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Anticipation and Retaliation: The Impact of the Supreme Court on Congressional Decision–making

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An abstract of a dissertation submitted to the Faculty of the Graduate School of Emory University in partial fulfillment of the requirements for the degree of Doctor of Philosophy
in Political Science
2009

Abstract

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By Bethany Blackstone

I explore the interaction between Congress and the United States Supreme Court. First, I consider the impact of anticipation of Supreme Court action on the decision of Congress to pass legislation. I hypothesize that under certain conditions (characterized by the preferences of the actors within each institution and the location of existing policies), Congress will refrain from enacting legislation because of the anticipated action of the Supreme Court. I find little evidence to support this hypothesis. Second, I assess the ability of Congress to respond to and reverse the impacts of the Court's constitutional decisions through the passage of ordinary legislation. I find that members of Congress frequently propose legislation that responds to the Court's constitutional decisions. There is substantial variation in the intended impacts of responsive bills that has been ignored in existing research. While some responsive bills attempt to wholly reverse the legal and policy implications of the Supreme Court's constitutional decisions, most are narrower. Many responses attempt to modify policy within the legal confines defined by the Court. I find that responsive legislation that attempts to completely reverse the legal doctrines announced by the Supreme Court are significantly less likely to be passed than legislation whose impact is limited to modifying public policy. An analysis of constitutional challenges to responsive legislation in the federal courts reveals that Congress is generally successful at locating responsive policies that survive judicial scrutiny. I conclude that the relationship between Congress and the Supreme Court is less conflictual than is frequently assumed in the separation of powers literature.

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Chapter 1

Introduction

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA) in response to a 1990 decision of the Supreme Court, *Employment Division, Department of Human Resources of Oregon v. Smith*. In *Smith*, the Supreme Court broke from existing precedent guiding alleged violations of the right to free exercise of religion by holding that laws that do not target religion for adverse treatment are not ordinarily subject to challenge under the Free Exercise clause, even if they result in substantial burdens on religious practice. Epstein & Walker (2004, 137) summarize the policy implications of the *Smith decision*: "[T]he Free Exercise Clause does not relieve an individual from his obligation to comply with a valid and neutral law of general applicability on the ground that the law commands behavior inconsistent with a person's religious teachings." The Court rejected the use of a strict scrutiny standard to evaluate these claims. Strict scrutiny would require a government to demonstrate that a law challenged under the First Amendment's Free Exercise Clause furthers a compelling government interest and that it does so in the least restrictive means possible even if that law was not targeted at religious groups or practices. Congress enacted RFRA under its authority to enforce the Fourteenth Amendment. The bill was passed with overwhelming support and dictated that the compelling interest–least restrictive means test that the Court rejected in *Smith* was the appropriate standard for use in free exercise cases.

Congress, however, did not have the final word on the matter. In 1997, the Supreme

Court heard a challenge to RFRA and found the statute unconstitutional as applied to the states (*City of Boerne v. Flores* (1996)). The Court asserted that Congress had exceeded its powers under the Fourteenth Amendment when it enacted RFRA because the statute was not remedial or enforcement legislation aimed at correcting past wrongs committed by states in the area of free exercise.

Members of Congress reacted to the the Supreme Court by proposing the Religious Liberty Protection Act of 1999 (RLPA). Representative Sue Myrick (R–NC) (1999) described the effect of the RLPA, "The Religious Liberty Protection Act would essentially overturn the *Smith* decision and return religious expression to its rightful place." This time, the House invoked its powers under the Spending and Commerce Clauses of the Constitution to justify the regulation. The proposed statute would have required the compelling interest–least restrictive means test be used in free exercise cases involving programs that receive federal financial support or that affect interstate commerce. After securing passage in the House, the bill was sent to the Senate where it died in committee. Among the issues addressed in the debate in the House was the reliance on Congress's power to regulate commerce to reinstate the strict scrutiny test for religious exercise cases. Proponents argued that the Religious Liberty Protection Act would not be subject to the same challenge that succeeded in the *Boerne* case. Others, however, voiced concern that the bill's relationship to Congress's interstate commerce and spending power authority was so tenuous as to raise serious constitutional problems.

Eventually, Congress passed a more modest bill that imposed the compelling interest–least restrictive means test in free exercise cases involving land use regulations and institutionalized persons (prisoners)—the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Congress again relied on its authority to regulate commerce, hinging the statute's applicability on whether (1) a substantial burden is imposed in a program or activity that receives federal financial support or (2) the burden affects interstate commerce. In May of 2005, a unanimous Supreme Court held that the RLIUPA was con-

stitutional (*Cutter v. Wilkinson* (2005)).

This interaction between Congress and the Supreme Court highlights two dynamics of legislative–judicial interactions that are largely ignored in extant formal and empirical work on the separation of powers (SOP). First, Congress may take into consideration the preferences and likely response of the Supreme Court when it enacts legislation. Second, it is not possible to assert a priori whether Congress or the Court will be the last mover in an interaction. This project contributes empirically and theoretically to the SOP literature by considering the impact of these often–overlooked characteristics of Congress–Court interactions. Empirically, I examine two aspects of separation of powers interactions that have received little or no attention in the literature. I conduct an empirical analysis of the hypothesis that Congress's decision to pass legislation is affected by its anticipation of negative treatment by the Supreme Court in two contexts. I hypothesize that the Supreme Court constrains Congress (a) at its first opportunity to pass legislation and (b) when Congress decides whether or not to pass legislation in response to a Supreme Court opinion it dislikes. I also conduct an empirical analysis of cases in which Congress attempts to pass responsive legislation to assess empirically the presumption that Congress is able to countermand the constitutional directives of the Supreme Court and to identify the conditions under which Congress (or the Court) enjoys the last move in these interactions.[1] I incorporate the legislature's initial decision to pass legislation and the ongoing nature of the Congress–Court dialogue to existing accounts of Congress–Court interactions to offer a more theoretically satisfying account of the Congress–Court relationship and to address questions in the SOP literature that have been largely neglected.

[1]This portion of the project is motivated by studies of what other scholars have called congressional "overrides" of judicial decisions (Eskridge 1991). While the language of "overrides" may be appropriate for the discussion the Court's statutory cases, existing work that discusses Congress's ability to "override" the constitutional decisions of the Supreme Court is problematic. The conventional understanding is that a constitutional amendment is required to override a constitutional decision of the Court. Congress, however, may pursue other means to sidestep an adverse ruling. For example, Congress may enact the same policy under a different authority or modify the language of the legislation to satisfy the Court's concern. Accordingly, I refer to what other scholars have called "override" or "decision–reversal" legislation (Eskridge 1991, Meernik & Ignagni 1997) as "responsive" or "Court–triggered" legislation.

The tendency of existing work to focus on the actions that occur in the interval between the legislature's first opportunity to act and the last move of either Congress or the Court may have led scholars to biased conclusions that one institution enjoys a systematic advantage over the other that are, in reality, artifacts of research design. For example, consider a study of the Supreme Court's decisions to invalidate federal statutes through its exercise of judicial review. This hypothetical study may indicate that the preferences of Congress have no bearing on the decision to invalidate statutes. These findings may lead an analyst to conclude that Congress does not constrain the Supreme Court's exercise of judicial review and that the predictions of strategic behavior derived from separation of powers theory are incorrect. An alternative interpretation is also plausible. If Congress takes into consideration the preferences of the Court when it enacts legislation, it may locate policy strategically to avoid invalidation by the Supreme Court. If this dynamic is operative, strategic behavior affects the location of Congress's policy, not the decision of the Court to review. In this case, the predictions of SOP theory are borne out, but cannot be detected by considering the exercise of judicial review. Only by considering the interaction of Congress and the Court from beginning to end can researchers draw unbiased inferences about the nature of the relationship between the institutions.

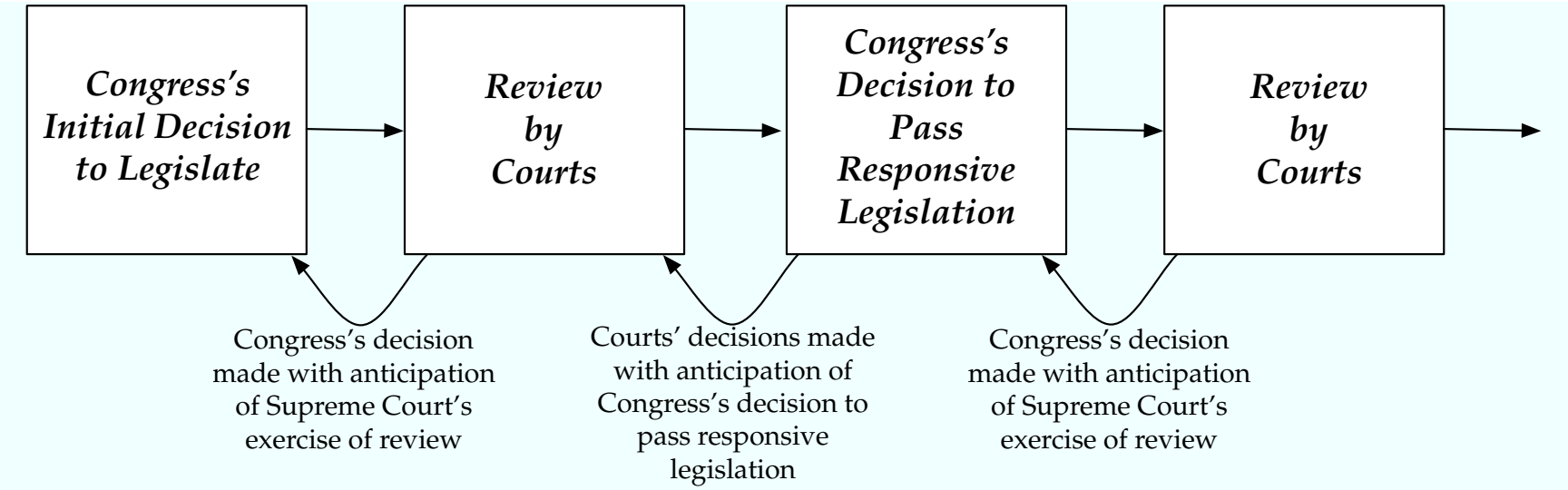
In Chapter 2, I review the relevant literature on Congress–Court interactions and lay out my theoretical expectations for the four empirical chapters that follow. In Chapters 3 and 4, I evaluate the hypothesis that the anticipation of negative treatment by the Supreme Court causes Congress to refrain from passing legislation. Chapter 3 evaluates this hypothesis for a general sample of bills while Chapter 4 tests the theory in a more likely case by restricting focus to legislative proposals that are introduced in response to specific decisions of the Supreme Court. Chapter 5 considers the decision of Congress to pass legislation that responds to the Supreme Court's constitutional decisions. Here, I focus on the substance of responsive proposals to evaluate the extent to which Congress can "reverse" the constitutional decisions of the Supreme Court. Finally, I consider the ulti-

mate success of legislative responses to the Court's constitutional decisions by analyzing their treatment in the federal courts in Chapter 6. Chapter 7 concludes.

Chapter 2

Theory and Literature Review

This project asks, "Does the Supreme Court constrain Congress when Congress decides whether or not to pass legislation?" and "Can Congress effectively negate the effect of constitutional rulings of the Supreme Court through the passage of ordinary legislation?" While these questions are not new to the literature on Congress–Court interactions, they have rarely been subjected to empirical analysis. Considering interactions between Congress and the Court from their inception and in their entirety fills significant gaps in extant work on the relationship between Congress and the courts. The research questions I consider fit into the broader literature on interactions between the Supreme Court and Congress. This body of literature asks whether or not the Supreme Court constrains Congress, when Congress will respond to Supreme Court decisions, whether Congress acts as a constraint on the Supreme Court and how interactions between Congress and the Court shape public policy and constitutional interpretation. The chart in Figure 2.1 illustrates the sequence of Congress–Court interaction and the primary works that address the various stages of the SOP dialogue. The bulk of research in the separation of powers tradition focuses on the decisions of the Supreme Court when it reviews statutes and the decision of Congress to respond to Supreme Court decisions. Little attention has been devoted to the initial decision of the legislature to act and the aftermath of the enactment of responsive legislation has been ignored altogether.



Initial Decision to Legislate	**Judicial Review**	**Passage of Responsive Legislation**	**Judicial Review of Responsive Legislation**
Ferejohn and Shipan (1990)	Dahl (1957)	Dahl (1957)	
Eskridge (1991)	Casper (1976)	Casper (1976)	
Ferejohn and Weingast (1992)	Ferejohn and Shipan (1990)	Ferejohn and Shipan (1990)	
Vanberg (2001)	Eskridge (1991)	Gely and Spiller (1990)	
Martin (2001)	Ferejohn and Weingast (1992)	Eskridge (1991)	
	Spiller and Gely (1992)	Ferejohn and Weingast (1992)	
	Segal (1997)	Meernik and Ignagni (1997)	
	Hansford and Damore (2000)	Pickerill (2004)	
	Martin (2001)	Spiller and Tiller (1996)	
	Segal and Spaeth (2002)	Spriggs and Hansford (2002)	
	Bergera, et al. (2003)	Hettinger and Zorn (2006)	
	Harvey and Friedman (2006)		

Figure 2.1: The Sequence of SOP Interactions and Previous Research

2.1 Congress's Decision to Legislate

While the empirical SOP literature focuses primarily on the reactions of Congress to judicial decisions, there is a significant amount of game theoretic work that includes dynamics that allow Congress to alter its behavior in anticipation of Supreme Court action. Models of SOP interactions that begin with a move by Congress and subsequently allow a court to modify policy, such as those of Ferejohn & Shipan (1990), Eskridge (1991), Ferejohn & Weingast (1992), and Vanberg (2001), predict that under certain preference configurations, a legislature will either refrain from enacting laws or locate policy strategically because of the expected action of the court. With the exception of Martin (2001), this hypothesis has not been subjected to empirical testing.

Vanberg's (2001) model considers the impact of the political environment in which courts operate on their behavior. He discusses the dependence of courts on other branches of government for enforcement of their decisions and hypothesizes that an "electoral connection" (Mayhew 1974) can serve as an indirect enforcement mechanism for judicial decisions. The game models the interaction between a legislature and a court with the legislature uncertain of the nature of the court (hostile or not hostile) and the transparency of the political environment (whether or not voters are able effectively to monitor legislative responses to judicial decisions). The court's only decision is whether or not to invalidate enacted legislation. The legislature must decide, first, whether or not to legislate and, if overruled, whether or not to evade the court's ruling. The equilibria of the game characterize four legislative/judicial regimes. The autolimitation regime predicts the type of anticipatory strategic behavior discussed in Chapter 1. In this equilibrium, transparency is high, as is the probability of encountering a hostile court. The legislature will not evade the court's ruling at the final node of the game; however, foreseeing the possibility of engaging a hostile court, the legislature will refrain from enacting legislation in the first place.

Scholars of the interaction between Congress and the Court accept, at least implic-

itly, this argument—that the behavior of Congress may be affected by its expectations about the actions of the Supreme Court. However, there have been few efforts to evaluate empirically the veracity of these predictions. The failure of extant work to evaluate the first opportunity for strategic behavior may explain the lack of evidence of strategic behavior in Congress–Court interactions (Segal 1997, Hansford & Damore 2000, Segal & Spaeth 2002, Spriggs & Hansford 2002). If Congress alters its behavior in anticipation of judicial action, analyses that consider either the judicial invalidations of legislative enactments or the congressional responses to judicial decisions ignore a potentially important path of influence.

Andrew Martin is one of few scholars to conduct a quantitative analysis testing the hypothesis of a judicial constraint on Congress. He assesses whether or not roll–call voting in Congress is affected by the preferences of the Supreme Court. Martin highlights the potential inconsistency between credit–claiming and position–taking strategies of members of Congress. He hypothesizes that strategic members of Congress may vote for a less preferred policy at the roll call stage to get better policy after review by the president and the Supreme Court. He models the interaction between a member of Congress, the median member of Congress, the president and the median justice on the Supreme Court.

Martin makes competing behavioral predictions for the strategic and nonstrategic accounts. The nonstrategic account predicts that votes are solely a function of preferences while the strategic model posits that in different political contexts, individual members of Congress will behave in profoundly different ways. Martin's analysis of roll–call votes on civil rights issues between 1953 and 1992 reveals that within both houses of Congress, members appear to be constrained by the separation of powers system—the ability of preferences to predict roll call votes varies systematically with the political context (characterized by the preferences of the other relevant actors). Notably, the effect of the president fails to attain statistical significance. Martin concludes that the influence of the president may fail to attain significance because Congress anticipates presidential action and

censors itself at the introduction stage. It is unclear, however, whether Congress should be equally attentive to the anticipated behavior of the Court. Further, while Martin finds support for the hypothesis of a judicial constraint on Congress, his focus on roll call votes excludes from consideration proposed enactments that do not reach the roll call stage.

Martin's analysis is unique for its focus on legislative anticipation of judicial action. Scholars have devoted little attention to elaborating theories of congressional anticipation of judicial activity. The analyses I undertake in Chapters 3 and 4 can be viewed as an extension of Martin's analysis. Our theoretical arguments are similar, but my project incorporates consideration of more of the legislative process by considering the fate of bills granted hearings instead of focusing solely on floor activity. I hypothesize that Congress will base its decision to pass legislation, at least in part, on the actions it expects the Supreme Court to take. When Congress anticipates that the Supreme Court, through its powers of judicial review or statutory interpretation, will alter a policy announced by the Congress in such a way that the Congress will be made worse off than it was before the legislation was enacted, Congress will refrain from passing bills that it would support if it were not facing a hostile Court.

Consider again the interaction between Congress and the Court in the area of free exercise. Figure 2.2 illustrates the policies announced by Congress and the Court in the back–and–forth between the *Smith* (1990) and *Cutter* (2004) decisions. The policies are arrayed from most protective of the individual right to free exercise on the left to least protective of the individual right to free exercise on the right. In *Smith*, the Supreme Court decided in favor of the state and announced a policy that Congress found to be insufficiently protective of individual rights to the free exercise of religion. Congress responded by passing the Religious Freedom Restoration Act which statutorily mandated that the federal courts use a "strict scrutiny" standard when deciding cases based on claims of violation of the Free Exercise Clause of the First Amendment. Under the policy announced by Congress, it would be more difficult for government actors to justify policies that impede the free

exercise of religion than it would be under the standard imposed by the policy announced in *Smith*. The Supreme Court reviewed and declared unconstitutional the Religious Freedom Restoration Act in *City of Boerne v. Flores* (1996), causing the guiding policy in the area to fall back to the position announced by the Supreme Court in *Smith*.

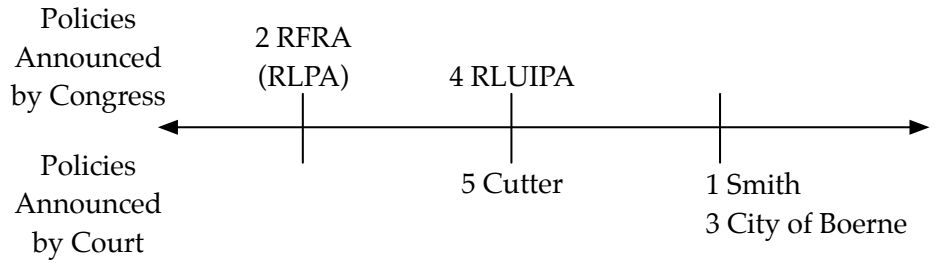


Figure 2.2: Example: SOP Dialogue Regarding Free Exercise of Religion

After the invalidation of RFRA, members of Congress debated the best way to respond to the *Boerne* decision. While some advocated the reinstatement of the RFRA policy under the congressional authority to regulate spending through passage of the Religious Liberty Protection Act, others called for a more limited policy that would be less likely to be invalidated by the Supreme Court. Eventually, the more narrow Religious Land Use and Institutionalized Persons Act of 2000 was passed and found to be constitutional by the Supreme Court. While this anecdote does not offer conclusive evidence to support my hypothesis, it is suggestive. It is reasonable to argue that in the absence of concerns about Supreme Court review, Congress would have passed the Religious Liberty Protection Act and that concern over Supreme Court review influenced members of Congress as they decided whether or not to support the Religious Liberty Protection Act and/or the Religious Land Use and Institutionalized Persons Act.

2.1.1 Congressional Anticipation of Judicial Action

I evaluate the hypothesis that anticipation of negative treatment causes Congress to refrain from passing legislation in Chapters 3 and 4. In this section, I outline a standard theory of Congress–Court interactions, focusing on the congressional anticipation of judi-

cial action, and review the hypotheses that will be evaluated in Chapters 3 and 4. I adopt two fundamental assumptions to characterize the relationship between Congress and the Supreme Court. First, members of Congress and the Supreme Court are strategic actors that are motivated primarily by their policy preferences. Second, members of Congress prefer to avoid seeing their policies reversed or modified by the Supreme Court.

Legislative scholars accept that members of Congress engage in goal–seeking behavior (Clausen 1973, Kingdon 1989, Mayhew 1974, Poole & Rosenthal 1997). Mayhew (1974) introduced the model of members of Congress as single–minded seekers of reelection and argued that pursuit of the reelection goal leads members of Congress to emphasize position–taking, credit–claiming and advertising rather than policymaking.[1] While members of Congress undoubtedly engage in these behaviors, they reveal little about the act of legislating and what non–distributive policies Congress will produce. Mayhew (1974, 141) acknowledges that "[I]f all members did nothing but pursue their electoral goals, Congress would decay or collapse." According to his more recent work, nearly half of the public actions engaged in by members of Congress are related to the act of legislating (Mayhew 2000, 79).

Even if the electoral goal is primary, members of Congress should behave as if they are motivated by policy goals. Many factors may shape policy preferences, including the instrumental goals of satisfying constituents. Policy preferences, then, may not be personal but induced by external factors (Clausen 1973, Martin 2001). Moreover, the electoral goal does not preclude members of Congress from pursuing public policy. According to Mayhew (2000, 14), members of Congress can choose what reelection constituency they will cater to, allowing them to simultaneously pursue electoral and policy goals. Because

[1]Members engage in position–taking when they publicly enunciate judgmental statements on subjects of interest to political actors (Mayhew 1974, 61). Credit–claiming involves the generation of a belief that a member of Congress is personally responsible for causing the government to do something. Credit–claiming emphasizes the individual accomplishments of the members of Congress and often involves the distribution of particularized benefits and casework (Mayhew 1974, 52). Members advertise when they engage in efforts to disseminate their name among constituents to create a favorable image in messages with little or no issue content (Mayhew 1974, 49).

members may have induced preferences over policy, it is impossible to separate electoral from policy goals. Further, the pursuit of policy may increase the effectiveness of credit–claiming and position–taking strategies. These strategies will usually yield higher payoffs to members of Congress when they are coupled with tangible policy outcomes. According to Martin (2001, 362),

> Citizens in our democracy are profoundly affected by public policy, not individual roll call votes; public policy, implemented by the executive branch and refined by future Congresses and the Supreme Court, is what pertains to their lives. Thus, to pursue reelection and other legislative goals, it is reasonable to assume that members of Congress are concerned with the ultimate state of policy.

The assumption that the electoral goal is the sole determinant of legislator behavior dominates the literature on congressional decisionmaking and scholars frequently argue that, to the extent that members pursue policy preferences they will pursue the policy preferences of their constituents. Others suggest, however, that legislators may be motivated by their own policy preferences. Fenno (1973) argues that members of Congress are motivated by three goals—reelection, the pursuit of good public policy and influence within the chamber. Others argue that characteristics of congressional elections leave significant room for members to pursue their own policy preferences. McCrone & Kuklinski (1979) and Burden (2007), for example, concede that politicians are significantly motivated by their desire to win reelection. They argue, however, that because voters choices are limited to (usually) two candidates both of whom hold positions on a bundle of policies that may be inconsistent or unknown to voters, voters simply do not have the option to choose a candidate with whom they agree on every issue.[2] Furthermore, congressional

[2]Burden (2007) goes on to argue that existing social science research neglects the importance of personal experiences and values in shaping legislative preferences. For my purposes, it is less important to ascertain what factors shape legislators' policy preferences than it is to make a case for the argument that legislators are primarily policy-driven.

elections tend to focus on a small number of issues, so most voters will be oblivious to their representatives' preferences and actions in many areas on the legislative agenda. Finally, most congressional elections are not seriously contested (Jacobson 2004, Wrighton & Squire 1997). This limits the ability of constituents to monitor their representatives and to punish "shirking." The pursuit of reelection clearly leaves ample space within which members of Congress can pursue their own policy preferences. I assume that members, whether for electoral or personal reasons, are concerned with the state of public policy.

A concern with electoral and policy goals coupled with the costs associated with legislating suggests that members of Congress will try to avoid having their legislative enactments altered by the Supreme Court. The process by which a bill becomes a law is beset with obstacles. Consider the complexity of getting a bill through the House. Proponents of a policy incur the costs of drafting legislation. They must shepherd the bill through the committee and markup procedures. If the bill does not languish indefinitely in committee, it may be subject to rules that result in dramatic changes to its content on the floor or kept off the floor altogether if the majority party leadership does not favor the proposal. If members of Congress are rational, they should prefer not to see the fruits of their time and efforts lost to invalidation by the Supreme Court.

Members of the Court are also assumed to be motivated primarily by their policy goals. This assumption is consistent with the dominant theories of judicial–decisionmaking, the attitudinal and strategic models (Segal & Spaeth 2002, Epstein & Knight 1998). While these models disagree about the extent to which Supreme Court justices are constrained by the actions of their brethren and other actors, they agree that judges are policymakers. Numerous studies have confirmed the hypothesis that attitudes are important determinants of judicial behavior. This is not to say that the justices are not constrained by legal factors, only that these concerns are not dominant. The unique institutional environment of the Supreme Court makes it possible for justices to decide cases primarily on the basis of their policy preferences.

To illustrate the theoretical gains achieved by considering the legislature's initial decision to act, I employ two stylized formalizations of a court's decision to review legislation enacted by a legislature. The players in the games are the pivotal members of a legislature (*Legislature*) and a court (*Court*). Each has single–peaked preferences over policy outcomes in a unidimensional policy space. Payoffs to both actors are comprised of their utility for the policy outcome (assigned by quadratic loss functions). The court further incurs a cost (c) for hearing a case. This cost (which is assumed to be fixed and known) is intended to capture the opportunity cost incurred for devoting scarce resources to action in a particular issue area. The ideal points of the pivotal members of the legislature and the court are L and J, respectively. I assume that the court's ideal point is equal to 0 and that the legislature is located to the right of the court, without loss of generality. ($J = 0$ and $L > J$). Policies announced by the legislature are denoted e; policies announced by the court are denoted by the symbol r. Finally, I assume that there is a status quo policy (q) in the relevant issue area in existence at the start of the game. Notation of parameters and choice variables is summarized in Table 2.1.

Table 2.1: Summary of Notation

Parameter		
q	$\in (-1, 1)$	Location of status quo policy at start of game
L	> 0	Ideal point of the pivotal members of *Legislature*
J	0	Ideal point of the median member of the *Court*
c	> 0	Cost incurred by *Court* when it reviews a statute
Choice Variable		
Enact or $\sim$ *Enact*		*Legislature*'s choice over whether or not to enact legislation
e	$\in (-1, 1)$	Location of policy announced by *Legislature* if *Legislature* chooses to enact legislation (*Enact*)
Review or $\sim$ *Review*		*Court*'s choice over whether or not to review policy
r	$\in (-1, 1)$	Location of policy announced by the *Court* if *Court* chooses to review statute (*Review*)

Figure 2.3 presents a decision–theoretic model of the court's choice to exercise review.

At the time of its decision, a policy (q) is in place. The court can choose not to review the statute, thereby accepting the status quo policy (q) and ending the game. Alternatively, the court can review the statute and through its powers of statutory interpretation or judicial review, move the policy outcome to another point in the policy space. If the court reviews the statute it incurs a cost (c).

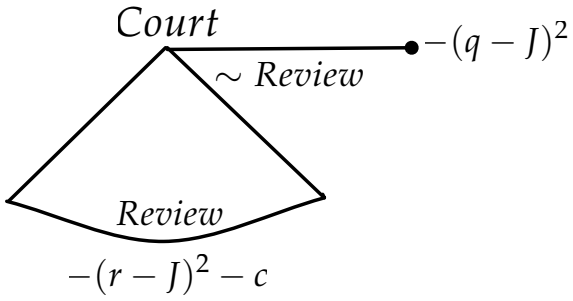


Figure 2.3: Decision–Theoretic Judicial Review/Statutory Interpretation Model

If the court reviews the statute, it will locate policy at its ideal point. The costliness of review, however, creates a zone of policies around the court's ideal point that it will not review because they are sufficiently close to be preferable to the payment of the cost c. For policies within this range (here, where $-\sqrt{c} < q < \sqrt{c}$), the court will not review. For those outside this range, the court will review and the outcome will be the court's ideal point. The status quo policies for which the court will exercise review are highlighted in Figure 2.4.

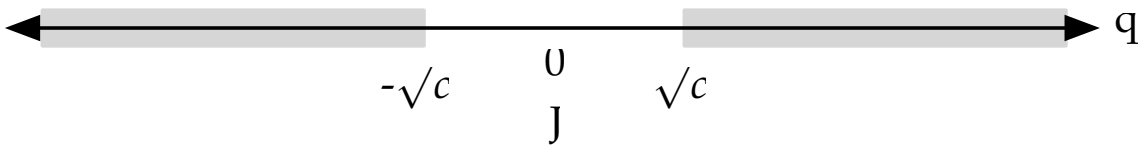


Figure 2.4: Conditions Under Which Court Will Exercise Review

Now, consider the effect of introducing a legislature to this model. Figure 2.5 includes a move by a legislature before the court decides whether or not to review, thereby endogenizing the location of the policy the court faces. The game again begins with a status quo policy (q) in place, but now the first move belongs to the legislature. The legislature first

decides whether or not to enact a statute altering the policy location. If it enacts a policy (e), it may locate it anywhere in the policy space. If a policy is enacted, the court then faces the same decision as in the decision–theoretic model—accept the policy or review the policy and choose a new location for the policy. If the legislature does not enact a statute, the status quo (q) is the policy outcome and the game ends.

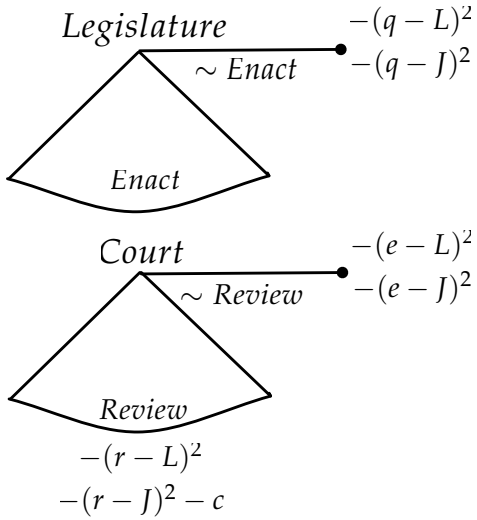


Figure 2.5: Judicial Review/Statutory Interpretation Model with Strategic Interaction

The game is solved by backwards induction for the subgame perfect equilibrium. [3] Figure 2.6 highlights the conditions under which the legislature will enact legislation as a function of the location of the status quo policy (q on the x–axis) and the distance between the ideal points of the legislature and the court (L on the y–axis). The shaded areas of the graph indicate that the legislature will enact a new policy. Clearly, the outcomes here differ significantly from those in Figure 2.4. When the legislature enacts a law, it locates policy to avoid review by the court, placing its policy (e) as close as possible to its own ideal point within the zone of policies the court will not review.

The model suggests that when the status quo policy is to the left of both the legislature and the court, anticipation of negative treatment by the court will not lead Congress to refrain from enacting legislation. For all status quo policies to the left of $\sqrt{c}$, the legislature

[3] All proofs are in Appendix A.

will enact legislation. If the cost to the court for reviewing a statute is sufficiently high, the legislature will be wholly unconstrained and can enact policy at its ideal point. When the costs of review are lower, the legislature may be forced to adopt an accommodation policy—locating the new statute at the point closest to its ideal point that will not trigger review by the court ($e = \sqrt{c}$). Under the latter condition, the legislature is expected to enact a new law but will not be able to place policy at its ideal point. Under both conditions, the configuration of congressional and judicial preferences coupled with the location of the status quo policies allows the legislature to increase its utility by enacting a new policy closer to its ideal point than the status quo policy.

When the status quo policy is located between the ideal points of the legislature and the court, the legislature may be further constrained by the anticipation of the court's action. Under these conditions, the threat of review may cause the legislature to refrain from enacting a new law altogether. When the status quo is to the left of $\sqrt{c}$, the legislature will pass a new law. When the status quo is to the right of $\sqrt{c}$, the legislature will not enact a new law under some conditions. The distances between the legislature and the court, the legislature and the status quo policy, and the court and the status quo policy will condition the decision of the legislature to enact legislation. When the preferences of the legislature and the court are sufficiently close, the legislature can enact policy at its ideal point without fear of alteration by the Court. When the preferences of the actors are more divergent, the legislature may accommodate the Court by locating policy at the uppermost boundary of the Court's indifference zone ($e = \sqrt{c}$). For legislatures sufficiently distant from the court, however, there is a range of status quo policies that the legislature finds preferable to the best policy that would be accepted by the Court. This creates a range of status quo policies that will be accepted by the legislature even when it prefers an alternative policy closer to its ideal point. In other words, there are conditions under which the legislature is fully constrained by the court and will not enact legislation because of the expected action of the Court.

This simple model makes clear an important point about SOP interactions. If Congress can anticipate judicial action, we should not witness a lot of conflict between Congress and the Supreme Court. This model predicts accommodation by Congress to avoid negative review—an element notably absent from empirical discussions of the SOP dialogue. If Congress engages in the type of strategic behavior predicted here, the failure of existing empirical work to consistently find support for SOP theory is an artifact of the question chosen for analysis and cannot be interpreted as conclusive evidence that Congress and the Supreme Court do not engage in strategic interaction.

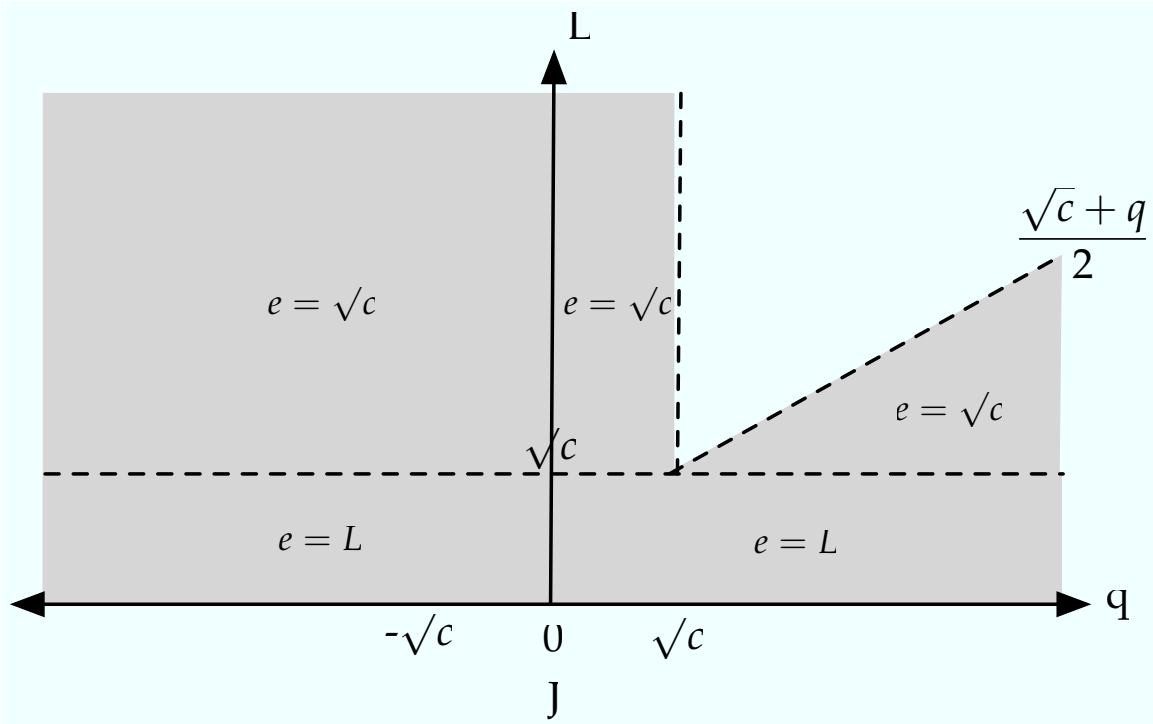


Figure 2.6: Conditions Under Which Legislature Will Enact Legislation

The formal model suggests some intuitive hypotheses about the effects of the relationships between Congress, the Court and the location of status quo policies on the likelihood that Congress will enact legislation. First, as the preferences of Congress and the Supreme Court become more similar, the legislature will be more likely to enact legislation. That is, the legislature will be more able to enact policy that both it and the Court prefer to the status quo. Second, under some preference configurations, Congress will be

unconstrained by the Court as to passage. This will generally be the case when Congress and the Court are located to the same side of the status quo policy. When this condition is satisfied, Congress and the Court both prefer a new policy to the existing policy and Congress will be free to enact a new statute. When the status quo is located between the ideal points of Congress and the Court, there is the potential for the Court to constrain Congress.[4] Under this condition, the model predicts that the distances between Congress and the status quo and the Court and the status quo will influence the probability of a new legislative enactment. Increasing distance between the status quo policy and Congress's ideal point should be associated with an increased probability of legislative activity. This makes intuitive sense—the more distasteful Congress finds the status quo policy, the more likely it will be to move policy. The ideological distance between the status quo policy and the Court's ideal point should also be positively associated with the probability of legislative activity. The less satisfied the Court is with the status quo, the more freedom the legislature will have to move policy toward the congressional ideal point without simultaneously making the Court worse off. Finally, when both the Court and Congress are far from the status quo policy, we should observe a heightened probability of legislative activity.

In summary, I evaluate the following hypotheses in Chapters 3 and 4:

> ***Hypothesis 1****: As the ideological distance between Congress and the Court ($|L - J|$) decreases, Congress will be more likely to enact legislation.*
>
> ***Hypothesis 2****: When Congress and the Court are located to the same side of the status quo policy Congress will be unconstrained and, therefore, more likely to enact legislation than when the status quo policy is located between the ideal points of Congress and the Court.*

[4] In the analyses of Congress's decision to enact legislation, I characterize Congress as "potentially constrained" when the status quo policy is located between the ideal points of the Court and the Congress and as "unconstrained" when the status quo is located to one side of Congress and the Court. Under the latter condition, the model predicts that Congress will always be able to increase its utility by passing a new law but the Supreme Court may force Congress to locate that policy strategically to avoid review. Since I focus only on the decision to pass legislation or not and not the ideological location of legislation, I do not distinguish between the conditions under which Congress will locate policy at its ideal point and when it will locate policy strategically.

Hypothesis 3*: As the ideological distance between Congress's ideal point and the status quo policy ($|L - q|$) increases, Congress will be more likely to enact legislation under conditions of potential constraint.*

Hypothesis 4*: As the ideological distance between the Court's ideal point and the status quo policy ($|J - q|$) increases, Congress will be more likely to enact legislation under conditions of potential constraint.*

Hypothesis 5*: As the interaction between the ideological distance between Congress and the status quo and the ideological distance between the Court and the status quo increases ($|L - q| * |J - q|$), Congress will be more likely to enact legislation under conditions of potential constraint.*

2.1.2 Alternative Explanations for Bill Success

While my primary research hypotheses focus on the relationship between Congress and the Supreme Court, it is important to review and control for other explanations for bill success. Legislative scholars have suggested that sponsor and bill characteristics may systematically influence the probability that a bill passes. I, accordingly, include variables to control for these factors.

The literature on bill success has consistently found that majority party members have more success at turning their bills into law than members in the chamber minority (Franzitch 1979, Moore & Thomas 1990, Anderson, Box-Steffensmeier & Chapman 2003, Krutz 2005, Cox & Terry 2008). I accordingly expect the dummy variable measuring membership of bill sponsors in the majority party to be positively associated with the probability of passage. There is less consensus on the role of other bill and sponsor characteristics on legislative success. The literature suggests that members with certain institutional prerogatives may have increased success. In Chapter 3, I follow Adler & Wilkerson (2005) and hypothesize that bills sponsored by a member of the committee or the chair of the committee to which the bill is initially referred are more likely to be successful than those sponsored by non–members of that committee.[5] I also include two measures that char-

[5]This hypothesis is not considered in Chapter 4 because a number of responses to Court decisions are proposed as amendments to underlying legislation and do not go through the standard committee referral process.

acterize the relationship between the preferences of the bill sponsor and his chamber. I expect that bills sponsored by "mainstream" legislators are more likely to be enacted than bills sponsored by more ideologically extreme legislators. Adler & Wilkerson (2005) suggest that sponsorship by a mainstream legislator may signal that a proposal is more likely to reflect the preferences of the median legislator (or party median) or that such proposals may actually better reflect median preferences than proposals advanced by more ideologically extreme members of Congress. Another measure that may capture the level of support for a proposal is its number of cosponsors. I expect that as the number of cosponsors increases, so should the probability of success.

The preferences of external actors may also be influential. Because the president has the power to veto any legislation, his preferences are especially likely to affect congressional decision–making. I hypothesize that bill success will increase with presidential support and will decrease when the president has gone on record opposing legislation. Finally, in each chapter I include a measure of salience to the public. In Chapter 3, I rely on a measure of the amount of media coverage devoted to a bill's topic to evaluate the impact of salience on the probability of bill passage. In Chapter 4, I classify a proposed response as salient if the Supreme Court decision that triggers it was afforded front page coverage in the *New York Times* the day after it was announced (Epstein & Segal 2000). I hypothesize that bills addressing issues and cases receiving significant media attention are more likely to be passed than those ignored in the popular press. A countervailing effect may also be at work. Salient issues and bills may provide the ideal platforms from which members of Congress can engage in position–taking behavior. If this is the case, proposals associated with salient issues or Supreme Court decisions may be no less likely (or even less likely) to be enacted than other bills. Operationalizations of these independent variables are discussed in detail in the relevant empirical chapters.

To summarize, I evaluate the following hypotheses in Chapters 3 and 4:

Hypothesis 6: *(Majority Party Sponsor) A bill will be more likely to pass when its sponsor*

is a member of the party that controls the chamber in which it is introduced.

Hypothesis 7: *("Mainstream" Sponsor) Bills sponsored by "mainstream" legislators will be more likely to pass than those sponsored by more ideologically extreme legislators.*

Hypothesis 8: *(Cosponsors) The number of cosponsors for a bill will be positively associated with the probability that the bill is passed.*

Hypothesis 9a: *(President Supports) Presidential support for a bill will increase the probability that the bill is passed.*

Hypothesis 9b: *(President Opposes) Presidential opposition to a bill will decrease the probability that the bill is passed.*

Hypothesis 10: *(Salience) Bills associated with salient issues/Supreme Court decisions will be more likely to be passed than bills associated with non–salient issues/Supreme Court decisions.*

In Chapter 3, I additionally evaluate the following hypotheses.

Hypothesis 11: *(Sponsor on Referring Committee) A bill will be more likely to pass when its sponsor is a member of a committee to which the bill is referred.*

Hypothesis 12: *(Sponsor Chairs Referring Committee) A bill will be more likely to pass when its sponsor is the chairperson of a committee to which the bill is referred.*

In this section, I reviewed explanations for bill success drawn from the literature on congressional decisionmaking. The hypotheses above should apply to the analysis of the decision of Congress to pass legislation generally and to the instances in which Congress chooses whether or not to respond to decisions of the United States Supreme Court. A considerable amount of scholarly work has considered that subset of legislative activity. Although I rely more heavily on the existing research on congressional decisionmaking in general, discussed above, I provide an overview of the literature on Congress's decision to pass responsive legislation and review additional factors that judicial scholarship suggests may influence the decision of Congress to respond to the Supreme Court.

2.2 Congress's Decision to Pass Responsive Legislation

Most work on the congressional side of Congress–Court interactions focuses not on the anticipation of judicial action but on when and how Congress can be expected to re-

spond to Supreme Court decisions it opposes. Members of Congress have several tools at their disposal if they wish to respond to a Supreme Court decision. These responses could range from the nearly costless issuance of public statements voicing criticism of the Court to the costly process of shepherding legislation designed to satisfy judicial scrutiny through Congress. Instead of attempting to alter the policy announced by the Court, members of Congress may engage in institutional attacks designed to weaken the Court. It is within the authority of Congress to alter the number of justices sitting on the Supreme Court, to impeach sitting justices and to alter the Court's jurisdiction, though these weapons have rarely been deployed.

Many scholars have focused their attention on the passage of legislation that alters the policy announced by the Supreme Court. They have considered congressional responses to statutory (Dahl 1957, Casper 1976, Eskridge 1991, Hettinger & Zorn 2006) and constitutional (Meernik & Ignagni 1997, Harvey & Friedman 2006) cases. I call these responses "responsive legislation" and adopt Stumpf's (1965, 382) definition for decision–reversal legislation—legislation intended "to modify the legal result or impact or perceived legal result or impact of a specific Supreme Court decision or decisions." I replicate the analysis in Chapter 3 for the subset of statutes that are introduced to respond to specific decisions of the Supreme Court. This analysis will provide an "easier" test of the strategic anticipation hypothesis than the analysis presented in Chapter 3 by focusing on the observations where Congress is most likely to be constrained by the Court. While Congress may not modify its behavior in anticipation of judicial action in average cases, legislators are especially likely to be attentive to the preferences of the Court when considering legislation that responds directly to a decision of the Supreme Court.

The most oft–cited explanation for congressional responses to Supreme Court decisions is the location of the Court's policy in the policy space. According to standard SOP accounts, the further a policy is located from the ideal points of the relevant congressional actors, the more likely a legislative response will be attempted (Eskridge 1991, Ferejohn

& Shipan 1990, Ferejohn & Weingast 1992, Gely & Spiller 1990, Segal 1997).

While the location of policy and preferences of the relevant actors are the predominant explanation for congressional responses to Supreme Court decisions, scholars have identified a multitude of case characteristics that may influence the likelihood of a response and its success. These characteristics suggest that the role of preferences may be conditioned by other factors. Eskridge (1991) and Meernik & Ignagni (1997) suggest that evidence of dissensus in a Supreme Court decision will increase the likelihood that a Supreme Court decision is met with a legislative response and that the response will be successful. Disagreement on the Court may signal fragility of the coalition supporting the Court decision. At the very least, disagreement offers evidence to members of Congress (or those who might appeal their losses at the Court to Congress) that the losing argument is sufficiently persuasive to win over at least some members of the Court. Eskridge (1991) further argues that when the divisions between the judges in the majority and minority mirror ideological divisions on the Court, a legislative response is more likely.

Eskridge (1991) and Meernik & Ignagni (1997) highlight other case characteristics associated with the presence of response attempts and with the success of those attempts. They expect losses by governments to be more likely to be met with legislative responses than the losses of non–governmental actors. Governments are more likely than other types of litigants to have the resources to advance a legislative response to an unpopular judicial decision. Interest group support may also influence the probability of a legislative response. Like governments, interest groups are likely to have the resources and know–how to parlay a loss at the Court into a legislative victory. Eskridge (1991) and Meernik & Ignagni (1997) accordingly expect that high levels of support for a losing litigant at the Supreme Court will be positively associated with the probability that responsive legislation is attempted and passed.

Meernik & Ignagni (1997) offer two additional factors that may influence the probability of a congressional response to a Supreme Court decision—whether or not the issue

affects the federal distribution of power and the level of public opposition to the Supreme Court ruling. Meernik and Ignagni identify the Supreme Court decisions in which the Court either rules that a federal statute violates the federal separation of powers principle or issues a ruling regarding federal election practices. This measure identifies the subset of cases that are likely to be especially important to members of Congress. They assert that these cases affect the distribution of federal power and find that cases that fall into this category are more likely to trigger responsive legislation. Visibility and salience to the public are the final factors proposed to influence the decision to pass responsive legislation. Meernik and Ignagni hypothesize that high levels of public opposition to a Supreme Court ruling and/or presidential support for proposed responsive legislation will increase the probability of a successful legislative response. Hettinger & Zorn (2006) also argue for the importance of salience (although they do not focus on support or opposition to the relevant Supreme Court ruling). They argue that ideological disagreement between Congress and the Court is insufficient to predict what Supreme Court rulings will be met with congressional responses. They argue that the majority of decisions of the Supreme Court are insufficiently important to Congress to ever become serious candidates for decision–reversal attempts. Accordingly, they hypothesize that case salience will increase the probability of a congressional response to a Supreme Court decision.

The empirical analysis in Chapter 4 is informed by the related works mentioned above; however, I do not evaluate the hypotheses advanced by Eskridge (1991) and Meernik & Ignagni (1997). Most of the factors considered by these authors are better predictors of the presence of a legislative response to a Supreme Court decision and are less theoretically relevant for an analysis that focuses on bill passage. I argue that once a proposed response has been taken up by a congressional sponsor, the standard predictors of bill success outlined in Section 2.1.2 will adequately explain variation in the treatment of proposed responses in Congress.

2.3 The Substance of Responsive Legislation

The analyses in Chapters 3 and 4 subject the prediction of the separation of powers theory that Congress will refrain from passing legislation because of anticipation of negative treatment by the Supreme Court to empirical testing. I hypothesize that the relationships between the preferences of Congress, the preferences of the Court, and the location of the status quo policy systematically influence the probability of bill passage generally, and especially when Congress responds to the decisions of the Supreme Court. In Chapters 5 and 6, I take a more qualitative approach to study the nature of congressional responses to the Court's constitutional decisions. I first consider the substance of legislation that responds to the Supreme Court to assess the effect of responsive legislation on the state of public policy. Second, I ask how the substance of responsive legislation may impact the probability of enactment of a responsive statute. In Chapters 3 and 4, I make no assumptions about the substance of responsive legislation and do not consider the possibility that different types of responsive proposals face different prospects for success. The analysis in Chapter 5 relaxes the assumption that all responsive proposals are created equal. Finally, in Chapter 6, I conduct an analysis of judicial interpretations of responsive legislation to gauge the long–term efficacy of those statutes.

These portions of the project are motivated primarily by the work of Meernik & Ignagni (1997) and their claim that a persistent and united majority can be effective at overriding the constitutional decisions of the Supreme Court. I expect that statutory responses to the Court's constitutional decisions will typically fail to "reverse" the Court's decisions.[6] Like Meernik & Ignagni (1997), I argue that Congress is able to modify the impact of the Court's constitutional rulings through the passage of ordinary legislation. Unlike those authors, I argue that congressional responses will frequently fail to reverse the constitutional decisions of the Supreme Court. The crux of my critique is based on the

[6]For these analyses, I omit congressional responses to the Court's statutory interpretation decisions because the claim that the Court can reverse those decisions is uncontroversial.

disconnect between the characterization of what constitutes "decision–reversal" legislation and the conclusions drawn about Congress's ability to reverse the Supreme Court. Meernik & Ignagni (1997) classify every bill that would modify the impact of a Supreme Court decision as a reversal bill and conclude that Congress can reverse the constitutional decisions of the Supreme Court because some bills that would (at least) modify the impact of Supreme Court decisions are enacted. I contend that "modifying" the impact of a Court decision is not the same as "reversing" a decision. I hypothesize that there is substantial variation in the nature of responses to Court decisions. Classifying all responsive legislation as "decision–reversal" legislation may obscure significant response characteristics that bear on the question of Congress's ability to negate the impacts of the Supreme Court's constitutional decisions.

2.3.1 Responses and Reversals

Studies of congressional responses to Court decisions have identified a multitude of factors that affect the probability that Congress will respond to a Court decision and that those responses will be successful. Notably absent from these works are analyses of the substance of responsive legislation. Accordingly, claims that Congress can and frequently does reverse the constitutional decisions of the Court are premature. The bulk of empirical research on congressional responses to the Court's decision in political science has favored large sample quantitative analyses that do not lend themselves to careful investigation of individual cases. These studies focus almost exclusively on policy outcomes. Legal scholars, on the other hand, have adopted case–study approaches to consider the impact of individual attempts by Congress to dictate constitutional policy but have not prioritized the identification of generalizable patterns. I pursue an approach that treads the middle–ground between these extremes by compiling a sample that is large enough to allow the use of statistical techniques to test causal hypotheses but small enough that I can also analyze the substance of individual responsive proposals and the court cases that

they engender when they are successful. I assess the hypothesis that Congress is able to reverse the constitutional decisions of the Supreme Court by considering the intended effects of responsive bills on the legal holdings announced by the Court and on the Court's policy outcomes.

Conventional wisdom holds that reversal of the Supreme Court's constitutional decisions can only be achieved through a constitutional amendment. Meernik & Ignagni (1997), on the other hand, conclude that Congress can and frequently does reverse the constitutional decisions of the Supreme Court through the passage of ordinary legislation. Many scholars, while not going as far as Meernik & Ignagni (1997), believe it is permissible and possible for Congress to modify the impact of Supreme Court decisions through the passage of ordinary legislation (Agresto 1984, Macedo 1990). Agresto (1984, 126) suggests that Congress can force reconsideration of issues of constitutional law by passing legislation in response to the constitutional decisions of the Court. Meernik & Ignagni (1997, 451) summarize the potential forms of these responses:

> Congress may rewrite legislation to pass judicial scrutiny; it may rewrite legislation to locate the sources of its power in alternative passages of the Constitution; and it may rely on alternative readings of earlier Court decisions to justify its powers.

Much of the confusion surrounding the ability of Congress to "reverse" the Court's constitutional rulings is the result of imprecise language and the inappropriate application of concepts used to characterize Congress–Court interaction in the area of statutory interpretation to the realm of constitutional decisionmaking. I anticipate that some statutory responses will attempt to reverse the policy and/or legal implications of the relevant Supreme Court decision while others will have narrower effects. If Congress makes major policy concessions or restricts the scope of a policy in response to a Court decision, it should not be characterized as a "decision–reversal" attempt. Simply put, I evaluate Meernik & Ignagni's (1997) implicit assumption that congressional responses to the

Court's constitutional decisions effectively reverse those decisions. I consider the substance of responsive bills in order to separate those that reverse the legal holding and/or policy impacts of a decision from those that have narrower impacts.

I also improve on existing research by offering a more explicit account of what constitutes a "reversal" statute. I consider the impact of responsive proposals on the policies announced by the Supreme Court and the effect of proposals on the Court's constitutional holdings. I characterize each response attempt as a complete reversal attempt, a partial–reversal attempt, or a non–reversing response on each of the two dimensions. I expect legal reversals will face the lowest probability of success, followed by policy reversals, and then non–reversals. If a majority (or a significant minority) of responsive bills fail to reverse the rulings of the Court, the relationship between Congress and the Court is much different than the ideal types suggested by coordinate construction scholars in which Congress actively asserts a role in interpreting the Constitution or the picture presented by Meernik & Ignagni (1997) who aver Congress frequently "overrides" the constitutional decisions of the Supreme Court.

I relax the assumption the judges are solely policy driven and assume that they also have preferences over legal doctrine/legal policy. The incorporation of a role for the justices' preferences over legal outcomes highlights the potential for variation in the nature of proposed responses to Court decisions. Members of the Court are assumed to have preferences over public policy and constitutional interpretations while legislators are assumed to be motivated solely by policy preferences. These differing incentives suggest that members of Congress may be able to achieve their goals without attempting to completely reverse the Court's decisions. For example, members of Congress may be able to correct constitutional deficiencies in legislation without sacrificing their preferred policies.

In order to conclude that Congress is able to reverse the constitutional decisions of the Supreme Court, it must be demonstrated that (1) Congress is able to reinstate the legal

holding and/or policy that was in place prior to the relevant Court decision and (2) that those statutes are not subsequently invalidated in the federal courts. In Chapter 5, I identify bills introduced between 1995 and 2007 that respond to constitutional decisions of the Supreme Court. I analyze the substance and intended effects of these bills to evaluate the extent to which they attempt to reverse the Court's decisions. In Chapter 6, I assess the frequency and impact of challenges to the constitutionality of responsive statutes.

In Chapter 5, I evaluate the following hypotheses:

> ***Hypothesis 1*** *(Response Attempts): The majority of bills* proposed *in response to the constitutional decisions of the Supreme Court would not have the practical effect of "reversing" the relevant Court decision.*
>
> ***Hypothesis 2*** *(Response Successes): The majority of statutes* enacted *in response to the constitutional decisions of the Supreme Court would not have the practical effect of "reversing" the relevant Court decision.*
>
> ***Hypothesis 3*** *(Substance and Success): Responsive bills that attempt to reverse constitutional decisions of the Supreme Court are less likely to be passed than responsive bills that do not attempt to reverse the Court's decision.*

These hypotheses are drawn from the logic of the separation of powers models presented in Section 2.1.1 and the literature discussed in Sections 2.1 and 2.2. The general argument offered by separation of powers scholars—that Congress and the Court engage in anticipatory decisionmaking—suggests that the policies produced by Congress in response to the Court should be less extreme than policies that are negatively reviewed by the Court.[7] This logic is reflected in the predictions of the formal model presented in Figure 2.5. While a non–strategic model predicts that when Congress dislikes a Supreme Court decision it will enact its most preferred policy regardless of the Court's preferences, the strategic model suggests that Congress will be attentive to the preferences of the Court—sometimes attempting to reverse the Court, sometimes locating policy strategically by accommodating the Court, and sometimes refraining from responding alto-

[7] This logic assumes there has been no change in the preferences of the Court between the announcement of the Court's decision and the initiation of a statutory response. I control for changes in Court composition in the models in Chapter 5.

gether. The presence of responsive bills that fall short of reversing the Court's decision is consistent with a strategic model of Congress–Court interaction.

In addition to evaluating the above hypotheses, I include a number of control variables that allow me to evaluate supplementary hypotheses. I expect the location of the status quo policy to be an important predictor of congressional action. I characterize congressional preferences for the Court's policy by including a measure of the ideological distance between the Court's policy and the pivotal members of Congress. I hypothesize that as the distance between the Court that rendered the relevant Court decision and the responding Congress increases, the probability of bill passage will increase.[8]

I, again, evaluate the hypothesis that bills sponsored by members of the majority party in the chamber in which they originate are more likely to pass than bills sponsored by minority party members. Membership in the majority party is the only bill characteristic that has been consistently identified as a predictor of bill success. I also include measures of presidential support and opposition to legislation, hypothesizing that support will increase the probability of enactment while opposition will have the opposite effect.[9]

I also introduce a set of new variables. First, I characterize the Supreme Court decisions to which responses are introduced as either "permissive" or "restrictive." I expect that responses to permissive Court decisions are more likely to be enacted. This variable is necessary because my analysis includes responses to Supreme Court decisions in which the Court exercises judicial review and upholds challenged statutes as well as responses to decisions in which the Court invalidates legislation. The majority of work in the separation of powers tradition considers only responses to invalidated statutes. I argue that responses to cases in which legislation is upheld should also be included to capture the whole of the shared roles of Congress and the Court in shaping policy. I recognize, how-

[8]Because of the small number of observations in the sample, I am unable to include the complete set of ideological distance variables that are employed in the analyses in Chapters 3 and 4.

[9]Again, because of the limited number of observations in the sample, I do not re–evaluate hypotheses about the relationship between other bill characteristics and bill success. None of the omitted variables has been consistently identified as a predictor of bill success and none is found to be significant in the analyses in Chapters 3 or 4.

ever, that it may be easier to garner support for a response to a decision in which the Supreme Court has signaled at least partial acceptance of a challenged policy. Accordingly, I expect permissive decisions to be more likely to engender successful responsive legislation. I include another indicator that measures whether or not Congress has previously attempted to enact the same piece of legislation. This "Reintroduction" variable could either increase or decrease the probability of success of a responsive bill. A previous failed attempt to enact the same legislation could energize supporters and increase the probability that subsequent attempts are successful. Alternatively, the presence of a previous failed attempt may indicate the response is not serious and, accordingly be associated with a decreased probability of enactment. Finally, I include a variable measuring the number of years that elapse between the announcement of the Supreme Court decision and the attempted response. Some have argued that over time Supreme Court precedents become entrenched and become more difficult to overturn (Landes & Posner 1976). While members of Congress are not constrained by precedent in the same was that judges are, it is conceivable that the public will view attempts to reverse these so–called super–precedents negatively. Public perception, then, could create disincentives to respond to older precedents. I, accordingly, expect the effect of this variable to be negative.

In summary, I will evaluate the following hypotheses.

> ***Hypothesis 4*** *(Distance between Congress and Status Quo): As the ideological distance between the status quo policy and Congress increases, the probability of a responsive bill being passed will increase.*
>
> ***Hypothesis 5*** *(Majority Party Sponsor): A bill will be more likely to pass when its sponsor is a member of the party that controls the chamber in which it is introduced.*
>
> ***Hypothesis 6a*** *(President Supports): Responsive legislation will be more likely to be passed when the President publicly supports the legislation.*
>
> ***Hypothesis 6b*** *(President Opposes): Responsive legislation will be less likely to be passed when the President publicly opposes the legislation.*
>
> ***Hypothesis 7*** *(Permissive Court Decision): Bills that respond to permissive Supreme Court decisions will be more likely to be passed than bills that respond to restrictive Supreme Court decisions.*

Hypothesis 8a *(Reintroduction): Bills that have been introduced in a previous session of Congress will be more likely to be passed than bills introduced for the first time.*

Hypothesis 8b *(Reintroduction): Bills that have been introduced in a previous session of Congress will be less likely to be passed than bills introduced for the first time.*

Hypothesis 9 *(Years to Response): As the number of years elapsed between the announcement of the relevant Court decision and the initiation of the statutory response increases, bill passage will become less likely.*

2.4 The Finality of Responsive Legislation

Having evaluated the substance of responsive bills in Chapter 5, I turn to the second prong of the test proposed to evaluate the hypothesis that Congress can reverse the Court's constitutional rulings in Chapter 6. I consider the frequency and success of challenges to the constitutionality of responsive legislation. While many scholars have considered the decision of Congress to pass responsive legislation, the aftermath of that decision has been ignored. Scholars have interpreted the passage of responsive legislation as evidence of Congress's ability to negate the actions of the Court. These analyses take no heed of what happens after responsive legislation is enacted. Absent such information, it is impossible to know if Congress has effectively reversed the decision of the Court.

Scholars conducting empirical and theoretical work in the SOP tradition have struggled with the characterization of the end of Congress–Court interactions. Scholars take one of two approaches. The first group adopts an assumption of congressional finality. They take as the the unit of analysis the judicial decision and consider attempts by Congress to pass responsive legislation. They interpret the passage of responsive legislation as evidence of Congress's ability to negate the actions of the Court. A second group of scholars adopts an assumption of judicial finality, implicitly assuming that Congress has no means by which to alter the policy outcome after the Court has announced a decision. Because it is not possible to know a priori which of these institutions will have the last move, formal models that attribute the last move to either Congress or the Court ignore important characteristics of the environment in which members within these institutions

act and bias their analysis toward finding the last–mover more influential in the shaping of policy than the other actor (Segal 1997). This bias is the result of the last–mover's ability to locate policy wherever it chooses with no fear of recourse at the last move of the game.

Scholars conducting empirical work in this area have implicitly adopted last–mover assumptions by restricting their focus to one stage in the Congress–Court interaction. Conclusions drawn from empirical models that focus on a single stage of the SOP dialogue must be measured. Scholars should not assume that the policy announced in one stage of the "game" played between Congress and the Court is final. Consider the case of the Congress–Court interaction beginning with the *Smith* decision. An analysis of congressional responses to Supreme Court decisions would identify the Religious Freedom Restoration Act as a congressional response that effectively overruled a constitutional decision of the Supreme Court. Viewed in isolation, this case would offer support for the argument that Congress can negate the rulings of the Supreme Court. However, a more detailed analysis of the *Smith*–RFRA aftermath would reveal that the Court voided RFRA in *Boerne v. Flores*. Here, Congress's "victory" over the Court was short–lived. The decision to consider either the Court's exercise of judicial review or the response of Congress can drastically influence the inferences drawn about the relative strength of Congress and the Court in shaping public policy. Considering the interaction of Congress and the Court from the beginning (at the first opportunity of the legislature to enact legislation) and in its entirety is the best way to circumvent the potential biases that inhere in focusing on isolated interactions that may be part of an ongoing dialogue.

Further, last mover status may depend less on the institutional advantage enjoyed by Congress or the Court and more on the ability of the actors within each institution to place policy at a location acceptable to the rival institution. If it is always possible for Congress to address decisions announced by the Supreme Court and for the Court to alter policy outcomes through statutory interpretation or judicial review, the actors within

each institution should be expected to consider the anticipated reaction of the members within the other institution. The discussion of the potential constitutional problems with the Religious Liberty Protection Act indicates that this anticipation is more than a theoretical possibility for members of Congress—members of Congress consider the probable reaction of the Court during the legislative process. The possibility of anticipatory decisionmaking by members of Congress and the Court suggest that when making decisions, neither Congress nor the Court can safely assume that it will have the final word.

To assess the claim of Meernik & Ignagni (1997) that Congress is able to "override" the constitutional decisions of the Supreme Court, I analyze the factors associated with challenges to the constitutionality of responsive legislation. First, I consider the factors affecting the probability that a constitutional challenge to responsive legislation is brought to the federal courts. Then, I consider the factors affecting the probability of success of these challenges. Focusing only on the decisions of Congress and the Supreme Court, however, could bias the analysis toward finding support for the Meernik and Ignagni hypothesis. Bias would occur if the Supreme Court does not review a piece of responsive legislation but the legislation is invalidated by the lower federal courts. If this occurs, focusing only on Supreme Court activity would lead me to (erroneously) conclude that Congress is successful in its response attempt while, at least in some geographic areas, the policy is invalid. A complete test requires the consideration of the actions of lower federal court judges who may be given the opportunity to review Congress's responsive legislation in the absence of action by the Supreme Court.

Because the opportunity to observe judicial action is dependent on a litigant bringing a suit, it is important to account for a possible selection effect. I hypothesize that the likelihood of a law being challenged will depend on the actions of strategic litigants which will be conditioned on case and statute characteristics. While judges and members of Congress may be motivated by the broad policy and legal implications of their decisions, it can be assumed that parties to particular suits are most interested in the outcome of

their case. Therefore, factors that suggest a legal challenge is likely to be successful should increase the probability that a litigant brings a suit.

I hypothesize that responses to restrictive Supreme Court decisions will be more likely to engender constitutional challenges. When the Supreme Court invalidates a federal or state law and Congress responds by enacting new legislation, potential litigants may challenge it in the hopes that the Supreme Court will also find a deficiency in the new statute. The previous invalidation by the Supreme Court will serve as a signal to litigants that the Court may be sympathetic to their position.

I expect that potential litigants will be more likely to challenge legal reversals than policy reversals, and will be more likely to challenge policy reversals than non–reversals. Furthermore, they will be more likely to initiate challenges to complete reversals than partial or non–reversals. (I again rely on the characterization of bill content outlined in Section 2.3.1.) Each responsive statute is classified as a completely reversing, partially reversing, or non–reversing statute on a policy dimension and a legal dimension. Some responsive statutes will make minor changes in policy without affecting legal policy while others will make significant policy and/or legal changes. I expect that the more expansive responsive statutes will be more likely to give rise to constitutional challenges. When members of Congress enact responsive legislation that is non–reversing or has limited reversing–effects, potential litigants may face increased uncertainty over whether or not the Supreme Court will be sympathetic to their challenge. Conversely, the probability that the Supreme Court is sympathetic will be increased when Congress enacts legislation that directly contradicts Supreme Court precedent.

Litigants are likely to perceive legal challenges to statutes that reverse consensual Supreme Court decisions as more viable than those reversing decisions decided by minimal winning coalitions. First, unanimous or near unanimous outcomes suggest that there was only one viable outcome to the case. Agreement between the Court's most liberal and conservative members signals to a potential litigant the broad appeal of the argu-

ment they wish to pursue. Another predictor of legal challenges to responsive legislation is the involvement of interest groups and/or governments. As discussed above, interest groups and governments are especially likely to possess the resources necessary to appeal their losses in Congress to the federal courts and governments routinely fare better in legal contests than private litigants. Increasing amounts of interest group support for the Supreme Court winner, then, should increase the probability of a constitutional challenge to responsive legislation. Lastly, Vanberg (2001) suggests that when national high courts enjoy high levels of public support, noncompliance by the legislature will be unattractive when the public is cognizant of legislative responses to judicial rulings. This suggests that responsive legislation that reverses a salient Supreme Court decision will be more likely to prompt a challenge in the federal courts. Baird (2004) also suggests salient cases in an issue area will promote litigation. She argues that the issuance of a salient opinion by the Supreme Court signals to litigants the Court's willingness to hear cases in that issue area which encourages litigants to pursue legal challenges in an issue area.

The dependent variable for Part 1 of the empirical analysis is a dichotomous measure of whether or not a challenge to the constitutionality of responsive legislation is brought to the federal courts. The unit of analysis is the responsive statute. I employ the bills in the data from Chapter 5 that became public laws in the analysis. The sample size is 12. Accordingly, I am unable to conduct multivariate statistical analyses. The analysis of the presence of constitutional challenges to responsive legislation in Chapter 6, accordingly relies on descriptive statistics and simple hypothesis tests of the differences between challenged and non–challenged statutes.

I evaluate the following hypotheses:

> ***Hypothesis 1*** *(Permissive Court Decision): Responsive statutes that respond to "permissive" Court decisions will be less likely to be challenged in the federal courts than responsive statutes that respond to "restrictive" Court decisions.*
>
> ***Hypothesis 2*** *(Response Type): Reversal statutes will be more likely to be challenged in the federal courts than non–reversals. This effect will be greater for legal reversals than for*

policy reversals, and greater for complete reversals than partial or non–reversals.

Hypothesis 3 *(Consensus in Supreme Court Decision): Consensus in the initial Supreme Court ruling will increase the likelihood of a judicial challenge to responsive legislation.*

Hypothesis 4 *(Salience of Supreme Court Decision): When the initial Supreme Court ruling is salient to the public, responsive legislation is more likely to be challenged in the federal courts than when the Supreme Court ruling is not salient.*

Hypothesis 5 *(Absolute Interest Group Support for Supreme Court Winner): The absolute number of interest groups supporting the litigant winning at the Supreme Court level will be positively associated with the probability that responsive legislation is challenged in the federal courts.*

Hypothesis 6 *(Supreme Court Winner is a Government): Responsive legislation that reverses the success of governments is more likely to give rise to a legal challenge than legislation responding to a case in which the winning litigant was not a government.*

Lastly, I consider the action of the court(s) in response to Court–triggered legislation, given a litigant has brought a suit. The dependent variable is a dichotomous measure that is equal to one when responsive legislation is declared unconstitutional by a federal court to review the statute. The unit of analysis is the responsive statute–case. I expect the courts that entertain constitutional challenges to responsive legislation to base their decision primarily on the content of the legislation. This leads me to predict that legal reversals will be more likely to be invalidated than policy reversals and that policy reversals will be more likely to be invalidated than non–reversals. Relatedly, complete reversals will be more likely to be invalidated than partial and non–reversing statutes.

I also expect ideology to influence a court's treatment of responsive legislation. I hypothesize that the further the ideal point of the court reviewing the statute is from the location of the responsive statute, the more likely the court is to declare the responsive statute unconstitutional. In addition to identifying strong effects for judicial ideology, scholars have suggested that certain types of cases are more likely to be met with success in the courts. Meernik & Ignagni (1997) suggest that judicial decisions that involve the distribution of federal power will be more likely to be overridden by Congress. The courts can similarly be expected to protect their institutions' prerogatives. I expect that responsive legislation involving the distribution of federal power will be especially likely to be

invalidated in the federal courts. Scholars have also hypothesized that organized interest groups and governments are more likely to be successful in the courts than other litigants (Eskridge 1991, Meernik & Ignagni 1997). I hypothesize that responsive legislation that reverses the success of interest groups or governments is more likely to be invalidated in the federal courts. I also evaluate the hypothesis that lower courts are constrained by the rulings of superior courts. I expect that when a superior court (the Supreme Court for Courts of Appeals and the Supreme Court and the relevant Court of Appeals for district courts) has previously reviewed and upheld (invalidated) the challenged legislation, the lower court will be increasingly likely to uphold (invalidate) the statute.

The following hypotheses are evaluated:

> ***Hypothesis 7****: Reversal statutes will be more likely to be invalidated in the federal courts than non–reversals. This effect will be greater for legal reversals than for policy reversals, and greater for complete reversals than partial or non–reversals.*
>
> ***Hypothesis 8****: As the ideological distance between the reviewing court and the enacting Congress increases, the probability that the court will invalidate the responsive statute will increase.*
>
> ***Hypothesis 9****: Responsive legislation involving the distribution of federal power is more likely to be invalidated in the federal courts than responsive legislation unrelated to the distribution of federal power.*
>
> ***Hypothesis 10****: Responsive legislation that reverses the success of governments is more likely to be invalidated in the federal courts than cases in which the successful Supreme Court litigant is not a government.*
>
> ***Hypothesis 11****: Responsive statutes that have previously been upheld (invalidated) by a superior court or courts will be more likely to be upheld (invalidated) than statutes that have been invalidated (upheld) by superior courts or not considered by superior courts.*

Considering the substance and aftermath of the passage of responsive legislation will allow me to confirm or refute assertions like those of Meernik and Ignagni that Congress can override the constitutional rulings of the Supreme Court. Further, the analysis will allow me to speak to the shared roles of Congress and the Court in shaping public and legal policy.

Conclusion

The preceding review of the literature on the interaction between Congress and the Supreme Court illustrates several significant deficiencies. First, the units of analysis adopted for empirical studies make it difficult to evaluate the possibility that Congress alters its behavior in anticipation of judicial action. Harvey & Friedman (2006) lament the nearly universal reliance on justices' votes on the merits in cases before the Court as the data source used to test the hypothesis of a congressional constraint on the Court and suggest the failure of extant research to reach consistent conclusions may be an artifact of the data sources employed.[10] They note that if the hypothesis of a constrained Court is true, "the justices will have few incentives to accept for review cases which challenge congressional laws that the Court's median justice anticipates cannot be struck in the current political environment" (2006, 1). An analogous criticism can be raised against studies of a judicial constraint on Congress. While many scholars have focused attention on the ease with which Congress can supersede the Supreme Court's decisions, by taking the judicial decision as the unit of analysis, scholars have neglected the question that logically precedes issues associated with override attempts—that is, does anticipation of negative treatment by the Supreme Court cause Congress to refrain from enacting legislation in the first place? If the Court's preferences influence Congress's decision to enact legislation, focusing only on statutes that have been reviewed by the Court ignores a potentially important path of influence.

In addition to considering the operation of a judicial constraint on the decision of the legislature to enact legislation, this project revisits the end of separation of powers interactions. I assess the veracity of Meernik and Ignagni's (1997) claim that Congress

[10]Whether or not the Court appears to be constrained by Congress varies with the issue area and periods studied and sometimes within them. Harvey & Friedman (2006, 24) offer an overview of the conflicting findings: "While Spiller & Gely (1992) found support for the constrained Court hypothesis in statutory labor relations cases between 1949 and 1988, and Bergara, Richman & Spiller (2003) found support in statutory civil liberties cases between 1947 and 1992, Segal (1997) and Segal & Spaeth (2002) found no such support in the same latter set of statutory civil liberties cases."

can effectively override the Supreme Court by considering the substance of responsive legislation and the treatment of responsive statutes in the federal courts. By coupling the findings from these analyses with the better–developed understanding of the intervening components of SOP interactions that have typically been the focus of SOP studies, I am able to draw more accurate inferences about the relationship between Congress and the Court.

Chapter 3

Beginning at the Beginning: The Decision to Legislate and the Separation of Powers

In this chapter, I evaluate the hypothesis that congressional anticipation of negative treatment by the Supreme Court leads Congress to refrain from enacting legislation. While scholars of the separation of powers (SOP) have devoted much attention to the study of the interaction between Congress and the Supreme Court, the majority of work is confined to two stages of that interaction—the decision of the Supreme Court to exercise review and the decision of Congress to enact legislation in response to Supreme Court decisions. Empirical studies tend to ignore the fact that Congress–Court interactions do not begin with the Court's exercise of review—the passage of legislation by Congress is a necessary precursor to the Court's review of federal statutes. If the decision of Congress to enact legislation is influenced by anticipation of review by the Supreme Court, the bill passage stage may be the only place we find evidence supporting the predictions of SOP theories.

As outlined in Chapter 2, I evaluate the following hypotheses:

Hypothesis 1*: As the ideological distance between Congress and the Court ($|L - J|$) decreases, Congress will be more likely to pass legislation.*

As the ideological distance between Congress and the Court decreases, the range of status quo policies for which both Congress and the Court both prefer a new policy closer

to Congress's ideal point increases. To illustrate the logic of the hypothesis, assume that review by the Court is costless. Given the configuration of preferences in Example A in Figure 3.1, Congress will enact a new statute when the status quo policy is in one of the shaded gray areas. Example B illustrates the effect of decreasing the ideological distance between Congress and the Court. As the preferences of Congress and the Court become more similar, the range of status quo policies for which both Congress and the Court prefer new legislation increases. Accordingly, enactment of a statute should become more likely.

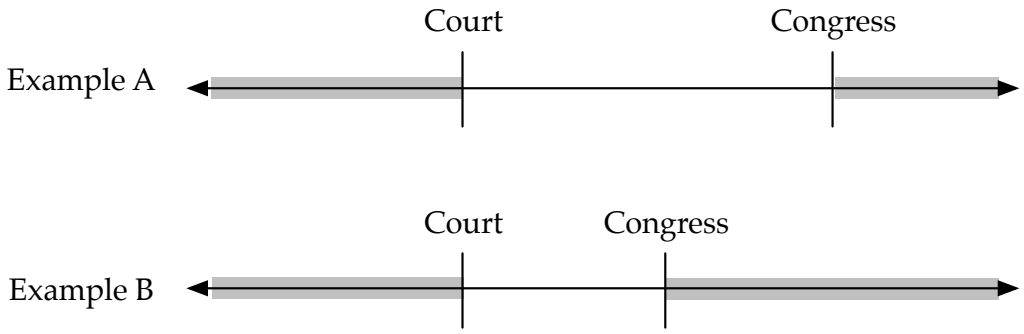


Figure 3.1: Hypothesis 1—Illustration

Hypothesis 2*: When Congress and the Court are located to the same side of the status quo policy Congress will be unconstrained (as to passage) and, therefore, more likely to pass legislation than when the status quo policy is located between the ideal points of Congress and the Court.*

Consider the configuration of ideal points and status quo policies in Figure 3.2. *Status quo 1* is located to the left of the Court and Congress. Given this status quo policy, *both* Congress and the Court would prefer a new policy be enacted that is further to the right than the status quo policy. Both would be made better off by a policy located at the Court's ideal point, for example, than they are by leaving policy at the status quo. Accordingly, Congress is motivated to enact a new policy and is not deterred from enacting a statute by the Court. Congress is unconstrained as to passage. Conversely, if *status quo 2* is the status quo policy, the Court constrains Congress. While Congress would prefer a policy further to the right than the status quo, given costless review, the Court will oppose any move to the right from *status quo 2*.

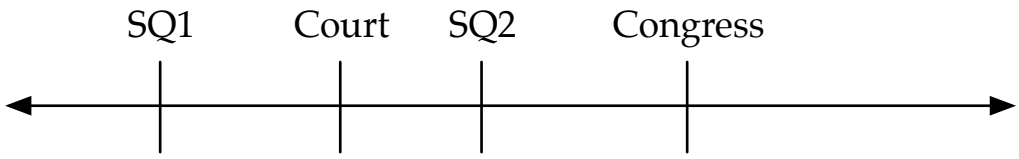


Figure 3.2: Hypothesis 2—Illustration

To clarify the logic of this hypothesis, I have assumed that review by the Court is costless. The costliness of review that is incorporated in the model from which the hypotheses are drawn creates a range of status quo policies between the congressional and judicial ideal points where Congress is also unconstrained—the cost of review will deter the Court from reviewing some statutes between the ideal points of Congress and the Court. The costliness of review to the Court shifts the range of status quo policies for which Congress is unconstrained by $\sqrt{c}$ to the right. Because I do not have adequate measures of the costs of review to the Court, I measure *constraint/potential constraint* based solely on the relative locations of the judicial and legislative ideal points and the status quo policy and do not account for the cost of review parameter. I refer to Congress as "potentially constrained" when the status quo is located between the ideal points of Congress and the Court. Regardless of the cost of review, Congress and the Court always prefer a new policy when the status quo is located to the same side of both institutions. When this condition is satisfied, I characterize Congress as "unconstrained."

Hypotheses 3, 4, and 5 are expected to apply when Congress is potentially constrained. When Congress is unconstrained, the ideological distances between the status quo policy and the Court and the status quo policy and the Congress should not condition Congress's decision to pass new legislation. When Congress is potentially constrained, however, these variables may condition the decision of the legislature to pass new legislation.

Hypothesis 3*: As the ideological distance between Congress's ideal point and the status quo policy ($|L - q|$) increases, Congress will be more likely to pass legislation under conditions of potential constraint.*

Hypothesis 4*: As the ideological distance between the Court's ideal point and the status quo policy ($|J - q|$) increases, Congress will be more likely to pass legislation under conditions of potential*

constraint.

***Hypothesis 5**: As the interaction between the ideological distance between Congress and the status quo and the ideological distance between the Court and the status quo increases ($|L - q| * |J - q|$), Congress will be more likely to pass legislation under conditions of potential constraint.*

Hypotheses 3, 4, and 5 address the relationships between the distances between Congress and the status quo policy and the Court and the status quo policy and the probability of enactment. I predict that as the distance between either Congress and the status quo policy or the Court and the status quo policy increase, the probability of Congress passing a bill will also increase. Figure 3.3 illustrates the intuition behind these hypotheses. As in Figure 3.1, the shaded areas of the figure highlight status quo policies for which Congress will enact new legislation. First, consider the configuration of preferences in Example C. Here, the preferences of Congress are sufficiently close to the Court's ideal point that, given costly review by the Court, Congress is always free to enact policy at its ideal point. Whether or not Congress is free to enact policy is not conditioned by any of the model's distance variables, only by the relative location of the institutional ideal points and the cost of review.

Example D illustrates the conditions under which Congress will be free to enact a new policy when the preferences of Congress and the Court are more divergent. Here, there is a range of status quo policies between the ideal points of Congress and the Court for which Congress will not enact legislation. While Congress is constrained and cannot enact new legislation when the status quo policy is sufficiently close to the ideal points of Congress and the Court (in the unshaded area in Example D), for status quo policies further away from the congressional ideal point (and consequently the Court's), Congress can enact new legislation.

To characterize the relationship in another way, recall the discussion of the model predictions in Chapter 2 and depicted in Figure 2.6 (reproduced below as Figure 3.4). The delimitation of the area in which Congress is free to enact policy is a function of the distance between the Court and the status quo policy. As this distance (q) increases,

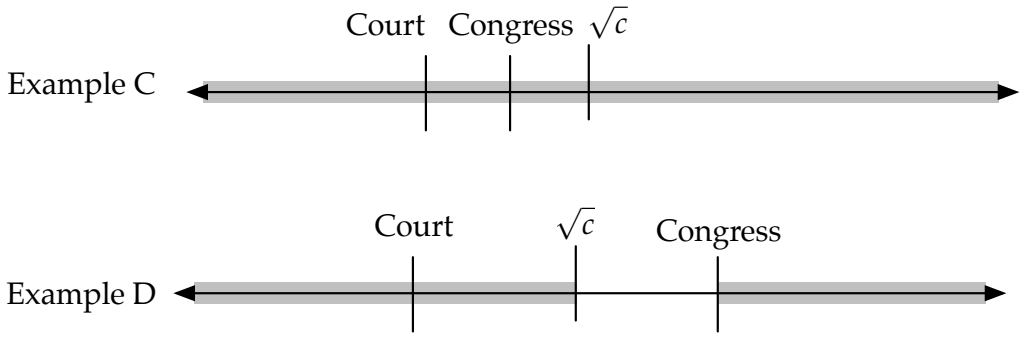


Figure 3.3: Hypotheses 3, 4, and 5—Illustration

the range of congressional ideal points where Congress is unconstrained also increases, making enactment of a statute more likely (all else equal). Accordingly, I predict that as the distance between Congress and the status quo policy increases (*Hypothesis 3*) *or* the distance between the Court and the status quo policy increases (*Hypothesis 4*) enactment of a new statute by Congress will be more likely. As the distance between the status quo policy and the ideal points of both institutions increases, enactment should also become more likely (*Hypothesis 5*).

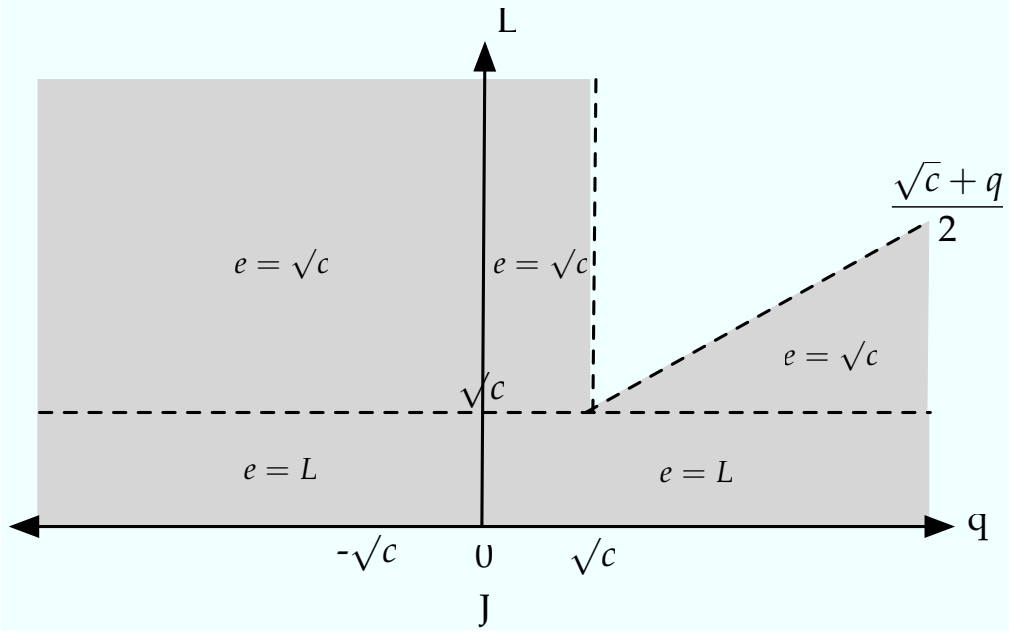


Figure 3.4: Conditions Under Which Congress Will Enact Legislation

The first five hypotheses (drawn from the model of Congress–Court interaction dis-

cussed in Chapter 2) are my primary research hypotheses. I also evaluate the hypotheses below that suggest bill and sponsor characteristics will influence the probability of bill success.

> ***Hypothesis 6:*** *(Majority Party Sponsor) A bill will be more likely to pass when its sponsor is a member of the party that controls the chamber in which it is introduced.*
>
> ***Hypothesis 7:*** *("Mainstream" Sponsor) Bills sponsored by "mainstream" legislators will be more likely to pass than those sponsored by more ideologically extreme legislators.*
>
> ***Hypothesis 8:*** *(Cosponsors) The number of cosponsors for a bill will be positively associated with the probability that the bill is passed.*
>
> ***Hypothesis 9a:*** *(President Supports) Presidential support for a bill will increase the probability that the bill is passed.*
>
> ***Hypothesis 9b:*** *(President Supports) Presidential opposition to a bill will decrease the probability that the bill is passed.*
>
> ***Hypothesis 10:*** *(Salience) Bills associated with salient issues will be more likely to be passed than bills associated with non–salient issues.*
>
> ***Hypothesis 11:*** *(Sponsor on Referring Committee) A bill will be more likely to pass when its sponsor is a member of a committee to which the bill is referred.*
>
> ***Hypothesis 12:*** *(Sponsor Chairs Referring Committee) A bill will be more likely to pass when its sponsor is the chairperson of a committee to which the bill is referred.*

The general argument offered here, that members of Congress will refrain from enacting legislation because of concerns about future action by the Supreme Court, is neither new nor controversial to scholars of Congress–Court interaction. However, it has rarely been subjected to empirical assessment. The reasons for this are twofold. First, scholars of Congress–Court interaction are usually judicial specialists with an exhibited preference for focusing on research questions that explain judicial behavior and decisionmaking, not legislative behavior and decisionmaking. Second, the evaluation of the hypothesis introduces significant methodological challenges. Most obviously, the analysis here attempts to explain *the absence of legislative activity*. I argue that Congress will fail to act under certain conditions and assess this hypothesis by considering whether or not proposed

legislation is passed in a given Congress. With the multitude of factors that influence legislative decisionmaking, this creates a difficult test for the strategic model. If, however, the decision to pass (or not pass) legislation varies systematically with changes in the ideological configuration of status quo policies and congressional and legislative ideal points, I will have persuasive evidence that the predictions of the separation of powers theory are correct.

In addition to the difficulty that inheres in explaining the absence of congressional activity, the research design presented here requires that I address three other methodological challenges. I must identify a set of potential bills to define the unit of analysis for the quantitative models, identify status quo policies, and locate the status quo policies in a unidimensional policy space. I review the methods I have employed to overcome these challenges in the section below.

3.1 Data

I employ data on bills granted hearings in the House and Senate Judiciary Committees in the 101st through 106th Congress (1989–2000) to evaluate these hypotheses.[1] The dependent variable is the decision of Congress to pass legislation. I employ a dichotomous measure that is equal to one when a bill granted a full committee or subcommittee hearing in either the House or Senate Judiciary Committee passes both chambers of Congress in the same form and is presented to the President for approval. These data are obtained from searches of *Lexis–Nexis Congressional* and *THOMAS.gov*.[2]

[1]The temporal period of the study is limited by data accessibility. The full–text of bills (needed to ascertain the policy location of proposed legislation) is available at *THOMAS.gov* from the 101st (1989–1990) through the current Congress. Sarah Binder's systemic agenda data, which are used to construct the independent variable measuring media coverage is only available through the 106th Congress (1999–2000).

[2]Per the direction of the leadership of the 104th Congress, The Library of Congress created *THOMAS.gov* to make federal legislative information freely available to the public. The available information includes bill summary and status information including stage in the legislative process, dates of legislative activity, and names and party affiliations of sponsors and cosponsors.

3.1.1 Defining "Legislative Opportunities"

To structure the quantitative analysis, I must define a reasonable set of opportunities for enactment of a statute by Congress. An obvious approach is to consider all bills introduced in a given Congress a possibility for passage. The primary drawback to employing bill introduction as the criterion for selection into the sample is the indiscriminate nature of bill introduction. Bill introduction is often an exercise in position–taking—the vast majority of bills introduced in Congress lack wide support and are introduced with no real expectation that they will be enacted into law (Mayhew 1974, Oleszek 2004). Reliance on bills introduced in Congress to define the sample for the analysis would result in the inclusion of thousands of observations per Congress making it difficult to disentangle the idiosyncratic characteristics of the introduction process from the factors that systematically affect bill success.

An alternative approach is to define a legislative opportunity for every issue on Congress's "systemic agenda" (Binder 1999, Binder 2001, Binder 2003). Binder's systemic agenda defines legislative opportunities as all items mentioned in unsigned editorials in the *New York Times* that also reference the House, Senate or Congress. This measure is reasonable for her purposes—defining opportunities for passage of *major* legislation; however, for the purposes of this analysis, the measure would over–correct for the problems associated with the bill introduction measure discussed above. The systemic agenda does not include the majority of items that Congress does enact. I contend that the measure is biased toward salient issues and omits a significant portion of Congress's actual output. To illustrate this point, consider the 104th Congress. The years 1995 and 1996 saw the enactment of 333 public laws. The systemic agenda for the same period identified 118 possibilities for passage. The portion of Congress's output that could be identified by the systemic agenda is even lower in the immediately preceding Congresses. There were 94 items on its systemic agenda when the 103rd Congress enacted 465 public laws; 125 items on the 104th Congress's when it enacted 590, and 147 on the 101st Congress's when it

enacted 650. The systemic agenda certainly underestimates the number of issues that are potentials for passage.[3]

To overcome the problems with the bill introduction and systemic agenda measures highlighted above, I propose a hearing–based measure of the congressional agenda to define "legislative opportunities." The use of the hearing–based criterion to select observations into the analysis is preferable to the bill introduction and systemic agenda measures—it reduces the problem of confusing real opportunities for passage with noise without omitting bills and issues that are insufficiently salient to garner coverage in the *New York Times*. Hearings are granted to only a fraction of bills referred to committee, result in real opportunity costs for the legislators involved and are not especially visible to the public. It is therefore reasonable to assume that bills granted hearings are given serious consideration. The hearing–based agenda measure strikes a balance between the overly inclusive bill introduction approach and the overly exclusive systemic agenda measure.

The primary limitation of the hearing–based measure is that it assumes an absence of strategic deterrence. That is, the measure does not allow me to detect the effect of anticipated congressional or judicial action on the decision of individual legislators to introduce bills or of committees to hold hearings. This is not likely a large problem for my analysis. First, I doubt that concerns about judicial review lead members of Congress to refrain from introducing bills in all but the most egregious cases. As mentioned above, in the majority of cases bill sponsors do not expect their proposed bills to become law. For these non–serious introductions, concern about Court review ought to be negligible. I also do not expect that concerns about judicial review will alter pre–hearing behavior significantly. Hearings are one of the primary means by which legislators acquire information about legislation. Hearings are likely to be the initial venue in which concerns about the impact of the courts on a proposed policy are raised. Relatedly, if members of

[3] As discussed below, I use the Binder agenda data to construct a measure of issue salience.

Congress wish to achieve a policy that they suspect may be negatively reviewed by the courts, proceeding with a hearing may be the best way to pursue their goals. Hearings can provide legislators with useful information about the probable reaction of the courts to proposed legislation through dialogue with other members of Congress and the testimony and questioning of relevant witnesses. I expect information obtained from hearings to weigh heavily in members' decisions about whether or not to pass legislation. I expect that any constraint imposed by the courts will be most evident once a hearing has been held and members have had the opportunity to acquire detailed information about the proposed legislation.

I consider each bill for which a full committee or subcommittee hearing is scheduled in either the House or Senate Judiciary Committees between 1989 and 2000 a possibility for passage. Data on bills granted hearings were collected from *Lexis–Nexis Congressional*. I confine the analysis to bills granted hearings by the Judiciary Committees for two reasons. First, the issues under the purview of the Judiciary Committees are those most likely to elicit responses by the Supreme Court. According to (Eskridge 1991, 341), "About half of the Supreme Court's statutory interpretation decisions in any given Term deal with issues within the jurisdiction of the House and Senate Judiciary Committees." If members of any committee are likely to be attentive to judicial preferences, it is the members of the Judiciary Committees. If anything, this biases the analysis toward finding an effect in these committees that is not generalizable to other committees. This is a calculated approach. Since there is little evidence to support the existence of a judicial constraint on Congress, looking in a likely case is a desirable approach for one of the first attempts to assess the hypothesis. Second, a considerable portion of existing work on interactions between Congress and the Court has been conducted using data on civil rights cases—a subset of the Judiciary Committees' jurisdictions. Working in this area will facilitate the comparison of my findings with those of other scholars who have conducted research on Congress–Court interactions.

3.1.2 Overview of Bills

The 390 bills in the sample cover a wide range of issues. I rely on the *Policy Agendas Project* Topics Codebook of Baumgartner & Jones (2008) to classify the subject of each bill. More than a third of the bills in the sample are classified as dealing primarily with "Law, Crime, and Family Issues." This is unsurprising since the sample consists only of bills granted hearings in the Judiciary Committees. Bills related to banking, finance, and domestic commerce comprise 24% of the sample. Table 4.1 reports the complete breakdown of bill topics.

Table 3.1: Bills by Topic

Policy Agendas Project Major Topic Code	*Number of Bills*	*% of Sample*
Law, Crime and Family Issues	140	35.90
Banking, Finance, and Domestic Commerce	94	24.10
Government Operations	33	8.46
Labor, Employment and Immigration	32	8.21
Civil Rights, Minority Issues, and Civil Liberties	28	7.18
Health	10	2.56
Space, Science, Technology, and Communications	20	5.13
International Affairs and Foreign Aid	9	2.31
Defense	6	1.54
Energy	4	1.03
Education	3	0.77
Transportation	3	0.77
Agriculture	3	0.77
Public Lands and Water Management	2	0.51
Foreign Trade	1	0.26
Other	2	0.51

The number of bills varies by year and Congress. 1994 saw the lowest number of bills (16) while a maximum of 43 were considered in 1992. The distribution by year appears random. Some of the variation by year is masked if bills are grouped by Congress. The data trend slightly downward over time with the 103rd Congress having notably fewer bills than others in the sample. Data on bills by year and Congress are reported in Figure 3.5. There are more House bills (62%) in the sample than Senate bills (38%). I do not anticipate bills or behavior to differ systematically between the two chambers so the lack

of parity is not a concern.

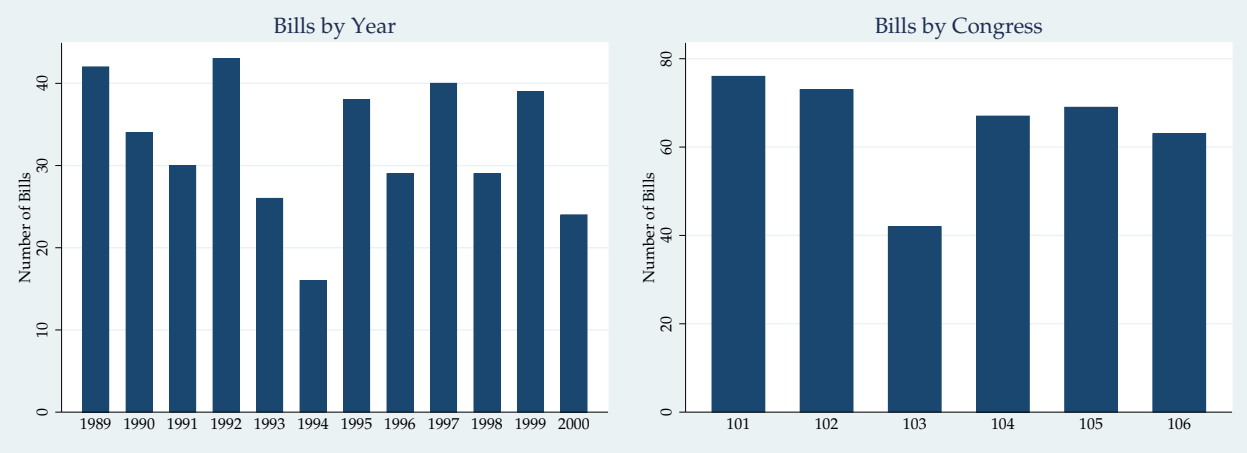


Figure 3.5: Distribution of Bills by Year and Congress

Figure 3.6 illustrates the range of the number of cosponsors for each bill in the sample. There is a considerable amount of variation. At the low end, 54 bills have no cosponsors. At the other extreme, one bill in the sample has 258 cosponsors. The average number of cosponsors for bills introduced in the House is 38. The average for Senate bills is 9. (The modal category in both chambers is 0.)

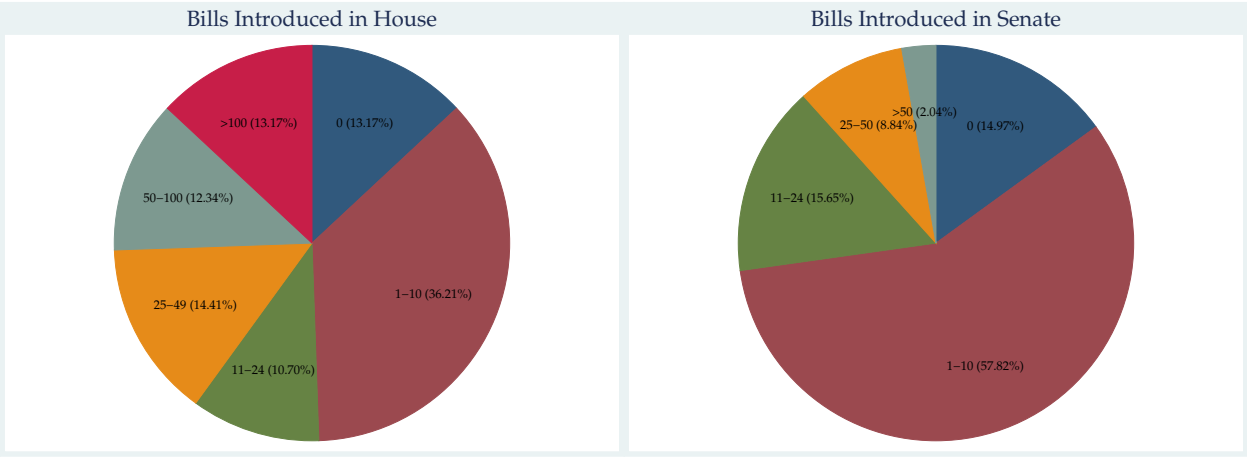


Figure 3.6: Number of Cosponsors per Bill

3.1.3 Status Quo Policies

The primary obstacle to testing predictions of spatial models is the difficulty that inheres in identifying status quo policies and locating outcomes in policy space. To test the

predictions of separation of powers models that assume there are statutes in place that govern policy in a particular issue area when Congress decides whether or not to enact legislation, it is necessary to identify the status quo policy (or policies) and then to assess the location of that policy in the same ideological space in which the preferences of the relevant actors are measured. One approach to identifying status quo policies would be to discern the primary topic of a bill and then to identify the most recent bill passed (prior to the newly proposed bill) addressing the same topic. The most recently passed bill addressing the same topic would be the status quo policy. The *Policy Agendas Project* (Baumgartner & Jones 2008) codes bills by their primary topic. Each bill is coded into one of nineteen major topics and 225 subtopics. These data could be used to match proposed legislation to recent enactments by issue area. This approach, however, would ignore an important reality about the modern legislative process—many statutes affect multiple, and often unrelated, policy domains. Accordingly, I adopt a more precise method to identify status quo policies based on the sections of the United States Code that a proposed bill would modify.

The United States Code "is the codification by subject matter of the general and permanent laws of the United States." It is divided into fifty titles which deal with broad, logically organized areas of legislation. The U.S. Code is maintained by the Office of the Law Revision Counsel of the U.S. House of Representatives which determines which statutes in the United States Statutes at Large should be codified and which existing statutes are affected by amendments, repeals, or expirations and updates the Code accordingly. The U.S. Code, then, can be used to identify what laws are in effect in an issue area at any given time. Within each of the titles of the U.S. Code, provisions are further divided into Chapters, Subchapters, and Sections. The U.S. Code reports the dates of modification to each section. Proposed legislation generally indicates the changes the statute would make to the U.S. Code by section. I rely on the text of a bill to identify the sections of the U.S. Code it would modify and the U.S. code itself to identify the most recent change to

each affected section. This two–step process allows me to identify status quo policies *and* locate them in ideological space.

I read the text of each proposed piece of legislation, identifying the sections of the U.S. Code that would be modified (amended or repealed) by the statute. For each legislative opportunity, I construct a list of "status quo policies"—sections of the U.S. Code that would be modified by the proposed bill. The bills in the sample vary in the breadth of the changes they propose to the U.S. Code. Forty percent of the statutes propose changes to a single section of the U.S. Code. At the other extreme, one bill proposes changes to 145 sections of the U.S. Code. This value, however, is extreme. Seventy–five percent of the bills in the sample would make changes to five or fewer sections of the U.S. Code. Figure 3.7 presents a histogram of the count of sections of the U.S. Code affected by bill.

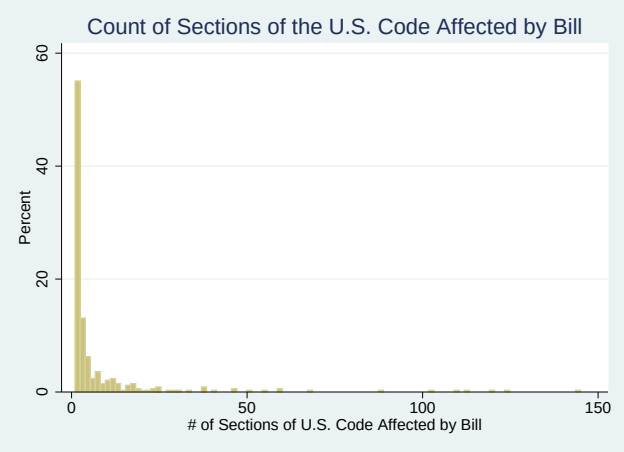


Figure 3.7: Count of Sections of the U.S. Code Affected By Bill

Having identified the status quo policies for each bill, I must next locate these policies in policy space. Because direct measures of the location of policies are unavailable, I rely on data on the ideological composition of Congress at the time of passage to infer policy locations. For each status quo policy (section of the U.S. code that would be modified by a bill), I identify the most recent modification to that section of the U.S. Code prior to the introduction of the newly proposed bill. I assign the policy the ideal point of the

Congress that made the preceding modification.[4] Where bills propose modifications to multiple sections of the U.S. Code, I average the ideal points of the Congresses making the most recent amendment to each section.

It is important to note that while this method of locating status quo policies has some advantages over relying on methods based on topic codes, it is not without significant limitations. First, it is not possible to identify a status quo policy for proposed new sections of the U.S. Code. Accordingly, data are only included for bills that modify existing sections of the U.S. Code. Further, because the ideology estimates I employ are unavailable for years prior to 1951, I am unable to locate policies where the most recent amendment to a section of the U.S. Code preceded that year. This should not introduce any systematic bias unless policies enacted prior to 1951 are consistently more liberal or conservative than those in the post–1951 period. I have no reason to believe that is the case; I am confident that the exclusion of pre–1951 status quo policies will not confound my analysis.

3.1.4 Primary Independent Variables

Ideal Points. I rely on the interinstitutional ideology estimates of Bailey (2007) to identify the ideal points of Congress and the Court. Bailey relies on "bridge" observations that provide fixed references against which the preferences of presidents, senators and justices can be estimated and compared. These "bridge" observations record positions taken by actors on issues before another institution. For example, when a president issues a statement expressing agreement with a Supreme Court decision, he provides a "bridge" that allows his preferences to be mapped into the same space as the Court. Similarly, intertemporal bridges exploit information about position taking by individuals on earlier votes in Congress and the Court. When a Supreme Court justice writes that an earlier case was "wrongly decided," she creates a bridge that allows her preferences to

[4]The measures of ideal points for Congress are discussed below.

be compared to those of justices who voted in the antecedent case, even if they did not serve together. Bridge observations for presidents are based on amicus filings by the Solicitors General and presidential statements on Supreme Court decisions. Congressional positions on Court cases are derived from statements in support or opposition to specific decisions, amicus filings by members of Congress, sponsorship of legislation that explicitly or implicitly takes a position on Supreme Court cases, and roll–call votes that explicitly take a position on specific Supreme Court cases. Observations for justices taking positions on cases from previous courts are taken from written opinions. Preferences are constrained to one dimension and are based on votes and cases related to the "major topics addressed by the courts in the postwar area, including crime, civil rights, free speech, religion, abortion, and privacy" (Bailey 2003, 441). The model is a standard random utility model that builds on the "canonical formulation of latent preferences in the ideal point estimation literature" (Bailey 2003, 440).

I believe the Bailey (2003) scores are superior to the measures used by many scholars that rely on a transformation of Martin & Quinn's (2002) ideal point estimates of Supreme Court justices. The transformation allows the direct comparison of the Supreme Court ideal points with Poole & Rosenthal's (1997) estimates of congressional and presidential ideal points. (The transformation is introduced by Epstein, Martin, Segal & Westerland (2007).) Bailey (2003) makes a convincing case that his measures offer better intertemporal comparability than the Martin–Quinn scores for Supreme Court justices and the NOMINATE measures of congressional ideal points. According to Bailey (2003, 436),

> [I]n Martin and Quinn's preference estimates, the median ideology of the Supreme Court nearly reaches its postwar conservative peak in 1973. . . If their estimates are correct, the Court that produced *Roe* and struck down the death penalty in *Furman v. Georgia* (1972) was actually one of the most conservative in the modern era and was more conservative than the Court today.

The NOMINATE preferences of legislators also contradict conventional wisdom about

which members are liberal and conservative when compared over time. A survey of the two–dimensional Common Space scores suggest that modern southern Democrats are no more liberal than their segregationist predecessors. Over time, the mapping of policies onto those dimensions has changed, making their interpretation quite complex. As a result, the scores produce results that, according to Bailey (2003, 437) "are inconsistent with conventional conceptions of what it means to be liberal or conservative." Valid inter–temporal estimates are imperative for my analysis, accordingly, I rely on the Bailey (2003) measures wherever possible.

Furthermore, even the proponents of the so–called "Judicial Common Space" scores (Epstein et al. 2007) suggest that a bridging methodology would be a preferable means to generate interinstitutional preference estimates if enough observations were available for the relevant actors within each institution. They say,

> The Martin–Quinn measures are not directly comparable to the NOMINATE Common Space scores [and] an insufficient number of "bridging observations" exists to place circuit court judges and Supreme Court justices on the same scale. The solution thus must lie in choosing a reasonable transformation from the Martin–Quinn space to the Common Space (Epstein et al. 2007, 5).

The use of the Bailey measures eliminates the need for this transformation at all.[5]

Admittedly, the conversion of 535 members' preference scores into a location in policy space requires that I adopt strong assumptions about which members of Congress are pivotal. Accordingly, I adopt two approaches to identify the location of status quo policies. First, I assume that the chamber medians are the pivotal actors and that the ideal point of Congress is the midpoint between the chamber medians. This operationalization is consistent with the floor median model advanced by Krehbiel (1998), the committee

[5]Of course, Epstein et al. (2007) could eliminate the need for their transformation and still compare preferences of circuit court judges, Supreme Court justices, members of Congress and presidents by employing Bailey's (2003) presidential preference estimates and the method proposed by Giles, Hettinger & Peppers (2001) to locate the ideal points of circuit court judges.

gatekeeping model introduced by Ferejohn & Shipan (1990), and the multiple veto model suggested by Segal (1997). For ease of exposition, I refer to the empirical models employing this measure as the "Chamber Median Models." Alternatively, and consistent with the party median model advanced by Aldrich and Rohde (1997, 2000), I assume that the majority party median in each chamber is pivotal and that the ideal point of Congress is the midpoint between these actors. Figure 4.1 depicts the ideal points of Congress and the Court for the period under study.

Figure 3.8: Ideal Points of Congress and Court

Distance Variables. Distance variables are operationalized by taking the absolute value of the distance between the relevant points: the ideal point of Congress and the ideal point of the Court, the location of the status quo policy and the ideal point of Congress, and the location of the status quo policy and the ideal point of the Court.

Potentially Constrained Congress. I include a measure to characterize the relative location of the congressional and legislative ideal points and the status quo policy. When the status quo policy is located to the same side of Congress and the Court, Congress is unconstrained as to passage and the "potential constraint" indicator variable is equal to 0. When the status quo policy is located between the ideal points of Congress and the Court, Congress is potentially constrained and the indicator variable is equal to 1. I expect the independent effect of this variable to be negative—when Congress is potentially

constrained, it should be less likely pass new legislation.

Potentially Constrained Congress * Distance Interactions. Hypotheses 3, 4, and 5 suggest that the impact of the distance between the status quo policy and Congress's ideal point and the distance between the status quo policy and the Court's ideal point will be conditioned on the location of these three points. Accordingly, I include three interaction terms: (1) *Potentially Constrained Congress * Congress–Status Quo Distance*, (2) *Potentially Constrained Congress * Court–Status Quo Distance* and (3) *Potentially Constrained Congress * Congress–SQ Distance * Court–SQ Distance*. (The constitutive components of each interaction are also included in the model.) I expect each of these interaction terms to exert a positive impact on the probability of legislative activity.

3.1.5 Control Variables

Majority Party Sponsor. This dichotomous variable is equal to one when a bill's sponsor is a member of the party that holds a majority of seats in the chamber in which the bill originates. I expect majority party sponsorship to increase the probability of bill success.

"Mainstream" Sponsor. It has been hypothesized that moderate legislators enjoy greater success at securing bill passage than their more ideologically extreme colleagues. To assess this hypothesis, I construct two variables that measure a sponsor's ideological extremism. For the chamber median model, I measure the ideological distance between a bill's sponsor and the chamber median. For the party median model, I measure the distance between a bill's sponsor and the median of the sponsor's party in the chamber. I expect that in both models, these variables will be negatively associated with the probability of passage. That is, as the distance between the sponsor and the chamber or party median decreases, bill passage should become more likely.

Cosponsors. I expect that as the number of legislators supporting a piece of legislation as cosponsors increases, so should the possibility of passage. I operationalize cosponsorship support as the proportion of the originating chamber that cosponsors the bill to

facilitate comparison across bills that originate in the House and Senate.

Presidential Support and **Presidential Opposition.** I anticipate that members of Congress will respond to known positions of the president. The president's signature is required to enact passed bills so members may respond to signals that the President is supportive of legislation by sending it to his desk while refraining from passing legislation in the specter of a veto. I include two variables to account for presidential preferences—an indicator for presidential support and an indicator for presidential opposition. I acquire data on presidential positions from *CQ Almanac* and *THOMAS.gov*. *Congressional Quarterly* identifies all roll call votes on which explicit statements are made by the president or his authorized spokesperson and indicates whether or not the president's preferred position is the outcome. When the president's preferred position prevails—*CQ* counts a victory for the president; when his preferred position loses, it is a presidential defeat. For each bill in the sample, I search *THOMAS.gov* to determine whether or not the bill was the subject of a recorded vote on which the president took a position. For each roll call vote on which the president takes a position, I can determine whether or not he supported the legislation based on the coding of *CQ*'s *Victory* and *Defeat* variables. For example, if a bill was voted on and passed in a chamber and the vote is coded as a presidential victory, the presidential support variable is coded as 1 (and the presidential opposition variable is coded as 0). If a bill is voted on and defeated in a chamber and the vote is a presidential victory, the presidential opposition variable is coded as 1 (and the presidential support variable is equal to 0). When a bill was not the subject of a roll call vote or the president did not take a position on a roll call vote both variables are coded as 0.

Issue Salience. I include a measure that assesses the amount of media coverage devoted to a bill's topic to assess the impact of salience to the public on bill success. Following Adler & Wilkerson (2005), I hypothesize that bills receiving increased media attention will be more successful than those ignored in the popular press. I rely on the issues on Binder (2003)'s systemic agenda to construct a measure of media attention to bill topics.

Binder (2003) constructs a measure of the congressional agenda using unsigned editorials in the *New York Times*. All issues referred to in editorials that also reference the House, the Senate, or Congress are considered possibilities for passage and are included in the systemic agenda. [6] To assess the amount of media coverage devoted to a topic in a given Congress, I first assign each of the systemic agenda items one of the twenty–seven major topic codes from the *Policy Agendas Project*. Baumgartner & Jones (2008) provide examples of bill subjects for each major topic code. Legislation addressing "economic growth and outlook" or "the state of the economy," for example, would be coded under the major topic "Macroeconomics." I assign the most relevant major topic code based on Binder's title for each agenda item. Table 3.2 presents the mapping of a subset of the agenda items from the 106th Congress to topic codes. (For a full list of major topic codes and descriptions, see Appendix B.) After assigning each agenda item a topic code, I construct a count of the number of issues within each major topic that are mentioned in *New York Times* editorials by Congress. This measure captures the salience of each of the twenty–seven topics by Congress. Table 3.3 presents the number of editorials related to each of the major topics for each Congress.

The Congressional Bills Project codes the primary topic of each bill according to the Policy Agendas Project Codes; as a result, I can match each bill in my sample to the topic–Congress score derived from the Binder data. Because I expect the impact of media coverage to be positive but characterized by diminishing returns, I employ the natural log of the issue–coverage count as my measure of issue salience. Figure 3.9 illustrates the distribution of the media coverage variable for the bills in the sample.

Sponsor is Member of Referring Committee. This dichotomous variable is equal to one when a bill's sponsor is a member of a committee to which the proposed bill is referred. I expect bills sponsored by members of referring committees to have an increased probability of success, relative to those sponsored by non–committee members.

[6] These data are provided courtesy of Sarah Binder.

Table 3.2: Sample Coding for Media Measure

Systemic Agenda Item	*Policy Agendas Major Topic Code*	
Revise Independent Counsel Act	20	Government Operations
Y2K Liability Legislation	17	Space, Science, Technology, and Communications
Foreign Aid	19	International Affairs and Foreign Aid
Healthcare–Drug Prices	3	Health
Motor Vehicle Safety (Government Regulation)	10	Transportation
Death Penalty Moratorium	2	Civil Rights, Minority Issues, and Civil Liberties
Patient Privacy	3	Health
Bankruptcy Reform	15	Banking, Finance, and Domestic Commerce
Florida Everglades Preservation	21	Public Lands and Water Management
Trade with China (WTO/PNTR)	18	Foreign Trade
Tax Break on Tuition Accounts for Families	6	Education
Internet Filters Against Porn (McCain)	17	Space, Science, Technology, and Communications
Limit Fed. Rapid–Transit Aid 12.5%–Shelby	10	Transportation
Expand Hate Crimes Legislation	2	Civil Rights, Minority Issues, and Civil Liberties
Tighten Clean Air Act (Moynihan–Schumer)	7	Environment
Target Youth Drinking in Anti–Drug Messages	3	Health

Table 3.3: Count of *New York Times* Editorials by Major Topic Code and Congress

	Congress					
Policy Agendas Project Major Topic	101^{st}	102^{nd}	103^{rd}	104^{th}	105^{th}	106^{th}
1 Macroeconomics	3	1	4	4	3	2
2 Civil Rights/Minority Issues/Civil Liberties	9	8	11	6	9	10
3 Health	9	5	3	10	8	16
4 Agriculture	6	2	5	7	7	5
5 Labor/Employment/Immigration	9	2	4	3	3	5
6 Education	1	4	2	3	6	7
7 Environment	3	3	1	3	3	3
8 Energy	4	2	0	1	0	4
10 Transportation	4	4	0	4	5	8
12 Law/Crime/Family Issues	7	9	6	9	4	8
13 Social Welfare	6	9	5	2	6	4
14 Community Development/Housing Issues	1	2	1	1	2	0
15 Banking/Finance/Domestic Commerce	18	15	7	12	12	13
16 Defense	9	14	4	15	6	5
17 Space/Science/Technology/Communications	5	5	5	6	7	7
18 Foreign Trade	6	6	4	2	6	5
19 International Affairs/Foreign Aid	21	10	7	10	5	11
20 Government Operations	12	10	13	10	7	9
21 Public Lands and Water Management	1	3	2	6	6	7
24 State and Local Government Admin.	3	3	3	0	1	1
26 Weather/Natural Disasters	0	0	0	0	2	0
27 Fires	0	0	0	0	0	2
28 Arts/Entertainment	3	0	0	1	1	0
29 Sports/Recreation	0	0	0	2	0	0
30 Death Notices	0	0	0	0	0	0
31 Churches/Religion	0	0	0	0	0	0
99 Other/Miscellaneous/Human Interest	7	10	7	2	7	5

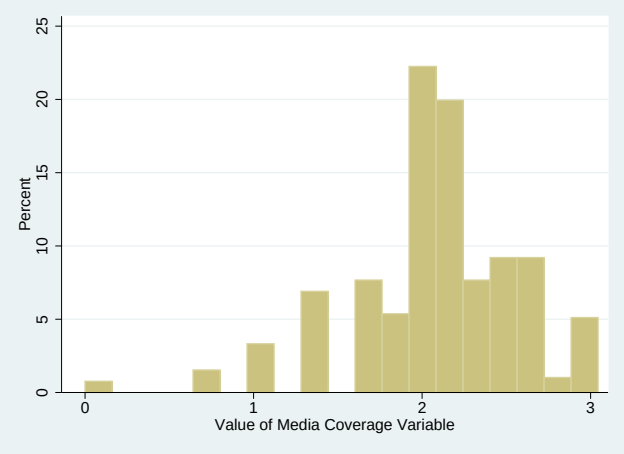


Figure 3.9: Distribution of Media Coverage Variable

Sponsor is Chair of Judiciary Committee. If a bill's sponsor is the Chairperson of the Judiciary Committee (to which all bills in the sample are referred), this dichotomous variable is coded as one. I expect sponsorship by the committee chair to be associated with an increased probability of success.

Descriptive statistics for all variables are presented in Table 3.4.

3.2 Analysis and Results

Because of the limited nature of the dependent variable, I estimate all models using probit. I employ robust standard errors to control for correlated errors. Model results for the "Chamber Median Models" are presented in Tables 3.5, 3.7, 3.8, and 3.9. Results for the "Party Median Models" are presented in Tables 3.10 and 3.12. It should be noted that the variable measuring the sponsor's membership in the majority party in his chamber is dropped from the models. Membership in the chamber minority predicts bill failure perfectly. That is, in the sample, there are no bills sponsored by members of the chamber minority that are successful. I cannot estimate an effect of this variable on bill success but the total absence of successful bills sponsored by minority members offers persuasive evidence supporting *Hypothesis 6*.

When estimating interactive models, the ideal approach is to include all interactive

Table 3.4: Descriptive Statistics

	Variable	*Minimum*	*Maximum*	*Mean*	*Standard Deviation*
DV	*Bill Presented to President*	0	1	0.04	0.19
Chamber Median Model	*Distance between Congress and Supreme Court*	0.01	0.40	0.17	0.13
	Potentially Constrained Congress	0	1	0.46	0.50
	Distance between Congress and Status Quo	0.00	0.33	0.11	0.06
	Distance between Court and Status Quo	0.04	0.48	0.20	0.09
	Distance between Sponsor and Chamber Median	0.00	2.94	0.76	0.51
Party Median Model	*Distance between Congress and Supreme Court*	0.48	0.86	0.60	0.12
	Potentially Constrained Congress	0	1	0.61	0.49
	Distance between Congress and Status Quo	0.01	1.35	0.49	0.44
	Distance between Court and Status Quo	0.03	0.90	0.48	0.20
	Distance between Sponsor and Party Median	0.00	2.55	0.41	0.41
All Models	*Sponsor is Member of Majority Party*	0	1	0.86	0.35
	Sponsor is Member of Referring Committee	0	1	0.81	0.40
	Sponsor is Chair of Judiciary Committee	0	1	0.15	0.35
	Proportion of Originating Chamber Co–Sponsoring	0.00	0.67	0.09	0.13
	Media Coverage of Bill Topic	0.00	3.04	2.07	0.49
	President Supports	0	1	0.04	0.19
	President Opposes	0	1	0.05	0.21
$n = 390$					

terms and all constitutive components of each interaction term (Brambor, Clark & Golder 2006). Accordingly, I first attempt to estimate a full model that includes eight strategic variables and all control variables. The results of this model are presented in Table 3.5. I employ one–tailed tests of significance since all of my hypotheses predict directional effects. The model offers little support for the separation of powers hypotheses—only one of the primary independent variables is significant as predicted. The interaction between the "potential constraint" indicator and the measure of the distance between the Court and the status quo is positive and significant. One of the constitutive terms (for which no effect is predicted) is also positive and significant—the interaction between the distance between the Congress and the status quo and the distance between the Court and the status quo. Bill success does not otherwise appear to be significantly related to the distance between Congress and the Court. The interaction terms make the interpretation of these findings difficult because the effect of the Court–status quo distance variable depends on the values of each independent variable in which the Court–status quo distance variable is a constitutive term, as well as the simple distance measure. To illustrate the impact of the significant variables, I generate predicted probabilities of bill passage for different values of the independent variables. This analysis reveals puzzling patterns. The baseline probability of bill passage (all variables set at their means/modes and the potential constraint variable equal to zero) is 0.11. The probability of bill passage decreases to 0.05 if the distance between the Court and the status quo is increased (and all other variables are held constant excluding interactive terms which are adjusted to reflect the hypothetical values), contrary to my expectations. Only when the distance between the Court and the status quo policy *and* the distance between the Congress and the status quo policy increase, do I observe an increase in the probability of passage. If both of these distance variables are increased by one standard deviation, the probability of bill passage increases to 0.15. These effects are not evident when the constraint variable is equal to 1. Then, the probability of passage in the baseline scenario is 0.01. When either the Court–

status quo distance variable or the pair of status quo distance variables are increased by one standard deviation, the probability of bill passage is less than 0.01. These predicted probabilities should be interpreted cautiously, however, because they rely on predictions based on changes in non–significant variables. It is difficult to offer an explanation for Congress responding as predicted to the Court–status quo distance variable but being indifferent to its own relative location to the status quo policy. The evidence for the strategic model is weak.

The majority of the control variables fail to perform as expected. While bills sponsored by the Chair of the Judiciary Committee are significantly more likely to be successful than others, the sponsor's membership on the referring committee and ideology are unrelated to bill success. The media coverage and cosponsorship measures also fail to attain statistical significance. Actually, the number of cosponsors a bill has is *negatively* related to the probability of bill success. This may reflect a cosponsorship strategy suggested by Wilson & Young (1997)—that members of Congress sign on to cosponsor legislation to signal support for proposals that are not assured of passage.

Because of collinearity among the regressors, this model drops the interaction between the "potentially constrained Congress" indicator and the variable measuring the distance between Congress and the status quo. Accordingly, Model 1 reports only the effects of seven of the strategic variables. This is problematic, as the omitted interaction term is one of the primary independent variables and its exclusion from the model may result in omitted variable bias. In order to assess the effect of the distance between Congress and the status quo on the probability of bill passage conditioned on Congress being constrained, I estimate a second model that excludes the three constitutive terms for which I do not expect independent effects on the dependent variable. Brambor, Clark & Golder (2006) discuss the *rare* conditions under which the exclusion of a constitutive term will not lead to significant inferential errors. They argue that the omission of constitutive terms is only appropriate when two conditions are satisfied. First, the analyst must have

a strong theoretical expectation that the omitted variables have no effect on the dependent variable in the absence of the modifying variable. Here, the omitted variables are the variables measuring the distance between Congress and the status quo, the distance between the Court and the status quo, and the interaction of those two variables. The modifying variable is the presence of a potentially constrained Congress. My theory predicts that the three constitutive terms will not affect the probability of bill success when Congress is unconstrained, so this condition is satisfied. Second, Brambor, Clark & Golder (2006) assert that prior to omitting a constitutive term, the analyst should estimate the fully specified model and find that the coefficients for the omitted terms are, in fact, not statistically distinguishable from zero. My attempt to estimate the full model is not realized because of the collinearity of the regressors. The significance of one of the three constitutive terms in Model 1 suggests that the full model may be preferable to a pared down model. However, those model estimates may be biased because of the inability to include the constraint–Congress–status quo distance variable. Recognizing these imperfections, I employ alternative model specifications below to ensure robustness.

Model 2 in Table 3.5 presents the results of a model that includes only the five primary strategic variables (*Congress–Court Distance*, *Potentially Constrained Court*, *Potentially Constrained Court * Congress–SQ Distance*, *Potentially Constrained Court * Court–SQ Distance*, and *Potentially Constrained Court * Congress–SQ Distance * Court–SQ Distance*) and the seven control variables for which effects can be estimated. Again, however, the model fails to support most of the predictions of the separation of powers model. Only the interaction between the constraint variable and the measure of the distance between the Court and the status quo is significant. Congress is not more likely to pass legislation when its preferences are similar to those of the Supreme Court and the location of the status quo policy relative to the Congress does not systematically affect the probability of enactment. I again find that bills sponsored by the Chair of the Judiciary Committee and/or supported by the president are more likely than others to be passed. The other control

variables fail to attain statistical significance. The lack of evidence in Model 1, then, is unlikely the result of omitted variable bias that results from the inability to estimate an effect for the interaction between the *Potentially Constrained Congress* and *Congress–SQ Distance* variables.

I next consider the possibility that the general failure of the SOP hypotheses is a product of collinearity among the independent variables. As can be seen in Table 3.6, the primary strategic variables are highly correlated with one another; this may result in inflated standard errors that make it more difficult to reject the null hypotheses in Models 1 and 2. To assess this possibility, I drop from the sample observations where Congress is unconstrained (*Potentially Constrained Congress=0*) and estimate the effect of the four strategic distance variables and the control variables. If the failure of the SOP hypotheses is the result of collinearity among the interacted regressors in Models 1 and 2, I should be able to discern independent effects for the distance variables when I restrict the sample to include only those observations where Congress is potentially constrained. The results are presented in Model 3 in Table 3.7. I find no support for the strategic hypotheses in the chamber median model. (The *Congress–SQ Distance* variable is dropped due to collinearity and I cannot estimate an effect for the *Sponsor is Chair of the Judiciary Committee* variable because all bills sponsored by the Chairperson of the Judiciary Committee under the conditions of potential constraint are successful.) Only the presidential support variable is significant and signed as predicted.

An alternative explanation for the lack of findings in the chamber median model may be the characterization of the Congress as a unitary actor. If the relative location of the Court differs for the House and Senate, the effect of the Court may be muted or absent. Figure 3.10 indicates that, in fact, for four of the twelve years of the study (1995, 1996, 1997, and 1998) the ideal points of the House and Senate are on opposite sides of the Court. This means that the Court should be constraining the members in each of these chambers in opposite directions. I re–estimate the empirical models including only those

Table 3.5: Probit Models Predicting Probability of Bill Passage: Chamber Median Model, 1989–2000

		Model 1		***Model 2***	
	Expected	*Coefficient*	*(Robust S.E.)*	*Coefficient*	*(Robust S.E.)*
Distance between Congress and Court	$-$	6.24	(3.65)	0.60	(1.68)
Potentially Constrained Congress (PCC)	$-$	-0.91	(0.76)	-0.59	(0.49)
*PCC * Congress/SQ Distance*	$+$	.	.	3.70	(5.07)
*PCC * Court/SQ Distance*	$+$	6.96^{*}	(3.83)	4.63^{*}	(2.80)
*PCC * Congress/SQ Distance * Court/SQ Distance*	$+$	-92.70	(32.20)	-55.92	(0.33)
Distance between Congress and Status Quo	*none*	-1.74	(3.56)	.	.
Distance between Court and Status Quo	*none*	-7.89	(5.49)	.	.
*Congress/SQ distance * Court/SQ distance*	*none*	36.43^{*}	(20.98)	.	.
Sponsor is Member of Majority Party	$+$	.	.	.	.
Sponsor is Member of Referring Committee	$+$	-0.62	(0.33)	-0.58	(0.33)
Sponsor is Chair of Judiciary Committee	$+$	0.81^{*}	(0.36)	0.81^{*}	(0.36)
Distance between Sponsor and Chamber Median	$-$	0.26	(0.29)	0.23	(0.29)
Proportion of Originating Chamber Co–Sponsoring	$+$	-2.69	(1.02)	-2.64	(0.93)
Media Coverage of Issue	$+$	-0.23	(0.24)	-0.32	(0.28)
President Supports	$+$	1.31^{**}	(0.43)	1.29^{**}	(0.42)
President Opposes	$-$	1.08	(0.47)	1.00	(0.47)
Intercept		-0.86	(0.85)	-0.96	(0.62)
		Model Details			
		$n = 335$		$n = 335$	
		Wald $\chi^2_{(14)} = 31.82^{**}$		*Wald* $\chi^2_{(12)} = 21.69^{*}$	
		Pseudo $R^2 = 0.19$		*Pseudo* $R^2 = 0.17$	

Significance levels (one–tailed tests): * : 5% ** : 1%

Table 3.6: Correlations Between Primary Independent Variables—Chamber Median Model

	Distance between Congress and Court	*Potentially Constrained Congress (PCC)*	*PCC * Congress/SQ Distance*	*PCC * Court/SQ Distance*	*PCC * Congress/SQ Distance * Court/SQ Distance*
Distance between Congress and Court	1.00				
Potentially Constrained Congress	0.72	1.00			
*PCC * Congress/SQ Distance*	0.71	0.78	1.00		
*PCC * Court/SQ Distance*	0.86	0.84	0.66	1.00	
*PCC * Congress/SQ Distance * Court/SQ Distance*	0.82	0.71	0.87	0.82	1.00

Table 3.7: Probit Models Predicting Probability of Bill Passage: Chamber Median Model when Congress is Potentially Constrained

		Model 3	
	Expected	*Coefficient*	*(Robust S.E.)*
Distance between Congress and Court	$-$	2.82	(5.28)
Distance between Congress and Status Quo	*none*/$+$	.	.
Distance between Court and Status Quo	$+$	0.72	(4.40)
*Congress/SQ distance * Court/SQ distance*	$+$	-33.56	(20.04)
Sponsor is Member of Majority Party	$+$	.	.
Sponsor is Member of Referring Committee	$+$	-0.43	(0.56)
Sponsor is Chair of Judiciary Committee	$+$	.	.
Distance between Sponsor and Chamber Median	$-$	-0.29	(0.41)
Proportion of Originating Chamber Co–Sponsoring	$+$	-4.41	(1.53)
Media Coverage of Issue	$+$	-0.09	(0.50)
President Supports	$+$	1.77^{*}	(.)
President Opposes	$-$	.	.
Intercept		-1.38	(0.92)
		Model Details	
		$n = 127$	
		Wald $\chi^2_{(8)} = 19.97^{*}$	
		Pseudo $R^2 = 0.13$	

Significance levels (one–tailed tests): * : 5% ** : 1%

years where the House and Senate are on the same side of the Court to consider the possibility that the configuration of preferences between 1995 and 1998 is muting strategic effects that are present in the remaining years of the sample.

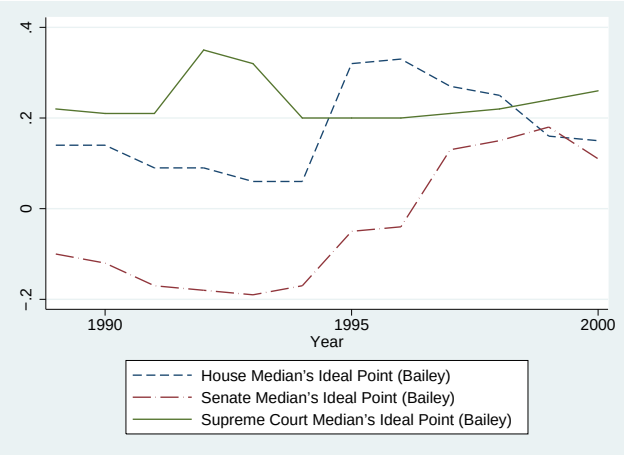


Figure 3.10: Ideal Points of Supreme Court and Chamber Medians

Model results for 1989–1994 and 1999–2000 are presented in Tables 3.8 and 3.9. As in Table 3.5, the first model (Model 4) includes seven strategic variables (the *Potentially Constrained Court*Congress–SQ Distance* interaction is again dropped) and the set of control variables. Model 5 omits the constitutive components of the primary interaction terms. The overall fit of Model 4 is insignificant, so I do not evaluate the contributions of individual independent variables. Model 5 offers an improved model fit, despite the fact that none of the proposed hypotheses is supported. Model 6 is presented in Table 3.9 and includes only those observations where Congress is potentially constrained (as in Model 3 for the analysis of all years). Here, none of the strategic hypotheses are supported. Presidential support is positively associated with the probability of passage but none of the other control variables are significant.[7]

In sum, the evidence supporting the strategic hypotheses for the chamber median model is weak. Only one of the five primary hypotheses is supported and the finding is not robust to alternative model specifications. Furthermore, it is difficult to explain why

[7]The similarity between the results in Models 3 and 6 is unsurprising as only one observation for the sample in Model 3 is from the 1995–1998 time period.

Table 3.8: Probit Models Predicting Probability of Bill Passage: Chamber Median Model (1989–1994, 1999–2000)

		Model 4		***Model 5***	
	Expected	*Coefficient*	*(Robust S.E.)*	*Coefficient*	*(Robust S.E.)*
Distance between Congress and Court	$-$	-11.33^{*}	(6.09)	-2.16	(3.47)
Potentially Constrained Congress (PCC)	$-$	1.82	(1.18)	-0.75	(0.66)
*PCC * Congress/SQ Distance*	$+$	.	.	3.34	(5.37)
*PCC * Court/SQ Distance*	$+$	-1.25	(2.93)	5.71	(3.83)
*PCC * Congress/SQ Distance * Court/SQ Distance*	$+$	18.47	(32.76)	-35.08	(19.20)
Distance between Congress and Status Quo	*none*	12.32^{*}	(6.16)	.	.
Distance between Court and Status Quo	*none*	16.21^{*}	(7.60)	.	.
*Congress/SQ distance * Court/SQ distance*	*none*	-53.89	(26.86)	.	.
Sponsor is Member of Chamber Majority	$+$	.	.	.	.
Sponsor is Member of Referring Committee	$+$	-0.13	(0.52)	-0.17	(0.49)
Sponsor is Chair of Judiciary Committee	$+$	0.35	(0.45)	0.34	(0.43)
Distance between Sponsor and Chamber Median	$-$	-0.15	(0.39)	-0.11	(0.40)
Proportion of Originating Chamber Co–Sponsoring	$+$	-2.68	(1.16)	-2.46	(1.07)
Media Coverage of Issue	$+$	-0.04	(0.35)	-0.07	(0.35)
President Supports	$+$	1.02^{*}	(0.62)	0.82	(0.56)
President Opposes	$+$	0.68	(0.59)	0.76	(0.62)
Intercept		-3.69^{**}	(1.23)	-1.03	(1.06)
		Model Details			
		$n = 215$		$n = 215$	
		Wald $\chi^2_{(14)} = 20.42$		*Wald* $\chi^2_{(12)} = 22.02^{*}$	
		Pseudo $R^2 = 0.15$		*Pseudo* $R^2 = 0.09$	
Significance levels (one–tailed tests): * : 5% ** : 1%					

Table 3.9: Probit Models Predicting Probability of Bill Passage: Chamber Median Model when Congress is Potentially Constrained (1989–1994, 1999–2000)

		Model 6	
	Expected	*Coefficient*	*(Robust S.E.)*
Distance between Congress and Court	$-$	2.49	(5.22)
Distance between Congress and Status Quo	*none*/$+$	.	.
Distance between Court and Status Quo	$+$	0.89	(4.39)
*Congress/SQ distance * Court/SQ distance*	$+$	-32.20	(20.02)
Sponsor is Member of Chamber Majority	$+$	.	.
Sponsor is Member of Referring Committee	$+$	-0.45	(0.56)
Sponsor is Chair of Judiciary Committee	$+$	.	.
Distance between Sponsor and Chamber Median	$-$	-0.31	(0.42)
Proportion of Originating Chamber Co–Sponsoring	$+$	-4.40	(1.52)
Media Coverage of Issue	$+$	-0.10	(0.49)
President Supports	$+$	1.78^{*}	0.81
President Opposes	$-$	.	.
Intercept		-1.30	(0.92)
		Model Details	
		$n = 126$	
		Wald $\chi^2_{(8)} = 19.93^{*}$	
		Pseudo $R^2 = 0.13$	

Significance levels (one–tailed tests): * : 5% ** : 1%

members of Congress would adjust their behavior in response to the location of the status quo policy vis-a-vis the Court while failing to respond to the distance between Congress and the Court or the distance between Congress and the status quo. This ambiguity limits the confirmatory weight of the finding.

Does the strategic model fare better if I assume it is the party medians that are the pivotal members of Congress instead of the chamber medians? The answer is a clear "No." Model 7 in Table 3.10 reports the estimates of the full model for all years (1989–2000) with the eight strategic variables and the set of control variables. Model 8 excludes three of the constitutive terms of the primary interaction terms. In neither of these models do any of the strategic variables perform as predicted by the separation of powers theory. As in the chamber median models, the majority of the control variables also fail to perform as expected. Only the impact of presidential support and the status of the bill sponsor as the chairperson of the referring committee are significantly related to bill success.

I again conduct an alternative analysis in which I include only those observations where Congress is potentially constrained to evaluate the possibility that collinearity among the regressors is to blame for the null findings in Models 7 and 8. The model estimates are reported in Table 3.12. (Table 3.11 reports the correlations among the primary strategic variables under the party median model.) As in the chamber median model analysis, the *Congress–SQ Distance* variable is dropped due to collinearity and I cannot estimate an effect for the *Sponsor is Chair of the Judiciary Committee* variable because all bills sponsored by the Chairperson of the Judiciary Committee under the conditions of potential constraint are successful. Model 9 provides minimal evidence in support of the strategic hypotheses. As predicted, the distance between the Supreme Court and the status quo is positively and significantly related to the probability of bill success. The magnitude of the effect is notable, as well. An increase in the distance between the Court and the status quo policy from 0 to the mean value (0.48) results in an increase of 3% in the probability that a bill is passed (from less than 0.01% when the status quo is located at the Court's ideal

Table 3.10: Probit Models Predicting Probability of Bill Passage: Party Median Model

		Model 7		***Model 8***	
	Expected	*Coefficient*	*(Robust S.E.)*	*Coefficient*	*(Robust S.E.)*
Distance between Congress and Court	−	−5.13	(6.56)	−0.08	(4.76)
Potentially Constrained Congress (PCC)	−	−2.12	(3.49)	0.27	(2.84)
*PCC * Congress/SQ Distance*	+	1.89	(7.24)	−4.66	(6.46)
*PCC * Court/SQ Distance*	+	2.47	(5.67)	−0.78	(5.51)
*PCC * Congress/SQ Distance * Court/SQ Distance*	+	8.32	(11.76)	9.18	(10.92)
Distance between Congress and Status Quo	*none*	−1.58	(2.69)	.	.
Distance between Court and Status Quo	*none*	1.77	(3.16)	.	.
*Congress/SQ distance * Court/SQ distance*	*none*	1.17	(4.17)	.	.
Sponsor if Member of Majority Party	+	.	.	.	.
Sponsor is Member of Referring Committee	+	−0.47	(0.34)	−0.52	(0.32)
Sponsor is Chair of Judiciary Committee	+	1.01**	(0.34)	0.98**	(0.36)
Distance between Sponsor and Party Median	−	0.58	(0.25)	0.59	(0.25)
Proportion of Originating Chamber Co–Sponsoring	+	−2.62	(0.87)	−2.79	(0.90)
Media Coverage of Issue	+	−0.38	(0.31)	−0.33	(0.30)
President Supports	+	1.08*	(0.47)	1.09**	(0.46)
President Opposes	−	1.24	(0.46)	1.05	(0.46)
Intercept		1.53	(3.25)	−0.91	(2.48)
		Model Details			
		n= 335		n= 335	
		Wald $\chi^2_{(15)} = 46.19^{**}$		*Wald* $\chi^2_{(12)} = 30.22^{**}$	
		Pseudo $R^2 = 0.22$		*Pseudo* $R^2 = 0.19$	
Significance levels (one–tailed tests): * : 5% ** : 1%					

point to 3% when it is 0.48 units away).[8] The impact is more pronounced for higher values of the variable–an increase by one standard deviation from the mean value increases the probability of passage from 0.03 to 0.33. The failure of this finding to manifest itself under the alternative "party median" model specifications coupled with the null findings for the other independent variables in this model and across other model specifications limits its utility in substantiating the predictions of the separation of powers theory. While the finding that the distance between the Court and the status quo is positively related to the probability of bill passage is consistent with *Hypothesis 4*, the overall case in favor of bill success being affected by congressional anticipation of judicial action is weak. It is implausible that Congress would take into consideration the distance between the Court and the status quo policy while being unaffected by the status quo policy's location relative to the ideal point of Congress itself. In the section below, I discuss the possible reasons for the lack of support for the strategic hypotheses and directions for future work.[9]

Table 3.11: Correlations Between Primary Independent Variables–Party Median Model

	Distance between Congress and Court	*Potentially Constrained Congress (PCC)*	*PCC * Congress/SQ Distance*	*PCC * Court/SQ Distance*	*PCC * Congress/SQ Distance * Court/SQ Distance*
Distance between Congress and Court	1.00				
Potentially Constrained Congress	0.60	1.00			
*PCC * Congress/SQ Distance*	0.50	0.58	1.00		
*PCC * Court/SQ Distance*	0.67	0.85	0.15	1.00	
*PCC * Congress/SQ Distance * Court/SQ Distance*	0.81	0.69	0.72	0.56	1.00

[8]Predicted probabilities are calculated with all other variables at their mean or modal values.

[9]Under the party median model, the House and Senate are always to the same side of the Court, so it is unnecessary to replicate the analyses in Tables 3.8 and 3.9 for the party median model.

Table 3.12: Probit Models Predicting Probability of Bill Passage: Party Median Model when Congress is Potentially Constrained

		Model 9:	
	Expected	*Coefficient*	*(Robust S.E.)*
Distance between Congress and Court	$-$	-6.64	(5.41)
Distance between Congress and Status Quo	*none*/$+$	.	.
Distance between Court and Status Quo	$+$	5.40^{*}	(2.51)
*Congress/SQ distance * Court/SQ distance*	$+$	13.81	(10.65)
Sponsor is Member of Majority Party	$+$	.	.
Sponsor is Member of Referring Committee	$+$	-0.39	(0.41)
Sponsor is Chair of Judiciary Committee	$+$	.	.
Distance between Sponsor and Party Median	$-$	1.07	(0.34)
Proportion of Originating Chamber Co–Sponsoring	$+$	-1.64	(1.10)
Media Coverage of Issue	$+$	-0.04	(0.44)
President Supports	$+$	0.62	(0.69)
President Opposes	$-$	.	.
Intercept		-1.23	(1.84)
		Model Details	
		$n = 163$	
		Wald $\chi^2_{(8)} = 24.20^{**}$	
		Pseudo $R^2 = 0.20$	

Significance levels (one–tailed tests): * : 5% ** : 1%

3.3 Discussion

The evidence supporting the strategic account of bill passage is weak. The most obvious explanation for these non–findings is that the prediction of separation of powers theory that under certain preference configurations Congress will refrain from passing bills because of the threat of review by the Supreme Court is false. However, reaching this conclusion based solely on the evidence presented is premature. First, the analysis considers only whether or not a bill is passed. While the separation of powers model presented in Chapter 2 (and others in the literature) predict that under certain conditions Congress will refrain from enacting legislation because of the anticipation of negative treatment by the Court, they also predict that much of the time Congress will respond to the threat of review by enacting policy but locating that policy strategically. If members of Congress are responding to the Court by deviating from their most preferred policies to enact policies that will survive Supreme Court scrutiny instead of foregoing legislative activity entirely, the predictions of the separation of powers theory are borne out. This satisficing behavior cannot be picked up by the research design adopted here, but will be discussed in portions of Chapter 5.[10]

Second, it is possible that while the predictions of separation of powers theory are correct, they do not apply universally. It is possible that while members of Congress have reason to be concerned about the possibility of negative treatment under certain conditions, that those concerns do not manifest themselves in every case, and therefore, would not be picked up in a research design like the one adopted here. Members of Congress may rationally reason that in most instances, they have little to fear from the Supreme Court. The Court's agenda space is limited, making the opportunity cost for reviewing any legislative enactment high. The probability of review for any single legislative en-

[10] A complete evaluation of the hypothesis that Congress locates policy strategically will require careful analysis of the substance of proposed legislative responses that would allow the comparison of proposed responses to status quo policies. This evidence would ideally be coupled with corroborating interview–based evidence that confirms legislator motivations. Candid interviews could reveal a role for the anticipation of judicial action in moving policy toward the perceived judicial ideal point.

actment, then, is quite low. To assess this possibility, I replicate the analyses presented here for the subset of proposed statutes for which the Court is most likely to engage in review—those introduced to respond to Supreme Court decisions. By focusing on the subset of proposed statutes where Congress is most likely to pay attention to the Supreme Court, I can conduct an "easier" test of the strategic model. If I do not find support for the strategic model in that analysis, I can be more confident that the null results here reflect a true failure of the theory.

Finally, it is possible that qualities of the data are partially responsible for the lack of support. The methods adopted here to locate status quo policies in a policy space result in noisy measures and may be inadequate. The measures may not be sufficiently precise to reliably ascertain the policy location of bills. In the absence of alternative measures, however, I am hesitant to abandon these measures. Preliminary evidence that suggests it is not simply the noise introduced by the status quo measures that explain the lack of support for the SOP hypotheses is the finding that in alternative models that only include the Congress–Court distance variable and the control variables, none of the findings presented herein are altered.[11] That is, omitting the status quo variables, Congress still does not appear to respond to changes in the location of the Court, presumably the primary characteristic of the strategic environment. The measures of judicial and legal preferences are also noisy (although less so than the status quo measures). Furthermore, I assume preferences and policies are unidimensional when certainly the politics of some of issues and bills are multidimensional. Imprecision in those measures makes it more difficult to reject the null hypotheses of no strategic behavior.

Another weakness of the data is the short temporal period under consideration. The data cover a twelve year period. As a result, there is limited variation in some of the independent variables. The Congress–Court distance variable for the chamber median model ranges from 0.00 in 1972 to 1.08 in 1963. In the sample analyzed here, however, the

[11] Analyses not shown.

variable never rises above 0.40. The range of the Congress–Court distance variable for the party median model is similarly circumscribed, varying only from 0.48 to 0.86. It is possible that for the duration of the period under study here, the preferences of Congress and the Court are sufficiently close that Congress is not constrained by the Court. It may be worthwhile to extend the data collection backwards in time to pick up data for years in which the preferences of Congress and the Court are more dissimilar. This would introduce more observations where Congress *should be* constrained by the Court.

The preliminary evidence presented here provides little evidence that Congress responds systematically to the threat of Supreme Court review by not enacting legislation that it would otherwise. In the next chapter, I consider the effect of anticipation of negative review in a set of "most likely cases" by considering the operation of a judicial constraint on Congress when Congress decides whether or not to enact legislation in response to decisions of the United States Supreme Court.

Chapter 4

The Decision to Pass Responsive Legislation

The analysis of Congress's decision to pass legislation in Chapter 3 offers little evidence that bill passage is systematically related to the relationships between the preferences of Congress, the Supreme Court and the current policy that the legislature might modify. In this chapter, I reassess the hypothesis that the Supreme Court constrains legislative activity in a subset of cases where the hypothesis is more likely to be supported. I ask if the Supreme Court constrains Congress when the legislature considers responses to Supreme Court decisions. I expect that Congress will be more likely to consider the preferences of the Supreme Court when it considers responses to Supreme Court decisions than when it considers non–responsive legislation. Members of Congress may reason that in most cases they have little to fear from Supreme Court action. The Court's agenda space is limited and the probability of review for any individual legislative enactment is low. When Congress responds to a Court decision, however, the probability of review may be heightened. First, the existence of the Supreme Court decision provides some evidence that the Court is interested in an issue area and may signal a heightened probability of review of laws passed in the same issue area. Baird (2004) finds that the issuance of Supreme Court opinion in an area increases the number of subsequent cases in that area in the lower federal courts and at the Supreme Court. Second, if Supreme Court justices are motivated primarily (or in large part) by their policy preferences, they should be expected to respond

to (and rectify) legislative action that displaces their preferred policy outcomes.

As in Chapter 3, I evaluate the following hypotheses:

***Hypothesis 1**: As the ideological distance between Congress and the Court ($|L - J|$) decreases, Congress will be more likely to pass legislation.*

***Hypothesis 2**: When Congress and the Court are located to the same side of the status quo policy Congress will be unconstrained as to passage and, therefore, more likely to pass legislation than when the status quo policy is located between the ideal points of Congress and the Court.*

***Hypothesis 3**: As the ideological distance between Congress's ideal point and the status quo policy ($|L - q|$) increases, Congress will be more likely to pass legislation under conditions of potential constraint.*

***Hypothesis 4**: As the ideological distance between the Court's ideal point and the status quo policy ($|J - q|$) increases, Congress will be more likely to pass legislation under conditions of potential constraint.*

***Hypothesis 5**: As the interaction between the ideological distance between Congress and the status quo and the ideological distance between the Court and the status quo increases ($|L - q| * |J - q|$), Congress will be more likely to pass legislation under conditions of potential constraint.*

***Hypothesis 6:** (Majority Party Sponsor) A bill will be more likely to pass when its sponsor is a member of the party that controls the chamber in which it is introduced than when its primary sponsor is a member of the chamber minority.*

***Hypothesis 7:** ("Mainstream" Sponsor) Bills sponsored by "mainstream" legislators will be more likely to pass than those sponsored by more ideologically extreme legislators.*

***Hypothesis 8:** (Cosponsors) The number of cosponsors for a bill will be positively associated with the probability that the bill is passed.*

***Hypothesis 9a:** (President Supports) Presidential support for a bill will increase the probability that a bill is passed.*

***Hypothesis 9b:** (President Opposes) Presidential opposition to a bill will decrease the probability that a bill is passed.*

***Hypothesis 10:** (Salience) Bills associated with salient Supreme Court decisions will be more likely to be passed than bills associated with non–salient Supreme Court decisions.*

4.1 Data

The data consist of proposed bills introduced between 1995 and 2007 that respond to Supreme Court decisions. I rely on the *Congressional Record* to locate these bills. With the assistance of several research assistants, I identify every instance in which the phrase "Supreme Court" is included in the *House*, *Senate*, and *Extensions of Remarks* sections of the *Congressional Record*. I then read these entries to determine whether or not each reference to the Supreme Court involves a bill (or portion of a bill) that is introduced in response to a specific decision of the Supreme Court. I only include bills that attempt in some way to modify the impact of a Supreme Court decision, not those that would codify the rulings of decisions with which a member of Congress agrees. It is often necessary to rely on additional information to identify the relevant Supreme Court decision. In some entries in the *Congressional Record*, members of Congress reference an adverse Supreme Court decision but do not cite the case by name. Where possible, I identify these cases using other information in the statement, the bill text, or committee reports (where available). Where I am unable to identify a specific Supreme Court decision, the observation is omitted.

Inclusion in the sample requires that a member of Congress identify the bill as a response to a Supreme Court decision. This is problematic if attempts to respond to the Supreme Court are not openly acknowledged. It is theoretically possible that members of Congress will be hesitant to openly respond to the Court's decisions. After all, the Supreme Court enjoys much greater public support than does the Congress and legislative responses to Court decisions may be viewed as illegitimate. This concern is more apparent than real. If responding to a Supreme Court decision is politically disadvantageous, it would likely be bill opponents that characterize proposed legislative enactments as attempts to alter Court rulings. However, members of Congress do not seem hesitant to object to Court action publicly. More than three–quarters of the bills identified here are characterized as responses to Court decisions by bill supporters.

The prevalence of position–taking behavior in Congress coupled with the apparent

lack of reticence in responding to Court decisions raises a final concern with the data. Members of Congress may appeal to their constituents by attempting to respond to unpopular Supreme Court decisions. If bills are introduced solely to appeal to constituents and without any real hope of becoming law, they should arguably be excluded from the analysis. Unfortunately, there are no reliable ways to ascertain which bills are "serious" and which are not. I do not believe position–taking behaviors will drive my results or confound my analysis. If members of Congress want to appeal to their constituents by "taking on the Court," they may do so in several ways. They may propose legislation to respond to Court decisions, but constituents are notoriously ill–informed about most of the work of the Supreme Court and Congress. I argue that proposed constitutional amendments and institutional attacks on the Court will provide much better vehicles for position–taking than ordinary bill introduction. I exclude both of these types of responses from the analysis for this reason.[1]

The coding of most variables is the same as in Chapter 3. There are four exceptions. First, the location of the status quo policy is based on the Supreme Court that rendered the decision to which a response is proposed. The status quo policy is equal to the ideal point of the median member of the Supreme Court that decided the relevant case.

Second, I rely on two sets of preference estimates in the analysis. In Section 3.1.4, I argued that the preference estimates of Bailey (2007) are better–suited for my analyses than the NOMINATE and Judicial Common Space preference estimates of Poole & Rosenthal (1997) and Epstein et al. (2007) because of their superior intertemporal comparability. While I believe that claim to be true, I estimate models using both sets of preference estimates in this chapter. Bailey's (2007) preference estimates are available only through

[1]In Chapter 3, I minimize the effect of non–serious bill introductions by including in the analysis only those bills that were the subject of a hearing. Here, I do not rely on this method. A number of proposed responses to Court decisions are proposed as amendments to underlying legislation so are not subject to the standard committee referral and hearing processes. To ensure my findings are not driven by the inclusion of non–serious bills, I estimate alternative models including only bills that are the subject of some post–introduction activity and the findings are not significantly altered. Throughout this chapter I report the models that include all observations.

2002. Relying solely on these measures would require that I discard a substantial number of observations. The NOMINATE/Common Space scores are available through 2008. By reestimating all models with the NOMINATE/Common Space measures, I can use all available observations and evaluate the robustness of my findings. Graphs presenting the values of both sets of ideology estimates are presented in Figure 4.1. The relationships between congressional and Supreme Court preferences are similar regardless of which measure is used for the years for which I have data on both measures. Expanding the data to include the post–2002 observations has the added advantage of introducing additional variation in the spatial independent variables.

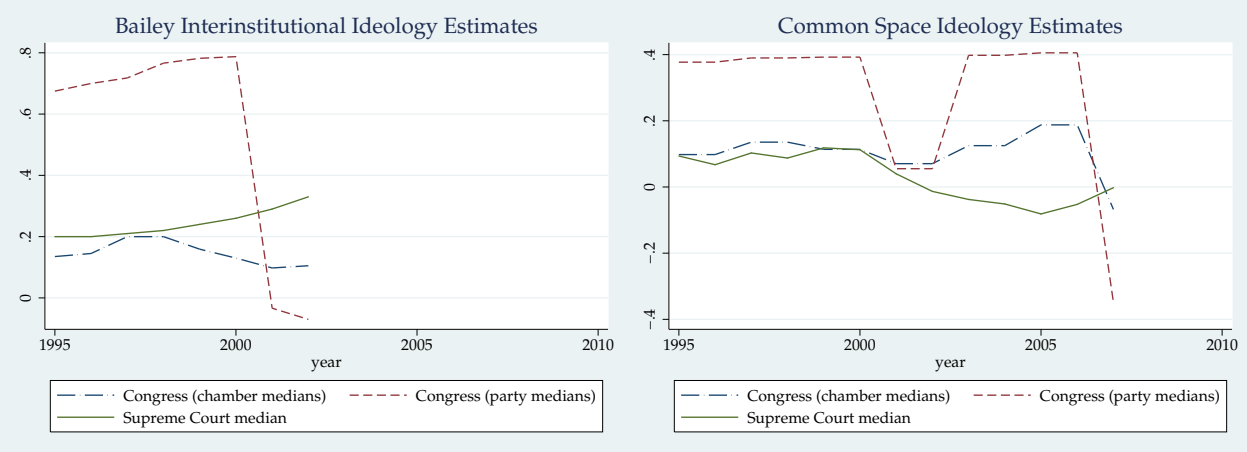


Figure 4.1: Ideal Points of Congress and Court

Third, I rely on a different indicator of salience in this analysis. To measure salience, I adopt the measure proposed by Epstein & Segal (2000) that classifies a Supreme Court case as salient if it receives front–page coverage in the *New York Times* the day after its announcement. This measure is more direct than the measure of issue salience I construct for the Chapter 3 analysis. Analyses of Supreme Court decisionmaking suggest that salience heightens the operation of preferences and diminishes the influence of other factors that have been found to influence decision-making including colleagues, the Solicitor General, and public opinion (Bartels 2005, Bailey, Kamoie & Maltzman 2005, Giles, Blackstone & Vining 2008, Maltzman & Wahlbeck 2003). It is plausible that salience operates simi-

larly for legislators. Accordingly, I hypothesize that responses to salient Supreme Court decisions will be more likely to be passed by Congress than responses to non–salient decisions.

Finally, as in Chapter 3, I rely on data from *Congressional Quarterly* on presidential position–taking to code the variables measuring presidential support and opposition. In three cases involving the incorporation of responsive legislation into appropriations bills, I deviate from this coding rule. When a legislative provision is included in an appropriations bill, I code the presidential support and opposition variables as 0, unless there is an individual roll call on the responsive provision. If there is a separate roll call for the responsive provision, I code the variable regularly. I deviate from the general rule in these cases because a president's position on must–pass appropriations legislation likely focuses on spending levels and not on the policy proposals embedded in the bill. For example, The Gun Free School Zones Amendment Act was introduced as a stand–alone bill but was eventually incorporated into the Department of Defense Appropriations bill. President Clinton issued a statement expressing his opposition to the appropriations bill even though the *Congressional Record* clearly indicates the Administration's support for the Gun–Free School Zones Act.[2] Requiring presidential positions be directly tied to the responsive provision at issue increases the validity of the measures.

4.1.1 Overview of Bills

The data consist of 159 bills introduced between 1995 and 2007. Each bill responds to a Supreme Court decision announced after 1950.[3] The breakdown of bills by topic is reported in Table 4.1.[4] The largest category is "economic activity;" 18% of the bills

[2]To be clear, I do not base the presidential support and opposition variables on the *Congressional Record*. (A systematic search for administration positions is beyond the scope of this project.) I simply wish to illustrate the reason for deviating from the regular coding rule generally relied upon to code presidential positions.

[3]When a bill responds to multiple Supreme Court decisions, I treat the bill as a response to the most recent Supreme Court decision.

[4]These data are drawn from Spaeth's (2008) Original Supreme Court Database and are based on the VALUE variable.

in the sample respond to Supreme Court decisions where the primary issue addresses economic activity. Over half of the bills respond to the hot–button categories of criminal procedure, civil rights, privacy, First Amendment, and due process. Responses are almost evenly split between the Court's constitutional and statutory interpretation cases. Fifty–seven percent of bills respond to the Court's statutory interpretation decisions while 43% respond to constitutional rulings.[5] Within the subset of responses to constitutional cases, two–thirds of bills respond to declarations of unconstitutionality.

Table 4.1: Bills by Supreme Court Case Topic

Primary Issue in Relevant Supreme Court Case	*Number of Bills*	*% of Sample*
Economic Activity	29	18.24
Criminal Procedure	23	14.47
Civil Rights	23	14.47
Privacy	21	13.21
First Amendment	17	10.69
Judicial Power	13	8.18
Federalism	10	6.29
Unions	6	3.77
Due Process	5	3.14
Attorneys	5	3.14
Miscellaneous	4	2.52
Federal Taxation	3	1.89

Figure 4.2 illustrates the number of bills by year and by Congress. Both graphs trend downward over time. Recall, however, that the data go through 2007 which includes only the first session of the 110th Congress. The uptick in 2007 may reflect an end to the downward trend. A maximum of 23 bills were introduced in 1995. The year with lowest number of observations (2002) saw 8 response attempts. Descriptive statistics for all variables are reported in Tables 4.2 and 4.3.

[5]Data are based on values of the AUTH_DEC variable in Spaeth's (2008) Original Supreme Court Database.

Table 4.2: Descriptive Statistics for Models Using Bailey Ideology Measures

	Variable	*Minimum*	*Maximum*	*Mean*	*Standard Deviation*
DV	*Bill Presented to President*	0	1	0.23	0.42
Chamber Median Model	*Distance between Congress and Supreme Court*	0.01	0.23	0.09	0.07
	Potentially Constrained Congress	0	1	0.23	0.42
	Distance between Congress and Status Quo	0.00	0.26	0.10	0.07
	Distance between Court and Status Quo	0.00	0.36	0.09	0.10
	Distance between Sponsor and Chamber Median	0.00	2.40	0.84	0.56
Party Median Model	*Distance between Congress and Supreme Court*	0.31	0.55	0.48	0.07
	Potentially Constrained Congress	0	1	0.34	0.48
	Distance between Congress and Status Quo	0.01	0.84	0.49	0.17
	Distance between Court and Status Quo	0.00	0.36	0.09	0.10
	Distance between Sponsor and Party Median	0.00	2.81	0.76	0.61
All Models	*Sponsor is Member of Majority Party*	0	1	0.79	0.41
	Proportion of Originating Chamber Co–Sponsoring	0.00	0.61	0.09	0.13
	President Supports	0	1	0.09	0.29
	President Opposes	0	1	0.10	0.30
	Salient Supreme Court Case	0	1	0.50	0.50
$n = 102$					

Table 4.3: Descriptive Statistics for Models Using Common Space Ideology Measures

	Variable	*Minimum*	*Maximum*	*Mean*	*Standard Deviation*
DV	*Bill Presented to President*	0	1	0.23	0.42
Chamber Median Model	*Distance between Congress and Supreme Court*	0.00	0.27	0.08	0.08
	Potentially Constrained Congress	0	1	0.29	0.45
	Distance between Congress and Status Quo	0.00	0.27	0.07	0.07
	Distance between Court and Status Quo	0.00	0.29	0.06	0.07
	Distance between Sponsor and Chamber Median	0.01	0.88	0.34	0.19
Party Median Model	*Distance between Congress and Supreme Court*	0.02	0.49	0.31	0.12
	Potentially Constrained Congress	0	1	0.49	0.50
	Distance between Congress and Status Quo	0.00	0.55	0.28	0.11
	Distance between Court and Status Quo	0.00	0.29	0.06	0.07
	Distance between Sponsor and Party Median	0.00	1.125	0.30	0.31
All Models	*Sponsor is Member of Majority Party*	0	1	0.77	0.42
	Proportion of Originating Chamber Co–Sponsoring	0.00	0.93	0.10	0.15
	President Supports	0	1	0.11	0.31
	President Opposes	0	1	0.07	0.25
	Salient Supreme Court Case	0	1	0.49	0.50
$n = 159$					

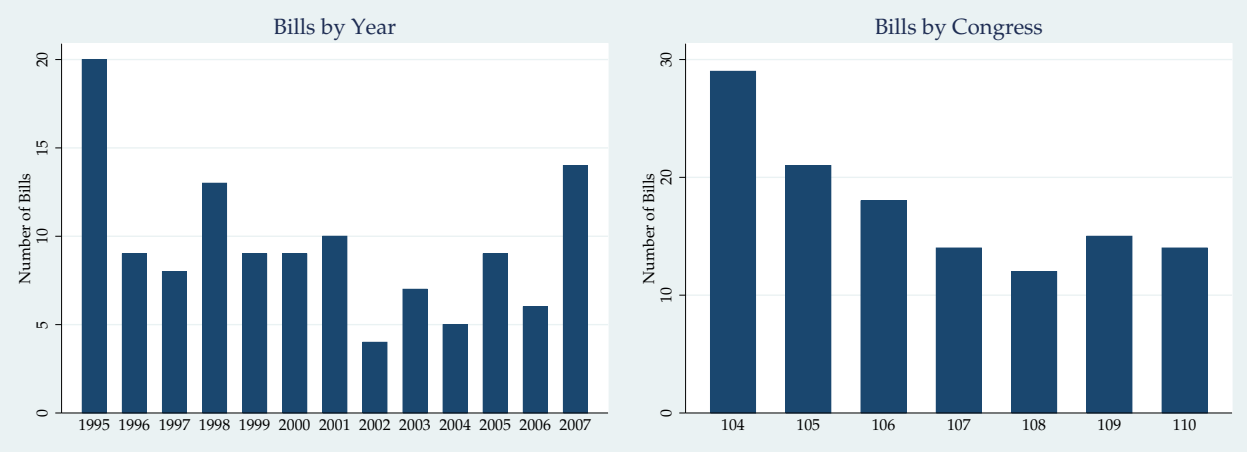


Figure 4.2: Distribution of Bills by Year and Congress

4.2 Analysis and Results

The dependent variable is a dichotomous measure that is equal to 1 when a bill passes both chambers of Congress in the same form and is sent to the president for signature.[6] I estimate all models using probit because the dependent variable is limited. I employ robust standard errors and cluster by Supreme Court case to correct for potentially correlated errors. (There are 159 observations that respond to 95 unique Supreme Court cases.) I first report the results for models using Bailey's (2007) interinstitutional ideology estimates. In Section 4.2.2, I report the findings from models using the NOMINATE/Common Space ideology measures. In each section, I estimate models that alternatively assume (1) the chamber medians in Congress are pivotal and (2) the party medians in Congress are pivotal.

As in Chapter 3, I include eight variables to evaluate the five SOP hypotheses. The five primary variables are: (1) a measure of the distance between Congress and the Court, (2) an indicator of whether or not Congress is "potentially constrained" as related to passage, (3) an interaction of the constraint indicator and a measure of the distance between Congress and the status quo policy, (4) an interaction of the constraint indicator and a measure of the distance between the current Supreme Court and the status quo policy,

[6]The results are unchanged if the dependent variable is recoded to equal 1 when a bill becomes law.

and (5) an interaction between the constraint variable and the measure of the distance between Congress and the status quo and the measure of the distance between the Court and the status quo. I also include three constitutive terms of the above interaction terms—a measure of the distance between Congress and the status quo, a measure of the distance between the Court and the status quo, and the interaction of those two variables. (I do not expect any of the last three variables to exert independent effects on the probability of bill passage.)

I also include a set of control variables that measure whether or not the primary bill sponsor is a member of the majority party in the chamber in which the bill originates,[7] a measure of the distance between the ideal point of the primary bill sponsor and the chamber (or party) median,[8] a measure of the proportion of the originating chamber cosponsoring the legislation,[9] indicators for whether the president supports or opposes legislation, and an indicator of whether the Supreme Court case to which Congress is responding is salient.

4.2.1 Models Employing Bailey Interinstitutional Ideology Estimates

Models 1 and 2 are reported in Table 4.4. These models assume the chamber medians in Congress are pivotal. Model 1 includes the eight SOP variables and five control variables. Whether or not a bill's sponsor is a member of the chamber majority perfectly predicts failure—no minority member sponsored bills pass both chambers. As a consequence, I cannot estimate an effect for this variable. It is omitted from this and all remaining models. Of course, the perfect relationship between minority status and bill failure offers conclusive evidence in favor of *Hypothesis 6*—bills sponsored by majority party members are more likely to be successful than bills sponsored by minority party members. Model 1 offers no support for the SOP hypotheses. None of the five variable

[7] Where a bill is introduced in both chambers, this variable is equal to 1 if either bill sponsor is a member of the majority party in his chamber.

[8] Where bills are introduced in both chambers, the average of the values from each chamber are included.

[9] Again, I take the average where bills are introduced in both chambers.

that characterize the relationships between Congress, the Supreme Court and the status quo are significant. The control variables also perform poorly. Only presidential support performs as expected—bills for which the president has publicly indicated support are more likely to be passed. The baseline probability of passage by both chambers when all non–interacted variables are at their means or modal values (with interaction variables appropriately adjusted) is 0.31 without presidential support. The probability of passage jumps to 0.70 with presidential support.

Model 1 includes all constitutive terms for the primary strategic interaction variables. Under limited conditions that are satisfied here, it is acceptable to estimate a model without all constitutive terms (Brambor, Clark & Golder 2006).[10] I re–estimate Model 1 omitting the three constitutive terms for which no independent effects are predicted to evaluate the possibility that the non–findings in Model 1 are the result of collinearity among the regressors that can be minimized by leaving out the variables for which my theory predicts no effects. Model 2 still offers no support for the predictions of my separation of powers model. Presidential support is again positive and significant.

Models 1 and 2 assume that the pivotal members of Congress are the chamber medians. Some scholars have argued convincingly that a chamber median model understates the significant role of parties in shaping congressional activity (Aldrich & Rohde 1997, Aldrich & Rohde 2000). I estimate another set of models that locates the congressional ideal point at the midpoint between the ideal points of the median member of the majority party within each chamber. Model 3 is presented in Table 4.5 and includes the eight SOP variables and five control variables. The evidence in support of the strategic hypotheses is weak. Only one of the variables is signed as predicted and statistically significant; the interaction between the constraint indicator and the distance between the Court and the status quo.

[10]Those conditions are (1) that theory predicts the variables to be omitted do not significantly impact the dependent variable and (2) that in the full model the variables to be omitted are statistically indistinguishable from zero.

Table 4.4: Probit Models Predicting Probability of Bill Passage: Chamber Median Model using Bailey Ideology Estimates, 1995–2002

		Model 1		***Model 2***	
	Expected	*Coefficient*	*(Robust S.E.)*	*Coefficient*	*(Robust S.E.)*
Distance between Congress and Court	−	3.70	(4.30)	−1.34	(3.84)
Potentially Constrained Congress (PCC)	−	−0.65	(0.97)	−0.27	(0.93)
*PCC * Congress/SQ Distance*	+	−8.67	(10.26)	−11.94	(10.11)
*PCC * Court/SQ Distance*	+	12.51	(10.99)	11.38	(9.62)
*PCC * Congress/SQ Distance * Court/SQ Distance*	+	100.95	(201.22)	164.51	(191.39)
Distance between Congress and Status Quo	*none*	−6.65	(4.74)		
Distance between Court and Status Quo	*none*	−5.77	(4.81)		
*Congress/SQ distance * Court/SQ distance*	*none*	32.26	(30.08)		
Sponsor in Chamber Majority	+	.	.	.	.
Distance between Sponsor and Chamber Median	−	0.08	(0.30)	−0.07	(0.30)
Proportion of Originating Chamber Co–Sponsoring	+	−1.55	(1.13)	−1.55	(1.12)
President Supports	+	1.62^{**}	(0.69)	1.49^{*}	(0.69)
President Opposes	−	0.18	(0.73)	−0.14	(0.75)
Salient Court Decision	+	−0.18	(0.38)	−0.24	(0.36)
Intercept		−0.15	(0.50)	−0.31	(0.46)
		Model Details			
		n= 81		n= 81	
		Wald $\chi^2_{(13)} = 21.17^{*}$		*Wald* $\chi^2_{(10)} = 19.66^{*}$	
		Pseudo $R^2 = 0.17$		*Pseudo* $R^2 = 0.14$	
Significance levels (one–tailed tests): * : 5% ** : 1%					

The effect of this variable cannot be simply interpreted because the components of the interaction term also appear in a number of other variables. To illustrate the substantive effect of the variable, I calculate predicted probabilities of bill passage for different configurations of the independent variables. I hold control variables at their mean/modal values. Holding the value of the variable measuring the distance between Congress and the Court at its mean, the model predicts that in the presence of constraint, the probability of bill passage increases as the distance between the Court and the status quo increases. The probability of passage is 0.46 when the distance between the Court and the status quo is 0 but rises to 0.62 when the Court–status quo variable is at its mean. The probability of passage rises to 0.77 if the Court–status quo variable is increased one standard deviation above its mean. This pattern is consistent with *Hypothesis 4* which predicts that under the conditions of potential constraint, the probability of bill passage will increase as the distance between the Supreme Court and the status quo policy increases. However, the lack of support for the related strategic hypotheses limits the weight of this finding. It makes little sense for Congress to pay attention to the relative locations of the status quo policy and the Supreme Court's preferences, while not responding systematically to its own location relative to the status quo or to the presence of constraint in general. In Model 4 (also presented in Table 4.5), I omit the constitutive terms for which no independent effects are expected. Here, I cannot reject the null hypothesis that all variables are collectively equal to zero. Because the model is insignificant, I do not consider the individual variables' effects.

I find little evidence supporting my theory of strategic Congress–Court interaction in this section. Across four models, I find support for one hypothesis.[11] The data here are limited to the 1995–2002 period. In the next section, I use alternative preference estimates

[11] I am unable to replicate several of the models that I employed in Chapter 3. In that chapter, I estimate models employing only observations where constraint is present and models including only years in which, according to the ideology estimates, the House and Senate are to the same side of the Court. My attempts to estimate those models with this data are unsuccessful. I do not have enough observations to estimate parameters and standard errors for each of the relevant variables.

that allow me to reevaluate these hypotheses within a longer timeframe.

4.2.2 Models Employing NOMINATE/Common Space Ideology Estimates

In the remaining models, I employ Poole & Rosenthal's (1997) estimates of legislator ideology and the transformed Martin–Quinn scores offered by Epstein et al. (2007) to estimate Supreme Court preferences. For Models 5, 6, and 7 the congressional ideal point is assumed to be located at the midpoint between the chamber medians. Model 5 is the full model and includes the eight strategic variables and five controls. Model 6 excludes the constitutive terms for which no independent effects are reported. Model 7 includes only the years where the House and Senate are located to the same side of the Court. This is the subset of observations for which the characterization of Congress as a unitary actor is the most defensible and should provide an easier test of the theory.

The results are consistent across the models. In each model, the interaction between the constraint indicator and the distance between Congress and the status quo is significant. This finding offers support for *Hypothesis 3*. The remaining strategic hypotheses are unsupported. The models also offer support for two of the supplementary hypotheses. As the number of cosponsors for a bill increases, so does the probability of passage. Also, presidential support is identified as a significant predictor of bill success.

An analysis of predicted probabilities illustrates the substantive effects of the significant variables. (I rely on Model 6 for the calculation of predicted probabilities.) The baseline probability for passage is 0.20. This is calculated holding all continuous non–interacted variables at their means and all dichotomous variables at their modes. The values of interaction terms are appropriately adjusted. The average bill is not salient and is not supported or opposed by the president. If this average bill gains the support of the president, its probability of passage increases to 0.84. The impact of additional cosponsors is more modest. The average bill is supported by 10% of its chamber. Doubling the number of cosponsors increases the probability of passage from 0.20 to 0.24.

Table 4.5: Probit Models Predicting Probability of Bill Passage: Party Median Model using Bailey Ideology Estimates

		Model 3		***Model 4***	
	Expected	*Coefficient*	*(Robust S.E.)*	*Coefficient*	*(Robust S.E.)*
Distance between Congress and Court	$-$	2.23	(10.67)	1.12	(2.45)
Potentially Constrained Congress (PCC)	$-$	-0.26	(2.64)	-0.08	(2.38)
*PCC * Congress/SQ Distance*	$+$	1.06	(5.71)	1.30	(5.19)
*PCC * Court/SQ Distance*	$+$	15.97^{*}	(8.32)	3.82	(6.90)
*PCC * Congress/SQ Distance * Court/SQ Distance*	$+$	-21.32	(29.13)	-9.17	(15.87)
Distance between Congress and Status Quo	*none*	-0.76	(10.24)		
Distance between Court and Status Quo	*none*	-13.21	(9.10)		
*Congress/SQ distance * Court/SQ distance*	*none*	10.27	(22.82)		
Sponsor in Chamber Majority	$+$	.	.	.	.
Distance between Sponsor and Party Median	$-$	0.14	(0.36)	-0.01	(0.36)
Proportion of Originating Chamber Co–Sponsoring	$+$	-0.59	(1.23)	-0.44	(1.32)
President Supports	$+$	1.66^{*}	(0.74)	1.50^{**}	(0.64)
President Opposes	$-$	0.29	(0.69)	-0.03	(0.67)
Salient Supreme Court Decision	$+$	-0.38	(0.37)	-0.42	(0.36)
Intercept		-1.22	(1.58)	-1.23	(1.32)
		Model Details			
		n= 81		n= 81	
		Wald $\chi^2_{(13)} = 717.18^{**}$		*Wald* $\chi^2_{(10)} = 9.20$	
		Pseudo $R^2 = 0.18$		*Pseudo* $R^2 = 0.13$	
Significance levels (one–tailed tests): * : 5% ** : 1%					

The impact of the interaction between the constraint indicator and distance between the Congress and the status quo is again complicated by the number of interaction terms. An analysis of predicted probabilities indicates that for low and medium values of the Court–status quo distance variable, *Hypothesis 3* is supported. When the distance between the Court and the status quo is at its mean and the potential constraint variable is equal to 1, the probability of bill passage increases as the distance between Congress and the status quo increases. When the Congress–status quo distance variable is equal to zero, the probability of passage is 0.30. The probability of passage is equal to 0.45 when the Congress–status quo variable rises to its mean value. The probability of passage rises to 0.62 when the Congress–status quo variable is one standard deviation above its mean. This relationship, however, does not hold for higher values of the Court–status quo distance variable. *Hypothesis 3* is supported but the overall evidence in support of the strategic account is weak.

I next adopt the "party median" framework and re–assess the hypotheses. Model 8 is the full model. Model 9 omits the three constitutive terms for which no independent effects are predicted. The results of these models are presented in Table 4.7. These models offer the most support for the SOP predictions. In Model 8, two of the strategic variables are appropriately signed and statistically significant, including the indicator for the presence of constraint. This indicates support for *Hypothesis 2*—that Congress is less likely to pass legislation when the status quo policy is located between the ideal points of Congress and the Court than when Congress and the Court are located to the same side of the status quo policy. Both models also support *Hypothesis 3*—that under constraint, Congress becomes more likely to pass legislation as it is further removed from the status quo policy. Model 9 also offers support for *Hypothesis 4* which predicts that under constraint, the distance between the Supreme Court and the status quo will be positively associated with probability of bill passage. Both models identify a positive and significant relationship between presidential support and bill passage but the remaining control variables fail to

Table 4.6: Probit Models Predicting Probability of Bill Passage: Chamber Median Model using Common Space Ideology Estimates

		Model 5		***Model 6***		***Model 7***	
	Expected	*Coeff.*	*(Robust S.E.)*	*Coeff.*	*(Robust S.E.)*	*Coeff.*	*(Robust S.E.)*
Distance between Congress and Court	$-$	-1.70	(4.61)	-3.51	(2.18)	6.09	(14.31)
Potentially Constrained Congress (PCC)	$-$	-0.10	(0.53)	0.03	(0.51)	-2.03	(1.28)
*PCC * Congress/SQ Distance*	$+$	19.43^{**}	(6.00)	18.77^{**}	(5.40)	45.90^{**}	(16.22)
*PCC * Court/SQ Distance*	$+$	-0.50	(6.13)	4.68	(5.44)	9.17	(10.36)
*PCC * Congress/SQ Distance * Court/SQ Distance*	$+$	-135.04	(100.06)	-206.72	(67.21)	-436.62	(278.99)
Distance between Congress and Status Quo	*none*	-2.50	(6.11)			-14.86	(18.04)
Distance between Court and Status Quo	*none*	3.47	(7.36)			-8.89	(19.27)
*Congress/SQ distance * Court/SQ distance*	*none*	-68.50	(77.47)			13.64	(163.93)
Sponsor in Chamber Majority	$+$	.	.	.	.	.	.
Distance between Sponsor and Chamber Median	$-$	0.74	(1.05)	0.56	(1.05)	7.04	(3.77)
Proportion of Originating Chamber Co–Sponsoring	$+$	1.49^{*}	(0.89)	1.50^{*}	(0.87)	5.68^{**}	(2.08)
President Supports	$+$	1.76^{**}	(0.51)	1.82^{**}	(0.49)	3.94^{**}	(1.08)
President Opposes	$-$	-0.29	(0.72)	-0.37	(0.69)	.	.
Salient Supreme Court Decision	$+$	-0.26	(0.27)	-0.27	(0.28)	-0.54	(0.95)
Intercept		-0.86^{*}	(0.45)	-0.92^{**}	(0.40)	-2.63	(1.30)
		Model Details					
		$n=123$		$n=123$		$n=44$	
		Wald $\chi^2_{(13)} = 45.99^{**}$		*Wald* $\chi^2_{(10)} = 39.49^{**}$		*Wald* $\chi^2_{(12)} = 71.61^{**}$	
		Pseudo $R^2 = 0.28$		*Pseudo* $R^2 = 0.25$		*Pseudo* $R^2 = 0.69$	
Significance levels (one–tailed tests): * : 5% ** : 1%							

attain statistical significance.

I again rely on predicted probabilities to illustrate the substantive impact of the statistically significant variables. Although the signs and significance of the independent variables reveal which hypotheses are supported, it is important to note that the effects of the variables vary with the values of other independent variables. I hold the value of the Congress–Court distance variable at its mean and the control variables at their mean or modal categories. In the absence of constraint, the probability of bill passage is 0.27 across the range of values of the Court–status quo and Congress–status quo distance variables. The significance of the *Potentially Constrained Congress* variable indicates that *Hypothesis 2* is supported. Congress is less likely to pass legislation when the status quo is located between the ideal points of the Congress and the Court. Consideration of predicted probabilities reveals that this finding holds for most values of the significant distance variables. When both the Congress–status quo and Court–status quo variables are 1 standard deviation below their means, the probability of bill passage is 0.27 in the absence of constraint and 0.07 in the presence of constraint. Similarly, when both distance variables are one standard deviation above their means, the probability of passage is 0.27 in the absence of constraint and 0.11 in the presence of constraint. These patterns lend support to *Hypothesis 2*. There are some middling ranges where the probability of bill passage is not significantly lower under constraint.

Holding the Court–status quo variable at its mean, I consider the impact of the Congress–status quo variable when *Potentially Constrained Court* is equal to 1. The probability of passage is 0.13 when the Congress–status quo variable is equal to 0. The probability of bill passage rises to 0.36 when the variable is equal to its mean and rises further to 0.68 when the Congress–status quo variable is one standard deviation above its mean. These data are consistent with *Hypothesis 3*. (This relationship holds for lower values of the Congress–status quo variable, but not for high values.)

Next, I hold the Congress–status quo variable at its mean to evaluate the impact of the

Table 4.7: Probit Models Predicting Probability of Bill Passage: Party Median Model using Common Space Ideology Estimates

		Model 8		***Model 9***	
	Expected	*Coefficient*	*(Robust S.E.)*	*Coefficient*	*(Robust S.E.)*
Distance between Congress and Court	$-$	8.96	(11.21)	-0.11	(1.46)
Potentially Constrained Congress (PCC)	$-$	-3.65^{**}	(1.14)	-3.60^{**}	(1.15)
*PCC * Congress/SQ Distance*	$+$	14.94^{**}	(3.92)	15.52^{**}	(3.99)
*PCC * Court/SQ Distance*	$+$	21.74	(19.20)	32.02^{**}	(10.16)
*PCC * Congress/SQ Distance * Court/SQ Distance*	$+$	-134.58	(40.26)	-142.38	(38.79)
Distance between Congress and Status Quo	*none*	-8.53	(10.77)		
Distance between Court and Status Quo	*none*	1.16	(9.88)		
*Congress/SQ distance * Court/SQ distance*	*none*	-6.05	(29.94)		
Sponsor in Chamber Majority	$+$	.	.	.	.
Distance between Sponsor and Party Median	$-$	1.06	(0.95)	0.98	(1.09)
Proportion of Originating Chamber Co–Sponsoring	$+$	1.07	(0.95)	1.22	(0.88)
President Supports	$+$	1.70^{**}	(0.42)	1.72^{**}	(0.45)
President Opposes	$-$	-0.00	(0.83)	-0.17	(0.75)
Salient Supreme Court Decision	$+$	-0.33	(0.28)	-0.29	(0.29)
Intercept		-0.97	(0.72)	-1.02	(0.62)
		Model Details			
		$n = 123$		$n = 123$	
		Wald $\chi^2_{(13)} = 59.16^{**}$		*Wald* $\chi^2_{(10)} = 36.91^{**}$	
		Pseudo $R^2 = 0.27$		*Pseudo* $R^2 = 0.25$	
Significance levels (one–tailed tests): * : 5% ** : 1%					

Court–status quo variable. *Hypothesis 4* predicts that the probability of bill passage will increase with the distance between the Supreme Court and the status quo under potential constraint. The predicted relationship is only evident for low values of the Congress–status quo distance variable. When the Congress–status quo variable is one standard deviation below its mean, the probability of bill passage increases as the distance between the Court and the status quo policy increases. The probability of bill passage is 0.07 when the Court–status quo distance variable is equal to zero but rises to 0.28 if the Court–status quo variable is one standard deviation above its mean. (This relationship holds for other values of the Congress–Court distance variable.) Although the relationship does not hold for all configurations of the independent variables, when Congress is close to the status quo policy, it responds as predicted to the relative location of the Court to the status quo policy.

4.3 Discussion

The evidence supporting the prediction of separation of powers theory that Congress will refrain from enacting legislation because of the anticipation of negative treatment by Congress is, at best, mixed. I propose five strategic hypotheses and two are wholly unsupported. Under no model specification do I find evidence that Congress responds systematically to its distance from the Supreme Court. (This is *Hypothesis 1*.) This is the primary prediction of my separation of powers model. If members of Congress were to respond to only one of the strategic variables, I would expect it to be this one. *Hypothesis 5*—which predicts that when the distance between Congress and the status quo and the distance between the Court and the status quo increase the probability of passage will increase—also receives no support.

The other three strategic hypotheses garner at least partial support, but some findings are not robust to the alternative model specifications. While, I would not necessarily expect relationships to hold across models that characterize congressional decisionmaking

differently, several of the findings here are not robust to alternative model specifications using the same framework and ideology estimates. *Hypothesis 4*, for example, predicts that when the status quo policy is located between the ideal points of Congress and the Supreme Court the probability of bill passage will increase with distance between the status quo and the Court. This hypothesis is supported in one of the the party median model specifications in each section (Models 3 and 9), but is not significant in models whose specifications differ modestly.

Hypothesis 3 predicts that distance between Congress and the status quo will be positively associated with the probability of bill passage when the status quo is located between the ideal points of Congress the Court. This hypothesis is supported in all of the models that employ the NOMINATE/Common Space ideology measures. The failure of this relationship to manifest itself in the models that employ the Bailey ideology estimates is probably a consequence of the limited number of observations in the analysis. I re–estimate the models that employ the NOMINATE/Common Space ideology measures including only those years included in the models that employ the Bailey estimates. When these additional observations are excluded, the hypothesis is not supported in four of the five models.[12] This gives me a high degree of confidence that the support for *Hypothesis 3* is not a fluke.

Hypothesis 2 predicts that under the conditions of potential constraint as to passage (when the status quo policy is located between the ideal points of Congress and the Court), Congress will be less likely to enact legislation than when Congress and the Court are to the same side of the status quo. This hypothesis is supported only in the party median models that employ the NOMINATE/Common Space preference estimates.

Only two of the control variables consistently perform as expected. Membership in the minority party is a perfect predictor of bill failures indicating the majority members bills are significantly more likely to be passed than those of minority members. Presidential

[12] Analyses not shown.

support is consistently identified as a predictor of bill success. Interestingly, presidential opposition does not exert a significant effect.

The analyses presented here offer slightly more evidence in favor of the predictions derived in Chapter 2 than the analyses in Chapter 3. This is encouraging since the set of bills considered in this chapter ought to provide an easier test of the theory. However, the consistent lack of findings for *Hypothesis 1* and *Hypothesis 5* and the fragility of the findings supporting *Hypotheses 2* and *4* suggest that, although Congress may respond to characteristics of the institutional environment when deciding whether or not to pass legislation, this behavior does not conform with the standard expectations of the separation of powers model, at least not as it relates to passage. These analyses leave open the possibility that Congress responds to the threat of negative treatment by the Supreme Court by strategically locating policy to avoid modification by the Supreme Court. This analysis has assumed that bill content perfectly reflects the ideal point of its sponsor. Future research should consider the substance of responsive legislation to assess the hypothesis that policy is located strategically to deter revisions and invalidations by the Court. A full consideration of the strategic location of policy is beyond the scope of this project, but the analyses in Chapters 5 and 6 offer preliminary evidence that, at least in the area of constitutional decisionmaking, members of Congress engage in the strategic location of policy and are effective at locating policy to avoid negative review.

Chapter 5

An Analysis of the Substance of Responsive Legislation

In this chapter I begin to ascertain the substantive effects of legislation passed in response to the constitutional decisions of the United States Supreme Court. As indicated in Chapter 2, in order to conclude that Congress can effectively override the Court, it must be demonstrated that (1) Congress can reverse the legal and/or policy implications of the Court's constitutional decisions and (2) that those statutes are not subsequently invalidated in the federal courts.[1] I echo Pickerill's (2004) argument that existing studies of congressional response overstate the frequency with which Congress overrides or challenges the Court's constitutional interpretations because they fail to account for variation in the nature of congressional responses to the Court's decisions. In this chapter, I present descriptive information about the frequency and timing of responses to the Court's constitutional decisions and analyze the substance of sixty–seven responsive bills to assess the extent to which they attempt to "reverse" the decisions announced by the Supreme Court. In the final portion of this chapter, I analyze the relationship between the content of proposed responsive statutes and the probability that they are enacted. (An analysis of subsequent judicial interpretations of responsive legislation is presented in Chapter 6.) My approach provides a balance between the two dominant modes of studying

[1]Claims that Congress can reverse the Court's statutory interpretation decisions are non–controversial so I do not consider statutory interpretation cases.

congressional responses to the Court. "Coordinate construction" scholars typically provide detailed case–study evidence. Formal theoretic and large–n quantitative analyses of congressional responses to the Court provide more breadth and systematic data, "but they lack detail and context regarding the substantive nature of congressional responses" (Pickerill 2004, 34). My analysis falls between these two extremes. The sample size is large enough that I can apply statistical techniques to evaluate causal hypotheses but small enough that I can provide detail about the individual cases.

Whether or not Congress can alter the impact of the Court's constitutional rulings is debated. While some scholars argue that the only recourse available to alter the Court's constitutional decisions is the constitutional amendment process (Bickel 1962, Black 1960, Snowiss 1990), others assert that Congress can and does affect the impact of the Court's constitutional decisions through the passage of ordinary legislation (Agresto 1984, Choper 1980, Dimond 1989, Meernik & Ignagni 1997). I accept the argument advanced by the latter group of authors but question the aptness of characterizing these bills as "reversals" in the absence of evidence that the bills have the practical effect of reversing the Court's decisions. It is plausible that congressional responses, while impacting the application of the Court's precedents, fall short of overturning the Court's rulings.

Like Meernik & Ignagni (1997), I argue that Congress is able to modify the impact of the Court's constitutional rulings through the passage of ordinary legislation. Unlike those authors, I argue that congressional responses will frequently fail to reverse the constitutional decisions of the Supreme Court. The crux of my critique is based on the disconnect between the characterization of what constitutes "decision–reversal" legislation and the conclusions drawn about Congress's ability to reverse the Supreme Court. Meernik & Ignagni (1997) classify every bill that would modify the impact of a Supreme Court decision as a reversal bill and conclude that Congress can reverse the constitutional decisions of the Supreme Court because some bills that would (at least) modify the impact of Supreme Court decisions are enacted. I contend that "modifying" the impact of a

Court decision is not the same as "reversing" a decision. I hypothesize that there is substantial variation in the nature of responses to Court decisions. Classifying all responsive legislation as "decision–reversal" legislation may obscure significant response characteristics that bear on the question of Congress's ability to negate the impacts of the Supreme Court's constitutional decisions.

The application of the language of "overrides" and "reversals" to all bills that respond to the constitutional decisions of the Court is problematic. Furthermore, it is unclear what scholars mean when they talk about reversing the Court's constitutional decisions. In the area of statutory interpretation, Congress can reverse the policies announced by the Court. When the Court exercises judicial review and Congress responds, Congress may attempt to modify the policy at issue or the constitutional interpretation. In recent years, a group of legal scholars have focused on Congress's shared role in shaping constitutional interpretations arguing that Congress and other government institutions should engage in "coordinate construction" of the Constitution or "departmentalism" (Burgess 1992, Burt 1992, Dimond 1989, Fisher 1988, Jacobsohn 1986, Levinson 1988, Macedo 1990, Murphy 1986, Nagel 1989). The approach of these scholars is jurisprudential and focuses more on the state of law than the state of public policy. This contrasts sharply with the primary focus in political scientists' studies of Congress–Court interaction on policy preferences and policy outcomes. Pickerill (2004) marries these approaches in his analysis of constitutional deliberation. He accepts that there is truth in both approaches but that neither, in isolation, is adequate. He contends that the "coordinate construction" approaches

> can be made more complete by accounting for the strategic motivations underlying much of the constitutional debate that takes place in Congress while the rational–choice theories and relevant statistical studies are often reductionist and incomplete and fail to account for many of the contextual factors that influence process, debate, and statutory language in Congress (Pickerill 2004,

20).

I also consider both the policy and legal implications of responsive legislation to gauge the extent to which responsive bills would effect reversals of Court decisions. As discussed in Chapter 2, I assume that members of Congress are motivated by their preferences over public policy while the Supreme Court's justices have preferences over policy and law. To characterize congressional responses to the Court's decisions, I focus on both the legal dimension and the policy dimension and consider the extent to which each proposed responsive bill would reverse the Court's decision on each dimension.

I anticipate that some statutory responses will attempt to reverse the policy and/or legal implications of the relevant Supreme Court decision while others will have narrower effects. If Congress makes major policy concessions or restricts the scope of a policy in response to a Court decision, it should not be characterized as a "decision–reversal" attempt. Simply put, I evaluate Meernik & Ignagni's (1997) implicit assumption that congressional responses to the Court's constitutional decisions effectively reverse those decisions. I consider the substance of responsive bills in order to separate those that reverse the legal holding or policy impacts of a decision from those that have narrower impacts. If a majority (or a significant minority) of responsive bills fail to reverse the rulings of the Court, the relationship between Congress and the Court is much different than the ideal type suggested by coordinate construction scholars in which Congress actively asserts a role in interpreting the Constitution or the picture presented by Meernik & Ignagni (1997) who aver Congress frequently "overrides" the constitutional decisions of the Supreme Court.

In this Chapter, I evaluate the following hypotheses:

> ***Hypothesis 1****: The majority of bills* proposed *in response to the constitutional decisions of the Supreme Court would not have the practical effect of "reversing" the relevant Court decision.*
>
> ***Hypothesis 2****: The majority of statutes* enacted *in response to the constitutional decisions*

of the Supreme Court do not have the practical effect of "reversing" the relevant Court decision.

***Hypothesis 3**: Responsive bills that attempt to reverse constitutional decisions of the Supreme Court are less likely to be passed than responsive bills that do not attempt to reverse Court decisions.*

5.1 Variation in the Subject and Timing of Responsive Legislation

In this section, I present descriptive information about Congress's statutory responses to the Supreme Court's constitutional decisions and review the intended substantive effects of the legislative proposals. The data that provide the basis of the analyses herein are drawn from searches of the *Congressional Record*. I discuss sixty–seven bills introduced between 1995 and 2007 in response to twenty–five constitutional decisions of the Supreme Court. To identify these bills, my research assistants and I found every instance in which the phrase "Supreme Court" was included in the *House*, *Senate*, and *Extensions of Remarks* sections of the *Congressional Record*. I then culled this data to include only documents that indicate a specific bill (or portion of a specific bill) was introduced in response to a specific decision (or decisions) of the Supreme Court. I further limited the sample to eliminate responses to the Court's statutory interpretation decisions and cases in which the Supreme Court declines to rule on the presented constitutional question.[2] I rely on Spaeth's (2008) Original United States Supreme Court Judicial Database to identify the Court's constitutional decisions. Constitutional cases include those in which the majority determines the constitutionality of some action taken by some unit or official of the federal government, a state government, or a local government (AUTH_DEC=1 or 2). Table 5.1 reports the Supreme Court cases that trigger responsive legislation and the associated bills. These bill–case pairs provide the basis for the empirical analyses presented here and in Chap-

[2]For example, in *Raines v. Byrd* (1997), several members of Congress brought suit challenging the constitutionality of the Line Item Veto Act as a violation of the Presentment Clause of Article I. The Court avoided the question of the Act's constitutionality by holding that the members lacked standing to maintain their suit. A search of the *Congressional Record* indicates that a provision of the Use of Force Act (105 S. 2387) responded to the Court's *Byrd* decision. Since the response is not related to the Court's treatment of a constitutional question, it is not included in the sample here.

ter 6.

In several instances, multiple bills were introduced in response to a Supreme Court decision in the same Congress. The Library of Congress's *THOMAS* website identifies related bills. Where multiple bills are introduced with the same objective, I assume that the bill that enjoys the most legislative activity is the primary vehicle for policy change in an issue area and include that bill in the sample. Where multiple bills with the same objective are introduced and fail at the same stage, I choose one of the bills at random.

Table 5.1: Supreme Court Case–Responsive Bill Pairs

Supreme Court Case	***Responsive Bill***
Case Name (Year)	*Bill Name* (Year), *Bill Number*
United States v. Harriss (1954)	*Lobbying Disclosure Act of 1995*, 104 H.R. 2564
Branzburg v. Hayes (1972)	*Free Flow of Information Act of 2005*, 109 H.R. 3223
	Free Flow of Information Act of 2007, 110 H.R. 2102
Roe v. Wade (1973)	*Right to Life Act of 1995*, 104 H.R. 1625
	Right to Life Act of 1997, 105 H.R. 641
	Right to Life Act of 1999, 106 H.R. 639
	Right to Life Act of 2001, 107 H.R. 2763
	Right to Life Act of 2003, 108 H.R. 3069
	Right to Life Act (2005), 109 H.R. 552
	Right to Life Act (2007), 110 H.R. 618
	Unborn Victims of Violence Act (1999), 106 H.R. 2436
	Unborn Victims of Violence Act (2001), 107 H.R. 503
	Unborn Victims of Violence Act of 2004, 108 H.R. 1997
Morton v. Mancari (1974)	*Native American Equal Rights Act of 2000*, 106 H.R. 5523
Buckley v. Valeo (1976)	*Senate Campaign Finance Reform Act of 1995*, 104 S. 1219
	Bipartisan Campaign Reform Act of 2002, 107 H.R. 2356
Gregg v. Georgia (1976)	*Federal Death Penalty Abolition Act of 1999*, 106 S. 1917
	Federal Death Penalty Abolition Act of 2001, 107 S. 191
	Federal Death Penalty Abolition Act of 2003, 108 S. 402
	Federal Death Penalty Abolition Act of 2005, 109 S. 122
	Federal Death Penalty Abolition Act of 2007, 110 S. 447
Bakke v. California Board of Regents (1978)	*Riggs Amendment to the Higher Education Act of 1998*, 105 H.R. 6

Plyler v. Doe (1982)	*Gallegly Amendment to the Immigration in the National Interest Act of 1995*, 104 H.R. 2202
Missouri v. Jenkins (1990)	*Fairness in Judicial Taxation Act of 1996*, 104 S. 1817
	Judicial Improvements Act, 105 S. 2163
United States v. Eichman (1990)	*Flag Protection Act of 1999*, 106 S. 931
	Flag Protection Act of 2004, 108 S. 2259
	Flag Protection Act of 2005, 109 S. 1370
Rust v. Sullivan (1991)	*Women's Right to Know Act*, 104 H.R. 3178
Simon and Schuster v. Crime Victims Board (1991)	*Federal Son of Sam Legislation*, 105 S. 2345
	Federal Son of Sam Legislation, 106 S. 816
Quill Corporation v. North Dakota (1992)	*Enzi–Dorgan Amendment to the Internet Tax Nondiscrimination Act*, 107 H.R. 1552
Planned Parenthood v. Casey (1992)	*Nickles Amendment to the Treasury, Postal Service, and General Government Appropriations Act of 1996*, 104 H.R. 2020
	Partial Birth Abortion Ban Act of 1995, 104 H.R. 1833
	Partial-Birth Abortion Ban Act of 1997, 105 H.R. 1122
	Partial Birth Abortion Ban Act of 2000, 106 H.R. 3660
	Child Interstate Abortion Notification Act (2005), 109 H.R. 748
Herrera v. Collins (1993)	*Conyers Amendment to the Witness Protection and Interstate Relocation Act of 1997*, 105 H.R. 2181
C&A Carbone v. Clarkstown (1994)	*Interstate Transportation of Municipal Solid Waste Act of 1995*, 104 S. 534
	Local Government Interstate Waste Control Act (1997), 105 S. 448
	Solid Waste Interstate Transportation and Local Authority Act of 1999, 106 S. 663
	Solid Waste Interstate Transportation and Local Authority Act of 2001, 197 S. 1194
Oklahoma Tax Commission v. Jefferson Lines (1994)	*ICC Termination Act of 1995*, 104 H.R. 2539 (section 14505)
United States v. Lopez (1995)	*Gun–Free School Zones Amendments Act of 1995*, 104 H.R. 3610
Seminole Tribe of Florida v. Florida (1996)	*USERRA Amendments Act of 1998*, 105 H.R. 3213
Boerne v. Flores (1997)	*Religious Liberty and Charitable Donations Protection Act* (1997), 105 S. 1244
	Religious Liberty Protection Act (1999), 106 H.R. 1691
	Religious Land Use and Institutionalized Persons Act (2000), 106 S. 2869
United States v. Bajakajian (1998)	*Drug Currency Forfeitures Act* (1998), 105 S. 2449

	Uniting and Strengthening America Act (2001), 107 S. 1510
Clinton v. City of New York (1998)	*Ryan Amendment to the Spending Control Act of 2004*, 108 H.R. 4663
Florida Prepaid v. College Savings Bank (1999)	*Intellectual Property Protection Restoration Act* (2003), 108 S. 1191
Kimel v. Florida Board of Regents (2000)	*Older Workers' Rights Restoration Act of 2000*, 106 S. 3008
	Civil Rights Act of 2004, 110 S. 2008
Rice v. Cayetano (2000)	*Native Hawaiian Government Reorganization Act*, 107 S. 81
	Native Hawaiian Recognition Act of 2003, 108 S. 344
	Native Hawaiian Government Reorganization Act (2006), 109 S. 147
	Native Hawaiian Government Restoration Act of 2007, 110 H.R. 505
U.S. v. Morrison (2000)	*Violence Against Women Authorization Act*, 106 H.R. 3244
Stenberg v. Carhart (2000)	*Partial–Birth Abortion Ban Act of 2002*, 107 H.R. 4965
	Partial–Birth Abortion Ban Act of 2003, 108 S. 3
Trustees of University of Alabama v. Garrett (2001)	*Civil Rights Restoration Act of 2006*, 109 S. 3823
Ashcroft v. Free Speech Coalition (2002)	*PROTECT Act of 2002*, 107 S. 2520
	PROTECT Act (2003), 108 S. 151
Kelo v. City of New London (2005)	*Private Property Rights Protection Act of 2005*, 109 H.R. 4128
	Amendments to the Wild and Scenic River Act (2007), 110 H.R. 986
Hudson v. Michigan (2006)	*Hinchey Amendment to Appropriations Bill FY2007, Commerce, Justice, Science, State*, 110 H.R. 5672

5.1.1 Issues Addressed by Responsive Bills

The list of cases in Table 5.1 is dominated by the Court's salient decisions. According to Epstein & Segal's (2000) measure of case salience, by which cases receiving front–page coverage in the *New York Times* the day after their announcements are considered salient, 84 percent of the cases (26 of 31) in the sample are salient. Over 86 percent of the responsive bills (58 of 67) are introduced to counter salient decisions. This suggests that, as

hypothesized by Meernik & Ignagni (1997), salient cases are more likely to be met with congressional responses than non–salient cases. It is not surprising, then, that the bulk of cases in the sample address issues commonly thought of as "hot–button issues" and that several cases generate multiple response attempts. Sixteen cases generate multiple response attempts with *Roe v. Wade* (1973) unsurprisingly prompting the highest number of responsive bills (10). Figure 5.1 and Table 5.2 classify response attempts by the issue addressed in the antecedent Supreme Court case.[3] Nearly half of the cases in the sample (49%) address the Court's abortion and First Amendment decisions. The remaining cases address civil rights, criminal procedure, due process, economic activity, and federalism. (Individual response attempts will be discussed in detail in the section below.)

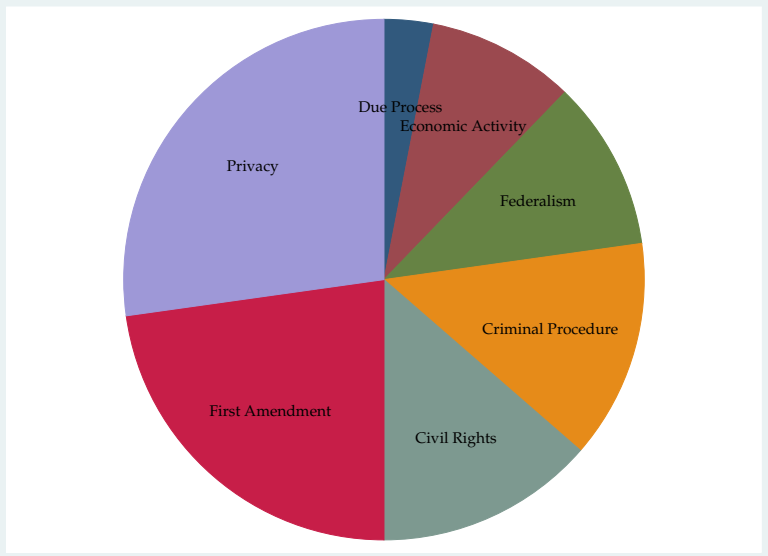


Figure 5.1: Response Attempts by Issue Area

5.1.2 Frequency and Timing of Responses

I identify responsive bills introduced between 1995 and 2007. Figure 5.2 reports the number of response attempts by year and by Congress.[4] An average of 5.15 responsive

[3]These data are drawn from The United States Supreme Court Judicial Database's VALUE and ISSUE variables. (Spaeth 2008).

[4]Note that the 110th Congress runs from January 2007–January 2009, and accordingly the data for that Congress reflect only the first session.

Table 5.2: Response Attempts by Issue Area

	Issue Area	*Response Attempts*
Privacy	*Abortion*	18
First Amendment	*Free Exercise of Religion*	3
	Obscenity	2
	Protest Demonstrations	4
	Campaign Spending	2
	Miscellaneous	4
Civil Rights	*Voting*	4
	Affirmative Action	2
	Access to Public Education	1
	Desegregation, schools	2
Economic Activity	*State Tax*	2
	State Regulation of Business	4
Federalism	*National Supremacy (miscellaneous)*	7
Criminal Procedure	*Cruel and Unusual Punishment (not death penalty)*	2
	Cruel and Unusual Punishment (death penalty)	6
	Search and Seizure	1
Due Process	*Takings Clause*	2
Miscellaneous		1

bills are initiated in a year. (The average per Congress—calculated excluding the 110th—is 10.33.) There is variation in the number of responses that are attempted in each year, however. 1996 saw the fewest number of responsive bills (2), while 1999 saw the most (9). A cursory examination of Figure 5.2 suggests that more responsive provisions are usually introduced in the first session of a Congress. For all but one of the Congresses in the study, the number of bills introduced in the first session is greater than the number of bills introduced in the second session. This pattern extends to bills in general, with more bills being introduced in the first session of a Congress than the second session for all of the years in the sample. These patterns are consistent with the theory of revolving gridlock offered by Brady & Volden (2006) who argue that the main impetus for policy change is electoral change. Dramatic changes in the composition of Congress may motivate new majorities to challenge newly vulnerable status quo policies that were previously un–moveable. The years 1995 and 2007 are among the years with the most re-

sponsive legislative activity. The midterm elections of 1994 returned control of the House to Republicans for the first time since 1954. (Republicans also regained control of the Senate.) The midterm elections of 2006 conversely ushered in a period of Democratic control of both chambers of Congress. It is possible that these electoral shocks contributed to the increased frequency of responses to existing Court decisions in 1995 and 2007. The evidence is suggestive, however, the limited temporal period under consideration and the small number of observations in the sample make a definitive conclusion unsustainable.

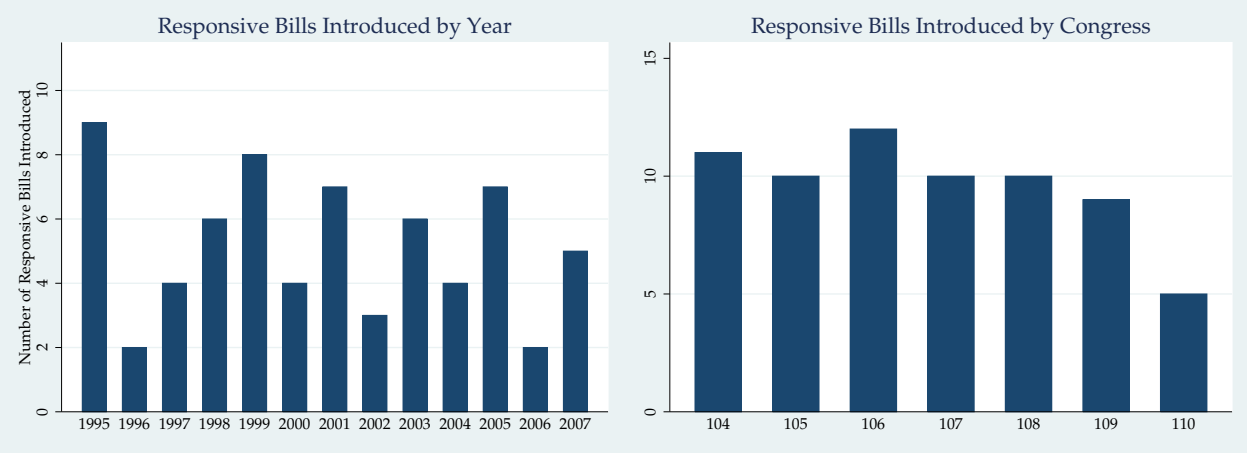


Figure 5.2: Number of Responsive Bills Introduced by Year and Congress

Figure 5.3 illustrates the age of the Supreme Court cases to which Congress responds between 1995 and 2007. In this period, an average of 13.65 years elapses between the announcement of a decision and the initiation of a congressional response. This number is misleading, however, because the distribution of the time–to–response variable is not uniform. Thirty–nine percent of response attempts are initiated within four years of the antecedent Supreme Court decision while 33 percent of bills respond to decisions that are more than 20 years old.

5.2 Variation in the Intended Effects of Responsive Bills

The characteristics reviewed above demonstrate that there is variation in the subjects addressed through responsive legislation and the timing of those responses. My primary

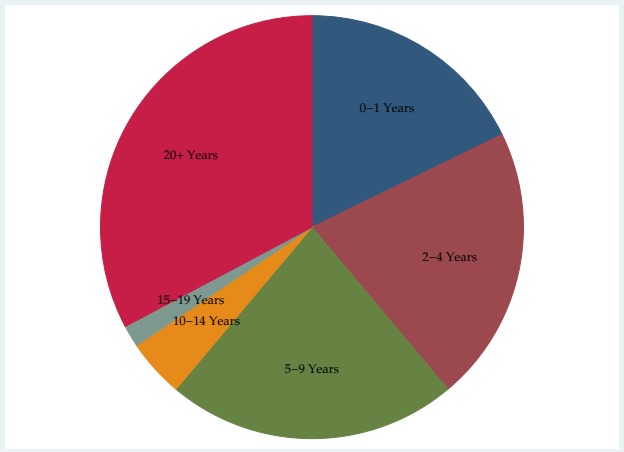


Figure 5.3: Years Between Supreme Court Decision and Initiation of Responsive Bills

interest, however, is in variation in the goals and impacts of responsive bills. Recall that Meernik & Ignagni (1997, 463) conclude that "determined and…united majorities can be quite effective in reversing Court decisions." This conclusion can only be supported if responsive bills have the practical effect of reversing Court decisions.

I classify each bill based on whether it would reverse the legal holding announced by the Supreme Court and whether it would reverse the policy impact of the Supreme Court decision. I employ a tripartite coding scheme for each dimension and classify each bill as *non–reversing*, *partially reversing*, or *completely reversing*. To classify the bills, I rely primarily on statements of members of Congress to characterize the intended political and legal implications of responsive legislation. Relying on statements of members of Congress to classify bill objectives is not a perfect method. It is plausible that bill opponents will routinely attack legislation for attempting to overturn the Court. If this strategy is widespread, I should find my sample dominated by bills identified as responses to the Court by bill opponents. This hypothesis is not borne out by the data. While some bills are identified because of opponents' references to the Supreme Court, 75 percent of the bills are identified as responsive legislation by their supporters. Another potential problem with the approach is that members of Congress often fail to distinguish between the legal and policy implications of proposed legislation. Where members' statements did

not clarify the intended goal of the responsive bill, I looked for additional discussions about the relevant bill in the *Congressional Record*, compared original and responsive bill text, and read bill summaries in the *Congressional Quarterly Almanac* and *United States Code Congressional and Administrative News* to ascertain the intended effects of introduced legislation.

On the legal dimension, the coding of bills depends on the extent to which responsive legislation would require the Supreme Court to decide the same constitutional question differently if the responsive bill was enacted and challenged. Meernik & Ignagni (1997, 451) suggest several ways that Congress may attempt to reverse a constitutional ruling of the Supreme Court:

> Congress may rewrite legislation to pass judicial scrutiny; it may rewrite legislation to locate the sources of its power in alternative passages of the Constitution; and it may rely on alternative readings of earlier Court decisions to justify its powers.

The means of response chosen will shape whether or not a response attempt is classified as a reversal attempt. For example, if Congress re–writes legislation to pass judicial scrutiny but relies on the same constitutional authority to enact legislation, the legal question before the Supreme Court would likely be similar, but not identical to the question in the antecedent Supreme Court case. If legislation is rewritten to locate sources of congressional power in alternative passages of the Constitution, the bill may avoid the same constitutional question entirely.

On the policy dimension, I classify a bill in one of the reversal categories if Congress is able to reverse the policy impact of the Court's decision. In cases where federal legislation was invalidated by the Supreme Court, a bill is characterized as a complete policy reversal when Congress attempts to reinstate the same policy that existed prior to the relevant Court decision. A complete policy reversal may occur when Congress enacts a bill to reinstate an invalidated policy under a different constitutional authority. Non–reversals

include bills that are motivated by a Supreme Court decision or decisions, but do not affect the application of a particular precedent.

This coding scheme creates the theoretical possibility of 9 response types, although only six combinations are plausible and present in the data. A responsive bill that reverses a constitutional interpretation offered by the Supreme Court will almost certainly reverse the associated policy that derives from that interpretation. The converse, however, is not necessarily true. Congress may respond to a constitutional decision of the Court by reinstating or modifying an invalidated policy but leaving the Court's constitutional interpretation intact. Accordingly, there are no instances in which a bill that attempts to enact a complete or partial legal reversal that does not simultaneously attempt at least a partial policy reversal. In the subsections below, I briefly describe each responsive proposal and classify each as a non–reversal, a partial reversal, or a complete reversal on both a policy and legal dimension.

5.2.1 Complete Legal and Policy Reversals Attempted

Responses to *Roe v. Wade* (1973)

In each of the Congresses in this sample, a "right to life" bill was introduced attempting to reverse the Court's decision in *Roe v. Wade* (1973). The "right to life" bills are universally lauded by their supporters upon their introduction as vehicles to overturn *Roe*. In its most recent incarnation, the Right to Life Act of 2007 is described by its sponsor Representative Duncan Hunter (R–CA):

> This legislation will protect millions of future children by prohibiting any State or Federal law that denies the personhood of the unborn, thereby effectively overturning *Roe v. Wade* (Hunter 2007).

I classify these responses as complete reversal attempts on the legal and policy dimensions—the bill attempts to negate the principal holding of the *Roe* decision that a woman's right to terminate a pregnancy by abortion falls within the rights to privacy protected by the

Fourteenth Amendment. The enactment of the Right to Life Act would reverse the Court's conclusion that fetuses are not persons within the meaning and language of the Fourteenth Amendment and concomitantly reverse the decision's policy implications.

A "right to life" bill was introduced in the House in each of the Congresses in the study period. For the 106th, 107th, 108th, and 110th Congresses, "right to life" bills were also introduced in the Senate. Each of these bills was introduced and referred to the appropriate committee or subcommittee but none enjoyed further legislative activity.

Response to *Plyler v. Doe* (1982)

Representative Elton Gallegly (R–CA) proposed an amendment to the Immigration in the National Interest Act of 1995 that would give states the option to deny public education to illegal aliens. This proposal would have negated the policy impacts of the Supreme Court's decision in *Plyler v. Doe* (1982) in which the Court held that a Texas law allowing the state to withhold state funds from local school districts for educating children of illegal aliens violated the Equal Protection Clause of the Fourteenth Amendment. Supporters and opponents of the Gallegly amendment agreed that the practical effect of the proposal would be to reverse the impact of the *Plyler* decision. Representative Frank Riggs (R–CA) spoke in favor of the amendment:

> I strongly support the Gallegly amendment which would reverse the Supreme Court *Plyler versus Doe* decision and permit the states to decide for themselves whether to provide a free public education to illegal aliens (Riggs 1996, H2493).

The bill's opponents, including Representative Sheila Jackson–Lee (D–TX), characterized the bill similarly.

> I rise in opposition to the Gallegly amendment which would allow States the option of denying education benefits to undocumented children. This amendment is unconstitutional. It is a direct attack on *Plyer versus Doe*, the Supreme Court decision which said that making access to education dependent on im-

> migration status is a violation of the equal protection clause (Jackson Lee 1996, H2492).

The proposed legislation seems to directly contradict the holding in the *Plyler* case and there is no evidence that the bill's supporters attempt to reconcile the legislation's seeming inconsistency with the Supreme Court precedent. I, accordingly, characterize it as an attempted complete legal reversal. The Gallegly Amendment was agreed to in the House and the Immigration in the National Interest Act was passed by the chamber. The amendment was removed prior to passage in the Senate and the House and Senate did not resolve the differences between the two versions of the bill.

Response to *Missouri v. Jenkins* (1990)

In *Missouri v. Jenkins* (1990) the Supreme Court held that a District court erred when it imposed a local property tax increase to allow the Kansas City, Missouri School District to improve the quality of its public schools as part of the school district's strategy to combat segregation. The Court, however, affirmed the modifications to the District Court order made by the U.S. Court of Appeals for the Eighth Circuit that enjoined state tax laws that prevented the District from raising the necessary funds. The Judicial Improvement Act was introduced by Senator Orrin Hatch (R–UT) in 1998 in response to that decision. The bill would have directly contradicted the Court's holding by holding that a Federal judge does not have the authority to order the Federal government or units of state or local governments to raise taxes as a legal remedy. The bill was referred to the Senate Judiciary Committee but was not the subject of a hearing or of floor activity.

Response to *Quill Corporation v. North Dakota* (1992)

Opponents of the Enzi–Dorgan Amendment to the Internet Tax Nondiscrimination Act (2001) argued that the amendment would have the effect of reversing the Supreme Court's decisions in *National Bellas Hess v. Department of Revenue of the State of Illinois* (1967) and *Quill Corporation v. North Dakota* (1992)(Gregg 2001). In *Bellas Hess*, the Court

ruled in favor of the appellant—a mail order house. The Court held that the nature of the appellant's business was purely interstate, and, therefore was exclusively within the power of Congress to regulate. Specifically, the Court held that the Commerce Clause prohibits a State from imposing taxes upon a seller whose only connection with customers in the State is by common carrier or by mail. (*Quill Corporation v. North Dakota* reversed a lower court decision that overturned the *Bellas Hess* precedent.) Opponents contended that the Enzi–Dorgan Amendment would reverse these Court decisions by removing the requirement that there must exist a a nexus between the seller of goods and the State in which the goods are sold before a tax can be assessed against the seller of the goods by allowing the collection of sales taxes on remote transactions. The bill is characterized as a complete legal and policy reversal attempt because it would (allegedly) reverse the Supreme Court's decisions by removing the legal nexus requirement. The amendment was tabled in the Senate.

Response to *United States v. Morrison* (2000)

In the case of *U.S. v. Morrison* (2000), the Supreme Court struck down a provision of the Violence Against Women Act that would have permitted private damage suits in federal court by victims of "gender motivated violence" as an improper use of Congress's authority to regulate interstate commerce (Laney & Siskin 2003). In floor debate over the reauthorization of the Violence Against Women Act (VAWA), Senator Richard Durbin (D–IL) (2000, S10221) asserted that "action by the Senate reauthorizing the Violence Against Women Act will overcome that Court decision." Although, a provision to reinstate the civil legal remedies to victims of gender–motivated violence was introduced and considered in the House, that provision did not pass independently and was not a part of the Victims of Trafficking and Violence Protection Act of 2000 which contained the VAWA reauthorization. This response constitutes an unsuccessful policy and legal reversal attempt.

Response to *Kelo v. City of New London* (2005)

In *Kelo v. City of New London* (2005), the majority upheld a city's taking of private property to sell for private development against a claim that the taking did not satisfy the "public use" requirement of the Takings Clause. The decision triggered several pieces of responsive legislation, among them the Private Property Rights Protection Act of 2005. Identical versions of the bill were introduced in the House and Senate in the 109th Congress. Representative Rehberg (R–MT) sponsored the legislation in the House. He criticized the *Kelo* majority for "redefining the Constitution's Fifth Amendment" and asserted that the responsive legislation would prevent "government officials from using the power of eminent domain purely for economic reasons" (Rehberg 2005, H5369). He said

> Our legislation establishes two important standards that must be met before government decides to exercise its power and take and transfer private property. The first standard is that eminent domain should only be used for public use, as guaranteed by the Fifth Amendment. The second is that this power should be reserved only for true public uses, not simply to provide private economic development so government can make more tax revenue.

The legislation would have prevented governments from taking private property to further economic development, effectively reversing the policy *and* legal implications of the *Kelo* decision. The House passed its version of the Private Property Protection Act, but the Senate neither took action on that legislation nor its own responsive vehicle.

5.2.2 Partial Legal and Complete Policy Reversals Attempted

Response to *Simon and Schuster v. Crime Victims Board* (1991)

Senator Byron Dorgan introduced federal "Son of Sam" legislation in the 105th and 106th Congresses. The bills respond to the Supreme Court's decision in *Simon and Schuster v. New York Crime Victims Board* (1991). In that case, the Court considered a New York statute that required proceeds from deals in which criminals "sell their stories" be turned

over to the New York Crime Victims' Board to fund payments resulting from civil suits filed by victims. The Court held that the state had failed to demonstrate that the discrimination furthered a compelling government interest in the least restrictive means possible.

Dorgan made clear that the his bills were introduced to "correct constitutional deficiencies cited by the Supreme Court in striking down New York's Son of Sam law" (Dorgan 1999, S3788). Dorgan explained that because of the constitutional deficiencies cited by the Court, the federal statute was never applied and that in order for the statute to be applied, it needed to be amended to satisfy the Court. Dorgan recounted the ways in which his legislation addressed the Court's concerns:

> To correct the deficiencies perceived by the Court, this bill changes significantly the concepts of the Federal statute. Because the Court criticized the statute for singling out speech, this bill is all–encompassing: It includes various types of property related to the crime from which a criminal might profit. Because the Court criticized the statute for being over inclusive, including the proceeds from all works, no matter how remotely connected to the crime, this bill limits the property to be forfeited to the enhanced value of property attributable to the offense. Because the Court found fault with the statute for not requiring a conviction, this bill requires a conviction (Dorgan 1999).

Dorgan's federal Son of Sam legislation would have negated the policy effect of the *Simon and Schuster* decision by mandating the forfeiture of proceeds from the expressive works of criminals and the donation of those proceeds to the victims of the perpetrator' crimes, as intended by the pre–*Simon and Schuster* versions of the bill. However, the authors of the responsive legislation did not attempt to wholly reverse the the Supreme Court's holding in *Simon and Schuster*. They attempted to draft legislation that would lead the Supreme Court to answer the question of whether or not legislation requiring the forfeiture of profits from crimes violates the First Amendment differently by modifying the federal statute. I, accordingly, classify the bill as a partial legal reversal attempt. In both

Congresses, Dorgan's bills were introduced and referred to committee but neither was the subject of further activity.

Response to *United States v. Lopez* (1995)

The original Gun–Free School Zones Act (GFSZ Act) was enacted by Congress in 1990 and prohibited the possession of firearms on or within 1,000 feet of a public, parochial, or private school. Congress enacted the statute under its authority to regulate interstate commerce. In *United States v. Lopez* (1995), the Supreme Court invalidated the act. The Court held that the law exceeded Congress's Commerce Clause authority. According to the majority opinion, possession of a gun in a local school zone is in no sense an economic activity that might have a substantial effect on interstate commerce. The majority also indicated that the lack of a jurisdictional element (which would ensure, through case by case inquiry, that the firearms possession in question has the requisite nexus with interstate commerce) was a problem.

Congress responded promptly to the *Lopez* decision by enacting the Gun–Free School Zones Amendments Act of 1995. The GFSZ Act as amended required that the government prove that a firearm has "moved in or the possession of such firearm otherwise affects interstate or foreign commerce." In a letter urging Congress to adopt the GFSZ Amendments Act of 1995, President Bill Clinton characterized the effect of the proposed revisions to the GFSZ Act.

> The addition of this jurisdictional element would limit the Act's "reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce," as the Court stated in Lopez, and thereby bring it within the Congress' Commerce Clause authority. The Attorney General reported to me that this proposal would have little, if any, impact on the ability of prosecutors to charge this offense, for the vast majority of firearms have "moved in . . . commerce" before reaching their eventual pos-

sessor (Clinton 1995).

By adding a jurisdictional element to the Gun Free School Zones Act, Congress was able to reinstate its policy outlawing firearm possession on or near school property. I classify the bill as an attempted partial legal reversal because Congress re–instituted the ban on firearm possession in a school zone under its Commerce Clause authority. The responsive legislation attempts to correct the legal deficiency in the original statute so the reversal is not complete.

Responses to *Stenberg v. Carhart* (2000)

The Supreme Court invalidated a Nebraska statute banning so–called "partial birth abortions" in 2000 (*Stenberg v. Carhart*). The Nebraska statute failed to adequately distinguish between two abortion methods and failed to include an exception to preserve the health of the mother. Prior to the Court's decision in *Stenberg*, Congress considered legislation to ban "partial–birth" abortions. In the aftermath of the *Stenberg* decision, Congress renewed its attempts to ban the procedure, and did so with an eye towards the Court's likely reaction. "Partial birth abortion ban" bills were introduced in the 107th and 108th Congresses. In debate in the Senate, Senator Santorum (R–PA) discussed the role of the *Stenberg* decision in shaping the language of the Partial–Birth Abortion Ban Act of 2003.

> We believe the issues the Supreme Court brought up with respect to the infirmities in the Nebraska statute have been addressed by this legislation. First, we have gone into much greater detail in describing this procedure…Second, we dealt with the issue of health…We have included in this legislation a voluminous amount of material that shows clearly, without dispute, in my mind—without dispute, period, not just in my mind—without any medical dispute, that there are no reasons this procedure has to be available for the health of the mother because there are no instances in which this procedure is required for the health of the mother. There is no medical organization out there that

believes that to be the case (Santorum 2003).

The bill's supporters argued that by responding to the concerns outlined by the Court in *Stenberg*, they could successfully enact a policy banning the procedure commonly known as "partial–birth abortion." Opponents of the Senate bill alleged that the language was virtually identical to the invalidated Nebraska statute and that the legislation was unconstitutional. I classify the bill as an attempt to effect a partial legal reversal because the bill would require the Court to reverse its ruling that the absence of an exception to preserve the health of the mother rendered a partial–birth abortion ban statute unconstitutional. The policy objective of the bill is identical to that of the invalidated Nebraska statute, so the bill is characterized as a complete policy reversal attempt. The bill was passed by both chambers of Congress and became public law 108–105.

Responses to *Ashcroft v. Free Speech Coalition* (2002)

In *Ashcroft v. Free Speech Coalition* (2002), the Court invalidated the Child Pornography Prevention Act of 1996 (CPPA). The statute prohibited "any visual depiction, including any photograph, film, video, picture, or computer or computer–generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct," and any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." The Supreme Court held that the statute proscribed a significant amount of speech that was neither obscene nor child pornography under the Court's relevant precedents in *Miller v. California* (1973) and *New York v. Ferber* (1982). Members of Congress initiated a failed response to the Court's decision in 2002. 2003 saw a successful response in the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act). Congress included a child pornography ban in the act. The language differed from that in the CPPA; the PROTECT Act's child pornography ban required material meet the conditions to be classified as obscene under *Miller v. California*. I classify the bill as an attempt to partially reverse the legal holding

and completely reverse the policy impact of the Supreme Court's decision. The legal reversal is partial because the bill reinstated a virtual child pornography ban with modest revisions that would require the Court to revisit the constitutionality of a ban on virtual child pornography. The policy reversal is characterized as complete because, like the invalidated CPPA, the bill attempts to ban virtual child pornography. The PROTECT Act became Public Law 108–21.

5.2.3 Partial Legal and Partial Policy Reversals Attempted

Response to *Branzburg v. Hayes* (1972)

In *Branzburg v. Hayes* (1972), the Supreme Court held that the First Amendment does not relieve reporters of the obligation to respond to grand jury subpoenas and answer questions relevant to criminal investigations. In the 109th and 110th Congresses, federal shield laws were proposed. The legislation (the Free Flow of Information Act of 2007 in the 110th Congress) offered a uniform set of standards to govern when testimony can be sought from reporters. The bill is not an attempt to completely reverse either the legal or policy implications of the Court's decision in *Branzburg v. Hayes* but it does attempt to modify these impacts by increasing the protections afforded to the media beyond what the Court provided for in *Branzburg*. Representative Jackson–Lee (D–TX) described the effect of the Free Flow of Information Act of 2007:

> H.R. 2102 establishes a procedure by which disclosure of confidential information from a journalist may not be compelled to testify or provide documents related to information obtained or created by the journalist unless the following conditions are met by a preponderance of the evidence and after notice to be heard: (1) The party seeking production must have exhausted all reasonable alternative sources of the information; (2) in the case of a criminal investigation, the party seeking production must have reasonable grounds to believe a crime has occurred and the information sought is critical to the case;

> (3) disclosure is necessary to: prevent an act of terrorism against the United States or other significant specified harm to national security or to prevent imminent death or significant bodily harm or to identify a person who has disclosed a trade secret actionable under 18 U.S.C. Sec. 1831 or Sec. 1832; or (4) the party seeking production must prove that the public interest in compelling disclosure outweighs the public interest in gathering or disseminating news or information (Jackson Lee 2007).

Clearly, the bill does not undermine the Court's holding that journalists do not enjoy an absolute First Amendment privilege. It does, however modify the policy and legal impacts of the decision by narrowing the scope of testimony that can be compelled. In the 109th Congress, versions of this legislation were introduced in the House and Senate. Hearings were held in the Senate. The bill was reintroduced in both chambers in the 110th Congress and was passed by the House; the measure was reported by the Judiciary Committee in the Senate but not considered by the full chamber.

Response to *Missouri v. Jenkins* (1990)

Legislation introduced in 1996 would have limited the power of federal courts to order cities to raise taxes. The Fairness in Judicial Taxation Act of 1996 responded to the Supreme Court's decision in *Missouri v. Jenkins* (1990) in which the Court held that an order requiring a local government body to levy a tax did not exceed the judicial power under Article III of the Constitution and it did not violate the Tenth or Fourteenth Amendments. The bill's sponsor, Senator Charles Grassley (R–IA) essentially characterized the bill as a partial reversal of the Court's decision (Grassley 1996):

> Now, we cannot by statute overturn *Missouri v. Jenkins*. And we don't have the votes to pass a constitutional amendment. Since the Supreme Court has spoken and we are stuck with judge–imposed taxes, the Fairness in Judicial Taxation Act goes as far as we can. The bill sets up a six–part test which must

> be met before a judge can compel the raising of taxes. . . [T]hese six factors will make it difficult—but not impossible—for courts to raise taxes. I wish we could just overturn *Missouri v. Jenkins* but we can't. So, this is the next best thing.

The Senate Committee on the Judiciary's Subcommittee on Oversight and Courts held hearings on the bill.

Response to *United States v. Eichman* (1990)

The Supreme Court struck the federal flag desecration statute in *United States v. Eichman* (1990) holding that the respondent's burning of a flag was expressive conduct protected by the First Amendment. Since the announcement of the Court's decision in *Texas v. Johnson* (1989), in which the Court invalidated a Texas flag desecration statute, members of Congress have repeatedly proposed constitutional amendments to ban flag burning. Legislative responses have also been proposed on multiple occasions. In 2004, Senator Dorgan proposed a flag protection statute that would outlaw flag desecration intended to incite violence. Senator Dorgan (2004, S3368) explained that he believed the accommodations would satisfy the Court:

> Constitutional scholars. . . have concluded that this statute passes constitutional muster, because it recognizes that the same standard that already applies to other forms of speech applies to burning the flag as well. This is the same standard which makes it illegal to falsely cry "fire" in a crowded theater. Reckless speech that is likely to cause violence is not protected under the "fighting words" standard, long recognized by the Supreme Court of the United States. So we are offering this bipartisan legislation with the confidence that its passage would meaningfully and effectively protect our cherished flag.

The Flag Protection Act of 2004 is a response to the *Eichman* decision, but it does not completely reinstate the policy invalidated in that case. It prohibits a narrower range of

flag desecrations than was allowed under the original federal flag desecration statute. Accordingly, the bill is characterized as a partial policy reversal attempt. The bill is also characterized as a partial reversal attempt on the legal dimension as it would require the courts find that a subset of the flag burnings outlawed by the original statute could constitutionally be restricted. Similar bills were introduced in the 106th and 109th Congresses. In each Congress, the bill was introduced in both chambers but none was the subject of consideration by a committee or floor consideration.

Responses to *C&A Carbone v. Clarkstown* (1994)

The Supreme Court's decision in *C&A Carbone v. Clarkstown* (1994) triggered multiple statutory responses. The Court's decision invalidated a local ordinance that required all solid waste generated in a town to pass through its solid waste recycling center so that the town could assess a handling fee and recoup its cost to build the center. The Supreme Court ruled that the ordinance violated the Commerce Clause because the local government used its regulatory powers to favor local enterprises and to discriminate against non–local entities. The Interstate Transportation of Municipal Solid Waste Act of 1995 (104 S. 534) sought to limit the effect of the *C&A Carbone* ruling by "grandfather–ing" flow control ordinances entered into prior to the 1994 Supreme Court decision. The bill's supporters argued that the grandfather provision was needed to protect municipalities that issued bonds to pay for the construction and operation of designated waste management facilities and that relied on flow control ordinances to meet their financial obligations and to repay those bonds (Snowe 1995, S6716). The bill is not characterized as a complete policy "reversal," however, because it does not attempt to wholly negate the policy impact of the Court's ruling. The proposal would phase–out flow control ordinances as the financial obligations expire. The bills are characterized as partial legal reversals because they would allow a subset of the local laws invalidated in *C&A Carbone* to remain in place at least in the short–term, in seeming contradiction to the Supreme Court's decision. Bills that included similar grandfather provisions were also introduced

in the House in the 104th Congress, in the Senate in the 105th Congress and 107th Congresses and in both chambers in the 106th and 108th Congresses. None of these bills were enacted, although the Senate version of the bill was passed by that chamber in the 104th Congress. Hearings were held to consider the Senate bills in the 106th, 107th, and 108th Congresses.

5.2.4 No Legal Reversal Attempted, Complete Policy Reversal Attempted

Response to *Morton v. Mancari* (1974)

In *Morton v. Mancari* (1974), the Supreme Court upheld a law that established a preference in favor of Native Americans in the filling of vacancies within the Bureau of Indian Affairs. Federal employees claimed that the statute had been impliedly repealed by the enactment of the 1972 Equal Employment Opportunity Act and that if the statute had not been impliedly repealed, it violated the Due Process Clause. The Court held that the statute had not been repealed and that the preference in favor of Native Americans was not the kind of invidious discrimination that the civil rights legislation sought to eliminate. In 2000, Curt Weldon (R–PA) called on his colleagues to repeal the Indian preference laws by enacting the Native American Equal Rights Act of 2000. Had it been enacted, the policy impact would have been the same as if the Supreme Court had reached the opposite decision in *Morton*. I, therefore, classify the bill as an attempt to effect a complete policy reversal. The responsive bill does not implicate the Court's decision about the constitutionality of the state law at issue in *Morton*, however, so it is classified as non–reversing on the legal dimension. The bill was introduced in the House and referred to the House Committee on Education and the Workforce's Subcommittee on Early Childhood, Youth and Families. The bill was never reported out of the committee.

Response to *Gregg v. Georgia* (1976)

In *Gregg v. Georgia* (1976), the Supreme Court held that the imposition of the death sentence did not violate the Eighth Amendment's ban on cruel and unusual punishment.

The decision ended the de facto moratorium on the imposition of the death penalty that resulted from the Court's decision in *Furman v. Georgia* (1972). Five of the seven Congresses in the sample saw the introduction of legislation in the House and Senate that would abolish the death penalty in the United States, reversing the policy announced in *Gregg*. While the legislation would have reversed the policy implications of the Court's decision in *Gregg*, it would not have affected the holding that the imposition of the death penalty did not violate the Eighth Amendment. Versions of the *Federal Death Penalty Abolition Act* were introduced in the 106th, 107th, 108th, 109th, and 110th Congresses. All bills died in committee.

Response to *Regents of the University of California v. Bakke* (1978)

In *Regents of the University of California v. Bakke*, the Supreme Court held that the use of racial quota systems violated the Civil Rights Act of 1964, but that the use of race as a criterion in admissions decisions in higher education was constitutionally permissible. Representative Frank Riggs (R–CA) proposed an amendment to the Higher Education Act of 1998 that would ban public colleges and universities that accept Federal funding under the Higher Education Act from using racial or gender preferences in admissions. An opponent of the bill characterized the bill as an attempt to overturn the Court's decision in *Bakke*:

> This amendment goes beyond what even the courts have said on this issue. It would overturn the 1978 Supreme Court decision in *Bakke versus California Board of Regents*, which found it constitutional for schools to use affirmative action to advance diversity in education. It would even go beyond the 1996 Fifth Circuit Court of Appeals ruling in *Hopwood v. Texas* by prohibiting the use of affirmative action where there is proven discrimination on the basis of race, sex, color, ethnicity, or national origin (Bentsen 1998, H2910).

The discussion of the bill suggests that the proposed bill would "overturn" the Court's decision in *Bakke*. Despite this rhetoric, I classify the bill as non–reversing on the legal

dimension. The Supreme Court said that the use of race as a criterion in the admissions process was constitutionally permissible, not that it was required. Accordingly, the Riggs amendment is not obviously inconsistent with the Court's legal holding in *Bakke*. On the other hand, the bill would have negated the policy implications of that holding by forbidding the use of racial or gender preferences in admissions even where the Supreme Court said such considerations were allowable. The amendment was voted on in the House but was not agreed to.

Response to *Rust v. Sullivan* (1991)

In *Rust v. Sullivan* (1991), the Supreme Court held that regulations issued by the Department of Health and Human Services limiting the ability of Title X fund recipients to engage in abortion–related activities were not violative of the First and Fifth Amendments. The Woman's Right to Know Act would have reversed the policy implications of this decision by amending the Civil Rights Act of 1964 to say that government cannot restrict a woman's right to receive information regarding her reproductive health options. The Women's Right to Know Act was introduced in the House and Senate but did not enjoy any post–introduction activity in either chamber.

Response to *Oklahoma Tax Commission v. Jefferson Lines* (1994)

The Interstate Commerce Commission Termination Act of 1995 contained a provision to reverse the Supreme Court's 1995 decision in *Oklahoma Tax Commission v. Jefferson Lines*. In that case, the Supreme Court held that an Oklahoma tax on interstate bus travel did not violate the Commerce Clause. The conferees described the provision in the conference report in the following language:

> Sec. 14505. State tax. This section prohibits a State or political subdivision of a State from levying a tax on bus tickets for interstate travel. This reverses a recent Supreme Court decision permitting States to do so and conforms taxation of bus tickets to that of airline tickets.

The provision was adopted and the bill became public law 104–88. Here, through the ordinary exercise of its authority to regulate interstate commerce, Congress was able to nullify the policy implications of the Court's decision. The Court's legal holding—that an Oklahoma tax on the sale of transportation services is consistent with the Commerce Clause—was not affected by the legislation.

Response to *Boerne v. Flores* (1997)

I began Chapter 2 with a discussion of the Religious Liberty Protection Act (RLPA). The proposed bill was introduced to negate the policy impact of the Court's decision in *Boerne v. Flores* (1997). *Boerne v. Flores* invalidated the Religious Freedom Restoration Act (RFRA) as it applied to the states as an improper exercise of Congress's authority under the Fourteenth Amendment. The RLPA is characterized as a complete policy reversal attempt because it attempts to reinstate the same policy advanced in RFRA by relying on Congress's authority to regulate interstate commerce. I, again, rely on members' characterization of the bill to assist with the classification. Representative Sue Myrick (R–NC) (1999, H5581) described the Religious Liberty Protection Act:

> The Religious Liberty Protection Act would essentially overturn the *Smith* decision and return religious expression to its rightful place.

Because the Religious Liberty Protection Act does not rely on Congress's authority to enforce the Fourteenth Amendment, it does not affect the legal doctrine announced in *Boerne v. Flores* (1997). The bill passed in the House and was sent to the Senate, where it died in committee. A related bill (S. 2081) was introduced in the Senate but was not the subject of any committee or floor activity.

Response to *Clinton v. City of New York* (1998)

The Line Item Veto Act allowed the president to cancel selected provisions of bills presented to him by the Congress. The Supreme Court held in *Clinton v. City of New York* (1998) that by canceling selected portions of bills, the President effectively "amended"

the laws before him in violation of the legislative procedures required by Article I of the Constitution. The Court's decision led members of Congress to propose an alternative means by which the President could eliminate "pork–barrel spending." Representative Paul Ryan (R–WI) proposed an amendment to the Spending Control Act of 2004 that would establish an enhanced rescission process that supporters asserted would satisfy the Court's constitutional requirements. The Ryan Amendment would have allowed the President to propose to Congress the elimination of wasteful spending identified in appropriations bills. The proposed language attempted to further the same policy goal of the Line Item Veto Act but did so differently to satisfy the Court. The Ryan Amendment was voted on but was not agreed to.

Response to *United States v. Bajakajian* (1998)

The Supreme Court held in *United States v. Bajakajian* (1998) that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the offense that it is designed to punish. In that case, the Court declared that the full forfeiture of Bajakajian's $357,144 for violation of the requirement that he report that he was transporting more than $10,000 in currency would be grossly disproportional to the gravity of the offense. Transporting the currency was permissible, as long as it was reported.

I identify two responses to the *Bajakajian* decision. One was initiated in the aftermath of September 11, 2001. The provision (section 351 of the Uniting and Strengthening American Act) makes the act of smuggling bulk cash itself a criminal offense, thereby authorizing the forfeiture of the transported/smuggled funds. Bill opponents characterized the response as an attempt to "circumvent the Supreme Court's decision in *United States v. Bajakajian* (1998)" (Leahy 2001). Senator Leahy asserts that the crime is no different than the one addressed in *Bajakajian* and that any forfeiture that is grossly disproportional with respect to the *Bajakajian* standard would inevitably be disproportional under Section 351 of the USA Act. The provision was eventually incorporated into the PATRIOT Act which became Public Law 107–56. I classify this bill as non–reversing on the legal dimension.

By making bulk cash smuggling itself a criminal offense, members of Congress eliminate the problem of the *Bajakajian* case. Under the bill, forfeitures of funds for failing to report currency will be unnecessary because the failure to report currency will itself give cause for the government to seize bulk cash. This bill is best characterized as an attempt to completely reverse the policy of the relevant Court decision.

Responses to *Rice v. Cayetano* (2000)

In *Rice v. Cayetano* (2000), the Supreme Court ruled that a Hawaiian Constitutional provision that limited the right to vote for the trustees of the Office of Hawaiian Affairs to qualified "Hawaiians" created a race–based voting qualification that violated the Fifteenth Amendment. Several members of Congress's Hawaii delegation responded by proposing legislation to limit or reverse the effects of the *Rice v. Cayetano* decision. In 2001, Senator Akaka (D–HI) introduced a bill that would recognize native Hawaiians as a sovereign people, creating the same type of political and legal relationship between native Hawaiians and the federal government that exists between the federal government and Native American tribes. Opponents of the bill argued that it was an end–run around the Court's decision in *Rice v. Cayetano* that would allow the Hawaiian government to discriminate on the basis of race (Cornyn 2006). While states cannot discriminate on the basis of race except in extraordinary circumstances, federally recognized tribes can. The proposed legislation is classified as an attempted policy reversal only, as the bill would not impact the Court's reading of the Fifteenth Amendment. It would, instead, use alternative means to make the relevant constitutional provisions inapplicable. Legislation with this purpose was introduced in both chambers in the 107th, 108th, 109th, and 110th Congresses.

Response to *Hudson v. Michigan* (2006)

In *Hudson v. Michigan* (2006), the Supreme Court concluded that the general rule excluding evidence obtained in violation of the Fourth Amendment does not apply to the

"knock–and–announce rule." That is, the failure of police to knock on the door, announce their presence, and wait briefly before forcibly entering a house with a search warrant does not necessitate the exclusion of evidence obtained from the search. In response to the Court's decision, Representatives Hinchey (D–NY) and Paul (R–TX) proposed an amendment to the Justice Department Appropriations Bill for fiscal year 2007 that would "prohibit funds in the bill from being used in contravention of the United States Code pertaining to the knock and announce policy when warrants are served by the police" (H. Amdt. 1167 to H.R. 5672).

In House debate over the amendment, opponents characterized the bill as an attempt to overturn the Court's decision in *Hudson*. The amendment's supporters argued that the bill would not overturn the Court's decision. However, even the comments made by supporters indicate that the amendment would negate the policy implications of the decision. In response to assertions that the amendment would overturn the *Hudson* decision, Representative Nadler (D–NY) explained

> Nor does the Hinchey amendment, contrary to what we heard from the distinguished chairman, overturn a Supreme Court decision. The Supreme Court decision in this case said you may do something. You may execute a search warrant without knocking. What this amendment says is, because we may doesn't mean we should (Nadler 2006).

Based on the *Congressional Record*, I classify this bill as an attempted complete policy reversal. The bill is non–reversing on the legal dimension because it would not affect the Court's holding that the Constitution does not require exclusion of evidence obtained in contravention of the knock–and–announce rule. The Hinchey amendment was voted on but did not pass.

5.2.5 No Legal Reversal Attempted, Partial Policy Reversal Attempted

Responses to *Buckley v. Valeo* (1976)

In *Buckley v. Valeo* (1976), the Court upheld the Federal Election Campaign Act of 1971's restriction on the amount individuals could contribute to a political campaign against allegations that the restriction violated the First Amendment's guarantees of freedom of speech and association. The Court invalidated limits on independent expenditures in campaigns, limits on expenditures by candidates from personal or family resources, and limits on total campaign expenditures. I identify two responses to the Court's decision in *Buckley*—the Senate Campaign Finance Reform Act of 1995 and the Bipartisan Campaign Reform Act of 2002 (BCRA).

The Senate Campaign Finance Reform Act of 1995 (S. 1219) was criticized by opponents as an attempt to subvert the Court's ruling in *Buckley*. The legislation created optional spending limits for members of Congress that would be rewarded with broadcast discounts and free time and postage reductions. It also provided for the elimination of political action committees, limits on soft money, modified reporting requirements and a revision of the definition of "independent expenditures" to include "express advocacy." The bill was discharged from committee but was not considered by the full chamber.

In 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002. In debate about the bill, its opponents also alleged that the bill would effectively reverse the Court's decision in *Buckley*. The Bipartisan Campaign Reform Act did not attack the Court's holding that contributions to political campaigns constitute speech protected by the First Amendment but introduced new restrictions on "soft money" contributions and on political advertising. The most direct attack on the *Buckley* precedent was in the bill's so–called "Millionaire's Amendment" which allowed for an increase in the contribution limits for candidates facing a wealthy opponent who intends to make large expenditures from personal funds.

While the opponents of the Senate Campaign Finance Reform Act and BCRA alleged that the bills were blatant attempts to undermine the Court's campaign finance precedents, neither bill attacked the core provisions of the *Buckley* decision. Neither bill at-

tempted to reinstate the regulations invalidated in *Buckley*. Accordingly, I characterize the bills as non–reversals on the legal dimension. I classify the bills as partial reversal attempts on the policy dimension. This is logical as the bills represent attempts to reverse what bill supporters perceive as negative consequences of the *Buckley* decision. For example, the increase in the significance of soft money in American campaigns is often characterized as a direct outgrowth of the limits imposed on hard money in the Supreme Court's campaign finance decisions. The attempts in these bills to limit "soft money" would partially reverse the policy impact of the Court decision.

Responses to *Planned Parenthood v. Casey* (1992)

Members of Congress introduced partial–birth abortion (PBA) ban legislation in the 104th, 105th, and 106th Congresses.[5] The bills are identified as responses to *Roe v. Wade* and *Planned Parenthood v. Casey*. In *Casey*, the Court again recognized a woman's right to choose to have an abortion prior to fetal viability, confirmed the State's power to restrict abortions after viability if the law contains exceptions for pregnancies endangering a woman's life or health, and reaffirmed the principle that the State has legitimate interests from the outset of a pregnancy in protecting the health of the woman and the life of the fetus that may become a child. None of the pieces of partial–birth abortion banning legislation challenged the core holdings or policy pronouncements of *Roe* or *Casey*. They instead sought to prohibit certain types of abortion. The 104th and 105th Congress's PBA bans passed by both chambers of Congress but were vetoed by President Clinton. In the 106th Congress, the PBA Ban legislation passed the House but was not considered by the full Senate. I classify these bills as partial policy reversal attempts. They do not challenge the core holding of *Roe* that was reaffirmed by *Casey*. The Partial–Birth Abortion Ban bills attempt to reverse, in part, the policy impact of the *Roe* and *Casey* decisions by restricting the availability of a particular type of abortion.

[5]These bills were initiated prior to the Court's decision in *Stenberg v. Carhart* (2000).

Response to *Herrera v. Collins* (1993)

Representative John Conyers, Jr. proposed an amendment to the Witness Protection and Interstate Relocation Act of 1997 that would have required courts to impose a sentence of life in prison if there is any doubt regarding the innocence of someone sentenced to death. The bill responds to *Herrera v. Collins* (1993) which stated that a prisoner who presents "belated evidence of innocence is not entitled to a new trial." The bill would not have had the effect of providing new trials to defendants providing "belated evidence of innocence." I classify the response as a partial policy reversal because bill supporters argued that as a result of the Court's decision, innocent persons would be executed. This is the policy effect that the proposed legislation attempts to modify. The Conyers amendment was voted on but was not agreed to.

Response to *Seminole Tribe of Florida v. Florida* (1996)

The Supreme Court held that the Eleventh Amendment provided Florida with immunity from a lawsuit brought against the state by the Seminole Tribe for violating the good faith negotiations requirement of the Indian Gaming Regulatory Act. The Court held that Congress intended to abrogate states' sovereign immunity under the Indian Gaming Regulatory Act but that this abrogation was inconsistent with the requirements of the Commerce Clause and the Indian Commerce Clause. Supporters of the USERRA (Uniformed Services Employment and Reemployment Rights Act) Amendments Act of 1998 argued that the decision necessitated a legislative response to clarify that the decision does not preclude federal court jurisdiction of claims to enforce federal rights of state employees under the USERRA. The authority for laws involving veterans' benefits involving veterans' benefits is derived from the War Powers clause so the response is not a legal reversal. Its impact on the Court's policy is also incomplete. The bill was passed in the House but was not considered in the Senate.

Response to *Boerne v. Flores* (1997)

As discussed in Section 5.2.4 above, the Supreme Court's decision in *Boerne v. Flores* (1997) triggered multiple statutory responses. The Religious Liberty Protection Act (RLPA) was an unsuccessful attempt to completely reverse the policy impact of the Supreme Court decision. Instead of taking action on the RLPA, the Senate proposed a more modest piece of legislation (The Religious Land Use and Institutionalized Persons Act—RLUIPA) that attempted to cure the defects in the Religious Freedom Restoration Act identified by the Court in *Boerne*. As with the RLPA, members of Congress attempted to satisfy judicial scrutiny by finding an alternative basis upon which to justify the regulations in RLUIPA—the Commerce and Spending Clauses. The scope of the RLUIPA was considerably narrower than that of the RLPA and RFRA. The RLUIPA re–instated the compelling government interest–least restrictive means test in cases that involved land use regulations and institutionalized persons. Supporters of the legislation indicated that, while narrower in scope than the original legislation, they believed the revised bill would protect free exercise in a way that would not be subject to the same challenge that succeeded in *Boerne* (Canady 2000). The bill is categorized as an attempt to partially reverse policy and as a non–reversing response on the legal dimension. The Religious Land Use and Institutionalized Persons Act became Public Law 106–274.

Response to *United States v. Bajakajian* (1998)

Another response to the Supreme Court's decision in *United States v. Bajakajian* attempted a partial policy reversal. Three months after the announcement of the *Bajakajian* decision, Senator Max Cleland (D–GA) introduced the Drug Currency Forfeitures Act. Upon its introduction, Cleland indicated that the Court's decision in *Bajakajian* necessitated legislation to "address…adverse court decisions" (1998). Cleland asserted that the Drug Currency Forfeiture Act would enhance the ability of law enforcement agents to interdict and confiscate drug money by relaxing the requirement that government be able to establish that the money is drug proceeds (for example). The proposed statute would establish that there exists a "rebuttable presumption that property is subject to forfeiture,

if the Government offers a reasonable basis to believe . . . that there is a substantial connection between the property and a drug trafficking offense" (S. 2449, Section 2). Among the conditions that would support this reasonable basis is a finding that $10,000 is being transported through an airport, on a highway, or at a port–of–entry, and that the property is packaged or concealed in a highly unusual manner. Whether or not this bill would have the effect of fully negating the policy implications of the Court's decision in *Bajakakian* is unclear. I err on the side of mischaracterizing the bill as a policy reversal. The proposed legislation does not directly contradict the Court's reading of the Excessive Fines Clause so it is characterized as non–reversing on the legal dimension. The last congressional action on the bill was its referral to committee.

Response to *Florida Prepaid v. College Savings Bank* (1999)

In *Florida Prepaid v. College Savings Bank* (1999), the Supreme Court held that Congress had unconstitutionally nullified the states' sovereign immunity in the Patent and Plant Variety Protection Remedy Clarification Act. The Court asserted that a nullification of sovereign immunity in this case would require a showing of a consistent pattern of state patent violations, and a lack of adequate legal remedies to address such violations. The implication of *Florida Prepaid* decision is that states are immune from suits alleging patent infringement. In the 108th Congress, members in the House and Senate searched for a legislative solution that would comply with the Court's ruling in *Florida Prepaid v. College Savings Bank* and allow states to be sued for patent infringement. Senator (Leahy 2003, S7480) discussed the proposal—the Intellectual Property Protection Restoration Act:

> This bill has the same common–sense goal as the three statutes that the Supreme Court's decisions invalidated: To protect intellectual property rights fully and fairly. But the legislation has been re–engineered. . . to ensure full compliance with the Court's new jurisprudential requirements. . . In essence, our bill presents States with a choice. It creates reasonable incentives for States to waive their

> immunity in intellectual property cases, but it does not oblige them to do so. This arrangement is clearly constitutional. Congress may attach conditions to a State's receipt of Federal intellectual property protection under its Article I intellectual property power just as Congress may attach conditions on a State's receipt of federal funds under its Article I spending power. Either way, the power to attach conditions to the federal benefit is part of the greater power to deny the benefit altogether. And no condition could be more reasonable or proportionate than the condition that in order to obtain full protection for your federal intellectual property rights, you must respect those of others.

Here, members of Congress sought a way to modify the policy impact of the Court's ruling. While they did not re–enact legislation that nullified sovereign immunity, they devised a strategy that would encourage states to waive immunity themselves. Because states are not compelled to waive their immunity, I do not characterize the responsive bill as a complete reversal attempt on the policy dimension. The bill is classified as non–reversing on the legal dimension because it avoids the issue of abrogation of sovereign immunity. Identical versions of this legislation were introduced in the House and Senate. The Senate bill was introduced and referred to committee. In the House, the Committee on the Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property held hearings on the legislation, after which no action was taken.

Response to *Kimel v. Florida Board of Regents* (2000)

The Court held that states are protected from suits for money damages under the Age Discrimination in Employment Act (ADEA) in *Kimel v. Florida Board of Regents* (2000). The Older Worker Rights Restoration Act responded to this decision. The bill attempted to restore to older state government workers the right to seek legal remedies for age discrimination that, according to bill sponsor Senator Jim Jeffords [I–VT], was taken away by the Supreme Court. The bill would have required states waive their immunity to suit

for violations of the ADEA as a condition of receipt of Federal funding. The bill attempts to reverse the policy implications of the *Kimel* decision by incentivizing states to waive their immunity voluntarily. The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions. The Civil Rights Act of 2004 also included this responsive language. That bill was introduced in the Senate by Senator Edward Kennedy but no action was taken.

Response to *Board of Trustees of University of Alabama v. Garrett* (2001)

The Supreme Court held in *Board of Trustees of the University of Alabama v. Garrett* (2001) that states were protected by the Eleventh Amendment from suits from state employees to recover money damages because of the state's failure to comply with Title I of the Americans with Disabilities Act (ADA). In response to this decision and the Court's decision in *Kimel v. Florida v. Board of Regents* (2000), Senator DeWine (R–OH) introduced the Civil Rights Restoration Act of 2006. The bill would have amended the ADA and the ADEA by conditioning a State's receipt or use of federal financial assistance on the State's waiver of immunity from suit for violations under the Acts. While this bill would not have the effect of reversing the legal precedents announced in the *Garrett* and *Kimel* cases, it attempts to partially reverse the policy implications of those decisions by creating strong incentives for states to voluntary abrogate their sovereign immunity. The bill is not an attempted legal reversal as it attempts to work within the confines announced by the Court in the case. The bill was introduced and referred to the Committee on Health, Education, Labor, and Pensions. Neither the committee nor the Senate as a whole took further action on this bill although the Committee reported a related bill that would have amended only the ADEA.

Response to *United States v. Harriss* (1954)

Proponents of lobbying disclosure reform legislation in the 104th Congress blamed the Supreme Court's decision in *United States v. Harriss* with rendering the 1946 Regula-

tion of Lobbying Act virtually meaningless. In that decision, the Court upheld the federal government's right to regulate the disclosure of and, to some extent, the conduct of lobbying. To avoid finding the statute unconstitutional, however, the Court narrowed the application of the law. The Court held that the statute only applied to "paid lobbyists" who "directly communicate" with Members of Congress on "pending legislation." The Court interpreted the statute to apply only to efforts to influence the passage or defeat of specific bills and only to paid efforts in which lobbyists directly contacted members of Congress—not their staff (Citizen 2005). To modify the impact of that decision, members in the House and Senate proposed amendments to the Lobbying Reform Act that would provide for the effective disclosure of those who lobby the executive and legislative branches of Government, what legislation they attempt to influence, and how much they are compensated to do so (Canady 1995). The LDA closed loopholes in the 1946 Act by clarifying the key concepts subject to regulation and providing a quantifiable threshold for when lobbying registration and reporting is required (Citizen 2005). The Lobbying Disclosure Act was enacted in 1995 and became Public Law 104–65. I classify the bill as an attempted partial policy reversal and a legal non–reversal. Congress intended to expand the types of activity that could be regulated and not to entirely reverse the policy impact of the Court's decision which permitted some regulation. The bill does not attempt to reverse the holding of the Court decision on the relevant constitutional question—the bill's proponents supported the Court's conclusion that the challenged provisions of the 1946 Regulation of Lobbying Act were constitutional, they took issue with the Court's construction of those statutes.

5.2.6 No Legal Reversal Attempted, No Policy Reversal Attempted

Responses to *Roe v. Wade* (1973)

In the 106th, 107th, and 108th Congresses, members of Congress introduced "Unborn Victims of Violence Acts." I include these bills in the non–reversal categories on the policy

and legal dimensions. The proposals recognize a "child in utero" as a legal victim if he or she is injured in the commission of a federal crime of violence. The intent of the legislation as it relates to the Court's abortion precedents is ambiguous. For the other observations in the sample, bill sponsors and proponents typically announce that bills are intended to reverse Supreme Court decisions or are silent on the relationship between the proposed statute and existing Supreme Court precedents. In the debate surrounding the Unborn Victims of Violence Act of 2004, the bill's opponents characterized the bill as a piece of decision–reversal legislation while bill proponents maintained the legislation would have no effect on existing Court precedents. Members of Congress opposed to the bill alleged that the bill was a direct attack on the Court's decision in *Roe v. Wade* (1973). Representative Sheila Jackson Lee (D–TX) outlined the argument:

> The Unborn Victims of Violence Act erodes the legal foundation of a woman's right to choose by elevating the legal status of all stages of prenatal development. If enacted, the legislation would be the first Federal law to recognize a fertilized egg, embryo or a fetus as a person who can be an independent victim of a crime. Our Supreme Court has held that fetuses are not persons within the meaning of the Fourteenth Amendment (2004).

On the other side of the aisle, Representative Steve Pence (R–IN) asserted that the "the bill explicitly provides that it does not apply to any abortion to which a woman has consented. And it is well established that unborn victims laws do not conflict with the Supreme Court's pro–abortion decrees" (2004). Whether or not the Unborn Victims of Violence Act of 2004 intends to or will have the effect of undermining the Court's abortion precedents is unclear. Because these bills include specific provisions barring prosecution for the provision of abortion services, I classify them as non–reversal bills. The 1999 (H.R. 2346) and 2001 (H.R. 503) bills passed the House but neither was the subject of activity in the Senate. The 2004 bill became Public Law 108–212.

Responses to *Planned Parenthood v. Casey* (1992)

I identify two non–reversing bills that are initiated in response to the Court's decision in *Planned Parenthood v. Casey* (1992).[6] Both bills are characterized as non–reversals on both the legal and policy dimensions because neither attempts to reverse the legal or policy implications of the *Casey* decision in particular. In that decision, the Supreme Court reaffirmed the core holding of *Roe v. Wade*, but upheld the imposition of waiting periods, informed consent requirements, and parental consent requirements for women seeking abortions. These bills do not challenge the core holding of *Roe* or present the same types of restrictions at issue in *Planned Parenthood v. Casey*. The responsive bills attempt to impose other restrictions on the provision of abortions. In the 104th Congress, an amendment to the Treasury, Postal Service, and General Government Appropriations Act, 1996 that mandated that federal employees' insurance exclude abortion coverage was considered. The amendment passed and was included in the final version of the bill. In the 109th Congress, Representative Ros–Lehtinen (R–FL) proposed the Child Interstate Abortion Notification Act. The bill would prohibit transporting a minor across state lines to obtain an abortion. The bill passed the House but was not taken up by the Senate.

Response to *Boerne v. Flores* (1997)

In addition to the bills discussed above, the Court's decision in *Boerne v. Flores* triggered a non–reversing responsive bill. According to its sponsor, Senator Charles Grassley (R–IA), the Religious Liberty and Charitable Donations Protection Act was introduced in response to the perceived threat to religious freedom evidenced by the Court's decision in *Boerne* (Grassley 1997). However, the bills did not attempt to reverse either the policy implications or legal holding announced in *Boerne*. The bill would have prevented bankruptcy judges from ordering churches to refund money donated by parishioners that subsequently declare bankruptcy. Identical legislation was introduced in the House and

[6] In both of these cases, congressional debate indicates the bill responds to or would impact the effect of multiple court decisions. *Casey* is the most recent of the multiple decisions identified.

the bill passed both chambers easily. The Religious Liberty and Charitable Donations Protection Act became Public Law 105–183. The bill attempts to prevent the *Boerne* decision from having a particular impact. Therefore, while the bill responds to the Court's decision, it is not appropriate to characterize it as an attempt to reverse either the legal or policy impact of the *Boerne* decision.

Response to *Kelo v. City of New London* (2005)

The final responsive bill identified is a response to the Court's decision in *Kelo v. City of New London* (2005). As discussed above, the majority in *Kelo* held that a taking of private property for economic development constituted an acceptable "public use" under the Takings Clause. In response to this decision, Congress amended the Wild and Scenic Rivers Act to include language that would prevent condemnation of areas near the Eightmile River watershed. Representative (Bishop 2007, H8953) explicated the relationship between *Kelo* and the proposed language:

> It is ironic that this happens to be in the district in which both the leaders of the State and local government turned their backs on Susette Kelo and brought about that infamous court case decision dealing with Kelo, imminent domain issues. We do not want that to be replicated, which is clearly why the Republicans presented language in both the Resources and Rules Committee to make it specifically clear what was the intent of this bill. The language we propose simply says, no Federal funds may be used to condemn land to carry out the purposes of this act or the amendment made by subsection B.

The language was motivated by the *Kelo* decision but not have the effect of reversing the decision. Instead, the language narrowly limits its reach to exclude certain lands. As in the case of the Religious Liberty and Charitable Donations Protection Act, the bill responds to the anticipated impact of the Court decision not its actual effect. Accordingly, I characterize the bill as non–reversing. The no–condemnation language was incorporated into the *Consolidated Natural Resources Act of 2008* which became Public Law 110–229.

5.3 Analysis: Reversal Attempts and Success

Having reviewed and classified each responsive bill, I can now evaluate the hypotheses outlined at the beginning of the chapter. *Hypothesis 1* suggests that the majority of bills proposed in response to the constitutional decisions of the Supreme Court would not have the practical effect of "reversing" the relevant Court decision. At the beginning of this chapter, I discussed the lack of clarity in existing work about what constitutes decision–reversal legislation for constitutional Supreme Court decisions. Here, I avoid this problem by adopting alternative operationalizations of the dependent variable—reversal. I offer three operationalizations of decision–reversal legislation, using the classifications from the previous section. First, I characterize a bill as decision–reversing if and only if it would constitute a complete legal reversal. This is the strictest reversal definition and the type of response necessary to support unqualified claims that Congress reverses the Supreme Court or otherwise asserts a role for itself in constitutional interpretation. Next, I expand the definition of reversals to include bills that wholly reverse the policy implication of a particular court decision. This policy–based measure captures the response characteristics assumed to be of primary importance to political scientists. Finally, I adopt an inclusive measure that classifies bills as reversals if they would effect a partial legal and/or partial policy reversal.

Hypothesis 1 is supported if the majority of responsive bills in the sample are non–reversals. Table 5.3 reports the number of bills that satisfy each of the reversal criteria outlined above. Approximately 18% of bills can be considered reversals by the strictest definition. Expanding the definition of reversal to include complete policy reversals brings the percentage of reversing bills to 54% while the most inclusive coding of the reversal variable includes over 89% of observations. Clearly, whether or not *Hypothesis 1* is supported depends on how reversal is coded. This is not a trivial point—the reason Meernik & Ignagni (1997) overstate the ease with which Congress reverses the Supreme Court's constitutional decisions is the result of the failure to account for differences in the na-

ture of responsive legislation. Their analysis adopts the most inclusive definition of what constitutes decision–reversal legislation, but they discuss their findings as though they have only included bills that satisfy the most exclusive operationalization. Because the majority of bills do not satisfy the complete legal reversal criterion, unqualified claims that responsive legislation frequently reverses the constitutional decisions of the Supreme Court are misleading. These data suggest that responsive legislation frequently attempts to partially reverse the impact of Supreme Court decisions but that complete legal reversal attempts are more rare. *Hypothesis 1* is partially supported.

Table 5.3: Hypothesis 1

Reversal Category Includes	*# of Responses*	*% of Observations*
(1) Complete Legal Reversals	12	17.91%
(2) Complete Legal or Policy Reversals	36	53.73%
(3) Partial Legal and/or Partial Policy Reversals	60	89.56%
n=67		

Next, I hypothesize that the majority of responsive bills enacted would not reverse the impact of the relevant Court decisions. I argue that a higher prevalence of non–reversal statutes is consistent with a standard separation–of–powers model that predicts Congress should sometimes accommodate the Court. A primary prediction of separation of powers theory is that members of Congress will respond to Court decisions by moving policy as close as is possible to the congressional ideal point. The theory does not require or suggest that these responses will take the form of reversals on the legal dimension. I, accordingly, expect the majority of successful responses to be non–reversals. The twelve responsive statutes are reported in Table 5.4.

I again, rely on alternative operationalizations of the reversal variable. None of the successful responsive bills effect complete legal reversals. This finding, again, highlights the disconnect between the empirical analysis and the conclusions drawn by Meernik & Ignagni (1997). Five of the successful bills (42%) are classified as complete policy reversals. Sixty–seven percent of successful responsive bills would effect at least a partial

Table 5.4: Responsive Bills that Became Public Law

Bill Title	*Public Law*
Treasury, Postal Service, and General Government Appropriations Act, 1996	104–52
Lobbying Disclosure Act	104–65
ICC Termination Act of 1995	104–88
Gun–Free School Zones Amendments Act of 1995	104–208
Religious Liberty and Charitable Donations Protection Act	105–183
Religious Land Use and Institutionalized Persons Act	106–274
PATRIOT Act	107–56
Bipartisan Campaign Reform Act of 2002	107–155
PROTECT Act	108–21
Partial–Birth Abortion Ban Act of 2003	108–105
Unborn Victims of Violence Act of 2004	108–212
Consolidated Natural Resources Act of 2008	110–229

policy or legal reversal. These findings offer mixed support for *Hypothesis 2* and highlight that Congress sometimes reverses the policy implications of Supreme Court decisions without wholly negating the legal holdings announced by the Supreme Court.

These findings suggest a rational characterization of the relationship between Congress and the Supreme Court. Members of Congress are generally assumed to be motivated primarily by their policy preferences and may be constrained by the Supreme Court, whose members are assumed to be motivated by preferences over policy and law. For members of Congress, attempting to achieve preferred policy outcomes without defying the Supreme Court is likely a more appealing strategy than attempting complete legal reversals. If Congress can affect policy without upsetting the Court's legal holdings, the members of both institutions can sustain their preferred outcomes. The different motivations and incentives faced by members of Congress and members of the Court may make the relationship between the institutions less conflictual than is often suggested in separation of powers work. At least in the sample here, there are more instances in which Congress responds to a Court decision by correcting a constitutional deficiency announced by the Court than there are instances in which Congress successfully reverses the constitutional holding of the Supreme Court. Stable policies may reflect a sort of colloquy between the

institutions more than a competition.

Table 5.5: Hypothesis 2

Reversal Category Includes	*# of Responses*	*% of Observations*
(1) Complete Legal Reversals	0	0.00%
(2) Complete Legal or Policy Reversals	5	41.67%
(3) Partial Legal and/or Partial Policy Reversals	8	66.67%
n=12		

5.4 Analysis: Response Type and Success

5.4.1 Data

The analysis of *Hypotheses 1* and *2* suggest that non–reversal bills are more likely to be enacted than reversal bills. None of the responsive statutes satisfy the strictest definition of a reversal. Conversely, two–thirds of enacted responses at least partially reverse the Court. In this section, I rely on multivariate analysis to evaluate *Hypothesis 3*—that non–reversal bills are more likely to be enacted than reversal bills. The unit of analysis is the attempted response. The data are the 67 response attempts identified through searches of the *Congressional Record* and discussed in detail above.

Thousands of bills are introduced in every Congress. There is no real expectation that most bills will become law. It is possible then, that the data will be dominated by bills that are introduced for purely political purposes, and not to alter policy. To evaluate this possibility, I identify the stage of failure (or passage) for each bill in the sample. If the bulk of bills are introduced and experience no further legislative activity, the sample may be problematic. Figure 5.4 presents the number of observations in the data that "survive" to various stages of the legislative process. All 67 bills in the sample are introduced and referred to the appropriate committee or subcommittee. Hearings are held for 43 bills in the sample, and 12 ultimately become public laws. While a significant percentage (36%) of bills in the sample fail at the introduction stage, this percentage is much lower than that for Congresses in general. Accordingly, I am not convinced that the sample is biased

because of a profusion of non–serious bill introductions. As I argued in Chapter 4, institutional attacks on the courts and proposed constitutional amendments are likely to serve as better vehicles for position–taking by members of Congress than is the introduction of ordinary legislation.[7]

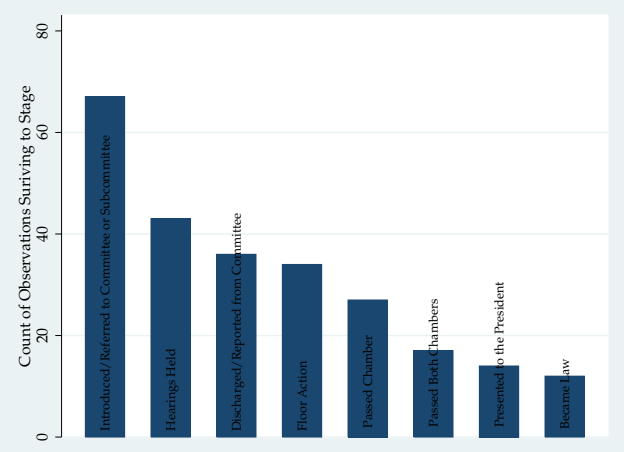


Figure 5.4: Stage of Failure for Responsive Bills

I also present the failure stage data by response type in Figure 5.5. Sixty–seven percent of attempted complete legal reversals fail at the introduction stage, compared to 47% for complete policy reversals and 40% for bills that include at least a partial reversal. (The difference in the frequency of failure at the introduction stage between the complete legal reversal category and the complete policy reversal category is statistically significant.) In this sample, none of the non–reversing bills fail at the introduction stage. The increased frequency of failure at the introduction stage for complete legal reversals is consistent with the argument that members' attempts to reverse the constitutional holdings of Court decisions are primarily appeals to members' constituents. The evidence here suggests that complete legal reversals are especially likely to fail. If responsive legislation that is more

[7]Limitations of the data prevent me from fully exploring the extent to which position–taking drives the results here. To limit the impact of bills that are simply appeals to outside audiences, I attempt to estimate the models in this chapter omitting bills that experience no post–introduction activity. Several of the models fail to attain statistical significance. The results from the remaining models are mixed. I find some evidence in support of my primary hypotheses—that "reversal" bills are less likely to be enacted than non–reversing bills, but the results are more fragile. In future research, I will rely on committee reports to identify a larger sample of responsive bills that do not fail at the introduction stage to further test the robustness of the findings here.

limited in scope is more likely to be successful than complete legal reversal attempts, it may be the case that complete legal reversals simply provide an easy way for members of Congress to signal their bona fides to their constituents.

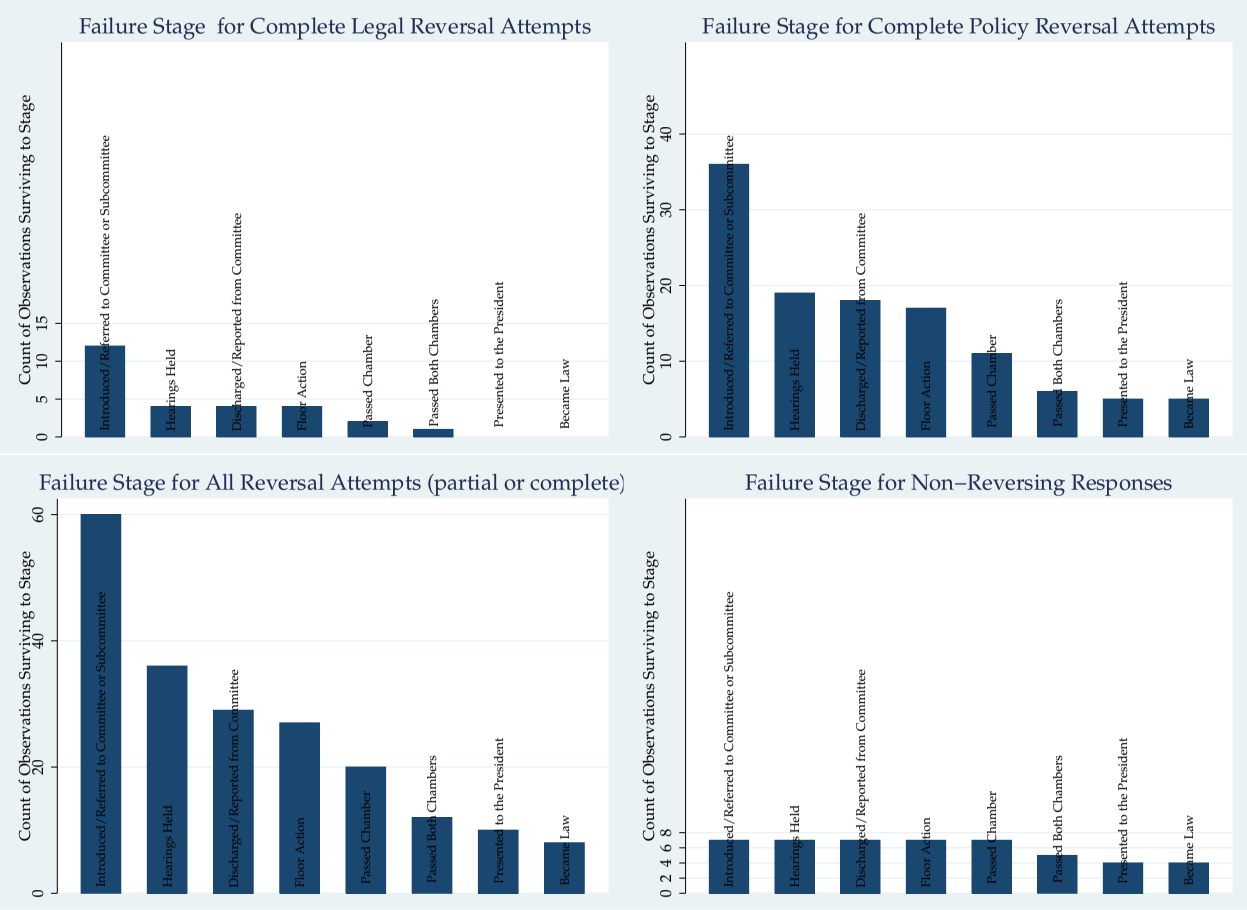


Figure 5.5: Comparison of Responsive Bill Progress by Response Type

While descriptive statistics suggest that the content of responsive legislation impacts the probability of enactment, I rely on multivariate analysis to evaluate the effect of response type more rigorously. The dependent variable is bill passage—a dichotomous variable that is equal to 1 when a bill becomes a public law.[8] It is beneficial to adopt a

[8]Meernik & Ignagni (1997) analyze the decision to initiate responses to the Court's judicial review decisions as well as the success of those attempts. I am unable to replicate their analysis of the decision to respond. I attempt to estimate a Heckman selection model predicting the decision to respond to a Court decision as well as the subsequent success of those attempts. The model estimates the coefficient that measures the correlation between the errors in the selection stage and the outcome stage at the boundary of the acceptable range, indicating the model is inappropriate (Heckman 1976, Heckman 1979). Even if it were possible to estimate the selection model, I would hesitate to do so. I am concerned with the factors that

framework that allows for the consideration of multiple responses to the same Court decision, accordingly, I use the attempted response as the unit of analysis and consider the enactment stage in isolation.

The independent variables fall into two categories—bill characteristics and characteristics of the political environment. Because the models include an ideological distance variable, I estimate two variants of each model—one adopting a *Chamber Median Model* of congressional decision–making and one adopting a *Party Median Model* of congressional decision–making.[9] Information on each of the independent variables is discussed below.

Response Type Variables. The primary independent variables characterize the substance of the responsive bill. I estimate two sets of models employing different variables to measure the content of proposed responsive bills. For *Models 1* and *2*, I include multiple dummy variables to characterize the content of each bill. The variable *Legal Complete* is equal to 1 if the bill would effect a complete legal reversal of the relevant Supreme Court decision. The variable *Policy Complete* is equal to 1 if the bill would effect a complete reversal of the policy implications of the relevant Supreme Court decisions. The variables *Legal Partial* and *Policy Partial* are similarly coded—*Legal Partial* equals 1 if the bill is a partial legal reversal attempt, *Policy Partial* is equal to 1 if the bill is a partial policy reversal attempt. Including each of these variables in the empirical model allows me to assess the

influence the success of individual response attempts. Employing a selection model would require that I use the Supreme Court case as the unit of analysis instead of the response attempt. In this framework, there is no way to treat multiple responses to the same court decision separately. As evidenced by the data in the sample, a significant number of decisions generate multiple response attempts. Considering them separately reveals more about the nature and frequency of congressional responses to the Supreme Court than lumping them together and assuming that passage of any responsive bill effects a reversal of the Court. The distinction between reversals and non–reversals is again significant. If all responsive bills are reversals, use of the case as the unit of analysis is less problematic. We would then assume that if a responsive bill is initiated and enacted, the Court decision has been effectively reversed. There would be no need for Congress to initiate additional responses to a decision that has been reversed. I argue, however, that responsive legislation need not reverse the Court. Therefore, it's plausible (and probable) that multiple responsive bills may address the same case and that multiple responses can be successful. Failure to account for multiple responses leads to an overestimation of the frequency of successful responses. A selection model can accurately gauge what proportion of the Court's decisions are met with successful responsive legislation, but cannot tell us the rate of success for Congress or appropriately account for variation in response types.

[9]Because of the limited sample size and the lack of support for the SOP hypotheses evaluated in Chapters 3 and 4, I do not include the complete set of distance variables that are included in the analyses in Chapters 3 and 4.

impact of response type on the probability of passage. The coefficient of each variable is interpreted relative to a non–reversing responsive bill.

For *Models 3* through *8*, I include one dummy variable indicating whether or not the bill is classified as a reversal. I estimate alternative models for each of three reversal criteria. In *Models 3* and *6*, *Reversal* is equal to 1 if the bill proposes a complete legal reversal. In *Models 4* and *7*, *Reversal* is equal to 1 if the bill proposes a complete policy reversal. In *Models 5* and *8*, *Reversal* is equal to 1 if the bill proposes a partial or complete legal reversal or a partial or complete policy reversal. The coding of these variables is discussed in detail above. I expect negative effects for all reversal variables, as non–reversing bills should be more likely to be enacted than reversal bills.

Ideological Distance between Status Quo Policy and Congress. Each model includes a variable measuring the ideological distance between the Supreme Court that announced the response–triggering decision and the responding Congress. As in Chapters 3 and 4, I employ alternative measures—one assuming congressional decisionmaking is driven by the location of the median member of each chamber and one assuming the median member of the majority party in each chamber is pivotal. I estimate separate "Chamber Median" and "Party Median" models. For the *Chamber Median* models, the congressional ideal point is located at the midpoint between the median member of each chamber. For the *Party Median* models, the congressional ideal point is located at the midpoint between the median member of the party controlling each chamber. For all models, I assume the ideal point of the Supreme Court is identical to the ideal point of its median member. Distance variables are calculated by taking the absolute value of the difference between the congressional ideal point and the ideal point of the Supreme Court that announced the relevant decision. I expect that as the ideological distance between the relevant Supreme Court and the responding Congress increases, a successful response becomes more likely. This reflects a standard prediction of separation of powers models—the more distasteful Congress finds the policy announced by the Supreme Court, the more likely it will be to

alter the policy. The effect of the distance variables should be positive.

I employ the ideal point estimates of Poole & Rosenthal (1997) for members of Congress and those of Epstein et al. (2007) that locate Supreme Court justices in the same unidimensional policy space.[10] Poole & Rosenthal's (1997) NOMINATE scores are derived from a scaling algorithm and provide ideal point estimates for all Representatives, Senators, and Presidents in a two–dimensional policy space. Like most researchers, I employ the predominant first dimension for my analysis. The "*Judicial Common Space*" ideal point estimates of Epstein et al. (2007) are based on a vote–based measure of Supreme Court ideology developed by Martin & Quinn (2002). Epstein et al. (2007) estimate a transformation of the Martin–Quinn scores that places them in the same bounded policy space as the NOMINATE data.[11]

Sponsor Chamber Majority. *Sponsor Chamber Majority* is a dichotomous measure that is equal to 1 when a bill's sponsor is a member of the chamber majority in which the bill originates. When versions of a bill originate in both chambers, this variable is equal to 1 if either sponsor is a member of the majority party in his chamber. I expect members of the majority party to enjoy increased probabilities of success. This variable, therefore, should have a positive impact on the probability of enactment.

President Supports and **President Opposes.** I include two dichotomous variables to account for presidential support and opposition to a bill. I hypothesize that success is more likely when the President has gone on record supporting a bill and less likely when he has indicated his opposition. The data are drawn from the *Congressional Quarterly Almanac*'s vote analyses. These data report presidential positions on roll call votes. When a responsive bill does not receive a roll call vote, I code these variables as if the president

[10] In Chapters 3 and 4 I use Bailey's (2007) ideology measures. While I would ideally use those measures here, they are only available through 2002. I would be forced to discard over one–third of the observations here if I relied on the Bailey measures. Both the NOMINATE–based data and the Bailey scores are widely–accepted as valid preference measurements in the judicial politics literature.

[11] NOMINATE scores are available through the 110th Congress at http://voteview.com/DWNL.html. The *Judicial Common Space* scores for the median Supreme Court justices through the 2007 term are available at http://epstein.law.northwestern.edu/research/JCS.html.

has not taken a position.

Permissive Supreme Court Decision. Next, I include a variable that indicates whether or not Congress is responding to a "permissive" Supreme Court decision. Most scholarship that considers congressional responses to the Supreme Court's constitutional decisions considers only responses to the Court's invalidations of statutes. I also include responses to Supreme Court decisions in which the Court exercises judicial review and upholds challenged statutes. The inclusion of these cases is necessary to capture the whole of the shared roles of Congress and the Court in shaping policy. The variable *Permissive* is equal to 1 if, in the antecedent Supreme Court case, the Supreme Court upheld, in whole or in part, the challenged statute. I expect that responses to permissive Court decisions will be more likely to be enacted. When the Supreme Court upholds a statute or action against a constitutional challenge, it signals at least partial acceptance of the challenged policy, leaving the door open to further regulation.

Reintroduction. For each bill in the sample, I include another dummy variable to measure whether or not Congress has previously attempted to enact the same legislation since 1989—*Reintroduction*. The variable is equal to 1 if a bill with the same short title, long title, or legislative language is introduced in a previous Congress after the 100th Congress. The *Reintroduction* variable could either increase or decrease the probability of success of a responsive bill. A previous failed attempt to enact the same legislation could energize supporters and increase the probability that subsequent attempts are successful. Alternatively, the presence of a previous failed attempt may be associated with a decreased probability of success. Much legislation is introduced without any real expectation that it will become law. A previous failed attempt may signal that a piece of responsive legislation is not a serious response and that a member is courting her constituents or public opinion by railing against the Court. For example, constitutional amendments to ban flag–burning and to allow voluntary school prayer are repeatedly introduced seemingly without regard to whether or not they have any chance of being enacted. Because many of

the observations in this data are bills that respond to salient Court decisions, it is possible that repeated response attempts are simply exercises in position–taking (Mayhew 1974). If this is the case, the relationship between the presence of a previous failed attempt to enact legislation will be negatively associated with the probability of success.

Data on the *Reintroduction* variable are collected through searches of the *Library of Congress*'s *THOMAS* website which contains information on bills from the 101st through the 110th Congresses. For each bill in the sample, I searched the previous Congresses for bills with similar names to identify previous attempts to enact the same legislation. To identify previously introduced amendments, I searched the *THOMAS* database using keywords from the official description of the amendment. For example, to identify previous attempts to enact the policy contained in the Gallegly Amendment to the Immigration in in the National Interest Act, I searched *THOMAS* for instances in which "public education benefits" and "illegal aliens" appear together.

For Supreme Court decisions rendered after 1988, this method is sufficient to identify all previous responses because all bills introduced after those Supreme Court decisions are searchable through *THOMAS*. Where a Supreme Court decision was rendered prior to 1989, however, searches of *THOMAS* may omit responses introduced after the announcement of the relevant Supreme Court decision but prior to the 101st Congress. Twenty–three observations in the data respond to Court decisions prior to 1989. For fourteen of these observations, I identify previous attempts to enact legislation with the same name or content with searches of *THOMAS*. I code the *Reintroduction* variable as zero for the remaining observations. While it would be ideal to search introduced bills from the date of the relevant Supreme Court decision, I believe this coding is defensible. First, all of the bills in the sample were introduced between 1995 and 2007. Accordingly, I am able to search for previous response attempts for at least six years prior to each responsive bill in the sample. I assume that if legislation was not introduced in the period since 1989, that it was not introduced prior to 1989. Several of the relevant cases generate multiple response

attempts in the data since 1995. The *Right to Life Act*, for example, was introduced in each of the Congresses in the sample. It's absence in the 101st, 102nd, 103rd, and 104th Congresses leads me to conclude with a high degree of confidence that it was not introduced in the Congresses prior to the 101st. Furthermore, I argue that a responsive bill introduced prior to 1989 that is not re–introduced until the post–1994 period will be unlikely to take the same form. *Reintroduction* is coded as 0 for the following bills responding to pre–1989 Supreme Court cases—the *Free Flow of Information Act of 2005*, the *Right to Life Act* (1995), the *Unborn Victims of Violence Act of 2004*, the *Native American Equal Rights Act of 2000*, the *Senate Campaign Finance Reform Act of 1995*, the *Bipartisan Campaign Reform Act of 2002*, the *Federal Death Penalty Abolition Act of 1999*, the *Riggs Amendment to the Higher Education Act of 1998*, and the *Gallegly Amendment to the Immigration in the National Interest Act of 1995*.

Years to Response. I also include a variable measuring the number of years that elapse between the announcement of the Supreme Court decision and the attempted response. *Years to Response* is an ordinal variable that is equal to the number of years between the relevant Court decision and the introduction of the responsive bill. When a bill responds to multiple Supreme Court decisions, I base the value of this variable on the year of the most recent Supreme Court decision. Some scholars have argued that over time Supreme Court precedents become entrenched and become more difficult to overturn (Landes & Posner 1976). While members of Congress are not constrained by precedent in the same was that judges are, it is conceivable that the public will view attempts to reverse these so–called super–precedents negatively. Public perception, then, could create disincentives to respond to older precedents. I, accordingly, expect the effect of this variable to be negative.

Summary statistics for all variables are presented in Table 5.6.

In summary, I evaluate the following hypotheses:

***Hypothesis 3**: Responsive bills that would reverse rulings of the Supreme Court will be less*

Table 5.6: Summary Statistics

Variable	*Minimum*	*Maximum*	*Mean*	*S.D.*
Success	0	1	0.18	0.39
Complete Legal Reversal	0	1	0.18	0.39
Partial Legal Reversal	0	1	0.25	0.44
Complete Policy Reversal	0	1	0.54	0.52
Partial Policy Reversal	0	1	0.36	0.48
Congress–Status Quo Distance (chamber median model)	0.00	0.30	0.07	0.07
Congress–Status Quo Distance (party median model)	0.01	0.55	0.26	0.13
Majority Party Sponsor	0	1	0.75	0.44
President Supports	0	1	0.15	0.36
President Opposes	0	1	0.12	0.33
Permissive Court Decision	0	1	0.42	0.50
Reintroduction	0	1	0.48	0.50
Years to Response	0	41	12.25	11.94
$n = 67$				

likely to be passed than responsive bills that would not reverse the Supreme Court.

***Hypothesis 4**: As the ideological distance between the Supreme Court that decided the relevant case and the Congress in which a response is proposed increases, the probability of passage will increase.*

***Hypothesis 5**: Bills sponsored by a member of Congress who is a member of the party that controls a majority of seats in the chamber of Congress in which the bill is introduced will be more likely to be passed than bills sponsored by members of a chamber minority.*

***Hypothesis 6a**: Responsive bills supported by the President will be more likely to be passed than bills on which the President has not taken a position.*

***Hypothesis 6b**: Responsive bills opposed by the President will be less likely to be passed than bills on which the President has not taken a position.*

***Hypothesis 7**: Bills that respond to permissive Supreme Court decisions will be more likely to be passed than bills that respond to restrictive Supreme Court decisions.*

***Hypothesis 8a**: Bills that have been introduced in a previous session of Congress will be more likely to be passed than bills introduced for the first time.*

***Hypothesis 8b**: Bills that have been introduced in a previous session of Congress will be less likely to be passed than bills introduced for the first time.*

***Hypothesis 9**: As the number of years between the announcement of the relevant Supreme Court decision and the proposed Congressional response increases, the probability of passage will decrease.*

5.4.2 Results

I estimate the models below using probit because the dependent variable—bill success—is dichotomous. I employ robust standard errors and cluster by Supreme Court case to correct for correlation between observations. I first estimate models that include a series of variables to characterize the content of each responsive bill. The primary independent variables are *Complete Legal Reversal*, *Partial Legal Reversal*, *Complete Policy Reversal*, and *Partial Policy Reversal*. Because none of the successful bills include complete legal reversals, an effect for that variable cannot be estimated. It is dropped from the model, as are the eleven observations for which the variable has a value of 1. I expect the effect of each of the reversal variables to be negative. The coefficients for each variable reflect the difference in the probability that a bill of that response type is enacted and a comparable responsive bill that includes no policy or legal reversal. *Model 1* includes the chamber median–based measure of congressional preferences and *Model 2* includes the party median–based measure of congressional preferences. These model results are presented in Table 5.7.

Both models are statistically significant, meaning that I can easily reject the null hypothesis that all coefficients are equal to zero. Both offer a significant improvement over a null model that simply predicts every observation is in the modal category. The proportional reduction in error (PRE) for *Model 1* is 50%. For *Model 2*, the PRE is 33%. The models drop the *Complete Legal Reversal* and *Sponsor in Chamber Majority* variables. Both predict failure perfectly—no complete legal reversal bills are enacted and no bills sponsored by non–majority members are enacted. While these variables cannot be included in the models here, the lack of variation offers strong support for *Hypotheses 2*, *3* and *5*.

The significance of the remaining independent variables varies across the two models. In neither model does the *Partial Legal Reversal* variable attain statistical significance. This indicates that responsive bills that include partial legal reversals are no more or less likely to be enacted than responsive bills that do not include a reversal. These models, however,

Table 5.7: Probit Models Predicting Probability of Bill Enactment, Responsive Bills, 1995–2007

		Model 1		***Model 2***	
		Chamber Median Model		*Party Median Model*	
	Expected	*Coefficient*	*(Robust S.E.)*	*Coefficient*	*(Robust S.E.)*
Complete Legal Reversal	$-$	.	.	.	.
Partial Legal Reversal	$-$	0.05	(0.48)	0.07	(0.44)
Complete Policy Reversal	$-$	-1.44^{*}	(0.69)	-1.18	(0.76)
Partial Policy Reversal	$-$	-1.53^{*}	(0.60)	-0.75^{*}	(0.36)
Congress–Status Quo Distance	$+$	-16.62	(9.89)	-4.28	(2.60)
Sponsor in Chamber Majority	$+$	.	.	.	.
President Supports	$+$	1.81^{*}	(0.73)	2.07^{**}	(0.89)
President Opposes	$-$	-0.30	(0.47)	-0.42	(0.60)
Permissive Court Decision	$+$	0.83^{*}	(0.40)	0.88^{*}	(0.41)
Reintroduction	$+/-$	0.61	(0.40)	0.37	(0.31)
Years to Response	$-$	-0.02	(0.02)	-0.05^{**}	(0.02)
Intercept		0.63	(0.82)	0.71	(0.90)
		Model Details			
		$n = 39$		$n = 39$	
		Wald $\chi^2_{(9)} = 63.39^{**}$		*Wald* $\chi^2_{(9)} = 43.72^{**}$	
		Pseudo $R^2 = 0.40$		*Pseudo* $R^2 = 0.34$	

Significance levels (one–tailed tests): * : 5% ** : 1%
Standard errors adjusted for clustering on Supreme Court case

necessarily underestimate the impact of the inclusion of a legal reversal in a bill because they cannot estimate an effect for the *Complete Legal Reversal* variable. While partial legal reversal bills may be no less likely to be enacted than non–reversing bills, complete legal reversals are significantly less likely to be enacted. Both policy reversal variables are negative and statistically significant in *Model 1* but only the *Partial Policy Reversal* variable attains significance in *Model 2*. With all other independent variables set at their mean or modal values, the probability of enactment of a non–reversing bill is 0.57 (based on *Model 1* values). For an otherwise identical bill, *Model 1* predicts that a partial policy reversal will be enacted with probability 0.10. A complete policy reversal will be enacted with a probability of 0.12. For Model 2, the baseline probability of passage is 0.53. This falls to 0.23 for a partially policy reversing bill.

The impact of the *President Supports* variable is positive and statistically significant across models while the *President Opposes* variable is not significant in either. The substantive effect is sizable. For a partially policy reversing bill with the mean/modal values for all other independent variables, the probability of enactment increases from 0.10 without presidential to support to 0.70 with presidential support for the *Chamber Median Model*. The effect is even larger for the *Party Median Model* with an increase from 0.23 to 0.92.

Both models offers support for *Hypothesis 7* (that bills responding to permissive decisions are more likely to be enacted). *Model 2* also provides evidence supportive of *Hypothesis 9* (that responses temporally removed from the relevant Court decision will be less likely to be enacted). To illustrate the substantive impact of these variables, I again compare the probability of enactment of the "average" responsive bill to a bill with different values of these independent variables. The average bill in this sample is a non–reversing bill on which the President has not taken a position that is sponsored by a member of the majority party controlling his chamber in response to an eleven–year old permissive decision of the Supreme Court. In *Model 2*, this bill has a 0.54 probability of enactment. If a bill with the same characteristics is introduced in response to a restrictive Supreme

Court decision, the probability of enactment falls to 0.20. If the bill, instead of responding to an eleven–year old Supreme Court decision, responds to a three year old precedent, the probability of enactment is 0.69.

Neither model offers support for the hypothesis that reintroduced bills are more or less likely to be enacted than newly introduced legislation (*Hypothesis 6*). *Models 1* and *2* offer support for my primary hypothesis. I can conclude definitively that complete legal reversals are less likely to be enacted than non–reversing bills. The hypothesis that policy reversals are less likely to be enacted than non–reversing bills receives partial support.

Next, I estimate models where the content of each proposed bill is characterized with one variable—a dummy variable that is equal to 1 if the bill constitutes a reversal attempt. I employ three alternative definitions of reversal and estimate a *Chamber Median* and *Party Median* model for each operationalization of the reversal variable. *Models 3*, *4*, and *5* are the *Chamber Median Models* and are reported in Table 5.8. *Models 6*, *7*, and *8* are the *Party Median Models* and are reported in Table 5.9. In the first column in Tables 5.8 and 5.9 (*Models 3* and *6*), *Reversal* is equal to 1 if the responsive bill includes a complete or partial legal reversal. In the second columns (*Models 4* and *7*), *Reversal* is equal to 1 if the bill includes a complete policy reversal. In the third columns (*Models 5* and *8*), *Reversal* equals 1 if the bill includes a partial or complete policy or legal reversal. These operationalizations move from more restrictive to less restrictive. There are 23 reversal observations in *Models 3* and *6*, 26 reversal observations in *Models 4* and *7*, and 40 reversal observations in *Models 5* and *8*.

The reversal hypothesis is supported in *Models 3* and *6* but not in *Models 4*, *5*, *7* and *8*. This is unsurprising—when the definition of reversal is restricted to include only legal reversals, we see that non–reversing bills are significantly more likely to be enacted. When reversal is defined broadly to include policy reversals and partially reversing bills, the differences between reversals and non–reversals disappear. The results allow me to conclude with confidence that the probability of bill success is significantly higher

Table 5.8: Probit Models Predicting Probability of Bill Enactment, Responsive Bills, 1995–2007, Chamber Median Models

		Model 3 *Any Legal Reversal*		***Model 4*** *Complete Policy Reversal*		***Model 5*** *Any Reversal*	
	Expected	*Coef.*	*(Robust S.E.)*	*Coef.*	*(Robust S.E.)*	*Coef.*	*(Robust S.E.)*
Reversal	$-$	-0.92^{*}	(0.49)	-0.75	(0.58)	-0.78	(0.68)
Congress–Status Quo Distance	$+$	-9.31	(6.61)	-9.82	(6.86)	-10.86	(7.62)
Sponsor in Chamber Majority	$+$	.	.	.	.	.	.
President Supports	$+$	1.77^{*}	(0.78)	2.00^{**}	(0.66)	1.73^{**}	(0.71)
President Opposes	$-$	-0.21	(0.47)	-0.28	(0.53)	-0.52	(0.69)
Permissive Court Decision	$+$	0.71^{*}	(0.41)	1.04^{*}	(0.52)	0.94^{*}	(0.44)
Reintroduction	$+/-$	0.71	(0.47)	0.55	(0.41)	0.42	(0.41)
Years to Response	$-$	-0.03	(0.02)	-0.03	(0.02)	-0.02	(0.02)
Intercept		-0.67	(0.50)	-0.82	(0.66)	-0.41	(0.89)
		Model Details					
		n= 50		n= 50		n= 50	
		Wald $\chi^2_{(7)} = 15.73^{*}$		*Wald* $\chi^2_{(7)} = 28.97^{**}$		*Wald* $\chi^2_{(7)} = 15.57^{*}$	
		Pseudo $R^2 = 0.35$		*Pseudo* $R^2 = 0.35$		*Pseudo* $R^2 = 0.34$	

Significance levels (one–tailed tests): * : 5% ** : 1%

Standard errors adjusted for clustering on Supreme Court case

Table 5.9: Probit Models Predicting Probability of Bill Enactment, Responsive Bills, 1995–2007, Party Median Models

		Model 6 *Any Legal Reversal*		***Model 7*** *Complete Policy Reversal*		***Model 8*** *Any Reversal*	
	Expected	*Coef.*	*(Robust S.E.)*	*Coef.*	*(Robust S.E.)*	*Coef.*	*(Robust S.E.)*
Reversal	$-$	-0.68^{*}	(0.41)	-0.99	(0.72)	-0.56	(0.53)
Congress–Status Quo Distance	$+$	-2.54	(2.23)	-4.66	(2.16)	-3.33	(2.03)
Sponsor in Chamber Majority	$+$	.	.	.	.	.	.
President Supports	$+$	1.86^{**}	(0.80)	2.27^{**}	(0.74)	1.88^{**}	(0.77)
President Opposes	$-$	-0.27	(0.58)	-0.36	(0.63)	-0.41	(0.69)
Permissive Court Decision	$+$	0.85^{*}	(0.41)	1.03^{*}	(0.49)	1.03^{**}	(0.45)
Reintroduction	$+/-$	0.48	(0.46)	0.45	(0.40)	0.30	(0.39)
Years to Response	$-$	-0.04^{**}	(0.01)	-0.05^{**}	(0.02)	-0.03^{*}	(0.01)
Intercept		-0.50	(0.65)	0.63	(0.95)	-0.17	(0.73)
		Model Details					
		$n = 50$		$n = 50$		$n = 50$	
		Wald $\chi^2_{(7)} = 18.91^{**}$		*Wald* $\chi^2_{(7)} = 28.01^{**}$		*Wald* $\chi^2_{(7)} = 20.59^{**}$	
		Pseudo $R^2 = 0.33$		*Pseudo* $R^2 = 0.35$		*Pseudo* $R^2 = 0.32$	

Significance levels (one–tailed tests): * : 5% ** : 1%

Standard errors adjusted for clustering on Supreme Court case

when Congress does not attempt to reverse the legal holdings announced by the Supreme Court. To illustrate the substantive effects of the reversal variables in *Models 3* and *6*, I again rely on predicted probabilities. Here, the "average" bill is proposed by a member of Congress that is a member of the party controlling the majority of seats in his chamber in response to a twelve–year old restrictive Supreme Court decision. The probability of enactment under the *Chamber Median Model* for a non–reversing bill is 0.05. Under identical circumstances, the probability of enactment of a bill that includes a legal reversal is 0.01. (For the *Party Median Model*, the probability of enactment falls from 0.06 for a non–reversing bill to 0.02.)

The findings for the remaining hypotheses are largely consistent across model specifications. I hypothesized that ideological distance between the Supreme Court that decided the relevant Court opinion and the responding Congress would increase the probability of a successful response. This hypothesis receives no support. Under none of the model specifications is the distance variable positive and significant. As in Chapter 3, there is limited variation in the value of the distance variables which may contribute to the lack of support for the hypothesis. Under the chamber median model, the distance between Congress and the Supreme Court–selected status quo policy ranges from 0.00 to 0.30. The highest value in the data is only 15% of the theoretical maximum. There is more variation in the variable under the *Party Median Model* where the variable ranges from 0.01 to 0.55 (up to 28% of the theoretical maximum). Of course, it is also possible that the failure of the variable to perform as expected represents a failure of the theory. This is also plausible. Most separation of powers models (including the one I adopt in Chapter 2), treat the Congress as a unitary actor and predict that when congressional preferences diverge sufficiently from a policy announced by the Supreme Court, a response that moves policy towards the institutional ideal point will be undertaken. This prediction does not account for the reality that Congress is comprised of hundreds of legislators looking for legislative opportunities for which they can claim credit. Members may have incentives to pursue

legislation that modifies the impact of Supreme Court decisions even when Congress is not diametrically opposed to a particular Court ruling. If members identify responsive legislative opportunities that are unlikely to be opposed by congressional gatekeepers, we will observe responses to Court decisions even when the ideological distance between Congress and the Supreme Court's policy is low.

In every model, *Hypothesis 6a* (that presidential support will increase the probability of bill success) is supported. Conversely, the effect of presidential opposition is never statistically significant. *Hypothesis 6b* is not supported. At least in this sample, the President's influence is most pronounced when he supports legislation. With other variables set at their means and modes, the probability of enactment is raised by 0.56 (on average) when the President supports a bill. For *Model 3*, for example, the probability of enactment for the otherwise "average" bill jumps from 0.34 to 0.87 if the bill is supported by the President.

Hypothesis 7 also receives strong support. This hypothesis predicts that responses to permissive Supreme Court decisions will be more likely to be enacted than responses to restrictive decisions. The effect of the *Permissive* variable is positive and statistically significant in each of the six models. The substantive effect varies–a change in the value of this variable results in an increase of between .12 and .36 in the probability of enactment for a non–reversing bill.

Neither *Hypotheses 8a* nor *8b* receives support. Under none of the model specifications does the variable indicating legislation has been previously introduced have a significant effect. I offered competing hypotheses for this variable, suggesting mechanisms by which previous introduction could increase or decrease the probability of bill success but neither is borne out by the data.

Hypothesis 9 predicts that older Supreme Court decisions will be less likely to trigger successful responses than newer cases. The effect is negative and significant in three of the six model specifications (*Models 6*, *7*, and *8*). Using model estimates from *Model 6*, I predict

that a non–reversing bill on which the President has not taken a position that responds to a three–year old restrictive decision of the Supreme Court will be enacted with a probability of .11. A similar response attempted 25 years after the decision's announcement will be enacted with a probability of 0.03. This effect is substantively significant across the party–median models. Table 5.10 summarizes the findings from the 8 models above.

Table 5.10: Summary of Findings

Hypothesis #	*Model #*							
Variable (*Predicted Effect*)	*1*	*2*	*3*	*4*	*5*	*6*	*7*	*8*
H3: Reversal (−)	x	x	x			x		
H4: Distance b/w Congress and Court (+)								
H5: Sponsor in Chamber Majority (+)	x	x	x	x	x	x	x	x
H6a: President Supports (+)	x	x	x	x	x	x	x	x
H6b: President Opposes (−)								
H7: Permissive (+)	x	x	x	x	x	x	x	x
H8a: Reintroduction (+)								
H8b: Reintroduction (−)								
H9: Years to Response (−)		x				x	x	x

"x" indicates the hypothesis is supported

5.5 Discussion

To assess the ease and frequency with which Congress can "reverse" the decisions of the Supreme Court, I identify and analyze 67 bills that respond to the Court's constitutional decisions. I focus on Congress's ability to reverse both the policy implications of Court decisions and its ability to affect the Court's constitutional interpretations. I find that while some responsive legislation attempts to affect policy by engaging in "coordinate construction," in a significant portion of cases, Congress responds to the Court through routine policy–making. I hypothesized that responses would generally not attempt to reverse the Court and that those that were enacted would fall short of reversing the Court. The findings largely conform to my expectations when a strict definition of "reversal" is adopted. Although a majority of the responsive bills that are proposed attempt to wholly reverse the policies announced by the Court, a significant minority do not. Fur-

thermore, less than 20% attempt to completely reverse the legal holdings announced by the Court. The majority of enacted responsive statutes cannot properly be characterized as complete reversals of Court decisions, even if consideration is limited to the policy dimension.

I also find that non–reversing responsive bills are more likely to be enacted than completely reversing responsive bills. These findings suggest that the realities of the Congress–Court relationship are different than the hybrid SOP/coordinate construction model offered by Meernik & Ignagni (1997). Meernik and Ignagni draw on both of these literatures and suggest that when Congress disagrees with a constitutional decision of the Court, it responds by enacting its preferred policy, thereby engaging in "coordinate construction" of the Constitution and reversing Court decisions. Sometimes, this hybrid model is apt. When Congress responded to the Court's decisions in *Boerne v. Flores* (1997) by proposing the Religious Liberty Protection Act and *Kelo v. City of New London* (2005) with the Private Property Protection Act, it attempted to alter policy by offering alternative interpretations of the Constitution that would simultaneously modify the constitutional interpretation *and* the policy announced by the Court. However, in many cases, Congress responds to the Court's constitutional decisions by modifying legislation to fit the Court's constitutional interpretations. In these cases, Congress is attempting to modify the impact of a Court decision without engaging in "coordinate construction." When Congress works within the constitutional guidelines provided by the Court, its responses ought not be characterized as reversals of the Court's decisions.

These analyses suggest that congressional responses are more likely to be successful under certain conditions. Responses are more likely to be successful when they are temporally proximate to the relevant Court decision and when the antecedent Supreme Court case does not completely invalidate the challenged law or action. This is not surprising as "permissive" Court decisions uphold, at least in part, a government action or law thereby leaving room for further regulation. Actors external to Congress and the Court can also

influence the probability of bill passage. When the President has made public statements indicating his support for legislation, its probability of enactment increases significantly. To my surprise, however, presidential opposition does not decrease the probability of enactment.

Congress clearly attempts to modify the impact of Court decisions through the passage of ordinary legislation. Some of these responses attempt to reverse the policy and/or constitutional interpretation announced by the Court. However, the assumption that all responses to the Court's constitutional decisions are reversals that affect constitutional interpretations is untenable. The majority of successful responsive bills do not wholly reverse the policy implications of the Court's constitutional decisions and none completely reverse the Court's constitutional interpretations. At the outset of the chapter, I asserted that in order to conclude that Congress can effectively reverse the Supreme Court it must be demonstrated that Congress can supplant the legal and/or policy implications of the Court's constitutional decisions and that those policies are not subsequently invalidated by the Supreme Court or the lower federal courts. The analyses in this chapter clarify that Congress *can* effectively reverse the policies announced by the Court, but that it does so less frequently than has previously been suggested. The evidence here suggests that if Congress can completely reverse the constitutional interpretations announced by the Supreme Court, it does so very rarely (and in no cases in the time period under consideration here). In the next chapter, I consider the efficacy of these responses and their long–term success by assessing the frequency with which responsive legislation is challenged and invalidated in the federal courts.

Chapter 6

The Finality of Responsive Legislation

I propose a two–pronged test to evaluate the claim that Congress can effectively reverse the constitutional decisions of the Supreme Court. The claim can only be sustained if it can be demonstrated (1) that Congress can reverse the policy or legal implications of the Court's constitutional decisions and (2) that those statutes are not subsequently invalidated in the federal courts. In Chapter 5, I evaluated the substance of a sample of responsive statutes and found that Congress can reverse the policy implications of the Court's exercise of judicial review—and to a lesser extent the legal implications of those decisions—but that it does so less frequently than is suggested in existing research. Now, I consider the fate of the responsive statutes that were enacted. The sample size is small but it should not be systematically biased in any way related to my dependent or independent variables. It can therefore offer, at least, preliminary insights into the factors associated with the presence and success of challenges to the constitutionality of responsive statutes. I find that responsive legislation fares very well in the federal courts. While half of the responsive statutes identified are subject to one or more constitutional challenges, most challenges are rejected. The Supreme Court has reviewed the constitutionality of four responsive statutes in the sample and only declared one statute unconstitutional (The Bipartisan Campaign Reform Act). Even then, the statute was invalidated in part and the major provisions survived.

The responsive statutes that became law are presented in Table 6.1. (For a detailed dis-

cussion of each statute and the Supreme Court decision to which it responds, see Chapter 5.) I also review the characterization of each statute as a reversing statute on both the policy and legal dimensions. No responsive statute that attempts to bring about a complete legal reversal was enacted. If I adopt the most stringent definition of what constitutes a "reversal"—that a statute must effectuate a complete change in legal rule and policy—the argument of Meernik & Ignagni (1997) fails on the first prong. It would be fair to conclude on this basis that Congress cannot reverse the Court's constitutional decisions. However, the responsive statutes that were enacted are not wholly without impact. As in Chapter 5, I relax the definition of what constitutes a "reversal" to include statutes that would partially reverse the policy or legal implications of a constitutional decision of the Supreme Court. Here, I consider the presence and success of constitutional challenges to these statutes as well as challenges to Congress's non–reversing responsive legislation. The analysis provides a picture of the shared role that Congress and the Court play in shaping policy.

In Chapter 2, I argued that the decision of a judge or judges to declare a responsive statute unconstitutional should be considered alongside the decision of the relevant litigant(s) to bring suit. The opportunity for a court to invalidate a responsive statute depends on the decision of a litigant to initiate a suit. In Section 6.1, I evaluate the hypothesis that the probability of a law being challenged will be affected by case and statute characteristics. I argue that factors that suggest to a litigant that her legal challenge is likely to be successful should increase the probability that she brings a suit. In Section 6.3, I consider the evaluation of constitutional challenges on the merits. Here, I hypothesize that judge, court, and case/statute characteristics will impact the probability that a responsive statute is invalidated.

Table 6.1: Responsive Bills that Became Public Law

Bill Title	*Public Law*	*Policy Reversal*	*Legal Reversal*
Lobbying Disclosure Act	104–65	*complete*	*no*
ICC Termination Act of 1995	104–88	*complete*	*no*
Gun–Free School Zones Amendments Act of 1995	104–208	*complete*	*partial*
Religious Liberty and Charitable Donations Protection Act	105–183	*no*	*no*
Religious Land Use and Institutionalized Persons Act	106–274	*partial*	*no*
PATRIOT Act's bulk cash smuggling provisions	107–56	*complete*	*no*
Bipartisan Campaign Reform Act of 2002	107–155	*partial*	*no*
PROTECT Act	108–21	*complete*	*partial*
Partial–Birth Abortion Ban Act of 2003	108–105	*complete*	*partial*
Unborn Victims of Violence Act of 2004	108–212	*no*	*no*
Nickles Amendment to Treasury, Postal Service, and General Appropriations Act of 1996	109–115	*no*	*no*
Amendments to Wild and Scenic River Act	110-229	*no*	*no*

6.1 Presence of Challenges to the Constitutionality of Responsive Legislation

I focus on two sets of variables—those that serve as signals to potential litigants and those that measure the resources of potential litigants—that may impact the probability that a challenge to the constitutionality of legislation is brought to the federal courts. First, factors that signal to potential litigants that their claims are likely to be successful will increase the probability of a challenge. While I have argued that judges and legislators are motivated by their preferences over policy and legal outcomes, I assume that litigants' decisions are based on the desire to prevail in their cases and that they will condition their decision to challenge the constitutionality of responsive legislation on relevant case and statute characteristics. These factors include the nature of the Supreme Court decision to which legislation responds (whether or not it is permissive), the nature of the responsive legislation (the type of reversal enacted by Congress), the degree of consensus in the antecedent Supreme Court decision, and the salience of the antecedent Supreme Court decision. Another set of factors—the number of interest groups supporting the litigant that prevailed at the Supreme Court and whether or not the Supreme Court winner was a government—serves as a proxy for the resources available to the party that would potentially seek an invalidation of responsive legislation. I expect that as the resources of the potential litigant increase, so will the likelihood that responsive legislation is challenged.

Legislation that responds to Supreme Court decisions characterized as "permissive" should be less likely to give rise to constitutional challenges than responses to totally "restrictive" decisions. As in Chapter 5, I code a decision as "permissive" if it fails to strike the challenged statute or action in its entirety. When the Court exercises judicial review and upholds at least a portion of the challenged statute or action, it endorses or allows some government action in the area. Challenges to legislation that responds to these cases are likely to be viewed as riskier to potential litigants than are responses to "restrictive" decisions.

I hypothesize that the nature of the responsive legislation will also impact the probability that its constitutionality is challenged. As evidenced by the discussion in Chapter 5, the scope of responsive legislation is varied. While some responsive statutes make relatively minor changes in policy without affecting legal policy, others attempt to make significant policy and/or legal changes. I argue that more expansive responsive statutes will be more likely to give rise to constitutional challenges. I adopt the two–dimensional, tripartite classification scheme from Chapter 5.[1] I hypothesize that (1) legal reversals will be more likely to be challenged than responsive statutes that do not effectuate legal reversals[2]; that (2) complete policy reversals will be more likely to be challenged than responsive statutes with more limited policy impacts; and that (3) statutes that enact any type of reversal will be more likely to be challenged than non–reversing responsive statutes. When members of Congress enact responsive legislation that is non–reversing or has limited reversing–effects, potential litigants may face increased uncertainty over whether or not the Supreme Court will be sympathetic to their challenge. Conversely, the probability that the Supreme Court is sympathetic will be increased when Congress enacts legislation that directly contradicts Supreme Court precedent.

The degree of consensus in the initial Supreme Court ruling is expected to increase the probability that a litigant brings a challenge to the constitutionality of responsive legislation. Responsive legislation is assumed to reverse (at least in part) the success of the party that prevailed at the Supreme Court. If the Supreme Court decision was unanimous or consensual, this may signal to litigants that their preferred outcome is supported by the Court and would, therefore, be more likely to be adopted by the lower federal courts. Of course, it is possible that Supreme Court membership may change in the intervening period between the announcement of the antecedent decision and the enactment of

[1] I code each responsive statute based on the extent to which it would "reverse" the relevant Court decision's policy and legal outcomes. Each case is coded as a "non–reversal," a "partial reversal," or a "complete reversal" on both a policy and legal dimension.

[2] I do not distinguish between "complete" and "partial" legal reversals in this chapter because there are no statutes in the sample in which a complete legal reversal is enacted.

responsive legislation. Even in the presence of membership change, consensus should have a positive impact on the probability of a challenge. Unanimous or near unanimous outcomes suggest that the argument and/or outcome favored by the potential litigant is broadly appealing in that it was supported by Supreme Court justices with diverse preferences. None of the cases that triggered responsive legislation in this sample were decided unanimously. To evaluate the impact of consensual decisions, I characterize the vote margin in the antecedent Supreme Court case. A case decided by a vote of 8–1 has a vote margin of 7. A case decided by a 5–4 vote has a margin of 1. I expect that legislation that responds to cases with larger vote margins will be more likely to be challenged in the federal courts. Data on vote margins are collected from the *Original U.S. Supreme Court Database* compiled by Spaeth (2008).

I hypothesize that legislation that responds to salient Supreme Court decisions will be more likely to be the subject of a constitutional challenge than non–salient decisions. Baird (2004) argues that litigants interpret salient decisions as signals of the Court's willingness to hear additional cases in an issue area area. She finds that when the Supreme Court issues a salient opinion in an issue area, the amount of litigation in that issue area subsequently increases. This suggests that legislative responses to salient Supreme Court decisions will be more likely to prompt subsequent legal challenges as potential litigants may interpret the antecedent Supreme Court decision as a signal that the Court is receptive to the type of case they wish to pursue. Vanberg (2001) offers another mechanism by which salient cases may increase the probability of constitutional challenges to responsive legislation. He suggests that when national high courts enjoy high levels of public support, noncompliance by the legislature will be unattractive when the public is cognizant of legislative responses to judicial rulings. I argue that enacting legislation that would partially or completely reverse Supreme Court rulings is a form of noncompliance. Scholars have consistently found that the United States Supreme Court enjoys high levels of public support—satisfying the first of Vanberg's (2001) conditions that must be present in

order to make noncompliance by Congress unattractive (Caldeira & Gibson 1992, Gibson, Caldeira & Smith 2003*b*, Gibson, Caldeira & Smith 2003*a*). The second condition is satisfied when the public is aware of congressional action. I argue that this is likely to be the case when Congress responds to a Supreme Court decision that was salient to the public. I rely on the measure of case salience proposed by Epstein & Segal (2000) that classifies a case as salient if it received front–page coverage in the *New York Times* the day after it was announced.[3]

Next, I consider two variables that serve as proxies for the resources available to a potential litigant—the number of amicus briefs filed in support of the Supreme Court winner and whether or not the Supreme Court winner is a government. Interest groups and governments are especially likely to possess the resources necessary to appeal their losses in Congress to the federal courts and governments routinely fare better in legal contests than private litigants. When the success of a government is reversed by responsive legislation, they should be more likely to challenge the reversal than non–governments—they are more likely to possess the resources necessary to mount a challenge and are also likely to perceive a high probability of success. The presence of amicus support for the Supreme Court winner should operate similarly. The presence of amicus suggests that parties with the resources to challenge the constitutionality of responsive legislation are aligned with the potential litigant. The "*Supreme Court Winner*" variable is a dichotomous measure equal to 1 when, according to the Spaeth (2008) data, the prevailing litigant at the Supreme Court is a government. Amicus data are provided by Collins (2008). The variable is a count of the number of amicus briefs filed in support of the winning litigant in the antecedent Supreme Court case.

In summary, I evaluate the following hypotheses:

[3]Since high levels of public support for the Supreme Court are constant, there is no need to include a measure of public support. Of course, the constancy of support makes it impossible to distinguish between the Baird (2004) and Vanberg (2001) explanations for the proposed relationship.

***Hypothesis 1**: Responsive statutes that respond to "permissive" Court decisions will be less likely to be challenged in the federal courts than responsive statutes that respond to "restrictive" Court decisions.*

***Hypothesis 2**: Responsive statutes that effectuate legal reversals will be more likely to be challenged in the federal courts than responsive statutes that do not bring about legal reversals.*

***Hypothesis 3**: Responsive statutes that effectuate complete policy reversals will be more likely to be challenged in the federal courts than responsive statutes that do not bring about complete policy reversals.*

***Hypothesis 4**: Responsive statutes that effectuate any policy or legal reversal will be more likely to be challenged in the federal courts than responsive statutes that do not bring about policy or legal reversals.*

***Hypothesis 5**: Consensus in the initial Supreme Court ruling will increase the likelihood of a judicial challenge to responsive legislation.*

***Hypothesis 6**: When the initial Supreme Court ruling is salient to the public, responsive legislation is more likely to be challenged in the federal courts.*

***Hypothesis 7**: The absolute number of interest groups supporting the litigant winning at the Supreme Court level will be positively associated with the probability that responsive legislation is challenged in the federal courts.*

***Hypothesis 8**: Responsive legislation that reverses the success of governments is more likely to give rise to a legal challenge than legislation responding to a case in which the winning litigant was not a government.*

6.1.1 Analysis and Results

The dependent variable is a dichotomous measure indicating whether or not a challenge to the constitutionality of a responsive statute is heard in the federal courts. To identify challenges, I use *LexisNexis Academic Universe*'s General Search of the *Federal and State Cases, combined* database using the Terms and Connectors mode. I identify published cases in the United States District Courts, Courts of Appeals, and United States Supreme Court that include the relevant statute name and any variant of the term "constitution." I restrict the range of dates searched to those falling after enactment of the relevant responsive statute through the end of 2008. For example, the standard search terms used to identify challenges to the Religious Land Use and Institutionalized Persons Act are:

"'Religious Land Use and Institutionalized Persons Act' and constitution!" for all dates after 9/22/2000 and prior to 01/01/2009. In some cases, only a portion of a statute is responsive. For example, only the bulk–cash smuggling provision in the PATRIOT Act responds to the Court's decision in *United States v. Bajakajian*. Accordingly, within the standard search results I search for references to the bulk–cash smuggling provision of the statute. All search terms used to identify cases for the analyses in this chapter are reported in Appendix C.

For each statute, I review the search results to determine whether or not any case presents a constitutional challenge to a responsive statute in a published case. I omit unpublished opinions because their availability varies by court and they are not binding precedent. By focusing only on published opinions, I can definitively identify the sample of precedent–setting cases. I identify constitutional challenges to six of the twelve responsive statutes—the Gun–Free School Zones Amendments Act of 1995, the Religious Land Use and Institutionalized Persons Act, the PATRIOT Act's bulk–cash smuggling provisions, the Bipartisan Campaign Reform Act of 2002, the PROTECT Act of 2003, and the Partial–Birth Abortion Ban Act of 2003. Table 6.2 reports the frequency of challenges by level of the federal judicial hierarchy. The table counts one observation for each case in which the constitutionality of a responsive statute is considered. Cases considered by multiple courts are counted multiple times. In the case of the Gun Free School Zones Amendments Act of 1995, there are challenges at the Courts of Appeals level but none recorded at the district court level. This is because there were no published opinions in the district courts.

The sample size is 12 observations, accordingly, the ability to evaluate the eight hypotheses proposed above is limited. I am unable to conduct multivariate analysis so instead rely on descriptive statistics and simple hypothesis tests to evaluate the extent to which my predictions are supported by the data. Table 6.3 reports the means and proportions of values of the proposed independent variables for challenged and unchallenged

Table 6.2: Frequency of Cases Challenging Constitutionality of Responsive Statutes

Responsive Statute	*District Court*	*Courts of Appeals*	*Supreme Court*
Lobbying Disclosure Act of 1995	0	0	0
ICC Termination Act of 1995	0	0	0
Gun-Free School Zones Amendments Act of 1995	0	2	0
Religious Liberty and Charitable Donations Protection Act	0	0	0
Religious Land Use and Institutionalized Persons Act	18	12	1
PATRIOT Act's bulk cash smuggling provisions	3	3	0
Bipartisan Campaign Reform Act of 2002	4	0	3
PROTECT Act of 2003	4	3	1
Partial–Birth Abortion Ban Act of 2003	3	3	1
Unborn Victims of Violence Act of 2004	0	0	0
Nickles Amendment to Treasury, Postal Service, and General Appropriations Act of 1996	0	0	0
Amendments to Wild and Scenic River Act	0	0	0

responsive statutes. I conduct two–sample *t*–tests of the equality of means for continuous variables and two–sample tests of independence for dichotomous variables to test for significant differences between the sub–samples. Because all hypotheses are directional, I employ one–tailed tests of significance.

I hypothesize that permissive Supreme Court decisions will be less likely to beget subsequent constitutional challenges than restrictive cases. Five of the six unchallenged statutes respond to permissive decisions while four of the six challenged statutes were triggered by restrictive decisions. This difference is significant, suggesting that responses to restrictive Court decisions are more likely to engender constitutional challenges. *Hypothesis 1* is supported.

Hypotheses 2, *3*, and *4* are also supported. Reversal statutes are consistently identified as likely to be challenged in the federal courts. Five statutes effectuate complete policy reversals and four of those give rise to challenges. This difference supports *Hypothesis 2*. The probability of a challenge is also higher for statutes that attempt to reverse the legal

Table 6.3: Predictors of Presence of a Challenge to Responsive Legislation

Variable	*Mean/Proportion for Challenged Statutes*	*Mean/Proportion for Unchallenged Statutes*	*Test of Difference in Means/Independence*
S.C. Case Triggering Response is "Permissive"	0.33	0.83	$z = 1.76^{**}$
Policy Reversal (complete)	0.67	0.17	$z = -1.76^{**}$
Legal Reversal (partial)	0.50	0.00	$z = -2.00^{**}$
Any Reversal (policy or legal, partial or complete)	1.00	0.33	$z = -2.45^{**}$
Unanimity of S.C. Decision	0.00	0.00	—
Vote Margin	2.67	3.00	$t = 0.29$ (10 df)
Amicus Support for S.C. Winner	3.50	3.00	$t = -0.20$ (10 df)
Salience of S.C. Decision	0.83	0.83	$z = 0.00$
Statute Reverses Success of Government	0.33	0.33	$z = 0.00$

Challenged Statutes: $n = 6$ / Unchallenged Statutes: $n = 6$

* significant at 0.10 level (one–tailed test) ** significant at 0.05 level (one–tailed test)

holding of a Court decision than for those that do not. Only three responsive statutes attempt legal reversals, but each is subsequently challenged, offering support for *Hypothesis 3*. *Hypothesis 4* suggests that the constitutionality of statutes attempting any type of reversal (policy or legal, complete or partial) will be more likely to be challenged than non–reversing responses. The data support this hypothesis—six of the seven reversing statutes become the subject of a constitutional challenge. Each of these differences is statistically significant.

Hypotheses 5, 6, 7, and 8 are not supported. My measure of consensus does not reveal significant differences between challenged and unchallenged statutes. Recall that none of the antecedent Supreme Court cases were decided unanimously so I depend here on a measure of the vote margin to characterize the level of consensus. While unchallenged statutes have a slightly higher vote margin on average (3.00 compared to 2.67 for challenged statutes), the difference is small and is not statistically significant. Amicus support also fails to perform as expected. The average number of amicus briefs is, as predicted, higher for challenged statutes (3.50 compared to 3.00), but the difference is small and not statistically significant. There are no differences between the sub–samples for the salience and "statute reverses the success of a government" variables.[4]

The analysis in this section suggests that the presence of a constitutional challenge to a responsive statute is not random and that reversal statutes are significantly more likely to be challenged than responses that do not attempt to reverse Court rulings (whether "reversals" are characterized as exclusively legal or not). This is consistent with the argument that litigants are strategic. It makes sense that litigants would anticipate a higher

[4]Throughout the discussion of strategic litigants, I have assumed that the potential petitioner will be the party wishing to challenge the constitutionality of responsive legislation. While this assumption holds for the majority of cases, in the cases in which the federal courts have considered challenges to the Religious Land Use and Institutionalized Persons Act, the plaintiff is typically either a prisoner or a representative of a religious institution bringing a complaint against a correctional facility or local government for violations of the statute. In these cases, the respondent raises the constitutional question, and the United States typically intervenes to defend the constitutionality of the statute. This dynamic may undermine the arguments about strategic litigants. I re–ran the analysis above excluding the RLUIPA observation but the significance of the relationships above is not affected. *Hypotheses 1–4* are still supported; *Hypotheses 5–8* are not. These analyses are available upon request.

probability of success when they challenge a statute that undermines a previously announced legal rule or policy than when they challenge a statute that does not immediately appear to be at odds with a prior judicial ruling. Interestingly, none of the other variables associated with litigant signals or resources evinces a significant effect here. It may be the case that criminal cases are especially likely to be challenged even though criminal defendants are unlikely to have the benefit of abundant resources. The enforcement of new or modified criminal statutes may create a large pool of potential litigants to challenge a statute's constitutionality. A test of the hypothesis that criminal statutes are more likely to be challenged is not supported, however ($z = -1.22$).

6.2 Overview of Constitutional Challenges to Responsive Legislation

In this section, I offer brief overviews of the constitutional challenges to responsive legislation. My intent is to provide a more thorough picture of the Congress–Court dialogue than can be acquired by considering the challenge–cases collectively. By chronicling the various challenges to each statute, I can provide information about the status of the responsive legislation that takes into consideration the timing of different challenges. These summaries suggest that Congress is effective at enacting responsive legislation that can survive judicial scrutiny.

6.2.1 The Gun–Free School Zones Amendments Act of 1995

Challenges to the constitutionality of the Gun–Free School Zones Amendments Act of 1995 (GFSZA) were brought to the Ninth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals. In *United States v. Tait* (202 F.3d 1320) and *United States v. Dorsey* (418 F.3d 1038) individuals charged with possessing a firearm in a school zone in violation of the GFSZA challenged their convictions on the grounds that the statute was unconstitutional. Both criminal defendants alleged that, like the original Gun–Free School Zones Act of 1990, the amended GFSZA also exceeded Congress's authority to

regulate commerce. In the Eleventh Circuit case (*Tait*), the Court found it unnecessary to reach the constitutional question because the defendant's possession of a license to carry a concealed weapon removed him from the reach of the GFSZA's prohibition on firearms in school zones. The Ninth Circuit Court of Appeals upheld the statute against the constitutional challenge, concluding that by adding the jurisdictional element to the statute, Congress had remedied the error in the statute invalidated in *United States v. Lopez*.

6.2.2 The Religious Land Use and Institutionalized Persons Act

The Religious Land Use and Institutionalized Persons Act generates more constitutional challenges than any of the other identified responsive statutes. Challenges to the institutionalized persons provisions of the statute were considered by the district courts for the districts of Arizona, Colorado, Eastern Texas, Western Michigan, Middle Pennsylvania, Southern Ohio, Southern South Dakota, Western Michigan, Western Virginia as well as the Circuit Courts of Appeals for the Fourth, Sixth, Seventh, Ninth, and Eleventh circuits. The institutionalized persons provisions were alleged (in various cases) to be violative of the Establishment Clause, the Fourteenth Amendment's Enforcement Clause, the Commerce Clause, the Spending Clause, the Tenth Amendment, the Eleventh Amendment, and the separation of powers principle. The only claim accepted by any of these courts was the Establishment Clause violation which led the district courts for the district of Western Virginia and Eastern Wisconsin to invalidate the provisions. The Courts of Appeals for the Fourth, Seventh, Ninth, and Eleventh circuits rejected challenges to the statutes. Only the Sixth Circuit found the RLUIPA's institutionalized persons provisions to be unconstitutional. That decision, however, was reversed on appeal to the Supreme Court (*Cutter v. Wilkinson*, 349 F.3d 257 and *Cutter v. Wilkinson*, 544 U.S. 709).

The statute's land use provisions were also subjected to multiple challenges. The challenges raised against the land use provisions mirror those brought against the institu-

tionalized persons portions of the law. Only the District Court for the District of Central California found a constitutional violation and its supervising Court of Appeals found the statue constitutional in a subsequent, similar case (*Elsinore Christian Center v. City of Lake Elsinore*, 270 F. Supp. 2d 1163 and 291 F. Supp. 2d 1083, and *Guru Nanak Sikh Society v. County of Sutter*, 456 F.3d 978). The other courts that upheld the land use provisions are the Circuit Courts of Appeals for the Second and Eleventh Circuits, and the federal district courts for the districts of Connecticut, Eastern California, Eastern Pennsylvania, Hawaii, Massachusetts, New Jersey, Northern Illinois, and Southern New York. Despite a multitude of levied challenges, at the end of 2008 there was no jurisdiction in which the Religious Land Use and Institutionalized Persons Act's institutionalized persons and land use provisions were considered unconstitutional.

6.2.3 The PATRIOT Act's Bulk–Cash Smuggling Provisions

Section 5332 of the PATRIOT Act makes it a criminal offense to smuggle currency, and thereby, authorizes the forfeiture of smuggled bulk cash. I identify several cases in which criminal defendants are convicted of concealing currency and are required to forfeit the funds in the aftermath of the the enactment of the PATRIOT Act. In five cases, as–applied challenges to forfeitures allowed under the bulk–cash smuggling provisions of the PATRIOT Act are challenged as being violative of the Excessive Fines Clause of the Eighth Amendment. One claim was not evaluated on the merits because the court finds the claim to be premature (United States v. Talebnejad, 342 F. Supp. 2d). The defendant prevailed in a case in District Court for the Eastern District of New York (U.S. v. $293,316 in U.S. Currency, 349 F.Supp.2d 638). In challenges considered by the First, Second, and Sixth Circuit Courts of Appeals, forfeitures were upheld.

6.2.4 The Bipartisan Campaign Reform Act of 2002

The Bipartisan Campaign Reform Act of 2002 includes a provision providing for an expedited judicial review process. The statute provides that challenges to the constitution-

ality of the Act shall be filed in United States District Court for the District of Columbia and heard by a three–judge court with final decisions reviewable only by direct appeal to the Supreme Court. Additionally, the statute expressly provides that any Member of Congress may challenge the Act's constitutionality. In the first challenge to the statute, eleven cases were consolidated and several provisions were challenged. (The lead case is *McConnell v. FEC* (251 F. Supp. 2d 176).) The three–judge district court considered the constitutionality of sixteen unique sections of the campaign finance bill and in twelve instances found no constitutional violation. The major provisions of the bill—its ban on "soft money" and the majority of regulations on the source, content, and timing of political advertising were upheld. The court struck (1) the statute's prohibition on campaign donations from minors; (2) its requirement that political parties choose between coordinated and independent expenditures during the postnomination, preelection period; (3) its requirement that broadcasters keep publicly available records of politically related broadcasting requests; and (4) a section forbidding national, state, and local party committees and their agents to "solicit any funds for, or make or direct any donations" to 501(c) tax exempt organizations that make expenditures in connection with a federal election. The decision was appealed to the Supreme Court which reversed the lower court decision as to the broadcast requests and the restriction on the solicitation of funds for and donations to 501(c) tax–exempt organizations that make expenditures in connection with a federal election. Again, the statute's primary provisions were upheld.

In *Davis v. FEC* (501 F. Supp. 2d 22 and 128 S. Ct. 2759), BCRA's "Millionaire's Amendment" which allowed candidates running against a self–financed opponent to receive contributions from individuals at increased limits and to have increased coordinated party expenditures made on their behalf was alleged to violate the First Amendment and the Equal Protection Clause. The district court upheld the "Millionaire's Amendment," but it was found by the Supreme Court to violate the First Amendment and the Equal Protection Clause.

In the aftermath of *McConnell* and *Davis*, the majority of challenges to BCRA have been as–applied challenges. The Supreme Court agreed that BCRA was unconstitutionally applied to some political advertisements in *FEC v. Wisconsin Right to Life* (530 F. Supp. 2d 274) and another as–applied challenge is currently before the Court (*Citizens United v. FEC*, Docket No. 08-205). While some provisions of the Bipartisan Campaign Reform Act have been invalidated, the bulk of the statute survives. These cases offer evidence that responsive legislation can have significant policy impacts *and* survive examination by the federal courts.

6.2.5 The PROTECT Act of 2003

Constitutional challenges to two responsive provisions in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act have been considered in the federal courts. The federal district courts for the districts of Southern New York, New Jersey, and Southern Iowa and the Circuit Courts of Appeals for the Fourth and Ninth Circuit Courts of Appeals have been presented with challenges to the constitutionality of the PROTECT Act's definition of what constitutes child pornography. Only the Iowa court invalidated a portion of the statute for being overbroad (United States v. Handley, 564 F. Supp. 2d 996). The Fourth and Eleventh Circuit Courts of Appeals ruled on the constitutionality of the PROTECT Act's pandering provisions. In *United States v. Forrest* (429 F.3d 73) the Fourth Circuit upheld the provisions against an as–applied challenge in which a criminal defendant argued that the statute did not reach his private, intrastate, production and possession of child pornography. The Eleventh Circuit concluded that the pandering provisions were both overbroad and vague and thus, unconstitutional in *United States v. Williams* (444 F.3d 1286). This decision, however, was ultimately reversed by the United States Supreme Court (United States v. Williams, 128 S. Ct. 1830). In total, the PROTECT Act has fared well in the courts. Its pandering provisions have been upheld by the Supreme Court and only one federal district court has invalidated any portion of

the statute's child pornography definition.

6.2.6 The Partial–Birth Abortion Ban Act of 2003

The Partial–Birth Abortion Ban Act of 2003 generated significant amounts of litigation. The statute's constitutionality was considered by district courts, courts of appeals, and eventually the United States Supreme Court. The statute has been challenged on multiple grounds—its opponents have argued that the statute is overbroad and vague, that it creates an undue burden on women's right to choose abortion and that its lack of a health exception renders the statute unconstitutional. The statute was invalidated in the federal district court for the District of Nebraska in *Carhart v. Ashcroft* (331 F. Supp. 2d 805). That decision was affirmed by the Circuit Court of Appeals for the Eighth Circuit *Carhart v. Gonzales* (413 F.3d 791) before being reversed by the United States Supreme Court in *Gonzales v. Carhart* (550 U.S. 124). Prior to the Supreme Court's ruling in *Gonzales*, four other courts found the statute unconstitutional due to its lack of an exception to preserve the health of the mother—the district courts for the Southern District of New York and for the Northern District of California and the Circuit Courts of Appeals for the Second and Ninth Circuits. The District Court for the Northern District of California and the Ninth Circuit Court of Appeals additionally argued that the statute was unconstitutional for vagueness and the creation of an undue burden on women's right to choose abortion. In the end, the statute was upheld by the high court despite its lack of a health exception. Here, Congress was able to impose and sustain a partial legal reversal as the Court had previously held that the lack of a health exception in Nebraska's "partial birth abortion" statute rendered it unconstitutional (*Stenberg v. Carhart, 530 U.S. 914 (2000).*)

An overview of the challenges to the responsive statutes makes clear that Congress's responsive statutes hold up well in the face of constitutional challenges. None of the responsive statutes have been invalidated in their entirety. Four of the six challenged statutes have been reviewed by the Supreme Court and in only one of those cases did

the Court find a constitutional violation. Even then, the Court rejected several other challenges to the same statute, and those generally perceived as the "major" provisions of the statute are intact. This discussion bears on the primary question of this chapter—can Congress effectively reverse the constitutional decisions of the Supreme Court? The analysis in Chapter 5 makes clear that Congress rarely attempts to (and is even more rarely successful at) reversing the legal rules announced by the Supreme Court. The responsive statutes that are enacted have, generally speaking, attempted minimal legal policy–making and survived constitutional scrutiny in the federal courts. These analyses suggest that the relationship between Congress and the Supreme Court is not as combative as existing research and separation of powers theory suggests. The norm for responses seems to be for the Supreme Court to guide Congress to acceptable legal policies. By pursuing responsive legislation that corrects constitutional deficiencies and focuses primarily on policy instead of legal rules, Congress can effectively modify the impact of Supreme Court rulings.

6.3 Predicting the Invalidation of Responsive Statutes

I now move from the statute to the case level to evaluate the action of the federal courts in response to Supreme Court–triggered, responsive legislation, given that a litigant has brought a suit in which a court is asked to rule on the constitutionality of the responsive statute. The dependent variable is a dichotomous measure that is equal to one when responsive legislation is declared unconstitutional by a federal court, in whole or in part. The unit of analysis is the case. There is one observation for every published case in which a federal district court, a federal Circuit Court of Appeals, or the United States Supreme Court rules on the constitutionality of one of the responsive statutes identified in Chapter 5. The method of case identification is the same as in Section 6.1 and is detailed in Appendix C. In this analysis, I evaluate hypotheses about factors that influence the success or failure of constitutional challenges to responsive legislation.

As discussed in Chapter 2, I evaluate the following hypotheses.

> ***Hypothesis 9****: As the ideological distance between the reviewing court and the enacting Congress increases, the probability that the court will invalidate the responsive statute will increase.*
>
> ***Hypothesis 10****: Responsive legislation involving the federal distribution of federal power is more likely to be invalidated in the federal courts than responsive legislation unrelated to the distribution of federal power.*
>
> ***Hypothesis 11****: Responsive legislation that reverses the success of governments is more likely to be invalidated in the federal courts than cases in which the successful Supreme Court litigant is not a government.*
>
> ***Hypothesis 12****: Responsive statutes that have previously been upheld (invalidated) by a superior court or courts will be less likely to be upheld (invalidated) than statutes that have been invalidated (upheld) by superior courts or not considered by superior courts.*
>
> ***Hypothesis 13****: Responsive statutes that effectuate legal reversals will be more likely to be invalidated in the federal courts than responsive statutes that do not bring about legal reversals.*
>
> ***Hypothesis 14****: Responsive statutes that effectuate complete policy reversals will be more likely to be invalidated in the federal courts than responsive statutes that do not bring about complete policy reversals.*

The hypotheses and coding of independent variables for the analysis are reviewed below.

Ideology. I expect ideology to influence a court's treatment of responsive legislation. I hypothesize that as the distance between the ideal point of the court reviewing the statute and the ideal point of the Congress that enacted the statute increases, an invalidation will become more likely. This hypothesis is consistent with numerous studies that find ideology is an important predictor of judicial outcomes (Atkins 1972, Benesh 2002, Klein 2002, Pinello 1999, Songer, Davis & Haire 1994, Songer, Sheehan & Haire 2000). To measure the ideological distance between the reviewing court and the relevant statute, I assign the statute the ideal point of the enacting Congress. (As in Chapters 3, 4 and 5, I employ alternative measures—one assuming policy is driven by the location of the median member of each chamber and one assuming the median member of the majority party in each chamber is pivotal.)

I again employ the ideal point estimates of Poole & Rosenthal (1997) for members of Congress and those of Epstein et al. (2007) for Supreme Court Justices. I employ only the first–dimension measures for my analysis. To identify the ideal points of judges in the United States Circuit Courts of Appeals and the U.S. district courts, I rely on the method proposed by Giles, Hettinger, and Peppers (2001, 2002) who assign ideal points to judges based on the key players in their appointment. These "GHP scores" employ the NOMINATE scores of Poole & Rosenthal (1997). When senatorial courtesy is absent (when neither of the nominee's home state senators is of the same party as the president), the judge is assigned the NOMINATE score of the appointing president. When senatorial courtesy is present the judge's ideal point is assigned the value of the home state senator's ideal point (or the average of the ideal points of both senators if both share the party of the president). Combining the NOMINATE data, the Judicial Common Space scores, and the GHP scores allows me to locate all the relevant actors in the same policy space.[5]

For each observation, I calculate a measure of the ideological distance between the reviewing court and the Congress enacting the responsive legislation. When a statute is reviewed by a single judge, the court is assigned the ideal point of that judge. When a statute is reviewed by a multi–member court, the court is assigned the ideal point of the median member of the court. The distance measures are equal to the absolute value of the distance between the ideal point of the enacting Congress and the reviewing court. Distance in the "Chamber Median Models" is calculated as the absolute value of the distance between the reviewing court and the average of the ideal points of the median member of the House and the median member of the Senate. Distance in the "Party Median Models"

[5]NOMINATE scores are available through the 110th Congress at http://voteview.com/DWNL.html. The *Judicial Common Space* scores for the median Supreme Court justices through the 2007 term and GHP scores for Courts of Appeals judges from 1950–2000 are available at http://epstein.law.northwestern.edu/research/JCS.html. I collected and coded the GHP scores for the district court judges in the sample and for the Courts of Appeals judges not included in the Epstein et al. data. I relied on data from the *Federal Judicial Center's Biographical Directory of Federal Judges* (http://www.fjc.gov/public/home.nsf/hisj) to determine the appointing president of each judge and the *Biographical Directory of the United States Congress* (http://bioguide.congress.gov) to ascertain whether or not senatorial courtesy was present.

is equal to the absolute value of the distance between the reviewing court and the average of the ideal points of the median member of the majority party in the House and the median member of the majority party in the Senate. Again, I hypothesize that an increase in the ideological distance between the reviewing court and the enacting Congress will be associated with an increased probability of invalidation.

Case Affects Federal Distribution of Power. Meernik & Ignagni (1997) suggest that judicial decisions that affect the federal distribution of power will be more likely to be reversed by Congress. The courts can similarly be expected to protect their institutions' prerogatives. I, therefore, expect that responsive legislation that affects the federal distribution of power will be more likely to be invalidated than responsive statutes that do not affect the federal distribution of power. I follow Meernik & Ignagni (1997) in coding cases in which the Supreme Court (1) rules that a federal statute violates the federal separation of powers principles; or (2) issues a ruling regarding federal election practices; or (3) declares that a state law "conflicts with" federal law, is "preempted by" federal law, or is in violation of the supremacy clause in a case where either the executive branch or a member of Congress filed an amicus brief on behalf of the aggrieved state party is a case affecting the federal distribution of power. Meernik & Ignagni (1997, 453) single out these cases because they affect the most important powers of members of Congress and the institution of Congress—that is, the powers to determine how members are elected and when Congress is supreme over the other branches of government and the states. If, as is often implied in the separation of powers literature, the relationship between Congress and the Supreme Court is conflictual, the federal courts should have different preferences over questions affecting the federal distribution of power—Congress will try to expand its power, the courts will try to restrict it.

Supreme Court Winner is a Government. As I argued in Section 6.1, governments are especially likely to appeal their losses in Congress to the courts, in part because they tend to be more successful than private litigants. I expect the heightened levels of success

by government–litigants to extend to these cases and, accordingly, hypothesize that when the party that prevailed in the antecedent Supreme Court case is a government, the probability of invalidation of a responsive statute will be heightened. I rely on data from the *Original U.S. Supreme Court Database* compiled by Spaeth (2008) to classify the winning Supreme Court litigant as a government or non–government.

Superior Court has Upheld Legislation / Superior Court has Invalidated Legislation. Next, I incorporate a variable to account for the impact of the hierarchical structure of the federal courts. Lower federal court judges may be constrained by the previous or anticipated action of their superior court(s). This is especially likely to be the case if a superior court has already ruled on the constitutionality of the statute when it is considered by a lower federal court. If a district judge hears a challenge to the constitutionality of a responsive statute after its Court of Appeals has upheld a challenge to the statute, the district court should be more likely to uphold the statute itself. This constraint could reflect legal factors, policy preferences, or a combination of the two. Lower courts may uphold legislation after it has been upheld by a superior court because the superior court's legal reasoning applies to the case and is binding. Alternatively, the superior court's decision may not dictate the outcome in the case at hand but may provide information to the lower court about the higher court's preferences. Even if the precedent is not entirely on point, the lower court may uphold the statute because it reasons that the higher court would prefer to see the statute upheld, given that the superior court has previously upheld the statute against a challenge. Similar effects are expected to operate when a superior court has invalidated legislation.[6] I collect and code data on two variables—*Superior Court Has*

[6]To fully account for the impact of potentially constraining rulings by superior courts, I conduct an analysis at the level of the constitutional challenge. In this analysis, I allow multiple observations to be included for the same case. For example, in *United States v. Hotaling* (599 F. Supp. 2d 306), the District Court for the Northern District of New York heard two challenges to the constitutionality of the definition of child pornography in the PROTECT Act (section 2256(8)(C)). The petitioners alleged that the definition was both vague and overbroad. Since the Court considered these questions separately, I include one observation for each challenge. To account for superior court effects, I attempt to include four variables—an indicator that is equal to 1 if a superior court has heard an identical challenge and upheld the responsive statute, an indicator that is equal to 1 if a superior court has heard an identical challenge and invalidated the statute, an indicator that is equal to 1 if a superior court has heard a different constitutional challenge to the responsive

Upheld Legislation and *Superior Court Has Invalidated Legislation*. The former is equal to 1 when the highest superior court to review the constitutionality of the responsive statute has upheld the legislation, in whole or in part. When a district court's relevant Court of Appeals and the United States Supreme Court have both ruled on the constitutionality of a statute, I base the coding of this variable on the Supreme Court's decisions. Coding for the *Superior Court Has Invalidated Legislation* variable is analogous, but there is insufficient variation in that variable to allow its inclusion in the model.[7] It should be noted that as a result of the inability to include all the precedent–capturing variables at the level of the constitutional challenge, my empirical models will necessarily underestimate the impact of superior courts on lower court decision making.

The included variable is equal to one when the highest superior court to rule on the constitutionality of the statute has upheld the statute (in whole or in part). For each district court, the relevant superior courts are the Court of Appeals to which its decisions can be appealed and the United States Supreme Court. For each Court of Appeals, the relevant superior court is the United States Supreme Court.[8] The variable is equal to 0 for all Supreme Court observations, as there is no superior court to constrain the high court. By coding this variable as 0 for all Supreme Court observations, I implicitly assume that

statute and upheld the statute, and an indicator that is equal to 1 if a superior court has heard a different constitutional challenge to the responsive statute and invalidated the statute. I collect and code data on these variables but there is insufficient variation to include them in the models. In each of the four instances in which a lower court hears a challenge to a statute after a superior court has upheld the statute in the face of the same challenge, the lower court also upholds the statute. This suggests that the lower court judges are responding as predicted to the legal precedent imposed by superior courts. There are no cases in the data in which a lower court hears an identical challenge after a superior court has invalidated a statute. This occurs because, in large part, lower courts will decline to review a constitutional issue once a superior court has ruled on the question. In the four cases considered after a superior court has invalidated the responsive provision on constitutional grounds different than those before the lower court, a superior court has also upheld the provision against another challenge and the statute is upheld by the lower court. These patterns are consistent with the restrained relationship hypothesized above. Because of the lack of variation in these variables, I am unable to include the complete set of challenge–level independent variables. I elect to rely on the case–level analysis here since the inclusion of multiple observations per case without challenge–specific independent variables only serves to artificially increase the sample size. The challenge–level analysis is available upon request.

[7] In every instance in which a superior court has previously considered and invalidated a portion of a responsive statute, that court or another superior court has upheld other provisions of the statute. In each of these cases, the lower court upholds the statute.

[8] I do not account for the potential impact of horizontal precedent on district court or circuit court judges.

the Supreme Court is not constrained by its own prior decisions.[9] For example, in *Cutter v. Wilkinson* (544 U.S. 709 (2005)), the United States Supreme Court upheld institutionalized persons provisions of the Religious Land Use and Institutionalized Persons Act. In subsequent district court or Courts of Appeals cases in which either the land use or institutionalized persons provisions of the RLUIPA are challenged, the *Superior Court Has Upheld* variable is equal to 1. For Courts of Appeals cases reviewing the constitutionality of RLUIPA prior to the Supreme Court's *Cutter* decision, the variable is equal to 0. The value of the variable for district court challenges prior to *Cutter* depends on whether or not the appropriate Court of Appeals had heard and rejected a previous challenge prior to the district court decision.

Responsive Statute Effects a Complete Policy Reversal / Responsive Statute Effects a Legal Reversal. In Section 6.1 I hypothesized that more far–reaching responsive legislation will be more likely to be challenged in the federal courts. Here, I evaluate the hypothesis that more sweeping responses will be more likely to be invalidated by including two variables—a dummy variable that is equal to 1 if the responsive statute is classified as a "complete policy reversal" and a dummy variable that is equal to 1 if the responsive statute is classified as a "legal reversal." I, again, rely on the tripartite coding scheme adopted in Chapter 5 that distinguishes between non–reversing, partially reversing, and completely reversing statutes on both policy and legal dimensions. However, in the data, there are no complete legal reversals and no statutes that are non–reversing on the policy dimension. Accordingly, the responses can be collapsed into three types—(1) complete policy/partial legal reversals; (2) complete policy/no legal reversals; and (3) partial policy/no legal reversals. By including these two indicator variables, I can compare the probability that complete policy reversals and legal reversals are invalidated to the probability that a partial policy/no legal reversal statute is invalidated. (The partial

[9]This is less controversial than it first seems. Of the four statutes for which challenges are heard by the Supreme Court, only one generates multiple Supreme Court cases (The Bipartisan Campaign Reform Act of 2002). In none of those cases does the Supreme Court hear a duplicate of a challenge on which it has already ruled.

policy/no legal reversal category is the omitted baseline category.) I expect the impact of both variables to be positive and significant—complete policy reversals and legal reversals should be more likely to be invalidated than partial policy/no legal reversal statutes.

Summary statistics are reported in Table 6.4.

Table 6.4: Summary Statistics

Variable	*Minimum*	*Maximum*	*Mean*	*Standard Deviation*
DV: Statute Declared Unconstitutional (in whole or in part)	0	1	0.33	0.47
Distance between Enacting Congress and Reviewing Court (chamber median model)	0.00	0.64	0.29	0.18
Distance between Enacting Congress and Reviewing Court (party median model)	0.01	0.92	0.42	0.25
Case Affects Federal Distribution of Power	0	1	0.13	0.34
Supreme Court Winner is a Government	0	1	0.20	0.40
Superior Court Has Upheld	0	1	0.38	0.49
Superior Court Has Invalidated	0	1	0.05	0.49
Complete Policy Reversal	0	1	0.35	0.48
Partial Legal Reversal	0	1	0.27	0.45
$n = 55$				

6.3.1 Analysis and Results

I estimate two sets of models below. In the first, I evaluate *Hypotheses 9-12* assuming that variation in the substance of responsive statutes is not significant. Then, I relax that assumption and include the variables characterizing the content of the responsive statutes to evaluate *Hypotheses 9–14* together. All models below are estimated using probit because the dependent variable is dichotomous. The data include 55 observations—the frequency of challenges by responsive statute are reported in Table 6.5.[10] The dependent variable

[10]In Table 6.2, I report the identification of 61 cases challenging the constitutionality of the responsive statutes. I am unable to include three challenges to the Religious Land Use and Institutionalized Persons Act from the district courts because the cases are decided by magistrate judges for whom no ideological scores can be constructed (*Murphy v. Zoning Commission of Town of New Milford*, 289 F. Supp. 2d 87; *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309; and *Gooden v. Crain*, 389 F. Supp. 2d 722). I also exclude a case challenging the bulk–cash smuggling provisions of the PATRIOT Act heard in the District Court for the Virgin Islands because data on judge ideology is unavailable. A challenge to the constitutionality of the Gun–Free School Zones Act that is presented to Eleventh Circuit Court of Appeals in a published opinion

is equal to 1 if any portion of the challenged responsive statute is invalidated. Because there are multiple observations for some responsive statutes, I do not expect observations or errors to be independent. I, therefore, employ robust standard errors and cluster observations by responsive statute. Results are in Table 6.6. Model 1 is the "*Chamber Median Model*" and locates the responsive statute at the midpoint between the median members of the House and Senate. Model 2 is the "*Party Median Model*" and assumes that the location of the responsive statute is located at the midpoint between the median members of the majority party in each chamber. All other independent variables are the same across the models.

Table 6.5: Data: Number of Observations per Responsive Statute

Responsive Statute	*DC Obs*	*CoA Obs*	*SC Obs*	***Total Observations***
Gun–Free School Zones Amendments Act of 1995	0	1	0	1
Religious Land Use and Institutionalized Persons Act	18	10	1	29
PATRIOT Act's bulk–cash smuggling provisions	1	3	0	4
Bipartisan Campaign Reform Act of 2002	4	0	3	7
PROTECT Act of 2003	2	4	1	7
Partial–Birth Abortion Ban Act of 2003	3	3	1	7

The evidence supporting the proposed hypotheses is weak. Only the *Case Affects the Federal Distribution of Power* is signed as predicted and statistically significant across both models–offering support for *Hypothesis 10*. This suggests that statutes affecting the federal distribution of power are more likely to be invalidated than statutes that do not affect the federal distribution of power. While this finding is robust to both model specifications, the only responsive statute in the sample that affects the federal distribution of power is the Bipartisan Campaign Reform Act of 2002 so the generalizability of this finding may be limited. *Hypothesis 12* receives mixed support. In the *Chamber Median Model*, the variable is negative and statistically significant, indicating that, as predicted, when a

is not evaluated on the merits (*United States v. Tait*, 202 F.3d 1320) and is excluded. Similarly, the District Court for the District of New Jersey is presented with but does not rule on a constitutional challenge to the PROTECT Act in *United States v. Payne* (519 F. Supp. 2d 466).

Table 6.6: Probit Models Predicting Probability of Invalidation, Case–Level Data, Models 1 and 2

		Model 1		***Model 2***	
		Chamber Median Model		*Party Median Model*	
	Expected	*Coefficient*	*(Robust S.E.)*	*Coefficient*	*(Robust S.E.)*
Distance between Statute and Reviewing Court	$+$	-0.18	(1.10)	0.03	(0.65)
Case Affects Federal Distribution of Power	$+$	1.32^{**}	(0.28)	1.32^{**}	(0.28)
S.C. Winner is Government	$+$	-0.48	(0.50)	-0.49	(0.47)
Superior Court Has Upheld Legislation	$-$	-1.02^{*}	(0.61)	-1.01	(0.62)
Intercept		-0.13	(0.52)	-0.20	(0.52)
		Model Details			
		n=55		*n=55*	
		LR $\chi^2_{(4)} = 8.56^{*}$		*LR* $\chi^2_{(4)} = 8.53^{*}$	
		Pseudo $R^2 = 0.12$		*Pseudo* $R^2 = 0.12$	

Significance levels (one–tailed tests): * : 5% ** : 1%
Standard errors adjusted for clustering on responsive statute

superior court has previously upheld a statute against a constitutional challenge, a lower court will be less likely to declare the statute unconstitutional. The relationship fails to attain statistical significance in the *Party Median Model*.

Hypotheses 9 and *11* receive no support. In neither model does the distance variable attain statistical significance—suggesting that the ideological distance between the reviewing court and the enacting Congress does not systematically impact the decision of the courts to invalidate legislation. This is counter to the standard arguments of separation of powers theorist who argue that the location of courts, legislatures, and policies in policy space are the primary determinants of legislative and judicial outcomes. *Hypothesis 11* predicts that for cases in which the winner in the response–triggering United States Supreme Court decision was a government, responsive legislation would be more likely to be invalidated. The hypothesis is not supported. At least in this sample, statutes that modify the impact of cases won by governments *are not* more likely to be invalidated than statutes that modify the success of non–government litigants.

To illustrate the substantive effect of the significant variables, I calculate predicted probabilities for different configurations of the independent variables based on *Model 1*. With continuous variables set at their means and dichotomous variables set to their modal categories, the probability of invalidation is 0.42. The probability of invalidation increases to 0.87 when the responsive statute affects the federal distribution of power. When a previous challenge to the statute has been rejected by a superior court, the probability of invalidation falls to 0.11. Clearly, the statistically significant variables in the model generate substantively significant changes in the probability of invalidation.

In *Models 1* and *2*, I treat all responsive statutes similarly. In this section, I relax that assumption in order to evaluate the hypothesis that the nature of the responsive statute will impact the probability that the statute is invalidated. In *Models 3* and *4* (reported in Table 6.7), I include the pair of variables that characterize the responsive statute type—*Complete Policy Reversal* and *Partial Legal Reversal*. The coefficients for these variables

report the difference in the probability that each responsive statute type is invalidated, compared to the baseline category—responses that entail partial policy reversals and no legal reversals. The *Partial Legal Variable* performs as expected—the effect is positive and statistically significant, indicating that a responsive statute that attempts to effect a legal reversal is significantly more likely to be invalidated than a responsive statute that is non–reversing on the legal dimension. The *Complete Policy Reversal* variable, however, does not perform as expected. I hypothesized that its effect would be positive and significant—that responsive statutes with greater policy effects would be more likely to be invalidated. This is not the case. *Hypothesis 13* is supported; *Hypothesis 14* is not. The *Supreme Court Winner is a Government* variable is positive and significant in both models, offering support for *Hypothesis 10*. *Models 3* and *4* do not offer support for *Hypotheses 9, 10* or *12*, however. The federal power variable is dropped due to collinearity and neither the distance variables nor the *Superior Court Upholds* variable are significant.

I consider the possibility that the puzzling results identified in *Models 3* and *4* are the result of collinearity among the regressors in the models. Examination reveals that the *Partial Legal Reversal* and *Complete Policy Reversal* variables have a correlation of 0.84—for every observation where *Partial Legal Reversal* is equal to one, *Complete Policy Reversal* is also equal to one. To obviate the potential impact of this multicollinearity on my findings, I estimate an alternative set of models where the responsive statute characterization relies on one variable that is equal to 1 if the response statute would effect *either* a complete policy or partial legal reversal. The omitted baseline category is still the partial–policy reversal statute. Results are presented in Table 6.8.

The results in *Models 5* and *6* are more consistent with the findings presented in *Models 1* and *2*. The effect of the *Case Affects Federal Distribution of Power* variable is still positive and statistically and substantively significant. In neither model does the variable measuring the distance between the enacting Congress and the reviewing Court attain significance. The *Supreme Court Winner is a Government* variable is signed opposite the

Table 6.7: Probit Models Predicting Probability of Invalidation, Case–Level Data, Models 3 and 4

		Model 3		***Model 4***	
		Chamber Median Model		*Party Median Model*	
	Expected	*Coefficient*	*(Robust S.E.)*	*Coefficient*	*(Robust S.E.)*
Distance between Statute and Reviewing Court	$+$	-0.27	(1.04)	-0.17	(0.65)
S.C. Winner is Government	$+$	1.19^{**}	(0.12)	1.15^{**}	(0.06)
Superior Court Has Upheld Legislation	$-$	-0.90	(0.57)	-0.90	(0.58)
Partial Legal Reversal	$+$	2.16^{**}	(0.49)	2.17^{**}	(0.49)
Complete Policy Reversal	$+$	-1.27	(0.26)	-1.26	(0.26)
Intercept		-0.50	(0.43)	-0.50	(0.42)
		Model Details			
		n=55		*n=55*	
		LR $\chi^2_{(5)} = 12.79^{*}$		*LR* $\chi^2_{(5)} = 12.77^{*}$	
		Pseudo $R^2 = 0.18$		*Pseudo* $R^2 = 0.18$	

Significance levels (one–tailed tests): * : 5% ** : 1%
Standard errors adjusted for clustering on responsive statute

Table 6.8: Probit Models Predicting Probability of Invalidation, Case–Level Data, Models 5 and 6

		Model 5		***Model 6***	
		Chamber Median Model		*Party Median Model*	
	Expected	*Coefficient*	*(Robust S.E.)*	*Coefficient*	*(Robust S.E.)*
Distance between Statute and Reviewing Court	$+$	-0.27	(1.04)	-0.17	(0.65)
Case Affects Federal Distribution of Power	$+$	2.16^{**}	(0.49)	2.17^{**}	(0.49)
S.C. Winner is Government	$+$	-0.97	(0.48)	-1.06	(0.46)
Superior Court Has Upheld Legislation	$-$	-0.90	(0.57)	-0.90	(0.58)
Partial Legal or Complete Policy Reversal	$+$	0.90^{**}	(0.39)	0.90^{**}	(0.38)
Intercept		-0.50	(0.43)	-0.50	(0.42)
		Model Details			
		n=55		*n=55*	
		LR $\chi^2_{(4)} = 12.79^{*}$		*LR* $\chi^2_{(4)} = 12.77^{*}$	
		Pseudo $R^2 = 0.18$		*Pseudo* $R^2 = 0.18$	

Significance levels (one–tailed tests): * : 5% ** : 1%

Standard errors adjusted for clustering on responsive statute

predicted direction. Finally, the new indicator of statute content reveals that responsive statutes that include partial legal reversals or complete policy reversals are more likely to be declared unconstitutional in the federal courts.

I, again, rely on predicted probabilities to report the substantive impact of the findings. (I report predicted probabilities based on *Model 5* although the substantive effects are comparable across models.) The baseline probability of invalidation for *Model 5* is 0.27. When the distance between the enacting Congress and the reviewing Court is at its mean value, the party prevailing in the response–triggering Supreme Court case is not a government, a superior court has not previously upheld the legislation, and the responsive statute attempts only a partial policy reversal, it has a roughly 1 in 4 chance of being invalidated. If that statute is changed to include a partial legal or complete policy reversal, the probability of invalidation jumps to 0.94. If the reversal variable is equal to 1 and the case affects the federal distribution of power, the model suggests it has a 98% chance of being invalidated. The magnitude of these effects is implausible, so I have little confidence that they are generalizable beyond the sample here.

6.4 Discussion

In this chapter, I have evaluated the finality of responsive legislation by considering the presence and success of constitutional challenges to responsive statutes. I find that statutes triggered by "restrictive" Supreme Court decisions are more likely to be challenged than responses to "permissive" decisions. Statutes that attempt to reverse the legal rules or public policies announced by the Supreme Court also face a heightened risk of challenge. In sum, the constitutionality of six of the twelve responsive statutes identified was considered in the federal courts. A summary of these challenges reveals that, although constitutional challenges are not rare, wholesale invalidation of responsive legislation is. Declarations of unconstitutionality occur in 32% of the cases in which constitutional challenges are considered and decided on the merits in the federal courts but

those declarations are limited to narrow portions of the responsive statutes. The United States Supreme Court ruled on the constitutionality of four responsive statutes in the sample and invalidated one in part, while upholding multiple other provisions against constitutional challenges.

In the final section, I considered the success of constitutional challenges at the level of the challenging case. Despite an abundance of hypothesized relationships, the results reveal that much of the process is randomly determined. Invalidation is not found to be significantly affected by the ideological composition of the reviewing court vis–a–vis the enacting Congress. I find that reversing statutes are more likely to be invalidated than responsive legislation that is more limited in scope and that cases affecting the distribution of federal power also face a heightened risk of invalidation. Because of a lack of variation in the data, I am unable to fully assess the role of higher courts in constraining lower courts. The limited evidence suggests that the hierarchical structure of the federal courts is significant. Judges of the district and appeals courts evince an unwillingness to revisit constitutional questions that have been settled by a superior court. Under at least one model specification here, the evidence suggests that lower courts are more likely to reject constitutional challenges when a superior court has heard and rejected a previous challenge to the statute.

Examination of the frequency and success of challenge to the constitutionality of responsive legislation suggests that the relationship between Congress and the federal courts, and especially the Supreme Court, is less antagonistic than is often presumed in research on Congress–Court interaction. Furthermore, standard separation of powers accounts of Congress–Court interaction neglect significant characteristics of this relationship. Law appears to seriously constrain federal judges and, accordingly, members of Congress. The back–and–forth that occurs between Congress and the Court in the cases here is not simply an interchange in which the institutions take turns imposing their ideal policies. The federal courts play an important role in guiding Congress to policies that are consistent

with the courts' legal requirements.

Chapter 7

Conclusion

7.1 Summary of Findings

I set out to evaluate stages of the interaction between Congress and the Supreme Court that have been largely ignored in existing research. In Chapter 2, I reviewed the relevant theoretical and empirical literatures in the separation of powers tradition to highlight the relevance of the questions I propose and to establish the framework for my analysis. I have focused on two stages of the Congress–Court dialogue. I first considered the decision of Congress to enact legislation and evaluated the hypothesis that Congress would be constrained by the Supreme Court when it decided whether or not to pass legislation. Second, I asked if Congress is able to effectively reverse the constitutional decisions of the Supreme Court.

For consideration of the operation of a judicial constraint on bill passage in Congress, I relied on a formal model of the Congress–Court interaction that adopts standard assumptions about the institutions and their interaction to derive hypotheses. I characterized both institutions as unitary actors that are motivated by their preferences over public policy. I assumed that their outputs and preferences can be characterized as points in a unidimensional policy space. Like other formal models of Congress–Court interaction, my model predicts that under certain preference configurations, Congress will refrain from enacting legislation because of the threat of review by the Supreme Court. I hypothesized that the relative location of the ideal points of Congress and the Court, as well

as the location of the status quo policy would systematically influence the probability of bill passage. I found little evidence to support these claims. In Chapter 3, the data consisted of bills granted hearings in the either the House Committee on the Judiciary or the Senate Committee on the Judiciary introduced between 1989 and 2000. In Chapter 4, the data consisted of bills introduced in response to specific decisions of the United States Supreme Court that were introduced between 1995 and 2007. (The bills responded to Supreme Court decisions before and during the 1995–2007 period). I did not find evidence that Congress's decision to pass legislation is systematically related to the threat of Court review. In Chapter 3, none of my primary hypotheses are consistently supported. The judicial constraint hypothesis receives modestly more support if consideration is limited to congressional responses to Supreme Court decisions. Even then, however, the overall case is weak.

I concluded that if the anticipation of Court action is influential, it likely influences the content of legislation, not bill success directly. (That the anticipation of Supreme Court action will shape bill content is another prediction of standard separation–of–powers models.) It is plausible that the impact of the anticipation of Supreme Court action on bill passage is indirect. Members of Congress may adjust the content of proposed legislation to avoid negative review, which should in turn increase the bill's probability of passage. I do not conduct an analysis that allows the complete evaluation of this hypothesis, but the analyses in Chapters 5 and 6 offer anecdotal evidence consistent with the strategic location of policy. In a significant number of cases, members of Congress modify legislation in the wake of judicial invalidations in the hopes that revised versions will survive judicial scrutiny.

The analyses in Chapters 3 and 4 also provided an opportunity to re–evaluate hypotheses about factors associated with bill success proposed by other scholars. I found that bills sponsored by members with certain institutional prerogatives enjoy greater probabilities of bill success. Bills sponsored by members of the majority party within their

chamber were more likely to be successful than bills sponsored by minority members. In fact, in neither of the analyses did I identify a minority–member sponsored bill that was successful. Bills sponsored by the chairmen of the Judiciary Committees were more likely to be successful than bills sponsored by non–members in the Chapter 3 analysis. I also found that bills were more likely to be successful when the President had issued a public statement indicating his support for the legislation. Presidential opposition did not have a significant impact on the probability of passage. This is surprising since the president has the power to veto legislation he disfavors. I found mixed support for the hypothesis that the number of cosponsors increases the probability of bill passage and no support for the hypothesis that the location of the bill sponsor's ideal point relative to the chamber or party median is influential. Finally, bills addressing salient issues (in Chapter 3) and bills responding to salient Court decisions (in Chapter 4) were no more likely to be successful than their nonsalient counterparts.

In Chapter 5, I began my examination of the instances in which members of Congress respond to the constitutional decisions of the Supreme Court by proposing ordinary legislation to evaluate the frequency and ease with which Congress can "reverse" those decisions. I identified responses to Court decisions initiated between 1995 and 2007 through searches of the *Congressional Record*. (Again, the bills responded to Court decisions announced within the 1995–2007 timeframe and in earlier years.) The majority of responsive bills addressed salient Supreme Court cases in what are typically thought of as "hot–button issues" (abortion, freedom of speech, freedom of religion, criminal procedure, and discrimination). Despite this regularity, I found significant variation in the substance and timing of legislative responses to the Court's constitutional decisions. Members of Congress appear to be as willing to respond to old Supreme Court decisions as they are to new ones. Thirty–nine percent of the bills in the sample responded to Supreme Court decisions within four years of their announcement while thirty–three percent responded to decisions more than twenty–five years old.

I was most interested in the substance of the responsive bills. I characterized each bill based on its intended effect on public policy and legal policy. Contrary to my expectations, I found that a significant number of proposed responses attempted to reverse completely the legal policy announced by the Court (slightly less than 18%). An even greater number attempted to completely reverse the public policy embraced by Court decisions (54%). However, as predicted, less ambitious bills enjoyed greater probabilities of success. No bills that would have completely reversed the Court's legal holdings were enacted. I found that responses to Supreme Court decisions that upheld challenged actions or statutes (at least in part) were more likely to be met with successful congressional responses than bills responding to "restrictive" Court decisions. It is plausible that these "permissive" decisions signal an openness to regulation by the Court that is absent in cases where a law or action is invalidated completely. I found partial support for the hypothesis that responses to older Supreme Court decisions are less likely to be successful than responses to recent decisions, but the finding did not hold for all model specifications. Finally, Chapter 5 offers further evidence that bills sponsored by majority party members and bills supported by the president enjoy greater probabilities of success.

The Chapter 5 analysis reveals that, contrary to the conventional wisdom, members of Congress frequently respond to constitutional decisions of the Court outside of the constitutional amendment process. However, the picture painted by Meernik & Ignagni (1997) overstates the impact of these statutory responses. Successful responses do not usually reverse the legal policies announced by the Supreme Court but can be successful at reversing the policy implications of high court decisions. Frequently, Congress responds to the Court's constitutional decisions by proposing legislation that cures constitutional defects identified by the Court. By "fixing" problems identified by the Court, Congress is often able to achieve its preferred policy outcomes in a manner that satisfies the Court's legal dictates. The analysis in Chapter 6 suggests that Congress is quite good at locating its responsive policies to avoid invalidation by the Supreme Court. Although I only

consider twelve responsive statutes, I did not identify any case in which the major provisions of a responsive statute were invalidated by the Supreme Court. While challenges to the constitutionality of responsive legislation are not rare, their wholesale invalidation is. The constitutionality of four of the twelve responsive statutes was considered by the Supreme Court. One was invalidated in part but multiple provisions of the same bill were concurrently upheld. The analysis in Chapter 6 further reveals that responses to "restrictive" Supreme Court decisions are more likely to be challenged in the federal courts than responses to "permissive" decisions.

7.2 Discussion

The findings in Chapters 3 and 4 do not seriously undermine the separation of powers theory. They do, however, illustrate some of its limitations and some inadequacies in its typical application. To evaluate the operation of a judicial constraint on Congress's decision to enact legislation, I purposefully selected samples that were biased toward finding support for the hypothesis. Even so, I found very little evidence consistent with my expectations. As mentioned above, this is partially an artifact of the implicit assumption that congressional policies are not strategically located. Future research should delve deeper into the legislative process to identify when and how proposed bills are modified in response to and in anticipation of judicial action. A better test of the operation of a judicial constraint on congressional decision–making would allow for consideration of when and why legislation might be modified in the hopes of satisfying judicial scrutiny.

More important than the failure to account for the strategic location of policy, however, is the possibility that separation of powers concerns simply do not operate frequently and consistently enough to ascertain clear patterns of constraint in studies of large samples of bills. I predicted that members of Congress would be especially attentive to the Court's preferences when a status quo policy was located between the ideal points of Congress and the Court. This formal characterization of the policy–making process ignores the

fact that even when preferences are so configured, members of Congress seek and find non–controversial bills on which sizable majorities in Congress (and presumably in the judiciary) can agree. The majority of bills passed by Congress are not contentious. On bills passed by broad coalitions, concerns about court review may remain latent. The analyses I have undertaken lead me to believe that the presence of some cleavage on an issue is a necessary condition for the activation of SOP concerns. Based on the analyses here, I would not argue that the predictions of SOP theories are wrong. However, I would suggest that the assumption that those predictions apply to policy–making generally is unreasonable.

The fact that Congress does not frequently refrain from enacting legislation because of the fear of judicial review led me to suggest that SOP concerns will more frequently be manifested through attempts to locate policy to avoid negative treatment by the Supreme Court than in decisions not to pass bills. The analyses in Chapters 5 and 6 offer evidence consistent with that account of the Congress–Court relationship. I suggested in those chapters that the relationship between Congress and the Supreme Court is less conflictual than it is depicted in standard separation of powers models. Again, this reflects in part my argument that SOP concerns remain latent in much congressional decision–making. The analysis of Supreme Court case–responsive bill pairs highlights the lack of open conflict between Congress and the Court. Every attempt to completely reverse the legal holding of a Supreme Court decisions was unsuccessful. While significant amounts of scholarship on Congress–Court interaction assume that Congress and the Supreme Court are competing for influence over the shape of public policy, the cases analyzed here suggest that the institutions fashion policy somewhat collaboratively. When Congress decides to pass most bills, it is completely unaffected by the Supreme Court. Even when Congress responds to decisions of the Supreme Court, it frequently responds by curing constitutional defects identified by the Court. This is not the world of some SOP scholars in which, given the opportunity to respond to an output of the "rival" institution, the re-

sponder simply moves policy to its ideal point. In the cases in which Congress is most likely to be attentive to potential judicial action, Congress evinces a willingness to work within the guidelines established by the Supreme Court. In so doing, Congress is able to (at least partially) reinstate its preferred policies without substantially altering or evading the Court's legal decrees.

The overly conflictual characterization of the Congress–Court relationship is an outgrowth of the assumption that members of the Court are single–minded seekers of public policy. While it has repeatedly been demonstrated that policy preferences are good predictors of judicial outcomes at the Supreme Court, the assumption remains problematic. It leaves no room for the operation of the justices' preferences over legal policy or doctrine even though these preferences influence public policy and outcomes. Segal & Spaeth (2002) argue that policy preferences drive Supreme Court decision–making and that legal justifications for outcomes are merely the "window dressing" that is required to sustain the legitimacy of the Court. The legal trappings of decisions, however, are likely to provide the primary source of information to members of Congress about the Court's likely treatment of its proposed legislative enactments and to the lower courts about the Supreme Court's likely treatment of their cases on appeal. Accordingly, members of all institutions should be expected to take the law seriously.

If a judge's legal and policy preferences significantly influence decision–making, strictly policy–based measures of preferences will confound comparisons of the locations of the institutions, at times making their preferences seem more divergent than they are and increasing expectations for conflict where none really exists. For example, in *United States v. Lopez* (1995), the Supreme Court invalidated Congress's attempt to restrict the possession of firearms in school zones as an improper exercise of congressional authority to regulate interstate commerce. It is conceivable that while the individual justices' policy preferences played a significant role in shaping the decision so did their beliefs about the proper role of Congress and the constitutional limits on congressional power. In the absence of

any change in the Court's membership, Congress promptly modified the challenged legislation in an attempt to conform the law to the Court's requirement that the regulation must meet some economic activity that might, through repetition elsewhere, have a substantial impact on interstate commerce. Although the Court did not have an opportunity to review the modified statute, members of Congress and legal observers anticipated that the revised statute would pass constitutional muster. The revised statute could only be treated differently if the Court's members were driven in large part by something other than their policy preferences, as the revised statute did not substantially modify the gun–free school zone policy. If the legislators and commentators were correct, the Court did not have an ideological (or policy–based) opposition to the gun–free school zones policy. Vote–based measures of ideology, however, read these preference into members' (and thereby the institution's) preferences. I will continue to look for ways to account for the multi–faceted preferences of judges as I pursue research in this area.

Another strong assumption I have adopted is that Congress can fairly be characterized as a unitary actor. In future research, I will look for ways to incorporate more of the complexity of the lawmaking process as I suspect its omission here may obscure significant aspects of the Congress–Court dynamic. Specifically, I am concerned that treating Congress as a unitary actor makes it impossible to understand when and why responses to Court decisions are attempted. Formal and empirical separation of powers works predict that response frequency and success will increase in the ideological distance between Congress and the status quo policy announced by the Court. Congress should be most likely to respond to decisions that are located far from its ideal point because those are the ones that involve the greatest loss of utility. In reality, there is no reason for a member of Congress not to respond to a Court decision that is relatively close to the congressional ideal point if he can improve policy even slightly. Every Congress contains hundreds of legislators looking for legislative opportunities for which they can claim credit. It may be a good legislative strategy to pursue responsive bills even when the status quo is close to

Congress's ideal point if the bill will be supported by enough other members. If members of Congress pursue this behavior, it will weaken the observed relationship between measures of "congressional" preferences and the presence and success of responses.

In Chapter 1, I lamented the failure of existing research to consider fully the "beginning" of separation of powers interactions. My consideration of the decision of Congress to pass legislation through the lens of separation of powers theory has not provided much evidence to bolster the theory. It has, however, provided information that can be used to refine it. Demonstrating that SOP concerns do not operate uniformly is a necessary precursor to identifying the conditions under which they do operate. The Chapter 5 analysis suggests SOP concerns, at the very least, impact the shape of responsive legislation. Future research may identify other scenarios in which concerns about judicial review are likely to come to the fore in the legislative process.

The analyses of responsive legislation reveal a need for greater nuance in characterizations of the Congress–Court relationship, especially as it relates to constitutional decision–making. The analyses I undertake in Chapters 5 and 6 allow me to incorporate some characteristics of the inter–institutional dialogue that are lost to my model's assumptions in Chapters 2, 3, and 4. Congress and the Supreme Court play important but very different roles in shaping public policy. The Supreme Court is not a miniature legislature. Its decisions can profoundly impact public policy, but they also affect a body of law that in turn influences judicial and legislative behavior. Judges and legislators take the law seriously; if political scientists want to understand the decisions of the individuals who occupy those institutions, we must take the law seriously too. This project has identified a fruitful course for future research on Congress–Court interaction. I will continue to consider the ways that the actors within each institution affect law and policy by analyzing the cases in which Congress and the Court work in concert to fashion legal and public policy.

Appendix A

Proof for Judicial Review/Statutory Interpretation Game

For each of the games below, I assume that the Court's ideal point (J) is equal to 0 and the Legislature's ideal point (L) is to the right of the Court's ideal point ($J = 0$ and $L > J$). All games are solved by backwards induction.

Court's Decision Over Whether or Not to Review Legislation and Choice of Policy (r)

If the Court chooses to review the legislative enactment, it will locate policy at its ideal point ($r = J$), yielding a payoff of $-c$.

The Court will review legislation when:

$$\begin{aligned} EU_{Court}(Review) &> EU_{Court}(\sim Review) \\ -(r-J)^2 - c &> -(e-J)^2 \\ -c &> -(e-J)^2 \\ e > \sqrt{c} \text{ or } e &< -\sqrt{c} \end{aligned} \tag{A.1}$$

These values delimit the set of policies the Court will not review.

Legislature's Choice of Policy (e)

If the Legislature enacts legislation, it will locate policy to make the Court indifferent between reviewing legislation and not. Therefore, if the Legislature enacts legislation, its policy will be located no further than $\sqrt{c}$ from the Court's ideal point. The Legislature will place policy as close as possible to its ideal point within this set.

$$\text{Legislature will choose } e = \begin{cases} L & \text{if } -\sqrt{c} \leq L \leq \sqrt{c} \\ \sqrt{c} & \text{if } L > \sqrt{c} \end{cases}$$

Legislature's Decision Over Whether or Not to Enact Legislation

For $e = L$, Legislature will *enact* when:

$$\begin{aligned} EU_{Legislature}(Enact) &\geq EU_{Legislature}(\sim Enact) \\ -(e-L)^2 &\geq -(q-L)^2 \\ 0 &\geq -(q-L)^2 \end{aligned} \tag{A.2}$$

This constraint is always satisfied.

For $e = \sqrt{c}$, the Legislature will *Enact* when:

$$\begin{aligned} EU_{Legislature}(Enact) &\geq EU_{Legislature}(\sim E) \\ -(e-L)^2 &\geq -(q-L)^2 \\ -(\sqrt{c}-L)^2 &\geq -(q-L)^2 \end{aligned} \tag{A.3}$$

EQUILIBRIUM

$$\text{Legislature}= \begin{cases} e = L & \text{if } L \leq \sqrt{c} \\ e = \sqrt{c} & \text{if } L > \sqrt{c} \text{ and } q \leq -\sqrt{c} \\ & \text{or } L > \sqrt{c} \text{ and } -\sqrt{c} < q < \sqrt{c} \text{ and } L \geq \frac{\sqrt{c}+q}{2} \\ & \text{or } L > \sqrt{c} \text{ and } L \leq \frac{\sqrt{c}+q}{2} \\ \sim E & \text{otherwise} \end{cases}$$

$$\text{Court}= \begin{cases} r = J & \text{if either } e > \sqrt{c} \text{ or } e < -\sqrt{c} \\ \sim R & \text{otherwise} \end{cases}$$

Appendix B

Policy Agendas Project Major Topic Codes

B.1 Policy Agendas Project Major Topic Codes and Descriptions

Table B.1: Policy Agendas Project Major Topic Codes and Descriptions

Major Topic Code		*Description*
1	Macroeconomics	The administration's economic plans, economic conditions and issues, economic growth and outlook, state of the economy, long-term economic needs, recessions, general economic policy, promote economic recovery and full employment, demographic changes, population trends, recession effects on state and local economies, distribution of income, assuring an opportunity for employment to every American seeking work.
2	Civil Rights, Minority Issues, and Civil Liberties	Civil Rights Commission appropriations, civil rights violations, Civil Rights Act, Equal Rights amendments, equal employment opportunity laws, discrimination against women and minorities, appropriations for civil rights programs, civil rights enforcement, coverage of the civil rights act, employment discrimination involving several communities (age, gender, race, etc. in combination), taking private property, impact on private property rights, employment discrimination due to race, color, and religion.

3	Health	National Institute of Health (NIH) appropriations, Department of Health and Human Services (DHHS) appropriations, activities that provide little evidence of policy direction, commissions to study health issues, solvency of Medicare, Comprehensive health care reform, Insurance reform, availability, and cost, Regulation of drug industry, medical devices, and clinical labs
4	Agriculture	DOA, USDA and FDA appropriations, general farm bills, farm legislation issues, economic conditions in agriculture, impact of budget reductions on agriculture, importance of agriculture to the U.S. economy, national farmland protection policies, agriculture and rural development appropriations, family farmers, state of American agriculture, farm program administration, long range agricultural policies, amend the Agriculture and Food Act, National Agricultural Bargaining Board.
5	Labor, Employment, and Immigration	Department of Labor budget requests and appropriations, assess change in labor markets to the year 2000, human resources development act, recent decline in the number of manufacturing jobs, national employment priorities, employment security administration financing, current labor market developments.
6	Education	Department of Education (DOEd) appropriations, state of education in the U.S., education programs development, education quality, national education methods, impact of education budget cuts, white house conference on education, National Institute of Education.
7	Environment	EPA, CEQ, ERDA budget requests and appropriations, implementation of the Clean Air Act, review of EPA regulations, Environmental Crimes Act, U.S. policies and international environmental issues, requirements for states to provide source pollution management programs, EPA pollution control programs, Comprehensive Environmental Response Act, environmental implications of the new energy act, environmental protection and energy conservation, adequacy of EPA budget and staff for implementing pollution control legislation.

8	Energy	Department of Energy (DOE) budget requests and appropriations, DOE and NRC budget requests and appropriations, national energy security policy, U.S. energy goals, U.S. energy supply and conservation, regulation of natural gas and electricity, impact of taxation on national energy policy, global energy needs, emergency plans for energy shortages, promotion of energy development projects, long-range energy needs of the U.S., energy capital requirements, establish the DOE, energy advisory committees.
10	Transportation	Department of Transportation (DOT) and National Transportation Safety Board (NTSB) requests and appropriations, budget requests and appropriations for multiple agencies (NTSB, FAA, CAB), surface transportation programs, national transportation policy, rural transportation needs, adequacy of transportation systems, Interstate Commerce Commission policies and procedures, impact of budget cuts on DOT programs, highway and mass transit programs, transportation assistance programs, high-speed ground transportation systems.
12	Law, Crime, and Family Issues	Emerging criminal justice issues, administration of criminal justice, revision of the criminal justice system, role of the U.S. commissioner in the criminal justice system.
13	Social Welfare	Health and Human Services (HHS) and Health, Education and Welfare (HEW) appropriations and budget requests, administration's welfare reform proposals, effectiveness of federal and state public welfare programs, social services proposals, public assistance programs, effects of economic and social deprivation on the psychology of underprivileged persons, social security and welfare benefits reforms.
14	Community Development and Housing Issues	Housing and Urban Development (HUD) budget requests and appropriations, housing and the housing market, HUD policy goals, building construction standards, future of the housing industry, national housing assistance legislation, administration and operation of national housing programs, housing safety standards.
15	Banking, Finance, and Domestic Commerce	Department of Commerce (DOC) and National Bureau of Standards (NBS) budget requests and appropriations, financial system structure and regulation, DOC reorganization plan, national materials policy, regulatory sunshine act, federal regulation of the economy, Interstate Commerce Act.

16	Defense	Department of Defense budget requests and appropriations (DOD), Department of the Air Force, Army, or Navy appropriations, armed services bills covering multiple subtopics, DOD operations and maintenance, defense production act, reorganization of the DOD, status of the national military establishment, establishment of the DOD, funding for defense activities of DOE, termination or designation of special defense areas.
17	Space, Science, Technology and Communications	Federal Communications Commission (FCC) and the Office of Science and Technology Policy budget requests and appropriations, science and engineering personnel requirements for the 1990s, U.S. technology policy, FCC oversight review, reorganization of the FCC, national engineering and science policy, automation and technological change, FCC regulation of multiple subtopics (TV, telephone, cable, etc.).
18	Foreign Trade	Federal Trade Commission (FTC), U.S. International Trade Commission, or International Trade Administration, budget requests and appropriations, world steel trade trends and structures, various tariff and trade bills, oversight hearings on U.S. foreign trade policy, U.S. trade relations with socialist economies, trade reform act, trade expansion act, tax and trade regulations, customs court issues, trading with enemy acts .
19	International Affairs and Foreign Aid	Department of State and U.S. Information Agency Budget Requests and Appropriations, U.S. foreign policy in view of recent world political developments, U.S. post cold war foreign policy, U.S. foreign policy and national defense issues, international tax treaties, international development and security, the U.S. ideological offensive–changing foreign opinion about the U.S., role of the diplomatic corps in foreign policy development and administration, foreign operations appropriations, information and educational exchange act, require Senate approval of treaty termination, establish the U.S. academy of peace, role of multinational corporations in U.S. foreign policy, Department of Peace, National Peace Agency.

20	Government Operations	Budget requests for various agencies and independent commissions, budget requests for DOL, HHS, and DOE, appropriations for VA, HUD, and independent agencies, budget requests for DOC, DOS, and DOJ, appropriations for the GSA, budget requests for legislative branch programs, supplemental appropriation bills, appropriations for the Treasury, Postal Service, and general government appropriations
21	Public Lands and Water Management	Budget Requests and Appropriations for the Department of Interior (DOI) and the Bureau of Land Management, proposed plan for the Department of Natural Resources, earth resources and drilling technology, resources planning, resource recovery act, activities and programs of the DOI, conveyance of certain real property of the U.S. government, conveyance of certain real property to states.
24	State and Local Government Administration	State and local candidates, campaigns, and elections, budget and tax issues, ethical issues about state and local officials, state and local buildings, museums, parks, landmarks, historical locations, state and local procurement and contracts, urban planning (zoning, land use, competition between cities to attract businesses, city boundaries), state and local services (water supply, street cleaning), constitutional issues (city charter revision), state and local statutes and ordinances, legislative action, speeches by the mayor or governor (inaugural, state of the city, state of the state addresses), partisan politics in the legislative arena, nominations to the state supreme court.
26	Weather and Natural Disasters	
27	Fires	
28	Arts and Entertainment	
29	Sports and Recreation	
30	Death Notices	
31	Churches and Religion	
99	Other, Miscellaneous, and Human Interest	

Appendix C

Search Terms and Case Lists for Chapter 6 Analysis

C.1 Search Terms for Chapter 6 Analysis

All searches were conducted using *LexisNexis Academic Universe*'s General Search. I restricted sources to include only the "Federal and State Cases, combined" database and searched for cases through the end of 2008.

Responsive Statute	*Search Terms*	*Date Range Begins*
Nickles Amendment to Treasury, Postal Service, and General Appropriations Act of 1996	"Treasury, Postal Service, and General Appropriations Act of 1996 and constitution!"	11/19/1995
	"abortion" and "insurance" and federal employee! and constitution!	11/19/1995
Lobbying Disclosure Act of 1995	"Lobbying Disclosure Act" and constitution!	12/19/1995
ICC Termination Act of 1995	"Interstate Commerce Commission Termination Act of 1995" and constitution!	12/29/1995
	"ICC Termination Act of 1995" and constitution!	12/29/1995
Gun-Free School Zones Amendments Act of 1995	"Gun–Free School Zones and constitution!" (within results searched for Lopez or 922(q))	9/30/1996
Religious Liberty and Charitable Donations Protection Act	"Religious Liberty and Charitable Donations Protection Act" and constitution!	6/19/1998
Religious Land Use and Institutionalized Persons Act	"Religious Land Use and Institutionalized Persons Act" and constitution!	9/22/2000

PATRIOT Act's bulk cash smuggling provisions	"PATRIOT Act" and constitution! (within results searched for "bulk cash smuggling" or "5332")	10/26/2001
Bipartisan Campaign Reform Act of 2002	"Bipartisan Campaign Reform Act" and constitution!	3/27/2002
PROTECT Act of 2003	"PROTECT Act" and constitution!	4/30/2003
	"Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today" and constitution!	4/30/2003
Partial–Birth Abortion Ban Act of 2003	"Partial–Birth Abortion Ban Act" and constitution!	11/5/2003
Unborn Victims of Violence Act of 2004	"Unborn Victims of Violence Act" and constitution!	4/1/2004
Amendments to Wild and Scenic River Act	"Wild and Scenic River Act" and constitution! (within results searched for "Eightmile")	5/8/2008

C.2 Case Lists for Chapter 6 Analysis

Table C.2: Case In Which Court Rules on Constitutionality of the *Gun–Free School Zones Amendments Act of 1995*

Case Name	*Court*	*Citation*	*Year*
United States v. Dorsey	Ninth Circuit COA	418 F.3d 1038	2005

Table C.3: Cases In Which Court Rules on Constitutionality of the *Religious Land Use and Institutionalized Persons Act*

Case Name	*Court*	*Citation*	*Year*
Ahmad v. Ehrmann	DC Colorado	339 F. Supp. 2d 1134	2004
Al Ghashiyah v. Wis. Dept. of Corrections	DC Eastern Wisconsin	250 F. Supp. 2d 1016	2003
Benning v. Georgia	Eleventh Circuit COA	391 F.3d 1299	2004
Boles v. Neet	DC Colorado	402 F. Supp. 2d 1237	2005
Charles v. Verhagen	Seventh Circuit COA	348 F.3d 601	2003
Coronel v. Paul	DC Arizona	316 F. Supp. 2d 868	2004
Cutter v. Wilkinson	Sixth Circuit COA	349 F.3d 257	2003
Cutter v. Wilkinson	Supreme Court	161 L.Ed.2d 1020	2005
Cutter v. Wilkinson	Sixth Circuit COA	423 F.3d 579	2005
Elsinore Christian Center v. City of Lake Elsinore	DC Central California	270 F. Supp. 2d 1163	2003
Elsinore Christian Center v. City of Lake Elsinore	DC Central California	291 F. Supp. 2d 1083	2003
Freedom Baptist Church v. Tp. of Middletown	DC Eastern PA	204 F. Supp. 2d 857	2002
Gerhardt v. Lazaroff	DC Southern OH	221 F. Supp. 2d 827	2002
Gooden v. Crain	DC Eastern Texas	389 F. Supp. 2d 722	2005
Guru Nanak Sikh Society v. County of Sutter	DC Eastern California	326 F. Supp. 2d 1140	2003
Guru Nanak Sikh Society v. County of Sutter	Ninth Circuit COA	456 F.3d 978	2006
Johnson v. Martin	DC Western MI	223 F. Supp. 2d 820	2002
Madison v. Riter	DC Western Virginia	240 F. Supp. 2d 566	2003
Madison v. Riter	Third Circuit COA	355 F.3d 310	2003
Madison v. Riter	DC Western Virginia	411 F. Supp. 2d 645	2006
Madison v. Virginia	Fourth Circuit COA	474 F.3d 118	2006
Mayweathers v. Newland	Ninth Circuit COA	314 F.3d 1062	2002
Midrash Sephardi, Inc. v. Town of Surfside	Eleventh Circuit COA	366 F.3d 1214	2004
Mintz v. Roman Catholic Bishop of Springfield	DC Massachusetts	424 F. Supp. 2d 309	2006

Murphy v. Zoning Commission of Town of New Milford	DC Connecticut	289 F. Supp. 2d 87	2003
Sisney v. Reisch	DC Southern South Dakota	533 F. Supp. 2d 952	2008
United States v. Maui County	DC Hawaii	298 F. Supp. 2d 1010	2003
Westchester Day Sch. v. Village of Mamaroneck	DC Southern New York	280 F. Supp. 2d 230	2003
Westchester Day Sch. v. Village of Mamaroneck	DC Southern New York	417 F. Supp. 2d 477	2006
Westchester Day Sch. v. Village of Mamaroneck	Second Circuit COA	504 F.3d 338	2007
Williams v. Bitner	DC Middle Pennsylvania	285 F. Supp. 2d 593	2003

Table C.4: Cases In Which Court Rules on Constitutionality of the *PATRIOT Act*'s Bulk Cash Smuggling Provisions

Case Name	*Court*	*Citation*	*Year*
United States v. $120,856 in United States Currency More or Less	DC Virgin Islands	394 F. Supp. 2d 687	2005
United States v. $293,316 in U.S. Currency	DC Eastern NY	349 F.Supp.2d 638	2004
United States v. Aref Elfgeeh	Second Circuit COA	515 F.3d 100	2008
United States v. Ely	Sixth Circuit COA	468 F.3d 399	2006
United States v. Jose	First Circuit COA	499 F.3d 105	2007

Table C.5: Cases In Which Court Rules on Constitutionality of the *Bipartisan Campaign Reform Act of 2002*

Case Name	*Court*	*Citation*	*Year*
Christian Civic League of Maine v. FEC	DC District of Columbia	433 F. Supp. 2d 81	2006
Citizens United v. FEC	DC District of Columbia	530 F. Supp. 2d 274	2008
Davis v. FEC	DC District of Columbia	501 F. Supp. 2d 22	2008
Davis v. FEC	Supreme Court	171 L. Ed. 2d 737	2008
FEC v. Wisconsin Right to Life	Supreme Court	168 L. Ed. 2d 329	2007
McConnell v. FEC	DC District of Columbia	251 F. Supp. 2d 176	2003
McConnell v. FEC	Supreme Court	157 L. Ed. 2d 491	2003

Table C.6: Cases In Which Court Rules on Constitutionality of the *PROTECT Act of 2003*

Case Name	*Court*	*Citation*	*Year*
United States v. Forrest	Fourth Circuit COA	429 F.3d 73	2005
United States v. Handley	DC Southern Iowa	564 F. Supp. 2d 996	2008
United States v. Hotaling	DC Southern NY	599 F. Supp. 2d 306	2008
United States v. Schales	Ninth Circuit COA	546 F.3d 965	2008
United States v. Whorley	Fourth Circuit COA	550 F.3d 326	2008
United States v. Williams	Eleventh Circuit COA	444 F.3d 1286	2006
United States v. Williams	Supreme Court	170 L. Ed. 2d 650	2008

Table C.7: Cases In Which Court Rules on Constitutionality of the *Partial–Birth Abortion Ban Act of 2003*

Case Name	*Court*	*Citation*	*Year*
Carhart v. Ashcroft	DC Nebraska	331 F. Supp. 2d 805	2004
Carhart v. Gonzales	Eighth Circuit COA	413 F.3d 791	2005
Gonzales v. Carhart	Supreme Court	167 L. Ed. 2d 480	2007
National Abortion Federation v. Ashcroft	DC Southern NY	330 F. Supp. 2d 436	2004
National Abortion Federation v. Gonzales	Second Circuit COA	437 F.3d 278	2006
Planned Parenthood Federation v. Ashcroft	DC Northern California	320 F. Supp. 2d 957	2003
Planned Parenthood v. Gonzales	Ninth Circuit COA	435 F.3d 1163	2006

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