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## Statutory Language and the Separation of Powers

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### ABSTRACT

Traditional separation of powers models assert that the Supreme Court takes into consideration the policy preferences of other institutions and behaves strategically so as to place legal policy at its preferred policy point. The vagueness doctrine, however, asserts that the Court determines statute constitutionality not from strategically calculating institutional ideological preferences but from the degree of specificity of the statute's language itself. This study finds that the vagueness doctrine better predicts Court declarations of unconstitutionality than preference-based models, suggesting that the language of the law itself is crucial to statutory decisions.

### KEYWORDS

Vagueness doctrine; statutory language; Supreme Court; separation of powers

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The ability of the U.S. Supreme Court to declare congressional statutes unconstitutional represents one of the Court's greatest powers. Because the Constitution provides Congress the authority to make law and provides the judiciary the authority to interpret the law, this joint legal authority often creates tension and an "invitation to struggle" between the legislative and judicial branches in determining the law (Corwin 1957, 171). Scholars examining these struggles often rely on separation of powers (SOP) models to determine whether one particular branch of government (typically the judiciary) defers to the ideological preferences of another branch (often the legislature)<sup>1</sup> in order to avoid having a particular decision overturned at a later stage—thereby resulting in a worse policy outcome.

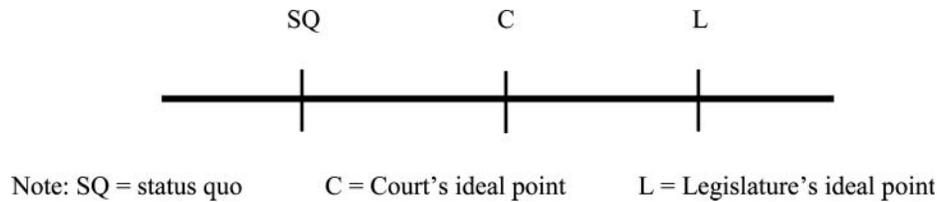
Yet, despite the theoretical and methodological advancements of these SOP models, they continue to overlook the legal aspect of law development by focusing solely on the policy preferences of each institution (but see Randazzo, Waterman, and Fine 2006; Randazzo and Waterman 2011). We argue that overlooking statutory language and detail compromises our understanding and evaluation of the separation of powers because the language of the law included in the statute provides the foundation for the struggles in law development and interpretation. While typical SOP models acknowledge the language of the statute only in determining the position of the legal status quo, which the judiciary (and perhaps the legislature at a later stage) may then struggle to move in order to align the law with its preferred policy outcomes, we argue that this legal language, in and of itself, may offer a more influential theoretical mechanism for incurring declarations of unconstitutionality than traditional preference-based SOP models.

While standard SOP models focus primarily on the types of constraints encountered by the Court based on the ideological distance between the Court's and Congress's policy preferences, they do not account for the degree of specificity written into the statute itself. This is problematic because the

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Color versions of one or more of the figures in the article can be found online at [www.tandfonline.com/ujsj](http://www.tandfonline.com/ujsj).

<sup>1</sup> Separation of powers models may also include the ideological distance between the Court and the president in addition to between the Court and Congress. In order to avoid repetition, and since we are primarily interested in the relationship between the Supreme Court and Congress, we assume throughout the article that similar arguments can be made in reference to the president as are made to the legislature.



**Figure 1.** General separation of powers model A.

vagueness doctrine stipulates that vague and ambiguous statutes should be declared unconstitutional (or “void for vagueness”). If the Court adheres to this doctrine, then the specificity of the legal language in the statute should provide the foundation for possible overruling. Thus the language of the statute itself offers the rationale and theoretical mechanism for rulings of unconstitutionality rather than the degree of ideological congruence or policy preference agreement between the Court and Congress.

Using data on Supreme Court decisions from 1953–2002, we test the influence of the vagueness doctrine on the likelihood of declarations of unconstitutionality and compare it against traditional SOP models. Our results demonstrate that preference-based models alone do not accurately predict decisions by the Court and that incorporating the vagueness doctrine offers a more influential theoretical mechanism that outperforms the SOP frameworks. In short, we demonstrate that vague and ambiguous statutes are significantly more likely to be declared unconstitutional by the Court than laws that provide clearer details and directions for more specific outcomes.

### Theoretical Argument and The Separation of Powers

According to standard SOP models, when judges make decisions regarding the interpretation of law, they may also consider the preferences of other institutional actors. This consideration occurs because legal interpretation is not a static process that necessarily terminates with a particular judicial decision. Instead, decisions may lead to subsequent legal action prompted by legislative attempts to reconcile court decisions by passing new laws. As such, these models examine these interbranch relationships and effects on the decision-making process. More specifically, SOP models focus on whether the judiciary will defer to the ideological preferences of the legislative branch in order to avoid having a particular decision overturned at a later stage, thereby resulting in a worse policy outcome. This area of research gained popularity after Brian Marks (1988) examined the Supreme Court’s decision in *Grove City College v. Bell*<sup>2</sup> and the subsequent attempts in Congress to overturn that ruling. Following this seminal examination by Marks, scholars increasingly incorporated SOP models in their research (for example, see Eskridge 1991a, 1991b; Ferejohn and Weingast 1992; Spiller and Gely 1992; Segal 1997, 1998; Spiller and Tiller 1996; Rogers 2001; Sala and Spriggs 2004; and Rogers, Flemming, and Bond 2006).

While these models continued to develop increasing levels of theoretical and methodological sophistication, the fundamental premise has remained constant: judges “make choices with the expectation that [their] decisions will affect the interests of actors in other political institutions [...] [Judges] who care about policy outcomes therefore have an incentive to take the preferences of other governmental actors into account in their own deliberations” (Sala and Spriggs 2004, 197).

Figure 1 provides an illustration of the general approach taken by SOP scholars.<sup>3</sup> In this figure, the policy preferences of a Court (C) and a Legislature (L) are arrayed along a unidimensional space. Additionally, the line labeled SQ represents the current status quo, over which the Court must adjudicate a dispute through statutory interpretation. Under the assumption that both actors (C and L) possess

<sup>2</sup> 465 U.S. 555 (1984).

<sup>3</sup> From here the models diverge along many aspects: whether to model the legislature as a single chamber or bicamerally; whether to include gatekeeping committee preferences or multiple veto points (such as the president); whether to model policy preferences unidimensionally or multidimensionally; whether to include uncertainty or model the game with perfect information; and whether to include transaction costs for the various actors (see Segal 1997, 1998).

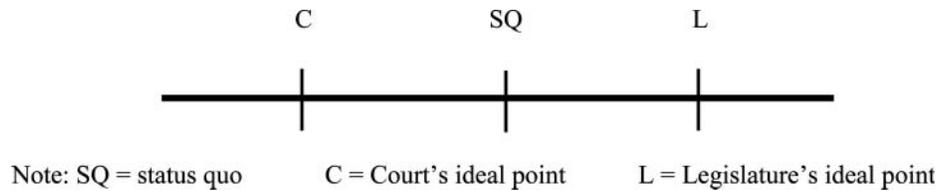


Figure 2. General separation of powers model B.

perfect and complete information about the preferences of the other actor, we can evaluate how the Court will resolve this dispute. Since its ideal point is on the same side of the status quo as the Legislature, the Court can render a decision at point C without fear of reprisal from the Legislature (since the Legislature prefers point C to the status quo).

In contrast to the first environment, consider Figure 2, in which the Court encounters a more difficult decision. Relying on the same assumptions of perfect and complete information and a unidimensional policy space, we see that the Court's ideal point (C) is now located to the left of the status quo (SQ), whereas the Legislature's ideal point (L) is to the right. In this situation, if the Court chooses to render its decision at point C, it is likely that the Legislature will choose to override this decision and move the policy to point L—which is worse for the Court than to simply affirm the status quo. Consequently, a sophisticatedly thinking and strategically oriented Court will vote to uphold the status quo (SQ) because it cannot achieve a better outcome but could conceivably encounter a worse policy should it attempt to change the position of SQ.

If either of these scenarios is valid, then one should expect the preferences of Congress to exert a significant influence on judicial behavior. Consequently, one should expect that greater preference congruence across these institutions lead to greater Court acceptance of federal statutes. Conversely, as the preferences of the Court diverge from those of Congress, one should expect to see the justices willing to exercise their power of judicial review and declare federal laws unconstitutional. This traditional SOP framework leads to our first hypothesis:

**Preference-Based Hypothesis:** As the ideological distance increases between the preferences of the Supreme Court and Congress (both the House and the Senate) and the president, the likelihood of a declaration of unconstitutionality will increase.

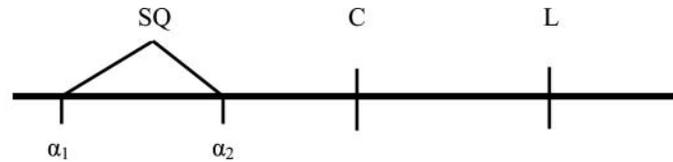
While the above examples and initial hypothesis illustrate the basic approach taken by traditional SOP models, another model posited by Randazzo, Waterman, and Fine (2006) and Randazzo and Waterman (2011) incorporates statutory language.<sup>4</sup> This statutory-detail SOP model encompasses statutory language within the standard preference-based framework by arguing that the degree of specificity of the language of a statute may provide differential levels of discretion to the judiciary.<sup>5</sup> Accordingly, these studies posit that the specific language included in the statute generates the status quo (SQ) point *and* determines the level of discretion provided to the judiciary. In essence, the statute

may describe policy outcomes in vague terms, leaving the courts with large amounts of discretion to interpret statutes according to their ideal points; or, the policy outcomes may be the result of extremely specific statutory language which constrains the abilities of judges to alter the status quo points based on their individual ideological preferences. (Randazzo, Waterman, and Fine 2006, 1007)

To illustrate this point, Figure 3 presents Randazzo, Waterman, and Fine's (2006) refinement to the traditional SOP model. Instead of representing the status quo as a single point (SQ), it is now portrayed as a range. The size of this range (represented by the distance between  $\alpha_1$  and  $\alpha_2$ ) is determined by the

<sup>4</sup> These two works are the first to incorporate legal language within a separation of powers framework examining Supreme Court behavior.

<sup>5</sup> We recognize that the degree of specificity within a statute may not be intentional on the part of Congress, or may be primarily designed to constrain the executive branch (see Epstein and O'Halloran [1999]). Additionally, we recognize there may be situations where Congress spends little time anticipating judicial reactions (see Spill Sohlberg and Heberlig 2000, 2005).



Note: SQ = status quo      C = Court's ideal point      L = Legislature's ideal point

Figure 3. General separation of powers model C.

degree of ambiguity written into the legislative statute. Thus vague statutes—possessing more ambiguous language—encompass wider intervals, while more specific statutes (such as the one depicted in Figure 3) will encompass relatively narrow ranges. Based on this figure, and under the additional assumption that the actual language of the statute exerts an influence, the Court is faced with a dilemma. Though it prefers to render a decision at its ideal point (C), knowing that the Legislature prefers this policy outcome to the status quo range, the Court is constrained by the law. Consequently, we should expect to observe an outcome at  $\alpha_2$ , which is the closest point within the statutory range to the Court's ideal point. In such a situation (where both the Court and Legislature prefer policy C but are constrained), we might expect to see an invitation from the Court to the Legislature to rewrite the statute that effectively overturns the Court's current decision in order to move legal policy closer to their ideal points. As Hausegger and Baum (1999) demonstrate, such invitations by the Supreme Court to Congress occur periodically. The opinion by Justice Thurgood Marshall illustrates this dilemma in *Mansell v. Mansell* (1989, 594), stating,

we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute [...] Congress chose the language that requires us to decide as we do, and Congress is free to change it.<sup>6</sup>

Similar invitations also occur in *Clinton v. Jones* (1997) with the Court writing, “If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation.”<sup>7</sup> Hence, this model incorporates statutory language as a *constraint* on preference-based judicial behavior.

If this statutory-detail SOP model is valid, then one should expect the level of discretion provided by the statute to exert a significant influence on judicial behavior. Accordingly, this theoretical argument implies that statutes that seek to constrain judicial behavior—that is, laws with more detail that prescribe specific policy outcomes—will be in greatest jeopardy because the Court will wish to remain free (unconstrained) to render decisions based on their collective ideological preferences. More simply, the Court should rule specific, unambiguous statutes unconstitutional more frequently than vague statutes in order to preserve their ability to interpret such vague statutes according to their ideological preferences. Consequently, we posit a second hypothesis:

Statutory-Detail SOP Hypothesis: The level of detail (i.e., discretion) afforded by the statute will significantly affect the likelihood of a declaration of unconstitutionality where more detailed statutes are more likely to be declared unconstitutional.

Yet while this model of discretion refines standard SOP models, it employs the same preference-based framework. That is, the language of the statute is incorporated into the model through the lens of the Court's ideological preferences. If the statute is too specific, the Court will declare it unconstitutional rather than allow the law to constrain its ability to vote ideologically.

Alternatively, the vagueness doctrine indicates simply that laws will be declared unconstitutional if they are inappropriately ambiguous and devoid of necessary detail. While this theory based on legal

<sup>6</sup> Quoted from *Mansell v. Mansell* 490 U.S. 581 (1989) at 594.

<sup>7</sup> Quoted from *Clinton v. Jones* 520 U.S. 681 (1997).

**Table 1.** Model predictions for statutory detail on declarations of unconstitutionality.

Model	Predicted Outcome
Preference-Based SOP Model	Statutory Detail $\Rightarrow$ No significant influence
Statutory–Detail (Randazzo-Waterman) SOP Model	High Statutory Detail $\Rightarrow$ Pr (unconstitutionality) High
Vagueness Doctrine Model	High Statutory Detail $\Rightarrow$ Pr (unconstitutionality) Low

doctrine is hardly novel, the argument provides an explanation for the occurrence of declarations of unconstitutionality that is grounded in established legal theory. The Supreme Court typically invokes the vagueness doctrine when a statute provides inadequate notice of unlawful behavior (thereby not providing fair warning), fails to establish minimal guidelines to govern law enforcement, creates a large class of violators, causes a chilling effect (thereby deterring lawful conduct), calls for case-by-case adjudication, leads to arbitrary or selective interpretation and enforcement (by prosecutors, police, and judges), allows for “excess of discretion” for judges in applying the law, and constrains public liberties (Abruzzi 2011; Burrell 2011; Alexander 2011; Bohannan 2010; Moore 2008; Goldsmith 2003). Of these, the Supreme Court most frequently cites a statute’s failure to establish minimal guidelines to govern law enforcement and its inadequate provision of notice or fair warning, where the former is more consequential than the latter in recent times (Moore 2008; Goldsmith 2003).

Statutory vagueness is obviously problematic and conflicts with the role of the Supreme Court to implement the rule of law in a clear, enforceable, non-arbitrary, and non-selective manner. Hence, the Court’s application of the vagueness doctrine necessarily focuses on the extent to which the degree of uncertainty is tolerable in congressional statutes. In their determination of how much ambiguity is tolerable, justices have relied primarily on three questions: (1) To what extent does the statute constrain public liberty by impairing the exercise of constitutionally protected rights? (2) To what extent does the statute deter lawful conduct? (3) Does the statute include a *scienter* or *mens rea* requirement (such that individuals are sufficiently aware of their guilt and consequences of their actions in order to hold them legally accountable)? (Abruzzi 2011). These guidelines have allowed the Court to invalidate statutes on vagueness grounds for 125 years (Moore 2008; Goldsmith 2003),<sup>8</sup> including statutes governing criminal statutes (*Connally v. General Construction Co.* 269 U.S. 385 (1926), *Lanzetta v. New Jersey* 306 U.S. 451 (1939), and *City of Chicago v. Morales* 527 U.S. 41 (1999)), vagrancy (*Papachristou v. Jacksonville* 405 U.S. 156 (1972) and *Kolender v. Lawson* 461 U.S. 352 (1983)), flag misuse (*Smith v. Goguen* 415 U.S. 566 (1974)), speech (*Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) and *Federal Communications Commission v. Fox Television Stations, Inc.* 567 U.S. \_\_\_ (2012)), and abortion (*City of Akron v. Akron Center for Reproductive Health* 462 U.S. 416 (1983)).

In short, the vagueness doctrine remains a prominent tool of the justices to declare statutes null and void. Additionally, the Court’s application of the vagueness doctrine offers a potentially more parsimonious theoretical argument and a prediction distinct from the preference-based frameworks currently offered by SOP models. Consequently, we posit a third hypothesis:

Vagueness Doctrine Hypothesis: Vague and ambiguous statutes are more likely to be declared unconstitutional than their more detailed counterparts.

Table 1 summarizes the predictions from each of the three models. In particular, this table indicates the *opposite* expectations between the Statutory-Detail SOP model from the Vagueness Doctrine model. Additionally, these three models are distinct in that preference-based variables are only significantly influential for declarations of unconstitutionality for the two SOP models, while the Vagueness Doctrine model predicts no significant influence of institutional preferences. Figure 4 depicts this relationship, where the Vagueness Doctrine essentially holds that the law matters while ideological preferences do not (at the most extreme). At the other extreme, however, the traditional preference-based

<sup>8</sup> While the vagueness doctrine has remained a prominent tool of the Court, its application has not remained static. For example, the doctrine incorporated—and even privileging—substantive values such as equality in the 1960s in addition to the existing procedural emphasis rooted in due process (Sun 2011).

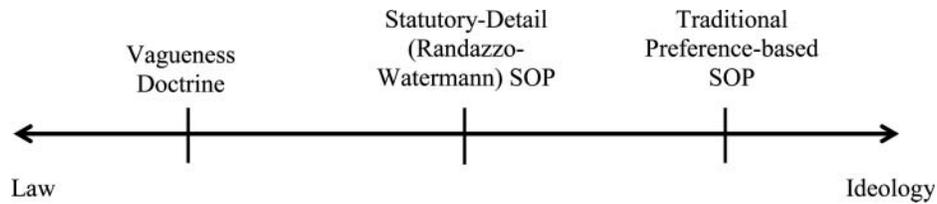


Figure 4. Relative influence of law and ideology across models.

SOP models assert that the law does not matter in judicial decision-making, and only ideological preferences determine declarations of unconstitutionality. Randazzo-Waterman's Statutory Detail model asserts that both the law and ideological preferences matter, but the law exerts influence only through its constraint on ideological preferences. As such, this model is in the middle of the law versus ideology/preference continuum.

Our purpose in discussing separation of powers models is not to criticize scholars for relying on preference-based models. Again, the insights generated from these models help to develop a better understanding of the interbranch relationships between legislatures (and presidents) and courts. Rather, our analyses seek to build on these SOP conclusions by focusing on the language of the statute, which is central to these preference-based models. In addition, we suggest that the language of the statute itself directly and systematically affects judicial behavior, enabling us to advance our understanding of traditional SOP models but also emphasizing the crucial role legal language plays in these discussions.

### Research Design and Data

Data for this analysis comes from the U.S. Supreme Court Database,<sup>9</sup> compiled by Harold J. Spaeth, and includes all formally decided cases from 1953–2002. The dependent variable for the analyses is whether the justices declare a congressional statute unconstitutional (coded 1) or not (coded 0). Based on the dichotomous nature of the dependent variable, we examine a probit model with robust standard errors.<sup>10</sup>

To evaluate the validity of the Preference-Based Hypothesis, we include three independent variables that account for the ideological distance between the Supreme Court and various political actors. Each measure is derived from the Judicial Common Space scores (compiled by Epstein et al. 2007) and is calculated by taking the absolute value of difference between the median Supreme Court justice's ideology and the median member of the particular actor. Consequently, the variable *Ideological Distance – Supreme Court and House* measures the absolute value of this difference with the contemporary<sup>11</sup> median House member; the variable *Ideological Distance – Supreme Court and Senate* uses the contemporary median senator; and the variable *Ideological Distance – Supreme Court and President* relies on the contemporary president's common space score. As we indicated earlier, if the Preference-Based Hypothesis is valid, then we expect these variables to positively affect the dependent variable. That is, as the ideological distance increases between the Supreme Court and the other political actor, the likelihood of a declaration of unconstitutionality will increase.<sup>12</sup>

<sup>9</sup> This dataset is available at [www.supremecourtdatabase.org](http://www.supremecourtdatabase.org).

<sup>10</sup> Due to the extremely small number of positive observations (i.e., those coded 1) in the data, we also ran rare events logit models and received the same substantive results as the probit models. Additionally, we ran probit models for each case type separately (criminal cases and civil liberties cases), which offer similar results. We present the pooled probit model, including criminal and civil liberties cases, here for the sake of parsimony.

<sup>11</sup> Ideological distances are measured from the Court to the contemporary political actors (House, Senate, and president) rather than from the enacting political actors (which passed the statute). Hence, these measures are taken from the year that the Court hears the case (rather than the year the statute was passed).

<sup>12</sup> While these are standard measures in SOP literature, because these measures compare the Court's preferences to a session of the House or Senate or president, all the cases in that year receive the same ideological difference score. These measures thus eliminate our ability to differentiate between why the Court overturns some cases but not others in the same year. Hence, these crude measures of institutional preference, to a large degree, set up the traditional SOP model for failure.

To evaluate the Statutory-Detail SOP Hypothesis as well as the Vagueness Doctrine Hypothesis, we include a measure of statute length, borrowed from Randazzo, Waterman, and Fine (2006) and Randazzo and Waterman (2011). The variable *Statutory Detail* measures the number of words in each congressional statute interpreted by the Supreme Court. It is calculated by simply counting the number of words in the law and then taking the natural log of this word count. Using the natural log is preferable because, from a methodological standpoint, using the raw number of words is problematic both because of the inherent noise associated with a raw count and the considerable skewness in the measure. Consequently, because we are interested in constraint brought by substantial differences among statutes, it is reasonable to take the natural log of each statute as our operationalization of the variable *Statutory Detail*. Taking the natural log allows us to minimize the noise associated with raw counts and reduce the variable's skewness, while preserving the expected theoretical relationship. As Randazzo, Waterman, and Fine (2006) and Randazzo and Waterman (2011) demonstrate, this measure serves as a reliable proxy for the statute's level of detail and level of discretion provided in the law.

It is important to note that while the variable *Statutory Detail* provides evidence for the Statutory-Detail SOP Hypothesis as well as the Vagueness Doctrine Hypothesis, these hypotheses predict opposite reactions (as demonstrated in Table 1). The Statutory-Detail SOP Hypothesis predicts that *Statutory Detail* will have a significant and *positive* relationship with the dependent variable of declaration of unconstitutionality. This prediction captures the intuition that more specific statutes more greatly constrain judicial discretion. Such constraint impedes on the ability of justices to interpret—and thereby place—policy most closely at their ideal policy preference.<sup>13</sup> Hence, justices are expected to declare such specific statutes unconstitutional in order to preserve their ability to place legal policy most closely at their ideal policy preference point. On the other hand, the *Vagueness Doctrine Hypothesis* predicts that *Statutory Detail* has a significant and *negative* relationship with the dependent variable of declaration of unconstitutionality, since the vagueness doctrine implies that vague statutes are, as a general rule, declared unconstitutional.

### Empirical Results

To empirically evaluate the validity of our hypotheses, we employ a probit model (reported in Table 2) due to the dichotomous nature of the dependent variable. The model analyzes the pooled set of all cases in the sample from 1953–2002.<sup>14</sup> While these results are not directly interpretable, one can immediately observe that none of the preference-based variables significantly predict the likelihood of a declaration of unconstitutionality. That is, the results demonstrate that the Supreme Court is not systematically influenced by the ideological preferences of either chamber of Congress or the president when it decides questions of constitutionality. Conversely, the variable *Statutory Detail* is significant and negative, indicating that longer (i.e., more detailed) congressional statutes are *less* likely to be declared unconstitutional. These results provide empirical support for the Vagueness Doctrine Hypothesis but not for the Preference-Based Hypothesis or for the Statutory-Detail SOP Hypothesis.

These results become more obvious in Figure 5, which depicts the declining probability of a declaration of unconstitutionality as statutory length (i.e., detail) increases. Shorter and more ambiguous statutes have a probability of as high as roughly 23 percent likelihood of being declared invalid by the Supreme Court, while the longest, more detailed statutes often have less than a 3 percent likelihood of being declared unconstitutional.

Similar results appear in the predicted probabilities, graphed in Figure 6 with 95 percent confidence intervals. Again, one sees that the likelihood of a declaration of unconstitutionality decreases substantially as statutes become more detailed. Indeed, the shortest statutes<sup>15</sup> are 13.4 percent likely to be

<sup>13</sup>Justices are assumed to dislike this constraint in implementing their desired, preferred policy as posited by the attitudinal model.

<sup>14</sup>Other iterations of this model including interactions between the preference distances of actors and statutory detail, Supreme Court ideology, and statutory age all result in the same substantive results reported here.

<sup>15</sup>The shortest statutes have 188 words with a natural log equivalent to roughly 5.24. (The average statute length is 2,411,121 with a corresponding natural log of roughly 10.69.)

**Table 2.** Probit model on declarations of unconstitutionality.

	Pooled Cases	Marginal Effects
<i>Preference-Based Variables</i>		
Ideological Distance Supreme Court and House	1.657 (1.200)	—
Ideological Distance Supreme Court and Senate	−1.519 (1.363)	—
Ideological Distance Supreme Court and President	−.513 (.454)	—
<i>Legal-Based Variables</i>		
Statutory Detail	−.186*** (.043)	−.008 (.002)
Constant	.025 (.422)	—
<i>N</i>	1,252	—
Log Likelihood	−134.23	—
Wald $\chi^2$	23.94	—
Probability > $\chi^2$	.000	—
Pseudo-R <sup>2</sup>	.099	—
Correctly Predicted	97.4%	—

\* $p < .05$ ; \*\* $p < .01$ ; \*\*\* $p < .001$ .

*Note.* Dependent variable is the likelihood of a declaration of unconstitutionality by the Supreme Court. Coefficients represent the results of a probit model with robust standard errors listed in parentheses. Model includes criminal and civil liberties cases. For the reported marginal effects, the baseline predicted probability of unconstitutionality is .017.

declared unconstitutional, holding all other values at their respective means. The longest statutes,<sup>16</sup> on the other hand, are only 0.2 percent likely to be declared unconstitutional, again holding all other values at their respective means.<sup>17</sup>

These results reveal that the Supreme Court responds to the language of statutes in predictable ways. Based on the tenets of the vagueness doctrine, we expected that those laws that are more vague or ambiguous would be more likely to receive declarations of unconstitutionality. The evidence reported above confirms this theoretical expectation. Furthermore, the results do not support the contention from Randazzo and Waterman (2011) nor the predictions from traditional SOP models. Declarations of unconstitutionality do not seem to be affected by potential constraining effects of the law nor by the ideological preferences of the other branches of government. Instead, the justices follow well-known legal principles by examining the specificity of statutes. Those that are not well developed and offer only vague or ambiguous policy pronouncements are significantly more likely to be declared null and void.

## Conclusions

Separation of powers models are useful tools that enable scholars to examine the potentially strategic, interdependent relationships across multiple branches of government. However, these models do not account for the full range of influences considered by the justices of the Supreme Court. Our article incorporates one of these influences by focusing specifically on the level of detail provided by the statute. Using data on Supreme Court decisions from 1953–2002, we show that preference-based SOP models do not accurately predict the likelihood of the Court declaring a statute unconstitutional.<sup>18</sup> These results therefore demonstrate the importance of the legal language in law development.

These results have several implications on the relationship between these institutions—particularly between the Supreme Court and Congress. One implication draws from the intuition that

<sup>16</sup>The longest statutes have 2,503,720 words with a natural log equivalent roughly to 14.73.

<sup>17</sup>Although this predicted probability is indistinguishable from zero (see Figure 6).

<sup>18</sup>We must note, however, that this test of the vagueness doctrine is indirect. Additionally, we do not argue that justices are, in fact, citing this doctrine (nor that they should)—rather we argue that the Court behaves in a manner consistent with this doctrine. Hence this doctrine appears to be a useful way to predict declarations of unconstitutionality.

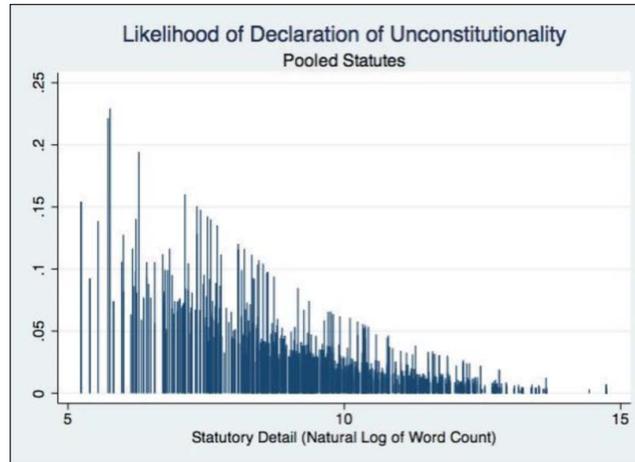


Figure 5. Likelihood of unconstitutional declaration for statutes.

congressional representatives may have significant incentives to draft vague statutes. For example, they may seek to claim legislative victories to their constituents in the hopes of future reelection. Vague and ambiguous statutes may entice representatives of both supporting and opposing parties to claim some statutes that they actually oppose as victories (Miller and Stokes 1963; Arnold 1990; Grundfest and Pritchard 2002; Fenno 2003; Mayhew 2004). Similarly, members of Congress can describe vague statutes in a variety of ways to different individuals so as to satisfy a broader, heterogeneous constituency (Hadfield 1994a). Additionally, legislators may draft vague so as to abdicate responsibility and place blame on others—namely, prosecutors, police, and judges—when the legislation fails or produces poor results (Hadfield 1994a). Yet another potential incentive for drafting vague statutes is the need for majority support in order to pass legislation. The requirement of majority support may thus create an incentive for ambiguity. Disagreements in wording may threaten legislative support, so incorporating

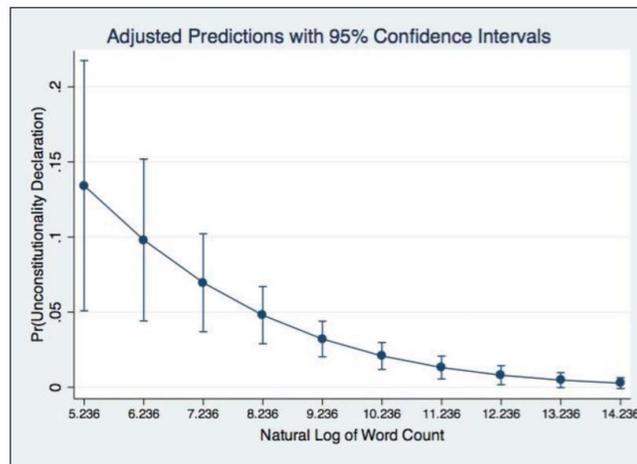


Figure 6. Probability of declarations of unconstitutionality based on statutory detail (length).

ambiguity may resolve the disagreements and bolster legislative support.<sup>19</sup> These intuitions lead to the implication that while Congress may have significant incentives to intentionally draft vague statutes, the Court strikes down these statutes at (relatively) high rates. This relatively high probability of legislation being struck down may make the drafting of vague statutes more costly for congressional representatives.<sup>20</sup>

Another implication is that justices do not appear to be concerned about the level of discretion statutes provide them so as to move the legal policy to their ideal point. Instead, the Court appears to determine statutes' constitutionality based on their interpretation of the rule of law. Vague statutes undermine the rule of law by not providing fair warning to citizens, by leading to arbitrary and selective enforcement, by failing to provide for minimal guidelines for law enforcement, by creating large groups of violators, by deterring lawful conduct, and by constraining public liberties protected by the Constitution. Furthermore, vague statutes undermine the rule of law by providing an "excess of discretion" for judges when applying the law (Abruzzi 2011); hence the Court appears to preclude the very mechanism expected by preference-based SOP models.

Finally, to the degree that vagueness is beneficial or necessary, the Court's high rate of striking down vague laws may negatively impact the enforcement and predictability of laws. For instance, Hadfield (1994a) argues that vagueness "softens the impact of judicial error on individual incentives without abandoning entirely the effort to control private behavior" when courts are likely to make mistakes in a law's application (545). Schaps (2006) argues that vagueness is necessary and beneficial when laws deal with moral standards, which cannot be rewritten with more clarity (without substantially changing the standard). This vagueness, then, enables flexibility at the price of "clarity and predictability" (Schaps 2006). Raban (2010) asserts even further that "clear rules are bound to produce less certainty and predictability than vague standards in many areas of the law," particularly in areas dealing with competing economic, social, and moral standards which cannot be "reduced to clear and determinate rules" (177). Hence, to the degree that vagueness is a necessary component of the rule of law, the Court may unintentionally undermine the very goals they pursue.

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<sup>19</sup>We do not assume congressional representatives necessarily intend to draft vague statutes. It is obviously possible that the statute is simply (unintentionally) poorly drafted. In addition, language inherently has certain limitations in the terms of precision and interpretation, including issues with contextualism (where context is necessary in order to appropriately comprehend an action or statement) and cotextuality of meanings (referring to the tendency of multiple meaning, subjects, or knowledge to either always appear together or always remain absent) (Engberg 2002, 2003; Tiersma 2006; Bonta 1996). Hence, some degree of ambiguity will always exist in statutes, legal rules, and decisions. Lastly, some argue that legal ambiguity is sometimes necessary and even beneficial, particularly when dealing with moral standards (Raban 2010; Schaps 2006; Hadfield 1994a, 1994b).

<sup>20</sup>Assuming, of course, that they earn no benefits from their statute being declared unconstitutional and that Congress takes judicial response into consideration during drafting (Eskridge 1991a, but see Epstein and O'Halloran 1999).

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#### Appendix A: Probit model on declarations of unconstitutionality by issue area.

	Model 1 Pooled Cases	Model 2 Criminal Cases	Model 3 Civil Liberties Cases	Model 4 Economic Cases
<i>Preference Based Variables</i>				
Ideological Distance	1.489	6.911**	.521	.066
Supreme Court and House	(.998)	(2.651)	(1.537)	(.900)
Ideological Distance	–1.459	–2.847**	–.571	–1.517
Supreme Court and Senate	(1.206)	(.854)	(1.694)	(2.550)
Ideological Distance	–.173	–.624	–.820	1.067
Supreme Court and President	(.362)	(.584)	(.597)	(.571)
<i>Legal Based Variables</i>				
Statutory Detail	–.160***	–.298**	–.195***	.011
	(.038)	(.107)	(.048)	(.086)
Constant	–.571 (.381)	–.123 (.632)	.466 (.487)	–3.171 (.947)
N	2456	320	605	1196
Log Likelihood	–170.795	–16.253	–90.507	–20.268
Wald $\chi^2$	18.52	14.30	22.55	65.89
Probability > $\chi^2$	.001	.006	.000	.000
R <sup>2</sup>	.069	.369	.104	.033
Correctly Predicted	98.6%	98.8%	96.0%	99.8%

\* $p < .05$ ; \*\* $p < .01$ ; \*\*\* $p < .001$ .

Note. Dependent variable is the likelihood of a declaration of unconstitutionality by the Supreme Court. Coefficients represent the results of a probit model with robust standard errors listed in parentheses.

**Appendix B:** Probit model on declarations of unconstitutionality (conditional on statute length).

	Pooled Cases
<i>Preference-Based Variables</i>	
Ideological Distance Supreme Court and House	10.584 (5.818)
Ideological Distance Supreme Court and Senate	-8.795 (6.260)
Ideological Distance Supreme Court and President	-.479 (.466)
<i>Legal-Based Variables</i>	
Statutory Detail	-.134* (.079)
<i>Interaction Terms</i>	
Ideological Distance Supreme Court and House * Statutory Detail	-.956 (.631)
Ideological Distance Supreme Court and Senate * Statutory Detail	.771 (.631)
Constant	-.468 (.785)
N	1252
Log Likelihood	-132.76
Wald $\chi^2$	31.38
Probability > $\chi^2$	.000
Pseudo-R <sup>2</sup>	.110
Correctly Predicted	97.4%

\* $p < .10$ ; \*\* $p < .05$ ; \*\*\* $p < .01$ .

Note. Dependent variable is the likelihood of a declaration of unconstitutionality by the Supreme Court. Coefficients represent the results of a probit model with robust standard errors listed in parentheses. Model includes criminal and civil liberties cases.

**Appendix C:** Alternative probit model on declarations of unconstitutionality.

	Pooled Cases	Marginal Effects
<i>Attitudinal Based Variables</i>		
Supreme Court Ideology	-1.700**	-.050
	(.668)	(.023)
<i>Strategic Based Variables</i>		
Ideological Distance	-2.836	—
Supreme Court and House	(1.709)	
Ideological Distance	3.294	—
Supreme Court and Senate	(1.955)	
Ideological Distance	-1.108*	-.032
Supreme Court and President	(.500)	(.016)
Statute Age	-.002	—
	(.006)	
<i>Legal Based Variables</i>		
Statutory Detail	-.265***	-.008
	(.067)	(.002)
Constant	1.11 (.767)	
N	876	
Log Likelihood	-83.972	
Wald $\chi^2$	30.88	
Probability > $\chi^2$	0.000	
Pseudo-R <sup>2</sup>	0.153	
Correctly Predicted	97.60%	

\* $p < .05$ ; \*\* $p < .01$ ; \*\*\* $p < .001$ .

Note. Dependent variable is the likelihood of a declaration of unconstitutionality by the Supreme Court. Coefficients represent the results of a probit model with robust standard errors listed in parentheses. Model includes criminal and civil liberties cases. For the reported marginal effects, the baseline predicted probability of unconstitutionality is .011.