GOVERNMENT UNCHECKED

THE FALSE PROBLEM OF "JUDICIAL ACTIVISM" AND THE NEED FOR **JUDICIAL ENGAGEMENT**

BY **CLARK NEILY** AND **DICK M. CARPENTER II**
SEPTEMBER 2011

CENTER FOR JUDICIAL ENGAGEMENT

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**MORE CONSTITUTION,
LESS GOVERNMENT**

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Is the Supreme Court really running roughshod over the other branches of government and systematically thwarting their legitimate attempts to make policy?

EXECUTIVE SUMMARY

The past five decades have seen a relentless expansion in the size of government and a sharp increase in the number of liberty-stifling laws and regulations at every level. Despite this explosion of *political* power, commentators and scholars of all ideological stripes appear to worry more about the supposed growth of *judicial* power.

Those who decry so-called "judicial activism" complain that the Supreme Court too frequently strikes down the acts of elected representatives, infringes on the prerogatives of the executive branch or upends settled law by overturning its own precedents.

This report puts those claims to the test with empirical data and concludes that we suffer not from rampant judicial activism, but rather from too little judicial engagement.

Contrary to popular belief, the Supreme Court rarely strikes down government enactments or overturns its own precedents—and this is consistently true over the past 50-plus years. If anything, fewer state laws and federal regulations are being struck down now than ever.

Moreover, compared with the explosive growth of laws and regulations, the impact of the Court's rulings on the legislative and executive branches is barely noticeable. Consider these findings:

- Congress passed 15,817 laws from 1954 to 2002. The Supreme Court struck down 103—or just *two-thirds of one percent*.
- State legislatures passed 1,006,649 laws over the same period. The Court struck down 452—or *less than one twentieth of one percent*.
- The federal government adopted 21,462 regulations from 1986 to 2006. The Court struck down 121—or about a *half of a percent*.
- In any given year, the Court strikes down just *three out of every 5,000* laws passed by Congress and state legislatures.
- The Supreme Court overturned earlier precedents in just *two percent* of the cases it considered from 1954 to 2010.

By the numbers, the image of rampant judicial activism is false. Precedents are rarely overturned, and democratically elected bodies and federal agencies enjoy wide latitude with little interference from the Supreme Court.

But should they? In our system of government, the courts—most especially the Supreme Court—serve as a critical check on the legislative and executive branches. They are intended to be "bulwarks" of liberty, keeping the other branches within the bounds of the Constitution and ensuring individual rights are not trampled by over-reaching government.

The years examined in this report saw more than a million federal and state laws passed and more than 20,000 regulations adopted. Many of these restrain liberty in significant ways. Decades of the Supreme Court's abdicating its duty to enforce the Constitution have made this growth in the size and scope of government possible.

More judicial "restraint" is not the answer. Judges engaging in meaningful review of constitutional claims and the facts behind them is.

The years examined in this report saw more than a million federal and state laws passed and more than 20,000 federal regulations adopted. Many of these restrain liberty in significant ways.

INTRODUCTION

Lately it seems nearly any Supreme Court decision that checks government power is met with cries of "judicial activism" from one side of the political spectrum or the other. Conservatives blasted the Court for finding that Guantanamo Bay detainees have a constitutional right to access federal courts in *Boumediene v. Bush*,[1] while many liberals consider *Citizens United v. FEC*,[2] which struck down restrictions on corporate political speech, a glaring example of conservative activism, both for striking down an act of Congress and for overturning two of the Court's own earlier rulings.[3]

Some decisions even draw fire from both sides, such as the Court's holding in *District of Columbia v. Heller*[4] that the Second Amendment protects an individual right to keep and bear arms, which was criticized as "activist" not only by liberals but by several leading conservatives including Richard Posner and J. Harvie Wilkinson.[5]

Perhaps not surprisingly, politicians contribute heavily to the anti-activism drumbeat. For instance, the 2008 Republican platform declared judicial activism "a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution…and imposing their personal opinions upon the public."[6]

President Obama decries interpretive theories like "original intent" that can "end up giving judges…more power than duly-elected representatives."[7] And according to former Senator Arlen Specter, the Supreme Court "has been eating Congress's lunch by invalidating legislation with judicial activism."[8]

Amidst all the bluster, a simple question seems to have gone unasked: Is it true? Is the Supreme Court really running roughshod over the other branches of government and systematically thwarting their legitimate attempts to make policy? In this pursuit, has the Supreme Court blithely tossed aside settled law as embodied in its past precedents?

This study addresses those questions by examining the frequency with which the Supreme Court strikes down laws and regulations and overturns precedents. But more than that, this study asks a critical question: How do those raw numbers compare to the universe of laws and regulations passed and prior cases decided?

That context is vital to understanding the scope of the supposed problem of judicial activism. If the concern is that the Court is overriding the will of democratically elected bodies, trampling on the prerogatives of the executive or overturning precedent, then it is important to understand how often

FIGURE 1: TOTAL STRIKE DOWNS OF FEDERAL AND STATE LAWS AND FEDERAL REGULATIONS

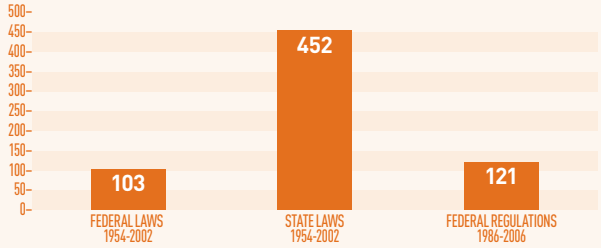


FIGURE 2: AVERAGE STRIKE DOWNS OF FEDERAL AND STATE LAWS AND FEDERAL REGULATIONS PER YEAR

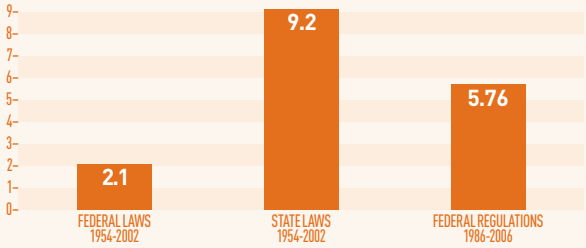
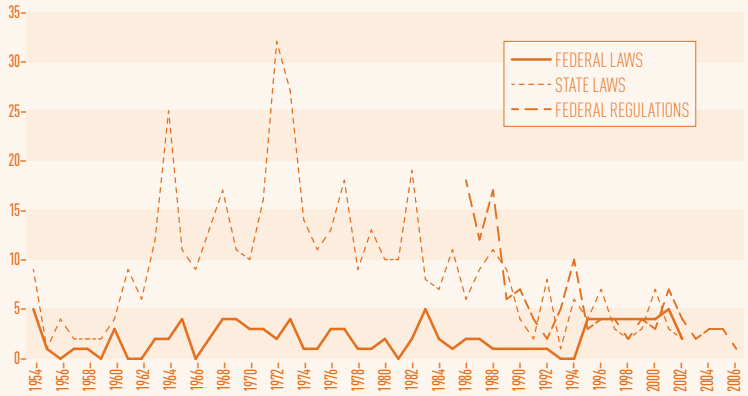


FIGURE 3: ANNUAL SUPREME COURT STRIKE DOWNS OF FEDERAL AND STATE LAWS, 1954-2002, AND FEDERAL REGULATIONS, 1986-2006



it actually declares laws unconstitutional and overrules controlling cases.

Moreover, in our system of government, the courts—most especially the Supreme Court—are supposed to serve as a critical check on the legislative and executive branches. They are intended to be "bulwarks" of liberty, keeping the other branches within the bounds of the Constitution and ensuring individual rights are not trampled by over-reaching government.[9]

This job cannot be left to policymakers themselves. For example, when asked where the Constitution grants Congress the authority to enact an individual health insurance mandate, then-Speaker Nancy Pelosi scornfully replied, "Are you serious? Are you *serious*?"[10]

Similarly, despite his stated belief that the president should exercise independent judgment and veto bills he considers unconstitutional, President George W. Bush signed into law the Bipartisan Campaign Reform Act, known as McCain-Feingold, even though he thought it violated the First Amendment.[11] Eight years later, after countless groups had been banned from speaking during election season, the Supreme Court finally agreed with him, striking down portions of the law in *Citizens United*.[12]

As the data in this report show, cases where the Supreme Court strikes down laws or overturns precedent are very much the exception, not the rule. Not only does that suggest the supposed problem of judicial activism is overblown, it raises a more significant concern: that the Court is failing to engage in meaningful review of constitutional claims.

HOW OFTEN DOES THE SUPREME COURT STRIKE DOWN LAWS AND REGULATIONS?

To measure how often the U.S. Supreme Court strikes down laws and regulations, we used three sources: *Acts of Congress Held Unconstitutional in Whole or Part by the Supreme Court of the United States*[13] as a measure of federal laws, *State Constitutional And Statutory Provisions And Municipal Ordinances Held Unconstitutional Or Held To Be Preempted By Federal Law*[14] as a measure of state laws, and a specially coded version of the Supreme Court Database[15]—a frequently used and highly regarded collection of Court decisions since 1954—as a measure of federal regulations.[16]

Drawing on these sources, we found that from 1954 to 2002, the Supreme Court struck down 103 federal laws and 452 state laws.[17] Over this 49-year period, the Court struck about two federal laws per year and only nine state laws per year.[18] From 1986 to 2006,[19] the Court struck

FIGURE 4: TOTAL STRIKE DOWNS COMPARED TO LAWS AND REGULATIONS PASSED

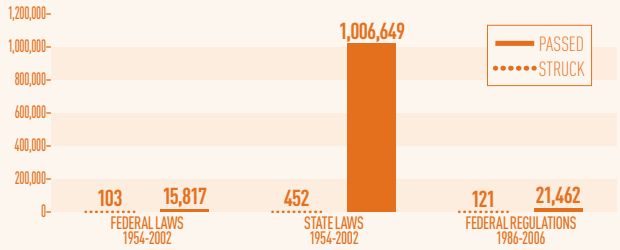
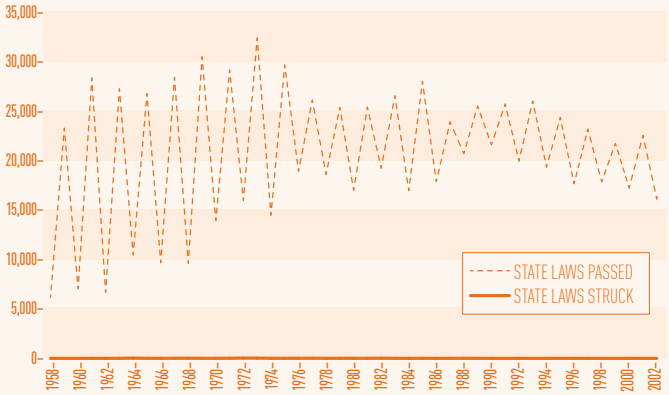


FIGURE 5: FEDERAL LAWS STRUCK COMPARED TO THOSE PASSED FOUR YEARS EARLIER, 1958-2002

FIGURE 6: STATE LAWS STRUCK COMPARED TO THOSE PASSED FOUR YEARS EARLIER, 1958-2002



121 regulations on statutory or constitutional grounds—fewer than six per year. ***Figures 1*** and ***2*** show the totals and averages of strike downs in each category, while ***Figure 3*** shows the frequency of such rulings over time.

Is this a lot of activity or a little? Too much or not enough? Some scholars and commentators have argued that recent years have seen historic highs in the frequency of Supreme Court strike downs, at least with regard to federal and state laws.[20] Yet the number of strike downs of laws and regulations, as illustrated in ***Figure 3***, simply does not support that claim. Moreover, as University of Michigan law professor Evan Caminker allows with regard to congressional enactments, any uptick could be due to a growing number of laws passed as well as Congress increasingly pushing the boundaries of its authority.[21]

Therefore, we compared the number of laws and regulations struck on constitutional grounds to those passed. This gives a clearer picture of how often the Court declares legislative enactments and federal administrative actions beyond the bounds of the Constitution or otherwise invalid. The answer is not often. By the numbers, Congress and state legislatures, as well as federal agencies, appear to enjoy wide latitude with little interference from the High Court.

From 1954 to 2002, Congress passed 15,817 laws according to the Congressional Quarterly Almanac, while 103 of those laws were struck down.[22] That amounts to about two-thirds of one percent (0.65 percent) of all congressional enactments. According to data we culled from the Book of the States, all state legislatures combined passed 1,006,649 laws over the same time period. Of these, 452 were struck down, or less than five one-hundredths of one percent (0.045 percent).

Together, democratically elected bodies at the state and federal levels passed 1,022,466 laws over the 49 years we examined. The Supreme Court struck 555 of those laws—just 0.054 percent of all laws passed.

The picture is similar for federal regulations. Using data from reginfo.gov, a division of the federal Office of Management and Budget responsible for tracking and analyzing federal regulations, we found that from 1986 to 2006, federal agencies adopted 21,462 regulations. Only 121 of those were struck down, or just over a half of a percent (0.56 percent).

Figure 4 illustrates how infrequent strike downs are compared to laws and regulations passed. The graph simply adds to ***Figure 1*** the number of laws and regulations passed over each time period.

FIGURE 7: ANNUAL PERCENTAGES OF COMBINED STATE AND FEDERAL LAWS STRUCK AFTER FOUR YEARS, 1958-2002

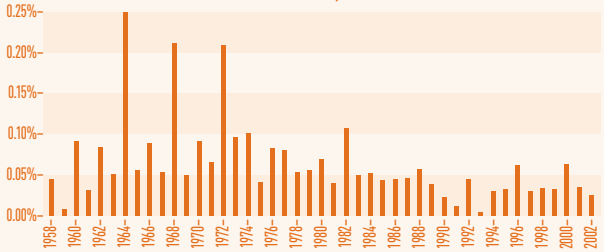


FIGURE 8: ANNUAL PERCENTAGES OF FEDERAL LAWS STRUCK AFTER FOUR YEARS, 1958-2002

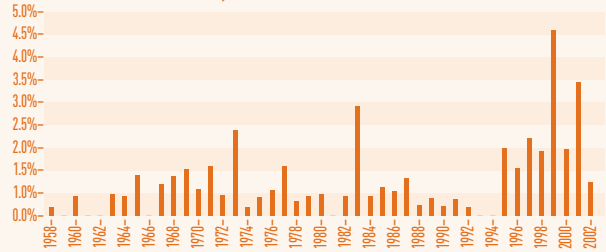
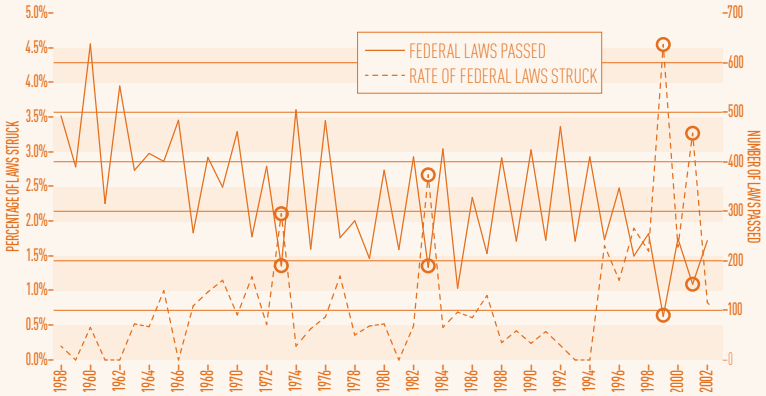


FIGURE 9: ANNUAL PERCENTAGES OF FEDERAL LAWS STRUCK AFTER FOUR YEARS COMPARED TO LAWS PASSED, 1958-2002



HOW MANY LAWS AND REGULATIONS ARE STRUCK DOWN EACH YEAR?

We also wondered, of laws passed in a particular year, how many will be struck down? To examine this, we had to account for the time it takes for a case to reach a conclusion at the Supreme Court. Comparing laws passed in, say, 1954 to those struck in 1954 assumes that the Court rules on new laws immediately, but this of course is rarely the case. So we lagged our comparisons by four years, comparing the number of laws passed in 1954 to those struck in 1958 and so on.[23]

Figures 5 and *6* show the numbers of federal and state laws struck down each year compared to laws passed four years earlier. Both graphs reveal that for any given year, few laws will be struck compared to the number passed.

And, as *Figure 7* shows, the annual percentage of combined federal and state laws struck down has been consistently low over the past half century. The high-water mark was 1964, when the Supreme Court struck down one quarter of one percent (0.25 percent) of state and federal laws passed four years earlier. Over the 49 years studied, the percentage of laws struck was higher than 0.1 percent—meaning more than 1 out of 1,000 laws were struck—only five times.

Indeed, the average percentage of laws struck annually over the past half century is just 0.06 percent. In other words, on average, the Supreme Court struck just three out of every 5,000 state and federal laws passed each year.[24]

Figure 8 shows the same comparison for federal laws alone. For federal laws, the high-water mark was 1999, when the Supreme Court struck 4.5 percent of laws passed four years earlier. This is still not a large number, but note that it is the result of an unusually low number of laws passed four years earlier, not an unusually large number of strike downs

This can be seen in *Figure 9*, which shows the percentage of federal laws struck down annually (the left axis and the dotted line) alongside the number of federal laws passed four years earlier (the right axis and the solid line). As the figure shows, the year when the highest percentage of federal laws was struck, 1999, was also the year when the fewest laws were passed four years earlier—fewer than 100.

Indeed, every spike in percentage of federal laws struck—1973, 1983, 1999 and 2001—coincides with a dip in laws passed. Those four years saw four, five, four and five federal law strike downs, respectively. (See the appendix for numbers of strike downs per year.) Those raw numbers are higher than the historical average of two per year, but not

FIGURE 10: ANNUAL PERCENTAGES OF STATE LAWS STRUCK AFTER FOUR YEARS, 1958-2002

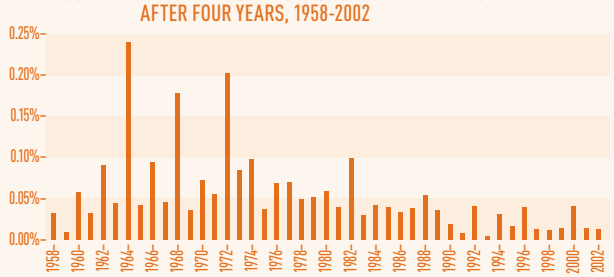


FIGURE 11: FEDERAL REGULATIONS STRUCK COMPARED TO THOSE ADOPTED FOUR YEARS EARLIER, 1990-2006

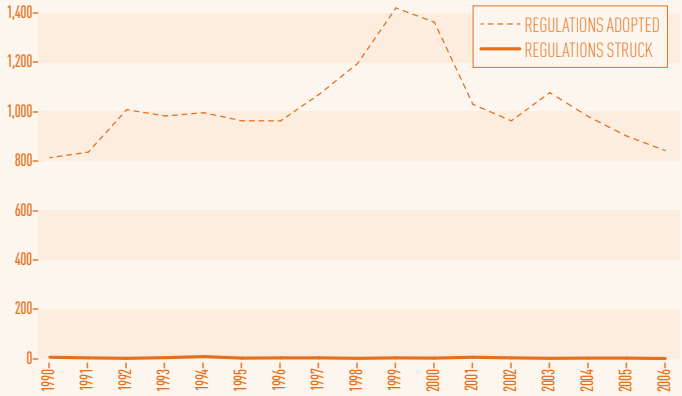
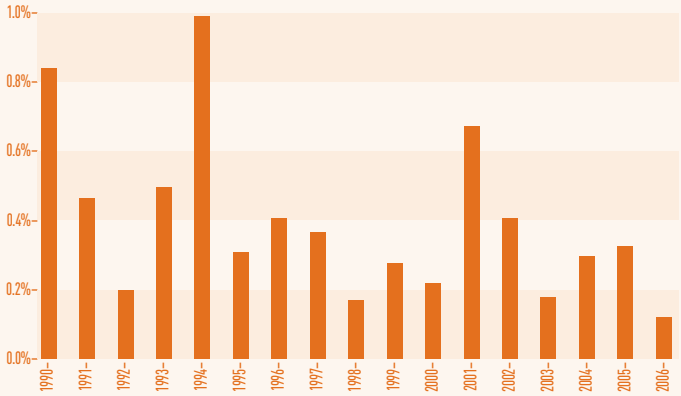


FIGURE 12: ANNUAL PERCENTAGES OF FEDERAL REGULATIONS STRUCK AFTER FOUR YEARS, 1990-2006



unusually high. As illustrated in *Figure 3*, annual federal law strike downs have held steady between zero and five. Meanwhile, congressional enactments have slowed somewhat in recent years. It is likely the slowdown of enactments, not an uptick of strike downs, that accounts for higher percentages of federal strike downs in later years.

For state laws the high point was 1964, when 0.24 percent of laws adopted four years earlier were struck. Moreover, *Figure 10* suggests that strike downs of state laws are increasingly rare compared to laws passed.

Again, the story is similar for federal regulations. *Figure 11* compares federal regulations struck to those adopted four years earlier. As with laws, few regulations adopted in any given year will be struck down. *Figure 12* makes this clear by showing the annual percentages of regulations struck. The high-water mark was 1994, when the Supreme Court struck one percent of federal regulations adopted. The average annual percentage was a mere 0.37 percent.

THE GROWTH OF LAWS AND REGULATIONS, COMPARED TO STRIKE DOWNS

There is another way to compare the adoption of laws and regulations to Supreme Court strike downs over time. Laws do not simply disappear after they are passed, and each year, more laws are added to the books. Moreover, people do not always challenge laws immediately—some laws are challenged years later. Thus, in any given year, any of the laws passed in any prior year could come before the Court. Accounting for this accumulation of laws and regulations over time, Supreme Court strike downs appear even rarer and the latitude available to legislators and federal agencies even wider.

Because historical data on legislative enactments and regulatory adoptions is limited, we start all of our analyses with a baseline of zero for the first year. In reality, though, there were already many laws and regulations on the books. So in that sense our comparisons underestimate the total number of laws and regulations eligible for strike down.

For these analyses, as above, we lagged strike downs by four years. We also subtracted the number of strike downs each year from the cumulative total of laws.

As shown in *Figures 13* through *15*, the number of laws passed by Congress and state legislatures and regulations adopted by federal agencies has grown at a sharp and steady pace. Meanwhile, the number of strike downs has remained essentially flat.

FIGURE 13: GROWTH OF FEDERAL LAWS COMPARED TO STRIKE DOWNS, 1958-2002

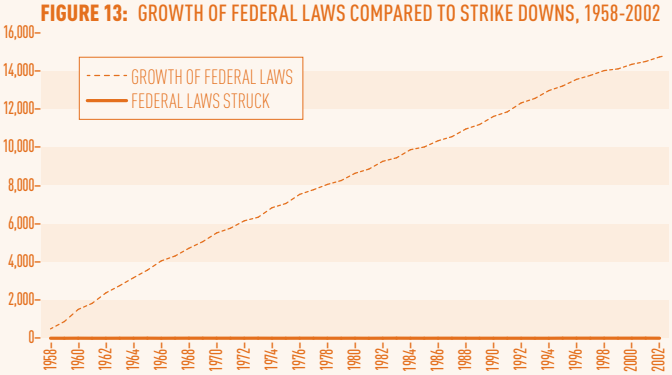


FIGURE 14: GROWTH OF STATE LAWS COMPARED TO STRIKE DOWNS, 1958-2002

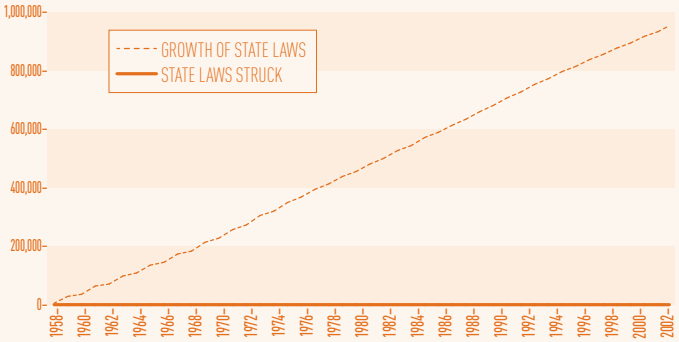
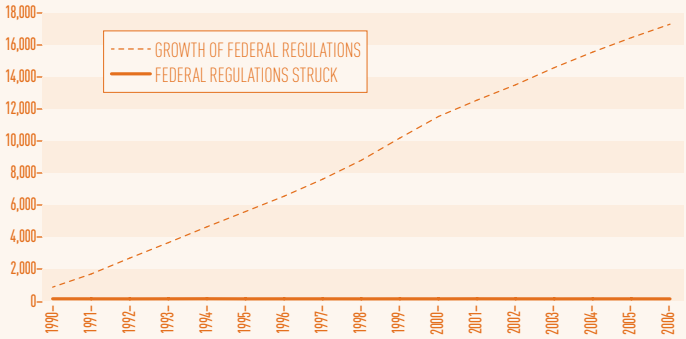


FIGURE 15: GROWTH OF FEDERAL REGULATIONS COMPARED TO STRIKE DOWNS, 1990-2006



These graphs show a growing gap between laws and regulations adopted and those struck. This illustrates just how little Supreme Court strike downs interfere with the vast accretion of laws and regulations over the past half century. Take the year 2002. By then, the net number of state and federal laws put on the books since 1954 and realistically eligible for strike down (i.e., had been on the books four years) stood at 945,060. In that year, the Court struck down four state or federal laws—or 0.00042 percent of laws in existence since 1954.

By 2006, 17,420 net regulations had accumulated since 1986 and were eligible for strike down (again, because of the four-year lag). The Supreme Court struck one regulation that year—or 0.0057 percent of those in existence.

HOW OFTEN DOES THE SUPREME COURT OVERTURN PRECEDENTS?

Using the Supreme Court Database, we also examined how often the Court overturns precedents. The database identifies cases in which the Court explicitly overturned or limited—"formally altered"—earlier cases. Of course, sometimes rulings may reinterpret earlier cases, effectively overruling them without explicitly doing so. However, since this is a matter of subjective judgment, we limit our analysis to cases explicitly overturned.

We found that between 1954 and 2010, a precedent was formally altered in 145 cases. During that time, the Court heard 7,438 cases. Thus, in only two percent of cases over the past half century did the Supreme Court overturn its own precedents. Not every case will necessarily call upon the Court to reconsider older cases. Still, the Court appears to overrule previous cases infrequently.

Figure 17 compares cases heard to precedents overturned annually, and ***Figure 18*** shows the percentage of cases heard in which a precedent was overturned for each year. Perhaps the main message of ***Figure 18*** is the lack of a trend over time. Recent courts do not appear to be overturning precedents more frequently than earlier ones. And in any event, few precedents are overturned.

THE FALSE PROBLEM OF JUDICIAL ACTIVISM

As documented above, the Supreme Court has struck down only tiny fractions of laws and regulations adopted:

- *about two-thirds of one percent* of laws passed by Congress from 1954 to 2003;
- *less than one twentieth of one percent* of state laws passed from 1954 to 2003;

FIGURE 16: TOTAL SUPREME COURT CASES DECIDED COMPARED TO CASES THAT OVERTURNED PRECEDENT, 1954-2010

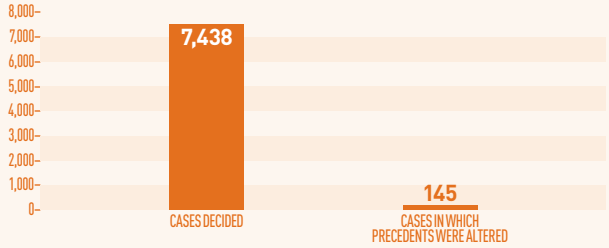


FIGURE 17: CASES DECIDED COMPARED TO PRECEDENTS OVERTURNED, 1954-2010

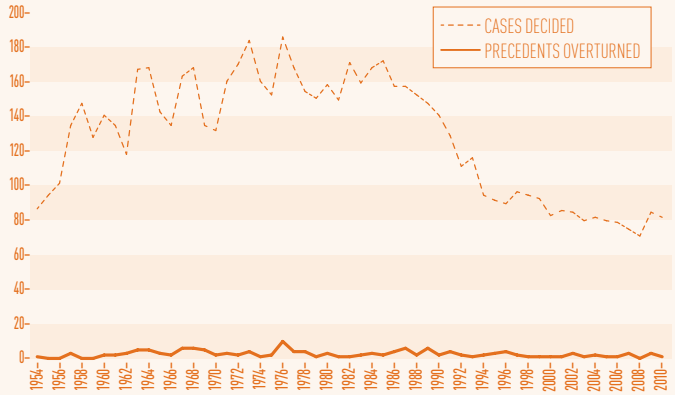
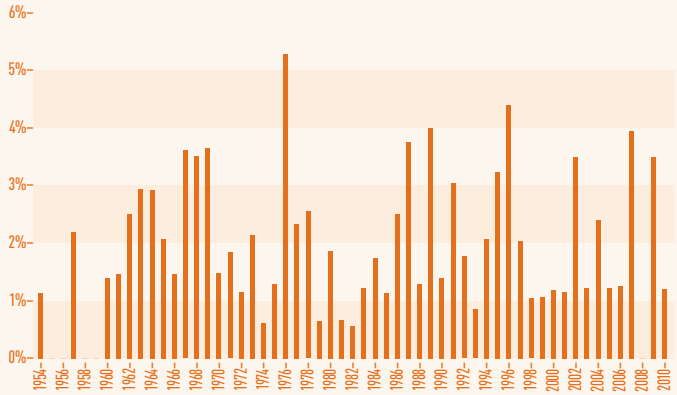


FIGURE 18: ANNUAL PERCENTAGES OF PRECEDENTS OVERTURNED, 1954-2010



- and just over *one half of a percent* of federal regulations adopted from 1986 to 2006.

What's more, such strike downs have either held steady or declined over the periods we studied. Contemporary complaints about judicial activism—and certainly the claim that the Supreme Court is "eating Congress's lunch," as Arlen Specter alleged—are, at the very least, off the mark.

So too is the worry that the Court is recklessly upending its own precedents: In only two percent of cases from 1954 to 2010 has the Court disturbed precedent.

To be clear, this study does not evaluate the Court's reasoning for striking down laws or regulations or overturning precedent in particular cases. Some rulings striking down laws may have done so incorrectly, just as others may have improperly upheld unconstitutional laws. Our point is simply that strike downs, whatever their merits or demerits, happen so rarely as to barely be noticeable empirically.

The practical result is that Congress, state legislatures and federal agencies enjoy wide latitude with little interference from the Supreme Court. And settled law is usually just that—settled. These findings have implications for what seems to be the underlying concern for most critics of judicial activism: that justices are substituting their own policy preferences for contrary provisions of the Constitution, properly enacted law or precedent. If so, this happens so infrequently that it cannot fairly be said that Supreme Court justices are systematically thwarting the policymaking efforts of the other branches.

THE NEED FOR JUDICIAL ENGAGEMENT

Unless we assume that the executive and legislative branches operate with perfect precision, then we must expect them to produce at least some unconstitutional enactments—and, presumably, given what we know about the political process, more than a mere fraction of a percent.

It is unrealistic to suppose that legislatures and administrative agencies can walk a perfect line between constitutional and unconstitutional regulation no matter how hard they might try (if indeed they try at all). Moreover, politicians face far greater incentives to expand the scope of their power than to limit it.

Those incentives are the subject of an extensive body of literature called public choice theory, the upshot of which is that politicians tend to act in self-interested ways, often

Contemporary complaints about judicial activism—and certainly the claim that the Supreme Court is "eating Congress's lunch," as Arlen Specter alleged—are, at the very least, off the mark.

by catering to rent-seeking interest groups.[25] It is not for nothing that the 10th U.S. Circuit Court of Appeals once observed, "[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."[26]

As a result, government officials face intense, sustained pressure to expand the reach of their powers and, correspondingly, to constantly push against the constitutional bounds of their authority.

Take, for example, the graphs showing the vast accretion of federal and state laws and federal regulations over time, ***Figures 13***, ***14*** and ***15***. The years examined in this report saw more than a million federal and state laws passed and more than 20,000 federal regulations adopted. Many of these restrain liberty in significant ways.

Compared to this explosion of lawmaking, the impact of the Supreme Court's rulings on the other branches is barely noticeable. Of course, the Supreme Court cannot possibly judge the constitutionality of each law and regulation adopted. But even allowing for its limited docket, it is hard to conclude that our biggest problem is the Court doing too much. Indeed, the opposite is likely true.

The job of judges is to judge. Constitutions alone cannot provide perfectly clear guidance in all settings. To the contrary, by their very nature, constitutions are designed to establish guiding principles, the application of which necessarily requires the exercise of judgment and judicial interpretation.

The Constitution was carefully crafted by the Framers to reflect a theory of government and its relationship to the individual. The federal government was to be one of limited, separated and enumerated powers. Those powers not specifically given to the federal government were reserved to the states and the people. Individuals were recognized to have rights that pre-existed the Constitution and that could not be abridged by the federal government absent a specific grant of authority. The 14th Amendment was added in 1868 to protect individual rights from state and local governments as well. Of course, there will be difficulties in interpreting a document over more than two centuries, but fidelity to the Constitution is essential if we are to continue to have a government of laws that is not ruled by the whim of politicians.

However, what we often see is not the application of judgment with an eye toward fidelity to the Constitution, but judicial abdication. For example, in *Kelo v. City of New*

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London,[27] the Supreme Court effectively deleted the "public use" provision from the Fifth Amendment. In doing so, the Court ceded to local government officials essentially unfettered authority to use the power of eminent domain to take property from one private owner and give it to another on the mere hope of more taxes or new jobs.

The Supreme Court has likewise stopped making any serious effort to ensure that the powers exercised by the federal government are "few and defined" as compared to those of the states, despite the plainly contrary intent of the Framers, not to mention the 10th Amendment and the very structure of the Constitution itself.

And when evaluating the regulation of supposedly non-fundamental rights like the ability to earn a living, courts use the so-called rational basis test, under which citizens must "negative" every "conceivable" justification for the challenged law, even those for which there is no evidence and that could not possibly have been the true purpose for which the law was enacted.[28]

This is judicial abdication, not judgment. And it is a root cause of the expansion of government power we see today. In response to overblown concerns about judicial activism, an ethic of judicial "restraint" or "minimalism" has taken hold that puts not merely a thumb on the scales but a virtually irrebutable presumption in favor of government power in most constitutional settings.

So instead of judgment, courts often show reflexive deference to other branches of government, often on the premise that in doing so they are respecting the "will of the people." In most instances that premise is quite doubtful. For example, it seems highly unlikely that most people in Louisiana know their state is the only one in the country that requires a license to be a florist, or that most people in Louisiana would support that law if they did know about it.

To the contrary, there is little doubt that Louisiana's florist-licensing law—like so many other economic regulations—was enacted at the behest of an interest group seeking to advance its own anti-competitive interests at public expense. It is a judge's job to recognize such facts and give them due consideration, not ignore them and simply rubber stamp whatever half-baked rationalization the government offers instead.[29]

Such deference is all the more inappropriate because the Framers were wary of the dangers that both government power and majority sentiment pose to individual rights. Courts should resist those impulses, not ratify them un-

More judicial "restraint" is not the answer. Judges engaging constitutional claims and the facts behind them is.

der the banner of judicial deference. As the 11th U.S. Circuit Court of Appeals wrote in holding that the federal government has no authority to compel individuals to purchase health insurance, "[T]he Constitution requires judicial engagement, not judicial abdication."[30]

The results of this study sharply challenge the notion that courts have been too active in striking down government regulation and instead suggest that courts are allowing a substantial amount of unconstitutional regulation to go unchecked. Either way, judges should judge—in all cases and without the use of formalistic doctrines like the rational basis test that practically ensure the outcome of any constitutional challenge in the government's favor regardless of its underlying merits.

This means, at a minimum, that judges should evaluate all laws that come before them in light of their actual purposes—just as they do in cases involving free speech, racial equality and other favored constitutional values—and require the government to demonstrate an appropriate fit between its stated objectives and the means it has chosen to pursue them. Finally, courts should not ignore the influence of interest groups or rationalize away the fundamentally corrupt nature of myriad laws that do little to protect the public interest and instead favor special interests.

Decades of the Supreme Court abdicating its duty to enforce the Constitution have made possible the incredible growth in the size and scope of government we see today. More judicial "restraint" is not the answer. Judges engaging constitutional claims and the facts behind them is.

APPENDIX: NUMBER OF STRIKE DOWNS AND PERCENTAGE OF LAWS AND REGULATIONS ADOPTED FOUR YEARS EARLIER

The table below includes the number of federal and state laws struck down each year from 1958 to 2002, as well as the percentage of laws struck compared to those passed four years earlier.

	FEDERAL LAW STRIKE DOWNS	PERCENTAGE OF FEDERAL LAWS	STATE LAW STRIKE DOWNS	PERCENTAGE OF STATE LAWS	FEDERAL AND STATE LAW STRIKE DOWNS	PERCENTAGE OF FEDERAL AND STATE LAWS
1958	1	0.2028%	2	0.0325%	3	0.0451%
1959	0	0.0000%	2	0.0086%	2	0.0085%
1960	3	0.4702%	4	0.0570%	7	0.0914%
1961	0	0.0000%	9	0.0318%	9	0.0315%
1962	0	0.0000%	6	0.0900%	6	0.0831%
1963	2	0.5222%	12	0.0442%	14	0.0508%
1964	2	0.4796%	25	0.2393%	27	0.2486%
1965	4	0.9975%	11	0.0412%	15	0.0554%
1966	0	0.0000%	9	0.0932%	9	0.0888%
1967	2	0.7782%	13	0.0459%	15	0.0525%
1968	4	0.9780%	17	0.1771%	21	0.2098%
1969	4	1.1461%	11	0.0362%	15	0.0488%
1970	3	0.6508%	10	0.0719%	13	0.0905%
1971	3	1.2048%	16	0.0550%	19	0.0648%
1972	2	0.5115%	32	0.2009%	34	0.2084%
1973	4	2.1053%	27	0.0836%	31	0.0954%
1974	1	0.1980%	14	0.0969%	15	0.1003%
1975	1	0.4464%	11	0.0372%	12	0.0403%
1976	3	0.6211%	13	0.0689%	16	0.0827%
1977	3	1.2146%	18	0.0691%	21	0.0799%
1978	1	0.3559%	9	0.0485%	10	0.0531%
1979	1	0.4878%	13	0.0514%	14	0.0549%
1980	2	0.5222%	10	0.0590%	12	0.0692%
1981	0	0.0000%	10	0.0395%	10	0.0391%
1982	2	0.4878%	19	0.0990%	21	0.1072%
1983	5	2.6738%	8	0.0302%	13	0.0488%
1984	2	0.4695%	7	0.0414%	9	0.0519%
1985	1	0.6897%	11	0.0394%	12	0.0428%
1986	2	0.6098%	6	0.0337%	8	0.0441%
1987	2	0.9302%	9	0.0377%	11	0.0457%
1988	1	0.2451%	11	0.0533%	12	0.0570%
1989	1	0.4167%	9	0.0354%	10	0.0389%
1990	1	0.2358%	4	0.0186%	5	0.0228%
1991	1	0.4132%	2	0.0078%	3	0.0116%
1992	1	0.2123%	8	0.0402%	9	0.0442%
1993	0	0.0000%	1	0.0039%	1	0.0038%
1994	0	0.0000%	6	0.0311%	6	0.0304%
1995	4	1.6461%	4	0.0165%	8	0.0326%
1996	4	1.1527%	7	0.0397%	11	0.0612%
1997	4	1.9048%	3	0.0130%	7	0.0300%
1998	4	1.5686%	2	0.0112%	6	0.0332%
1999	4	4.5455%	3	0.0138%	7	0.0322%
2000	4	1.6327%	7	0.0407%	11	0.0631%
2001	5	3.2680%	3	0.0133%	8	0.0353%
2002	2	0.8299%	2	0.0124%	4	0.0245%

The table below lists the number of federal regulations struck down each year from 1986 to 2009, as well as the percentage of regulations struck compared to those adopted four years earlier.

	FEDERAL REGULATION STRIKE DOWNS	PERCENTAGE OF FEDERAL REGULATIONS ADOPTED
1990	7	0.8464%
1991	4	0.4711%
1992	2	0.1969%
1993	5	0.5045%
1994	10	0.9960%
1995	3	0.3086%
1996	4	0.4115%
1997	4	0.3717%
1998	2	0.1671%
1999	4	0.2825%
2000	3	0.2206%
2001	7	0.6750%
2002	4	0.4115%
2003	2	0.1847%
2004	3	0.3033%
2005	3	0.3289%
2006	1	0.1170%

ENDNOTES

[1] 553 U.S. 723 (2008); an example of criticisms can be found at http://online.wsj.com/article/SB121366596327979497.html.

[2] 130 S. Ct. 876 (2010).

[3] See, for example, http://www.thenation.com/article/democracy-inc.

[4] 554 U.S. 570 (2008).

[5] Wilkinson, H. J., III. (2009). Of guns, abortions, and the unraveling rule of law. *University of Virginia Law Review*, 95(2), 253-323; Posner, R. A. (2008). In defense of looseness: The Supreme Court and gun control. *New Republic, 239*(3), 32-35.

[6] http://www.gop.com/2008Platform/GovernmentReform.htm.

[7] http://www.whitehouse.gov/the-press-office/remarks-president-travel-pool-aboard-air-force-one.

[8] http://blogs.abcnews.com/thenote/2010/12/sen-arlen-specters-closing-statement-supreme-court-eating-congress-lunch.html.

[9] James Madison wrote that the courts were intended to be "an impenetrable bulwark against every assumption of power in the legislative or executive." See http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html.

[10] http://www.cnsnews.com/node/55971.

[11] http://www.washingtonpost.com/wp-dyn/content/article/2005/10/04/AR2005100400954.html; http://writ.news.findlaw.com/amar/20020405.html.

[12] 130 S. Ct. 876 (2010).

[13] http://www.gpoaccess.gov/constitution/pdf2002/046.pdf.

[14] http://www.gpoaccess.gov/constitution/pdf2002/047.pdf.

[15] http://scdb.wustl.edu. The version of the database used for the analysis of federal regulation strike downs was provided by Dr. Stefanie Lindquist.

[16] It is also possible to use the Supreme Court Database (SCD) to determine the number of state and federal laws struck down each year. However, in comparing the SCD strike down numbers to the *Acts of Congress Held Unconstitutional* and *State Constitutional And Statutory Provisions And Municipal Ordinances Held Unconstitutional* documents, the latter two reported a greater number of strike downs than the SCD. Therefore, to make our analysis more conservative, we used the two documents rather than the SCD. Were the comparisons herein replicated with the SCD, the percentages would be even smaller.

[17] We did not examine the frequency of strike downs of local ordinances. These data are included in an analysis of state and local strike downs by Lindquist, S. A., & Cross, F. B. (2009). *Measuring judicial activism*. New York: Oxford University Press. We also did not examine the frequency of strike downs of state or local regulations.

[18] Drawing on data from the Supreme Court Database for the years 2003 to 2009, these trends have persisted into the Roberts Court era. For example, each of those years has seen federal law strike downs at or below the historical average of two.

[19] Because we wanted to compare strike downs to laws and regulations adopted and because data on federal regulations are only available starting in 1986, we examined a shorter time period.

[20] Caminker, E. (2002). Thayerian deference to Congress and Supreme Court supermajority rule: Lessons from the past, *Indiana Law Journal, 78*, 73-117; Douthat, R. (2009, June 1). Justices gone wild, *New York Times*, Retrieved July 29, 2011 from http://www.nytimes.com/2009/2006/2002/opinion/2002douthat.html; Shugerman, J. H. (2010). Economic crisis and the rise of judicial elections and judicial review. *Harvard Law Review, 123*, 1061-1150.

[21] Caminker, 2002, p. 74.

[22] We treat all laws and regulations equally. For example, practically meaningless symbolic legislation is counted the same as an omnibus bill with many provisions. Unfortunately, it would be cost- and time-prohibitive to be more precise with these measures. Moreover, we do not know how many laws or regulations were eliminated legislatively. In any event, the ratios of strike downs that we find are so tiny that even a more precise accounting is unlikely to look much different.

[23] According to the Administrative Office of the United States Courts, cases at the appellate level take approximately 12 months from filing to decision (Redmond, K. (2008). Caseload of federal courts remains steady overall. Retrieved December 15, 2010, from http://www.uscourts.gov/News/NewsView/08-03-11/Caseload_of_Federal_Courts_Remains_Steady_Overall.aspx). We added an additional 12 months for decisions at the Supreme Court and 24 months for decisions at the trial court. Note that this is an estimate, as some authors note that measuring the time it takes a case to make it to the Supreme Court is almost impossible (Baird, V. A. (2004). The effect of politically salient decisions on the U.S. Supreme Court's agenda. *Journal of Politics, 66*(3), 755–772).

[24] Drawing on the Supreme Court Database, the rate of strike downs of state and federal laws compared to those passed stays consistent through 2009.

[25] Becker, G. (1983). A theory of competition among pressure groups for political influence. *Quarterly Journal of Economics, 98*, 371-400; Buchanan, J. M., & Tullock, G. (1962). *The calculus of consent*. Ann Arbor, MI: University of Michigan Press.

[26] *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004).

[27] 545 U.S. 469 (2005).

[28] *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 (1938).

[29] *See Meadows v. Odom*, 360 F. Supp. 2d 811 (M.D. La. 2005) (upholding Louisiana's florist licensing scheme partly on the basis of a hypothetical concern about infected dirt), *vacated as moot,* 198 Fed. App'x. 348 (5th Cir. 2006).

[30] *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, Nos. 11–11021, 11–11067, 2011 WL 3519178, at *40 (11th Cir. Aug. 12, 2011).

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Clark Neily joined the Institute for Justice as a senior attorney in 2000. He litigates economic liberty, property rights, school choice, First Amendment and other constitutional cases in both federal and state courts.

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The Institute for Justice's Center for Judicial Engagement seeks to restore constitutional limits on the size and scope of government by advocating the Constitution as a charter of liberty and educating the public about the proper role of judges in enforcing constitutional limits on government power. Today, America has more government at every level than the Constitution authorizes. This is because many judges are either unwilling or feel unable to keep legislators and executive branch officials within the proper bounds of their authority. The Center seeks to change that by articulating a principled vision of judicial review and the importance of constitutionally limited government.

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