2018

Why Does the Supreme Court Uphold So Many Laws?

Benjamin B. Johnson, *Penn State Law*
Keith E. Whittington

WHY DOES THE SUPREME COURT UPHOLD SO MANY LAWS?

*Benjamin Johnson**
*Keith E. Whittington***

Scholars spend a lot of time considering the legitimacy and implications of the Supreme Court striking down federal laws by use of judicial review. Similarly, there is a large literature focusing on the Court's power and obligation to manage the federal judiciary through its certiorari powers over its own docket and its ability to reverse lower courts. There is almost no work, however, that examines the interplay of the Court's judicial review powers and its managerial authority. Scholars have overlooked this intersection because they implicitly understand the power of judicial review and the federal hierarchy as institutions based on vetoes. On this account, the Court takes a judicial review case to veto either Congress or a lower court. This suggests that the Court should never take a case in which it affirms a lower court and upholds a federal statute. This account is (almost) entirely wrong. Using a new and comprehensive dataset, we show that throughout its history, the Court has affirmed the lower court and upheld the statute in the plurality of its judicial review decisions. The box that current theories predict should be empty is actually the fullest.

This Article is the first to provide an empirical look at the Supreme Court's judicial review practices in relation to its discretionary power over its docket. It considers various possible explanations for these uphold-affirm cases, like circuit splits or mandatory review, and finds them wanting. The empirical results lead us to develop a theory of positive judicial review. While many scholars have pondered what the Court gains from striking down laws, we are the first to consider the normative implications of, and what the Court may gain from, upholding statutes.

We use these empirical and theoretical efforts to examine the Roberts Court and show that it is an historical outlier. Under Roberts, the Court has dramatically reduced its judicial review docket, and it has stopped taking uphold-affirm cases entirely. We examine what may have caused the Roberts Court to be the first Court in history that conforms to theoretical

* Ph.D. Candidate, Department of Politics, Princeton University; J.D., Yale Law School.
** William Nelson Cromwell Professor of Politics, Princeton University.
Thanks are owed to Randy Beck, Eric Fish, Jim Fleming, Paul Frymer, Jason Iuliano, Paul Kahn, Nick Parrillo, David Rabban, and participants in seminars at the Yale Law School and Princeton University.

expectations and use these insights to predict how the Court may behave in the future.

TABLE OF CONTENTS

I. INTRODUCTION

The Roberts Court has almost left the judicial review business entirely. While the Rehnquist Court reviewed about nine federal statutes a year, the Roberts Court reviews less than four.[1] Since the Court has control over its own docket,[2] the Justices have willingly chosen to lay down their judicial review power—or at least to wield it far less often. This Article focuses on the choice

1. *See* Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2226–31 (2014) [hereinafter Whittington, *The Least Activist Supreme Court in History?*] (describing the decline in invalidations of state laws in the Roberts Court).

2. *See* 28 U.S.C. §§ 1254, 1257–60 (2012).

the Court makes to deploy judicial review. It shows that the Roberts Court is a historical anomaly both in how little it reviews federal statutes for constitutionality and in how it deploys that power across the cases it does take.

Judicial review and the Court's place atop the judicial hierarchy, the twin sources of its power and its control over its own docket through certiorari, only enhances it further. Accordingly, legal scholarship has a longstanding interest in both the power of judicial review[3] and the Supreme Court's near absolute control over its docket through certiorari.[4] And yet, there is little scholarship that examines these core features of the Court in tandem.[5] To our knowledge, there is no work that examines how the Court uses its power to take or deny cases involving the power of judicial review and the supervision of lower courts. This is troubling, since certiorari jurisdiction allows the Court to target not only cases, but specific constitutional questions. This transforms the Court from a passive backstop into a political institution with something approaching will, if not force.[6] The combination of the discretionary docket and the ability to strike down statutes raises challenging questions that have barely been noticed, much less discussed, in the literature. This hole in the literature reflects a mistaken assumption on the part of scholars that the Court matters because of its power to correct those who have gotten the law wrong before: whether that be Congress (judicial review) or a lower court (judicial hierarchy). In contrast with this theory, we are the first to show that most of the time, the Court both supports Congress and agrees with the lower courts. Since the empirical reality conflicts with the existing theory, we offer a new theoretical account of judicial review that explores what the Court accomplishes through affirming a lower court case that upholds a statute.

Having done that, we immediately run into a problem. The Roberts Court has dropped most of its judicial review work, but it has dropped *all* of its cases where it affirms a lower court that upholds a statute. Again, since the Court controls its own docket, this seems to reflect an intentional shift on the Roberts Court. Using the empirical tools and theory we have developed, we explore the Roberts Court, examine what it is giving up by changing the composition and size of its judicial review docket, and predict what it may do in the future.

These theoretical advances and windows into the Roberts Court have so far been obscured by the lack of any literature describing how the Court actually

3. The literature is too vast to cover, but see, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1695 (2008); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1350 (2006).

4. *E.g.*, Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rule and the Supreme Court*, 136 U. PA. L. REV. 1067, 1072 (1988); Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 3 (2011).

5. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1643 (2000) [hereinafter Hartnett, *Questioning Certiorari*] is a notable exception. *See infra* note 102 and accompanying text.

6. THE FEDERALIST NO. 78 (Alexander Hamilton).

implements certiorari and judicial review in combination. This gap in the literature presumably results from the assumption that the interplay between the Court's judicial review and certiorari powers is obvious. The Court would choose to review a lower court decision striking down an act of Congress to check the lower court's work. If the lower court is correct, then the Supreme Court strikes the law down for the nation as a whole. If the lower court is wrong, it needs correcting. It is also clear why the Court would take a case to reverse a lower court that had wrongly upheld a statute. If the lower court is improperly deferential to Congress, the Court steps in to protect the Constitution. Notice what is missing: we cannot tell a general story for why the Court would take a case only to affirm a lower court that upheld a statute.

One might reasonably assume that this theoretical silence should indicate that the Court would never, or only rarely, grant certiorari only to affirm in a case where the lower court upholds a statute against constitutional challenge. This assumption turns out to be (almost) completely wrong. Over the nation's history, the *plurality* of cases invoking the Court's power of judicial review saw the Court affirm a lower court that upheld a statute. In other words, most of the time when Justices decide cases involving the constitutionality of a federal statute, they leave things just as they found them.[7] Far from being entirely absent or rare, this has traditionally been the most common occurrence even though it is the very thing our current theories cannot explain. It is only recently, under the Roberts Court, that the Justices have begun to conform to existing theoretical expectations.

These current expectations reflect legal and political theories of the Court as a veto player. Of course, everyone knows the Court does not *always* veto, but theories traditionally find this concession uninteresting. We pay lip service to the idea that judicial review is the power to review the constitutionality of legislative and executive action, and appellate review is the power to review the legal correctness of an action by a lower federal court. These definitions are agnostic as to the outcome of the case. But we almost exclusively talk about the former as the means through which the Court strikes down federal statutes as unconstitutional. The Court does its important work when it protects individual rights and the constitutional structure by striking down laws that threaten them. Accordingly, scholars have largely ignored the Court's power to uphold statutes when theorizing about judicial review, since leaving statutes in place does not raise the "counter-majoritarian difficulty" that drives so much work on judicial review.[8] Why the Court might uphold a statute is a question left almost entirely unexplored and unexplained by the literature, even though many of the most important judicial decisions in our nation's history involve upholding federal statutes

7. Although writing on a somewhat different issue, Judge Richard Posner's riposte, "What am I? A potted plant?" is relevant here. The judicial inclination is not to be a wallflower and leave all the exciting action to others. RICHARD A. POSNER, OVERCOMING LAW 229 (1995).

8. BICKEL, *supra* note 3, at 16.

against constitutional challenge.[9] Indeed, given the focus on the power of the Court to wield a veto power, the implicit assumption is that the Court should rarely bother to uphold a statute, and little would be accomplished by doing so.

Similarly, the appellate power is how the Court keeps the lower courts in line, which implies disciplining lower courts who go astray. It oversees the development of legal doctrine by chastising lower courts that overreach or do not go far enough. If there is no lower court conflict and the Justices agree with the approach taken below, the Court can simply leave things be; their preferred policy is already in effect. Supposing there is a split, resolving it will almost, by definition, reverse some lower court precedent no matter how the Court decides. In the context of a split, affirming case *A* is in many ways simply a vehicle through which the Court can reverse case *B*. Even here, the Court exercises power primarily by nullifying the actions of other government officials.

Any empirical hypothesis for any study of the intersection of certiorari and judicial review must take seriously these theories of judicial review—that lack a coherent explanation for why the Court would need to uphold a statute at all—and certiorari, which cannot explain why the Court would take a case just to affirm the lower court absent a circuit split. Together, this suggests that there is no existing theoretical account for why the Court would review and uphold a statute that has already been validated by a lower court and faces no judicial threat from another circuit. Legally and institutionally, then, the Court accomplishes little by upholding and affirming what others have done. The reasonable assumption would be that in the minority of cases in which the Court affirms, most of these should work to resolve circuit splits. Otherwise, the Court is wasting resources and space on a limited docket on cases that will work no change in the law.

And yet, despite these theoretical expectations, the *most common* judicial review case is one where the Supreme Court affirms a lower court that upheld the statute. The very thing that our theories suggest should not occur is in fact the plurality outcome. Therefore, the first question we address is: why has the U.S. Supreme Court taken and affirmed so many decisions that upheld so many laws against constitutional challenge?

But recent events pose an equally interesting question: why did the Roberts Court stop doing this? Over its entire history, the Roberts Court has issued only two opinions that affirm a lower court that upheld a federal statute.[10] One of those cases was placed on the docket by the preceding Rehnquist Court.[11] That means as Chief Justice, Roberts has only taken one of these uphold-affirm cases, and that was more than a decade ago. This raises twin inquiries: why did the Court stop taking these cases, and what are they giving up by doing so?

---

9. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937); Knox v. Lee, 79 U.S. 457, 526 (1871); McCulloch v. Maryland, 17 U.S. 316, 437 (1819).

10. Whittington, *The Least Activist Supreme Court in History?*, *supra* note 1, at 2250 tbl.3.

11. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006).

As these questions only reveal themselves after a careful empirical inquiry, we must take a moment to describe the data. For years, both legislators and commentators have long had an interest in identifying and cataloging cases in which the Court has struck down a legislative provision.[12] The constitutional canon largely consists of cases in which the Court has, for good or for ill, struck down some government action.[13] As a result, inventories of cases invalidating statutes have been constructed over time,[14] and counts of cases invalidating legislation have often been used as variables in empirical analyses of the exercise of judicial review.[15] No comparable effort has been made to inventory cases in which the Court has upheld legislation against constitutional challenge.

This paper takes advantage of a recent compilation of such cases. The Judicial Review of Congress ("JRC") database identifies cases decided by the U.S. Supreme Court that substantively review the constitutionality of provisions of federal statutes from the founding to the present.[16] Significantly, the JRC database includes not only cases in which the Court found a federal statutory provision to be unconstitutional, but also cases in which the Court upheld a statutory provision against constitutional challenge.

Our examination of these data reveal that the category of cases we call the "uphold-affirm" set—where the lower court upholds a statute and the Court affirms—is the plurality category among judicial review cases. This is surprising not only because this category is completely incompatible with current theories of judicial review and certiorari, but it also shows that the Court, which usually reverses lower courts,[17] deviates from its general practice when it exercises its judicial review powers where it tends to affirm.

Having identified this phenomenon, we set out to understand the factors that could generate cases in the uphold-affirm set. We mined existing theories of judicial review and certiorari for factors that could account for this surprising finding. After examining several of the obvious candidates, we found that they could provide, at most, only a partial explanation for this uphold-affirm category.

---

12. *See* Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925, 928–29 (1965); Whittington, *The Least Activist Supreme Court in History?*, *supra* note 1, at 2244.

13. *See, e.g.*, Jerry Goldman, *The Canon of Constitutional Law Revisited*, L. & POL. BOOK REV., Aug. 2005, at 648, http://www.lawcourts.org/LPBR/reviews/goldman0805.htm (listing twelve cases, out of an inventory of 541 principal cases, that Goldman believes are canonical).

14. *See, e.g.*, 131 U.S. CCXXXV (1889); THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION 2309–58 (2016).

15. *See, e.g.*, Gregory A. Caldeira & Donald J. McCrone, *Of Time and Judicial Activism: A Study of the U.S. Supreme Court, 1800-1973*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 103–27 (Stephen C. Halpern & Charles M. Lamb eds., 1982); TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 2 (2011); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 286, 288 (1957); Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, 57 POL. RES. Q. 131, 135 (2004); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 883 n.18 (1975); Nagel, *supra* note 12, at 928.

16. *See* Keith E. Whittington, Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present (Dec. 2017) (unpublished manuscript) (on file with author).

17. The Court reverses the lower court in about 60% of cases. *See* Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, LANDSLIDE, Jan./Feb. 2010, at tbl.3.

Unsatisfied with what we could extrapolate from current theories, we introduce possible theoretical justifications and explanations for this category. In particular, we suggest that the Court may be interested in bolstering Congress, settling public constitutional disputes, protecting its own powers, or engaging in policymaking in the guise of constitutional interpretation. A better understanding of why the Court might take these cases can help us understand what can be accomplished through the exercise of judicial review and what the Roberts Court is potentially giving up in declining to decide such cases.

II. THE JUDICIAL AND POLITICAL LOGICS OF TAKING CASES AND REVIEWING STATUTES

The Court is at once both a legal and a political institution, and as such, it has both judicial and political interests.[18] When taking cases that invoke the power to review federal statutes, the Court must deal with both parts of its institutional nature. As the highest court in the Article III judiciary, it has an obligation to supervise lower courts and to vindicate constitutional duties. But as the most powerful body in the third branch of government, it must be aware that striking a statute passed by the coordinated efforts of the other two branches strains the separation of powers and potentially places the Court at risk of political reprisals.[19] With this dual nature in mind, we consider the judicial and political logics of taking and deciding cases that question the validity of federal statutes.

A. The View from Atop the Judicial Hierarchy

It is all too easy to equate the judiciary and the Supreme Court, especially when considering a topic like judicial review. But the "judicial power" is vested across different Article III bodies. Unlike many constitutional systems, the power of judicial review is not solely vested in the Supreme Court.[20] Indeed, as the Court engages in judicial review primarily through its appellate jurisdiction, lower courts almost always get the first bite at the apple. Thus, the decision to take such a case implicates both the Court's institutional obligation to monitor lower courts and to engage in substantive review of the nation's laws, as well as its power to effectively amend the constitutional framework in which those laws operate. Substantively, the Court will be deciding whether a statute is constitutional. But procedurally, the Court makes this decision as it affirms or reverses a lower court that has already addressed that question.

---

18. For a classic statement of this dual character, see generally MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT (1964).

19. *See generally* CLARK, *supra* note 15; LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1997); LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1988); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); Nagel, *supra* note 12; Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992).

20. On the alternative model of specialized constitutional courts, see Georg Vanberg, *Constitutional Courts in Comparative Perspective: A Theoretical Assessment*, 18 ANN. REV. POL. SCI. 167, 181 (2015).

B. When the Lower Court Strikes Down a Statute

The Court tends to review a lower court decision striking a statute for at least one of three reasons: concerns over uniformity, constitutional deviancy, and institutional legitimacy. First, the Court is generally concerned with uniformity in federal law.[21] If one district or circuit holds a statute or an application thereof to be unconstitutional, the effect is generally limited to that particular jurisdiction.[22] That leaves different parts of the country under different operating federal statutory regimes.[23]

The second reason the Court is likely to review is that parts of the country are living under a statutory regime that the Court now has good reason to believe may be unconstitutional. The lack of uniformity is bad enough, but the lower court decision is a costly signal on the part of the lower court that the statute is actually unconstitutional. It is a costly signal because lower court judges prefer not to be reversed.[24] Striking a statute as unconstitutional certainly increases the chances the Court will take the case on appeal, and as is widely known, the Court more often than not will reverse the lower court upon review.[25] The Court is three times more likely to reverse a lower court that finds a constitutional violation than it is to affirm.[26] Striking down a statute is inviting a reversal, and lower court judges are unlikely to risk this if they do not believe there is actually constitutional error.

Of course, some lower court judges may be willing to run the risk of reversal in order to push the law in new directions. A judge or panel may be interested in doing more to protect individual rights or limit federal power than in avoiding a reversal, and both of these motivations may favor striking federal statutes. Further, since the likelihood of reversal is so high, only the more extreme judges on the right and left are likely to be willing to run the risk of being overturned. For more moderate judges, the policy payoff is simply not worth it.[27] This suggests that extreme judges are the ones most likely to strike down statutes.

---

21. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1568 (2008); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1109 (1987).

22. That said, there have been several nationwide injunctions that have captured public attention. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV 417, 444 n.161 (2017).

23. *But see* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716, 722–28 (1984) (arguing that while uniformity is valuable, the Court should wait until the issue has percolated sufficiently and a split has become intolerable before a matter becomes a priority).

24. *See* POSNER, *supra* note 7, at 117; Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77–78 (1994); Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130 (1980).

25. *See* Lawrence Baum, *Judicial Demand—Screening and Decisions on the Merits*, 7 AM. POL. Q. 109, 110–11 (1979); Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 828, 834 tbl.1 (1989).

26. *See infra* Part V.

27. *But see* Jennifer Barnes Bowie & Donald R. Songer, *Assessing the Applicability of Strategic Theory to Explain Decision Making on the Courts of Appeals*, 62 POL. RES. Q. 393, 395 (2009).

The third reason to review a lower court's decision to strike a statute is to defend the Court's legitimacy. To recap the current argument thus far, when a lower court strikes down a statute, there are uniformity concerns and the Court has reason to believe that either the law is unconstitutional or an extremist panel below is trying to do mischief. Leaving these problems unresolved would point to a failure of the institution itself. When a lower court strikes down a statute as unconstitutional, it sends a costly signal not only to the Court, but also to the broader public and Congress that there is currently no uniformity and a real threat to constitutionally-protected rights. The legitimacy of the Court depends in large part on its ability to promote uniformity and protect individual rights. The Court's institutional legitimacy is now at issue as the public and the legislature are aware of the lower court's decision. If the Supreme Court ducks the case, it risks its own institutional standing.

C. When the Lower Court Upholds a Statute

There are at least two reasons why the Supreme Court would review a statute the lower court upheld. First, the Court could infer that the lower court was too deferential to Congress. Second, the Court could decide that it is ready to work a change in constitutional meaning.

As to the first, courts tend to give great deference to the legislature. In part, this stems from the traditional aversion that "the least dangerous branch" has with starting fights with Congress.[28] This deference manifests itself in many ways, including special doctrines that purport to keep the Court from such inter-branch conflicts such as the political question doctrine or the canon of constitutional avoidance.[29] For lower courts, this tendency is likely to be exacerbated by the threat of reversal alluded to above. Knowing that the Supreme Court tends to reverse lower courts—especially when the lower courts strike down a statute—there is an additional institutional incentive for the lower courts to let the Supreme Court do the dirty work of telling Congress it went too far.

Further, if the legislature is operating within constitutional parameters, a Court wanting to make new law will likely reverse. Lower courts are likely less inclined to attempt such policymaking[30] and should uphold the federal action when Congress is following the law. So when the Court is interested in moving or refining the law in new ways, the Court must often work through reversing lower courts that upheld statutes. When the constitutional playing field is generally known, the lower courts should be upholding laws against challenge and the Supreme Court should leave them to that business. When the Justices want to

28. Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1042 (1994).

29. *See, e.g., id.*; Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 665 (2012).

30. The Supreme Court may want to reserve this jurisgenerative power to itself. Guarding this power would then be an additional reason we would expect the Court to review a decision below that strikes a statute. Moreover, we may expect the Court to be especially on guard if the statute is not relatively recent. Older statutes and their applications are more likely to have already been vetted. If a lower court strikes an older statute, it indicates somebody is ignoring standing Supreme Court precedent—either the lower court or the Executive.

move the goalposts, then they will need to reverse the lower courts to make those wishes known.

D. The Missing Box

Having said this much, we have recounted a fairly uncontroversial account of how the Court should handle certiorari petitions in cases dealing with judicial review. When the lower court strikes a statute, the Court is immediately worried about uniformity of the law and divergence from constitutional principles by either Congress or the lower courts. This creates institutional pressure to bring the nation's laws back into harmony and within the constitutional framework. When the lower court upholds a statute, the Court may look at the case being appealed and worry that the lower court was overly deferential or think that the case may be a good vehicle to change the law, either being motive to reverse the lower court and strike the statute. This explains three of four possible outcomes shown in Table 1 below.

TABLE 1: SUPREME COURT REVIEW OF THE LOWER COURTS

	lower court upholds	lower court strikes
SCOTUS affirms	uphold-affirm	strike-affirm
SCOTUS reverses	uphold-reverse	strike-reverse

Notice there is a fourth box in the top-left corner that signifies cases in which the lower court upholds the statute and the Supreme Court agrees that this is the right outcome. At first blush, this box is consistent with a view that both the lower court and the Supreme Court are deferring to Congress. But upon reflection, it is unclear why the Court would voluntarily choose to take such a case. If the Court wants the law to stand, all it has to do is deny certiorari and leave the lower court's decision as the law. Given that Supreme Court review is a scarce and precious resource, it is unclear why the Court would grant cert in a case that will not much affect the law.

From a theoretical perspective, this box should be almost empty. When the lower court affirms, there is no threat to the integrity of the national statutory scheme and no particular reason to worry about constitutional violations or rogue judges. We might expect a few stray cases where the Supreme Court initially thinks the lower courts were too deferential but, upon review, changes its mind. But if our current theoretical understanding of how the Court takes cases involving judicial review is to be believed, we would expect this box to be largely empty.

E. The Political Logic

The positive literature on the Court comes at this issue from a somewhat different perspective but reaches a very similar conclusion. Conventional political logic suggests that courts are empowered with the authority to interpret and enforce constitutional rules in order to strike down legislation.[31] The origin and maintenance of independent judiciaries armed with constitutional review hinges on the good will of political elites, organized interests, and the mass public who calculate that policies they favor will, on average, be struck down less often than the policies they disfavor.[32] The construction of a judicial veto is an "insurance policy" against the possibility of current majorities becoming future minorities.[33] Judges empowered with such a weapon would use it to bring policies adopted by legislature into alignment with their own policy preferences.[34]

From that perspective, there is little point to courts upholding laws. Courts do their valuable political work when they apply the veto. Scholars have struggled to provide a compelling political explanation for judges to actively refrain from striking down laws. Charles Black suggested, for example, that courts might serve a legitimating function in such cases,[35] but the support for that argument is thin.[36] Cases striking down statutes are more visible, but cases upholding laws against constitutional challenge are perhaps as consequential. Nonetheless, they are undertheorized.

If the Court is primarily a veto player within the political system, it should never uphold laws; it should only strike them down.[37] Yet empirically, we observe the Court deciding cases that uphold statutes against constitutional challenge. The puzzle is whether there is a political logic that would account for the Court engaging in such behavior.

One option is to recognize that policy divergence can come from more than one source. Theories of judicial review, as such, generally focus on horizontal divergence between the preferences of the judiciary and the legislature. Greater inter-branch divergence should increase the probability of judicial invalidation

---

31. *See* Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 444 (2005).

32. *See* Georg Vanberg, *Establishing and Maintaining Judicial Independence*, *in* OXFORD HANDBOOK OF LAW AND POLITICS 99, 100 (Gregory A. Caldeira, Daniel Keleman & Kieth E. Whittington eds., 2008); Landes & Posner, *supra* note 15, at 876; J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722 (1994).

33. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 33 (2003).

34. *See* Jeffrey A. Segal, *Judicial Behavior*, *in* OXFORD HANDBOOK OF LAW AND POLITICS, *supra* note 32, at 19, 20.

35. CHARLES L. BLACK, THE PEOPLE AND THE COURT 48–52 (1960).

36. *See* Robert J. Hume, *State Courts and Policy Legitimation: An Experimental Study of the Ability of State Courts to Change Opinion*, 42 PUBLIUS 211, 213–14 (2012); Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 L. & SOC'Y REV. 357, 380 (1968).

37. The idea of "veto players" particularly entered political analysis through game theory. *See, e.g.*, McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO L.J. 705, 707 (1992); George Tsebelis, *Veto Players and Institutional Analysis*, 13 GOVERNANCE 441, 442 (2000).

of legislative outputs.[38] But the judicial hierarchy also opens the possibility of vertical divergence between the preferences of the Supreme Court and the lower courts.[39] Where horizontal divergence leads to the nullification of legislation, vertical divergence leads to reversals of lower court decisions.

Thus, one form of upholding laws fits the judicial veto player model quite neatly—upholding legislation while reversing a lower court.[40] The rationale for court action in this type of case is completely consistent with the effort of the judges to bring policies into alignment with their own preferences. The target of the judicial veto is simply different—oppositional judges rather than oppositional legislators. This would largely solve the puzzle of why the Court upholds legislation, if such cases generally involve reversing lower courts.

Distinguishing between horizontal and vertical divergence clarifies the main puzzle regarding the exercise of judicial review. Table 2 sets up the four possibilities given these two dimensions along which the Court might diverge from other actors in the system. Convergence and divergence of policy preferences in constitutional cases can arise along either the horizontal (across the branches of government) or the vertical dimension (across the judicial hierarchy). If preferences along both dimensions converge (as in the upper left quadrant), the Court would be expected to affirm the lower court and uphold the statute. If preferences along both dimensions diverge (as in the lower right quadrant), the Court would be expected to reverse the lower court and invalidate the statute. If preferences diverge from just that of the lower court but are shared with the legislature (as in the lower left quadrant), then the Supreme Court should reverse that court while upholding the legislation. If preferences diverge from just that of the legislature but are shared with the preferences with the lower court (as in the upper right quadrant), then the Supreme Court should affirm that court while invalidating the statute.

TABLE 2: THE DIMENSIONS OF SUPREME COURT CONFLICT

	Horizontal Convergence	Horizontal Divergence
Hierarchical Convergence		Policy Veto Attitudinal Logic
Hierarchical Divergence	Judicial Hierarchy Logic	Policy Veto Attitudinal Logic

A different political logic provides an expectation regarding judicial action in each cell. Table 2 identifies the logic associated with each cell. In the right

38. *See* Jeffrey A. Segal & Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 N.C. L. REV. 1323, 1340 (2005).

39. Vertical policy divergence might also arise in a federal structure as a result of disagreements between the national judiciary and state legislatures, but this potential source of vertical divergence is not a significant consideration here.

40. *See, e.g.*, Jonathan P. Kastellec, *The Judicial Hierarchy: A Review Essay*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS 9 (forthcoming) (on file with author).

column, the Supreme Court is driven by an *attitudinal logic* to invalidate statutes in the cases that come before them, regardless of what the lower courts had done.[41] Regardless of whether the Court's action involves affirming or reversing a lower court, the preference of divergence between the Court and the legislature would lead to the exercise of the judicial veto to strike down the law. A simple attitudinal model of judicial behavior indicates that striking down laws would be driven by the ideological distance between the court and the enacting legislature.[42]

The left column of Table 2 encompasses cases in which the Supreme Court would uphold legislation. Given ideological convergence between the legislature and the Court, the Court would have little reason to invalidate laws in those cases. Nonetheless, in a subset of those potential cases the Court would have a reason to act as a veto player. In particular, in the lower left quadrant, the Court should veto the policy established by the lower court. In doing so, the Court would be upholding the statute but reversing the lower court. The logic of judicial hierarchy should encourage the Court to accept such cases and issue rulings upholding laws.[43]

The political logic of judicial review in Table 2 suggests that all cases upholding laws should be crowded into the bottom left quadrant and governed by the politics of judicial hierarchy. The upper left quadrant, by contrast, should be an empty set. Cases that would fall into that quadrant involve policies that the Court already likes. The Court would have no reason to disturb the status quo in those cases and, as a result, would have no reason to issue rulings on the constitutionality of statutes in cases of that sort. In such cases, the lower courts are being good agents to the Supreme Court, and the entire judicial hierarchy is aligned with the legislature. Litigants seeking to challenge Congress are being turned away at the courthouse door, and the Justices should be satisfied.

III. THE EMPIRICAL REALITY AND SOME POSSIBLE EXPLANATIONS

According to both the judicial and political logics, the Court should essentially never affirm a lower court that upholds a federal statute. This is not because the Justices would not agree with the lower court; rather, it is because there is no need to waste a precious spot on the Court's docket when the Court's judicial and political preferences are already in effect. The principle of conservation[44] of resources suggests that agreement should result in no action by the Justices.

Current theory regarding the types of cases the Court takes also suggests that the Court should favor cases where it will reverse a lower court or strike a

41. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 111 (2002).

42. *See* Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89, 101 (2011).

43. *See* Kastellec, *supra* note 40, at 9; Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 L. SOC'Y REV. 163, 164 (2006).

44. *See* Estreicher & Sexton, *supra* note 23, at 726–27.

statute. In an exhaustive study of cert petitions filed during the 1982 term, Estreicher and Sexton categorized petitions into three sets.[45] The "priority docket" included cases the Court has an institutional obligation to hear.[46] These include resolving "intolerable conflicts" in the lower courts, threats to the separation of powers or federalism, or blatant disregard of Supreme Court precedent.[47] The second set of cases are those that the Court should have discretion to take as it sees fit. These kinds of cases involve federal challenges to state statutes adjudicated in state courts and decided against the federal claim, federal courts striking down state actions in a way that threatens federalism interests, interference with the federal executive, and national emergencies, along with cases that call for the Court's "extraordinary power of supervision" or those that provide a vehicle to make new law.[48] The third set of cert petitions are the cases the Court should not grant.

Considering the Priority Docket and Discretionary Docket in the context of judicial review of federal statutes allows us to focus in on a subset of cases. Notably, cases involving review of state statutes or other actions fall by the wayside. Further, careful examination of these categories would suggest that the Court should spend more time reversing than affirming. For example, if the Court grants a petition because a lower court disregarded clear precedent, one would expect a reversal. Similarly, if the Court is sufficiently concerned that a statute threatens the separation of powers or federalism, one would expect it to be more likely to strike the statute. If the Court wants to make new law, it should be reversing a lower court that followed the old law. This is not to say that one cannot imagine such a case appearing in the uphold-affirm box; rather, it points to the expectation that cases in that box should be relatively scarce. But they are not scarce at all.

Over its history, the *most common* outcome is for the Court to affirm a decision that upholds a statute. In over 42% of the Court's judicial review cases, the Court affirms when the lower court upholds. The category that should be empty is actually the most likely outcome. Our aim in this section is to look for possible explanations for this behavior.

TABLE 3: THE INCIDENCE OF JUDICIAL REVIEW OF CONGRESS BY THE U.S. SUPREME COURT

	Uphold Law	Invalidate Law
Affirm Lower Court	42%	14%
Reverse Lower Court	32%	12%

45. *Id.* at 706.
46. *Id.*
47. *Id.* at 720–31.
48. *Id.* at 731–37.

We begin by examining possible judicially minded explanations. These explanations emphasize the Court's role as a judicial body operating within the Article III judiciary. We consider possible explanations that would come quickly to mind for most lawyers and legal theorists: mandatory jurisdiction, circuit splits, etc. We find that these possibilities explain very little of the mystery.

A. Cases from a Previous Era

The modern discussion of how the U.S. Supreme Court exercises the power of judicial review understandably revolves around modern judicial practices. A central feature of the modern Court is that it acts on a largely discretionary docket.[49] Since the Judiciary Act of 1925, the Court has been able to control most of its docket through the discretionary decision of whether to grant a writ of certiorari.[50] On the assumption of a discretionary docket, the veto player model of judicial review suggests that the Court should rarely resolve cases by simultaneously upholding laws and affirming lower court decisions. If the Court were asked to review such a case, it should simply decline to hear the case since it would be satisfied with the policy status quo. That pool of potential cases—and case outcomes—would be filtered out at the cert stage.

But the pre-modern history of the Court was very different. Until the Court gained control over its docket, it was forced to take many cases it did not want to hear.[51] The existence of cases simultaneously upholding a law and affirming the lower court would not be so surprising if the Court's docket were mandatory, rather than discretionary. If the Court were forced to hear and resolve cases in which it was content with the status quo, then it would routinely issue decisions affirming that status quo. Judicial validations of legislation would be comparable to the President affixing his signature to legislative bills of which he approves. The validation would serve no particular political function but would simply be ministerial.

Further, since the Court had to take so many cases for so long, perhaps the historical numbers merely reflect the larger number of cases from that previous era. The presence of a large number of cases in the upper left quadrant of Table 3 might simply be an artifact of the Court's early history with a non discretionary docket. If so, we would expect that category to approach an empty set if the set of judicial review cases were restricted to those that the Court had discretion over whether to hear the case.

The pre-modern court also allowed cases to be argued differently. Across the nineteenth century, the Court, for the most part, heard constitutional cases on appeal. The norms of the period, moreover, gave the parties in the case substantial discretion over what arguments to raise before the Court. Having accepted the case for decision, the Justices were at the mercy of the lawyers to determine

49. *See* LAWRENCE BAUM, THE SUPREME COURT 85–98 (12th ed. 2016).

50. JUSTIN CROWE, BUILDING THE JUDICIARY 199–212 (2012); DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 11–15 (1980).

51. *See* CROWE, *supra* note 50, at 199.

what issues were to be addressed in the case. On the margins, Justices could skew the discussion in order to address the issues that they thought were most pressing or avoid those that they thought not worth discussing. But as a general matter, the arguments in cases heard before the Supreme Court were wide-ranging, and judicial opinions might likewise work through a variety of issues in each case in order to reach a judgment.[52]

In that context, the Justice writing the opinion of the Court might feel obliged to address constitutional issues relating to the validity of legislation even when such issues were mostly side-notes to the main arguments at play. The cases were not "constitutional cases" in the sense that they arrived at the Court primarily for the purpose of resolving a constitutional claim. Constitutional claims were incidentally resolved as part of the judicial process of disposing of all the major legal arguments mooted by the attorneys. Such secondary and tertiary constitutional claims might be particularly unlikely to raise substantial issues that would lead the Justices to overturn a lower court or strike down a statute. In response to such arguments, the Justices might be particularly likely to simply affirm the conventional wisdom as they spend more of their time and energy focusing on the more seriously contested issues in the case.[53]

This style of judicial decision-making has been largely eliminated from the modern Court. The writ of certiorari delimits the issues to be considered by the Justices and narrows the scope of the docket in terms of issues to be addressed rather than cases to be resolved.[54] Likewise, attorneys at the Supreme Court bar are now highly constrained in what arguments they can raise. The relaxed approach of the nineteenth-century Court has been replaced by a highly regimented approach to conducting business on the modern Court. Again, the cert process should have empowered the Justices to scrub such cases from the docket and make it less likely that the Court would issue opinions affirming the decision of the lower court to uphold a statute. Not only are "easy" *cases* dropped from the Court's agenda, but easy *issues* are excluded from Supreme Court review when the remaining hard cases are heard.

Older cases are potentially more likely to end up in our mystery box both because the Court had to take these cases and because they were often forced to deal with potentially meritless constitutional claims raised by lawyers on mandatory appeal. But both factors fade away after the Court got control over its docket, and we should expect the box to empty out quickly. As Table 4 shows, however, this account explains at most only part of the story. In the post-1925 era, the Court affirmed lower courts when they upheld statutes in nearly one-third of judicial review cases. Again, this is quite surprising since the Court could

52. *See* David C. Frederick, *Supreme Court Advocacy in the Early Nineteenth Century*, 30 J. SUP. CT. HIST. 1, 2 (2005).

53. As the Court noted, the constitutional question was sufficient to support a writ of error, but once the case was before the Justices the "entire case, including all questions, whether of jurisdiction or of merits" was fair game. Chappell v. United States, 160 U.S. 499, 509 (1896). This, of course, incentivized lawyers to find a constitutional claim to provide a jurisdictional hook for Supreme Court review.

54. SUP. CT. R. 14(1)(a).

stop taking cases and issues that the lower courts had already "gotten right." The expectation should be that the uphold-affirm category should disappear almost entirely.

TABLE 4: POST-1925 JUDICIAL REVIEW CASES

	Uphold Law	Invalidate Law
Affirm Lower Court	33%	14%
Reverse Lower Court	39%	14%

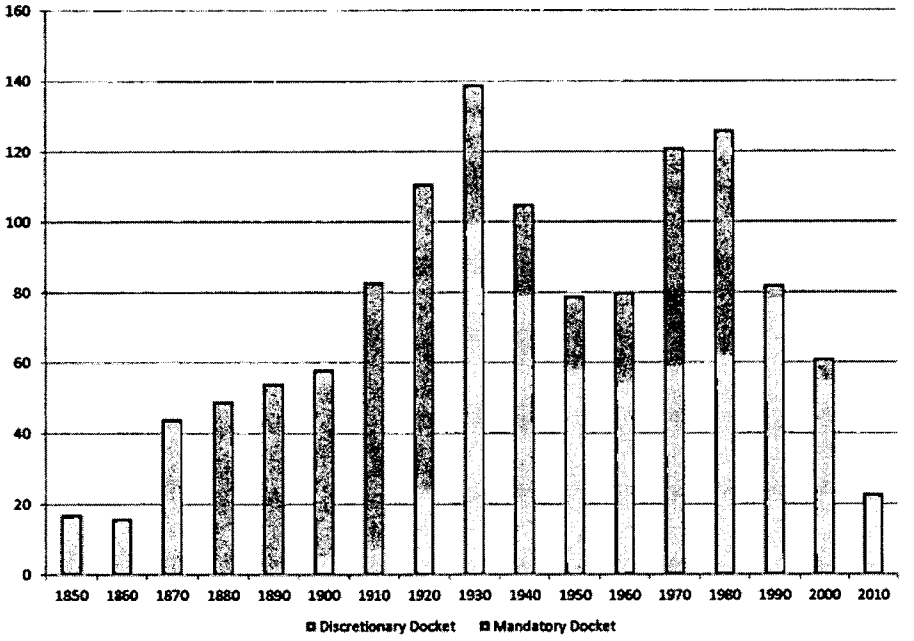
B. Mandatory Appeals

The Court's docket of constitutional cases involving challenges to congressional power has become far more discretionary over time, but even in the modern period, mandatory cases have been a surprisingly persistent feature of the Court's constitutional docket.[55] Figure 1 tracks the number of decisions issued by the Court that resolve a constitutional challenge to a federal statutory provision. The figure distinguishes between those cases that arrived at the Court by way of writ of certiorari and those that arrived by other mechanisms. As would be expected, the proportion of cases heard on cert dramatically increases after the passage of the Judiciary Act of 1925 and again after Congress removed much of the remaining mandatory jurisdiction in 1988.[56] Still, appeals account for a nontrivial portion of the docket.

55. *See* Mark Tushnet, *The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments*, 46 U. CIN. L. REV. 347, 348–49 (1977).

56. *See* CROWE, *supra* note 50, at 257.

FIGURE 1: DISCRETIONARY AND MANDATORY DOCKET IN JUDICIAL REVIEW CASES



The conventional narrative is overstated, however, in characterizing the modern docket as entirely discretionary. There is a persistent stream of cases involving challenges to federal statutes that arrive at the Court by other means, reflecting both routine and *ad hoc* paths that Congress has created to track such challenges toward eventual resolution by the U.S. Supreme Court.[57] We, therefore, might expect that the continued presence of these uphold-affirm decisions is a function of the remainder of the mandatory docket. If so, these decisions should be concentrated in the mandatory parts of the docket and largely absent in the portion the Court selects through cert.

As a substantive matter, this would be a surprising cause indeed given how the Court's jurisdiction has been constructed by modern statutes. The statute generating most of the mandatory judicial review on the Court's docket was eventually codified at 28 U.S.C § 1252. This statute placed cases striking down federal statutes within the Court's mandatory jurisdiction.[58] Accordingly, cases that required the Court to invoke judicial review on appeal—as opposed to on certiorari—were more likely to be cases where the lower court struck down the statute.

57. For example, the Voting Rights Act and the Bipartisan Campaign Finance Reform Act of 2002 provide for a three-judge panel to decide the case with direct review to the Supreme Court. Similarly, the Flag Protection Act of 1989 provided for "expedited review of constitutional issues" by directing U.S. Supreme Court to accept jurisdiction over the first appeal questioning the constitutionality of the act. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 § 777.

58. The United States must also have been a party to the case. 28 U.S.C. § 1251 (2012).

Congress wants the Court to review a lower court when a statute is struck down but has far less interest in whether the Supreme Court becomes involved when a statute has been upheld. This suggests that mandatory appeals should place additional weight on the right side of the box in Table 2, as the Court should hear more cases where the lower court invalidates the law. It is, therefore, unlikely that mandatory jurisdiction accounts for the high proportion of uphold-affirm cases.

Consistent with this theoretical prediction, Table 5 shows that the Court's discretionary docket has a higher proportion of uphold-affirm cases than its total docket, which indicates the Court chooses to take these cases more often than it is required to.

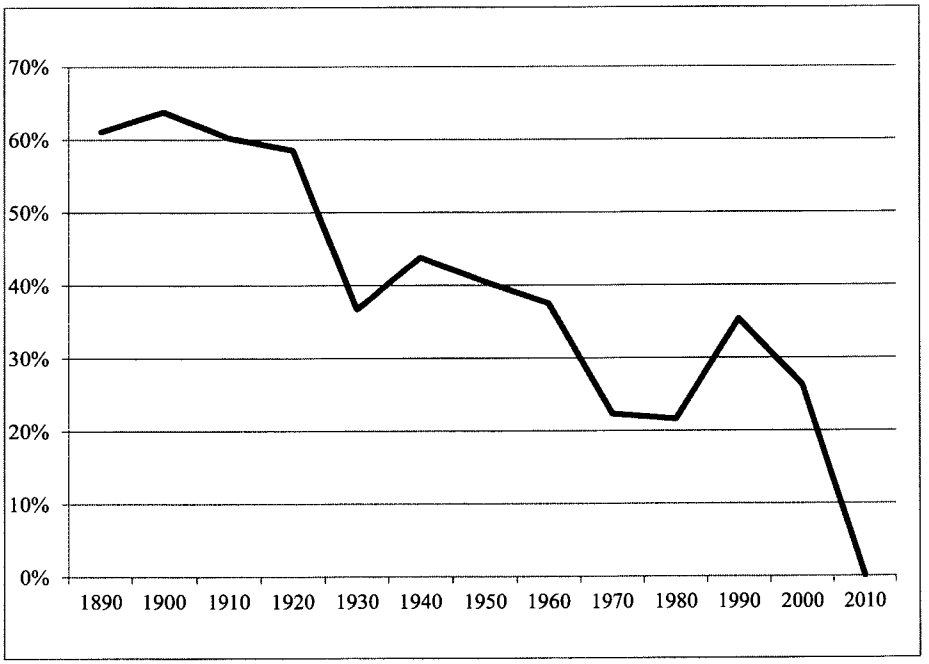
TABLE 5: POST-1925 JUDICIAL REVIEW CASES ON CERTIORARI

	Uphold Law	Invalidate Law
Affirm Lower Court	37%	12%
Reverse Lower Court	35%	16%

As a further test, we note that Congress gradually closed the mandatory jurisdiction tap, and the flow of direct appeals slowed.[59] In 1988, Congress repealed 28 U.S.C § 1252, which was the source of most of the direct appeals. Accordingly, if mandatory appeals are driving the mystery box, we should see a marked shift after 1988. We do not see any significant shift in 1988. As Figure 2 shows, the proportion of the docket in the uphold-affirm box peaks in the 1990s and is a larger portion of the docket in the 2000s than in the 1980s. If mandatory jurisdiction was the driving force behind the uphold-affirm box, the 1988 repeal of most of that jurisdiction should have dramatically reduced the number of uphold-affirm cases. Instead, in the decade following the repeal of mandatory jurisdiction, the share of the docket involving uphold-affirm cases spiked.

59. *See* Tushnet, *supra* note 55, at 359. Tushnet notes that in 1971, Congress repealed the Criminal Appeals act of 1907; in 1974 it repealed direct review in antitrust cases and also removed the requirement that a three-judge panel review certain orders from the Interstate Commerce Commission, which removed these cases from direct appeal to the Court under 28 U.S.C. § 1253. *Id.*

FIGURE 2: PERCENTAGE OF JUDICIAL REVIEW DOCKET CONSISTING OF UPHOLD-AFFIRMS



C. *Important Statutes*

The distinction between cases that arrive by cert and those that reach the Court by other means captures a procedural distinction between the Court's discretionary and mandatory dockets, but perhaps some cases are effectively mandatory even if technically discretionary. The introduction of cert petitions gave the Court formal discretion over the composition of its agenda, but it might be that some cases are only formally discretionary. Although Congress has been content to allow the Justices to control most of their docket, it has been more insistent that the Justices hear cases that raise questions about Congress's own constitutional authority.[60] As a matter of substantive political and policy salience, some cases might be too important to easily avoid.[61] If so, the distinction between the discretionary and mandatory dockets is only partly a matter of time period or statutory mandate.

Even so, we might imagine that when the Justices were empowered to avoid most cases that would merely leave the status quo unchanged, they would prefer to do so and to instead spend their resources hearing cases that would move policy toward their own ideal point. The literature of strategic judicial behavior

60. *See* CROWE, *supra* note 50, at 275.

61. *But see* Greg Goelzhauser, *Avoiding Constitutional Cases*, 39 AM. POL. RES. 483, 485 (2011).

tends to assume that the Justices will duck difficult cases at the agenda setting stage. If the Court refrains from using its veto power, it will do so by simply reducing the number of cases raising such issues and decreasing the number of cases in which it strikes down laws.[62]

We test this possibility by considering the importance of the statutory provision at issue in these judicial review cases. We take advantage of the list of "landmark statutes" passed by each Congress over the course of American history compiled by Congressional Research Service scholar Stephen Stathis.[63]

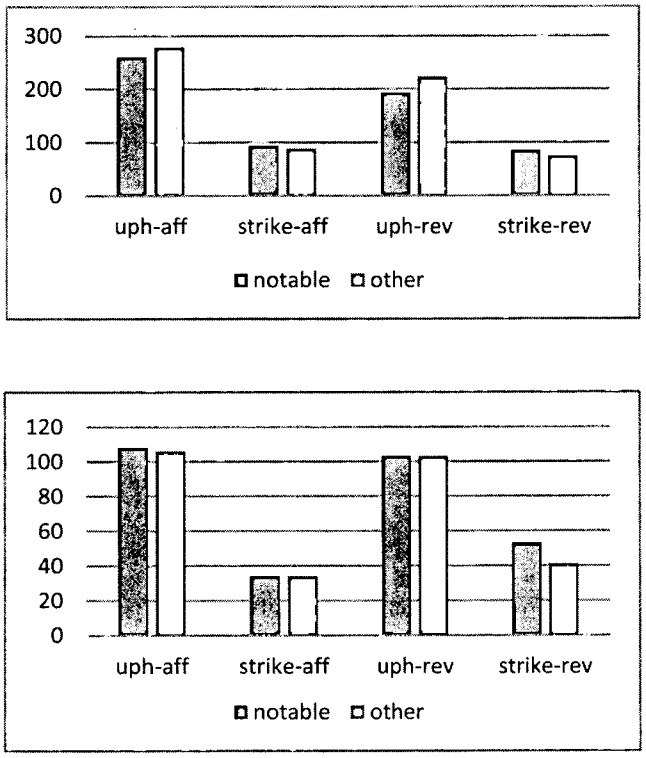
For each landmark statute, he provides an abstract describing the most important provisions of the law. For each case, we coded whether the statutory provision reviewed by the Court was one of those notable legislative provisions. Landmark legislation is often complex, and constitutional challenges can be raised to relatively minor features of important statutes in ways that generate few political or policy consequences. Constitutional cases involving notable features of landmark legislation are surely the most important that the Court has considered.

If the effectively mandatory account is driving granted cert petitions into the uphold-affirm category, then we should expect the vast majority of the cases in that bucket to come from these landmark statutes. We do not observe this over the Court's entire history or in the post-1925 era. Figure 3 shows the breakdown of each quadrant over the Court's history (top) and in cases granted certiorari since 1925 (bottom). The similarity between the two graphs shows that the Judge's Bill in 1925 did not interact much with the importance of the statutes in question.What is most important for our purposes here is that in both the overall set and in the more recent cases, the uphold-affirm set is almost evenly split between landmark statutes and other statutes. In fact, across all four sets, there is essentially no evidence that the importance of the statute affects the probability in landing in any particular one of the four boxes. This leads us to believe that the Court is not treating landmark statutes differently from other statutes, and the effectively mandatory docket is not driving the story. Indeed, we can discern no meaningful difference at all in the Court's willingness to strike important statutes in these implicitly mandatory cases.

62. *See* CLARK, *supra* note 15, at 165; Anna Harvey & Barry Friedman, *Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda*, 71 J. POL. 574, 576 (2009).

63. STEPHEN W. STATHIS, LANDMARK LEGISLATION 1774–2012 at vii (2d. ed. 2014).

FIGURE 3: DISTRIBUTION OF RESOLUTION BY IMPORTANCE OF STATUTE REVIEWED



D. Hidden Hierarchical Divergence: Circuit Splits

A second possibility for accounting for why the Court issues decisions simply validating the status quo focuses on how the status quo is characterized. The logic of the politics of judicial hierarchy suggests that the U.S. Supreme Court should not generally accept cases merely to endorse what the lower court has already done. If the lower court has already brought policy to the Court's preferred location, there is little reason for the Supreme Court to intervene.

The "lower court" is a "they," however, not an "it." So far, we have only classified cases on the vertical dimension depending on whether the judgment of the lower court is reversed in the case decided by the U.S. Supreme Court. But this only accounts for the actions of a single lower court (most often a federal circuit court). The judicial hierarchy has many components, and while the particular case that the Court considers emerged from a single lower court, it is possible that other courts have also considered the same issue in other cases and reached a different conclusion.

Both formally and empirically, the existence of circuit splits is supposed to be a major determinant of whether the U.S. Supreme Court accepts a cert petition. [64] As a result, the Court not only reviews lower court decisions directly, but also "indirectly." By considering the issue raised in a single case from a single court, the Court effectively engages in a "parallel" review of other "sleeper" courts that have ruled on the same issue.[65] Across its docket, as a whole, the Court generally reverses the lower court in the cases that it hears, but that high reversal rate obscures the various circuit courts who effectively had disagreed with the court under review and that had their prior legal interpretations endorsed by the Court. Perhaps there is a similar process in these cases of judicial review. In affirming a particular lower court, the Court might be indirectly reversing some other lower court that had reached a different conclusion on the constitutionality of the statutory provision in question.

Resolving circuit splits is a core part of the Court's job.[66] The Court resolves splits in constitutional and nonconstitutional cases alike. But what is curious is that the Court usually reverses the lower court in the case under review; in these constitutional cases, however, the Court was more likely to affirm the lower court. The split resolution explanation is also difficult to square with the uphold-affirm decision. For there to be a split *and* an uphold-affirm decision in a constitutional case, then there must have first been a lower court decision that struck the statute down as unconstitutional *and* the Supreme Court must have passed on taking that case. Waiting for issues to percolate in the lower circuits is surely something the Court likes to do, but it seems less likely that the Court would be willing to leave in place lower court decisions striking down federal legislation and wait for additional circuits to weigh in.[67] If there are instances where the lower court has struck down a law (inappropriately from the Court's perspective), the Court would likely be independently motivated to take the case to reverse it without waiting for circuit splits to develop. Put differently, if the lower court upholding the statute causes a split, then the Court should have already taken the first case and the split should not come into being.

The obvious exception to this logic would be cases where the circuits decide cases differently and nearly simultaneously.[68] But in such cases, it is not

64. *See* H.W. PERRY, DECIDING TO DECIDE 216–17 (1991); S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 901 (1984); Deborah Beim & Kelly Rader, Evolution of Conflict in the Federal Circuit Courts (Apr. 1, 2016) (unpublished manuscript), https://campuspress.yale.edu/beim/files/2016/09/Beim_Rader_Conflicts_Princeton2016-293m9zr.pdf.

65. *See* Aaron-Andrew P. Bruhl, *Measuring Circuit Splits: A Cautionary Note*, 4 J.L. 361, 361–62 (2014) ("indirect reversal"); Tom Cummins & Adam Aft, *Appellate Review*, 2 J.L. 59, 60 (2012) ("parallel review"); Karen M. Gebbia, *Circuit Splits and Empiricism in the Supreme Court*, 36 PACE L. REV. 477, 503 (2016) ("sleeper circuits").

66. *See* SUP. CT. R. 10.

67. On the logic of percolation, see Deborah Beim, *Learning in the Judicial Hierarchy*, 79 J. POL. 591, 592 (2017); Tom S. Clark & Jonathan P. Kastellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. POL. 150, 151 (2013).

68. *See, e.g.*, Touby v. United States, 500 U.S. 160, 164 (1991) (granting certiorari to review United States v. Touby, 909 F.2d 759 (3d Cir. 1990)). The Third Circuit had upheld § 201(h) of the Controlled Substances Act, 98 Stat. 2071, 21 U.S.C. § 811(h) (2012). *Touby*, 909 F.2d at 771. The pool memo for the appeal notes that the

obvious why a case upholding the law would provide a better vehicle for Supreme Court review than a case striking it down. Further, these types of simultaneous splits should be rare, and the presence of the split is not providing any extra motivation because, presumably, the Court would review the lower court decision to strike the law anyway.

Nonetheless, there is one type of split that is particularly interesting. Suppose lower courts differ on a question of statutory interpretation, which draws the Court's attention. In the course of deciding the case, the Court finds that it must also address the constitutionality of the statute. For instance, suppose the Court finds that one circuit's interpretation of a statute is constitutionally suspect and so the canon of constitutional avoidance counsels in favor of another interpretation. This would indicate that the Court finds this latter interpretation to be within constitutional bounds. On this account, the Court takes the case not to address the constitutional question, but it answers it anyway in the course of dealing with the statutory question split that drew its interest. This type of split might explain some of the uphold-affirm cases.

To investigate the possibility that the Court is indirectly reversing a lower court when affirming a court in the case before it, we examine a subset of cases from the early Rehnquist Court. The Blackmun Archive has data on the cert votes for each Justice and the memo written for the cert pool.[69] From this, we can examine what the Justices knew about the cases from 1986–1993 where they eventually affirmed a decision upholding a statute. In particular, we can look to see if the cert pool memo indicates a split in the circuits and whether that split is over statutory or constitutional concerns.

In our data, we find twenty-five cases from the first eight years of the Rehnquist Court where the Justices affirmed a lower court decision upholding a statute. Eleven memos made no mention of a circuit split, leaving fourteen cases where the clerk writing the memo informed the Justices of a split. Of these fourteen cases, nine involved constitutional splits and only five involved a circuit split over statutory interpretation.

Assuming this period is somewhat representative of the Court's workload, circuit splits are present in about 56% of the uphold-affirm cases. This finding, however, raises an additional question of why the Court waited for a lower court to uphold a statute before taking the case. In about one-third of these cases, the Court passively watched a lower court strike down a federal statute as unconstitutional without resolving the question itself upon review.[70]

Tenth Circuit reached the opposite result in *United States v. Widdowson*, 916 F.2d 587 (10th Cir. 1990), which was decided just after the Third Circuit released its opinion. *See* Cert Pool Memo, Touby v. United States, No. 90-6282 (U.S. Jan. 11, 1991), http://epstein.wustl.edu/research/blackmunMemos/1990/Granted-pdf/90-6282.pdf.

69. Lee Epstein, *Digital Archive of the Papers of Harry A. Blackmun*, WASH. U., http://epstein.wustl.edu/blackmun.php (last visited Mar. 28, 2017).

70. This does raise the intriguing possibility that the executive branch is responsible for some of these cases through its own litigation choices. In most, though not all of the cases involving the constitutionality of a federal statutory provision, the federal government is a party to the case. If the government is losing some cases in the lower courts and winning others, the executive branch might delay appealing the losing cases or refrain

And yet even if we set this curiosity aside and attribute all of these cases to the presence of a circuit split, 20% of judicial review cases fall into the uphold-affirm box even without a split, which is still a higher percentage than cases in either of the strike-affirm or uphold-reverse categories. Since our theoretical expectation is that this bucket should be empty, one-fifth is still a very high proportion.

E. Accidents

An underlying assumption of the preceding analysis is that, at the cert stage, the Court can predict its final decisions in these constitutional cases. Current theory suggests that the Justices construct a docket in order to exercise their veto power. The surprise is that they have also added cases to that docket that do not result in displacing the policy status quo. The previous sections have proceeded on the assumption that such cases must serve some political function, just as cases where the Court exercises the veto serve a political function. But it is possible that those cases are mere "accidents."

Perhaps there are cases in which the Justices had an *ex ante* expectation of overturning the status quo but that expectation ultimately went unrealized. The Justices are unlikely to be able to perfectly predict how every case would be resolved if the Court grants cert. The Court may take a case expecting to reverse the lower court and to alter the status quo, but then change its mind upon closer inspection. If the Justices had foreseen that outcome, they might well have refused to take the case at all. But their foresight is unlikely to be perfect in every case. Thus, the Court might sometimes actively exercise the power of judicial review only to leave the status quo unchanged as a result of the peculiar features of the judicial process.[71]

It may well be that the outcomes in these judicial review cases are harder for the Justices to predict. We compared the number of Justices in the majority in judicial review cases with the sizes of majority coalitions in other cases, and judicial review cases have a higher percentage of close cases. In judicial review cases, about 28% of cases have five or fewer members of the Court in the majority. The rate for all cases is 22%. Likewise, unanimous decisions are the modal outcome across all cases, with all nine Justices in the majority 28% of the time in all cases but only 21% of the time in judicial review cases.

Since cases are closer, there is reason to believe that Justices are less certain of which side will get the five votes needed to prevail. But on the other hand,

---

from appealing them at all in hopes that the Court will instead take a case in which the government had already been successful below and that perhaps presented the government's case in a better light. If so, then the Justices would be seeing a skewed sample of cases, systematically considering facts that were more favorable to the constitutionality of statutes than what the lower courts were seeing. We do not explore that possibility here.

71. In particular, recall the example from *Gathers* above. The conservative faction thought they were going to be able to reverse a disfavored precedent, but they were wrong. If they knew they could not get Justice White to join them, they most likely would not have taken the case. South Carolina v. Gathers, 490 U.S. 805, 811–12 (1989) (affirming the Supreme Court of Carolina's judgment, with Justices Scalia, O'Connor, Kennedy, and Chief Justice Rehnquist dissenting).

judicial review cases are likely to be the most ideological, and Justices are probably more certain of how they and their fellow Justices will vote. Thus, while we may think that *ceteris paribus* (with other conditions remaining the same) the outcome of a 5-4 case may have been harder to predict *ex ante* than a 6-3 case, it may be that the outcome of a judicial review case is universally predicted to be 5-4 while a 6-3 outcome in another case may have been unexpected.

But notice that even in the judicial review cases, over 70% of cases have more than a bare majority. In fact, 30% of these judicial review cases were unanimous. This suggests that the Court was almost certain of the outcome of a case more often than they were unsure.

Further, there are solid anecdotal and empirical reasons to believe that Justices can predict case outcomes at the cert stage. In his qualitative examination of the cert process, H.W. Perry recounts that Justices often take into account the likely outcome of a case when they vote at cert.[72] Further, the internal memos from Justice Blackmun's clerks often alerted him to the likely outcomes and effects of cases. Empirically, a simple statistical model that accounts for some case-importance factors and judicial ideology correctly predicts between 76% and 87% of each Justice's cert votes and 84% of their combined votes.[73] If a simple one-dimensional model can predict more than four-fifths of the cert votes, the Justices, with all their personal experiences and greater insight into their colleagues, should be able to do at least that well.

It is certainly possible that uncertainty will occasionally lead the Court to affirm when it thought it would reverse, but there is little reason to think that the Justices should have so much uncertainty about case outcomes that these sorts of cases form the plurality. Accidents do happen, but we would expect them to be rare, not common.

IV. THEORIZING JUDICIAL REVIEW

Current theories of judicial review do not explain why the Court upholds statutes at all, much less statutes that have already been blessed by a lower court. The empirical reality of the ubiquity of these cases and the lack of a coherent juridical explanation leaves us searching for a way to expand our understanding of the theory of judicial review. A successful revision must account for the prevalence of these cases, but as before, we need not find a silver bullet. Instead, once we open our eyes to the reality of the uphold-affirm set of cases, several overlapping possibilities arise.

To begin, it is important to distinguish between two overlapping but conceptually distinct lines of inquiry within the current literature. First, the countermajoritarian difficulty is a powerful normative objection that asks how it is that an unelected Court can thwart the will of the elected branches in a way that is

72. PERRY, *supra* note 64, at 218.

73. Benjamin Johnson, The Court's Political Docket: Examining the Court Through the Lens of Certiorari 22 (Sept. 26, 2017) (unpublished manuscript), https://q-aps.princeton.edu/sites/default/files/q-aps/files/ben_2017.pdf.

consistent with principles of democracy. If this tension cannot be resolved, we would have to either give up our democratic principles or judicial review. Potential answers to this challenge have largely focused on what is essentially a series of functional theories. These theories focus on what judicial review can accomplish, with the hope that the benefits will be sufficient to justify the counter-majoritarian practice.

One reason theory has ignored the Court's role in upholding statutes is likely that such an action does not obviously pose a threat to democratic values. That is not to say that it is free of normatively undesirable consequences. The obvious way in which upholding statutes could be normatively problematic is when the Court upholds when it should not. If the Court gets this wrong, it may not be a counter-majoritarian act, but it is failing to function as it must if judicial review is to be justified under previous theories that arose in response to the counter-majoritarian problem. But aside from this obvious possibility, there are some normative consequences for taking some cases and not others. The Court takes less than eighty cases a year,[74] and every case it takes that simply leaves the law in place is an opportunity missed to clarify or to improve the law. These opportunity costs may not grab hold of the imagination in the same way as Bickel's counter-majoritarian problem,[75] but they do add up.

Moreover, certiorari powers enable the Court to address or dodge questions as the Court desires. This allows the Court to start, continue, or possibly conclude national conversations on important issues. It permits the Court to insert or withdraw itself from national debates at will. This allows the Court to be far more active than the Constitution imagines. But perhaps more important, it is quite possible that the Court's control over its docket threatens the legitimacy of judicial review and, indirectly, the Court. Having raised this thorny problem, we follow the well-trodden path of looking for functionalist theories to deal with this deeper difficulty.

A. A Justified Veto?

It is conventional to conceptualize courts armed with the power of judicial review as veto players and the power of judicial review itself as a veto power.[76] This conceptualization was explicit in such early terms as "judicial veto" and "judicial nullification," which were used to describe the power of the American courts to review the constitutionality of laws.[77] This idea is commonplace in both the normative and positive literature about judicial review. Alexander Bickel's famous "counter-majoritarian difficulty" is premised on the view that when the

74. *The Justices' Caseload*, U.S. SUP. CT., https://www.supremecourt.gov/about/justicecaseload.aspx (last visited Mar. 28, 2018).

75. BICKEL, *supra* note 3, at 16–23.

76. *See, e.g.*, Brian R. Sala & James F. Spriggs, *Designing Tests of the Supreme Court and the Separation of Powers*, 57 POL. RES. Q. 197, 197 (2004); Mary L. Volcansek, *Constitutional Courts as Veto Players: Divorce and Decrees in Italy*, 39 EUR. J. POL. RES. 347, 347 (2001); David Watkins & Scott Lemieux, *Compared to What? Judicial Review and Other Veto Points in Contemporary Democratic Theory*, 13 PERSP. POL. 312, 313 (2015).

77. *See* CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 16 n.2 (1914).

Court exercises the power of judicial review, "it thwarts the will of representatives of the actual people of the here and now."[78] As Jeremy Waldron observes, democracy is compromised by "a constitution that empowers a small group of judges or other officials to veto what the people or their representatives have settled on as their answers to disputed questions about what democracy involves."[79]

In an influential article, Robert Dahl laid out the political logic of judicial review.[80] Justices are appointed to the U.S. Supreme Court to advance the policy interests of national majority coalitions.[81] The primary political function of the Court is to block the policies of the opposition, while getting out of the way of the policies of its own legislative partners.[82] Judicial review is a veto gate, which can be turned off by appointing a sufficient number of sympathetic Justices to the bench.[83] More formalized approaches to understanding the policy-making process categorize constitutional courts as veto players capable of exercising a negative lawmaking function.[84] As nations add such veto gates as judicial review to the constitutional system, they become less majoritarian in character and require greater consensus in order to take action.[85]

This perspective of judicial review as a policy veto leads to a variety of empirical expectations, many of which have been vigorously examined and debated. If the political function of constitutional courts is to veto the policies of the opposition, then judicial review should rarely be used for any other purpose than to strike down legislation.[86] Dahl drew the natural conclusion: the Court should be active in striking down laws only during the brief intervals when the opposition had taken control of the legislature, but had not yet taken control of the Court itself (as in the case of the New Deal).[87] At other times, the Court should be quiescent and dormant, at least in the exercise of judicial review.[88] Relative to that expectation, the Court across its history has seemed to exercise "too much" judicial review and has struck down too many laws,[89] which has in

78. BICKEL, *supra* note 3, at 16–17.

79. JEREMY WALDRON, LAW AND DISAGREEMENT 303 (1999).

80. Dahl, *supra* note 15, at 293–95.

81. *See id.* at 285.

82. *Id.*

83. *See* Mark Hallerberg, *Empirical Applications of Veto Player Analysis and Institutional Effectiveness*, *in* REFORM PROCESSES AND POLICY CHANGE 21, 21–26 (Thomas Konig, George Tsebelis & Marc Debus eds., 2011).

84. *See* Detlef Jahn, *The Veto Player Approach in Macro-Comparative Politics: Concepts and Measurement*, *in* REFORM PROCESSES AND POLICY CHANGE, *supra* note 83, at 43–44.

85. *See* AREND LIJPHART, PATTERNS OF DEMOCRACY 30–45 (2d ed. 2012).

86. Ginsburg and Elkins usefully point out the increasing number of additional powers and duties that are being entrusted to constitutional courts besides the power of judicial review. *See generally* Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431 (2009).

87. Dahl, *supra* note 15, at 293.

88. *Id.*

89. *See* Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 795 (1975).

turn fed further theoretical development to account for why the Court might strike down so many laws, given Dahl's basic political insight.[90]

The use of judicial review to overturn statutes is justified on several different grounds. The most familiar defense of the practice is that it is the Court's primary tool for defending rights against legislative assault.[91] This view is commonly invoked in the context of the rights of minorities.[92] For example, while Ronald Dworkin tried to distance the terminology of a "veto," which he thought implied a discretionary policy instrument, from judicial review as such, his core commitment was to providing minorities with "trumps over the majority's power" and empowering courts to deploy those trumps on the minority's behalf when their rights are threatened.[93]

The practice may also be defended as a necessary part of dialogue.[94] The most common dialogue is between the branches of government.[95] Indeed, some go so far as to say that judicial review is a textually justified part of the separation of powers system.[96] But judicial review can also be important for a public constitutional dialogue. For instance, in Bruce Ackerman's framework, judicial review "is an essential part of a vital present-oriented project" through which the Court can

> signal[] to the mass of private citizens of the United States that something special is happening in the halls of power; that their would-be representatives are attempting to legislate in ways that few political movements in American history have done with credibility; and that the moment has come, once again, to determine whether our generation will respond by making the political effort require to redefine, as private *citizens*, our collective identity.[97]

The dialogue justification views the Court as a lagging indicator of political power.[98] The judiciary was staffed by a previous regime and owes allegiance to a previous generation's interpretation of the Constitution, and until sufficient turnover enables the current regime to replace the personnel, the courts serve as

---

90. *See* Howard Gillman, *Courts and the Politics of Partisan Coalitions*, *in* OXFORD HANDBOOK OF LAW AND POLITICS, *supra* note 32, at 644–45; Dahl, *supra*, note 15, at 293–95; Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 35–36 (1993); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 583 (2005).

91. SUSAN ROSE-ACKERMAN, STEFANIE EGIDY & JAMES FOWKES, DUE PROCESS OF LAWMAKING 69 (2015).

92. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

93. RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 131 (2006).

94. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV 577, 653–54 (1993).

95. *See* LOUIS FISHER, CONSTITUTIONAL DIALOGUES 234 (1988).

96. "Judicial review also arises from an understanding of the separation of powers as creating three branches of government that bear independent obligations to interpret and enforce the Constitution within their respective spheres." Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 891 (2003).

97. Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1050 (1984).

98. *Id.* at 1056 n.73.

a political check on the popularly-elected branches.[99] This holdover account explains both why judges have a different view of law and policy than the current Congress or Executive Branch and offers a democratic justification for judicial recalcitrance. If the Court finally acquiesces, or is brought into line through the appointment of new Justices, this signals the resolution of the issue in favor of the new regime. Accordingly, negative judicial review is necessary to signal the beginning of a higher political dialogue, and it is also necessary for the Court to signal the end of the conversation: the Court's affirmation would not be meaningful if it lacked the power to refuse.

B. Why We Need a Theory for Taking Cases to Affirm

On its own, the Court upholding a statute seems to pose no particular problem. Surely there is a problem in practice if the Court upholds a statute it should strike, but making mistakes is problematic whether the case involves the Court's judicial review powers. If the Court upholds a statute, it allows the democratic process to proceed, which creates no counter-majoritarian dilemma. But when the power of judicial review intersects with the power to control the docket, problems arise.

Traditionally, the power of judicial review stems from the Court's obligation to decide cases. This understanding has not waned over time, as scholars and Justices agree that the power of judicial review still flows from the duty to decide cases.[100] The classic explanation of the relationship between the Court's obligation to decide a case and the power to interpret law is given in *Cohens v. Virginia*.

> [T]his Court . . . must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it being brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. . . . Questions may occur which we would gladly avoid; but we cannot avoid them.[101]

But the Court is no longer bound to decide all the cases within its jurisdiction. If the power of judicial review flows from the duty to decide the case at bar, what becomes of that power when the Court is no longer required to decide the case at all? As Professor Hartnett framed the problem, "[a] court that can simply refuse to hear a case can no longer credibly say that it had to decide it."[102]

---

99. This process is summarized by Jack Balkin as attempting to win the "constitutional trifecta." *See* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1455–56 (2001).

100. Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 147 (1999) ("Under *Marbury*, it is the court's obligation to decide a case by issuing a judgment that gives rise to the power of judicial review."); *see also* Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 349 (1994); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965).

101. Cohens v. Virginia, 19 U.S. 264, 404 (1821).

102. Hartnett, *Questioning Certiorari*, *supra* note 5, at 1717; *see also* Richard H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 28 (2003).

This clearly poses a challenge to the current Court's power of judicial review. But taken only this far, the challenge may not be insurmountable. The power of judicial review follows from the *power* to decide the case, not the *obligation* to decide the case. It may be that the obligation to decide a case implies the power to decide the case and, therefore, to exercise judicial review. Then judicial review would be an indirect effect of the Court's obligation to decide cases. But that would only follow necessarily if the power to decide was also necessarily contingent on the obligation to decide all cases. *Cohens* preaches that the Court "must take jurisdiction if it *should*."[103] Article III gives Congress the power to regulate the Court's appellate jurisdiction and effectively tell the Court what cases it should take. Certiorari jurisdiction may simply be a delegation of this power to the Court. If such a delegation is permissible,[104] *Cohens* now merely requires the Court to decide all cases it views as worthy of cert.

Still, what exactly makes a case "certworthy" is often difficult to ascertain. One leading scholar asserts the definition is essentially tautological.[105] Since the Court takes the cases it wants to and rejects those it does not want to take, the "should" in *Cohens* no longer reflects an institutional obligation to adhere to a rule; instead, "should" has been effectively replaced so that *Cohens* now would say the Court "must take jurisdiction" *if it wants to*. This does seem to sit uneasily with the modesty that lends moral weight to Marshall's argument in *Cohens*. Marshall argued the Supreme Court "invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."[106] It does not follow from this that Congress could not create an exception under its Article III powers, but the current practice of certiorari essentially delegates that power to the Court. The Justices can now effectively create and remove exceptions at whim.[107]

If this much is problematic for the legitimacy of judicial review, the problem deepens when we consider that the Court now grants certiorari to decide *questions* instead of cases.[108] As Hartnett points out, by limiting attention to the narrow question presented, the Court may affirm judgments because the lower court got the narrow question correct even if the judgment rests on faulty or unjust answers to other questions.[109] At this point, the Court is not deciding cases at all; it is answering questions. This brings the current Court perilously close to becoming a policy-making body with a roving mandate, rather than a court in any meaningful sense. Whether the judicial power of Article III supports such

103. *Cohens*, 19 U.S. at 404 (emphasis added).

104. While we have doubts as to whether this delegation is appropriate, we set those concerns aside at present.

105. PERRY, *supra* note 64, at 34.

106. *Cohens*, 19 U.S. at 404.

107. One might also argue that if the Court is acting wrongly, it is in denying cert in cases it should hear. Failing to live up to an obligation in another case need not imply the Court is powerless to do its duty in the cases where it undertakes to fulfill its obligations and takes the case.

108. SUP. CT. R. 14(1)(a).

109. Hartnett, *Questioning Certiorari*, *supra* note 5, at 1707.

practice, it does seem to fall outside of the justification for judicial review provided by Justice Marshall. If the Court is not deciding *cases*, it needs a new justification for judicial review.

So much for the larger conceptual problem. There still remains the problem that the Court takes and affirms cases that uphold statutes instead of taking some other case where it could correct an error or protect some individual right. The argument is that every grant of certiorari implies an opportunity cost of a case not taken. Taking a case only to uphold, which the Court has so often done, may be relatively inexpensive on the margin, but overall, it adds up. How can the Court justify leaving so much undone while it simply affirms and upholds statutes? Put differently, what are the benefits of the Court taking and affirming these cases, and do they outweigh the good the Court could have done had it exercised its more traditional veto powers in some other case?

Like the scholars who responded to the counter-majoritarian difficulty, we begin a search for answers to these questions by looking for functional theories of this behavior. We suggest several possible goals the Court may pursue through taking and affirming a case where the lower court has upheld a statute. First, the Court could be advancing the legitimacy of the federal government by validating actions taken by other branches—particularly Congress. Second, the Court may see itself as engaged in the larger enterprise of resolving public disputes. If there is a burgeoning public controversy over some federal policy or program, the Court may step in so as to settle the matter. Third, the Court may be disguising raw policy-making as judicial deference to Congress. It is presumably easier to adjust federal policy by affirming the statute with an opinion that implements the Court's preferred reading of a statute, than it is to keep vetoing Congress's efforts until the legislature "gets it right." Finally, the Court may be concerned that if it does not take these cases, it will be too easily painted as a policy-maker rather than a Court. Taking these cases provides cover for the Court to continue its essentially legislative work in other areas.

C. Bolstering Congress

At the outset, we need to distinguish the idea of bolstering from the concept of deference. Courts may defer to Congress for various reasons, and this may make them more likely to uphold a statute in any case. Indeed, the most deferential posture for the Court is to decline to moot constitutional challenges to a federal statute. Initiating "unnecessary" judicial review both implies the authority of the Court to strike laws down and sets up the Court as having the final say over the scope of congressional authority.[110] Deference cannot explain why the Court took the case in the first instance. The question before us is: Why did the Court take the case if it knows it is going to defer?

110. *See* Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1323 (2009); Keith E. Whittington & Amanda Rinderle, *Making a Mountain Out of a Molehill?* Marbury *and the Construction of the Constitutional Canon*, 39 HASTINGS CONST. L.Q. 823, 837–38 (2012).

This rationale suggests that the Court takes the case in order to reaffirm Congress. Bolstering suggests that the Court wants to add its support to federal action expecting it to provide greater legitimacy[111] and improved implementation. This goes beyond simply permitting the federal action in question to continue; the Court could permit it by just letting the lower court's decision stand. Rather, the Court takes the case to bolster the federal statutory enterprise. By using its judicial review powers to give public approval to federal statutes, the Court enhances the legitimacy of the broader federal, constitutional project. The Court's freedom to direct its docket lets it target particular issues where federal oversight is tenuous and to shore up the foundations by blessing the statutory regime.

There are at least two reasons the Court may choose to do this. First, the Court could share Congress's policy preferences. If so, the Court may wish to amplify the message sent in the policy. Simply leaving the statute alone would allow it to work, but the Court goes the extra mile to announce its agreement with the policy and to vouch that it is consistent with the nation's core constitutional principles. This is possibly efficacious because the Court is generally held in higher regard than Congress and adding its moral authority to federal legislation may somehow legitimize the enterprise. Of course, this is a difficult notion to operationalize into a testable hypothesis.[112]

Second, affirming may also boost the shared preferences of the Court and Congress by sending signals to lower courts to pull in a certain direction. For instance, if some lower courts are not aligned with the Supreme Court and Congress, the Court may use these uphold-affirm cases as a carrot to amplify and empower those judges who get with the federal program. The Court still has the stick of reversal to beat recalcitrant circuits as needed, but insofar as lower court judges are trying to do the "right thing" by being faithful agents of the Supreme Court majority, sending these positive signals may do a lot to bring the lower courts in line.

111. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952).

112. It should be noted that this is a hypothesis about judicial motivations rather than judicial effects. It might well be the case that the Justices hope to bolster Congress and its policies by upholding laws, but in fact do little of actual consequence. On judicial efficacy in this regard, see Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 752 (1989); Valerie J. Hoekstra & Jeffrey A. Segal, *The Shepherding of Local Public Opinion: The Supreme Court and* Lamb's Chapel, 58 J. POL. 1079, 1085 (1996); Timothy R. Johnson & Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 AM. POL. SCI. REV. 299, 300 (1998); Stephen P. Nicholson & Thomas G. Hansford, *Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions*, 58 AM. J. POL. SCI. 620, 620 (2014); James W. Stoutenborough, Donald P. Haider-Markel & Mahalley D. Allen, *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 419, 420 (2006); Joseph Daniel Ura, *Backlash and Legitimation: Macro Political Reponses to Supreme Court Decisions*, 58 AM. J. POL. SCI. 110, 110 (2014).

D. Settlement

The second reason the Court may be interested in taking these cases is because it may perceive a growing split within the broader public. Even if the courts have not divided on the issue, the Supreme Court may feel that there is a public disagreement about what the Constitution means. It may feel that some of these divides are corrosive to the body politic and want to step in to decide the matter. This settling mechanism could apply in both normal and high politics.

The Court may have a unique ability to facilitate such settlements because of the institutional goodwill mentioned above and also because it can enforce its conclusion as it supervises the lower courts. In addition, by taking such a case and giving it a place on the Court's small docket, it raises the profile of the debate. [113] But by taking the cases in which the Court is aligned with both Congress and lower courts, the Court appears less political as it attempts to quiet public controversies.

The Court can also play a role in declaring a new constitutional regime.[114] Just as striking down a statute may signal a challenge to a new regime's legitimacy, affirming decisions that uphold recent statutes may signal acquiescence by the old regime to the new order. This is the traditional story of the "switch in time."[115] Actively upholding statutes may solidify the position of one side in a broader political debate and undercut the opposition. When John Marshall went out of his way in *McCulloch v. Maryland* to emphasize the constitutional power to charter a national bank, he was hoping to sap the legitimacy of the strict constructionist wing of the Jeffersonian party and add the Court's weight to the more nationalist wing of that coalition.[116] Such "friendly" judicial review is aimed at quieting those who oppose the constitutional vision shared by both the Court and its political allies.

The lingering uncertainty that hovers over a set of statutes might well have been created by the Court's own actions, and thus the Justices might feel some need to issue opinions that simply announce the limits to their activism and dispel the worries of those who might harbor doubt about the Court's future actions. The New Deal "switch in time"[117] generated several cases of this sort. In the *Steward Machine* decision upholding the Social Security Act, Justice Cardozo began by observing that although several state and federal courts had already turned away constitutional challenges to the act, there were at least some judges

113. *See* Roy B. Flemming, John Bohte & B. Dan Wood, *One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947–92*, 41 AM. J. POL. SCI. 1224, 1224 (1997).

114. *See also* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1080 (2001); Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. Rev. 619, 629–34 (2017).

115. *See, e.g.*, EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 72 (1941).

116. McCulloch v. Maryland, 17 U.S. 316, 330 (1819). On *McCulloch*, see MARK R. KILLENBECK, M'CULLOCH V. MARYLAND 33 (Peter Charles Hoffer & N.E.H. Hull series eds., 2006); Keith E. Whittington, *The Road Not Taken:* Dred Scott, *Judicial Authority, and Political Questions*, 63 J. POL. 365, 368–72 (2001). On Marshall's relation to the Jeffersonian coalition, see Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229, 231 (1998).

117. CORWIN, *supra* note 115, at 72.

who held doubts about the law, and since an "important question of constitutional law is involved," the Court granted cert simply to affirm what the Fifth Circuit had done.[118] The Court acted similarly in several lower profile decisions, emphasizing the Court's new dispensation toward the New Deal while affirming lower court judgments.[119] The Rehnquist Court was in a similar, if less momentous, position at the tail end of its federalism offensive of the 1990s.[120] The Chief Justice authored an opinion clarifying for the lower courts that the states did not have immunity from suits under the Family and Medical Leave Act.[121] Similarly, the Court overruled federalism objections to applications of the Americans with Disability Act, trying to dispel uncertainty on what the lower courts took to be a "difficult question" under the Court's recent rulings.[122]

E. Empirical Tests for Bolstering and Settlement

Both the bolstering and the settlement rationales fit with a story of the Court engaging in contemporary debates. If the Court wants to use judicial review to bolster a congressional act or to take sides in an ongoing dispute, we should expect the instances where the Court affirms a decision upholding a statute to be focused on reviewing recent statutes. Affirming a statute passed by a previous regime is unlikely to curry favor with the current legislature. Similarly, one would expect the harder constitutional issues stemming from older statutes to have been worked out already, and as such, older statutes are unlikely to generate new, public constitutional conflicts requiring Supreme Court intervention.

With this in mind, we examine the vintage of the statutes considered by the Court. Figure 4 below shows that most of the Court's judicial review docket deals with statutes that are fifteen years old or less. In fact, the largest group of cases involves statutes passed within the preceding eight years at the time of review. But this is true of *all* judicial review cases. As the figure shows, cases where the Court affirms a lower court that upholds a statute seem to move in tandem with the other types of outcomes. If the bolstering and settlement hypotheses were doing most of the work, we would expect to see the dark bars to be higher in the early years relative to the light bars. That is, we would expect the share of uphold-affirm cases to be higher when the statutes are recent, than when the statutes are

118. Steward Mach. Co. v. Davis, 301 U.S. 548, 573 (1937).

119. Currin v. Wallace, 306 U.S. 1, 19 (1939) (upholding provisions of the Tobacco Inspection Act); Mulford v. Smith, 307 U.S. 38, 51 (1939) (upholding application of the Agricultural Adjustment Act); Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 33 (1939) (upholding provisions of the Home Owners' Loan Act); Elec. Bond & Share Co. v. SEC, 303 U.S. 419, 443 (1938) (upholding provisions of the Public Utility Holding Company Act); Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, 464 (1938) (upholding provisions of the National Labor Relations Act); *In re* NLRB, 304 U.S. 486, 496 (1938) (upholding provisions of the National Labor Relations Act).

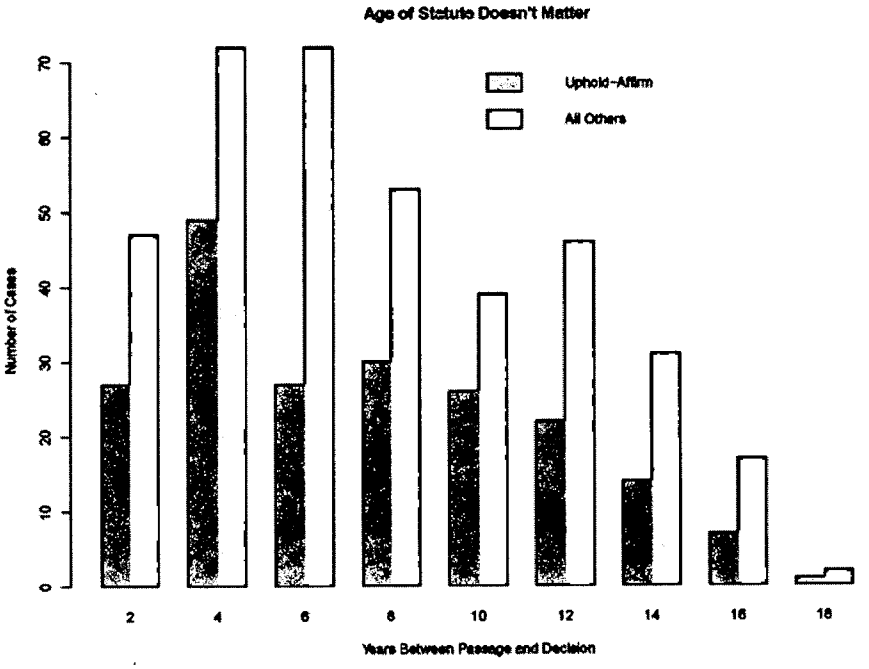
120. *See* Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 509 (2001).

121. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 734 (2003).

122. Tennessee v. Lane, 541 U.S. 509, 515 (2004); *see also* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006) (upholding application of the bankruptcy code to state agency).

older. We do not see that in Figure 4, which instead shows that the proportion seems to remain constant.

FIGURE 4: RESOLUTION OF CASES BY AGE OF STATUTE REVIEWED



This is not to say that the Court *never* engages in bolstering or takes cases to settle public issues. We do believe that these remain plausible theoretical explanations for affirming a lower court's decision to uphold a statute. Figure 4 suggests that these motivations do not seem to be a cause of this behavior in the aggregate.

F. Policymaking: Policy Entrepreneurs or Faithful Agents

Legislation scholars have long been aware of the Court's ability to effectively rewrite legislation by interpreting it in ways that seem more or less unrelated to congressional intent.[123] Some other scholars have noted that the doctrine of constitutional avoidance lets the Court justify this reinterpretation in the guise of being deferential to Congress.[124] We believe that the upholding of a statute offers a vehicle for the Court to reinterpret a statute, but with a powerful additional feature. By elevating its interpretation to a level of constitutional concern,

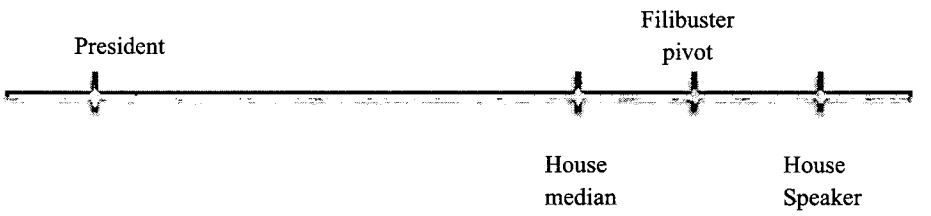
123. *See, e.g.*, Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1275 (2016).

124. *E.g.*, *id.* ("In a number of recent landmark decisions, the Supreme Court has used the canon of constitutional avoidance to essentially rewrite laws.").

the Court expands the range of policies it may pursue without risking effective backlash.

Political scientists have long recognized something called the "gridlock interval"—the policy window within which Congress will not be able to alter the status quo policy.[125] Introduced by Keith Krehbiel, pivotal politics assumes that legislators, the President, and policies can all be placed on a left-to-right continuum. [126] The theory takes seriously the institutional reality that to pass a new law that would overturn the status quo, a proposal must be supported by a coalition that includes a filibuster-proof majority in the Senate, the House leadership and majority, and either the President or "veto pivots" in both houses that could override a veto.[127] Under a liberal president, the gridlock interval would extend from the president's "ideal point" to the most conservative pivot, for example a conservative Speaker of the House. Any policy within that ideological space would be safe from reform because any alternatives would fail to attract sufficient support to overcome the built-in obstacles in the legislative process. Figure 5 below shows such a configuration. The theory is very flexible and can be adapted to any configuration of the relevant players.

FIGURE 5: ILLUSTRATION OF PIVOTAL POLITICS



The gridlock region is important because Congress cannot change any status quo policy in this region. If current law is in that region, any attempt to move the law to the left will be blocked by conservatives, just as liberals will block any attempt to move the law to the right. Specifically, the President would veto any conservative bill, and the Speaker would not let any liberal bill come up for a vote. While largely overlooked by political scientists, pivotal politics analysis explains how the Court can reinterpret statutes without facing effective backlash from Congress. So long as the Court only shifts policy within the gridlock interval, Congress will be unable to override the Court by adopting new statutory language.

Additionally, the Court may be loath to strike a statute because when it rules something out of constitutional bounds, it requires a much larger coalition

125. *See, e.g.*, DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 126–37 (1999); Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, *in* SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 19, 37 (Nathaniel Persily ed., 2015).

126. KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 21 (1998).

127. *Id.* at 23–24.

to override that ruling through the Article V procedures. Adding judicial review to the mix raises the stakes because it expands the gridlock interval. To overturn the Court, the coalition must include three-fourths of the states.[128] Upholding the statute leaves the law in place and gives the Court time to gather more information about the law, whereas if it strikes the statute, the game is effectively over. But notice that this creates a reason to uphold a statute, not to review a case in which the statute has already been upheld. The Court could just leave the lower court's ruling alone and collect its data for a future case. This is not an independent reason to take the case.

If the Court does want to shift federal policy, however, the doctrine of constitutional avoidance provides an easy justification. What is more, by couching its reasoning in a credible warning that deviations in at least one direction are likely to be held unconstitutional, the Court can both institute its policy preference and require a constitutional supermajority to override it. By invoking its judicial review authority, the Court can bolster its own policymaking through interpretation.

While this seems to provide the Court with even more policymaking discretion than traditionally realized, it does not imply that the Court is always, or even usually, using its power to replace congressional preferences with its own. Enacting coalitions may not necessarily agree on what policy is actually implemented. There may be disagreements, or a bill may be so large and complicated that nobody really has any idea what is in the bill.[129] The Court may simply be trying to adjust the policy to reflect what Congress intended, even if this comes at the expense of what the legislation actually says.

A related possibility is that the Court may be reviewing the actions of an administrative agency that is taking a more aggressive position in implementing the legislation. The Court may uphold the action because it represents the will of the current elected branches. A previous regime may have passed a statute that creates a particular policy status quo, but when an executive branch agency alters that policy through its own initiative, the Court may ratify it not because it agrees with that policy, but because it perceives that the elected branches agree with it. The Court may simply be going along with the program.

The interesting question here arises when the executive uses implementation authority to shift the policy location within the gridlock interval. So long as the new policy resides in the gridlock region, Congress cannot effectively push back against the president. So, the Court has to choose whether to defend Congress's original policy and incur the wrath of the executive, or acquiesce to the President and anger Congress.

Here, the Court is not actively trying to curry favor with the elected branches or tamp down a budding constitutional conflict. Rather, the Court may

128. U.S. CONST. art. V.

129. *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 71 (2015); Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1803 (2015).

seek to guard its institutional prerogative to oversee the development of constitutional law. We would expect this rationale to arise in instances when agencies push constitutional boundaries and not just strain against plausible interpretations of the statute. The Court may feel that the safest path is to police only large deviations that threaten its own prerogatives and let Congress fend for itself. Decisions that uphold and affirm can further empower the executive's interpretation of statutory language against congressional adjustment. This provides both a plausible account of the Court's traditional deference to agencies and a possible explanation for some of the uphold-affirm decisions, as the Court must examine the extent of the policy shift to know whether they are willing to fight back.

G. Bolstering the Court

Another possibility is that the overall portfolio of judicial review cases can be situated on something of a balance sheet. When the Court strikes down a statute, it makes a withdrawal. Congress is likely displeased,[130] and the public may think that the Court is wrongly inserting itself into politics. On the other hand, upholding statutes is like making a deposit into the account, as Congress is pleased and the public likes that things are moving along swimmingly.

A similar account may apply within the judicial hierarchy. Certainly, the Justices are at the top of the judicial hierarchy, but we should not expect that they are entirely unconcerned about their reputation among the lower court judges who will be citing their opinions and talking with them at conferences. Reversing lower courts, which the Court often does, may demoralize their fellow Article III officers. Affirming, on the other hand, may generate goodwill within the judiciary.

On this view, the Court generates the most goodwill within and across branches when it affirms a lower court that upholds a statute. Taking and deciding such cases gives the Court the capital to take other cases where they will reverse lower courts and/or strike down statutes. In this way, the Court is not trying to bolster the other branches, it is trying to preserve its own reputation and power. If the Court were to stop taking and affirming lower courts that uphold statutes, they would always be angering at least one of these audiences, and importantly for our purposes, it might imperil judicial review.

Moreover, even if the Court did not feel bound to decide certain cases and viewed itself as primarily a policy-maker, it may have good reason to take cases in the uphold-affirm bucket. Consistent with the previous Court-bolstering theory, striking down Congress or reversing lower courts may paint the Supreme Court as something other than a court deciding cases.[131] If the Supreme Court is seen as only taking cases where it acts as a policy-maker, it may diminish the

130. *But see* Brief for Members of the U.S. Senate as Amici Curiae Supporting Petitioner at 5, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (No. 11-393); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 583 (2005) (arguing that there are times when Congress wants the Court to strike down statutes).

131. *See supra* Section IV.C.

legitimacy of the judicial review power itself. But affirming lower courts and Congress gives the impression of a court at work doing judicial business. Both the legislature and the lower court would prefer to believe that their actions have been met with approval by a court, so taking these cases demonstrates that the Court is still a court, rather than a super-legislature.[132]

This suggests, then, that the Justices need to try to keep the books balanced so that they can maintain the Court's reputation. This idea has an interesting implication: namely, the values, or prices if you will, of these different actions may vary over time. There may be times when striking a statute is relatively "costly," so the Court will need to uphold more statutes to balance the accounts. If this were so, one would expect the costs to be relatively higher when the Court is ideologically distant from the other branches. For instance, if liberals control the Court and conservatives control the elected branches, there is a greater chance the Court could face a threat from the other branches, and possibly the people that elected them. Accordingly, the conservatives could exact a higher price. One could tell other stories to justify different pricing regimes, but it seems clear that any such story would require some correlation between the ideological distance between the Court and the other branches of government

However, as Figure 6 shows, this expectation fails. The solid line in Figure 6 shows the proportion of judicial review cases where the Court affirmed the lower court decision upholding a statute. The dashed line shows the share of cases where the lower court upheld the statute and the Supreme Court reversed, thereby striking the statute. Notice the Burger Court was more likely to reverse the lower court to strike a statute during both the Carter years when Democrats controlled both the White House and both houses of Congress, and when Republicans fully controlled the other branches in the Reagan years. In contrast, Chief Justice Warren was more likely to take cases that would affirm the lower court in such an instance under both unified Democratic governance in the Sixties and when Republicans controlled the Senate under Eisenhower. If the Court is trying to come to a balance to preserve some sort of equilibrium, evidence for that proposition is missing in Figure 6.

132. To put this slightly differently, a record of both upholding and striking down laws emphasizes the Court's image as a neutral arbiter of constitutionality. If the Court only strikes laws down, then Congress might come to doubt whether the Court is a valuable forum for dispute resolution of constitutional issues. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1–64 (1981) (outlining the logic of the triad in conflict resolution); Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT'L J. CON. L. 446, 447–48 (2003) (outlining logic of political support for judicial review).

FIGURE 6: HISTORICAL TRENDS

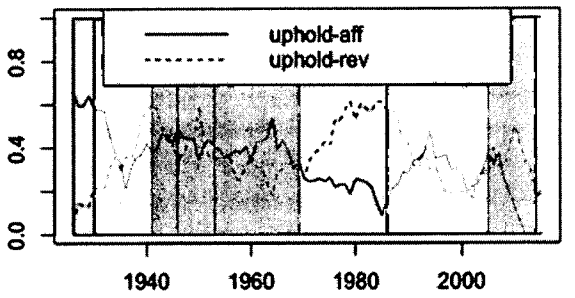


Figure 6 also suggests that the prevalence of the uphold-affirm set is not merely a result of institutional inertia. The argument for inertia runs as follows: Congress granted the Court such wide discretion based in large part upon the Court's promise that it would take cases that are sufficiently important. In particular, the Court said it would never fail to review a case of constitutional import.[133] While the shrinking docket overall may suggest that the required threshold level of importance has increased over time, perhaps the Court initially felt bound by its promise to take up such cases, and it simply continued doing so as a matter of course. That story is largely consistent with the general decline in the proportion of these cases over time, as shown in Figure 6, up to the end of the Burger Court. But the second half of the Warren Court and most of the Rehnquist Court defy that trend. Similarly, the sharp drop under Roberts does not appear to be the result of a slow decline playing itself out. Instead, it appears that under Roberts, the Court is doing something novel.

V. THE CURIOUS CASE OF THE ROBERTS COURT

The Roberts Court's judicial review docket is an historical anomaly. First, it has dramatically reduced its judicial review work in general. The Rehnquist Court heard 176 judicial review cases over nineteen years, which comes to a rate of just over 9.26 cases a term.[134] In contrast, the Roberts Court took only thirty-four such cases over its first eleven years, which is about three cases a year.[135] That is, the Rehnquist Court took judicial review cases at three times the rate of the Roberts Court.

Secondly, the affirm-uphold box has virtually vanished from the docket. The Roberts Court has only issued two opinions that affirm a lower court upholding a statute, but one of those cases was put on the docket by the previous Rehnquist Court.[136] That is, under Chief Justice Roberts, the Court has not taken

133. Hartnett, *Questioning Certiorari*, *supra* note 5, at 1715.

134. Stefanie A. Lindquist & Rorie Spill Solberg, *Judicial Review by the Burger and Rehnquist Courts: Explaining Justices' Responses to Constitutional Challenges*, 60 POL. RES. Q. 71, 80 (2007).

135. Whittington, *The Least Activist Supreme Court in History?*, *supra* note 1, at 2220.

136. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006), *cert. granted*, 544 U.S. 960 (2005).

a case and affirmed where the lower court upheld the statute since 2006,[137] and that is the only instance where the Roberts Court has made such a grant. The Roberts Court is essentially the first Court in history to behave as current theory would expect.

TABLE 6

	Rehnquist		Roberts	
	Uphold	Strike	Uphold	Strike
Affirm	34%	21%	7%	27%
Reverse	19%	26%	27%	40%

To return to where we began, there is currently no theory of why the Court would take a case where the lower court upholds a statute only to affirm it. In theory, the Court should not take such cases, and yet over its history, every Court has taken such cases with great regularity. Indeed, in previous eras, it was the plurality outcome. The Roberts Court is the first that agrees with general theoretical expectations.

This new empirical reality is further evidence that the Court can predict, at certiorari, how cases will turn out at disposition. If the Court could not reliably make these predictions, it would at least accidentally put such a case on the docket. Moreover, the sudden shift in the makeup of the docket between the Rehnquist era and the Roberts Court plainly shows that the Court must have altered and implemented its preferences. Such effective implementation requires the ability to predict case outcomes at cert.

While we are now more certain than ever that the Court can regularly and accurately predict case outcomes at the agenda-setting stage, we are still left with the problem of accounting for this shift in the Court's preferences. Essentially, we have worked diligently to explain why the Supreme Court would want to take and decide such cases, just as the Court has decided it no longer wants to take such cases. This introduces yet another puzzle that we can only briefly address here: has the Court lost its interest in generating goodwill from Congress or in remaking constitutional policy?

At first blush, one may think that the conservative Roberts Court really did lose any interest in generating goodwill from the elected branches during the Obama Administration. While conservatives might point to Chief Justice Roberts's decisions in the Affordable Care Act cases as counter-examples,[138] we do not take that to be a sufficient rejoinder. We do not think that this is a particularly strong explanation for two reasons. First, as Table 6 shows, the conservative Rehnquist Court routinely affirmed lower courts that upheld statutes during the Clinton years, so suggesting that the lack of ideological alignment between the

137. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 22 (2007), *cert. granted*, 547 U.S. 1205 (2006).

138. *See* David G. Savage, *Obamacare Ruling Again Shows Chief Justice John Roberts' Independent Streak*, L.A. TIMES (June 25, 2015, 6:42 PM), http://www.latimes.com/nation/la-na-court-roberts-20150626-story.html.

president and the Court is not a sufficient condition for these results. Second, the Roberts Court never took such a case even in the Bush years. The Roberts Court does uphold legislation, but it has done so only in cases that reversed a lower court ruling.[139] Thus, the empirical curiosity of the Roberts Court does not seem to be a function of inter-branch partisan differences.

TABLE 7

	Clinton		Obama	
	Uphold	Strike	Uphold	Strike
Affirm	31%	27%	-	35%
Reverse	22%	20%	30%	35%

It also seems unlikely that the Roberts Court has sworn off using opinions to shift the ideological valence of statutes. Observers have noted that under Chief Justice Roberts, the Court has been willing to aggressively reinterpret statutes.[140] Landmark examples include *Bond*[141] and *Sebelius*,[142] but we note that neither of these examples fit within our uphold-affirm category of judicial review. *Bond* reversed the Third Circuit and the Court avoided the constitutional question of the limits of the Treaty Power.[143] Since the opinion is limited to statutory interpretation, it falls outside the parameters of our dataset. *Sebelius* affirms that the individual mandate is constitutional,[144] but because the Court struck the Medicaid provisions, it enters the dataset as a reversal and strike.[145] If the uphold-affirm box is where the Court takes the opportunity to creatively rewrite statutes to accord with the Court's preferences, then we would expect this category to be especially prevalent in the Roberts Court.

So, we have the particular puzzles of the Roberts Court: why has the judicial review docket as a whole declined and why has the uphold-affirm set vanished? We consider three possible explanations. While data does not exist to test these hypotheses conclusively, they do generate predictions that might be confirmed or refuted over time. Most importantly, these predictions suggest what might (or might not) push the Roberts Court back onto a more traditional judicial review track.

139. Admittedly, those cases generally involved statutes that predated the Obama administration. This, in itself, is not especially surprising, however, given the usual time lag between the passage of statutes and Supreme Court review of their constitutionality and the relatively low legislative productivity of Congress during the Obama years.

140. *See* Fish, *supra* note 123, at 1278.

141. Bond v. United States, 134 S. Ct. 2077, 2093 (2014).

142. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).

143. *Bond*, 134 S. Ct. at 2094.

144. *Sebelius*, 567 U.S. at 588–89.

145. *Id.*

A. Kennedy Equilibrium

The idea of equilibrium simply suggests that there is less need to review statutes because all of the other actors in the system have internalized what will happen if the Court takes the case. Congress, agencies, lower courts, etc., all see where the law is heading, and they just go ahead and set policy in a place the Court likes. For this explanation to work, three things are required. First, the Court must be stable. Second, the Court must be almost entirely focused on policy. Third, Congress and lower courts must be able and willing to set policies the Court will accept. If the Court is not stable, if the other actors cannot meaningfully take advantage of that stability, or if the Court is interested in taking cases for nonideological reasons, the equilibrium analysis will not hold.

The first requirement seems to be satisfied, since Justice Kennedy has been the pivotal Justice throughout the Roberts era to date. Congress knows that Justice Kennedy's vote is necessary to survive judicial review, and it can write statutes that will be acceptable to Kennedy. If they do, the statutes should be acceptable to the Court. This would explain why the judicial review docket, as a whole, has fallen. Similarly, if lower court judges have learned his preferences, they can simply do what Justice Kennedy would want, and there is no risk of being overturned.

The second requirement is that Congress and the lower courts can correctly gauge what the Court will do and will be able to write statutes that the Court will approve. There is less justification for this prerequisite than for the first. For one thing, it seems to assume that Congress can only enact the will of the Court, rather than view the Court as upholding the will of Congress—within constitutional bounds. The condition is also empirically dubious given recent work by Professors Gluck and Bressman, showing that Congress is often unaware of the canons of construction the Court applies, and when it is aware, they often disregard them for political purposes.[146]

The third requirement is that the Court be almost entirely interested in policy outcomes. If the Court is only concerned with the substance of the law they expound, and the lower courts are already enforcing the pivotal Justice's preferred policy, then the Court does not need to move the policy by taking the case and writing an opinion that shifts the law to a new place. If the Court is interested in bolstering Congress or its own image, then there is no reason to stop taking these cases because Congress is doing what the Court would like. If anything, the Court should want to reward Congress for doing such a fine job. The assumption that the Court is almost always interested in policy to the exclusion of other concerns is a useful heuristic for models in political science, but it seems too strong to provide a full account of the Roberts Court's behavior.

146. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II*, 66 STAN. L. REV. 725, 732 (2014); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 907 (2013).

Nonetheless, the equilibrium explanation does present an obvious prediction for something that could return the Court to its traditional judicial review docket. The explanation relies on a stable equilibrium and policy set to reflect that equilibrium. If that equilibrium were upset—like by the replacement of Justice Kennedy—then not only would policy-makers be uncertain of the preferences of the new Court, but the statutes that passed reflecting the previous equilibrium would be ripe for reconsideration by a Court with a new preferred outcome. This suggests that the Roberts Court would begin taking more judicial review cases and some uphold-affirm cases once the Court gets a new median Justice.

B. Polarization in Congress

Political scientists generally agree that polarization in Congress has reached an all-time high.[147] In theory, polarization has two effects that could collectively account for what we observe in the Roberts Court. First, Congress passes fewer laws. As polarization increases, it is harder to cobble together a filibuster-proof majority in the Senate in particular. As the gridlock interval increases, fewer policies are open for revision in Congress.[148] If Congress is passing fewer laws, then there are fewer new statutes in need of review.

But while this possibility could explain the decline in the judicial review docket overall, it cannot explain the demise of the uphold-affirm set in particular. Almost by definition, the statutes that do pass are those that have support from a broad range of the ideological spectrum. Striking such a statute would require returning to the law as it existed before the statute passed, which presumably was bad enough that a bipartisan coalition wanted to fix it. One might also imagine that the Court, if it is policy-minded at all, would share that preference. This should drive more cases into the uphold sets, both for the Court and for the lower courts.

The first effect of polarization does not explain one of our two empirical findings about the Roberts Court. What is more, the premise itself is rather dubious. During the Obama years, Congress enacted almost 1,300 laws.[149] That seems to be ample ground for litigation and possible review. Given these theoretical and empirical defects, we turn to the second possible effect of polarization.

Assuming the Court is actually interested in setting policy, polarization allows the Court to do this at a more granular level. Precisely because the gridlock interval is so wide, the Court can set policy by reinterpreting statutes without worrying that Congress will overrule them by passing a new statute. Recall from

147. *E.g.*, NOLAN MCCARTY, KEITH POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES ix (2d ed. 2016).

148. We discussed the gridlock interval *supra* Section IV.F.

149. *Statistics and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics (last visited Mar. 28, 2018).

Section IV.F that if the Court can put policy inside the gridlock region, no congressional coalition will form to unmake the Court's policy. When Congress is less polarized, not only is the Court more constrained by the smaller gridlock region, Congress is also more likely to be able to police its institutional powers. If Congress is able to legislate regularly and efficiently, then it has an institutional incentive to keep the Court out. But in an era of polarization, partisans on both sides may look to the Court as a way to achieve policy change unavailable in Congress, given the gridlock. If the Court is less likely to face reversal or reprisals from Congress, it is free to pursue its policy agenda at the level of the statute.

On this account, the Court takes fewer judicial review cases because it can achieve its policy ambitions more efficiently through statutory interpretation. This is particularly true of cases in the uphold-affirm set. The Court may still need to police deviations from constitutional norms or affronts to individual rights, but policy-making can now be done more efficiently and without fear of congressional response since the legislature is paralyzed by polarization and the Court will always have a sufficiently powerful cadre of sympathetic legislators to block any attempts at congressional interference.

This analysis leads to the following proposition: if polarization is driving the change in the docket, then if congressional polarization were to ebb, we would expect to see Congress reassert itself and the Court would have to retreat from setting policy through statutes. What is more, whatever new ideological profile emerges to overcome gridlock would almost certainly differ along some dimensions from the political coalitions that have staffed the Court in earlier periods, which would generate conflict between the branches. Both of these effects would augur a return to more traditional levels of judicial review.

C. We Are All Legal Realists Now

The final possibility we consider is that the Court is finally acting as political scientists have long presumed. The Court has long viewed itself as the last word on constitutional issues.[150] Political scientists and legal realists alike assume the Justices would use that last word to achieve outcomes they prefer. Current theories, such as they are, about the intersection of certiorari and judicial review are consistent with this assumption. The Court takes cases where it reverses the lower court because it wants to make sure the law reaches its preferred outcome, and the lower courts have failed to live up to that task. The Court affirms lower courts that strike down statutes both to ensure their preference to strike is carried out nationwide, and to ensure that they are the last word when the judiciary strikes down a federal statute. But when Congress is giving the Court what it wants and the lower courts are blessing that work, there is no reason for the Court to take up the case. This view implicitly underlies much of the

150. Cooper v. Aaron, 358 U.S. 1, 23 (1958); Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final."); Marbury v. Madison, 5 U.S. 137, 177 (1803).

speculation that the uphold-affirm box should be empty. Perhaps the Court is simply living down to our expectations.

If this is so, then we should expect to see the Court continue to ignore the uphold-affirm box. But even if this explanation is correct, it does not explain why the Court has so drastically reduced the overall number of judicial review cases. It seems strange that a Court that has fully embraced its potential as a constitutional policymaker would decrease the number of cases in which it can make such policy.

VI. CONCLUSION

Current theories of judicial review focus almost exclusively on the minority of cases in which the Court strikes a statute and ignore the majority of cases where the Court upholds a statute. Similarly, there is little theoretical explanation for why the Court would review and affirm a lower court holding when there is no conflict. Both seem to be something of a waste of time for the Court. And yet, we find that throughout history, the justices affirm a lower court decision that upholds a statute in the plurality of judicial review cases.

Having identified this surprising empirical reality, we have considered a variety of possible explanations. Empirically, none of them seem to be particularly strong, and so at most they could be partial explanations for a few cases. This leads us to develop new theories of judicial review for affirming statutes. We think the Court may be willing to affirm statutes when it wants to bolster Congress, settle public disputes, or rewrite the law in the guise of constitutional avoidance.

In recent years, the Court has finally begun to pare such cases from its docket. But the Court did not come to that point quickly. As the Court switched from a largely mandatory to a largely discretionary docket, it could cut back significantly on the percentage of constitutional cases that it decided that merely affirmed the status quo. Nonetheless, it is surprising that for nearly a century, well over a third of the Court's federal constitutional cases continued to do just that. The Court routinely expended its limited time and resources not in vetoing the actions of others, but merely in leaving things unchanged.

For the past several years, observers have commented on the Court's shrinking docket.[151] The Justices have taken on fewer cases for decision in the Supreme Court and have left more cases to be resolved in the lower courts. Such contextual factors as the reduction of mandatory jurisdiction have been associated with a less active Supreme Court.[152] When it comes to constitutional cases, however, the surprise is not that the Court's docket has shrunk, but that it remains

151. *See, e.g.*, Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403 (1996); David M. O'Brien, *The Rehnquist Court's Shrinking Plenary Docket*, 81 JUDICATURE 58, 58 (1997); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366 (2006); David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 151 (2010).

152. *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1267 (2012).

as large as it is. The scholarly literature has been obsessed with those instances in which the Court has struck down legislation, but it has largely ignored most of how the Court actually exercises judicial review. It has ignored the cases in which the Court upholds laws against constitutional challenge. The surprise is that the Court expends so much time and effort deciding such cases at all. The Roberts Court might have finally decided that such cases are not worth the effort.