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# THE LEAST ACTIVIST SUPREME COURT IN HISTORY? THE ROBERTS COURT AND THE EXERCISE OF JUDICIAL REVIEW

Keith E. Whittington\*

## ABSTRACT

*Not too many years ago, scholars could reasonably speak of the U.S. Supreme Court as being among the most activist in American history. Both empirical and normative scholarship was driven by the sense of a Court that was aggressive in the assertion of its own supremacy and active in the exercise of the power of judicial review. The Court under Chief Justice John Roberts cannot be viewed in the same way. The Roberts Court has issued its share of controversial constitutional decisions, but a rarely observed but important feature of the Roberts Court is its unusual restraint in the exercise of judicial review. By some measures, in fact, the Roberts Court can thus far be called the least activist Supreme Court in history. This Article demonstrates that the Roberts Court is deserving of that title and investigates some features of the exercise of judicial review of the current Court compared to its recent predecessors. The Court has become less likely to strike down federal laws, but importantly it has become far less likely to invalidate state laws. Although the willingness of modern conservative jurists to strike down statutes is notable, the declining ability of the liberals on the Court to form majorities willing to strike down state laws has been particularly important to the creation of a restrained Court. The return of judicial activism on the Supreme Court is likely to depend on the appointment of more liberal Justices to the Court who could press the constitutional views that are now most often expressed in dissent.*

## INTRODUCTION

Not too many years ago, both activists and scholars were increasingly alarmed by the apparent activism of the U.S. Supreme Court. Such critiques of the Court have gradually faded, but have certainly not disappeared. Justice Ruth Bader Ginsburg only recently insisted that she needed to stay on the Court in order to oppose what is “one of the most activist courts in history.”<sup>1</sup> The Justices are still subjected to denunciations of particular deci-

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1 Adam Liptak, *Court Is ‘One of Most Activist,’ Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 25, 2013, at A1.

sions, but broad-gauged attacks on the activism of the Court have seemingly receded.

The shifting critiques of the Court reflect an underlying reality. In recent years the Court has been less active in exercising the power of judicial review than it has at any point in its modern history. But even the earlier critiques of an apparently activist Court obscured underlying trends in judicial review.

The Roberts Court is notably conservative, but that simple label provides only a partial description of the recent Court. Chief Justice John Roberts is himself part of a conservative majority that has often been able to shape the recent development of constitutional law. But the Court remains divided between more conservative and more liberal Justices, and those coalitions offer competing visions of what the constitutional rules are and how they ought to be applied. Over time, the liberal wing of the Court has often been able to form majorities to strike down legislation, usually over the objections of the conservative wing. Ironically, it is Ginsburg herself who is among the most activist Justices on the current Court and represents the most likely source of increased judicial invalidations.<sup>2</sup>

It has not been frequently observed that the Roberts Court has been remarkably reluctant to exercise the power of judicial review. The Court in recent years has struck down federal laws in fewer cases than has its predecessors. More importantly, the Court has struck down state laws in far fewer cases than has been routine for the past century. This Court could plausibly be described as the least activist Court in history, and this recent pattern should also cause us to reevaluate the claims of activism during the late Rehnquist Court.

This Article proceeds in stages. Part I reviews claims that the contemporary Court has been the most activist in history. Part II develops the case for thinking that the Roberts Court has instead been the least activist. Part III examines the transformation of the Court through a series of snapshots of constitutional decisions from the late Burger Court through the Roberts Court. Part IV examines the constitutional decision making of the Roberts Court in more detail.

## I. THE MOST ACTIVIST COURT IN HISTORY?

During the late Rehnquist Court, cries of “judicial activism” were common.<sup>3</sup> Much, though not all, of this attention was focused on the Court’s invalidation of federal statutes. There was a notable uptick in how often the Rehnquist Court struck down federal laws. Moreover, those laws were struck down by slim 5 to 4 majorities, often with the same set of conservative Justices

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<sup>2</sup> See *infra* Section III.C.

<sup>3</sup> See, e.g., Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1367, 1369 (1996).

leading the way.<sup>4</sup> Those cases also tended to reflect a remarkably coherent set of constitutional concerns. The Court repeatedly returned to the question of how far Congress was restrained by structural features of the Constitution, most notably federalism, and often found that Congress was limited in ways that had not been emphasized by the Court since the first half of the twentieth century. Unsurprisingly, this line of decisions attracted attention from scholars and pundits alike.<sup>5</sup>

Charges of judicial activism from the political right have been familiar for quite some time, and the Rehnquist Court heard its share of such complaints. In the aftermath of the 1992 abortion rights decision of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>6</sup> authored by a trio of Reagan–Bush appointees, the conservative journal *First Things* sparked a firestorm with its “End of Democracy” symposium<sup>7</sup> pondering whether a United States government dominated by an unrestrained Court had lost legitimacy.<sup>8</sup> Christopher Wolfe was among a group of conservative scholars who continued through the 1990s and into the 2000s to denounce judicial activism as a threat to republican government.<sup>9</sup> For many on the right, “the Court’s continuing injection of its power into so-called culture war issues” was the primary concern and seemed unabated by the appointment of more conservative Justices.<sup>10</sup> Conservative politicians continue to rail against judicial activists, as evidenced by everything from bills introduced in Congress<sup>11</sup> to party platforms<sup>12</sup> to congressional hearings.<sup>13</sup>

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4 Tom Keck usefully pointed out, however, that these cases often involved more bipartisan judicial coalitions and more bipartisan legislative coalitions than has been commonly observed. See Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 330 (2007).

5 For one overview, see Keith E. Whittington, *Taking What They Give Us: Explaining the Court’s Federalism Offensive*, 51 DUKE L.J. 477 (2001) (detailing the Rehnquist Court’s unprecedented focus on federalism).

6 505 U.S. 833 (1992).

7 Symposium, *The End of Democracy? The Judicial Usurpation of Politics*, 67 FIRST THINGS 18 (1996).

8 RICHARD JOHN NEUHAUS, *THE END OF DEMOCRACY?*, at vii–x (Mitchell S. Muncy ed., 1997); see also Richard J. Neuhauus, *Rebuilding the Civil Public Square*, 44 LOY. L. REV. 119, 119 (1998) (noting the “storm that swirled and continues to swirl around the symposium”).

9 See, e.g., CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM* (1997).

10 THAT EMINENT TRIBUNAL 1–2 (Christopher Wolfe ed., 2004).

11 See, e.g., Congressional Accountability for Judicial Activism Act of 2004, H.R. 3920, 108th Cong. § 2 (proposing a means for congressional reversal of Supreme Court judgments).

12 See, e.g., REPUBLICAN PLATFORM COMMITTEE, *WE BELIEVE IN AMERICA: 2012 REPUBLICAN PLATFORM* 25 (2012), available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf> (discussing judicial activism as a threat to the Constitution). Notably, the 2012 GOP platform did admit that there had been “improvements as a result of Republican nominations to the judiciary.” *Id.*

13 See generally *Judicial Activism: Defining the Problem and Its Impact: Hearings on S.J. Res. 26 Before the Subcomm. on the Constitution, Federalism, and Prop. Rights of the S. Comm. on the Judiciary*, 105th Cong. 1 (1997) (“This morning’s hearing is the first in a series of three hearings which will examine the challenges and the problems of judicial activism, how it impacts

Perhaps more notable has been the resurgence of critiques of judicial activism from the left. Such criticisms of the courts were once familiar, roiling political and intellectual debate in the early twentieth century,<sup>14</sup> but had been muted by the revolutions in constitutional law since the New Deal.<sup>15</sup> Over the past couple of decades, the left has rivaled the right in its perception of growing judicial activism. Symposia and panel discussions have been organized to analyze “conservative judicial activism.”<sup>16</sup> Trade books were written denouncing right-wing judicial activism.<sup>17</sup> Liberal democratic politicians have begun to worry about judicial activism.<sup>18</sup> Academic concerns with a growing “judicial supremacy” during the Rehnquist Court dovetailed with an emerging literature calling for a “popular constitutionalism” that would take the Constitution away from the Court<sup>19</sup>—all of which amounts to a “new activist Court.”<sup>20</sup>

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people, and what can be done about the problem of judicial activism.” (statement of Sen. John Ashcroft)).

14 See, e.g., WILLIAM G. ROSS, *A MUTED FURY* (1994) (detailing the origins of the hostility and controversy toward the Court during the Progressive Era).

15 See generally Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in *THE BURGER COURT* 218 (Vincent Blasi ed., 1983).

16 See, e.g., Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1139 (2002) (“It is very much in vogue these days to accuse the current Rehnquist Court of ‘conservative judicial activism.’”).

17 See, e.g., RONALD DWORKIN, *THE SUPREME COURT PHALANX* (2008) (examining Supreme Court decisions in 2006 and 2007 and arguing that the Court’s conservative Justices have taken unprecedented steps toward partisan, activist decision making); JAMIN B. RASKIN, *OVERRULING DEMOCRACY* 3–10 (2003) (arguing that a new set of protections guarding basic democratic rights must be developed in light of aggressive judicial activism on the Supreme Court); *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* (Herman Schwartz ed., 2002) (collecting essays documenting the Rehnquist Court’s dramatic shift to the right).

18 See, e.g., *Barack Obama: Remarks to the White House Press Pool and an Exchange with Reporters*, AM. PRESIDENCY PROJECT (Apr. 28, 2010), <http://www.presidency.ucsb.edu/ws/index.php?pid=87815> (“Q[.] Senator Leahy’s been talking a lot about conservative judicial activism . . . . The President[’s response:] . . . It used to be that the notion of a[n] activist judge was somebody who ignored the will of Congress, ignored democratic processes, and tried to impose judicial solutions on problems instead of letting the process work itself through politically. And in the sixties and seventies, the feeling was, is that liberals were guilty of that kind of approach. What you’re now seeing, I think, is a conservative jurisprudence that oftentimes makes the same error.”).

19 See LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 8 (2004) (arguing for a return back to the original understanding of the Constitution as one where “[f]inal interpretive authority rested with the ‘people themselves,’ and courts no less than elected representatives were subordinate to their judgments”); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, at x–xi (1999) (advocating for a “populist constitutional law” that provides a people-centered interpretation to the Constitution); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 237, 330 (2002) (discussing the “rise of judicial supremacy” and noting that “a recent trend in the academic literature is to identify issues that are better left to the political branches instead of the courts”).

20 Zeigler, *supra* note 3, at 1367.

The framing of judicial activism has changed somewhat with the shift in ideological valence. It is perhaps telling that President Obama framed judicial activism as opposing the “will of Congress,”<sup>21</sup> while conservatives have tended to focus more on the judicial nullification of state laws. Democratic Representative Elijah Cummings characterized as a “staggering assertion of judicial activism” the possibility of the Justices “dismiss[ing] the legitimacy of our votes in Congress” by striking down federal statutory provisions.<sup>22</sup> Senator Patrick Leahy has denounced conservative Justices for obstructing the congressional will, contending that “[i]t is the very definition of judicial activism when a court imposes a rule of decision rejected by its own precedent and rejected by Congress.”<sup>23</sup> Early on, Linda Greenhouse took to the pages of the *New York Times* to warn of a “radical” Court that was upsetting “[l]ong-held assumptions about the authority of the national government.”<sup>24</sup>

One useful perspective on the Rehnquist era that both captured this gist and offered an explanation for the activist turn is provided in Thomas Keck’s *The Most Activist Supreme Court in History*.<sup>25</sup> Keck’s wide-ranging study is ultimately concerned with tracing the abandonment of a tradition of judicial self-restraint most closely associated with Justice Felix Frankfurter. No subsequent Justice has embraced the posture of across-the-board deference to legislatures in the exercise of constitutional review that Frankfurter advocated. The Warren Court instead adopted a vision of “rights-based constitutionalism” that marked out a robust role for the judiciary in monitoring and checking the other branches of government.<sup>26</sup> The Warren Court’s decisions continue to shape conceptions of the judicial role, even if the particular substance of constitutional law has been in flux.

Keck observes that the invalidation of statutes by the U.S. Supreme Court has varied over time.<sup>27</sup> The brief period of Frankfurter’s greatest influence, from the introduction of the Court-packing plan to his departure from the bench in 1962, also marked a period of unusual restraint for the modern

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21 *Barack Obama: Remarks to the White House Press Pool and an Exchange with Reporters*, *supra* note 18.

22 Elijah E. Cummings, *Justice Scalia’s Staggering Assertion of Judicial Activism*, THE HILL’S CONG. BLOG (Mar. 8, 2013, 7:30 PM), <http://thehill.com/blogs/congress-blog/judicial/287037-justice-scalias-staggering-assertion-of-judicial-activism>.

23 Press Release, Senator Patrick Leahy, Judiciary Committee Look at SCOTUS Rulings in Age Discrimination, Arbitration Cases (Oct. 7, 2009), <http://www.leahy.senate.gov/press/leahy-judiciary-committee-look-at-scotus-rulings-in-age-discrimination-arbitration-cases> (quoting the statement of Senator Patrick Leahy, Chairman of the Judiciary Committee, regarding the hearing on “Workplace Fairness: Has the Supreme Court Misinterpreted Laws Designed to Protect American Workers”).

24 Linda Greenhouse, *Farewell to the Old Order in the Court: The Right Goes Activist and the Center Is a Void*, N.Y. TIMES, July 2, 1995, at E1.

25 THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004).

26 *Id.* at 4–5.

27 *See id.* at 39–41 (documenting the variation in invalidations in Table 2.1).

Court.<sup>28</sup> Subsequently, the Court became more active, striking down statutes at a higher rate, either on behalf of a liberal rights agenda or a conservative rights agenda. Importantly, Keck contends that once the “conservative majority started to come into its own,” the late Rehnquist Court embarked on a period of “extraordinary activism.”<sup>29</sup> Moreover, he explains this shift by focusing on the willingness of the pivotal Justices on the Court, Sandra Day O’Connor and Anthony Kennedy, to endorse a program of both liberal *and* conservative activism.<sup>30</sup> The willingness of those Justices to form coalitions from both ideological directions pushed the Court to ever-greater heights of activism.

It is worth noting an alternative perspective on the late Rehnquist Court offered by Mark Tushnet. For Tushnet, this was a “chastened” Court that did not have the kind of ambition of its predecessors.<sup>31</sup> Tushnet is less focused than Keck on the exercise of judicial review per se and the number of laws struck down, and his explanation for changes in the Court is less concerned with the internal intellectual development of the Justices than with the external political environment that might have consequences for the Court’s agenda.<sup>32</sup> As a good ally (or instrument) of a broader political coalition, the Court should dutifully serve the needs of that coalition. The conservative Court of the post-Reagan era is treading water, neither undertaking dramatic new initiatives nor significantly retrenching received doctrine.<sup>33</sup>

The larger constitutional regime provides the rationale for this more chastened Court. The “big government” of the Great Society needed “a big Court” to help achieve its goals.<sup>34</sup> Post-New Deal liberals needed the judiciary to help them accomplish their political aims, which could not all be achieved efficiently and effectively through the legislative process.<sup>35</sup> The key

28 During this period (which Keck labels as the Roosevelt Court and the Early Warren Court), the annual average of federal invalidations, noted in Keck’s Table 2.1, was 0.5 and the annual average of state invalidations was 7.23 in Table 2.2, both well below the twentieth-century norms. Keck identifies the “Late Rehnquist Court” as occupying the years 1995 to 2003. *Id.* at 40–41.

29 *Id.* at 203.

30 *Id.* at 199–201.

31 Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 33 (1999) [hereinafter Tushnet, *Chastening*]. For an expansion on this article, see MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003).

32 See Tushnet, *Chastening*, *supra* note 31, at 32 (stating that “we cannot understand the Supreme Court’s work as a whole without understanding the interaction between the president and Congress in staffing the Court”).

33 *Id.* at 64.

34 *Id.* Also, “[a]n activist government necessarily included an activist Court collaborating with the other branches of the national government to implement the regime’s principles.” *Id.* at 68–69.

35 See LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 248–311 (2009); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 138–68 (Ronald Kahn & Ken I. Kersch eds., 2006); see also KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 119–120, 126–30 (2007).

difference between the political environment of the Warren Court and that of the Rehnquist Court, Tushnet contends, is that the crucial political constituencies of the contemporary era “need less help from the Court than did the prior regime’s constituencies.”<sup>36</sup> Those constituencies “have already achieved substantial success in the political arena, leaving to the Court only some modest judicial moves on the margins of the issues that concern those groups.”<sup>37</sup> Contemporary political interests are more involved in obtaining favorable legislation and administrative actions than in striking them down, leaving the courts with relatively little to do with the power of judicial review. The enhanced awareness of the political branches of the requirements of the new constitutional order renders “the need for judicial intervention . . . rare.”<sup>38</sup> Whereas for Keck the conservative constitutional order of the contemporary era features a rights constitutionalism that invites an active role for the Court, Tushnet’s conservative constitutional order emphasizes tax cuts and deregulation and, as a consequence, sidelines the Court.<sup>39</sup> Undoubtedly, both narratives have an element of truth, with the Court’s recent work being less politically salient than in the Warren years, even if the recent Justices have been equally or more willing to override legislative decisions.

## II. THE LEAST ACTIVIST COURT IN HISTORY?

The building narrative from the right and from the left that we have fully entered an age of judicial supremacy and unprecedented judicial activism overlooks some important features of the Court’s exercise of judicial review even in the Rehnquist era. Moreover, the narrative of “extraordinary activism” hardly fits the Roberts Court at all. Indeed, the Roberts Court has a plausible claim to being the least activist U.S. Supreme Court in history, and it has established that claim by building on tendencies that were already visible during the Rehnquist era.

Keck and Tushnet are no doubt correct that Frankfurter’s philosophy of Thayerian deference has found few adherents since the mid-twentieth century. More importantly, the individuals who have been successfully appointed to the Court have not been heirs of such progressive jurists as Felix Frankfurter and Learned Hand. Contemporary Justices have an expansive view of their own authority and role within the political system, and they remain committed to the idea that a vast number of controversies can be brought before them for authoritative resolution. This Court, like others before it, embraces the notion of judicial supremacy. But judicial supremacy does not necessarily translate into judicial activism.

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36 Tushnet, *Chastening*, *supra* note 31, at 64.

37 *Id.* at 67.

38 *Id.* at 70.

39 *See id.* at 68–69.



The term “judicial activism” is, of course, crude and unavoidably political.<sup>40</sup> Judicial activism has long been a term of invective and thus is hard to use as a neutral description of judicial behavior. Moreover, judicial activism has been used in myriad ways over time. In political discourse, judicial activism is a deeply ambiguous concept. Even so, the idea has a resonance that remains useful. Empirical scholars have tried to recover the core of the idea of judicial activism in order to identify something that is measurable, relatively objective, and comparable across contexts.<sup>41</sup> In such studies, “judicial activism” is used to refer to the relative frequency of judicial invalidation of statutory provisions as inconsistent with constitutional requirements.<sup>42</sup> Activist courts strike down statutes in many cases; restrained courts more rarely declare legislation to be unconstitutional. This is the starting point for Keck’s own analysis.<sup>43</sup> I trade on that convention here as well, while admitting its limitations.<sup>44</sup>

My starting point is to observe that the Roberts Court has invalidated statutes in fewer cases per year than had any previous modern Court.<sup>45</sup>

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40 See Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 237 (1983); Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441, 1443 (2004).

41 There are, no doubt, other useful ways to conceptualize judicial activism and to construct a portrait of the contemporary Court. For present purposes, I hope to bracket both normative assessments of the relative activism of recent Courts and alternative approaches to thinking about what constitutes activism and restraint. See, e.g., Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385, 389 (1969) (distinguishing between “negative activism” that obstructs democracy and “positive [activism]” that promotes civil liberties and democracy).

42 See, e.g., Gregory A. Caldeira & Donald J. McCrone, *Of Time and Judicial Activism: A Study of the U.S. Supreme Court, 1800–1973*, in SUPREME COURT ACTIVISM AND RESTRAINT 103–27 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (modeling the “process of change in the level of judicial activism”); STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 29–46 (2009); Sujit Choudhry & Claire E. Hunter, *Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v. Nape*, 48 MCGILL L.J. 525, 532 (2003) (“This measure . . . posits that courts are more activist the more frequently they find that democratically elected institutions have acted unconstitutionally.”); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 44 (2007) (performing an “empirical examination” by examining how often the Court invalidates legislation and overturns precedent).

43 See KECK, *supra* note 25.

44 It should be noted that the constitutional review of statutes does not exhaust the constitutional adjudication of the Court. The Court also develops and applies constitutional law in evaluating the actions of judges and executive branch officials that does not implicate the scope of legislative authority or legislatively endorsed policy. Such cases are excluded from the analysis of this Article.

45 As the discussion above already suggests, periodizing the history of the U.S. Supreme Court by the tenure of the Chief Justice is unavoidably crude. “History’s Warren Court” is not the Supreme Court of 1959, but the Supreme Court of 1965. Nonetheless, focusing our attention initially on the Roberts Court seems like a convenient entry point for thinking about recent judicial history. John Roberts has only served as Chief Justice for

Under Chief Justice Roberts, the Court has struck down statutes at an annual average rate of 3.8 cases, which is the fewest since before the Civil War (only the Gilded Age Courts are even close).<sup>46</sup> The rate of invalidation is a bit more complicated if cases involving federal laws are distinguished from cases involving state laws.<sup>47</sup> Over the course of the Court's history, it has been far more active in striking down state laws than federal laws.<sup>48</sup> This tendency no doubt reflects both the relative political vulnerability of the states to federal judicial oversight (compared to the coordinate branches of the federal government) and the relative abundance and diversity of state laws compared to congressional statutes. The Roberts Court has struck down federal law in fewer cases, on average, than any modern Court, with the exception of the immediate post–New Deal Courts.<sup>49</sup> The change is even more striking in cases involving the invalidation of state laws. The Roberts Court has struck down state laws in fewer cases per year than any Court since the Civil War, by a significant margin.<sup>50</sup>

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eight years at this point, which is not yet at the historical median tenure of eleven years for a Chief Justice. It is likely a long enough tenure, however, to justify an initial assessment of his Court. Roberts's tenure is comparable, for example, to that of Salmon Chase or William Howard Taft.

46 The numbers here reflect cases heard and decided by the Court, as is conventional. This ignores a variety of potentially salient features of those cases. The analysis treats each case (and statute) as equivalent. It counts cases striking statutes, rather than statutes struck. The legal implications of a given case might well extend to numerous statutes. It brackets the question of legislative activity, as well as how many and what type of statutes the courts might confront. For a more comprehensive examination of the judicial review of federal statutes, see KEITH E. WHITTINGTON, *REPUGNANT LAWS* (forthcoming 2015).

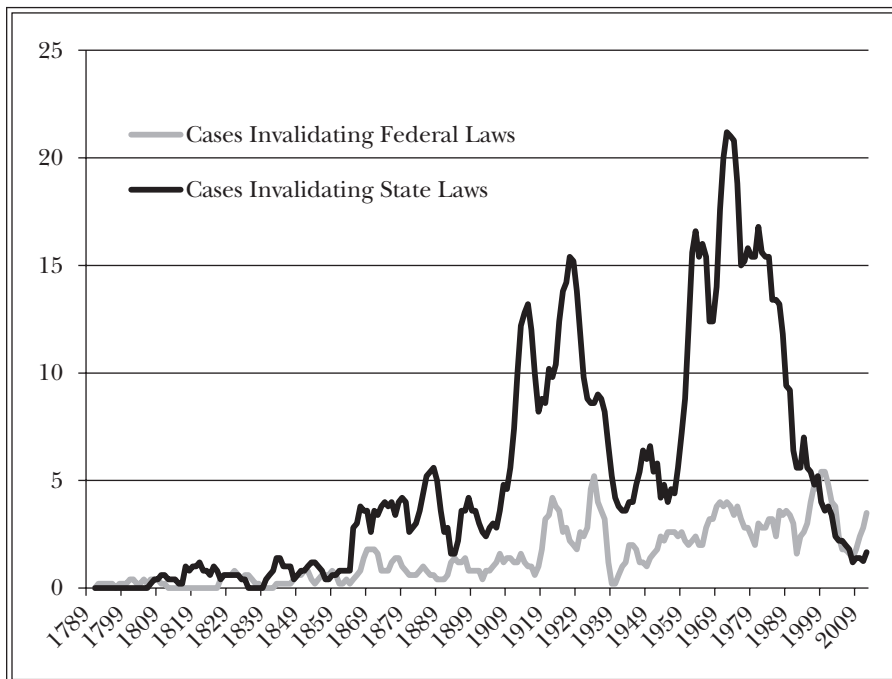
47 For the analysis of the constitutional review of federal statutes, this Article draws on the Judicial Review of Congress database. The construction of the database is described in Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 *Geo. L.J.* 1257, 1262–66 (2008). In short, the dataset was constructed through a full-text electronic search of all U.S. Supreme Court cases for a number of terms associated with known cases of judicial review. All cases identified by that search process were then read in order to identify the set that in fact involved the substantive review of the constitutionality of a federal statutory provision as it applied to the case before the Court. This resulted in a comprehensive inventory of all cases across American history in which the Court either upheld the application of a statute against constitutional challenge or blocked the application of a statutory provision on constitutional grounds. The dataset consists of just under 1300 cases, just over a quarter of which involve the invalidation or narrowing of a statutory provision given constitutional limits on the legislative authority of Congress.

48 The political significance of this vertical judicial review is explored in Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 *COLUM. L. REV.* 1137, 1159 (2011), and Keith E. Whittington, "Interpose Your Friendly Hand": *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 *AM. POL. SCI. REV.* 583 (2005).

49 The annual average rate for the Roberts Court has been 2.3 federal statutes per year, which exceeds the rates of the Stone and Vinson Courts that struck federal laws at a rate of fewer than 2 statutes per year. All discussion of constitutional cases involving federal statutes draws on the Judicial Review of Congress dataset. See *supra* note 47.

50 The annual average rate for the Roberts Court has been 1.6 state statutes per year. The Chase Court is the next closest since the Civil War, and it struck down state laws at an

FIGURE 1: U.S. SUPREME COURT CASES INVALIDATING STATUTES, 1789–2012



Note: Centered, five-year moving average of the number of cases striking down state and federal laws. Data on state laws derived from *The Constitution of the United States: Analysis and Interpretation*. Data on federal laws derived from the Judicial Review of Congress database.

There are a variety of ways to contextualize this basic pattern. Figure 1 shows a centered, five-year moving average of the number of cases decided by the U.S. Supreme Court that find either a federal law or a state law unconstitutional. By smoothing annual fluctuations, the moving average makes the patterns in the data somewhat more evident. There has been substantial variation in the number of both types of cases over time. The Court has been active throughout its history in striking down state and federal laws, but has generally decided more cases invalidating state laws than federal statutes.<sup>51</sup> The several peaks and troughs of judicial activity in exercising the power of constitutional review have followed somewhat similar patterns across cases involving state laws and cases involving federal laws. For both types of cases,

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average rate of 3.3 statutes per year. The identification of cases invalidating state laws is derived from the list maintained by the Congressional Research Service and published in *THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION*, S. DOC. NO. 112-9, at 2327–502 (2013).

<sup>51</sup> For the U.S. Supreme Court activity evaluating the constitutionality of federal laws in the decades prior to the Civil War, see Whittington, *supra* note 47. For the years surrounding the turn of the twentieth century, see Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 829–38 (2005).

there was an uptick in activity after the Civil War, in the early twentieth century, and the second half of the twentieth century. Within these broad phases of relative activism and restraint, there are some minor divergences between how the Court treated federal and state law. The invalidation of state laws spiked relative to federal laws in the late 1880s, and the Court's nullification of state laws preceded the nullification of federal laws in the early twentieth century (peaking for the states with the Taft Court in the Progressive Era rather than Hughes Court during the New Deal) and in the latter twentieth century (peaking for the states with the late Warren and early Burger Courts rather than the Rehnquist Court for Congress). The swings in the invalidation of state laws have been more dramatic than in the number of cases involving federal law, but particularly striking is the abrupt fall in the number of cases limiting state legislatures since the 1980s, returning the Court to levels not seen since the Civil War. As a consequence, the total number of cases imposing constitutional limits on legislatures has been held to a number that the Court has not seen for a sustained period since the nineteenth century.

The simple variation in the count of cases over time can be somewhat misleading, however, since the baseline rate of judicial review has not been a constant over the Court's history. There have been three fairly clear inflection points in how often the Court uses the power of judicial review to strike down statutes, but the timing of those shifts are slightly different for the review of state laws versus the review of federal laws. The Court struck down state laws at a fairly stable rate through 1866 and plateaued at a significantly higher level through 1912 before establishing a new baseline that has endured to the present. Similarly, the Court's pace of invalidations of federal laws jumped in 1877 and again in 1920. Within these three broad regimes established by the transition out of the Civil War and the battles of the Progressive Era, there were bursts of relative activism and restraint. What would have seemed like restraint for the post-War Vinson Court would have seemed like outrageous activism to the antebellum Taney Court. Thus, we can normalize the Court's record of judicial review by controlling for the average number of cases striking down statutes in any given historical period. The variation around the trendline shows more clearly the pattern of activism and restraint relative to the historical era.<sup>52</sup>

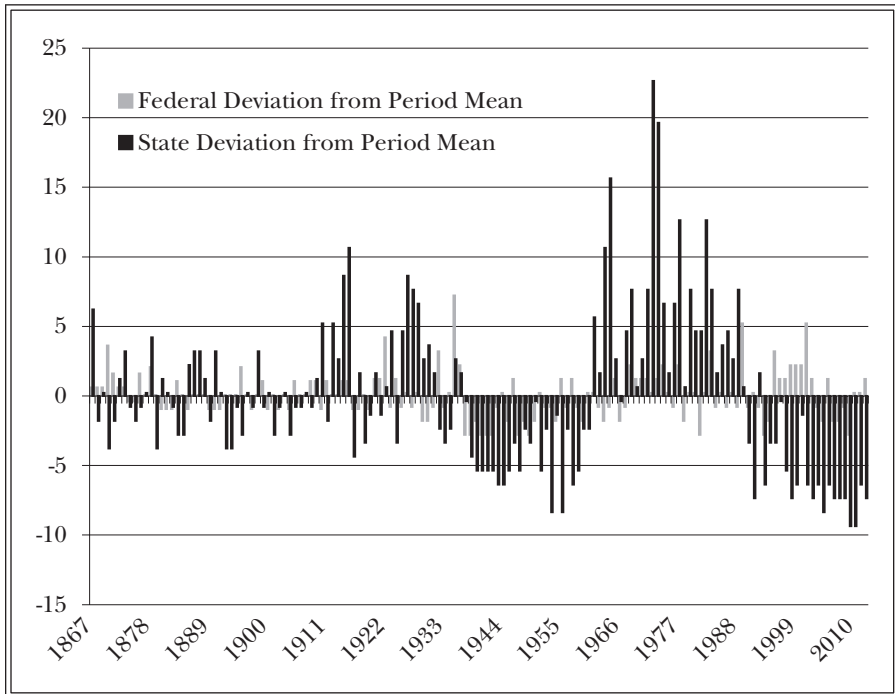
Contextualizing the Roberts Court indicates just how restrained it has been. Figure 2 treats cases involving state and federal laws separately, but, unlike Figure 1, normalizes the annual count of such cases. The Court since 2000 has been unusually restrained for the modern era, invalidating federal laws at a relatively low rate and striking down state laws at a historically low rate. The Roberts Court rivals the post-New Deal Court for its restraint in striking down laws, exceeding it slightly in its depth. Moreover, the period of restraint shown by the contemporary Court is now starting to rival the early Frankfurterian Court in its duration. Unless something like the Warren

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52 This approach is modeled after Caldeira & McCrone, *supra* note 42.

Court succeeds the current Court, we might well look back on the late 1980s as an inflection point of its own, marking out a new, lower baseline in the historical pattern of judicial review. Ironically, the Rehnquist Court that was denounced as among the most activist might instead be the harbinger of a period of sustained judicial restraint not seen since before the Progressive Era.

FIGURE 2: JUDICIAL ACTIVISM AND RESTRAINT BY THE U.S. SUPREME COURT, 1867–2012



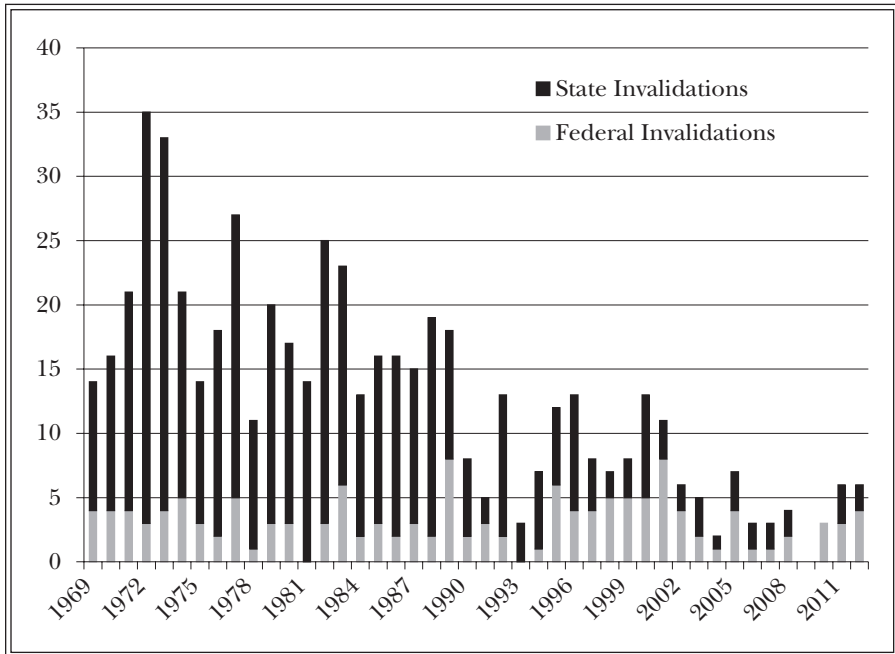
Note: Annual count of cases invalidating federal and state laws, normalized by historical period. Historical periods for judicial review were state laws beginning in 1867 and 1913 and for federal laws in 1877 and 1920.

Ultimately, we should focus more closely on the dynamics associated with the contemporary period. Figure 3 illustrates from yet a different perspective the pattern of decline in the exercise of judicial review by the U.S. Supreme Court in recent decades. In this figure, the annual counts of cases invalidating state and federal laws are stacked in a single column.<sup>53</sup> The trend from the beginning of the Warren Court to the present is evident.

<sup>53</sup> For purposes of thinking about judicial activism generally, there is little obvious reason for distinguishing state and federal cases. Federal cases are not, intrinsically, more politically salient than state cases, and judicial decisions invalidating or upholding statutes may be either sweeping or limited in their policy and legal effects. Whether involving federal or state legislation, these cases provide the Court with the opportunity to establish

Moreover, as Figure 2 also suggests, the cases invalidating state laws are the true driving force of this contemporary trajectory. There has been fluctuation in the number of cases striking down federal laws over the past forty years, but the number of cases striking down state laws has inexorably declined, putting the Court on its current path.

FIGURE 3: NUMBER OF U.S. SUPREME COURT CASES INVALIDATING STATUTES, 1969–2012



Note: Annual count of cases invalidating federal and state laws.

### III. FROM THE BURGER COURT TO THE ROBERTS COURT: FOUR SNAPSHOTS

The seeds of the judicial restraint evident in the Roberts Court were planted in the years before Chief Justice John Roberts reached the bench. The early Burger Court stands as among the most activist in the Court's history. The puzzle is in identifying what distinguishes these Courts, and how the Burger Court developed into the Roberts Court. There is little question that the Court since Chief Justice Earl Warren's departure in 1969 has been a generally conservative Court, with the median Justice occupying an ideological space to the right of where the Court stood in the decades prior to President Richard Nixon's appointments.<sup>54</sup> Although the Court as a whole may not have ever been as conservative as some hoped, or feared, the Court since

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and enforce constitutional limits on legislatures and obstruct public policy, with varying effects.

<sup>54</sup> See *infra* note 55.

the Nixon era has been characterized by Republican appointments and a generally more conservative orientation to constitutional law and adjudication.<sup>55</sup>

The approach of this Article is to examine the development of the Court through a series of snapshots of constitutional decisions from the late Burger Court through the Roberts Court. In particular, this Article focuses its attention on four two-year periods: 1981–1982, 1989–1990, 1998–1999, and 2007–2008. These samples of the Court’s constitutional adjudication give a representative perspective on the activities of the late Burger, early and late Rehnquist, and Roberts Court and track the decline in judicial activism from the Burger era to the Roberts era.<sup>56</sup> These samples capture the appointment of Justice O’Connor—the first Reagan Justice—to the Burger Court, the Rehnquist Court with Justice Kennedy replacing Justice Powell and again during the long period of stability with two four-Justice coalitions arrayed around Justice Kennedy, and then finally the core line-up of the Roberts Court. The samples are evenly spaced across this period of the Court’s history, with some minor adjustments to better capture changes in the personnel on the Court and meaningful judicial review activity.

#### A. *The Late Burger Court*

The Court just after Ronald Reagan’s inauguration had already been under the leadership of Chief Justice Warren Burger for over a decade. During the 1981–1982 window, Reagan’s first nominee, Sandra Day O’Connor,

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55 There are two common approaches to measuring the relative conservatism of the Supreme Court in the judicial politics literature. Bailey scores situate the Justices relative to each other and the other branches based on a common set of votes and policy statements. Michael A. Bailey, *Comparable Preference Estimates Across Time and Institutions for the Court, Congress, and Presidency*, 51 AM. J. POL. SCI. 433, 442 (2007). Martin-Quinn (or more broadly, Judicial Common Space) scores do the same, but rely on voting behavior and make somewhat different statistical assumptions. Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 307 (2007). Both show that the Court became more conservative with Warren’s departure and has remained so since. See Bailey, *supra*, at 435 fig.2; Epstein et al., *supra*, at 312 fig.4. More concretely, the median member of the Court went from being far to the left of the median member of the House of Representatives during the Warren era to being relatively close to the House afterwards (the two measures differ on whether the Court is to the right or left of the House after 1969). See Bailey, *supra*, at 435 fig.2; Epstein et al., *supra*, at 313 fig.6. Put differently, the median of the Court shifted from Justice Brennan in the Warren Court to Justice White in the Burger Court to Justice O’Connor in the Rehnquist Court. The median of the average majority coalition that formed on those Courts tells a similar story. See generally Deborah Beim et al., *Policy and Disposition Coalitions on the Supreme Court of the United States* (Oct. 23, 2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1641542](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641542).

56 The cases of judicial review of state laws for this analysis are identified through a similar process that was used to construct the Judicial Review of Congress database. The search of state cases, however, focused on the introductory materials in the U.S. Reports (particularly the syllabus), which are generally reliable in identifying instances of statutory provisions being upheld or struck down in the modern period.

joined the bench, replacing the centrist Potter Stewart.<sup>57</sup> O'Connor joined a Court characterized by a large bloc of centrist Justices who held sway between two smaller blocs of liberals (anchored by Brennan and Marshall) and conservatives (anchored by Rehnquist and Burger).<sup>58</sup> As Figures 1 and 2 indicate, by 1981 the Burger Court was significantly off its peak of judicial invalidations from a decade earlier, but the Court was still within the historic wave of activism that began during the Warren era.

Reflecting the prominence of the group of centrists, the coalitions to invalidate legislation in this sample tended to be large and ideologically diverse. Narrow majorities were rare, whether the Court was striking down or upholding statutes. The median number of Justices that joined a decision striking down a state law during these years was six. Building such sizable majorities required pulling in not only liberal Justices like William Brennan and John Paul Stevens but also more conservative Justices like Lewis Powell and Byron White. Brennan may have known how to count to five, but getting five usually meant getting six or seven on the late Burger Court.<sup>59</sup>

For a Court with a relatively conservative reputation, however, those coalitions to nullify laws tended to be built from the left. True to his Burger-era moniker as the "Lone Ranger," Justice Rehnquist tended to join only the largest of majorities voting to strike down legislation (two of the four decisions invalidating state laws that Rehnquist joined were unanimous). By contrast, Justices Brennan and Marshall were members of all but two of the coalitions that struck down laws during these years. They were also the least likely to join majorities upholding laws against constitutional challenge. The Burger Court in 1981–1982 was not as activist as Brennan and Marshall would have preferred, but they rarely thought that the Court had struck down an undeserving law. By contrast, the most conservative members of the Court at that time were the most likely to vote to uphold statutes and the least likely to vote to strike them down.

Judicial review of federal statutes did not drive the Court's activism at the start of the Reagan era. In 1981, the Court did not strike down any federal statutory provisions, the first such occasion since the 1940s. In 1982, the Court invalidated provisions of two bankruptcy acts.<sup>60</sup> Those cases hardly raised hot-button issues, and one was decided unanimously.<sup>61</sup> The Justices were busy hearing constitutional challenges to federal statutes, however. The Court rendered decisions in over a dozen cases contesting the constitutional-

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57 *Reagan's Nomination of O'Connor*, NAT'L ARCHIVES, <http://www.archives.gov/legislative/features/oconnor.html> (last visited Apr. 9, 2014).

58 On the composition of the Burger Court, see Keith E. Whittington, *The Burger Court (1969–1986): Once More in Transition*, in *THE UNITED STATES SUPREME COURT 300* (Christopher Tomlins ed., 2005). A convenient mapping of the voting patterns of the Justices can be found at [www.targetpointconsulting.com/scotusscores-labels.html](http://www.targetpointconsulting.com/scotusscores-labels.html).

59 On Brennan's understanding of the "most important rule in constitutional law," the rule of five votes, see MARK TUSHNET, *A COURT DIVIDED* 35 (2005).

60 See *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

61 *Sec. Indus. Bank*, 459 U.S. 70.



ity of congressional actions, but the Justices almost always turned back those challenges and upheld the actions of the government. At that point, it was the liberal wing of the Court that would have preferred to strike more of those congressional statutes down as unconstitutional. When the majority upheld the congressional directive that only men had to register for the military draft or allowed Congress to give a smaller disability subsidy to those residing in mental institutions, for example, the liberal Justices were in dissent.<sup>62</sup> The notable exception to that pattern came in the area of campaign finance, with the conservative Justices dissenting from a narrow majority that upheld limits on the amount that individuals could donate to political action committees.<sup>63</sup>

The action was in the cases involving the constitutionality of state laws. The Court heard more of them in these two years (over three dozen) and struck them down at a higher rate (roughly half of those challenges resulted in an invalidation). But where Rehnquist joined the majority to strike down laws in only seven of those cases, Brennan joined nineteen. Sometimes those majorities were narrow, as when the Court struck down Wisconsin's directive of how political parties choose presidential nominating convention delegates,<sup>64</sup> San Diego's restriction on roadside billboards,<sup>65</sup> or Seattle's public initiative requiring that children attend neighborhood schools.<sup>66</sup> At other times, the coalitions were quite broad, as when the Court struck down Berkeley's limitation on campaign donations to political action committees supporting ballot measures,<sup>67</sup> a Massachusetts statute allowing churches to block the issuance of liquor licenses to nearby businesses,<sup>68</sup> or the application of an Ohio statute requiring the publication of the names of donors to the political campaigns of minor parties.<sup>69</sup>

What united the large number of cases challenging state and local ordinances was the need for the Justices to clarify the application of relatively new and complex constitutional rules. The Burger Court in these years was not developing bold new doctrinal initiatives so much as it was managing the fallout from earlier decisions. Over a decade later, the Justices were still deeply enmeshed in the constitutional dialogue between judges and legislators that had been set off by the constitutional revolution of the 1960s and early 1970s. New constitutional rules regarding everything from campaign finance to expressive speech to sexual equality left the state of the law unset-

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62 *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981); *Schweiker v. Wilson*, 450 U.S. 221, 239 (1981).

63 *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 184–85 (1981).

64 *Democratic Party v. Wis. ex rel. La Follette*, 450 U.S. 107, 126 (1981).

65 *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 (1981) (6-3 decision).

66 *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 (1982) (5-4 decision).

67 *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981) (8-1 decision).

68 *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (8-1 decision).

69 *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 102 (1982) (6-3 decision).

tled, and the Justices found that the devil was in the details.<sup>70</sup> Even when a majority voted to uphold statutes against constitutional challenge, such as a ban on nude dancing where liquor is served,<sup>71</sup> a parental-notice requirement for abortions,<sup>72</sup> or the restriction on the remedial powers of state court judges in desegregation cases,<sup>73</sup> the correct application of the law was uncertain given the Court's own recent decisions. Given that those rulings often turned on how aggressively the Court should now extend the logic of earlier liberal doctrinal innovations, it is perhaps unsurprising that the liberal wing of the Court was normally on the side of striking down state policies. The debate on the Court turned on how far more conservative-centrist Justices like Lewis Powell or Byron White were willing to go in extending the scope of those precedents.

### B. *The Early Rehnquist Court*

By the end of the decade, the Justices were differently situated. Chief Justice Burger had been replaced by the Associate Justice who had been consistently on his right, William Rehnquist.<sup>74</sup> Robert Bork's nomination had failed,<sup>75</sup> but Reagan had been able to add three new members to the Court.<sup>76</sup> As a consequence, the Court now had a sizable conservative bloc consisting of Rehnquist, O'Connor, Kennedy, and Scalia, which could look to the often sympathetic Byron White to form a narrow majority against an increasingly solid liberal bloc consisting of Brennan, Marshall, Stevens, and Blackmun. The landmark liberal precedents were several years older, and the intellectual underpinnings for an alternative constitutional jurisprudence were being developed.

In 1989 and 1990, the Court was showing a shift in both the overall level of activity in judicial review and in its target. The Court struck down laws in half a dozen fewer cases than it had in the two-year period at the start of the decade. Moreover, the composition of the laws being struck down had begun a dramatic shift, with cases involving federal statutes now composing a third of the total, and the overall number of cases striking down state statutes cut nearly in half. The Court was less active in striking down statutes but more focused on Congress.

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70 On the idea of interbranch constitutional dialogues over the details of constitutional rules, see NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES* (1996), which argues that most landmark Supreme Court decisions "cannot be understood without paying attention to the politics surrounding them," *id.* at 7, and LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* (1988), which asserts that "[t]he purpose of this book is to show that constitutional law is not a monopoly of the judiciary," *id.* at 3.

71 *N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981) (per curiam).

72 *H.L. v. Matheson*, 450 U.S. 398, 413 (1981).

73 *Crawford v. Bd. of Educ.*, 458 U.S. 527, 545 (1982).

74 Tom Wicker, *Foreword* to *THE REHNQUIST COURT*, *supra* note 17, at 3, 10.

75 *Id.* at 11.

76 *Id.*

The decline of the centrists (whether through retirement like Stewart or drift to the ideological wings like Blackmun) translated into narrower majority coalitions in judicial review cases. Constitutional cases were routinely decided by five- or six-Justice majorities, whether the legislation was the product of the national or state legislature and whether the outcome was to strike down or uphold legislation. When the Burger Court voted to uphold legislation at the start of the decade, it did so with sizeable majorities. When the early Rehnquist Court voted to uphold legislation, it often did so with only the slimmest of majorities. More laws were surviving judicial scrutiny, but just barely.

Despite these narrow majorities, the coalitions that formed in these cases had a more mixed ideological profile than did those in the late Burger era. The liberals on the Court were still the most likely to vote to strike down legislation and were still quite likely to appear in the majority in a case invalidating statutory provisions (and the least likely to appear in majorities upholding statutes against constitutional challenge). But now they were joined more often in those proclivities by conservative members of the Court. Though Rehnquist was still unlikely to vote to strike down laws, Antonin Scalia joined nearly as many coalitions to nullify legislation as William Brennan did, and the Court rarely struck down a law without Anthony Kennedy in the majority.<sup>77</sup> Surprisingly, this record was less the result of Kennedy (or O'Connor) oscillating between Scalia and Brennan than all three joining the same decision. Narrow ideological majorities were more likely to be built from the left (swinging either O'Connor or Kennedy), but most decisions striking down laws drew from both the left and the right wings of the Court.

The constitutional review of federal legislation played a more significant role in the activism of the early Rehnquist Court than of the late Burger Court. In these two years, the Court resolved well over a dozen constitutional cases involving federal legislation, and nearly a third resulted in invalidation. The conservative Justices, including Chief Justice Rehnquist, showed a markedly greater willingness to strike down federal laws than they did state laws. But those cases often created strange bedfellows and did not reflect narrowly ideological commitments. The narrow nullification of the federal Flag Protection Act pulled together Scalia and Brennan against White and Stevens.<sup>78</sup> More often, Congress offended a broad coalition of the Justices, including unanimous decisions striking down a congressional ban on adult telephone messaging services<sup>79</sup> and an effort to impose substantial civil as well as criminal penalties on those committing Medicare fraud.<sup>80</sup> The Court also decided some seemingly easy (if largely technical) cases in favor of Congress, unani-

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77 Kennedy was not especially likely to vote to strike down a statute, but even in these early moments on the bench, he was especially likely to be in the majority when a law was struck down. He was almost as unlikely to dissent from a majority decision to uphold a statute as Rehnquist was.

78 *United States v. Eichman*, 496 U.S. 310, 311 (1990).

79 *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 117 (1989).

80 *United States v. Halper*, 490 U.S. 435, 451-52 (1989).

mously holding, for example, that the monetary “special assessment” provision of the Victims of Crime Act was not a bill raising revenue and so did not violate the origination clause.<sup>81</sup> But when the decision to uphold a federal statutory provision against constitutional challenge was more closely contested, it was often the conservatives who lined up in support of Congress.<sup>82</sup>

During this two-year period, the Court heard fewer cases raising questions about the constitutionality of state laws, and it upheld those laws at a higher rate. The four most liberal members of the Court were again most likely to vote in favor of striking down state laws, and they were the least likely to be found in a majority upholding a state law. The conservatives tended to resolve new constitutional claims in favor of the states, as when the guardians of Nancy Cruzan asked the courts to identify a “right to die” that would override Missouri’s living will statute.<sup>83</sup> They also tended to pare back efforts to extend or aggressively apply constitutional rules laid down by earlier, more liberal judicial majorities. Thus, the conservatives accepted Arizona’s scheme for determining death penalty sentences<sup>84</sup> and Missouri’s system of abortion restrictions over the objections of the Court’s liberals.<sup>85</sup> A distinctly conservative invalidation of state law made an appearance in another minority set-aside case,<sup>86</sup> but more often than not a unified liberal wing of the Court joined hands with one or more conservatives (usually Kennedy and O’Connor) to strike down state laws.<sup>87</sup> As George H.W. Bush succeeded Ronald Reagan in the White House, the Court was engaged in a process of conservative retrenchment in constitutional law. The result was a gradual decline in judicial review of the states and of judicial nullification of state policy decisions.

### C. *The Late Rehnquist Court*

In 1998 and 1999, there were no Warren-era Justices still on the bench. The first President Bush had replaced Brennan and Marshall with Souter and Thomas, while Clinton had replaced White and Blackmun with Breyer and Ginsburg.<sup>88</sup> The net result was, in some ways, a wash. White had often joined the conservatives in recent constitutional decisions, while Marshall was a bulwark of the liberal wing of the Court. Their replacements on the bench

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81 *United States v. Munoz-Flores*, 495 U.S. 385, 387–88 (1990).

82 The most politically salient decision upholding a federal statute during these years, however, relied on the liberal wing of the Court in order to save minority set-asides in the allocation of broadcast licenses. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 552 (1990).

83 *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 265 (1990).

84 *Walton v. Arizona*, 497 U.S. 639, 655–66 (1990).

85 *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 499 (1989).

86 *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (holding that the City of Richmond’s treatment of citizens on a racial basis, with respect to awarding construction contracts, violated the Equal Protection Clause).

87 Most of the majorities striking down state laws included both Kennedy and O’Connor, but none were made without at least one of them.

88 Wicker, *supra* note 74, at 11.

simply switched sides, with White's successor joining the liberals and Marshall's successor joining the conservatives.<sup>89</sup> The late Rehnquist Court remained narrowly divided with two sizeable ideological wings.

If the ideological balance on the Court was similar at the end of the decade to what it had been at the beginning, its exercise of the power of judicial review looked quite different, accelerating patterns that had made an appearance early in the Rehnquist era. The Court struck down legislative provisions in only a dozen cases during these two years, half of what it had done in the sample from the late Burger Court. More famously, the traditional ratio of federal to state cases was reversed, with the Justices striking down federal laws in twice as many cases as they did state laws. The decision to invalidate laws was reached with even smaller majorities on the late Rehnquist Court, but the decision to uphold state and federal laws tended to be more consensual. The Court was no longer upholding laws over the objections of a determined minority of the Justices. When the Court accepted cases in order to uphold a statute against constitutional challenge, it did so in order to correct the lower courts or settle political uncertainties rather than to resolve its own internal disagreements about the direction of constitutional law.

The ideological orientation of the coalitions on the Court in judicial review cases made a notable shift during this two-year period in the late Rehnquist Court. At the beginning of the 1990s, judicial majorities striking down laws were ideologically mixed but built from the left wing of the Court. At the end of that decade, the conservative Justices were building invalidating coalitions from the right. They were willing and able to put together narrow majorities to strike down laws, and even more mixed coalitions included a significant number of conservative Justices. Scalia, O'Connor, and Kennedy were the regular members of invalidating coalitions, while Stevens, Souter, and Breyer primarily joined in decisions striking down state laws. In the earlier samples, the more liberal Justices displayed a distinctly greater propensity for voting to strike down laws in the cases that had come before them. In 1998 and 1999, there were relatively small differences among the Justices in their propensity to vote to nullify laws. Perhaps nothing reflects the shift from the early 1980s to the late 1990s more than that the conservative Justice Thomas was the most likely to vote to invalidate legislation. Just as significant, Thomas was especially likely to vote against the government in cases involving challenges to federal statutes, but he was among the least likely to vote against the government in cases involving challenges to state statutes.<sup>90</sup> The conservative Justices were now the ones most likely to be in a majority

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89 Brennan's successor, David Souter, quickly became a reliable vote for the liberals, and the left-leaning Blackmun successor, Ruth Bader Ginsburg, became a leader of the liberal wing of the Court.

90 The sharp decline in the number of cases involving judicial review of state statutes allowed Thomas to maintain the unusual statistical position of being among the most likely to vote to invalidate statutes overall and among the least likely to vote to invalidate state laws specifically. Only the Chief Justice was less likely to vote to invalidate a state law dur-

striking down legislation, and they oriented their efforts against federal statutes. Unlike the earlier periods, however, few of the Justices were left out of decisions to uphold laws against constitutional challenge. The median size of an upholding coalition was eight Justices, and only Justice Stevens was likely to urge from a dissenting position that his colleagues strike down additional statutes (and he particularly did so in cases involving state laws).

In contrast to earlier periods, at the end of the 1990s federal statutes occupied most of the Court's constitutional agenda. There were twice as many constitutional cases decided involving federal statutes as state statutes in this sample, and the percentage of constitutional cases decided against the government was the same for both the state and federal governments. This sample was, of course, at the tail end of the Court's federalism offensive that began in the mid-1990s and that repeatedly relied on five conservative votes to strike down federal laws. But the federalism cases were always only a sliver of the Court's work in constitutional review. In 1998 and 1999, the "federalism five" dealt blows to Congress in two sovereign immunity cases.<sup>91</sup> But the Court also limited congressional authority in other cases great and small, including the line-item veto,<sup>92</sup> federal regulation of advertising for legal gambling,<sup>93</sup> and a federal harbor tax.<sup>94</sup> The conservative Justices were at the core of each of those decisions save one,<sup>95</sup> but in half of those cases they were joined by Justices from the liberal wing of the Court. And while the Justices accepted several cases in which they upheld federal statutory provisions against constitutional challenges, they displayed little disagreement among themselves over how such cases should be decided. Only one of those, however, could be regarded as politically salient—the adoption of decency requirements for grants from the National Endowment of the Arts.<sup>96</sup> The issue provoked more furor in Congress than in the judiciary.

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ing this two-year window, and he was somewhat less inclined than Thomas to vote against Congress.

91 *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999) (holding that congressional abrogation of state sovereign immunity from claims of patent infringement "cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's Due Process Clause").

92 *Clinton v. City of N.Y.*, 524 U.S. 417, 421 (1998) (holding that the line-item veto violates the Presentment Clause).

93 *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 176 (1999) (holding that Congress cannot prohibit radio or television advertising of gambling in states where gambling is legal).

94 *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363 (1998) (holding that the Harbor Maintenance Tax is not a fair estimation of services and thus is in violation of the Export Clause because it is not a permissible user fee).

95 *United States v. Bajakajian*, 524 U.S. 321, 324 (1998) (holding that the forfeiture of more than \$350,000 for failure to report carrying said currency when leaving the United States violates the Excessive Fines Clause of the Eighth Amendment).

96 *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572–73 (1998).

Cases involving constitutional questions about state laws took a back seat at the end of the 1990s. Not only were there fewer cases of judicial review of state laws and fewer decisions rendered against state governments, but the cases that were resolved by the Court were less significant. These were, after all, the years in which Mark Tushnet wrote of the chastened ambitions of the Court.<sup>97</sup> There was little being done with the state cases to call attention away from those instances in which the Court struck down federal statutory provisions. The most politically salient decisions involving state laws resulted in the invalidation of state residential duration requirements for social welfare programs<sup>98</sup> and Chicago's loitering ordinance aimed at street gangs.<sup>99</sup> Even those cases were decided by robust, ideologically diverse majorities.

In 1998 and 1999, there was relatively little to talk about regarding how the Court was exercising the power of judicial review. The Court took few cases, decided most of them by sizable majorities that crossed ideological lines, and had little impact on the course of national politics and policymaking. There was little reason to change the established narrative that revolved around the unusual set of federalism cases. But below that intriguing surface, the Court was reinforcing the pattern of the prior decade of hearing fewer constitutional cases and invalidating far fewer laws, especially those of the state and local governments.

#### D. *The Roberts Court*

The final snapshot of judicial review comes from the early Roberts Court in 2007 and 2008. By the end of 2008, the Court had not quite yet taken on its current composition. After a long period of stability, Rehnquist and O'Connor both left the bench and were replaced by two conservatives, John Roberts and Samuel Alito. The polarized ideological profile of the late Rehnquist Court was preserved, though the replacement of O'Connor perhaps solidified Kennedy's standing as the pivotal centrist.<sup>100</sup>

In many ways, the Roberts Court in these two years was a continuation of the exercise of judicial review by the late Rehnquist Court. But the Roberts Court was even less active in invalidating laws than the Rehnquist Court had been and lacked the signature constitutional agenda that had helped define the Rehnquist Court of the late 1990s. Consistent with the overall pattern illustrated in Figure 3, the Roberts Court struck down laws in fewer cases in this snapshot than had the Court in any of the earlier three samples. The Court found legislative provisions constitutionally defective in fewer than a dozen cases.

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97 See *supra* note 31.

98 *Saenz v. Roe*, 526 U.S. 489, 510–11 (1999).

99 *City of Chi. v. Morales*, 527 U.S. 41, 64 (1999).

100 The subsequent addition of Sonia Sotomayor and Elena Kagan, in place of Souter and Stevens, did not alter the size of the liberal wing of the Court or move the median on the bench (though Souter's replacement may have shifted the center of gravity of the liberal wing to the left). Their addition did mean that for the first time since the Nixon era, the liberal wing of the Court was composed entirely of Democratic appointees.

The dominant coalitions in these two years of the Roberts Court also continued the tendencies of the late Rehnquist Court. The majorities that formed to strike legislation tended to be extremely narrow, generally consisting of only five Justices, but the majorities that upheld legislation were generally broad (the majorities upholding federal statutes against constitutional challenges were narrower than those upholding states'). Both liberal and conservative Justices routinely voted to strike down legislative provisions. The conservative Antonin Scalia and the liberal Ruth Bader Ginsburg had an almost identical history of joining majorities to strike down laws. Scalia joined two majorities striking down federal laws and three striking down state laws; Ginsburg joined the majority in one federal case and four state cases. The exercise of judicial review was not a story of conservative dominance but of shifting coalitions that drew from both ends of the ideological spectrum.

Cases involving federal statutes occupied a smaller share of the Court's docket. The Court continued to strike down federal statutory provisions in half the cases it considered. Whether upholding or striking down federal legislation, the Justices were forced to rely on narrow majorities.<sup>101</sup> On campaign finance, slim conservative majorities imposed limits on Congress.<sup>102</sup> On military detainees, a slim liberal majority took the lead.<sup>103</sup> Conservatives and liberals likewise split in cases upholding statutes.<sup>104</sup> The conservative Justices were more likely to be in a majority actually striking down a federal law, but there was little difference between how often liberal and conservative Justices voted to strike down laws.

State laws occupied more of the docket, but the Court continued to strike down state laws at a lower rate than it upheld them. The decisions to strike down state laws were also narrow, but larger majorities joined decisions upholding state statutes. The more liberal Justices continued to be more likely to vote to strike down legislation in cases involving the states, while the conservative Justices were more likely to vote to uphold state laws. Souter and Ginsburg led the way in voting to strike down state statutes, both in joining majorities and in dissenting. The most conservative Justices were the most likely to vote to uphold state laws and the least likely to strike them down, but the differences between the liberal and conservative extremes were not as stark in this snapshot. Kennedy showed himself to be ubiquitous in majority decisions in this snapshot as well, joining nearly every majority striking down a law *and* nearly every majority upholding one. Substantively, the Court struck down (and upheld) a wide range of state laws raising a vari-

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101 See, e.g., *infra* notes 102–03.

102 See *Davis v. FEC*, 554 U.S. 724 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

103 See *Boumediene v. Bush*, 553 U.S. 723 (2008).

104 See *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding a partial-birth abortion ban by a conservative majority); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (upholding a federal banking regulation by a liberal majority). Only once did both liberal and conservatives join a broad majority to uphold a federal statute. *United States v. Williams*, 553 U.S. 285 (2008) (upholding child pornography law).



ety of constitutional questions. Both conservatives and liberals had their way in high-profile cases, with conservatives carrying the Court in cases on gun rights<sup>105</sup> and desegregation<sup>106</sup> but the liberal Justices controlling decisions on the death penalty.<sup>107</sup> Conservatives were at the heart of the coalitions upholding state statutes against constitutional challenges in the most polarizing cases,<sup>108</sup> but most decisions to uphold were endorsed by large majorities.

The conservative and liberal Justices disagreed about which statutes ought to be struck down, but both wings of the Court were able to muster narrow majorities to strike down laws. The liberal Justices would have preferred to strike down more state laws than a majority of the Justices were willing to strike. By 2007 and 2008, the Court was working out the implications of its own recent precedents, whether in campaign finance, late-term abortions, war powers, or the death penalty. Its agenda for constitutional innovation was relatively narrow, however.

TABLE 1: AVERAGE MEDIAN OF THE INVALIDATING COALITION

	Late Burger	Early Rehnquist	Late Rehnquist	Roberts
Federal Laws	Stevens	White	O'Connor	Roberts
State Laws	Stevens	Blackmun	Breyer	Ginsburg

Note: Average median Justice voting in the majority in cases that constitutionally invalidated provisions of federal laws and state laws.

As the Burger Court transformed into the Roberts Court, there were fewer signs either that the Justices were on a mission to remake constitutional law or that there was a large pipeline of unresolved constitutional disputes. As the Justices settled the thorny issues that had been raised by the Warren Court and the early Burger Court, they did not so much launch into new efforts to put their own stamp on constitutional law as they did withdraw from the constitutional arena. Neither the left nor the right was able to take firm command of the Court, and to the extent that conservatives were often able to put together majorities, they often used them to uphold state laws. Although the Court was still capable of rendering controversial decisions, such decisions were becoming more rare and were almost as likely to involve instances of the Court upholding laws as striking them down.

105 *District of Columbia v. Heller*, 554 U.S. 570 (2008). Although *Heller* involved constitutional limits on federal power, the policy at stake in the case was endorsed by the city leaders of the District of Columbia and not by Congress. *See id.* at 574–75. The politics of the case pitted the national judiciary against a city, and the same majority soon made clear that the constitutional law of the case applied equally in the federal and state contexts.

106 *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

107 *See Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007).

108 *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *Morse v. Frederick*, 551 U.S. 393 (2007).

The majorities that were interested in invalidating state and federal laws came apart. In the late Burger Court, Stevens was on average the median Justice in the majorities that voted to strike both federal and state laws, as Table 1 highlights. Since the early 1980s, the median member of majorities striking down federal laws became more conservative, while the median member of the majorities striking down state laws remained relatively liberal. Ginsburg now sits at the center of the coalitions that form to strike down state laws, but it is Roberts who sits at the center of coalitions to strike down federal statutes. As the conservative wing of the Court grew, it turned its attention to Congress. Meanwhile, the liberal wing of the Court continued to vote to strike down state laws but had increasing difficulty commanding the five votes necessary to take that action.

#### IV. THE ROBERTS COURT: AN OVERVIEW

The late Rehnquist Court was characterized by remarkable stability in personnel, so much so that it gave rise to new discussions of reforming judicial tenure in the federal system.<sup>109</sup> The final configuration of Justices on the Rehnquist Court lasted from the addition of Justice Stephen Breyer in the summer of 1994 to the death of Chief Justice William Rehnquist in the summer of 2005.<sup>110</sup> The stability of the late Rehnquist Court is rivaled only by the distance between the appointments of Justice Gabriel Duvall and Justice Smith Thompson in the Marshall Court, which limited Presidents James Madison and James Monroe to a total of only three Supreme Court appointments (though on a smaller bench).<sup>111</sup>

There have been far more transitions among the individuals who make up the Roberts Court, but politically the current Court has remained surprisingly stable. Including the Chief Justice himself, the Court has seen the addition of four new members. The substitution of four Justices can make a profound difference to the orientation of the Court, as President Franklin D. Roosevelt illustrated with the rapid replacement of all of the “Four Horsemen” during his second term in the White House.<sup>112</sup> In the case of the Roberts Court, however, two conservative additions filled in for two conservative departures (Roberts for Rehnquist, Alito for O’Connor)<sup>113</sup> and two liberal

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109 See, e.g., Paul D. Carrington & Roger C. Cramton, *Reforming the Supreme Court: An Introduction to REFORMING THE COURT* 3, 3–12 (Roger C. Cramton & Paul D. Carrington eds., 2006); Justin Crowe & Christopher F. Karpowitz, *Where Have You Gone, Sherman Minton? The Decline of the Short-Term Supreme Court Justice*, 5 PERSP. ON POL. 425, 425 (2007).

110 Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in REFORMING THE COURT, *supra* note 109, at 15, 27.

111 *Id.* at 27 n.41.

112 Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, in REFORMING THE COURT, *supra* note 109, at 435, 438.

113 Justice Samuel Alito has thus far proven to be more strongly conservative in his voting tendencies than the sometimes-pivotal Justice Sandra Day O’Connor, which likely has some consequences on the margins. For much of her career, O’Connor’s voting tendencies placed her squarely within the conservative wing of the Court, but she became

additions filled in for two liberal departures (Sotomayor for Souter,<sup>114</sup> Kagan for Stevens). Chief Justice Roberts assumed leadership of an ideologically polarized and finely balanced bench in 2005, and the Court has remained so during his tenure, with Justices Sandra Day O'Connor and Anthony Kennedy playing the role of swing voter between two fairly stable coalitions on the wings.

It is, of course, a cliché at this point to observe that as Justice Kennedy goes, so goes the Supreme Court. Kennedy is not only the clear median member of the Court, but he is also pivotal for many decisions, determining whether the outcome of a case will be decided by the conservative wing of the Court or the liberal wing.<sup>115</sup> For Keck, Kennedy's importance to judicial decision making suggested that the contemporary Court would be unusually activist.<sup>116</sup> A rights-oriented jurisprudence that is hospitable to arguments from both the right and the left is likely to translate into abundant opportunities for coalition-building on the Court and prolific judicial invalidations of statutes.

Keck assumed that Kennedy was promiscuous, willing to join all comers in striking down laws.<sup>117</sup> Rather than providing the crucial fifth vote to invalidate myriad statutes, Kennedy has often voted to uphold statutes. In the process, he has often denied one side or the other the necessary votes to strike a law down. Rather than indiscriminately giving his vote away to all sides, Kennedy often withholds his vote from short-handed coalitions. More often than not, the disappointed would-be activists have come from the liberal wing of the Court.

The Court's relative passivity may in fact be a function of Kennedy's remarkable reign as the decider-in-chief of the nation's constitutional law. For nearly three decades, O'Connor and Kennedy have held the key votes on the Court and shaped the content and direction of constitutional law.<sup>118</sup> By now, legislators and lower court judges know the Kennedy Court's preferences and have adjusted accordingly. Without the rise of dramatic new issues, or a significant shift in the views of pivotal Justices, there should be little need or opportunity for the Court to continue striking down legislation at a high rate. Replacing Kennedy on the Court might well shift the ideal point of the Court sufficiently to alter the status quo and generate a new round of activity by the Court to bring the state of law into alignment with the views of the pivotal Justices.

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increasingly centrist over time. See Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1505–08 (2007).

114 Although Justice David Souter was appointed by a relatively conservative Republican president, he quickly became a reliable member of the liberal wing of the Court. *Id.* at 1508–09.

115 See KECK, *supra* note 25, at 7; HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM* 1–2 (2009); Erwin Chemerinsky, *The Kennedy Court: October Term 2005*, 9 GREEN BAG 2D 335, 335 (2006).

116 KECK, *supra* note 25, at 7–8.

117 See *id.* at 7.

118 *Id.*

But the history of the Roberts Court thus far might suggest the source of the pressure for invalidations. Since Roberts assumed the center seat, the Court has struck down statutes in roughly half the cases in which it substantively deliberated on the constitutionality of a state or federal law and came to a determination on its constitutional validity.<sup>119</sup> The coalitions that have formed among the Justices to strike down laws have often been narrow ones. The median size of the majority voting to strike down either state or federal laws over the course of the Roberts Court has been five.<sup>120</sup> By contrast, coalitions upholding statutes against constitutional challenges have been broader, with a median of seven Justices. Especially on a polarized Court, such narrow invalidating majorities are particularly unstable, with few viable options to replace a Justice who might defect through a change of preferences or a departure from the Court.<sup>121</sup> But in the near term, the narrow invalidating majorities are more vulnerable to change than are the more robust majorities that have been voting to uphold legislation against constitutional challenges.

Unsurprisingly, this has left Justice Kennedy in the catbird seat. Kennedy is the single Justice most likely to be in the majority for a case invalidating a statute; he was in the majority of nearly every case in which the Court struck down a law. But Kennedy was also extremely likely to be in any majorities upholding legislation against constitutional challenge. Coalitions to strike legislation could not be easily made without him, and Kennedy regularly found majorities willing to declare acts unconstitutional when he thought it appropriate to do so.

We can gain a clearer picture of the pressures to invalidate legislation on the Court by looking at the voting tendencies of the Justices from multiple perspectives. Figure 4 represents the percentage of cases in which an individual Justice voted to strike down legislation as unconstitutional.<sup>122</sup> The figure organizes the Justices in descending order by how likely they were to vote to invalidate state laws, as represented by the black bars. The propensity to vote to invalidate federal laws is represented in Figure 4 by the gray bars, with the horizontal lines indicating the median percentage of cases in which the individual Justices voted to invalidate rather than uphold a statute. This captures not only the instances when Justices joined a majority of their colleagues to actually declare laws unconstitutional, but also the instances in which the

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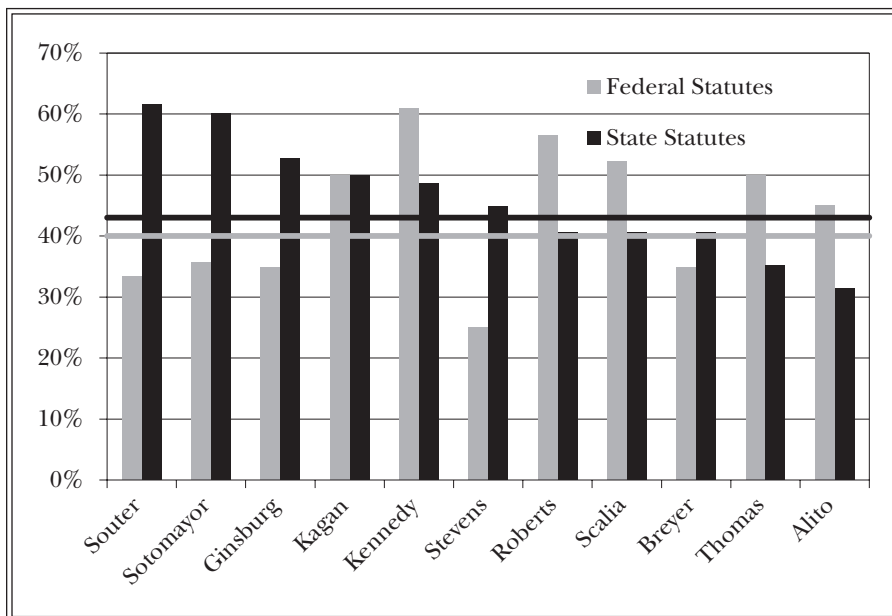
119 The Court invalidated state laws in 51% of its cases and ruled against federal laws in 57% of its cases.

120 Less than a third of the cases striking down statutes (either state or federal) had majorities of more than five Justices.

121 The polarization in the Court is evident in the bilateral correlations in the voting of the Justices in judicial review cases. Sotomayor, Ginsburg, Kagan, and Souter form a tight bloc, voting together but rarely voting with Thomas or Scalia. Likewise, Alito, Roberts, Thomas, and Scalia form a tight bond, but rarely vote with Ginsburg or Souter. Thomas and Scalia voted in near lockstep in these constitutional cases, while Sotomayor and Ginsburg have been equally joined at the hip.

122 Justice O'Connor is excluded, since she voted in very few cases involving judicial review under Chief Justice Roberts. In each of those cases, she voted to uphold the challenged statute.

FIGURE 4: PERCENTAGE OF CASES IN WHICH AN INDIVIDUAL JUSTICE VOTED TO INVALIDATE A STATUTE



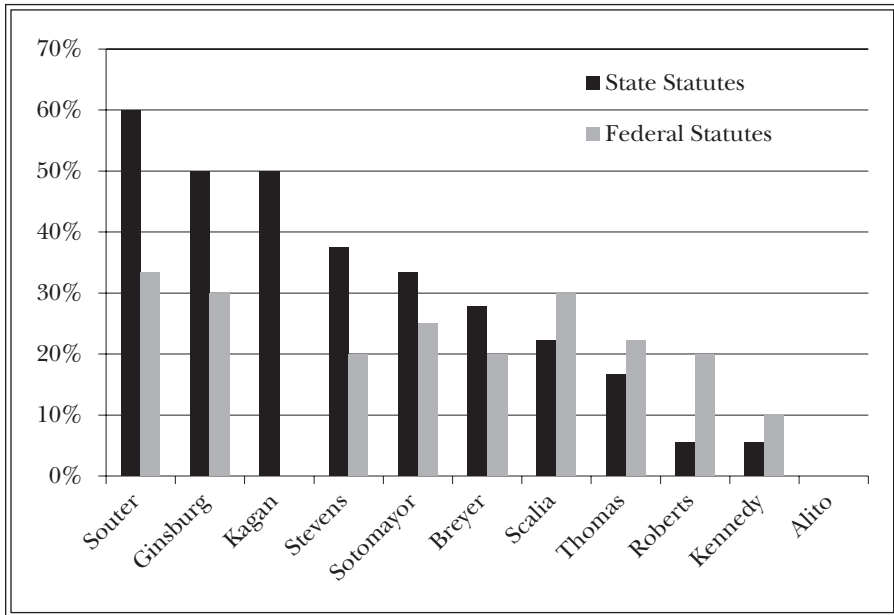
Note: Horizontal line marks median of individual Justice votes to invalidate state statutes (black) and federal statutes (gray).

Justices dissented from a holding that a statute was constitutionally valid and instead argued that the law exceeded constitutional limits. Since Justice Kennedy almost always voted with a majority, whether to strike down or uphold statutes, his voting record is very similar to the record of the Roberts Court itself.<sup>123</sup> Other Justices present a mix of votes cast with majorities and in dissent.

Although the alignment in Figure 4 is not perfect, the Justices in the liberal wing of the Court tended to vote to strike state laws more often (thus clustering on the left of Figure 4 with black bars that stretch above the median line). The Justices in the conservative wing of the Court tended to vote to strike federal laws more often (with gray bars stretching above the median line). Justice Stephen Breyer is the one Justice located in an unexpected place. He was relatively deferential to both state and federal legislatures, which in Figure 4 places him with the conservative Justices in being less likely to vote to strike state laws. From this perspective, Breyer is as close to the Frankfurterian model of across-the-board deference as any current Jus-

123 The median percentage of cases in which the individual Justices voted to invalidate differs somewhat from the percentage of cases in which at least five Justices collectively agreed to invalidate a statute.

FIGURE 5: PERCENTAGE OF CASES IN WHICH A JUSTICE CAST A DISSIDENTING VOTE TO INVALIDATE A LAW



tice is willing to be.<sup>124</sup> Of course, this still means that Breyer cast a vote to strike legislation in nearly 40% of the cases resolved by the Court.<sup>125</sup> Even the most deferential Justices on the Roberts Court are fairly willing to declare laws unconstitutional, whether that is Justice John Paul Stevens voting to strike federal statutes in only a quarter of the cases or Justice Samuel Alito voting to strike state statutes in less than a third of those cases.<sup>126</sup>

Figure 5 takes a somewhat different perspective on the tendencies of the individual Justices. Figure 5 organizes the Justices by their propensity to vote to invalidate state laws.<sup>127</sup> Unlike the previous figure, however, Figure 5 focuses on just those votes in which the Justice dissented from a Court decision upholding the constitutionality of a statute. That is, Figure 5 shows how often individual Justices would have preferred to invalidate a statute but were

124 Justice Elena Kagan shows the opposite pattern, voting to invalidate both state and federal statutes at a disproportionately high rate, but she participated in a relatively small number of cases in the dataset. Justice Kennedy shares her apparent propensity to vote to strike down both federal and state laws at an above average rate.

125 To be sure, Breyer's preferences about which statutes should be struck down have a distinctly liberal tilt.

126 Of course, these tendencies are likely to be relative rather than absolute. With a different docket posing different issues or statutes to the Justices, these relatively deferential Justices may well have been more willing to vote to enforce constitutional constraints on legislatures.

127 That propensity is the percentage of cases upholding a statute against constitutional challenge in which the individual Justice voted to invalidate the statute.

restrained by their colleagues, evidencing a pent-up demand for greater judicial activism.<sup>128</sup> It is perhaps unsurprising that on a relatively conservative Court, the Justices in the liberal wing are more likely to be in dissent.<sup>129</sup> But notice that in this figure they are specifically in dissent from judgments upholding statutes and would have preferred to strike down a law in those cases. By contrast, the more conservative Justices rarely dissented in cases upholding statutes. Consistent with the general pattern, the conservative Justices were more likely to prefer to strike down federal statutes, while the liberal Justices were more likely to prefer to strike down state laws. Even so, a number of the liberal Justices also dissented often in cases involving federal laws.

TABLE 2: COALITIONS OF JUSTICES IN CASES INVALIDATING STATUTES

Cases Invalidating Federal Statutes			
Justices in Top Three Coalitions	# of Cases	Ideological Orientation of All Coalitions	% of Cases
Roberts, Alito, Scalia, Thomas, Kennedy	7	Conservative Coalition	50%
Stevens, Souter, Ginsburg, Breyer, Kennedy	2	Liberal Coalition	29%
Ginsburg, Breyer, Sotomayor, Kagan, Kennedy	1	Mixed Coalition	21%
Cases Invalidating State Statutes			
Justices in Top Three Coalitions	# of Cases	Ideological Orientation of All Coalitions	% of Cases
Roberts, Alito, Scalia, Thomas, Kennedy	6	Conservative Coalition	42%
Stevens, Souter, Ginsburg, Breyer, Kennedy	4	Liberal Coalition	37%
Roberts, Stevens, Souter, Ginsburg, Breyer	1	Mixed Coalition	21%

Finally, Table 2 highlights the most common coalitions that formed on the Roberts Court in cases invalidating statutes. These coalitions can also be characterized as having been built from either the left or the right. Conservative invalidating coalitions include no more than one Justice from the

128 Thus far, Justice Alito has shown no such frustration. He has not called for the nullification of a statute in any dissenting opinion. When a majority has voted to uphold a statute, Alito has been in agreement.

129 Dissents from cases striking down statutes show a far more mixed pattern. The pent-up demand to uphold statutes against constitutional challenge has no clear ideological flavor.

liberal wing of the Court, and vice versa for liberal invalidating coalitions.<sup>130</sup> Since a large majority of the cases invalidating statutes relied on narrow majorities and most cases divided the Justices along expected ideological lines, there were relatively few mixed coalitions that contained more than one conservative and more than one liberal Justice. Indeed, the pattern of invalidating coalitions on the Court indicates just how deeply polarized the Roberts Court is. There is rarely agreement across ideological lines to strike down a statute. Either liberal Justices preferred to strike a statute or conservative Justices did, but rarely both.<sup>131</sup>

Table 2 both reinforces and complicates the standard narrative of a conservative Roberts Court, clarifying why the Court has been unsatisfying to both the political left and the political right. Although a plurality of the invalidating coalitions have been built from the right wing of the Court, the liberal wing of the Court has been able to strike down statutes almost as often.<sup>132</sup> In particular, the liberal wing of the Court has often predominated in cases striking down state laws during the Roberts Court. As a result, the overall ideological profile of the cases in which the Roberts Court has struck down statutes is distinctly mixed, even though relatively few individual cases have been decided by ideologically mixed coalitions. When imposing limits on legislatures, the Court has oscillated between its conservative and liberal poles, rather than building broad-based coalitions or being consistently dominated by one ideological faction.<sup>133</sup>

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130 For this purpose, the swing-Justice, Kennedy, is not counted as either conservative or liberal. All other Justices are categorized as one or the other, in the conventional pattern.

131 The unique instance of a five-person majority with a mixed ideological profile was *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), which held that the Fourteenth Amendment limited punitive damages, *id.* at 349, with a majority consisting of Roberts, Alito, Kennedy, Souter, and Breyer, *id.* at 348. Every other mixed invalidating majority consisted of six or more Justices. Even six-person invalidating majorities with a mixed ideological profile were rare. Coalitions of six Justices favoring striking down a statute tended to build from one ideological wing of the Court, include Kennedy, and draw in one Justice from the other wing of the Court. Roberts and Alito were the only conservative Justices willing to join those liberal coalitions, and from the left only Breyer and Sotomayor were willing to join such conservative coalitions.

132 The absolute number of cases decided by a particular liberal coalition is relatively small, however, because there has been more turnover in those members of the Court since the selection of Roberts as Chief Justice. By contrast, Alito has been present for nearly the entire length of the Roberts Court.

133 One might think that the Court's reputation for conservative activism is driven by the relative political salience of those particular decisions. It is true that cases invalidating federal statutes are cited more by lower courts in the next three years than are any other type of judicial review case, suggesting that such cases (predominantly decided by the conservative Justices) have at least had greater legal salience. The picture for their relative political salience is much less clear. A standard measure of political salience of Supreme Court cases is whether the decision was reported on the front page of the *New York Times*. Cases invalidating federal laws receive greater attention from the *Times* than cases invalidating state laws, and invalidations of any type receive more attention than cases upholding statutes. Over half of the federal invalidations got front-page treatment, but only a third of



At the same time, the two wings of the Court have adopted somewhat different attitudes toward state and federal statutes. When the Court strikes down an act of Congress, the conservative wing of the Court is more likely to be calling the shots. When the Court strikes down a state law, the liberal wing of the Court is likely to be prominently represented in the majority.

TABLE 3: COALITIONS OF JUSTICES IN CASES UPHOLDING STATUTES

Cases Upholding Federal Statutes			
Justices in Top Three Coalitions	# of Cases	Ideological Orientation of All Coalitions	% of Cases
Roberts, Alito, Scalia, Thomas, Stevens, Ginsburg, Breyer, Sotomayor, Kennedy	2	Conservative Coalition	22%
Roberts, Alito, Scalia, Thomas, Kennedy	1	Liberal Coalition	22%
Stevens, Souter, Ginsburg, Breyer, O'Connor	1	Mixed Coalition	56%
Cases Upholding State Statutes			
Justices in Top Three Coalitions	# of Cases	Ideological Orientation of All Coalitions	% of Cases
Roberts, Alito, Scalia, Thomas, Stevens, Souter, Ginsburg, Breyer, Kennedy	3	Conservative Coalition	43%
Roberts, Alito, Scalia, Thomas, Breyer, Kennedy	2	Liberal Coalition	7%
Roberts, Alito, Scalia, Thomas, Kennedy	2	Mixed Coalition	50%

Table 3 highlights the most common coalitions in cases upholding statutes against constitutional challenge. On the whole, these coalitions tend to be broader, with a median of seven Justices in the sustaining majorities. Sev-

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decisions upholding federal law were similarly publicized (and cases upholding state laws were rarely reported on the front page). But there is little difference between the amount of attention received by invalidating decisions in which Justice Alito voted in the majority and those in which Justice Ginsburg voted in the majority (using those votes as proxies for the overall ideological tenor of the decision). Indeed, the *Times* was somewhat more likely to give front-page attention to cases in which Ginsburg joined a majority striking down a federal law and to cases in which Alito joined a majority to uphold a state law, which tends to cut against rather than reinforce the standard narrative of an activist conservative majority on the Court. On the whole, the cases featuring the conservative Justices striking down statutes do not appear to be unusually politically salient. For every *Citizens United v. FEC*, 558 U.S. 310 (2010), there is a *United States v. Windsor*, 133 S. Ct. 2675 (2013); for every *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), there is a *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

eral of these cases were decided by a unanimous Court (which was never the situation in cases striking down statutes), and relatively few were decided by narrow five-person majorities (only a quarter of cases upholding statutes were decided by such narrow majorities, compared to over two-thirds of the cases striking down statutes). As a result, a majority of cases upholding statutes were decided by mixed coalitions that drew from both wings of the Court.

Even so, the Court displayed distinct ideological tendencies in its cases upholding legislation. When narrower, more ideological coalitions formed to uphold federal statutes, they were equally likely to come from the right or the left. But when the Court narrowly upheld state statutes, conservative coalitions tended to predominate. When liberal coalitions held sway in cases evaluating the constitutionality of state laws, they almost always acted to strike down rather than uphold the law. This is not, of course, to say that the liberal wing of the Court never supported upholding state statutes, but only that they did so in cases that also attracted support from the conservative Justices.

#### CONCLUSION

The dramatic decline in the number of cases striking down state laws that has characterized the contemporary Court has depended on keeping the liberal Justices at bay. Had the liberal wing of the Court held a more stable majority, many of the cases in which the Court in fact upheld a statute would have flipped and turned into judicial invalidations. A smaller number (and proportion) of cases involving federal statutes would have flipped the other way, as a liberal Court would have upheld federal legislation in a somewhat larger set of cases than the Roberts Court actually did. Whereas Justices Souter and Ginsburg would have led the charge for a more activist Court than we have actually seen in recent years, there is no similar indication that Justices Roberts and Alito would have driven a more conservative Court to be more activist than it has already been. The Justices disagree among themselves over *which* laws should be struck down, but on the whole (and given the same docket) Justice Souter would have preferred that the Roberts Court have struck down *more* laws while Justice Alito would have preferred that the Roberts Court have struck down even *fewer* laws.

The attention received by a handful of decisions obscured a more fundamental pattern that developed during the Rehnquist era and has come to full flower under Chief Justice Roberts. Although conservative majorities did organize to strike down an unusually large number of statutes, particularly for violating key federalism principles, they had been simultaneously shifting the Court's constitutional docket away from state legislation and toward the federal legislation that was under greater scrutiny. In the process, the Court dramatically reduced the overall number of constitutional cases that it was deciding and the number of cases in which it struck down legislation.

Over the past three decades, the Court has made a gradual transition away from the extension and application of the liberal precedents of the Warren Court and the early Burger Court, but it has not replaced that caseload with a similarly robust set of new constitutional commitments. Liberal Jus-

tices had driven the exercise of judicial review to invalidate statutes well into the 1980s. As the liberal wing of the Court lost support, the Court became less interested in nullifying the actions of legislatures. A Court that often turned on the whims of Justice Anthony Kennedy may have been more bipolar, sometimes empowering liberal-leaning majorities and sometimes empowering conservative-leaning majorities, but it was becoming less, not more, activist. There are few signs that any of the Justices doubt their own role within the constitutional system or believe in a generalized posture of judicial restraint. They all prefer to be activist when they believe that the legislature has made a constitutional error, and they are willing to override vocal minorities on the bench or political opposition outside the Court in order to enforce their views of constitutional requirements. The Court may not need to commit itself to a theory of judicial restraint, however, in order to be restrained. The Justices are rarely able to assemble a majority to strike down laws, and they have given little indication that they nurture an expansive constitutional agenda of the type that drove the Court to the height of its activism in the mid-twentieth century. As a consequence, Chief Justice Rehnquist and Chief Justice Roberts have overseen a Court that has surprisingly become one of the least activist in history, and perhaps have pointed the way for the Court to retreat from the role that it played within the political system through most of the twentieth century and make a return to the more modest judicial role that characterized the nineteenth century.