

Congressional Responses to the Supreme Court's Constitutional and Statutory Decisions

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Abstract

We evaluate the frequency and form of legislative responses to Supreme Court decisions to evaluate the assumption that the legal basis of the Court's decision will determine the form of congressional response. Studies of Congress–Court interaction have often argued or assumed that Congress will respond to constitutional decisions with Court-curbing measures and to statutory decisions with policy-based measures, but recent scholarship suggests this distinction may be overstated. We introduce a new strategy for identifying policy-based responses and use new data to subject the conventional wisdom to empirical evaluation. In the period under consideration here, we find that the Court's statutory decisions appear to be nearly immune to Court-curbing attempts but are regularly targeted with policy-based responses, while a subset of constitutional cases (those that invalidate policies) are doubly vulnerable, triggering the introduction of Court-curbing bills and successful policy-based responses.

Keywords: interbranch relations, separation of powers, statutory overrides, policy-based responses, Court-curbing, Congress, Supreme Court

I. Introduction

Members of Congress regularly introduce legislation responding to disfavored Supreme Court decisions. These responses have been extensively analyzed in the separation of powers literature, with scholars addressing the determinants of these bills and their consequences for Supreme Court behavior and public policy. Scholars distinguish between two types of congressional responses. First, members of Congress can target the Court as an institution by introducing Court-curbing bills that would modify the Court’s structure, jurisdiction, or powers (e.g. Clark 2009, Rosenberg 1992). Second, members of Congress can initiate legislative responses that aim to directly modify the impact of a specific Court decision (or set of decisions). We refer to proposals in the latter category as “policy-based responses.” Because Congress has the power to override the Supreme Court’s statutory interpretations, but not its interpretations of the Constitution, it is commonly assumed that the Court’s constitutional decisions are more likely to be met with institutional attacks while statutory decisions will provoke the introduction of legislation to directly overturn Court-announced policies. We refer to this expectation as the traditional view. The perception that Congress can respond to the Court’s statutory decisions with relative ease grounds the widely-held view that Supreme Court justices are more likely to be constrained in statutory cases than in constitutional cases (see e.g. Bergara, Richman, and Spiller 2003; Epstein, Segal, and Victor 2002; Gely and Spiller 1990; Segal 1997; Spiller and Gely 1992). Epstein & Knight (1998, 141) summarize the argument: “[t]he infrequency of congressional responses to constitutional decisions, coupled with the difficulty in overturning them, means the justices may be less attentive to the preferences and likely actions of other government actors in constitutional disputes than in statutory cases.”

The perception that the form of legislative-judicial interaction will depend on the legal basis of the Supreme Court’s decisions has fostered the development of distinct strains of work on legislative-judicial relations. Studies of observed statutory overrides and the potential for anticipated statutory overrides to constrain judicial decision-making are the mainstay of legislative-judicial interaction in the statutory realm. Studies of legislative-judicial interaction over constitutional issues have often highlighted the role of Court-curbing as a key tool for signaling congressional displeasure with the Court (e.g. Rosenberg 1992, Clark 2011)

Two bodies of work bridge the divide between the statutory/override and constitutional/curbing camps. First, numerous studies demonstrate that Congress passes laws that directly target the policies embodied in the Court’s constitutional decisions (Blackstone 2013, Fisher 1988, Fisher 2004, Meernik & Ignagni 1995, Meernik & Ignagni 1997, Pickerill 2004, Uribe, Spriggs & Hansford 2014). Second, while the separation of powers literature long maintained that separation of powers effects ought to be stronger in the realm of statutory interpretation, recent years have seen a flurry of studies that find evidence of SOP effects on Supreme Court decision-making in constitutional cases. Harvey & Friedman (2006) and Segal, Westerland & Lindquist (2011) find that justices are less likely to invalidate laws when the Court is ideologically distant from Congress. Clark (2009, 2011) demonstrates that periods of heightened congressional hostility are associated with less frequent use of judicial review to invalidate federal laws. Epstein, Knight & Martin (2001) demonstrate that justices’ voting in constitutional civil rights cases becomes more conservative as congressional conservatism increases. In short, there is a growing body of empirical evidence that the separation of powers concerns that scholars expect to shape the Court’s statutory decision-making are operative in constitutional cases.

The historical prominence of the statutory/constitutional distinction in the literature on Congress-Court interaction leads us to assess the degree of divergence in Congress’s responses to these bodies of cases. We ask whether and how much the legal basis of Supreme Court decisions determines the form of legislative response pursued by members of Congress. Using original data on congressional responses to Supreme Court cases decided between 1997 and 2012, we provide an integrated analysis of policy-based and Court-curbing responses to the Court’s constitutional and statutory decisions to evaluate how frequently statutory and constitutional cases trigger congressional responses of different types. We find that institutional attacks are used almost exclusively to respond to constitutional decisions but responses that target Court-announced policies directly regularly follow statutory and constitutional decisions. Constitutional decisions in which policies were invalidated were most likely to trigger the introduction and passage of these direct substantive responses.

Our approach contributes to the literature on Congress-Supreme Court interaction in several ways. First, we offer information on the number and type of congressional responses to Supreme

Court decisions that can inform key debates about Congress-Supreme Court interaction. While recent years have seen a wealth of innovative research on congressional responses to Court decisions, the existing literature is not well-suited to this type of inquiry. Although there are exceptions, most studies analyze responses to *either* constitutional or statutory cases and focus on *either* institutional or policy-based responses. This makes it difficult to make or evaluate claims about the relative frequency of institutional and policy-based responses to Court decisions.

We focus on observed responses to Supreme Court decisions. Scholars interested in the identification of strategic behavior may argue that the frequency of responses to Court decisions is a poor measure of incentives to engage in strategic behavior. We agree. We recognize that Supreme Court justices may be attentive to congressional preferences when they decide which cases to hear and that the Court may forestall some congressional responses by avoiding cases that would engender inter-institutional conflict. The empirical evidence supporting these claims has grown substantially in recent years (Hall & Ura 2015, Harvey & Friedman 2006, Harvey & Friedman 2009). However, even if the Court acts to minimize congressional responses, the frequency of observed responses should inform our understandings of the shared role of Congress and the Supreme Court in shaping public policy and in the ability of Congress to participate in policy dialogues across constitutional and statutory cases. Furthermore, the observed use of statutory overrides is sometimes used to justify the view that Supreme Court justices ought to be more constrained in statutory cases than constitutional ones. In supporting this position, scholars highlight the infrequency with which these tactics have been successfully deployed (Epstein & Knight 1998, 141). To the extent that the frequency of statutory overrides plays a role in shaping scholars' expectations for strategic behavior, these counts ought to be supplemented with data on comparable responses to constitutional decisions. If introduction and passage of responsive proposals are failures of strategic anticipation, we can, at the very least, provide a means to evaluate whether the justices are more successful at avoiding responses in one body of cases than the other. Finally, even if the Supreme Court could perfectly avoid policy-based responses in the short-term, the ability of later Congresses to modify the policies announced in the Court's constitutional decisions is a significant part of interbranch dialogue. Measuring the frequency of congressional

modifications of policies embodied in the Court’s statutory *and* constitutional decisions provides evidence of the iterative and potentially cooperative aspects of interbranch relations (Barnes & Miller 2004, Fisher 2004, Keck 2007, Lovell 2003, Pickerill 2004, Whittington 2005).

Second, we clarify concepts. Statutes passed to overcome the Supreme Court’s statutory interpretations are typically referred to as statutory overrides. Studies of legislative responses to constitutional decisions, in contrast, are variably referred to as “overrides,” (e.g. Uribe, Spriggs, and Hansford 2014) “decision-reversal legislation,” (e.g. Meernik and Ignagni 1997) and “policy-based responses” (e.g. Blackstone 2013). We contend that these terms carry different connotations and that using them interchangeably can obscure important differences between substantive responses to the Court’s constitutional and statutory decisions. We prefer the term policy-based responses for legislative proposals that aim to modify or reverse the policy impact of Supreme Court decisions directly; statutory overrides are a subset of the proposals we classify as policy-based responses.

Third, we demonstrate the viability of a new method for identifying bills introduced in response to Supreme Court decisions. Congressional committee reports have been the primary source of information on non-curbing responses to the Court’s constitutional decisions. Some argue that the value of these reports as sources of information on major legislation has decreased dramatically since 1990 (Christiansen & Eskridge 2014), hindering the study of policy-based responses in the post-1990 period. (But see Buatti & Hasen [2015].) We supplement the committee report method introduced by Eskridge (1991) by relying on searches of bill text and the *Congressional Record* to identify responsive proposals. Our approach works equally well in identifying responses to statutory and constitutional cases, provides a mechanism for identifying proposals that do not become law, and is not time-bound like the committee report methods.

The manuscript proceeds as follows. In the next section, we contend that the statutory–constitutional distinction drives fragmentation in studies of Congress–Supreme Court interaction and review theoretical arguments and empirical evidence that cast doubt on the traditional view. We then review our data collection strategy and present results. The final section concludes.

II. The Statutory–Constitutional Distinction in Context

The Traditional View

The traditional view posits that Congress–Supreme Court interactions differ markedly between the realms of statutory and constitutional interpretation. When the Court issues a disfavored constitutional decision, members of Congress are expected to respond primarily with institutional attacks known as Court-curbing bills. When the Court issues a disfavored statutory decision, however, members of Congress are thought to focus their efforts on policy-based responses that override the Court’s statutory interpretation. The reason for this expected difference is straightforward: Congress has the power to override interpretations of statutes, but the Court’s interpretations of constitutional provisions are final absent subsequent overruling or constitutional amendment.

Two examples illustrate the response types. In *Roe v. Wade* (1973), the Court recognized a woman’s fundamental right to terminate a pregnancy under the Fourteenth Amendment’s Due Process Clause. In response, members of Congress signaled their displeasure with the outcome by introducing legislation to eliminate the Court’s appellate jurisdiction in abortion cases—something they continue to do long after the initial decision. Jurisdiction stripping is one type of Court-curbing bill, other examples include proposals to alter the size of the Court and restrict exercise of judicial review by requiring a supermajority vote. These sorts of responses are institutional attacks primarily used as position-taking opportunities by members of Congress.

In *Grove City College v. Bell* (1984) the Court narrowly interpreted Title IX of the Education Amendments of 1972. The Court held that the statute prohibited private institutions enrolling students receiving federal grants from discriminating on the basis of sex in the administration of their financial aid programs, but not with respect to other programs or activities. This case yielded a prototypical statutory override. Congress passed the Civil Rights Restoration Act of 1987 (PL 100-259) to clarify that Title IX should be applied fully to institutions accepting federal financial assistance. Rather than signaling displeasure with the Court’s decision-making through proposals that threaten to diminish its institutional power, a policy-based response of the type that followed *Grove City College* seeks to reverse the impact of the Court’s ruling directly.

The view that these are the sorts of responses typical for constitutional and statutory cases,

respectively suggests the following patterns will be observed:

1. When members of Congress introduce legislation in response to Supreme Court cases decided on constitutional grounds, they will typically introduce Court-curbing legislation.
2. When members of Congress introduce/pass legislation in response to Supreme Court cases decided on statutory grounds, they will typically introduce policy-based responses (i.e. statutory overrides).
3. Compared to cases decided on statutory grounds, constitutional cases will be more likely to trigger the introduction of Court-curbing proposals.
4. Compared to cases decided on statutory grounds, constitutional cases will be less likely to trigger the introduction/passage of policy-based responses.

Reconsidering the Traditional View

Theoretical and empirical developments suggest the time is ripe to reconsider the traditional view of the relationship between case type (constitutional or statutory) and response type (Court-curbing or policy based). First, a growing literature demonstrates that members of Congress (MCs) regularly introduce and pass proposals that directly modify policies announced in the Court's constitutional decisions. These policy-based proposals are similar, though not identical, to overrides of statutory decisions. We contend that their import has not been adequately incorporated into the broader theoretical debate over the likelihood and nature of congressional responses to the Court. Second, we argue that MC incentives to respond to Supreme Court decisions depend little on the legal basis of a decision; accordingly, MCs should find it useful to use Court-curbing and policy-based proposals in response to both constitutional and statutory cases.

Policy-Based Responses to Statutory and Constitutional Cases

Congress regularly passes legislation in response to the Supreme Court's constitutional decisions (Blackstone 2013, Fisher 1988, Fisher 2004, Meernik & Ignagni 1995, Meernik & Ignagni 1997, Pickerill 2004, Uribe, Spriggs & Hansford 2014). While institutional constraints may prevent Congress from directly overruling the Court's constitutional interpretations, they do not prevent members of Congress from trying to achieve their policy objectives by rewriting statutes or introducing new bills to achieve their policy goals when they are thwarted by the Court. Policy-based

responses to Supreme Court decisions decided on statutory and constitutional grounds are thus a basic feature of the American policymaking process that is characterized by repeated inter-institutional interaction (Devins & Fisher 2004, Fisher 1988, Miller 2009). Scholars studying these legislative responses, however, differ considerably in how they conceptualize these proposals and their significance for constitutional interpretation and public policy.

Perhaps no study has shaped this line of inquiry more than Meernik & Ignagni’s (1997) study of congressional responses to constitutional decisions. They characterize congressional responses to the Court’s invalidation of federal laws as coordinate construction of the Constitution—“a process whereby governmental and nongovernment actors seek to realize their interpretation of the Constitution as equals to the Supreme Court” (p. 448). The finding that Congress introduces and passes legislation in response to the Court’s constitutional decisions is interpreted as evidence that Congress regularly engages in coordinate construction *and* that Congress reverses the Court’s constitutional decisions. They conclude that their findings—that Congress attempted to reverse 22% of the Court’s cases where it invalidated federal law and succeeded in a third of those attempts—offer a significant challenge to the theory of “judicial finality” in constitutional interpretation. We think they overstate their case.

Meernik & Ignagni (1997) and many studies that have followed it in studying non-curbing responses to the Court’s constitutional decisions, adopt the nomenclature of responses to statutory decisions. They refer to these responses as *overrides* or *decision-reversal* legislation but include in those categories proposals with much more modest effects than those labels suggest. Meernik & Ignagni (1997, 451) include proposals to rewrite legislation previously invalidated by the Supreme Court to survive judicial scrutiny as examples of decision-reversal legislation. We think this type of response is typical of what scholars have in mind when they talk about congressional responses to the Court’s constitutional decisions. Characterizing these responses as overrides or decision-reversals tends to overstate and conflate their intended policy and legal impacts.

In her analysis of the intended policy and legal impacts of responsive proposals, Blackstone (2013) finds that none of the statutes passed in response to the Court’s constitutional decisions between 1995 and 2010 could be characterized as attempts to modify the Court’s interpretation

of the Constitution. She writes, “Twelve of the 18 successful responsive proposals offered no legal challenge to the Court’s decision, five purported to correct legal defects identified by the Supreme Court and one extended the protection of a constitutional right above the minimum required by the Court” (p. 223). Characterizing these statutes as overrides of Court decisions connotes dramatic and conflictual interbranch interactions when the interactions and their resultant policy changes are typically quite incremental and judicious. We think this is more than a semantic quibble. An enduring question in the study of American politics is the extent to which institutions interact collaboratively and competitively. The language that we use to describe these interactions should reflect the way they work in practice.

As the response to *Grove City College v. Bell* (1984) demonstrates, Congress can reverse the Court’s interpretations of statutes much like a higher court would overrule a lower court’s interpretation. Policy-based responses to constitutional decisions are different in a key respect from the prototypical statutory override—they typically take the Court’s legal interpretation as fixed and try to fashion a modified policy that can further the legislators’ policy goals without running afoul of Court-announced legal rules.¹ Congressional responses to two Supreme Court decisions from the 2009 Term’s closing months demonstrate the similarities and differences apparent in policy-based responses to statutory and constitutional cases. In *Morrison v. National Australia Bank* (2010), the Court held that the Securities Exchange Act’s anti-fraud provisions did not apply to extraterritorial investment deals. Congress modified *Morrison*’s impact by including a provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act (PL 111-203) to rebut the presumption against extraterritoriality that the Court relied on in reaching its decision, clarifying that Congress intended extraterritorial application in cases brought by the SEC or DOJ (Kanjorski 2010).

In *United States v. Stevens* (2010), the Court invalidated a federal statute criminalizing the commercial creation, sale, or possession of animal cruelty depictions on overbreadth grounds under

¹There are exceptions. The *Religious Freedom Restoration Act* passed in response to the Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), the federal flag protection statute passed in response to *Texas v. Johnson* (1989), and the 1968 provision of the Omnibus Crime Control and Safe Streets Act of 1968 which purported to statutorily override *Miranda v. Arizona* (1966) can all reasonably be characterized as attempts to overturn the Court’s constitutional interpretations. Even though these bills became law, none were ultimately successful in achieving their policy objectives because of subsequent judicial interpretations.

the First Amendment. In response, Congress passed the Animal Crush Video Prohibition Act of 2010 (PL 111-294) narrowing the invalidated statute and reenacting the ban on “crush videos,” a particular category of animal cruelty depictions targeted by the original statute. Consistent with our argument that this response should not be characterized as an override, the Animal Crush Video Prohibition Act does not alter the legal rules the Court uses to evaluate First Amendment claims and the reach of the responsive statute is considerably more narrow than the statute it replaced. Even so, the statute modifies the policy impact of the Court’s decision in *Stevens* by re-criminalizing a category of speech that was not punishable under federal law as a result of the *Stevens* decision. A federal grand jury in Houston, TX returned the first indictments under the revised statute in 2012. A district court judge dismissed the crush video charges, citing “constitutionality issues.” On appeal, the Fifth Circuit overturned the district court’s decision (*United States v. Richards*, No. 13-20265, U.S. Court of Appeals for the Fifth Circuit, June 13, 2014). The Supreme Court denied certiorari;² The Supreme Court’s decision *not* to hear the constitutional challenge to the revised statute leaves the Animal Crush Video Prohibition Act as good law and may encourage other federal prosecutors to charge the offenses in the statute.

While readers are likely to be more familiar with congressional responses to the Court’s constitutional/invalidations cases, bills regularly respond to non-invalidations cases. Examples in our data include bills to strengthen the “knock and announce” rule in the aftermath of *Hudson v. Michigan* (2006), efforts to limit between-census redistricting after *LULAC v. Perry* (2006), and proposals to statutorily limit the use of takings for economic development in the aftermath of *Kelo v. City of New London* (2005). In sum, scholars need not believe that Congress can *reverse* the Supreme Court’s interpretations of the constitution through ordinary legislation to conclude that policy-based responses to constitutional decisions are an important part of Congress–Court interaction with significant potential to shape public policy.

Incentives to Respond to the Court

A consideration of MC incentives to pursue responses to Court decisions and the benefits associ-

²United States Supreme Court Order List, 575 U.S. ____ March 23, 2015, Dockets 14-6212, 14-6295.

ated with different response types further cautions against giving too much weight to the distinction between constitutional and statutory decisions in structuring the behavior of legislators. MCs are regularly assumed to be driven by electoral and policy goals (Clausen 1973, Fenno 1973, Mayhew 1974). Court-curbing and policy-based proposals provide potential position-taking benefits that can enhance an MC’s electoral prospects (Mayhew 1974). These position-taking benefits accrue to an MC regardless of whether a particular proposal is passed.³

Court-curbing proposals, if passed, would deliver further benefits to the MC by preventing future policy losses. If, in response to unpopular Supreme Court decisions related to school prayer, Congress removes the Supreme Court’s jurisdiction to hear cases arising under the First Amendment’s Establishment and Free Exercise clauses or makes it more difficult for the Court to exercise judicial review, the effect is to prevent the Court from rendering decisions that do further damage to a legislator’s preferred policies related to religious exercise. While these proposals threaten dramatic changes to the Supreme Court as an institution, MCs use Court-curbing proposals primarily for purposes of position-taking and credit-claiming (Clark 2011). For practical purposes, they can be considered symbolic measures.

The reputational benefits of Court-curbing proposals are available to MCs when the Court decides cases on constitutional or statutory grounds. There is no reason *ex ante* to expect MCs to reserve the use of these responses strictly for constitutional cases. The primary limit on the utility of position-taking is the limit on information available to the relevant audiences about the relevant Supreme Court case and the member’s stance. Constitutional cases will often present good vehicles for position-taking. MCs on both sides of the aisle have long criticized Supreme Court activism. Criticisms of constitutional decisions are easily fashioned into sound bites that allow MCs to paint themselves as defenders of the Constitution. However, the majority of the Court’s constitutional

³We recognize that response introduction is an individual act rather than a collective one. Mark & Zilis (2018a, 2018b) substantially advance the literature on Court-curbing by shifting to member of Congress-level analysis of Court-curbing introductions and justice-level analysis of responsiveness to Court-curbing introductions. We agree with their assessment that the literature’s focus on inter-institutional conflict has pushed out consideration of other influences on Court-curbing interactions. Even so, we adopt the Supreme Court case as the unit of analysis in our study. Our primary interest centers on how a case characteristic (the legal basis of a decision) affects the nature and probability of a response emerging in Congress. In part because responsive statutes and Supreme Court decisions are the primary units of inquiry in the bulk of separation of powers work, analysis at the case-level provides the most direct means to evaluate the veracity of the assumptions about the connection between the legal basis of Supreme Court decisions and the nature of congressional responses they engender.

decisions are not salient to the public, and a subset of its statutory cases are. Accordingly, while curbing proposals may not be used in equal numbers for constitutional and statutory cases, their use need not be limited solely to constitutional cases.

In addition to facilitating position-taking and credit-claiming, policy-based proposals can deliver tangible policy benefits to MCs. If an unfavorable Court decision's impact can be minimized or reversed through the passage of a policy-based response, members that support the proposal stand to reap whatever position-taking benefits are associated with opposing a decision unpopular with their constituents as well as the ability to claim credit for passing laws to minimize the decision's impact. We contend that MCs that care about policy should use PBRs in response to the Court's statutory *and* constitutional cases. If, as is often argued, the policy stakes are higher in constitutional cases than in statutory cases, it should not be surprising to see MCs use PBRs as often for constitutional cases as for statutory ones.

Status Quo Maintaining and Status Quo Disrupting Constitutional Decisions

In the analyses that follow, we distinguish between constitutional cases where the Court invalidates policies and those where it upholds policies against constitutional challenges. Supreme Court observers treat decisions to invalidate laws as particularly noteworthy. While the Supreme Court relies on the same power to interpret the constitution whether it invalidates or upholds a challenged policy, Supreme Court cases in which the Court uses its power of judicial review to invalidate policies are viewed as particularly important. These are the cases most often invoked in debates about and studies of the extent to which the Court acts in a countermajoritarian manner and they are the decisions that provide fodder for claims that the Supreme Court is usurping the power of the elected branches of government. The concept of legal salience (Maltzman, Spriggs & Wahlbeck 2000) routinely invoked in studies of judicial politics and interbranch relations highlights the import of constitutional/invalidations cases. In part because of their assumed significance in our separation of powers system, studies of Congress-Court interaction often focus exclusively on the subset of cases in which the Court invalidates policies (Dahl 1957, Keck 2007, Meernik & Ignagni 1995, Pickerill 2004, e.g). In other studies, scholars consider responses to all cases in which the Court interprets the Constitution (Blackstone 2013, Uribe, Spriggs & Hansford 2014). Rather

than considering only invalidations or treating all constitutional cases similarly, we allow the data to tell us whether the binary constitutional/statutory distinction obscures variation in congressional responses to different types of constitutional cases.

The legislative policymaking literature yields expectations about congressional responses to Supreme Court decisions that are significantly different than the ones associated with the traditional view in the Supreme Court-centered separation of powers literature. We join Blackstone (2013), Pickerill (2004), and Uribe, Spriggs & Hansford (2014) in arguing (1) that members of Congress are primarily interested in the policy impact of Supreme Court decisions, rather than their legal bases and (2) that Congress can meaningfully alter the policy impact of invalidations cases without amending the constitution. Given these background assumptions, invalidations take on extra significance. Because these cases disrupt the status quo,⁴ they may present unique opportunities to force issues onto the congressional agenda. If invalidations cases can serve as focusing events, they may be more likely to secure scarce agenda space and therefore present the best opportunities to pursue policy change (Baumgartner & Jones 1993, Birkland 1998, Kingdon 1984).

III. Data and Measurement

Our primary goal is to examine whether Congress responds in different ways to the Supreme Court’s constitutional and statutory decisions. Although there is a well-developed literature on congressional responses to Supreme Court decisions, its fragmentation makes it difficult to test this proposition with available data. First, studies often examine Court-curbing proposals (e.g. Clark 2009, Clark 2011, Rosenberg 1992) or policy-based legislation (e.g. Meernik and Ignagni 1997, Uribe, Spriggs & Hansford 2014), but not both. Second, studies often examine responses to either statutory (e.g. Christiansen & Eskridge 2014, Eskridge 1991, Hettinger & Zorn 2005, Solomine & Walker 1992) or constitutional (e.g. Ignagni & Meernik 1994, Meernik & Ignagni 1995) decisions, but not both. Third, studies often focus on single issue areas, such as civil rights (Eskridge 1991), labor and antitrust (Henschen 1983), or tax (Staudt, Lindstädt & O’Connor 2007). While recent studies have more frequently broadened their scope to encompass consideration of

⁴We thank an anonymous reviewer for suggesting we consider this distinction.

responses across issue areas, legal bases, or both (e.g. Nelson & Uribe-McGuire 2017, Uribe, Spriggs, & Hansford 2014), we know of no existing study that considers Court-curbing responses and policy-based responses to constitutional and statutory decisions across issue areas. Evaluating whether congressional responses to Supreme Court decisions differs by case type requires resolving fragmentation along each of these dimensions. We do this by taking the Supreme Court case as the unit of analysis and evaluating (1) the frequency of response introduction and passage of both response types for cases decided on different legal bases and (2) the case-level determinants of response introduction and passage, focusing especially on the legal basis of decision. Our data include cases decided by signed opinion coming to the Court via certiorari or appeal between 1997 and 2012. Our dependent variables are a series of dichotomous measures that indicate whether the Supreme Court case led to (1) the introduction of a Court-curbing proposal, (2) the passage of a Court-curbing proposal, (3) the introduction of a policy-based response, and (4) the passage of a policy-based response.

We gather data on congressional responses to Supreme Court decisions that were decided and between 1997–2012.⁵ To ensure that we capture the first congressional response to each decision, we exclude responses to Supreme Court decisions prior to 1997. For cases decided prior to 1997 for which we do not observe response introductions, we cannot ascertain whether they have never been the subject of a legislative response or were the subject of response introductions prior to 1997. While some decisions engender responses for decades, other studies demonstrate that congressional responses to the Supreme Court’s statutory (Hettinger & Zorn 2005) and constitutional (Blackstone 2013) decisions are most susceptible to congressional responses in the few years immediately following their announcement. Including cases decided prior to 1997 would therefore lead us to systematically underestimate the probability of response introduction and passage for pre-1997 cases.

We identified Court-curbing measures in two steps. Data on Court-curbing proposals introduced in the 105th through 110th Congresses were obtained from Clark (2011). We updated these data

⁵This time period is driven largely by data availability; at the time of data collection the 105th through 112th Congresses were the only Congresses for which the full-text of the *Congressional Record* was available through the Sunlight Foundation’s Capitol Words API, which we used for our *Congressional Record* searches.

through the 112th Congress.⁶ For each Court-curbing proposal introduced in the 105th through 112th Congresses, we reviewed the text of the bill and any remarks in the *Congressional Record* related to the proposal to determine whether the bill responded to a specific Supreme Court decision.

Identifying policy-based responses to Supreme Court decisions is a more daunting task. By definition, the Supreme Court is the subject of a Court-curbing proposal. The Congressional Research Service assigns a subject category to every bill introduced in Congress. As a result, it is tedious but relatively straightforward to identify Court-curbing proposals by searching introduced bills within the set of subject categories related to the Supreme Court. In contrast, policy-based responses to Court decisions may cover the range of topics addressed by the Supreme Court. To identify policy-based responses to Supreme Court decisions, we began by locating congressional documents that include the phrase “Supreme Court.” We searched the *Congressional Record*, legislative history reports from the United States Code Congressional and Administrative News (USCCAN), and the full-text of bills for Supreme Court mentions in the 105th through 112th Congresses.⁷ This search method subsumes and expands on the approach introduced by Eskridge (1991). In his seminal study, Eskridge relied on the committee reports included in USCCAN documents to identify statutory overrides. This method has long been the standard approach for identifying congressional responses to constitutional and statutory cases. (See, for example, Hasen [2012], Meernik and Ignagni [1997], and Uribe et al. [2014]). Christiansen & Eskridge (2014, 1328) argue that looking beyond USCCAN documents is important because of the “radical decline of committee reports as a useful source of information for major legislation after 1990.” To the extent that USCCAN fails to provide comprehensive legislative history information past 1990, scholars are limited in their ability to study congressional responses to more recent Supreme Court cases. Bill text and comments included in the *Congressional Record* are plausible venues for the identification

⁶We used the Standard Subject Term search feature formerly located at <http://thomas.loc.gov> to identify Court-curbing proposals. (This feature has since been relocated to <http://congress.gov>.) Congressional Research Service analysts assign Subject Terms to each introduced bill. The search term dictionary was modified in the 110th Congress so we could not rely on the same terms employed by Clark (2011). We read all bills classified under the following terms to identify Court-curbing proposals: “constitution and constitutional amendments,” “Supreme Court,” “judicial procedure and administration,” “judicial review and appeals,” and “jurisdiction and venue.” We used these terms to code the 110th Congress (the most recent Congress in the Clark data), and identified 100% of the proposals identified by Clark using the old dictionary terms.

⁷This approach is similar to the one used in Blackstone (2013). However, that study only considered responses to constitutional decisions.

of legislative responses to Court decisions.

To search bill text, we relied on the search tool at <http://thomas.loc.gov>.⁸ For searches of the *Congressional Record*, we relied on the Sunlight Foundation’s Capitol Words project available at <http://capitolwords.org>. In total, these searches returned over 10,000 documents (2,600 bills, 1,070 legislative history reports, and 7,100 entries in the *Congressional Record*) that we reviewed manually. We read each document to determine whether it included a reference to a case-specific legislative response. In order for a legislative proposal to be included in our sample, one of the previously mentioned sources must clearly note that a Supreme Court decision (or decisions) provoked the legislative proposal and that the proposal’s supporters are opposed to the relevant Supreme Court decision. Each policy-based response satisfies two criteria: it is motivated by disagreement with a specific Supreme Court decision (or decisions) and its supporters argue that it would modify or reverse consequences of the relevant decision. We categorize any proposal that would partially or fully reverse the policy impact of a decision as a policy-based response. Following Eskridge (1991), and extending his approach to constitutional cases, policy-based responses include complete and partial statutory overrides; proposed constitutional amendments that would modify the policies embodied in particular Supreme Court decisions; proposals that would discontinue, prohibit, or modify policies upheld by the Supreme Court in its constitutional cases; proposals that would replace or revise policies invalidated by the Supreme Court; and proposals that would impose new policies to deal with the consequences of a decision. We include proposals that are introduced as stand-alone legislation and those that are offered as amendments to other bills. This approach yields 473 legislative proposals responding to 127 cases decided during the sample period.

Christiansen & Eskridge (2014) supplement their search of congressional committee reports by identifying Supreme Court decisions that were subsequently coded as “superseded” in *Westlaw* and considering them as potential overrides. In contrast to our approach, theirs does not require that the legislative record include an explicit link between a proposal and a Supreme Court case. As a result, our strategy does not identify what Buatti & Hasen (2015) refer to as “unconscious” responses—statutes that inadvertently change the understanding of statutes as interpreted by the Supreme

⁸This tool has since been relocated to <http://congress.gov>.

Court. We agree with Buatti & Hasen (2015) that conscious responses provide unique insight into the dialogue between Congress and the Supreme Court (but see Christiansen, Eskridge, and Thypin–Bermeo [2015]).⁹ The appendix includes the complete list of statutory overrides identified by each sample.

The Westlaw method may also prove useful for constitutional cases but we suspect it will be less comprehensive there for several reasons. First, lower court judges and the lawyers that code cases for West may be more likely to distinguish earlier cases than to state they have been superseded when cases were decided on constitutional grounds. Second, the Westlaw method requires a lower court to identify a previous decision as having been superseded, which may happen years after bill passage, if it happens at all. Last, this method cannot identify responses that are introduced and not passed, limiting its utility for comparing successful and unsuccessful response attempts.

IV. Analysis and Results

In this section, we report the frequency of different types of legislative responses to Supreme Court decisions decided on different legal grounds and evaluate whether the probabilities of Court-curbing and policy-based response introduction and passage differ systematically between the Court’s constitutional and statutory cases. Court-curbing policies are typically assumed to be symbolic measures designed to signal dissatisfaction with the Court and its policy; they need not pass to have their intended effect. In contrast, studies of policy-based responses often focus on those that become law because these are the proposals that directly modify Court-announced policies. While policy-based response introduction is clearly less important than passage from a policy perspective, we see no reason *ex ante* to assume that policy-based response introduction cannot deliver reputa-

⁹We compared the statutory overrides in our sample to those identified by Christiansen & Eskridge (2014) and Buatti & Hasen (2015). In combination, the studies identify 25 statutory overrides passed between 1997 and 2012 that responded to Supreme Court decisions announced in the same time period. Our approach identified all of the conscious statutory overrides identified by Buatti & Hasen (2015). Christiansen & Eskridge (2014) identify four overrides that we did not identify; each of these overrides was classified by Buatti and Hasen as an unconscious override. We identify 3 statutory overrides that were not identified by Christiansen and Eskridge. One of these statutes is identified as a conscious override by Buatti and Hasen—the OPEN Government Act of 2007 overriding *Buckhannon Board & Care Home, Inc. v. WV Department of Health and Human Resources* (2001). A second is the response to *Morrison v. National Australia Bank* (2010) discussed above. The third is a provision in the Fair and Accurate Credit Transactions Act of 2003 (FACTA) which we identified on the basis of its description during Senate debate. Senator Cantwell (2003) explicitly characterized the extension of the statute of limitations for identify theft charges as an effort to address problems created by the Supreme Court’s decision in *TRW v. Andrews* (2001).

tional benefits to members of Congress. Furthermore, studies of Court-curbing demonstrate that the proposal of legislation may influence Supreme Court decision-making (Clark 2011, Marshall, Curry & Pacelle 2014, Segal, Westerland & Lindquist 2011). Scholars wishing to assess whether that effect extends to statutory decision-making may find the frequency of response introduction informative, notwithstanding the proposals' low prospects for success. Accordingly, we consider the impact of case characteristics on response introduction *and* response passage in the analyses that follow.

We are primarily interested in how case characteristics influence the probability and form of congressional responses to a Supreme Court decision so we employ the Supreme Court case as the unit of analysis. Table 1 compares the frequency of introduced and passed responses to Supreme Court decisions by response type. Consistent with the traditional view, Court-curbing bills are significantly more likely to be introduced in response to the Supreme Court's constitutional decisions than its statutory ones. Eighteen constitutional cases (4.5%) triggered Court-curbing bill introductions while only two statutory cases (0.29%) did so. Also consistent with the traditional view, rates of passage for Court-curbing bills are exceedingly low. Only one Court-curbing proposal in the sample became law. The successful Court-curbing proposal was a jurisdiction-stripping provision contained in the Detainee Treatment Act of 2005, passed in response to the Court's decision in *Rasul v. Bush* (2004), a statutory case. (A majority of justices in *Hamdan v. Rumsfeld* (2006) concluded that the statute had not removed the Court's jurisdiction in pending cases.)

As with most bills introduced in Congress, policy-based proposals responding to Supreme Court decisions usually fail to become law. However, the success rate for policy-based responses is comparable across constitutional and statutory cases in our sample. During the sample period, Congress passed twenty-one policy-based responses to statutory cases and eight policy-based responses to constitutional cases. The case-level successful response rates are 2.0% for constitutional cases and 3.0% for statutory cases. This difference is not statistically significant.

Columns 3 reports responses to the subset of constitutional cases in which the Court declared a challenged policy unconstitutional. While invalidations of policies account for only 16% of the constitutional cases in the sample, they are responsible for more than half of the introduced curbing

Table 1: Number and Percentage of Supreme Court Cases Triggering Case-Specific Congressional Responses

	Statutory Cases ($n = 692$)	All Constitutional Cases ($n = 399$)	Invalidations Only ($n = 63$)
Curbing Introduction	2 (0.29%)	18 (4.50%)	10 (15.87%)
Curbing Law Passed	1 (0.14%)	0 (0.00%)	0 (0.00%)
Policy-Based Response Introduced	74 (10.69%)	44 (11.02%)	23 (36.51%)
Policy-Based Response Passed	21 (3.03%)	8 (2.00%)	7 (11.11%)

and policy-based responses to constitutional cases and 88% of the successful policy-based responses to constitutional decisions. In this subset of cases, policy-based responses appear to play a significantly larger role than in the entire body of constitutional cases. Compared to statutory cases, policy-based responses to invalidations of challenged policies were significantly more likely to be introduced and passed, while responses to other judicial review cases experienced significantly lower rates of introduction and passage. The conventional wisdom leads scholars to focus on Court-curbing as the primary response to exercises of judicial power that Congress dislikes. Our analysis reveals that cases in which the Court invalidates policies are doubly vulnerable—triggering the introduction of a substantial number of Court-curbing bills *and* successful policy-based responses. We conclude that the traditional view’s expectations with respect to Court-curbing are largely confirmed while the traditional view understates the role of policy-based responses in interbranch interactions in which the Court exercises judicial review.

Table 2 presents results from multivariate model specifications that control for case characteristics that have been found to affect the probability of response introduction and passage. We consider the impact of the legal basis of a decision on three dichotomous dependent variables (1) introduction of a Court-curbing bill, (2) introduction of a policy-based response, and (3) passage of a policy-based response; the infrequency of Court-curbing response passage makes estimation

of a Court-curbing passage model impossible. To evaluate the impact of the legal basis of a decision on the probability that a case triggers the introduction of a Court-curbing bill, we estimate a probit model. For the policy-based response dependent variables, we employ a probit model with sample selection. The first stage predicts whether a policy-based response is introduced for a case. The second stage predicts whether an introduced policy-based response becomes law. Both models employ robust standard errors.

Our primary explanatory variable is a trichotomous variable that characterizes the legal basis of the decision. Cases are categorized as statutory cases, judicial review/invalidation cases, or judicial review/no invalidation cases. We rely on the Supreme Court Database’s *Authority for Decision* and *Declaration of Unconstitutionality* variables to construct this variable.¹⁰ Statutory cases are the omitted baseline category. The traditional view suggests that the effect of the two *judicial review* indicators should be positive and significant in the Curbing Response Introduction model and negative and significant in both stages of the Policy-Based Response model.

We include measures for other case characteristics previously found to affect the probability of response introduction and passage. Salient cases are more likely to generate public interest and therefore motivate congressional attention; a salience indicator is scored 1 for cases that received front-page coverage in the *New York Times* the day after they were announced (Epstein & Segal 2000).¹¹ Unanimous decisions may be less likely to generate congressional responses either because they signal unimportance or broad consensus; an indicator is scored 1 for unanimous judgments.

¹⁰Constitutional cases are those with authority for decision values of 1 (judicial review–national level) or 2 (judicial review–state level). Invalidation cases are the subset of judicial review cases where *Declaration of Unconstitutionality* is equal to 2 (act of Congress declared unconstitutional), 3 (state or territorial law, regulation, or constitutional provision unconstitutional), or 4 (municipal or other local ordinance unconstitutional). Statutory cases are those with authority for decision values of 4 (statutory construction) or 5 (the interpretation of an administrative regulation, rule, or executive order).

¹¹Our key findings—(1) that constitutional cases that invalidate policies are significantly more likely to trigger the introduction of Court-curbing legislation than statutory cases, (2) that constitutional cases that do not result in invalidation are significantly less likely to trigger the introduction and passage of policy-based responses than statutory cases, and (3) that policy-based responses to constitutional cases that invalidate policies are passed at rates similar to the rate for statutory cases—are robust to a substitution of the *NYT*-based measure with the salience measures created by Clark, Lax & Rice (2015) that do not depend on media coverage. We also estimate models that include both the *NYT* and Clark et al. measures for the portion of our sample for which the Clark et al. measures are available; these models exclude cases decided after 2009. In these models, we interpret the effect of the *NYT* measure as the impact of media coverage controlling for case salience. We conclude that salience (not media coverage) drives the introduction of Court-curbing introductions, that salience *and* media coverage exert significant effects on the probability of policy-based response introduction, and that salience (not media coverage) increases the probability of policy-based response passage, conditional on introduction. These analyses are reported in the appendix.

Table 2: Model Results Predicting Introduction and Passage of Policy-Based Responses to Supreme Court Decisions, 1997–2012 (robust standard errors in parentheses)

	Model 1 (Probit)		Model 2 (Probit w/ Selection)			
	Curbing Response Introduced		Policy-Based Response Introduced		Policy-Based Response Passed	
	β	(S.E.)	β	(S.E.)	β	(S.E.)
Constitutional case – no invalidation	0.46	(0.34)	−0.38**	(0.14)	−1.02*	(0.45)
Constitutional case – invalidation	1.13**	(0.36)	0.42*	(0.21)	0.04	(0.28)
Case is salient	1.15**	(0.27)	0.90**	(0.16)	0.82**	(0.23)
Case is unanimous			−0.35**	(0.12)	−0.29	(0.24)
U.S. is losing litigant	−0.69	(0.52)	0.65**	(0.19)	0.50	(0.29)
Case outcome is liberal	0.37	(0.26)	−0.13	(0.11)	−0.41	(0.24)
Issue is civil liberties or rights	0.84*	(0.43)	−0.41**	(0.12)		
Time outside gridlock zone					−0.06	(0.05)
Time	−0.03	(0.02)	0.02	(0.01)	0.05*	(0.02)
Constant	−3.51**	(0.54)	−1.21**	(0.14)	−2.08**	(0.29)
Model Stats	$n = 644$		$n = 973$		$n = 118$	
	$\chi^2(7) = 41.17^{**}$		$\chi^2(8) = 34.81^{**}$		Wald test of $\rho = 0$, $\chi^2(1) = 6.65^{**}$	

Robust standard errors in parentheses, ** $p < 0.01$, * $p < 0.05$, (*two-tailed tests*)

The federal government’s resources and political standing may make it particularly successful at motivating congressional action after losing before the Court, so we include an indicator scored 1 when the U.S. was the losing party and 0 otherwise. Since certain response types may be tied to ideological preferences (Clark 2011), we include an indicator scored 1 for cases decided in a liberal direction. To account for the previous literature’s emphasis on civil rights and liberties cases, we include an indicator scored 1 for these issue areas and 0 otherwise. This variable is omitted from the passage-stage model to satisfy the exclusionary restriction. To account for the impact of congressional preferences on the probability that a policy-based response is passed, the passage-stage includes a measure that counts the number of Congresses where the case is outside the gridlock zone. The measure is constructed using Bailey’s (2013) inter-institutional ideology estimates. The boundaries of the gridlock zone depend on the ideological location of the members of Congress whose support is needed to change policy. We adopt the filibuster-veto model of congressional

decisionmaking advanced by Krehbiel (1998) and Brady & Volden (2006). The filibuster-veto model assumes that in order for Congress to pass a new law, the law must be preferred to the status quo policy by two-thirds of the members of each chamber of Congress (in order to overcome a potential presidential veto) and sixty percent of the Senate (in order to overcome a potential filibuster). For our purposes, the Supreme Court decision is the status quo policy; we locate Supreme Court cases at the ideal point of the median member of the majority coalition (Carrubba, Friedman, Martin & Vanberg 2012). We follow the procedures outlined by Gray & Jenkins (2019, 121) to identify the boundaries of the gridlock zone for each year and then average across the two years of each Congress.¹² We then count the Congresses during which the case was outside the gridlock zone. We expect higher values to be associated with an increased probability of policy-based response passage.¹³ Finally, we include a measure of the time available for Congress to respond to the cases in our sample; the measure equals the years between the announcement of a decision and the end of our observation period.¹⁴

Figure 1 plots the average change in the predicted probability of curbing response introduction, policy-based response introduction, and policy-based response associated with a change from absence to presence of select dichotomous independent variables. For each model, we report the effect of the two constitutional legal basis variables and statistically significant variables. For the legal basis variables, the effect reported is the predicted change associated with a change from a statutory case to the relevant constitutional case type.

Constitutional cases in which the Court affirms the constitutionality of challenged policies are not more likely to engender the introduction of Court-curbing proposals than statutory cases and

¹²Because we do not have ideology scores for 2012, values for the 112th Congress are based only on 2011 values.

¹³We also estimated a series of Cox Proportional Hazard Models predicting the time to passage of a policy-based response. Using the case-year as the unit of observation allowed us to incorporate measures of congressional preferences that vary over time. In one model, we included a measure of the distance between the relevant Supreme Court case and Congress, operationalized as the midpoint between the House and Senate averaged over the two years that make up a Congress. In a second model, we include a measure of the distance between the Supreme Court opinion and the median member of the chamber of Congress further from the opinion. We reason that it is the further chamber that will constrain the ability to pass a response to a decision. Across models, we fail to identify significant effects for the measures of congressional preferences and our key findings are robust. These analyses are available from the authors.

¹⁴Results are robust to the inclusion of the squared and cubed measures to control for time dependence per the method recommended by Carter & Signorino (2010). A test of joint significance of the squared and cubed terms fails to reject the null that the terms are jointly equal to 0.

are significantly less likely to engender the introduction of policy-based responses than statutory cases. For curbing proposals, the predicted probabilities of introduction are 0.01 for statutory cases, 0.03 for judicial review/no invalidations cases, and 0.08 for judicial review/invalidations cases.¹⁵ Turning to policy-based responses, the predicted probability of introduction is 0.12 for statutory cases. This is significantly higher than the prediction for the non-invalidation constitutional cases (0.06) and significantly lower than the prediction for the invalidations cases (0.21). At the PBR passage stage, our model predicts the probabilities of passage (conditional on introduction) are 0.05 for the non-invalidation judicial review cases, 0.19 for the invalidations cases, and 0.29 for statutory cases. We cannot reject the null hypothesis that the probability of policy-based response passage is equal for statutory cases and the invalidations cases. The unconditional probabilities reveal a similar pattern—a near-zero probability of passage for the non-invalidations judicial review cases with significantly higher and statistically indistinguishable predictions for the statutory (0.05) and invalidations cases (0.05).

Other case characteristics shape the prospects for the introduction and passage of responses to Court decisions. Across models, the impact of case salience is positive and significant indicating the salient cases are more likely to motivate the introduction of Court-curbing and policy-based responses and the passage of policy-based responses. The predicted probability of a non-salient case triggering a curbing-response is 0.01, compared to 0.08 for salient cases. For policy-based responses, the average increase in the probability of response introduction associated with a change in the value of the salience measure from 0 to 1 is 0.20—this is a 250% increase from the baseline prediction. The probability of passage (conditional on PBR introduction) is predicted to be an average 0.10 higher for salient cases than for non-salient cases (an increase of 53%). Unanimity is also important. The effect of unanimity cannot be estimated in the curbing introduction model because no unanimous cases were met with curbing responses during the sample period. For policy-based responses, the probability of introduction for unanimous cases is 0.08; for cases with dissent the probability of PBR introduction is 0.13. Cases related to civil rights and liberties are significantly more likely

¹⁵Predicted probabilities are calculated for each observation in the dataset at different values of the relevant independent variable. Other variables retain their observed values. The predictions for each value of the independent variable of interest are then averaged across the observations in the sample. These calculations are carried out using Stata's *margins* command.

to trigger the introduction of curbing responses and significantly less likely to trigger policy-based response introductions than cases in other issue areas. Ninety-five percent of curbing proposals are introduced in response to cases related to civil liberties or civil rights while policy-based responses are distributed broadly across issue areas. Policy-based responses are introduced and passed in response to cases related to civil liberties, civil rights, economic activity, federalism, attorneys, and federal taxation. When the United States government is the losing party in a case, the probability of policy-based response introduction is expected to increase to 0.23 (from a baseline of 0.10).

V. Conclusion

We ask whether Congress responds differently to the Supreme Court’s constitutional and statutory decisions. The conventional wisdom is that members of Congress will primarily pursue institutional attacks in response to constitutional decisions and will primarily pursue policy-based responses to statutory decisions. This view is rooted in the correct notion that Congress does not enjoy the power to reverse the Court’s constitutional interpretations as it does with the Court’s statutory interpretations. We contend that it overlooks the parallels between the policy goals and impacts of responses to constitutional and statutory cases.

Our analysis of Court-curbing and policy-based responses to the Supreme Court’s constitutional and statutory decisions between 1997-2012 suggests that the reality is more complicated than is often assumed. We find that the use of Court-curbing bills is consistent with the conventional wisdom—they are primarily used in response to constitutional cases and enactment is rare. However, they are not the sole or primary tool used by members of Congress to respond to constitutional decisions. Rates of introduction and passage of policy-based responses are comparable for statutory cases and the subset of constitutional cases in which the Court invalidates policies. Because these are the cases most likely to be the focus of studies of Congress–Supreme Court interaction, their inconsistency with the predictions derived from the conventional wisdom is especially noteworthy. The legal basis of a Supreme Court decision *is* an important factor in shaping congressional responses to the Court; however, neither the Court’s statutory decision-making nor its constitutional decisions in which policies are invalidated are characterized by judicial finality (Fisher 2004).

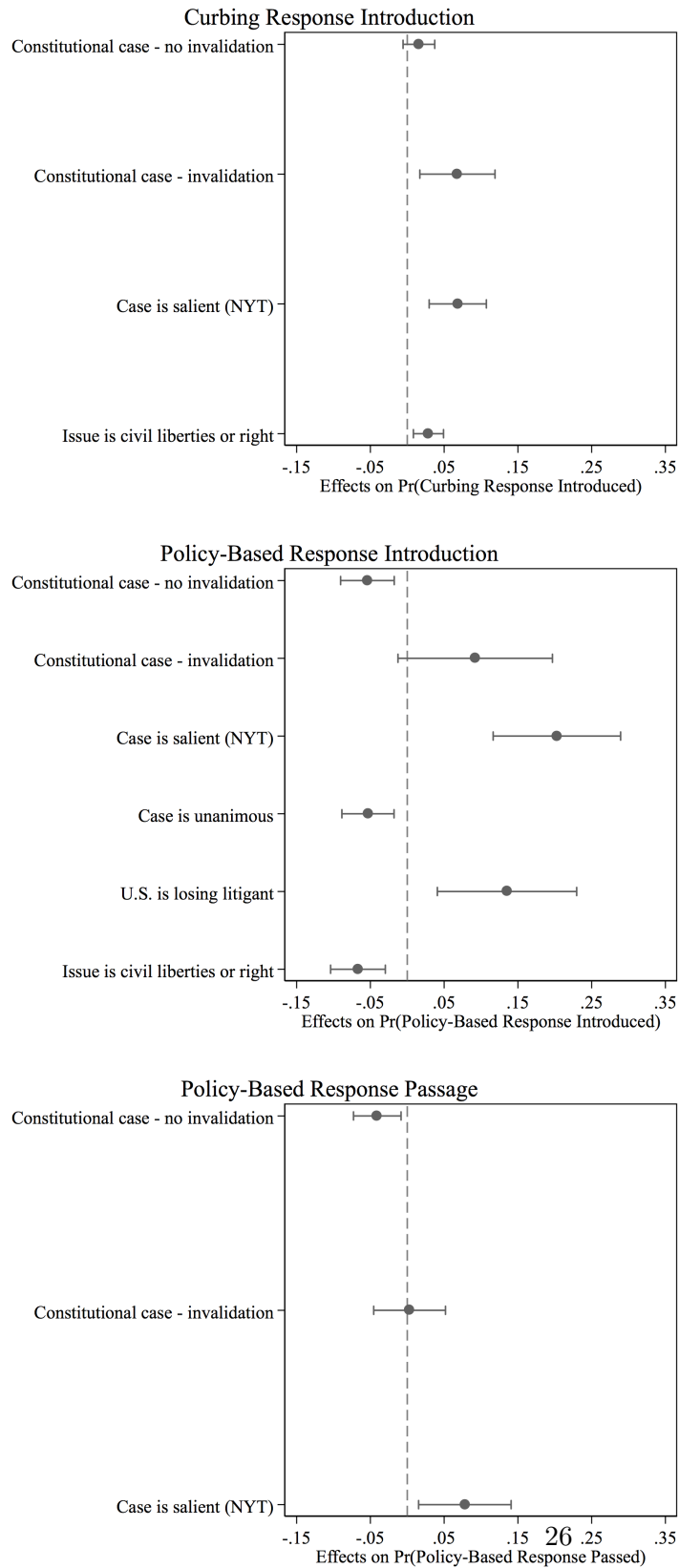
Like Meernik & Ignagni (1997) and Uribe, Spriggs & Hansford (2014), we find that Congress regularly responds to the Court’s constitutional/invalidations cases. However, we caution against interpreting our findings as evidence that Congress can or does *reverse* or *override* this set of cases at higher rates than the Court’s statutory cases. Careful attention to the substance of these proposals makes clear that they are meaningful attempts to change policy, but that they are substantially constrained by the legal rules announced in the cases to which they respond.

The regular use of policy-based responses in addition to the use of Court-curbing proposals is consistent with theoretical understandings of legislative behavior and policymaking. These cases are, by definition, legally salient (Maltzman, Spriggs & Wahlbeck 2000). They also disturb the status quo. Their disruptive nature may make them more likely to provoke action from other policymakers. Policy-based responses can further the electoral and policy goals assumed to motivate members of Congress (Clausen 1973, Fenno 1973, Mayhew 1974). Constitutional cases will often present good vehicles for position-taking, making them good candidates for Court-curbing responses. Objecting to Supreme Court activism can be a winning political strategy and critiques of constitutional decisions are easily fashioned into sound bites that allow members of Congress to portray themselves as defenders of the Constitution. (The relative ease of messaging around the Court’s constitutional decisions coupled with the public’s perception that the Court’s work is primarily focused on judicial review likely contributes to the dearth of Court-curbing responses to statutory decisions.) The utility of Court-curbing proposals, however, should not be interpreted as evidence that there is no benefit from policy-based responses to the Court’s constitutional decisions. Members of Congress need not choose between these tools; they can pursue multi-pronged strategies for dealing with disfavored Court decisions. If a decision’s impact can be minimized or reversed with a policy-based measure, members of Congress who support the proposal stand to reap whatever position-taking benefits are associated with opposing an unpopular decision as well as the ability to claim credit for passing laws to minimize the decision’s impact. In short, Supreme Court invalidations of policies imposed by other political actors are likely to be especially good targets for Court-curbing and policy-based responses.

Finally, our empirical approach contributes the literature on congressional responses to the

Supreme Court by introducing a new method for identifying responsive proposals. Congressional committee reports have been the primary source of information on non-curbing responses to the Court’s constitutional decisions, but the value of these reports as sources of information on major legislation has decreased dramatically since 1990 (Christiansen & Eskridge 2014), hindering the study of policy-based responses in the post–1990 period. We supplement the committee report method introduced by Eskridge (1991) by relying on searches of bill text and the *Congressional Record* to identify responsive proposals. Our approach works equally well in identifying responses to statutory and constitutional cases and is not time-bound like the committee report methods. This new approach allows us to offer an integrated analysis that avoids some of the fragmentation in previous work. By integrating the analysis of institutional attacks and policy-based responses in statutory and constitutional cases across issue areas, we are able to offer a more complete picture of congressional responses to Supreme Court decisions.

Figure 1: Predicted Change in Probability of Response Introduction and Passage Associated with Change in Value of Independent Variables from 0 to 1 (with 95% confidence intervals)



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Appendix

Appendix Table 1 reports the statutory override-Supreme Court case pairs used in each of 3 studies—this manuscript (Column heading=“B&G.”), Christiansen and Eskridge (column heading=“C&E”), and Buatti and Hasen (column heading=“B&H”). A one in a column indicates that the relevant study identified the listed override-case pair. The statutory overrides included in our sample are numbered 1 thru 21.

Appendix Tables 2 and 3 report the models referenced in Footnote 11 that employ Clark, Lax, and Rice (2015) salience measures (1) in place of and (2) in addition to the Epstein and Segal (2000) *New York Times*–based measure used in the models reported in the manuscript. To facilitate comparisons across specifications, each table includes the model reported in the manuscript in the left-most column(s).

Table 1: Comparison of Override Statute–Case Pairs Samples

Override Statute–Case Pair		B&G	C&E	B&H
1	IRS Restructuring and Reform Act of 1998 / <i>United States v. Brockamp</i> (1997)	1	1	1
2	Credit Union Membership Access Act / <i>National Credit Union Administration v. First National Bank & Trust Co.</i> (1998)	1	1	1
3	Job Creation and Worker Assistance Act of 2002 / <i>Gitlitz v. Commissioner</i> (2001)	1	1	1
4	REAL ID Act of 2005 / <i>INS v. St. Cyr</i> (2001)	1	1	1
5	Detainee Treatment Act of 2005 / <i>Rasul v. Bush</i> (2004)	1	1	1
6	VRA Reauthorization and Amendments Act of 2006 / <i>Georgia v. Ashcroft</i> (2003)	1	1	1
7	VRA Reauthorization and Amendments Act of 2006 / <i>Reno v. Bossier Parish School Board</i> (2000)	1	1	1
8	Trademark Dilution Revision of 2006 / <i>Moseley v. V. Secret Catalogue, Inc.</i> (2003)	1	1	1
9	Military Commissions Act of 2006 / <i>Hamdan v. Rumsfeld</i> (2006)	1	1	1
10	ADA Amendments Act of 2008 / <i>Toyota Manufacturing of KY, Inc. v. Williams</i> (2002)	1	1	1
11	ADA Amendments Act of 2008 / <i>Albertson’s Inc. v. Kirkingburg</i> (1999)	1	1	1
12	ADA Amendments Act of 2008 / <i>Murphy v. UPS, Inc.</i> (1999)	1	1	1
13	ADA Amendments Act of 2008 / <i>Sutton v. United Airlines, Inc.</i> (1999)	1	1	1
14	Lilly Ledbetter Fair Pay Act of 2009 / <i>Ledbetter v. Goodyear Tire & Rubber Co.</i> (2007)	1	1	1
15	Fraud Enforcement and Recovery Act of 2009 / <i>United States v. Santos</i> (2008)	1	1	1
16	Fraud Enforcement and Recovery Act of 2009 / <i>Allison Engine Co. v. U.S. ex. rel. Sanders</i> (2008)	1	1	1
17	Family Smoking Prevention and Tobacco Control Act / <i>FDA v. Brown & Williamson Tobacco Corp.</i> (2000)	1	1	1
18	Leahy-Smith America Invents Act / <i>Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.</i> (2002)	1	1	1
19	Fair and Accurate Credit Transactions Act of 2003 / <i>TRW Inc. v. Andrews</i> (2001)	1	0	0
20	OPEN Government Act of 2007 / <i>Buckhannon Board & Care Home, Inc. v. WV Dept. of Health and Human Resources</i> (2001)	1	0	1
21	Dodd-Frank Wall Street Reform and Consumer Protection Act / <i>Morrison v. National Australia Bank Ltd.</i> (2010)	1	0	0
x	Act of Nov. 13, 1998 / <i>Muscarello v. United States</i> (1998)	0	1	0
x	Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 / <i>Till v. SCS Credit Corp.</i> (2004)	0	1	0
x	Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 / <i>Assoc. Commercial Corp v. Rash</i> (1997)	0	1	0
x	Dodd-Frank Wall Street Reform and Consumer Protection Act / <i>Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson</i> (2005)	0	1	0
Total		21	22	19

Table 2: Court-Curbing Introduction Model, Comparing Use of *New York Times* and *Clark, Lax, and Rice (CLR)* Salience Measures

	Using <i>NYT</i> Salience Measure	Using <i>CLR</i> Salience Measure	Using Both Salience Measures
Constitutional case - no invalidation	0.46 (0.34)	0.92* (0.43)	0.85* (0.43)
Constitutional case - invalidation	1.13** (0.36)	1.36** (0.48)	1.21** (0.45)
<i>NYT</i> Salience	1.15** (0.27)		0.52 (0.42)
<i>CLR</i> Salience		1.52** (0.29)	1.33** (0.33)
U.S. was losing litigant	-0.69 (0.52)	0.16 (0.55)	0.13 (0.57)
Liberal decision	0.37 (0.26)	0.56 (0.37)	0.46 (0.38)
Issue is civil liberties or rights	0.84* (0.43)		
Time	-0.03 (0.02)	0.00 (0.04)	0.00 (0.04)
Constant	-3.51** (0.54)	-4.46** (0.78)	-4.39** (0.80)
Observations	644	338	338
χ^2	41.17	37.33	37.38
Log pseudo-likelihood	-57.74	-38.57	-37.70

Robust standard errors in parentheses

** p<0.01, * p<0.05

Table 3: Heckman Probit Model Results Predicting Introduction and Passage of Policy-Based Responses to Supreme Court Decisions, 1997–2012 (robust standard errors in parentheses)

	Using <i>NYT</i> Measure		Using <i>CLR</i> Measure		Using Both Measures	
	Introduction	Passage	Introduction	Passage	Introduction	Passage
Constitutional case – no invalidation	–0.38** (0.14)	–1.02* (0.45)	–0.57** (0.16)	–1.29** (0.43)	–0.57** (0.16)	–1.32** (0.44)
Constitutional case – invalidation	0.42* (0.21)	0.04 (0.28)	0.40 (0.22)	–0.03 (0.35)	0.32 (0.24)	–0.09 (0.35)
<i>NYT</i> Salience	0.90** (0.16)	0.82** (0.23)			0.38* (0.18)	0.19 (0.32)
<i>CLR</i> Salience			0.49** (0.08)	0.56** (0.13)	0.39** (0.09)	0.52** (0.17)
Case is unanimous	–0.35** (0.12)	–0.29 (0.24)	–0.26* (0.13)	–0.30 (0.26)	–0.24 (0.13)	–0.29 (0.27)
U.S. is losing litigant	0.65** (0.19)	0.50 (0.29)	0.76** (0.21)	0.61 (0.33)	0.73** (0.21)	0.59 (0.34)
Case outcome is liberal	–0.13 (0.11)	–0.41 (0.24)	–0.14 (0.12)	–0.48 (0.26)	–0.16 (0.12)	–0.50 (0.26)
Issue is civil liberties or rights	–0.41** (0.12)		–0.46** (0.13)		–0.47** (0.13)	
Time outside gridlock zone		–0.06 (0.05)		–0.07 (0.05)		–0.07 (0.05)
Time	0.02 (0.01)	0.05* (0.02)	0.01 (0.02)	0.04 (0.03)	0.00 (0.02)	0.04 (0.03)
Constant	–1.21** (0.14)	–2.08** (0.29)	–0.86** (0.18)	–1.80** (0.35)	–0.90** (0.19)	–1.80** (0.37)
Observations	973	118	780	105	780	105
$\chi^2(8)$		34.81**		41.97**		40.25**
Wald test of $\rho = 0$, $\chi^2(1)$		6.65**		4.20*		4.74*

Robust standard errors in parentheses, ** $p < 0.01$, * $p < 0.05$, (*two-tailed tests*)