

“An Appeal to the People”: Public Opinion and Congressional Support for the Supreme Court

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Scholars often assert that public support for judicial authority induces Congress to grant resources and discretion to the Supreme Court. However, the theory of competing public agency embraced by the Constitution suggests that public support for courts cannot, by itself, explain congressional support for judicial authority. Instead, the logic of the separation of powers system indicates that legislative support for the institutional capacity of courts will be a function of public confidence in the legislature as well as evaluations of the judiciary. We test this theory, finding that public confidence in both Congress and the Court significantly affect congressional support for the Supreme Court, controlling for the ideological distance between the Court and Congress as well as the Court's workload. The results offer a more refined and complex view of the role of public sentiment in balancing institutional power in American politics.

Although the Framers contemplated judicial review as a barrier against an overreaching legislature or executive, they were also aware that judges might substitute their will for that of the people (e.g., Hamilton [1788] 1996). These competing considerations are evident in the U.S. Constitution, which guards the federal courts' independence while also nesting judicial power in a system of interinstitutional checks and balances. In particular, the Constitution grants Congress broad authority to control the resources, structure, and jurisdiction of the federal courts.

Yet, since the Founding, and especially since the mid-twentieth century, federal courts in general, and the Supreme Court in particular, have become increasingly prominent and institutionalized components of American national government, “seeking to control matters at the heart of contemporary politics” (Kramer 2004, 227; see also Burns 2009; McGuire 2004). The juxtaposition of growing judicial power with congressional authority to limit courts raises a critical puzzle for scholars of judicial politics and interinstitutional relationships. Why does Congress choose to govern under the constraint of judicial review?

A classic resolution to this puzzle is that public sentiment in support of judicial authority constrains an election-minded Congress from exercising its prerogatives to undermine federal courts. Segal and Spaeth summarize this position, arguing that “the negative political consequences . . . of limiting judicial

independence far outweigh whatever short-run policy gains Congress might gain by reining in the Court” (2002, 94). By extension, this notion of a connection between the Supreme Court's authority and public opinion has spurred a rich literature that investigates the determinants of individual and aggregate support for the Court (e.g., Baird 2001; Benesh 2006; Caldeira 1986; Caldeira and Gibson 1992; Durr, Martin, and Wolbrecht 2000; Gibson and Caldeira 2009a, 2009b; Gibson, Caldeira, and Baird 1998; Gibson, Caldeira, and Spence 2003a, 2003b; Mondak 1994).

However, this theory of externally induced support for judicial authority is incomplete. While the theory connects public perceptions of courts to institutional choices made (primarily by legislatures) within a system of checks and balances, it takes no notice of public evaluations of other institutions and how public confidence in these alternative governmental agents might influence the discretion, resources, and authority allocated to courts. More specifically, to whatever extent the public might be conceptualized as a principal “doling out bits and pieces of [its] power to various popular agents, including . . . judges” (Wood 1981, 17), a signal to “dole out” another “bit” of power to one or another department of government is, in some sense, a signal that a branch should become more powerful *relative* to the remaining branches. By extension, public confidence in an institution per se is not the only relevant dimension of public opinion for assigning authority and resources

within a separation of powers system. Rather, the balance of power among the branches of government is refereed by the public's confidence in the various departments of government relative to one another. This suggests that congressional support for the Supreme Court is a function of the public's confidence in Congress as well as its confidence in the Court.

We assess this expectation by estimating a model of an augmented version of McGuire's (2004, 2007) Supreme Court institutionalization index as a function of public confidence in the Court and confidence in Congress, while controlling for the ideological distance between the Supreme Court and Congress and the size of the Court's workload. The data demonstrate that public confidence in both the Court and Congress significantly predict changes in Supreme Court institutionalization. These results provide novel evidence for the theory of externally induced congressional support for judicial authority in general and for our "separation of powers hypothesis" in particular.

Legislative Support for Judicial Authority

Federal courts in the United States have limited constitutional protections. Although Article III asserts that federal "judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made . . . under their authority . . .," it quickly adds, "with such exceptions, and under such regulations as the Congress shall make." Likewise, the Constitution guarantees that federal judges receive compensation for their services, which "shall not be diminished during their continuance in office," and may serve for life during "good behaviour." However, it offers no provisions about the size, composition, structure, or resources of the federal judiciary, leaving these matters to Congress's discretion. Thus, while the Constitution protects the independence of judges, it simultaneously embeds the federal courts in a system of interinstitutional checks and balances in which Congress possesses tremendous authority over the judiciary (e.g., Ferejohn 1999).

Given its constitutional authority to establish and empower (or curb and control) federal courts, one might expect Congress to undermine the judiciary in order to make policy without the constraint of judicial oversight. This possibility may be especially alluring in the post-World War II era, as the federal courts—led by the Supreme Court—have become increasingly prominent players in national policy-

making. At a minimum, the modern Supreme Court has influenced an array of important policy and political questions, and, perhaps more importantly, challenged the legitimacy of Congress's independent engagement with the Constitution. As Chief Justice Rehnquist wrote in *United States v. Morrison* (2000), "No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."

This is a curious state of affairs. Congress has the authority to exempt its policy choices from judicial scrutiny and assume the role of principal interpreter of the Constitution. Yet it elects not to do so. This raises a critical puzzle for political scientists and other scholars of constitutional government: Why does Congress choose to govern under the constraint of judicial review?

Generally, Congress should allocate authority and its precursors to the judiciary because it receives benefits or avoids costs when it does so, offsetting the potentially negative consequences of judicial review. And indeed, scholars have often suggested that public support for courts constrains legislatures to accept the costly institutions of judicial authority. When support for courts is sufficiently high, election-minded legislators—who would otherwise prefer to make policy without the constraint of judicial review—are induced "to respect judicial decisions as well as the institutional integrity of a court . . . [by t]he fear of . . . a public backlash" against court-curbing activity (Vanberg 2001, 347; see also, e.g., Gibson, Caldeira, and Baird 1998; Gibson, Caldeira, and Spence 2003b; Murphy and Tannenhaus 1968a; Segal and Spaeth 2002; Vanberg 2005).

In the case of the Supreme Court, the idea of important linkages between the public's evaluation of the Court and its institutional capacity has also been an explicit element of the Supreme Court's "self-concept," since the nineteenth century. In *United States v. Lee* (1882), Justice Miller writes, the Supreme Court's "power and influence rest solely upon the public sense of . . . confidence reposed in the soundness of [its] decisions and the purity of [its] motives." Likewise, Justice Frankfurter emphasizes, "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction" (*Baker v. Carr* 1962; see also Justice O'Connor writing in *Planned Parenthood v. Casey* 1992).

Taking this idea as a starting point, numerous scholars have examined the sources of individual and aggregate support for courts and judicial power. In

particular, scholars have investigated the roles that perceptions of procedural fairness (e.g., Benesh 2006; Caldeira and Gibson 1992; Gibson 1989; Lind and Tyler 1988) and policy agreement (e.g., Baird 2001; Durr, Martin, and Wolbrecht 2000; Gibson, Caldeira, and Baird 1998; Gibson, Caldeira, and Spence 2003a, 2003b; Hoekstra 2003; Murphy and Tanenhaus 1968a) play in motivating support for courts.

While public confidence in courts may be a worthwhile topic for study in its own right, scholars almost inevitably couch analyses of support for the judiciary in terms of its purported link to courts' institutional capacity. As Durr, Martin, and Wolbrecht note, "[I]nterest in Supreme Court support is driven by . . . the expectation that the Court necessarily depends on public support as a source of institutional legitimacy and political capital" (2000, 775). Likewise, Gibson, Caldeira, and Baird write, "Not even the most powerful courts in the world have the power of the 'purse' or the 'sword' . . . [c]ourts are therefore uncommonly dependent on the goodwill of their constituents for . . . support" (1998, 343).

This literature therefore relies on an expectation of a positive association between public support for the judiciary and the allocation of resources and discretion from a legislature to courts as well as a legislature's tolerance of the judiciary's assertions of its own authority and independence. In the case of American national politics, this implies a relationship between public support for the Supreme Court (and the federal courts more generally) and congressional support for the judiciary. Yet, empirical inquiry that specifically addresses the question of whether changes in the public's broad confidence in the judiciary translate into changes in the Court's institutional capacity is quite limited.¹ To some extent, this shortcoming places the literature on public confidence in

the Court on poor footing. Though the theoretical claim of a link between confidence and capacity is cogent, it remains a proposition in need of empirical scrutiny.

Public Opinion and the Separation of Powers

In addition to the limited empirical foundations in the literature, the theory of externally induced support for judicial authority is incomplete. Previous scholarship suggests that the level of public confidence in the judiciary is a signal about the degree of authority the public wishes to invest in courts.² Election-minded legislators should therefore work to match the institutional capacity of the courts under their control to the public's signal in order to avoid electoral reprisals. However, this approach ignores other dimensions of public opinion that may shape the separation of powers.

In an effort to protect individual liberties and ensure the effective representation of public interests, the Constitution establishes a system of checks and balances to reinforce its "parchment barriers" restricting the scope of government power (Madison [1788] 1996a, 343). This system assigns unique powers and responsibilities to the individual branches of the federal government and makes the use of each department's prerogatives contingent on the consent (or at least acquiescence) of the other branches. Judicial authority is, therefore, one of several constitutional mechanisms meant to maintain an equilibrium of constitutional government "by so contriving the interior structure of the government as that its several constituent parts may . . . be the means of keeping each other in their proper places" (Madison [1788] 1996b, 355).

Yet, it is clear that the Founders regarded the system of checks and balances as a secondary precaution and anticipated that the principal responsibility for policing the government would lie with the people. As, Madison writes, "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions [i.e. checks and balances]"

¹Most evidence for the theory of externally induced legislative support for judicial review is indirect. For example, Vanberg (2001) shows that the German constitutional court is more likely to overturn statutes in cases which have been orally argued, since those "transparent" cases are likely to engender stronger public support. Marshall (1989) demonstrates that higher public support for specific Supreme Court decisions is correlated with lower incidence of congressional reversals of the Court's policy choices. Likewise, Gibson (1989) shows that survey respondents' perceptions of the Supreme Court's legitimacy are positively related to compliance with judicial decisions. Yet, there is little evidence of a link between public confidence in the Supreme Court and its institutional capacity or independence. Clark (2009) is the exception, showing that public confidence in the Supreme Court is negatively related to the number of laws invalidated by the Supreme Court.

²This literature is also supported by recent scholarship which indicates that the public is more knowledgeable about the Supreme Court than many scholars have generally assumed (Gibson and Caldeira 2009a; see also Durr, Martin, and Wolbrecht 2000).

([1788] 1996b, 356). Madison emphasizes the point in *Federalist 49*, writing “The several departments being perfectly coördinate by the terms of their common commission, none of them . . . can pretend an exclusive or superior right of settling the boundaries between their respective powers . . . without an appeal to the people themselves . . . ([1788] 1996c, 348; also Friedman 2009; Fritz 2008; Kramer 2004, 39–92).

Ultimately, the Framers viewed the public as a principal who assigns “bits and pieces of [its] power to various popular agents, including . . . judges” (Wood 1981, 22). This indicates that the electoral institutions of American national government are meant to provide a mechanism through which public opinion may bring about redistribution of political power among the branches of government consistent with the public’s judgment about which branches may be more or less faithful agents.³ This, in turn, has at least two important implications. First, the relationship between public sentiment about the balance of powers among the branches of government is dynamic. Over time, the public might empower or challenge its agents as they become more or less protective of its liberties and interests. Second, judgments about the faithfulness and fitness of one branch of government as a public agent are relative. A public signal to increase the power or influence of one branch is implicitly a signal to diminish the relative standing of the remaining branches.

Thus, the separation of powers context in which the Supreme Court and Congress interact structures how public opinion shapes the balance of powers among the branches of government. In particular, the level of support for a particular branch does not contain sufficient information to judge where it stands among the other departments of national government. Rather, comparative judgments among the branches of government—and changes in these comparative judgments over time—also provide important information about how the public might care to “dole out” authority among them. Therefore, Congress’s allocation of resources and discretion to the Supreme Court should be a function of both

public confidence in the Court *and* public confidence in Congress, rather than the level of public support for the Court alone. This does not imply that Congress is strictly attentive to all fluctuations in public confidence in the branches of national government. However, in the same way that Congress is responsive to electoral pressures generated by broad changes in the tenor of public mood (e.g., Erikson, MacKuen, and Stimson 2002), we expect that public opinion signals about the standing of the Supreme Court and Congress should structure and constrain Congress’s expressed disposition toward the Court.

Previous scholarship argues that political support for judicial authority is a function of public confidence in the judiciary. More specifically, this research suggests that as support for the judiciary increases, Congress and its members will face growing pressure to empower the judiciary to act independently in the policymaking process. This raises the baseline hypothesis:

The Public Support Hypothesis: The higher the level of public support for the Supreme Court, the greater the level of congressional support for the Supreme Court.

In contrast, we argue that scholars should view the role of public opinion in shaping congressional support for the Supreme Court through the prism of the separation of powers. From this vantage, we expect that congressional choices over the Supreme Court’s institutional capacity are a function of the public’s confidence in the Court as well as its confidence in Congress. As the public’s trust and confidence in Congress increases, holding all else constant, Congress should accumulate additional political capital and standing, making it more feasible for Congress to undermine federal judicial power. Thus, we hypothesize:

The Separation of Powers Hypothesis: The higher the level of public support for Congress, the lower the level of congressional support for the Supreme Court.

Alternative Explanations

Scholars have suggested two principal alternatives to the theory of externally induced legislative support for judicial authority. First, some have argued that political support for judicial review arises endogenously within legislatures. These “internalist” theorists view judicial power as a product of legislative

³A system of competing public agency was also expected to govern the division of power between the states and the federal government. As Madison writes ([1788] 1996d), “The federal and State governments are in fact but different agents and trustees of the people . . . [W]hether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other . . . depends on the sentiments and sanction of their common constituents” ([1788] 1996d, 330).

politics divorced from direct public pressure (Rogers 2007). Despite a common rejection of external political pressure as the primary cause of congressional support for judicial power, however, internalist theorists have provided disparate accounts of the imperatives that motivate legislatures to support courts.

For example, Landes and Posner (1975) argue that legislatures support judicial authority in order to preserve legislative bargains in the face of future political attacks. Whittington (2005) reverses Landes and Posner's claim, arguing that Congress supports judicial review because courts can undo older policies, removing obstructions to new policy regimes. Rogers (2001) offers another view, arguing that legislatures may use judicial review to limit the unintended consequences of their policy choices since courts often review legislative choices after implementation (see also Thayer 1893). Dahl (1957) argues that constitutional courts may act to legitimize the policy choices of a lawmaking majority in the public's mind, decreasing lingering political opposition and increasing public compliance with legislative choices (see also Helmke 2002). Alternatively, Graber (1993) argues that legislatures may benefit by delegating difficult policy choices to courts, thus avoiding electoral accountability for unpopular decisions. Indeed, Whittington notes that legislatures, "may effectively delegate a range of tasks to a judicial agent that the courts may be able to perform more effectively or reliably than the elected officials can acting directly" (2005, 584).

Although they come in many flavors, internalist theories of legislative support for courts all indicate that legislatures choose to empower courts to undertake tasks in the policymaking process that are politically inopportune or otherwise costly for the legislature itself. Therefore, legislatures might expect that delegating these tasks to courts will be a more effective strategy when the judiciary is politically sympathetic to legislative objectives. This suggests the empirical implication that, *inter alia*, a legislature can expect higher payoffs from judicial power when courts share its political preferences. Thus, we hypothesize:

The Ideological Distance Hypothesis: The smaller the degree of ideological distance between Congress and the Supreme Court, the greater level of congressional support for the Supreme Court.

In addition to externalist and internalist accounts of political support for judicial power, some scholars suggest that support for judicial authority arises from

objective administrative responsibilities assumed by courts rather than from political pressures exerted on or generated within legislatures. This perspective suggests that legislatures provide discretion and resources to courts in order to facilitate the administrative operation of the judiciary, independent of other political considerations (Chutkow 2008). As the demand for judicial review and number of legal disputes presented to judges increases, courts require additional resources to process their workload. This suggests:

The Administrative Demand Hypothesis: The higher the level of the Supreme Court's workload, the greater the level of congressional support for the Supreme Court.

Measuring Congressional Support for the Supreme Court

We are interested in legislative support for the Supreme Court which may influence its institutional capacity, i.e., those which permit the Court to pursue and implement policy agendas either independently or with the cooperation of other political actors. This notion of institutional capacity closely parallels the concept of "institutionalization," which reflects three faces of institutional development—differentiation, durability, and autonomy (McGuire 2004; see also Gurr 1974; Polsby 1968). Taken together, the three elements of institutionalization reflect a cumulative development of political standing which permit an institution to project its influence into the larger political system. Thus, McGuire notes, "[a]s a rule, institutionalization translates into political power" (2004, 135).

In the case of the Supreme Court, McGuire (2004, 2007) creates an institutionalization index from a variety of indicators of resources allocated to the Court by Congress as well as measures of the scope of the Court's discretion in its docket and procedures, which are also subject to congressional control. The annual index scores are calculated by taking the first principal component of time series measuring associate justice salaries, the Court's agenda-setting powers, the development of rules of the Supreme Court, the Court's location, the federal judicial experience of the Court's membership, the role of law clerks, and the justices' circuit riding duties from 1790 to 1996, and later extended through 2007 (McGuire 2004, 2007). The emergent factor index explains more than 80% of the variance in the component series and Granger causes each of

the individual measures of Supreme Court development. Moreover, McGuire's institutionalization index Granger causes and is a significant, long-run predictor of a Supreme Court "power" index composed of indicators of the number of "landmark" decisions handed down by the Court, as well as counts of the number of state and federal statutes, respectively, invalidated by the Court.

McGuire's index thus captures the common variance in a variety of indicators of Congress's actual allocation of resources and discretion to the Supreme Court and congressional acceptance of the Court's independence. It therefore reflects a latent dimension of Congress's support the Court's development—its institutional capacity—that leads to increases in outward signs of the Court's power and tracks its ability to act authoritatively, projecting its influence into the larger political system.

Despite these virtues, though, McGuire's index has limitations. In particular, some components of McGuire's index, such as the physical location of the Supreme Court and the justices' circuit riding duties, do not vary in the period we analyze, 1973–2002. While we regard Congress's decision to refrain from manipulating these resources when it is within its power to do so as useful information about congressional support for the Supreme Court, we are sensitive to concerns that their invariability may mute the extent to which the index captures changes in congressional support for the judiciary along dimensions which are perhaps of greater contemporary salience than some other index components, such as circuit riding. So while McGuire's index provides a useful starting point, it is important to augment McGuire's original Supreme Court institutionalization index with indicators that provide additional information about Congress's disposition toward the judiciary.

Congress's annual budget appropriations to the Supreme Court and other federal judicial institutions provide precisely this sort of information. Financial resources are essential for the basic functioning of the judiciary. By providing a greater or lesser degree of financial support to the judiciary, Congress provides a varying resource base for judicial independence and authority. Over time variance in these appropriations provides useful information about Congress's willingness to provide resources to support judicial activity and, therefore, provide useful insight into congressional support for judicial independence and authority (Toma 1991). Two budget line items are especially important in this respect: the first supports the operation and programs of the Supreme Court itself;

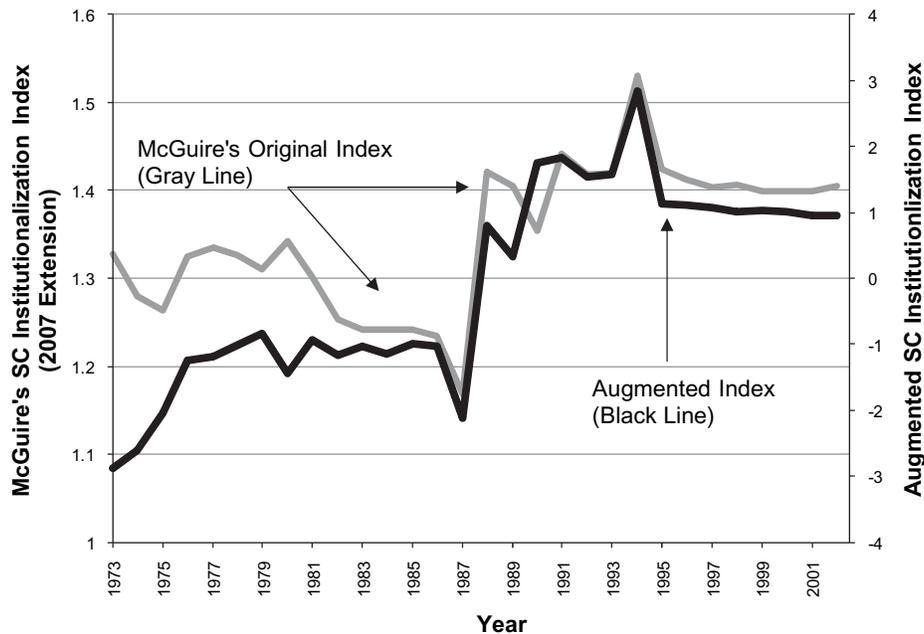
the second is the line item for the Administrative Office of the United States Courts (hereafter the "Administrative Office").⁴

Using federal budget line items for the Supreme Court and the Administrative Office from 1973 to 2002 expressed as a proportion of the entire federal budget—along with the components of McGuire's original index which vary in that same period (associate justice salaries, rules of the Supreme Court, docket control, and justices' prior judicial experience)—we estimate a revised version of McGuire's institutionalization index by using principal components analysis. Figure 1 illustrates the resulting series along with McGuire's original index. Though the two series share much common variance ($r = 0.84$), there are some qualitative differences between them. In particular, the original index shows a modest downward trend in Supreme Court institutionalization prior to 1988, whereas the revised index suggests that the Court's institutional development increased through the middle and late 1970s and largely remained constant through the Reagan administration before sharp increases in the late 1980s. This difference is, perhaps, in greater accord with historical accounts of the Court's development during the period, which included a number of cases in which the Supreme Court asserted its authority over coordinate branches of government (e.g., *United States v. Nixon* 1974), continued its active oversight of state governments in salient policy domains including abortion (*Roe v. Wade* 1973), the death penalty (*Gregg v. Georgia* 1976), and affirmative action (*Regents of the University of California v. Bakke* 1978), and further eroded the constraint of precedent on its own decisions (*Payne v. Tennessee* 1991). Writing about the Burger and Rehnquist Courts prior to the Clinton administration, Burns argues that "rarely had the Court been so supreme" (2009, 223).

The high correspondence between McGuire's original index and our augmented institutionalization index indicates that both capture much of the same variance in Supreme Court development. Yet by including budgetary indicators of congressional resource support for the Supreme Court and the Administrative Office, we are able to extend McGuire's approach with additional information

⁴Congress created the Administrative Office in 1939 which assumed administration of the federal courts' finances and personnel from the Department of Justice (which had administered the federal courts since 1870). The Administrative Office's director is appointed by the Supreme Court, and its operations are supervised by the Conference of Senior Circuit Judges. Over time variance in support provided to the Administrative Office is a reasonable indicator of congressional support for the federal judiciary, including the Supreme Court.

FIGURE 1 McGuire's Supreme Court Institutionalization Index and an Augmented Index (1973–2002)



about the development of the Court (alone and in the context of the larger federal judiciary), which yields a measure of the Court's institutional capacity somewhat more consonant with the recent historical record. Thus, we utilize our augmented version of McGuire's (2004, 2007) Supreme Court institutionalization index as the dependent variable in our empirical analyses.⁵

Measuring Public Confidence in the Supreme Court and Congress

To measure the public's confidence in the Supreme Court and Congress, we turn to the General Social Survey (GSS). From 1973 and 2002, the GSS asked respondents to express their degree of confidence in the Supreme Court and Congress on a 3 point scale

in each survey year.^{6,7} Figure 2a illustrates the time series resulting from taking the average degree of confidence in the Supreme Court and Congress in each year (recoded so that higher values represent greater confidence).

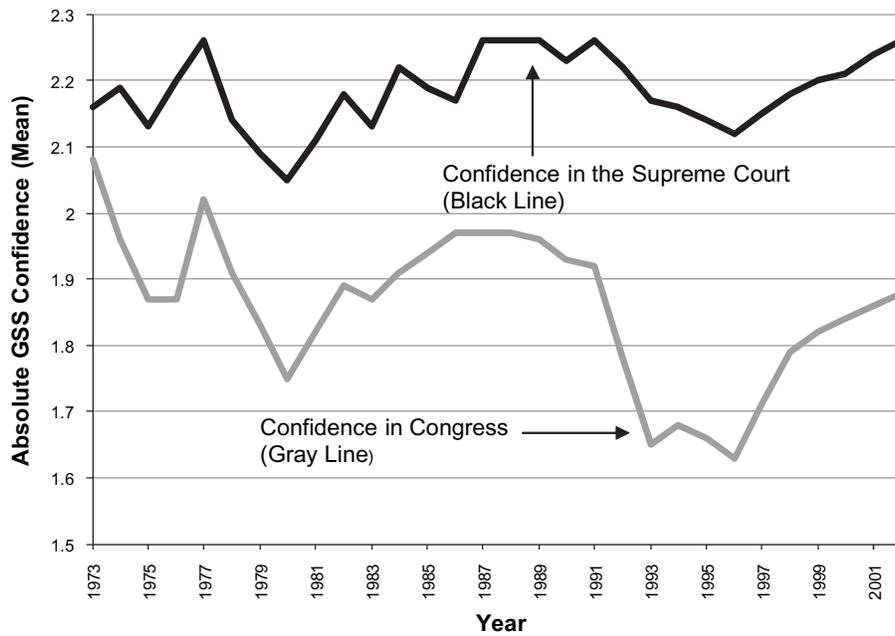
Though the two series share some common dynamics, the correlation between annual mean confidence in Congress and confidence in the Supreme Court is only 0.49. Thus, more than three quarters of the variance in the two series is unique. This independence is more evident in Figure 2b, which shows the difference between confidence in the Court and confidence in Congress. This time series shows that, over the last three decades, confidence in

⁶Respondents are asked, "I am going to name some institutions in this country. As far as the people running these institutions are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them? U.S. Supreme Court/Congress"

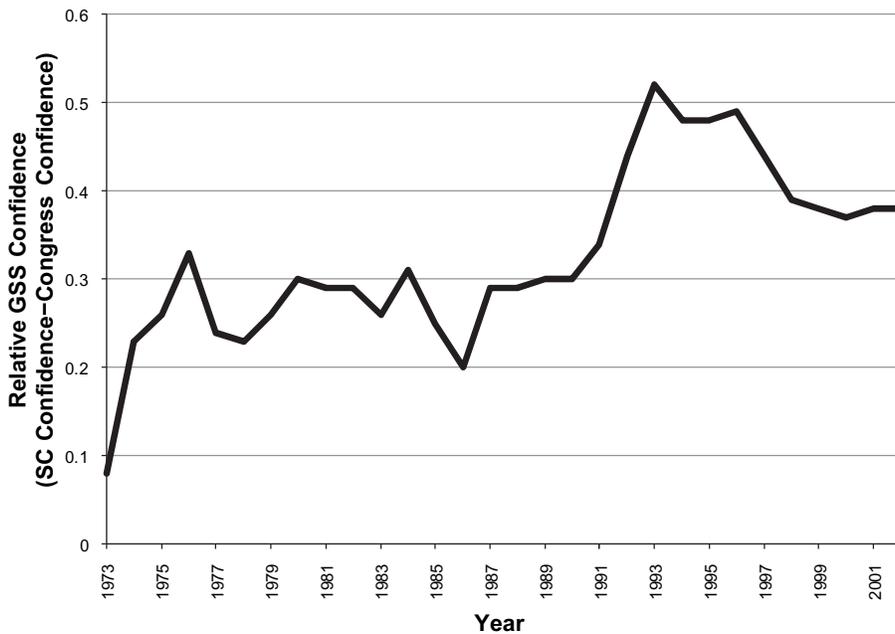
⁷The GSS was not conducted in 1979, 1981, 1992 nor in odd-numbered years since 1993. We implemented three approaches to replacing these missing values for model estimation: linear interpolation, cubic spline interpolation (e.g., Knott 2000) implemented with WebCab XL, and multiple random imputation implemented with Amelia II (Honaker, King, and Blackwell 2009; King et al. 2001). All three procedures produce time series that are highly correlated with one another and, when used to estimate the models in this paper, produce comparable estimates and almost identical inferences about substantive effects. Ultimately, we rely on the values interpolated by cubic spline, as the model estimated with these data yield the best fitting estimate of the Supreme Court institutionalization index.

⁵Despite the theoretical motives for augmenting McGuire's (2004, 2007) Supreme Court institutionalization index with additional indicators of congressional support for the Court, its empirical implications are modest. Parameters estimated for the original index are similar to those estimated for the augmented index and also provide significant support for our principal theoretical claims. Model estimates for McGuire's original index are reported in an online appendix available at <http://journals.cambridge.org/JOP> and at <http://dvn.iq.harvard.edu/dvn/dv/jura>.

FIGURE 2 Measuring Confidence in the Supreme Court and Congress



(a) Mean Annual Confidence in the Supreme Court and Congress (1973-2002)



(b) Relative Confidence in the Supreme Court and Congress (1973-2002)

the Supreme Court has been consistently higher than confidence in Congress and that this difference has generally increased over time. This change has emerged principally in two sharp increases, the first during the Watergate period and the second roughly corresponding to the first Bush presidency in the late 1980s and early 1990s, amidst longer periods of stability in the relative public standing of the two institutions.

As with any survey item we might utilize to measure public confidence in the Supreme Court and Congress, the GSS confidence question is potentially problematic. Most notably, Gibson, Caldeira, and Spence (2003a) find that (cross-sectionally) individual responses to the GSS question more strongly correspond to indicators of “specific support” of the Court’s institutional performance and decision-making than

to indicators of “diffuse support” of the Court as an institution. Gibson and his coauthors conclude that “the [GSS-form] question asking about confidence in the leaders of the Supreme Court . . . appears to be capturing something about both long-term and short-term attitudes toward the institution, although the latter factors seem to dominate the variance” (Gibson, Caldeira, and Spence 2003a, 363; see also Gibson and Caldeira 2009b). As an alternative, the authors suggest measuring institutional confidence using either: (1) a set of survey items that interrogate respondents about eliminating or constraining some institutions that reflect judicial power, punishing judges, and the power of constitutional review, or (2) feeling thermometer ratings such as those utilized by the American National Election Study (ANES), which measure “highly general attitudes toward the institution” (Gibson, Caldeira, and Spence 2003a, 363). Also, Kritzer’s (2005) review of polls indicating public support for the Rehnquist Court concludes that the GSS confidence item and other survey questions show a “lack of consistency,” perhaps measuring different aspects of public orientations toward the Supreme Court.

While these findings weigh against interpreting the GSS confidence measures as strict indicators of diffuse support, other theoretical, empirical, and practical considerations strongly suggest their use in the present case. As a theoretical matter, concern with the GSS-form confidence measure stems from its treatment in the judicial politics literature as an indicator of individual attitudes toward the legitimacy of the Supreme Court per se rather than contemporary Supreme Court decision-making. However, Madisonian constitutional theory—from which we derive our account of the role of public opinion in balancing the separation of powers—is premised on the related ideas that the people are sovereign and the institutions of government exercise authority as agents of the public. In (normative) theory, the dynamics of this system should be governed by the public’s judgments about the relative faithfulness of its various governmental agents in representing those preferences and interests. Assessing a positive theory derived from these principles invites measures of public confidence in institutions that are sensitive to the dynamics of policy agreement. And indeed, we understand changes in public “confidence” to represent an institution’s changing status in the public’s mind as an effective agent for its political will as well as judgments about the essential legitimacy of courts or elected legislatures separate from more temporal political concerns.

Secondly, as an empirical matter, whatever the micro-level (cross-sectional) properties of responses to the GSS-form confidence question, the ANES feeling thermometer, and some other indicators of institutional legitimacy may be, their macro-level dynamics (over time variance of the aggregated series) are dominated by a common dimension of public attitudes toward the Supreme Court. As Durr, Martin, and Wolbrecht (2000) report, dynamic factor analysis of aggregated responses to more than a dozen commercial and academic survey items addressing trust and confidence in the Supreme Court indicates that a single latent dimension (principal component) explains the vast majority of observed over-time variance in both the GSS confidence question (86%) and the ANES feeling thermometer (93%).⁸ This analysis strongly suggests that the aggregate behavior of the GSS confidence question is comparable to that which we might have observed in other survey items, had they been administered more regularly during the past three decades.⁹

Finally, the GSS confidence item is the most consistently administered survey measure of public dispositions toward the Supreme Court. Moreover, because the GSS asks respondents the same question about Congress, it provides data on the comparative standing of the two institutions at the same points in time on the same scale. We know of no other data source that provides both the longitudinal volume of data and interinstitutional comparability of the GSS data. Given their unique coverage, along with their theoretical relationship to the current research problem and strong correspondence to other survey indicators of support for the Supreme Court and

⁸Durr, Gilmour, and Wolbrecht (1997) produce similar results with respect to an analysis of survey indicators of confidence in and approval of Congress. A single dimension of congressional support explains roughly 75% of the observed over time variance in the GSS confidence question.

⁹Gibson, Caldeira, and Spence’s (2003b) analysis of support for the Supreme Court following *Bush v. Gore* suggests an explanation for the contrasting micro-level differences between and macro-level similarities of the GSS confidence item and ANES feeling thermometer. They show that variance components of individual-level confidence related to institutional legitimacy are not sensitive to policy disagreement with the Court’s decision while variance components of confidence related to specific support are tightly linked to policy agreement. This suggests that diffuse support is a stable individual-level quantity while specific support may be more variable. This implication bears on measures of aggregate dispositions toward the Supreme Court. If diffuse support is stable at the individual level while specific support varies in response to changes in the behavior of the Court, then over time change in aggregated responses to any indicator of trust in the Supreme Court that reflects both specific and diffuse support will be dominated by changes in specific support.

Congress, these data are the most useful window into this problem that are currently available.

Measuring Ideological Divergence

The measurement of relative individual and institutional preferences in some policy space is a critical methodological challenge in political science. Without valid, reliable measures of preferences, a great deal of scholarship on political institutions would remain solely theoretical. Thus, efforts to produce preference indicators, at both the individual and institutional levels, have served as cornerstones for empirical studies of Congress (e.g., Poole and Rosenthal 1997) and the Supreme Court (Martin and Quinn 2002; Segal and Cover 1989). Despite the sophistication of these preference measurement techniques within particular institutions, scholars have been limited in generating ideal point estimates that are comparable across institutions. Testing hypotheses about interinstitutional politics, therefore, has often been difficult.

Yet, recent efforts by Bailey (2007) have provided a novel solution to the problem of interinstitutional ideal point estimation. Bailey undertakes a massive data collection effort in which he observes actual roll call data in each branch of national government along with positions taken by presidents, senators, representatives, and Supreme Court justices on policy choices made in other institutions across time. This creates a unified matrix of “votes” for a single “chamber,” which Bailey reduces to individual ideal point estimates in a common space through a Bayesian, Markov-Chain Monte Carlo procedure. This yields preference metrics for each member of Congress and Supreme Court justice on a common scale for each year from 1953 through 2002.¹⁰

In turn, we employ these individual-level ideal point estimates to construct indicators of institutional preferences to utilize in our aggregate analysis. Our orientation is to generate institutional preference

scores that correspond with scholarship about the dynamics of intra-institutional decision making. For the Supreme Court, we aim to balance the centripetal influence of the median voter against the centrifugal influence of other justices who may take advantage of the collegial bargaining process among the justices to obtain non-median outcomes (Maltzman, Spriggs, and Wahlbeck 2000). Thus, we index the Court’s institutional preference by taking the mean of the median justice’s ideal point estimate and the average ideal point of all justices for each year.¹¹ Likewise, for Congress, we balance the competing influences of median dominance (e.g., Krehbiel 1998) and party control (e.g., Aldrich 1995), along with the importance of bicameralism, by computing the mean score of each chamber’s median member and the median member of the majority party in each chamber.¹²

Figure 3a presents the resulting time series of institutional liberalism indicators, which have been recoded to a scale with a mean value of zero and so that higher values indicate greater liberalism. With these institutional-level indicators generated on a common scale, ideological distance between the Supreme Court and Congress can be computed by taking the absolute value of the difference between the institutions’ ideology scores. Figure 3b illustrates the resulting time series.

Measuring the Supreme Court’s Workload

We measure the scope of the Supreme Court’s objective administrative needs using the total size of the Court’s docket as listed in the *Supreme Court Compendium* (Epstein et al. 2006). This variable specifies the number of all cases on all dockets, including certiorari petitions, original jurisdiction cases, and holdovers from a previous term. In the period 1973–2002, the Supreme Court had an average of about 6,300 pending cases in each term, ranging from 4,668 to 9,406.

Modeling Supreme Court Institutionalization

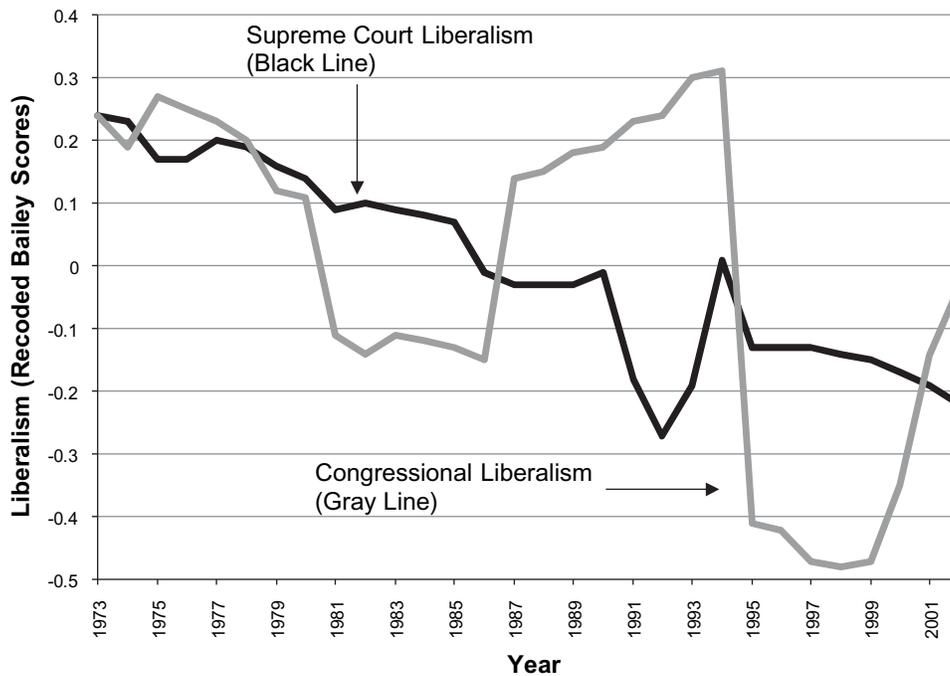
With these data in hand, we turn to the problem of estimating Supreme Court institutionalization. Like McGuire’s (2004, 2007) original Supreme Court institutionalization index, our augmented index of congressional support for the Supreme Court is a

¹¹ $(\text{Court Median} + \text{Court Mean})/2$

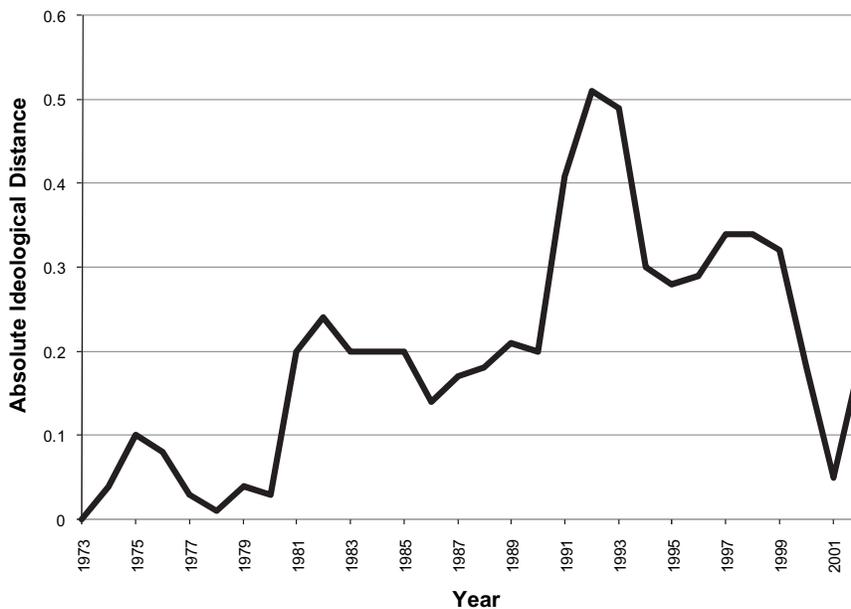
¹² $[(\text{House Median} + \text{House Majority Party Median}) + (\text{Senate Median} + \text{Senate Majority Party Median})]/4$

¹⁰Epstein et al. (2007) also devise a method for scaling Martin and Quinn’s (2002) dynamic ideal point estimates for Supreme Court justices into the House-Senate “Common Space” space estimated by Poole (1998), creating ideal point estimates that are nominally comparable across time and institutions. However, these “Judicial Common Space” estimates are not appropriate for our analyses. As Binder notes, Poole’s (1998) original Common Space scores are estimated under the strong substantive assumption that individual “preferences [are fixed] over time and across institutions as a ‘glue’ to tie the two chambers into a single ideological rank ordering” (2008, 217). While this assumption is reasonable for analyses involving short time frames, it is unreasonable for longitudinal research designs like ours. Thus, we rely on Bailey’s (2007) ideal point estimates which do not impose similar assumptions about temporal stability.

FIGURE 3 Measuring Ideological Divergence between the Supreme Court and Congress



(a) Recorded Bailey Ideal Point Estimates (1973-2002)



(b) Ideological Divergence Between the Supreme Court and Congress (1973-2002)

nonstationary time series.¹³ Substantively, the unit root process indicates that Supreme Court institutionalization has a permanent “memory.” Thus, changes in congressional support for the Supreme Court accumulate and there is no tendency for the Court’s institutional capacity to return to some mean

value. Integrated time series are also associated with the estimation of spurious regression models (Granger and Newbold 1974). Thus, models that estimate the value or level of an integrated series are generally inappropriate. Instead, a time series demonstrating a unit root must be transformed into a stationary series prior to estimation. This is most typically accomplished by taking the first difference of the integrated series, which produces a stationary

¹³An augmented Dickey-Fuller test fails to yield sufficient evidence to reject the null hypothesis of a unit root ($\chi^2 = -2.17$; $p = 0.22$).

time series of the changes observed in the series of interest from one time point to the next. The differenced series does not inherit the unit root from the original time series and can be modeled with a variety of specifications.

Among alternative statistical models, the error correction model (ECM)—which explicitly models short-run and long-run effects for each independent variable (Beck 1992; DeBoef and Keele 2008; Durr 1992; Smith 1992)—stands out as an appropriate choice for assessing the dynamic linkages between public opinion and congressional support for the Supreme Court.¹⁴ Thus, in addition to indicating the direction and magnitude of the effect of each independent variable on changes in the Supreme Court institutionalization time series, the ECM can also reveal the temporal dynamics of the relationships. Though the model specification was originally developed for investigating cointegrated time series, DeBoef and Keele (2008) note that it may also be applied in a variety of time series contexts in the absence of cointegration with either stationary or nonstationary data. In addition to these attractive analytic properties, Monte Carlo experiments indicate that an ECM implemented through OLS capably recovers the data generating process even in small samples (DeBoef and Keele 2008). Thus, we implement the ECM approach, estimating a model of the first difference of the augmented Supreme Court institutionalization index as a function of the first lag and first difference of the public's confidence in the Supreme Court, its confidence in Congress, the ideological distance between the Supreme Court and Congress, and the Supreme Court's workload.¹⁵

¹⁴In the bivariate case, the Bardsen (1989) single equation ECM takes the form:

$$\Delta Y_t = \alpha_0 + \alpha_1^* Y_{t-1} + \beta_1^* \Delta X_t + \beta_2^* X_{t-1} + \epsilon_t, \quad (1)$$

where α_1 indicates the speed of the reequilibration of Y to a deviation from its equilibrium with X , β_2 reflects the long run effect of changes in X on Y , and β_1 indicates the contemporaneous relationship between a change in X and a change in Y .

¹⁵Like most studies of political support for judicial authority, our analysis focuses on the relationship between Congress and the Supreme Court without providing similar attention to the presidency (but see Whittington 2007). However, since the GSS asks respondents to identify their level of trust in the executive branch of government and Bailey (2007) provides ideal point estimates for presidents, it is possible to test whether the public's confidence in the president or the level of ideological divergence between the Court and the president influence the Supreme Court's institutional capacity. Adding these variables to our model, though, shows that the neither public opinion about the presidency nor the ideological proximity of the president and the Court have statistically significant effects for changes in the Supreme Court institutionalization index. See the online appendix for model estimates.

Results

Table 1 reports the mean, standard deviation, and range of each of the time series discussed above, which are jointly available from 1973 through 2002. Table 2 shows the ECM estimates.^{16,17}

First, we observe support for our baseline public support hypothesis. Consistent with our expectations, the model shows that increasing public confidence in the Supreme Court significantly predicts higher levels of Supreme Court institutionalization in the long run. Specifically, the model predicts that a one-point increase in the public's confidence in the Supreme Court (measured on the three-point GSS confidence scale) will yield a long-run increase of 12.82 points in the Supreme Court institutionalization index.

This long-run effect predicts that changes in public confidence in the Supreme Court influence congressional support for judicial authority over time as a part of the error correction process. In particular, the model predicts that a unit change in the public's confidence in the Supreme Court at time t would begin to filter into the Court's level of institutionalization over time at a rate indicated by the error correction parameter (-0.68). This error correction estimate indicates that the system of congressional responsiveness to public support for the Supreme Court adjusts rather quickly, predicting that 68 percent of the predicted long-run effect (about 8.72 points) would appear in the institutionalization series in year $t + 1$ (yielding a median lag length of 1), with 68 percent of the remainder (2.75 points, about 22 percent of the total effect) appearing in year $t + 2$, and so forth until the Supreme Court institutionalization index has increased a total of 12.82 points. This rate of error correction predicts that nearly 97% of this total effect will filter into the Supreme Court institutionalization time series within three years following a change to the predictor series.

¹⁶We observe significant negative first-order serial correlation in our model's residuals, which would inflate standard errors estimated by OLS and introduce the prospect of Type II errors (DeBoef 2004). Thus, we estimate Newey-West (1987) standard errors, an extension of "robust" standard errors (White 1980) which produce consistent estimates in the presence of autocorrelation as well as heteroskedasticity. However, relying on unadjusted standard errors does not substantially alter our statistical inferences. See the online appendix.

¹⁷Estimates for several reduced form models reported in the online appendix show that the predicted effects of public confidence in the Supreme Court, confidence in Congress, and workload are robust to model specification.

TABLE 1 Descriptive Statistics of ECM Components

Variable	Mean	Std. Dev.	Range
Supreme Court Institutionalization Index	0.00	1.46	5.72
Confidence in the Supreme Court	2.18	0.06	0.21
Confidence in Congress	1.86	0.11	0.45
Congress-Supreme Court Ideological Divergence	0.20	0.14	0.51
Docket Size (Thousands of Cases)	6.31	1.58	4.74

Of course, discussing the magnitude of the model estimates in terms of unit changes is somewhat deceptive. We measure confidence in the Supreme Court on the 3-point GSS scale and a one-unit change in the mean evaluation of the Supreme Court is substantially larger than the observed range of that time series. In fact, the standard deviation of the Supreme Court confidence series is 0.06. An increase in public confidence in the Supreme Court of this magnitude predicts a long-run effect of 0.77 points in the Supreme Court institutionalization index, roughly

53% of a standard deviation for the observed period. The dashed line in Figure 4 illustrates this effect, showing the predicted long-run effect of a standard deviation increase in public confidence in the Court at time t for the Supreme Court institutionalization index.

In addition, the squared part (or semipartial) correlation between the first difference of the Supreme Court institutionalization index and the lagged value of public confidence in the Supreme Court is 0.12. This indicates that the long-run effect of public confidence in the Supreme Court uniquely

TABLE 2 An Error Correction Model of Supreme Court Institutionalization

Predictors (Expected Sign)	Effects
Long Run Effects	
Confidence in the Supreme Court _{$t-1$} (+)	12.82* (4.92)
Confidence in Congress _{$t-1$} (-)	-7.15* (2.95)
Congress-Supreme Court Ideological Distance _{$t-1$} (-)	-0.18 (1.04)
Docket Size (Thousands of Cases) _{$t-1$} (+)	0.02 (0.13)
Short Run Effects	
Δ Confidence in the Supreme Court _{t} (+)	2.64 (3.64)
Δ Confidence in Congress _{t} (-)	-2.29 (2.41)
Δ Congress-Supreme Court Ideological Distance _{t} (-)	0.07 (1.62)
Δ Docket Size _{$t-1$} (+)	1.31* (0.39)
Error Correction and Long Run Multipliers (LRM)^a	
Error Correction (Supreme Court Institutionalization _{$t-1$})	-0.68* (0.23)
LRM Confidence in the Supreme Court	18.88* (6.04)
LRM Confidence in the Congress	-10.53* (3.24)
LRM Congress-Supreme Court Ideological Distance	-0.26 (1.56)
LRM Docket Size	0.03 (0.19)
Constant and Diagnostics	
Constant	-14.96* (5.67)
R^2	0.63
First-Order Residual Autocorrelation ($r_{\hat{e}_t, \hat{e}_{t-1}}$)	-0.36
Breusch Godfrey LM Test for Autocorrelation ^b	7.46*
Augmented Dickey-Fuller Test for Unit Root ^c	-7.52*

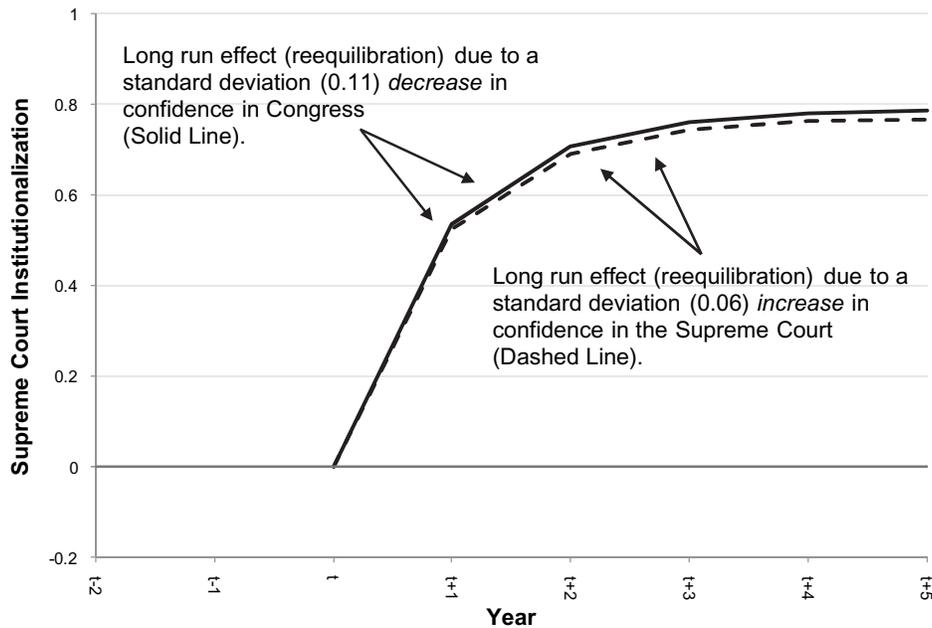
Note: OLS Estimates. Newey-West standard errors in parentheses. * $p < 0.05$; One-tailed tests. $N = 29$.

^aLRMs are estimated via Bewley model (DeBoef and Keele 2008).

^bThe Breusch-Godfrey Lagrange multiplier tests the null hypothesis of uncorrelated residuals.

^cThe augmented Dickey-Fuller statistic tests the null hypothesis of a unit root (integrated) process in the model's residuals using Mackinnon's (1994) critical values.

FIGURE 4 Predicted Effects of Standard Deviation Changes in Confidence in the Supreme Court and Confidence in Congress



explains twelve percent of the observed variance in changes in the Court's level of institutionalization. Together, the relatively strong standardized effect of confidence in the Court and its explanatory power suggest that the long-run effect of public confidence in the Supreme Court on its institutional capacity is substantively important, in addition to its statistical significance.

While these results provide empirical evidence for the theory of externally induced support for judicial authority reflected in our public support hypothesis, the model estimates also support our separation of powers hypothesis. There is a strong negative association between the public's confidence in Congress and the Supreme Court's institutional capacity. As expected, the data indicate that increasing public confidence in Congress significantly predicts a decrease in the Supreme Court's institutional capacity in the long run. In particular, the model predicts that a unit increase in confidence in Congress at time t will yield a long-run decrease of 7.15 points.

As with public confidence in the Supreme Court itself, the model indicates that changes in public confidence in Congress affect Supreme Court institutionalization in a manner consistent with the estimated error correction dynamics. For example, a one-unit increase in the public's confidence in Congress in year t disrupts the equilibrium relationship between public opinion and the balance of power between the Supreme Court and Congress, predicting

a long-run decrease of 7.15 points in the augmented Supreme Court institutionalization index, which filters into congressional support for the Court at the estimated rate of error correction, -0.68 . This predicts that 68% of the predicted long-run effect (4.86 points) would appear in the institutionalization series in year $t + 1$, with 68% of the remainder (2.25 points) appearing in year $t + 2$, and so on until the full long-run decrease in Supreme Court institutionalization has transpired.

Again, the magnitude of these effects are best understood in the context of the observed range of the data. The standard deviation of public confidence in Congress is 0.11. An increase of this magnitude in confidence in Congress predicts a long-run decrease of 0.78 (0.53 standard deviations). The solid line in Figure 4 illustrates the effect of a standard deviation decrease in public confidence in Congress for the institutional capacity of the Supreme Court.

Confidence in Congress also has much explanatory power for the Supreme Court's institutional capacity. The squared part correlation between the differenced Supreme Court institutionalization index and lagged public confidence in Congress is 0.09. This indicates that the long-run effect of changes in public confidence in Congress accounts for 9% of the variance in changes in Supreme Court institutionalization.

In contrast to evidence for externalist accounts of political support for judicial power, the data offer no support for the ideological distance hypothesis. The

model estimates indicate that the association between the ideological distance between Congress and the Supreme Court and the Court's institutional capacity is not statistically distinguishable from zero in either the short or long run. Likewise, the respective squared part correlations between the differenced Supreme Court institutionalization index and the lagged and differenced values of our measure of ideological distance between the Supreme Court and Congress are each near zero. Substantively, this indicates that the dynamics of congressional support for the Supreme Court are not generally related to the degree of ideological alignment between the two institutions.

Finally, the data support the administrative demand hypothesis. The model estimates predict that each increase of 1,000 cases on the Supreme Court's docket predicts a significant short-run increase of 1.31 points in the Supreme Court institutionalization index. This predicts that a change in the Court's workload in year t yields an "instantaneous" increase in the Supreme Court's institutional capacity in year t . Specifically, the coefficient estimate of 1.31 indicates that each standard deviation increase in the size of the Court's workload (about 1,500 cases) predicts an increase of about one and a half (1.42) standard deviations in the Supreme Court institutionalization index. The squared part correlation between the differenced Supreme Court institutionalization time series and the first difference of the size of the Court's docket is 0.15, indicating that this short-run effect uniquely accounts for 15% of the observed variance in the dependent variable.¹⁸

Conclusions

We began by presenting the puzzle of congressional support for courts, asking: Why does Congress choose to govern under the constraint of judicial review? A classic answer suggests that public opinion in support of courts constrains legislators from undermining judicial power. Noting the separation

of powers context which structures interinstitutional relationships among the branches of the national government, we refine this theory and argue that legislative support for courts should be motivated by the public's support for Congress as well as its support for the judiciary.

We assess this expectation by estimating a dynamic model of congressional support for the Supreme Court using an augmented version of McGuire's (2004, 2007) Supreme Court institutionalization index, finding a significant relationship between the public's confidence in Congress and congressional support for the Court. We also find evidence that links congressional support for the Supreme Court to the level of public confidence in the Court and the size of the Supreme Court's workload. These results offer new evidence for the theory of externally induced political support for the judiciary.

These results confirm our primary theoretical insight: institutional development in the separation of powers system is a function of the public's comparative judgments about the fitness and faithfulness of its competing governmental agents. In particular, congressional support for the Supreme Court is a function of public opinion about Congress as well as public opinion about the Supreme Court. More broadly, the results reported here also provide some indication that public opinion contains meaningful signals about preferred institutional arrangements. These signals can have consequences for the actions of elected politicians in much the same way that the public's dynamic issue preferences can induce officeholders to create new policies that converge with public sentiment (e.g., Ellis, Ura, and Robinson 2006; McGuire and Stimson 2004; Mishler and Sheehan 1993; Stimson, MacKuen, and Erikson 1995; Ura and Ellis 2008; Wlezien 1995).

The data also provide some basis to reconcile claims of externalist and internalist theories of support for the judiciary. While our results suggest that public opinion is influential in shaping the dynamics of congressional support for the Supreme Court, the data do not yield evidence of a significant association between changes in the ideological distance between the Supreme Court and Congress and the Court's institutional capacity. These findings are convergent with Chutkan's (2008) conclusion that "when Congress [strips federal courts' jurisdiction] it appears to do so in response to operational concerns . . . and not in response to ideological differences between institutions" (1053–1054). Yet, it may be a mistake to read either set of empirical findings too generally. While both sets of results are consistent with the view that

¹⁸It is plausible that our empirical model underestimates the effects of internalist or administrative influences on congressional support for the Supreme Court. Our augmented version of McGuire's institutionalization index is constructed from indicators of the Supreme Court's institutional capacity that represent resource support and discretion in case selection. Yet, Congress's ability to deny federal courts jurisdiction over specific pieces of legislation constitutes another important dimension of congressional oversight of the courts which is not directly measured here (e.g., Chutkan 2008). This process might be more evident in different data or in research designs that investigate discrete cases of legislative-judicial interactions.

ideological divergence between the Court and Congress is unrelated to legislative support for the judiciary, both are also consistent with a “threshold” argument that the degree of ideological divergence between the two branches has not been sufficiently large to provoke significant court curbing activity in Congress. Nevertheless, accumulating evidence that observed variance in ideological alignment of the Supreme Court and Congress should temper internalist theories that posit changes in judicial power resulting from political dynamics that are strictly endogenous to legislatures in isolation from public opinion and other political or administrative considerations.

In a similar vein, we also find support for our administrative demand hypothesis. Like Chutkow (2008), we find that congressional support for courts relates strongly to the objective needs of the judiciary to manage its workload. As the Supreme Court’s workload increases, Congress allocates higher levels of support to the Court. This result suggests that future research on the development of judicial power should continue to examine the role that public demand on courts plays in the evolving role of courts in American politics.

Finally, these results validate the importance of existing studies of public support for the Supreme Court by providing direct empirical evidence of the nexus between public opinion and judicial power. However, our findings also indicate that future scholarship on public evaluations of the judiciary should focus to a larger extent on trust in a separation of powers context rather than on public opinion about the judiciary considered alone. In particular, the results reported here emphasize the importance of understanding public confidence in courts relative to legislatures and other institutions and generating new theories to explain why the mass public would prefer to empower unelected courts relative to elected legislatures.

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