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Zackary O. Crawford April 17, 2011

# Congress and Court, President and Precedent: External Actors' Impact on Stare Decisis

by

Zackary O. Crawford

Dr. Tom S. Clark
Adviser

Department of Political Science

Dr. Tom S. Clark

Adviser

Dr. Thomas G. Walker

Committee Member

Dr. Hazel Gold

Committee Member

April 17, 2011

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Zackary O. Crawford

Dr. Tom S. Clark

Adviser

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Abstract

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Although there is a growing literature suggesting that the Supreme Court of the United States is influenced by external actors, such as Congress and the President, prior scholarships has not found strong evidence that the Court is influenced when deciding to overrule one of its own precedents. Many of the most salient cases in modern U.S. jurisprudence have been overrulings of past decisions: Brown v. Board of Education and Miranda v. Arizona to name a couple. Does the Court not take into account the preferences of the President nor Congress when deciding these watershed cases? By using active signals from the other two branches rather than mere ideological disparities and party changes in government, as prior studies have done, I in this thesis seek to determine if the Court is influenced by these external branches, branches on which it is largely dependent to carry out its decisions. I assembled an original dataset of statements made by the President about the Supreme Court from 1950-2008 to test for presidential influence, and to test for a congressional impact I used an already complied Court-curbing dataset, bills that seek to strip the Court of its power. With the President the results are mixed, and for the House no intelligible impact is detected. However, the results do suggest an influence from the Senate, and thereby injuring the notion of an independent judiciary.

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"Liberty finds no refuge in a jurisprudence of doubt."

Justice Anthony Kennedy – Opinion from *Planned Parenthood v. Casey* (1992)

## I. Introduction:

The U.S. legal system places much emphasis on the doctrine of stare decisis, adherence to precedent, as the quotation above indicates. A chief goal of law is to enable stability, and this doctrine is supposed to help achieve that end. However, the U.S. judiciary does not always follow precedent. Although somewhat rare, many of the Supreme Court's most well known rulings were explicit overrulings of prior decisions. *Brown v. Board of Education* (1954), *Baker v. Carr* (1961), *Gideon v. Wainwright* (1962), *Miranda v. Arizona* (1966), *Miller v. California* (1973), and somewhat ironic with the above quote, *Planned Parenthood v. Casey* (1992) are among the most famous and salient cases in modern U.S. jurisprudence and all were overrulings of prior precedents. Overruling a case is the most extreme way to treat a precedent, an *active* step to kill a precedent. This is markedly different than permitting a case to "die" out on its own. Further, the departure from the doctrine occurs often and consistently enough to deserve explanation (Brenner and Spaeth 1995). Much of judicial politics literature posits that the Court is a political institution in a political environment, which begs the question: what political factors, if any, influence the likelihood of overruling precedent? More specifically, to what extent, if any, do external actors influence the Court when deciding to overrule? When the President or Congress voice opinions about the Court does this influence the Court to overrule a precedent? This project uses an original dataset of

presidential statements to examine if public presidential opinions about the Court impact the Court's decision-making process to overrule. For Congress a dataset of Court-curbing bills, bills that seek to rein in the Court, is used to gauge the same effect (Clark 2009).

The answers to these questions are highly important for at least two reasons. First, the Court is supposed to be an institution that simply applies the law; at least that was the conventional wisdom for much of the Court's history (see *Federalist No. 78*). The Court overruling itself could be interpreted as a mistake that the ruling justices made by accident or it could be seen as driven by ideology to etch preferences into the law, which goes against the theoretical proposition of simple rule application. Another interpretation does not necessarily acknowledge a mistake, but rather that society changes. A good example of this is the "evolving standards of decency" test first articulated by *Trop v. Dulles* (1958) with regard to what constitutes a violation of the VIII Amendment's Cruel and Unusual Punishment Clause. This muddles the distinction between an overruling as a clear legalistic mistake and one driven by ideological concerns, but more so invites personal attitude or ideology to be included in the Court's output. Nonetheless, this detracts from the notion that the Court is to simply apply rules. With the extremes, the legalistic mistake interpretation suggests that applying the law is a complex process where the Court inevitably will make mistakes that it needs to correct, whereas the ideological interpretation suggests judges are not simply applying the law.

The answers to the abovementioned questions also lead to a related second point: theoretically the Court is to be completely independent, free from *outside* influences and political impulses within the U.S government system. An independent judiciary is extremely important for legal stability and the rule of law. That said, the Court might be supposedly independent in making decisions, but it is heavily *dependent* on other branches to carry out those decisions; the Court has no enforcement mechanism of its own at its disposal. Much of the literature has suggested that the Court does not act in a way that both of these theoretical propositions hold, including when overruling a precedent, suggesting that other factors than mere law application come into play when the Court makes a ruling (Segal and Spaeth 1993, 1999; Vanberg 2001; Hansford and Spriggs 2001, 2006; Whittington 2007; Clark 2009 to name a few).

More broadly speaking, within this area of political science there has been a great tension between the legal and attitudinal models as explanations for judicial decision-making. The former suggests that justices simply apply the law, which includes adhering to stare decisis, with personal ideology removed from their opinions, whereas the latter posits that justices actively seek outcomes close to their ideological preferences, which ties into the idea of the Court being influenced by other factors, not necessarily legal considerations (Segal and Spaeth 1993). However, most attitudinal scholars do not posit that stare decisis plays no role in judicial decision-making; there is just lack of consensus on what role it does play and to what extent. Do these legal doctrines, such as precedent, act as constraints on the justices as they attempt to achieve their policy preferences or do they just ignore

them? The fact the Court overrules itself helps to injure the legal model by itself (Spaeth and Segal 1999; Bueno de Mesquita and Stephenson 2002; Hansford and Spriggs 2006).

## II. Literature Review:

Looking toward what influences the Court when deciding to overrule itself is not a new exercise or area of study. Many studies have tried to pinpoint what goes into this calculus, such as ideological concerns, certain inherent characteristics of cases, and most importantly for this study, external influences. This work builds off these works, and they therefore bear mentioning.

### A. Ideological Factors

The attitudinal model literature is rich, and is currently an influential explanation of American judicial behavior that deals with justice ideology influencing the Court's output. Much of the research in this area of political science works within the attitudinal framework, or a variation.

With factors influencing overrulings, on the most basic level scholars have looked toward Court composition and justice ideology as explanations. One study noted that precedent was more likely to be overruled when the composition of the Court was changing. The theory behind this is that as new justices are placed on the Court, they tend to strike older law that they dislike (Banks 1992). In a similar vein, several studies have compared justice ideology and the ideological direction of

overruled cases to show that ideology plays a role through simple comparison as well as multivariate analysis. Many of the overruled cases' assigned ideology scores were not similar to the justices who were in the majority overruling opinion (Brenner and Spaeth 1995; Hansford and Spriggs 2006).

Another factor somewhat related to personal political ideology is an ideology pertaining to stare decisis itself. Different justices have different conceptions of precedent's role in decision-making, in that different justices value or interpret the controlling effects of precedent differently. For instance, one study on this matter noted that Scalia was much more likely to overrule precedent than Stevens, suggesting that some justices are constrained or have different levels of respect for the doctrine of stare decisis (Bailey and Maltzman 2008, 378). Brenner and Spaeth (1995) go further with this and draw a distinction between institutional and personal stare decisis. Institutional stare decisis, they define, is the conventional understanding of stare decisis, whereas, personal stare decisis is being consistent with one's own prior votes. Not surprising, they found justices are more likely to follow "personal" stare decisis than institutional stare decisis, which detracts from the legal model.

B. Personal/Internal Costs and Constraints

A different way of looking at overruling concerns internal and personal costs. The assumption is that adhering to stare decisis is desirable, and therefore deviation from it is costly. The idea here is that this is a cost that justices take into consideration when deciding to overrule, against possible benefits, such as law more

in accordance with their ideological preferences or preservation of institutional legitimacy. The Court can even be found to use such language in its own opinions, as Justice David Souter stated in *Planned Parenthood v. Casey* (1992): "A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, *at the cost of both profound and unnecessary damage to the Court's legitimacy and to the nation's commitment to the rule of law.* It is, therefore, imperative to adhere to the essence of Roe's original decision, and we do so today."(emphasis added)

Several studies put the decision to overrule in rational actor or economic terms. One put forth a formal model in which justices do a cost-benefit analysis of utility when deciding whether to overrule precedent (Bueno de Mesquita and Stephenson 2002). Although this theory specifically looks toward the appellate level and intrajudicial communication, the theory can be applied to the Supreme Court as well, in that the justices communicate their rules (or preferences) down to the appellate, district, and, when pertinent, the state levels. To switch or change rules for these lower courts in the judicial hierarchy by overruling precedent is a cost that may constrain justices in carrying out their preferences. The other study (Nicola and Shleifer 2007) suggests the same general theory, but more specifically applies it to the Supreme Court. Again, these scholars suggest more broadly that costs and benefits of overruling are a concern for the justices. They did not just look toward judicial communication as a cost, but more generally toward instability resulting from changes in the law.

C. Characteristics of Cases

Scholars have also examined certain characteristics of cases that may encourage or inhibit justices to overrule past decisions. One characteristic noted early in the literature is age of a precedent. Again in economic terms, Posner and Landes (1976) analyzed "depreciation" rates of precedent through a "capital investment" approach. A decision's value decreases with time, and falls out of use as society changes. This does not speak to overruling, but points out a characteristic other scholars later examined: age of cases. Although Posner and Landes suggested that cases generally fall out of use, cases that have been overruled seemingly are exceptions to this rule. One study found that over half of decisions overruled from 1946-1992 were less than twenty-one years old (Brenner and Spaeth 1995, 47). Another study found that the average overruled case survives for only 15.2 years (Hansford and Spriggs 2006, 81). Both studies noted that most of the overruled cases were younger, and older cases much more rare, suggesting that cases that end up being overruled are done so relatively quickly. These two studies reason that overruled cases are those that are young compared to the general body of precedent because they are probably more relevant in current affairs and likely to pique the justices' ideological interests. Put differently and at extreme, a justice today will be more inclined to overrule a recent campaign finance case than a case on Native American reservation policy from the 1800's. However, even older cases that are still pertinent today, such as *McCullough v. Maryland* (1819), may have attained a level of being "sacrosanct" and deeply entrenched, so entrenched that even if a justice vehemently disagreed with the case, he or she would be dissuaded from

overruling. This age-overruled precedent relationship does appear to be curvilinear; as the age of the precedent increases to around fifteen years its likelihood of being overruled is higher, but after that the likelihood decreases to almost zero (Brenner and Spaeth 1995).

Scholars have also looked toward case type as a factor in overruling. The main categorization has been opinions based in statute or the Constitution. What has been shown several times is that the Court gives more deference to precedents based in statute compared to Constitutional cases (Brenner and Spaeth 1995; Hansford and Spriggs 2001). This is a legal norm of the Court that has been voiced by several justices (Hansford and Spriggs 2001). The logic is that statutes can be amended or altered by the legislative body that made them if they are incorrectly applied or interpreted, but with Constitutional doctrine, a Constitutional amendment is typically required unless the Court alters its interpretation, which is more practical and feasible than an amendment (Hansford and Spriggs 2001).

Hansford and Spriggs (2001, 2006) looked at three other characteristics of overruled cases. They looked toward legal complexity of a case, arguing that a more complex case is likely to serve as precedent for several issues, and therefore more likely to be overruled. They define legal complexity by looking towards the number of issues brought up in a case and the number of legal provisions brought up, which they find to actually increase the likelihood that a case will be overruled. Another variable they use is prior negative treatment, which they find to be very statistically significant. A precedent that has been deemed a bad precedent by the Supreme

Court several times, through negative citations in later opinions, is likely to be overruled. Conversely, they look at positive treatment of precedent, which for them are positive citations of a precedent in later opinions as categorized by *Shepherd's Citations*. They posit that the more positive treatments a case receives, the less likely the Supreme Court will overrule it, and although the coefficient was in the expected direction they actually did not find this measure to be statistically significant. Another deterrent Hansford and Spriggs cite is the size of the coalition in the precedent's majority opinion. They find that a precedent with a larger coalition will be less likely to be overruled, especially when compared to 5-4 decisions. The logic is that a divided opinion is somehow a "weaker" opinion, and they too find this to be an influencing factor.

D. External Costs and Constraints

Other factors that may influence precedent overruling are external actors, such as Congress, the President, and public opinion. The first two concern separation-of-powers with an independent judiciary in the U.S government. If Congress or the President is adamantly against, or negative toward the Court, does the Court take this into account? This could act as a constraint or an incentive to overrule precedent. If the Court is ideologically congruent with other external actors, justices may feel freer to overrule, and if they do not agree with the other branches, they may constrain themselves and not overrule, or not hear cases pertaining to such issues at all. This conditional effect concept does injure the idea of a completely independent judiciary; however, it does comport with the strategic

model, which is somewhat similar to the attitudinal model. When the Court constrains itself, contrary to its policy preferences, Epstein and Knight (1998) say this is to protect institutional legitimacy, which is a necessary condition before the Court can ever rule in accordance with its policy preferences. They call this form of strategic interaction "sophisticated behavior."

Measuring other actors' influences on Court cases is very tricky, and when Hansford and Spriggs (2001) tested for it using ideology scores for the other branches, they found little to no evidence. Spaeth and Segal (1999) attempted the same using similar measures and found little as well. This is curious because there is an existing body of literature supporting the idea that the Court pays attention and responds to Congress. Notably, court-curbing bills (bills with the intention to strip the Court of jurisdiction, financing, etc.) seem to constrain the Court (Clark 2009).

Another scholar, Georg Vanberg (2001), put forth a formal model of the Supreme Court as related to Congress. He looked toward transparency of what political actors do, and how that affects interaction between these branches. Transparency is the level at which the public monitors the governmental actors. During high levels of transparency there is a possible threat of censure from the public, thereby influencing the branches' actions. Under low levels of transparency, the actors feasibly play a different game; they can "get away" with more. The model also took into account hostility between Congress and the Court. More clearly, the model suggests that when the Court's hostility toward Congress is low and

transparency is high (with the public watching) there is what he calls "judicial supremacy. " The logic is that if the likelihood that the Court will be hostile toward Congress is low, then Congress will pass laws it wants to, thinking that the Court will be friendly enough not to declare the law unconstitutional; however, because of the high level of transparency, Congress is expected to comply with the Court's decision regardless of whether it is declared unconstitutional or not. When transparency is high and the two branches are at odds with each other Congress is expected to strategically "auto-limit" itself –-Congress is expected to constrain itself and not pass laws it wants to in fear that the Court will overrule the law. Alternatively, Vanberg suggests that when transparency is low (when the public is not paying attention) the legislature reigns supreme, regardless of hostility levels, because having a law declared unconstitutional loses its negative bite on the legitimacy of Congress. Vanberg's work suggests that the Court and Congress *do not* act independently of each other, but rather gauge each other and the public during policy-making and adjudication.

What is also lacking in the literature is consideration for public opinion as related to overrulings. The data may not be there, as it is hard to gather data on public opinion for many types of court cases, but the literature has not adequately addressed this. For certain salient issues, like abortion, it may be easier to see if the Court responds to the winds of public opinion. Clark's (2009) work uses Court-curbing as a reflection of public will, and Vanberg (2001) theoretically takes public opinion into account. Is there a more direct way of accounting for public opinion

with the Court? When the Court's ideology is not similar to the public's on an issue, does it refrain from precedent overruling?

Vanberg's work, tied with Clark's, suggests that the Court is aware of its political environment and that it influences decision-making. How can this be so and yet seemingly have no effect on overrulings, as Hansford, Spriggs, Spaeth, and Segal have found?

The Court looking toward external actors to gauge its limits, while etching their preferences into law yields a few hypotheses:

$H_1$: For a case that Congress agrees with, but the Supreme Court does not, as the incidence of Congress members introducing Court-curbing bills increases, the likelihood that the case will be overruled decreases. Conversely, for a case that Congress disagrees with, but the Supreme Court agrees with, as the incidence of Congress members introducing Court-curbing bills increases, the likelihood that the case will be overruled increases.

$H_2$: For a case that the President agrees with, but the Court does not, as the incidence of the President making negative statements about the Court increases, the likelihood that the case will be overruled decreases. Alternatively, for a case that the President disagrees with, but the Court agrees with, as the incidence of the President making negative statements about the Court increases, the likelihood that the case will be overruled increases.

$H_3$: For a case that the President agrees with, but the Court does not, as the incidence of the President making positive or neutral statements about the Court increases, the likelihood that the case will be overruled increases. Alternatively, for a case that the President disagrees with, but the Court agrees with, as the incidence of the President making positive or neutral statements about the Court increases, the likelihood that the case will be overruled decreases.

And to account for the public, these above hypotheses will be influenced by the public approval of the respective institutions:

$H_4$: The relative impact of these denouncements (or signals of approval) will be greater with higher approval ratings of the respective institutions, than with lower approval ratings.

## III. **Research Design:**

### A. Unit of Analysis and Dependent Variable

The main dataset for this research is from Hansford and Spriggs (2006). This dataset includes each case decided by the Supreme Court from 1946 – 2001. Because I am interesting in the persistence of precedent, I merged and analyzed the data with a survival model (further explanation and details will be provided below). Therefore, the dataset is customized such that each is observed over each year. For example, a case decided in 1950 has an observation for 1950, and one for 1951, and 1952, etc. The dependent variable in this study is the likelihood that a case will be overruled.

### B. Operationalization of Concepts

Now that the dependent variable has been identified, a chief issue is what constitutes overruling a precedent. The Court has several means by which it can end a policy or interpretation. The Court can explicitly state that it is overruling precedent. However, the Court can also distinguish precedent, which can have the same effect as overruling by severely limiting its controlling power, or it can even

overrule *sub silentio*, without expressly stating it is overruling a case (Murphy, Pritchett, Epstein, and Knight 2006). Another problem that Posner and Landes (1976) bring to light is that precedent can "depreciate," fall out of use, or be actively ignored. This presents concerns because the data may not be capturing all that it is trying to. Further, the Court may strategically use one method or another for various reasons. For instance, a *sub silentio* overruling may be used when other external actors are ideologically opposed to the Court, as to hide what they are doing.

The most widely used definition of what constitutes overruling precedent is Brenner and Spaeth's (1995). They define alteration of precedent as any time the majority or plurality opinion explicitly mentions they are overruling or partially overruling a prior case. They try to capture overrulings that do not have explicit overruling language or statements by counting cases where a later majority opinion states that a precedent was in fact overruled. They also include cases where the opinion states that a prior precedent is "limited to its facts," which is a strong way to distinguish a precedent. They do not include minority opinions stating that the majority is overruling a precedent, unless the minority opinions "empirically establish" that the majority is overruling and that the majority was trying to "obfuscate" that they were (Brenner and Spaeth 1995, 18-22). Brenner and Spaeth used *Shepherd's Citations* and the Congressional Research Service to assist them, but they deemed both inadequate on their own due to error and limitations, so they compiled their own list. This definition has been the definition for the field since this work was published in 1995. A concern here is that they potentially do not

account for all *sub silentio* overrulings, which may be impossible to detect, but are something that should be included if possible. They try to account for this when they look to minority opinions to signal this, but it is incomplete because in theory there could be a unanimous decision where there is no dissent flagging an overruling, or a non-unanimous decision absent of dissents.

That said, the criteria for overrulings used by Brenner and Spaeth are adequate. The Hansford and Spriggs dataset uses the Brenner and Spaeth data, and therefore is used for this project. Michael J. Gearhardt (2008) has identified a group of *sub silentio* overrulings, most of which are included in the Brenner and Spaeth dataset. It is worth noting, though, that some of the identified *sub silentio* overrulings did not meet the criteria defined by Brenner and Spaeth, and therefore are not coded as overrulings.

C. Independent Variables

With regard to positive or negative environments, measurement is integral as well. For the presidential statements I used the *American Presidency Project* (Woolley and Peters) database, which places the public papers of Presidents all in one location. This required reading presidential public statements pertaining to the Supreme Court, and involved coding statements as positive, negative, or neutral toward the Court. I used the search term "Supreme Court" for 1950-Present, which yielded 1,659 hits. Each statement was examined to see if it was positive, negative, or neutral, of which 463 were coded. Many were explicit, but some required a closer reading with interpretation. An example of an explicit positive statement, from

President Clinton, is: "Today's decision by the Supreme Court in the *Vernonia School District v. Acton* case sends exactly the right message to parents and students." An example of where context was used for coding, and an example of a negative statement, comes from, again, President Clinton over *Bush v. Gore* (2000): "But I think that from my point of view, as long as I'm President, what I should be focused on doing is telling the country that we should accept it, because the principle of judicial review has served us well. And all of us believe, looking back in history, that there were periods when the *Supreme Court made serious mistakes*, but when they did, they normally were corrected over time" (emphasis added). Most neutral statements dealt with the President stating that he would adhere to a case, or when he cited it as controlling his action in a neutral manner. For example from President Ford: "On February 16th, I submitted legislation to the Congress which would reconstitute the Federal Election Commission along the lines mandated by the Supreme Court. At that time, the Congress had 2 weeks in which to take affirmative action on this legislation or the Commission would lose most of its powers under the Federal Election Campaign Act. Now, there are only 9 days left for the Congress to act."

There may be ideological undercurrents in many of the neutral statements; however, they were not coded as positive or negative unless the attitude was revealed in the statement itself. Finally, statements about highly salient cases that were mentioned quite often were not included beyond ten years. The three cases this was applied to were: *Brown v. Board of Education* (1954), *Roe v. Wade* (1973), and *INS v. Chadha* (1983). *Brown* is still mentioned quite often even to the present

day, so this would not be accurate for gauging the current political environments. Almost every president since Eisenhower has made positive public statements about *Brown*, but President George Bush saying he supports *Brown* is not praising the current Court he is facing. The same applies, though less so because it still causes a divide, with *Roe.* With *Chadha*, the case was cited as controlling in many bill signings, and therefore coded as neutral, but after ten years was not coded. The logic here is that these statements, although about precedents of the Court, are not attacks or signals of approval of the current Court.

For Congress I used Clark's Court-curbing database. Court-curbing bills are defined as "a legislative proposal to restrict, remove, or otherwise limit judicial power" (Clark 2009, 978). All bills indexed under certain relevant categories were examined (e.g., "Courts". "Supreme Court", and "Justices"), and to increase validity three different methodologies were employed, which all agreed 100% (Clark 2009, 978).

A main issue with the Hansford and Spriggs database is that it is in years, whereas the Presidential statements and Court-curbing bills have specific dates assigned to them. To permit data merging, a frequency of positive, negative, and neutral presidential statements and of Court-curbing bills was made for each year. More clearly and for example, the Court-curbing variable has the same value for all cases that occurred in one year.

Presidential statements and Court-curbing bills being used for political environment measures may be better at capturing inter-branch influence than mere party control or ideology scores. Two precedent studies that found that the political

environment did not influence overrulings used these definitions. Segal and Spaeth (1999) tested if the political environment had changed with regard to the progeny case and the overruling case. They examined party control of the House, Senate, and Executive branch when the original case was decided and compared it to the party control of these branches when the case was overruled. Their logic was that overrulings would occur in different environments than that of the original case, and that would show inter-branch influence. Hansford and Spriggs (2001) used a "zone of acquiescence" for each year for all three branches, which relied on ideology scores, W-Nominate scores to be more specific. These scores were generated by Poole and Rosenthal (1997) for the House and Senate, based off of scaling Congressional roll call votes on certain issues. For presidents, roll-call voting was used for their time in Congress, if they were ever in Congress, as well as their policy statements on certain issues. Hansford and Spriggs tested if the median ideology of the majority opinion was within the "zone of acquiescence" (i.e., not the most "extreme" actor) or not, and used that to see if the environment was an influence.

What public presidential announcements and Court-curbing show that mere ideology scores do not show are *active* denunciations (or commendations) of the Court, whereas an ideology score just shows a disparity or congruence that could be passive --passive meaning that the President or Congress is not strongly stating an opinion about the Court. There is a difference between having different ideologies and actually actively targeting the Court (though the impetus for these "attacks" is typically grounded in ideology). The same applies to simple changes in party

control of different institutions, which is the measure that Segal and Spaeth used for their external analysis.

That said, the method Hansford and Spriggs (2001) use is an appropriate method to capture ideological divergence between a branch and a precedent, but an updated ideological scoring was used: The *Judicial Common Space* (JCS) (Epstein et al. 2007). Unlike Hansford and Spriggs, who used a different scale for the Court's ideology, the JCS measure incorporates scores for the different actors on the same scale. These scores are based on the NOMINATE scores for the President, House, and Senate (Poole and Rosenthal 1997). For the Court, Epstein et al. use the Martin-Quinn scores, which look toward justices' ideal preferences per term based on voting patterns (Martin and Quinn 2005). Using the differences between the original case's median justice JCS ideology and the ideology score of the other branches when the case is overruled is a good, although admittedly not perfect, way to gauge if Congress or the President agrees or disagrees with a case. An important note here is that these scores only go back to 1950, forcing the analysis to start at 1950 despite the database going back to 1946.

Variables were created for the House, Senate, and the President to see if each actor agreed or disagreed with a case, with the case's ideology being the Court's median ideology score for a given year. If both the actor and the "case's" ideologies is either both positive or both negative, then the actor was coded as "in agreement" with the case. If one ideology is positive and one negative, then the actor was coded as "in disagreement" with the case. However, these variables are not sufficient on

their own. Looking toward the hypotheses, an additional dimension needs to be accounted for: the current Supreme Court (i.e., the Court that is to be influenced or not). In terms of "agreement" or "disagreement," among a set of two current actors there are four possibilities with regard toward attitudes toward a given case. Table 1.1 outlines these four possibilities.

Table 1.1

Four Possibilities of Joint Stances on a Given Precedent

| | | **Supreme Court's Stance** | |
|---|---|---|---|
| | | Agree | Disagree |
| **External Actor's Stance** | Agree | Joint Agreement | Maintain Against Wishes of Court |
| | Disagree | Overrule Against Wishes of Court | Joint Disagreement |

Variables were created for each of these possibilities for each external actor, and the current Court. Both "Joint Agreement" and "Joint Disagreement" were bundled together for coding purposes because they are both in agreement –- they both agree with the case or are in agreement that they dislike the case. For the other two possibilities I titled them "Overrule" and "Maintain" from the external actor's point of view, as this study is examining the influence of the external actors on the Court, not vice versa. If the external actor and the assigned case ideologies are on

the same side of zero and the current Court's ideology is on the other side of zero, then a case was marked for external actor agreement, but Court disagreement, or "Maintain Against Wishes of Court." Slightly differently for "Overrule Against Wishes of Court," if the current Court and the assigned case ideologies are on the same side of zero and the external actor's ideology is on the opposite side of zero, then the case was coded for Supreme Court agreement, but external actor's disagreement.[1] For the purposes of this paper, the "Joint" possibilities fall into what is an "agreement scheme," and the "Overrule" and "Maintain" possibilities together are "disagreement schemes." This project just examines the "Overrule" and Maintain" possibilities, or the disagreement schemes, with the assumption that when the Court and an external actor are ideologically in agreement, the external actor will not push the Court to act against its own wishes with negative signals. For the positive and neutral statements, there is the assumption that the Court will not act against the President's wishes if both branches are ideologically in agreement as well.

Again, this does not lead to answering the hypothesis by itself. For the cases where the Court and the President view a precedent differently, ideologically

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[1] Here are two of the four possibilities in different notation for clarity's sake. One is an agreement scheme and the other is a disagreement scheme. Let "Id" be short for Ideology :
**Joint Agreement**, where the current Court and the external actor are in agreement with a case: Current Court Id>0 **&** External Actor Id>0 **&** Case Id>0 **OR** Current Court Id<0 **&** External Actor Id<0 **&** Case Id<0
**Maintain Against Wishes of Court**, where the Court disagrees with a case, but the external actor agrees with is: Current Court Id>0 **&** External Actor Id<0 **&** Case Id<0 **OR** Current Court Id<0 **&** External Actor Id>0 **&** Case Id>0.
Also, since none of the ideologies equals zero, the exclusion of it from these definitions is not important.

speaking, the variables were interacted each type of statement: positive, negative, and neutral statements. Looking toward the hypothesis, the Court is expected to constrain itself in the presence of negative statements and not as much in the presence of positive or neutral statements. Cases where Congress and the Court disagree with each other will be interacted with the Court-curbing variable to see if these bills constrain the Court from pursuing its preferences.

Although Clark (2009) uses Court-curbing bills as a reflection of public opinion to some extent, looking to actual public opinion with regard to the Federal actors is helpful as well. Though the Court usually has the highest favorability ratings among the three branches, it would be interesting to see if any fluctuations in opinion among the signaling branches have an effect on the incidence of overrulings, and what is overruled. For instance, when the President with low approval ratings releases statements condemning the Court, it would be expected that the Court would discount the denunciation.

To take public opinion into consideration, public approval of the House, Senate, and President was interacted with the "Maintain" and "Overrule" interaction variables mentioned above, creating triple interaction variables. The polling data is from *The Roper Center for Public Opinion Research*. For the President and Congress very rich data were collected, mainly from Gallup, and within the past ten years there has been polling information almost every week; however, the dataset used only has years. Therefore, the approval ratings used are an average of polls for a given year, if each one of the three institutions had more than one approval poll per

year. An issue is that the person who occupies the presidency changes not at the start of a new year, either due to a scheduled inauguration, assassination, or resignation. A new President usually carries a different approval rating, sometimes a drastically different approval rating. To account for this, when there were two Presidents in a given year, the weighted average of each president was taken, based the portion of time spent in office for that year, and then the two were added together.

D. Control Variables

Although touched upon in the literature review, the control variables used are: legal complexity, positive treatment, negative treatment, case type, and majority coalition size. The legal complexity variable is based on a factor analysis of the number of legal provisions brought up in a given case and number of issues. The theory is that a more complicated case is more likely to be overruled. The number of legal issues and provisions for each case is from Spaeth's (1995, 1997) *United States Supreme Court Judicial Database,* the database from which the Hansford and Sprigg's works (2001, 2006) is derived. Positive and negative treatments concern how the Court has subsequently treated a case, with negative treatment being a pretty good harbinger that it is going to be overruled. This was collected by Hansford and Spriggs (2001) by using *Shepherd's Citations* categorizations of a precedent's treatment in subsequent cases. For positive treatment they used the "followed" and "paralleled" treatment categories, and for negative treatment they

used “distinguishes,” “questions,” “criticizes,” or “limits” categories. Case type falls into two categories: Constitutional and statutory, with the idea that the Court is more willing (or eager) to overrule cases that hinge on a Constitutional issue. Again, this is derived from Spaeth’s database (1995, 1997), and used by Hansford and Spriggs (2001, 2006) Lastly, majority coalition size was controlled for because larger coalitions are deemed to have more weight or be stronger, and therefore are more costly to overrule. This, too, is from Spaeth’s (1995.1997) database. Age of the precedent was not included as a control variable because the Cox Proportional Hazards model already takes age into account (see Hansford and Spriggs 2006, 83).

E. Type of Analysis

Much of the early research in this area has been descriptive in nature. Brenner and Spaeth’s (1995) work describes many of the characteristics of overrulings, but does not gauge relative impact of different independent variables. Hansford and Spriggs (2001, 2006) do use a hazard survival model, a Cox Proportional Hazards survival model, which permits seeing the likelihood of a case to “survive.” They also look at all decisions with this model, which is what this study does, whereas earlier studies just examined cases that were overruled. This model does permit a statistical analysis that can determine if many of the abovementioned variables are significant. Further, these other variables can be held constant, and therefore give the findings related to the hypotheses more explanatory power.

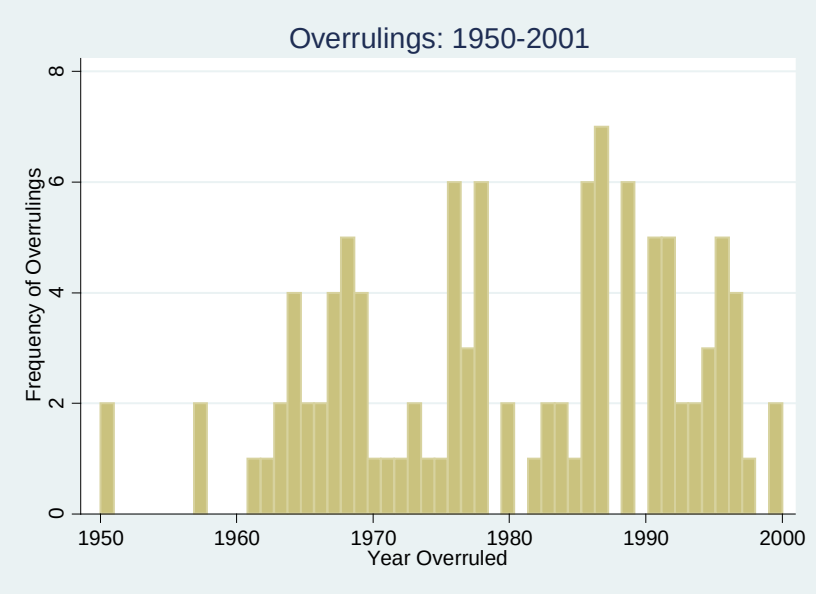
F. Goal of Research Design

The goal of this project is to see if external actors impact the Court when deciding to overrule itself. Holding the other identified independent variables constant assists this analysis. There is literature that suggests the Court is influenced by other branches in many respects; however, the research on overrulings has been inconclusive on this point. If the hypotheses are supported by the analyzed data then the overrulings literature comports more with the other literature suggesting an influence. With this, the Supreme Court is then shown to not be working in a vacuum, but as an institution that that gauges other branches on which it is dependent.

## IV. Data and Analysis:

Looking first toward the dependent variable, the dataset from 1950-2001 has 107 overrulings. Using Figure 1.1 , what should first be noted is how infrequently a case is overruled. Among the 6,363 cases in this dataset only 107 were overruled, which is roughly 1.68%. Further, this dataset only takes into account cases decided later than 1950, so although there have been many overrulings before 1950, there is also a much larger body of precdent that has not been overruled in addition to the cases in this dataset that have not been overruled. What should also be noted is the

Figure 1.1

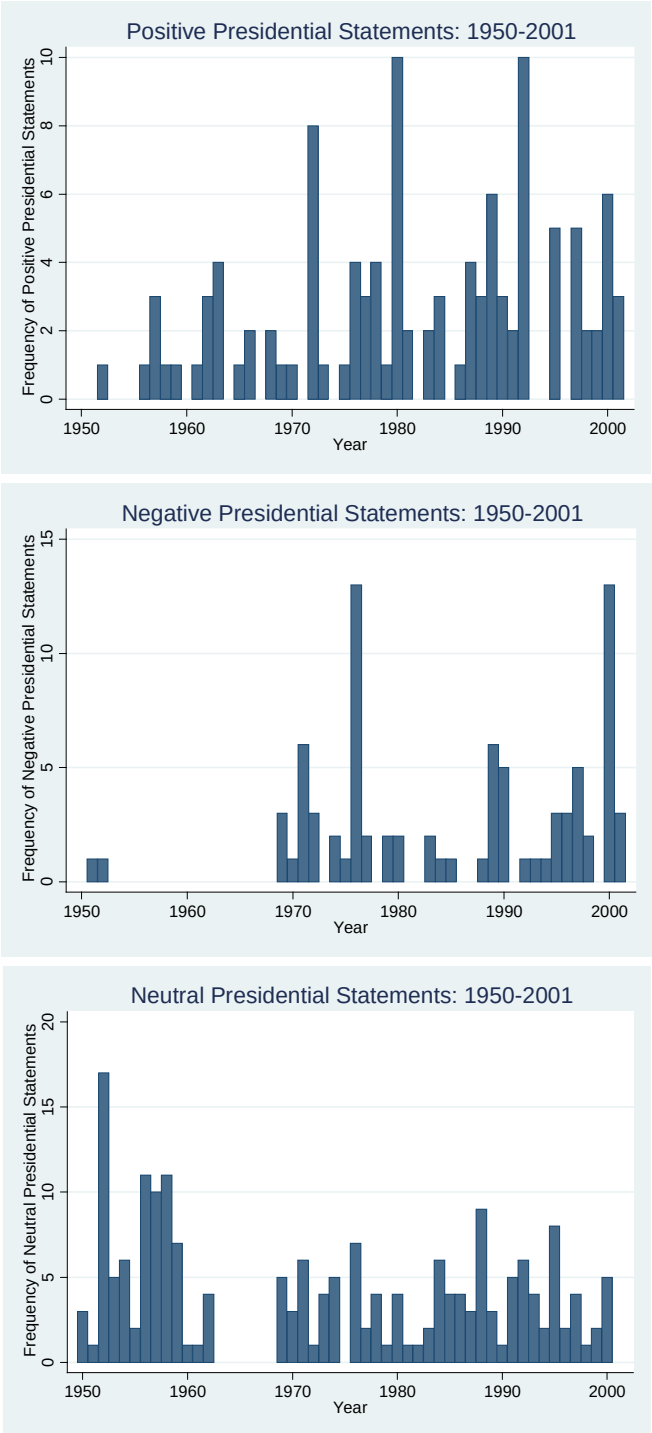



*Notes:* In this figure what should be noticed is that overrulings occur consistently, but vary in frequency over time. Although not immediately inferred from the figure, overrulings constitute a small portion of the Court's rulings in a given year. Even the maximum of seven overrulings is still a small portion of the Court's yearly caseload.

variation in the frequency of overrulings per year, which presumably is partially casued by the already identified variables. The maximum number of overrulings in one year is seven, with no overrulings in a given year being the minimum.

Communications or signals from external actors vary as well. With presidential statements, each type of statement exhibits variation. Figures 1.2-4 are interesting for several reasons. The first observation, which is important before further analysis, is that all three statement types do not vary similarly. In other words, there are environments that can be categorized as negative, positive, or

Figures 1.2-4

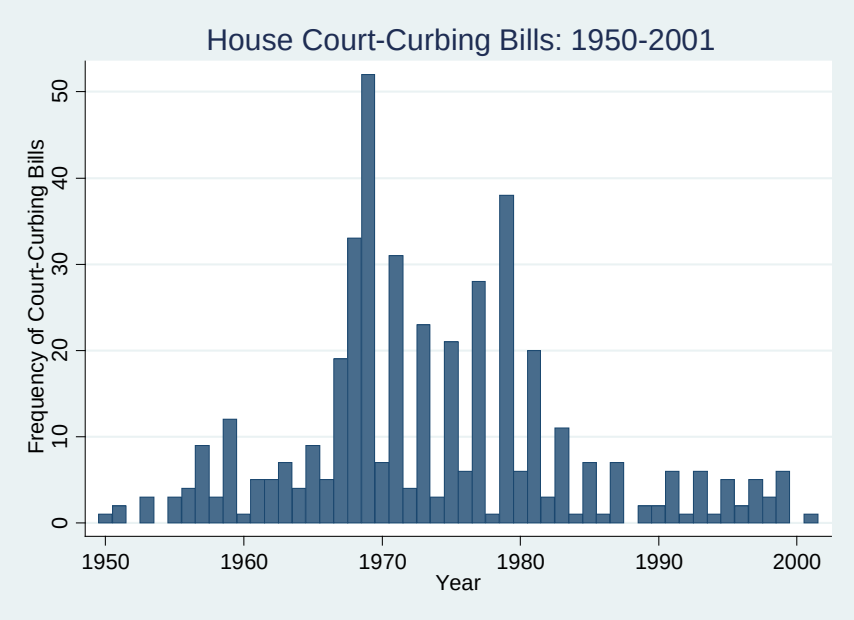


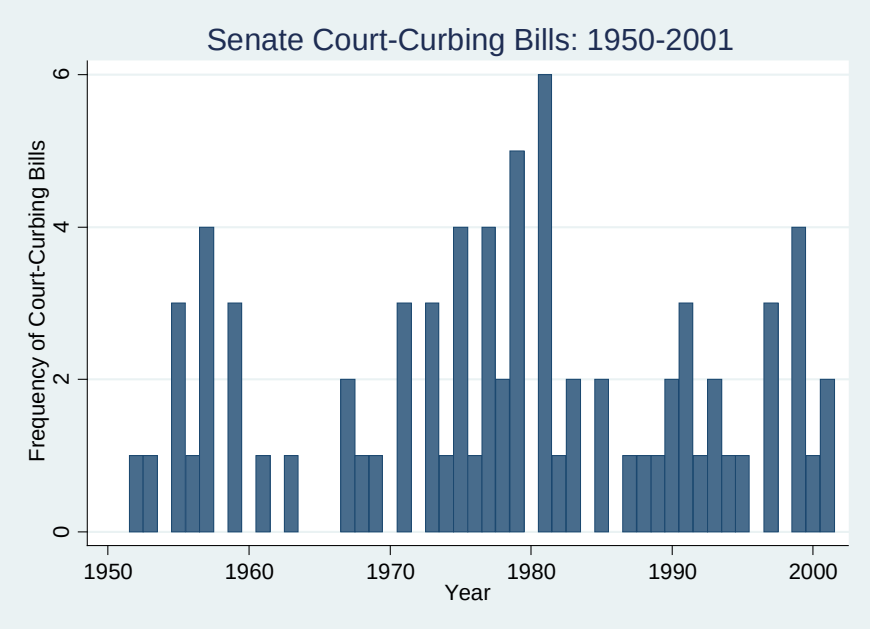

*Notes*: What should be noticed here is that all three statement types vary over time. What is interesting is that negative statements are the least frequent type of presidential statement, which is expected as they are politically more costly. Also apparent is that statements of opinion, both positive and negative, over time occur more frequently, suggesting that a norm of being reticent about the Court is being whittled away.

mixed, with respect to the President and the Court; there are periods when the President is much more positive than negative, and vice versa. Second, negative statements are quite rare when compared to neutral and positive statements. This is not surprising because negative statements come at a cost. Although this cost may be outweighed by some other benefit (e.g., public support), at the very least these statements strain Executive-Court relations. The second observation is the increases of both positive and negative statements over time. In a formal sense, there is a norm or "ideal" that the President should withhold opinions about the Court. In fact, reading through presidential statements about the Court reveals that a great portion of them decline to comment, as it would be improper, and this is even more strongly adhered to before a case is decided. It would be imprudent to condemn or praise the Court because in theory the President is supposed to comply with the decision. Further, the President is not supposed to attempt to influence the Court. Though the span of time covered by this dataset does not cover the nation's entire history and there are many examples of clashes between the Court and the President, these data do suggest that the norm of withholding opinions about the Court is being whittled away. This could be explained in many different ways, but is out of the scope of this paper

For Congress, figures 1.5 and 1.6 show somewhat coherent drifts in the introduction of Court-curbing bills, which demonstrate changes in the level of dissatisfaction with the Court. The high level of Court-curbing is to be an environment characterized as unfriendly.

Figures 1.5-6




*Notes:* With these two figures what is seen is variation in the levels of Court-curbing bills over time. Also, they do not vary together, which is expected as the two chambers have been ruled by two different parties for various times throughout history. The differences in frequencies between the two chambers are noteworthy. The House is expected to have more of these bills, as an institution with more members; however, the House has disproportionally more Court-curbing bill introduction when compared to the Senate. If these bills are categorized as "reactionary", then this disparity makes sense. As the chamber of "sober second thought", Senate constituencies are larger, and therefore less likely to have outlier districts with outlier representation who introduce "reactionary" bills.

There are several differences between the House and Senate worth noting. The fluctuations of bills do not vary together. This is expected as the two chambers have been controlled by separate parties, at times, which carries different opinions about the Court. What are more noteworthy are the different frequencies between the two houses: a maximum of 54 for the House and a maximum of 6 for the Senate. This, too, is expected as the House has more members. However, the House seemingly introduces disproportionately more of these bills. Another way of interpreting this is that the House is typically more reactionary than the Senate, the chamber of "sober second thought." These bills that rarely even make it to committee vote, let alone a floor vote, are generally communicative in nature (Clark 2009). They seek to communicate to the Court to constrain itself, which formally speaking does not comport with the concept of an independent judiciary. Therefore, these bills could be classified as "reactionary," with an expectation that the House would introduce these bills more frequently.

## V. Results:

### A. Part I: Signals without Public Approval of External Actors

I created models for each of the three external actors using a Cox Proportional Hazards Regression. The first set of models does not include public opinion of the external actors for the President and Congress, but does include relevant external actor variables as well as controls. This type of regression uses the data to calculate a baseline hazards rate, similar to a probability, that a case will be overruled for any given time after being ruled upon (Hansford and Spriggs 2006).

What is extremely useful for this project is the analyst is able to set the variables at different values, and then run the average case through set levels of different types of presidential statements or Court-curbing. For instance, the variable can be set at the maximum and minimum for Court-curbing to examine the differences in survival rates.

i. Presidential Models

Unlike Congress, where Court-curbing is inherently negative, the data collected for the President go three ways: positive, negative, and neutral. The results here are mixed. Starting with simply examining the impacts of different types of statements, regardless of agreement/disagreement scheme (i.e., all cases), an increase in the incidence of positive statements increases the likelihood of a precedent being overruled, when compared to negative statements. The opposite goes for levels of negative and neutral statements, meaning that as the level of these statements increases, the likelihood of survival increases. One way to interpret this is borrowing from the "constrained" and "unconstrained" idea that was used for Court-curbing in Clark's work (2009). In his work, the Court was expected to "constrain" itself in the presence of Court-curbing bills. "Constraint" was defined as not exercising judicial review on Federal statutes, not declaring them unconstitutional. Although not entirely similar, if overruling a case is costly and characterized as "unconstrained" behavior, then it is not surprising that for all cases the Court would be less likely to overrule a case in the presence of negative statements from the President (analogous to Court-curbing), which is the case here.

The neutral statements direction is surprising, as with the hypothesis it was grouped with positive statements. However, when these statements are interacted with cases where the two institutions disagree, the "constrained" logic is not evident, thus injuring this proposition.

Looking toward the two disagreement schemes models, two observations are immediately apparent. First, when the positive and negative statements are interacted with the different types of cases, their impacts invert. More clearly, as positive statements increase, so does the likelihood of survival of a given case, and when there are more negative statements, the likelihood of survival decreases. This is the exact opposite of what occurred above in the prior paragraph. Remember here these two models only concern cases where the Court and President do not see eye to eye on a case, whereas, in the prior paragraph it was all cases. The second significant observation is that what seemingly drives the direction of increased or decreased likelihood is not the *type* disagreement scheme (either "Maintain" or "Overrule Against Wishes of Court) as much as what types of statements are being made about the Court. Positive statements increase likelihood of survival for both when the Court agrees with a case but the President does not *and* when the Court disagrees with a case, but the President does. These two observations together do suggest that disagreement between the Court and President matters, but the type of disagreement not as much.

The theoretical expectation is that the Court is more likely to overrule a case when either the President disagrees with a case and is making negative statements

about the Court or when the President agrees with a case and is non-threatening to the Court by releasing positive or neutral statements about the Court. The models here suggest that this is not necessarily true.

ii. Interpretation of Presidential Models

We have seen that positive statements had the same effects for both disagreement schemes, as did negative statements. However, saying that the definition used to categorize cases as an "agreement scheme" or "disagreement scheme" to which each case was assigned cannot be deemed wholly irrelevant either. For *all* cases positive statements decreased survival more than negative statements; the disagreement models both invert those. So something is occurring here, but it is difficult to interpret. Although, technically speaking, half the findings comport with the hypothesis, it is difficult to imagine that that Court would purposely respond to presidential statements in the expected way only for cases where the President disagreed, and the Court agreed with the case, but not for cases where the President agreed, and the Court disagreed. That carries an assumption that is unfeasible: a high cost strategic calculation that would be hard to gauge. It is also difficult to interpret these disagreement scheme findings through a lens of "unconstrained" behavior. If that were the case here, the positive and negative statements would go in the opposite directions that they do (like they do when applied to all cases).

This may be indicative of the inherent differences between a negative presidential statement and a Court-curbing bill. A Court-curbing bill by definition

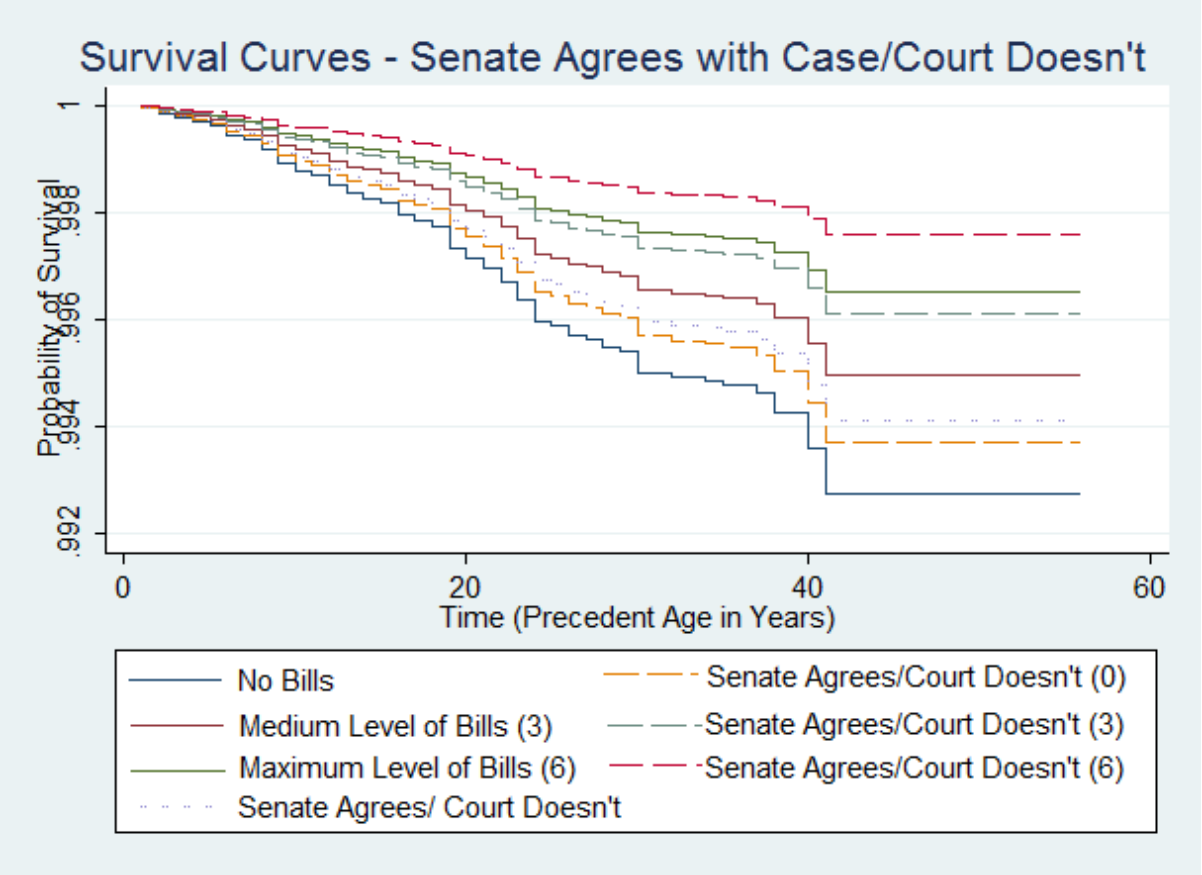
seeks to constrain the Court, to limit its power in some way, to rein it in. For this project, a negative presidential statement had to simply be negative toward the Court in some way. Further, the President extremely rarely makes open statements about not abiding by a decision, or announcing policies to reduce its power. Most deal with disagreement over an individual case or disagreement with the Court more abstractly. So whereas with a Court-curbing bill the intent is quite evident, with a negative presidential statement, for the most part, the Court would have to make the assumption that the President would not comply with decisions or work to reduce its power. Since neither the hypothesis theory nor the constrained theory seem to explain presidential statements as related to cases where the two actors disagree, it makes interpretation here more difficult.

iii. Senate and House Models

The results from this first set of Congressional models are mixed. Influence in the expected direction is noticeable particularly with the Senate. Figure 1.7 illustrates this in the context of where the Senate agrees with a case, but the Court does not ("Maintain Against Wishes of Court" in Table 1.1). The solid lines are simply running all cases, regardless of whether the Senate agrees with the case or not, under three different levels of Senate Court–curbing: minimum, medium, and maximum. As the incidence of Senate Court-curbing increases so does the likelihood of survival of a precedent. Put differently, when there is less Court-curbing there is a greater likelihood of a case being overruled. Again, it should be pointed out that Court-curbing can go both ways, in that the Senate has cases that it agrees with and

disagrees with; it has some cases that it would like overruled and some that is wishes the Court will uphold, so mere Court-curbing would not have an expected direction in terms of probability of survival when related to ideology. The finely dotted line "Senate Agrees/ Court Doesn't" is, as defined above, all cases where the Senate likes a case, but the Court does not. The last three long dashed lines are the

Figure 1.7



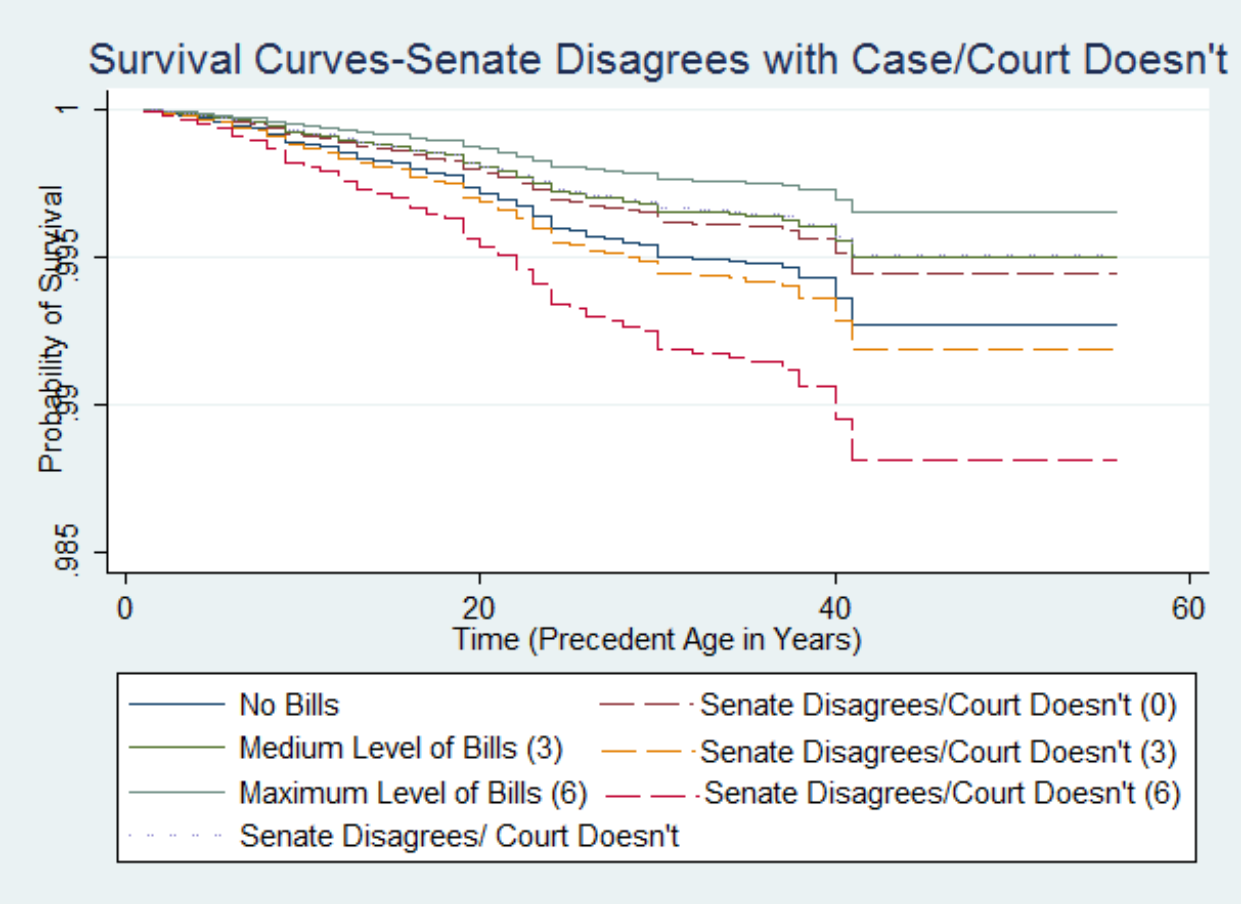

*Notes*: In this figure the solid lines represent the likelihood of survival after a given amount of time for all cases, regardless of agreement/disagreement scheme. Court-curbing on its own increases the likelihood of the survival of a case, which comports with the "constrained/unconstrained" theory. The long dashed lines are for cases where the "Senate Agrees/Court Doesn't" for different levels of Court-curbing bills. When interacted with Court-curbing, the Court acts more in accordance with the Senate's wishes (i.e., the likelihood of survival increases). Also, looking laterally at the pairs (both pertaining to "0", "3", or "6") what should be noticed is that the disagreement scheme matters, in that the disagreement scheme interaction curves each respectively have higher likelihoods of not being overruled compared to their related curves for all cases.

interaction variables between "Senate Agrees/ Court Doesn't" with different levels of Court-curbing. These last four lines comport with the hypothesis. The Agree/Disagree curve, which does not take into account Court-curbing, has the second lowest probability of survival among the curves in this graph. This is expected and in a sense in agreement with the attitudinal model: a case that ideologically the Court does not like is less likely to survive. However, when Court-curbing is taken into consideration those same cases are more likely to be upheld. In fact, as the incidence of Court-curbing increases, so does the likelihood of survival. One major caveat with this graph is that the differences in likelihoods are quite small. That said, all curves directly related to the hypothesis are in the expected order and direction.

Figure 1.8 illustrates the opposite instance. This is when the Senate disagrees with a case, but the Court agrees with it -- "Overrule Against Wishes of Court" in Table 1.1. Similar to Figure 1.7, for all cases, regardless of disagreement type, as the incidence of Court-curbing increases, so does the likelihood of surviving. Although difficult to see on the graph (it is extremely close to the "Medium Level of Bills (3)" curve) for cases where the "Senate Disagrees/ Court Doesn't", this curve is higher than any of the Court-curbing interaction variables. Again, this goes along with the attitudinal model, in that the Court wants to keep a precedent that it agrees with. However, when Court-curbing is interacted with these cases, the likelihood of

the precedent surviving decreases. As the incidence of Court-curbing increases, the likelihood of survival for a precedent that the Court agrees with, but the Senate disagrees with, goes down. The three curves are in the opposite order from the prior scheme, which is expected.

Figure 1.8




*Notes*: In this figure, like the prior Senate one, the solid lines are likelihoods that a case will not be overruled for all cases, regardless of disagreement/agreement scheme. In fact, these are the same exact curves as portrayed in the prior figure. What is key in this figure is when Court-curbing bills are interacted for cases where the "Senate Disagrees/Court Doesn't" the direction of the curves invert. That is, as Court-curbing increases for these types of cases, the likelihood of being overruled increases, which is the Court bending to the Senate's wishes.

With the House, the results are mixed. Like the Senate bills, as the incidence of House bills increases, so does the likelihood of a precedent surviving, for all cases. What is curious is when the incidence of bills is interacted with cases where the House agrees with a case, but the Court does not, as the incidence of bills increases, the likelihood of survival decreases, which is the opposite of what is expected. Even more curious is that the survival rate for maximum Court-curbing for these cases decreases more than any of the curves above in Figures 1.7-8: a little more than 98.5%. This difference, again, may be quite small, but relative to the other Senate curves is noteworthy. With regard to cases that the House disagrees with, but the Court does agree with, the curves are in the expected order and direction. That is, as the incidence of House bills increases, the less likely a case in this type of disagreement scheme is to survive. This, on its own, is in alignment with the Houses' wishes; however, when conjointly examined with the other House's disagreement scheme something else is apparent, that the *type* disagreement scheme does not seem to matter here.

iv. Interpretation of Senate and House Models

For the Senate, the data suggest that the hypothesis is true, but not so with the House results. For all results the differences are small, indicating that gauging Congress, with Court-curbing bills as signals, is certainly not the dominant factor involved with deciding to overrule a precedent. However small, generally it cannot

be said that the Court is not influenced by these bills, including the unexpected results from the "House Agree/ Court Doesn't" scheme.

Constant across three of the four models is that the increase in the incidence of Court-curbing bills increased the likelihood of a precedent surviving. Additionally, Court-curbing for both chambers, when applied to all cases, increased survival of a precedent as well. In other words, Court-curbing appears to increase survival. Going back to "constrained/ unconstrained" theory articulated in the presidential model section, the Court overruling itself is costly for institutional legitimacy and legal stability, regardless of whether Congress wants the Court to overrule itself or not. An overruling is more often than not an admission that the institution was wrong. Although different, in that the Court overruling itself many times does not pertain to a Federal law, let alone Congress, if overrulings as a whole were categorized as the "unconstrained" actions, then the observations with Court-curbing make sense. That is, generally, when either chamber of Congress is hostile toward the Court, as shown through these bills, the Court is less likely to act in an "unconstrained" manner--less likely to act in a way that shakes legal stability and its own legitimacy.

v. Robustness of Models

To increase the validity of these findings, alternate measures of "agreement" and "disagreement" were used. In the original models the Court and the external

actor were jointly in agreement if their ideology scores were all on the same side of zero, all positive or all negative. Other combinations for disagreement were used using this logic (See Footnote 1). A limitation of this measure is that the President could ideologically be closer to a given case's ideology score on the other side of zero, than something on the same side of zero. For example, an ideology score of -.01 is closer to +.01 than -.7. This applies to all actors in relation to each other, and is more important for actors who are closer to zero, who are more moderate. To account for this a different, although admittedly not perfect, measure was devised. The absolute value of the ideological distance between the actors and cases was taken; the larger the distance, the more likely the actor disagrees with a given case. However, a cutoff point needed to be calculated to decide what would be categorized as "agreement" and "disagreement." The distributions of the absolute values were examined to decide how wide the agreement ranges should be. If they were too large the actor would be categorized as in agreement with every case. The Court's median score does not vary widely, so a conservative .25 range was decided. If the absolute value between a case's ideology and the Court was less than .25, then the Court was coded as in agreement. For the House and Senate, the same method was applied, and .25 was decided. For the President a different range was used, as the range of ideology scores for the President is much larger. A more liberal .5

range was used for the President. [2] Interestingly, the absolute values between the President and cases fit an almost near perfect normal distribution. For all actors, the range was constricted and relaxed to examine the effects of different definitions of agreement and disagreement. Also, all variables that were derived from this definition were recoded accordingly.

For the President models, the alternate definitions have the largest noticeable differences when compared to the first agreement definition. For the .5 range of agreement, the findings are especially remarkable, as seen in Figure 1.9. The survival curves for every disagreement type and statement type are in the exact opposite expected order and direction, when looking toward the hypothesis. In other words, during high levels of positive statements the Court acts in a way that is positive toward the President. Conversely, during high levels of negative statements the Court acts in a way that is negative toward the President. That is an interpretation with the assumption that the hypothesis makes: that the Court *responds to* these statements. However, these findings more likely suggest that the

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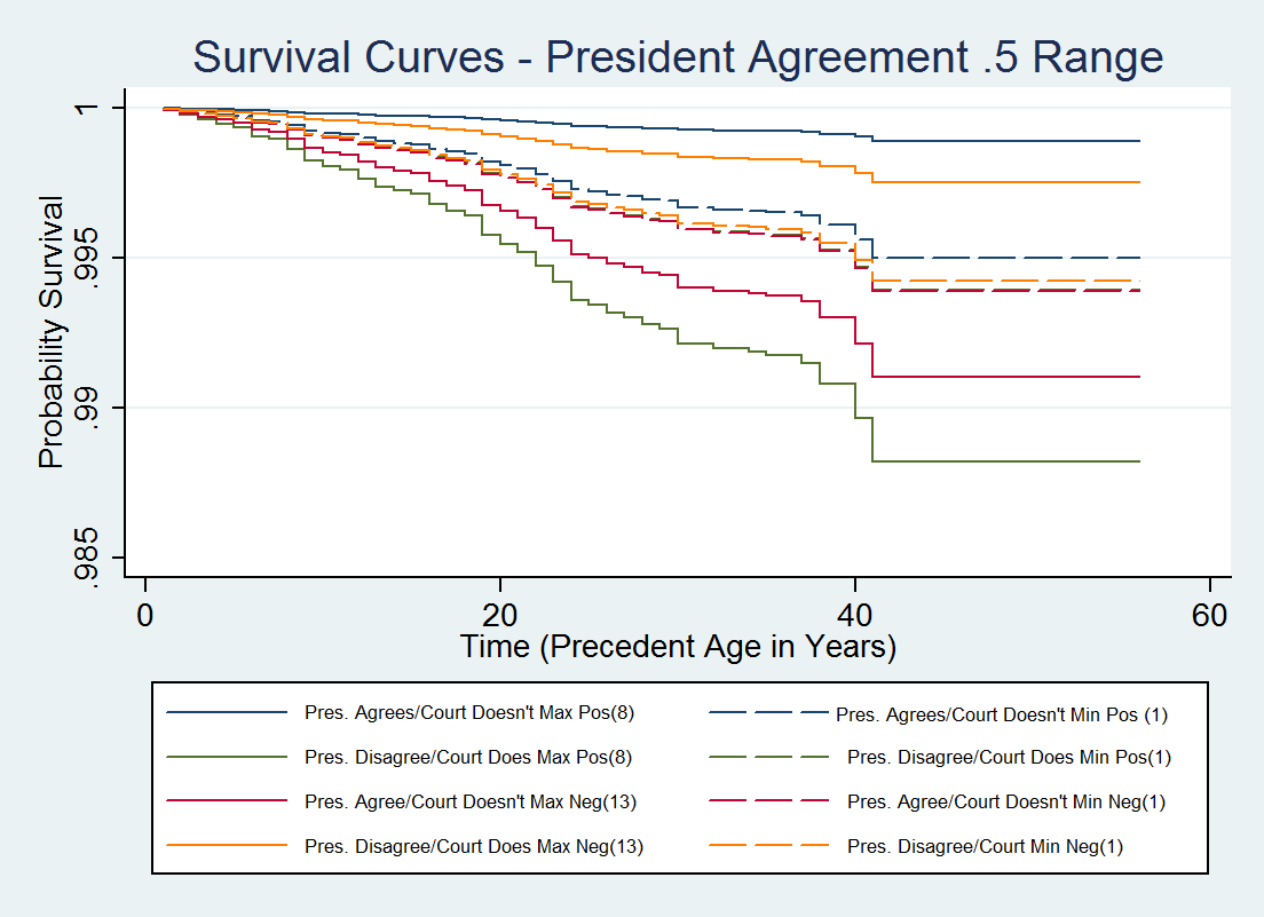
[2] To state this in a different way for clarity, here is the concept in a different notation using the President for example. Let "Id" equal ideology:
Absolute value(President Id – Case Id)
Absolute value(Current Court Id- Case Id)
If the absolute value for President<.5, the President agrees with case. If the absolute value for Current Court Id<.25, then Court agrees with case. These are dummy variables, so that 1=agreement and 0=disagreement. Then, after these are calculated, different variables were created similar to the original definition of agreement and disagreement. For "Maintain Against Wishes of Court" or where the President agrees with a case, but the Court doesn't, the President agree/disagree variable=1 and the Court agree/disagree variable =0. For "Overrule Against Wishes of Court" or where the President disagrees with a case, but the Court does, the opposite was used: President variable=0, Court variable=1.

*President is responding to the Court.* It is a question of which direction these statements work. Although this form of dialogue between the Court and the President may influence and inform each other's decisions, the mixed data from the prior definition of agreement and the findings here make the President responding to" direction more compelling. Why Court-curbing more so comports

Figure 1.9




Notes: This graph depicts both disagreement schemes under the new definition of agreement. The "Pres. Disagree/Court Does Min Pos (1)" and "Pres Agree/Court Doesn't Min Neg (1)" curves overlap each other. What is remarkable in this graph is for each type of statement for each disagreement type, the likelihoods are in the exact opposite expected order and direction. This may point to an operationalization/ measurement error, in that what was captured is not what was originally thought. That is, these statements seemingly work in the direction of the President responding to the Court, not that the Court will respond to these public statements.

with the hypothesis than presidential statements does highlight their inherent differences, which were already mentioned. Whereas Court-curbing bills are bills are generally "wholesale-level responses" to the Court rather than a "case-specific effort to reverse a decision" (Clark 2009, 979), many, if not most, of the positive and negative statements about the Court from the President are in fact responses to specific decisions. When joined with the observation that very few, to no, public presidential statements concern stripping the Court of power or noncompliance, this may explain these observed differences between the measured signals for both the President and Congress.

The Senate checks out at the first, middle range definition of agreement. That is, not only does the .25 range support the hypothesis, but is therefore also in agreement with the original model's definition of agreement. Furthermore, when this is relaxed to a .35 range, which in turn means examination of fewer cases, the same holds true. Also, the highest level of Court-curbing in this model is seemingly a death knell to a case that the Senate disagrees with, almost approaching zero. However, breakdown is evident when the agreement range is limited to .15, with the "Maintain Against Wishes of Court" disagreement scheme, when the Senate agrees, but the Court disagrees with a case. This restricting also means more cases fell into what was deemed disagreement. This analysis gives the Senate models more explanatory power, especially with support for the related hypothesis.

With the House, the range differences, .25, .35, and .15 do not impact the results: an increase in Court-curbing decreased the likelihood of a case surviving.

Moreover, this is observed across disagreement types. This goes against the "constrained" explanation, and also goes against the findings in the first House model with the original agreement definition. An interesting observation, though, is that the most extreme, by far, survival curve comports with the original hypothesis. This was observed at the .35 range, which means that the cases observed were those that the House was in strong disagreement with. Another interesting finding is that in comparison with the cases where the House agrees, but the Court doesn't, the cases where the House disagrees have much lower likelihoods of survival as Court-curbing increases, which again, agrees with the hypothesis. However, although Court-curbing clearly has effects, the results are too mixed, under both definitions of agreement, to suggest that the hypothesis is true with regard to the House.

B. Part II: Signals with Public Approval of External Actors

The analysis thus far has not taken into consideration the level of public opinion as related to who make these signals made. This is where triple interaction among cases in different disagreement schemes, signals to the Court, and public approval of the respective institutions flagging such signals are taken into account.

i. Presidential Model

First, I just examined the new interaction between the disagreement schemes and approval ratings, with the expectation that the Court would bend to the President's wishes when he had a higher approval rating. However, with the new approval rating variable for the President, the results do not go in the expected direction. In fact, at the highest approval rating for the President with cases where

the President agrees with the case, but the Court disagrees with the case there is a very high likelihood that the case will be overruled (as low as .75 likelihood of survival). For the other disagreement scheme, the maximum and minimum presidential approval ratings had little distinguishable effects. Prima facie, these approval rating findings imply that the Court is not taking into account the approval rating of the President, but public statements still need to be accounted for. A higher approval rating does not on its own push the Court to act towards his wishes against its will.

The triple interaction variable yields some interesting findings. Here the disagreement scheme matters, but not the type of statement. In other words, where the President agrees with a case, but the Court does not, as the approval rating increases and the levels of statements increases, so does the likelihood of a case surviving. With cases where the President disagrees with a case, but the Court does agree with it, as the approval rating of the approval rating of the President increases in conjunction with the level of statements about the Court, the likelihood of a case surviving decreases. With the "Overrule Against Wishes of Court" scheme (President disagrees), the negative statements at high levels of presidential approval have a dramatic, extreme effect on the likelihood of being overruled, in the expected direction of the President.

It must be noted that the types of statements did not have an impact on the direction of the of survival likelihood. Positive and negative statements went in the same direction for each scheme, which does run counter to the hypothesis. What

may be occurring here is that increased levels of opinionated discourse about the Court, at least in terms of public signals, are what make the Court act more in accordance with the President's wishes, conditional on public approval rating. With regard to the little noticeable differences between positive and negative statements, the Court may see a President who talks about the Court more often as someone who is more attuned to with what the Court is doing. Generally, positive and negative statements both indicate that the President is not only watching the Court, but also willing to take a public stance on its actions. As the data show in prior sections, types and level of statements on their own did not go in the expected direction, and neither did approval ratings. But a variable combining and capturing both suggest that the Court is responding to the President, albeit not in the exact manner the hypothesis expected.

ii. Senate Model

Although not perfect, for both chambers of Congress I used the same approval data, as there is little data on approval ratings of each individual chamber. Before examining the results of the triple interaction variable, the new component variable was tested to see if it made an impact. The interaction variable between disagreement type and public approval of Congress did show something that was expected, although this is not one of the stated hypotheses. When comparing the maximum public opinion rating (56.15%) to the minimum approval rating (18%), the Court is more likely to overrule a case Congress supports when Congress's approval rating is lower. The converse is supported as well for cases where the

Senate disagrees with a case. That is, when the Senate disagrees with a case, the Court is more likely to overrule when the approval rating of Congress is higher. Interestingly, and inducing some confusion, is when Court-curbing is factored in by creating the triple interaction, the opposites are evident. When the Senate agrees with a case, has its highest approval rating, during a period of high Court-curbing, the Court is more likely to overrule a case. When the Senate disagrees with a case, the results change direction as well. Whereas the component variables related to approval rating and related to Court-curbing are as expected, the final variable that seeks to measure that levels of public approval alter the effectiveness of Court-curbing bills does not.

iii. House Model

As is the theme with the House, the component approval rating variable is not consistent. For cases where the House agrees with a case, but the Court does not, the results go against intuition; however, for the cases where the House disagrees with the case, but the Court does agree with the case, approval rating seems to have an effect in the expected direction. This indicates that disagreement scheme does not seem to alter the impact of approval rating. When Court-curbing is factored in to create a triple interaction variable, the results for both disagreement schemes go in the same direction too, again, suggesting that the disagreement scheme does not matter with approval rating as related to Court-curbing.

## VI. Discussion and Conclusion:

Overall, the findings are mixed. However, the Presidential findings did yield some interesting results. For all cases, negative statements seemed to "constrain" the Court from overruling with positive statements not so much, but when these statements were interacted with the original definition of disagreement schemes, positive and negative statements flipped, and disagreement type did not matter for direction. This inversion is very difficult to interpret, only compounded by the fact that the disagreement scheme did not matter. What they do suggest is that these statements do not influence the Court in the expected manner.

The alternate measure of agreement/disagreement may have shed light on an operationalization/ measurement issue. Among all the combinations possible, all the survival curves went in the exact opposite direction and order expected. It is not to be reasonably expected that the Court would actively or even coincidentally go against the wishes of the President in this way. What is a more likely explanation is that a large number of these statements were responding to the Court. When the Court was ruling in ways that the President disliked, he released negative statements. There is an issue of lagging here potentially too.

The triple interaction model for the President produced intriguing findings: with increased statements, regardless of type, and increased approval rating had the Court bend toward the President's preferences. As stated before, increased opinionated discourse about the Court may show an attentive President, which may worry the Court to act according to his preferences with overrulings. The major

issue here is if measurement is not capturing what is intended, that significantly detracts from these last findings.

The Senate models, under both definitions of agreement and disagreement, comport with the hypothesis. Further, with the second definition, the Senate findings were fairly robust. Also with the Senate, public approval on its own, when interacted with the disagreement schemes, suggests that the Court takes public opinion into account. However, when the two are combined the results are inconclusive. That said, the findings suggest that Court-curbing does influence the Court with what types of cases it overrules. Further, the more Court-curbing there is, the more the Court goes against its own wishes and bends to the wishes of the Senate.

The House on the other hand is inconclusive. Constant across all models and analyses of this institution is that disagreement type does not matter. Under the original definition of agreement, Court-curbing increased the likelihood of survival regardless of disagreement scheme. With the alternate definition, disagreement scheme did not matter, again, but the impacts reversed, with increased Court-curbing decreasing likelihood of survival. The approval rating variable on its own suggests that the Court does not pay attention to approval rating with regard to which cases the House wants overruled or not. Lastly, with the triple interaction variable, the same issue surfaced. What does this mean? The findings, at the very least, suggest that Court-curbing bills from the House do not necessarily work in the expected way the introducing members intend, as related to overrulings.

The House findings taken together with those from the Senate beg the question of why would the Court respond to the Senate more so than the House? Looking back to the descriptive statistics, one of the observations and interpretations between the House and Senate Court-curbing bills' frequencies was that the House members may introduce disproportionately more bills because the chamber is more "reactionary" than the Senate. The Senate is supposedly the chamber of "sober second thought," more immune from impulse. Another, although not mutually exclusive interpretation, is that Court-curbing is supposed to be a "position taking endeavor" that members of Congress use to gain constituent support, and it is costly for the Court to rule in a way against public opinion (2009, 974). Senate constituencies represent more people than do House districts. The Court may take into account the Senate more, because these bills are the "will" of more people. This contributes to the "soberness" of the Senate, as larger districts presumably will be less likely to be represented by outliers, or less extreme outliers. The characterized differences between the chambers may be the reason why one makes disproportionately fewer statements, but the Court takes its bills more seriously with regard to overruling a precedent.

One last observation that should be noted: for all cases, House and Senate Court-curbing bills increased the likelihood of precedent survival. This was observed also for both House disagreement schemes under the first definition of agreement/disagreement. If Court-curbing is dissatisfaction with the Court, and overruling is costly for the Court's institutional legitimacy, this makes sense. However, the cost of not bending to the public will, as represented by Court-curbing,

could be a larger cost, and thus the Court opts to bend to the Senate when it disagrees with a case; the costliness of overruling, admitting that the institution was wrong, is mitigated by bending toward the Senate.

A. Difficulties and Caveats

The findings taken together do suggest that the Court is influenced at the very least by one actor. There are some difficulties and caveats, though, worth mentioning. First, a vast majority of the changes in survival probabilities induced by the tested variables were very small. The extent to which these variables on their own, *ceteris paribus*, influence overruling is expected to be small, as there are many variables that together influence the Court when overruling. Another issue concerns ideology and case categorization, which is why two different measures of agreement and disagreement were used. Taken together, they increase the confidence in the results, although each measure on its own is not perfect. Again with ideology, ideally the case's ideology would not be that of the median justice of the Court, which operates under a Median Voter Theorem assumption (and with it, all its related errors). The ideology of the median justice from each case's majority opinion is much more desirable. The docket for a given term typically has cases that vary in terms of ideological direction. That said, a case's ideology being that of the median justice of the majority vote may refine the analysis, but does not mean the findings herein are not valid. Another issue is that all the data had to be formatted in terms of years due to the nature of the database. However, the used variables are not stagnate during the year: approval ratings fluctuate throughout the year, the

level of signals from the President and Congress fluctuate throughout the year, the Court does not decide all cases at the same time during a year, etc. The point is that much changes within a year. The alternative would be a database where each case has an observation for each month, or each day, but that would yield over a million observations, which is an option for future studies, but was not feasible for this project. Because of this year-observation limitation, In terms of approval rating, weighted averages for Presidents when there was a change in command were used. Also, for all external actors rich polling data were used to get an average for that year that took into account not just one time period, but various cross-sections throughout the year.

## Future Research and Implications

The United State's judiciary is deemed one of the most powerful and independent judiciaries in the world. Since external influence occurred with overrulings in the United States, it would be expected that other judiciaries that value precedent would not be immune to external influence as well. Additionally, because the Senate influences the Court, it is curious that the President did not show as strongly as well. The differences between the House and the Senate have been explained, which should serve as an impetus for further research, as have the differences between Court-curbing and Presidential public statements. For future analysis, different types of Presidential communication should be used. This can occur in at least two ways. One is to be more stringent in coding and use only statements that are exceptionally harsh, that actually hint toward noncompliance or

reducing the power of the Court somehow, or to use statements about pushes for Constitutional amendments. There may be far fewer of these statements, but more akin to Court-curbing bills. Another way, which is quite different from the analysis here, is to use private communications between the Court and the President, to the extent these exist. This would require much more intensive archival research, but may prove to be incredibly rewarding. This would be worthwhile only because if the Senate seemingly influences the Court, it should be expected that the President would as well, and that the disparate results here may be an operationalization/ measurement error. The presidential data collected for this project, and the potential more in-depth presidential data, would also be extremely valuable in examining all cases, not just overrulings.

Lastly, there are two interesting, though not necessarily related future research possibilities in this area. This dataset did not include *sub silentio* overrulings as their own variable, overrulings where it is not explicitly stated in the opinion. Are these used strategically by justices to not let external actors fully know what they are doing? Are these more likely to occur in "hostile" political environments, "hostile" in terms of disagreement over a case? Another area to examine is motivated by Gretchen Helmke's *Courts Under Constraints* (2005). In the Argentinean context she examined the nation's top Court, and how it gauged the likelihood and ideologies of incoming leaders and governments. She observed that justices would go against the current government, and "strategically defect" toward the preferences of incoming leaders before they were seated. For all cases, and more specifically overrulings, it would be interesting to see if statements and

stances by the candidate who is likely to ascend to the presidency have any influence on the Court's actions. *The American Presidency Project* includes many statements made at party conventions and on the campaign trails that can be used for this.

These findings do injure the concept of a completely independent judiciary. This is not all too surprising, as several other studies have suggested this to be true (Clark 2009; Vanberg, 2001, albeit in the German context). However, several studies have tried to apply this concept to overrulings, and did not yield much (Hansford and Spriggs, 2001; Spaeth and Segal, 1999). Though everything in this project did not turn out as expected, the alternative method of examining signals, rather than mere ideological disparities, made by external actors did show that the Court is at least influenced by the Senate, if not the President too. What these findings show is something somewhat extreme. Precedent overruling, the death of precedent, is the most extreme form of precedent treatment. But what is also extreme is that the cases examined here were cases where the actors disagreed. So with the Senate, their Court-curbing actions seemingly push the Court to treat precedent in the most extreme manner *against* its own ideological preferences. The influence, again, is small but noticeable. The hope is that this project will encourage further empirical analysis of Court-External actor relations, and concomitant normative analysis into the U.S.'s separation-of-powers system with its notion of an independent judiciary.

## VII. References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