Is Judicial Review a Likely Tool to Curb Human Rights Abuse?: An Empirical Assessment of the U.S. Supreme Court's Exercise of This Power Over Two Centuries

Introduction

Many observers note that we have entered into an age of constitutionalism, where people all over the world are turning to the courts and the process of constitutional review to protect basic human rights (for example, see Beatty 1994). Moreover it is argued that is the U.S. model of constitutionalism and judicial review has that influenced the shape of formal constitutionalism globally. Rosenthal argues that the most striking feature of U.S. constitutionalism is judicial review, and he asserts that “the enumeration of rights and their protection by the judiciary” have gradually come to be seen as “the most important safeguards of democracy and freedom, quintessential aspects of the American constitutional system, and the objects of widespread respect” (1990, 401). And he observes that since World War II country after country has adopted judicial review, influenced directly or indirectly by U.S. constitutionalism. Twining also observes that constitutional reform today “assumes a strong American-style version of judicial review which includes the judicial power to determine the constitutionality of legislation” (1993, 385). Waldron agrees, noting that “the constitutionalization of basic rights together with judicial review” which were long regarded as an “American peculiarity nowadays tends to be seen as a global model for democratization” with new democracies turning “almost instinctively to some version of this constitutional arrangement” (1998, 335). Dworkin (1996) goes so far as to argue that this arrangement is “the most important contribution American history has made to political theory” (6). Deeply ingrained in this model is the assumption that judicial review serves as the main bulwark in protecting individual constitutional rights.

Universally, this power is posited to be a substantial factor in the protection of human rights, particularly during periods of crisis or instability (see International Commission of Jurists 1983; Ackermann 1989; Maduna 1989; and Chowdhury 1989). However, empirically, the expectation that the courts exercising the power of judicial review would serve as guarantors of individual human rights has not materialized as predicted. And it is this failure that brings me back to the experience of the originator of this model, the United States Supreme Court. Despite the Court’s two-hundred years of experience exercising the power of judicial review political scientists have not tested systematically the question of whether in fact this power has been exercised primarily to support civil rights and civil liberties of against incursions by the majority-elected branches of government.1 Below, I will examine the expectations in regard to judicial review and individual rights, both in the U.S. context and in the global context, as well as the countervailing expectations of the skeptics. Ultimately the goal of this paper is to examine the U.S. Supreme Court’s exercise of judicial review of congressional statutes over the Court’s two-hundred year history since Marbury v. Madison (1803) first established this power, and to test empirically whether the exercise of the power to nullify or uphold congressional statutes, has been used to support or curb civil rights and civil liberties. I will also examine trends across time and decision making patterns of the individual justices, and I will discuss the implications of the U.S. experience in regard to the global expectations of this power.

Judicial Review and the Protection of Individual Rights
When we look to the constitutional founders, such as Madison and Hamilton, and early commentators, such as Alexis de Tocqueville, we see strong arguments that judicial review will serve as an important check against tyranny of majority. De Tocqueville, in observing the American political system argued that an independent judiciary especially one empowered with judicial review is “one of the most powerful barriers erected against the tyranny of political assemblies.” Founding fathers such as Alexander Hamilton had made a more specific argument in regard to the judicial review and the protection of individual rights. Hamilton in *Federalist* No. 78 argued that without this judicial check, “all the reservations of particular rights or privileges would amount to nothing” (466). And James Madison in defense of the bill of the rights argued that judges, when faced with individual rights constitutionally incorporated into a bill of rights would consider themselves as a guardians of these rights and would thus serve as an impenetrable bulwark against the encroachment upon these rights by the legislative and executive branches (439). Danelski notes that in claiming the power of judicial review *Marbury v. Madison* (1803) Chief Justice John Marshall in effect argued that “the very essence of civil liberty” was recourse to the courts to ensure their protection (1992, 22).

Overtime the U.S. Supreme Court and students of the Court have continued to accept this link between judicial review and the protection of rights as historical fact across several periods of time. Danelski concludes that “a strong argument can also be made for the proposition that in the late eighteenth century the principle purpose of judicial review in the United States was also the protection of individual rights” (21). In 1911 Justice Horace Lurton posited that the course of American history “supports the contention that the exercise of judicial review is an obligation of the judiciary as a guarantor of liberty” (as cited in Slotnick 1987, 20). And more specifically, Justice Stone speaking for the Court in the 1938 in the *Carolene Products* footnote penned the preferred freedoms doctrine setting forth the special status of rights and freedom in constitutional challenges, stating that the Court will assume “legislation constitutional unless it facially abridges a provision of the Bill of Rights, restricts access to normal political processes or reflects prejudices against discrete and insular minorities.” McCloskey asserts that this concern reflected in the “more exacting judicial scrutiny” standards of the *Carolene Products* has actually been the tradition running back to Marshall and beyond, that the Court has the power and duty to right wrongs, to translate its moral convictions into constitutional limitations” (1994, 129). Even though some normative theorists and empirical researchers see judicial review as a largely antidemocratic exercise, we find the special exception made in regard to this negative assessment, if the power is exercised in protection of individual rights; Howard and Segal (2004) conclude that “the dominant viewpoint is for a judiciary to restrain from overturning laws passed by the democratic majority unless necessary to protect fundamental freedoms or suspect classes (emphasis added)” (132). This positive expectation of judicial review is also reflected in much of the international legal community; the International Commission of Jurists observes that in all societies judicial review “assumes an important role in protecting the rights of citizens” (434). They and other scholars (Ackermann 1989; Maduna 1989; and Chowdhury 1989 for example) believe that judicial review is essential especially during states of emergency, and they argue that it has become “axiomatic, that for the protection of human rights, the greatest possible degree of judicial control should be striven for” (435).
The strong international assessment of judicial review’s beneficial effect is not unanimous, however. Ghanaian scholar Prempeh (1999) notes that though judicial review is “widely celebrated by democrats and constitutional architects in transitional democracies, it is not the unmitigated virtue it is frequently made out to be” (135). He argues instead that judicial review is a double-edged sword—that “if exercised courageously (but prudently) to defend rights or hold the line against abuses of power, it could enhance constitutionalism in transitional democracies” but “in the hands of weak, insecure, illiberal judges, however, judicial review could easily become an even more formidable instrument for legitimizing authoritarianism” (137). He believes that there is significant risk that the actual decisions of the courts will not produce rights-friendly, liberal democratic jurisprudence. Other scholars echo his concern that ultimately the judicial defense of human rights depends upon a judges that value political liberty (Turner 1999). Sripati assessment parallels Turner. He notes that in its first twenty five years the Supreme Court in India “offered little safeguard to individual liberties” and that it was “only when judges with more liberal views ascended to the bench” that the court handed down opinions protecting rights (1999, 110). Prempeh also emphasizes this link, noting that it is easy to establish judicial review—with but a clause or two in the national constitution but he reminds us that “the challenge is to ensure that judges in newly democratizing states exercise their new power so as to advance and deepen the tradition of constitutional democracy”(135). Ultimately the exercise of judicial review must be guided by “rights-respecting jurisprudence, and not the might-justifying jurisprudence or illiberal jurisprudence that has been evident in the Ghanian judiciary” (137).

Other African specialists such as Mutua (2001) argues that in regard to particular case of Kenya, despite its constitutional provisions for judicial independence, the judiciary has evaded its constitutional responsibility to protect individual rights and instead has served as an agency of the executive. He concludes that in Kenya there is no longer even a façade of judicial independence and that “the one possible venue for protecting human rights and punishing their violation has willingly become a compliant instrument of repression” (118). Moderne (1990) also strongly suggests that the African experience, particularly that of Ghana, Nigeria, Tanzania, and Zambia, should temper the expectation that judicial independence will have a significant influence on the protection of individual human rights (329). These observations are consistent with those of Prillaman (2000) who believes that the Latin American experience has not supported the optimistic expectations about judicial review, but rather he observes a weak judiciary that is ultimately unable to protect the boundaries of constitutionalism. He and other Latin American specialists argue that the judiciary has been but a docile agent of the executive (see Boron 1993, Fruhling 1993). My study of formal judicial review across the global set of countries has strongly supported these skeptics' hypothesis, finding that not only does the power of judicial review not lead to the protection of core human rights, but instead the formal power is been associated with regimes’ increased human rights abuse—suggesting that we should be cautious about our advice and should reexamine our assumptions in regard to judicial independence and judicial review in particular (XXX 2004, XXX 2001), which brings us back to the example of the U.S. Supreme Court.
The United States offers a unique opportunity to explore this behavior, since we have approximately two hundred years of experience with this judicial power. Certainly, we have anecdotal evidence that the power of judicial review in the U.S. has been used to curb rights. Obvious examples would be *Dred Scott*, *Plessy*, and *Korematsu*—decisions in which, as Sherry (1998) reminds us, it is now the dissenters whom we admire rather than the justices in the majority. Political scientists have not however tested systematically the question of whether the Supreme Court has in fact used the power of judicial review to protect individual rights. To gain some insight into this question, I turned to the Court’s judicial review of congressional statutes.

**Supreme Court Review of Congress**

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 the cases in which the Supreme Court reviewed the constitutionality of congressional statute and *upheld* rather than nullified 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 in the database. 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 data. 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 dataset as determining constitutionality of federal action and 2) cases identified in Library of Congress list as nullification cases. Using LEXIS I ran key word searches on case syllabi to identify potential cases until I reached the point that multiple word searches repeatedly failed to produce any new hits. I read all of the hits from these searches and culled out the cases where Court actually determined the constitutionality of congressional action. 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 enough. I selected random years in each decade and then 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 by using the syllabus search method. Combining my set of cases with those identified through the Spaeth data base produces a set of 896 Supreme Court cases that review congressional statutes. After identifying the set of congressional review cases, I read each case to gather relevant case and statute data. For the analysis reported in this paper, I also identified the cases in which the Court was considering a claim that the congressional statute violated a constitutionally protected civil rights or civil liberties and found 364 such cases (41 percent).

**Analysis**

The first trend we should note is the strong general tendency of the Court to uphold Congress. In 287 of the 364 cases (78.8%) the Court upheld congressional statutes with only 77 cases (21.2%) resulting in nullification. While this trend clearly parallels that of
the Court in regard to its review of congressional statutes generally, the nullification rates is significantly higher in regard to cases in which individual rights are at stake: 21.2% compared to 17% in the total set of congressional review cases. The data presented in Table One clearly show that the Court’s exercise of judicial review has not served the function of protecting civil rights and civil liberties against majority incursions, as purported. Instead we find that 76 percent of the time the Court curbs rights rather than protect them in these cases. We might find that the Court when exercises this power to nullify congressional action, it would be more likely to do so in order to protect rights. Justice Iredell asserted such an expectation 1798 that because the authority to declare a legislative act, federal or state, “void is of a delicate and awful nature, the Court will never resort to that authority but in a clear and unjust case” (as quoted in Slotnick, 14). So next, I examined the data to determine whether the Court acted differently in protecting these rights when it nullified congressional action rather than upheld it. In second and third column we can see that in the largest percentage of cases (70%) the Supreme Court is upholding congressional statutes that curb rights. In the second highest percentage of cases (only 15%) the Supreme Court is nullifying congressional statutes to protect rights. In nine percent of the cases the Court is upholding Congress to protect rights. But, finally, it is rather significant that in only six percent of the cases does the Court nullify congressional action in order to curb rights. In Tables Two and Three the cases in which Congress is nullified are separated out from those in which it is upheld by the Court.

In Table Two we can see that when the Court decides to take action against Congress and nullify its statutes as unconstitutional, it overwhelmingly does so to protect rights (71%) rather than to curb them (29%); however, we must remember this stills nets out to be only 15 percent of the cases. In Table Three we see the opposite trend in regard to the Court upholding Congress, with Court’s action overwhelmingly going against rights and freedoms (88%) rather than to protecting them (12%). Thus, even though we see that the Court is slightly more likely to challenge Congress in rights and freedoms cases than in other judicial review cases, the norm is to uphold congressional statutes that curb rights and freedoms. It may seem reassuring to democratic theorists that when the Court tends to nullify in rights cases, it does so to protect them, these results bring to mind Prempeh’s concern about the double-edged sword of judicial because the exercise of the power “means not only that the Court may strike down a legislative action as unconstitutional but also that it may validate it as within constitutionally granted powers and as not violating the constitutional limits” and thereby serving “not only a checking function but also a legitimating function” for an illiberal regime. Bickel (1986) also alludes to the possibility that judicial review can be used as a legitimizing tool for illiberal action. Waldron (1998) echoes this concern, noting that others such Dworkin tend to underestimate the damage done by the Court’s exercise of judicial review by focusing on cases that overturned laws. He argues that “the most serious mistakes the Supreme Court has made, over its history, have not been in striking down laws it ought to have upheld, but in upholding laws it ought to have struck down.

It seems plausible that the Supreme Court might be more supportive of some types of rights claims than others. McCloskey’s assessment in 1957 of the Court’s use of judicial review in cases that would fall under the preferred freedoms doctrine, concluded that the Court had pursued a “somewhat irregular course” in asserting its powers to protect
rights against Congress and the states in regard to freedom of speech rights and procedural rights; however, in regard what he refers to as “the third great civil rights problem—racial discrimination” he asserts that the Court has been “more venturesome, more confident in announcing its proscriptions” (1994, 139). I test these expectations in Table Four where I sort and examine the data by major constitutional issue area, following Spaeth’s division of issue areas: 1) criminal procedure which “encompasses the rights of persons accused of crime, except for the due process rights of prisoners, 2) civil rights which includes “non-First Amendment cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage”, 3) First Amendment rights, 4) due process claims and 5) privacy rights. Over eighty percent of the cases involve either criminal rights (34%), civil rights (28%), or First Amendment rights (25%). Somewhat counter to McCloskey’s hypothesis, First Amendment rights enjoy the strongest support of the court, with 31% of these claims supported by the Court, followed by civil rights, with 26% of the claims upheld, and criminal procedure, with 22% of the claims upheld. Due process claims receive the lowest level of support, only 12%. From a human rights perspective, the Court’s stronger level of support for First Amendment rights over other types of right is not surprising given that these freedoms are negative human rights, those that require only government forbearance rather than positive action and expenditure of resources. Additionally, in the balance between individual rights and the interests of society, the full exercise of First Amendment freedoms are not perceived under most circumstances as much a threat to public as might be the provision criminal procedural rights and due process. Thus, as McCloskey suggests, the courts may be more likely to perceive a legitimate government (majority) interest in curbing due process and criminal rights.

Figures One through Three illustrate the overtime trends of the Court’s support for constitutional freedoms and rights claims in the cases of congressional review. In the 1800s we can see that Court only supported rights claims 8 times out 48 (17%) cases. In the first half of the 1900s the Court’s support for rights claims decreases as the number of review cases involving rights claims doubles in half the time, 10 cases out of 91 (11%). In last half of the 1900s, in which the number of review cases involving rights claims increases, the protection of rights goes up, the Court’s support for such claims reaches it highest level with the Court supporting 70 out of 145 claims (48%). Not surprisingly, the two highs occur in the last two years of the Warren Court: in 1968 the Court upholds 7 of 7 claims (100%) and in 1969 5 of 8 claims (63%). Even in this period, however, the only other years in which the Court supported more rights claims than they denied were 1957 and 1960 where the Court upheld 2 out of 3 claims (66%) and 4 out of 7 claims (57%), respectively. Thus, in relative terms, as Epp (1998) has claimed by late sixties the SCT had “essentially, proclaimed itself the guardian of the individual rights of the ordinary citizen” (20); however, the empirical analysis here, suggests that this guardianship does not extend beyond the Warren Court years. The Burger Court years contrast rather starkly in that the Court denied a record number of rights claims: 11 out of 13 in 1977 (85%), 10 out of 13 in 1980 (77%) and 9 out of 11 in 1972 (82%). In three other years (1973, 1974, and 1976) the Burger Court rejected seven or more rights claims (between 73% and 87% of the claims). The level of support for rights remains low on the Rehnquist Court, as the number of rights claims against Congress decreases. Then, finally we see the level of support for rights increase as the
two Clinton appointees come onto the bench. Overall, the historical pattern suggests that to some extent the Court gradually has become more protective of constitutional rights against incursions by Congress, but ultimately the data suggest that the Court’s willingness to protect rights against tyranny of the majority is largely dependent upon the particular justices who sit on the bench. This finding, of course, parallels the expectations and observations of Prempeh and other skeptics, and leads us to the next set of analyses.

Figure Four presents the support of the individual justices with votes in ten or more cases. The mean level of support for rights claims across these justices is 31%. The lowest level of support is zero for Associate Justices Minton and Butler and for Chief Justice Vinson. Even though Minton came to the bench with a strong liberal reputation from his years in the Senate, he ended up joining the other Truman appointees in the conservative coalition (Cushman 1993), and rarely overturned congressional legislation (only 6.5% in all congressional review cases). Not surprisingly, Butler’s record is in line with his conservative reputation as one of the Four Horsemen. In part Vinson’s record may reflect that he rarely overturned congressional legislation in general (less than 3% in the full set of congressional review cases). However, in regard to overruling state legislation Vinson had a more noticeable record of protecting rights, at least anecdotally. He wrote the Court’s unanimous opinions in Shelly v. Kraemer, which struck down restrictive covenants, and McLaurin v. Oklahoma a State Regents and Sweatt v. Painter, which set the stage for the Warren Court’s Brown’s decision. Most of the justices with scores substantially below the mean served on the bench prior to the Warren Court, with the exception of Chief Justices Rehnquist (12%) and Burger (14%) and Associate Justices Powell (18%) and Scalia (21%). Ten justices achieve scores of more than twice the mean. Fortas achieves the highest scores (88%), which is consistent with Segal and Spaeth’s (2002) finding that in Fortas’ first four terms he had supported the liberal position in over 80% of civil liberties cases—one of the factors which they note led the contentious nature of his confirmation hearings for chief justice (190-1). Fortas is followed by the two Clinton nominees, Ginsburg (80%) and Breyer (78%), Douglas (77%), Souter (76%), Goldberg (73%), Black (73%), Brennan (69%), Warren (68%) and Marshall (64%). Of the current Court, only Rehnquist (12%) and Scalia (21%) earn scores well below the Court mean. Scalia’s low score is interesting given his examination of the United States constitutional jurisprudence and the Supreme Court’s historical branching out into constitutional “innovation,” as he refers to it, which led him to argue in 1994 that the “innovation has, by and large, not protected minority rights, except to the extent that the majority has wished to protect minority rights.” He concluded that the Court’s record of protecting constitutional rights against national majority sentiment is not a strong one. His own voting record suggests the same. Certainly, the data here suggest that when faced with a conflict between individual rights and freedoms and majority interest, as is manifest here in congressional statute, the Court will overwhelmingly decline to protect the individual’s right in deference to the governmental interest and any exception to this generality, is largely dependent upon the individual justices that happen to make up the bench at any given time. These results parallel those of Segal and Spaeth and Howard Spaeth, which suggest strong ideological patterns in the periods of judicial review that they examined.
Conclusions

The analysis here of the U.S. Supreme Court's exercise of judicial review suggests that we should not totally surprised that globally the power of judicial review is associated with curbing rather protecting human rights. Our own experience in the United States would predict such an outcome. Obviously, in drawing conclusions from this analysis, we must recognize the limitations of the study. This analysis is limited to the Court's exercise of judicial review in regard to Congress, and does not include the larger body of cases, those which examine the constitutionality of state statutes. A similar analysis with that larger set of decisions should be the next step in testing this important hypothesis; however, the task is rather daunting. If the nullification rate in regard to congressional statutes is a valid predictor of nullifications generally, then we might extrapolate that in as many five thousand cases the Court considers the constitutionality of state statutes. The initial process of identifying these cases would be a rather daunting but important task. As Segal and Spaeth point out the Court is much more likely to strike down state laws than federal laws, so we might find a higher level of support for rights in those cases, given that we have seen the Court increased probability to protect rights when nullifying. Of course, if the general empirical findings that it is the individual justices on the bench that make a difference holds true, then we would expect to find similar results with this set of cases as well.

The global implications of this analysis and the larger question of the role of judicial review and an independent judiciary remain uncertain but do suggest direction for future study. Clearly, over time in the United States, the government has come to largely respect civil rights and civil liberties, perhaps despite the lack of a judicial role. Certainly, Rosenberg's (1991) work suggests that civil rights and liberties were ultimately not a product of judicial action, but rather were achieved only after Congress and the executive acted—which seems to place the protection of individual rights in the hands of elected majorities. Ferejohn, Rosenbluth, and Shipan's (n.d.) assessment of judicial independence appears to lead them to agree with others who argue that "a better solution to the problem of protecting minority rights might be a stronger voice in the assembly." Ferejohn et al. ultimately suggesting that "competitive elections are likely to be more fundamental than the trappings of "independent" courts for the rule of law and minority protection in developing courts" (21). Thus another path for future study of the U.S. context, might be to examine how often and under what circumstances the rights that are curbed or declined by the Court are eventually protected through congressional and executive action. In the global context, we have incredible opportunity for continued examination of the role of judicial independence and the power of constitutional review. It is important to examine empirically the differences in the newer European model of constitutional review and the American model of judicial review in regard to human rights protection. And as the work of Rosenberg and Ferejohn et al. suggests, we must examine empirically the constraints on courts, not only in regard to the U.S. Supreme Court but globally as well, where have the opportunity to study more broadly the effects of legislative and executive systems. We should continue to use both the depth of the U.S. experience and breadth of the global experience to inform our studies of the rule of law and the role of the courts.
References


Cushman


Ferejohn, Rosenbluth, and Shipan’s


### Table One
**Supreme Court Support for Rights and Freedom in Congressional Review Cases**

<table>
<thead>
<tr>
<th></th>
<th>N</th>
<th>Upholds Congress</th>
<th>Nullifies Congress</th>
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<tbody>
<tr>
<td>Curbs Rights and Freedoms</td>
<td>275</td>
<td>253 (70%)</td>
<td>22 (6%)</td>
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<tr>
<td>Support Rights and Freedoms</td>
<td>89</td>
<td>34 (9%)</td>
<td>55 (15%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>364</td>
<td>287</td>
<td>77</td>
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### Table Two
**Supreme Court Support for Rights and Freedom in Cases in Nullifying Congressional Statutes**

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<tr>
<td>Curbs Rights and Freedoms</td>
<td>22 (29%)</td>
</tr>
<tr>
<td>Support Rights and Freedoms</td>
<td>55 (71%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>77</td>
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### Table Three
**Supreme Court Support for Rights and Freedom in Cases in Upholding Congressional Statutes**

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<tr>
<td>Curbs Rights and Freedoms</td>
<td>253 (88%)</td>
</tr>
<tr>
<td>Support Rights and Freedoms</td>
<td>34 (12%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>287</td>
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</table>
### Table Four
Supreme Court Support for Rights and Freedom by Major Issue Area

<table>
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<tr>
<th>Issue Area</th>
<th>N</th>
<th>Percentage of Overall Cases</th>
<th>Supports Rights and Freedoms</th>
<th>Curbs Rights and Freedoms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Procedure</td>
<td>102</td>
<td>28%</td>
<td>22 (22%)</td>
<td>80 (78%)</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>124</td>
<td>34%</td>
<td>32 (26%)</td>
<td>92 (74%)</td>
</tr>
<tr>
<td>First Amendment</td>
<td>90</td>
<td>25%</td>
<td>28 (31%)</td>
<td>62 (69%)</td>
</tr>
<tr>
<td>Due Process</td>
<td>42</td>
<td>12%</td>
<td>5 (12%)</td>
<td>37 (88%)</td>
</tr>
<tr>
<td>Privacy Rights</td>
<td>6</td>
<td>2%</td>
<td>1 (17%)</td>
<td>5 (83%)</td>
</tr>
<tr>
<td>Overall</td>
<td>364</td>
<td></td>
<td>88</td>
<td>276</td>
</tr>
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</table>
Figure Two Judicial Review: Support for Individual Freedoms and Minority Rights 1900-1950
Figure Three Judicial Review: Support for Individual Freedoms and Minority Rights 1951-2001
Figure Four Individual Justices Votes: Percentage of Votes Supporting Freedoms and Minority Rights

Clifford
Swayne
Miller
Field
Strong
Bradley
Waite
Harlan
Gray
Blatchford
Fuller
Brewer
Brown
Shiras
EWhite
Peckham
McKenna
Holmes
Day
Lurton
Hughes
Van
JR Lamar
Pitney
McReynolds
Brandeis
Clarke
Sutherland
Butler
Stone
Roberts
Black
Reed
Frankfurter
Douglas
Murphy
R Jackson
Rutledge
Burton
Vinson
Clark
Minton
Warren
Harlan II
Brennan
Whittaker
Stewart
B White
Goldberg
Fortas
T Marshall
Burger
Blackmun
Powell
Rehnquist
Stevens
O'Connor
Scalia
Kennedy
Thomas
Souter
Ginsburg
Breyer
Segal and Spaeth do examine the ideological patterns of the Supreme Court’s nullification cases and find that liberal justices were more likely to strike laws that infringe on individuals civil liberties and conservatives more likely to strike laws that infringe on business interests (1993, 321-22).

To conduct this search I sorted the dataset and culled out all observations that were coded where AUTHDEC1 and AUTHDEC2 were equal to one. This sort pulls out all cases in which the Court engaged in judicial review at the national level. I then had to read each of these cases to identify the false positives that were selected, as the operationalization of the Spaeth variable does not distinguish the type or level of federal action was reviewed in the case. In this data set and my analysis I have deliberately chosen to use the calendar year rather than the Supreme Court’s term as a point of reference, which follows Caldeira and McCrone. I made this choice because ultimately I am trying to identify trends overtime and to link these trends to events in U.S. history, particularly in regard to partisan politics in the Congress and presidency. Changes in Congress and the presidency coincide almost perfectly with the calendar year for most of the history under study here. But since the Supreme Court’s term begins in October and only represents three months of the calendar year it is rather problematic to say that those three months represent the entire year.

Since Spaeth’s dataset covers the 1946 term rather than the year 1946 his dataset only included three months of 1946, so I have read and coded the entire year of 1946 myself.

The key word searches included such phrases as unconstitutional and Congress, Congress and constitutional or constitution, Congress and power, act and constitution/constitutional or unconstitutional, statute(s) unconstitutional or constitutional/constitution, Congress and competent, violation and congress/act, (in)valid and Congress, (in)valid and act, act and violate, statute and infamous, act and infamous, constitutionality, infringe or abridge and amendment.