

## **Severability Doctrine and the Exercise of Judicial Review**

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Abstract: One of the most important doctrines a constitutional court must consider when exercising judicial review is severability doctrine. If declaring a statutory provision unconstitutional, judges must also decide whether that provision may be severed from the statute to allow the remainder to carry the full force of law. While the use of severability by the U.S. Supreme Court has generated substantial controversy among legal scholarship, there is little empirical understanding of the Court's systematic approach to severability. Relying on both legal and political science scholarship, I derive a series of hypotheses about the Court's use of severability. I test these hypotheses on the Court's constitutional decisions on important federal statutes over the post-war period. The analysis shows that the Court's use of severability is driven by ideology: the Court is more likely to find an unconstitutional provision severable when the Court is ideologically inclined to strike the statute.

## **Introduction**

The passage of the Affordable Care Act, the landmark legislation of the Obama administration that overhauled the American healthcare system, caused intense and immediate backlash from its many critics. Included in the many efforts to stymie the law was a series of lawsuits challenging its constitutionality, the most salient of which culminated in the case *National Federation of Independent Business v. Sebelius* (2012). The most pressing question of the case was whether the statute's individual mandate, which required virtually all persons in the U.S. to purchase health insurance, was under Congress' authority in Article I of the Constitution. While the Obama administration argued that the mandate was well within the government's powers to regulate commerce in the healthcare industry given the substantial problems within the industry, opponents argued that the mandate greatly exceeded the limits of the Commerce Clause and, if upheld on those grounds, would represent a gross threat to the liberty of individual Americans.

An equally important, if less salient, part of this case centered on what would happen to the rest of the Affordable Care Act if the individual mandate was ruled unconstitutional. Opponents of the Act argued that because the individual mandate was at the core of the legislation, and that Congress would have likely not passed legislation if it were not included, the entirety of the Act must be invalidated if the individual mandate were ruled unconstitutional. Unusually, the Obama administration offered a limited agreement; while most of the Act need not be tied to the mandate, Congress would not have passed a provision requiring companies to offer insurance to individuals with preexisting conditions without it and should also be invalidated if the mandate were ruled unconstitutional. This issue caused a legal firestorm, with the vast majority of amicus briefs focusing on the issue rather than the merits of the individual

mandates or other provisions at issue. Even the justices requested additional amicus briefs arguing certain perspectives on the issue, signaling just how important it was for their final decision.

The Court eventually found the individual mandate to be constitutional exercise of taxing powers, as opposed to the regulation of commerce, short-circuiting the need to decide how crucial the individual mandate was the rest of the Act. New litigation on the mandate triggered by reforms during the Trump administration, however, once again raise this question. After legislation removed all financial penalties for violating the individual mandate, new lawsuits claimed that an individual mandate without a financial penalty could not be constituted as a tax and, as a result, is unconstitutional. Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas agreed in *Texas et. al. v. U.S. et al.* (2018), further arguing that given the Court's decision in *National Federation* that the mandate was integral to the entirety of the law and therefore the whole statute must be invalidated. As of this writing, the legal fate of the Affordable Care Act is still uncertain given the ongoing disputes over the individual mandate.

The ongoing saga over the constitutionality of the Affordable Care Act highlights the importance of severability doctrine in constitutional decisionmaking. A technical legal doctrine constitutional courts must engage when ruling a statutory provision as unconstitutional, a court may “sever” an unconstitutional provision from a statute so that the remainder still carries the full force of law. Judges justify severability in their jurisprudence by reference to judicial deference to legislatures, as severance allows a court to preserve as much of the original statute as possible when dealing with constitutionally infirm provisions. If a statutory provision is inseverable, however, the court will strike down not only the unconstitutional provision but also interrelated, otherwise constitutional provisions of that same statute. Judges justify rulings of

inseverability again through judicial deference, arguing that courts must invalidate more statutory provisions if the legislature would not have enacted them without also passing the problematic provision(s).

Severability doctrine is widely discussed within legal scholarship. There is large debate, however, about whether constitutional courts, and more specifically the U.S. Supreme Court, consistently approach the doctrine of severability. At best, inconsistent application of severability doctrine would be an unforced error on an institution known for principled decisionmaking. At worst, severability may function as a mask for judicial activism driven by ideological motives. But while there is strong concern about the Court's application of severability doctrine, there has yet to be positive analysis on the subject; this makes it ripe for study by empirically-oriented scholars.

This paper analyzes the systematic determinants of severability decisions in constitutional law. I begin by elaborating on the concept of judicial deference and its roots in the institutional constraints of constitutional courts. I next examine the history and legal scholarship on severability doctrine. I proceed to develop a series of hypotheses about the determinants of severability grounded in both positive and legal theory. I then test these hypotheses on U.S. Supreme Court constitutional decisions on important federal statutes from 1949-2011. The analysis reveals that the Court's use of severability is driven by ideology: the Court is more likely to find an unconstitutional provision severable when the Court is ideologically inclined to strike the statute.

### **Judicial Deference and the Maintenance of Judicial Review**

The most important principle for constitutional courts exercising judicial review is deference to the legislature. While constitutional courts are vested with the authority to invalidate

statutes by declaring them unconstitutional, they are not vested with the authority to create law. Thus judges should be careful not to let the desirability of a law from a policy perspective contaminate the legitimacy of a law from a constitutional perspective (Bickel 1986). Such a view has been around since the emergence of modern democracy; Thomas Jefferson once expressed that “one single object [earns] the endless gratitude of society; that of restraining judges from usurping legislation. And with no body of men is this restraint more wanting than with the judges of what is commonly called our general government”. In the American context, this principle has manifested itself in the U.S. Supreme Court’s reluctance to strike down federal laws when given the opportunity (Dahl 1957, Bailey and Maltzman 2011).

As with most norms in political institutions, judicial deference has roots in the incentives constitutional courts have to respect legislatures. Within the separation of powers, judicial review is the strongest tool constitutional courts have to influence public policy. Such a strong power naturally draws the attention of elected officials, who do not want judicial review exercised arbitrarily. What is more, elected officials have a variety of tools for influencing the conduct of judges in these cases. The U.S. Congress and president, for example, can influence the Supreme Court by ignoring or circumventing previous decisions (Epstein and Knight 1997, Meernik and Ignagni 1997), starving the Court of resources like support staff and salary increases (Ura and Wohlfarth 2010), limiting the amount of discretion the Court has in determining its docket (Harvey 2013), pursuing constitutional changes that would damage it, or even impeach the justices (Whittington 2007). Given that judicial review occurs in the shadow of reprisal by elected officials, its existence and continued maintenance is an empirical puzzle judicial scholars have been analyzing for decades.

Some scholars argue that judicial legitimacy allows constitutional courts in general, and the U.S. Supreme Court in particular, make constitutional decision without fear of retaliation. Courts in modern democracies often have broad support among their publics (Gibson, Caldeira, and Baird 1998, Gibson, Caldiera, and Spence 2003). This support may cause voters to abandon officials that engage in court-curbing, which in turn insulates courts from the other branches of government who are fearful of losing their jobs. In turn, constitutional courts are free to strike down laws regardless of government preferences (Carruba 2009). In the U.S. context, this view is advocated by supporters of the attitudinal model of judicial decision-making, arguing that the “negative political consequences, electoral or otherwise, of limiting judicial independence far outweigh whatever short-run policy gains Congress might gain by reining in the Court” (Segal and Spaeth 2002, pg. 94).

More recent research shows, however, that variations in legitimacy weigh heavily on constitutional courts when deciding whether to strike statutes. Ura and his coauthors similarly show that the U.S. Supreme Court’s popularity relative to Congress influences how both institutions approach their interactions with one another, including the use of judicial review (Ura and Wohlfarth 2010, Merrill, Conway, and Ura 2017). Clark (2009) shows that the Court invalidates fewer laws when the number of court-curbing bills increases, a signal of the Court’s popularity. Additional comparative evidence shows that constitutional courts are vulnerable to punishment when support is low (Helmke 2010, Helmke and Staton 2011).

Furthermore, there is considerable evidence that the U.S. Supreme Court takes into account the tools and preferences of elected officials when making constitutional decisions. Hall (2014) shows that the Court is sensitive to the preferences of elected officials when implementation of its constitutional decisions lies outside the judicial system. McGuire (2004)

shows that the Court is sensitive to its institutionalization when using its powers of judicial review; such institutionalization is the direct result of ordinary legislation by Congress. The Court is even directly influenced by the preferences of elected officials when deciding to hear cases (Hall and Ura 2015) and strike laws (Bergara, Richman, and Spiller 2003), though there is evidence to the contrary (Owens 2010, Segal, Westerland, and Lindquist 2011). Overall, however, there is considerable evidence that the U.S. Supreme Court must take the actions of elected officials into account when deciding whether a government action is unconstitutional.

### **The Jurisprudence of Severability**

Once the U.S. Supreme Court has decided that a government action is unconstitutional, however, its decisionmaking does not simply end. It must also make a series of decisions in order to properly remedy the unconstitutional action. In general, the Court will rule as narrowly as possible as a means of deference to avoid needlessly frustrating legislative will. They can do this using one of two means (Sherwin 2000). First, the Court might decide that a statute is only unconstitutional as applied to a particular case (Lindquist and Corley 2011). If it does so, the statute still carries the full force of law except for the specific circumstances that led to the litigation. For example, Title III of the Voting Rights Act Amendments of 1970 set the voting age in national, state, and local elections to 18, an act which contradicted many age requirements set by state law. In *Oregon v. Mitchell* (1970), the Supreme Court ruled that while Congress had the authority to set requirements for national elections, it could not set voting age requirements for state and local elections. Thus the Court ruled that Title III was unconstitutional as applied to state and local elections, but allowed the law to continue to be applied to national elections.

Sometimes, however, certain portions of statutes have no constitutional applications; these are called facially unconstitutional. In the event of facially unconstitutional statutory

provision, the Court can use its second means of deferring to Congress by ruling that the provision is severable (Metzger 2004). If the offending section is severable, also at times referred to as separable, then the unconstitutional portion no longer carries the full force of the law while the rest of the statute does. In *Marbury v. Madison*, the Court ruled that Congress could not change the Court's jurisdiction through ordinary legislation. They ruled that Section 13 of the Judiciary Act of 1802 was unconstitutional, but severable; the remaining parts could still function as law. Indeed, the dominant paradigm for the first century of judicial review was that any provision of a facially unconstitutional law were severable (Nagle 1993). As a parallel in modern times, the majority in *National Federation* ruled that while the Affordable Care Act's expansion of Medicaid was unconstitutional, as it violated the principle of federalism by attempting to coerce action by the states, this provision was severable from the rest of the statute and could function independently as law.

If an offending section is facially invalid but not severable from other provisions of the statute, up to and including the entirety of the statute, then all of those provisions are ruled unconstitutional; this includes those parts of the law that, in absence of the offending section, would otherwise be constitutional. The first instance of inseparability was *Warren v. Mayor & Aldermen of Charlestown*, when the Supreme Judicial Court of Massachusetts invalidated a statute authorizing the annexation of Charlestown to Boston. When the Supreme Judicial Court determined that the annexation was unconstitutional, all subsequent provisions of the law detailing the implications of the annexation were also ruled unconstitutional.

Why might a court choose to strike the entirety of a statute due to a single section being unconstitutional? Surprisingly, striking a law as inseparable is also justified from a perspective of judicial deference. If a legislature would pass a statute even without a constitutionally



problematic provision, the Court should rule it as severable. If not, however, the Court should rule it as inseverable. Chief Justice Shaw, who issued the *Warren* decision, explained his decision from a viewpoint of judicial deference:

“that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.”

This deference to legislative intent was subsequently adopted by the U.S. Supreme Court when it first confronted issues of severability in *Champlin Refining Company v. Corporation Commission of Oklahoma* (1932); the Court generally assumes severability “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not”. This approach has changed little in subsequent Supreme Court jurisprudence. In *United States v. Booker*, the Court invalidated a provision of Sentencing Reform Act that created an appellate review process for mandatory prison sentences because it ruled that those sentences themselves were unconstitutional.

### **Critical Views of Severability Doctrine**

While grounded in the basis of judicial deference, the Court’s approach to severability is controversial amongst legal academics. From a normative angle, some scholars do not accept severability as judicial deference to the legislature. Noah (1999) views severance as a form of judicial policymaking, comparing the severing of a statute to the line-item veto that the Court

ruled as an unconstitutional encroachment of legislative authority in *Clinton v. City of New York* (1998). The only consistent way for the Court to approach unconstitutional legislation is to presume inseverability in legislation unless explicitly stated; as will be discussed below, such an approach is not currently used.

Empirically, scholars have questioned whether the Court consistently applies severability doctrine. Some scholars have criticized the application of severability in different areas of law. Stern (1937) noted that the Court might presume severability more often for state laws and national criminal laws. Jona (2008) argues that inseverability might be more common in First Amendment and Equal Protection cases. Such an approach is certainly possible, given the increasing evidence that legal considerations play a large role in some, but not all, cases before the U.S. Supreme Court (Bailey and Maltzman 2011). But the most common view is that there does not appear any systematic application of severability doctrine based on jurisprudence (Stern 1937, Nagle 1993, Movsesian 1995, Metzger 2004, Gans 2008).

In the worst possible scenario, legal scholars fear that severability doctrine is employed for ideological ends (Stern 1937, Noah 1999, Gans 2008). Justices might selectively declare provisions severable and inseverable in order to pursue other ends, ideological or otherwise. This viewpoint is consistent with the attitudinal model, which posits that ideological considerations alone drive U.S. Supreme Court decision-making (Spaeth and Segal 2002). This leads to a clear hypothesis:

*Severability as Ideology Hypothesis:* a court's decision to find an unconstitutional provision inseverable from other provisions should be affected by the court's ideological predispositions in that case.

The specter that severability doctrine might not be systematically used by the Court should be of great interest to both legal scholars and political scientists. That severability doctrine might further be driven by simple ideological considerations would also be of great interest. But rather than simply testing predictions from legal scholarship, it is worth applying positive models of political institutions to see if they can give a systematic explanation to the Court's use of severability doctrine. I now turn to the legislative and judicial politics literatures to derive relevant testable hypotheses.

### **Severability Doctrine and Severability Clauses**

As discussed at length earlier, Congress has many tools at its disposal to respond to Court decisions and coordinately construct the Constitution (Meernik and Ignagni 1997). But Congress does not only rely on ex post retaliation when confronted with the possibility of judicial review. Legislators can anticipate judicial review when crafting legislation, adding in provisions that guide the decision-making of the courts when reviewing the constitutionality of a statute. One of the most prominent provisions added to statutes are severability clauses (Nagle 1993). Utilized soon after American courts began employing severability doctrine, these clauses specifically state that certain or all provisions within a statute are severable from the rest of the statute. The Budget Control Act of 2011, for example, contained the following severability clause: "If any provision of this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act and the application of this Act to any other person or circumstance shall not be affected."

Severability clauses are readily discussed in Supreme Court cases. In *National Federation*, the lack of a severability clause garnered significant debate in the briefs filed in the case. The petitioners, believing the individual mandate to be unconstitutional, argued that because

the House version of the statute originally contained a severability clause but the clause was removed prior to passage, this should lead to the view that the provisions of the Affordable Care Act are inseverable and the entirety of the Act should be invalidated. The Obama administration made a limited concession on this point; if the mandate were ruled unconstitutional, it was inseverable from the provisions guaranteeing the issuance of insurance policies to individuals with preexisting medical conditions.

Legal scholars have criticized how the Court approaches severability clauses. The Court's current jurisprudence on these clauses, stated in *Alaska Airlines v. Brock* (1987), is "the inclusion of such a clause creates a presumption that Congress did not intend the validity of [the entirety of a statute] to depend on the validity of the constitutionally offensive provision." But just two decades earlier in *United States v. Jackson* (1968), the Court frankly stated that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." These statements infuriate many scholars, who see such statements as contravening legislative intent and entering into the realm of judicial policymaking (Nagle 1993, Gans 2008).

Scholars have further argued that even if the Court consistently approaches severability clauses, their impact is limited given how the Court approaches severability doctrine as a whole. When approaching matters of severability, the Court does not approach each statute with a blank slate. Instead, the Court generally presumes severability for a statute, even if those statutes do not have a severability clause (Metzger 2004, Gans 2008). This presumption reduces the power of severability clauses, which would also make the Court default to severability. Indeed, there is a significant scholarly claim that severability clauses have no effect on determinations of severability doctrine by the Court.

While severability clauses have garnered much scholarly attention in the legal community, they have not been widely studied by political scientists. The sole study I have found in political science looks at the effect of severability clauses on judicial decision-making in cases only involving statutory questions (Maltzman et al 2014). While certainly a useful contribution in its own right, it sidesteps the core questions about the impact of severability clauses on constitutional law. Thus, we now develop expectations about how severability clauses might affect constitutional law.

I begin with a simple assumption: elected officials pass legislation because they desire the policy change these statutes bring.<sup>1</sup> When crafting legislation, then, they craft them so as to maximize their policy impact. One way in which they might do so is by including a severability clause. If elected officials fear that a statutory provision will be challenged and invalidated, they will include a severability clause in order to preserve the rest of the statute. The Court, then, can interpret the severability clause as a signal of the relative intensity of elected officials' preferences for a statute to be upheld even if faced with constitutional issues. As explained earlier, the Court has a variety of reasons to respond to the influences of elected officials. The clauses, therefore, will encourage the Court to respect the statute's integrity by not striking it down. This leads to a clear hypothesis:

*Constitutional Upholding Hypothesis:* a court should be less likely to rule a statutory provision unconstitutional when that statute includes a severability clause.

Implicit within the above decisionmaking process to include a severability clause is the assumption that it will be relevant in a court case. But why would Members of Congress believe a law would come under review by a court? It may be likely that these clauses are added to

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<sup>1</sup> I am agnostic whether elected officials actually prefer these policies or whether they are preferred by their constituents.

statutes that, at least from the perspective of some legislators, suffer from a somewhat rational objection to its constitutionality. Members of Congress would not be alone in recognizing constitutional deficiencies in legislation, however. Savvy attorneys could identify constitutional faults in legislation after it becomes law, which could inspire those opposed to such legislation to fund court challenges. The Supreme Court could also recognize these deficiencies and, wanting to fulfill its role as arbiter of constitutional matters, want to invalidate said legislation. When these statutes come before the Court, it might not strike down every law. But the Court may be more likely to strike a law with a severability clause than without because of the underlying constitutional problems with statutes that led legislators to add a severability clause in the first place.

This is not to suggest that severability clauses serve as a signal of the unconstitutionality of legislation. It would be absurd to think that Congress has a relative advantage in identifying unconstitutional statutory provisions relative to the Supreme Court; it might even be incorrect to assume they have more information relative to motivated attorneys. Rather, Congress only includes these clauses when engaging in constitutionally dubious policymaking and, as a result, the Court is more likely to grant certiorari to a constitutional challenge of these statutes and subsequently rule them unconstitutional. This leads to a contradictory hypothesis:

*Constitutional Invalidation Hypothesis:* a court should be more likely to rule a statutory provision unconstitutional when that statute includes a severability clause.

Beyond the Court's decision to invalidate a statute, severability clauses may also influence judicial decision-making on the legal matters it was designed to address: severability doctrine. The clause instructs a court to sever some provisions of a statute from others if they are declared unconstitutional. Ostensibly, the legislature would include these clauses if it believed

two related propositions: 1) that the Court rules statutory provisions inseverable frequently enough to warrant a legislative response, and 2) that the Court is less likely to rule a statute inseverable if that statute has a severability clause than if it did not. The former proposition is almost trivial, given the prominent examples of inseverability and the low cost of adding the clause. The latter is contestable, as evidenced by legal scholarship on the matter, but leads to a clear hypothesis:

*Severability Clause Hypothesis:* a court should be less likely to rule an unconstitutional provision of a statute inseverable from other provisions when that statute includes a severability clause.

### **Severability Doctrine as Statutory Decisionmaking**

Severability doctrine only becomes relevant when the Court is engaged in constitutional decisionmaking. Yet at its core, severability is a statutory question rather than a constitutional one. If a statute has a severability clause, then the Court's choice is clear: Congress intended for unconstitutional provisions to be severed. In the absence of a clause, the Court must divine the intent of Congress using other means. Such a description clearly puts severability doctrine within the realm of statutory decisionmaking. As a result, positive models of statutory decisionmaking should be applicable to severability doctrine.

There is broad consensus that statutory and constitutional cases involve different approaches to judicial decisionmaking. Of the many differences, one notable difference is the importance of elected officials' preferences (Epstein and Knight 1997). In statutory decisionmaking, elected officials can respond to unfavorable decisions by passing new legislation. In order to make their decisions last, then, the Court must take into account the preferences of elected officials. In contrast, elected officials cannot respond to constitutional

decisions via ordinary legislation. Instead, it can either pursue constitutional changes, which are much more difficult to enact, or court-curbing, a blunt, politically costly attempt to punish courts by changing their level of funding or amount of discretion (Clark 2009). This is not to say that constitutional courts generally, or the U.S. Supreme Court specifically, are completely immune to the influence of elected officials when engaging in constitutional decisionmaking, as previously described. Nevertheless, the Court is seen to be more sensitive to the preferences of elected officials when engaging in statutory decisionmaking.

Perhaps the canonical model of statutory decisionmaking that takes into account the preferences of elected officials is Marks' separation of powers model (2015).<sup>1</sup> Marks explained why Congress would tolerate a statutory Supreme Court decision inconsistent with its preferences. If the pivotal actors in the policy-making process, such as the median member of the House, the median member of the Senate, and the president, share the same interpretation of a particular statutory provision, then they will respond to an unfavorable statutory decision by passing a statute containing said interpretation. Looking down the game tree, the Court would anticipate this reaction and adopt this desirable interpretation so that it is not statutorily overruled.<sup>2</sup> But if a single pivotal member has a different preferred interpretation of the statute, the Court is free to choose a statutory interpretation it prefers so long as it is not too extreme. There is considerable debate as to whether this model has empirical support; proponents of the

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<sup>2</sup> Courts are assumed to not want their decisions statutorily overturned, including the desire to save face and the desire to not waste time issuing decisions that will only be in effect for a short time.



attitudinal model in particular argue for a negligible relationship (Spiller and Gely 1992, Segal 1997, Segal and Spaeth 2002, Marshall, Curry, and Pacelle 2015).

The separation of powers models could predict judicial decisionmaking on severability doctrine in at least two ways. First, elected officials may have preferences over whether a statutory provision should be construed as severable or inseverable. In this instance, it would be straightforward to apply the separation of powers model to arrive at concrete predictions. But while this is a promising line of research in theory, in practice it is likely to not influence Court decisionmaking. Elected officials do not always take positions on cases before the Court, such as explicitly advocating whether a statute is severable or inseverable. Even when they do, such positions might be the result of a moral hazard given that they do not have to make the judgement on severability (Fox and Stephenson 2011). Thus while theoretically possible, such a relationship is unlikely to be observed.

In a more promising vein, the separation of powers model may have a more general influence on severability doctrine. If currently sitting elected officials support a statute under review as a general matter, a ruling of inseverability is inconsequential; the otherwise constitutional provisions can simply be reenacted. Given that the Court does not like to be statutorily overturned, then, it will avoid ruling unconstitutional provisions inseverable. But if even one pivotal policymaker opposes a statute under review, then otherwise constitutional provisions cannot be reenacted. This gives the Court the flexibility to rule provisions as inseverable without the fear of being statutorily overruled. This application of the separation of powers model also makes a clear prediction and, unlike the previous application, pivotal policymakers regularly take positions supporting statutes. This leads to a clear hypothesis:

*Pivotal Support Hypothesis*: a court should be less likely to rule an unconstitutional provision of a statute inseverable from other provisions when the statute is uniformly supported by pivotal policymakers.

## **Research Design**

In order to test the above hypotheses, I need to analyze a set of constitutional court decisions that also employ severability doctrine. The U.S. Supreme Court provides an excellent test case for two reasons. First, the literature on severability doctrine almost exclusively focus on the U.S. Supreme Court, making the Court an ideal place to test my hypotheses. Second, the Court is the subject of a wealth of research on the ideological preferences of its members over a long period of time, with a particular emphasis on the measures of justice ideal points (Segal and Cover 1989, Martin and Quinn 2002, Epstein, Martin, Segal, and Westerland 2007, Bailey and Maltzman 2011). This will allow us to test whether severability doctrine can be predicted by the ideological preferences of the judges who use it. Third, the U.S. Congress regularly includes severability clauses within its statutes. This variation allows for statistical analysis to be conducted on many of the hypotheses. For these reasons, I analyze a subset of U.S. Supreme Court cases from 1949-2011 in which the Court made an explicit decision on the constitutionality of a statute.

Rather than solely focusing on U.S. Supreme Court decisions, however, this analysis draws on a statute-centered approach of previous studies (Hall and Ura 2015, Harvey and Friedman 2006, 2009). The study of judicial review inevitably leads to studying court decisions. Solely studying them in presence of a discretionary docket, as the U.S. Supreme Court has, can lead to sample selection bias as strategic interactions may happen at the certiorari stage. This can negatively impact our ability to make inferences, meaning we must go beyond simply looking at

decisions and look at the statutes which the decisions are about. Thus, the unit of observation in this analysis are federal statutes. Of course, there are difficulties with looking at all federal statutes. Collection of the data would be a monumental task and would thus limit analysis to a small time period. As a middle ground, I analyze a subset of statutes enacted between 1949 and 2011. The subset is whether a law is landmark legislation, as defined by Mayhew (2005). This results in an unbalanced time-series cross-sectional dataset of 368 statutes over the time period.

To identify whether the Court decided on the constitutionality of a statute, I consult both the Supreme Court Database (Spaeth et al 2016) and the Judicial Review of Congress Database (Whittington 2019). Each database was searched for cases where the Court decided on the constitutionality of one of the important statutes. When using the Supreme Court Database, only cases in which the Court used judicial review on a federal statute are examined. All cases were hand-coded as to which statute a case focused on, even those cases that had specific references to statutes in their data.<sup>3</sup> This search resulted in 213 cases on important federal statutes, including 65 where the Court invalidated at least one provision of a statute. Of these invalidations, 5 cases had otherwise constitutional provisions of a statute invalidated because they were inseverable from other unconstitutional provisions.

In order to account for potential sample selection effects, I employ a Heckman multinomial probit model. The first stage is a model of whether the Court decided the constitutionality of an important statute in a given year. The second stage is a model of the Court's decision whether to invalidate, in part or in whole, the statute on constitutional grounds.

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<sup>3</sup> In both databases, there were errors when associating cases with statutes that were revealed during initial data examination that prompted the hand-coding.

Because the Court has many different options when ruling on the constitutionality of a particular section of a statute – constitutional, unconstitutional but severable, unconstitutional and inseverable from other parts of the statute – the second stage must be a multinomial probit model with three possible outcomes. I estimate the model using the `cmp` package developed for Stata by Roodman (2011). The comparison group is a statute that is invalidated but ruled to be severable from the rest of the statute. Standard errors are clustered by statute as the Court often decides multiple cases on a given statute, leading to correlated observations (Box-Steffensmeier and Zorn 2002). In the first stage, I also include cubic polynomials to control for duration dependence (Carter and Signorino 2010) and to provide the necessary instrument to estimate the Heckman model.

One could argue that a more appropriate modelling strategy would be a multinomial probit with four outcomes: constitutional, unconstitutional as applied, facially unconstitutional and severable, and facially unconstitutional and inseverable from other parts of the statute. Such a model would take into account distinctions between facial and as applied invalidations (Lindquist and Corley 2011). I do not use this approach for both theoretical and methodological reasons. Theoretically, there is little distinction between as applied invalidations and facial invalidations that are severable; both are means of preserving the original statute in order to defer to the legislature (Sherwin 2000). In the context of this paper's questions, then, there is no reason to separate the two categories. Methodologically, a Heckman multinomial probit model with four alternatives would not converge during my estimation procedure.

In 17 instances, there were two cases decided on a single statute in a single year. Given this unusual data structure for a duration model, two different approaches were used. The first approach, reported in the replication materials, simply included the case decided earliest in the

year and dropped the latter case. This approach preserves the statute-year structure of the data while excluding cases in an arbitrary manner. As a drawback, however, it increases inefficiency because it discards observations and may even bias inferences if the date of the decision is somehow correlated with the dependent variable.

As an alternative to this approach, I devise a method for including all observations that purposefully breaks the statute-year observation set-up in the data. For every statute-year that saw the Court decide on the constitutionality of a statute, a duplicate observation was created that was coded as not being subject to a challenge and in which the years since the statute was enacted or previously decided upon was set to zero. For a statute-year with multiple cases, only one duplicated observation was created. These additional represent the time after the Court has decided on a case but before the end of the year.<sup>4</sup> Because they represent a subset of time rather than an entire year, they can accommodate more than one case being decided in a given year by simply inserting a later case in between earlier case and this duplicate observation. The results from this approach are reported in the paper; the substantive inferences from the two approaches, however, are virtually identical.

There are three crucial independent variables in this analysis, which I now describe in turn. The first measure is a dummy variable if a statute contains a severability clause. This includes general severability clauses, like the one contained in the Balanced Budget Control Act of 2011. It also includes more specific severability clauses that may only pertain to specific sections within statutes. Because this is a statute-specific variable, I include it in both stages of my analysis. Of the 368 statutes in the sample, 102 have severability clauses.

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<sup>4</sup> Such an approach is not without precedent. For a given statute, the first year it enters the data is the year it was passed and signed into law. But statutes are not passed only at the beginning of the year; rather, they are created at many different points of time. These initial observations, then, do not represent a full year but randomly represent shorter periods of time.

The second variable represents Marks' separation of powers model. I adopt a measure in the literature that estimates whether the current pivotal policymakers support or oppose a given statute under review (Segal, Westerland, and Lindquist 2011, Hall and Ura 2015). I collect the original roll call votes for each public law from VoteView (Lewis et al 2017). Using logit, I then regress these roll call votes on the Common Space Score of Members of Congress and the president (Poole 1998).<sup>5</sup> Using the resulting model coefficients, I can then predict the probability that a future elected official supports a law using their Common Space Score. Note that for those laws passed unanimously or via voice votes in both chambers, there is no variation to run regression models. In these instances, the predicted support for all future officials is 1.

I then identify pivotal actors in the policymaking process, relying on the insights of Krehbiel (1998), and record the minimum level of predicted support to a statute from any of the pivotal actors. I test three different pivot models: the floor median model, the Senate filibuster model, and the party gatekeeping model. Each of these models are outlined in more detail in Hall and Ura (2015).<sup>6</sup> The resulting measure gives the probability that the most hostile pivotal actor supports the law based on their ideology, as measured by Common Space scores. Like the previous variable, this variable is included in both stages of the analysis. While the Pivotal Support Hypothesis only makes predictions for the decision stage, Hall and Ura (2015) have shown how this variable also effects the certiorari stage.

My third measure measures the Court's ideological predispositions in a given case. To measure the court's ideological preferences, I use a combination of Bailey's (2013) ideal point estimates of justices' ideology and the direction of the decision classification from the Supreme

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<sup>5</sup> One statute, public law number 107-40, was predicted perfectly. Coefficients could not be generated it is subsequently excluded from the analysis.

<sup>6</sup> Only the Floor Median Model is presented in the paper; the other models can be found in the replication materials and obtain substantively similar results.

Court Database. If striking a statute was consistent with the median member of the court's ideological predisposition, then the observation is assigned the absolute value of the median member's ideal point. If not, then the observation is assigned the negative of the absolute value of the median member's ideal point. All cases where the ideological implications of a decision were unclear were coded as zero. This results in a measure of the court's attitudes towards the case where positive values indicate the court is ideologically inclined to striking and negative values indicate the court is ideologically opposed to striking.

At the second stage of the model, I control for additional legal doctrines that may influence decisions to strike laws and, more specifically, to strike laws as severable or inseverable. The Court has been noted to approach decisions in certain areas of constitutional laws different than others. Overbreadth doctrine suggests that the Court is more likely to invalidate and find inseverable laws when challenged on free speech grounds, while equal protection doctrine suggests the Court is more likely to invalidate and find inseverable federal laws when challenged on due process grounds (Jona 2008, Lindquist and Corley 2011). Therefore, I also control for whether a free speech or due process challenge was brought against the law under review in the second stages of my analysis.

## **Analysis**

Table 1 contains the results of the first stage of the Heckman model. A few items are worth noting up front. The model supports the use of cubic polynomials as a means of modelling duration dependence within the data. The coefficient of the first power is statistically significant, and a joint Wald test of their coefficients is statistically significant below the 0.001 level. The model replicates prior work showing that as the support for a statute from all pivotal policymakers becomes uniformly positive, the Court is less likely to hear a constitutional

challenge to a statute (Hall and Ura 2015). The finding, however, is not statistically significant, casting some doubt on the robustness of the finding.

**Table 1: Heckman Multinomial Probit Model of Decision to Invalidate an Important Federal Statute, Second Stage**

Severability Clause	0.46** (0.09)
Support of Pivotal Policymaker	-0.23 (0.16)
Years Since Previous Challenge	-0.06* (0.02)
Years Since Previous Challenge <sup>2</sup>	0.00 (0.00)
Years Since Previous Challenge <sup>3</sup>	-0.00 (0.00)
Constant	-1.59** (0.15)
N Stage 1	11852
*p<0.05, **p<0.01, two-tailed tests	
Robust Standard Errors Clustered by Statute in Parentheses	
Table shows Floor Median Model; additional models in the replication materials	

The parameter for severability clauses is also statistically significant. In a given year, the Court is 4% more like to decide the constitutionality of a statute in the sample with a severability clause compared to one without such clauses ( $p < 0.001$ ). Such a finding is consistent with the Constitutional Invalidation Hypothesis: if statutes with severability clauses are more constitutionally problematic than other statutes, then the Court would choose to decide on the constitutionality of these statutes more frequently. Even still, caution must be exercised when interpreting these findings. Because the dependent variable at this stage is whether the Court decided on the constitutionality of a statute in a given year, it subsumes a myriad of decision-making processes: the Court's decision to grant certiorari, the petitioner's decision to appeal a lower court ruling, judges on inferior court's decision in their cases, etc. While this finding does give some preliminary evidence, its interpretation is limited. Even still, the purpose of this first



stage of analysis is not to untangle these processes prior to the merit stage. Rather, it is to control for sample selection bias that happens prior to the merit stage, the subject we turn to now.

Table 2 presents the second stage of the Heckman multinomial probit model. The first column contains the comparison between a statute being ruled as constitutional and being ruled as unconstitutional and severable. The severability parameter is positive and statistically significant: statutes in the sample are with severability clauses are 8% more likely to be found constitutional than unconstitutional and severable ( $p < 0.000$ ). This result provides support for the Constitutional Upholding Hypothesis and does not support the Constitutional Invalidation Hypothesis.

**Table 2: Heckman Multinomial Probit Model of Decision to Invalidate an Important Federal Statute, Second Stage**

	Constitutional	Unconstitutional and Inseverable
Severability Clause	0.72* (0.29)	-0.29 (0.29)
Support of Pivotal Policymaker	0.74 (0.59)	1.35* (0.58)
Court's Ideological Predisposition to Strike	-1.21** (0.45)	-1.09* (0.45)
Freedom of Speech Challenge	-0.90* (0.36)	-0.64* (0.31)
Due Process Challenge	0.63* (0.28)	0.41 (0.26)
Constant	-0.98* (0.46)	1.20* (0.49)
N Stage 2		210
* $p < 0.05$ , ** $p < 0.01$ , two-tailed tests		
Comparison group is Unconstitutional and Severable		
Robust Standard Errors Clustered by Statute are in Parentheses		
Table shows Floor Median Model; additional models in the replication materials		

Most of the control variables in this column perform as expected. When the Court is ideologically predisposed to striking, it is less likely to rule a law as constitutional; this result is largely consistent with previous research (Segal and Spaeth 2002). The Court is also less likely

to find a law constitutional when it is challenged on free speech grounds: a statute in the sample is 3% less likely to be found constitutional when challenged in this way ( $p=0.04$ ). Interestingly, statutes challenged on due process grounds are more likely to be constitutional, not less. While this result goes against the current literature, it is hardly surprising. Due process challenges to statutes are often tacked on to other controversies in order to exhaust the possible litigation strategies. The justices undoubtedly know this and likewise view such challenges with suspicion, according to the results of the model: statutes challenged on due process grounds are 3% more likely to be found constitutional ( $p=0.22$ ). Finally, the support of the pivotal policymaker has no influence on whether a law is constitutional or unconstitutional but severable; this comports well with previous research (Segal, Westerland, and Lindquist 2011, Hall and Ura 2015).

The second column contains the comparison between a statute being ruled as unconstitutional and inseverable and being ruled as unconstitutional and severable. A look at the severability parameter reveals it is negative and statistically insignificant. While this result is in the correct direction, it fails to provide support for the Severability Clause Hypothesis. Despite the Court's current rhetoric concerning severability doctrine, it does not seem to respect the inclusion of a severability clause within a statute. Caution, however, must be used when interpreting this result: a null result is not necessarily indicative of a null relationship (Rainey 2014). Even still, the lack of support for the expected relationship does cast further doubt on whether severability clauses affect judicial decisionmaking.

In contrast, the support of the pivotal policymaker is positive and statistically significant. As elected officials become more uniformly supportive of a statute, the Court is more likely to find a statute inseverable rather than severable. This result completely contradicts the Pivotal Policymaker Hypothesis. Because it does not support my hypothesis, I view this as a null result

caused by chance. The strength of the result, however, may indicate a theoretical explanation that I have yet to consider. The finding should drive further interesting research on this topic.

The parameter for the Court's ideological predisposition is negative and statistically significant. When the Court is ideologically predisposed to striking, it is less likely to rule a statute inseverable rather than severable. This result provides support for the Severability as Ideology Hypothesis and indicates that critics concerns of severability doctrine are well-founded; ideology does play a role in severability determinations. From the results, it appears severability serves as a convenient tool for the Court to pick and choose which statutory provisions it wants in effect.

One of the control variables shows an interesting result. The free speech variable is negative and statistically significant. The Court is less likely to find a statute inseverable when it is challenged with a freedom of speech violation. While there was no formal hypothesis about this variable, it contradicts expectations from the literature that suggest that the Court is more likely to find statutes inseverable when challenged with a freedom of speech violation (Jona 2008). Whether this result is a null result or indicative of a different decisionmaking process should be of future interest to scholars. Meanwhile, the due process coefficient is statistically insignificant and close to zero.

Finally, a word about selection effects. While not presented explicitly, my model provides strong evidence that sample selection bias would be problematic outside of a Heckman modelling strategy; these results can be found in the replication materials. The result gives credibility to the many fears scholars have about selection effects when studying U.S. Supreme Court decisions. Unfortunately, many prior studies that use Heckman models do not explicitly state whether there is evidence of selection bias, instead employing them only because of the

possibility of such bias (Hall and Ura 2015, Harvey and Friedman 2009). In future research, scholars should be more explicit about their findings.

## **Discussion**

This study analyzed the determinants of severability doctrine in U.S. Supreme Court decisionmaking. Despite concern to the contrary, there are systematic influences of the Court's decision to rule a statute inseverable rather than severable. Some of the results support the suspicions of the legal community: the Court does not seem to consistently employ severability clauses in their decisions using severability clauses but does seem to consistently use its own ideological predispositions. Other results support positive theories derived from political science scholarship: the Court is more likely to find a statute constitutional when it includes a severability clause.

How do these results align with the principle of judicial deference to legislatures? The absence of a predictable relationship between severability doctrine and severability clauses indicates that judicial deference is not an important consideration in cases where the doctrine is relevant. The presence of a predictable relationship between severability doctrine and the Court's ideology further compounds this concerning result. Yet the Court does seem to show deference when it upholds as constitutional statutes with severability clauses. My findings are decidedly mixed on the point.

The results of the study indicate that the Court does not rely on severability clauses as intended. But this finding begs the question: why does Congress include these clauses in the first place? Indeed, there is no existing study that systematically analyzes when Congress includes severance clauses in legislation. The area is ripe for study and will likely yield additional insight into the legislative process.

Additionally, the results of the study also beg questions as to the effects of inseverability clauses. These less common clauses have the opposite function of severability clauses, stating that several, possibly all of the provisions of a statute are inseverable and if one is struck down, all have to be struck down. While these clauses are rarely adopted by Congress, they are more frequently included in state legislation. There is some evidence that these clauses are taken more seriously than severability clauses by American courts, which could lead to different findings (Friedman 1997). When these clauses are included in legislation and what effect they might have on judicial decision-making are open questions that scholars should consider in future research.

This study is not without limitations. There is concern about the generalizability of the findings, given that the research design focuses on statutes that are regarded as important. But the focus on important statutes excludes statutes with moderate to minor importance. In these cases, it is entirely possible that the results would differ and would be an interesting avenue for future research.

This study also approaches judicial review from a countermajoritarian perspective: elected officials do not desire their laws to be invalidated. There is an influential body of literature, however, that argues the opposite: judicial review can be majoritarian and, at times, elected officials may desire judicial review (Whittington 2007, Fox and Stephenson 2011). It is entirely possible that new theoretical insights could be developed by approaching severability from a majoritarian perspective; these insights could then be tested empirically. Such a line of inquiry is promising for future research.

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