

Windsor v. Dred Scott:
When Judicial Review and Rights Conflict

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ABSTRACT

Windsor represents an archetypal Rights-Enhancing defense of judicial review—the Court invalidated majoritarian legislation, to protect a minority group’s rights. However, Rights-Enhancing justifications of judicial review give scant reason to support the countermajoritarian practice when it harms rights. Take the case of *Dred Scott v. Sanford*, where the Court simultaneously denied the constitutional rights of blacks, while also denying elected representatives the authority to limit slavery. *Scott* highlights both a countermajoritarian dilemma and a Rights-Rescinding dilemma. *Scott* is no anomaly. In numerous cases, Congress acted to protect rights, but the Court barred its actions. If judicial review, has produced more *Dred Scotts* than *Windsors*, then Rights-Enhancing justifications of judicial review, are inadequate. In this paper, I shed new light on the countermajoritarian dilemma by examining every instance where the Court has struck down an act of Congress. I code the Court’s opinions in these 186 cases along a spectrum ranging from “Rights-Enhancing” to “Rights-Rescinding.” This review indicates that the Court has often operated under a Rights-Enhancing mode in well less than half of these cases while the Court has often operated under a Rights-Rescinding model which is often ignored by Court scholars.

I. INTRODUCTION

In *United States v. Windsor* (2013),¹ the Supreme Court declared the Defense of Marriage Act (DOMA) an unconstitutional violation of same-sex couples’ Fifth Amendment rights. This ruling left DOMA unenforceable and extended federal marriage rights granted to opposite-sex couples to same-sex couples. Just 19 years earlier, when 65% of the public opposed legal recognition of same-sex marriages,² Congress rode the wave of public disapproval and overwhelmingly adopted DOMA.³ Viewed from this perspective, *Windsor* represents an archetypal defense of judicial review—the Court invalidated majoritarian legislation, to protect a minority group’s rights. This archetypal defense of judicial review I label the Rights-Enhancing model of the Court.

¹ *United States v. Windsor*, 570 U.S. ____ (2013).

² As asked by Gallup starting in 1996 and into present: “Do you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriages?” <http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx>

³ The vote in the House was 342-67 and in the Senate, it was 85-14.

As described in the opening chapter, judicial review labels the power of the federal courts to examine and invalidate governmental actions. It's a massive power, and it's denied to the courts of many liberal-democracies. United States judges who exercise judicial review are unelected, they serve life-terms, and as individuals, they face few accountability measures. The "countermajoritarian dilemma" recognizes that judicial review's inherent democratic tension between granting unelected judges the ability to nullify laws (adopted by the people's elected representatives) and the democratic ideal of self-government.⁴ However, theorists such as Ronald Dworkin argue that judicial review can be democratically justified when it operates as it did in *Windsor as Rights-Enhancing*.⁵

But most defenses of judicial review give scant reason to support the practice if it harms rights. Take, for example, the 1857 decision in *Dred Scott v. Sandford* where the Court announced that blacks are "an inferior order" with "no rights which the white man was bound to respect." *Dred Scott* represents the second time the Court explicitly struck down an act of Congress.⁶ In this instance, the Court ruled that Congress did not have the authority to limit the expansion of slavery. The *Dred Scott* ruling simultaneously denied the constitutional rights of people legally defined as black, while also denying the people's elected representatives the authority to limit slavery. *Dred Scott* highlights a *Double-Dilemma* in that it poses a countermajoritarian dilemma

⁴ Unlike other veto points in the U.S. political system, judicial review is often thought to be fatal to future legislation. Under the concept of judicial supremacy, judicial decisions are thought to remain fixed until they are overturned by a future Court action or by a constitutional amendment.

⁵ Ronald Dworkin labels his view of democracy as the "constitutional conception of democracy," which argues that the defining aim of democracy to be that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect. *Freedom's Law: The Moral Reading of the American Constitution*, (Cambridge: Harvard University Press, 1996.): 7-8. Ronald Dworkin also specifically argued against majorities being able to deny same-sex couples of the privileges conferred upon marriage as it would infringe on individual dignity see "Three Questions for America," in the September 21, 2006 issue of *The New York Review of Books*.

<http://www.nybooks.com/articles/2006/09/21/three-questions-for-america/>

⁶ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

and a rights-rescinding dilemma for which classic defenses of judicial review offer little justification.

This Rights-Rescinding model of the Court is largely ignored, but even a cursory appraisal of judicial review shows that a Rights-Rescinding case like *Dred Scott* is not a one-off anomaly. For example, the United States Supreme Court has nullified congressional acts which have:

- prevented child labor;
- restricted slavery;
- promoted racial equality;
- protected voting rights;
- safeguarded religious liberty; and
- attacked gender-based violence;

In the examples noted above, Congress worked to protect rights only to have the Court bar its actions. Without question, some of these decisions can be debated for their constitutional accuracy. However, nullifications of laws which extend rights—which is exemplary of the Rights-Rescinding model—clearly challenge the traditional justification for judicial review.

If one of the strongest defenses of judicial review—against its countermajoritarian tendencies—rests on its rights enhancing abilities, we need to know how well it does so. If judicial review, as it has been practiced in the United States, tends to produce more *Dred Scotts* than *Windsors*—and if the Rights-Rescinding model often occurs—then judicial review as employed throughout U.S. history needs to be reevaluated and the Framers vision (that there should be significant checks on the Court) becomes more obvious.

II. JUDICIAL REVIEW, COUNTERMAJORITIANISM, & DEMOCRATIC RIGHTS

Alexander Bickel identified a “countermajoritarian dilemma” inherent in granting unelected,

lifetime appointed judges the authority to nullify majoritarian enacted laws.⁷ Scholars pre- and post- Bickel have continued to explore the tension between the power of the people to self-govern and the power of the Court to pronounce the law. The contemplation of this tension remains one of the defining debates in normative constitutional law.

Jeremy Waldron voices the most insightful critique of American-style judicial review from the standpoint of defending democratic procedures. Waldron argues that once an agreement has been negotiated through institutional arrangements—which incorporate the diverse viewpoints of the population—there is no democratically justifiable reason to give a smaller, less representative body a veto.⁸ Waldron develops his theory by putting aside judicial review’s “historical manifestations and...the decisions (good and bad) that it has yielded.”⁹ Such a method has important benefits.¹⁰ However, there remains a need to analyze how judicial review is applied to national legislation to see if it truly functions in a countermajoritarian way as Bickel and Waldron lament.

For Ronald Dworkin, it matters little if judicial review does or does not violate the desires of majorities. According to Dworkin, non-majoritarian procedures, such as judicial review, should be used when they better ensure the equal status of citizens—which Dworkin sees as the essence of democracy. Dworkin’s support of judicial review has been categorized as the “bulwark defense”¹¹ as it represents a defense of judicial review for its ability to protect rights and serve as a bulwark against majority tyranny. But his argument lacks expansive empirical

⁷ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, (New Haven: Yale University Press, 1986.)

⁸ Jeremy Waldron, “The Core of the Case Against Judicial Review,” *The Yale Law Journal* 115 (2006): xxxx

⁹ Jeremy Waldron, *Political Political Theory: Essays on Institutions*, (Cambridge: Harvard University Press, 2016), 197.

¹⁰ Waldron argues that such a methodology allows him to go to the philosophical “core of the case against judicial review.”

¹¹ David Watkins and Scott Lemieux, “Compared to What? Judicial Review and Other Veto Points in Contemporary Democratic Theory,” *Perspectives on Politics* 13 (2015).

analysis of how the practice has functioned. If evidence indicates that judicial review is more commonly used to negate rights-based protections, than it is employed to safeguard them, then Dworkin's bulwark defense disintegrates.¹²

Robert Dahl supplied empirical evidence that the Court rarely rules against congressional majorities, and thus Bickel and Waldron's lamentations of a countermajoritarian dilemma might be misplaced. However, Dahl's research presents an even greater challenge to Dworkin; Dahl found that when the Supreme Court struck down an act of Congress, *the Court was much more likely to strike down rights-based protections than laws that infringed on rights.*¹³ Other scholars conducting empirical analysis on the Court have added further support to Dahl's findings. Gerald Rosenberg's groundbreaking *The Hollow Hope* argued that the Court offers little threat of being countermajoritarian, but it also offers few protections to vulnerable minorities.¹⁴ Louis Fisher, writing sixty years after Dahl, concluded there is little "evidence that courts are particularly gifted or reliable in coming to the defense of individual rights."¹⁵

Much has changed since Dahl wrote; the length of judicial terms has nearly doubled,¹⁶ and the rate at which the Court has struck down acts of Congress has increased more than three-

¹² Dworkin correctly notes that there can be a disconnect between democracy and majority will, but it is a separate question as to whether judicial review or majority will does a better job of protecting rights. *Freedom's Law*, 6-7. It is also possible that judicial review embodies and reflects the popular will such as in the case of *Windsor* where most wanted the Court to strike down DOMA. However, my question is different than Lemioux and Watkins (I am not asking if judicial review is countermajoritarian but does it protect rights).

¹³ Robert A. Dahl. *A Preface to Democratic Theory Expanded Edition*, (Chicago: University of Chicago Press, 2006), 59; and Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 285.

¹⁴ Gerald Rosenberg in *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 2008) offers another argument consistent with the separation of powers model. He argued that American courts are ineffective and relatively weak unless they are working in concert with other political actors.

¹⁵ Louis Fisher, *Congress: Protecting Individual Rights* (Lawrence: University of Kansas Press, 2016) conducted a number of case studies of rights issues; xii

¹⁶ Dahl calculated the average time that justices stayed on the Court from 1789 to 1957 as 16.6 years. The average length of terms for all justices that have served on the Court is now more than 26 years based on compiling the data from http://www.supremecourt.gov/about/members_text.aspx

fold.¹⁷ These changes pose a question of whether an updating of Dahl's empirical analysis would still present a challenge to Bickel and Dworkin's theories. Despite the importance of knowing how well judicial review functions in a Rights-Enhancing fashion, my research will be one of the few systematic analyses of all congressional acts nullified by the Court since Dahl wrote in 1957.¹⁸

III. JUDICIAL REVIEW: RIGHTS-ENHANCING, RIGHTS-RESCINDING & EVERYTHING IN BETWEEN

Here, I shed new light on the countermajoritarian dilemma, and on the democratic justifications of judicial review, by examining every instance where the Court has struck down an act of Congress from 1803-2016.¹⁹ My dataset focuses on what was involved in the *Marbury* decision, namely cases where the Supreme Court negated an act of Congress. My analysis excludes judicial review by the district and circuit courts, Supreme Court review of state legislation²⁰ and review of executive branch actions. Further, my review focuses on instances when judicial review was employed to strike down national legislation (as opposed to instances where the Court chose to uphold national legislation). Given that I am examining judicial review's impact on rights, it is more important to find instances where the Court struck down acts of Congress

¹⁷ Dahl only has 78 number of cases in his analysis, while 108 have happened since. Further, when Dahl wrote, the Court had struck down only 78 acts of Congress which equates to about .5 per year from 1803 to 1957. Since 1957 the Court has struck down acts of Congress at more than three times that rate (at 1.61 per year). Data from Governmental Printing Office, U.S. Senate, *The Constitution: Analysis and Interpretation 2014 Supplement, The Constitution: Acts of Congress Held Unconstitutional through 20014*.

<https://www.congress.gov/content/conan/pdf/GPO-CONAN-REV-2014-11.pdf>

¹⁸ In Louis Fisher, *Congress: Protecting Individual Rights*, (Lawrence: University of Kansas Press. 2016), Fisher explores cases studies on where Congress did a better job of protecting individual rights than the Court, but he does not do a systematic analysis of all examples of judicial review being used to strike down an act of Congress.

¹⁹ Data from Governmental Printing Office, *The Constitution: Analysis and Interpretation 2016 Supplement, The Constitution: Acts of Congress Held Unconstitutional through 20016*. <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-REV-2016/pdf/GPO-CONAN-REV-2016-11.pdf>

²⁰ Review of state legislation by the Court has a much clearer basis in the Constitution given the Supremacy Clause.

than it is to find instances where the Court deferred to Congress; when the Court defers to Congress, Congress could be said to have impacted rights on its own. Ultimately, instances of judicial review striking down actions is the most obvious way to measure judicial review's impact.

Based on these criteria, the database maintained by Governmental Printing Office identifies 186 instances from 1803-2016 where the Court has struck down an act of Congress. I examine each of these cases to establish if it was a rights-enhancing decision consistent with *Windsor* or if it was rights-rescinding like *Dred Scott*; I also code for a number of categories that fall between *Windsor* and *Scott*. Each of these categories is explained before presenting an initial tabulation of the results.

A. Rights-Enhancing: When Judicial Review Expands Rights

Since Dworkin is the archetype defender of judicial review's ability to protect individual rights, I evaluate how well judicial review protects rights as defined by Dworkin. Per Dworkin, democratic citizenship-rights are founded on two principles: (1) all subjects require equal moral and political status and need to be treated with equal concern and (2) the individual freedoms necessary for those ends,²¹ must be ensured.²² Using this criterion, only some instance of judicial review are properly counted as Rights-Enhancing.

(1) Upholding Principle 1: Equal Moral & Political Status with Equal Concern

²¹ Dworkin, *Freedom's Law* cites speech, religion, press, assembly, and the other procedural rights in the Constitution as the freedoms needed to ensure equal moral and political status and need to be treated with equal concern.

²² Ronald Dworkin, *Freedom's Law*, 7-8 labels his view of democracy as the "constitutional conception of democracy," which argues that the defining aim of democracy to be that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.

The Defense of Marriage Act (DOMA), which denied marriage rights to same-sex couples, clearly violates Dworkin's first principle of treating all subjects with equal moral and political status. Thus, *Windsor*, which nullified DOMA, is, therefore, best classified as Rights-Enhancing.²³ In addition to *Windsor*, there are some other cases of judicial review being used to strike down laws that violated the right of minorities and unpopular groups. For example, *Bolling v. Sharpe* (1954)²⁴ which struck down a congressional statute segregating D.C. public schools also shows a clear protection of Dworkin's principles. *Wong Wing v. United States* (1896), where the Court struck down a provision of the Chinese Exclusion Act that allowed non-citizens to be imprisoned at hard labor for up to a year without a trial also provides a clear instance of the Court using judicial review to enhance rights.

Like *Windsor*, *Bolling*, and *Wong Wing* there are other instances of the Court striking down acts to protect unpopular groups like Communists²⁵ or to protect categories of people defined by race and gender.²⁶ That makes up a portion of the Rights-Enhancing category.

²³ Ronald Dworkin also specifically argued against majorities being able to deny same-sex couples of the privileges conferred upon marriage as it would infringe on individual dignity see "Three Questions for America," in the September 21, 2006 issue of *The New York Review of Books*.

<http://www.nybooks.com/articles/2006/09/21/three-questions-for-america/>

He advocated for several other "right to privacy" arguments within the 14th Amendment in *Freedom's Law*, so this argument seems consistent.

²⁴ This was a parallel case to *Brown v. Board* (1954).

²⁵ The decision in *Aptheker v. Secretary of State* (1964) protected the travel rights of communists by overturning a provision in the Subversive Activities Control Act of 1950 which made it a crime for a member of a Communist organization to apply for a passport. Likewise, the decision in *Lamont v. Postmaster General* (1965), where the Court struck down a portion of a law which allowed the Post Office to detain material determined to be "communist political propaganda," also protected the rights of an unpopular group which in the absence the practice of judicial review would have continued to be harmed.

²⁶ *Frontiero v. Richardson* (1973) protected spouses of female service members to certain dependent benefits. According to the GPO summary of the case, the Court held two "statutes providing that spouses of female members of the Armed Forces must be dependent...to qualify for certain dependent's benefits, whereas spouses of male members...qualified for allowances, whatever their actual status... invalid sex classification under the equal protection principles of the Fifth Amendment's Due Process Clause." Also, *Califano v. Westcott* (1979) struck down a "provision of Social Security Act [which] extend[ed] benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father but not giving benefits when the mother becomes unemployed." Citing the GPO again, this act was "held to impermissibly classify on the basis of sex and violate the Fifth Amendment's Due Process Clause."

(2) Upholding Principle 2: Respecting the Freedoms Necessary for Equal Status

Over the Court's more than 200-year history it has also struck down acts of Congress to respect the freedoms necessary for individuals to access equal moral and political status and be treated with equal concern. For example, in *Chief of Capitol Police v. Jeanette Rankin Brigade* (1972) the Court protected the rights to protest by striking down a statute which prohibited "parades or assemblages on United States Capitol grounds." The Court also expanded the meaning of the First Amendment to include protection of symbolic expression in *United States v. Eichman* (1990) when the Court ruled a federal statute barring the burning of the American flag as violating the First Amendment.

There are also a number of cases providing criminal justice protections or procedural rights protections which also exemplify Dworkin's Rights-Enhancing vision of judicial review. Many of these cases deal with self-incrimination, presumed guilt based on certain activities, or the limits of penalties that can be imposed.²⁷

(3) Protecting Rights that are More Questionable

Some of these cases I place in the Rights-Enhancing category could be seen as being "generous" towards supporting the Court's record for enhancing rights. In other words, when there was some doubt, I tended to categorize the case as Rights-Enhancing. I did this to ensure that I was not unfairly discounting Dworkin's position that judicial review as practiced in the U.S. is an important process for protecting rights. Thus, many cases I have classified as Rights-

²⁷ For example, the Court struck down provisions of the Subversive Activities Control Act of 1950 because it required Communists to register with the Subversive Activities Control Board which violated the 5th Amendment right against self-incrimination because the mere association with the Communist Party presents sufficient threat of prosecution" under various federal laws. *Albertson v. Subversive Activities Control* (1965). In *Trop v. Dulles* (1958) the Court ruled that denationalization, because it was a penalty that was "a form of punishment more primitive than torture" as it inflicts the "total destruction of the individual's status in organized society" and therefore could not be a penalty for a crime.

Enhancing arguably only protected rights for few people or protected rights that might be non-essential such as the protection of obscenity.²⁸ It is true that denying the state the power to both define and restrict obscenity might be necessary to ensure other rights, but the argument for this position is less clear than the need to strike down laws that racially segregated schools.

Even included in this list of Rights-Enhancing cases is *United States v. Stevens*, 559 U.S. (2010) which struck down a law that prohibited “crush videos”²⁹ which criminalized the “commercial creation, sale, or possession of depictions of animal cruelty.” Even though the law had an exemption for depictions with “serious religious, political, scientific, educational, journalistic, historical, or artistic value” the Court still determined the law impacted speech protected by the First Amendment.³⁰ Also, the Court’s determination that lying about earning a military medal was protected by the First Amendment is also included in this list.³¹ Of course, both of these laws saw Congress successfully pass modifications so it is tough to say that these cases significantly protected rights, when the cases simply limited the way Congress could act, and now substantially similar laws are back on the book. The fact that Congress modifies decisions is something we will see often. But in this instance, I defaulted to placing these as protecting rights.

Another group of cases placed in the Rights-Enhancing category protect spending in elections. Some argue this is an important right that fits well within Dworkin’s principle of

²⁸ *United States v. Playboy Entertainment Group, Inc.* (2000); *Reno v. ACLU* (1997); *Sable Communications v. FCC* (1989). *Blount v. Rizzi* (1971) considered the post master’s ability to limit obscene materials placed in the mail without court review. Thus, the case touched on obscenity, but also the need for court review.

²⁹ As described by Fisher in “Crush Videos: A Constructive Dialogue, *National Law Journal*, 2011 “these video feature the intentional torture and killing of helpless animals.. [for people who] find the depictions sexually arousing.”

³⁰ One day after the Supreme Court struck down the law, its original sponsor, Rep. Elton Gallegly (R-CA) introduced a new bill with much more specific language indicating it was intended only to apply to “crush videos.” President Barack Obama signed the bill into law on December 9, 2010. Thus, the impact of the decision of the Court was modified.

³¹ *United States v. Alvarez* (2012).

protecting the individual freedoms necessary for ensuring equal political and moral status. But others argue this granting a right to use company funds in elections, when individuals within the company and the owners/directors already had full access to these rights as individuals, is less about protecting rights needed for equal status than it is about granting greater rights to some.³² Further, since the Court had a series of cases upholding laws restricting campaign donations for decades, it is hard to give the Court immense credit here as protecting rights now unless we also determine that the Court denied these rights for decades before. Despite these caveats, I placed some of the cases striking down campaign finance laws here as long as they had a substantial effect.

Even when the Rights-Enhancing category includes the protection of some rights, we might disagree with, and when it even includes some rights that we might not define as particularly important, the history of judicial review indicates a limited number of Rights-Enhancing decisions.

B. Rights-Rescinding

The Rights-Enhancing decisions of the Court must be juxtaposed to its Rights-Rescinding decisions. This fact is almost always missed in debates about judicial review, even though cases such as *Dred Scott* clearly represent an example where judicial review rescinded rights. In 1820 Congress adopted the Missouri Compromise which limited the number of newly admitted slave states; *Dred Scott* struck down this limitation allowing slavery to expand further, and the decision also stripped all citizenship rights from those legally identified as black. Thus, *Scott*

³² In a similar fashion we could argue that granting some people double-votes increases rights as now a category of people have additional voting powers, but at the same time, the relative weight of those not granted additional votes would be diluted and letting people spend additional money (or have additional votes) could be seen as limiting the equal political status of others.

stands for much more than the Court simply failing to extend rights, or where the Court is simply reinforcing a congressional action that stripped rights. *Scott* stands as an example where Congress took action to protect rights, but the Court rescinded those protections. The example of *Scott* and other cases in the Right-Rescinding category most directly challenge Hamilton’s claim that the Court “will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.”³³ The Court, as shown by cases in this category clearly can, and has “injured” rights.

There is, of course, a challenge that can be made to my Rights-Rescinding categorization; perhaps what I code as Rights-Rescinding is actually an example where the Court faced a choice between competing rights. We could see the decision in *Scott* as such an example. The Court argued that its decision denying political rights to blacks, and preventing limitations on slavery, was necessary to protect the Fifth Amendment property rights of slaveholders. Thus, some might argue that while *Scott* denied equal status rights of all blacks, it did protect the property rights of others. I reject this argument. Since I am employing Dworkin’s notion of rights, and following in the footsteps of scholars such as Dahl, I have no trouble identifying *Scott* and other cases like it as an instance of Rights-Rescinding. There are other cases that I do code as Rights-Conflicting, but the cases presented here, based on Dworkin’s categorization, are best viewed as Rights-Rescinding.

Another Rights-Rescinding example includes the *Civil Rights Cases* (1883) where the Court struck down the Civil Rights Act of 1875, which banned race discrimination for services offered to the public. The *Civil Rights Cases* severely restricted the federal government’s

³³ *Federalist* 78

authority to guarantee equal moral and political status for blacks. The decision opened the path to Jim Crow segregation which took Congress until 1964 to federally outlaw.³⁴

Other examples in this category include Court decisions restricting access to the vote,³⁵ negating congressional attempts to expand religious freedoms,³⁶ restraining congressional authority to protect worker safety and employment rights,³⁷ refuting congressional efforts to protect individual safety,³⁸ striking down laws preventing age discrimination,³⁹ dissolving laws protecting disability rights,⁴⁰ and limiting voters “right to hear” additional arguments in campaigns.⁴¹ In all, more than 10% of all cases striking down an act of Congress rescinded rights.

C. Rights Conflicting/Rights Debatable

Unlike *Dred Scott*,⁴² some cases indicate a true conflict between competing rights. Further, many of the cases listed here could plausibly be placed in different categories. The fact that a good number of cases fit into the category of conflicting/debatable should not be seen as a limitation of this methodology. In fact, the identification of this category provides strong evidence for Jeremy Waldron’s argument that there is a lack of agreement on what counts as rights, despite

³⁴ The precedent of the 1883 decision required Congress to devise strained logic to adopt the 1964 Civil Rights Act to simply protect rights it had protected nearly a century before.

³⁵ *United States v. Reese* (1876); *James v. Bowman* (1903); *Oregon v. Mitchell* (1970); and *Shelby County v. Holder* (2013).

³⁶ *City of Boerne v. Flores* (1997).

³⁷ *Adair v. United States* (1908); *Employers’ Liability Cases* (1908); *Hammer v. Dangenhart* (1918); *Knickerbocker Ice Co. v. Stewart* (1920); *Bailey v. Drexel Furniture Co.* (1922); *Adkins v. Children’s Hospital* (1923); *Washington v. Dawson & Co.* (1924); *Carter v. Carter Coal Co.* (1936); *National League of Cities v. Usery* (1976); *Alden v. Maine* (1999); *Coleman v. Court of Appeals of Maryland* (2012).

³⁸ *United States v. Harris* (1883); *Hodges v. United States* (1906), *United States v. Morrison* (2000).

³⁹ *Kimel v. Florida* (2000).

⁴⁰ *Board of Trustees of Alabama v. Garrett* (2001).

⁴¹ *Davis v. FEC* (2008).

⁴² In *Scott*, the Court made a weak argument that denying political rights to blacks was grounded in upholding slaveholders Fifth Amendment property rights.

people’s confident assertion that “rights” should be protected. Thus, the fact that a review of all cases striking down acts of Congress struggles to classify all of them is an important finding in itself.

The idea of conflicting rights even from a Dworkinian perspective can be seen in *United States v. Booker* (2005). Here the Court struck down two provisions of the Sentencing Reform Act, which Congress adopted to reduce bias and add uniformity in criminal sentencing. In *Booker*, the Court overturned an increased sentence made by a judge supported by the mandatory Sentencing Reform Act guidelines made in the absence of jury findings. To protect the 6th Amendment right to a jury trial, and prevent judges from doling out increased sentences in the absence of jury findings, the Court made the guidelines advisory rather than mandatory. While this protected the procedural right to a jury trial, it also undermined Congress’s goal of fair and equal sentencing, which could have reduced biased sentencing, which is often based on race discrimination. Thus, this decision could have hampered an effort to treat all subjects with equal moral and political status, while also ensuring access to a jury.⁴³

Overall, I am less interested in getting all of the “borderline” cases categorized perfectly than I am in getting the categories defined and showing that the Rights-Enhancing justification of Court power which is the one most commonly cited by Congress⁴⁴ and the Court⁴⁵ seems to

⁴³ Of course, the Court could have made the guidelines mandatory while requiring jury verdicts, but instead the Court undermined Congress’s goal of furthering fair and equal sentencing that reduced bias. In the specific case of *Booker*, his sentence was increased from 21 years to 30 based on using the guidelines; the case was appealed to the Supreme Court, the Court sent his case back to the lower court which gave him the 21-year sentence, but then Congress reduced the length of terms for crack cocaine after his conviction, so his sentence was reduced to 10 years based on Congress’s action.

⁴⁴ A simple review of the Senate Confirmation Hearings of for Supreme Court Justice Neil Gorsuch indicates that Congress at least communicates to the public that it believes that Congress has the final and authoritative say over the Constitution and that is necessary to protect rights.

⁴⁵ Several Court cases could be cited to indicate this, but this is especially shown in *Cooper v. Aaron* (1958) and *Dickerson v. United States* (2000). Further, the introduction to Justice Stephen Breyer’s book *Making Our Democracy Work: A Judge’s View* (New York: Vintage Press, 2011) provides a tale of two cases that indicate rights

neglect a majority of the times the Court strikes down an act of Congress. Someone else might (and some surely will) place some of the tough cases in different categories, but I challenge anyone to fail to not to see that the Court has often acted in a Rights-Enhancing manner.

D. Rights on the Periphery

While *Windsor* and *Scott* represent archetypal cases of rights-protecting and rights-rescinding, other cases are less clear. Some cases are indirectly related to civil liberties and some only deal with them in a peripheral way.⁴⁶ Court decisions coded as peripheral include laws struck down on narrow grounds, decisions that only apply to a small number of individuals, or decisions that have a greater effect on defining governmental powers than rights.

(1) Peripheral Cases

We can see an example of a peripheral case in *Rasmussen v. United States* (1905), where the Court ruled that a section of the Alaska Code providing for six-person jury trials for misdemeanors violated the Sixth Amendment. Given that the decision guaranteed a right to a 12-person jury—which would make convictions less likely—the decision could be viewed as expanding rights. However, the holding applied to only one part of the country where few individuals lived. Further, the case was later overruled in *Williams v. Florida* (1970).⁴⁷ Thus, if

are best (and perhaps only) protected when the decisions of the Court are followed by the elected branches of the government.

⁴⁶ The Concept of peripheral civil liberties comes from John P. Frank “Review and Basic Liberties,” 109-139 in *Supreme Court and Supreme Law ed. Edmond Cahn* (Bloomington: Indiana University Press, 1954).

⁴⁷ In *Williams v. Florida* (1970) the Court held that “the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment.” According to the Court the purpose of the jury was “to prevent oppression by the Government,” and this purpose remained independent of the number on the jury. The Court concluded that “the fact that the jury...was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance.”

the case expanded rights in 1905, then the overruling decision in 1970 must have restricted rights.⁴⁸

Other cases in this category similarly apply to criminal justice protections for 4th, 5th, and 6th Amendments, but the cases were so specific to the individual cases that it is hard to argue rights were greatly expanded. Surely, cases that fit the peripheral category are debatable. And if one wanted to place many of them in a category of protecting rights one could. However, I argue the impact of these decisions is so narrow and the fact that some are later reversed it seems best to place these in their own category.⁴⁹ Another way to think about peripheral rights is to ask how many lives would be affected if the decision was not made. If the answer is very few, then I code as peripheral.

(2) *Governmental Powers: Marbury Points the Way*

Marbury v. Madison (1803) is infamous as the first instance where the Court struck down an act of Congress, but we rarely pair the *Marbury* decision to defenses of judicial review. A brief overview of *Marbury* shows that the case had nothing to do with protecting individual's equal status; instead, the case was about delimiting governmental powers. In *Marbury*, the Court ruled that a provision of the Judiciary Act of 1789 was unconstitutional because it expanded the original jurisdiction of the Court beyond what was specifically identified in Article III of the Constitution.⁵⁰ Thus, Marbury was denied access to his right to his commission to be a Justice of

⁴⁸ Further, the ruling in 1970 seemed to have a greater impact too; the 1905 ruling applied only to areas controlled by Congress and, in particular, it struck down the Alaska Code. But there remain today very few federal criminal statutes and that was even more true in 1905. Further, the 1970 ruling once the Bill of Rights had been incorporated meant that the decision applied to all states and federal territories.

⁴⁹ This is also what was done by some previous scholars.

⁵⁰ As Chief Justice Marshall argued: the Court was bound to interpret laws, and the Constitution was the law, therefore the Court would interpret the Constitution and ignore the Judiciary Act—which was an inferior law to the law of the Constitution.

the Peace because he was denied access to the Court that a congressional statute had provided claimants in his position.

While *Marbury* is a clear example of judicial review, it is *clearly not* an instance where the Court protected or rescinded rights. Instead, *Marbury* stands as an example of the Court ruling on the delimitations of governmental power. *Marbury* also stands for what constitutes many examples of judicial review; often the Court is not determining rights, but determining the divisions of governmental powers. This is of course an important task, but it is not the vision that most people carry when they think about judicial review and when they speak in reverent tones about cases like *Brown v. Board of Ed.* or *Windsor*.

The fact that often the Court strikes down acts of Congress to define the limits of its own powers or the powers of the first two branches of the federal government poses a strong challenge to granting the Court's the final and determinative interpretation of the Constitution. Why should the Court have final, determinative say over its own powers and the powers of the other branches any more than the other branches should determine this?

Like the categories above, what counts as regulating governmental powers is debatable.⁵¹ For example, when *Dred Scott* struck down Congress's attempt to limit the expansion of slavery the decision determined the division of governmental power, but it also rescinded rights from all the additional people who could now be enslaved. As *Dred Scott* indicates, when the Court rules on governmental power it can and does have implications for rights. But as *Marbury* shows, this

⁵¹ As former Supreme Court Justice Scalia argued during a Senate Hearing on October 5, 2011 which was titled "Considering the Role of Judges Under the Constitution of the United States," the framers thought that the main protection of minorities would be governmental structures, not the listing of specific rights. It should not be surprising then, that when the Court rules on the limits of governmental power, the rulings often can and do have implications for rights. Thus, Hamilton in *Federalist* 78 through 81 must have been arguing that the Court would protect rights by delimiting congressional powers, not by ruling on the meaning of enumerated or inferred rights. Scalia's argument seems all the more obvious given the Constitution was adopted without a Bill of Rights.

is not always the case. I have limited this category to only those cases that have a strong effect on governmental powers, but a limited (or no) effect on rights.

Here is a small sampling of cases that are categorized as addressing governmental powers. For example, *The Alicia* (1869) and *Keller v. Potomac Elec. Co.* (1923) limited the types of appeals that Congress could send to the Supreme Court, but the cases did not influence governmental powers in any way directly related to rights. The Court restricted Congress's ability to reduce the pay of retired judges in *Booth v. United States* (1934). *Meyers v. United States* (1926) overturned a federal law requiring Senate approval before the president could remove certain federal appointees. *United States v. Lopez* (2000) delimited Congress's commerce clause authority by preventing Congress from criminalizing guns in and around schools, but the case did not prevent states from limiting guns, nor did the Court's decision advance gun rights. Further, Congress readopted nearly identical language to criminalize guns in and around schools even after the *Lopez* decision.⁵²

F. Decisions Overruled or Modified

The fact that the Court reverses itself is another indication that there is not some formulaic way to read the Constitution. It also strongly indicates that the Court could not have been protecting rights in both of its conflicting decisions. Throughout the Court's history, it has reversed itself 236 times;⁵³ this means the Court has struck down its own rulings more often than it has struck

⁵² Despite the fact that the Court saw its ruling as protecting the rights of states to act in this issue area more than 20 states wrote friend of the Court briefs arguing that they wanted the federal government to have authority to prevent guns near schools.

⁵³ Governmental Printing Office, "Supreme Court Decisions Overruled by Subsequent Decision," <https://www.congress.gov/content/conan/pdf/GPO-CONAN-REV-2016-13.pdf>

down an act of Congress.⁵⁴ In 12 cases⁵⁵ where the Court struck down an act of Congress, the Court later reversed its decisions. These overrulings are about equally divided among Rights-Rescinding, Rights-Enhancing, and Peripheral. This provides further evidence that the Court's decision often needs to be revisited to protect rights and get the interpretation of the Constitution correct.

IV. FINDINGS

Initial review of this data indicates that judicial review of congressional acts has served as “Rights-Enhancing” in well less than half of these cases, while it has been “Rights-Rescinding” in at least 10%. Further, 30% of these cases were decided by a 1-vote margin, which indicates that the politics of the appointment process, rather than clear-cut constitutional principles of protecting clearly-defined constitutional rights, has led to the nullification of many congressional acts.

V. CONCLUSION

An evaluation of all instances of judicial review employed against acts of Congress indicates that the Court does a far worse job of protecting rights than theories defending judicial review often acknowledge. We are presented with a heroic narrative of the Rights-Enhancing model of the Court based on regaling stories of cases like *Brown* and *Windsor*. But this heroic narrative distorts the broader picture. It neglects the Rights-Rescinding Court. And this false narrative

⁵⁴ These 236 instances should be seen as a low estimate as the Court often obfuscates when it is reversing itself. There are numerous examples where dissenting opinions argue that the majority is overruling precedent despite majority protestations against such accusations; counting some of these decisions as reversal would push this number up higher.

⁵⁵ These cases are

makes it harder to protect rights. The existence of the Rights-Rescinding Court shows that the Court has hampered rights in a way that goes further than simply failing to protect rights in the face of majorities. The Rights-Rescinding Court indicates that the Court commonly prevents congressional majorities from extending rights. Further, the fact that the Court later reverses some of its own Rights-Rescinded decisions indicates that the Court is not simply preventing Congress from extending rights based on some obvious, neutral interpretation of the Constitution. This indicates that the Rights-Rescinding nature of the Court is not simply a product of the limited rights provided by the Constitution but is a product of how judicial review functions in the United States.

These findings present serious challenges to how we think about the role of judicial power within a separated system, and challenge how we think about the ability of majoritarian legislation to extend and protect rights. These findings also add credence to the voices of the Framers who acknowledged that the Court could err (just like Congress, the states, and the President) and therefore decisions of the Court should also be subject to checks. As Supreme Court Justice Oliver Wendell Holmes once remarked: “I do not think the United States would come to an end if we lost our power to declare an act of Congress void.” The theory of the Rights-Rescinding Court indicates something even more: perhaps rights could be better protected if judicial review functioned differently than how it is commonly thought. Based on an analysis of the historical use of judicial review, we need to explore institutional fixes to the practice that can better preserve rights and overcome the countermajoritarian dilemma.