Judicial review has long been touted as a significant component of American constitutionalism and judicial independence generally. This power has been praised and criticized—praised as a “powerful barrier erected against the tyranny of political assemblies” (de Tocqueville) but criticized as being inherently undemocratic by constitutional scholars.\(^1\) Regardless of the normative debates, judicial review is arguably the U.S. Supreme Court’s most potent power. In two centuries the Court has overturned as unconstitutional, in whole or in part, over 1,500 laws and ordinances passed by elected bodies across the United States. One hundred and fifty-five of the laws overturned were congressional statutes. The extent of this power is further illustrated by the finality of the Court’s decisions in these nullifications. Congress has only succeeded in directly overturning four of these cases by passing an amendment to undo the Court’s decision.\(^2\)

Strangely, political scientists have given relatively little

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attention to this behavior beyond the context of constitutional case studies, doctrinal analysis, or normative theory; relatively few systematic empirical studies have been published. Two early behavioral works examined the policy influence of Court decisions to nullify legislation. Robert A. Dahl examined the influence of the Court on national policy and the antimajoritarian nature of judicial activism. He concluded that the Court does not have significant policy influence because it had been unable to hold out against the national majority or the other branches of the government for long, and in only a few important cases was it able to thwart or delay the national will. In 1976 Jonathan D. Casper updated Dahl’s original analysis, which he criticized for its narrow focus that ignored statutes that were overturned after four years. He concluded that the Court was more influential than Dahl believed it to be.

While not a systematic empirical analysis like Dahl and Casper, Robert McCloskey’s seminal work, which examined the evolution of the Court’s exercise of judicial review across historical time periods, contributed significantly to our understanding of this behavior, and formed part of the theoretical basis for subsequent empirical studies such as Caldiera and McCrone’s 1982 time series analysis. McCloskey largely concluded that the Court’s politically astute use of this power under changing circumstances has insured its survival and strengthened the ability of the Court to be an active participant in American politics.

Caldiera and McCrone’s time series analysis of the Supreme Court’s nullification of federal or state statutes is the most extensive and rigorous descriptive study of the Court’s exercise of judicial review. They discover a gradual but significant increase in nullifications over time following the Civil War and identify five distinct periods of activism: the late 1860s, Theodore Roosevelt’s presidency, post-World War II, the 1920s and 1930s, and the 1960s. Their quantitative studies largely supported McCloskey’s qualitative work. But while exploring deeply the time dimension, they make no other attempts at empirical explanations through the use of intervention or independent variables beyond that of the Civil War.

Champagne and Nagel considered the voting behavior of the four justices who are best known as strong advocates of judicial restraint: Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, and Harlan F. Stone. In their analysis of cases in which state, federal, or local statutes or ordinances were nullified during these justices’ tenure on the Court,
they found restraint varied with the justice’s position on the Court, with the Court’s make-up, and, more importantly, according to whose political preference would benefit from the decision, and concluded that judicial restraint was primarily “a smoke screen to mask political alliances and ideologies.”

Segal and Spaeth examined the Court’s nullification of federal, state, and local laws and found, with only two exceptions, that “every justice displays an attitudinal pattern: They vote to uphold either conservative or liberal laws, but never both.” While each of the above studies have contributed to our understanding of the Supreme Court’s exercise of judicial review, they have been limited in that they examined only the set of cases in which the Court decided to nullify state or congressional statutes, leaving unexamined the larger body of cases in which the Court upheld the laws.

In light of the obvious significance of this behavior, the need for more systematic empirically based analysis is evident. Ultimately this research seeks to build upon these previous quantitative studies by examining the full set of Supreme Court opinions involving judicial review of congressional statutes. In particular, this article makes a first step at building upon the descriptive empirical work of Caldeira and McCrone and the qualitative work of McCloskey.

**Cases**

While lists of the Supreme Court’s nullification of congressional statutes across its two-century history are widely available in archived sources, there are no similar lists of cases in which the Supreme Court upheld the statute. Harold Spaeth’s widely used *U.S. Supreme Court Judicial Data Base* does include a variable that can be searched to identify cases from the 1946 term forward in which the Supreme Court determined the constitutionality of national government action; Spaeth’s source is the individual case syllabus. For the years 1947-2001 I was able to identify 336 such cases. I have expanded backwards the dataset to cover all years prior to 1947, following Spaeth’s guidelines so that my data will be consistent with his.10

I conducted LEXIS key word searches of all Supreme Court syllabi prior to 1947 to identify cases that determined the constitutionality of Congress’s actions. In order to do the most comprehensive and appropriate word searches, I generated a list of key word pairings by reading 1) the syllabi of cases identified in Spaeth’s dataset as determining constitutionality of federal action and 2) cases identified in Library of Congress lists as nullification cases.11

I ran key word searches on case syllabi to identify potential cases until I reached the point that multiple searches repeatedly failed to produce any new hits. I read all cases that were hits and culled out those where the Court actually determined the constitutionality of congressional action.12 The result was 560 cases. Then, I conducted a double check based on LEXIS headnotes rather than syllabi to insure that my search was exhaustive. I selected random years in each decade and reviewed the LEXIS headnotes for all cases in each of those individual years. Through this process I verified that for each of the random years no constitutional cases were missed. Combining my set of cases with those identified through the Spaeth data base produces 896 Supreme Court cases that review congressional statutes.

**Judicial review across time**

Figure 1 presents the annual number of Supreme Court opinions reviewing the constitutionality of congressional action. The first observable trend is a rise in the number of cases following the Civil War. The mean number of congressional review cases prior to 1865 is only .2 per year, while in the following period (1865 through 2001) the mean is remarkably higher at 6.58 per year. This pattern fits Caldeira and McCrone’s conclusion that the end of the Civil War marks the “solidification” or “institutionalization of the Court’s power to negate actions of the legislative departments.”

Even though the data here represent all opinions involving judicial review, the observable patterns still parallel those of Caldeira and McCrone. The periods of increased judicial review generally parallel the periods of increased nullifications: “the late 1860s; during the administration of Theodore Roosevelt; after World War I; during the 1920s and 1930s; and during the 1960s, a cycle that has not yet begun its decline.”11 I also find that the general trend has been toward overall growth in judicial review as Caldeira and McCrone...
found in regard to nullifications; however, unlike their study the data
here do indicate that the cycles of judicial review become more and more extreme. It should be noted though that their study did not extend beyond 1973.

Figures 2-6 provide a closer examination of the judicial review cases by dividing them into those that nullified congressional action and those that upheld congressional action and by examining each of the time periods more closely. Figure 2 depicts the period 1803-1864. As is commonly known, the Supreme Court, after establishing judicial review in *Marbury v. Madison* in 1803, did not use the power of judicial review again to nullify a congressional statute until *Dred Scott* in 1856. Less well known is the fact that during this period the Supreme Court considered questions of constitutionality in 11 other cases challenging congressional action. In each of these, the Court upheld the congressional statute. Thus we find additional evidence of the restraint exercised by both the Marshall and Taney Courts.

McCloskey argues that despite rather bold actions by Chief Justice Marshall, he exercised substantial restraint, recognizing that the Court must slowly gain national acceptance for the power of judicial review—

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12. Ultimately I am examining the Court’s own words in the arguments of the opinion to answer the question—did the “majority determine the constitutionality” of the congressional statute at issue in disposing of the case. This follows Spaeth’s coding rules. Thus, cases in which the Court dismissed on technicalities (lack of jurisdiction, lack of standing, lack of actual controversy) were not included in the dataset. In regard to *Ashwander* principles (which the Court actually discusses in many cases prior to *Ashwander*—Brandeis gives full citation of these in his *Ashwander* concurring footnote), I followed as consistently as possible the language of the Court’s opinion itself and Spaeth’s rule. Obviously, in regard to the Spaeth data, he and his coders made the final call, and I cannot know how many cases they rejected in their coding. However, in regard to the pre-Spaeth data I made the final call, and tried to employ logic that was consistent with the intent of the Spaeth rule. For the 1803-1946 period I had a relatively small number of cases, 31 of 567, in which I had to deal with *Ashwander* type issues. Of these 31, 16 were rejected from the dataset and 15 were accepted, an even split.

Of the 16 cases that were rejected, there were generally three or four types of reasoning in the opinion that I felt did not fit the decision rule here. First, the Court argues that it cannot or will not deal with the constitutional issue because the court below made no mention of the constitutional questions. Additionally, I rejected cases in which the Court dismisses the constitutional issue as a frivolous federal question. I also rejected cases in which the Court digged the case—dismissing as improvidently granted. Finally, I rejected cases in which even though the constitutionality of a congressional statute is raised, the Court says that it does not consider it here because there are other grounds upon which the case may be disposed of. Again, I believe these decisions are consistent with Spaeth’s rule as whether the majority determined the constitutionality of the statute.

14. Id. at 113.
that the power had to “be nourished and cultivated” in order to grow into a nationally accepted doctrine of judicial sovereignty. McCloskey also posits that the Taney Court for a long time, too, “recognized the need to slow the pace of [the Court’s] constitution-making process so that America could grow used to the house that John Marshall had built” and in order for the judicial power to be “consolidated.”

With the Dred Scott decision the Taney Court abandoned this protective restraint and severely weakened the foundation of the Court’s power, the principle of national sovereignty. During the Civil War the Supreme Court ducked salient constitutional issues, such as presidential war powers and civilians being tried in military courts, based on jurisdictional grounds. McCloskey argues that the Civil War demonstrated that “the experiment of an independent and influential national judiciary had failed.” He accepts this outcome as inevitable, arguing that “war is never a favorable environment for judicial power” because war is characterized by emotion and quick, drastic actions and courts are not well equipped to deal with either.”

Human rights scholars would take issue with this assertion and argue that an independent judiciary is most suited to stand between the passions and emotions of the majority and the constitution, especially during times of threat. This issue is both a normative question and an empirical question that must be deferred to future research.

Figure 3 depicts 1865-1900, the period McCloskey labels as “Constitutional Evolution in the Gilded Age.” The mean number of cases challenging congressional statutes during this period is 3.22, a remarkable increase over the previous period’s mean of .2 cases per year. Towards the end of this period, we find five outlier years in which the annual number of cases is well beyond the mean of 3.22: 1879 (6), 1884 (6), 1892 (6), 1897 (7), and 1899 (9). The annual number of review cases in these five years is more in line with the mean of the next period we will examine.

In the 1865-1900 period the Supreme Court nullified congressional action in 21 of 116 cases, an average of .58 per year. As Caldeira and McCrone point out the substantial increase in nullification cases following the Civil War marks the solidification or “institutionalization of the court’s power to negate actions of the legislative departments.” McCloskey recognizes this period as one of increased but moderated activism, arguing that the Court had realized that the “ambiguity of its mandate is both its limitation and its
His assertion is supported by Caldeira and McCrone’s empirical analysis that identifies a significant but gradual growth in Supreme Court nullifications after the Civil War. And this result fits with Ackerman’s claim that it was during this period, which he refers to as the Middle Republic, that the Supreme Court began to review regularly the national legislation.

Figure 4 depicts 1901-1937, the period McCloskey refers to as the “Judiciary and the Regulatory State.” McCloskey’s analysis of this period becomes somewhat trapped in his metaphor of medieval knights slaying the dragons of socialism to protect the maidens of capitalism, but ultimately he settles upon the label of “judicial dualism” to describe a court that at times was “determined to halt the regulatory movement in its tracks” and one that “ratified many inroads on the free enterprise ideal.” This period overlaps with four of the five periods of activism identified in Caldeira and McCrone’s work, which were all linked to “such economic phenomena as industrialization, depression, and the rise of corporations.”

During the 1901-1937 period the Supreme Court decided 347 cases in which congressional actions were challenged constitutionally. The Court heard an average of 9.38 of these cases per year during this period. Fifty-seven of the cases resulted in nullification of a congressional statute, with an average of 1.54 nullifications per year. While the number of nullifications increased substantially in this period, the proportion of cases resulting in nullifications is actually smaller than in the previous period: .16 compared to .18 per year. In no year does the number of cases nullifying Congress surpass the number in which the Court upheld congressional action. A few individual years appear as outliers: 1911 and 1937 for the number of congressional cases reviewed and 1935 for the number of cases nullifying congressional action.

Figure 5 depicts the years 1937-1957, which McCloskey called the “Modern Court and Postwar America.” During this period the Supreme Court nullified congressional action in only 5 cases out of 148, which is the smallest nullification rate (.03) of any period since the Civil War. This number nets an average of .23 nullifications per year, again the smallest figure since the Civil War. This finding fits the nullification trend identified by Caldeira and McCrone. The Court during this period heard an average 6.73 cases per year constitutionally challenging actions of Congress, which is substantially lower than the previous period’s average of 9.38 cases per
year. Three years emerge as outliers in this period, with the Court deciding more cases challenging congressional statutes: 1937 (15), 1938 (17), 1939 (12). Clearly, during the period encompassing World War II, the Court was much less likely to challenge Congress, even though it was hearing substantial numbers of such challenges.

Figure 6 depicts the remaining years, 1958-2001. During this period the Court heard 299 cases reviewing the constitutionality of congressional action, an average of 6.8 per year, which is approximately the same average as the previous period. Three years are outliers, with the Court hearing more than 10 cases: 1973 (11), 1977 (13), and 1981 (14). This period produces several notable records. First, the Court handed down 74 cases that nullified Congress, at a rate of 1.68 nullifications per year, the highest rate of any period. The proportion of nullifications is .25, the highest of any period. Additionally, in five years the Court nullified Congress in four cases: 1965, 1968, 1969, 1995, and 1998. Finally, it is significant that, for the first time, we have terms in which the cases resulting in nullification outnumber the cases upholding Congress: 1965 (4 nullifying Congress to 2 upholding Congress), 1967 (2 to 0), 1995 (4 to 1), 1996 (3 to 2), 1998 (4 to 2), 1999 (3 to 1). Four of the six years occur in the Rehnquist Court and the other two in the Warren Court. While Caldeira and McCrone’s study extended only to 1973, they do identify the 1960s as a cycle of activism “that had not yet begun its decline.”

The nullification rates here support their conclusion.

Court support for Congress
When we examine the annual number of cases nullifying congressional action across the entire 1803-2001 period, we see clearly the increase following the Civil War. While between 1803 and 1864 the Supreme Court only overturned two congressional statutes, in the period 1865-2001 the Court nullified on average one statute per year. This result parallels Caldeira and McCrone’s study, which concluded that the Civil War was a watershed in the “development of the Court’s use of judicial review to declare state and federal enactments invalid.” We also see a second increase in nullifications occurring in 1920. For the period 1920-2001 the Court nullified congressional action an average of 1.3 cases per year. And then again in 1965, we see a third increase in nullifications, with the mean number rising to 1.8 for the period 1965-2001. We can observe several outliers, years with four or more nullifications. During the New Deal, for three years four or more cases nullify congressional action: 1930 (5), 1935 (8), and 1936 (4). In the Warren Court, three years produce four nullification cases: 1965, 1968, and 1969 and in the Rehnquist Court we find two years with four nullification cases: 1995 and 1998. Of course, the Court’s opportunity to nullify cases will vary by the number of cases on the docket that consider constitutional challenges to congressional action.

When we look at the annual percentage of cases reviewing congressional action that resulted in

27. Id. at 113.
nullification from 1865 to 2001, we see that on average the Court nullified congressional action in only 26 percent of the cases challenging Congress. These data support Lamb’s observation that the Court is “primarily a Court of restraint—or at least of mild and infrequent activism.”

While Lamb only examines the set of cases that resulted in nullification, he too notes major exceptions to his observation: the Warren Court in its entirety and the Court during the years between 1890 and 1936. My analysis examining the nullification outcomes as percentage of the cases actually challenging Congress finds only eight years to be extreme outliers—with percentages higher than 60 percent. In three of these years the Court nullified in 100 percent of the cases: 1867, 1888, and 1967, but it should be noted that the number of cases is quite small, only one case in 1867 and 1888 and only two in 1967.

The more significant outliers are 1869 (67 percent nullification), 1965 (67 percent), 1995 (80 percent), 1998 (67 percent), and 1999 (75 percent). In these years the Court considered four or more cases of constitutional challenges to Congress.

When we consider the Court by decade, rather than year, and look at the mean percentage of cases that nullify Congress in the post Civil War period, we find the mean decade nullification rate across the entire period is .26 percent. The rates for four of the thirteen decades reach levels well above the mean. The Rehnquist Court during the 1990s earns the highest average percentage, 42 percent, with cases primarily dealing with civil rights and civil liberties, as well as federalism and interstate economic issues. Slightly less than two-thirds of the nullification cases are decided in the conservative direction (64 percent). The Warren Court during the 1960s earns the second highest average at 37 percent. Civil rights and civil liberties dominate in these nullification cases, with 74 percent of the cases decided in the liberal direction. The half decade following the Civil War produces the third largest average, and this set of cases is dominated by taxation, interstate commerce, and federalism issues. The 1880s earns an average of 30 percent with cases primarily dealing with interstate commerce, federalism, and economic issues. There are also some cases dealing with civil rights issues for Indians and immigrants.

The two lowest average percentages in nullifying Congress occur during the two world wars. During World War II and the period immediately following only 2 percent of the cases challenging Congress were nullified. In eight of these ten years the Court upheld Congress in 100 percent of the cases. The second lowest average is during World War I, with the Court nullifying Congress in only 2 percent of the cases. In four of these years, the Court upheld Congress 100 percent of the time. This result supports McCloskey’s expectation that “judicial review is to be weakest during grave national emergencies.” Also born out in this analysis is Chief Justice Rehnquist’s assertion that “there is some truth to the maxim Inter arma silent leges.”

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29. McCloskey, supra, n. 5, at 135.
Table 1: Analysis by Major Legal and Constitutional Issues

<table>
<thead>
<tr>
<th>Issue Area</th>
<th>% of Cases of Judicial Review of Congress</th>
<th>% of Judicial Review Cases That Nullified Congressional Action</th>
<th>% of Judicial Review Cases That Upheld Congressional Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal procedure</td>
<td>10.5%</td>
<td>13.2%</td>
<td>9.99%</td>
</tr>
<tr>
<td>Civil rights</td>
<td>13.4%</td>
<td>17.8%</td>
<td>12.55%</td>
</tr>
<tr>
<td>First Amendment</td>
<td>10.5%</td>
<td>17.1%</td>
<td>9.18%</td>
</tr>
<tr>
<td>Due process</td>
<td>11.8%</td>
<td>6.6%</td>
<td>12.96%</td>
</tr>
<tr>
<td>Privacy</td>
<td>0.7%</td>
<td>0.7%</td>
<td>0.67%</td>
</tr>
<tr>
<td>Attorneys</td>
<td>0.2%</td>
<td>0.0%</td>
<td>0.27%</td>
</tr>
<tr>
<td>Unions</td>
<td>0.9%</td>
<td>0.7%</td>
<td>0.94%</td>
</tr>
<tr>
<td>Economic activity</td>
<td>8.7%</td>
<td>0.0%</td>
<td>10.53%</td>
</tr>
<tr>
<td>Judicial power</td>
<td>5.0%</td>
<td>7.9%</td>
<td>4.45%</td>
</tr>
<tr>
<td>Federalism</td>
<td>19.2%</td>
<td>17.8%</td>
<td>19.57%</td>
</tr>
<tr>
<td>Taxation</td>
<td>14.1%</td>
<td>13.2%</td>
<td>14.30%</td>
</tr>
<tr>
<td>Miscellaneous (primarily separation of power)</td>
<td>5.0%</td>
<td>5.3%</td>
<td>4.99%</td>
</tr>
</tbody>
</table>

**Issue Areas**

Table 1 presents the analysis of the cases according to the major issue area that forms the legal basis of the decision. This variable is obtained from Spaeth's *U.S. Supreme Court Database* for the cases decided since 1953. The author has coded the preceding years, following Spaeth's coding guidelines. The first column shows the percentage of cases by issue area. Federalism is the most prevalent, with almost 20 percent of the cases. Two issue areas tie with the second highest percentage, taxation (14 percent) and civil rights (13 percent). The third most frequently occurring issue is due process at 12 percent.

Spaeth's category for due process, however, is rather problematic in that it combines economic due process, such as cases involving the takings clause (7 percent of the judicial review cases) with non-economic due process issues (5 percent of the judicial review cases). An economic issue is the major issue in 9 percent of the cases, but if economic due process cases are added to this category, we find that 16 percent are economic in nature, the second largest percentage of cases. This result is more consistent with expectations. Two issue areas fall into the fourth-highest percentage: criminal procedure (11 percent) and First Amendment (11 percent). Judicial power cases are tied for the lowest percentage at 5 percent, along with the miscellaneous category, which is mostly cases dealing with separation of powers issues. Two other issue areas are hardly worth mentioning; those dealing with unions and privacy issues, each representing less than 1 percent of the cases under study here.

The second column in Table 1, the cases that nullified Congress, are separated and then proportioned by issue area. These data show that the Supreme Court is much more likely to nullify Congress when the case deals with civil rights, the First Amendment, or federalism. Each of these represents 17 percent of the nullification cases. The issue where the Supreme Court is next most likely to nullify Congress is criminal procedure, 14 percent. And the next most likely issue area the Court will overturn Congress is taxation, at 13 percent. Judicial power issues represent 8 percent of the nullification cases. The issue where the Supreme Court is next most likely to nullify Congress is criminal procedure, 14 percent. And the next most likely issue area the Court will overturn Congress is taxation, at 13 percent. Judicial power issues represent 8 percent of the nullification cases. When we separate out the takings clause due process cases from the others, we find that 5 percent of the nullification cases involve the takings clause and only 2 percent involve the other areas of due process, such as right to an impartial decision maker. Spaeth's miscellaneous category takes up 5 percent of the nullification cases. As noted before, the majority of the miscellaneous cases are separation of powers issues, such as the constitutional challenge to the Line Item Veto Act or the War Revenue Act of 1898. Three areas represent less than 1 percent each of the cases that nullify Congress: privacy, unions, and economic issues. While the percentage of cases falling in Spaeth's economic subject area is only .6 percent, when the economic due process cases are added the percentage is over 5 percent of the nullification cases.

In the third column of Table 1 the cases in which the Court supports rather than nullifies Congress are separated out and then proportioned by issue. Since the Court overwhelming supports Congress, we would expect that these data would parallel those seen when we looked at the mean percentage of cases that nullified Congress in the post Civil War period, but the data are not as similar as we would expect. The most prevalent issue area in these cases is federalism at 20 percent, but beyond that finding the similarities disappear. The Supreme Court is next most likely to support Congress in taxation cases, at 14 percent. Due process and civil rights issues are the next highest at 13 and 12 percent, respectively. When the takings clause cases are separated out from the due process
cases, we find these cases represent 7 percent of the cases that support Congress. Economic issues are next at 11 percent, followed by criminal procedure at 10 percent and First Amendment issues at 9 percent. Combining the economic cases and the takings clause cases, we can see that they encompass over 17 percent of the cases in which the Court upholds Congress. Judicial power and miscellaneous issues continue to produce percentages at around 5 percent. The other issues remain below 1 percent.

Figure 7 separates out each issue area to be examined on its own. Looking across all issues we can see the norm is to uphold Congress, with an average support rate of 83 percent. On five issues the Court’s support of Congress is below the mean, but even so, each is still above a 70 percent support rate. The Supreme Court is most likely to challenge the constitutionality of congressional action on First Amendment issues. The second most likely issue for the Court to challenge Congress is in regard to judicial power. Civil rights and criminal procedure cases are the other subject areas slightly below the mean.

While we might expect the Supreme Court to use its power of judicial review to challenge Congress on civil rights and civil liberties, it is not clear at this point whether the challenges are to support rights or to curb them. Future study will examine this empirical question. The miscellaneous category, which is primarily separation of powers cases, is right on average. On three other issues Congress earns about average support from the Court: privacy, taxation, and federalism. In two issue areas Congress earns the Court’s support at 90 percent or higher: Spaeth’s due process and economic activity. Separating out the takings clause cases from the due process cases produces only moderate changes: 87 percent support for Congress in takings clause cases and 93 percent support in the other due process cases. The Court supports Congress on union issues at about 88 percent.

Constitutional provisions
Figure 8 examines a slightly different dimension of the cases—the key constitutional clause in each case in which there were five more cases dealing with that clause as the key legal provision. As with issue area, these data were culled from Spaeth’s U.S. Supreme Court Database for the years prior to 1953 and the author has coded the preceding years following Spaeth’s operationalization. The domination of the Interstate Commerce Clause presents the most noticeable trend: in 132 of the cases (31 percent) the commerce clause was the primary legal provision under consideration. The First Amendment is the second most prevalent legal provision: 78 cases (18 percent). The taxation clauses are only slightly below the First Amendment: 76 cases (18 percent).
Three constitutional provisions appear in the 4 to 5 percent range: the Tenth Amendment (22 cases, 5 percent), the Fourteenth Amendment (18 cases, 4 percent), and the delegation of powers and separation of powers provisions (17 cases, 4 percent). The naturalization clause is close behind these three with 16 cases (4 percent). The Sixteenth Amendment is the key legal provision in 16 cases (3 percent).

The remaining seven provisions represent less than 3 percent of the cases: the bill of attainder provision (9 cases, 2 percent), the necessary and proper clause (9 cases, 2 percent), the District of Columbia clause (8 cases, 2 percent), the Thirteenth Amendment (7 cases, 2 percent), and the coin money clause (6 cases, 1 percent). And at 5 cases (1 percent) are the Eleventh Amendment, the governance of the armed forces clause, and the postal powers clause.

**Conclusion**

In this analysis we have seen the number of Supreme Court cases challenging Congress increase gradually following the Civil War, with a concomitant increase in the number of nullifications. However, the dominant trend across the Court’s history remains one of supporting Congress, with exceptions primarily during the decades of the 1960s and the 1990s. We have also seen a decline in proportion of cases nullifying Congress during times of national crises, such as the two world wars. Federalism issues have dominated when we examine the full set of cases challenging Congress, but when we narrow our examination to nullification cases only, we find civil rights and First Amendment cases have been equally prevalent. The Interstate Commerce clause was the dominant constitutional provision upon which these constitutional challenges were based, followed by the First Amendment and taxation clauses.

This study makes only an initial examination of this important judicial power. Future studies will analyze the role of the chief justice in these cases, the votes of individual justices, and the ideological outcomes of the Court’s votes and the individual justices’ decisions. Ultimately, I plan to address de Tocqueville’s quote, with which I began this article, and examine empirically the question of whether judicial review has actually been used as a tool to protect against the “tyranny of the majority.”

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