

William & Mary Law Review

Volume 58 (2016-2017)
Issue 5 *Judicial Supremacy v. Departmentalism*
Symposium

Article 4

4-1-2017

Why Congress Does Not Challenge Judicial Supremacy

Neal Devins

William & Mary Law School, nedeви@wm.edu

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [American Politics Commons](#), [Constitutional Law Commons](#), and the [Law and Politics Commons](#)

Repository Citation

Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 Wm. & Mary L. Rev. 1495 (2017), <https://scholarship.law.wm.edu/wmlr/vol58/iss5/4>

Copyright c 2017 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

WHY CONGRESS DOES NOT CHALLENGE JUDICIAL SUPREMACY

NEAL DEVINS*

ABSTRACT

Members of Congress largely acquiesce to judicial supremacy both on constitutional and statutory interpretation questions. Lawmakers, however, do not formally embrace judicial supremacy; they rarely think about the courts when enacting legislation. This Article explains why this is so, focusing on why lawmakers have both strong incentive to acquiesce to judicial power and little incentive to advance a coherent view of congressional power. In particular, lawmakers are interested in advancing favored policies, winning reelection, and gaining personal power within Congress. Abstract questions of institutional power do not interest lawmakers and judicial defeats are seen as opportunities to find some other way to advance the same policy priorities. Relatedly, party polarization cuts against bipartisan embraces of pro-Congress views of the law and cuts in favor of Democrats and Republicans advancing competing views of congressional authority. Finally, Congress makes use of institutional structures that accentuate lawmaker disinterest in legal questions and treat the courts as the last word in legal disputes. The committee system, the Offices of Legislative Counsel, the Congressional Research Service, and the offices of House and Senate counsel all contribute to Congress's acceptance of judicial supremacy.

* Sandra Day O'Connor Professor of Law, Robert E. and Elizabeth S. Scott Research Professor of Law, and Professor of Government, William & Mary Law School. This Article builds on remarks presented at the 2016 *William & Mary Law Review* symposium on departmentalism. Thanks to Tara Grove for organizing this symposium and for helpful comments on a preliminary version of this Article. Thanks also to Stacy Kern-Scheerer for her insights and to my research assistants Dan Carroll, Patrick Harner, and David Schlosser.

TABLE OF CONTENTS

INTRODUCTION	1497
I. INSTITUTIONAL INCENTIVES	1501
<i>A. The Competing Incentives of Congress and the Executive</i>	1502
<i>B. Lawmaker Motivations</i>	1505
<i>C. Disunitariness = Disinterest & Disarray</i>	1508
<i>D. Position Taking, Polarization, and Congressional Responses to Judicial Decisions</i>	1515
<i>E. Wrapping Up</i>	1523
II. INSTITUTIONAL STRUCTURES	1525
<i>A. Legislative Drafting</i>	1526
<i>B. Congress in Court</i>	1532
1. <i>Agency Litigation Authority</i>	1532
2. <i>The DOJ's Duty to Defend Federal Statutes</i>	1536
3. <i>The House and Senate Counsel</i>	1538
III. CONCLUDING OBSERVATIONS	1541
<i>A. The Exceptions Power</i>	1543
<i>B. The Confirmation Power</i>	1546

INTRODUCTION

Let me start with a confession: I set out to write an article on why Congress affirmatively backs judicial supremacy. After all, there are numerous examples of Congress seeking political cover by explicitly punting issues to the Supreme Court.¹ At the same time, these examples are unrepresentative of the larger whole. They suggest that Congress is actually thinking about the judicial role and the political advantages of a judicial supremacy regime.² The truth, however, is that Congress rarely thinks about the courts when enacting legislation.³ Correspondingly, lawmakers never think about articulating a distinctive pro-Congress view of either Congress's constitutional authority or theories of statutory interpretation.⁴ On those rare occasions when Congress contemplates judicial review of its handiwork, the sole focus of lawmakers and staff is on what the courts will do—not what the courts should do.⁵ For example, when responding to Supreme Court rulings, lawmakers hardly ever criticize the Court or push the Court to consider a new theory of constitutional or statutory interpretation; instead, lawmakers operate within the boundaries set by the Court.⁶

1. For a specific example, Senator Arlen Specter voted in support of legislation denying federal courts the power to issue writs of habeas corpus in cases involving military commissions; Specter thought the provision unconstitutional and, in explaining his vote, remarked that he was sure the courts would “clean it up.” See Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 283 (2008) (quoting Daniel Michael, *The Military Commissions Act of 2006*, 44 HARV. J. ON LEGIS. 473, 479 (2007)); see also MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57-58 (1999) (arguing that the knowledge that the courts will police constitutional issues deters lawmakers from taking account of constitutional issues); Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 442-44 (2001) (discussing Congress's use of expedited Supreme Court review provisions to punt contentious constitutional questions to the Court); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 37-38 (1993) (arguing that prominent elected officials look for courts to resolve constitutional controversies that they cannot resolve or would prefer not to resolve).

2. For an excellent treatment of the political advantages of a judicial supremacy regime, see KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 8-18, 22-27 (2007).

3. See *infra* Part I.A.

4. See *infra* Part I.A.

5. See *infra* Part I.A.

6. See J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT*

My Article will explain why this is so, focusing on why lawmakers have both strong incentive to acquiesce to judicial power and little incentive to advance a coherent view of congressional power. In part, lawmakers are uninterested in abstract questions of institutional power; instead, lawmakers are interested in advancing their vision of good public policy, winning reelection, and gaining personal power within Congress.⁷ Relatedly, lawmakers hardly ever have incentive to speak with a unitary voice.⁸ Lawmakers who oppose a measure will embrace a narrow view of congressional power; lawmakers who support the measure will back a broad view.⁹ Further reflecting Congress's focus on policy goals and not judicial theories, lawmakers and their staff—when drafting legislation—largely delegate legal questions to two court-centric offices within Congress: the Offices of Legislative Counsel and the Congressional Research Service's American Law Division.¹⁰ These offices have no interest in advancing a broad or coherent view of congressional power; instead, they assume that courts speak the last word on legal questions and that precedent is to be adhered to, not challenged.¹¹ More telling, lawmakers essentially give the Department of Justice (DOJ) a free hand to craft legal arguments in court.¹² The House or Senate is

OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 23-30, 147-53 (2004).

7. See RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1-14 (1973); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13-19 (1974); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1286-90 (2001); John W. Kingdon, *Models of Legislative Voting*, 39 J. POLITICS 563, 569-70 (1977).

8. See *infra* Part I.

9. See *infra* Part I.C.

10. See *infra* Part II (discussing court-centric norms in these offices). For general discussion of the structure and norms of these offices, see Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 739-44 (2014); Louis Fisher, *Constitutional Analysis by Congressional Staff Agencies*, in CONGRESS AND THE CONSTITUTION 64, 68-73, 75-81 (Neal Devins & Keith E. Whittington eds., 2005); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 818-43 (2014).

11. See *infra* Part II.A.

12. See *infra* Part II.B.

hardly ever a party to a legal dispute;¹³ Congress has also left it to the court-centric Judiciary Committees to oversee the DOJ.¹⁴

In short, the individual incentives of lawmakers and the corresponding institutional structures that Congress makes use of both cut against lawmaker interest and involvement in legal questions. Making matters worse, party polarization exacerbates lawmaker tendencies to trade off institutional prerogatives for policy goals.¹⁵ With Democrats and Republicans increasingly pursuing conflicting agendas and with power increasingly centralized in House and Senate leadership, party polarization cuts against lawmakers thinking concretely about legal issues, let alone asserting a pro-Congress view of the law.¹⁶ Correspondingly, Congress exercises power through bicameral legislation and cannot resist the courts or the executive without strong majorities in both houses.¹⁷ Indeed, as compared to its powers over the executive (some of which do not require bicameral action, for example, the powers to confirm and

13. The House or Senate, but not Congress, can participate as a party in litigation with respect to enforcement of internal rules, including committee-issued subpoenas. See Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 628-30 (2014). It is unclear if the House or Senate may participate in other contexts, most notably, the defense of federal statutes. See *id.* at 622-28 (noting that the Supreme Court has yet to definitively settle this question and suggesting that Congress cannot defend federal statutes). For a competing perspective, see Jack M. Beermann, *Congress's (Less) Limited Power to Represent Itself in Court: A Comment on Grove and Devins*, 99 CORNELL L. REV. ONLINE 166, 167-68, 180-81 (2014); see also Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 948-51, 953-56 (2012) (arguing that Congress must play a more substantial role in litigation in order to defend its institutional priorities).

14. See Neal Devins & Michael Herz, *The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS., Winter 1998, at 205, 214-15, 221.

15. I have made this point before. See Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 759-62 (2011) [hereinafter Devins, *Party Polarization*]; Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 408-13 (2009) [hereinafter Devins, *Presidential Unilateralism*].

16. See Devins, *Party Polarization*, *supra* note 15, at 756-59.

17. See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 143-48 (1999) (explaining structural and political impediments to Congress's resisting executive branch initiatives); Keith E. Whittington, Commentary, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 509 & n.154 (2001) (arguing that Congress will only challenge judicial decisions in rare cases in which the Court undermines the ability to pursue first-order policy preferences).

investigate), Congress has few levers of power to influence the judiciary.¹⁸

In making these points, this Article extends existing scholarship on Congress's interest in legal questions. Several scholars, myself included, have examined why it is that Congress is interested in issues of policy and power, not abstract issues involving the scope of Congress's power to advance a pro-Congress view of constitutional or statutory interpretation.¹⁹ Scholars, too, have examined the issue of Congress-federal court dialogue through examinations of the Offices of Legislative Counsel and the ability of today's polarized Congress to override disfavored statutory interpretation cases.²⁰ This Article seeks to connect the dots of existing scholarship and advance a more nuanced explanation for why Congress acquiesces to judicial interpretations of the Constitution and federal statutes.

This Article is divided into three parts. Part I contrasts the institutional incentives of Congress and the executive and, in so doing, explains why lawmakers are generally uninterested in legal questions and, relatedly, why Congress lacks the institutional will to advance a coherent pro-Congress view of legal issues. Part I also explains how party polarization exacerbates Congress's tendencies to discount legal questions. Part II considers institutional structures in Congress and how those structures both accentuate lawmakers' disinterest in legal questions and treat the courts as the last word

18. For a discussion of Congress-executive negotiations, see Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 120-22 (1996) [hereinafter Devins, *A Modest Proposal*]. For discussions of Congress's unwillingness to use its exceptions power to limit Court authority and how it is that court-stripping proposals are not likely to be acted on by a polarized Congress, see Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1358-62 (2006) [hereinafter Devins, *Fear Congress?*]; Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 931-32, 982-84 (2013).

19. See PICKERILL, *supra* note 6, at 23-30, 147-48, 151-53; Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609-10 (1983); Keith E. Whittington, *James Madison Has Left the Building*, 72 U. CHI. L. REV. 1137, 1146-48 (2005) (reviewing PICKERILL, *supra* note 6).

20. For discussions of congressional offices, see sources *supra* note 10. For discussions of congressional polarization and its impact on statutory overrides, compare Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 233-42 (2013) (arguing polarization limits overrides), with Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1319-20 (2014) (contrasting high publicity overrides when polarization is relevant to routine policy-updating overrides).

in legal disputes. Part II will focus on the committee system, the ascendancy of the court-centric Judiciary Committee to oversee legal questions and the DOJ, and the role of the nonpartisan, court-centric Offices of Legislative Counsel and Congressional Research Service. Part II will also contrast the executive to Congress, noting how the institutional structures of the executive branch facilitate pro-executive understandings of the law.²¹ Part III is a summary and extension of the first two Parts. Specifically, Part III considers how Senate judicial confirmation fights and Congress's refusal to limit federal court jurisdiction support my conclusions about Congress's acceptance of judicial supremacy.

I. INSTITUTIONAL INCENTIVES

The Constitution does not detail the actual powers of the three branches; instead, the “ongoing practice of politics” defines the practical rights of each branch to exercise power both “in an absolute sense and relative to one another.”²² The early Congresses were vigorous defenders of legislative prerogatives. On war powers, Congress routinely asserted its prerogative to declare war, and Presidents and the Supreme Court alike saw Congress as empowered to “declare a general war or ... a limited war.”²³ On issues implicating judicial power, Congress expressed its disapproval of the *Marbury v. Madison* litigation both by canceling the Supreme Court's 1802 term and by refusing to honor a Court order to turn over documents concerning the Marbury appointment.²⁴ The Jeffersonian Congress, too, threatened to use its impeachment power to clear the bench of disliked Federalist judges.²⁵ The Supreme Court did not fight back.

21. On the other hand, the very offices that make pro-executive legal arguments also have incentives to embrace a court-centered view of the law so that the executive rarely challenges judicial supremacy while advocating pro-executive understandings of the law. See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 537-59 (2012).

22. Moe & Howell, *supra* note 17, at 135.

23. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (opinion of Chase, J.). For additional discussion, see NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 137-42 (2d ed. 2015).

24. See LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 25-28 (5th ed. 2011).

25. See *id.* at 26-27.

Court decisions tracked legislative debates.²⁶ Perhaps more telling, *Marbury* was the only case to invalidate an act of Congress before 1857; the Court and Chief Justice John Marshall argued that Congress should not impeach judges but, instead, should recognize the “mildness” of the judicial character by statutorily reversing “legal opinions deemed unsound.”²⁷

Today’s Congress, however, lacks both the will and the way to assert a strong view of congressional power to either the courts or executive.²⁸ Lawmaker motivations cut against both broad assertions of institutional prerogatives and efforts to coordinate with other lawmakers to advance a pro-Congress agenda. Party polarization exacerbates these inclinations. By way of contrast, the unitary structure of the executive incentivizes the President to embrace departmentalism and advance a consistent pro-executive vision of executive power. This Part will initially contrast the incentives of the modern-day executive and Congress; it will then consider more concretely why today’s lawmakers have little reason both to think about congressional power and to work together to advance a pro-Congress view of the law.

A. The Competing Incentives of Congress and the Executive

The individual and institutional interests of the President are one and the same. Thanks both to the singularity of the office and the power to execute, Presidents have both the tools and incentives to advance their agenda and the scope of presidential power.

26. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 78-80 (1997) (discussing how the Supreme Court decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), tracked legislative debates about Congress’s ability to act without an explicit constitutional grant and create a national bank).

27. ALBERT J. BEVERIDGE, 3 *THE LIFE OF JOHN MARSHALL* 177 (1919) (quoting letter from Marshall to Justice Samuel Chase).

28. The focus of this Article is the modern Congress. In an earlier piece, I detailed several sources that explain differences between the incentives of today’s lawmakers and those of lawmakers in earlier Congresses, including the rise of the administrative state, the related expansion of Supreme Court review of governmental action, and changes in how lawmakers pursue all facets of their job (time spent in their districts and states associated with campaigning, fundraising, and constituent services; the growth of government and related need to delegate to staff; and the polarization and increasing importance of party politics). See Neal Devins, *The Constitutional Politics of Congress*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 155, 170-75 (Mark Tushnet et al. eds., 2015).

Professors Terry Moe and William Howell put it this way: “[W]hen presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power.”²⁹ Most notably, by acting unilaterally and end-running Congress, Presidents routinely expand the boundaries of both their inherent constitutional authority and statutory grants of authority. For example, Presidents Bill Clinton, George W. Bush, and Barack Obama all pursued signature initiatives unilaterally after Congress refused to enact legislation supporting presidential priorities. Clinton pursued health-care reform, Bush pursued faith-based initiatives, and Obama pursued immigration reform.³⁰

The power to execute also expands presidential authority vis-à-vis the judiciary. Presidents control legal arguments that the federal government makes in court and routinely advocate for broad views of presidential power, including limits on the jurisdiction of federal courts to review presidential initiatives.³¹ Presidents can also keep an issue from the courts and, in so doing, effectively nullify a law or regulation. In particular, by refusing to enforce or defend that which the DOJ thinks is unconstitutional, there may be no one with standing to challenge a presidential interpretation.³² Finally, presidential interpretations of court rulings can either limit or expand the reach of court decisions. Abraham Lincoln claimed *Dred Scott v.*

29. Moe & Howell, *supra* note 17, at 138; *see also* Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 *PRESIDENTIAL STUD. Q.* 850, 865 (1999) (explaining why Presidents are “well positioned to put their powers of unilateral action to use, as well as to expand the bounds of these powers over time”).

30. For discussions of Clinton and Bush initiatives, *see* William G. Howell, Introduction, *Unilateral Powers: A Brief Overview*, 35 *PRESIDENTIAL STUD. Q.* 417, 418, 434-36 (2005). For a highly critical assessment of Obama-era unilateralism, *see* DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION’S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* 139-43 (2015). For a speculative assessment of President Donald Trump, *see* Eric Posner, *And If Elected: What President Trump Could or Couldn’t Do*, *N.Y. TIMES* (June 3, 2016), <http://www.nytimes.com/2016/06/04/opinion/campaign-stops/and-if-elected-what-president-trump-could-or-couldnt-do.html> [<https://perma.cc/8NTD-UPH2>].

31. For a general treatment of the DOJ’s embrace of pro-executive arguments, *see* Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 *COLUM. L. REV.* 1097, 1105-07 (2013). For examples of DOJ efforts to invoke jurisdictional limits to legal challenges to presidential initiatives, *see* Tara Leigh Grove, *When Can a State Sue the United States?*, 101 *CORNELL L. REV.* 851, 874-76 (2016).

32. *Cf.* Devins & Prakash, *supra* note 21, at 510-11 (arguing that the DOJ has a “near-monopoly” on government litigation).

Sandford was binding only on the parties and pursued policies at odds with the decision; Bill Clinton concluded that the 1995 Supreme Court ruling that made it tougher to justify federal race preferences, in fact, reaffirmed the necessity of affirmative action.³³

Compare this to Congress.³⁴ Unlike the unitary executive, the individual and institutional interests of members of Congress are often in conflict with each other.³⁵ By focusing on first-order policy concerns, abstract questions of institutional authority receive scant attention.³⁶ Lawmakers routinely take competing positions on Congress's power to advance its legislative agenda and to oversee the executive.³⁷ This Part will show that lawmakers rarely have incentive to think about judicial review of their handiwork and even less incentive to think about advancing a coherent pro-Congress theory of legislative power. Consequently, while each of Congress's 535 members has some stake in Congress as an institution, policy goals (and related goals of reelection and power) overwhelm this collective good.³⁸ In describing this collective action problem, Professors Moe and Howell note that lawmakers are "trapped in a prisoners' dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride in favor of the local constituency."³⁹

For this reason, lawmakers have no incentive to stop presidential unilateralism simply because the President is expanding his or her powers vis-à-vis Congress. This collective action problem also undermines Congress's ability to advance its agenda before the courts. In part, lawmakers are principally interested in advancing favored policies and generally uninterested in articulating a clear agenda about congressional power.⁴⁰ On those infrequent occasions when lawmakers debate the boundaries of congressional power, bill opponents embrace a narrow view of congressional authority.⁴¹

33. See DEVINS & FISHER, *supra* note 23, at 20, 224-26.

34. This paragraph is drawn from Devins, *Presidential Unilateralism*, *supra* note 15, at 400.

35. *Id.*

36. *See id.*

37. *See id.*

38. See Garrett & Vermeule, *supra* note 7, at 1286-90.

39. Moe & Howell, *supra* note 17, at 144.

40. *See id.*

41. See, e.g., Hasen, *supra* note 20, at 206 (describing Republican attempts to have

Correspondingly, policy disagreements among lawmakers limit Congress's power to countermand judicial rulings.⁴² Perhaps more important, Congress rarely represents itself in court. The executive speaks the government's voice, and lawmaker participation is often limited to competing sets of amicus briefs.⁴³ Indeed, outside of House or Senate efforts to enforce subpoenas through institutional counsel, it is unclear whether individual members or institutional counsel have standing to defend congressional prerogatives.⁴⁴ And even when institutional counsel participates in litigation, competing amicus briefs are often filed by members of the minority party.⁴⁵ For the balance of this Part, I will provide a fuller accounting of lawmaker motivations. In Part II, I will look at congressional organization, explaining how lawmaker motivations are reflected in the institutional design of Congress—demonstrating that most members steer clear of legal questions and that legal policy making is almost exclusively delegated to court-centric offices and committees.

B. Lawmaker Motivations

Why is it that lawmakers lack motivation to work in concert to overcome the collective action problem? More specifically, why do lawmakers not care about preserving Congress's institutional authority, including a shared embrace of broad legislative and investigatory powers? The simple answer is that the benefits of collective action are often outweighed by the costs of pursuing disfavored policies, of hurting reelection chances, and of limiting opportunities for advancement within the party, including the related benefits of serving on desirable committees.⁴⁶ To start, leg-

Obamacare struck down on constitutional grounds).

42. See *id.* at 233-34, 237-42; Victoria F. Nourse, Response, *Overrides: The Super-Study*, 92 TEX. L. REV. SEE ALSO 205, 210-13 (2014).

43. For a general treatment of congressional amicus briefs, see Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 CASE W. RES. L. REV. 933, 939-41 (2015).

44. See *United States v. Windsor*, 133 S. Ct. 2675, 2712-14 (2013) (discussing but not resolving standing of the House to defend federal statutes); Grove & Devins, *supra* note 13, at 622-30 (arguing that the House or Senate can seek judicial enforcement of subpoenas but cannot defend federal statutes).

45. See *infra* notes 141, 273 and accompanying text.

46. See Garrett & Vermeule, *supra* note 7, at 1286-90; Kingdon, *supra* note 7, at 569-70,

islators pursue a complex set of goals—some personal (designed to maximize reelection and status or power) and some designed to advance the public interest (the legislator’s conception of good public policy as well as beliefs about justice and morals).⁴⁷ Goals are traded off against each other but reelection is seen as “a necessary means to their preferred goals of influencing public policy for the better and accumulating prestige with colleagues.”⁴⁸ The “electoral connection” explains most congressional behavior, ... [including] congressional leadership, party positions, committee structures, [and] institutional procedures.”⁴⁹

Today, reelection means that a lawmaker must prevail in increasingly polarized party primaries.⁵⁰ Reelection also means that lawmakers must increasingly focus their energies on fundraising and constituent services.⁵¹ Today’s lawmakers strengthen their position with their constituents by “visit[ing] their districts and states extremely frequently (often three or four times a month). They and their staffs devote much of their time to constituency casework (with roughly one-third of members’ staffs based in their home district or state).”⁵² Fundraising is also increasingly important; lawmakers feel pressure to raise money for their own reelection campaigns and for their parties.⁵³ Like constituent services, fundraising pulls lawmakers away from “discussing the issues ... forging legislation and monitoring federal bureaucrats” with colleagues.⁵⁴ For example, as Professors Elizabeth Garrett and Adrian Vermeule observed, a lawmaker who invests in constitutional interpretation “loses time for fundraising, casework,

575.

47. See FENNO, *supra* note 7, at 1; PICKERILL, *supra* note 6, at 21; Kingdon, *supra* note 7, at 569-70, 575.

48. Garrett & Vermeule, *supra* note 7, at 1288.

49. PICKERILL, *supra* note 6, at 21.

50. See *infra* note 139 and accompanying text.

51. See Devins, *Party Polarization*, *supra* note 15, at 763.

52. ANTHONY KING, *RUNNING SCARED: WHY AMERICA’S POLITICIANS CAMPAIGN TOO MUCH AND GOVERN TOO LITTLE* 49 (1997). In the twenty years since publication of King’s study, all available evidence suggests that members focus more on constituents today than before. See Devins, *Party Polarization*, *supra* note 15, at 763.

53. Lawmakers advance their status in the party system, including desirable committee assignments, by making financial contributions to the party. See Eric S. Heberlig, *Congressional Parties, Fundraising, and Committee Ambition*, 56 *POL. RES. Q.* 151, 154-55 (2003).

54. 144 *CONG. REC.* 19,814 (1998) (remarks of Rep. Hamilton).

media appearances, and obtaining particularized spending projects in her district; she will thus be at a disadvantage” when seeking re-election.⁵⁵

It therefore comes as no surprise that lawmakers have little interest in abstract discussions of legislative power. Policy making is what matters, especially the policy priorities of the lawmaker’s party. The combined effect of party polarization, constituency service, and fundraising is that today’s lawmakers increasingly look to parties and other constituents when assessing policy-making priorities.⁵⁶ There clearly is no appetite for pursuing institutional goals such as enhancing pro-Congress interpretations of the Constitution or federal statutes. Indeed, lawmaker incentives cut against any kind of engagement with federal court decision-making.⁵⁷ Courts are largely ignored when legislation is enacted, and court decisions limiting congressional prerogatives often go unnoticed.⁵⁸ As Chief Judge Robert Katzmann put it, “Congress is largely oblivious of the well-being of the judiciary as an institution.”⁵⁹ And for those occasional exceptions when Congress does take note, court decisions are “credit claiming” opportunities for lawmakers to be on the right side of salient issues by reasserting their policy preferences through new legislation.⁶⁰

All of the above loops back to the above-identified collective action problem; Congress might gain as an institution if courts embraced pro-Congress views of constitutional and statutory interpretation, but individual lawmakers will trade off that collective goal to pursue their individual interests. For the balance of this Part, I will elaborate on this unsurprising claim.

55. Garrett & Vermeule, *supra* note 7, at 1301.

56. See Devins, *Party Polarization*, *supra* note 15, at 763.

57. See Garrett & Vermeule, *supra* note 7, at 1286-90; Kingdon, *supra* note 7, at 569-70, 575.

58. See Robert A. Katzmann, *The Underlying Concerns*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 7 (Robert A. Katzmann ed., 1988).

59. *Id.*

60. See MAYHEW, *supra* note 7, at 52-53.

C. Disunitariness = Disinterest & Disarray

The executive is singularly unitary on issues of legal interpretation. Through the DOJ and the Office of Management and Budget, the executive can coordinate issues of legal policy making governing the promulgation of regulations and judicial challenges to executive action.⁶¹ In court, for example, the DOJ takes great pride in advancing consistent legal arguments governing canons of statutory interpretation and jurisdictional questions regarding challenges to governmental conduct.⁶² Also, when advancing the President's policy preferences, DOJ lawyers routinely embrace broad views of presidential power—and never argue that the President's action is *ultra vires* and that presidential power should be constrained.⁶³ With its 535 members, Congress is just the opposite.⁶⁴ Congress is beset by a collective action problem (the trading off of institutional power in order to advance the priorities of a lawmaker and her constituents),⁶⁵ a related salience problem (lawmakers pursue high salience issues that matter to their constituents),⁶⁶ and a disunitariness problem (lawmakers have competing policy preferences, especially in today's polarized Congress).⁶⁷ Part II will examine why Congress is hardly ever a party in judicial or agency proceedings; it is therefore under no obligation to advance a theory of statutory or constitutional interpretation before a court.⁶⁸

Consider, for example, two matters that cut to the core of legislative power—Congress's power to declare war and Congress's power to define the meaning of the statutes it enacts. In the abstract, lawmakers should be interested in defending Congress's turf in both arenas; in practice, however, Congress seems willing to cede

61. See Devins & Herz, *supra* note 14, at 212-13.

62. See Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 571-78 (2003).

63. See Devins & Herz, *supra* note 14, at 219-20.

64. See *id.* at 220-21.

65. See Moe & Howell, *supra* note 17, at 144.

66. See *id.*

67. See Devins, *Party Polarization*, *supra* note 15, at 763-64.

68. Likewise, Congress is not obligated to have a theory of jurisdiction—including the jurisdiction of courts to resolve legal challenges involving lawmakers, committees, or institutional counsel for the House and Senate. See *infra* Part II.

its war powers to the executive⁶⁹ and its power to define statutory meaning to the courts.⁷⁰ On war powers, lawmakers have very little incentive to embrace and act on a robust view of legislative power.⁷¹ In particular, “one byproduct of an all-volunteer army is that lawmakers feel little constituent or public pressure to reign in presidential warmaking.”⁷² Consequently, “[r]ather than oppos[ing] the President on a potential military action, most members of Congress find it more convenient to acquiesce and avoid criticism that they obstructed a necessary military operation.”⁷³ For their part, courts do not fill the void left by Congress. As then-judge Ruth Bader Ginsburg put it, “If the Congress chooses not to confront the President, it is not our task to do so.”⁷⁴

Theories of statutory interpretation go unnoticed for another reason. Unlike war powers, in which lawmakers duck a high visibility issue that has no constituency payoff, “[m]ethods of statutory interpretation are the arcana of a lawyerly elite” and lack sufficient salience to hurdle the agenda bar.⁷⁵ “No one ever lost an election by saying ‘I’m for purposivism.’”⁷⁶ Indeed, even though the Supreme Court’s turn towards textualism has limited congressional control of legislative meaning, lawmakers have not resisted the Court at all.⁷⁷ Congress has never issued a general directive on statutory interpretation and has never mandated that legislative history be used.⁷⁸ Indeed, even though courts eschew legislative history when interpreting statutes, lawmakers and their staffs continue to make

69. LOUIS FISHER, *PRESIDENTIAL WAR POWER*, at xi (1995).

70. See Nourse, *supra* note 42, at 214.

71. See Devins, *Presidential Unilateralism*, *supra* note 15, at 400.

72. Neal Devins, *Bring Back the Draft?*, 19 GA. ST. U. L. REV. 1107, 1110 (2003).

73. Devins, *Presidential Unilateralism*, *supra* note 15, at 400.

74. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 211 (D.C. Cir. 1985) (Ginsburg, J., concurring) (quoting *Goldwater v. Carter*, 444 U.S. 996, 998 (1979)).

75. Nourse, *supra* note 42, at 214.

76. *Id.*

77. See Frost, *supra* note 13, at 923-26. In 2016, House Democrats and Republicans divided on proposed legislation that would eviscerate judicial deference to agency interpretations in favor of judicial authority to interpret statutes de novo. See *infra* note 128. This bill, which was never considered by the Senate, did not seek to shift power to Congress; the concern of House Republicans was to limit the authority of the “lawless” Obama executive branch. See *infra* note 128.

78. See Linda D. Jellum, “Which Is to Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 848-52 (2009).

extensive use of legislative history when enacting statutes.⁷⁹ The reason: legislative history is principally a vehicle by which lawmakers make “pleasing” statements to their constituencies.⁸⁰ It matters little to lawmakers whether courts find those statements persuasive. For similar reasons, occasional efforts to override individual Court decisions through the enactment of another statute do not formally challenge judicial interpretations; Congress acquiesces to the interpretation and reaffirms its policy priorities through the enactment of the corrective statute.⁸¹

War powers and statutory interpretation issues exemplify the above-noted collective action and salience problems that make it hard for Congress to find ways to articulate pro-Congress views of the law and, relatedly, speak to the reality that Congress often has little incentive to monitor judicial developments or participate in judicial proceedings. Correspondingly, lawmakers are happy to acquiesce to judicial or even executive supremacy rather than take the heat for articulating pro-Congress views of the law. Lawmakers do not think about their responsibilities to interpret the Constitution or defend institutional prerogatives; these collective goods are routinely traded off to pursue favored policy or otherwise advance the personal agenda of lawmakers.

Separate from these impediments, Congress is divided in ways that cut against its making consistent, coherent pro-Congress arguments. First, lawmakers frequently divide on what policies should be pursued and how they should be pursued.⁸² Correspondingly, lawmakers who back legislation embrace a pro-Congress view of legislative power; bill opponents back judicial limits on Congress.⁸³ And since Congress does not participate as a party defending pro-Congress views of the law,⁸⁴ intramural squabbles spill over into legislative debates and amicus filings.⁸⁵ Second, and equally telling,

79. See Bressman & Gluck, *supra* note 10, at 739-43.

80. See Devins, *supra* note 1, at 461-62.

81. See *infra* Part I.D.

82. See Hasen, *supra* note 20, at 237-38, 241-42.

83. See *infra* Part I.D.

84. This, of course, distinguishes the executive from Congress and helps propel the executive to advance pro-executive understandings of the law in DOJ court arguments and Office of Legal Counsel opinions. See Grove & Devins, *supra* note 13, at 622-30; *infra* Part II.B.

85. See *infra* Part I.D.

lawmakers flip flop their positions on legislative power to suit their policy preferences—sometimes espousing and other times eschewing a broad view of legislative power.⁸⁶

Federalism cases provide a good illustration of both phenomena. Consider two statutes—one that Republicans supported and Democrats opposed (the Partial-Birth Abortion Ban Act) and one that divided Congress in exactly the opposite way (the Affordable Care Act).⁸⁷ Both statutes raised substantial constitutional questions, including questions about Congress's power under the Commerce Clause.⁸⁸ When the statutes were challenged in court, Democrats lined up in favor of congressional power in the Affordable Care Act case and against Congress in the partial birth case.⁸⁹ Republicans took precisely the opposite position.⁹⁰ In the partial birth case, 52 of 54 Democrats who signed briefs argued the statute was unconstitutional; all 152 Republicans who signed briefs backed congressional power.⁹¹ In the Affordable Care Act case, 12 briefs were submitted by congressional amici.⁹² All were strictly party line; Republican

86. *See infra* Part I.D.

87. Republicans and Democrats largely divided along party lines when voting for the statutes. Few Democrats voted for the Partial-Birth Abortion Ban Act, and few Republicans opposed it. *See* Office of the Clerk, *Final Vote Results for Roll Call 242*, U.S. HOUSE REPRESENTATIVES, <http://clerk.house.gov/evs/2003/roll242.xml> [<https://perma.cc/W6CZ-ZGAQ>]; Office of the Clerk, *Senate Roll Call Vote Results for S. 3*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00051 [<https://perma.cc/E5AT-4YC9>]. No Republican in either the House or Senate voted for the Affordable Care Act. *See* Office of the Clerk, *Final Vote Results for Roll Call 165*, U.S. HOUSE REPRESENTATIVES, <http://clerk.house.gov/evs/2010/roll165.xml> [<https://perma.cc/S2PJ-FCJL>]; Office of the Clerk, *Senate Roll Call Vote Results for H.R. 3590 as Amended*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396 [<https://perma.cc/9QKE-PLLP>].

88. For the partial birth bill, see David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 60-61 (1997); Simon Lazarus, *Next on Abortion: Supreme Collision*, WASH. POST (Nov. 23, 2003), <https://www.washingtonpost.com/archive/opinions/2003/11/23/next-on-abortion-supreme-collision/8f98085d-b7f0-4bed-946d-2471b974607e/> [<https://perma.cc/6C84-BKRT>]. For the Affordable Care Act, see RANDY E. BARNETT ET AL., A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE 2-3 (Trevor Burrus ed., 2013); Nathaniel Persily et al., *Introduction to THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* (Nathaniel Persily et al. eds., 2013).

89. *See* Devins, *supra* note 43, at 936-37, 936 n.6.

90. *See id.*

91. *See id.* at 1014-15.

92. *See id.* at 992-94.

briefs garnered 480 signers, and Democratic briefs garnered 44 signers, with Democratic signatories limited to party leaders.⁹³

When the statutes were debated, however, this sharp Democrat-Republican divide did not spill over to a fierce debate about the scope of congressional authority and, relatedly, what might happen when the statutes were subject to Supreme Court challenge. For example, notwithstanding newspaper chatter about Commerce Clause challenges to the Affordable Care Act, Republican members focused almost exclusively on policy issues that resonated with their constituents and virtually ignored the Commerce Clause and Spending Power issues that were the subject of the *NFIB v. Sebelius* litigation.⁹⁴ For their part, Democrats—who controlled both the House and Senate—bypassed discussion of potential constitutional objections.⁹⁵ None of the twenty reports issued by congressional committees formally addressed the statute’s constitutionality, and, with the exception of Patrick Leahy, no congressional Democrat meaningfully addressed potential constitutional objections to the statutes in congressional debates.⁹⁶ In other words, lawmakers seemed almost single-minded in their focus on policy—largely ignoring issues of congressional power and potential litigation until there was a constitutional challenge before the Supreme Court.⁹⁷ More significant, a lawmaker’s view of congressional power before the Supreme Court coalesced with a lawmaker’s view of policy, not a commitment to expanding the power of Congress.⁹⁸

The Affordable Care Act and partial birth abortion cases, while extraordinary, are nonetheless emblematic of congressional practice. On federalism, lawmakers have always let their views on first-order

93. *See id.*

94. *See* Neal Devins, Essay, *Party Polarization and Judicial Review: Lessons from the Affordable Care Act*, 106 NW. U. L. REV. 1821, 1835-36 (2012).

95. *See id.* at 1834-36.

96. *See id.*

97. The Partial-Birth Abortion Ban Act is an even more extreme example of this phenomenon. The Commerce Clause issue was not raised in either legislative debates or congressional amicus filings. *See* Neal Devins, *How Congress Paved the Way for the Rehnquist Court’s Federalism Revival: Lessons from the Federal Partial Birth Abortion Ban*, 21 ST. JOHN’S J. LEGAL COMMENT. 461, 468-71 (2007). The sole focus of lawmakers was abortion rights—the issue that resonated with their constituencies. *See id.*

98. *See* Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 134-37 (2004).

policy priorities dictate their views on congressional power.⁹⁹ Northern Federalists and Jeffersonians flipped their positions on states' rights when debating the Louisiana Purchase—with Federalists fearing a shift of power to the South and Jeffersonians rejecting claims that the Constitution would need to be amended to authorize the Purchase.¹⁰⁰ During the early twentieth century, pro-labor and pro-business interests flipped their positions on federal government authority after the election of the progressive New Deal Congress.¹⁰¹ The list goes on and is not limited to federalism. Recent separation of powers disputes involving the scope of Congress's investigatory powers have seen Democrats and Republicans flip positions.¹⁰² The key variable is whether the President is a Democrat or a Republican—Republicans in Congress embrace broad judicially enforceable investigatory powers when there is a Democrat but not a Republican in the White House; the position of Democrats in Congress is the polar opposite.¹⁰³

In 2008, House Democrats unanimously backed contempt of Congress citations against White House Chief of Staff Josh Bolten and former White House counsel Harriet Miers for refusing to turn over documents pertaining to the George W. Bush Administration's firing of U.S. Attorneys;¹⁰⁴ three Republicans supported the motion and other Republicans joined forces to block judicial enforcement of the subpoena, noting their "deeply held concerns that this suit

99. For a quick tour, see *id.* For a more detailed treatment of how federalism is typically overwhelmed by first-order policy preferences, see John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 99-100, 103-05, 121-22 (2004).

100. See FORREST McDONALD, *STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876*, at 58-62 (2000).

101. See *id.* at 228-29.

102. Recess appointments are another example. Republicans in Congress fought hard to limit President Obama's recess appointment authority, arguing as a bloc before the D.C. Circuit and Supreme Court. See Neal Devins, *Counsel Rests*, SLATE (Jan. 13, 2014, 5:55 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/01/the_senate_s_lawyer_doesn_t_participate_in_important_litigation_against.html [<https://perma.cc/H9BX-WATM>]. For their part, no Democrat spoke against the President; they bitterly complained about Republican obstructionism undermining the appointments power and then stood on the sideline rather than defend congressional prerogatives in the *NLRB v. Noel Canning* case. See *id.*

103. See *id.*

104. See Paul Kane, *West Wing Aides Cited for Contempt*, WASH. POST (Feb. 15, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/02/14/AR2008021402415_pf.html [<https://perma.cc/8HX3-JMB3>].

invites the courts to enter into a political thicket.”¹⁰⁵ In 2012, the situation was reversed. In investigating Obama Attorney General Eric Holder’s handling of the “Fast and Furious” gun running operation, the House divided along party lines in holding the Attorney General in contempt for refusing to turn over documents.¹⁰⁶ This time, however, Democratic members filed an amicus brief arguing against judicial enforcement of the subpoena.¹⁰⁷

None of this is especially surprising, especially in today’s polarized Congress, but it underscores how Congress is essentially disunitary and that lawmakers will only come together to assert a broad shared view of congressional power in those rare cases in which there is constituency support—so that the personal interests of lawmakers are served by asserting a broad view of legislative power. For example, Democrats and Republicans during the Watergate Era had incentive to stand together on budget reform, war powers, and limits on DOJ control of criminal investigations of government officials.¹⁰⁸ Today, however, polarization cuts against Democrats and Republicans pursuing a shared view of congressional power;¹⁰⁹ for reasons I will now detail, today’s lawmakers are especially apt to ignore the courts altogether and especially likely to embrace position-taking measures that accentuate the ever-growing ideological divide.

105. See Memorandum Amici Curiae of Representatives John Boehner et al. at 3, Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-0409 (JDB)).

106. See John Bresnahan & Seung Min Kim, *Holder Held in Contempt*, POLITICO (June 28, 2012, 5:47 PM), <http://www.politico.com/story/2012/06/holder-held-in-contempt-of-congress-077988> [<https://perma.cc/CS6M-H8W2>]. The vote was 255-67, with 2 Republicans voting against, 17 Democrats voting for, and many Democrats walking out of the House chamber in protest. *Id.*

107. See Jerry Seper, *House Dems Call for Dismissal of Contempt Lawsuit Against Holder Over Fast and Furious*, WASH. TIMES (Dec. 19, 2012), <http://www.washingtontimes.com/news/2012/dec/19/house-dems-call-dismissal-contempt-lawsuit-against/> [<https://perma.cc/F68E-CJXT>].

108. See Devins, *Presidential Unilateralism*, *supra* note 15, at 401-05.

109. See *id.* at 407-11.

D. Position Taking, Polarization, and Congressional Responses to Judicial Decisions

Lawmaker incentives clearly cut against Congress staking out a pro-Congress view of the law in order to advance institutional interests. Likewise, lawmakers have little incentive to embrace one theory of statutory or constitutional interpretation over another. Unlike the policy merits of legislation or oversight, interpretative questions and concerns of institutional power are “generally abstract, unpopular, and fail to capture the imagination of either the media or the public.”¹¹⁰ Indeed, the only lawmakers who raise constitutional concerns are those opposed to a measure; for others, the Constitution is “portrayed as an obstacle to a better society.”¹¹¹ Professor Bruce Peabody’s 2004 survey of lawmaker attitudes towards Court-Congress relations bears out how policy concerns dominate all else.¹¹² Professor Peabody’s study highlights two related phenomena, namely that (1) lawmakers care little about legal issues unless they concern “local and electorally salient matters,”¹¹³ and (2) the overwhelming majority of lawmakers (more than 70 percent) say that courts should give little or no weight to congressional judgments about the constitutionality of legislation.¹¹⁴

What then of taking the courts into account when judicial review might undermine political victories? If lawmakers truly care about policy outcomes, they should care about the ultimate fate of legislation. Relatedly, what happens after a court either strikes a law down as unconstitutional or interprets a statute at odds with lawmaker preferences? Can Congress respond to a court ruling without thinking about the interpretive theories that propelled that ruling?

Studies of lawmaker efforts to revamp legislation in response to constitutional and statutory interpretation decisions are particularly revealing in this regard. Specifically, Professor J. Mitchell Pickerill’s 2004 study of congressional responses to constitutional

110. See Mikva, *supra* note 19, at 609-10.

111. See *id.* at 610.

112. See Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959-2001*, 29 LAW & SOC. INQUIRY 127, 166-67 (2004).

113. *Id.* at 151.

114. *Id.* at 147-48.

rulings makes clear that lawmakers are remarkably disengaged with the courts both before and after judicial review of Congress's handiwork.¹¹⁵ Lawmakers care very little about the substance of the rulings they are responding to and even less about the interpretive theories that underlie these rulings.¹¹⁶ Based on an evaluation of congressional responses to federal statutes struck down from 1953 to 1997 and interviews with lawmakers and their staff, Professor Pickerill assessed lawmaker priorities and the relevance of judicial invalidations to the pursuit of those priorities.¹¹⁷ Most striking, Professor Pickerill found that Congress frequently rewrites legislation in response to court overrulings (47 percent);¹¹⁸ Congress hardly ever challenges the Court's decisions;¹¹⁹ and Congress acquiesces to the Court because members can pursue their policy priorities through alternative legislation.¹²⁰ The Court and Congress are both "capable of getting what they want because they want different things."¹²¹ The Court seeks control of legal standards; Congress needs some outlet to express its policy preferences.

Professor Pickerill's findings suggest that Congress can largely ignore the courts when enacting legislation—the courts might well approve the measure and, if not, Congress can return to the issue through amending legislation. Moreover, when amending legislation, lawmakers need not engage with the courts; they rather "make[] clear concessions to the Court's decision" by embracing the same policy through alternative means.¹²² Lawmakers, in other words, have next-to-no reason to think about courts when pursuing favored policies, rewarding constituencies, and bolstering their

115. PICKERILL, *supra* note 6, at 46-47.

116. *See id.*

117. *See id.*

118. *Id.* at 46. This figure dramatically understates Congress's willingness to intercede in response to Supreme Court overrulings. In the vast majority of cases in which Congress does not intervene, the Court ruling involved "as applied" challenges and, as such, there was not necessarily any need for legislative intervention—for the executive branch might recalibrate its enforcement scheme in ways that would cure the constitutional infirmity. *See id.* at 43-45.

119. *See id.* at 49.

120. *See id.* at 54.

121. Whittington, *supra* note 19, at 1146 (reviewing Pickerill's evidence and finding it persuasive).

122. PICKERILL, *supra* note 6, at 49.

prospects for reelection.¹²³ Interviews with lawmakers and staff back up these conclusions; here is a sampling:

- “Policy issues first, how do you get a consensus to pass the bill, six other things, then constitutionality.”¹²⁴
- “When I go home and talk to my constituents, they ask me to help solve problems in Congress. They don’t ask if it’s constitutional. They want common sense.”¹²⁵
- “We know that the Senator is not going to go home and not get re-elected because he voted for legislation which was later struck down as unconstitutional.”¹²⁶

Congressional overrides of statutory decisions tell a similar story. A study of 275 overrides from 1967 to 2011 reveals that Congress “does not override because of statutory method (e.g. textualism or purposivism).”¹²⁷ Just like interpretive theories of congressional power, theories of statutory interpretation are one step removed from the underlying policy controversy and lack political salience.¹²⁸

123. The only potential exception is when courts truly foreclose first-order policy priorities—preventing all alternative legislative mechanisms so that the only available way to advance lawmaker policy preferences is to compel a change in Court doctrine. See Whittington, *supra* note 17, at 493-95. This is extremely unlikely to occur on structural questions like federalism and separation of powers as there almost always is an alternative mechanism available to Congress. See Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decision Making But Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307, 1314-15 (2002).

124. PICKERILL, *supra* note 6, at 134 (quoting former Democratic Senator).

125. *Id.* (quoting former Republican Representative).

126. *Id.* at 135 (quoting Senate Republican legislative director).

127. See Nourse, *supra* note 42, at 206-07 (emphasis omitted) (discussing findings of Christiansen & Eskridge, *supra* note 20).

128. The one possible exception is the court-centric Judiciary Committees. See *infra* Part I.E. In 2016, for example, the House Judiciary Committee approved the Separation of Powers Restoration Act (SOPRA), legislation that would shift power away from executive agencies and to the courts by vitiating so-called *Chevron* deference. See H.R. REP. NO. 114-622, at 1-2 (2016). This shift arguably limits legislative prerogatives in that statutory override studies suggest a close working relationship between courts and agencies on interpretive questions. See Nourse, *supra* note 42, at 213-14. On the other hand, limiting executive power is a boon to congressional prerogatives during periods of divided government. See Frost, *supra* note 13, at 931.

The 2016 SOPRA is telling for another reason. House Republicans uniformly backed the measure (239 votes for and none against) and all but 1 of 172 voting Democrats opposed the measure. See Office of the Clerk, *Final Vote Results for Roll Call 416*, U.S. HOUSE REPRESENTATIVES, <http://clerk.house.gov/evs/2016/roll416.xml> [<https://perma.cc/ZE6L-FLS7>]. The reason: the bill was pushed by Republicans in an effort to condemn the Obama Administration for pushing the boundaries of executive power. See Press Release, Sen. Mike Lee, Senate,

Most notably, the Court's shift away from pro-Congress theories of interpretation that make use of legislative history has not caused a stir; as noted, I could find no evidence on congressional efforts to mandate the use of legislative history.¹²⁹ Instead, Congress overrides to achieve policy goals. For example, when Congress passed the Civil Rights Act of 1991 (overriding several Supreme Court opinions), an unusual statutory provision directed courts to rely exclusively on an "interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) ... as legislative history in construing or applying, any provision of this Act."¹³⁰ More typically, Congress does not formally take the Court into account. Most overrides are so-called policy-updating overrides which update public law years or decades after a Supreme Court opinion.¹³¹ Even though these overrides negate "bushels of Supreme Court opinions," the Court is a big player in these stories—as the focus is strictly updating policy, not correcting judicial mistakes.¹³²

Policy too is the focus in "restorative" overrides that directly target disappointing Supreme Court cases. Most (around 70 percent) of these overrides are triggered by executive agencies and the DOJ, responding to cases in which agency views were more in line with lawmaker preferences than judicial opinions.¹³³ Over the past twenty-five years, and especially since 2000, however, Congress

House Leaders Introduce Bill to Restore Regulatory Accountability Through Judicial Review (Mar. 17, 2016), <http://www.lee.senate.gov/public/index.cfm/2016/3/senate-house-leaders-introduce-bill-to-restore-regulatory-accountability-through-judicial-review> [https://perma.cc/5EED-YCY3]. Ironically, Republican backers of the measure did not think that judicial supremacy in interpreting statutes violated our system of checks and balances. *See, e.g., id.* Instead, the focal point of this partisan debate was the lawfulness of Obama initiatives; the authority of Congress to interpret was never in play. *See id.* Likewise, the fact that the Senate never pursued this measure further highlights that its purpose was to highlight Republican complaints against the Obama Administration and not to reform judicial interpretations of federal statutes.

129. *See supra* text accompanying note 78; *see also* Frost, *supra* note 13, at 968 (noting dominance of anti-Congress theories and suggesting that Congress participate in litigation advancing pro-Congress theories).

130. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1991). For further discussion, see Robert Pear, *With Rights Act Comes Fight to Clarify Congress's Intent*, N.Y. TIMES (Nov. 18, 1991), <http://www.nytimes.com/1991/11/18/us/with-rights-act-comes-fight-to-clarify-congress-s-intent.html> [https://perma.cc/H2WE-ENUT].

131. *See* Christiansen & Eskridge, *supra* note 20, at 1319-20.

132. *See id.* at 1320.

133. *See id.* at 1321.

rarely overturned Supreme Court statutory rulings by putting earlier understandings of the law back into effect.¹³⁴ The reason: lawmakers in today's polarized Congress increasingly are at odds about preferred policies, and lawmakers cannot work together in bipartisan ways to check the Court on divisive policy questions.¹³⁵ In this way, polarization further facilitates judicial supremacy.¹³⁶

Polarization facilitates judicial supremacy in other ways. It makes it more likely that lawmakers will emphasize party-coordinated messages without consideration of institutional interests, including potential judicial review.¹³⁷ It shifts congressional resources away from committees and to party leaders—so much so that committee hearings related to constitutional and statutory interpretation have become the province of the court-centric Judiciary Committees.¹³⁸ Polarization also means that there are next to no moderates in either party and that all Republicans are conservative and all Democrats liberal.¹³⁹ There is no need for lawmakers to pursue policies of moderation or engage in bipartisan compromise.¹⁴⁰ Members of your party largely agree with you; members of the opposition party largely disagree with you.¹⁴¹

134. See Hasen, *supra* note 20, at 209 (noting an average of 12 overrides per year from 1975 to 1990; 5.8 per year from 1991 to 2000; and 2.8 per year from 2001 to 2012).

135. See *id.* at 228-42.

136. See Adam Liptak, *In Congress's Paralysis, a Mightier Supreme Court*, N.Y. TIMES: SIDEBAR (Aug. 20, 2012), <http://www.nytimes.com/2012/08/21/us/politics/supreme-court-gains-power-from-paralysis-of-congress.html> [<https://perma.cc/3H9H-W29N>].

137. See C. Lawrence Evans, *Committees, Leaders, and Message Politics*, in CONGRESS RECONSIDERED 217, 219-20 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001).

138. See Devins, *Party Polarization*, *supra* note 15, at 762-63.

139. Today, the ideological distance between the two parties is greater than it has ever been. See Sean M. Theriault, *The Case of the Vanishing Moderates: Party Polarization in the Modern Congress* 6 figs.1 & 2 (Sept. 23, 2003) (unpublished manuscript), <https://msu.edu/~rohde/Theriault.pdf> [<https://perma.cc/6TH6-XJNW>]; Keith T. Poole, *The Polarization of the Congressional Parties*, POLARIZED AM. (Jan. 30, 2016), http://polarizedamerica.com/political_polarization_2015.htm [<https://perma.cc/2EWK-GGJZ>]. On the absence of moderates, see Hasen, *supra* note 20, at 233-42; Theriault, *supra*, at 3.

140. When Congress was ideologically diverse, lawmakers routinely pursued bipartisan measures and acted in bipartisan ways. See, e.g., Neal Devins, Essay, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 DUKE L.J. 1525, 1543 (2005) (discussing bipartisan approaches to witness lists at congressional hearings); Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 255-56 (2007).

141. For this very reason, there has been a dramatic rise in party-line voting and amicus filings. For example, no Republican voted for the Affordable Care Act, judicial nominees are

Because intraparty agreement is so high, party members are increasingly willing to delegate authority to like-minded party leaders. “As the views of members within the ... party become more alike, the costs of [members] delegating positive agenda power [to leadership] diminishes relative to the potential benefits.”¹⁴² By embracing party leadership and party-crafted messages, lawmakers invest less in policy and more in fundraising, constituency service, and other activities related to reelection.¹⁴³

The shift in power to leadership is consequential in other ways. Leaders bolster their claim of power by cutting committee resources and otherwise shifting power away from committee chairs.¹⁴⁴ For example, by setting term limits on committee service and taking greater control of naming the committee chair, leadership rewards party loyalty (including fundraising) when staffing committees.¹⁴⁵

increasingly subject to party-line votes, and congressional amicus briefs are increasingly single-party briefs. See Sarah A. Binder & Forrest Maltzman, *Congress and the Politics of Judicial Appointments*, in CONGRESS RECONSIDERED, *supra* note 137, at 297, 302-04 (explaining that federal court of appeals nominees increasingly are subject to party-line votes); Devins, *supra* note 43, at 943-44 (noting rise in single-party amicus briefs); Robert Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, N.Y. TIMES (Dec. 24, 2009), <http://www.nytimes.com/2009/12/25/health/policy/25health.html> [<https://perma.cc/5SR5-EALE>] (explaining passage of Affordable Care Act); see also John H. Aldrich & David W. Rohde, *Congressional Committees in a Continuing Partisan Era*, in CONGRESS RECONSIDERED 217, 232-37 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009) [hereinafter CONGRESS RECONSIDERED, 9th ed.] (discussing rise of minority party filibuster).

142. David W. Rohde et al., *Parties, Committees, and Pivots: A Reassessment of the Literature on Congressional Organization 12* (Aug. 22, 2008) (unpublished manuscript), <http://research.allacademic.com/> [<https://perma.cc/99MU-FW6L>] (select “Titles” from the drop down box and search for “Parties, Committees, and Pivots” from the “Quick Search” box on the main page; then find the APSA presentation and follow the link entitled “Application/PDF”); see also STEVEN S. SMITH, *PARTY INFLUENCE IN CONGRESS 120* (2007) (noting that “party influence varies with party polarization”).

143. See KING, *supra* note 52, at 49.

144. For general treatments of the balance of power between committee chairs and party leaders, see BARBARA SINCLAIR, *LEGISLATORS, LEADERS, AND LAWMAKING: THE U.S. HOUSE OF REPRESENTATIVES IN THE POSTREFORM ERA* 163-66 (1995); SMITH, *supra* note 142, at 116-18; Aldrich & Rohde, *supra* note 141, at 233-34.

145. For discussions of House Speaker Newt Gingrich’s efforts to centralize power after the 1995 Republican takeover of Congress, see CHRISTOPHER J. DEERING & STEVEN S. SMITH, *COMMITTEES IN CONGRESS* 48 (3d ed. 1997); Aldrich & Rohde, *supra* note 141, at 223. For discussions of how House Democrats too coordinated power after their 2007 takeover, see Steven S. Smith & Gerald Gamm, *The Dynamics of Party Government in Congress*, in CONGRESS RECONSIDERED, 9th ed., *supra* note 141, at 141, 160-61. For discussions of how polarization and the related shift to party leadership affected the Senate as well as the House, see DEERING & SMITH, *supra*, at 51-52; SUSAN WEBB HAMMOND, *CONGRESSIONAL CAUCUSES*

Moreover, reductions in committee staff result in greater attention to first-order policy priorities and less attention to second-order concerns, including the constitutionality of legislation and other matters associated with potential judicial review of legislative action. Indeed, my 2011 study of committee consideration of constitutional questions revealed that—with the important exception of the Judiciary Committees—committee consideration of constitutional questions was inversely related to party polarization, declining starting around 1980 and declining precipitously from 1995 to 2009.¹⁴⁶ During the less polarized 1970-1980 period, 54 percent of constitutional hearings took place outside the Judiciary Committee; during the highly polarized 1995-2009 period, that percentage dropped by half—to 28 percent.¹⁴⁷

The shift in power to leadership and related coalescing of party views also results in each party seeking political advantage by diminishing the power of the other party. Consider, for example, the willingness of each party to investigate and oversee the policies of the opposition party President but not Presidents of their own party.¹⁴⁸ This behavior weakens Congress by facilitating disunity and reliance on the courts to adjudicate interparty disputes.¹⁴⁹ It also results in each party's embrace of so-called message politics—party efforts to use the legislative process to make symbolic statements to voters and other constituents.¹⁵⁰ Indeed, party members may even trade off preferred policies and cast strategic votes “to enhance their party's brand name with various constituencies.”¹⁵¹

This emphasis on party messaging, combined with the related changes in the committee structure and lawmaker priorities, has resulted in a severe decline in major legislation that requires the

IN NATIONAL POLICY MAKING 87-92 (1998); FRANCES E. LEE, *BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE* 174-80 (2009).

146. See Devins, *Party Polarization*, *supra* note 15, at 780 n.195.

147. See *id.* at 751-52.

148. See Devins, *Presidential Unilateralism*, *supra* note 15, at 409-10.

149. See *id.*

150. See Evans, *supra* note 137, at 219. In particular, Republicans and Democrats look to party leaders to coordinate a message—rather than allow committee leaders the power to set the legislative agenda. See *id.* at 226-27.

151. See Frances E. Lee, *How Party Polarization Affects Governance*, 18 *ANN. REV. POL. SCI.* 261, 265 (2015).

cooperation of both parties.¹⁵² It has also resulted in a decline in legislation overturning Supreme Court statutory interpretation decisions and restoring earlier understandings of the law.¹⁵³ More generally, it has resulted in a de-emphasis on legislative accomplishment (when lawmakers take credit for having the government do something) and an emphasis, instead, on so-called position taking.¹⁵⁴ Position taking can instead be defined as “the public enunciation of a judgmental statement on anything likely to be of interest to political actors. The statement may take the form of a roll call vote.”¹⁵⁵ Position taking is an “effort at image adjustment [that] can take many forms, including press releases, letters to constituents, paid advertising, public appearances, interviews, writings, roll call votes, bill sponsorships, floor speeches, and activity at legislative hearings.”¹⁵⁶

Position taking allows lawmakers to “take credit for voting the right way on the issue,”¹⁵⁷ and therefore, the political benefit is not contingent on a law actually being passed by Congress or upheld by the courts. Indeed, judicial invalidations can prove beneficial, for they create new opportunities for lawmakers to return to the issue and consider alternative measures. Consider, for example, the Gun-Free School Zones Act invalidated by the Supreme Court in *United States v. Lopez*.¹⁵⁸ Lawmakers never thought about the courts when enacting the measure.¹⁵⁹ Lawmakers were able to take a position on protecting children, regardless of whether the Court upheld the law. After the statute was invalidated, lawmakers could return to the issue and enact alternative legislation—again, reaping the benefits of taking a position against crime. In so doing, the lawmakers could

152. See Hasen, *supra* note 20, at 240-41.

153. See *supra* text accompanying notes 118-28.

154. For an excellent summary of the differences between credit claiming and position taking, see Whittington, *supra* note 17, at 512-13.

155. DAVID R. MAYHEW, PARTIES AND POLICIES: HOW THE AMERICAN GOVERNMENT WORKS 36 (2008).

156. WHITTINGTON, *supra* note 2, at 134.

157. Whittington, *supra* note 17, at 513.

158. 514 U.S. 549, 551 (1995) (describing the Gun-Free School Zones Act).

159. See PICKERILL, *supra* note 6, at 101-02. Lawmakers did not make any findings that the law impacted commerce until after a federal court of appeals invalidated the statute as outside the commerce power—findings that were attached to unrelated legislation and based on no evidence. See *id.* at 150.

simultaneously reap position-taking benefits while backing judicial power to limit Congressional power.¹⁶⁰ More generally, “[e]nhancing the judicial authority to define and enforce constitutional meaning can ease the legislative policy conscience, while allowing legislators to reap the electoral gains of position taking.”¹⁶¹

E. Wrapping Up

Lawmakers place policy, constituency, and reelection ahead of institutional goals. In today’s polarized Congress, lawmakers also place their party ahead of institutional goals. These divisions within Congress cut against Congress’s power to persuade the courts and Congress’s power to formally take issue with court decision-making. Correspondingly, lawmakers pursue favored policies without regard of potential judicial review. And when lawmakers act in response to court decisions, there is little agonizing over potential judicial review.

Let me close this Part by reiterating one of the central claims of this Article: Lawmaker incentives facilitate judicial supremacy and, correspondingly, lawmakers acquiesce to judicial supremacy. In particular, the prospects of judicial review and the theories of interpretation utilized by courts are low salience matters to most lawmakers—so much so that judicial review is rarely taken into account. That, however, does not mean that lawmakers support judicial supremacy. Occasions when lawmakers declare that a question of constitutional or statutory interpretation should be settled by the courts are rare.¹⁶² Indeed, a survey of 137 congressional staffers involved in the legislative drafting process revealed that most drafters do not want courts to fill in gaps in statutory meaning—91 percent said gaps should be filled in by agencies as compared to 39 percent who also looked to courts.¹⁶³ Equally

160. *See id.* at 37-38; Devins, *supra* note 123, at 1316-17.

161. WHITTINGTON, *supra* note 2, at 139.

162. On rare occasion, lawmakers formally embrace judicial supremacy. For example, expedited review provisions are sometimes utilized for the very purpose of kicking an issue to the Supreme Court. *See* Devins, *supra* note 1, at 442-44.

163. *See* Bressman & Gluck, *supra* note 10, at 774. Based on strict party-line voting on proposed 2016 legislation regarding judicial deference to agency interpretations, there may now be a Republican-Democrat divide on this question (with Democrats backing agency deference

significant, most of that 39 percent worked for entities removed from the actual implementation of the law, that is, removed from the actual policy making central to most members—40 percent were from the court-centric Offices of Legislative Counsel, 23 percent were from the court-centric Judiciary Committees, and 10 percent were from other committees that do not oversee agencies.¹⁶⁴

Against this backdrop, it is little wonder that courts—the Supreme Court in particular—feel that they need not take Congress into account when interpreting statutes or the Constitution.¹⁶⁵ Lawmakers and their staff may not prefer a regime of judicial supremacy, but Congress will not resist judicial supremacy.¹⁶⁶ As I will now show in Part II, the very offices and committees in Congress most likely to pay attention to courts embrace broad judicial authority. Specifically, while most committees and members eschew courts in pursuing policy, constituency, reelection, and party objectives, the committees and offices who oversee judicial matters have incentive to embrace broad views of judicial power. Part II will make this point by examining the Judiciary Committees, the Offices of Legislative Counsel and the American Law Division of the Congressional Research Service, and the House and Senate offices of legal counsel.

and Republicans backing judicial supremacy). *See supra* note 128. On the other hand, the party-line vote may have had nothing to do with rules of statutory construction and everything to do with Republican efforts to cast doubt on the legality of Obama initiatives. *See supra* note 128.

164. *See* Bressman & Gluck, *supra* note 10, at 774.

165. The Supreme Court increasingly embraces this view in both constitutional and statutory cases. In constitutional cases, the Court increasingly avoids the avoidance canon in order to raise issues not presented by the case. *See* Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 667 (2012). In statutory cases, the Supreme Court is increasingly likely to declare statutory language clear rather than defer to agency interpretations of ambiguous statutes. *See* Cass R. Sunstein, *The Catch in the Obamacare Opinion*, BLOOMBERG: VIEW (June 25, 2015, 2:22 PM), <https://www.bloomberg.com/view/articles/2015-06-25/the-catch-in-the-obamacare-opinion> [<https://perma.cc/K88H-7964>]. For further discussion, see *supra* Part I.D.

166. *See supra* Part I.C.

II. INSTITUTIONAL STRUCTURES

The institutional design choices made by lawmakers reflect lawmaker incentives. Unlike the unitary executive, lawmakers do not advance their preferred policies through coordinated legal arguments that expand congressional power.¹⁶⁷ As Part I makes clear, lawmakers rarely think of congressional power; indeed, the individual interests of lawmakers are sometimes served by judicially imposed limits on Congress's powers. Congressional organization reflects Congress-executive differences. Unlike the unitary executive, there are no offices in Congress—like the DOJ's Office of Legal Counsel—tasked to advance pro-Congress understandings of the law, nor is there a DOJ or Office of Management and Budget to coordinate a unified pro-Congress understanding of regulatory and legal policy priorities.¹⁶⁸ The President has incentive to have such offices because his policy interests are advanced through coordinated pro-executive enforcement strategies.¹⁶⁹ In contrast, Congress neither executes the law nor presents an organized, cohesive view of congressional authority.¹⁷⁰ By its very nature, “[c]ongressional organization leads to fragmentation.”¹⁷¹ Reform proposals highlight that Congress is limited by the very fact that lawmakers pursue “legislative” priorities—but reform proposals go nowhere because lawmakers have no reason to constrain themselves when pursuing policies that cut against Congress's institutional interests.¹⁷²

167. *See supra* Part I.A.

168. *See supra* Part I.C.

169. *See* Devins, *Presidential Unilateralism*, *supra* note 15, at 399-400.

170. *See supra* Part I.A.

171. Robert A. Katzmann, *The American Legislative Process as a Signal*, 9 J. PUB. POL'Y 287, 291 (1989).

172. For example, Beth Garrett and Adrian Vermeule proposed the establishment of a legislative office that would—akin to the Office of Legal Counsel—develop pro-Congress theories of the Constitution and prepare “constitutional impact” statements on proposed legislation. Garrett & Vermeule, *supra* note 7, at 1313-19. According to Garrett and Vermeule, “If Congress wants to step out of the shadows of the judicial and executive branches with regard to constitutional determinations, it must establish an equivalent set of experts.” *Id.* at 1314. Proposals like this, however, are the province of law professors—not members of Congress who have incentives to trade off Congress's institutional interests. *See* Devins, *supra* note 43, at 935. For another proposal advocating broader congressional involvement in judicial proceedings, see Frost, *supra* note 13, at 967.

This Part will examine legislative drafting, congressional oversight of DOJ legal arguments, and the occasional efforts of the House and Senate counsel to advance congressional prerogatives in court. In so doing, I will show how institutional structures facilitate judicial supremacy. In particular, these structures reflect the fact that lawmakers pay scant attention to courts and delegate power on court-related questions to committees and offices that embrace judicial power.¹⁷³ To a lesser extent, these structures also highlight polarization in today's Congress and how lawmakers are often at odds with each other on the scope of congressional power.¹⁷⁴

A. *Legislative Drafting*

Legislative drafting is not pursued in a uniform manner. Power is not clearly delineated among members. Committees operate in an ad hoc manner, and there is nothing resembling precedent that governs theories of statutory interpretation; there is no need to coordinate a broader congressional agenda.¹⁷⁵ In contrast to Office of Management and Budget regulatory review,¹⁷⁶ there is no requirement that lawmakers work with either of the two offices that could represent some type of coordinating institution within the legislature: the American Law Division of the Congressional Research Service and the Offices of Legislative Counsel. These offices are not required to participate in legislative drafting; correspondingly, and unlike the Office of Legal Counsel, they are not bound by internal pro-Congress precedent nor do they have any institutional incentive to assert broad legislative authority to the courts.¹⁷⁷ As I will soon discuss, the incentives of these offices are not to expand the boundaries of legislative power, but to embrace judicial supremacy. More

173. See *infra* Part II.A.

174. See *infra* Part II.B.

175. See Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 109-11 (2015).

176. See Arthur Fraas, *Observations on OIRA's Policies and Procedures*, 63 ADMIN. L. REV. 79, 80 (2011) (discussing efforts of the Office of Information and Regulatory Affairs to coordinate executive policy making through mandatory regulatory review of draft agency rules).

177. On the role of precedent in Office of Legal Counsel decision-making, see Bradley & Morrison, *supra* note 31, at 1133. On Office of Legal Counsel incentives to expand presidential power, see Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 463-64 (1993).

significant, congressional drafters are far more concerned with agency interpretations than court interpretations.¹⁷⁸ Without any authority to argue pro-Congress theories of statutory or constitutional interpretation before the courts, lawmakers, committee staff, and the Offices of Legislative Counsel are much more interested in directing agency action than in legal theories that are one step removed from policy making.

More generally, the mechanics of legislative drafting mitigate against formal consideration of the courts and potential judicial review by members and staffers. Members of Congress “are not drafters [of legislation] but rather decisionmakers. They are managers of a mini-bureaucracy who set the direction for policy and sometimes wade into the details of policy, but who rarely get into the technical work of legislative drafting.”¹⁷⁹ Outside of the Judiciary Committees, congressional staff do not typically draft legislation.¹⁸⁰ Like the members or committees they represent, staffers are far more focused on broad policy goals than in the specific language of the bill.¹⁸¹ The actual drafting of legislation is largely pursued by the nonpartisan Offices of Legislative Counsel.¹⁸²

Throughout the drafting process, members and staff focus on policy goals, including agency implementation. Reflecting the fact that agencies and committees are in close contact regarding the drafting and implementing of legislation, agencies participate in legislative drafting, and members sometimes purposefully include ambiguous statutory language to create levers whereby they can pressure

178. See Bressman & Gluck, *supra* note 10, at 769-70, 774.

179. Sitaraman, *supra* note 175, at 90-91 (footnote omitted).

180. For a study of Judiciary Committee staff participation in legislative drafting, see Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 582-83 (2002). Judiciary Committee staff suggest that they frequently prepare a draft of legislation before turning over the bill to Legislative Counsel for fine-tuning. See *id.* at 591. This is a far more active role than reported by other staffers surveyed by Bressman and Gluck. See Bressman & Gluck, *supra* note 10, at 740 (“99% is drafted by Legislative Counsel. Most legislation is an amorphous concept given by member or staffer.”). Likewise, Judiciary Committee staff seemed to take into account “what a court will do with certain language.” Nourse & Schacter, *supra*, at 601. For additional discussion of the Judiciary Committee, see *infra* Part II.B.

181. See Nourse & Schacter, *supra* note 180, at 607.

182. Bressman & Gluck, *supra* note 10, at 740. Contact with the Offices of Legislative Counsel may be initiated when the bill is first being drafted or at any other point in the deliberative process. See Katzmman, *supra* note 171, at 288-89.

agencies to pursue member priorities through the implementation of statutes.¹⁸³ Oversight hearings, confirmations, and appropriations also result in constant dialogue between members, staffers, and agency officials.¹⁸⁴ Unlike agencies, courts are absent from legislative drafting and implementation. The DOJ is the government's voice in court proceedings, and prohibitions of advisory opinions keep judges far removed from the lawmaking process.¹⁸⁵ And while Congress does oversee the judiciary through, among other things, its exceptions and appropriations powers, there is little to no direct communication between Congress and the courts.¹⁸⁶

For their part, the Offices of Legislative Counsel seek to actualize the policy goals of client members, committees, and staffers. A survey by Professors Abbe Gluck and Lisa Bressman of 137 congressional staffers underscores that policy concerns are the near-exclusive concern of members and staffers.¹⁸⁷ A survey of fifty-four agency officials by Professors Jarrod Shobe revealed that agency officials often participate in the drafting process to ensure that

183. On the role of agencies in drafting, see Christiansen & Eskridge, *supra* note 20, at 1448-49; Sitaraman, *supra* note 175, at 103-09. See generally, Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. (forthcoming 2017). For a discussion of how members draft statutes in such a way that they can later push agencies to do their bidding, see Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1505 (2015). For a related discussion of how staffers are more apt to delegate authority to agencies they have jurisdiction over, see Bressman & Gluck, *supra* note 10, at 754. For a discussion of House Republican efforts to expand judicial review and limit agency control of statutory meaning, see *supra* note 128.

184. For a detailing of the multifarious ways Congress asserts its interests in negotiations with the executive over information access requests, see Devins, *A Modest Proposal*, *supra* note 18, at 109, 111-13.

185. For additional discussion of DOJ control of government litigation, see *infra* Part II.B.2. For a discussion of the Framers' rejection of a Council of Revision that would allow lawmakers to seek advisory opinions from the judiciary, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2000-02 (2011).

186. For a helpful inventory of ways that Congress and the courts do interface, see MARK C. MILLER, *THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY* 77-104 (2009). On the need to improve communications between Congress and the courts, see generally JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY, *supra* note 58.

187. See Bressman & Gluck, *supra* note 10, at 740. For a discussion of the methodology used in the survey, see 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, 919-24 (2013).

staffers and agency officials agree *ex ante* on statutory meaning.¹⁸⁸ On the other hand, questions of potential judicial review are largely ignored by members and staffers.¹⁸⁹ Instead, these questions are the province of the Offices of Legislative Counsel.¹⁹⁰ And while attorney drafters in these offices see “their primary interpretive relationship as one with agencies, not courts,”¹⁹¹ they are also aware of theories of statutory construction, of relevant case law, and of potential constitutional challenges.¹⁹² On occasion, the Offices of Legislative Counsel will seek legal advice from the American Law Division of the Congressional Research Service; more typically, when a potential constitutional issue is flagged, the Offices of Legislative Counsel will encourage members and staffers to seek legal advice from the American Law Division.¹⁹³

The organizational structure and norms of the American Law Division and Offices of Legislative Counsel do not facilitate pro-Congress views of the law. There is no mechanism in the offices to develop or adhere to legal theories that advance Congress’s institutional interests in either statutory or constitutional cases. For example, the Offices of Legislative Counsel are fragmented in ways that undermine coordination; like congressional committees with competing jurisdiction, attorneys in the Offices of Legislative Counsel are assigned to specific subject areas.¹⁹⁴ They work with and

188. For a discussion of Shobe’s survey methodology, see Shobe, *supra* note 183 (manuscript at 11-13).

189. See Shobe, *supra* note 10, at 831-32.

190. See *id.*

191. Bressman & Gluck, *supra* note 10, at 767. Conversations I have had with Legislative Counsel attorneys echoed this point: that agencies are far more important than courts to the staffers and members who are the clients of the Office of Legislative Counsel. Agency representatives often meet with staffers and Legislative Counsel attorneys to ensure that agencies will adhere to legislative preferences.

192. See Shobe, *supra* note 10, at 831-32. At the same time, legislative drafters are more interested in clearly expressing Congress’s policy goals and do not “always draft with courts’ behavior specifically in mind.” *Id.* at 832; see also Gluck & Bressman, *supra* note 187, at 943-44. For a somewhat competing view, see Nourse & Schacter, *supra* note 180, at 603 (noting that their interviews with Legislative Counsel lawyers showed substantial expertise in court statutory drafting as well as efforts to draft legislation with an eye toward federal court decision-making).

193. See Fisher, *supra* note 10, at 68-73; Shobe, *supra* note 10, at 834-43.

194. See Bressman & Gluck, *supra* note 10, at 746-47; see also Peter M. Goodloe, *Simplification—A Federal Legislative Perspective*, 105 DICK. L. REV. 247, 248 (2001) (describing legislative drafting as “trying to build a house with no general contractor, [rather] just a

advance the priorities of their clients (committees and members); they do not coordinate with each other nor do they seek to advance a uniform view of legislative prerogatives.¹⁹⁵ Correspondingly, there is no such thing as precedent, so staffers in these offices seek to codify policy preferences, even if that comes at the expense of pro-Congress theories of interpretation.¹⁹⁶ Attorney-client confidentiality in both offices also operates to shield lawmakers and committees from having draft legislation or legal opinions shared with other members.¹⁹⁷ Members opposed to legislation sometimes seek out legal opinions from the American Law Division and submit those opinions for publication in the *Congressional Record* when they identify limits to congressional power.¹⁹⁸

Equally significant, the structures and incentives of these offices cut in favor of a strict adherence to Supreme Court precedent. Most staffers spend twenty-five or more years working in these offices and are attracted to work in offices that have a strong reputation for serving lawmakers and for being nonpartisan.¹⁹⁹ Indeed, American Law Division attorneys are instructed to consider both sides of legal questions and thereby not formally embrace pro-Congress understandings of the law.²⁰⁰ Relatedly, there are strong incentives for these offices to see the Supreme Court as the last word on questions of constitutional interpretation and theories of statutory interpretation. In part, adherence to Supreme Court precedent fuels the nonpartisan reputation of these offices.²⁰¹ These offices have no interest

bunch of subcontractors trying to coordinate with each other”).

195. In sharp contrast, the principal argument in favor of DOJ control of agency litigation is to ensure consistent positions in court and a pro-executive understanding of the law. *Cf. Devins & Herz, supra* note 62, at 559-61.

196. There is a drafting guide, but it is not “comprehensive”; instead, “the drafters themselves hold the offices’ expertise.” Shobe, *supra* note 10, at 824-25.

197. *See id.* at 828-29. Legislative Counsel attorneys cannot tell members or staffers about the efforts of other lawmakers to pursue similar legislation—even if to foster cooperation between members and committees pursuing similar objectives. *Id.* Conversations I have had with Legislative Counsel staffers also highlighted the import of confidentiality.

198. *See id.* at 838-39. American Law Division work product is also subject to attorney-client privilege and cannot be shared without the consent of the member who requests it. *See id.* at 841. On the other hand, that member is free to do what she sees fit. *See id.*

199. *See id.* at 825.

200. *See id.* at 841-42. I have heard this numerous times from American Law Division attorneys and analysts who work for other Congressional Research Service divisions.

201. *Cf. id.* at 818, 834, 841 (discussing the bipartisan reputations of the Office of Legislative Counsel and the American Law Division).

in staking out contested pro-Congress views of the law; unlike the unitary executive, Congress is disunitary and pro-Congress positions might be resisted by lawmakers who oppose legislation on policy grounds.²⁰² The status of these lawyers is somewhat hinged to the status of the courts; for example, the work of American Law Division lawyers is very much tied to the Supreme Court imposing checks on Congress—checks that can be discerned through an analysis of case law.²⁰³ On constitutional questions, moreover, staffers in both offices have incentive to give legal advice that will result in the upholding of federal legislation.²⁰⁴ Consequently, potential judicial limits to congressional power are embraced, not challenged.²⁰⁵ Likewise, on statutory matters, there is no interest in revisiting Supreme Court doctrine that limited the use of legislative history.²⁰⁶

None of this is surprising. Congress is disunified and does not push for pro-Congress views of the law. Lawmakers, in general, do not care about potential judicial invalidations so long as there are available mechanisms to express their policy preferences.²⁰⁷ Lawmakers, in other words, place no pressure on congressional offices to embrace a pro-Congress view of the law; indeed, the incentives of attorneys in the Offices of Legislative Counsel and the American Law Division favor both judicial supremacy and broad readings of judicial limits on congressional power.²⁰⁸ Judicial supremacy fosters

202. See Moe & Howell, *supra* note 17, at 861 (discussing congressional members' need to please their constituencies at the expense of bipartisanship).

203. See Shobe, *supra* note 10, at 842 (noting that American Law Division lawyers are "acutely concerned with Supreme Court decisions").

204. See Devins & Prakash, *supra* note 21, at 517-18 (discussing the Office of Legal Counsel opinion stating that the DOJ should bring plausible arguments to allow the court to uphold a statute). Not surprisingly, attorneys in both offices have told me that they looked to Supreme Court precedent to assess likely judicial outcomes, and there was no interest in examining alternative theories that might expand the boundaries of congressional power.

205. See Devins, *Party Polarization*, *supra* note 15, at 764 (noting that lawmakers are increasingly willing to acquiesce to Supreme Court authority to invalidate legislation).

206. See Frost, *supra* note 13, at 926 (noting that Congress has stood by while the Court diminishes the role of legislative history in statutory interpretation).

207. See Whittington, *supra* note 17, at 512 (noting that members of Congress have the strongest reaction to Court decisions when the political costs of the decision are the greatest).

208. See Shobe, *supra* note 10, at 831-32, 840 (discussing the awareness of judicial statutory interpretation on the part of the Office of Legislative Council and the American Law Division).

bipartisan norms; broad readings mitigate against potential judicial invalidation of lawmaker preferences.

B. Congress in Court

Congress's disinterest in the courts, including potential judicial invalidations of federal law, is also revealed in Congress's participation in legal proceedings—indirectly through its oversight of the DOJ and directly through legal filings by the House and Senate counsel. First, by both centralizing litigation authority in the DOJ and leaving it to the court-centric Judiciary Committee to oversee the DOJ, most lawmakers have washed their hands of any oversight responsibilities involving legal arguments made in court.²⁰⁹ Second, by acquiescing to DOJ refusals to defend federal statutes in court, Congress further signals its acceptance of DOJ control of legal arguments—including arguments that directly cut against congressional power.²¹⁰ Third, congressional norms and institutional structures further reinforce DOJ control. In particular, when the DOJ advances a limited view of congressional power, the House and Senate offices of legal counsel are not effective counterweights to the DOJ.²¹¹ This is particularly true today; party polarization cuts against meaningful efforts for institutional counsel to advance a pro-Congress vision of the law before the courts.²¹²

1. Agency Litigation Authority

Outside of the Judiciary Committees, lawmakers and their staffs are generally uninterested in legal arguments.²¹³ Their focus is direct influence on policy making through the drafting of statutes and through oversight of agency decision-making.²¹⁴ For these lawmakers, the question of who controls litigation authority barely registers; legal arguments made in court are too abstract and too indirect to most lawmakers. What matters is shaping the direction

209. *See infra* Part II.B.1.

210. *See infra* Part II.B.2.

211. *See infra* Part II.B.3.

212. *See* Devins & Herz, *supra* note 14, at 221.

213. The analysis in this paragraph draws from my previous work. *See id.* at 220-21.

214. *See id.*

of agency policy making through legislation, hearings, and investigations.²¹⁵ Furthermore, post-1995 cutbacks in congressional staff have resulted in increasing committee attention to policy questions; questions about the underlying constitutionality of legislation and legal arguments made in court are increasingly considered a luxury by understaffed policy-focused committees.²¹⁶

In sharp contrast, there are strong advocates of centralization of litigation authority in the DOJ—most notably the executive branch and the House and Senate Judiciary Committees. For the White House, the coordination of legal policy making bolsters presidential control of the administrative state.²¹⁷ Before President Franklin Delano Roosevelt issued an executive order transferring litigation authority from agency solicitors to the Attorney General,²¹⁸ there was no attempt to coordinate legal policy making and agency solicitors were more beholden to oversight committees in Congress than to the White House.²¹⁹ Recognizing that this diffusion of litigation authority undermined his efforts to consolidate power and advance a coordinated vision of executive power and policy, Roosevelt made DOJ control of litigation and the related strengthening of the DOJ centerpieces of his efforts to reorganize government.²²⁰ Correspondingly, Roosevelt and other presidents have seen the Attorney General as a close political ally; unlike most agency and department heads, who typically do not have strong ties to the President before their appointment, the Attorney General is usually active in the President's personal and political life.²²¹

The DOJ and the Judiciary Committees that oversee the DOJ are also strong advocates for DOJ control of litigation. The power and prestige of the DOJ is tied to its litigation authority and, relatedly, the DOJ fends off agency rivals by advancing a pro-President legal policy agenda.²²² For stunningly similar reasons, the Judiciary

215. *See id.* at 221.

216. *See* Devins, *Party Polarization*, *supra* note 15, at 782-83.

217. *See, e.g.*, Devins & Herz, *supra* note 14, at 219.

218. *See* Exec. Order No. 6166, *reprinted as amended in* 5 U.S.C. § 901 (2012).

219. *See* Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 256-58 (1996) (book review) (discussing Roosevelt's reorganization of the DOJ).

220. *See id.* at 260-61.

221. *See* Devins & Herz, *supra* note 14, at 219.

222. *See* Bradley & Morrison, *supra* note 31, at 1105-06, 1105 n.32; *see also* Devins & Prakash, *supra* note 21, at 538-39 (noting that the DOJ enhances its autonomy by embracing

Committees embrace DOJ control and are fierce advocates for centralization.²²³ The power of the Judiciary Committees is very much moored to the power of the agency they supervise, the DOJ.²²⁴ Consequently, when other congressional committees have sought to enhance their own authority by shifting litigation authority away from the DOJ and to the agency overseen by that committee, the Judiciary Committees fight back and seek to preserve power in the DOJ.²²⁵ For example, in two 1980s disputes involving the EPA, the House's Judiciary Committee squared off against the Energy and Commerce Committee.²²⁶ In both disputes, the Judiciary Committee successfully rebuffed efforts by the Energy and Commerce Committee to limit DOJ authority over Superfund settlements and over Resource Conservation Recovery Act litigation.²²⁷

More telling, the Judiciary Committees and the DOJ are also strong advocates of judicial power. DOJ power is formally moored to the courts: DOJ control of litigation matters more when the Supreme Court is a critical player in national policy making.²²⁸ Likewise, the power and prestige of the Judiciary Committees is tied to judicial power. The more powerful the courts, the more salient is the Judiciary Committee's confirmation power²²⁹ and its oversight of the DOJ.²³⁰ Consequently, where as most committees give short shrift to the courts, the Judiciary Committees are court-centric.²³¹

The characteristics of Judiciary Committee members likewise reflect their embrace of court-centric norms. Unlike power committees

its duty to defend and enforce).

223. See Devins & Herz, *supra* note 14, at 221.

224. See *id.*

225. See *id.*

226. See *id.* at 221-22.

227. See *id.* at 220-22. By limiting the DOJ, the EPA assumed a more prominent role and, with it, the Energy and Commerce Committee was expanding its own power through its oversight of the EPA. See *id.*

228. See Frost, *supra* note 13, at 917.

229. See Devins, *Party Polarization*, *supra* note 15, at 780-81.

230. See Devins & Herz, *supra* note 14, at 221.

231. For a competing perspective, see John C. Yoo, *Lawyers in Congress*, 61 LAW & CONTEMP. PROBS., Spring 1998, at 1, 6 (“[C]ongressional lawyers [do not bear the responsibility of executing the law and therefore] do not hold any special relationship with another branch, such as the Supreme Court, that might override their loyalty to the members or institution of Congress.”).

that members join in order to reward interest groups and voters, members join the Judiciary Committees for “issue-based motivations,”²³² in particular their personal interest in engaging in the legalistic issues considered by the Committee.²³³ Lawyers, moreover, are dominant on the Judiciary Committee. In 2015, 36.5 percent of congressmen were lawyers; however, lawyers dominated the House (72 percent) and Senate (70 percent) Judiciary Committees.²³⁴ Judiciary Committee members employ a “lawyer-like culture and deliberative style”;²³⁵ not surprisingly, they care about court review of their handiwork and consume substantial time in legalistic debates about the constitutionality of the matters before them.²³⁶ Furthermore, Judiciary Committee members demonstrate respect for basic legal principles, “adher[ing] to formal rules against interfering in any way with ongoing litigation, and maintain[ing] a general policy that no bills should take effect retroactively.”²³⁷ Committee staffers are also lawyers and familiar with Supreme Court theories of statutory and constitutional interpretation.²³⁸

Against this backdrop, it is little wonder that the work of the DOJ is of great interest to the Judiciary Committee members and of next to no interest to other committees or members. Legal arguments defending federal statutes or agency action take place after policy is formulated.²³⁹ Members care about the making of policy and not

232. See DEERING & SMITH, *supra* note 145, at 72.

233. See Lynette P. Perkins, *Member Recruitment to a Mixed Goal Committee: The House Judiciary Committee*, 43 J. POLITICS 348, 353-56 (1981).

234. See Nick Robinson, *The Declining Dominance of Lawyers in U.S. Federal Politics* 7, 39-40 (Harvard Law Sch. Ctr. on the Legal Profession, Research Paper No. 2015-10), <http://papers.ssrn.com/abstract=2684731> [<https://perma.cc/EV9T-93NR>].

235. Mark C. Miller, *Congressional Committees and the Federal Courts: A Neo-Institutional Perspective*, 45 W. POL. Q. 949, 961 (1992). The House Judiciary Committee is the only committee to have a Parliamentarian. See Mark C. Miller, *Congress and the Constitution: A Tale of Two Committees*, 3 SETON HALL CONST. L.J. 317, 337-38 (1993) [hereinafter Miller, *Congress and the Constitution*].

236. See Miller, *Congress and the Constitution*, *supra* note 235, at 341 (contrasting practices of the House Judiciary Committee to the House Energy and Commerce Committee).

237. *Id.* at 338.

238. See Nourse & Schacter, *supra* note 180, at 581-82; see also Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge of Positive Political Theory*, 80 GEO. L.J. 653, 663 (1992) (contrasting Judiciary Committee interest in the judiciary with general disinterest in courts).

239. See Devins, *Party Polarization*, *supra* note 15, at 760.

ex post judicial interpretations.²⁴⁰ Correspondingly, the success or failure of DOJ legal arguments is of little interest to most members. Indeed, member acquiescence to DOJ control of litigation extends to those rare instances when the DOJ does not defend the constitutionality of federal statutes.²⁴¹

2. *The DOJ's Duty to Defend Federal Statutes*

Lawmaker acceptance of both judicial supremacy and DOJ control of government litigation is underscored by Congress's approval of DOJ practices regarding the defense of federal statutes. For the most part, the DOJ defends federal law.²⁴² On occasion, the DOJ refuses to advance all plausible arguments in support of congressional power.²⁴³ Obama Solicitor General Elena Kagan, for example, refused to argue that limits on corporate campaign speech were needed to prevent distortions in the political marketplace (an argument that the Supreme Court had previously upheld).²⁴⁴ Lawmakers did not comment about this omission,²⁴⁵ and it may well be that lawmakers hardly ever pay attention to the details of DOJ arguments defending federal statutes.

More striking, lawmakers are sanguine both about DOJ non-defenses of federal law and related DOJ arguments regarding judicial supremacy.²⁴⁶ When the DOJ refuses to defend, the executive typically enforces the law in order to facilitate a judicial challenge to the law. For example, in explaining the Obama Administration's decision to enforce but not defend the Defense of

240. See *supra* text accompanying notes 213-16.

241. See Grove & Devins, *supra* note 13, at 595.

242. See Devins & Prakash, *supra* note 21, at 550. The DOJ defense of most federal statutes both shields the DOJ from political attack within the executive and advances the status of attorneys who work for the DOJ. See *id.* at 540. For a discussion of how bureaucratic theory propels the duty to defend, see *id.* at 538-41.

243. See *id.* at 550.

244. See Letter from Michael W. McConnell, Professor of Law, Stanford Law Sch., to the Honorable Patrick Leahy, Chair, Senate Judiciary Comm. & the Honorable Jeff Sessions, Ranking Member, Senate Judiciary Comm. 2-3 (June 25, 2010), <http://volokh.com/wp/wp-content/uploads/2010/06/mcconnell-kagan-letter.pdf> [<https://perma.cc/NDJ5-66R8>].

245. At least, they did not comment until later. See *id.* at 3.

246. See Devins & Prakash, *supra* note 21, at 554.

Marriage Act (DOMA), Attorney General Eric Holder declared that the courts should be “the final arbiter of ... constitutional claims.”²⁴⁷

Lawmakers accept this DOJ defense of judicial supremacy. Lawmakers who oppose legislation never call on the executive to foreclose judicial challenges by refusing to enforce and defend.²⁴⁸ In the DOMA case, for example, no lawmaker called for the President to back up his view that DOMA was unconstitutional by refusing to enforce the statute.²⁴⁹ Only three lawmakers spoke on the House or Senate floor about the President’s action, and all three praised him for his decision to enforce, but not defend, the statute.²⁵⁰ No member of Congress formally took issue with the DOJ’s decision to tell the Supreme Court that the House lacked constitutionally required standing to fill in for the DOJ and defend DOMA.²⁵¹

The DOMA case typifies congressional practice. Aside from asking DOJ nominees about their willingness to defend federal statutes,²⁵² Congress largely steers clear of DOJ conduct of federal litigation, including decisions regarding the enforcement and defense of federal statutes. In a 2012 study I conducted with Professor Sai Prakash, we could find only three cases in which Congress challenged the DOJ regarding its enforcement/defense of federal statutes.²⁵³ Our conclusion, consistent with the claims of this Article, was that “Congress generally accepts DOJ practices and that lawmakers are much more interested in their own reelection and the policy goals of their parties than they are in collective goods implicating ‘the institutional power of Congress.’”²⁵⁴ In particular, there is little to no pushback against DOJ arguments that constrain

247. See Letter from Eric H. Holder, Jr., Attorney Gen., to the Honorable John A. Boehner, Speaker of the House (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<https://perma.cc/BQ3M-BEG2>].

248. See Devins & Prakash, *supra* note 21, at 554-55.

249. See *id.* at 551.

250. See 157 CONG. REC. 3540 (remarks of Rep. Jerrold Nadler); *id.* at 4152-53 (remarks of Sen. Patrick Leahy); *id.* at 4152 (remarks of Sen. Dianne Feinstein).

251. See Reply Brief for the United States on the Jurisdictional Questions at 9-11, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

252. See Devins & Prakash, *supra* note 21, at 552 (citing examples of confirmation hearing questions).

253. See *id.* at 552-54.

254. *Id.* at 554 (quoting Moe & Howell, *supra* note 17, at 144).

congressional prerogatives, including cases in which the DOJ claims that legislation is unconstitutional.²⁵⁵

3. *The House and Senate Counsel*

Congress's acquiescence both to judicial power and to DOJ control of litigation implicating the powers of Congress is further demonstrated by the inability of the House and Senate counsel to advance a pro-Congress agenda in court. Indeed, in today's polarized Congress, the House and Senate counsel exemplify Congress's disunitariness and the related inability of lawmakers to bond together to advance a pro-Congress view of the law, in court or elsewhere.²⁵⁶ To start, Congress is constrained by its bicameral structure and the constitutional demand that Congress act as a bicameral body.²⁵⁷ As a practical matter, bicameralism means that there is not a unified Congress but separate houses of Congress.²⁵⁸ It also means that Congress will appear disunitary unless both the House and Senate coordinate, advancing a coherent and consistent pro-Congress view of the law.²⁵⁹

Partisanship in Congress further hampers the ways these offices might participate in litigation to advance a pro-Congress view of the law. Ironically, these offices developed in the bipartisan post-Watergate Era and were intended to represent congressional interests in court and thereby counterbalance DOJ control of government

255. *See id.* at 554-55.

256. *See* Devins, *supra* note 102.

257. For a general treatment of this topic, see Grove & Devins, *supra* note 13, at 603-22.

258. *See* Frost, *supra* note 13, at 949-50. For thoughtful proposals on how Congress might overcome this disunitariness problem, see *id.* at 956-60.

259. Finally, bicameralism calls into question the ability of either the House or the Senate to represent the views of Congress before the courts. Outside of issues (including congressional investigations) that are under the control of one house, bicameralism means that neither house can act unilaterally. *See* Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1356-57 (2014); Grove & Devins, *supra* note 13, at 607-08. For this and other reasons, it is unclear whether congressional counsel can intervene in litigation and defend the constitutionality of federal statutes. The Supreme Court is yet to answer this question definitively. In *United States v. Windsor*, the Court punted the question of whether the House could defend DOMA after the DOJ announced it would not defend the statute. 133 S. Ct. 2675, 2688 (2013). Concluding that the executive had standing because the lower court decision invalidating the statute adversely affected the government, the Court simply noted that it "need not decide" whether the House had standing to pursue the case. *Id.*

litigation.²⁶⁰ In the late 1970s, Congress considered proposals to create a unified “congressional counsel,” recognizing the need for coordination and the fact that “[n]either House acting alone can assert the prerogative[s] of representing ... Congress.”²⁶¹ The House, however, rejected these efforts because of “inter-house rivalry” with the more deliberative, less partisan Senate.²⁶² Instead, legislation was approved creating an Office of Senate Legal Counsel, an office whose tasks included “defend[ing] vigorously ... the constitutional power[s] of the Senate” and “the constitutionality of Acts and joint resolutions of the Congress.”²⁶³ The House counsel developed around the same time.²⁶⁴ Reflecting the fact that the majority party controls the House, the office was largely “responsible to the Speaker of the House.”²⁶⁵ Nonetheless, the principal tasks of the office were initially conceived to represent House interests in court—defending the constitutionality of legislation and enforcing subpoenas against executive branch officials.²⁶⁶

From 1978 (when the Senate Legal Counsel was created) through 1995, House and Senate counsel regularly participated in separation of powers disputes before the Supreme Court.²⁶⁷ Most of these disputes pitted congressional interests against executive branch interests,²⁶⁸ and Congress typically defended its turf in bipartisan ways. At least until 1986, Democrats and Republicans joined together in backing these filings; for example, amicus briefs rarely called into question the position of institutional counsel.²⁶⁹ In the

260. See Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONGRESS & PRESIDENCY 131, 136 (1993).

261. *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings on S. 555 Before the S. Comm. on Governmental Affairs*, 95th Cong. 60-61 (1977) (statement of Sen. James Abourezk).

262. See Salokar, *supra* note 260, at 136 (quoting from an interview with Steven Ross); see also Grove & Devins, *supra* note 13, at 611-12.

263. 2 U.S.C. § 288h (2012).

264. See Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROBS., Spring 1998, at 47, 49.

265. See Salokar, *supra* note 260, at 148; see also Tiefer, *supra* note 264, at 49-50 (noting that House majority leaders hold the power to appoint the General Counsel).

266. See Grove & Devins, *supra* note 13, at 608-10; Tiefer, *supra* note 264, at 49-50.

267. See Devins, *supra* note 43, at 950-52.

268. See *id.* at 950.

269. See *id.*; see also *id.* at 1016-17 (comparing amicus filings from 1974 to 2014).

1983 legislative veto case, the House and Senate counsel participated in both briefing and oral argument; only one amicus brief was filed in support of congressional power.²⁷⁰

Since 1995, however, party polarization has severely limited the influence of institutional counsel. The House counsel—through the majority party-controlled Bipartisan Legal Advisory Group—has backed majority party preferences by defending federal statutes that the Attorney General refused to defend.²⁷¹ Prominent examples include DOMA and a 2000 challenge to legislation overturning *Miranda v. Arizona*.²⁷² These efforts, however, have been undercut by amicus filings by the minority party. In the DOMA case, for example, 132 House Democrats joined together to file briefs arguing both that DOMA was unconstitutional and that the House counsel “does not speak” for the House.²⁷³

For its part, the Senate counsel did not participate in either case,²⁷⁴ nor did it participate in the 2014 recess appointment case, *NLRB v. Noel Canning*.²⁷⁵ Unlike the House (authorized to act by a simple majority vote of the Bipartisan Legal Advisory Group), the Senate counsel can only act if two-thirds of the Senate Leadership Group backs the filing.²⁷⁶ The consequence of this super-majority rule is that the Senate counsel never participates in litigation that divides the parties.²⁷⁷ In the *Noel Canning* case, for example, Senate Republicans joined together to file an amicus brief and make oral arguments defending Senate prerogatives; Democratic Senators

270. *See id.* at 1017-18. For further discussion, see Tiefer, *supra* note 264, at 52-54.

271. *See* Grove & Devins, *supra* note 13, at 609-10, 618.

272. For a discussion of the Attorney General’s refusal to defend *Miranda*-override legislation, see Devins & Prakash, *supra* note 21, at 566-67; Seth P. Waxman, Essay, *Defending Congress*, 79 N.C. L. REV. 1073, 1087-88 (2001).

273. *See* Brief of Members of the U.S. House of Representatives—Including Objecting Members of the Bipartisan Legal Advisory Group, Representatives Nancy Pelosi and Steny H. Hoyer—As Amici Curiae in Support of Plaintiff-Appellee and Urging Affirmance at 1, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (No. 12-2335). In the *Miranda*-override case, “House Democratic Leadership” filed an amicus brief claiming the override statute was unconstitutional. *See* Brief Amicus Curiae of the House Democratic Leadership in Support of Petitioner at 22-24, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525).

274. *See* Grove & Devins, *supra* note 13, at 617-19.

275. *See* Devins, *supra* note 102.

276. *See* Grove & Devins, *supra* note 13, at 610, 613.

277. *See* Devins, *supra* note 43, at 951.

preferred to sit on the sidelines rather than to criticize President Obama's claims about recess appointments.²⁷⁸

No doubt, the House and Senate counsel no longer stand before the courts as vigorous advocates of congressional prerogatives. The House often appears at war with itself; the Senate can rarely achieve the bipartisan consensus necessary to trigger Senate counsel participation.²⁷⁹ Beyond these (and other) limits on Congress advancing pro-Congress arguments in court,²⁸⁰ the House and Senate counsel stand as a testament to judicial supremacy. Outside of impeachment,²⁸¹ there are next to no examples of these offices claiming that Congress has exclusive authority to settle a dispute. Instead, these offices embrace and are propelled by judicial supremacy. Their *raison d'être* is to represent Congress in court, and their authority and importance are very much tied to judicial authority. Like the Offices of Legislative Counsel and the Congressional Research Service,²⁸² the House and Senate counsel have strong incentive to embrace judicial supremacy. Along with the Judiciary Committees,²⁸³ judicial power propels the status and authority of the very offices created by Congress to deal with potential legal challenges to congressional action.

III. CONCLUDING OBSERVATIONS

Congress acquiesces to judicial supremacy for a host of reasons. Lawmakers have little incentive to invest in institutional concerns, including the power of Congress in our system of checks and

278. See Devins, *supra* note 102.

279. See Grove & Devins, *supra* note 13, at 618-22. Over the past twenty years, the Senate counsel has only been involved in one major Supreme Court case involving congressional power. That case, *Zivotofsky v. Kerry*, concerned Congress's power to buck the State Department by declaring Jerusalem a part of Israel for passport purposes. 135 S. Ct. 2076, 2081 (2015). *Zivotofsky*, however, is the exception that proves the rule; lawmaker statements about the case make clear that Senate counsel participation had everything to do with lawmaker attitudes towards Israel and nothing to do with abstract claims of congressional power. See Devins, *supra* note 43, at 954-55.

280. For example, the House and Senate appear as separate entities so that there is no unified congressional voice speaking in court. See Grove & Devins, *supra* note 13, at 575-76.

281. See Brief for the Respondents and Amicus Curiae United States Senate at 16-18, *Nixon v. United States*, 506 U.S. 224 (1993) (No. 91-740).

282. See *supra* Part II.A.

283. See *supra* Part II.B.1.

balances. Unless an issue implicating congressional power also serves political ends (reelection, constituency service, and so forth), lawmakers will trade off institutional ends for first-order policy preferences. Correspondingly, divisions within Congress over policy—especially in today’s polarized Congress—make it likely that lawmakers will divide on basic questions of congressional power. Bicameralism also fuels Congress’s inability to speak a single voice. The House and the Senate may well have different priorities and procedures; moreover, the simple fact that each House acts alone casts doubt on the idea that there is a unitary Congress advancing a pro-Congress agenda.

Lawmakers also acquiesce to judicial supremacy because court decisions rarely figure into the policy-driven decision-making of lawmakers and their staff. Courts are reactive—judicial rulings are made after a statute is enacted or agency action is initiated. Lawmakers focus on immediate policy objectives—the enactment of laws and the prodding of agencies to advance lawmaker preferences. Court review is almost always an afterthought, especially since Congress hardly ever participates in litigation regarding the meaning or constitutionality of statutes.²⁸⁴ Indeed, even when lawmakers respond to a judicial ruling, lawmakers do not question how it is that the ruling constrains congressional preferences and whether the underlying doctrine needs to change.²⁸⁵ The focus is how to advance the same policy through alternative means—so that this emphasis on policy almost always overwhelms potential discussion of congressional power writ large.

Finally, the institutions Congress has created to deal with legal questions reinforce both lawmaker desires to steer clear of judicial questions and to acquiesce to judicial supremacy. The centralization

284. For a discussion of instances in which House or Senate counsel appear in litigation and why those instances highlight Congress’s limited role in litigation, see *supra* Part II.B.3. For a related discussion of lawmaker amicus filings, see *supra* text accompanying notes 267-78.

285. As Professor Keith Whittington and others have noted, Court decisions that make it impossible to pursue first-order policy preferences have sufficient political salience for Congress to seek to strike back against those decisions. See Whittington, *supra* note 17, at 509-10. At the same time, there is some reason to question this claim. Congress, for example, refused to enact Court-packing legislation. See 81 CONG. REC. 7381 (1937). Further, Congress’s failure to use its exceptions power to constrain the Court suggests that lawmakers are loath to take action against the Court. See *infra* Part III.A.

of litigation authority in the DOJ, the delegation to the court-centric Judiciary Committees of DOJ oversight, and the shifting of legal resources away from subject matter committees have all contributed to a system whereby most lawmakers wash their hands of court-related issues. Correspondingly, lawmakers and their staff leave it to the Offices of Legislative Counsel and the Congressional Research Service to think about legal questions pertaining to legislative language and related efforts to prod agencies to follow lawmaker preferences. These offices are court-centric and have incentives to broadly interpret judicial rulings limiting lawmaker power. The House and Senate counsel are also court-centric in their orientation. Party polarization further constrains the ability of these offices to effectively advocate for broad claims of congressional power.

In documenting all of the above claims, I have provided a fairly robust, and I hope nuanced, account of why lawmakers do not challenge judicial supremacy. Let me close with two final examples—Congress’s failure to use its exceptions power to slap down the Supreme Court for decisions lawmakers dislike and the 2016 fight over Merrick Garland’s confirmation—as emblematic of the Senate’s embrace of judicial supremacy.

A. *The Exceptions Power*²⁸⁶

Congress’s power to make exceptions to the Supreme Court’s appellate jurisdiction is often seen as an “ever-present threat” to the Court, a “sword of Damocles hanging over the Supreme Court.”²⁸⁷ In 1868, when prohibiting Supreme Court review of a lawsuit questioning the Reconstruction military government in the South, lawmakers spoke of the Supreme Court having “no power to interfere with the question of reconstruction.... [it] only ha[d] power to decide cases, and it must receive the law from the lawmaking power.”²⁸⁸

The 1868 measure is one of hundreds considered by Congress but it is only one of a handful in which Congress actually limited Supreme Court jurisdiction. From 1953 to 1968, Congress considered

286. Portions of the following three paragraphs are drawn from Devins, *supra* note 28, at 163.

287. Grove, *supra* note 18, at 930.

288. See CONG. GLOBE, 40th Cong., 2d Sess. 2118 (1868) (remarks of Sen. Stewart).

more than sixty bills to limit Court jurisdiction in response to Warren Court decisions on school desegregation, criminal confessions, the free speech rights of communists, and much more.²⁸⁹ Only one bill passed, a modest measure limiting the access of alleged communists to government documents.²⁹⁰ In the 1970s and 1980s, Congress considered a raft of measures concerning abortion, school busing, and school prayer but none passed.²⁹¹ Senator Barry Goldwater explained the prevailing view in Congress: “judicial excess[.]” should not be met with “legislative excess[.]”²⁹²

From 2003 to 2008, Congress took aim at federal and state court decisions on same-sex marriage, the Pledge of Allegiance, the public display of the Ten Commandments, and judicial invocations of international law.²⁹³ None of these measures were approved, and all seemed to operate as rhetorical attacks by social conservatives in the House of Representatives.²⁹⁴ Indeed, most of the measures never made it out of committee, and none were even considered in the Senate.²⁹⁵ Perhaps more telling, the principal target of lawmaker attacks were lower federal courts and state courts,²⁹⁶ rather than wait for Supreme Court action, lawmakers sought to score points with their political base.²⁹⁷

289. See DEVINS & FISHER, *supra* note 23, at 29.

290. See Act of Sept. 2, 1957, Pub. L. No. 85-269, 71 Stat. 595 (codified as amended at 18 U.S.C. § 3500 (2012)); Barry Friedman, “*Things Forgotten*” in *the Debate Over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 752 (1998).

291. See DEVINS & FISHER, *supra* note 23, at 30-31.

292. See 128 CONG. REC. 4458 (1982) (remarks of Sen. Goldwater).

293. For a general treatment of these proposals, see Devins, *Fear Congress?*, *supra* note 18, at 1348-58.

294. Party polarization figures largely in this story. House Republicans embraced an anti-court agenda to win over their increasingly partisan base. See *id.* at 1356. Also, an upswing in (very ideological) nonlawyers on the House Judiciary Committee and the anti-court rhetoric of then-committee chair Jim Sensenbrenner made that committee less reverential towards the courts during the 2003-2008 period. See MILLER, *supra* note 186, at 142-45.

295. See Devins, *Fear Congress?*, *supra* note 18, at 1356.

296. See *Newdow v. U.S. Cong.*, 292 F.3d 597, 612 (9th Cir. 2002) (holding that Pledge of Allegiance as written violated Establishment Clause), *rev'd on other grounds sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Glassroth v. Moore*, 275 F. Supp. 2d 1347, 1349-50 (M.D. Ala. 2003) (ordering removal of Ten Commandments statue from Alabama courthouse); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (legitimizing same-sex marriage in Massachusetts).

297. See Devins, *Fear Congress?*, *supra* note 18, at 1357.

On those extremely rare occasions when Congress acted, moreover, lawmakers seemed solicitous of the Supreme Court. 1996 legislation limiting successive habeas petitions nonetheless allowed for original habeas petitions and, as such, allowed the Court to “serve as expositor of the federal constitutional rules governing criminal prosecutions.”²⁹⁸ 2006 legislation, the Military Commission Act, prohibited federal court consideration of habeas petitions by Guantanamo detainees, limiting their rights to those afforded by military commissions.²⁹⁹ When enacting the statute, lawmakers claimed that they were acting at the Court’s invitation—from a related 2006 case—to grant the “President the legislative authority to create military commissions.”³⁰⁰ Moreover, legislative debates and a proposed expedited Supreme Court review provision make clear that lawmakers thought the Supreme Court was the appropriate body to settle the question of the bill’s constitutionality.³⁰¹

Lawmaker support for judicial authority is also revealed through numerous bills expanding federal court jurisdiction and, more generally, the authority of the Supreme Court. Most significant, “at the very time that agitation [against the Court] by progressives and labor leaders ... was reaching a new intensity,” Congress enacted the Judiciary Act of 1925,³⁰² legislation that substantially expanded Supreme Court certiorari power and, with it, propelled the Supreme Court’s status as the principal expositor of federal law.³⁰³ During the Warren and Burger Court Eras—when lawmakers were threatening to strip the Court of jurisdiction—Congress enacted measures expanding federal court jurisdiction.³⁰⁴ Likewise, in the midst of

298. See Brief for the United States as Amicus Curiae at 26, *Felker v. Turpin*, 518 U.S. 651 (1996) (No. 95-8836). For additional discussion, see Grove, *supra* note 18, at 991-92.

299. See Grove, *supra* note 18, at 992 & n.336.

300. *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring); see Samuel Estreicher & Diarmuid O’Scannlain, *Hamdan’s Limits and the Military Commissions Act*, 23 CONST. COMMENT. 403, 417 (2006).

301. See 152 CONG. REC. 20123-26 (2006) (remarks of Rep. Moore, Rep. Skelton, and Rep. Jackson-Lee).

302. WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 253 (1994). For additional discussion, see Grove, *supra* note 18, at 962-68.

303. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1705-13, 1733 (2000).

304. Compare Devins, *Fear Congress?*, *supra* note 18, at 1343-46 (explaining jurisdiction-stripping threats), with Orrin G. Judd, *The Expanding Jurisdiction of the Federal Courts*, 60

2003-2006 attacks on the Court, conservatives in Congress pushed through legislation authorizing federal court review of a state court judgment regarding the termination of life support for a brain-dead woman.³⁰⁵

The fact that Congress almost always uses its exceptions power to both bolster federal court jurisdiction and to strengthen the Supreme Court's power, of course, speaks volumes to lawmaker acquiescence to court decision-making.³⁰⁶ Correspondingly, the failure of lawmakers to check judicial excess through the exceptions power highlights lawmaker acquiescence to Court decision-making. None of this is to say that Congress does not participate in constitutional dialogues with the Court; it is to say that lawmakers consider the exceptions power too blunt a tool. For reasons discussed above, lawmakers have little interest in asserting institutional prerogatives and battling courts over the boundaries of congressional power.³⁰⁷ Lawmakers, instead, are interested in pursuing first-order policy priorities and see no reason to engage with courts when they can pursue identical policy objectives through different means.³⁰⁸

B. The Confirmation Power

Let me close with a fairly obvious point about the 2016 fight over President Obama's nomination of Merrick Garland to the Supreme Court. The fight over Garland epitomizes the view that the Supreme Court is a political court, that Democratic- and Republican-appointed Justices will rule differently, and that filibusters and other delay tactics are increasingly common precisely because lawmakers see the Supreme Court as the last word on politically salient issues.³⁰⁹

A.B.A. J. 938, 938-41 (1974) (describing expansions of federal court jurisdiction in the 1960s and early 1970s).

305. See Charles Babington & Mike Allen, *Congress Passes Schiavo Measure*, WASH. POST (Mar. 21, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/03/26/AR2005032604055.html> [<https://perma.cc/6W92-SAKY>].

306. Other examples of this phenomenon are 2016 House efforts to eviscerate *Chevron* deference to federal agencies in favor of a judicial supremacy regime. See *supra* note 128.

307. See *supra* Part I.A.

308. See *supra* Part I.B.

309. See Richard A. Posner, *The Supreme Court Is a Political Court. Republicans' Actions Are Proof.*, WASH. POST (Mar. 9, 2016), <https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142->

Before the Garland fight, ideological measures made clear that all Democratic-appointed Justices were to the left of all Republican-appointed Justices;³¹⁰ also, changes in judicial appointment strategies and the political polarization of Republican and Democratic elites made it likely that party identity and ideology were inextricably linked.³¹¹ Correspondingly, party polarization transformed the process of confirming lower federal court judges, resulting in a dramatic upswing in the amount of time it takes for the Senate to confirm judges and an equally dramatic downswing in the percentage of lower court nominees whom the Senate approves.³¹² The refusal of Senate Republican leadership to hold hearings on Judge Garland is cut from this same cloth. The related claim (made by Senate Republican leadership) that voters should “make their voice heard in the selection of Scalia’s successor as they participate in the

11e5-8d98-4b3d9215ade1_story.html [https://perma.cc/WM9K-T77J]. The confirmation power is relevant to this Article for other reasons. The question of Congress’s power in our system of checks and balances is rarely explored in confirmation hearings and debates. Lawmakers are much more interested in a nominee’s views on privacy, race, and church-state matters than on the commerce power, theories of statutory construction, or the separation of powers. See Mitch McConnell & Chuck Grassley, *McConnell and Grassley: Democrats Shouldn’t Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html [https://perma.cc/4TN9-L948] (implying that controversial wedge issues like the separation of church and state matter more to Justice selection than constitutional theory). As discussed earlier, the reason is that lawmakers focus on first-order policy priorities; the scope of the commerce power and theories of statutory interpretations are too far removed from first-order preferences. See Devins, *Party Polarization*, *supra* note 15, at 762-64; see also McGinnis & Somin, *supra* note 99, at 99-100, 113-14 (explaining why federalism is sacrificed for the pursuit of first-order policy preferences).

310. See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. (forthcoming 2017) (manuscript at 3), <http://ssrn.com/abstract=2432111> [https://perma.cc/UGX8-6CVD].

311. See *id.* (manuscript at 29-46). For a discussion of how President Trump’s nomination of Judge Neil Gorsuch for the Supreme Court exemplifies Republican and Democratic differences and the related rise of ideology in judicial appointment strategies, see Lawrence Baum & Neal Devins, *Federalist Court*, SLATE (Jan 31, 2017, 10:12 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/how_the_federalist_society_became_the_de_facto_selector_of_republican_supreme.html [https://perma.cc/GL2M-JLWZ].

312. See Sarah A. Binder & Forrest Maltzman, *Advice and Consent: The Politics of Confirming Federal Judges*, in CONGRESS RECONSIDERED 265, 268-72 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 10th ed. 2013).

process to select their next president” exemplifies both the ideological gap between the parties and the power of the Court.³¹³

Ironically, the Court’s power is very much tied to partisanship in Congress. Polarization contributes to lawmaker disinterest in the courts; it also contributes to the unwillingness of Republicans and Democrats to come together to advance a pro-Congress view of the law. When combined with other incentives for lawmakers to either ignore the courts or acquiesce to judicial rulings, today’s Congress is beset by a perfect storm that propels judicial supremacy. At the same time, even if Congress were once again to become bipartisan, most of the forces that propel judicial supremacy would not abate. Lawmakers and their staff care about policy making, and court rulings rarely prevent Congress from advancing its policy priorities.

313. See McConnell & Grassley, *supra* note 309. For much the same reason, several Democrats claim that Republicans stole the Scalia seat and, as such, Trump Supreme Court pick Neil Gorsuch should be rejected. See Jeff Merkley, *Don't Let Republicans Steal the Seat*, N.Y. TIMES (Feb. 3, 2017), <https://www.nytimes.com/2017/02/03/opinion/make-the-republicans-go-nuclear.html> [<https://perma.cc/L5Q6-WH7X>]. Democrats have also embraced judicial authority by rallying in favor of judicial independence and, correspondingly, the need for the courts to check the President—a concern that has spilled over to the Gorsuch confirmation in the wake of President Trump’s attacks on judges who ruled against his January 2017 executive order on immigration. See Robert Barnes, *Trump's Blasts at Judge Raise Questions for Gorsuch on Independence*, WASH. POST (Feb. 5, 2017), https://www.washingtonpost.com/politics/courts_law/trumps-blasts-at-judge-raise-questions-for-gorsuch-on-independence/2017/02/05/1642212c-ebc2-11e6-b4ff-ac2cf509efe5_story.html [<https://perma.cc/XBF5-M8PQ>].