

Identifying Cases of Judicial Review¹

Identifying the cases in which the U.S. Supreme Court has restricted the scope of a statute, or invalidated it entirely, on the grounds that the federal law is unconstitutional is surprisingly difficult. When scholars first began to seriously debate the origins and use of the power of judicial review – and the young constitutional scholar Edward Corwin first gave a name to that power – there was no canonical list of cases in which the Court had struck down laws. Answers ranged from zero to dozens. The U.S. Supreme Court did not itself maintain such a list or clearly identify cases as exercises of judicial review when they were decided, though one Court reporter did eventually draft an influential list of such cases. It was not until, at the request of Congress, Edward Corwin at the end of his career assembled a list of cases in which the Court “struck down, in whole or in part” federal statutes that a somewhat canonical list was established. That list from the mid-twentieth century has since been maintained by the Congressional Research Service (hereafter the “CRS list”).²

But that list is incomplete, and is subject to more uncertainty than might be assumed. Cases were added *and deleted* to Corwin’s list in its early versions, as the scope of the task was refined. Most notably, some (but not all) cases in which the Court had struck down a statutory provisions as applied to particular fact situations were removed from the initial list.³ As a consequence, there has been no systematic accounting of such cases in which the Court has refused to apply federal law on constitutional grounds.⁴ Some cases in which the Court had invalidated statutory provisions in their entirety were overlooked (especially in the first decades of the Court’s work, when neither the justices nor the reporter were always clear about what they were doing and the political stakes were often low).⁵ Even more significantly, for present purposes, Corwin did not even attempt to identify cases in which statutory provisions had been upheld against constitutional challenge. And neither did anyone else.

The complications of creating a better list are multiple. The syllabus prepared by the Court reporter is not always an accurate guide (especially in the nineteenth century). Judicial opinions are not always clear about what the Court is doing and what the effects of a decision might be. The conceptualization of the very object under examination – judicial review – is not as well-established as one might expect. To what extent do cases striking down the application of a law count as judicial review? When exactly has the Court upheld a statute against challenge? What separates statutory interpretation from judicial review? What are the implications of various “avoidance” doctrines? The approach taken here seemed most useful for this study, and to mark an improvement over existing inventories of cases of judicial review, but there is little doubt that there is room for reasonable

¹ A version of this document is included as an appendix to Keith E. Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (Lawrence: University Press of Kansas, 2019).

² Legislative Reference Service, *The Constitution of the United States – Analysis and Interpretation* (Washington, D.C.: Government Printing Office, 1952), 1241. This volume was a radically revised version of an earlier document, Legislative Reference Service, *The Constitution of the United States, Annotated* (1923). The earlier document included its own list of “acts of Congress Declared Unconstitutional by the Supreme Court.” That list included 43 cases, but notably left out the *Dred Scott* case, which is widely regarded as a canonical instance of judicial review.

³ The editors claimed to have dropped those cases in which the statutes “were not held unconstitutional in their entirety and therefore inoperative,” but only their “application to specific factual situations . . . was held to be prohibited by the Constitution.” Legislative Reference Service, *The Constitution of the United States – Analysis and Interpretation*, Rev. Ed. (Washington, D.C.: Government Printing Office, 1964), 1401.

⁴ See also, Nicholas S. Zeppos, “Deference to Political Decisionmakers and the Preferred Scope of Judicial Review,” *Northwestern University Law Review* 88 (1993): 296.

⁵ See especially, Mark A. Graber, “Naked Land Transfers and American Constitutional Development,” *Vanderbilt Law Review* 53 (2000): 73.

disagreement on the margins and other lists could be either more or less inclusive, depending on the goal of the analysis.

The goal here is to identify cases in which the U.S. Supreme Court *deliberately defined and enforced* constitutional limits on the legislative authority of Congress. This immediately leaves off many exercises of judicial review. It ignores federal constitutional review of the state governments. It sets aside the many instances in which the Supreme Court reviews the constitutionality of judicial or executive actions that do not rely upon or implicate congressional legislative authority. (For example, much of constitutional criminal procedure – a very large set of cases – is aimed at judicial and executive actors and its application does not define or impinge on legislative authority.⁶) The small number of cases involving congressional actions but not legislative authority (e.g., the congressional power of contempt or impeachment) is also ignored.⁷ Of course, this also does not include exercises of judicial review by lower courts that are not eventually resolved by the U.S. Supreme Court.⁸

To address these problems, the dataset reported here is constructed from the ground up. The full text of every U.S. Supreme Court opinion, with accompanying notes, is available electronically from a variety of services such as Lexis-Nexis. A set of word search terms were identified that would cast an extremely wide net over the relevant set of cases but would at least make an initial cut at excluding irrelevant cases that do not raise constitutional issues about federal statutes. A set of keywords were identified that would call up *at least* every case on the list of invalidated cases maintained by the Congressional Research Service *and also* cases of judicial invalidation of federal statutes that have been

⁶ Thus, when the Department of Justice relies upon the provisions of the Sherman Antitrust Act to bring legal action against the E.C. Knight Company for creating a monopoly over the production of refined sugar, the scope of congressional authority is at stake. When a federal district judge issues constitutionally flawed jury instructions or a customs official searches an office without a proper warrant and collects evidence, the scope of congressional authority is not at issue. Since many of the constitutional restrictions built into the Bill of Rights are primarily aimed at judges and executive branch officials rather than Congress, a great deal of the Court's elaboration and application of civil liberties against the federal government is not included in the dataset. At a relatively early date, for example, Congress passed the Tucker Act of 1887, which expanded the jurisdiction of the Court of Claims to hear all claims against the federal government founded on the Constitution. One effect of the Tucker Act was to largely convert constitutional takings cases under the Fifth Amendment from challenges to congressional authority into challenges to judicial interpretation of the statute.

⁷ See, e.g., *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (limiting the contempt power of legislative inquiries); *National Labor Relations Board v. Canning*, 134 S.Ct. 2550 (2014) (determining that pro forma legislative sessions were sufficient to preclude the use of the presidential power to make recess appointments). These boundaries are permeable across cases and over time. The treaty-making power, as such, is distinct from the legislative power of Congress, but treaties may give rise to related statutes and constitutional questions about congressional authority to pass such statutes. For a significant part of its history, Congress actively legislated for territories and the District of Columbia (and thus invited constitutional disputes over limits on the congressional legislative authority), but once day-to-day governance is delegated to a territorial legislature or city council many such questions are no longer framed in a way that implicates the constitutional limits on Congress itself. See, e.g., *Dunphy v. Kleinsmith and Duer*, 78 U.S. 610 (1870) ("From the provisions of the organic law . . . it is apparent that the Territorial legislature has no power to pass any law in contravention of the Constitution of the United States"); *Mullaney v. Anderson*, 342 U.S. 415 (1952) ("[W]e cannot presume that Congress authorized the Territorial Legislature to treat citizens of States the way States cannot treat citizens of sister States. Only the clearest expression of Congressional intent could induce such a result. It is not present. . . . [The territorial legislature] was granted no greater power over citizens of other States than a State legislature has").

⁸ Instances of lower courts striking down an act of Congress are *almost* always appealed to the U.S. Supreme Court, but even in such appeals the Supreme Court might not directly address the substantive constitutional question in its decision.

identified by subsequent scholars.⁹ A full-text search of all cases decided by the U.S. Supreme Court resulted in a list of roughly 10,000 cases, which were then read to determine whether the legislative power of Congress under the Constitution was reviewed by the Court. Additional cases that have been subsequently cited by the Supreme Court as establishing relevant constitutional principles or that have been cited in the existing literature were also read.

This dataset is concerned with cases in which the justices explicitly considered a constitutional challenge to the scope of federal legislative authority and rendered a substantive judgment as to whether the case at hand fell within or without that authority. Although in principle every case creates the opportunity for the Court to exercise the power of judicial review, the Court relatively rarely takes the opportunity to define and enforce the constitutional limits on the national legislature's power. The dataset *excludes* cases in which the Court simply applies federal law without explicit constitutional deliberation, as well as the more difficult cases in which the Court notes the existence of a constitutional challenge but does not address it, explicitly disclaims answering it, or refuses to articulate a binding constitutional rule because the case is disposed of on jurisdictional or other unrelated grounds.¹⁰ Also *excluded* are cases in which the Court makes trivial references to Congress' constitutional authority to pass the law being applied or dismisses a constitutional challenge without elaboration as fully resolved in an earlier case.¹¹

⁹ The search included various combinations of keywords that reflected federal legislation (e.g., "Congress," "federal w/2 government," "national w/2 government," etc.) and constitutional review (e.g., "constitution!," "unconstitution!," "invalid," "void," "no w/2 power," etc.) until no new additional cases could be located. One benefit of a full text search is that it includes not only the judicial opinions themselves, but also the reporter's headnotes and syllabus and (for earlier periods) a transcription of the lawyers' arguments. A relevant term would frequently appear in one part of the text (such as the opinion itself) but not another (such as the headnotes). Although variations on "Congress" and "constitution!" capture most of the cases, a significant number (including some on the CRS list) escape such a search. The headnotes were a particularly unreliable guide to whether constitutional review had occurred in the nineteenth century.

¹⁰ See e.g., *Embry v. United States*, 100 U.S. 680 (1880) ("We have had no difficulty in reaching the conclusion that the appellant is not entitled to recover. The important constitutional question [of whether Congress can restrict the president's power to remove an executive official] which has at times occupied the attention of the political department of the government ever since its organization, and which was brought to our attention in the argument, is not, as we think, involved."); *Lewellyn v. Frick*, 268 U.S. 238 (1925) ("We do not propose to discuss the limits of the powers of Congress in cases like the present."); *The Martha Washington*, 16 F. Cas. 871 (1860) ("Every question involving the constitutional power of the general government is important, and there can be scarcely any one more so than this. . . . Although this question must be decided, I think it cannot be in the present case, and the courts of the United States are not in the habit of volunteering their opinions when they are not called for."); *United States v. Apel*, 134 S.Ct. 1144 (2014) ("[T]he Court of Appeals never reached Apel's constitutional arguments, and we decline to do so in the first instance.").

¹¹ See e.g., *City of Cleveland v. United States*, 323 U.S. 329 (1945) ("Little need be said concerning the merits. . . . Congress may exempt property owned by the United States or its instrumentality from state taxation in furtherance of the purposes of the federal legislation. This is settled by such an array of authority that citation would seem unnecessary [but providing citations]."); *California v. United States*, 320 U.S. 577 (1944) ("We have disposed of the only serious question raised. The numerous other questions call for only summary treatment. . . . [I]t is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies. *United States v. California*, 297 U.S. 175, 184-5."); *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937) ("The questions relating to the construction and validity of the act have been fully discussed in our opinion in *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). We hold that the principles there stated are applicable here.").

Cases are *included* even when the Court's opinion airily dismisses a constitutional challenge as easily resolved with minimal analysis if it is evident that the constitutional issue was in fact raised and contested by the parties in the case and/or that the Court later relied on that case for the constitutional proposition at issue. Cases are *excluded* that involve a single-sentence reference to a precedent settling the constitutional claim, but cases are *included* when the justices felt obliged to explain, expound upon, or further develop existing precedents, even when they assert that the issue is not new.¹²

Cases are *included* as limiting congressional authority under the Constitution (as "invalidating or narrowing" a statute) whenever a constitutional proposition limiting the power of the national legislature is cited to disallow the application of a statute to the case at hand, even when that involves the creative "interpretation" of the statute's meaning rather than an explicit nullification of the statute. "Saving constructions" that have the effect of placing hard constraints on congressional power and severing the application in question from the scope of the legislation in order to salvage the broader statute's constitutionality are recognized as exercises of the Court's power of judicial review to limit Congress.¹³ Notably, such saving constructions do not, in fact, avoid the constitutional question or avoid imposing limits on legislative authority. In contrast to Justice Brandeis's suggestion in *Ashwander v. Tennessee Valley Authority*, the Court in these cases "typically interpreted the Constitution in ways that settled potential statutory questions," rather than "interpreted statutes in ways that enabled Justices to avoid potential constitutional questions."¹⁴ Moreover, these cases do not necessarily "save" the statute from wholesale nullification because both litigants and Justices are, in the first instance, concerned with the application of the statute that is before the Court in a given case. There is no necessary challenge to the statutory provision as a whole or as it might be applied in other situations, and the Court does not necessarily vouchsafe the validity of the law as it might be applied in all future cases. It does not interpret the law so as to "uphold" it against a constitutional challenge in such cases. It rules out the effort to apply the law in the case before the Court as being beyond the constitutional authority of Congress, even as it indicates the possibility that the same statutory provision might have other applications that are constitutionally valid. The scope of the statute is narrowed on constitutional grounds in such cases, and congressional authority is circumscribed by judicial interpretation of the Constitution. Cases are *excluded*, however, when the Court explicitly leaves the constitutional question open or leaves Congress with the power to overturn the Court's constitutionally driven interpretive assumptions, as with constitutionally motivated "clear statement" rules.¹⁵

¹² The restriction on cases that simply cite existing precedent excluded a small number of substantively unimportant cases. Especially given that the Court did not have discretionary jurisdiction for much of its history, the goal was to exclude legally trivial cases that simply reaffirmed what is reflected elsewhere in the dataset without establishing new constitutional rules.

¹³ On saving constructions, see generally Emily Sherwin, "Rules and Judicial Review," *Legal Theory* 8 (2000): 299; Adrian Vermeule, "Saving Constructions," *Georgetown Law Journal* 85 (1997): 1945. On as-applied versus facial invalidations, see Richard H. Fallon, "As-Applied and Facial Challenges and Third-Party Standing," *Harvard Law Review* 113 (2000): 1321. Cf., Matthew D. Adler, "Rights Against Rules: The Moral Structure of American Constitutional Law," *Michigan Law Review* 97 (1998): 1.

¹⁴ Mark A. Graber, "The New Fiction: *Dred Scott* and the Language of Judicial Authority," *Chicago-Kent Law Review* 82 (2007): 187. Cf., *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

¹⁵ See, e.g., *Bond v. United States*, 134 S.Ct. 2077 (2014) ("Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach."); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) ("We . . . affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."); *United States v. Bass*, 404 U.S. 336 (1971) ("We will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. . . . [and therefore employ] a requirement

This process yielded a total of 1308 cases that are included in the dataset, approximately 13% of the cases returned from the initial electronic search (as of the conclusion of the October 2017 term of the Court). Of those, 345 involve invalidations or limitations of statutory provisions, and 963 upheld federal legislation against constitutional challenge.

The full list of cases is archived as the “Judicial Review of Congress” dataset at www.princeton.edu/~kewhitt. The archived materials include both a text list of cases evaluating the constitutionality of federal statutes comparable to the CRS list and a dataset of cases and associated political and legal variables.

of clear statement.”); *United States v. Rumely*, 345 U.S. 41, 46 (1953) (“Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits.”)