**I. Introduction**

At the heart of *National Federation of Independent Business v. Sebelius* (2012), the landmark U.S. Supreme Court case on the constitutionality of the Affordable Care Act, was the question of whether the statute could constitutionally require virtually all persons in the U.S. to purchase health insurance. An equally important, if less salient, part of this case centered upon what would happen to the rest of the Affordable Care Act if this individual mandate was ruled unconstitutional. Opponents of the Act argued that because the individual mandate was at the core of the statute, 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 the mandate and thus it should also be invalidated if the mandate were ruled unconstitutional.

This issue caused a legal firestorm, triggering dozens of amicus briefs focusing on severability rather than the merits of the individual mandate or other provisions at issue. Even the justices requested additional amicus briefs specifically addressing severability, signaling just how important it was for their final decision. Eventually, the Court found the individual mandate to be a constitutional exercise of taxing powers, short-circuiting the need to decide the severability of the mandate. New litigation triggered by reforms during the Trump administration, however, once again raised the question of severability. After legislation removed all financial penalties for violating the individual mandate, new lawsuits claimed that a 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, the whole statute must be invalidated. This invalidation was reversed by the Supreme Court in *California v. Texas* (2021), though on a procedural issue without addressing the merits of the severability claim.

The saga over the constitutionality of the Affordable Care Act highlights the importance of severability doctrine in constitutional decisionmaking. After deciding a statutory provision is unconstitutional, a constitutional court may “sever” that provision from its statute so that the remainder still carries the full force of law. If a statutory provision is not severable, however, the court will strike down not only the unconstitutional provision but also interrelated, otherwise constitutional provisions of that same statute. Severability routinely comes into play in the decisions of constitutional courts. In the data analyzed in this study, for example, 14% of cases discuss the severability of allegedly unconstitutional statutory provisions. And as shown in *National Federation*, it can have immense policy consequences.

Severability doctrine is widely discussed within legal scholarship, both referencing American courts and internationally (Nightingale 2016, Ong 2019). There is large debate, however, about whether constitutional courts, and more specifically the U.S. Supreme Court, consistently approach severability doctrine. 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 to ground such debate. Such grounding is necessary to evaluate the veracity of legal scholars’ claims, making the topic ripe for study.

This paper analyzes the systematic determinants of severability decisions in constitutional law. I begin by elaborating on the different models of judicial decisionmaking and how they apply to judicial review. 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 shows that both political and legal considerations influence the Court’s severability doctrine, simultaneously fueling and allaying the criticisms of the legal community. I close by discussing how these results fit into broader social science scholarship and how they should inform normative debates in the legal community going forward.

**II. History of Severability Doctrine**

When exercising judicial review, a constitutional court does not only evaluate the constitutionality of a statute. It must also decide the fate of the statute given its unconstitutional application. While a court can totally invalidate a statute, there are multiple saving constructions it can employ to preserve a statute as a means of judicial deference (Sherwin 2000). 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.

Sometimes, however, certain portions of statutes have no constitutional applications; these are called facially unconstitutional. In the event a provision is facially unconstitutional, the Court can use a second type of saving construction 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* (1803), the Court ruled that Congress could not change the Court’s original 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).

If an unconstitutional provision is not severable from other provisions of the statute, up to and including the entirety of the statute, then all of those other 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 a constitutional court ruling a statutory provision inseverable, or finding an unconstitutional provision is not severable from other provisions, was *Warren v. Mayor & Aldermen of Charlestown* (1854)*,* 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. Though this first articulation of severability doctrine came from a single American state, it has since been adopted by the other American states, American federal courts, and other countries like Canada, Germany, and Singapore (Nightingale 2016, Ong 2019).

Though inseverability invalidates more a statute than is strictly necessary from a constitutional perspective, judges justify its use by appealing to judicial deference to legislative intent. If a legislature would pass a statute even without a constitutionally problematic provision, a constitutional court should sever that provision from the statute. If not, however, that court should invalidate the statute as a whole. 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.”

**III. Severability as Judicial Activism**

While grounded in the basis of judicial deference, the U.S. Supreme Court’s approach to severability is controversial amongst legal academics on both normative and empirical grounds. From a normative angle, some scholars do not accept severability as judicial deference to the legislature. Noah (1999) views severing a statute as a form of judicial encroachment on legislative authority, comparing the severing of a statute to the line-item veto. As the Court ruled in *Clinton v. City of New York* (1998), the line-item veto undermines the separation of powers and is therefore unconstitutional. Similarly, Noah argues that severability also undermines the separation of powers and that the only consistent way for the Court to approach unconstitutional legislation is to presume a provision is not severable unless explicitly stated otherwise.

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. Dorf (1994) argues that severability is less common in freedom of speech cases under the First Amendment due to overbreadth doctrine (see also Jona 2008). But the most common view is that there does not appear to be any systematic application of severability doctrine based on jurisprudence (Stern 1937, Nagle 1993, Metzger 2004, Gans 2008).

In the worst possible scenario, legal scholars fear that severability doctrine is employed for judicial activism (Stern 1937, Noah 1999, Gans 2008). Justices might selectively declare provisions severable as a means of rewriting statutes to their own end. While the legal literature leaves unclear what goals justices might pursue using severability, political science literature has routinely identified judges as ideological actors pursuing their own policy goals (Segal and Spaeth 2002). The attitudinal model specifically suggests that the U.S. Supreme Court’s enduring popularity and constitutional protections give it broad leeway to pursue ideological goals with their rulings. Indeed, a plethora of evidence exists demonstrating that the justices pursue ideological rulings in all types of cases before the Court, including cases featuring judicial review (Segal, Westerland, and Lindquist 2011, Harvey 2013).

At first glance, inseverability may seem to have the greatest potential to achieve the policy goals of judges because it gives them an opportunity to dispense with the largest amount of statutory text. But inseverability is a blunt instrument for policy change, and total invalidation of a statute will often do more harm than good to judges’ policy objectives when judges approve of some of the policy changes in the underlying statute. Instead, the slight alterations to a statute achieved via severability provide judges a more tailored method for achieving their policy goals. Indeed, it is for this reason why Noah (1999) and others criticize severability as giving constitutional courts legislative functions.

A similar dynamic is observed when examining veto bargaining between a legislature and an executive. Dearden and Husted (1993) create a formal model of budgetary politics that considers both a line-item veto and a traditional veto. The budgetary goals of an executive are easier to achieve when the executive possesses a line-item veto. In an examination of budgetary processes in the American states, they find that the actual budget for a state is more similar to the governor’s proposed budget when the governor has access to a line-item veto rather than a traditional veto. Given the noted similarities between severability and line-item vetoes, this is strong evidence indicating that severability is the preferred means for constitutional courts to pursue ideological goals. Therefore, I hypothesize:

*Ideological Severability Hypothesis:* a court should be more likely to rule a statutory provision severable from other provisions when the court is ideologically predisposed to striking the statute.

While early research in judicial politics supported the attitudinal model as applied to constitutional decisionmaking, more recent research shows that even the U.S. Supreme Court must be strategic when striking down statutes (Epstein and Knight 1997). Variation in the popularity of constitutional courts influences how elected officials engage with them which, in turn, affects how courts exercise judicial review (Helmke 2010, Ura and Wohlfarth 2010, Merrill, Conway, and Ura 2017). Because courts are not invulnerable institutions, they are sensitive to the preferences of elected officials when pursuing their own agendas. The U.S. Supreme Court, for example, is 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). The totality of this literature demonstrates that constitutional courts do pursue their own ideological agendas when exercising judicial review but must be strategic when doing so.

As mentioned earlier, inseverability is a blunt instrument for policy change. If used to invalidate a large portion of a statute, the resulting dramatic shift in policy could trigger response legislation by a legislature looking to remedy the gap in policy. This would undo at least some judicially-created policy change and squander the time and resources of the court. Even more threateningly, a hostile legislature may ignore the court’s ruling and simply reenact the statute unchanged, nullifying policy gains and triggering a constitutional crisis (Epstein and Knight 1997, Meernik and Ignagni 1997).

A more strategic approach would suggest that a court should rule an unconstitutional statutory provision severable because such a ruling will be a more durable means for the court to affect policy change (Gans 2008). Legislatures have limited agendas due to time constraints and prioritizes legislation that results in the greatest policy gains. While a legislature may respond to the total invalidation of a statute due to the large policy shift it would cause, simply severing an unconstitutional provision is a comparatively smaller shift. A legislature should be less likely to respond to a severability ruling, making the policy change durable. Anticipating this, a court will choose to sever an unconstitutional provision from a statute when seeking to advances its ideological goals in order to circumvent a response.

This is not to suggest that a constitutional court is always mindful of a legislative response. While legislatures have an overall preference for constitutional courts to invalidate as little of their statutes as possible, such a relationship is likely conditional. A court facing an ideologically hostile legislature may very well trigger a crisis after a particularly unfavorable ruling. But a friendly legislature is less likely to do so, as the long-term gains of a friendly constitutional court outweigh any short-term costs an unfavorable ruling might have. If a legislature actually dislikes the statute under review, then it might welcome a court’s ability to invalidate as much of a statute as possible.

In the American context, severability decisions might be best described by Marks’ separation of powers model (2015). 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 featuring said interpretation. Looking down the game tree, the Court would anticipate this reaction and adopt this desirable interpretation to save face and wasting time and resources. 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 attitudinal model in particular argue for a negligible relationship (Spiller and Gely 1992, Segal 1997, Segal and Spaeth 2002, Marshall, Curry, and Pacelle 2015).

While the issue of severability is only discussed in a case involving constitutional questions, it is, at its core, an instance of statutory decisionmaking. Using both statutory text and outside influences, the Court must decide whether Congress would have intended constitutional provisions to function as law in the absence of an unconstitutional provision. Thus, Marks’ separation of powers model directly applies in this context. If currently sitting elected officials support a statute under review as a general matter, a ruling of inseverability is inconsequential because the otherwise constitutional provisions can simply be reenacted. In turn, the Court will avoid wasting its time and resources in a ruling that is not durable. 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 leads to a conditional version of the previous hypothesis:

*Conditional Ideological Severability Hypothesis*: a court should be more likely to rule a statutory provision severable from other provisions rather than inseverable when the court is ideologically predisposed to striking the statute and the statute is uniformly supported by pivotal policymakers. The court becoming less likely to rule a provision severable as one or more pivotal policymakers oppose the statute.

**IV. Severability Doctrine and Severability Clauses**

As discussed earlier, legislatures have many tools at their disposal to respond to court decisions and coordinately construct the Constitution (Meernik and Ignagni 1997). But ex post retaliation is not the only option available 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 U.S. 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 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 not severable 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 not severable 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 frustrate 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, it generally presumes severability for a statute, even if those statutes do not have a severability clause (Metzger 2004, Gans 2008). This presumption may reduce the power of severability clauses, which would also make the Court default to severability. Indeed, there is a significant cadre of scholars that claim severability clauses have no effect on determinations of severability doctrine by the Court whatsoever.

Empirical support for the influence of legal considerations like severability clauses in judicial decisionmaking was originally scant (Segal and Spaeth 2002). But recent research efforts have demonstrated the clear role that legal considerations have on judicial decisionmaking. Bailey and Maltzman (2011, Bailey 2013) find evidence that doctrines like precedent and deference substantially influence the Court’s decisionmaking independent of ideological and political influences. Indeed, such doctrines substantially influence how the Court exercises judicial review (Bartels 2009). Though not the dispositive forces legal scholars may desire them to be, legal considerations are recognized alongside political considerations as influencing the decisions of constitutional courts.

While there is empirical support for legal doctrines in general, there is little research on the role of severability clauses in judicial decisionmaking. The sole study I have found examines the effect of severability clauses focuses on cases involving statutory questions, rather than constitutional 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 the decisions they were designed to influence. This leaves a notable gap in the literature to test the contentious debate over the role of severability clauses in the use of severability doctrine.

Though severability clauses are unlikely to have an absolute effect on judicial decisionmaking given the known influences of ideology and strategic political considerations, it may very well have an influential role in severability doctrine. This role can be tested using a straightforward hypothesis:

*Severability Clause Hypothesis*: a court should be more likely to rule a statutory provision severable from other provisions when that statute includes a severability clause.

**V. 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 three reasons. First, the literature on severability doctrine largely focuses 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 justices’ ideal points (Martin and Quinn 2002, Bailey and Maltzman 2011). This enables tests of the Ideological Severability Hypothesis. Third, the U.S. Congress regularly includes severability clauses within its statutes. This variation allows for statistical analysis on the Severability Clause Hypothesis. 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 (Harvey and Friedman 2009, Hall and Ura 2015, Vande Kamp 2021). The study of judicial review inevitably leads to studying court decisions. The U.S. Supreme Court has a discretionary docket, however, and this discretion can lead to sample selection bias as strategic interactions may happen at the certiorari stage and even prior. This can negatively impact our ability to make inferences, meaning scholars must go beyond simply looking at decisions and look at the statutes which the decisions are about. Thus, the unit of analysis are federal statutes in a given year. 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 follow Vande Kamp’s (2021) approach and 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) the Judicial Review of Congress Database (Whittington 2019), as well as a dataset created by previous scholars (Vande Kamp 2021). I searched each database for cases where the Court decided on the constitutionality of one of the important statutes. When using the Supreme Court Database, I only examined those cases the Court decided on constitutional grounds. 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.[[1]](#footnote-1)

This search resulted in 93 statutes being challenged in 213 cases. Parts of 43 statutes were invalidated in 65 of those cases. In 30 cases, the justices discussed the severability of the allegedly unconstitutional provisions. However, only 4 statutes in 4 cases had unconstitutional provisions ruled inseverable from otherwise constitutional provisions. While severability is a somewhat common discussion topic in cases, actual instances of inseverability are rare. There were no cases in which the Court invalidate a statute in its entirety; therefore, a statute remains in the sample even if it is invalidated because the Court may choose to hear a second challenge to the statute, a phenomenon that is relatively common.

In order to account for potential sample selection effects, I employ a Heckman multinomial probit model.[[2]](#footnote-2) 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. 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 is a multinomial probit model with three possible outcomes.[[3]](#footnote-3) The comparison group is an unconstitutional but severable statute.

This sample selection model controls for potential sample selection bias at the merits stage, though it does not allow for us to disentangle what social processes are governing whether a statute is granted a constitutional challenge.All variables to be described in this analysis are included in both stages of the model, as needed in a Heckman model. The sole exception is a measure of the number of years since a statute has either been passed or previously challenged in the Court, as well as its cubic polynomials. These variables are included in the first stage in order to control for duration dependence (Carter and Signorino 2010) and to provide the necessary instrument to estimate the Heckman model.[[4]](#footnote-4) In addition, I interact these variables with a dummy variable of whether the constitutionality of a given statute had already been previously considered by the Court. This, along with standard errors clustered by statute, was done because this duration data is characterized by multiple spells, or multiple instances of the Court reviewing the constitutionality of a given statute (Box-Steffensmeier and Zorn 2002).

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, 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 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. This results in a statute having n+1 observations in a given year, where n is the number of cases about the constitutionality of that statute decided in a given year. These additional observations represent the time after the Court has decided on a case but before the end of the year.[[5]](#footnote-5) Because they represent a subset of time, 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.

There are three crucial independent variables in this analysis, which I now describe in turn. The first variable 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).[[6]](#footnote-6) Using the resulting model coefficients, I can then predict the probability that a future elected official supports a law using their Common Space Score.[[7]](#footnote-7) 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). The pivotal actors are come from Hall and Ura’s Party Gatekeeping model: the president, the chamber medians of the House and Senate, the filibuster member in the Senate, and the majority party medians in the House and Senate. The level of predicted support for a statute is calculated for all the pivotal actors. Because any one of a number of pivotal actors can derail a legislative response, my measure of current elected officials support for a statute under review is the estimated probability that the most hostile pivotal actor supports the law based on their ideology, as measured by Common Space scores.

The second measures the Court’s ideological predisposition in a given case. To measure the court’s ideological preferences, I use a combination of the estimates produced for the preceding variable and Bailey’s ideal point estimates of justices’ ideology (2013).[[8]](#footnote-8) In the logit models of the roll call votes for the statutes, the coefficient for the common space variable represents a measure of the conservativeness of a statute. By multiplying this by the negative of Bailey’s ideal point score for the Court’s median, which is an estimate of the conservativeness of the Court, one can craft a measure of the Court’s ideological disagreement with a statute in which more positive values indicate higher levels of disagreement. The variable is then standardized to aid with model convergence.

The third measure is a binary variable indicating 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. Of the 368 statutes in the sample, 102 have severability clauses.

Additional legal variables are included as controls. Stern (1937) argues that the Court approaches severability doctrine differently for criminal statutes than for civil ones. Therefore, I include a binary measure in which a 1 indicates whether a statute is a criminal statute and 0 otherwise. I coded a statute as a 1 if it was classified under the “Law and Crime” major topic in the Policy Agendas Project (2019). Of the 368 statutes, 20 are criminal statutes. Overbreadth doctrine suggests that the Court is more likely to invalidate and find inseverable statutory provisions when challenged on free speech grounds (Dorf 1994, Jona 2008, Lindquist and Corley 2011). Therefore, I include a binary measure in which a 1 indicates whether a statute is challenged on free speech grounds in a case and 0 otherwise. This information was hand-coded based on my reading of the cases. Of the 213 cases, 43 featured freedom of speech challenges.[[9]](#footnote-9)

Multiple robustness checks were performed for this analysis. In addition to the Party Gatekeeping model presented in this paper, multiple other measures of the predicted support of pivotal policymakers are also used. The Floor Median model just uses the president and the chamber medians, while the Senate Filibuster model also includes the filibuster member in the Senate but not the party medians. These results are presented in the supplementary materials. A multinomial probit of just the second stage of the analysis is performed because of concerns about multicollinearity that are unique to Heckman selection models (Puhani 2000). These results are also presented in the supplementary materials.

Finally, the case level variable of the second stage is disaggregated into justice level data. This allows an investigation of justice level variation while also benefitting from an increased sample size. The sample includes all justices who voted to resolve cases on constitutional grounds using the same trichotomous variable of constitutional, unconstitutional but severable, and unconstitutional and inseverable. Whenever ambiguity was present because a justice disagreed with the majority opinion, the vote was coded based on how the justice would have ruled if the justice was authoring a unanimous majority opinion completely under the justice’s discretion. In the 213 cases in the analysis, 1,758 votes were cast to resolve the case on constitutional grounds. 1,134 votes were to find a statutory provision constitutional, while 602 votes were to find a provision unconstitutional but severable. 22 votes were cast to find a statutory provision unconstitutional and inseverable.

These votes were analyzed using a multinomial probit analysis. All variables from the second stage of the Heckman model are included in the analysis. The standard errors continue to be clustered. In order to control for potential correlation between the unobserved justice-level effects and the independent variables, a correlated random effects approach is taken for those variables that have justice-level variation (Bell and Jones 2015, Crisman-Cox 2021).

The only variable that requires recoding for the justice-level data is the ideological predisposition variable; rather than focusing on the predisposition of the Court, it would be more interesting to focus on the predisposition of the justices. I create a measure to do so using Bailey’s ideal point estimates as well as the direction variable from the Supreme Court database. If striking a statute was consistent with a justice’s ideological predisposition, then the vote is assigned the absolute value of the 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 justices’ attitudes towards a case where positive values indicate a justice is ideologically inclined to striking and negative values indicate the justice is ideologically opposed to striking.[[10]](#footnote-10)

**VI. Analysis**

To test the hypotheses presented, I estimate two different Heckman models. The first is an additive model used to test the Ideological Severability Hypothesis and the Severability Clause Hypothesis, the results of which are contained in Table 1. In the first stage of the model, the model for duration dependence is supported by the data. A joint Wald test of the cubic polynomials is statistically significant at the 0.001 level. Similarly, accounting for previous Court decisions on a statute is also supported: its constitutive term is statistically significant and its interaction with the cubic polynomials results in a jointly significant outcome as well.

The coefficient for severability clauses is statistically significant. In a given year, the Court is 3% more likely to decide the constitutionality of a statute in the sample with a severability clause compared to one without such clauses.[[11]](#footnote-11) The criminal statutes coefficient has a similar magnitude and statistical significance; the Court is 4% more likely to decide the constitutionality of a criminal statute in the sample than other statutes. Caution must be exercised when interpreting these findings as the dependent variable subsumes a myriad of decision-making processes: the Court’s decision to grant certiorari, the petitioner’s decision to appeal a lower court ruling, inferior courts judges’ decisions in their cases, etc. The primary purpose of this first stage of analysis is not to untangle these processes, but to instead control for sample selection bias that happens prior to the merit stage. In contrast, the ideology variable is not statistically significant.

The second stage of the model presents two sets of results, which are discussed in turn. The first column contains the comparison between a statute being ruled as constitutional and being ruled as unconstitutional but severable. The only statistically significant result is for the coefficient for the Court’s ideological predisposition: the Court is less likely to rule a statute constitutional it finds ideologically objectionable. This result is largely consistent with previous research (Segal and Spaeth 2002).

The second column contains the comparison between a statute being ruled as unconstitutional and inseverable and being ruled as unconstitutional and severable. The parameter for the Court’s ideological predisposition is negative and statistically significant. When the Court is ideologically predisposed to striking, it is more likely to rule a statute severable. This result provides support for the Ideological Severability Hypothesis.

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| **Table 1: Additive Heckman Multinomial Probit Model of Court’s Decision to Invalidate an Important Federal Statute, Party Gatekeeping Model** |
| *Second Stage* | *Constitutional* | *Unconstitutional and Inseverable* |
| Court’s Ideological Predisposition to Strike | -0.42\*(0.17) | -0.43\*(0.23) |
| Severability Clause | 0.65(0.33) | -1.00\*(0.57) |
| Criminal Statute | -0.01(0.46) | 0.78(0.65) |
| Free Speech Challenge | -0.64(0.37) | 0.47(0.52) |
| Constant | 0.61(1.01) | -0.95(0.81) |
| Sample Selection Term | -0.05(0.29) | -0.25(0.18) |
| *First Stage* |  |  |
| Court’s Ideological Predisposition to Strike | 0.04(0.02) |
| Severability Clause | 0.32\*\*(0.08) |
| Criminal Statute | 0.34\*\*(0.10) |
| Previous Court Case | 0.63\*\*(0.11) |
| Cubic Polynomials+ | 173.54\*\* |
|  |  |
| Cubic Polynomials\*Previous Court Case+ | 11.54\*\* |
| Constant | -2.08\*\*(0.09) |
| N Stage 2 | 210 |
| N Stage 1 | 11,889 |
| \*p<0.05, \*\*p<0.01, one-tailed tests used for hypothesized relationships+ Joint Wald test of statistical significanceComparison group is unconstitutional and severableRobust standard errors clustered by statute are in parentheses |

The severability coefficient is also negative and statistically significant. This result provides support for the Severability Clause Hypothesis. A statute that contains a severability clause in the sample is 12% more likely to be ruled severable compared to statutes without them. Despite the consistent criticism legal scholars levy towards the Court, it does seem that severability clauses influence the Court’s decisions on the margins.

Table 2 presents a second model containing an interaction between the Court’s ideological predisposition and a statute’s support of the pivotal policymaker; this interaction is meant to test the Conditional Ideological Severability Hypothesis. Little changes in first stage with the introduction of the interaction term. The term itself, as well as the constitutive term for the support of the pivotal policymaker, are not statistically significant. Similarly, neither term is statistically significant in the first column of the second stage. Indeed, the Court’s ideological predisposition to striking a statute loses statistical significance as well.

The important result for this analysis is in the second column of Table 2. The three coefficients in the interaction are not statistically significant and are incorrectly signed. Given the coding scheme used, the interaction term should have a negative coefficient: as the pivotal policymaker increasingly supports a statute under review, the Court should be less likely to rule a statute severable. Similarly, the coefficient for the constitutive term of the Court’s ideological predispositions is incorrectly signed: when the pivotal policymaker opposes a statute under review, the Court should be less likely to rule a statute severable. These findings fail to provide support for the Conditional Ideological Severability Hypothesis, which suggests that the Court is not concerned with external political pressure when deciding whether to sever a statute. In contrast, the findings supporting the Ideological Severability Hypothesis provide evidence that the Court is instead concerned with their policy preferences when deciding to sever. The attitudinal model of judicial behavior seems to better describe the Court’s decision to sever compared to the strategic model (Segal and Spaeth 2002).

Some discussion must be given to the selection effects in these models. The sample selection parameters reported in the Tables are the estimated selection effects from the Court having a discretionary docket. The sample selection parameter in both columns are not statistically significant for either model, failing to provide evidence of sample selection. Unfortunately, it is difficult to compare this result to the rest of the literature as prior studies employing similar strategies do not report results concerning selection effects (Hall and Ura 2015, Harvey and Friedman 2009). In future research, scholars should explicitly state these results.

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| **Table 2: Multiplicative Heckman Multinomial Probit Model of Court’s Decision to Invalidate an Important Federal Statute, Party Gatekeeping Model** |
| *Second Stage* | *Constitutional* | *Unconstitutional and Inseverable* |
| Court’s Ideological Predisposition to Strike | -0.67(0.24) | -0.03(0.52) |
| Support of Pivotal Policymaker | 1.29(0.49) | 1.20(0.72) |
| Court Ideology\*Pivotal Policymaker | 0.42(0.48) | -0.45(0.92) |
| Severability Clause | 0.69(0.37) | -0.99\*(0.56) |
| Criminal Statute | -0.18(0.46) | 0.63(0.78) |
| Free Speech Challenge | -0.72\*(0.32) | 0.31(0.45) |
| Constant | -0.03(1.21) | -1.77(1.20) |
| Sample Selection Term | -0.12(0.36) | -0.24(0.23) |
| *First Stage* |  |  |
| Court’s Ideological Predisposition to Strike | -0.02(0.06) |
| Support of Pivotal Policymaker | -0.22(0.14) |
| Court Ideology\*Pivotal Policymaker | 0.08(0.07) |
| Severability Clause | 0.31\*\*(0.08) |
| Criminal Statute | 0.36\*\*(0.09) |
| Previous Court Case | 0.61\*\*(0.11) |
| Cubic Polynomials+ | 156.24\*\* |
|  |  |
| Cubic Polynomials\*Previous Court Case+ | 9.77\* |
| Constant | -1.92\*\*(0.13) |
| N Stage 2 | 210 |
| N Stage 1 | 11,835 |
| \*p<0.05, \*\*p<0.01, one-tailed tests used for hypothesized relationships+ Joint Wald test of statistical significanceComparison group is unconstitutional and severableRobust standard errors clustered by statute are in parenthesesTable shows Party Gatekeeping Model; additional models in the appendix |

Turning now to an analysis of individual justice votes, Table 3 presents the results for an additive model comparable to that in Table 1. As one can see, the coefficients in these tables are largely in the same direction as before. The justices are more likely to invalidate statutes that they disagree with ideologically, as indicated by the statistically significant coefficient in Column 1. And the justices are more likely to rule a statute severable, rather than inseverable, when they disagree with a statute ideologically and when the statute has a severability clause, as indicated by the coefficients in Column 2.

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| **Table 3: Additive Multinomial Probit Model of Justices’ Decision to Invalidate an Important Federal Statute** |
| *Second Stage* | *Constitutional* | *Unconstitutional and Inseverable* |
| Justice’s Ideological Predisposition to Strike | -1.02\*\*(0.10) | -0.62\*\*(0.19) |
| Severability Clause | 0.32(0.26) | -1.24\*\*(0.45) |
| Criminal Statute | 0.20(0.30) | 0.28(0.58) |
| Free Speech Challenge | -0.43(0.25) | 0.88(0.48) |
| Constant | 0.53(0.16) | -1.96\*\*(0.26) |
| N Stage 1 | 1,758 |
| \*p<0.05, \*\*p<0.01, one-tailed tests used for hypothesized relationshipsComparison group is unconstitutional and severableRobust standard errors clustered by statute are in parenthesesGroup Mean Coefficients are not reported |

One interesting change is the coefficients on the freedom of speech challenge in both columns. Both coefficients are in directions that make sense: the justices are more likely to find a statute unconstitutional and inseverable rather than the other two options. In terms of statistical significance, the p-values are barely outside conventional thresholds at 0.081 and 0.064 in the first and second columns, respectively; a one-tailed test would find these effects significant. This indicates that the overbreadth doctrine for First Amendment speech issues likely influences the justices’ use of severability.

Table 4 presents the results for an additive model comparable to that in Table 2. Its model results are largely identical to the one in Table 2, including the statistically significant coefficient on the freedom of speech challenge variable in the first column. Overall, the results in Tables 3 and 4 continue to find support for the Ideological Severability Hypothesis and the Severability Clause Hypothesis, though there is no evidence supporting the Conditional Ideological Severability Hypothesis.

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| **Table 4: Multiplicative Multinomial Probit Model of Justices’ Decision to Invalidate an Important Federal Statute, Party Gatekeeping Model** |
| *Second Stage* | *Constitutional* | *Unconstitutional and Inseverable* |
| Justice’s Ideological Predisposition to Strike | -1.46\*\*(0.20) | 0.17(0.59) |
| Support of Pivotal Policymaker | 0.66(0.39) | 1.31(0.81) |
| Justice Ideology\*Pivotal Policymaker | 0.66\*(0.28) | -0.94(0.75) |
| Severability Clause | 0.39(0.24) | -1.20\*(0.48) |
| Criminal Statute | 0.13(0.31) | 0.27(0.63) |
| Free Speech Challenge | -0.49\*(0.24) | 0.79(0.44) |
| Constant | 0.18(0.27) | -2.92\*\*(0.73) |
| N Stage 1 | 1,758 |
| \*p<0.05, \*\*p<0.01, one-tailed tests used for hypothesized relationshipsComparison group is unconstitutional and severableRobust standard errors clustered by statute are in parenthesesGroup Mean Coefficients are omitted not reported |

**VII. 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 use of severability doctrine. The Court is more likely to rule a statute severable when it is ideologically predisposed to invalidation, though this relationship is not conditional upon the preferences of Congress as hypothesized. The Court is also more likely to rule a statute severable when that statute has a severability clause, responding to the statutory provisions intentionally included by Congress. These results demonstrate that both political and legal considerations influence the Court’s use of severability, a finding consistent with both the attitudinal and legal models of judicial decisionmaking.

The core results both support and undermine the most important legal criticisms against the Court’s use of severability doctrine. There is mixed evidence demonstrating that severability doctrine sometimes serves as a veneer for judicial activism, as the Ideological Severability Hypothesis was supported but its conditional version was not. But despite much criticism to the contrary, severability clauses have a consistent, though not absolute, influence on the Court’s decisionmaking. While not the clear dispositive result legal scholars may hope for, it demonstrates an ethic of deference to the codified intent of legislators that scholars greatly desire the Court to follow.

The results of the study also point out additional lines of research in the future, primarily related to severability clauses. This study indicates that the Court faithfully considers severability clauses when making decisions. But this finding begs the question: when does Congress include these clauses in the first place? Indeed, there is no existing study that attempts to systematically answer this question. An investigation of this question will yield new insights into the relationship between legislatures and the judiciary.

Furthermore, the findings of this study concerning severability clauses naturally leads to inquiries about 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 rarely adopted by Congress, these clauses are more frequently included in legislation in the American states. Qualitative evidence suggests these clauses are taken more seriously than severability clauses by state courts (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 this focus 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.

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**Appendix**

**Additional Models**

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| **Table A3: Additive Multinomial Probit Model of Court’s Decision to Invalidate an Important Federal Statute** |
| *Second Stage* | *Constitutional* | *Unconstitutional and Inseverable* |
| Justice’s Ideological Predisposition to Strike | -0.42\*\*(0.18) | -0.41\*(0.23) |
| Severability Clause | 0.68\*(0.31) | -0.85\*(0.57) |
| Criminal Statute | 0.02(0.42) | 0.92(0.67) |
| Free Speech Challenge | -0.64(0.37) | 0.46(0.54) |
| Constant | 0.43\*(0.22) | -1.85\*\*(0.36) |
| N Stage 1 | 209 |
| \*p<0.05, \*\*p<0.01, one-tailed tests used for hypothesized relationshipsComparison group is unconstitutional and severableRobust standard errors clustered by statute are in parentheses |

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| **Table A4: Multiplicative Multinomial Probit Model of Court’s Decision to Invalidate an Important Federal Statute, Party Gatekeeping Model** |
| *Second Stage* | *Constitutional* | *Unconstitutional and Inseverable* |
| Justice’s Ideological Predisposition to Strike | -0.67\*\*(0.25) | -0.04(0.53) |
| Support of Pivotal Policymaker | 1.24\*\*(0.48) | 1.14(0.73) |
| Justice Ideology\*Pivotal Policymaker | 0.44(0.49) | -0.40(0.94) |
| Severability Clause | 0.76\*\*(0.27) | -0.85\*(0.56) |
| Criminal Statute | -0.11(0.42) | 0.77(0.79) |
| Free Speech Challenge | -0.71\*(0.33) | 0.30(0.47) |
| Constant | -0.39(0.36) | -2.57\*\*(0.73) |
| N Stage 1 | 207 |
| \*p<0.05, \*\*p<0.01, one-tailed tests used for hypothesized relationshipsComparison group is unconstitutional and severableRobust standard errors clustered by statute are in parentheses |

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| **Table A3: Multiplicative Heckman Multinomial Probit Model of Decision to Invalidate an Important Federal Statute, Floor Median Model** |
| *Second Stage* | *Constitutional* | *Unconstitutional and Inseverable* |
| Court’s Ideological Predisposition to Strike | -0.60\*(0.31) | 0.04(0.79) |
| Support of Pivotal Policymaker | 1.17\*(0.58) | 1.86\*(0.83) |
| Court Ideology\*Pivotal Policymaker | 0.31(0.53) | -0.49(1.16) |
| Severability Clause | 0.70\*(0.36) | -1.05(0.58) |
| Criminal Statute | -0.11(0.47) | 0.75(0.74) |
| Free Speech Challenge | -0.73\*(0.34) | 0.28(0.47) |
| Constant | -0.18(1.27) | -2.38(1.04) |
| Sample Selection Term | 0.07(0.36) | -0.23(0.22) |
| *First Stage* |  |  |
| Court’s Ideological Predisposition to Strike | -0.03(0.07) |
| Support of Pivotal Policymaker | -0.22(0.13) |
| Court Ideology\*Pivotal Policymaker | 0.09(0.09) |
| Severability Clause | 0.31\*\*(0.08) |
| Criminal Statute | 0.35\*\*(0.10) |
| Previous Court Case | 0.60\*\*(0.11) |
| Cubic Polynomials+ | 153.14\*\* |
|  |  |
| Cubic Polynomials\*Previous Court Case+ | 9.44\* |
| Constant | -1.90\*\*(0.14) |
| N Stage 2 | 210 |
| N Stage 1 | 11,835 |
| \*p<0.05, \*\*p<0.01, one-tailed tests used for hypothesized relationships+ Joint Wald test of statistical significanceComparison group is unconstitutional and severableRobust standard errors clustered by statute are in parentheses |

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| **Table A4: Multiplicative Heckman Multinomial Probit Model of Decision to Invalidate an Important Federal Statute, Senate Filibuster Model** |
| *Second Stage* | *Constitutional* | *Unconstitutional and Inseverable* |
| Court’s Ideological Predisposition to Strike | -0.64\*(0.29) | 0.03(0.69) |
| Support of Pivotal Policymaker | 1.21\*(0.55) | 1.44\*(0.72) |
| Court Ideology\*Pivotal Policymaker | 0.35(0.52) | -0.50(1.07) |
| Severability Clause | 0.70(0.37) | -1.00\*(0.57) |
| Criminal Statute | -0.15(0.47) | 0.66(0.77) |
| Free Speech Challenge | -0.75\*(0.34) | 0.28(0.46) |
| Constant | -0.10(1.28) | -1.98(1.13) |
| Sample Selection Term | -0.09(0.37) | -0.24(0.23) |
| *First Stage* |  |  |
| Court’s Ideological Predisposition to Strike | 0.01(0.06) |
| Support of Pivotal Policymaker | -0.19(0.14) |
| Court Ideology\*Pivotal Policymaker | 0.05(0.07) |
| Severability Clause | 0.31\*\*(0.08) |
| Criminal Statute | 0.35\*\*(0.10) |
| Previous Court Case | 0.61\*\*(0.11) |
| Cubic Polynomials+ | 159.58\*\* |
|  |  |
| Cubic Polynomials\*Previous Court Case+ | 9.78\* |
| Constant | -1.93\*\*(0.14) |
| N Stage 2 | 210 |
| N Stage 1 | 11,835 |
| \*p<0.05, \*\*p<0.01, one-tailed tests used for hypothesized relationships+ Joint Wald test of statistical significanceComparison group is unconstitutional and severableRobust standard errors clustered by statute are in parentheses |

1. In both databases, there were errors when associating cases with statutes that were revealed during initial data examination that prompted the hand-coding. [↑](#footnote-ref-1)
2. I estimate the model using the cmp package developed for Stata by Roodman (2011). [↑](#footnote-ref-2)
3. 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. I do not use this approach for theoretical reasons. There is little distinction between as applied invalidations and facial invalidations that are severable; both are saving constructions used to preserve the original statute (Sherwin 2000). In the context of this paper’s questions, the notable difference is between whether the Court uses a saving construction to preserve a statute or rule an unconstitutional provision inseverable. [↑](#footnote-ref-3)
4. It was investigated whether cubic polynomials had any predictive power in the second stage of the model by estimating a simple multinomial probit. There was no evidence of this, either in the individual coefficients or a joint Wald test. [↑](#footnote-ref-4)
5. 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, much like these duplicate observations represent shorter periods of time. [↑](#footnote-ref-5)
6. One statute, public law number 107-40, was predicted perfectly. Because coefficients could not be generated, it is subsequently excluded from the analysis. This includes one case. [↑](#footnote-ref-6)
7. Because a Common Space Score is not calculated for Truman, observations before 1953 are excluded. This includes two cases. [↑](#footnote-ref-7)
8. Some scholars have expressed concern over using ideal point estimates to predict Supreme Court decisions given the “votes explaining votes” criticism: a justice’s ideal point in a given year is influenced in some small way by the vote they cast in a given case, creating an issue of simultaneity. Empirical analysis reveals that the effect of such simultaneity is negligible (Martin and Quinn 2005). Ideal point estimates on subsets of Court cases are very highly correlated with ideal point estimates from the rest of the cases. This is unsurprising, given that any one case plays an extremely small role in an estimate of an ideal point. Further, estimates of justices’ ideology that do not rely on votes do not allow ideology to change over time, creating issues of measurement error. This error seems like a much greater source of endogeneity and, therefore, I choose to employ Bailey’s estimates over other measures. [↑](#footnote-ref-8)
9. This measure only appears in the second stage of the analysis. [↑](#footnote-ref-9)
10. Because this is the only measure with justice-level variation, it is also the only measure that requires the correlated random effects approach. [↑](#footnote-ref-10)
11. This and all other marginal effects reported are average marginal effects in the sample. See Hanmer and Kalkan 2013. [↑](#footnote-ref-11)