologically distant president, who is more prone to threaten nonenforcement of disagreeable judicial rulings. This effect is most pronounced when public opinion aligns with presidential preferences on salient issues, and, thus, judicial policy and power are most at risk. We also find that the court is most constrained by presidential preferences when the agency responsible for implementing the statute is more directly controlled by the president. These are the times, we argue, that her threats of nonenforcement are the most credible.

Still, observable presidential nonenforcement of Supreme Court decisions is relatively uncommon, which may lead one to be skeptical that the justices are, in fact, constrained by presidential ideology. Does not the lack of nonenforcement instead support the unconstrained view? This concern, however, only highlights the need for our approach. Given that both the constrained and unconstrained view may predict little nonenforcement, our analysis tips the needle in favor of presidential constraint.

Future research could test other mechanisms by which presidents can threaten the court's legitimacy and thus influence its decision-making. Most notably, they can make public appeals on pending or recently decided litigation that may deter courts from acting against them in the future (Collins and Eshbaugh-Soha 2019). Furthermore, presidents can use signing statements to publicly convey their constitutional objections to the law and are often used for the purposes of influencing judicial review (Thrower 2019).

Overall, we join a growing number of scholars who demonstrate the limits of judicial independence in constitutional decision-making. Although there are abundant studies of judicial decision-making, only newer research has challenged the idea that the Supreme Court is constrained by political considerations in its constitutional decisions. Still, the studies that do feature interbranch considerations focus almost exclusively on congressional influences, while largely ignoring the role of the executive. Instead, we show that the president has at least as important a role to play as Congress, if not more, and maintains policy-making tools that are effective at advancing executive policy preferences. We thus provide additional evidence for the efficacy of the separation-of-powers model, beyond Capitol Hill. Furthermore, attention to the relationship between presidents and the courts has been mostly limited to SG advocacy or judicial nominations. Our study is the first to provide systematic evidence of presidential influence across a broad swath of policies and time. Finally, the preponderance of separation-of-powers literature focuses on two branches at a time when understanding policy-making actions and outcomes. Here, we offer one of the few studies to theoretically argue and empirically show how the three branches of government all interact in the policy-making process. Such perspectives are more realistic and important for understanding the true nature of US politics and governance.

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