

Confidence and Constraint: Public Opinion, Judicial Independence, and the Roberts Court

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ABSTRACT

Although Americans continue to express greater and more stable levels of confidence in the Supreme Court than in Congress and the executive branch of the federal government, the Supreme Court's public standing has fallen steadily over the last fifteen years. A growing body of research in political science and related fields indicates that declining public support for the Supreme Court undermines judicial independence. To illustrate these effects, we estimate a statistical model of the Supreme Court's propensity to invalidate federal laws on constitutional grounds in each term from 1973 through 2014 and generate predictions of the number of federal laws struck down by the Supreme Court under various political conditions. This analysis shows how public support lost during the Roberts Court has mattered for the justices' willingness to invalidate federal laws. We argue that evidence of a link between persistent declines in the Supreme Court's public standing and lost institutional capacity suggest that Chief Justice Roberts take a more aggressive public stance as an advocate for the Supreme Court and the rule of law.

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There has been a steady decline in the public standing of the Supreme Court for more than a decade. Although the Supreme Court continues to enjoy substantially higher public confidence than either Congress or the executive branch of the federal government, public hostility to the Supreme Court is at the highest levels recorded in the four decades covered by the record of survey research on Americans' views of the Court. Although the beginning of the decline in the Court's public standing precedes John Roberts's joining the Court as Chief Justice, it has continued throughout his tenure.

The decline in the Court's public standing over the past fifteen years works against the justices' shared ability to use their institutional prerogatives to shape legal and political outcomes. Research in political science demonstrates that declining confidence in the Supreme Court undermines judicial independence: creating political space for Congress to decrease resource support and discretion and leading the Court to hold back from invalidating federal laws in order to avoid conflict with the elected branches of government. Among other things, lost public confidence undermines the justices' willingness to invalidate federal laws. Although this effect is mitigated by low confidence in the elected branches of the national government, the Court is in a precarious position. Either further erosion of its public support or an increase in confidence in Congress and the executive branch would substantially curtail judicial independence.

To demonstrate the consequences of these political dynamics and show the magnitude of their effects, we estimate a statistical model of the Supreme Court's propensity to invalidate federal laws on constitutional grounds in each term from 1973 through 2014. This model allows us to generate predictions of the number of federal laws struck down by the Supreme Court under various political conditions. In particular, we generate predictions showing how changing public support for the Court and Congress affected the justices' willingness to invalidate federal laws and simulate the impact of further reductions in the Court's public standing and increases in confidence in Congress and the executive branch for expressed judicial independence.

Public Confidence in the Supreme Court

Since 1973, the General Social Survey (GSS) has asked a representative sample of Americans to evaluate various public and private entities.¹ Specifically, it asks respondents, “I am going to name some institutions in this country. As far as the people running these institutions are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them?” The Supreme Court, Congress, and the “[e]xecutive branch of the federal government” are among the institutions named.

The GSS confidence data set is among the longest and most complete longitudinal records of Americans’ evaluations of their governing institutions. The GSS data is especially useful since it asks about multiple institutions using the same question stem, permitting reasonable comparisons of evaluations of the three branches of government. Additionally, responses to the GSS confidence question call individual attitudes related to both specific support (performance approval and policy agreement) and diffuse support (legitimacy, institutional loyalty) (Gibson, Caldeira, and Spence 2003). Political scientists often measure public support for the Supreme Court and other branches of government using these confidence data (e.g. Clark 2011; Durr and Wolbrecht 1997; Ura and Wohlfarth 2010).

Figure 1 shows GSS confidence data for each branch of the national government. The top panel shows the percentage of GSS respondents reporting that they have a “great deal” of confidence in each institution. The middle panel shows the percentage of respondents saying they have “hardly any” confidence in each institution. The bottom panel reports the ratio of “great deal” of confidence respondents to “hardly any” confidence respondents.

[Figure 1 about here.]

The GSS data show that Americans’ confidence in their governing institutions has declined substantially over the last four decades. The decline in confidence in the elected

¹The GSS was not conducted in 1979, 1981, 1992, or in odd-numbered years since 1993. Values for missing years are imputed by taking the average of the preceding and following years’ values. The latest GSS data now publicly available is from 2014.

branches of government has been especially acute. In 1973, 29% and 24% of Americans said they had a great deal of confidence in the executive branch and Congress, respectively. In 2014, 11% said they had a great deal of confidence in the executive branch, and only 6% reported a great deal of confidence in Congress. In the same period, the percentages of Americans saying they had hardly any confidence in the executive branch grew from 19% to 45%, and claims of hardly any confidence in Congress increased from 16% to 53%.

The standing of the Supreme Court has generally been higher and more stable than evaluations of Congress and the presidency in this period. Between 1973 and 2002, the percentage of Americans saying they had a great deal of confidence in the Supreme Court dropped to 30% or below for only four years and was never lower than 26%. In those years, an average of only 14% said they had hardly any confidence in the Court.

Since 2002, though, there has been a steady decline in Americans' confidence in the Supreme Court. Expressions of a great deal of confidence in the Court have declined from 37% to 24%, and expressions of hardly any confidence have increased from 11% to 20%. The ratio of "great deal" of confidence in the Supreme Court responses to "hardly any" confidence responses in the GSS has been less than 2:1 since 2009 and reached the lowest level in the survey's history in 2014, the last year of available data. Although confidence in the Court remains robust compared to Congress and the presidency, it is increasingly difficult to deny that Americans' views of the Supreme Court are dimming as well.

This conclusion is supported by other public opinion data. Figure 2 illustrates three additional indicators of the public's view of the Supreme Court. The top panel shows Gallup data from 1973 to 2016 on public confidence in the Supreme Court. (Gallup asks respondents to choose among "a great deal, quite a lot, some, or very little" confidence and records volunteered responses of "none".) The middle panel shows data from Pew Research Center surveys conducted between 1987 to 2015 asking, "Would you say your overall opinion of the Supreme Court is very favorable, mostly favorable, mostly unfavorable, or very unfavorable?" The final panel reports Gallup data from 2000 through 2016 on whether Americans

“...approve or disapprove of the way the Supreme Court is handling its job?” Each of these measures of the public’s view of the Supreme Court show clear, generally steady declines in favorable attitudes about the Supreme Court over the last fifteen years.

[Figure 2 about here.]

Consequences of Declining Public Support for the Supreme Court

There is a substantial body of theoretical and empirical research in political science and related fields showing that positive public perceptions of the Supreme Court (and constitutional courts more generally) forestall or buffer political attacks from other branches of government and create electoral incentives for legislatures and executives to accept judicial authority.² When support for courts is sufficiently high, election-minded officials are prompted “to respect judicial decisions as well as the institutional integrity of a court [by t]he fear of... a public backlash” against court-curbing activity (Vanberg 2001, 347, also see Clark 2011; Gibson, Caldeira, and Baird 1998; Taylor-Robinson and Ura 2013).

This research indicates that a decline in public confidence in the Supreme Court can erode judicial independence. Disapproval and distrust of the judiciary can encourage court curbing actions by Congress (Ura and Wohlfarth 2010; Vanberg 2001) and judicial self-restraint (Clark 2011). In an extreme historical example, unpopular Federalist efforts to seat some of the “midnight judges” appointed by John Adams undermined public confidence in the judiciary and prompted Jeffersonian Republicans to adopt the Repeal Act 1802, eliminating judgeships, limiting the Supreme Court to one term per year, and forcing justices to ride circuit (Kramer 2004, especially pp. 114-127).

²The Court’s justices may cultivate public support by maintaining ideological consistency between its decisions and public mood (e.g. Casillas, Enns, and Wohlfarth 2011; Durr, Martin, and Wolbrecht 2000; McGuire and Stimson 2004; Mishler and Sheehan 1993), using symbols of institutional legitimacy (Gibson and Nelson 2014), adjusting the language used in opinions (Black, Owens, and Wohlfarth 2016), and pursuing greater consensus (Ura and Flink 2016*a,b*).

The recent decline in public confidence in the Supreme Court has similarly contributed to the erosion of the Supreme Court’s independence during the Chief Justice Roberts’s tenure. This is evident in episodes of political actors pressuring the Court to reach particular decisions or threatening the Court’s independence in response to decisions already made. These include President Obama’s 2010 State of the Union criticisms of *Citizens United*, Chief Justice Roberts’s “wobbly” vote in *National Federation of Independent Business v. Sebelius* (2012, Crawford 2012; Ura and Higgins 2017), efforts by the Clinton campaign to try “scaring” the Court into upholding subsidy payments to participants in federal Affordable Care Act exchanges in *King v. Burwell* (2015, *Rolling Justice Roberts* 2016), and Senate Republicans’ refusal to act on the nomination of Merrick Garland to succeed Justice Antonin Scalia. Holding all else constant, greater public confidence in the Supreme Court would have raised the expected political costs (and mitigated the political benefits) of criticizing the Court’s past or prospective actions. While any particular attempt to influence the Court may have still occurred, the decline in the public’s trust in the Supreme Court has made these attempts systematically more likely to occur.

Assessing the Effects of Public Confidence for Independence

To demonstrate the consequences of these political dynamics and show the magnitude of their effects, we estimate a statistical model of the Supreme Court’s propensity to invalidate federal laws on constitutional grounds in each term from 1973 through 2014 expressed as a function of public evaluations of the Supreme Court and Congress.

The number of federal laws struck down by the Court is used here as an indicator of *judicial independence*. A court is independent if its members may choose their most preferred outcomes for the cases before them without reasonable fear of reprisals against themselves or their institution for doing so. In the case of the United States Supreme Court, scholars have identified the latent quality of judicial independence with the Court’s constitutional invalidation of federal laws (Clark 2011; Segal and Westerland 2005). Striking down acts of Congress on constitutional grounds is an act of judicial power that cannot be overturned by

an ordinary statute. A decision to invalidate a federal law hinges on the Court's willingness to replace Congress's views of constitutional limits on federal power with its own. Consideration of the constitutionality of federal laws reveals an aspect of judicial independence. All else equal, a more independent Court's willingness to strike down acts of Congress should yield more invalidations.³

In order to measure the public's disposition toward the Supreme Court and Congress, we turn to the General Social Survey. We measure the public standing of the Supreme Court as the percentage of GSS respondents in each survey year expressing "hardly any" confidence in the Supreme Court (Clark 2011). We measure the public standing of Congress with the percentage of GSS respondents saying they have "hardly any" confidence in Congress. We expect that the model will return estimates of a negative association between disaffection from the Supreme Court and the number of laws struck down in each year. Conversely, we also expect to find a positive relationship between mistrust of Congress and the number of federal laws invalidated by the Court.

The dependent variable in the analysis is the number of federal laws invalidated by the Supreme Court in each year, a count with a lower bound of zero. In the absence of strong autocorrelation or overdispersion, this type of data is often modeled using the Poisson regression estimator (Brandt et al. 2000). The annual count of federal laws invalidated since 1973 shows only weak autocorrelation ($r_{t, t-1} = 0.15$), and the time series's estimated dispersion parameter (α) in a negative binomial regression is zero. We therefore use the Poisson regression approach to model the annual number of federal laws invalidated by the Supreme Court expressed as a function of public evaluations of the Supreme Court (% hardly any confidence), public evaluations of Congress (% hardly any confidence), as well as dummy variable for each natural court to control for otherwise unmodeled factors arising

³We use Whittington's (2005) count of federal laws struck down by the Supreme Court reported by Clark (2011) and extended by us through 2014.

from the composition of the Court. Data are available from 1973, when the GSS first asks its institutional confidence battery, through 2014. Model estimates are reported in Table 1.

[Table 1 about here.]

Results

The statistical estimates align with prior findings about the role of public opinion in shaping judicial independence. Holding all else constant, as the public becomes more hostile to the Supreme Court, the justices' propensity to invalidate federal laws decreases significantly. Conversely, as the public becomes more hostile to Congress, the justices' propensity to strike down federal laws increases significantly. These results provide further evidence that public evaluations of the coordinate branches of the national government influence how the Supreme Court uses its institutional prerogatives by altering the strategic environment in which elected legislators and unelected judges interact with one another.

The model estimates can be also used to generate predictions of how many laws the Supreme Court will invalidate in a given year under various conditions. Figure 3 shows the predicted number of federal laws invalidated as public evaluations of the Supreme Court and Congress change. The left panel shows predictions for a relatively low-level of "hardly any" confidence responses in the Congress (21%, about one standard deviation below the average level of hardly any confidence responses since 1973) as the public becomes less confident in the Supreme Court (hardly any confidence in Congress responses rising from one standard deviation below the mean on the left to one standard deviation above the mean on the right). The middle panel shows predictions of the number of invalidated laws when the percentage of GSS respondents reporting hardly any confidence in Congress is at its mean (31%) as the public becomes less confident in the Supreme Court (across the same range). Finally, the right panel shows predictions when the percentage of respondents saying they have hardly any confidence in Congress is about one standard deviation above the mean (31%)—again—as mistrust of the Supreme Court rises. Predictions are illustrated by the solid lines with 95% confidence intervals shown by the dotted lines

[Figure 3 about here.]

The pattern described above is evident in these predicted values. As the public loses confidence in the Supreme Court, the predicted number of invalidations falls for all levels of confidence in Congress. Increasing the percentage of GSS respondents expressing hardly any confidence in the Supreme Court from one standard deviation below the mean to one standard deviation above the mean reduces the expected number of federal laws invalidated each year by one to four laws, depending on the public's view of Congress. Conversely, as the public loses confidence in Congress, the predicted number of laws struck down rises. Increasing the percentage of GSS respondents expressing hardly any confidence in Congress from one standard deviation below the mean to one standard deviation above the mean increases the expected number of federal laws invalidated by one-and-a-half to four laws, depending on the public's level of confidence in the Supreme Court. Together, these predictions show that the Supreme Court's current (low) public standing depresses the justices' propensity to invalidate acts of Congress despite the historic lack of public confidence in Congress and the presidency.

Reflections on the Roberts Court

The Supreme Court is in a precarious position as it moves into the second decade of John Roberts's service as Chief Justice. The court faces a nation that is deeply, bitterly divided after the recent presidential election and heading toward an uncertain future with an untested leader. In the near term, the Court will need to weather a contentious confirmation fight over President-elect Trump's nomination of Justice Scalia's replacement and decide high-profile cases on abortion, the death penalty, and religious liberty. Over the next several years, the Court is also likely to encounter continued turnover, a steady stream of cases testing the limits of Republicans' unified control of the federal government, and controversies over executive power emanating from the Trump administration.

At this critical moment, the Court is fifteen years into a steady decline in its public standing and boasts the least public confidence it has had in the last four decades. The Court

and its members have little political capital to insulate their actions or their institution from political attacks from Congress or the president, especially a media-savvy president with little regard for the norms that traditionally structure presidential-judicial relations. Although Congress and the executive branch are even more poorly regarded than the Court at the moment, the public's limited confidence in the judiciary weighs heavily against the Supreme Court justices' willingness to challenge the elected branches of the national government and exercise their power of judicial review.

In an interview with Jeffrey Rosen conducted at the close of his first term as Chief Justice, John Roberts expressed keen awareness the chief justice's role in preserving the institutional integrity of the Supreme Court (Rosen 2007). He explained his willingness carefully to compromise principle in order to build consensus within the Court and to avoid conflict with other institutions. He approvingly cited John Marshall's work to promote agreement among the justices and argued that "...every justice should be worried about the Court acting as a Court and functioning as a Court, and. . . [about] the Court as an institution."

Despite Roberts's strong sense of history and responsibility, the public's view of "the Court as an institution" continues to break down under his watch. While it is not clear that any action or set of actions within the chief justice's reach alone can reverse this trend, it is now clear that quiet efforts to promote consensus and avoid conflict are not enough to prop up the Court's public standing. Although Roberts's rightly admires Chief Justice Marshall, the Court may benefit from his following the lead of a different predecessor, Chief Justice William Howard Taft.

Although Taft's historical reputation suffers from his uneven record as a jurist, he was unquestionably among the most active and successful chief justices in enhancing the Court's discretion, standing, and independence. Taft worked to promote consensus among the high Court's members, but he was also a public advocate for the Supreme Court and the rest of the federal judiciary. Among other things, he spoke publicly and lobbied for the creation of the Judicial Conference of the United States, greater discretion in choosing the Supreme

Court's docket, and the construction of a permanent, dedicated Supreme Court building. According to Anderson (1999), Taft's career as chief justice "was dedicated to maintaining and strengthening the public reputation of the Court as . . . [a] national symbol of . . . the rule of law," and "he was as aggressive in pursuit of his agenda in the judicial realm as Theodore Roosevelt was in the presidential" (353). Chief Justice Roberts has all the makings of an effective public advocate and representative of the Supreme Court, and the Court as an institution stands to benefit greatly from his becoming an aggressive advocate for a robust version of the Supreme Court's role in the American republic.

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Table 1: Poisson Regression Model of the Number of Laws Struck Down by Supreme Court

| Predictor (Expected Sign) | |
|----------------------------------------------------|------------------------|
| % “Hardly Any” Confidence in the Supreme Court (–) | -0.2* (0.1) |
| % “Hardly Any” Confidence in Congress (+) | 0.1* (0.0) |
| <i>Constant and Fit</i> | |
| Constant | 3.6* (1.1) |
| LR χ^2 (14 d.f.) | 28.5 ($p < 0.05$) |

Note: Poisson regression estimates (standard errors in parentheses). $N = 42$.

* $p < 0.05$; One-tailed tests. Estimates of fixed effects for natural courts are not reported.

Figure 1: General Social Survey: Confidence in the Three Branches of Government

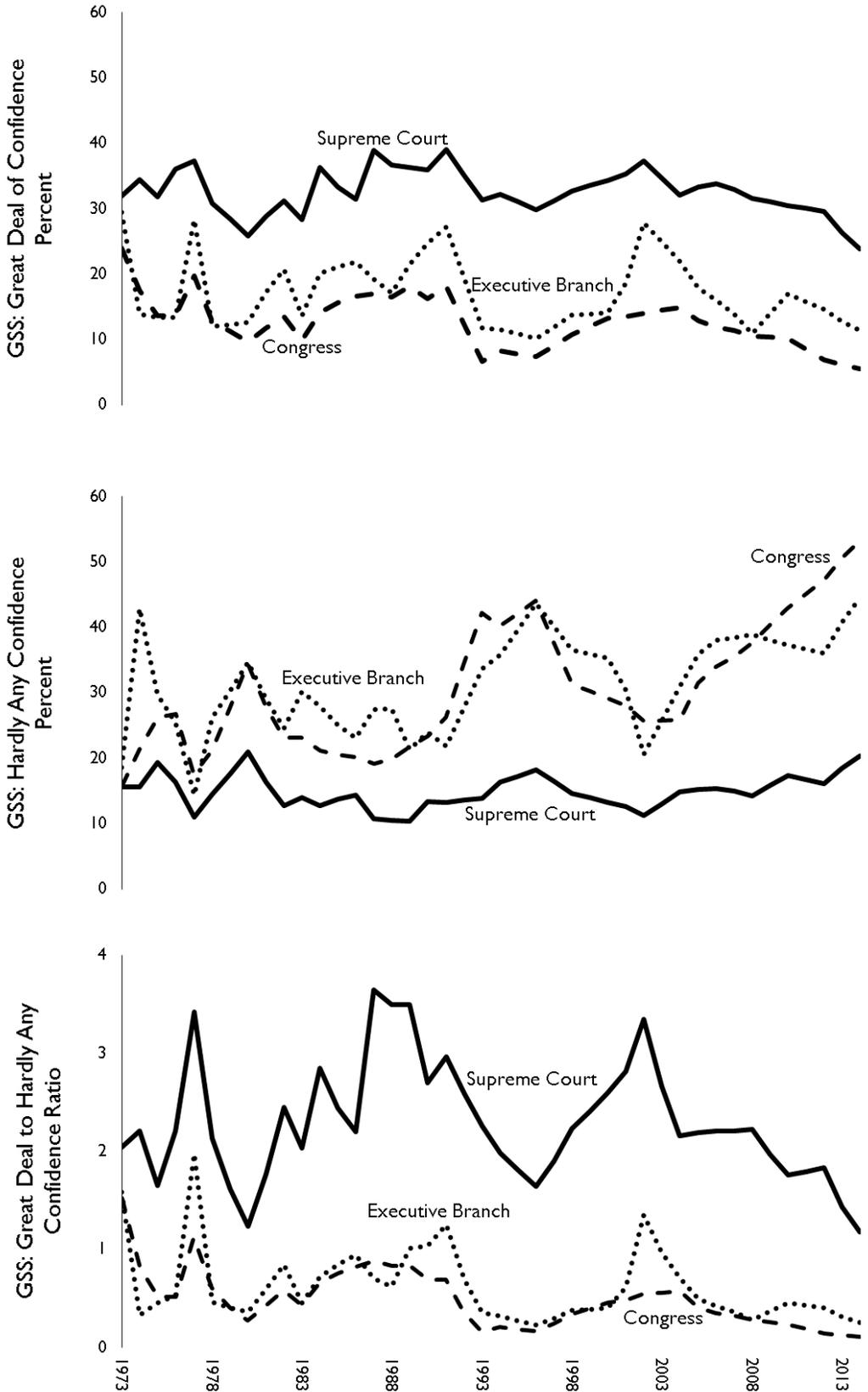


Figure 2: Gallup and Pew: Supreme Court Confidence, Favorability, and Approval

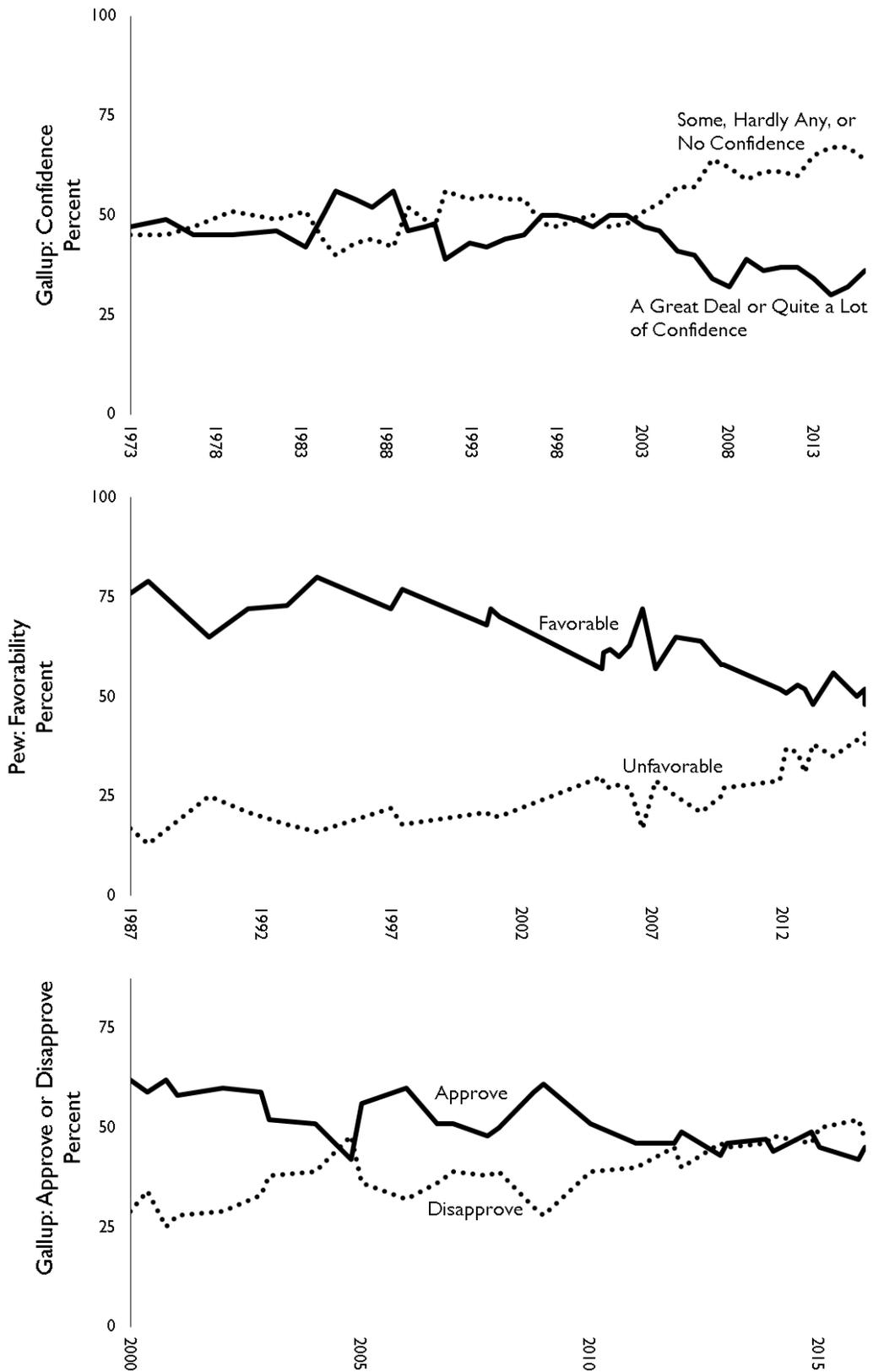
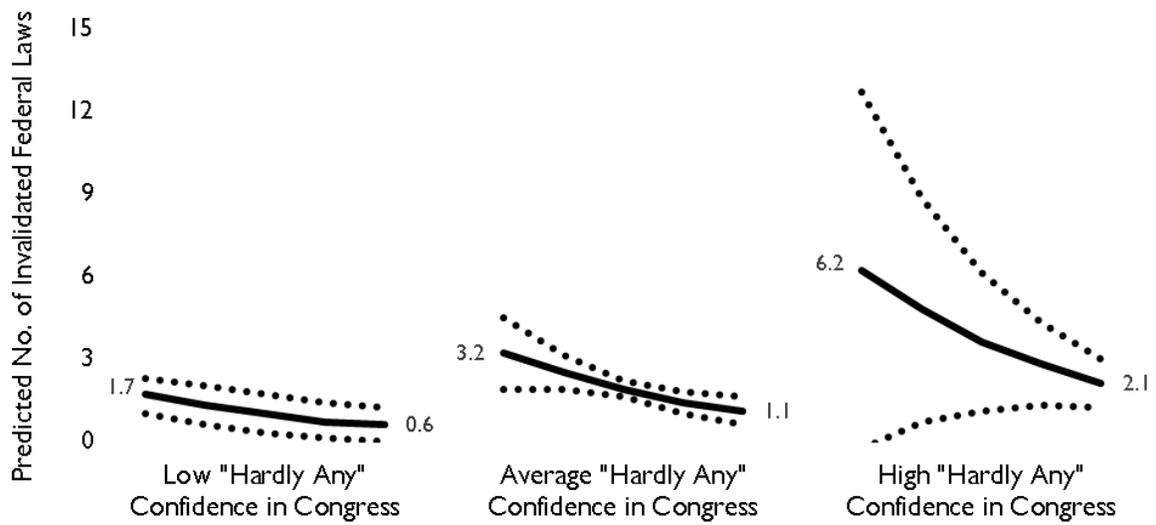


Figure 3: Predicted Number of Invalidated Federal Laws



Note: Each solid line shows the predicted number of federal laws invalidated by the Supreme Court each year as the percentage of GSS respondents saying they have "hardly any" confidence in the Court rises from one standard deviation below the mean to one standard deviation above the mean. Dotted lines are 95% confidence intervals.