JENNIFER EILEEN BYRNE
Judicial Review and Judicial Decision Making: A Multivariate Model of U.S. Supreme Court Behavior
(Under the direction of DR. STEFANIE LINDQUIST)

This paper examines the characteristics that influence U.S. Supreme Court decision making. These factors are grouped into the attitudinal, institutional, and legal models respectively. The data consists of 170 judicial review cases where both a challenge and a strike to a statute exist. The results indicate that civil liberties statutes, in addition to state and local statutes, are most likely to be ruled unconstitutional by the Court. The Court is not sensitive to Congress or the presidency. The impact of the solicitor general is significant, while the impact of interest groups is insignificant. Conservative justices are overall less likely to strike down legislation, but will more often strike federal statutes in an attempt to protect states rights when they exercise their power of judicial review. In contrast, liberal justices are prone to exercise the power of judicial review, and will be more inclined to overturn state statutes and local ordinances.

JUDICIAL REVIEW AND JUDICIAL DECISION MAKING:

A MULTIVARIATE MODEL OF U.S. SUPREME COURT BEHAVIOR

by

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DEDICATION

I would like to dedicate this thesis to my Mom, Sarah Ward. Her endless love, encouragement of education, and dedication to me as the most important thing in her life has enabled me to achieve a masters degree.

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Methods: A logit analysis will be used for modeling a dichotomous dependent variable, reflecting whether the individual justice chose to strike of uphold the challenged statute.

CHAPTER 1

INTRODUCTION

A national debate over the acceptable role of the Supreme Court regarding the interpretation of the United States Constitution began when Chief Justice John Marshall authored the majority opinion in *Marbury v. Madison* (1803), declaring the power of judicial review. Proclaiming the Supreme Court the appropriate institution to evaluate the compatibility of legislation with the mandates of the Constitution, Marshall established the principle of judicial review that has subsequently led many scholars to acknowledge the prominence of the Supreme Court in the national political process (e.g. Black 1960; Berger 1977; Segal and Spaeth 1993). Scholars differ over the concept of judicial review as some claim that it protects the rights of minorities, otherwise lost amongst the demands of the majority so typical of majoritarian, democratic systems, and that intervention on the part of the Supreme Court guards against the abuse of power by other branches of government (Choper 1980; Burt 1992; Dworkin 1984). Others claim that since the inception of judicial review nearly two centuries ago, scholars have criticized its countermajoritatian characteristics, and continue to decry the resulting usurpation of congressional power. While the constitution establishes the legislative and executive

branches to reflect the will of the people, the judiciary, in contrast, is comprised of appointed justices, conferred with life tenure and the ability to offer an alternate interpretation of the Constitution. According to Alexander Bickel (1962), judicial review is inherently contrary to the Constitution: He maintains that, "When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people" (275). In essence, the Supreme Court does not exert control on behalf of the prevailing majority. Rather the Court's decisions reflect the opinion of an independent body of justices that can strike down legislation as unconstitutional.

In addition to public law scholars, government officials, the media and the general public also recognize the Supreme Court as the final arbitrator of constitutional meaning, while the Court itself fosters an impression of its own supremacy on controversial cases (Black 1960; Burgess 1991). Aggrieved parties have few arenas in which to challenge a Supreme Court decision ruling a statute unconstitutional. The limited mechanisms to contest the finality of a decision rendered by the Supreme Court include restricting the appellate jurisdiction of the Court, the passage of new legislation by Congress as means of overruling the decision, or the arduous process of passing a new amendment to the constitution.

As the Supreme Court possesses the preeminent position of suggesting the final interpretation of the Constitution, the determination of the criteria used by the Supreme Court to arrive at its decisions in judicial review cases continues to interest scholars. While earlier studies, such as the one presented by Robert Dahl (1957), contend that the

Supreme Court is a member of what he terms a "ruling coalition," and is thereby generally supportive of policies established by other political institutions, subsequent studies such as those conducted by Casper (1976) assert that the Court assumes the role of a protector, striking down federal laws that violate liberties guaranteed by the Constitution without hesitation. Essentially endowed with the authority to substitute its own judgment for that of the legislature, a coequal branch of government, the Supreme Court effectively exercises its powers of judicial review when it strikes down a federal, state, or local statute as unconstitutional, although at times the Court defers to the other branches of government or to state and local legislatures when it upholds a piece of legislation as constitutional. The puzzle then is to identify what factors influence the decision of the justices on the Supreme Court to override constitutionally dictated law-making bodies of elected representatives, and supplant its own judgment for that of the legislature, or defer to the wisdom of the legislature.

In this thesis, I propose to develop an integrated case-related model, using a multivariate, cross-sectional analysis to explain the justices' decisions to exercise the power of judicial review. To ascertain why the Supreme Court decides to uphold or strike down a piece of legislation in a given case, I examine six factors that have been previously identified by scholars as contributing to the Court's decision in these cases. While there has been a substantial amount of research on the Supreme Court, judicial review, and the judicial decision-making process, a lack of a multivariate model encompassing all of the variables that I have described in this design suggests a gap in the literature. Scholars have focused on the impact of one of these variables on judicial

decision making, but have never attempted to combine all of the factors identified as relevant to the literature into a comprehensive study that can better explain this process.

A similar study conducted at the state supreme court level (Emmert 1992), successfully established that judicial decisions are indeed affected by more than one characteristic. Gibson (1983) suggests that more complex approaches need to be employed to more fully explain judicial behavior; future studies should include such variables as case-related materials, justice policy preferences, and role orientations. This study represents an effort to apply this reasoning to the federal courts, with the goal of better understanding how the Supreme Court arrives at decisions in cases challenging the constitutionality of statutes. Unlike its predecessors, this study considers not only the cases in which the Supreme Court strikes down federal statutes, but also cases where the Court refrains from judicial review, and upholds the statute in question. By combining several factors into a multivariate model, which examines attitudes, institutions, the nature of the statute challenged, and case-related factors, higher levels of explanation Supreme Court behavior can be achieved.

CHAPTER 2

JUDICIAL REVIEW AND JUDICIAL DECISION MAKING

Extensive literature exists on the nature of judicial review, and a paper examining the factors of judicial decision making must canvass this area throughout its history. Under what circumstances has the Court used its power to nullify legislation, and thereby check the powers of the legislative branch? The Court remains a useful tool in protecting against excesses by the other branches of government, yet as long as the practice of judicial review exists, scholars and politicians will inveigh against its countermajoritarian quality. The decision in *Marbury v. Madison* (1803), the *Dred Scott v. Sanford Decision* (1857), the anti-New Deal decisions, and the sharp contrast of the civil rights and liberties decisions set forth by the Warren and Burger Courts have all sparked controversy on the role of the Supreme Court. The empirical debate on judicial review, however, began with the work of Robert Dahl (1957), followed by the critique of Dahl's study by Jonathan Casper (1976).

Answering the attacks on the power of the Supreme Court, Dahl argues that the Court rarely attempts to overturn statutes established by representative law-making bodies; he also finds that even when the Court has tried to thwart the will of the majority, it has traditionally been unsuccessful in the majority of cases. Studying judicial review cases from the inception of the Constitution until 1957 (a span of time covering 167 years), Dahl contends that democratically-elected presidents appoint justices who share their ideology. As a result, the views of the justices typically coincide with the prevailing political coalition, except during critical realignment periods. He argues that the Court will eventually yield authority to congressional policies on various policy issues.

Although the Supreme Court has at times successfully delayed the policy implementation process for up to 25 years in a minute number of important cases, it will not hold out indefinitely, and ultimately the will of the majority will triumph.

Dahl also addresses the types of cases that can cause a conflict between the views of the justices sitting on the Supreme Court and elected officials in the legislature. Contrary to the popular view of the Court as the guardian of minorities, Dahl discovers that the cases in which the Supreme Court successfully attempted to block the policy-making efforts of the legislature did not involve issues where the Court sought to protect powerless minorities from the tyrannical nature of the majority. Indeed, these cases often involved issues such as the power of Congress to regulate child labor, or workmen's compensation with the Court ruling against such use of congressional power. Dahl's study asks a fundamental question: What is the role of the Supreme Court in the national policy making process? He concludes that the Supreme Court exists to confer legitimacy on the law-making policies of the other branches of government. According to Dahl, the nation sanctions such an undemocratic institution because judicial review provides this "legitimacy conferring, or educational function for the government" (Meernik and Ignagni 1997). Scholars regard Dahl's work as fundamental for i ts initiation of the consequential debate concerning judicial review and the role of the Supreme Court as a national policy maker.

While Dahl recognizes the Supreme Court as an important institution because of its capability to legitimize congressional policy by declaring legislation to be constitutional, Casper offers an alternative explanation to Dahl's findings. Representing the first significant criticism to Dahl's work nearly two decades later, Casper

demonstrates that the Warren Court struck down thirty-two provisions of federal statutes in twenty-eight cases (1976). According to Casper, Dahl's research design has serious limitations, including that it did not take account of the period between 1958-1974, where a more activist Court struck down statutes on the basis of the Bill of Rights or the Fourteenth Amendment far more often than its predecessors. During the period studied by Casper, the data clearly contradicts Dahl's findings, as the Warren Court effectively acted in a manner consistent with the view that the Court protects the rights of minorities against the will of a tyrannical majority.

Apart from the fact that Dahl's findings were not generally applicable to the period that Casper studied (1958-1974), shortcomings such as the lack of consideration given to those cases where the Court struck down legislation more than four years after it was passed limited Dahl's research design. Casper demonstrates that Warren Court increasingly supported and advocated the rights of the minority, supporting the view that the Supreme Court, an undemocratic institution, derives its legitimacy as the protector of minorities. In a later study, Adamany (1973) also rejected Dahl's argument that the Supreme Court derives its legitimacy by giving credence to the laws passed by Congress when he noted that the Court had historically failed to grant legitimacy to administrations at the most critical points following realigning elections. However, subsequently Jeff Segal (1991) has argued that Adamany's challenge actuall y supports Dahl's thesis because by the nature of the appointment process, the Court remains a representative body.

To this extent, Funston (1975) also defends Dahl's argument that the Court is generally consistent with the ruling coalition, excluding realignment periods. Conversely,

he finds that the Supreme Court is only slightly more inclined to strike down legislation during the acute realignment intervals, defined as the eight years following the onset of a political realignment. In addition, he concludes that the Court is three times more likely to strike down federal legislation in the first four years of their enactment during the critical periods as opposed to the non-critical periods. It is important to note that later studies have illustrated that Funston's conclusion resulted from the clash between the New Deal period and the ideology of the Supreme Court during this time (Canon and Ulmer 1976). Moreover, Segal (1997) finds evidence to overwhelmingly and unambiguously support the premise of the attitudinal model over the institutions model: justices decide cases in accordance with their own policy preferences, and seldom defer to the policy preferences of Congress, even in statutory cases where Congress may overturn the Court's judgment through re versal legislation. Subsequent scholars have examined several models of judicial decision making, including the various models to measure the influence of the justices' ideologies, the effects of Congress and the presence of the Conservative Coalition, the presidency, the Solicitor General, interest groups, and other case-related factors (Meernik and Ignagni 1997; Segal 1997; Segal and Spaeth 1993).

CHAPTER 3

THE ATTITUDINAL MODEL

A. Justices as Policy Makers

While initial studies on judicial decision making focus on the impact of Congress and the Executive branch on the Supreme Court, subsequent studies have introduced the role of justice ideology, public opinion, and interest groups in the judicial process. In order to ascertain the impact of these variables on Supreme Court decision making, it must first be established that the Supreme Court is in fact a policy-making institution. Lending credence to this assumption, Adamany (1973) characterizes the functions of the judiciary as entailing policy making. He describes the functional role of the Supreme Court as interpreting federal laws and treaties, preserving the federal system by settling disputes between the states and the federal government, and preserving the system of checks and balances as part of the national policy making process. Guaranteeing the provisions in the Constitution, the Court often exercises it power of judicial review to protect individual rights; this actively involves the Court in the policy-making process.

Segal and Spaeth contend that "the authoritative character of judicial decisions results because judges make policy and policy making involves the choosing among alternative courses of action, where the choice binds the behavior of those subject to the policy-maker's action" (1993, 65). In their words, a policy maker effectively "allocates resources" and the precedent set by the courts at all levels in the United States undoubtedly affect others besides the litigants directly involved in the cases. The court system decides a wide range of issues from trivial matters to the most important issues confronting society.

B. The Use of Discretion in Judicial Decision Making

Earlier works claim that judicial decision making is a process unfettered by choice; it is merely a matter of function (Peltason 1955). Traditionally, scholars have maintained that the Supreme Court relies on the intent of the Framers, the plain meaning of the Constitution and statutes presented in a given case, and a balance between these constitutional interests and the contemporary societal interests to arrive at a decision. In contrast, the attitudinal model postulates that justices make policy by choice as well as function, and thereby decide disputes in light of the their own ideology and values (Segal and Spaeth 1993). Alexander Bickel also presents this argument, as he defines the Constitution as consisting of two separate documents: In many cases judges have little room to exercise discretion in the decision making process, but the Constitution also consists of broad phrases that allow for different interpretations that Bickel terms the "open-textured constitution" (1962, 154). Unlike the clear-cut provisions of the Constitution that specifically allocate two senators to each of the 50 states, characteristics of Bickel's "manifest constitution," include broadly phrased passages such as the equal protection and due process clauses that give judges wide latitude to interpret the Constitution according to their preferences, and thus engage in judicial policy making.

Do justices in fact take advantage of this opportunity to set in place their personal policy preferences? Studies as early as the pre-Civil war era show that justices on the Supreme Court voted along party lines on issues related to slavery, while subsequent studies show that justices voted as liberals or conservatives in such issues as the New Deal legislation and the civil rights cases that were so salient during the Warren and Burger Courts (Pritchett, 1954; Schubert 1962). More recent studies amply demonstrate

that the justices render decisions in accordance with their policy preferences (Segal 1997). This previous research demonstrates that justices do indeed decide judicial review cases in light of their own individual preferences and policy ideals. Furthermore, liberal justices, such as those that sat on the Warren Court will be more inclined to protect the rights of minorities and suspicious of conservative legislation that restricts these rights. Conservative justices, on the other hand, will be more likely to strike liberal legislation. Thus I present the following hypothesis:

H_1: Justices' votes to strike federal, state or local legislation will be determined by the justices' ideologies: liberal justices will vote to strike conservative statutes, and conservative justices will vote to strike liberal statutes.

C. Judicial Activism and Judicial Restraint

Since the inception of judicial review in the United States Supreme Court, the justices throughout history have typically taken a position of restraint in overturning legislation, and refrained from activist policy making. Lamb defines judicial restraint as, "a belief system, a role concept, an ideal of how justices ought to function in a democratic society" (1982, 8). In *American Federation of Labor v. Sash and Door Company* (1949), Justice Felix Frankfurter argues that the Supreme Court is indeed a countermajoritarian body, and should minimize the instances where it limits the power of the legislature, even where a law may be socially undesirable. Judicial restraintists often assert that legislatures should be allowed to correct their own mistakes, rather than having statutes nullified through judicial review. This phenomenon is thought to be conservative in nature, as justices do not legislate new law, but merely interpret the law under the Constitution. Justices that consider themselves judicial restraintists often cite the "plain meaning" approach and the "intent of the framers" approach when interpreting the

Constitution, and consider activist judgments, such as those of the Warren Court, atypical (Lamb 1982).

In contrast, judicial activists maintain that the power of judicial review should be used broadly rather than in limited fashion, and rests on the core position that judges should decide cases to achieve justice, and establish law if necessary (Schick 1982). This concept received new meaning with the landmark decision of the Warren Court in *Brown v. Board of Education* (1954). In a sense, the policy preferences of judges came to be seen as more enlightened and preferred to that of the legislature, especially since it is a body loyal to many private interests (Graglia 1982). Liberals are often viewed as activists, and accused of using the Supreme Court as a forum to protect the rights of the minority, thus thwarting the democratic process. Miller states that activist judges tend to "perceive vital societal needs and attempt to fill them" (1982, 189). Activist justices can be expected to view the Constitution as a changing document in congruence with societal norms, which may require new laws for adaptation. Learned Hand maintains that, "[justices] must be aware of changing social tensions which require new schemes of adaptation and societal organization" (1982, 190). Miller also argues that Congress does not always represent the "people" but instead groups, and that the Court is justified in overturning laws passed by legislatures that do not meet the demands of the Constitution (1982, 171).[1] As such, the conventional wisdom suggests that liberal justices will be more inclined to exercise the power of judicial review, especially when the rights of minority groups are threatened, while conservative justices, in an effort to maintain an

[1] Some scholars have been careful to note that conservative justices can also make activist judgments that simply are not in support of liberal policies. However, for the purposes of this design, I am testing the notion found in the literature that throughout history, conservative justices are more likely to be activists,

image of judicial restraint, will be less likely to strike legislation as unconstitutional. Therefore, I offer the following hypothesis in the context of judicial review cases.

H_{1a}: Conservative justices will be less likely to exercise the power of judicial review; liberal justices will be more likely to exercise the power of judicial review, by striking down statutes as unconstitutional.

D. The New Federalism

While the Supreme Court has sometimes been referred to as the branch of government that upholds the rights of the people, the most recent decisions of the Court have supported the new federalism, and championed states rights. While liberals such as Justice Blackmun view federalism as a method of protecting liberty, and a valuable concept when successful at accomplishing this goal, the Rehnquist Court has used federalism as mechanism for expanding the power of the states, and consequently weakening the power of the national government (Gottlieb 2000).

In over fifty years of dealing with the Fair Labor Standards Act and its interpretation under the Tenth Amendment, the inconsistency of very narrowly decided rulings (typically 5-4 decisions in the recent federalism cases) suggests that while the Court authoritatively ventured into uncharted waters, it had become lost at sea. With the ruling in *Usery* (1976) overturned by *Garcia* (1985), the decision in *Alden v. Maine* (1999), a case where state employees sued the state of Maine for compensation of overtime work under a federal statute, the Fair Labor Standards Act, appears to be quite simplistic on the surface. One might expect that due to past precedent, that the Court would rule in favor of the employees, and force the state of Maine to compensate its probation officers for their overtime work.

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and less likely to exercise the power of judicial review. In contrast, liberal justices are traditionally more activist, and will be more likely to exercise the power of judicial review.

Instead, the majority of the Court refers to the original intent of the Constitution, and arrives at the conclusion that the probation officers are prohibited from suing the state of Maine. Justice Kennedy states in the majority opinion that the historical record demonstrates that the framers intended to preserve the sovereign immunity of the states through the Eleventh Amendment, and that this doctrine of sovereign immunity is strengthened by the provisions of the Tenth Amendment. Furthermore the majority finds that Congress does not have the power under the Commerce Clause to regulate the conditions of employment of state government officials or workers; as a result, Congress's power under the Commerce Clause has been severely limited. Through these arguments, the Court confirms that states may not be sued in their own courts for violations of a federal labor law such as the FLSA. In essence, the Court deems the states' immunity from suit as a crucial and fundamental aspect of the autonomy they possessed before the ratification of the Constitution, and still retains today in the spirit of Federalist No. 39.[2]

In summary, the Supreme Court held that the state of Maine was immune from accountability for the required overtime pay by the provisions of the FLSA, and could not be sued in state court without its consent. The Court concluded that Article I of the Constitution did not authorize Congress to subject a non-consenting state to suits for private damages in their own state courts. Prior to the *Alden* decision, the Court ruled that state employees cannot pursue relief in the federal courts in *Seminole Tribe of Florida v. Florida* (1996). Subsequent decisions have also granted states immunity from lawsuits

[2] Federalist Paper No. 39, authored by James Madison, declares that states are "not obligated to the role of mere provinces or political corporations, but retain their dignity, though not full authority, or sovereignty."

concerning a variety of claims including gender, age, and disability discrimination.[3] The Court has essentially weakened Congress's power under the Commerce Clause to regulate the states, and put the authority in the hands of the states themselves.

In all of these new federalism cases, the more liberal justices have dissented from the consensus of the majority. Thus at least in recent history, conservatives tend to be states rights advocates, while liberals tend to favor the national government. Concordant with this knowledge, it comes as no surprise that the prevailing majority in the new federalism cases are the most conservative justices that sit on the court.[4] These justices, in an effort to promote state's rights, have been consistently striking down federal statutes, and advocating the wisdom of state and local legislatures. Hence I offer the following hypothesis in the context of the study of judicial review:

H_{1b}: Conservative justices will be less likely to strike down state or local legislation and more likely to strike down federal legislation; liberal justices will be more likely to strike state or local legislation and less likely to strike federal legislation.

[3] An example of this would be the Violence Against Women Act (42 U.S.C section 13981).
[4] These new federalism majority consists of: Scalia, Thomas, Rehnquist, O'Connor, and Kennedy.

CHAPTER 4

THE INSTITUTIONAL MODEL

A. Congress: Attempts at Reversal Legislation

In this study, I also examine the impact of Congress on judicial decision making. The legislature has some very important checks over the judiciary as provided for in the Constitution, including the power to restrict the Court's appellate jurisdiction, and to impeach Supreme Court justices. As Meernik and Ignagni find, Congress assumes the primary responsibility for "engaging the Supreme Court in a dialogue over the Constitution" (1997, 450). They argue that justification for such a role on the part of Congress stems from the Constitution, as Congress retains the broad powers to uphold the provisions of the Constitution, and assert national standards to govern state authority. Even more specifically, Congress has the ability to nullify a Supreme Court decision by what Stumph (1965) terms "decision reversal legislation…intended to modify the legal result or impact, or perceived legal result or impact of a specific Supreme Court decision" (451). Congress has the power to devise legislation, or rewrite legislation that the Supreme Court refuses to accept, and through the use of judicial review, render unconstitutional. It can be expected that the legislature will especially challenge a Court decision that curtails or augments congressional power in a way that does not conform to the will of the members. If the Court rules that Congress has overstepped the bounds of constitutional confinement, a natural response would be to attempt to regain this lost power, especially in cases involving the distribution of federal power.

Ignagni and Meernik define reversal legislation on the basis of Eskridge's (1991) definition of override legislation regarding statutory construction cases. According to this

definition, a congressional override of a Court decision includes a statute that 1) completely overrules the holding of a decision as the Court would overrule precedent, 2) modifies the result of the decision in a way that the same case would have been decided differently, or 3) modifies the consequences of a decision, with subsequent cases being decided differently. As the legislature has been shown to zealously guard its own power, the Supreme Court can be expected to do the same. Though Congress has only tried to restrict the Court's appellate jurisdiction once during the reconstruction era, and has only once impeached a Supreme Court justice, the threat constantly remains, and has become a very real consideration in certain periods in history, such as the McCarthy era. More importantly, the Court has derived a sense of legitimacy and authority, especially from the general public, through its attributed characteristic of judicial finality (Black 1960). Therefore, it is believed that the Court will give consideration to the ideology of Congress when engaging in the decision making process, if for no other reason than to avoid having its decisions overruled and consequently appearing to be a weaker institution.

According to the work of Dahl (1957), the Supreme Court will be generally supportive of the ruling coalition; this coincides with more recent positive theories of the judiciary that assert that the Court will frequently defer to the policy preferences of Congress. Conversely, Segal (1997) demonstrates that the Court does not act strategically, and justices vote in accordance with their own policy preferences rather than defer to the preferences of Congress, even in statutory cases where the threat of reversal legislation is most eminent. Nevertheless, for the purposes of this paper, I will

assume that the Court will consider retaliatory action by Congress and the presidency when engaging in judicial review. Therefore:

$H_{2:}$ Justices will be sensitive to the ideological orientation of Congress and the presidency. Therefore, a justice will be less inclined to strike down a statute that reflects the current ideological composition of congress and the presidency.

B. The Impact of the Solicitor General of the United States

Not only does the Solicitor General control the flow of cases reaching the Supreme Court docket, and represent the government when it is a party to case, but he also participates in the most frequent interaction between the executive and judicial branches of government (Segal 1991). The Solicitor General significantly influences what cases the Court will hear, as he determines all appeals originating from the Justice Department, and the Solicitor General's approval is necessary for most independent regulatory commission requests to the Supreme Court. In addition to representing the executive branch before the Supreme Court, the Solicitor General can also file amicus briefs when the United States is not a direct party to case. The briefs filed by the Solicitor General could potentially influence whether or not the Court will hear a case if filed at the certiorari level, stage support for the government's position, or generally support one of the parties involved in the suit.

The Solicitor General has enjoyed great success in the judicial arena. The "cue theory" initiated by Joseph Tanenhaus and his colleagues hypothesizes that the Supreme Court would be more likely to grant certiorari to a case when the government favored review, than when the United States did not specify a position (1963). Indeed, it was discovered that the Court did grant a higher percentage of review when the United States favored review; the study found that certiorari was granted in 47% of the cases where the

United States favored review versus a mere 5.8% when it did not take such a position. More recent research complements and even furthers this earlier conclusion as it indicates percentages as high as the Court granting certiorari 70% of the time that the United States attempts to appeal cases where it turned out as the losing party. In sharp contrast, the same number is only 8% indicating the most favorable percentage toward other parties (Provine 1980; Teger and Kosinski 1980). In addition to this advantageous rate of review, the United States won 62% of the cases it argued before the Court between the years of 1801 and 1958 (Handberg and Hill 1980).[5]

The Solicitor also enjoys a tremendous leverage in the submission of amicus briefs to the Supreme Court when the United States, while not a direct party, harbors a substantial interest to a given case. An example would be that although the United States was not party to *Brown v. Board of Education* (1954), the solicitor general filed an amicus brief in support of desegregation. While the government commands success as a litigant, "it has an even better record as an amicus curiae" (1971, #). Earlier studies, such as the one conducted by Scigliano (1971) showed that the Supreme Court ruled in favor of 87% of the cases supported by the Solicitor General, and subsequent, more comprehensive studies show that the solicitor general won in 74% of cases, and the figure jumps to slightly over 80% in political cases (Puro 1971).

Due to the extensive findings that recognize the significant impact of the Solicitor General's position on judicial decision-making, one might expect that the Solicitor will also experience considerable influence over the Supreme Court's decision making in judicial review cases. This influence should be most profound when the Solicitor

[5] The solicitor general enjoys great success before the Supreme Court not only because of his preeminent position in the government, but also because of the selection bias that he enjoys by choosing the cases in

participates directly in a case or submits a brief that challenges the constitutionality of a statute. Hence I offer the following hypothesis:

H_3: If the solicitor general supports a statute, by direct representation on behalf of a party or through the submission of an amicus brief, a justice will be more likely to uphold it. Conversely, if the Solicitor General opposes a statute through direct representation of a party of by filing an amicus brief, the Court will be more likely to strike the challenged statute down as unconstitutional.

C. The Influence of Amicus Curiae Briefs

Though interest groups have many mechanisms for competing in the judicial forum, including the sponsorship of litigation, and organized protests before the Supreme Court, I focus on the impact of amicus curiae briefs in this study. As actual litigation may be costly, many groups find it more beneficial to file "friend of the court" briefs on behalf of the parties that they support, though it is important to note that the filers themselves are not direct participants. Amicus briefs are also useful for smaller groups that cannot bear the cost of direct sponsorship, and thereby allow an organization to accomplish its objectives (Epstein and Rowland 1991). More recently, interest groups have united their forces to build coalitions, and thus present a united front to the Court on such important societal issues as abortion with these united coalitions (Wilson 1973). Also crucial to the influence of interest groups is the fact that they are increasingly becoming more active in the political process than ever before, in part due to the growing number of organizations. The Supreme Court itself has recently encouraged the submission of amicus briefs by acknowledging the role that these public law interest groups can play in litigation. Moreover, the Court rarely denies a group the opportunity to present briefs in favor of parties. While the Court can reject motions to file "third party" b riefs if the parties

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which he participates.

involved refuse to give their consent, Epstein and O'Connor find that the Court rarely denies these motions, denying only 11% between 1969 and 1981 (1989, 82).

Given that interest groups and government officials have traditionally played such a prominent role in the judicial decision making process at the certiorari stage, and that the Court is actively encouraging their participation in the form of amicus briefs, I hypothesize that their impact will be significant in the decision making process as it pertains to judicial review cases.[6] In essence, the Court is more likely to uphold or strike down a statute when more briefs are filed in support of a statute rather than opposing it. Previous studies support this hypothesis as Richard Kluger's (1976) examination of the LDF and school desegregation litigation, David Mawaring's (1962) study of the flag salute reached the same conclusion: amicus briefs do affect the decisional outcomes of the Supreme Court. Thus:

H_4: The greater the number of amicus briefs filed in favor of the constitutionality of a statute relative to the number of briefs opposed to the constitutionality of a statute, the less likely a justice will be to strike it down.

[6] It is important to note that not only do organized interest groups submit amicus briefs to the Supreme Court, but that government officials, such as state attorney generals also submit amicus briefs in cases that involve their respective interest, such as when a state statute is challenged as unconstitutional.

CHAPTER 5

THE LEGAL MODEL

Prior research suggests that courts do not react to all types of cases in the same way. Cases that raise certain types of issues, such as civil rights and liberties, provide more discretion in the decision making process, and thereby provide a greater opportunity for judicial policy making than do other types of cases, such as cases involving regulatory economic matters (Glick and Pruet 1986). Economic, taxation, and commercial cases are often seen as routine (typically decided through use of a rational basis test) and with the exception of a few cases that raise controversial and nascent issues, confine the Court to deal with familiar questions where well-established precedent exist. While most criminal cases involve challenges to regulatory issues such as prescribing penalties for crimes, laws governing trial procedure, and numerous death row appeals, there are instances where due process and other civil liberties disputes leave more room for judicial interpretation, and may trigger strict scrutiny, a traditionally activist test developed by the Supreme Court. Therefore, cases involving criminal procedure are often classified as civil liberties cases.

The judiciary, especially the federal court system, has traditionally been the most active in the civil rights and liberties forum in modern times. Gottlieb (2000) asserts that, "All of the members of the [current] Court received their legal training after the great switch in 1937 from a Court that assessed the reasonableness of economic legislation to one much more concerned about democracy, equality, and personal freedom" (192). Civil liberties cases deal with issues of racial and gender discrimination, and fundamental freedoms, and include such laws as those mandating that only wives may claim alimony,

laws that limit the rights of illegitimate children, laws that deny access to reporters during criminal trials, laws which regulate the circulating of types of pornography, and laws that provide state-based aid to religious schools (Emmert 1992).

Statutes will be most susceptible to challenge when the basis of that challenge rests in civil liberties grounds. Therefore, it is expected that these types of statutes would be more likely to be overturned by the justices than other types of cases**.** With regards to the findings of previous research, I offer the following hypothesis in the context of the study of judicial review.

H_5: A justice will be more likely to overturn a statute if the basis of the challenge to the statute rests on civil liberties grounds.

CHAPTER 6

THE LOWER COURT DECISION

Craig Emmert's study (1992) yields a very important conclusion regarding state supreme court decision-making: he finds that the single most important factor in determining whether or not a supreme court will strike down or uphold a statute is the lower court decision. Many state supreme courts tend to follow the precedent set by the circuit courts, and will thereby more often affirm rather than reverse the judgment that precedes it. However, one would not expect the U.S. Supreme Court to follow this same pattern, as the justices have a discretionary docket, meaning that they themselves review and select the cases that they deem necessary to hear.[7] On average, the justices are able to grant certiorari to a scant two percent of the petitioners, and most of the cases that make it to the Court are controversial with conflicting precedent among the lower courts, or pose a pressing federal question. The Supreme Court Compendium (Epstein 1994) indeed confirms that the U.S. Supreme Court reverses the lower court about 60% of the time, as opposed to state supreme courts, which reverse the lower court decision only 40% of the time (Emmert 1992). Consequently, I choose not to include a control variable for the lower court decision.

[7] It is important to note that some state supreme courts also have a discretionary docket.

CHAPTER 7

DATA AND METHODS

The data for this study consists of judicial review cases, as collected from the U.S. Supreme Court Data Base (Benesch 2001), that challenge the constitutionality of a federal, state or local statute in the United States Supreme Court from 1988-1999.[8] The unit of analysis is the individual justice's vote. After the cases are reviewed, the data is coded by each variable, including justices ideology, statute ideology, political consistency, support from the solicitor general, the influence of interest groups, the type of issue raised by the statute, and the type of statute challenged. The dependent variable, also referred to as "jstrike," is whether or not the justices decide to uphold or strike down a federal statute, coded "0" if the Court chooses to uphold the statute as constitutional, and coded "1" if the Court exercises its power of judicial review in striking down the statute.

In this design, I choose to use three separate models, a basic model that incorporates the variables listed above, a model that employs an interactive term ***(justice ideology x statute ideology)***, and at third model with an alternative interactive term ***(justice ideology x federal statute***). The first model is the most parsimonious; it is a basic model that provides a simplistic understanding of the data. Due to the complications of interpreting multiple interactive terms with a logistic regression analysis, also referred to as "logit," I have included a separate model to represent each multiplicative term. Then, a logit analysis is used to determine the impacts of each of the eight characteristics (six variables and two interactive terms) on the dichotomous dependent variable. A logit

[8] Please see. www. icpsr.umich.edu for this data base, which is centered around individual justices rather than the Court as an entity.

analysis is most appropriate for this research design because of the dichotomous dependent variable; logit estimates the effect of one variable on the probability of the dependent variable being equal to one, while simultaneously controlling for the other independent variables in the model. The results will then be tabulated, and compared to the hypotheses for each independent variable, and a conclusion drawn to show which factors significantly influence the judicial decision making process of United States Supreme Court justices in judicial review cases.

A. Operationalization of the Dependent Variable

For the purposes of this study, I examine a twelve-year period. Due to the alteration of the Supreme Court's discretionary docket through statutory law in 1988, which gave the justices greater discretion concerning the judicial review cases they select to hear, this data set is limited to Court's most recent decisions rendered in the past twelve years.[9] The cases were identified through reference to the LAW (#24) and UNCON (#39) variables in the U.S. Supreme Court Data Base.[10] Although the database identifies cases where a statute was invalidated by the Court (the UNCON variable), it does not identify cases where the parties challenge a statute, but the Court does not invalidate it. This resulted in the construction of a data set including cases where the constitutionality of a statute is challenged. The dependent variable is therefore dichotomous: a "0" is coded when the Supreme Court upholds the challenged statute as constitutional, and a "1" is coded when the Court s trikes the statute.

[9] See 28 U.S.C. Section 1254.

B. The Independent Variables: An Overview

As previously explained, judicial scholars have identified a series of variables to explain Supreme Court decision making based on attitudinal, institutional and legal models of judicial decision making. The variable reflecting the impact of justice ideology is most commonly measured by the criteria set forth by Segal and Spaeth (1993), including past voting behavior to predict votes in subsequent cases, facts from the lower court records of cases decided by the Supreme Court and editorials published in advance of nominee confirmation of the justices. However, I intend to employ a different method of measurement by utilizing the novel Quinn-Martin data that assesses justices' policy preferences to construct this variable, also referred to as "jideo." Moreover, a statute ideology variable, also referred to as "statideo," is included in the model to indicate whether or not the challenged statute is liberal or conservative in direction because hypothesis 1a states that justice ideology is conditioned upon statute ideology, also referred to as "jideolaw." Furthermore, hypothesis 1b states that the that the type of statute struck is also conditioned upon justice ideology, herein referred to as "ideofed." Finally, a variable called "fed" will be included to test for whether a federal, local or state statute is struck down by the Court.

The basis for the identification for statute ideology comes from Harold Spaeth's (1999) typology in the U.S. Supreme Court Data Base. Conservative statutes are identified by those that protect states rights, restrain fundamental freedoms such as religious freedoms or the freedom of communication, oppose to the rights of accused persons, convicted criminals, or the right to jury trials, oppose unions, antitrust, and trial

[10] Please see www.msu.edu. for information on this database. Go to the Judicial Law and Politics Page, and then click on "databases" to access the U.S. Supreme Court Data Base.

in arbitration, anti-judicial activism and anti-taxpayer basis provisions. In contrast, liberal statutes are those that favor anti-state/pro U.S. legislation, support judicial activism, support civil rights, strongly support a broad interpretation of the First Amendment and freedom of communication, support unions and antitrust action, and more broadly interpret criminal procedure by supporting the rights of accused persons and criminal defendants (Segal and Spaeth 1993). A more concrete example of a conservative statute would be an Oregon statute that banned use of peyote even in specific circumstances, such as a Native American religious ceremony. On the other hand, a gun control law, such as the Brady Bill, would be a liberal statute.[11]

The institutional model examines the impact that the Solicitor General, Congress, the presidency and interest groups have on the Supreme Court decision making process. The political consistency variable, also referred to as "polcons," examines how susceptible the Court is to the ideological orientation of the current legislature and presidency. The Solicitor General's influence is represented by examining his participation as both counsel and through the submission of an amicus brief in favor or opposition to the challenged statute. There are two separate variables included in the model for the Solicitor General: "sgstr" if the Solicitor is opposed to the statute, and "sgnostr" if the Solicitor is in favor of the statute. In effect the Solicitor General variable also reflects the government's immense success as a litigant in the federal judicial arena in comparison to the organizational and individual litigants.[12] Additionally, a variable

[11] Please see Appendix A for more details and tables concerning the operationalization of statute ideology.
[12] I have not included the party capability model in this design because a previous study devoted to this particular variable by Mishler, Songer, and Sheehan found that the status of the litigants was insignificant at the Supreme Court level. Prior research has shown the only the government as a litigant increases the likelihood that a statue will be struck down or upheld in the U.S. Supreme Court.

called "amicus" is included to measure the impact of amicus briefs submitted by interest groups or government officials in judicial review cases before the Supreme Court.

The legal model examines the type of challenge presented to a statute. For the purposes of this study, I have chosen to work with two broad groups: 1) criminal procedure and civil rights and liberties, and 2) all other cases including, economic or commercial, federalism, interstate relations and commerce and political or judicial power. This variable is called "civilibs." Table 1 presents a summary of the variables that have been discussed above, and groups them under the respective theoretical categories that they belong.

Table 1: Theories and Variables

Theory	**Variable(s)**
The Attitudinal Model	Justice Ideology, Statute Ideology, Federal Statute, Justice Ideology x Statute Ideology (interactive term), and Statute Ideology x Federal Statute (interactive term).
The Institutional Model	Political Consistency, Solicitor General, Interest Groups
The Legal Model	Civil Liberties

C: The Independent Variables: Coding and Measurement

Hypothesis 1

With regards to the hypothesis one, the Quinn-Martin measure focuses on the individual voting patterns of justices rather than large voting blocs. A further advantage of using this measure is the fact that is applicable to all types of cases, including economic cases, that come before the Supreme Court. This is in contrast to previous measures, which have subsequently fallen under criticism for being applicable solely to civil rights and liberties cases. Another feature of the Quinn-Martin measure is that the

researchers have created their work under the assumption that the policy preferences of judges change over time, and control for the type of cases reaching the Supreme Court so that this does not influence how liberal or conservative a justice may appear to be. Quinn and Martin estimate ideal points for each justice on the Supreme Court, which reflects how he would vote if there were no constraints.

The Quinn-Martin measure assigns negative scores for liberal justices, and gives positive scores for conservative justices. Consequently, the higher a justice's score, the more conservative he is. For example, Scalia, one of the more conservative justices sitting on the Rehnquist Court, is awarded a score of 2.641. The values for this data set range from 4.232, assigned to Thomas, the most conservative justice, and a -.2.005 for Marshall, the liberal justice in this data set.[13]

The ideal points for the Quinn-Martin data is presented in two separate models: a dynamic model and a constant model. The dynamic model assigns each justice an ideal point for each Supreme Court term, and allows a justice to move on the scale of measures over time with his evolving policy preferences. On the other hand, the constant model assumes that a justice has a fixed ideal point throughout his career, and so he is assigned one overall score. It is important to note that it makes little difference which model is used because a trajectory is built into the constant model that allows for a justice to become more conservative or liberal over time. For the purposes of this paper, I have chosen to work with the constant model, which assigns one overall ideal point score for each justice. Below, table 2 shows the scores for each of the justices in my data set that are taken from the constant model.

Table 2: Quinn Martin Constant Model- Justice Ideology Scores

Justice	Ideology Score
Marshall	-2.005
Brennan	-1.617
White	.411
Blackmun	-.048
Powell	.807
Rehnquist	3.046
Stevens	-.565
O'Connor	1.302
Scalia	2.641
Kennedy	1.324
Souter	.18
Thomas	4.232
Ginsburg	.281
Breyer	.274

The characteristics of a case may invoke different responses among justices, depending on their ideological leanings (Emmert and Traut 1994; Segal and Spaeth 1993). I have created interaction terms to identify whether this data sustains this finding in the literature. Including these terms in the research design, which enables me to test for the changing effects of the type of statutes challenged over time ***(justice ideology x federal statute)***, and the hypothesis that justice ideology is conditioned upon statute ideology ***(justice ideology x statute ideology)***. The interactive variables are added to the models 2 and 3 respectively to measure the effects of hypotheses 1a and 1b that posit conditional relationships among two of the variables.

To discern the type of statute challenged, a "0" is coded for a federal statute, and a "1" is coded for a state statute or local ordinance. To evaluate statut e ideology, a "0" is assigned to conservative statutes, and conversely, a "1" indicates liberal legislation.

[13] Quinn and Martin have two different sets of scores, one set from a constant model that awards each justice a fixed score, and a dynamic model that allows for the changes in justice policy preferences over time. This research design uses the constant model to operationalize justice ideology.

Hypothesis 2

Regarding hypothesis 2, political consistency is measured by first examining the dominant party in Congress and the presidency for the years 1988-1999. A 0 is assigned if both houses of the legislature and the presidency are controlled by the Democratic party, a 1 is assigned if two of these entities are controlled by the Democratic party, a 2 is assigned if two of these institutions are dominated by the Republican party, and a 3 is assigned if the majority of Congress and the party of the presidency is Republican. The political consistency variable creates an interaction where the expectation is that if two of more institutions are Republican, justices will be less likely to strike conservative statutes. In contrast, where two or more of these institutions are Democratic, the Court will less inclined to strike liberal statutes. The "polcons" variable is coded "0" where there is a lack of consistency, but is coded "1" where consistency exists among the institutions and the ideology of the statute. Consequently, when the political consistency variable is equal to 1, I expect a lesser likelihood of the statute being struck; in effect it should be negatively related to the independent variable. Table 2 demonstrates the scenarios where political consistency is achieved between the challenged statute, the Congress, and the presidency.

Table 3: Operationalization of Political Consistency

Statute Ideology	**Political Consistency=0**	**Political Consistency=1**
Conservative Legislation	0-All Democratic Institutions 1-Two Democratic Institutions	2-Two Republican Institutions 3-All Republican Institutions
Liberal Legislation	2-Two Republican Institutions 3-All Republican Institutions	0-All Democratic Institutions 1-Two Democratic Institutions

Hypothesis 3

I have also included two variables to measure the impact of the Solicitor General before the Supreme Court in an attempt to evaluate hypothesis 3. The first variable, "sgnostr," measures the influence of the solicitor general on Supreme Court decision making is coded by assigning a "1" if his office supports the challenged statute or a "0" if his office does not take a position regarding the statute in question. The second variable, "sgstr," is coded "1" if the Solicitor General opposes a challenged statute, and "0" if he takes not such position in the case. The combination of these variables include both the cases where the solicitor general directly supported or opposed a statute through representation of a party before the Supreme Court, and the cases where he filed an amicus brief in support or opposition to a challenged statute.

Hypothesis 4

With regards to hypothesis 4, the impact of amicus briefs in judicial decision making is measured simply by recording the number of amicus briefs filed in favor of the statute and the number of briefs filed in opposition to the statute that are cited in the Supreme Court opinion. Consequently, this means that all briefs as cited in favor or opposition of a statute in the opinion are coded for the purposes of this design. However, this choice of coding method has some shortcomings, since not all briefs listed in the opinion are cited in favor or opposition to a statute, and thereby may not account for all of the briefs submitted in a given case. [14] This measurement reflects the number of briefs submitted in favor of a statute minus the number of briefs filed in opposition to the statute.

Hypothesis 5

The Legal Model is operationalized simply by coding a "0" for civil rights and liberties legislation, and coding a "1" for other types of legislation. Civil rights and liberties challenges include such categories as criminal procedure, due process, First Amendment rights, privacy and equal protection. For the purposes of this study, challenges dealing with unions and attorneys will also be considered civil rights matters. The non-civil rights and liberties category includes challenges to a statute that rest primarily in economic, federal taxation, and federalism grounds. Challenges to a statute citing interstate relations are classified as non-civil liberties cases; a miscellaneous category is incorporated to include cases that do not fit precisely into one of the above named groups, but are not civil rights and liberties matters. The following table summarizes the issue areas that correspond with each category.

Table 4: Issue Areas and Corresponding Categories

Civil Liberties	**Non-Civil Liberties**
1. Criminal Procedure	1. Federal Taxation
2. Due Process	2. Interstate Relations
3. First Amendment	3. Federalism
4. Equal Protection	4. Economic Activity
5. Attorneys	5. Miscellaneous
6. Unions	
7. Civil Rights	
8. Privacy	

In an effort to summarize the list of variables, and how I have coded them for this research design, I have provided a table. Table 5 displays each variable and its code name for the analysis, as well as its operationalization in the right-hand column. Moreover,

[14] In some cases, amicus briefs were listed as indicating whether the brief supported the petitioner or the respondent, but did not always cite a position in the opinion. In this case, only the briefs with clear attributions were coded.

Table 6 seeks to provide the reader with an overview of the data, and displays the descriptive statistics for the data set.

Table 5: Variables and Coding Procedures

Variable	Coding
Justice Ideology "jideo"	Quinn-Martin Ideal Points -Constant Model-
Statute Ideology "statideo"	Coded "0 for conservative statute Coded "1" for liberal sta tute
Federal Statute "fed"	Coded "0" for federal statute Coded "1" for state or local statute
Civil Liberties "civilibs"	Coded "0" if civil liberties challenge Coded "1" if other challenge
Political Consistency "polcons"	Coded "0" if no consistency Coded "1" if consistency exists
Amicus Briefs "amicus"	Coded by the # of amicus briefs submitted in support of a statute minus the # of amicus briefs submitted in opposition to a particular statute
Solicitor General- supports statute "sgnostr"	Coded "0" if takes no such position Coded "1" if Solicitor supports statute
Solicitor General- opposes statute "sgnstr"	Coded "0" if takes no such position Coded "1" if Solicitor opposes statute

Table 6: An Overview of the Data

Variable	N	Mean	Std. Dev.	Minimum	Maximum
Jstrike	1493	0.48	0.50	0	1.0
Fed	1493	0.25	0.43	0	1.0
State	1493	0.60	0.50	0	1.0
Local	1493	0.15	0.35	0	1.0
Civilibs	1493	0.62	0.48	0	1.0
Polcons	1502	0.45	0.50	0	1.0
Amicus	1484	1.42	10.3	-49	50
Sgnostr	1502	0.15	0.36	0	1.0
Sgstr	1502	0.08	0.28	0	1.0
Jideo	1493	0.48	0.50	-2.005	4.232

Table 6 suggests that of the 170 cases (a total of 1484 justice votes) where a challenge to a statute existed, a quarter of these laws originated from the federal

government.[15] The majority of contested legislation came from state governments, 60%, while 15% of challenged statutes resulted from discontent with local ordinances. More than half of these combined statutes involved civil rights and liberties matters, 62%, leaving the other 38% of the cases as an eclectic mix of matters ranging from economic activities to interstate relations and federalism. The average amicus brief submitted in a given case in favor of a statute was 1.4, while the Solicitor General actively supported, through direct representation or an amicus brief, 15% percent of the challenged statutes in the data set. The variable that represents the Solicitor General's opposition to a challenged statute indicates that the Solicitor General opposed a piece of challenged legislation in 8% of the cases.[16]

[15] The N does not equal 1530 (170x9) as one might expect because not all justices participate in all judicial review cases.

CHAPTER 8

RESULTS, INTERPRETATIONS, AND CONCLUSIONS

A. The Empirical Results

Because the dependent variable is dichotomous, the three models are estimated using logit analysis: this includes a basic model and two interactive models including the joint effects of statute ideology with justice ideology and federal statutes. The results are presented in Table 7; it displays that nearly all of the coefficients are in the expected direction, and most are statistically significant. Furthermore, the basic model reduces the predicted error a little over 15% (r.o.e. =15.7%) while the interactive models perform almost equally in terms of error reduction. The second model has a slightly improved reduction of error (r.o.e =16.17%), while the third model has an error reduction of 15.4%. It is also important to note that the chi-square value demonstrates that all three models are overall highly statistically significant at the .001 level, with respectable reduction of error values.

The Basic Model

The Basic model shows that justice ideology is in the expected direction, and is highly significant at the .001 level indicating that conservative justices are less likely to strike statutes than liberal justices. The federal statute variable is also in the expected direction, indicating that justices are less likely to strike federal statutes than state statutes and local ordinances; it displays significance at the .01 level. The basic models also indicates that if the challenge to a statute rests on civil liberties grounds, the statute is more likely to be overturned, and is highly significant at the .001 level. The variable that

[16] The low percentage of cases where the Solicitor General opposes a challenged statute may contribute to the reasons why it did not show up as significant in the final results.

represents the Solicitor General's support for a statute also displays a high level of significance (.001), indicating that the Court often defers to the position of the Solicitor General when he supports a statute. Additionally, the Solicitor General variable indicating his opposition to a challenged statute suggests that the Court is more likely to strike a statute if the Solicitor opposes it, but lacks any statistical significance. The political consistency variable is not significant, and the coefficient shows up in a positive direction, contrary to my hypothesis. The variable for amicus briefs is insignificant.

Model 2: Justice Ideology x Statute Ideology

The coefficient for justice ideology stays highly significant at the .001 level in this model, and still displays a negative direction, supporting hypothesis 1a that states conservative justices are less likely to exercise the power of judicial review. The interactive term also is highly significant at the .001 level, and in the anticipated direction. This suggests that the interactive term supports hypothesis 1, which states that conservative justices are more likely to strike liberal statutes. The statute ideology is also highly significant at the .001 level, and in the expected direction. Federal statute loses significance as it shows up at the .10 level, and civil liberties variable is still in the anticipated direction and significant at the .001 level. The political consistency variable remains in a direction contrary to my hypothesis in this model, but amicus remains insignificant. Once again, if the Solicitor General supports a statute, the Court is less likely to overturn it, as indicated by the negative coefficient. Also, this variable remains highly significant at the .001 level. In contrast, the variable that represents the Solicitor General's opposition to a challenged statute is not significant, but is in the hyp othesized direction.

Model 3: Justice Ideology x Federal Statute

Consistent with the first two models, justice ideology remains in the anticipated direction, and highly significant at the .001 level. Federal statute reaches its highest level of significance, .001, in this model. The interactive term is highly significant at the .001 level, and also is in the anticipated direction.[17] The positive coefficient suggests that conservative justices are more likely to strike federal statutes, and this finding is consistent with hypothesis 1b regarding the new federalism. It appears that a civil liberties challenge to a statute will make it most susceptible to being invalidated, and this remains highly significant at the .001 level in all three models. The political consistency variable once again is insignificant and in a direction that is contrary to my hypothesis. The amicus variable remains insignificant in all three models. The Solicitor General opposing variable also remains highly significant at the .001 level, and is once again in a negative direction. The variable that represents the support of the Solicitor General for a statute is repeatedly in the right direction, but not significant in any of the models.

Table 7: Variables,Coefficients, and Results

Independent Variable	**Basic Model**	**Model Reflecting Statute Ideology**	**Model Reflecting Federal Statute**
Attitudinal Model			
Justice Ideology	-0.1501***	-0.3560***	-0.2268***
Justice Ideology*Statute Ideology		0.4635***	
Statute Ideology		-0.8772***	
Federal Statute	-0.1637**	-0.1639*	-0.4836***
Justice Ideology*Federal			0.3029***
Legal Model			
Civil Liberties	0.5367***	0.4950***	0.5453***

[17] The significance levels for the interactive terms must be interpreted with some caution, however, given the fact that the model is non-linear.

Institutional Model			
Political Consistency	0.0774	0.4139*	0.0757
Amicus Briefs	-0.00117	-0.00069	-0.00102
Solicitor General -uphold	-0.7226***	-0.7647***	-0.7081***
Solicitor General- strike	0.1569	0.1371	0.1891
Chi-Square	70.5987***	122.2842***	86.6052***
Degrees of Freedom	7	9	8
Reduction of Error	15.7	16.17	15.4
Number of Votes	1484	1484	1484

* p < .10, ** p < .05, *** p < .001

B. Summary of Results and Findings

As expected, ideology plays a key role in determining how justices will vote. Consistent with my initial hypothesis, the interactive term, justice ideology x statute ideology, suggests that conservative justices are less likely to strike conservative statutes and more likely to strike liberal statutes, and in turn, liberal justices are less inclined to strike liberal statutes. The coefficient for justice ideology also confirms my hypothesis that liberal justices are more likely to engage in judicial activism, while conservative justices are less likely to exercise the power of judicial review, striking statutes less often than their liberal counterparts. This variable is negative and significant at the .001 level in all three models, indicating that the likelihood of this association being attributed purely to random chance is less than one percent. However, the results from the third model indicate that when conservative justices do strike statutes, they typically overturn federal legislation. Liberal justices, on the other hand, are more inclined to strike state and local legislation when they overturn a statute. All of the variables regarding ideology are significant at the .001 level, and support my hypotheses.

The political consistency variable turns out to significant at the .10 level in the first interactive model and insignificant in the other two models, though the coefficient is

in the wrong direction in every model. The positive coefficient indicates that the Court may not be as sensitive to the ruling coalition as originally expected. The impact of the Solicitor General turns out to be significant at the .001 level in all of the models, indicating that justices are less likely to strike a statute if the Solicitor's office supports it, either through direct representation on behalf of the United States or through an amicus brief. This finding thereby confirms my hypothesis that a statute will be less likely to overturned if supported by the Solicitor General's office. The sgstr variable generally supports my hypothesis that if the Solicitor is opposed to a statute, it is more likely that a justice will vote to overturn it, though it fails to achieve statistical significance. The impact of amicus briefs turns out to be insignificant in all three models, so I must conclude that the number of briefs filed in support of a statute does not heavily influence justices' decisions to overturn a statute.

In general, the coefficient for federal statute shows that justices are less likely to strike federal statutes overall, and more likely to strike a statute if the challenge to a statute is based in a civil liberties issue. The basic model reveals that justices are generally less likely to strike a federal statute than a state statute or local ordinance, and is significant at the .01 level. The significance level decreases to .10 in the second model. It reaches the highest level of significance in the third model (.001), which includes an interaction term, statute ideology x federal statute, to test whether justices are more likely to strike a federal statute if they are conservative in ideology. As previously discussed, the positive coefficient indicates that conservatives are more likely to strike federal statutes than their liberal counterparts. The civil liberties variable is highly significant at the .001 level in all three models.

C. Conclusions

This study shows that ideology, the type of statute in question, the support of the Solicitor General, and the type of issue raised in the challenged statute all contribute significantly to a justice's decision to overturn a statute. While other factors identified in previous research do affect the decision to override legislation, this study shows that in the past twelve years, conservative justices are still less likely to exercise judicial review than liberal justices. Moreover, consistent with the doctrine of the new federalism, conservative justices will more often vote to strike federal statutes rather than state and local statutes. This can be explained by the shift in recent Supreme Court decisions from personal rights to state's rights, especially with the majority of justices sitting on the current Rehnquist Court that actively favor the concept of state sovereignty. Consistent with conventional wisdom, my results indicate that, in general, conservative justices are more likely to overturn liberal statutes, and liberal justices tend to strike conservative legislation.

The results in this study may also be thought of as novel because they are inconsistent with Dahl's fundamental hypothesis that the Supreme Court generally supports the ruling coalition. The positive coefficient for the political consistency variable indicates that the Supreme Court is more likely to strike a conservative statute when two of more of the institutions (house, senate, or presidency) are Republican. Though this is contrary to conventional wisdom, this finding provides limited support for Segal's (1997) conclusion that the Court does not act strategically, and that justices decide cases in accordance with their own policy preferences and values, without deference to Congress and the looming threat of reversal legislation.

However, the results affirm prior findings that the Solicitor General has tremendous success in the cases he represents before the Supreme Court and with the amicus briefs that he files in favor of a statute. A plausible explanation for this is the fact that the Solicitor General will most likely support a federal statute when he participates in a case before the Supreme Court, and the findings also show that justices in general are less likely to strike federal statutes. This also indirectly emphasizes the success of the government as a litigant in the federal judicial arena. Though the impact of amicus briefs turns out to be insignificant in this study, this can also be attributed to tradition: amicus briefs play a key role in the certiorari process, but are less effective in the actual decisional outcome of a case that has been granted certiorari (Epstein 1994).

This study also demonstrates that the origin of the law in debate (i.e. federal, state, or local legislation) plays a critical role in a justice's decision to strike it down as unconstitutional, or uphold it as constitutional. Federal statutes are less likely to be struck overall by the Supreme Court, but once again conservative justices are more likely than liberals justices to strike federal statutes. The fact that the a justice is in general less likely to strike a federal statute can be explained by the Supremacy Clause of the Constitution, which grants the national government a preeminent position in respect to the states. Therefore, in general the Supreme Court is more likely to overturn state and local legislation that does not conform to the Constitution or federal policies.

The type of issue raised in the challenged statute has a significant impact on whether or not a justice will decide to exercise his power of judicial review. Harmonious with the modern phenomenon that finds that Court consistently active in the civil liberties forum since the mid-nineteenth century, a justice is more likely to strike a statute if its

challenge rests on civil liberties grounds. An explanation for this steady involvement in the civil rights and liberties arena, is the fact that these types of cases often trigger strict scrutiny, a more activist test employed by justices, and thus may leave more room for discretion in the interpretation process.

Though this study sheds some light on the factors that justices take into account when deciding judicial review cases, there are still many questions unanswered that may interest scholars. For example, what is the role of public opinion in the decision making process, and how does it affect ideology? This study shows that justices will vote in accordance with their own policy preferences, but do they act strategically, and take into account the way that the other justices on the Court will vote? This study could also be improved by including a clustering method since there are only 9 justices that decide cases within this data set. A further expansion would include a table of predicted probabilities, so that the influence of the variables could be compared against one another. This study shows that justice ideology, the position of the Solicitor General, the type of statute challenged, and whether or not the challenges rests in civil liberties grounds all contribute to a justice's decision to uphold or strike a cha llenged statute, but is one factor more important to a justice than the others? Furthermore, this study could be expanded back as far as to the era of the New Deal, and attempt to account for trends in the decision making process. For example, for this data set shows that conservative justices are more likely to strike federal statutes, but this may not be the case in a different time period outside of the new federalism. Another limitation of this particular research design is that I have not yet performed a reliability check on the data. A final shortcoming may be observed in the political consistency variable, which presents a

crude attempt to measure the effects of institutions on Supreme Court decision making. A more detailed measure should be developed to measure the impact of Congress. While this study can be expanded and improved in the future, it overall accomplishes the task of adding new information about the factors that justices take into account when deciding judicial review cases, thereby, improving the literature.

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APPENDIX

STATUTE IDEOLOGY CODING TABLES

0 =Conservative Statute
1 =Liberal Statute

Table1: Criminal Procedure

ISSUE of SUPPORT	STATUTE IDEOLOGY
Involuntary confession	0
Contempt of court	0
Habeas corpus	1
Plea bargaining	1
Retroactivity	1
Search and seizure	0
Search and seizure- automobiles	0
Self-incrimination	0
Miranda Warnings	1
Immunity	1
Right to counsel	1
Cruel and unusual punishment- death penalty	0
Jury trial	1
Speedy trial	1

Table 2: Civil Rights

ISSUE OF SUPPORT	STATUTE IDEOLOGY
Voting	1
Voting Rights Act of 1965	1
Ballot access	1
Equal employment opportunity	1
Affirmative action	1
Reapportionment	1
Debtor's rights	1
Deportation	0
Aliens, employability	1
Indians	1
Indians, state jurisdiction	1
Juveniles	1
Poverty law, statutory	1
Illegitimates	1
Indigents	1
Immigration and naturalization	1
Civil rights acts, liability	1
Poverty law, constitutional	1
Handicapped rights	1

Table 3: First Amendment

ISSUE OF SUPPORT	**STATUTE IDEOLOGY**
First Amendment	1
Commercial speech	1
Libel, defamation	0
Libel, privacy	0
Federal internal security legislation	0
Legislative investigations	0
Campaign spending	1
Religious freedom	1
Establishment of religion	0
Parochial school aid	0
obscenity	1

Table 4: Due Process

ISSUE OF SUPPORT	STATUTE IDEOLOGY
Due process	1
Due process, hearing	1
Prisoner's rights	1
Impartial decision maker	1
Takings clause	1
Due process, jurisdiction	1
Due process, government employees	1

Table 5: Privacy

ISSUE OF SUPPORT	STATUTE IDEOLOGY
Abortion	1
Freedom of Information Acts	0

Table 6: Attorneys

ISSUE OF SUPPORT	STATUTE IDEOLOGY
Commercial speech, attorneys	1
Attorney's fees	1

Table 7: Unions

ISSUE OF SUPPORT	STATUTE IDEOLOGY
Arbitration	1
Union antitrust	1
Union/union member conflict	1
Fair Labor Standards Act	1
OSHA	1
Rights of unions- business	1
Rights of business- unions	0

Table 8: Economic Activity

ISSUE OF SUPPORT	STATUTE IDEOLOGY
Antitrust	0
Mergers	0
bankruptcy	0
State tax	0
State regulation	0
Natural resources	1
Securities regulation	1
Governmental corruption-regulate	1
Zoning	1
Consumer protection	1
Liability-governmental	1
Patents and copyrights	1
Public utilities regulation	1
Liability-non-governmental	1
Transportation regulation	1

Table 9: Federalism

ISSUE OF SUPPORT	STATUTE IDEOLOGY
Preemption- state court jurisdiction	1
Preemption- state regulation	1
National supremacy	1

Table 10: Federal Taxation

ISSUE OF SUPPORT	STATUTE IDEOLOGY
Federal tax	1
Priority of federal fiscal claims	1