

Opportunity and Overrides: The Effect of Institutional Public Support on Congressional Overrides of Supreme Court Decisions

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Abstract

Existing theories of legislative-judicial relations emphasize the role of public support for the judiciary on the likelihood of legislative compliance. Though Congress can strengthen or weaken the Court's decisions after initial compliance, the role of public support for the judiciary on subsequent legislative action is unclear. We develop a theory of legislative-judicial interactions, which suggests that Congress considers the Court's current level of public support when determining whether to override a Supreme Court decision. We test our theory using data on congressional overrides of U.S. Supreme Court decisions, finding that high levels of public support for the Court shield the Court from hostile congressional action. The results underscore the vital role played by the public in interbranch relations, suggesting that public support plays a role in the legacy of a judicial decision beyond ensuring initial compliance.

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Public and scholarly interest in the public's support for the U.S. Supreme Court has blossomed in recent years. Journalistic accounts of the Court's support have suggested that the Court's support at the beginning of this decade reached perilously low levels (e.g. Liptak 2011; Pew Research Center 2013). Gallup reported in 2014 that only 30% of Americans had a "great deal" or "quite a lot" of confidence in the institution (Riffkin 2014). This low level of public confidence marked a historic low for the judiciary (McCarthy 2014).

Given the wealth of social scientific evidence emphasizing the vital nature of public support to institutions (e.g. Easton 1975, Gibson and Caldeira 1992), these reports suggest that the Court's position as an equal partner in governance may be in grave danger should these levels of support continue. After all, courts rely on other actors to implement their decisions, and low public support increases the likelihood of legislative noncompliance, making it less likely that the Court's decisions are implemented (Vanberg 2005). The legislative electoral connection provides the mechanism: if legislators fail to implement the decisions of a popular Court, they may suffer harmful electoral consequences; as the Court's support declines, so do the costs of legislative noncompliance (Stephenson 2004; Carrubba 2009). Hence, because both the Court lacks implementation power and public support affects legislative compliance, low levels of public support put the judiciary at risk of impotency.

Yet, the Court's decisions are open to renegotiation long after initial compliance is achieved. Once a high court issues a decision, that ruling represents the state of the law until either the legislature or that same Court takes actions which overrule that decision. Even without nullifying a decision, the legislature can continue to respond to the decision, subsequently taking actions that either strengthen or weaken that opinion's legacy (Barnes 2004; Staudt et al. 2007). While congressional responses to U.S. Supreme Court decisions are fairly rare—less than 5% of U.S. Supreme Court decisions are eventually overridden—these responses to Supreme Court decisions are substantively important. In the last two decades, Congress has used this power to negate U.S. Supreme Court decisions on issues ranging from civil rights, intellectual property, illegal immigration, and equal pay for women (Christiansen and Eskridge 2014). As a result, understanding the

circumstances that lead Congress to move the status quo away from the policy made by the U.S. Supreme Court is essential to our understanding of interbranch relations in the United States.

What explains these congressional responses to U.S. Supreme Court decisions? Surprisingly, the bulk of the evidence suggests that Congress's ideological disagreements with precedents rarely affect congressional responses to Supreme Court decisions (Hettinger and Zorn 2005, but see Uribe, Spriggs and Hansford 2014). The lack of an obvious role for ideology in this process suggests that other forces play a primary role. Given the important role that it plays immediately after the Court decides a case, public support is an obvious candidate to explain the timing of subsequent congressional responses to the Court's decisions. Yet, though scholars have acknowledged that the public's attitude toward specific decisions may affect congressional behavior (Ignagni and Meernik 1994; Ignagni et al. 1998), to date, no systematic study has addressed the role of the Court's support on subsequent congressional actions toward the Court's decisions.

This omission is particularly surprising given the bevy of more general evidence that public support serves as a shield for political institutions, particularly courts, that protects their decisions from reprisal (Caldeira and Gibson 1992; Gibson and Caldeira 2009). This evidence leads us to theorize that public support affects subsequent congressional responses, just as it affects initial legislative compliance. Should these theories apply to congressional responses to judicial decisions beyond implementation, it would imply that the current historically low levels of public support for the Court have even wider-ranging implications which put the Court's past decisions in peril.

In this paper, we look beyond initial compliance and examine the effect of the judiciary's public support on Congress's subsequent responses to judicial decisions. In contrast to previous studies (e.g. Clark 2011), which focus on the relationship between public support and judicial decisionmaking, we develop a theory of legislative-judicial interactions that underscores the importance of the *Court's* public support for *congressional* decisions. We argue that Congress acts strategically when considering when to respond to a judicial decision. Congress waits for the right opportunity to respond based on the Court's level of public support. When the Court's support is low, Congress should be more likely to act in ways that overrule or limit judicial decisions because

of a similarly low likelihood of a negative public response.

This approach posits a new avenue of influence of the Court's public support: policy implications. Overrides serve as more than simply court-curbing devices; they have real policy implications. While initial compliance and judicial self-restraint have some subsidiary policy implications, the primary purpose for overrides of Supreme Court decisions is to change the location of policy. The evidence we find suggesting that public support affects the likelihood of overrides is evidence that the Court's support can hurt more than just the legitimacy of the Court; it also limits the Court's position in the policymaking process.

We test our theory by examining congressional overrides of U.S. Supreme Court decisions using information about public support for the Court over four decades. We find support for our theory. Our results suggest that when the U.S. Supreme Court's support is thriving, Congress is less likely to override the Court's decisions.

These results—particularly in a day and age when the media suggests that the Court's public support is near historic lows—suggest that public esteem for the Court plays an even more important role in our political system than has been previously recognized. The role of public support reaches beyond compliance and affects subsequent legislative responses, as well. Just as low public support for the Court can make Congress unwilling to comply with judicial decisions, it also can leave the Court's body of precedent open to congressional renegotiation.

The Roles of Institutional Public Support

Theories of the policy process are often based on the postulate that political actors make policy decisions based on their ideological preferences (Krehbiel 1998; Segal and Spaeth 2002). These theories apply both within and across institutions, suggesting that, when one branch of government in a system of separated powers passes a policy disagreeable to another branch of government, the second institution will nullify it. In the case of the U.S. Supreme Court's statutory decisions, Congress can pass a law that overrides a judicial decision, thereby nullifying it. Scholars have long been interested in the timing and effects of these overrides (e.g. Eskridge Jr. 1991a;

Ignagni et al. 1998; Barnes 2004). Conversely, ideology also acts as a preemptive constraint. Because their members are motivated by policy goals, institutions are unlikely to pass policies they know are likely to be nullified by the other branches (Epstein et al. 2001).

Yet, one of the most glaring empirical puzzles in separation of powers scholarship is the paucity of evidence supporting the role of ideology in interactions between Congress and the Supreme Court. Indeed, the lack of evidence supporting Marks's (1989) canonical theory, which suggests a rational Supreme Court should be sensitive to the preferences of the other branches of government, has confounded scholars for a quarter-century (Segal 1997; Owens 2010).¹

In the case of the U.S. Supreme Court's statutory decisions, Congress can pass a law that overrides a judicial decision, thereby nullifying it and moving the location of the status quo to a new location. Scholars have long been interested in the timing and effects of these overrides (e.g. Eskridge Jr. 1991a; Ignagni et al. 1998; Barnes 2004). However, despite the strong theoretical (and intuitive) basis underlying the hypothesis that Congress is more likely to override decisions it disagrees with, scholars have again mostly failed to find evidence that congressional overrides are driven by ideological disagreement (Ignagni et al. 1998; Hettinger and Zorn 2005).²

One likely reason for the lack of an ideological explanation for congressional overrides comes from Christiansen and Eskridge (2014), who examine congressional behavior between 1967 and 2011. Examining the circumstances that lead Congress to override a judicial decision, they note that a majority of congressional overrides do not occur in extremely salient policies—like

¹This is not to say that there is no evidence that ideology drives interactions between Congress and the Supreme Court; scholars have demonstrated that policy preferences drive the sponsorship of court-curbing bills (Clark 2011; Curry 2007), Court decisions subsequent to cuts to the judiciary's budget (Toma 1991), and Congress's consideration of Supreme Court ideology during passage of civil rights legislation (Martin 2001).

²There are a few notable exceptions, mainly qualitative (Eskridge Jr. 1991a,b) or involving case studies (Clark and McGuire 1996). Uribe et al. (2014) is the only large-N study to find evidence that Congress is motivated by ideology in its decisions.

voting rights—which are the most commonly used as examples of the such overrides. Rather, they write that about two-thirds of overrides involve Congress updating policies set by the Court with ones “that Congress considered more equitable, more efficient, more consistent with current political values, or better suited to changed circumstances” (1370). In this way, most congressional overrides represent a bipartisan desire by Congress to update a policy, albeit away from the status quo policy set by the Court. The bipartisan nature of these overrides suggests that the direction of such changes may not be in the direction typically predicted by our ideological theories.

If ideology is not the driving force behind Congress’s decisions to move policy away from status quo policies set by the Court, what else might explain congressional action? Previous literature has identified at least one possible explanation: invitations from the Supreme Court. Indeed, in some cases—about 20% by Christiansen and Eskridge’s count—Congress responds directly to an invitation by the Court to override. However, the percentage of cases in which “responding to Supreme Court concerns” is the main reason for an override is far less than the percentage of overrides that “correct[] a bad interpretation of the law”, “respond[] to confusion in the law” or “updat[e] policy” (1370). Additionally, it is not clear whether the Supreme Court includes invitations with the sole intent of signaling to Congress that they should override the decision. Rice (2015) shows that most invitations to override are not intended to bring about override, but are incorporated to indicate to lower courts that the issue belongs with Congress and is not subject to subsequent review by the courts.

We suggest a different mechanism through which Congress might choose to respond to a judicial decision at a particular point in time. A prominent literature presents a wealth of evidence that public support plays a key role in how institutions behave (see e.g., Clark 2011; Vanberg 2005). As applied to the relationship between the legislature and the judiciary, this literature has focused almost exclusively on how support for the judiciary affects either a court’s own decisionmaking tendencies or the legislature’s willingness to implement a given judicial decision. This is easily seen by reviewing three major findings.

First, the central body of scholarship on public support for the judiciary suggests that dif-

fuse public support (more commonly termed legitimacy) is essential for an independent judiciary, because it enables political institutions to make unpopular decisions without popular reprisal (Caldeira and Gibson 1992). As Gibson and Caldeira (2009) put it, “no political institution could be effective without some mechanism to believe that accepting their policy outputs, even disagreeable ones, is the right thing to do” (4, see also Easton 1975). By this account, public support affects interbranch relations by cushioning popular blowback caused by unpopular decisions. Thus, low public support opens the Court to popular reprisal, but not necessarily to nullification of its policies.

Second, public support also affects institutions by promoting institutional self-restraint. Clark’s (2009) account of the role of public support suggests that public esteem matters primarily by creating opportunities for members of Congress to engage in position-taking activities—the introduction of court curbing legislation—that have little chance of becoming law but act as signals of low public support for the Court. Thus, “because the Court relies on political will to give effect to its decisions, and because political will is often directed by public opinion, the most relevant constraining force on judicial power is public support for the Court” (3-4). Clark finds that these bills *do* induce self-restraint among the Court’s justices, making them less likely to exercise their power of judicial review (and therefore change policy) after Congress introduces a spate of court-curbing legislation. Thus, by Clark’s account, low levels of public support induce self-restraint among the justices that makes them less likely to change the status quo because they fear nonimplementation of their decisions. Hence, Clark’s view of the role of public support is court-centric: the effect of low public support, by Clark’s theory, is to make courts cautious when their support is low and to embolden them to nullify congressional policies when it is high.

Third, public support promotes compliance with individual judicial decisions. Courts usually depend on other institutions to implement their decisions, and public support affects this process. Specifically, legislatures are more likely to comply with judicial decisions when support for the Court is high (Vanberg 2005). When support is high, the costs of legislative noncompliance are raised (Stephenson 2004; Carrubba 2009). These costs bear an electoral form; a legislature that fails to comply with a popular Court risks public reprisal in the next election (Vanberg 2000,

2001).³ Thus, by this view, low levels of public support matter at the time a decision is issued, suggesting that high levels of public support are necessary to put an opinion into practice.

An Opportunity Theory

These central insights from the literature on public support for the Court suggest that higher levels of public support affect both the Court's own decisionmaking and Congress's implementation calculus; these existing theories emphasize the importance of public support for the Court at the time that a decision is issued. The literature is relatively silent on consequences of public support for the Court on Congress's subsequent treatment of a decision. This omission is particularly surprising, because judicial decisions have long-reaching consequences; judicial decisions continue to have weight until they are overridden by Congress or by a future court. If, as Caldeira and Gibson (1992) and Easton (1975) suggest, higher levels of public support can cushion the Court against negative *public* reaction in the *short-term*, might this shielding effect of public support also be applicable against the *legislature* in the *long-term*?

We answer this question in the affirmative, suggesting that Congress behaves proactively as it pertains to the Court's public support as a result of the electoral connection. Recall that both Clark (2011) and Vanberg (2005) suggest that electoral motivations underpin legislative action vis-à-vis the judiciary. On this point, Ignagni and Meernik (1994), Ignagni et al. (1998), Meernik and Ignagni (1995), and Meernik and Ignagni (1997) all provide evidence that electoral motivations underlie subsequent congressional responses, just as they affect the introduction of court-curbing bills and initial legislative compliance.

A dispute over equal pay for men and women provides a concrete example of this logic. In the 2008 election cycle, many Democrats campaigned against the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, a ruling dealing with equal pay for men and women (Holland 2007). At the start of the next term, following the Democratic takeover, Congress passed

³Threats of noncompliance work both ways. Carrubba and Zorn (2010) demonstrate that conditions promoting noncompliance constrain Supreme Court decisionmaking.

the Lilly Ledbetter Fair Pay Act of 2009, which overrode the Court's decision; the bill was the first one signed into law by Barack Obama. According to data from the General Social Survey, which we describe in detail below, the proportion of the public who expressed little confidence in the Court rose in the years after the Court decided *Ledbetter* and the time when the decision was overturned. Thus, as this example and the prior literature demonstrate, the legislature may initially implement a decision if the Court was popular when it was issued and wait until the Court's support falls before overriding the decision. Put differently, because public support has a shielding effect, high levels of public support will protect the Court's decisions from congressional overrides even long after initial compliance is established, but a drop in popular support for the Court leaves its decisions open to congressional nullification, because the potential electoral backlash that is so potent when the Court's support is high fades away as the Court's support falls.⁴ Thus,

The probability of a congressional override of a Supreme Court decision is inversely related to the Court's level of public support.

Data

Our theory suggests that Congress is more likely to override Supreme Court decisions when the Court's public support is low. A test of this theory requires reliable and valid measures of (1) congressional overrides in a given year, (2) the Court's public support in that year, and (3) an appropriate battery of control variables.

Identifying Treatments of Court Decisions: The Outcome Variables

We have all congressional overrides from 1973-2010 from Christiansen and Eskridge (2014). Our data begin in 1973 because that is the year in which data on support for the Court is first available, as explained below. With these data, we are able to examine our hypothesis.

⁴This theory is similar to Kingdon's (1984) well-known "policy windows" framework. In our theory, low public support opens a policy window, creating an opportunity for Congress to act; conversely, high levels of judicial public support close the policy window.

We focus on overrides of Supreme Court decisions, consistent with prior literature which has focused on Congress's decision to override these cases (Hettinger and Zorn 2005; Ignagni et al. 1998; Spiller and Tiller 1996). The outcome variable in many of these prior studies has been based on a measure pioneered by Eskridge (1991a). Eskridge (1991a) relied on committee reports printed in the *U.S. Code Congressional and Administrative News* to determine whether a decision had been overridden. However, in recent years, these committee reports have become a less reliable source for counting overrides. To this end, Christiansen and Eskridge (2014) provide an updated methodology for counting overrides and provide evidence that the updated measure is more valid than the Eskridge (1991a) measure. We use their listing of overrides in each year as the basis for our outcome variable. The data contain 244 overrides in our time frame.⁵ Many scholars have emphasized the distinction between overrides in congressional and statutory cases (Blackstone 2013; Hettinger and Zorn 2005). We do not expect our theory to differ in constitutional vs. statutory cases. Moreover, Uribe et al. (2014) shows that there is little difference in how Congress approaches these types of cases, at least in terms of ideological divergence. The majority of overrides included in our data are statutory. 204 of the overrides identified by Christiansen and Eskridge (2014) (84%) occur in statutory cases.

⁵Summary statistics for all variables are located in Appendix B.

Measuring Support for the Court

We also require a measure of public support for the Court.⁶ The only available time series of public support for the U.S. Supreme Court comes from the General Social Survey (GSS), which has asked respondents most years since the early 1970s for their attitudes regarding their confidence in the U.S. Supreme Court.⁷ This measure is “the most reliable and consistent way to capture public support for the Court” (Clark 2011, 125), though we acknowledge that it is a measure of institutional *confidence* rather than institutional *legitimacy*.⁸ However, because our concept of interest is general public support (which blends short- and longer-term evaluations of the Court), rather than institutional legitimacy specifically, the GSS measure is appropriate as Gibson et al.

⁶Some may question whether unpopular decisions, which are more likely to be overturned, are driving our public support measure, thus indicating a different story for the relationship between public support and congressional overrides. To try to address this alternative story we have run two additional models, both of which support our opportunity theory. In the first, we remove all observations in the year the case is decided. Since unpopular decisions would only influence the measure of public support in the year they are decided, and would be most likely to be overridden swiftly, this allows us an opportunity to test whether our opportunity theory holds once the salience of a decision has decreased. Our results are robust to removing these cases from our dataset. Second, for a decision to be unpopular, the public has to know about the decision, suggesting that this alternative theory would only hold in salient cases. We remove from our data all cases that were featured on the front page of the *New York Times* when they were decided, and test our theory on the non-salient cases. Our results hold in these non-salient cases.

⁷The full question is “I am going to name some institutions in this country. As far as the people running these institutions are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them? The U.S. Supreme Court.”

⁸Appendix A contains more information about the theoretical appropriateness of the GSS question as a measure of public support.

(2003) have shown. Our measure of Court Disapproval follows from Clark's (2009) and is the percentage of GSS respondents espousing "hardly any" confidence in the U.S. Supreme Court.⁹ This variable has a median of 14.73% and ranges from 10.94% to 20.71%.

Control Variables

While an ideological connection has not always been well supported in the literature, it would be entirely inappropriate not to control for the most prominent alternate explanation for congressional overrides: ideological disagreement.¹⁰ Spatial theories of policymaking predict that Congress is more likely to override judicial decisions it disagrees with when the decision is located farther from its most preferred policy. We model our ideological distance measurement on the approach in Uribe et al. (2014), the only large-N study to find support for ideological disagreement. To measure the location of the precedent, we rely on Judicial Common Space scores (Epstein et al. 2007) scores, using the ideal point of the median of the majority coalition as the measure of the location of the judicial decision.¹¹ We assume a chamber median model, where the left and right

⁹Like Clark (2009), for those years in which the GSS did not query respondents about their confidence in the U.S. Supreme Court, we take the average of the two surrounding years.

¹⁰Our purpose in this paper is to examine the direct effect of the Court's support on congressional action. But, perhaps support is more potent motivator for congressional action for some status quo locations than others. To explore this possibility, we have run a separate analysis interacting our support measure with our measure of ideological distance and whether the case is in the gridlock interval. The results of this analysis can be found in Appendix C. The results of the analysis suggest that the effect of the Court's public support is particularly important when cases fall in the gridlock interval, providing the impetus necessary to break congressional gridlock and motivate congressional action.

¹¹We have also estimated the model using Bailey scores (Bailey and Maltzman 2011). With the Bailey scores as the measure of ideological distance, the ideology coefficients are positive both inside and outside the gridlock interval. However, the results are not statistically significant in either model.

most pivotal members of the gridlock interval are determined by the medians of the two chambers and the president (Krehbiel 1991, 1998).¹² The left pivot is the ideology of the three members (House median, Senate median, and president) whose ideology measure is the smallest and the right pivot is the member with the largest ideology measure. We define the gridlock interval as the space between the left and right pivots. If the case is located between these pivot points, the case is said to be in the gridlock interval. Here, we depart from the approach taken in Uribe et al. (2014). We choose to separate out the gridlock interval from ideological distance. Thus, if the case is located between the pivot points, *Gridlock Interval* is equal to 1, otherwise, it is equal to 0. We then measure *Ideological Distance* as the absolute value of the distance between the Court decision and the closer of the left and right pivotal members.¹³ We include in our analysis both *Gridlock Interval* and *Ideological Distance*, as well as an interaction between the two to control for any differences in the effect of ideological distance inside the gridlock interval, where theoretically it should have no effect, and outside the gridlock interval.

As discussed above, Clark (2009; 2011) has argued that inter-institutional attacks can serve an important position-taking function that is electorally beneficial to legislators. Thus, if we do not take the electoral calendar into account, we risk attributing congressional actions on the basis of their electoral calendar to our theory, which predicts congressional action on the basis of public

¹²We chose this model because it is consistent with the model of Congressional decisionmaking that Clark (2009) used. We also estimated our models using the veto-filibuster pivot used in Uribe et al. (2014). Under this specification, the results are robust, with the exception of the marginal effect of the gridlock interval, which switches direction, though this coefficient is not significant in either model.

¹³Clark (2009) uses a measure of ideological distance between the current Court and Congress; because our theory dictates that Congress overrules *decisions* rather than *courts*, the measure of decision-Congress distance is more appropriate for testing our theory than a measure of current Court-Congress distance.

support. Thus, we control for whether or not the year is an *Election Year*. We expect, following Clark's logic, that overrides should be more common in election years. This variable has the added benefit of capturing heterogeneity between policymaking in the first and second years of a Congress.

Likewise, when choosing which case to treat, not all cases are created equal. Thus, we control for case-level salience using an indicator of whether the case was on the front page of the *New York Times* the day after it was decided, following Epstein (2000).^{14,15}

The prior literature on congressional overrides presents a bevy of case-specific explanations that predict which cases Congress is likely to treat. With these in mind, we control for the same concepts suggested by Hettinger and Zorn (2005) to account for case-level variation in the likelihood of a congressional response.¹⁶ We include six dichotomous variables: case salience, whether a congressional *amicus* brief was filed in the case, whether the United States was the losing party to the case at the U.S. Supreme Court, whether there are multiple legal provisions in the case,

¹⁴Hettinger and Zorn (2005) use *amicus* briefs as their measure of salience. Our theory calls for a control of the salience of the Court *to the public*, thus a measure that relies upon communication of the Court's work to the public (the Epstein and Segal measure), rather than elite-level discourse is more appropriate. Hence, we employ Epstein and Segal's (2000) measure of case salience.

¹⁵As a robustness check, we also estimate this model using the Clark et al. (2015) measure of salience. The results are robust, with the exception of the salience measure which switches signs, though this variable is not significant in either model.

¹⁶We recognize that many of these variables are not theoretically correlated with our primary variable of interest: Court Disapproval. We still include these measures to ensure that our findings are comparable with the findings in previous literature, as well as to ensure that any tenuous connections that exist between these measures and our key variable of interest are controlled for. We have estimated a model with just public support, public mood divergence, which is theoretically correlated with both public support and overrides, and our time variables. Our finding about the effect of Court Disapproval remains unchanged in this pared down version of our model.

whether the Supreme Court decision was unanimous, and whether the Supreme Court reversed the lower court decision.¹⁷ All of these variables were measured as described by Hettinger and Zorn (2005).

Because the public is such a key actor in our theory, we also include a measure of the public's divergence from the Court first pioneered by Durr et al. (2000) to account for variation in judicial approval that is due to policy agreement. As Durr et al. (2000) show, this divergence can influence the public's view of the Court. This divergence measure increases as the public and the Court are more distant from one another.^{18,19} Because the translation of changes in divergence to changes in

¹⁷Hettinger and Zorn (2005) also include a measure of Court-Congress ideology (whether the decision is outside the set of pareto optimals) and salience (the number of *amicus* briefs filed). As discussed above, these concepts are included in the model, though our operationalization differs from that of Hettinger and Zorn (2005).

¹⁸We use the 2014 release of Stimson's public mood measure (Stimson 1991) to calculate the measure. The equation used to measure this divergence is: " $-100 \times [\text{mood} - E(\text{mood})] \times [\% \text{ liberal decisions} - E(\% \text{ liberal decisions})]$ " (Durr et al. 2000, 771). The score takes on positive values when one of the public or the Supreme Court is more liberal than average and the other is more conservative and negative scores when both are more conservative or liberal than average.

¹⁹It has been suggested that perhaps we should simply control for public mood here, rather than this divergence measure. We have estimated the model with mood as a robustness check. The results are robust to this specification, and the mood variable itself is positive and statistically significant at the 95% confidence level. We opted to utilize this divergence measure, because this divergence is correlated with support for the Court (Durr et al. 2000) and thus a theoretically better control. Though we do find evidence of an effect, there is no theoretical reason to anticipate that Congress should be more or less likely to override a decision based on whether the public is more liberal or conservative. Instead, this effect is likely capturing higher overrides in eras where the public is more liberal, perhaps accounting for an increasingly conservative Court in our timeframe. We have opted to utilize the divergence measure in our primary model, as it is more logical to

support will be lagged, we use a two-year moving average of the divergence score.

Additionally, given the explosion of congressional polarization during this time period, which likely influences the likelihood of an override as well as the size of the gridlock interval, we also include polarization as a predictor in the model. We measure polarization as the distance between the Democratic and Republican party means using DW-NOMINATE scores, as suggested by Poole.²⁰

The last item that we control for is multiple treatments of the same case. The data contain some repeat overrides of cases after the initial override.²¹ Since this indicates that the Supreme Court decision does not “die” as in a standard survival model, we keep the case in our dataset after every override, and we include a variable that controls for whether the case has been previously expect Congress to be sensitive to the relative location of the public compared to the Court when anticipating whether the public would be more receptive to overrides of the Court’s decisions.

²⁰Some may question whether this secondary model of congressional behavior is necessary. We have estimated the model without the polarization measure and the results are robust to excluding this variable.

²¹There are only 10 of these repeat, or follow up overrides. We do not have a theory for why such subsequent overrides would occur. Because of the rare occurrence of these types of overrides, creating a story is even more difficult. We have tried running an analysis on cases that have been overridden once before to try to explain why some cases are overridden again, but due to the small variation in the dependent variable, no story emerges. One possible story is that Congress chips away at the case in the first override and waits for a further decrease in Court support before finishing the job. Among the 10 cases, exactly half see such a decrease in Court support, while the other half occur after an increase in Court support. To test for the possibility that these cases might be different somehow, or might be affecting our results, we have estimated our model as a typical duration model, removing cases after an initial override. Our results are robust to this approach, which suggests that these 10 cases are not blurring our story in any way. Still, these follow up actions by Congress are interesting, and further research should be devoted to follow up responses to Supreme Court decisions after initial override.

treated before a given year.

Method

The theory implies the importance of time.²² Though Congress can override a case any time after it is decided, the theory predicts that treatments are more or less likely given levels of the public's support for the Court. We model if and when Congress overrides a given U.S. Supreme Court decision. We employ a discrete time duration model, consistent with recent approaches to modeling congressional overrides (Uribe et al. 2014).²³ This approach allows us to model the hazard shape directly. Following Carter and Signorino (2010), we use a cubic polynomial approach to model the hazard shape. Carter and Signorino (2010) suggest that this parameterization strikes a balance between finding the best hazard shape and not overfitting the data. Because we take this discrete approach, our data consist of case-year dyads. The outcome variable is whether case i is overridden in year t . Because this outcome variable is binary, we use a logit model in our analysis.

Results

Table 1 provides the results of our analysis. Recall that our theory predicts that disapproval should be positively related to the likelihood of an override.

²²There is good variation in terms of time between when the case is decided and when it is first overridden by Congress. 12% of overrides occur in the same year the case is decided, 29% occur in the year after the case is decided, 41% occur within two years after the case is decided, 50% within three years, 57% within four, and 64% within five years after the case is decided.

²³Other research (Hettinger and Zorn 2005) has used Cox-proportional hazards models for similar analyses. We choose the discrete version because it better allows us to test what we are interested in: whether overrides are more likely when support is low. Since our support measure only changes yearly, the exact event time approach in the Cox model does not provide better information than the yearly approach we take. Additionally, using a discrete time model allows us to more exactly model the hazard shape.

<TABLE 1 ABOUT HERE>

These results support our theory. According to these estimates, Congress is more likely to override a decision when disapproval of the Court increases. In short, as the Court's level of support increases, the probability of an override decreases.

How large are these effects? Importantly, the likelihood that Congress overrides any judicial decision in any year is very low. With this in mind, Figure 1 shows the predicted probability of an override. As Court Disapproval increases, the probability of an override increases. While Figure 1 makes it seem as though the difference over the range of this variable is small, due to the low probability of an override in any year, the percentage increase in predicted probability across the range of Court Disapproval is substantial. The probability of an override increases by about 109% from the minimum to the maximum of the observed Court disapproval scores.

<FIGURE 1 ABOUT HERE>

These results also underscore the importance of electoral motivations in the decision to override Supreme Court decisions. The probability of an override is substantially higher in an election year than in a non-election year. An override is 256% more likely in an election year than in a non-election year.

Some of the other estimates also merit discussion. Consistent with much of previous literature, we do not find evidence of an ideological effect on the likelihood of override.²⁴ We do not find evidence of an ideological effect using either our distance measure or our gridlock interval measure. The ideological distance variable does not reach conventional levels of significance either inside or outside the gridlock interval. We find evidence that cases that have been previously overridden are substantially more likely to be overridden in the future. This result suggests that if Congress has responded to any portion of a case in the past, the rest of case is more vulnerable to future overrides. Consistent with previous literature, we find that overrides of unanimous cases are less likely. We also find that the likelihood of override decreases exponentially as the case ages.

²⁴This result is robust to interacting the variable with our support measure, as we show in Appendix C

The likelihood of override is highest in the first few years after the decision is passed.

Discussion and Conclusion

In his essential study of legislative-executive relations, Clark (2011) argues that “elite will is not necessarily enough to check the courts; rather the separation of powers requires a degree of public will to ‘rein in’ the judiciary” (4). Our analysis takes this point one step further, suggesting that public support can restrain the legislature, as well as the judiciary. Our data indicate that Congress shows self-restraint by failing to negatively respond to judicial decisions when the Court’s support is high. However, low levels of public support for the Court signal to legislators that the electoral costs of nullifying judicial policies are negligible, enabling Congress to override a judicial decision without fear of popular reprisal.

The implications of the finding are both important and distinctive. First, the findings demonstrate that maintenance of high levels of public support in the long term is essential for the Court. Just as theories of judicial legitimacy would suggest, high levels of public support act as a shield for the Court’s policies. If the Court’s public support declines in the present, the continued acceptance and implementation of its past decisions are at risk. In short, public support is not only important for the Court’s short-term policy goals; it needs high levels of public support to maintain the policies espoused by its previous decisions.

Second, the focus on the effect of the Court’s public support on Congress is distinctive. We demonstrate that the Court’s public support has meaningful consequences for the long-term success of the policies it espouses in its opinions. Whereas previous theories of legislative-judicial relations (e.g. Clark 2011) have emphasized the Court’s reactions to fluctuations in its own public support, we show that Congress also responds to changes in the Court’s public support, becoming more likely to nullify the Court’s policies when the Court’s own public support is low.

Indeed, these results underscore the important role that the Court’s public support plays in Congress. Clark’s (2011) theory suggests that members of Congress at least indirectly reflect the Court’s public support in their patterns of bill introductions, but, because those court-curbing bills

rarely become law, there is no direct relationship between congressional policymaking and public support for the Court. Our theory expands the role of public support for the Court, showing that Congress also responds to the Court's level of public support in the bills that it passes. Indeed, overrides are not merely symbolic acts like the introduction of court-curbing legislation. Rather, overrides change policy, nullifying a decision of the U.S. Supreme Court. In short, these results suggest that the Court's support has more expansive effects than have heretofore been documented.

The effect of public support on the Court is a substantively meaningful one. The likelihood that Congress will treat a given Supreme Court opinion in a particular year is very low, as is the probability that a country will transition to a democracy in a given year, that a state will fail in a given year, or that two countries will go to war in a particular year. Yet all of these outcomes are politically important ones, affecting national security, the quality of governance, and the efficacy, in our case, of a constitutional system. The ability of Congress to check the Court by overriding its decisions is a fundamental power of that institution; simply because it is rarely employed does not make it an unimportant outcome. Indeed, to reiterate a result from above, this study demonstrates that a massive change in the Court's public approval can make a congressional override of a particular decision over 100% more likely. This is a substantively important finding.

Returning to the journalistic hand-wringing that opened the paper, our analyses, coupled with the findings of Clark and Vanberg, indicate that low public support has three negative consequences for the Court: it makes the Court less likely to act assertively to nullify congressional action, it increases the likelihood of legislative noncompliance, and it leaves the Court's past decisions open to congressional nullification. Hence, public support for the Court affects both initial compliance as well as subsequent congressional actions regarding judicial decisions. Moreover, because of the policy based nature of congressional overrides, our findings here show explicitly for the first time that the Court's support has real policy considerations in addition to the institutional legitimacy considerations shown in previous studies.

These findings underscore the vital nature of public support to the judicial branch of government. Lacking a direct electoral connection to periodically replenish its public support, the Court

is dependent upon public approval in order to fulfill its role as an equal partner in American governance and to ensure that, over time, its decisions continue to be respected by the legislature. While we have known that public sentiment at the time of the decision affects the Court's decisions (Epstein and Martin 2010; Casillas et al. 2011) and the likelihood of implementation (Vanberg 2005), our study illuminates that, even after initial compliance is established, the Court's support still influences the longevity of its decisions; if its support dips, then its body of prior decisions are at risk of override.

Beyond the implications of these findings for the Court, our results also shed light on the efficacy of the American system of separated institutions sharing power. Given the paucity with which previous research has found evidence supporting ideological separation-of-powers considerations in the Supreme Court's decisions in the past (Segal 1997; Owens 2010), this suggests a new mechanism through which the Court might consider Congress's preferences. It could be that the Court's historically high levels of support help to explain why scholars have been unable to find evidence of separation of powers considerations in Supreme Court voting, with the Court relying on its "reservoir of goodwill" to ward off the most severe attacks from Congress. Future research should further examine how public support for the Court affects the relationship between Congress and the Supreme Court.

Likewise, future research may want to examine how variation in the level of public support for the Court affects the success of a congressional override. The research design we have employed necessarily treats all overrides as equal, but the effects of overrides might differ in many ways: the extent to which they move policy, the extent to which they affect levels of judicial dissensus (a possibility ably documented by Barnes 2004), the amount of discretion they provide to implementing actors, and the extent to which the implementation of the override results in *de facto* differences in policy. It may be that public support has a second-order effect, not only making an override less likely to happen but also making an observed override less effective in practice. This possibility is ripe for future research.

To return to the empirical observation that began the paper, what might the longer-term con-

sequences of the Court's lower-than-typical levels of public support have on its policies? Our results suggest that, should the Court's support continue to decline, Congress will feel freer to override the Court's decisions, therefore undermining the stability of the law. Moreover, should the Court's support continue to decline, an emboldened Congress would be able to disempower the Court in the latter's attempts to be a coequal partner in governance: when Congress is willing and able to override the Court with impunity, the Court's ability to be an effective check on congressional and presidential power begins to waver. In a time where many are looking to the Court to fulfill this constitutional role, our findings suggest that the Court's low public support render it unable to be the knight in shining armor wished for by many.

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Appendix A: Measuring Public Support for the Court

We measure public support using the standard GSS question about confidence in the Court. As Gibson et al. (2003) demonstrated, the GSS measure is *not* a measure of diffuse support because institutional confidence is not the same as institutional legitimacy.²⁵ Rather, “confidence seems to indicate relatively short-term but nonetheless global judgments of how the institution is performing. It is not dependent upon approval of any particular policy decision by the institution... but instead seems to reflect a holistic judgment about institutional performance” (361). Gibson, Caldeira, and Spence (2003) demonstrate that institutional confidence represents a middle ground between diffuse and specific support, blending short- and long-term views of the institution.

This “blend” is exactly the type of support our theory implicates. On the one hand, our theory does not suggest that a measure that captures only short-term, specific support (such as the traditional job approval question that is often asked in research on diffuse support) is appropriate because congressional judgments about their actions toward the Court may be based on both short-term and longer-term understandings of the Court. Put differently, we do not argue that an unpopular decision in one case leads Congress to override a different case, as a measure of pure specific support might indicate.²⁶

On the other hand, a measure of diffuse support is inappropriate. Our quantity of interest refers not to the sorts of large-scale changes in institutional structure that define diffuse support (for example, to use an oft-used item, whether or not one thinks it might be better to “do away with” the

²⁵Additionally, as Gibson, Caldeira, and Spence (2003) note, the question queries respondents about the “people running” the Court, rather than the Court as an institution, and there may be heterogeneity among respondents in whether their answer refers to their perceptions of the Court as an institution, the Chief Justice, all nine justices, or something else.

²⁶Some might suggest that a more issue specific measure of support, similar to that used by Ignagni et al. (1998) would be more appropriate here. However, such a measure is inappropriate because our theory deals with more general institutional support, not simply opinion.

Court) but rather to overrides of individual judicial decisions—a sort of institutional attack that is completely in line with traditional views of the American separation-of-powers system. Moreover, because the U.S. Supreme Court’s diffuse support is stable at the aggregate level over time (Gibson and Nelson 2015), meaning that, should we use a measure of diffuse support, there likely would be no meaningful variation in the measure that one could use to explain congressional actions. Furthermore, even if a multi-item series of diffuse support for the Court created using a series of items like those employed by Bartels and Johnston (2013) or Gibson and Nelson (2015) was appropriate, these data have only been asked annually in very recent years, making a measure like this not feasible for our analysis. In sum, neither traditional measures of specific nor diffuse support are appropriate (or available) for our analysis.

Appendix B: Summary Statistics

<TABLE 2 ABOUT HERE>

Appendix C: Interacting Support and Preferences

The clearest prediction from our theory is the hypothesis we test in the body of the paper: Congress is more likely to override a decision when the Court's support is low. We have not suggested that public support is the only or most important determinant of congressional overrides of Supreme Court decisions. Rather, public support is just one of many factors that explains congressional action. The hypothesis tested in the body of the paper relates only to the direct effect of public support and leaves unaddressed the possibility that the Court's support is more likely to motivate congressional action against some decisions but not others.

For example, it may seem likely that judicial decisions that are ideologically distant from pivotal members of Congress and outside the gridlock interval should be particularly likely to be overridden. Such policies are the ones that are most disliked by those members of Congress with the ability to influence institutional action. These are also the same set of policies that traditional pivotal politics theories suggest—without considering the Court's support—should be likely to be acted upon by Congress. It is thus possible, that support would play a lesser (or no) role in these cases. Where traditional ideological approaches can explain the policymaking process, there might be little added explanatory power the Court's support can provide.

This raises the possibility that the Court's support particularly potent among the subset of policies—those in the gridlock interval—for which other theories do not adequately explain overrides. This suggestion may seem initially surprising. When cases fall within the gridlock interval, pivotal politics theories suggest they are unlikely to be overturned. However, we find that a majority of overrides actually fall within the gridlock interval. This suggests that our traditional theories of congressional overrides are missing a key part of the puzzle. It is possible that when a policy of interest to Congress lies within the gridlock interval and the Court's support is low, an opportunity arises for Congress to act without public reprisal and that institution is therefore emboldened to act. Moreover, recall that most congressional overrides involve broad, bipartisan coalitions. It is possible that the lower Court support may pave the way for the formation of these broad coalitions, allowing Congress to overcome the usual hurdles that accompany congressional action within the

gridlock interval.

To examine this prediction, we have also estimated our model with a three-way interaction between our two measures of ideology—whether or not the case fell in the gridlock interval and ideological distance—along with support for the Court. If traditional ideological processes explain congressional overrides, then we should find that support plays a greater role outside of the gridlock interval. If, instead, public support paves the way for the type of broad bipartisan coalitions that characterize the majority of overrides, then support should have a greater effect in the gridlock interval. We find support for the latter. We present the results of our analysis below. The full results are in Table 3 and the marginal results are in Figures 2 and 3.

<TABLE 3 ABOUT HERE>

Figures 2 and 3 show the marginal effects of the Ideological Distance and Court Disapproval variables both when the case is inside and outside of the gridlock interval. Figure 2 shows the marginal effect of Court Disapproval. As the figure shows, the relationship between Court disapproval and overrides is only positive and significant—meaning that overrides are more likely as disapproval increases—when the case is inside the gridlock interval and for small to moderate distances between the closest pivotal actor and the decision. When the case is outside the gridlock interval or inside the gridlock interval and the pivotal actor is either very close to or sufficiently far away from the decision, the Court’s level of disapproval is unrelated to the probability of congressional action. In short, the results of this analysis provide support for our suggestion the Court’s support can tip the balance from congressional inaction to action, paving the way for broad coalitions to form where Congress would otherwise be gridlocked. Contrary to a purely ideological story, where Congress is already likely to act, the consideration of the Court’s support provides little additional explanatory power for congressional action. In this sense, the Court’s support provides an opportunity for congressional coalition building on policies that would be otherwise difficult to act upon.

<FIGURE 2 ABOUT HERE>

<FIGURE 3 ABOUT HERE>

Importantly, the range of data for which the effect of Court Disapproval is statistically significant covers a substantial proportion of the data. The majority of observations in our data (56%) involve cases that fall within the gridlock interval. Moreover, nearly two-thirds (65%) of overrides happen to cases that fall within the gridlock interval. Drilling down to the range of ideological disagreement for which the effect is statistically significant, 47% of the overrides in our data are in this region and in the gridlock interval. This suggests that the primary ideological expectation present in most studies of congressional overrides, that cases that fall within the gridlock interval are “protected” from override, does not hold. In fact, the majority of overrides occur to cases within the gridlock interval. This is consistent with the description of overrides given in Christiansen and Eskridge (2014). Many congressional overrides come in the form of broad, bipartisan bills that seek to update policy to be more efficient or equitable. These types of bipartisan overrides are most likely for cases in the gridlock zone, since a unified majority should be able to target those cases that it dislikes on ideological grounds alone. Thus, perhaps support is a better mechanism for “protecting” decisions in this region.

Recall that outside of the gridlock interval we expected the predictions from traditional pivotal politics theories to hold: policies are more likely to be overridden as Ideological Distance increases. Figure 3 reveals a null result for ideology across the range of Court Disapproval and regardless of whether the case falls in the gridlock interval. Moreover, the two effects are not statistically different from one another. In short, there is no evidence that ideologically distant cases are more likely to be overridden.

Initially this seems surprising. However, recall that only one study—Uribe, Spriggs, and Hansford (2014)—has found the probability of an override to be affected by the ideological distance between the Court and Congress. Just as judicial scholars have struggled to demonstrate that the Court is responsive to congressional preferences (e.g. Segal 1997; Owens 2010), scholars have similarly been unable to provide robust evidence that Congress responds to the Court’s preferences. This lack of a separation-of-powers effect is an important consideration to keep in mind when considering the null result for ideology shown in Figure 3. Our result should not be

surprising; rather, it supports the conclusions from most studies on this topic.

This analysis provides further, though qualified, support for our opportunity theory. As shown in Table 1 and discussed in the body of the paper, the Court's public support has, on average, an important effect on the probability of an override. The circumstances under which the Court's support is most likely to alter the probability of an override are exactly those circumstances under which we would expect Congress to be least likely to act. Additionally, we find the support plays a role in predicting almost a majority of overrides. Again, 47% of the overrides in our data are in the region where we estimate Court Disapproval to have a statistically significant effect. This provides important support for the theory that we have presented in this paper.

| | Model 1 |
|---|-------------------|
| Court Disapproval | 0.08 * (0.03) |
| Public Mood Divergence | 0.01 (0.00) |
| Gridlock Interval | 0.11 (0.27) |
| Ideological Distance | -0.63 (0.97) |
| Election Year | 1.27 * (0.16) |
| <i>New York Times</i> Front Page | -0.03 (0.20) |
| Congressional Amicus | 0.36 (0.34) |
| Unanimous | -0.61 * (0.15) |
| Multiple Issues | 0.24 (0.15) |
| U.S. Lost Case | 0.33 (0.24) |
| Reverse Lower Court Decisions | -0.04 (0.13) |
| Polarization | 0.58 (0.52) |
| t | -0.28 * (0.04) |
| t^2 | 0.01 * (0.00) |
| t^3 | -0.00 (0.00) |
| Previously Overridden | 0.80 * (0.33) |
| Gridlock Interval \times Ideological Distance | 1.19 (1.34) |
| Intercept | -6.93 * (0.65) |
| N | 217,270 |
| AIC | 3097.80 |

* indicates significance at $p < 0.05$

Table 1: Override discrete time duration model. The outcome variable is whether a case is overridden in a given year.

Table 2: Summary Statistics

| Continuous Variable | Mean | St. Dev. | Min | Max |
|------------------------|-------|----------|--------|-------|
| Court Disapproval | 14.73 | 2.18 | 10.94 | 20.71 |
| Public Mood Divergence | -2.95 | 17.59 | -47.92 | 30.35 |
| Ideological Distance | 0.17 | 0.50 | 0.00 | 0.70 |
| Polarization | 0.75 | 0.17 | 0.50 | 0.99 |

| Categorical Variable | Proportion | Min | Max |
|----------------------------------|------------|-----|-----|
| Override | 0.001 | 0 | 1 |
| Gridlock Interval | 0.56 | 0 | 1 |
| Election Year | 0.50 | 0 | 1 |
| Congressional Amicus | 0.01 | 0 | 1 |
| Unanimous | 0.39 | 0 | 1 |
| Multiple Issues | 0.23 | 0 | 1 |
| U.S. Lost Case | 0.09 | 0 | 1 |
| <i>New York Times</i> Front Page | 0.13 | 0 | 1 |
| Reverse Lower Court Decision | 0.52 | 0 | 1 |
| Previously Overridden | 0.02 | 0 | 1 |

| | Coefficient | S.E. |
|--|-------------|-----------|
| Court Disapproval | 0.02* | (0.08) |
| Public Mood Divergence | 0.01 | (0.00) |
| Ideological Distance | -0.49 | (6.43) |
| Gridlock Interval | -1.32 | (1.77) |
| Election Year | 1.30* | (0.16) |
| <i>New York Times</i> Front Page | -0.03 | (0.20) |
| Congressional Amicus | 0.34 | (0.34) |
| Unanimous | -0.59* | (0.15) |
| Multiple Issues | 0.24 | (0.15) |
| U.S. Lost Case | 0.32 | (0.24) |
| Reverse Lower Court Decision | -0.03 | (0.13) |
| Polarization | 0.60 | (0.52) |
| t | -0.27* | (0.04) |
| t^2 | 0.01* | (0.00) |
| t^3 | -0.00 | (0.00) |
| Previously Overridden | 0.81* | (0.33) |
| Court Disapproval \times Gridlock Interval | 0.09 | (0.11) |
| Court Disapproval \times Ideological Distance | -0.01 | (0.41) |
| Gridlock Interval \times Ideological Distance | 0.17 | (8.90) |
| Court Disapproval \times Gridlock Interval \times Ideological Distance | 0.09 | (0.59) |
| Constant | -6.06* | (1.37) |
| N | | 217,270 |
| Log Likelihood | | -1,466.36 |
| Akaike Inf. Crit. | | 3,100.71 |

Note:

* indicates significance at $p < 0.05$

Table 3: Override discrete time duration model with interaction. The outcome variable is whether a case is overridden in a given year.

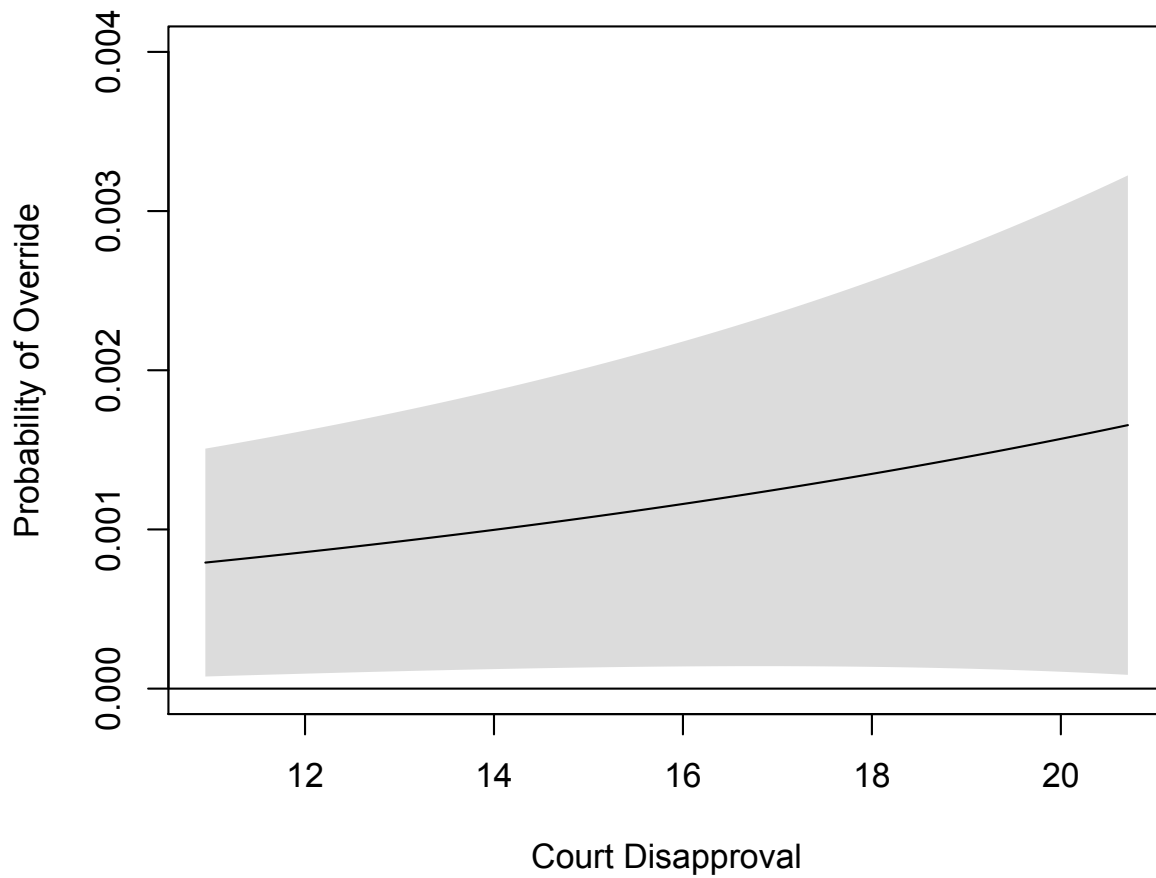


Figure 1: This graph shows the predicted probability of an override across values of the Court's public disapproval measure. Predicted probabilities are estimated using estimates from Model 1 shown in Table 1.

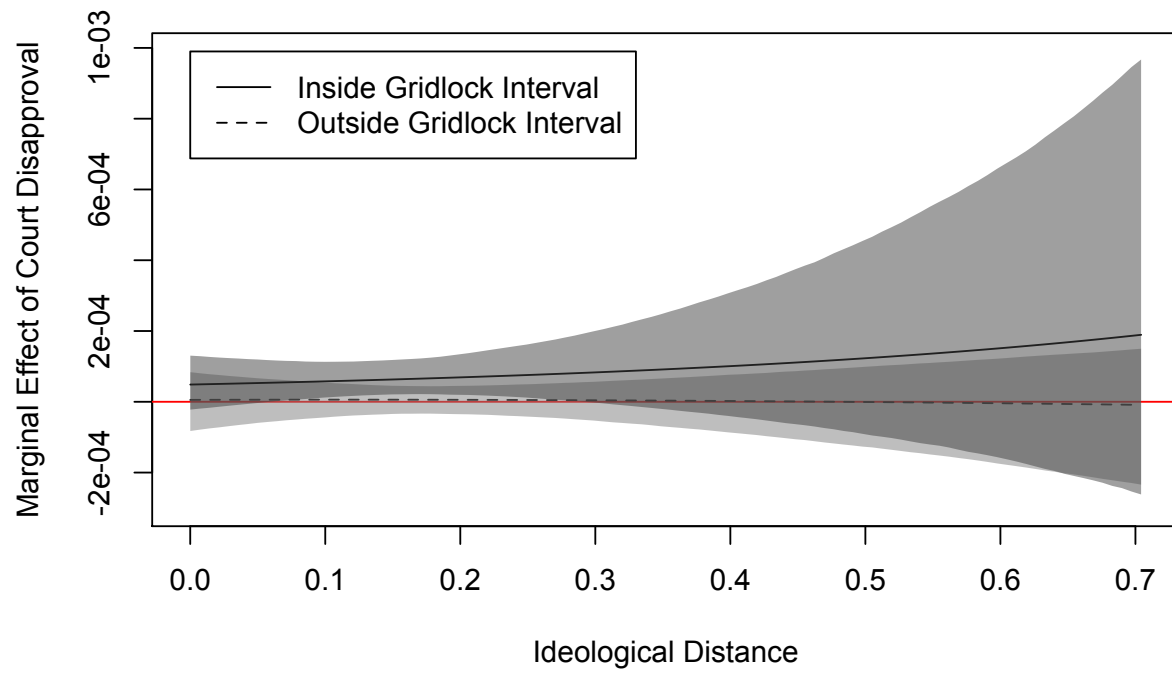


Figure 2: This graph shows the marginal effect of the Court Disapproval variable on the probability of override across values of the Ideological Distance measure. The effect is graphed separately for instances where the variable is inside and outside the gridlock interval.

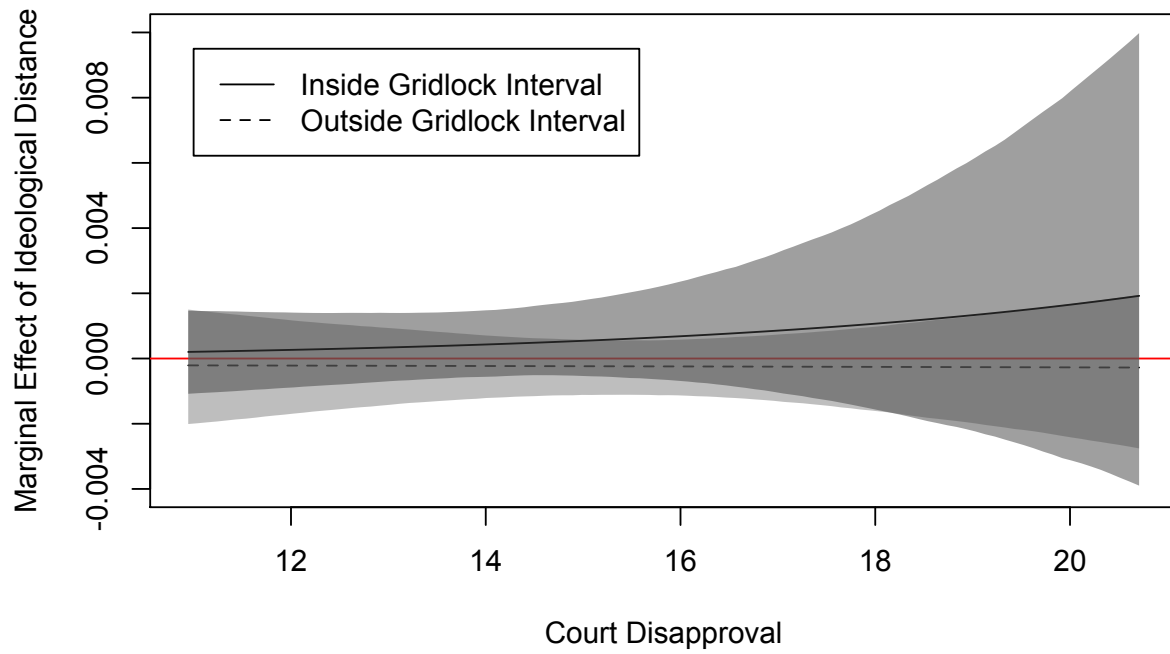


Figure 3: This graph shows the marginal effect of the Ideological Distance variable on the probability of override across values of the Court Disapproval measure. The effect is graphed separately for instances where the variable is inside and outside the gridlock interval.