The Supreme Court and Presidential Elections: An Analysis of Divisive Decisions and Judicial Review in Presidential Elections

Jeff Hastings
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THE SUPREME COURT AND PRESIDENTIAL ELECTIONS: AN ANALYSIS
OF DIVISIVE DECISIONS AND JUDICIAL REVIEW IN
PRESIDENTIAL ELECTIONS

by

Jeff Hastings

A thesis submitted in partial fulfillment of the requirements for the degree
of
MASTER OF ARTS
in
Political Science

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UTAH STATE UNIVERSITY
Logan, Utah

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ABSTRACT

The Supreme Court and Presidential Elections: An Analysis of Divisive Cases and Judicial Review in Presidential Elections

by

Jeff Hastings, Master of Arts

Utah State University, 2023

Major Professor: Greg Goelzhauser, Ph.D.
Department: Political Science

A presidential election is, arguably, the most important event in the American political system. The Congress and the president are undoubtedly affected by the pressures and publicity of these events, but we have little understanding of whether the Supreme Court behaves differently in presidential election years. In this paper, I argue that the Supreme Court will experience more consensus in its decisions and make less use of judicial review because of the potential for heightened public scrutiny that can arise during the term overlapping with a presidential election. I test this claim using ordinary least squares regression. I find that a presidential election has no significant effect across three measures of dissent and across a measure of the use of judicial review from the 1946 through 2020 terms. Overall, the Court seems well-insulated from the effects of a presidential election—at least as far as these measures indicate.

(70 pages)
PUBLIC ABSTRACT

The Supreme Court and Presidential Elections: An Analysis of Divisive Cases and Judicial Review in Presidential Elections

Jeff Hastings

A presidential election is, arguably, the most important event in the American political system. The Congress and the president are undoubtedly affected by the pressures and publicity of these events, but we have little understanding of whether the Supreme Court behaves differently in presidential election years. In this paper, I argue that the Supreme Court will experience more consensus in its decisions and make less use of judicial review because of the potential for heightened public scrutiny that can arise during the term overlapping with a presidential election. I test this claim using ordinary least squares regression. I find that a presidential election has no significant effect across three measures of dissent and across a measure of the use of judicial review from the 1946 through 2020 terms. Overall, the Court seems well-insulated from the effects of a presidential election—at least as far as these measures indicate.
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Introduction

Does a presidential election cause less division in Supreme Court decisions or discourage the Court’s exercise of judicial review? The Supreme Court’s power derives from the perception of its legitimacy; that is, from the perception that it is worthy of the public’s trust because it acts impartially and justly (Gibson and Caldeira, 1998). A presidential election is, arguably, the most important event in the American political system. The Congress and the president are undoubtedly affected by the pressures and publicity of these events, but we have little understanding of whether the Supreme Court behaves differently in presidential election years. A presidential candidate or other high-profile figure—using the stage of a presidential election—has the chance to do a great deal of damage to this perception of legitimacy by highlighting the Court’s partisan character, (in essence, suggesting the Court is not impartial and is not just). Given these considerations, it seems reasonable to explore exactly how—if at all—a presidential election can influence the Court’s decisions. If such an effect does exist, it would suggest the electoral context of the Supreme Court’s decisions can have a bearing on the outcome of those decisions.

In this paper, I argue that the Supreme Court will experience more consensus in its decisions and make less use of judicial review because of the potential for heightened public scrutiny that can arise during the term overlapping with a presidential election. I test this claim using ordinary least squares regression. I find that a presidential election has no significant effect across three measures of dissent and across a measure of the use
of judicial review from the 1946 through 2020 terms. Overall, the Court seems well-insulated from the effects
of a presidential election—at least as far as these measures indicate.

I begin by sketching out a few fundamental theoretical points of my argument including a brief discussion of judicial decision making and legitimacy. Next, I review why the Supreme Court may care about presidential elections and why the Supreme Court might not care about presidential elections. I then lay out the results of my research, and offer some conclusions based on the data.
Theories of Judicial Decision Making and Legitimacy

In one sense, we have a good understanding of how elections affect the Court. The electorate selects the president, and the president appoints the justices, subject to Senate confirmation. In another sense, however, despite the significance of these events and despite scholarly interest in judicial decision making and legitimacy, we have very little understanding about whether presidential elections affect the Court as an election unfolds. At its core, my argument is that the Court will strategically limit division and judicial review in a presidential election year out of a concern for the Court’s legitimacy. More essentially, I am arguing that the Court uses its decisions to protect its good name. This requires we answer two preliminary questions: Do the justices respond to outside pressures? And are the justices motivated enough by their legitimacy to act on these outside pressures?

If we consider the primary explanations for judicial behavior, one ideological, and one strategic, we find very different answers about the possibility of an outside event like a presidential election impacting the Court.\footnote{There are other approaches, namely psychological and legal approaches, but because my focus is on the Court as a whole and because I focus on division, judicial review, and external constraints, rational choice theories dealing with ideology and constraints such as the attitudinal model and the strategic model seemed most appropriate.} If ideology is the driving force behind a justice’s decisions, what is happening outside the Court does not make much of a difference. Although the justice may be aware of what is happening in an election and even care deeply about what is happening, the justice is not likely to put ideology aside just to avoid the possibility of looking bad for a brief moment in time. Justices, according
to this view, can prioritize ideological aims precisely because the Court has institutional insulation enabling it to stay above the fray of an election (Segal and Spaeth, 1993; Shughart and Tollison, 1998). Unlike their counterparts in the legislature and the presidency, the justices do not face the prospect of reelection and they serve for life under good behavior. Research tells us that ideological theories have significant explanatory power (Baum, 2017). In search and seizure cases, for example, ideology correctly predicted 64% of justices’ votes on the merits (Segal, 2017). As convincing as this is, we also know not every decision will invoke ideology and not every justice votes conservatively or liberally all the time (Epstein and Knight, 2017, Baum, 2017).

By contrast, if we consider strategic accounts, the justices are more open to outside influence, particularly outside constraints. In this view, a justice acts strategically when, as part of their decision-calculus, they account for the preferences not only of other justices but the preferences of external actors as well—a process which sometimes entails choosing less preferred or less ideologically pleasing alternatives (Epstein and Knight, 2017 pg. 49). In this way, external forces can function as constraints on the Court’s range of choices: the justices survey their options, weigh the potential responses from external actors, and adjust their decisions accordingly. As Epstein and Knight (1998) argue:

> Justices are not unconstrained actors who make decisions based only on their own ideological attitudes. Rather, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act”.

Empirical work has suggested that Congress (through Court curbing threats), the President (through appointments and the office of the Solicitor General) and—to an arguable degree—public opinion all can impose external constraints on the Court of one
kind or another (Clark, 2009; Dahl, 1959; Caldiera and Wright, 1998; McGuire, 1998; Enns and Wolhfarth, 2017). We have also seen examples of the Court tempering the ideological tenor of its outputs because of an ideologically hostile Congress. The Rehnquist Court, for instance, was far more willing to declare liberal laws unconstitutional as soon as Republicans came to power in the House in 1994 (Harvey and Friedman, 2006). If we are to find an effect during a presidential election, I argue that it is most likely to take the form of an outside constraint like these examples—that is, the justices specifically account for the timing of a presidential election, account for the potential reaction to their decisions, and modify their decisions accordingly.

However, in order for a presidential election to exert any constraining influence, the justices must first care about what happens to the Court. My argument assumes, therefore, that the justices concern themselves with the legitimacy of the Court. The justices have good reasons to do so (Bartels and Johnston, 2013). The judiciary possesses neither the purse nor the sword. It has only the power of judgment—a power the Court cannot wield effectively without the widespread trust of the people (Federalist 78). As Justice O’Conner wrote, “The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands” (Bush v.

---

2 Of course, when discussing external influences, the ‘Switch in Time that Saved Nine’, immediately comes to mind, one of the key moments in judicial history. This episode might be thought of as the quintessential example of a President leveraging his popularity to get the Court to budge from its outdated position. Some evidence suggests that the justices already had made their choice in West Cost Hotel v. Parrish (1937) before Roosevelt ever unveiled his court packing plan, a fact which implies the Court truly began to back the New Deal only after Roosevelt had appointed five new, sympathetic justices (Shughart, 2004; Leuchtenburg 1995).

3 By legitimacy, I mean a “reservoir of goodwill” powerful enough to ensure compliance even when people disagree with a given decision (Gibson and Nelson, 2015).
Vera, 1996). The Court, it must be remembered, is not the keeper of its own legitimacy so maintaining the public’s confidence “is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself” (Bush v. Gore, 2000). The wrong move might impact the image, and thus the efficacy, of the entire judiciary and potentially endanger the Court’s ability to administer justice and protect rights. For this reason, the Court must treat its legitimacy like any other resource: empowering yes, but also limited and perishable.⁴

Since the justices have reasons to care about the Court’s public image, we can also posit that one of the things motivating them is the maintenance of the Court’s institutional legitimacy. This is an important distinction because caring about a presidential election is one thing and acting on that care is another. When it comes to motivations, we know the significance of ideological goals in explaining judicial behavior (Segal and Spaeth, 1993). But we also know that judges’ goals are not unidimensional (Segal and Spaeth, 1993; Epstein and Knight, 1998; Epstein, Landes and Posner, 2013; Epstein and Knight, 2017). In fact, the research on this subject seems to favor multiplicity over single-mindedness and complexity over simplicity (Krewsom and Owens, 2017).⁵ If justices can be motivated by something like external satisfaction and

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⁴ Even though the Court has good reasons to care about its legitimacy, it is possible the Court does not really need to worry about losing the trust of the people because people’s feelings about the Court are relatively stable and relatively positive, even when they disagree with Court’s decisions (Gibson 2007; Gibson, Caldiera, 1998). As I note later, the justices do not necessarily believe this.

⁵ Epstein, Landes and Posner (2013), for instance, identified five major, non-ideological factors which judges might pursue in maximizing their own preferences: job satisfaction, external satisfaction, leisure, salary, and promotion. Some of these areas, like promotion, do not apply to the Court, but maintaining a collegial atmosphere with associate justices, job satisfaction, reputation, prestige, and leisure all could conceivably play roles.
personal prestige, it is not too hard to imagine they can be motivated to protect the prestige of their institution.

One compelling reason to believe the justices are motivated by their legitimacy is a pragmatic one. The justices need other branches to implement their decisions (Hall, 2014; Enns and Wohlfarth, 2017). If the Court loses the confidence of the people, what is to stop the Congress and the President from simply ignoring its decisions? Without legitimacy, the Court quite simply cannot get anything done. In that sense, legitimacy is one of the most powerful motivators the justices have.

The fact that justices are—in all likelihood—motivated to protect the Court’s legitimacy is an important point. It means external forces like a presidential election, can become constraints on the Court’s actions if they pose a threat to the Court’s legitimacy. I do not, however, imagine every decision that comes before the Court triggers a concern for legitimacy but, over time, the Court may worry about growing trends enough to watch their aggregate output more vigilantly at key times.
Why the Court Might Care About Presidential Elections

For the Supreme Court, presidential elections have the power to impact the Court’s legitimacy. First, the public’s attention is keyed into public affairs. Gallup surveys routinely indicate that the number of people following the election ‘very closely’ can rise by as much as 10% in the months before a presidential election (Younis, 2020). Presidential elections, thus, create fertile ground for attitude formation. While people might not be persuaded by campaign ads or rhetoric, the campaign as a whole makes a difference to voters, possibly because it removes uncertainty surrounding candidates and their positions (Coppock, Hill, and Vavreck, 2020; Peterson, 2009; Holbrook, 1999). Presidential rhetoric towards the Supreme Court does tend to ramp up in election years, which suggests that an election can serve as an instrument informing the public about the Court’s decisions and, perhaps, more significantly, the candidate’s interpretation of those decisions (Blackstone and Goelzhauser, 2014).

Second, though the justices do not face the pressure of a campaign, the Court is uniquely disadvantaged during an election in a way that gives it an incentive to be extra careful. The Court cannot respond to accusations and criticisms in the same way as other political actors. The Court does not participate in debates or issue media releases, and unlike non-election years, the Court can take flak from both sides during an election year. The Sebelius (2012) decision furnishes us with an example of how Supreme Court

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6 Results from a Gallup’s survey suggest that the public follows national politics more closely during a presidential election year. On average, 39% of people polled in the last fifteen years said they follow national politics “very closely” in a presidential election year as opposed to 29% in non-years (Younis, 2020). See also (Mitchell et al, 2020)
decisions can morph into political mobilization against the Court during a campaign. According to reports, in just 24 hours after the decision was announced, the Romney campaign collected $4 million in donations in the of 2012. “What happened yesterday calls for greater urgency”, Romney said the next day, “I think many people assumed that the Supreme Court would do the work that was necessary in repealing Obamacare,” but they “did not get that job done” (‘Romney Raises Millions After Obamacare Ruling’, 2012). All of this controversy occurred without the Court saying one word in its defense. Though there are undoubtedly anomalous aspects involved in such an important decision, this example serves to illustrate that the Court’s decisions can become rallying cries in an election to the opponents of a decision. If a candidate can fire life into a campaign with the right piece of news, a recent controversial Supreme Court decision may very well prove to be good kindling.

Third, politics take on an urgent and intense character during an election as partisans and patriots labor to ensure the country adopts their vision for the future. Voter turnout is higher in presidential election years, more money is raised for elections in these years, and voters increasingly believe the stakes are higher during a presidential election (McDonald and Popkin, 2002; “Cost of Elections”, 2022; Goldmacher, 2020; Galston, 2020). It is likely, then, that criticism of the Court, when it happens, takes on a more intense character too. Evidence does suggest Presidents are more critical in their commentary about the Court during an election and these critical comments could set the tone for the entire campaign (Blackstone and Goelzhauser, 2014). If the justices’

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7 Voter turnout is a higher during presidential election years. On average, 60% of the voting populace casts a ballot during presidential election years compared with 40% turn out during mid-term election years (McDonald and Popkin, 2002).
sensitivity to criticism varies with the intensity of that criticism, then potential is there for the Court to be more sensitive during an election.

Justice Alito’s confirmation provides insight into what can happen when the intensity of a campaign focuses on the Court. During his confirmation battle, millions of dollars were raised by both sides, which turned into ads showing him as either a partisan operative or a restrained hero, which turned into lobbying, which all set the stage for a round of contentious hearings. In the process, people came away with a lower opinion of the Court itself. Gibson and Caldiera (2009 pg. 110) observed, “Perhaps most telling, those who saw a greater number of advertisements became substantially less supportive of the Court…Exposure to the ads is associated with lower levels of support for the Court, as well as a decline in support for the institution. This is one of the strongest relationships we observe in these data”. In similar fashion, if a presidential election campaign mobilizes its resources to take on the Court, we can expect a similar outcome and we can expect the justices can anticipate this, having experienced these confirmation battles firsthand.

One could argue that if the justices are worried about exposure during a presidential election, this would encourage them to be careful all the time, not just during a presidential election year. While possibly true, there are also solid grounds to suppose that the Court may behave differently during the term of an election. Public affairs seem to make the biggest splash closest in time to when they occur. This is one reason why candidates respond better to constituents in elections (Christensen and Ejdemyr, 2020). Similarly, a search of New York Times articles revealed that mentions of the Supreme Court’s decision in Sebelius (2012) exploded after the announcement of the decision but
declined precipitously after the 2012 election (“Search of the New York Times”, 2022). This ‘factor of timeliness’ could apply to campaign issues as well. When presented with multiple arguments, people tend to give over-emphasis to the final argument they encounter in their decision making (Chong and Druckman, 2010). For presidential candidates, this means they might over-emphasize the Court’s more recent decisions in their campaigns. For those who only pay closer attention to public affairs during a presidential election year, what they read or see or hear about the Court during the election may be one of the only impressions of the Court they get, and given Druckman’s research, it may certainly be the most salient impression. For the Court, this means that if a series of controversial decisions are issued in an election year, these decisions are likely to receive the most attention right at the time politics become more intense, people start following politics more closely, and people start caring about politics more deeply.

The Court might also change its behavior in a presidential election year in response to the partisan character of politics. Americans, at least recently, seem to believe politics are becoming more partisan during presidential elections (Schaeffer, 2020; Doherty, Kiley, and Jameson, 2016). The Court might react to this by changing its output to better reflect the Court’s impartiality. Professor Kate Shaw, referring to the partisan divisions created by the 2020 election speculated, “I suspect the justices feel there is value in conveying to the American people that in a hyper-partisan moment…the court remains a nonpartisan institution” (Dwyer, 2021). Likewise, in other presidential election

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8 I counted over 100 references to the Supreme Court decision in Sebelius from June 26, 2012 to Dec. 31, 2012. For all of 2013, however, I counted fewer than 30 references to the decision.
years, when the partisan voices are loudest, we can surmise the Court might try to
distance itself as much as possible from any stain of political bias.

The Sebelius (2012) decision shows us exactly how the Court’s reputation can
come under attack after a controversial decision in a presidential election year. Justices
are, we can reasonably infer, aware of the reactions to their decisions and have their
fingers on the pulse of the Court’s reputation. The justices care about appearances, they
care about the reputation of the Court, and the justices take note of events around them
(Tushnet, 2005; Rosen, 2007; Farias, 2015). The chief justice, meanwhile, may watch
the public’s mood very closely during a presidential election because strong reactions to
Court decisions can become defining features of a chief’s tenure. One vote can swing
the entire Court. Consequently, the pressure of an election does not have to sway every
justice, or even a majority of them, only key justices at key times. It seems possible, then,
the Court would try to show itself in the best light possible just in case the exacting
spotlight of public attention turns to the judiciary.

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9 Justice Kennedy, for instance, “would constantly refer to how it’s going to be perceived, how the papers
are going to do it, how it’s going to look” (Tushnet, 2005); Chief Justice Roberts, for one, admitted as much
in an offhand comment in his interview with Jeffrey Rosen (Rosen, 2007).
Justice Breyer said in an interview, “judges, like everyone else, read the newspaper” (Farias, 2015)
10 Even though the Hughes Court produced some major decisions in its early years United States v. Curtiss-
Wright Export Corp. (1936) and Near v. Minnesota (1931), it mainly is remembered for just two things: its
obstruction of the New Deal and for the legendary ‘Four Horseman’ who were the primary authors of that
obstruction. The ‘Four Horseman’ were justices Pierce Butler, James Clark McReynolds, George Sutherland,
and Willis Van Devanter.
Why the Court Might Not Care About a Presidential Election

At the same time, a number of persuasive arguments can be made that the justices are unphased by presidential elections. One such argument, for example, is that people’s deep-seated feelings about the Court exist independently of the Court’s specific actions. In the literature, such feelings constitute the Court’s ‘diffuse support’, a reservoir of goodwill towards the Court or a general resistance to changing fundamental aspects of the Court as an institution (Gibson 2007; Gibson, Caldiera, 1998). In this view, nothing the court does in the short term can really change its levels of diffuse support because these beliefs are grounded in things outside of the Court’s direct products: democratic socialization, exposure to authoritative judicial symbols, and positive experiences in formative years (Nelson and Gibson, 2017; Gibson, Lodge, and Woodson, 2014). This means the Supreme Court can issue a controversial decision every now and then and still enjoy people’s long-term trust and loyalty (Mondak and Smithey, 1997). It also means the Court should not be too concerned about how their decisions look at specific moments in time.

Though this notion of diffuse support has figured prominently in scholarly discourse for decades and has the empirical endorsement of numerous studies, it is far from undisputed. Specifically, recent work has cast doubt on the idea that people’s levels of diffuse support and their satisfaction with court decisions are completely unrelated (Nelson and Gibson, 2017). Bartels and Johnston (2013), for instance, found that ideologically incongruous decisions can damage a person’s levels of diffuse support. In Christensen and Glick’s (2015) study, they observed that, for those who have ideological
misgivings about the result, a significant decision such as *Sebelius* (2012) can undermine their faith in the judiciary as an institution. Taken together, these studies give us reason to believe that people’s feelings about the court may not be as monolithically inflexible as was thought.

Ultimately, however, what matters is what the justices think. Even if the justices are aware of the latitude afforded by diffuse support, they conceivably may recognize the public’s trust has its limits, and that too many of the “wrong” types of decisions can cause the reservoir of goodwill to run dry. On several occasions, the Justices have, in fact, voiced concern over how their decisions affect the Court’s legitimacy. In *Bush v. Vera* (1996), Justice O’Connor asserted that the preservation of legitimacy is inextricably tied to adherence to precedent. Justice Kagan and Justice Sotomayor both have warned about the damage to its legitimacy if the Court becomes too partisan (Rubin, 2021; Politi, 2018). Not only do these examples suggest the Court is aware of the possibility it can destroy its own source of credibility, but they also seem to suggest the Court is just one bad decision or one wayward justice away from doing so.

Another objection might be that the justices care too much about impressing their social circles in the media and academia to worry about public opinion. A Court that does not care about public opinion does not care how the public reacts during an election. If we take Baum and Devins’ (2010) argument as evidence, playing to one’s preferred audience constitutes a very important motivation for justices. The justices do not shed their social identities when appointed to the Court and advancing the cause of their preferred audience might generate a lot of personal satisfaction for them (Baum, 2017). The public, for its part, does not know enough about Court cases to criticize it. By
contrast, elites who follow the Court can have both strong opinions and specialized knowledge, and the justices probably derive utility from their esteem.

It might be true the average citizen does not have a firm opinion on most Court cases, but that does not mean the justices do not account for public opinion. For one thing, people can have opinions about general Supreme Court trends. They can believe the Court is too liberal, too reactionary, too weak, or too divisive. While the Court might not care about public opinion in any given case, it might care about public opinion as it relates to the Court’s aggregate output. For another thing, the justices cannot know beforehand exactly how the public will react to their decisions, in part because the public’s reaction might be a function of how the case is decided. As a result, they need to act as if the public might react negatively to any decisions. As Key (1961 pg. 261) observed, “Even though few questions attract wide attention, those who decide may…consciously adhere to the doctrine that they should proceed as if their every act were certain to be emblazoned on the front pages... and to command universal attention.” This means the justices must respect the broad outlines of public opinion when deciding between alternative resolutions to cases (Enns and Wolhfarth, 2017).

Finally, the justices may care about elite opinion because they see these audiences as representatives and custodians of public opinion. Justices cannot write op-eds or defend their decisions on social media. Elites in the media and academia, as intermediaries, carry that message to the public. People, research shows, take cues about the Court from elites seriously (Nicholson and Hansford, 2014). If the Court wants to safeguard its image, it might be important for them to win these elites to their side. Moreover, the interests of the public and the interests of the elites are not always
mutually exclusive. The Court may care about elite opinion only because elite opinion and public opinion happen to agree.
The Issue of Avoidance

The Court has the power to prevent controversial appeals from becoming controversial Court decisions. To avoid exposure during an election, one could argue all they really need to do is avoid controversial cases in the run up to a presidential election year. Such a possibility raises methodical concerns and could make it difficult to distinguish between the effect of avoiding controversy and the effect of a presidential election. If a term shows less division, for example, it may be because the Court declined to hear more controversial decisions in that term rather than moderated their decisions because of a presidential election.

We can subject such an argument to direct empirical testing, though, admittedly, this provides only a partial answer to the possibility of avoidance.\footnote{The case types, while helpful, are only a rough indication of what we really want to measure: divisive cases and cases which require the use of judicial review. This test assumes that if the Court is avoiding cases in a presidential election year, this will be reflected in the types of cases the Court hears. But the test shown in Table 1 by itself does not tell us with certainty that cases which cause division and cases which require the use of judicial review are avoided in presidential election years. It merely suggests this by showing us that the types of cases which plausibly lead to division and judicial review are not avoided in presidential election years at higher or lower rates than other years.} If the Supreme Court’s decisions reflect a selection bias during presidential election years, we might expect them to take fewer of the types of cases that result in divisive opinions. To test for such an effect, I tabulated the total number of cases under each issue area specified in the Supreme Court Database for each term from the 1946 through 2020 terms. I also tabulated the number of salient cases, and the number of cases in which at least one lower court judge dissented accepted for argument each term by the Supreme Court (Spaeth et
As Table 1 shows, however, the types of cases accepted for argument during presidential election years do not differ significantly for any issue area. Additionally, the Court does not accept fewer salient cases or fewer lower court cases in which at least one judge dissented in presidential election years either.

Table 1:

*Types of Cases Accepted in Presidential Election Years v. Other Years - Two Tailed T Tests*

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<td>Division in Lower Courts</td>
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<td>0.6897</td>
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</table>

Furthermore, the extent to which the Court can steer clear of all unwanted cases is potentially complicated by several factors. The Court may have substantial control over the cases it hears but this does not mean the Court completely resists outside pressures when accepting cases. In fact, there are cases the Court may be particularly inclined to
accept because the solicitor general asks them to hear it, or because of interest group activity, or because appellate courts have reached divergent conclusions on the same question (Bailey, Kamoie, Maltzman, 2005; Caldiera and Wright, 1988).\textsuperscript{12} Certainly, if the justices want to see their preferences translated into policy, they have a practical incentive to grant \textit{certiorari} in at least some cases (Goelzhauser, 2011; Provine, 1980).

The justices’ beliefs about the proper role of judges and the importance of the judiciary in the context of constitutional governance might also encourage them, out of a sense of obligation, to accept cases in order to render judgments, decide difficult questions, and set policy for the entire judiciary (Provine, 1980).

Another complicating factor is that the justices may either change their minds about a case after accepting it for argument or may not know for sure how they will vote in a case at the time they agree to hear it. Justices are influenced by oral arguments, engage in bargaining and coalition building strategies to shape the content of a decision, they respond to Congressional threats, and switch their votes after taking an initial position on a case (Johnson and Pryor, 2017 pg. 227; Maltzman \textit{et al}, 2000; Black, Johnson, and Wedeking, 2012 pgs. 80-82; Clark, 2009; Rosen, 2012; Kliff, 2012).\textsuperscript{13} These examples suggest that the question of how the justices will ultimately vote in a given case and, thus the eventual outcome of the case, is somewhat unpredictable at the \textit{certiorari} stage. A seemingly innocuous case could, after \textit{certiorari}, transform into something more controversial and publicly salient, possibly because of the way the case

\textsuperscript{12} Caldiera and Wright’s (1988) study demonstrated that, when more amici briefs are filed, this increases the likelihood the Court will accept the decision.

\textsuperscript{13} It is important to note here that reports of vote switching are rare. We do, however, have two prominent, recent examples: Chief Justice Roberts in \textit{Sebelius} (2012) and Justice Kennedy in \textit{Planned Parenthood v. Casey} (1992) (Rosen, 2012; Kliff, 2012)
was decided (Enns and Wolhfarth, 2017; Clark, Lax, and Rice, 2015). For example, *Kelo v. New London* (2005) attracted relatively little attention at first, but public interest in the case increased sharply following the announcement of the decision (Clark, Lax, and Rice, 2015). Though the exact reason for this is unclear, we could speculate that the case generated more publicity because of the position taken by the majority or the divisive nature of the result, or a combination of both factors. The fact that so much in a case could change from *certiorari* to final decision might make it difficult for the justices to filter out effectively beforehand which cases might become controversial, salient, or divisive in a presidential election year.

Even if the Court successfully dodges undesirable cases, it is conceivable that, for those cases accepted, a presidential election has an impact in ways the justices could not anticipate at the certiorari stage. For instance, a case could be impacted when a presidential candidate takes a sudden interest in it. Additionally, the Court might feel pressured to watch its term-level trends more closely if the Court’s voting record becomes an election issue.
Division Hypotheses

One area where we might expect the effect of a presidential election to manifest itself is in the types of decisions the Supreme Court issues. More specifically, if the Supreme Court is sensitive to the effects of presidential elections, we might expect the number of divisive decisions to decline in presidential election years because of the potential harm that can be done to the Court’s legitimacy if the Court’s divisiveness becomes an election issue.

While we have very little empirical understanding of how divisive decisions impact the Court’s levels of support, the research on judicial legitimacy provides some basis for believing divisive decisions may hurt the court’s legitimacy.\(^{14}\) As we have seen already in Christensen and Glick (2015) and Bartels and Johnston (2013), the ideological tenor of a decision can turn people against the Court. But, research shows, ideological differences are not the only means of inflicting harm. Gibson and Caldeira, for instance, found that people’s levels of support are most damaged, not by attitudinal behavior from

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\(^{14}\) Scholarly research available on coalition size has concerned itself mostly with the question of whether or not the Court can persuade people to accept a decision by means of large coalitions (Gibson, Caldeira and Spence, 2005; Zink, Spriggs, and Scott, 2009, Salamone, 2014). In Gibson, Caldeira & Spence’s study, people were no more likely to approve of a unanimous decision than a divided one (2005). Zink, Spriggs & Scott, by contrast, found that knowing a case was unanimous does, in fact, increase the likelihood that a person will approve of the decision (2009). Salamone was the first to ask whether or not the margin made people more or less likely to accept a decision. He found that division can undermine the perception of the decision, but this effect is shaped by the salience of the case. In highly salient cases, divisive opinions can actually strengthen people’s opinion of the decision amongst those who agree with the dissent because they see the Court as representing their views (2014).
judges, but by politicized behavior i.e., when judges act like politicians (Gibson and Caldiera, 2011). This damage can occur through the Court's own actions, like when Chief Justice Roberts switched his vote in *Sebelius* (2012), and it can also occur at the hands of outside actors as the battle over Alito's confirmation shows us (Christensen and Glick, 2015; Gibson and Caldiera, 2009).

If a campaign chooses to focus on the Court's divisiveness in an election, the Court's voting record could become politicized in much the same way justice Alito's voting record did during his confirmation hearings (Gibson and Caldiera, 2009). Divisive decisions have been linked to the idea of "politicians in robes" in the past (Dwyer, 2021; "Considering the Role of Judges Under the Constitution of the United States", 2011). As a result, a candidate, brandishing the Court's divisiveness on politics' largest stage, could inflict a great deal of damage to the Court's reputation.

Here again, however, we are interested most in whether or not the justices believe divisive decisions injure the Court's legitimacy because this perception will determine if the Court acts strategically during a presidential election. On this point, the justices do seem to be aware that divisive decisions can jeopardize people's trust in the Court. In his interview with Jeffrey Rosen from *The Atlantic*, Chief Justice Roberts acknowledged the detrimental effect of highly divisive cases. Rosen went on to write:

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15Justice Breyer, in his testimony before the Senate Judiciary committee, defended the independence of the Court this way: "but I also know a lot of you are thinking this. You are thinking in those tough 5-4 cases that we really are junior league politicians. And I say that would be ridiculous" ("Considering the Role of Judges Under the Constitution of the United States", 2011). Speaking of the 2021 term, Professor Kate Shaw, hinted that the Court sought more unanimity to forestall accusations of partisan bias: "I think this term's unanimous opinions need to be understood against that backdrop -- as the court asserting that the justices are not just politicians in robes, and they won't necessarily rule in line with the expectations of politicians and pundits" (Dwyer, 2021).
In Roberts’s view, the most successful chief justices help their colleagues speak with one voice. Unanimous, or nearly unanimous, decisions are hard to overturn and contribute to the stability of the law and the continuity of the Court; by contrast, closely divided, 5–4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics.

Justice Breyer, in his *Bush v. Gore* (2000) dissent, likewise argued that a liberal-conservative split in a highly visible case would do irreparable harm to people’s confidence in the Court: “And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure.”

Even if, as Chief Justice Roberts and Justice Breyer indicate, division does shake people’s confidence in the Court, division comes in many flavors, and it is entirely possible that different kinds of division cause different effects. Since Salamone’s (2014) work indicates that people respond differently when they know the actual margin of the decision, it makes sense to explore multiple types of division. Accordingly, I examine the effect of a presidential election across three measures of division: one vote margin decisions, decisions with at least one dissent, and decisions with at least one concurring opinion.
Figure 1:

**Measures of Division 1946-2020**

![Graph showing measures of division from 1946 to 2020](image)
One Vote Margin Decisions

Of all the types of dispositions the Court hands down, decisions where only vote separates the majority vote from the minority vote can look the most like acts of judicial license. When people hear the media refer to a ‘5-4’ result or ‘conservative/liberal split, they see politics at work, not sound legal principles. Many of the Court’s most controversial cases have been decided by this margin: *District of Columbia v. Heller* (2008), *Planned Parenthood v. Casey* (1992), *Bush v. Gore* (2000) etc. Highly divisive decisions, therefore, have the potential to undermine the perception of impartiality so important to the justices. This is a position that is echoed by elites in the media. Ross Douthat, in his 2009 *New York Times* op-ed, commented, “settling so many vexing controversies with 5-to-4 votes ... is an awfully poor way to run a republic” (Douthat, 2009). The justices have also shown a particular sensitivity to how 5-4 decisions are viewed. Roberts, in his interview with the *Atlantic*, expressed frustration over the fact the media chose to focus on such decisions (Rosen, 2007). Justice Breyer defended the Court’s record this way: “Look, we are unanimous in our Court 40 percent of the time. Our 5-4's are about 20 to 25 percent and, surprisingly enough, it is not always the same 5 and the same 4” (“Considering the Role of Judges Under the Constitution of the United States”, 2011).

Yet, for all the attention they garner, we know very little about why cases result in clean ideological splits (like 5-4) as opposed to other kinds of ideological splits (like 6-3 or 7-2). Clark’s (2009) work shows us that highly divisive decisions are a product of ideological polarization, but that still leaves open the question of whether or not other
factors, constraints, or outside forces affect the number of 5-4 splits. Nevertheless, the salience of 5-4 decisions combined with the justice’s sensitivity to how these decisions are portrayed make it likely that if the Court is trying to present itself in the best possible way during an election, it would want to minimize these types of decisions.

H1: The Supreme Court will experience a lower proportion of 1 vote margin decisions in the term of a presidential election.
Dissents in General

Because the presence of any kind of dissent has the power to make the Court look divided, the issue of division extends beyond one vote margin decisions. At first glance, an 8-1 decision might not appear like a partisan split, but a high number of decisions with dissent, aggregated over a term, can be evidence of a disunited Court. The media, for instance, frequently make note of the Court’s overall levels of dissensus in a term (Dwyer, 2021; Greenhouse, 2008; Liptak, 2020). Additionally, when there are multiple dissents, the media has shown a tendency to focus on the dissent to expose divisions in the Court (Sill, Metzgar, and Rouse, 2013).

Dissents have ideological components and legal components but have important strategic ones as well (Clark, 2009, Corely, Steigerwalt, and Ward, 2013).\textsuperscript{16} Dissents impose a cost on the Court in terms of time and collegiality (Epstein, Landes and Posner, 2011).\textsuperscript{17} It is also possible that dissents engender costs in terms of the Court’s institutional prestige too, especially when the dissent is worded in caustic terms (Nelson and Gibson, 2017). Some justices, admittedly, have praised dissents because they allow the justice to express their unadulterated opinion (Kagan 2012; Scalia, 1994, 42). Notwithstanding, there still is a general sense that dissents can hinder the success of the Court. At the time of his appointment, Chief Justice Roberts pledged that he would work

\textsuperscript{16} From an ideological standpoint, when the preferences of the majority and the preferences of the justice sharply diverge, the justice is keen to break with the majority (Segal and Spaeth, 2002; Wahlbeck, Spriggs, and Maltzman 1999). Corely, Steigerwalt, and Ward (2013) found that as legal complexity increases, consensus decreases.

\textsuperscript{17} Scholars have even hypothesized that psychological factors like the need for achievement can play a role in a justice’s decision dissents. Justices who have less need for achievement are less liable to author dissents because they are more concerned with getting the law right than getting credit (Aliotta, 1998).
towards creating greater consensus for his Court: “Division should not be artificially suppressed, but the rule of law benefits from a broader agreement. The broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds” (“Chief Justice Says His Goal is More Consensus on the Court”, 2006). If dissent undermines the legal force of a decision and dissents can expose the Court’s divisions, then external events, highlighting the Court’s dissents, can make the Court look bad. We can conclude on this basis that the Court has an incentive to curtail them as much as possible during a presidential election.\textsuperscript{18}

\textit{H2: The Supreme Court will experience lower rates of dissent (decisions with at least 1 dissenter) in the term of a presidential election year.}

\textsuperscript{18} Admittedly, many reasons can be found for explaining why a justice might choose to dissent, and it is possible the effect of a presidential election may be drowned out by the noise of all such reasons.
Concurring Opinions

One other area where we might see the effect of a presidential election is in the number of cases with concurring opinions. Like dissents, concurrences are explainable on ideological and strategic grounds, but other research indicates external factors like salience and the question of constitutionality are also keys to understanding why separate opinions are issued (Segal and Spaeth, 2002; Goelzhauser, 2016; Whalbeck, Spriggs, and Waltzman, 1999; Corely and Ward, 2017; Corely et al, 2010). If justices act strategically with their concurrences and the number of concurrences can change in response to things like public interest (i.e., salience), it becomes conceivable to think that an external event like a presidential election might have an effect on the justice’s concurrences too.

The Court does have a very good reason to be cautious about concurrences in a presidential election year because concurrences are a potential sign of division on the Court: “While a unanimous vote may reflect agreement among all the justices, it may also conceal true disagreements, particularly with regard to legal reasoning” (Corely, Steigerwalt, and Ward, 2013 pg. 115). The presence of a concurrence has the potential to “shake public confidence in the judiciary by bringing into question the certainty of the law” (Walker, Epstein, and Dixon, 1988). Consequently, if the Court is trying to present a unified, non-partisan front, we might expect the number of cases with separate opinions to decline in presidential election years.

**H3: The number of decisions with at least one concurring opinion will be lower in the term of a presidential election**
Judicial Review Hypothesis

Judicial review is one of the most significant means through which the Court exercises its power (Marbury v. Madison; Lindquist and Solberg, 2007). Naturally, then, it must also be one of the chief means through which the Court can protect rights, defend the Constitution, and promote justice but also antagonize the public and other branches of government (Waldron, 2006, Lindquist and Solberg, 2007).¹⁹ In other words, the exercise of judicial review has the potential to either reinforce the Court’s legitimacy or undermine it, a fact which may explain the Court’s reluctance to use it (Howard and Segal, 2004).

We know that the Court’s likelihood of judicial review increases as the ideological distance between the piece of legislation and the ideological position of the median justice widens (Segal, 2017).²⁰ The Court is not, however, free to strike down a law any time a majority of justices do not like the ideological bent of it. There are important constraints, qualifications, and considerations involved in its use (Bailey and Maltzman, 2008; Lindquist and Solberg, 2007).²¹ When it comes to the Court’s willingness to exercise judicial review, the Court does seem to be responsive to outside pressures. Clark (2009), for instance, found that threats from an ideologically antagonistic

¹⁹ Conversely, avoiding the use of judicial review is a way for the Court to maintain harmony between the judiciary and other branches (Goelzhauser, 2011; Clark, 2009).

²¹ Bailey and Maltzman (2008) demonstrated that the state of the law (e.g., precedent, judicial rules etc.) is an influential factor in the Court’s decisions to uphold freedom of speech. The research of Lindquist and Solberg (2007) shows that there are variations in the use of judicial review across judicial eras. The Rehnquist Court, for instance, showed more willingness to strike down federal statutes and uphold state law compared with the Burger Court.
Congress can make the Court think twice about striking down a law. Goelzhauser’s (2011) study similarly indicated that when Congress involves itself in a case through amici briefs, the Court is more reluctant to use judicial review and will instead rely on procedural mechanisms such as ‘standing’ and ‘mootness’ to dispose of a case. Even Popular presidents, Yates (2004) observed, can more easily bend the Court to their will than less popular ones and presumably this means the Court is more likely to refrain from striking down a law at the behest of a popular president.

President Obama’s famous warning to the Court about the challenge to the Affordable Care Act illustrates how the Court can feel pressured during a time of heightened public interest to bow to the president’s wishes regarding the use of judicial review (Blackman, 2013 pg. 56). Some commentators saw Chief Justice Robert’s switch as proof the Court received the message. Whatever the exact reason Roberts switched his vote, we can speculate he was at least partially concerned about what would happen to the Court’s legitimacy in such a high-profile case if the Court decided to strike down the individual health insurance mandate.

What all this means is that the Court might potentially want to tread very lightly when considering the exercise of judicial review in a presidential election year since a declaration of unconstitutionality can give the President and Congress cause to turn an

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22 President Obama said, "Ultimately, I'm confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress.”
23 Mitt Romney, for one, made this assessment (Reske, Kessler 2012).
24 Jeffrey Rosen argued that Roberts “placed the bipartisan legitimacy of the court above his own ideological agenda.” (Rosen, 2012)
unfavorable decision into a campaign issue. The same could be said of striking down state laws too since an unfavorable decision can prompt an equally dramatic response from state actors. In the aftermath of *Kelo v. New London* (2011), 45 states revised their property laws (Somin, 2015). Given these potential factors, it makes sense that if the Court is concerned about how its decisions will look during a presidential election, the Court would want to make judicious use of their powers of judicial review.

**H4: The Supreme Court will make less use of judicial review in the term of a presidential election.**

![Figure 2: Cases with Judicial Review 1946-2020](image-url)
Research Design

This project uses the term level as the unit of analysis. For instance, the Supreme Court’s ‘1956’ term would be considered as one observation. I take a macro-level approach in that I aggregate data at the term level. The data I use come from the Supreme Court Database and cover the 1946-2020 period (Spaeth et al., 2020). This time frame contains eighteen presidential elections and seventy-five Court terms. I hypothesize that, holding other variables constant, the Court experiences more consensus during a presidential election year and makes less use of judicial review because of the potential for heightened public scrutiny.

The variable of interest is a presidential election. The Supreme Court term runs from the first Tuesday of October to late June or early July (“The Court and Its Procedures”, 2022). I argue that if the Court is affected by a presidential election, we are most likely to find this effect in the term that ends in June or early July of the year the election takes place. For the election in 2016, for instance, this means we are interested in analyzing the cases heard and decided by the Court from October of 2015 to June/early July of 2016 to see if there are key differences. In this case, therefore, the ‘presidential election’ variable would set equal to a ‘1’ for the 2015 term. I use this same technique

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25 Macro-level analysis often involves estimated dependent variables (EDV) that are aggregations of smaller subsets (Estimating US economic output from aggregated state data is an example) (Lewis and Linzer, 2005). This project will not involve EDV. The term-level approach has also been applied in Supreme Court studies before. Epstein, Landes, and Posner (2010) rely on that approach to determine if the number of questions asked to lawyers during oral argument before the Supreme Court has any bearing on the level of success. They estimate a Logit Transform model to convert the number of wins (favorable rulings) in a term into a percentage of wins for each term. Similarly, my study will tabulate 5-4 decisions in a term and then convert this into a proportion.
for the whole dataset. If the term finishes in June or early July of a presidential election year, then this variable will take a ‘1’. It will be ‘0’ otherwise.

To test my hypotheses, I estimate the effect of a presidential election in four models with four different independent variables. Because the number of cases the Supreme Court hears differs from year—and has consistently declined over the past fifteen years—I examine the proportion of cases as opposed to the total number in these first three model. In the first and second models, I follow the example of Clark (2009) and operationalize the proportion of cases in which the margin between the number of justices in the majority and the number of justices in the minority was one vote (‘1 vote margin’), and the proportion of cases in which at least one justice dissented (‘presence of at least 1 dissent’) as my dependent variables in a given term. In the third model, the dependent variable is the proportion of cases in a given term wherein at least one concurring opinion was written in the case (‘proportion of separate opinions’). The last dependent variable will be the total number of cases in which the Court exercised judicial review by striking down either a state statute, federal statute or a municipal ordinance in a given term (‘total number of judicial review’). It is important to note that I use totals here, as opposed to the proportions, because doing so is a more intuitive way of thinking about the total number of laws struck down by the Court and because it has become a consistent practice in the literature (Clark, 2009).

As for control variables, I include a measure for ideological heterogeneity of the Court, a variable for the proportion of salient decisions in a given term, a variable measuring the effect of confirmation hearings, a variable comparing the ideological median of the Court with the ideological median of both houses of Congress, and
variables for the natural court. If prior research shows that one factor causes division, it is ideology. Clark’s (2009) research, as we have already seen, is evidence that ideological differences cause division. The idea that justices vote along ideological lines (i.e., the attitudinal model) is “the dominant theory of judicial behavior in the field of political science” (Yates, Cann, and Boyea, 2013). Because of its potential influence, it is certainly a factor I want to hold to constant. The ‘ideological heterogeneity’ variable in my study is based on the standard deviation of the Martin and Quinn scores for a term. Their equation pins a justice to a point in ideological space. The standard deviation is, therefore, a measure of how far each of the justices are from the Court’s median voter. The larger the number, the more heterogeneous the Supreme Court’s term will be (Martin and Quinn, 2002). I expect that, as the ideological heterogeneity of the Court increases, the measures of division in Models 1 through 3 will increase.26 I also expect that as ideological heterogeneity increases, the Court will be more likely to exercise judicial review.27

The ‘proportion of salient cases’ variable consists of the proportion of salient cases in a given term. Here, I use the pre-decision salience data compiled by Clark, Lax, and Rice (2015).28 Because salience is correlated with ideological voting, it carries

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26 This expectation is consistent with the findings of Corely, Steigerwalt, and Ward (2013) who utilize a measure of polarization that calculates the difference between the most extreme justice and the median justice as measured by the Martin-Quinn scores. Their results suggest that consensus increases as the ideological heterogeneity decreases.
27 The reason I believe ideological heterogeneity will increase the rate of judicial review is that a variety of parties who have lost in lower courts can appeal and conceivably see success at the hands of an ideologically diverse Court. With a homogenous Court, however, only cases the justices disagree with will be appealed to the Court.
28 As Clark points out, the salience of a case can come as a consequence of how a case was decided. In other words, the salience is generated by the decision. In this study, I hypothesize that the salience has an impact on either division or lowers rates of judicial review which means I’m primarily interested in cases which
explanatory potential when it comes to division (Unah and Hancock, 2006). The more visibility a case has, the more likely justices are to see its core dispute as an ideological one and, as such, I expect to observe more more splits along ideological lines. I reason that, as the proportion of salient cases increases, division in a term will increase as well.

Since any strategic behavior by the Court may be due more to an effort to avoid provoking an ideologically hostile Congress than to a presidential election year, I have included a measure which compares, on ideological grounds, the median justice of the Court to the median member of the House and the median member of the Senate. I assume that as the distance, measured in absolute value, increases between the median justice and the median member of either chamber, the proportion of divisive decisions will increase as well. The confirmation hearings variable is used to indicate that a Supreme Court justice is being considered for confirmation at any point during that term. This variable takes a ‘1’ when a justice is being confirmed in that term and will be ‘0’ otherwise. For example, Justice Alito was nominated in November of 2005 and confirmed in January of 2006. Because his confirmation took place entirely within the Court’s 2005 term, the value of this variable would take a ‘1’ for the 2005 term (“Supreme Court Nominations”, 2022). Lastly, the models also include ‘fixed effects’ variables centered on the “natural court” eras in the Court’s history.29

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29 A ‘natural court’ is a period in which no turnover in the Court’s personnel occurs (Spaeth et al., 2020, Heck, 1980).
Results

Table 2: Measures of Division and Judicial Review: 1946-2020

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<th>Proportion 1 Vote Margin</th>
<th>Proportion Presence of Dissent</th>
<th>Proportion Concurring Opinions</th>
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<td>(0.01)</td>
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<td>5.38**</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.3</td>
<td>0.102</td>
<td>0.11</td>
<td>0.29</td>
</tr>
<tr>
<td>Fixed Effects</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Dickey-Fuller</td>
<td>-6.8***</td>
<td>-5.3***</td>
<td>-6.1***</td>
<td>-6.42***</td>
</tr>
</tbody>
</table>

Note: All coefficients are estimated using Heteroskedasticity Corrected Robust Standard Errors.

*p>.05  **p>.001  ***p>.0001

In these models, the coefficients tell us that for every one-unit increase in an independent variable, we should expect a one-unit increase or decrease in the dependent
variable.\textsuperscript{30} Because the dependent variable is a proportion in Models 1-3, any variation in the independent variables should cause proportionate changes in the dependent variable. Notably, the ‘presidential election’ variable is not significant in any of these three models of division.\textsuperscript{31} I also estimated these models with a salience variable because of the potential confounding effect of salience. My reason for doing so is that the pre-decision salience data is only available from 1952 to 2008 and my time frame of interest is 1946 to 2020. Even with the salience variable the presidential election variable remains statistically insignificant (see Appendix A for the salience-specific results). This means that, with respect to the amount of division that occurs, the terms overlapping with a presidential election year are no different than other terms. Thus, I find no support for Hypotheses 1-3.\textsuperscript{32}

\textsuperscript{30} It is also possible that the coefficient of the independent variable is so small it has no effect on the dependent variable.

\textsuperscript{31} Neither do the results show evidence of any meaningful effects. According to Rainey’s (2014) research, examining p-values alone is an insufficient method when arguing for negligible effects. Instead, a researcher can use the confidence intervals to find any meaningful effects in the data. This involves selecting the smallest meaningful effect ‘m’ and testing this against the confidence intervals. To ensure there were no meaningful effects in the data, I constructed a 95% confidence interval surrounding the presidential election variable across the four models. As my ‘m’ value, I selected the value -.20. This is consistent with the impact of Clark’s (2009) polarization statistic on the proportion of dissent in a term. I use Clark’s coefficient here because his dependent variables, proportion of dissent and proportion of 1 vote margin decisions, are similar to two of my dependent variables. I reason that any meaningful change from 5% to 95% percentile in the Presidential Election variable will not have at least as great an impact as Clark’s polarization statistic.

For Model 4, in which the dependent variable is not a proportion but a total, I reason that any meaningful change from 5% to 95% will not cause a decrease of approximately 20 cases (i.e., a coefficient of -.20) in which judicial review was exercised. The results indicated there were no meaningful effects in any of the four models. See Appendix C for the results.

\textsuperscript{32} There is some statistical significance scattered throughout the models in Model 1, the ‘confirmation’ variable, the ‘ideological heterogeneity’ variable and the JCS variables are all significant. The ‘confirmation’ variable appears to be a factor that lends something new to our understanding of dissent and 1 Vote Margin decisions. If a confirmation takes place in a given term, this tends to decrease the level of 1 Vote Margin decisions. By contrast, in the ‘Presence of Dissent’ model, the fact that a confirmation is taking place in that term does not make much of a difference. One possible explanation for this--which would certainly be consistent with my theory here is this project--is that the Court exercises more caution during a confirmation because the public’s attention fixes on the judiciary. Like the ‘confirmation’ variable, the
The dependent variable in model 4 is the number of cases in which the Court made use of the power of judicial review in a given term. Any change in the independent variables should cause a change to the total amount of cases with judicial review. Contrary to what I was expecting, when the term takes place in a presidential election year, the number of cases where judicial review is exercised actually increases, though the small coefficient and statistical insignificance means we should not interpret this as an especially meaningful result. Thus, I find no support for Hypothesis 4.\(^3\) When included, the salience variable does change things up a bit with a negative coefficient but the variable of interest, a presidential election, does not become any more significant with the addition of salience (see Appendix A for the results).\(^4\)

\(^3\) As for the control variables, the ‘ideological heterogeneity’ variable does have significance, suggesting that ideological heterogeneity does increase the likelihood of the use of judicial review.\(^3\) The positive coefficient means as the salience increases, the likelihood of the use of judicial review increases as well. This may be because the case is already salient due to a lower court using judicial review or because the case has generated a lot of public interest. A full explanation is beyond the scope of this paper.
Discussion

The results from these models provide no support for the theory that the Court will moderate its decisions in the term overlapping a presidential election year. A presidential election does not, according to these findings, reduce levels of division across any of the three measures I have used, nor does it appear to discourage the use of judicial review. As such, one might be tempted to argue that these results bolster the case for the Court’s independence over the past seventy years. The lack of statistical significance throughout the various models and the models’ overall lack of explanatory power, however, caution against this stronger conclusion about the Court’s general independence during presidential elections.\(^{35}\) What we can say is that, with respect to this sample and these measures, the Court seems fairly impervious to the pressures and publicity of presidential elections.

I suspect there is a lot happening in a Supreme Court term, much of which might not be capturable in a generalized and empirically analyzable form. As discussed earlier, selection issues remain a complicating factor making it difficult to untangle the effects of a presidential election from avoidance effects. Still, I believe these results do point to a potential avenue for future research. To see this, we need look no farther than a pre and post-Bork division of the data where we find startling differences between how a presidential election appears to affect the cases decided.\(^{36}\) The ‘presidential election’

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\(^{35}\) In no model does the R2 ever exceed .50, which means these models leave more about the phenomenon of division and judicial review unexplained than explained.

\(^{36}\) The Pre-Bork era is 1946 to 1986 and post-Bork era is 1987-2020
A variable in the post-Bork era has all the makings of a causal mechanism that should be taken seriously, though there are too few observations to draw too dramatic of a conclusion (see Appendix B). Not only does a presidential election have the largest impact across all variables in the post-Bork era (and the largest impact of all the variables in all the models) but it also the most statistically significant.

The pre-Bork era washes out this effect (see Appendix B). One possible reason for this is that the Court consisted of more moderate justices (Powell, Stewart, White, and so on), and perhaps the media and other elites did not see divided decisions as fundamentally driven by ideology the way they do today. Another possible explanation is that the Court has become more of a campaign issue in recent years because of the importance attached to ideological conformity in appointees. Whatever the reason, we can be sure there is more emphasis on ideological identity after Bork and this gives the Court a reason to avoid ideological division that can potentially make it look bad.

With the current makeup of the Court, we might not see many more 5-4 splits, but we could conceivably see more ideological splits, and this very well might be behavior the Court tries to minimize as it seeks to fend off the next wave of criticism. In other words, the kind of behavior that I hypothesized we would see from the court during presidential elections might become more common if interest in the Court spikes.

I believe this study demonstrates that we should take contextual factors like elections into consideration if we want to bridge the gap between what we do know about the Court and what we do not. At the very least, closing this gap will mean exploring areas that bear no empirical fruit, but such endeavors round out the comprehensiveness of
our theoretical explanations and give them a vigorous and sturdy character. To the extent that these results are inconsequential, they still paint a clearer picture of why the Court splits or does not split, and they indicate a path for future research.
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APPENDICES
Appendix A. Salience
### Measures of Division and Judicial Review with Salience: 1955-2008

**Standard Errors in Parentheses**

<table>
<thead>
<tr>
<th></th>
<th>Proportion 1 Vote Margin</th>
<th>Proportion Presence of Dissent</th>
<th>Proportion Concurring Opinions</th>
<th>Total Judicial review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Presidential Election</td>
<td>-0.004</td>
<td>-0.02</td>
<td>0.007</td>
<td>.77</td>
</tr>
<tr>
<td></td>
<td>(0.01)</td>
<td>(0.02)</td>
<td>(0.01)</td>
<td>(1.86)</td>
</tr>
<tr>
<td>Confirmation</td>
<td>-0.02</td>
<td>0.02</td>
<td>-0.01</td>
<td>-0.02</td>
</tr>
<tr>
<td></td>
<td>(0.02)</td>
<td>(0.2)</td>
<td>(0.02)</td>
<td>(1.98)</td>
</tr>
<tr>
<td>Ideological Heterogeneity</td>
<td>-0.43*</td>
<td>0.36</td>
<td>-0.10</td>
<td>-91.5***</td>
</tr>
<tr>
<td></td>
<td>(0.03)</td>
<td>(0.37)</td>
<td>(0.16)</td>
<td>(4.42)</td>
</tr>
<tr>
<td>Salience</td>
<td>0.39</td>
<td>-0.25</td>
<td>0.37</td>
<td>12.7</td>
</tr>
<tr>
<td></td>
<td>(0.25)</td>
<td>(0.23)</td>
<td>(0.29)</td>
<td>(12.4)</td>
</tr>
<tr>
<td>JCS House Median</td>
<td>-0.06</td>
<td>-0.06</td>
<td>-0.13</td>
<td>23.4</td>
</tr>
<tr>
<td></td>
<td>(0.95)</td>
<td>(0.23)</td>
<td>(0.13)</td>
<td>(10.2)</td>
</tr>
<tr>
<td>JCS Senate Median</td>
<td>-0.19</td>
<td>0.05</td>
<td>0.03</td>
<td>-37.5</td>
</tr>
<tr>
<td></td>
<td>(0.14)</td>
<td>(0.12)</td>
<td>(0.12)</td>
<td>(10.2)</td>
</tr>
<tr>
<td>Constant</td>
<td>0.34**</td>
<td>0.25**</td>
<td>0.59**</td>
<td>64.0</td>
</tr>
<tr>
<td></td>
<td>(0.09)</td>
<td>(0.17)</td>
<td>(0.10)</td>
<td>(9.78)</td>
</tr>
</tbody>
</table>

| N                         | 75                       | 75                            | 75                             | 75                    |
| F-Statistic               | 5.84**                   | 2.68*                         | 3.71**                         | 8.11***               |
| R-squared                 | 0.23                     | 0.14                          | 0.18                           | 0.18                 |
| Fixed Effects             | Yes                      | Yes                           | Yes                            | Yes                  |
| Dickey-Fuller            | -6.8***                  | -5.3***                       | -6.1***                        | -6.42***             |

All Coefficients are Estimated using Heteroskedasticity Corrected Robust standard Errors.

* p > .10  ** p > .05  *** p > .001
Appendix B. Pre and Post-Bork
**TABLE 4**
Measures of Dissent Post-Bork: 1987-2020

<table>
<thead>
<tr>
<th>Presence of Dissent</th>
<th>1 Vote Margin</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Coefficient</strong></td>
<td><strong>SE</strong></td>
</tr>
<tr>
<td>Presidential Election</td>
<td>-0.03</td>
</tr>
<tr>
<td>Confirmation</td>
<td>0.047</td>
</tr>
<tr>
<td>Polarization</td>
<td>-0.152</td>
</tr>
<tr>
<td>JCS House Median</td>
<td>-0.175</td>
</tr>
<tr>
<td>JCS Senate Median</td>
<td>0.070</td>
</tr>
<tr>
<td>Intercept</td>
<td>0.531</td>
</tr>
</tbody>
</table>

| **N** | 34 | 34 |
| Random Effects | Yes | Yes |
| Wald | 15.51 | 0.008 | 20.8 | 0.0009 |
| R-squared | 0.19 | 0.31 |
| Dickey-Fuller | -5 | 0 | -5.7 | 0 |

All Coefficients are Estimated using Heteroskedasticity Corrected Robust Standard Errors and Random Effects
### TABLE 4  
Measures of Dissent Pre-Bork: 1946-1986

<table>
<thead>
<tr>
<th>Presence of Dissent</th>
<th>Coefficient</th>
<th>SE</th>
<th>P Value</th>
<th>Coefficient</th>
<th>SE</th>
<th>P Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Presidential</td>
<td>0.008</td>
<td>0.02</td>
<td>0.655</td>
<td>-0.004</td>
<td>0.010</td>
<td>0.691</td>
</tr>
<tr>
<td>Election</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confirmation</td>
<td>0.038</td>
<td>0.019</td>
<td>0.045</td>
<td>-0.046</td>
<td>0.014</td>
<td>0.002</td>
</tr>
<tr>
<td>Polarization</td>
<td>0.038</td>
<td>0.034</td>
<td>0.261</td>
<td>-0.067</td>
<td>0.049</td>
<td>0.172</td>
</tr>
<tr>
<td>JCS House Median</td>
<td>0.135</td>
<td>0.132</td>
<td>0.309</td>
<td>-0.010</td>
<td>0.142</td>
<td>0.946</td>
</tr>
<tr>
<td>JCS Senate Median</td>
<td>-0.151</td>
<td>0.146</td>
<td>0.300</td>
<td>0.018</td>
<td>0.145</td>
<td>0.899</td>
</tr>
<tr>
<td>Intercept</td>
<td>0.309</td>
<td>0.030</td>
<td>0.000</td>
<td>0.205</td>
<td>0.042</td>
<td>0.000</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1 Vote Margin</th>
<th>Coefficient</th>
<th>SE</th>
<th>P Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>N</td>
<td>41</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Random Effects</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wald</td>
<td>6.25</td>
<td>0.28</td>
<td></td>
</tr>
<tr>
<td>R-squared</td>
<td>0.31</td>
<td>0.22</td>
<td></td>
</tr>
<tr>
<td>Dickey-Fuller</td>
<td>-4.9</td>
<td>0</td>
<td>-4.4</td>
</tr>
</tbody>
</table>

All Coefficients are Estimated using Heteroskedasticity Corrected Robust standard Errors
Appendix C. Marginal Effects
### Table 5: Marginal Effects

<table>
<thead>
<tr>
<th>Model</th>
<th>Upper Bound</th>
<th>Lower Bound</th>
<th>M</th>
<th>Coefficient</th>
<th>Mean</th>
<th>95% Confidence Interval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Model 1</td>
<td>-0.0088</td>
<td>-0.0038</td>
<td>-0.2</td>
<td>-0.02</td>
<td>0.25</td>
<td>0.15 0.35</td>
</tr>
<tr>
<td>Model 2</td>
<td>-0.0075</td>
<td>-0.0032</td>
<td>-0.2</td>
<td>-0.02</td>
<td>0.25</td>
<td>0.15 0.35</td>
</tr>
<tr>
<td>Model 3</td>
<td>0.0018</td>
<td>0.0008</td>
<td>-0.2</td>
<td>0.01</td>
<td>0.25</td>
<td>0.15 0.35</td>
</tr>
<tr>
<td>Model 4</td>
<td>0.1386</td>
<td>0.0597</td>
<td>-20</td>
<td>0.39</td>
<td>0.25</td>
<td>0.15 0.35</td>
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</tbody>
</table>