THE STRATEGY OF JUDICIAL REVIEW

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INTRODUCTION

The most important institutional prerogative enjoyed by U.S. Supreme Court justices is their power to determine the constitutionality of federal and state legislation. Yet the power of judicial review remains controversial even 200 years after *Marbury v. Madison*,[1] particularly because its exercise has the potential to produce countermajoritarian results. When an unelected judiciary invalidates legislation produced by the elected branches, the result arguably conflicts with fundamental principles of democratic self-governance.

Nevertheless, the Supreme Court does not exercise this considerable power in a vacuum. Rather, studies show that the Court's decisions are shaped by its political environment, including public opinion and the preferences of other governmental elites.[2] For the most part, empirical studies have concluded that the Court's decisions are rarely out of step with prevailing public opinion or with the preferences of policy elites, either because of membership change on the Court or because the Court, in the immortal words of Mr. Dooley, "follows the election returns." These findings suggest, first, that to the extent the Court's decisions conform to public opinion, the justices' exercise of judicial review is not necessarily countermajoritarian after all. Second, they indicate that the justices may act strategically to shield their decisions from reversal or to protect their institution's resources, prerogatives and prestige from encroachment by Congress and/or the President.[3] For example, recent studies demonstrate that the Court's ideological proximity to Congress and the President, as well as those actors' preferences over the challenged statute, influence the justices' choices whether to uphold or invalidate a particular statute.[4]

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[1] 5 U.S. 137 (1803).

[2] *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy Maker*, 6 Emory Law Journal 279 (1957); Thomas R. Marshall, Public Opinion and The Supreme Court (1989); William Mishler and Reginald A. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87(1) The American Political Science Review 87 (1993); Jonathan Casper, *The Supreme Court and National Policy Making*, 70 The American Political Science Review 50 (1976).

[3] *See, e.g.*, Jeffrey A. Segal, Chad Westerland and Stefanie A. Lindquist, *Congress, The Supreme Court, and Judicial Review*, Paper prepared for delivery at the Conference on Empirical Legal Studies (2007).

[4] *See, e.g.*, Stefanie A. Lindquist and Rorie Spill Solberg, *Judicial Review by the*

These empirical results undermine the conceptual thrust of the "countermajoritarian difficulty."[5] Moreover, they paint a portrait of the justices as strategic actors whose choices are deeply embedded in a system of separated powers. Yet the justices' opportunities to act strategically in the context of judicial review are not limited solely to the decision to invalidate or uphold a challenged statute.[6] Instead, the decision to invalidate a legislative enactment also involves a second potentially strategic choice: whether to invalidate the statute on its face or as applied.[7] Although the choice to invalidate clearly implicates the possibility of counteraction by the legislature and executive, once that choice is made, the Court has the opportunity to moderate its impact by invalidating the statute as applied rather than on its face. This option to strike a statute solely as applied to the individual litigants arguably allows the Court to mitigate the effect of its constitutional rulings by limiting their impact. In contrast, facial invalidations constitute a much more pronounced institutional challenge to other governmental actors because they result in complete nullification of the challenged law.

In this paper, therefore, we evaluate the justices' choices to invalidate a state or federal enactment on its face or as applied throughout the Burger and Rehnquist Courts. We begin by modeling the justices' votes to uphold or invalidate federal or state laws. We then take the analysis one step further. Assuming the individual justice votes to find the statute constitutionally infirm, we then evaluate the justice's choice regarding whether the statute should be invalidated on its face or as applied. We do so through a theoretical lens that assumes the justices are strategic actors who consider the consequences of their actions vis-à-vis other critical actors in the system of separated powers. In particular, given the potential for retaliatory action, Supreme Court justices may be particularly sensitive to the preferences of members of Congress regarding the statutes under review as well as the justices' ideological proximity to Congress. We find that, with respect to the decision whether to strike legislation and with respect to the decision whether to invalidate a statute on its face or as applied, the justices' choices are dependent (1) on Congressional preferences over the legislation at issue, and (3) on the justices' own ideological preferences regarding the challenged enactment. These findings suggest that judicial review of legislative enactments is substantially shaped by separation of powers constraints, both in the decision whether to invalidate an enactment as well as in the decision

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Burger and Rehnquist Courts, 60(1) Political Researach Quarterly 71 (2007).

[5] Lee Epstein, Jack Knight, and Andrew Martin, *The Supreme Court as National Policymaker*, 50 Emory Law Journal 583 (2001).

[6] *See, e.g.*, James Meernik and Joseph Ignagni, *Judicial Review and Coordinate Construction of the Constitution*, 41(2) American Journal of Political Science 447 (1997); Rorie Spill Solberg and Stefanie A. Lindquist, *Activisim, Ideology, and Federalism: Judicial Behavior in Constitutional Challenges Before the Rehnquist Court, 1986 to 2000*, 3(2) Journal of Empirical Legal Studies 37 (2006).

[7] *See, e.g.*, David H. Gans, *Strategic Facial Challenges*, 85 Boston University Law Review 1333 (2005); Richard H. Fallon, *Commentary: As Applied and Facial Challenges and Third Party Standing*, 113 Harvard Law Review 1321 (2000).

regarding the method of that invalidation.

In Part I, we explain the jurisprudence underlying the Court's choices to invalidate or uphold federal and state legislation on constitutional grounds, as well as the dilemma this power poses for democratic theory. We also explain the complicated choice facing the justices in terms of the method of invalidation. In Part II, we explore the institutional constraints on the Court's power of judicial review, with a focus on positive political theories that direct our attention to factors arising from the system of separation of powers that may affect the justices' willingness to vote to strike these enactments. These factors enable us to identify certain hypotheses that may be tested using empirical data. In Part III, we specify and estimate an empirical model of the justices' votes in judicial review cases, proceeding in two stages: whether the justices vote to invalidate the challenged statute, and, if so, whether they vote to invalidate the statute on its face or as applied. In Part IV, we describe our results and consider the implications of our findings for our understanding of how the justices may act strategically in the context of judicial review.

I. JURISPRUDENTIAL DOCTRINES OF JUDICIAL REVIEW

At least since the decision in *Marbury v. Madison,* the Supreme Court has exercised the power of judicial review over the constitutionality of federal and state statutes.[8] Since that time, the Court has invalidated 317 Acts of Congress in whole or in part,[9] and many hundreds more state statutes.[10] Yet while the power of judicial review is therefore firmly entrenched in the federal courts, it nevertheless remains the subject of continuing controversy among academics.[11] In large part, this controversy stems from the "countermajoritarian difficulty" associated with the invalidation of democratically enacted legislation by an unelected judicial body. As the argument goes, invalidation of legislation threatens democratic principles of self-governance when it is accomplished by unaccountable judges insulated from the electorate. As the Constitution fails to commit this power to the judiciary explicitly, the claim can be made that judicial review undermines constitutional values as well. Nor is it clear, as some have argued, that judicial review is necessary for the functioning of a healthy democracy.[12]

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[8] See also *Martin v. Hunter's Lessee,* 14 U.S. 304 (1816)(establishing power of Supreme Court to review constitutionality of state action).

[9] Keith Whittington and Tom Clark, *Judicial Review of Acts of Congress* (2006)(paper available at SSRN), at 17.

[10] See Stefanie A. Lindquist and Frank B. Cross, MEASURING JUDICIAL ACTIVISM 47-84 (2009)(setting forth data on challenges and invalidations of federal and state statutes throughout the Warren, Burger and Rehnquist Courts).

[11] *See, e.g.*, Suzanna Sherry, *Democracy and the Death of Knowledge*, 75 University of Cincinnati Law Review 1053 (2007); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112(2) Yale Law Journal 153 (2002).

[12] Robert Dahl, DEMOCRACY AND ITS CRITICS (1989); Robert Dahl, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006).

In light of this conundrum, early scholarly treatment of the question cautioned federal courts against the aggressive use of judicial review, with James Bradley Thayer arguing as early as 1893 that federal courts should defer to Congress on the constitutionality of federal legislation as long as the legislature's interpretation of its constitutional prerogatives was reasonable.[13] Similarly, Alexander Bickel argued in the 1950s and 1960s that the Court should refrain from exercising its powers of constitutional review by employing the "passive virtues" of judicial restraint, particularly those associated with doctrines of justiciability. More recent calls for restraint are exemplified by Professor Cass Sunstein's recognition of judicial "minimalism" as a guiding principle in Supreme Court decision making, and Professor Mark Tushnet's call for "taking the constitution away from the courts" and committing constitutional interpretation more clearly to the elected branches.[14]

The obvious rejoinder to these concerns is that the Court's power of judicial review operates to constrain majoritarian tyranny over minority groups and thus serves Madisonian interests in tempering radicalism and demagoguery in democratic politics. Countermajoritarian is arguably the purpose of the American system of separated powers, with the power of factions moderated by checks and balances among the branches.[15] The notion that the Supreme Court should act to protect vulnerable minorities was advanced theoretically by John Hart Ely in light of the famous footnote 4 in the 1938 case *United States v. Carolene Products Co.*[16] In that footnote, Justice Stone argued that the Court should be most vigilant in exercising the power of judicial review when legislation disadvantaged minorities that were insulated from or shut out of the democratic process.

The *Carolene Product* footnote gave rise to one among many normative theories justifying judicial review by an unelected Court.[17] Other scholars have argued in favor of alternative methods to constrain judicial discretion in constitutional cases, including the application of neutral principles or adherence to original intent.[18] In light of the countermajoritarian difficulty, normative discussions of judicial review thus often prescribe methods of constitutional interpretation to channel or cabin the Court's power or justify the exercise of judicial review in one way or another. And the Court itself has followed Justice Stone's

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[13] James Bradley Thayer. *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 Harvard Law Review 129 (1893).

[14] Cass. R. Sunstein, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Mark Tushnet, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

[15] See *Federalist No. 10, in* Hamilton, Alexander; Madison, James; and Jay, John, THE FEDERALIST (Jacob E. Cooke, ed. 1961).

[16] 304 U.S. 144 (1938);.

[17] John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)

[18] *See, e.g.*, Robert Bork, The Tempting of America (1990): Ely, *supra* note 8; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54(4) Columbia Law Review 543 (1954); Bickel, *supra* note 8.

suggestion in the formulation of its doctrines of judicial review. Thus it has developed a hierarchy of judicial scrutiny to evaluate the constitutionality of legislation depending on the interests at stake and the groups affected by the challenged enactment by drawing the distinction between strict scrutiny, intermediate scrutiny and the rational basis test. Other doctrines have emerged to assist the Court in evaluating the constitutionality of legislation where the law threatens the separation of powers (e.g. the so-called non-delegation doctrine and doctrines associated with Congressional powers under the commerce clause) or where the law undermines principles associated with federalism or national supremacy (e.g. tests to determine the constitutionality of Congressional enactments to abrogate the Eleventh Amendment or to implement the Fourteenth and Fifteenth Amendments).

In addition to applying these constitutional doctrines to evaluate the constitutionality of legislation, however, the Court is often faced with a second consideration: whether to invalidate the enactment on its face or as applied. According to the conventional wisdom, a litigant has two choices in challenging the constitutionality of state or federal legislation. She may challenge the statute on its face, in which case she is arguing that the statute must be invalidated as to all possible applications and is thus rendered null and void. Alternatively, she may challenge the statute only as applied to her particular circumstances, in which case the statute remains valid for other applications that do not implicate constitutional concerns. Of course, she may also challenge the statute both on its face and as applied, as the two are not mutually exclusive options.[19]

Indeed, the distinction between facial and as-applied invalidations has garnered considerable scholarly interest of late.[20] In part, this interest was enhanced by a 1986 Supreme Court ruling setting forth doctrinal standards regarding when facial invalidation is appropriate. In *United States v. Salerno*,[21] the Court emphasized that a litigant bringing a facial challenge to a legislative enactment bears a heavy burden to prove that the challenged law cannot be constitutionally applied in any set of circumstances. According to Chief Justice Rehnquist, author of the majority opinion, "the challenger must establish that no set of circumstances exists under which the Act would be valid."[22] Thus, *Salerno* stands for the proposition that the Court prefers to invalidate statutes as applied to the individual litigants in the case, since doing so preserves institutional values associated with judicial restraint, eliminates concerns over third party standing implicated by consideration of statutory applications beyond the plaintiff's individual circumstances, and limits the

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[19] David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 Iowa Law Review 41, 54 (2006).

[20] *See, e.g.*, Gans, *supra* note --; Fallon, *supra* note --; Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stanford Law Review 359 (1994); Michale D. Adler and Michale C. Dorf, *Rights and Rules: An Overview*, 6 Legal Theory 241 (2000).

[21] 481 U.S. 739 (1986).

[22] *Id.* at 745.

potential that the Court's ruling constitutes an advisory decision regarding cases yet to be presented and argued before the Court.

Salerno has hardly provided the last word, however, as even Supreme Court justices continue to debate the appropriateness of facial invalidations in the pages of the United States Reports. These debates have been most prominent between Justice Scalia, who protests that facial invalidations are almost never appropriate, and Justice Stevens, who often takes the opposite view. In the light of these debates, Richard Fallon has remarked that "it is tempting to say that the Justices of the Supreme Court are not only divided, but also conflicted or even confused, about when statutes should be subject to facial invalidation."[23] Other commentators have similarly lamented the lack of coherence in the Court's approach to the method of invalidation, with one remarking that, "[i]n short, the law in this area is a mess."[24]

Two cases illustrate the point. In *City of Cleburne, Texas v. Cleburne Living Center*,[25] the proposed operator of a group home for the mentally retarded brought suit challenging the validity of a zoning ordinance, which required a special permit for such homes, as a violation of the Equal Protection Clause. In holding the ordinance invalid as applied, the majority opinion stated that the proper inquiry was

> first whether requiring a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws. If it does there will be no occasion to decide whether the special use permit provision is facially invalid where the mentally retarded are involved, or to put it another way, whether the City may never insist on a special use permit for a home for the mentally retarded in an R-3 zone. This is the preferred course of adjudication since it enables court to avoid making unnecessarily broad constitutional judgments.[26]

Justices Marshall, Brennan and Blackmun concurred in the judgment in part and dissented in part. Specifically, they disagreed with striking the statute as applied rather than on its face because "by leaving the sweeping exclusion of the 'feebleminded' to be applied to other groups of the retarded, the Court has created peculiar problems for the future."[27] According to Justice Marshall's opinion, the Court's ruling failed to "delineate any principle that defines to which, if any, set of retarded people the ordinance might validly be applied" and thus left the city and other disabled applicants "without guidance as to the potentially valid, and

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[23] Fallon, *supra* note 6, 1323.

[24] Edward A. Hartnett, *Modest Hope for a Most Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 Southern Methodist Law Review 1735, 1751 (2006).

[25] 473 U.S. 432 (1985).

[26] *Id.* at 447.

[27] *Id.* at 474-475 (Marshall, J., dissenting in part).

invalid, applications of the ordinance."[28] He continued:

> As a consequence, the Court's as-applied remedy relegates future retarded applicants to the standardless discretion of low-level officials. . . . Invalidating on its face the ordinance's special treatment of the 'feebleminded,' in contrast, would place the responsibility for tailoring and updating Cleburne's unconstitutional ordinance where it belongs: with the legislative arm of the City of Cleburne.[29]

In a more modern case illustrating the debate between Justices Scalia and Stevens, *City of Chicago v. Morales*,[30] the Court evaluated the constitutionality of a gang-loitering ordinance that granted discretion to police officers to order individuals "reasonably believed to be gang members" to disperse; in the event the individuals failed to disperse, they were subject to arrest. In striking the statute on its face, the four-justice plurality held the statute invalid on its face on vagueness grounds. According to Justice Stevens' plurality opinion, *Salerno* did not require a more limited as-applied invalidation in part because the Court's standard for facial invalidations "is not the *Salerno* formulation, which has never been the decisive factor in the decisions of this Court, including *Salerno* itself."[31] In dissent, Justice Scalia reprimanded the Court for failing to follow *Salerno* on grounds that the ordinance could be constitutionally applied at least in some conceivable circumstances.[32]

The debate between Justices Scalia and Stevens has played out in other contexts, with the justices' willingness to invalidate statutes on their face appearing to stem from their substantive preferences over the content of the laws at issue. Thus, "in the abortion and gay rights contexts, Justice Scalia resists facial challenges . . . while Justice Stevens happily finds statutes unconstitutional on their face."[33] In contrast, in cases brought challenging Congressional authority under Section Five of the Fourteenth Amendment, Justice Scalia "is receptive to facial challenges," while Justice Stevens prefers as-applied invalidations.[34]

The confusion over the distinction between facial and as-applied invalidations is exacerbated by certain exceptions to the general preference for as-applied challenges depending on the legal basis for the suit. Specifically, there are certain categories of cases in which the Court has decided it is best to strike the statute facially rather than as applied.[35] In the context of First Amendment challenges in particular, the Court has

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[28] *Id.*
[29] *Id.*
[30] 527 U.S. 41 (1999).
[31] *Id.* at 55 n.22.
[32] *Id.* at 81-83 (Scalia, J, dissenting).
[33] *Id.* at 1751.
[34] *Id.* at 1751-1752.
[35] *See, e.g.*, Gans, *supra* note 6; David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, http://ssrn.com/abstract= 132656.

determined that facial invalidations are most appropriate as a means to ensure that questionable statutes do not chill free speech. "Better in such cases, from the standpoint of First Amendment values, to invalidate the challenged regulation on its face, even at the cost of leaving some proscribable speech untouched, than to keep it on the books and chill speech."[36] Thus the Court has formulated the doctrine of "overbreadth" that constitutes an exception to its general proscription against third-party standing. Furthermore, in *Sabri v. United States*,[37] the Court listed other areas in which facial overbreadth challenges have been recognized, including in the area of abortion rights. Moreover, the Court has struck down laws involving the Commerce Clause on their face without even considering if they would be unconstitutional in all circumstances.[38]

This inconsistency has been highlighted in the literature, particularly in relation to the *Salerno* test, which has been criticized as pronouncing an almost insurmountable standard for successful facial challenges.[39] Among the most influential scholars in this area, Michael Dorf has argued that *Salerno* is misguided because individuals have a constitutional right to be governed by valid rules of law that can be applied constitutionally in all circumstances.[40] This perspective can be traced to earlier work by Henry Paul Monaghan, who argued in 1981 that a litigant may "insist that his conduct be judged in accordance with a rule that is constitutionally valid."[41] Such a "valid-rule facial challenge" (a phrase coined by Marc Isserles), is "independent of the specific facts of the litigant's predicament."[42] Rather, it judges the content of the rule against constitutional norms and insists that the rule be valid regardless of its application to alternative factual scenarios. Marc Isserles argues that the *Salerno* test can be viewed through this theoretical prism: its admonition that facial challenges must demonstrate no set of facts to which the law may be constitutionally applied may be, according to Isserles, viewed as the expression of such a valid-rule facial challenge.[43] He therefore argues that *Salerno* is "best viewed not as a universally applicable threshold requirement for the availability of a facial challenge, but as a rather clumsy description of the state of affairs that obtains when a valid-rule facial challenge succeeds: there are no valid 'applications' because the

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[36] Franklin, *supra* note 25 at 11.

[37] 541 U.S. 600, 609-610 (2004).

[38] *See* Nathaniel Persily and Jennifer Rosenberg, *Defacing Democracy: The Prominence of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, _ Minn. L. Rev. _ (unpublished manuscript at 4). *See also* Nathaniel Stewart, Note, *Turning the Commerce Clause Challenge "On Its Face": Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 Case. W. Res. L. Rev. 161 (2004).

[39] For an excellent discussion of the *Salerno* standard and its theoretical implications, *see* Marc. E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 American Law Review 359 (1998).

[40] *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stanford Law Review 235 (1994).

[41] Henry Paul Monaghan, *Overbreadth*, 1981 Supreme Court Review 1.

[42] *Id.*

[43] *See* Isserles, supra note --, at 423.

rule itself is constitutionally deficient."[44]

Moreover, even in the light of *Salerno*'s apparently rigorous standard for facial invalidation, the Court nevertheless continues to strike statutes on their face quite frequently. Indeed, scholars have recognized that the Court actually invalidates statutes on their face far more frequently than the doctrinal standards would suggest.[45] This observation is borne out in empirical data indicating that facial invalidations remain the norm. Figure 2 presents a frequency distribution of invalidated state or federal statutes per Court term from 1969 to 2004. The blue bars represent the number of statutes invalidated, with the red bars representing statutes invalidated on their face. (Thus the differences between the height of the two bars represents the statutes invalidated as applied.) One trend is clear: in general, the Court invalidates statutes on their face rather than applied. Moreover, this trend is most pronounced since the Court's declaration of its preference for as-applied challenges in 1986! Clearly, *Salerno* did not change the Court's approach in any meaningful fashion.

Figure 1 about here.

These data indicate that factors other than the Court's doctrinal standards may also be shaping the justices' approaches to constitutional challenges and their choices whether the strike statutes as applied or on their face. Perhaps the justices' ideological preferences are an important determinant of their votes, or it may be that other institutional factors stemming from the separation of powers influence and shape these choices. In the next section, we therefore propose some alternative explanations stemming from positive political theory that may explain the Court's decision making in cases involving judicial review.

II. SEPARATION OF POWERS MODELS OF CONSTITUTIONAL REVIEW

As noted above, theoretical analyses of the practice of judicial review have explored the normative justification for judicial review by an unelected court; these treatments typically seek to reconcile judicial invalidation of legislative enactments with majoritarian democracy.[46] Such normative theories of judicial review—and admonitions that the Court should exercise its substantial power to invalidate statutes in accordance with particular principles—all turn on one empirical premise. For the countermajoritarian difficulty to have any normative bite, the Court's actions must actually *be* countermajoritarian.[47] Otherwise, there is no dilemma: to the extent the Court renders decisions in conformity with majoritarian preferences, it is, in fact, acting to serve democratic

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[44] Franklin, *Facial Challenges and the Commerce Clause*, supra note --, at 60-61.

[45] *See* Gilliam Metzger, *Facial Challenges and Federalism*, 105 Columbia Law Review 873, 878 & n. 24 (2005)("the Court accepts facial challenges far more frequently that its stated tests suggest").

[46] *See, e.g.*, John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Jesse Choper, Judicial Review and The National Political Process (1983); Alexander Bickel, The Least Dangerous Branch: The Supreme Court At the Bar of Politics (1986).

[47] Barry Friedman, *Dialogue and Judicial Review*, 91 Michigan Law Review 577 (1993).

principles of self-governance by furthering the objectives of the democratic majority. Indeed, ample evidence from the political science literature suggests that the Court is rarely out of step with the public mood. Early work by Robert Dahl presented data indicating that the Court invalidated federal statutes enacted by previous national majorities no longer in power, while upholding those enacted by the dominant political coalition in office at the time of the Court's decision.[48] Later work by William Mishler and Reginald Sheehan similarly demonstrated that the Court's decisions in civil liberties case track the public mood with about a five year lag.[49] And in his study of the Court's responsiveness to public opinion, Tom Marshall concluded that the modern Court's decisions "appear neither markedly more nor less consistent with the polls than [the decisions of] other policy makers."[50]

The Court may also respond indirectly to the public's preferences through the influence of elected officials in government. The advent of positive political theory has focused attention on the institutional constraints on the Court in the exercise of its powers. In particular, separation of powers models ("SOP models") of the Court's decision making highlight the potential for strategic action by Supreme Court justices in anticipation of potentially retaliatory action by other governmental actors, including Congress and the President. SOP models begin with the assumption that, like other political actors, Supreme Court justices seek to embody their own policy preferences in the law. Indeed, the proposition that the justices' preferences shape their voting behavior is well documented in the literature.[51] SOP models also recognize, however, that the justices' policy choices may be shaped by their expectations regarding the preferences and actions of other political actors in response to those choices. As a result, strategic justices may moderate their decisions to conform to the preferences of the elected branches in order to insulate those decisions from some form of reversal or to insulate the judiciary itself from other adverse consequences that Congress might enact via ordinary legislation.

In the context of statutory interpretation, it is easy to see how the justices might be constrained by foreseeable responses to their rulings: Congress may modify the Court's interpretations by overriding them via statutory amendment.[52] To be sure, the Court's constitutional rulings are more difficult to override, generally requiring a constitutional amendment to do so. On the other hand, Congress and the President may employ other mechanisms to "punish" the Court for unwelcome rulings. Gerald Rosenberg has catalogued these mechanisms as follows:

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[48] Dahl, *Decision Making in a Democracy*, supra note --.

[49] Mishler and Sheehan, supra note --.

[50] Thomas Marshall, PUBLIC OPINION AND THE SUPREME COURT 80 (1989).

[51] Jeffrey Segal and Harold Spaeth. THE SUPREME COURT AND THE ATTITUDINAL MODEL (1999).

[52] *See* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91(1) The American Political Science Review 28 (1997).

> (1) using the Senate's confirmation power to select certain types of judges; (2) enacting constitutional amendments to reverse decisions or change Court structure or procedure; (3) impeachment; (4) withdrawing Court jurisdiction over certain subjects; (5) altering the selection and removal processes; (6) requiring extraordinary majorities for declarations of unconstitutionality; (7) allowing appeal from the Supreme Court to a more 'representative' tribunal; (8) removing the power of judicial review; (9) slashing the budget; (10) altering the size of the Court.[53]

Empirical studies indicate that the threat of these responses is often effective in constraining the Court. Indeed, although the justices enjoy life tenure and undiminishable salaries, researchers have evaluated whether the justices moderate their behavior in rational anticipation of actions by Congress and/or the President. For example, Eugenia Toma found that the Court responds to budgetary constraints imposed by Congress in its rulings in civil liberties cases. [54] According to Tom Clark's research, the introduction of court-curbing legislation affects the Court's willingness to invalidate acts of Congress.[55] Epstein, Knight and Martin investigated whether individual justices' voting behavior in civil liberties cases was influenced by current presidential administrations, finding that they were.[56] And in their study of Congressional responses to Supreme Court constitutional decisions, Ignagni and Meernik concluded that, "contrary to popular and scholarly opinion, the Congress can and does attempt to reverse Supreme Court [constitutional] rulings."[57] In total, these findings suggest that, even in constitutional cases, strategic justices may produce outcomes that deviate from their ideal preferences in the short term in order to preserve institutional power or achieve broader policy objectives in the long term.

Moreover, these strategic considerations are not limited solely to judicial review of federal enactments. In the case of constitutional invalidation of Congressional action, the Court's decision directly challenges the decisions of a coordinate branch. In that situation, the Court's decision may invite an adverse Congressional response because members of Congress view the decision as a challenge to their institution's power. But where the Court invalidates a state enactment, the decision may also trod on Congressional preferences and thus invoke legislative responses for several reasons. First, Congress may respond to judicial invalidation of state enactments because of constituency pressures.

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[53] Gerald Rosenberg, *Judicial Independence and the Reality of Political Power*, 54(3) The Review of Politics 369, 377 (1992).

[54] Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, XX Journal of Legal Studies 131 (1991).

[55] Tom S. Clark, *Congressional Hostility and Judicial Review*, Paper Presented at the Annual Meeting of the American Political Science Association (2007).

[56] Epstein, Knight and Martin, *supra* note 4.

[57] Joseph Ignagi and James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47(2) Political Research Quarterly 353 (1994).

"Court decisions regarding prayer in public schools, abortion, desegregation, and school busing have all generated tremendous public outcry and Congressional denunciation."[58] Second, judicial decisions invalidating state legislative acts may have implications for Congressional enactments as well; when the Court invalidates a state law regulating abortion, for example, it reduces federal power to regulate abortion at the same time. Thus, "while its own power may not be directly affected by the Court ruling, significant concerns regarding federal power may be."[59] Third, members of Congress not only represent their individual constituents; they also serve as important representatives of state interests at the federal level—especially in the Senate. Members of Congress may therefore be sensitive to the Court's encroachment on state legislative power in the light of these state affiliations. As a result of these considerations, one might expect that the same institutional or SOP constraints operate when the Court evaluates the constitutionality of state or federal legislation.

A. Congressional Preferences as Constraint

As explained above, SOP models suggest that the Court will respond to the preferences of other elite actors in cases challenging the constitutionality of state and federal legislative enactments. These responses may take two forms. First, the justices may be concerned that the elected branches will attempt to override or undermine the Court's constitutional decisions either statutorily or via constitutional amendment. In this sense, the justices may be most sensitive to the preferences of members of Congress over the specific legislation at issue. In addition, however, the justices may also be sensitive to their own ideological preferences relative to those in Congress. Where a justices' ideal point is distant from the median ideal point in Congress, the justice may feel more vulnerable to institutional retaliation as well as Congressional override. This latter dynamic has been supported by recent research. Following the 1994 Republican takeover in Congress, the conservative Rehnquist Court demonstrated a far greater willingness to invalidate acts of Congress regardless of their substantive content.[60] More recent research has demonstrated that the Court's ideological proximity to the floor and party medians in Congress affects its propensity to declare acts of Congress unconstitutional.[61]

Figure 2 about here.

To illustrate this point, Figure 2 provides a very simple spatial

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[58] James Meernik and Joseph Ignagni, *Congressional Attacks on Supreme Court Rulings Involving Unconstitutional State Laws* 48(1) Political Research Quarterly 43, 44 (2005).

[59] *Id.* at 57.

[60] *See* Anna Harvey and Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987-2000*, Legislative Studies Quarterly 533 (2006).

[61] *See, e.g.*, Segal, Westerland and Lindquist, *supra* note 2.

representation of the ideal points of the median member of the House (H), the median member of the Senate (S) and an individual justice (J) in ideological space. Where the justice votes for an outcome in the interval between H and S (represented by x_1), the outcome is immune to override or since moving it to the left or to the right within that space undermines the interest of one or the other chamber. If the justice votes for a decision outside the interval between H and S, however, such as at x_2, the outcome supported by that vote *is* subject to override or potential retaliation since both H and S prefer an outcome closer to their own ideal points. In that situation, the threat of override or institutional retaliation in the form of budget constraints, etc., may cause the justice to moderate her ideological preferences in recognition of her ideological distance from the prevailing preferences in Congress. In this way, the justice may be sensitive both to Congressional preferences *over the specific legislation at issue,* as well as to the justice's own ideological preferences *vis-à-vis the preferences of sitting members of Congress.*

Thus, we hypothesize the following:

H1: A justice will be more (less) likely to strike a statute as the ideological distance between the justice and Congress increases (decreases).

H2: A justice will be more (less) likely to strike a statute as Congressional preference for the challenged statute decreases (increases).

H3: A justice will be more (less) likely to strike a statute as the ideological distance between the justice and the statute increases (decreases).

B. Judicial Review as Multi-Staged Process

The discussion above outlined the basic strategic considerations facing Supreme Court justices in their choices to invalidate legislative enactments. As explained in Part I, however, that decision is not purely dichotomous. Although the justices must first determine whether a statute violates a constitutional principle, they must also rule on whether the statute is unconstitutional on its face or as applied. If a statute is struck on its face, the state or the federal government may not enforce the statute under any circumstances, while if a statute is struck as applied, the statute may be enforced in different circumstances.[62] The former method of invalidation has far greater institutional implications simply because it eradicates the statutory provision in its entirety, thus posing a more pronounced challenge to the institutional prerogatives of the state or federal governments. For that reason, the method of invalidation, as well as the simple act to invalidate, raises separation of powers concerns and suggests that the justices may be sensitive to Congressional preferences in making both choices. Thus we hypothesize the following:

H1: A justice will be more (less) likely to facially strike a statute as the ideological distance between the justice and Congress increases

[62] *See* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Columbia Law Review 873 (2005).

(decreases).

H2: A justice will be more (less) likely to facially strike a statute as Congressional preference for the challenged statute decreases (increases).

H3: A justice will be more (less) likely to facially strike a statute as the ideological distance between the justice and the statute increases (decreases).

III. MODELING JUDICIAL REVIEW

Constitutional challenges to state and federal enactments thus present the justices with two choices. First, they must determine whether the statute infringes on constitutional rights. If so, they must then determine whether the statute is invalid on its face or as applied. This decision-making process is modeled as a decision tree in Figure 3. Because both stages represent critical decision making points for the justices and have significant implications in terms of statutes actually invalidated, we model each stage making process to evaluate whether separation of powers considerations constrain the justices' choices at both points in the two-staged process. But because those choices involve a two-staged decision tree in which the second choice is dependent on the first, it is also important to ensure that selection bias does not adversely affect the results statistically. We address that concern below.

Figure 3 about here.

A. Dependent Variables

To evaluate SOP effects in these cases, we collected data on the individual justices' votes to uphold or invalidate state or federal laws from the 1969 to 2004 Terms (the Burger and Rehnquist Courts). To do so, we first identified all cases in the United States Supreme Court Database in which the "uncon" variable was coded 1, 2 or 3, indicating that the majority had invalidated a federal, state or local law (ordinance). Because the Supreme Court Database does not identify cases in which the Court considers a statute's constitutionality but upholds the law, we relied on the auth_dec variables, as well as the Justice-Centered Supreme Court Databases, to identify these additional cases.[63]

We then examined each vote to invalidate to determine whether the justice voted to invalidate the statute on its face or as applied. Often, this is a relatively straightforward enterprise. However, occasionally the justices do not make clear whether they are voting to invalidate using one or the other method. Thus we applied the following coding convention: when the justices' opinions included language the appeared to clearly limit the invalidation to the facts of the case, we coded the justice as having voted to strike the statute as applied. Otherwise, we coded the justice as voting to strike the statute on its face. To resolve the question, we also compared majority, concurring and dissenting opinions to glean

[63] The Justice Centered Databases are organized with the individual justices as the unit of analysis, but these databases are available only up to 2000 and also do not clearly identify cases in which a statute was challenged but upheld unanimously.

information about the approach taken by the individual justices, and we occasionally sought guidance in the briefs and even reviewed the affected statute to determine whether (particularly in the case of state legislation), the legislature had repealed the statute in light of the Court's pronouncement (reflecting the proposition, we thought, that the statute had been facially invalidated).

This coding process generated a database of 6459 votes to strike or uphold state, federal or local legislation from 1969 to 2004 (coded 1 if the justice voted to strike, and 0 otherwise), and 3136 votes to strike a statute on its face (coded 1) or as applied (coded 0).

B. Independent Variables: Strike Model

In this study, we are primarily interested in evaluating the influence of Congressional preferences on the justices' voting behavior in order to evaluate SOP constraints in the context of judicial review. To test the hypotheses identified in the previous section, then, we needed to measure Congressional and judicial preferences over the statutes at issue in each case, as well as the distance between Congress and the voting justice at the time of the Court's decision. We thus constructed two variables representing Congressional constraints. Both are based on the Judicial Common Space ("JCS") scores developed to measure the justices' and members of Congress's preferences in the same ideological space.[64] The first, "Ideological Distance between Justice and Congress," reflects the distance between the individual justice's ideal point and the ideal point for Congress, calculated as the mean of the ideal points for the median members of each chamber at the time of the Court's decision. The second, "Congressional Preference for Statute," reflects the degree to which the median members of each chamber prefer the challenged statute (based on the mean of the two chambers' median member's common space score). This variable was created by, first, coding each statute as liberal (coded as 1) or conservative (coded as -1), based on the directionality codes in the United States Supreme Court database. Since the JCS scores are continuous, with positive values associated with liberal positions and negative values with conservative positions,[65] we simply multiplied the statute's ideological direction times the Congressional mean to create a variable reflecting the degree to which members of Congress prefer the statute ideologically. We created a similar preference measure for the individual justices, "Justice Preference for Statute," using the same technique.

We also controlled for a number of other influences on the justices' choice to invalidate the challenged enactment. First, we included variables reflecting whether the Solicitor General supported or opposed the statute, either while representing the government as a party or as amicus. One of the Solicitor's primary functions is to argue cases in which the federal

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[64] Lee Epstein, Andrew Martin, Jeffrey Segal, Chad Westerland, *The Judicial Common Space*, 10 Journal of Law, Economics and Organization (2007).

[65] As originally coded, the JCS scores associated liberalism with negative values and conservatism with positive values. We switched the signs on these scores for our own purposes.

government is a litigant; he also files amicus briefs at his own request or in response to a request from the Court. In both situations, the Solicitor has a remarkable record of success.[66] And although the Solicitor (as the "Tenth Justice") is theoretically ideologically neutral before the Court, he generally does not stray far from the preferences of the President or attorney general.[67] Thus, if the Solicitor argues in favor of the statute's constitutionality, the President very likely supports the statute, and vice versa. Because of the Solicitor's track record before the Court, we expect that the individual justices will be less likely to strike a statute supported by the Solicitor, and more likely to strike a statute whose constitutionality he questions or challenges.

Second, we controlled for whether amici supported or opposed the statute (coded as the number of briefs filed in support or opposition to the challenged law). Amici briefs filed by interest groups reveal the breadth and scope of the issue for the justices as well as provide a gauge of current public opinion. This interest group pressure may provide important constraints on the justices' choices to strike legislation to the extent such public sentiment may circumscribe or undermine implementation of the Court's decisions.[68] In addition, interest groups may provide the impetus for a political response by Congress and the President.[69] Thus, increasing numbers of briefs filed in support of the statute's constitutionality should be negatively associated with a justices' willingness to strike the statute, while increasing numbers of briefs filed in opposition to the statute should be positively associated with a vote to strike.

The statute's age may also be a relevant consideration, but two opposing arguments can be made regarding the expected influence of a law's age on the Court's deliberations. First, to the extent the Supreme Court's interpretation of the Constitution changes over time, older statutes may be more vulnerable to invalidation under a new constitutional regime created at a later date.[70] Moreover, Robert's Dahl's early research indicated that the Court's generally preferred statutes enacted by the dominant ruling coalition at the time of the Court's decision, and was more likely to strike statutes that were more than four years old.[71] On the other hand, one might argue that older statues are more likely to be upheld because they have "stood the test of time." This is consistent with findings regarding the Court's interpretation of its own precedents: as precedent ages, the probability of being positively interpreted decreases until the precedent becomes very old, at which point positive

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[66] *See* Stefanie A. Lindquist and Rorie Spill Solberg, *Judicial Review by the Burger and Rehnquist Courts: Explaining Justices' Responses to Constitutional Challenges*, 60 Political Research Quarterly 71 (2007).

[67] *See* Paul M. Collins Jr., Friends of the Supreme Court: Interest Groups and Judicial Decision Making (2008).

[68] *See* Gerald Rosenberg, The hollow hope: Can courts bring about social change? (1991).

[69] *See* Lindquist and Solberg, *supra* note 36.

[70] *See* Lindquist and Solberg, *supra* note 36.

[71] Dahl, *Decision Making in a Democracy,* supra n. --.

interpretations increase.[72] To test these alternative hypotheses, we included a variable in our model reflecting the age of the challenged statute in years.

Throughout the course of history, the Supreme Court has, overall, demonstrated far greater deference to federal than state statutes, striking down more than twice as many state as federal laws and at a greater rate.[73] Thus, we control for the source of the statute (coded 1 if a federal law, 0 if a state law). We expect that the justices will be less likely to strike a federal statute than a state statute.

We also included a control for selection bias in relation to the Court's agenda setting process. The Supreme Court generally reverses about two-thirds of the decisions it accepts for review. To control for this effect, we included a dummy variable reflecting whether the lower court struck the statute in the decision below.

C. Independent Variables: Method of Invalidation Model

In the second stage model of the justices' votes to strike a statute on its face or as applied, we included several of the same variables used to estimate the first stage model but added additional variables uniquely relevant to the method of invalidation. First, we included the Congressional preference variables described above, as well as the variable reflecting the justice's preference for the statute. In addition, we incorporated a variable reflecting whether the party challenging the statute argued that it should be invalidated on its face (coded 1 if the party made any argument that the statute was invalid on its face, and 0 if the party argued only that the statute was invalid as applied). We expect that if the party argued that the statute should be struck on its face, the justices will more likely to strike the statute on its face as well.

To control for doctrinal influences, we included a variable reflecting decisions rendered after *Salerno* was decided, coded 1 for decisions after 1986 and 0 for those prior to 1987. Quite simply, we expect that the justices will be less likely to strike the statute on its face after *Salerno*. Moreover, we incorporated several variables to control for issue areas in which a justice may be more likely to declare a statute facially unconstitutional: First Amendment free speech, Commerce Clause, and abortion.[74] In addition, we controlled for whether the statute was struck on Supremacy grounds.[75] To control for presidential influences, we included a variable measuring Solicitor opposition to the statute as amicus. We expect that, if the SG opposes the statute as amicus, the justices will

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[72] Thomas Hansford and James F. Spriggs II, The Politics of Precedent on the United States Supreme Court (2006).

[73] Rorie Spill Solberg and Stefanie A. Lindquist, *Activism, Ideology, and Federalism: Judicial Behavior in Constitutional Challenges Before the Rehnquist Courts, 1986-2000*, 3(2) Journal of Empirical Legal Studies 237 (2006).

[74] Using the United States Supreme Court Judicial Database, we created a dummy variable for commerce clause, which is equal to 1 if the Law variable in the database is coded 183; abortion equals 1 if the Issue variable in the database is coded 533; and free speech is coded 1 if the Issue variable is coded 401, 451, 471, or 472.

[75] This variable is coded 1 if the Law variable in the United States Supreme Court Judicial Database is coded 62.

be more likely to strike the statute on its face. Finally, we included a control for the source of the statute at issue, coded 1 if the statute was federal and 0 for a state statute. We expect that the Court will be less likely to strike a federal statute on its face than a state statute. Table 1 in the Appendix provides summary statistics for each of the independent variables and the dependent variable used in each model.

D. The Statistical Model

To test hypotheses related to SOP constraints, our statistical models must explain votes to uphold or strike challenged enactments, as well as whether a vote to strike was on the statute's face or as applied. Because these two stages are obviously interrelated, it raised the specter of selection bias as the second stage analysis is dependent on the first. If selection bias is present, failure to control for its effects can result in correlation between the exogenous variables and the disturbance terms, yielding inconsistent estimates. For that reason, we first employed a heckman probit model to estimate both equations simultaneously; however, the two-staged heckman procedure did not produce a statistically significant selection coefficient (rho), indicated that selection bias was not a problem (the result of the heckman models are presented in Tables 2 and 3 in the Appendix).

Thus we estimated two separate logit models in Stata 10.0, the first modeling the choice to strike or uphold the challenged statute, and the second (if the justice voted to strike), whether the justice voted to strike the statute on its face or as applied. To control for dependence among the observations and to generate robust standard errors, we clustered on the individual justice. Clustering on the case citation yielded almost identical results, although clustering on the individual justice was the more conservative approach. We also controlled for temporal effects and for dependence among long-serving justices by incorporating dummy variables reflecting the fourteen natural courts formed as a result of membership change from 1969 to 2004 (these latter control variables are omitted from the tables).

IV. RESULTS: THE JUSTICES AS STRATEGIC DECISION MAKERS

The results of the two logit models are presented in Tables 2 and 3. These results provide support for the SOP model of judicial review at both stages in the analysis. Table 2 reports the results of the first model to strike. To facilitate interpretation, we report in the last column of the table the difference in predicted probability when the independent variable changes from its minimum value to its maximum value.[76]

First, the result indicate that, as expected, the justices' own preferences regarding the substantive content of the statute plays a major role, with justices less likely to strike a statute with which they agree on ideological or substantive policy grounds. This relationship is displayed graphically in Figure 4, with the predicted probability of a justice voting

[76] The baseline predicted probability of voting to strike, with all independent variables set at their mean values, is .481.

to strike decreasing as the justice' preference for the statute increases (holding all other variables at their mean). Specifically, the probability of voting to strike when the justice is ideologically opposed to the statute is .799. That probability decreases to .171 (by .627) when the justice favors the statute ideologically.

In this first model, one of the measures of Congressional preferences is statistically significant and in the hypothesized direction. As Congressional preference for the statute increases, the justice is less likely to vote to invalidate the enactment. This relationship is evident in Figure 5. Specifically, when Congress is ideologically opposed to the statute, the predicted probability of voting to strike is .583. When Congress prefers the statute, however, the predicted probability of voting to strike decreases by .237 to .345. These results indicate that the justices act to further their own ideological preferences in cases involving judicial review, but that their freedom to act in accordance with their policy preferences is constrained by Congressional preferences as well.

Tables 1 and 2 about here.

Figures 4 and 5 about here.

The control variables in the model also paint a portrait of a constrained Court. Acting through the Solicitor General, the President is able to influence the justices' votes, whether as a party to the litigation or as amicus in support or opposition to the statute. If the Solicitor supports the statute as direct representative of the government, the predicted probability of striking the statute decreases by .062. If the Solicitor supports the statute as amicus, the predicted probability of striking the statute decreases by .163; conversely, if the Solicitor opposes the statute as amicus, the predicted probability of striking the statute increases by .140.

Amicus support or opposition also influences these votes, with the number of briefs filed in opposition or support mitigating in favor or against a vote to strike the challenged law. Specifically, if the number of briefs supporting the statute is 30, the predicted probability of a vote to strike is .207. If there are no amicus briefs filed supporting the statute, the predicted probability of a vote to strike is .503. In contrast, if the number of briefs opposing the statute is 23, the predicted probability of a vote to strike is .760 while if there are no amicus briefs opposing the statute, the predicted probability goes down to .449.

The dummy variable reflecting whether the statute was federal or state is also significant, indicating that the justices are more likely to vote to strike state as opposed to federal statutes, with the probability increasing by .156. In addition, the variable measuring the age of the enactment is statistically significant and has a negative coefficient; the justices are less likely to strike older statutes. This finding is inconsistent with Dahl's thesis that the Court supports statutes enacted more recently in time, although further exploration of the impact of this variable in state and federal cases might find differences in this variable's impact depending on the source of the statute.

In the second logit model of the justices' votes to strike statutes on

their face or as applied (results in Table 3), judicial preferences for the underlying statute also shape the justices' choice regarding the method of invalidation. Again, to facilitate interpretation, we include the difference in predicted probabilities as the independent variable changes from its minimum value to its maximum value.[77] As illustrated by Figure 6, the more the justice prefers the statutory policy, the less likely he or she is to find the statute facially invalid. Specifically, if the justice is ideologically close to the statute, the predicted probability of striking the statute on its face is .746, while if the justice is ideologically distant from the statute, the predicted probability of striking the statute on its face is .851. Obviously judicial preferences are much less influential in the context of the decision whether to strike the statute on its face rather than as applied versus deciding to strike in the first place, but ideology still has an impact in this second stage.

Figure 6 about here.

Congressional preferences also appear to influence the justices' choices. Specifically, Congressional preferences over the challenged legislation is statistically significant and negatively signed, indicating that the more Congress prefers the statute on policy grounds, the less likely the justice is to strike the statute on its face. Figure 7 displays this information graphically. When Congress prefers the statute, the predicted probability of a vote to facially strike the statute is .640 compared to .875 when Congress does not prefer the statute.

Figure 7 about here.

Control variables, including whether the challenging party argued that the statute was facially invalid, and the nature of the constitutional challenge (free speech, commerce clause, supremacy clause) also influenced the justices' votes regarding the method of invalidation. Specifically, if the challenging party argued the statute was facially invalid, the predicted probability of the justice voting to facially strike the statute went from .369 to .971. If the statute involved free speech, the justices were more likely to strike the statute on its face, increasing the predicted probability from .790 to .915. If the justices struck the statute based on the Supremacy Clause, the justices were more likely to strike the statute facially (.810 to .956). If the statute involved the Commerce Clause, the justices were more likely to strike the statute on its face versus as applied, increasing the predicted probability by .066. Finally, *Salerno* affects the justices' propensity to vote to strike statutes as applied rather than on their face, with justices less likely to vote to strike facially after *Salerno*. This is a modest impact, with the predicted probability decreasing by .04. Nevertheless, this finding reveals that, once other factors are controlled, *Salerno* did, indeed, influence the justices' votes to a modest degree.

V. CONCLUSION: A CONSTRAINED COURT IN A MULTISTAGE PROCESS

This paper presents results of an SOP model of judicial review that

[77] The baseline predicted probability of voting to facially strike is .814.

incorporates analysis of the justices' choices to invalidate statutory enactments, as well as their choices to invalidate enactments on their face or as applied. These results provide support for the SOP model at each stage of the decision making process, suggesting that the justices act strategically at both stages in deference to Congressional preferences. First, in the choice whether to invalidate challenged enactments, the individual justice's votes are influenced by Congressional preferences over the statute at issue. This result indicates that the justices' votes are constrained by forces related to the separation of powers. Even when deciding whether to invalidate a statute on its face or as applied, the justices' votes are shaped by Congressional preferences regarding the substantive policy content of the challenged law. Thus SOP constraints operate at both stages of the decision tree illustrated in Figure 3. This finding is further supported by the influence of the Solicitor General, who represents the President before the Court. Although the Court's exercise of judicial review has the potential for countermajoritarian effects, these results indicate that the justices' choices to invalidate state and federal laws are substantially constrained by other actors in the governmental system.

Table 1: Logit Model of Individual Justice's Choice to Invalidate Statute

Variable	Coefficient	Robust Std. Err.	Z	p-value	Dif: Min to Max
Ideological Distance between Justice and Congress	-.399	.457	-.87	.382	n.s.
Congressional Preference for Statute	-2.315	.487	-4.75	.000	-.238
Judicial Preference for Statute	-1.809	.124	-14.58	.000	-.628
Lower Court Declared Statute Unconstitutional	-.323	.057	-5.70	.000	-.081
Solicitor General Support	-.250	.157	-1.59	.112	-.062
Solicitor General Support (Amicus)	-.702	.120	-5.85	.000	-.169
Solicitor General Opposition (Amicus)	.570	.115	4.94	.000	.140
Amicus Support	-.045	.012	-3.90	.000	-.296
Amicus Opposition	.059	.015	3.92	.000	.312
Age of Statute	-.003	.001	-3.76	.000	-.104
Federal Statute	-.638	.226	-2.82	.005	-.156
Constant	.830	.160	5.18	.000	

Note: Dependent variable: Justice choice to invalidate statute = 1, uphold statute = 0; N = 6460. Standard errors clustered on justice. Fixed effects for natural courts included but not reported. P-values are two-tailed.

Table 2: Logit Model of Individual Justice's Choice to Strike on Face or As Applied

Variable	Coefficient	Robust Std. Err.	Z	p-value	Dif: Min to Max
Ideological Distance between Justice and Congress	.136	.125	1.09	.274	n.s.
Congressional Preference for Statute	-3.590	.600	-5.98	.000	-.235
Judicial Preference for Statute	-.406	.087	-4.65	.000	-.105
Party Argued Statute Facially Invalid	4.047	.129	31.38	.000	.602
Post-Salerno	-.257	.087	-2.96	.003	-.040
First Amendment (free speech)	1.047	.102	10.25	.000	.125
Federal Statute	-.088	.108	-.82	.412	n.s.
Supremacy Clause	1.612	.423	3.81	.000	.146
Abortion	-.066	.214	-.31	.759	n.s.
Commerce Clause	.498	.153	3.25	.001	.066
Solicitor General Opposition (Amicus)	-.084	.277	-.31	.760	n.s.
Constant	-.912	.050	-18.23	.000	

Note: Dependent variable: Justice choice to invalidate statute on its face = 1, as applied = 0; N =3143. Standard errors clustered on justice. P-values are two-tailed.

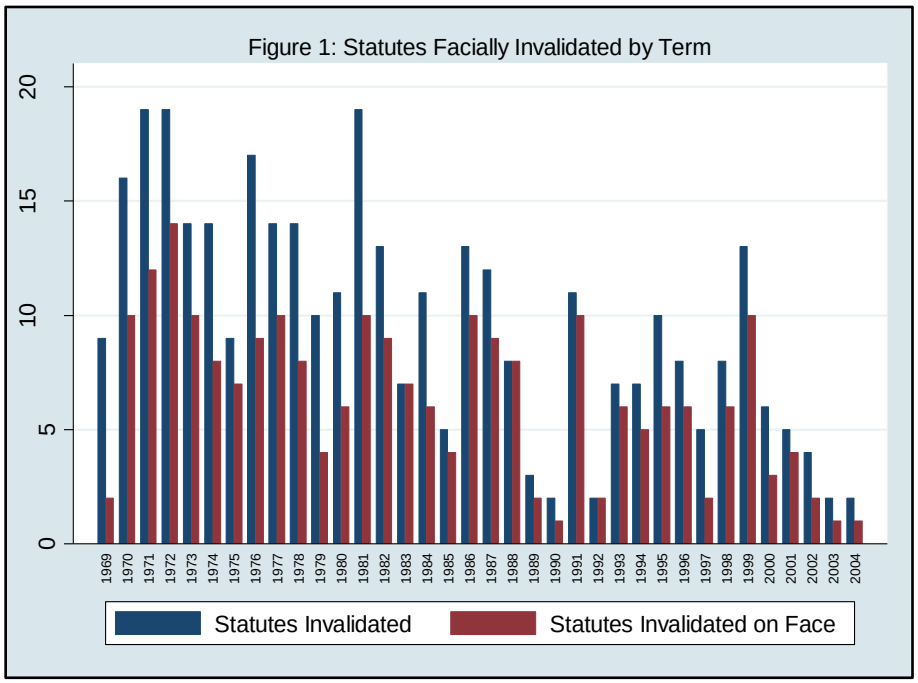


Figure 2: Spatial Representation of SOP Game

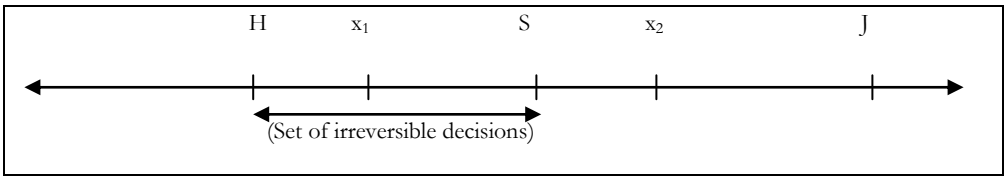
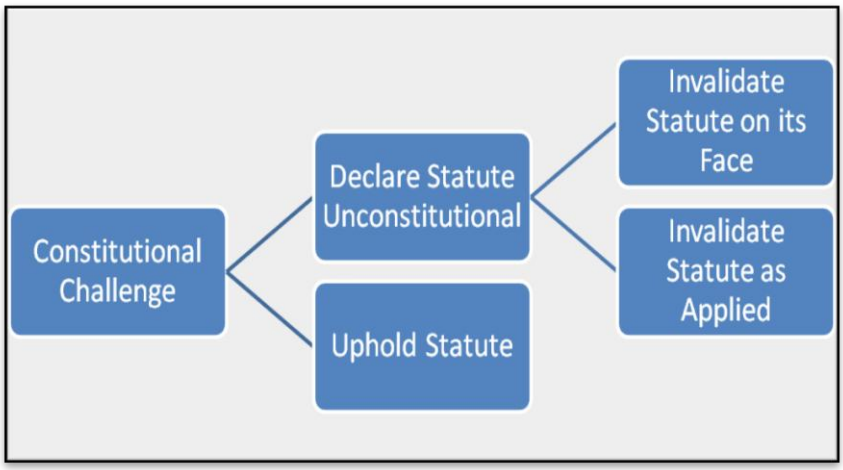


Figure 3: Decision Tree in Constitutional Cases



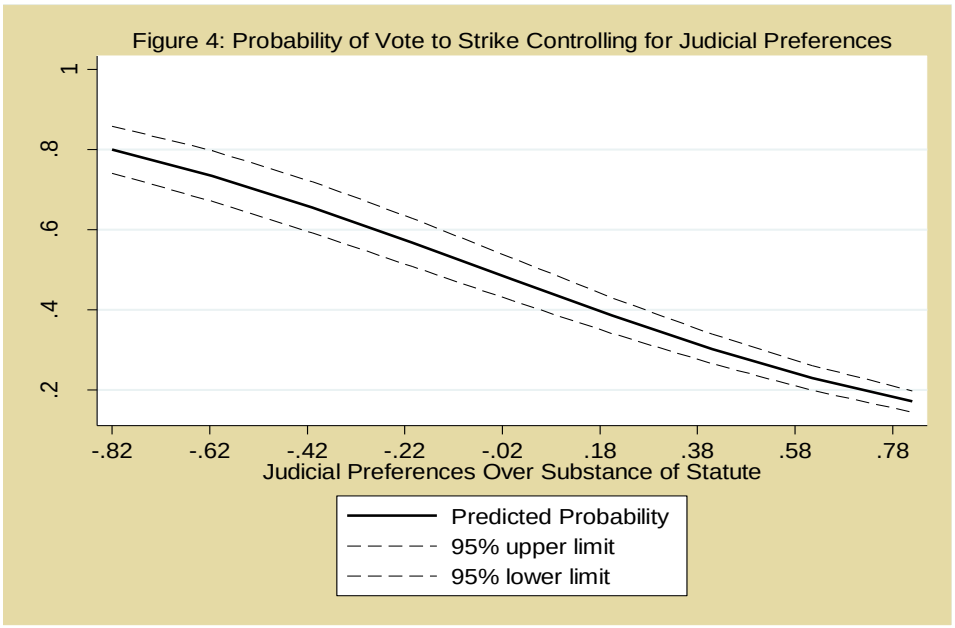


Figure 4: Probability of Vote to Strike Controlling for Judicial Preferences
.2
.4
.6
.8
1
-.82
-.62
-.42
-.22
-.02
.18
.38
.58
.78
Judicial Preferences Over Substance of Statute
Predicted Probability
95% upper limit
95% lower limit

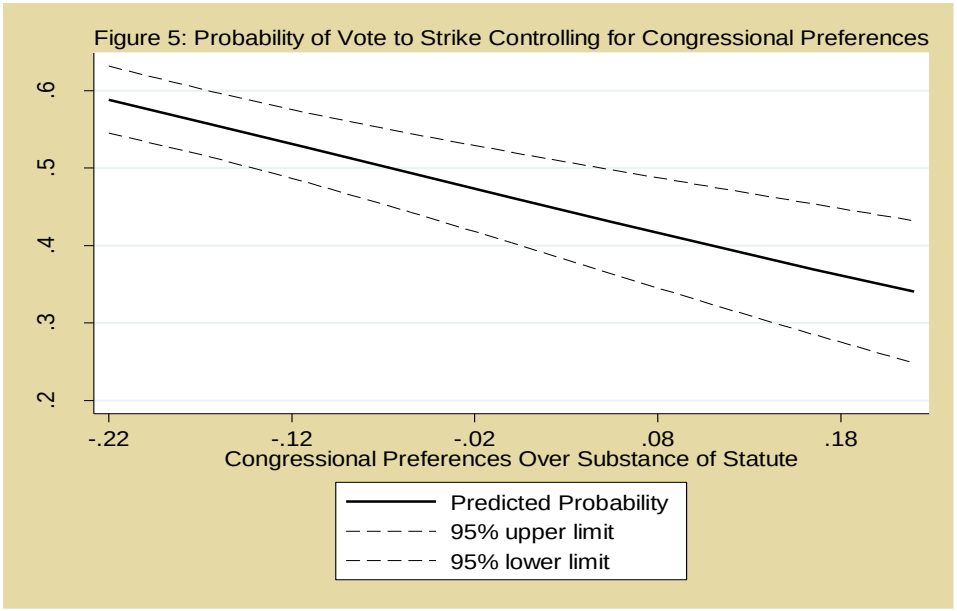


Figure 5: Probability of Vote to Strike Controlling for Congressional Preferences
.2
.3
.4
.5
.6
-.22
-.12
-.02
.08
.18
Congressional Preferences Over Substance of Statute
Predicted Probability
95% upper limit
95% lower limit

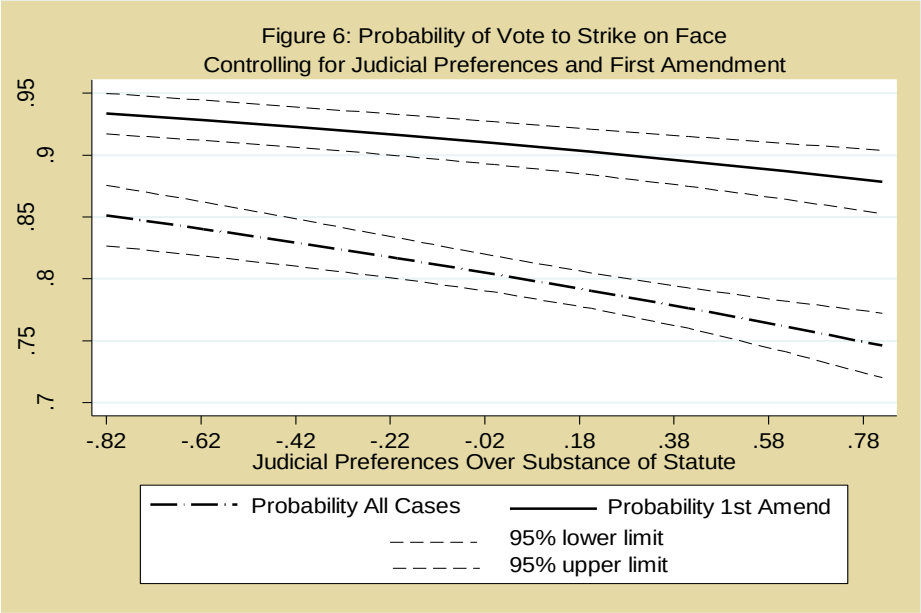


Figure 6: Probability of Vote to Strike on Face
Controlling for Judicial Preferences and First Amendment
.95
.9
.85
.8
.75
.7
-.82
-.62
-.42
-.22
-.02
.18
.38
.58
.78
Judicial Preferences Over Substance of Statute
Probability All Cases
Probability 1st Amend
95% lower limit
95% upper limit

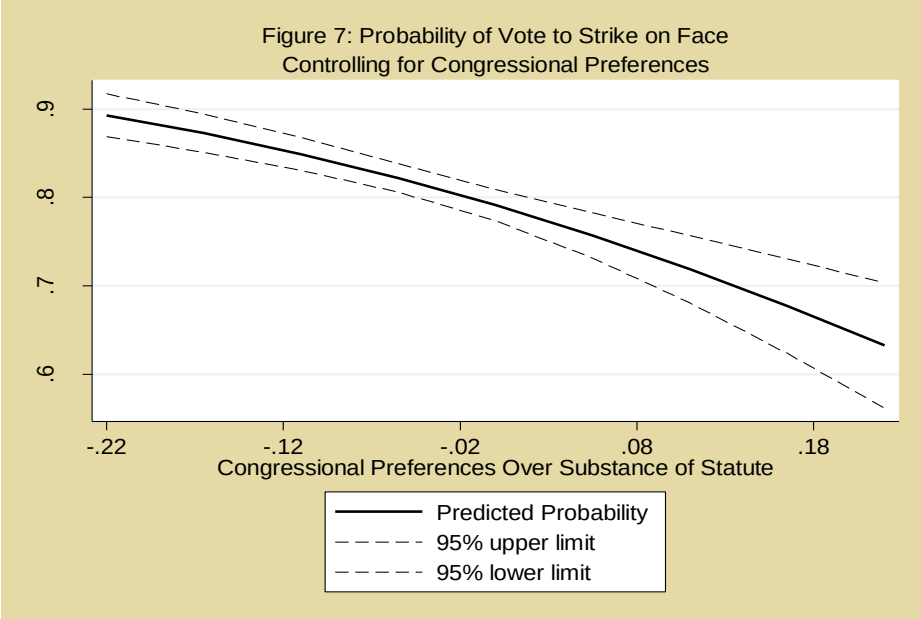


Figure 7: Probability of Vote to Strike on Face
Controlling for Congressional Preferences
.9
.8
.7
.6
-.22
-.12
-.02
.08
.18
Congressional Preferences Over Substance of Statute
Predicted Probability
95% upper limit
95% lower limit

Appendix Table 1: Summary Statistics

Variable	Mean	Std. Dev.	Min	Max
Dependent Variables				
Strike	.486	.500	0	1
On its Face	.670	.470	0	1
Independent Variables				
Ideological Distance between Justice and Congress	.383	.225	.002	.872
Congressional Preference for Statute	-.033	.100	-.211	.211
Judicial Preference for Statute	-.011	.430	-.817	.817
Lower Court Declared Statute Unconstitutional	.517	.500	0	1
Solicitor General Support	.250	.433	0	1
Solicitor General Support (Amicus)	.108	.310	0	1
Solicitor General Opposition (Amicus)	.038	.192	0	1
Amicus Support	1.938	3.416	0	30
Amicus Opposition	2.197	3.013	0	23
Age of Statute	15.845	19.720	1	143
Federal Statute	.275	.447	0	1
Party Argued Statute Facially Invalid	.487	.500	0	1
Post-Salerno	.343	.475	0	1
First Amendment (free speech)	.133	.339	0	1
Supremacy Clause	.013	.115	0	1
Abortion	.030	.169	0	1
Commerce Clause	.087	.281	0	1

Appendix Table 2: Probit Model with Sample Selection
Justices' Votes to Invalidate Statute

Variable	Coefficient	Robust Std. Err.	Z	p-value
Ideological Distance between Justice and Congress	-.223	.274	-.82	.414
Congressional Preference for Statute	-1.346	.276	-4.87	.000
Judicial Preference for Statute	-1.088	.073	-14.87	.000
Lower Court Declared Statute Unconstitutional	-.208	.034	-6.19	.000
Solicitor General Support	-.152	.098	-1.55	.122
Solicitor General Support (Amicus)	-.441	.073	-6.08	.000
Solicitor General Opposition (Amicus)	.318	.066	4.84	.000
Amicus Support	-.028	.007	-4.19	.000
Amicus Opposition	.035	.008	4.33	.000
Age of Statute	-.001	.001	-1.83	.067
Federal Statute	-.380	.142	-2.67	.008
Constant	.495	.097	5.13	.000

Note: Dependent variable is justice choice to invalidate statute = 1, uphold statute = 0; N = 6459. Natural court dummies included but not reported.

Appendix Table 3: Probit Model with Sample Selection
Justices Votes to Strike Statute Facially or As Applied

Variable	Coefficient	Robust Std. Err.	Z	p-value
Ideological Distance between Justice and Congress	-.010	.134	-0.08	.939
Congressional Preference for Statute	-1.987	.287	-6.91	.000
Judicial Preference for Statute	-.465	.133	-3.50	.000
Party Argued Statute Facially Invalid	2.147	.091	23.54	.000
Post-Salerno	-.122	.055	-2.21	.027
First Amendment (free speech)	.474	.065	7.34	.000
Abortion	.001	.117	.01	.991
Commerce Clause	.231	.092	2.51	.012
Supremacy Clause	.894	.272	3.29	.001
Federal Statute	-.146	.080	-1.83	.067
Solicitor General Opposition (Amicus)	.080	.180	.44	.657
Constant	-.740	.120	-6.16	.000
Selection Term (ϱ)	.349	.220	1.59	.113

Note: Dependent variable is justice choice to invalidate statute on its face = 1, as applied = 0; N = 3136.