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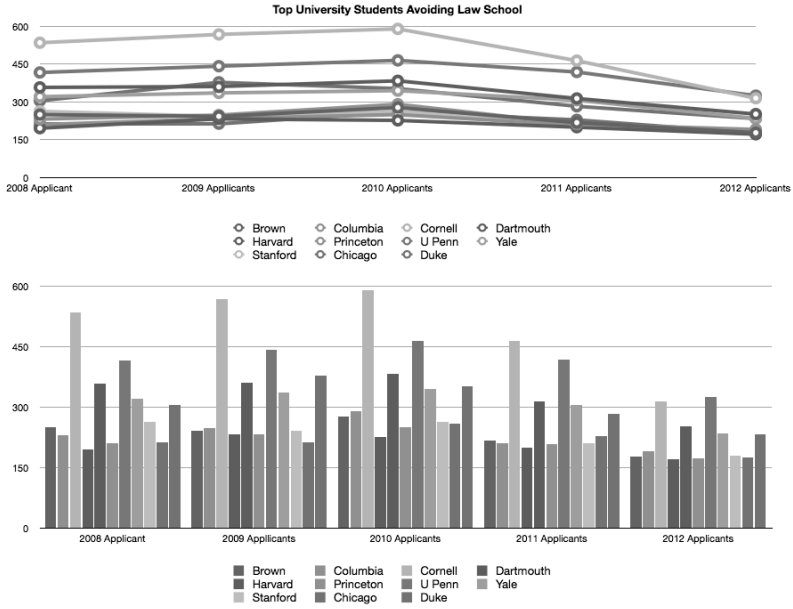

Journal of Legal Metrics

About the cover

Top University Students Avoiding Law School

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CONSTITUTIONAL INTERPRETATION AND CONGRESSIONAL OVERRIDES

CHANGING TRENDS IN COURT-CONGRESS RELATIONS

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I. INTRODUCTION

National policy in the United States is shaped through a complex process involving frequent interaction between the Supreme Court and Congress. The Court devotes the largest portion of its work to applying and interpreting congressional statutes.[1] Congress carefully considers these interpretations in future legislative action. The Court's use of judicial review to nullify acts of Congress is one of the most contentious and discussed aspects of this relationship. However, the subsequent interaction that occurs after judicial review is often ignored. When trying to understand Court-Congress relations, it is important to note that Congress *often overrides Court decisions that hold federal laws unconstitutional*. This post-judicial review activity is an increasingly important component to maintaining equilibrium between judicial and legislative powers.

From a historical perspective, the Court rarely rules against Congress. For example, from 1803-2010 the Supreme Court de-

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[1] Lawrence Baum & Lori Hausegger, *The Supreme Court and Congress: Reconsidering the Relationship*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 107 (Mark C. Miller & Jeb Barnes eds., 2004).

clared just 167 acts of Congress unconstitutional – an average of less than one per year.[2] With so few examples, it is not surprising that few quantitative studies have examined Congress's rate of response to these decisions. However, this type of interaction between the two branches has rapidly increased. Nearly 60 percent of all federal laws struck down by the Court have occurred in the last fifty years. The Rehnquist Court alone is responsible for nearly 25 percent of all nullified federal laws.[3] Understandably, the rapid acceleration in judicial activity has renewed fears of an imperial judiciary. These fears, however, are based partly on the incorrect assumption that the complex process of policy development suddenly ends with judicial review. Surprisingly, this recent flurry of Court activity has not spurred increased quantitative scholarship into the area of congressional overrides of constitutional-interpretation decisions. The results of this study indicate that *as the Court has become more active in striking down congressional acts, Congress has increasingly resorted to overriding these decisions.* In fact, this study illustrates that 29.3 percent of the congressional acts struck down by the Rehnquist Court were later overridden (at least in part) by future congressional legislation. This is a significantly higher percentage of overrides than found in previous studies examining constitutional-interpretation overrides. These results indicate that increased judicial activity nullifying federal law is suggestive of changing trends in Court-Congress relations rather than a sign of judicial finality. Indeed, this Article argues that judicial finality – the theory that the Supreme Court has the final word in constitutional interpretation – is incorrect. Congress and the Court interact in the policy making process even after judicial

[2] THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2008 SUPPLEMENT, S. Doc. No. 110-17, at 163-4 (2008), *available at* www.gpoaccess.gov/constitution/browse2002.html#04supp; THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION OF THE CONSTITUTION ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES, S. Doc. No. 108-17, at 2117-59 (2002), *available at* www.gpoaccess.gov/constitution/pdf2002/046.pdf. The Supreme Court Database: 2006-2010 Cases Declaring Federal Laws Unconstitutional, scdb.wustl.edu/analysisCaseListing.php?sid=1102-TICTAC-5332 (last visited July 29, 2011).

[3] *See Analysis Case Listing*, THE SUPREME COURT DATABASE, scdb.wustl.edu/analysisCaseListing.php?sid=1102-TICTAC-5332 (last visited July 29, 2011).

review. The increase in post judicial review activity shows that equilibrium in Court-Congress relations is still being maintained, however, this maintenance emanates from a process that is different from the one that occurred in previous decades.

This Article begins by examining some theories of Court-Congress relations. I argue that theories of judicial finality, the countermajoritarian nature of the Court, and "rational choice," as well as studies on court-curbing and decision reversals would all benefit from considering more fully constitutional-interpretation overrides. Since judicial review and constitutional-interpretation overrides are becoming increasingly common, the lack of study in this area limits understanding of modern Court-Congress relations. To assist scholarship in this area, this study generates a dataset of all congressional acts nullified by the Rehnquist Court based on constitutional grounds (Appendix I). This dataset is then compared with the frequency of nullified federal law between the Rehnquist, Brennan, and Warren Courts to identify emerging trends. The dataset is also examined for the presence of congressional overrides to Rehnquist Court decisions overturning federal law. Finally, the resulting data is used to further the dialogue regarding current Court-Congress theories and assist in understanding the changing nature of the Court-Congress relationship.

II.
EXPLORING SOME THEORIES ON COURT-CONGRESS RELATIONS

A.
Judicial Finality and the Countermajoritarian Dilemma

The Court's ability to rule congressional acts unconstitutional has led to claims of judicial supremacy or judicial finality. Supreme Court Justice Robert Jackson articulated this view when he declared "we are infallible only because we are final."[4] Chief Justice Charles Hughes also expressed this sentiment when he claimed "the Consti-

[4] Brown v. Allen, 344 U.S. 443 (1953).

tution is what the judges say it is."[5] Scholars Walter Murphy and C. Herman Pritchett wrote in 1961 that the "Courts are protected by their magic."[6] In Murphy and Pritchett's view, this "magic" essentially made Court decisions final, despite Congress's constitutional powers over the Courts. Modern scholarly advocates of judicial supremacy make claims ranging from normative arguments that judicial supremacy should exist, to empirical based observations that judicial review is the most important step in interpreting the Constitution.[7] In 2004, a longtime judicial affairs correspondent for the New York Times, Linda Greenhouse, argued that the Court's frequency in overturning acts of Congress in recent years empirically supports the existence of judicial finality.[8]

As Alexander Bickel described in *The Least Dangerous Branch*, there is a potential "countermajoritarian dilemma" posed by unelected judges wielding final interpretation of the Constitution.[9] Scholars contemplating this dilemma muse that the will of the majority, as represented through Congress, can be frustrated by an unelected Court overturning federal law.[10] Students of the US system of separated powers have long explored solutions to the countermajoritarian dilemma. Alexander Hamilton, in Federalist 78, famously penned there was little to fear from the "least dangerous"

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[5] Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1387 (1998).

[6] WALTER MURPHY ET AL., COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 554-55 (6th ed. 2005).

[7] Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 518 (1981); Alexander & Schauer, *supra* note 5, at 1387; John Marini, *The Political Conditions of Legislative-Bureaucratic Supremacy*, www.claremont.org/publications/pageid.2592/default.asp ("Judicial Review has given way to judicial supremacy.").

[8] Linda Greenhouse, *"Because We are Final" Judicial Review Two Hundred Years After* Marbury, 148 AM. PHILOSOPHICAL SOCIETY 38, 52 (2004).

[9] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1986).

[10] Scholars point out that countermajoritarian dilemma holds true even if the majority will is frustrated to ensure protection of individual and minority rights. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. OF PUBLIC LAW 279, 283 (1957) ("[T]o affirm that the Court supports minority preferences against majorities is to deny that popular sovereignty and political equality, at least in the traditional sense, exist in the United States; and to affirm that the Court *ought* to act in this way is to deny that popular sovereignty and political equality *ought* to prevail in this country.").

branch; he denied that judicial review implied a superiority of judicial over legislative power. James Madison stated in Federalist 51 that the legislative branch necessarily predominates in a republican government. Abraham Lincoln argued the solution to the dilemma was inherent in Congress's authority as independent interpreter of the Constitution; he denied the *Scott v. Sanford* decision was binding on future congressional actions.[11]

B. Congressional Checks on the Court's Power

Modern scholars continue to envision resolutions to the countermajoritarian ramifications posed by judicial finality. In 1957 Robert Dahl argued the judicial appointment process largely constrained the anti-majoritarian nature of the Court.[12] Dahl observed that a new justice was, on average, appointed every twenty-two months; therefore, a president could expect to appoint two new justices each term. For Dahl this indicated – except for a certain lag time – the Court would typically remain in line with national majorities.[13] Dahl's theory could partially explain why the Court rarely rules against Congress, but it does not directly answer what happens when the Court does. Additionally, if Dahl's theory is correct, we should expect to see increased judicial activity striking down acts of Congress as the justices' terms (and therefore the lag time between appointments) increase. In the absence of other congressional checks on the Court, longer terms would equate to increased judicial power.

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[11] Lincoln's First Inaugural Address March 4, 1861, *available at* avalon.law.yale.edu/19th_century/lincoln1.asp ("[I]f the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers.").

[12] Dahl, *supra* note 10, at 285.

[13] Dahl further backs up his argument that the Court is rarely countermajoritarian for long by using the example of Roosevelt and the New Deal hostilities over the Court rulings. Based on a new justice being appointed every twenty-two months, it stands that "[g]eneralizing over the whole history of the Court, the chances are about one out of five that a president will make one appointment to the Court in less than a year, better than one out of two that he will make one within two years, and three out of four that he will make one within three years. Mr. Roosevelt had unusually bad luck: he had to wait four years for his first appointment; the odds against this long an interval are four to one. With average luck, the battle with the Court would never have occurred." *Id.*

In the decades following Dahl's article, a handful of empirical studies highlighted Congress's ability to check the Court outside of the appointment process.[14] Often congressional checks on the Court are broken into two categories – Court curbing or decision reversals/congressional overrides. Court curbing is defined as congressional legislation that attempts to alter "the structure or functioning of the Supreme Court as an institution."[15] These types of actions may include the creation of new judgeships, shaping the jurisdiction and procedures of the courts, controlling compensation and appropriation, passing laws affecting sentencing, or requiring constitutional interpretation to have super majorities.[16] Thus, Court curbing actions are aimed at the institution, whereas decision reversals attempt to "modify the legal result or impact . . . of a specific Supreme Court decision."[17]

The judicial appointment process, combined with the ability of Congress to enact decision reversals, and Court curbing measures are often used to explain why the Court rarely rules against Con-

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[14] *See* Harry P. Stumpf, *Congressional response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377, 95 (1965); Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441, 458 (1983); William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L. J. 331, 455 (1991); Lori Hausegger & Lawrence Baum, *Behind the Scenes: The Supreme Court and Congress in Statutory Interpretation*, *in* GREAT THEATRE: THE AMERICAN CONGRESS IN THE 1990S 224-247, (Herbert F. Weisberg & Samuel C. Patterson, eds. 1998); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMPLE L. REV. 425, 458 (1992); Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEG. STUDIES Q. 5, 28 (2005); Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353, 371 (1994); Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729, 750 (1991).

[15] Stumpf, *supra* note 14, at 382. Stumpf's definition has been used by several other studies focused on congressional overrides. Court curbing research has explored the variety of ways that Congress can check the powers of the courts. *See* Ignagni & Meernik, *supra* note 14 at 371. Some of the studies in the area of court curbing have focused on studying a specific check, such as jurisdiction stripping. See for example Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 922 (1984).

[16] COLTON C. CAMPBELL & JOHN F. STACK JR., CONGRESS CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING 2 (2001); Stumpf, *supra* note 14, at 382.

[17] Stumpf, *supra* note 14, at 382.

gress. As noted earlier, there have only been 167 acts of Congress struck down by the Court from 1803-2010. This works out to an average of only 0.81 acts of Congress nullified per year.[18] However, the existence of congressional checks, which remains consistent throughout time, fails to explain why some time periods experience increased examples of overturned federal law, or how often these checks are employed. Dahl's "lag-time" theory and the necessity of congressional majorities to check the judicial branch probably help explain that the use of Court curbing measures and overrides are a product of certain conditions, not the mere existence of formalized powers.

Most Court checking literature claims that Court curbing actions are incredibly rare. This literature, with notable exceptions, cites decision reversals as the most common and effective means for Congress to check the Court.[19] There have been a handful of empirical studies focused on decision reversals. Some of these studies used quantitative analysis to detail both the frequency of successful overrides and the conditions most likely to produce them. These studies almost universally conclude that the vast majority of cases decided by the Court would not be overridden by Congress, although Congress monitors the Court closely. They also conclude that congressional responses to Court decisions are far from rare.[20]

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[18] *See supra*, note 2. Some scholars argue that even this number is misleadingly high because many congressional acts struck down by the Court were enacted decades before the current Congress. Thus, the sitting Congress may have little support for the laws struck down by the Court – in fact Congress may even support the Court's use of judicial review to strip away laws the current majority disagrees with. This argument almost transforms the majority of Court nullifications of federal law into actions to implement Congress's will.

[19] RICHARD ALLEN PASCHAL, THE CONTINUING COLLOQUY (1992); Beth M. Henshen and Edward I. Sidlow, *The Supreme Court and the Congressional Agenda-Setting Process*, 5 J. L. & POL. 685 (1989); LAWRENCE BAUM, THE SUPREME COURT 202-08 (10th ed., 2010), all make a similar observation that Congress can use statutes to modify the Courts constitutional interpretations. For an opposing view see Tom Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 989 (2009). Clark argues that years that see more court curbing threats have been followed by years of decreased usage of judicial review of federal laws.

[20] *See* Eskridge, *supra* note 14, at 455; Hausegger & Baum, *supra* note 14, at 247; Solimine & Walker, *supra* note 14, at 458; Mikva & Bleich, *supra* note 14, 750. For an opposing view see Hettinger & Zorn, *supra* note 14, at 28.

William Eskridge's 1991 article "Overriding Supreme Court Statutory Interpretation Decisions," is arguably the most influential of this new collection of studies. In his article, Eskridge points out that from 1967-1990 an average of ten statutory decisions per Congress[21] were overridden. Eskridge's study, and most similar studies that followed, placed the percentage of Supreme Court statutory rulings[22] successfully overridden by Congress at between 2 and 7 percent.[23] These low percentages of successful overrides indicate that in the vast majority of cases, Congress would not override the Court – an important conclusion for developing theories on Court-Congress relations. One of the most recent studies following-up on Eskridge's work was conducted by election law expert Richard Hasen. Hasen noted that in the most recent years (2001-2012) there were a decreasing number of statutory overrides. Whereas from 1975-1990 Congress overrode six statutory cases per year, that number has decreased to less than 1.4 after 2000. Hasen surmises that this trend could indicate that the "dialogue model" of Court-Congress relations has broken down with the advent of increased congressional partisanship.[24] As

[21] "Congress" in this context includes the two one-year terms that each elected "Congress" serves.

[22] Statutory rulings rely on interpreting the words in a statute to determine the outcome of a case. For example if a statute limits the amount of damage awards "up to $10,000 for non-serious offences" the Court might have to interpret if a particular action falls under the category of "non-serious," thus falling under the $10,000 limit. If Congress disagrees with the outcome in a statutory interpretation case Congress can simply rewrite the statue to make its intent more clear, thus overriding the Court decision and preventing future Court decisions from having the same result. In constitutional interpretation cases the Court is interpreting the language of the Constitution to see if the statue itself is an allowable exercise of congressional power.

[23] Eskridge, *supra* note 14, at 338. After Eskridge's study several others explicitly used variations of his dataset and definitions while adding a few unique variables; not surprisingly many of the studies came to similar conclusions. Hausegger & Baum, *supra* note 14, at 228 use Eskridge's definition of "override" and concluded 5.6 percent of cases were overridden. Solimine and Walker concluded that 2.7 percent of the Supreme Court statutory cases that fit their study were successfully overridden, Solimine & Walker, *supra* note 14, at 458; and Hettinger and Zorn, concluded 6.9 percent of the cases they analyzed were overridden, Hettinger & Zorn, *supra* note 14, at 28. Notably, the differences in percentages between the studies likely stems from the fact that counting overrides is a difficult task. Indeed, the authors of the above-referenced studies acknowledge that fact and the likelihood that some overrides probably escaped their observation.

[24] Rick Hasen, *Scholarship highlight: End of the Supreme Court-Congress dialogue?*, SCO-

important as Eskridge's, Hasen's, and other similar studies are, their focus on overrides to statutory-interpretation decisions gives an incomplete picture of Court-Congress relations. Without exploring the differences between statutory and constitutional-inter-pretation overrides, resulting theories are incomplete.

C. Rational Choice Perspective & Strategic Interpretation

Starting in the 1990s a cadre of scholars explored Court-Congress relations from a rational choice perspective.[25] This perspective argued that justices and members of Congress act to maximize their policy preferences. Based on this premise, rational choice scholars argued justices resist basing a decision purely on their policy preferences for fear of provoking a congressional response – a response that could potentially push policy further from the justices' preferences. Therefore, rational choice scholars argue the Court's interpretation would be strategically positioned to prevent congressional overrides. This theory is partially supported by the relatively small percentage of successful overrides of statutory decisions. In the end most rational choice studies argue: when the Court does not want to be overridden, it rarely is.[26]

There are two important limitations to the rational choice approach when developing a theory of Court-Congress relations. One, if the Court is rarely overridden it becomes a re-argument of judicial finality. As long as the justices are competent at analyzing the preferences of other political actors they can avoid overrides when they choose. Thus, in most instances judicial decisions would be final. This points to the second major problem with rational choice perspectives on congressional-judicial relations; it often reduces the Court-

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TUSBLOG (Jan. 29, 2013, 4:23 PM), www.scotusblog.com/2013/01/scholarship-highlight-end-of-the-supreme-court-congress-dialogue/.

[25] *See, e.g.*, Lee Epstein, Jack Knight, & Andrew D. Martin, *Constitutional Interpretation from a Strategic Perspective*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 170-188 (Mark C. Miller & Jeb Barnes, eds. 2004). Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503, 521 (1996).

[26] Hausegger & Baum, *supra* note 14 at 122. Further, some of these studies argue that the few overrides that do occur, occur because of the Court's desire, or its "invitations," to be overridden.

Congress game to a two-step process – a process that starts with the Court interpreting a statute and ends with Congress debating an override. Rational choice models are often built with the assumption that the Court will never get another chance to interpret an override, so the dialogue between the branches suddenly stops.[27] Like all models, rational choice theory simplifies reality to help explain reality. However, some components of the Court-Congress relationship might be so distorted by rational choice models that the distortion makes them counterproductive. The examination of constitutional-interpretation overrides helps expose some of these distortions.

D. Lack of Study of Constitutional-Interpretation Overrides

There are important differences between constitutional and statutory interpretation. In a statutory decision, for example, the power is presumed to be with Congress.[28] In a constitutional decision, it is often assumed that unless Congress works to amend the Constitution there is little it can do. Exemplifying this point is Justice Harlan's observation that: "Congress may not by fiat overturn the constitutional decisions of this Court."[29] More recently, Chief Justice Rehnquist stated that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."[30] Given that the Court rarely overrules its precedent, and constitutional amendments are even rarer, there is an implication of judicial finality with constitutional-interpretation-decisions. The likelihood of congressional overrides to constitutional-interpretation-decisions could help accept or reject judicial finality.

Some case studies of Court-Congress relations have taken pains to show that even in instances of constitutional interpretation, congressional overrides do occur. For example, in Richard A. Paschal's

[27] If the Court has a policy preference it could be argued that the Court will base its initial decision on its most preferred outcome and if the decisions is overridden the court could overrule the new statute based on a strategic model. One is as able to start their assumptions here as with the assumptions inherent in rational choice modeling.

[28] *Id*. The authors state there is "clear legal and political superiority of Congress over the Court in statutory interpretation; the Court is the weaker partner in the relationship."

[29] Gidden Co. v. Zdanok, 370 U.S. 530, 541 (1962), *quoted in* Paschal, *supra* note 19, at 148.

[30] Dickerson v. United States, 530 U.S. 438 (2000).

oft cited article, "The Continuing Colloquy: Congress and the Finality of the Supreme Court," he states that statutes can change the "political or economic effects of the Court's opinions" even when the opinions are based on constitutional interpretation.[31] Like Paschal, other researchers have included case studies of constitutional-interpretation overrides in their works.[32] Louis Fisher in "Judicial Finality or an Ongoing Colloquy?" explores hot button social issues such as the death penalty, abortion, the right to die, and gay rights to provide examples of how the Court's exercise of judicial review is neither final nor definitive.[33] These case studies provide important examples of congressional responses to the Court's constitutional interpretation, proving they can and do happen. However, these case studies do not give a sense of how often overrides occur in constitutional interpretation cases. Thus, it is an open question as to whether these examples are common or rare exceptions. Without quantitative studies to complement these qualitative ones, judicial finality could be assumed to exist in most instances of constitutional interpretation.

Judicial finality, the countermajoritarian nature of the Court, and rational choice theories are all easier to justify if constitutional-interpretation overrides occur as rarely (or even less often, as many assume) as statutory interpretation overrides. The few studies focused on constitutional-interpretation overrides indicate, however, the exact opposite: *Constitutional-interpretation overrides occur more frequently than overrides to statutory interpretation decisions.*[34]

Robert Dahl's "Decision-Making in a Democracy" included a survey of certain constitutional interpretation cases from 1789-1957. He focused on Supreme Court decisions holding "major legislation" unconstitutional, within four years of enactment.[35] Of the

[31] Paschal, *supra* note 19, at 210. Henschen & Sidlow, *supra* note 19, at 687 makes a similar observation that Congress can use statutes to modify the Court's constitutional objections.
[32] Louis Fisher, *Judicial Finality or an Ongoing Colloquy?*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 153-69 (Mark C. Miller & Jeb Barnes, eds. 2004); Louis Fisher, *Congressional Checks on the Judiciary*, *in* Congress Confronts the Court 21-35 (Colton C. Campbell & John F. Stack Jr., eds. 2001); Baum, *supra* note 19, at 209.
[33] Fisher, *supra* note 32, at 169.
[34] Two of these studies are discussed in the following paragraphs.
[35] This limited the dataset from seventy-eight cases to thirty-eight.

thirty-eight cases that fit such criteria, Dahl noted that 50 percent were reversed by Congress.[36] This figure is several times higher than what statutory studies have shown.[37] However, since Dahl carefully selected cases holding "major-legislation" unconstitutional, it is hard to know how representative his results are of the entire universe of cases where overrides were possible. In 1994, Ignagni and Meernik completed a rare quantitative study purely focused on constitutional-interpretation overrides that examined all overrides based on constitutional interpretation from 1954-1990.[38] Ignagni and Meernik found that 20 percent of Supreme Court cases nullifying federal laws were later modified by Congress.[39] Again, the results of a constitutional-interpretation-override study deviated substantially from the results of statutory override studies. The results from these two studies, and the few like them, imply a rejection of judicial finality in constitutional interpretation cases, and they also challenge the notion that Congress has an easier time of overriding statutory interpretation cases. Additionally, these studies also contest the rational choice claim that justices have the desire or competency to avoid overrides.

The most important implications of the studies above: *theories of Court-Congress relations that ignore post-judicial review interactions, or theories based solely on statutory interpretation decisions, are incomplete.* Likewise, arguments claiming the Court rarely exercises judicial review ignore the increasing examples of congressional acts being struck down by the Court and fail to account for potential explana-

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[36] Dahl, *supra* note 10, at 290.

[37] Part of the increased percentage could be attributed to him only looking at the cases most likely to be reversed. However, even if all seventy-eight cases of the Court ruling an act of Congress unconstitutional were included and there was not another example of a reversal, a reversal rate of 24 percent would still exist, which is four times higher than the results of most statutory studies.

[38] Ignagni & Meernik, *supra* note 14, at 353-71.

[39] They cite Congress responding to 29 percent and reversing 20 percent of Supreme Court cases that ruled acts of Congress unconstitutional from 1954 to 1990. These numbers are much more similar to Dahl's than to statutory studies. J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004), notes that from 1954-1997 that 48 percent of the time Congress acted to restore policies that the Court had invalidated. Despite using very similar years to Ignagni and Meernik, Pickerill achieves a different response rate because he uses different criteria to count "responses."

tions for this change. If Congress regularly overrides constitutional-interpretation-decisions of the Court, then the Court is neither final nor supreme.

III.
SURVEY METHODOLOGY

The U.S. Government Printing Office maintains a list of "Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States."[40] This list was examined for all acts of Congress nullified during the Rehnquist Court (1986-2005). This examination generated a dataset of Court cases eligible for congressional overrides (*see* Appendix I). Using that dataset, this study first compares the rate of nullification of federal law during the Rehnquist Court with the frequency under the Burger and Warren Courts, as well as the rate throughout the Court's entire history. After comparing rates of nullification of federal law for each of the Courts, the analysis shifts to examine the congressional overrides for all acts of Congress that were struck down during the Rehnquist Court. All cases from this dataset were entered into GPO Access' new Federal Digital System database, FDSYS.[41] Using the "advanced search" function, all cases were checked for their appearance in "Congressional Bills," "Congressional Record," "History of Bills," and "Congressional Hearings." Each match was examined for bills intentionally introduced to respond to a Supreme Court case. Each identified bill number was then searched in the Library of Congress's database[42] to establish the bill's legislative history.[43]

By focusing on the Rehnquist Court, this study accomplishes two goals. First, it establishes 2005 as the cutoff date, providing Congress seven years to register a response. A more contemporary cutoff date would fail to provide Congress sufficient time to respond, causing missed overrides. Second, such a study is the first of its kind, i.e., a

[40] *See supra* note 2.

[41] U.S. GOVERNMENT PRINTING OFFICE, www.gpo.gov/fdsys/ (last visited Aug. 22, 2013).

[42] *THOMAS*, THE LIBRARY OF CONGRESS, thomas.loc.gov (last visited Aug. 22, 2013).

[43] It is expected that accidental overrides, legislation that was not primarily intended to override the Supreme Court, but still does, will be missed using this method. This is appropriate as the focus of the study is Congress being able to pass overrides when it intends.

quantitative analysis of congressional overrides for the entirety of the Rehnquist Court.[44] Focusing exclusively on the Rehnquist Court provides a dataset that can be used for comparison purposes. The comparison between the three Courts can then be used to identify current trends in Court-Congress relations that can assist in understanding the modern relationship between the two branches of government.

IV.
SURVEY RESULTS

A. Frequency of Judicial Review

Table 1: Average Number of Acts of Congress Nullified by the Supreme Court Per Year

Court	Years of Court	Acts Nullified	Acts Per Year
Warren	(1954-1969) 16 years	20	1.25
Burger	(1969-1986) 17 years	32	1.88
Rehnquist	(1986-2005) 19 years	41	2.16

Sources: U.S. Senate, The Constitution: Analysis and Interpretation 2008 Supplement, 163-64; U.S. Senate, The Constitution: Acts of Congress Held Unconstitutional 2002, 2117-2159.

Table 2: Average Number of Acts of Congress Nullified by the Supreme Court Per Year

Period	Acts Nullified	Acts Per Year
1803-1953 (151 years)	66	.44
1803-2010 (208 years)	167	.81
1954-2010 (57 years)	101	1.77

Sources: U.S. Senate, The Constitution: Analysis and Interpretation 2008 Supplement, 163-64; U.S. Senate, The Constitution: Acts of Congress Held Unconstitutional 2002, 2117-2159.

As shown in the tables above, the Rehnquist Court, compared with the two preceding it, nullified federal law more frequently. From 1986 to 2005, the Rehnquist Court struck down an average of 2.16 federal laws per year. The Burger Court nullified federal laws at a rate of 1.88 per year; whereas, the Warren Court did so at 1.25 per year (see table 1). The Court's overall average of nullifying federal

[44] Two previous studies looked at the first part of the Rehnquist Court but combined those years with the Warren and Burger Courts. Ignagni & Meernik, *supra* note 14, looks at 1954-1990 and Pickerill, *supra* note 39, looks at 1954-1997.

laws since *Marbury v. Madison* (1803) is less than one per year at .81. Before the four most recent Courts, the average number of congressional acts nullified per year was only .44 (see table 2). This indicates that the Warren Court struck down federal laws at nearly three times the Court's pre-1953 rate, the Burger Court at nearly four times that rate, and the Rehnquist Court at nearly five times that rate.

Table 3: Number of Acts of Congress Nullified by the Supreme Court, 1790-2008

Period	Number		Period	Number		Period	Number
1790-1799	0		1870-1879	7		1950-1959	5
1800-1809	1		1880-1889	4		1960-1969	16
1810-1819	0		1890-1899	5		1970-1979	20
1820-1829	0		1900-1909	9		1980-1989	16
1830-1839	0		1910-1919	6		1990-1999	23
1840-1849	0		1920-1929	15		2000-2010	20
1850-1859	1		1930-1939	13			
1860-1869	4		1940-1949	2		Total:	167

Sources: U.S. Senate, The Constitution: Analysis and Interpretation 2008 Supplement, 163-64; U.S. Senate, The Constitution: Acts of Congress Held Unconstitutional 2002, 2117-2159; The Supreme Court Database: 2006-2010 Cases Declaring Federal Laws Unconstitutional, SCDB, scdb.wustl.edu/analysisCaseListing.php?sid=1102-TICTAC-5332 (last visited July 29, 2011).

This rate of activity can be further broken down by decade. The period of 1990 to 1999 had the most federal laws stricken in a single decade with twenty-three (see table 3). Zeroing in on the eight-year period from 1995-2002, there were thirty-one federal laws invalidated by the Court – by far the most of any eight-year period. During these eight years, the Court struck down a record of 3.9 federal laws per year. This is a significantly higher rate compared to historic periods of turmoil between the Court and Congress. For example, from 1930 to 1939 only thirteen federal laws were nullified. The period from 1918 to 1936 – often seen as a time of some of the greatest conflict between the Court and Congress – saw twenty-nine federal laws overturned. This equates to 1.5 federal laws struck down per year, a rate lower than either the Burger or Rehnquist Courts. [45]

[45] *See supra* note 2.

B. Overruling Recently Enacted Federal Law

Table 4: Number of Years from Adopted Legislation to Court Nullification

Court	Nullified Acts	1-5 years	6-10	11-15	16 plus
Warren	21	2 (10.5%)	4	8	7 (33%)
Burger	32	11 (34%)	4	4	13 (41%)
Rehnquist	41	16 (39%)	9	5	11 (27%)

Sources: U.S. Senate, The Constitution: Analysis and Interpretation 2008 Supplement, 163-64; U.S. Senate, The Constitution: Acts of Congress Held Unconstitutional 2002, 2117-2159.

When evaluating the level of conflict between the two branches, the age of the legislation is relevant. It is often theorized that the Court is more willing to strike down older congressional legislation – giving deference to recently enacted laws.[46] This is justified on the basis that legislation passed by previous Congresses may no longer be supported by the current majority. Thus, it is thought, the Court is less likely to nullify laws recently adopted by Congress. The activity of the Rehnquist Court directly challenges this notion. Of the forty-one congressional acts struck down by the Rehnquist Court, 39 percent were adopted less than five years previously – only 27 percent were adopted more than fifteen years before the Court struck them down. This is in sharp contrast to the Warren Court where only 10.5 percent were recent acts of Congress with 33 percent adopted sixteen or more years before. Likewise, the Burger Court was more likely to strike down federal laws passed sixteen or more years before issuing its decisions, versus the laws enacted within five years of the Court writing its opinion. (see table 4). *Thus, the Rehnquist Court not only struck down more acts of Congress than any in history, it was far more likely than the two preceding Courts to strike down laws recently enacted by Congress.*

[46] *See, e.g.*, Dahl, *supra* note 10, at 290; Eskridge, *supra* note 14, at 455; Hettinger & Zorn, *supra* note 14, at 28; Ignagni & Meernik, *supra* note 14, at 371; Mikva & Bleich, *supra* note 14, at 750.

C. The Role of Judicial Appointments in Maintaining Equilibrium In Court-Congress Relations

Table 5: Average Length of Supreme Court Justices' Terms Appointed After a Particular Decade Excluding Those Yet to Retire

	Number appointed	Average term length
1940	24	16.6 years
1950	16	20.3 years
1960	11	20.1 years
1970	6	25.17 years

Source: www.supremecourt.gov/about/members_text.aspx

In 1957 Dahl observed that on average, throughout the history of the Court, a new justice was appointed every twenty-two months. Based on this rate of turnover Dahl viewed President Roosevelt's four year wait to appoint his first justice as unusually bad luck – the odds were four to one against such a long interval. For Dahl, this extended and unlikely interval helped explain the 1930s rift between the elected and appointed branches of the federal government.[47] A thorough examination of Supreme Court justices' terms over the last fifty years shows President Roosevelt's "bad luck" is now the norm. The average term for all justices appointed since 1940 is 16.6 years (see table 5). This is a similar term length to what Dahl observed from the beginning of the Court until 1957.[48] If the average term is examined for justices appointed after 1950, the average jumps to 20.3 years. This trend is even more pronounced when looking at all justices appointed since 1970; the average Supreme Court term since 1970 is 25.17 years.[49]

Since 1970 a new Supreme Court justice has been appointed, on average, every thirty-three and a half months. This is a 50 percent increase in the average from the first 167 years of the Court, when

[47] Dahl, *supra* note 10, at 85.
[48] Dividing 16.6 years by 9 (the number on the Court) equals 1.84 years or 22.1 months.
[49] *See supra* Table 5.

Dahl made his observations.[50] This increase in justices' terms provides the Congress and the President fewer opportunities to control the Court through the appointment process. The "lag time," or the interval of time Dahl described before current majorities could reshape the Court, is now significantly longer. Based on Dahl's theory, this should lead to a Court that is more often out of touch with current majorities in Congress. If Dahl's theory – that the appointment process is part of what reduced the likelihood the Court would rule against Congress – has any validity, then a significant increase in justices' terms would alter Court-Congress relations.

D. Congressional Overrides

During the Rehnquist Court, justices served longer terms and struck down more federal laws than anytime during the Court's history. As noted above, these longer terms provide Congress and the President fewer opportunities to control the Court through the appointment process. Perhaps not surprisingly, as members of the Court are less tied to national majorities through the appointment process, the Court has increasingly nullified federal laws. This is a significant reorganization in Court-Congress relations from what Dahl observed, and this striking change has renewed fears of judicial supremacy. Despite these trepidations, such trends may not indicate judicial supremacy; instead, these trends may indicate a new model for maintaining equilibrium between the Court and Congress: constitutional-interpretation overrides.

The "continuing dialogue" model asserts the Supreme Court does not have the final word in interpreting the Constitution; under this model the Court engages in "dialogues" with other political actors to shape constitutional interpretation. If the Court is being more assertive in striking down acts of Congress based on the justices' interpretation of the Constitution, then a logical conclusion under the "continuing dialogues" model is that Congress will respond to these

[50] Strikingly, the eleven-year period from 1994-2005 did not see a single new justice placed on the Court; the first time this has occurred since there have been nine members of the Supreme Court.

decisions and try to modify them. This in fact seems to be the case. Of the forty-one federal laws overruled during the Rehnquist Court, twelve were overridden by Congress. This represents 29.3 percent of all constitutional cases eligible for an override. This is an almost 10 percent higher rate (or a 50 percent increase in the percentage of overrides) than found in Joseph Ignagni's and James Meernik's study of constitutional-interpretation overrides from 1954-1990 (which includes the first five years of the Rehnquist Court).[51] This seems to indicate that *as the Court became more active, so did Congress.* In nearly one out of three cases, when the Rehnquist Court struck down a federal law on constitutional grounds, Congress did not accept this as the final word. Instead, Congress continued the constitutional dialogue.

The number of successful overrides during the Rehnquist Court highlights only part of post judicial review interaction between the Court and Congress. In addition to the twelve successful overrides, two additional override bills passed one chamber of Congress and another three bills died in committee (but even these unsuccessful attempts managed to attract a dozen or more co-sponsors). These unsuccessful override attempts indicate that congressional support to override the Court goes beyond the twelve that were successful. In fact, of the forty-one federal laws nullified by the Rehnquist Court only fourteen failed to generate an override bill.[52] Thus, even in cases where override legislation failed to become law, Congress was expending valuable time and effort on trying to override Court decisions. While some scholars may argue the Court possesses judicial finality over constitutional interpretation, numerous members of Congress seemed unwilling to agree.

During the Rehnquist Court, judicial review of federal law sparked a dialogue between the branches that went beyond override attempts. The Congressional Record shows that members of Congress cited almost all Rehnquist Court decisions nullifying federal

[51] Ignagni & Meernik, *supra* note 14, at 371.

[52] This is accurate as of July 2011. It is possible that in the last two years some of these fourteen decisions have seen override legislation introduced.

law.[53] In almost all forty-one cases from the dataset, Congress exhibited a familiarity with the Court's decisions and prominently cited these opinions in future legislative work.

E. Court Invitations to Congress

Some of the congressional overrides to the Rehnquist Court could best be described as responses to invitations received from the Court.[54] For example, in *Thomson v. Western States Medical Center*,[55] the Court struck down commercial speech restrictions as "more extensive than necessary to serve" the government's interest.[56] The Court's opinion did not close the door to all future commercial speech restrictions; rather, it offered boundaries for new restrictions. To describe an override in such a case as a direct attack on the Court would be overreaching. Judicial invitations indicate that not all legislative overrides, modifying the results of a Court decision, indicate hostility between the two branches. In fact, invitations and the resulting overrides may be a sign of a healthy dialogue between the two branches.

Override invitations also show the Court going beyond the role of deciding a case – or even ruling on the constitutionality of a statute. These invitations suggest the contours of future legislation. Such a process pulls the Court into the legislative realm. When Congress accepts that invitation, Congress, in a way, uses the Court as a partner in carrying out its purpose. Still, the Court does not directly draft new legislation. Instead, Congress must interpret both the Court decision overturning Congress's enacted legislation and

[53] A quick search of GPO Access' new Federal Digital System database, FDSYS, for the forty-one decisions of the Rehnquist Court nullifying federal law provides numerous examples of members of Congress giving impassioned speeches citing the nullification of federal law as examples of the Court treading on Congressional authority. Other results show Congress members citing many of these Court decisions in attempts to sway votes on new legislation, and in other cases, sponsors of bills cited how their proposed legislation was crafted to comply with Court decisions.

[54] An invitation for an override means that the Court provided Congress an option for future legislation.

[55] 535 U.S. 357 (2002).

[56] *See supra* note 2.

the Constitution to create new legislation. This process of: (1) the Court nullifying federal law with an invitation to override; (2) Congress accepting that invitation; and (3) the drafting of new legislation within those guidelines, indicates two branches sharing duties that are often defined as distinct. This seems to indicate support for Richard Neustadt's famous claim that the Constitution does not separate powers but instead creates "separate institutions sharing powers."[57]

F. Non-Invited Overrides

In some instances, the Court is overridden despite not having invited a congressional response. For example, in *Dickerson v. United States*, Rehnquist's opinion stated, "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."[58] Despite Rehnquist's admonishment, this is precisely what Congress did, and it took the Court thirty-two years to strike down Congress's override. In particular, the Court-Congress dialogue started in 1966 when the Supreme Court ruled in *Miranda v. Arizona*[59] that the accused had a right to be informed of their constitutional rights. Two years after that decision, Congress passed the Omnibus Crime Control and Safe Streets Act (OCCSSA) of 1968 which included an override of the *Miranda* decision.[60] In this instance, Congress's interpretation of the Constitution, one that directly overrode the Court's interpretation, was the final word – at least for several decades – in the Court-Congress dialogue on this topic. If Congress truly cannot legislatively supersede Court decisions, it still took the Court thirty-two years to assert its authority. Currently, the Court has the *last word,* but given the history of the dialogue between the Court and Congress is there any reason to believe that the Court's 2000 decision in *Dickerson* is the *final word* simply because the Court proclaimed it so?

Likewise, the Supreme Court's decision in *City of Boerne v. Flo-*

[57] RICHARD E NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 29 (1990).
[58] 530 U.S. 428, 437 (2000).
[59] 384 U.S. 436 (1966).
[60] *See supra* note 2.

res,[61] and the congressional override that followed, exemplify an ongoing struggle to claim superiority in defining the limits of the First Amendment's free exercise clause. This back and forth between the two branches started with the Supreme Court upholding an action by the State of Oregon government to deny unemployment benefits in *Employment Division, Department of Human Resources of Oregon v. Smith*.[62] In *Smith*, the Court stated that a law does not violate the First Amendment's free exercise clause as long as it is a "neutral law of general applicability" rather than a law specifically intended to target a particular religion.[63] In response, Congress passed the Religious Freedom Restoration Act (RFRA) of 1993 which stated that laws of general applicability – federal, state, and local – may substantially burden free exercise of religion *only* when furthering a compelling governmental interest and constituting the least restrictive means of doing so. The RFRA imposed a substantially higher burden for state legislation; many state laws that would be allowable under the *Smith* standard would be struck down under Congress's RFRA standard. But the second round of this dialogue was just the beginning. In *Boerne* the Court found the overriding statute, the RFRA, to be unconstitutional when applied to state governments. The story did not end there, however. In response to the *Boerne* ruling, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, which significantly modified the impact and reach of the *Boerne* decision.[64] The passage of the RFRA and RLUIPA shows that Congress was willing to modify Court decisions even without an invitation to do so.

The Metropolitan Washington Airports Act (MWAA) of 1986 is the beginning of another back and forth policy exchange between the Court and Congress without Congress being offered an invitation. The MWAA transferred operating control of two Washington, D.C. area airports from the Federal Government to a regional air-

[61] 521 U.S. 507 (1997).
[62] 494 U.S. 872 (1990).
[63] *Id.* at 1015-16.
[64] *Id.* at 1073-1075. Unlike the RFRA, which required religious accommodation in virtually all spheres of life, RLUIPA only applies to prisoner and land use cases. But the RLUIPA was a direct attempt to blunt the decision of *City of Boerne v. Flores*, *see supra* note 61.

port authority. However, that transfer was conditioned on the establishment of a board of review, composed of Members of Congress with veto authority over actions of the airports authority's board of directors. The Court ruled the MWAA unconstitutional because it violated separation of powers principles.[65] After the Supreme Court struck down the MWAA, Congress changed its tactics but retained its goal of controlling the operation of the airports. The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 maintained a board of review for the airports but conceded members of Congress would no longer be directly on the Board. However, the Board's members were now to be chosen from lists provided by the Speaker of the House and President pro tempore of the Senate. Most significantly, if the Airport Authority approved an action opposed by the Board of Review, the proposed action could not be implemented until Congress was provided sixty legislative days to pass a joint resolution disapproving it.[66] Congress members were no longer on the Board, but Congress was able to achieve its goals through other means. In other words, the Court nullification of federal law did not substantially affect the ultimate aims of Congress.

The cases above show that Congress is willing to pass overriding legislation even when the Court does not offer an invitation to do so. The cases also illustrate that the interaction between the Court and Congress is more complicated than the Court nullifying federal law and Congress contemplating an override – this process can sometimes go multiple rounds. This seems to pose a challenge to the notion that justices always act strategically, or at least always successfully, to avoid overrides. This process shows that judicial finality is a myth, and the process also indicates that increased judicial activi-

[65] Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 255 (1991).

[66] H.R. Rep. No. 104-596. Despite these changes, a federal court again found that the Board of Review was a congressional agent exercising significant federal power in violation of separation of power principles in *Hechinger v. Metropolitan Washington Airports Authority*, 36 F.3d 97 (D.C. Cir 1994). Thus, Congress passed the Metropolitan Washington Airports Amendments Act of 1995 which gave the president the right to appoint members of the MTAA with advice and consent of Senate, the MTAA would be reviewed by the Federal Advisory Commission of the Airports Authority.

ty nullifying federal law does not automatically signal judicial supremacy. If Congress is increasing its rate of constitutional-interpretation overrides in reaction to increased Court activity, this is a sign of Congress shifting its constraints on the Court from before-the-fact appointment controls (as described by Dahl) to after-the-fact overrides of Court decisions. While this signifies a change in Court-Congress relations, it does not signal a move towards judicial supremacy.

V.
CONCLUSION

This Article identifies and examines the forty-one acts of Congress nullified during the Rehnquist Court (see Appendix I). These forty-one federal laws represent the greatest number of federal statutes overturned in any nineteen year period in U.S. history and represent the highest rate of judicial activity striking down federal law in U.S. history. Equally noteworthy, the Rehnquist Court saw 29.3 percent of its decisions nullifying federal law overridden by Congress, a rate of successful overrides nearly 50 percent higher than seen in a previous study examining such overrides during 1954-1990 (which includes the first five years of the Rehnquist Court). Thus the Rehnquist Court displays an increase in both judicial review and congressional overrides to constitutional-interpretation-decisions. The high rates of both nullifications and overrides are indicative of a changing relationship between Congress and the Court and have important implications for testing and developing theories of judicial-congressional relations.

There are three major trends that emerge from this study: (1) Supreme Court justices are sitting for increasingly longer terms providing the president and the Senate fewer opportunities to control the Court through the appointment process; (2) the Court has been significantly more active in nullifying federal law in the last fifty years, with each of the last three Courts more active than the previous; and (3) Congress has reduced the impact of these nullifications by overriding these constitutional-interpretation-decisions at a rate that is substantially higher than previous studies identified.

The first major trend observed in this study is the increasing length of time the Supreme Court justices hold their seats. The average term for a Supreme Court justice from the beginning of the Republic until the late 1950s was 16.6 years. Term lengths have now expanded to 25.17 years. This means that on average, a Supreme Court justice appointed after 1970 serves a 50 percent longer term than a justice appointed before 1950. As the length of Supreme Court terms increase, Congress and the President have fewer opportunities to shape the Court through the appointment process. In light of this change, theories that primarily rely on the appointment process as a control on the countermajoritarian nature of the Court should be reexamined.

Since Supreme Court justices appointed after 1950 are serving longer terms, it may not be surprising that the Warren, Burger, and Rehnquist Courts were more likely than previous Courts, to strike down acts of Congress. Up until 1950, the Court only invalidated 0.44 federal laws per year. Under the Rehnquist Court, that number has increased more than fivefold to 2.16 per year. The Rehnquist Court expanded a trend that started with the Warren Court. The Warren Court struck down federal statutes at a rate three times that of the Court prior to 1953. This was followed by the Burger Court that nullified federal law at four times the pre-1953 rate. In all, the Rehnquist Court struck down forty-one federal laws, the greatest total of federal statutes overturned in any nineteen-year period. These forty-one statutes represent nearly 25 percent of all acts of Congress overturned in U.S. history. During one eight-year period, the Rehnquist Court was striking down nearly four acts of Congress a year. In 39 percent of cases where the Rehnquist Court struck down a federal law, the law had been adopted within the last five years. The actions of the Warren, Burger, and especially the Rehnquist Court, show a significant departure from the precedent of the Court rarely overruling Congress.

A third trend identified by this Article is the increased number of successful overrides to Court decisions nullifying federal law. In most instances when federal law was nullified, bills were proposed to modify the decision. In 29.3 percent of cases invalidating federal

law, during the Rehnquist Court, Congress successfully overrode the Court decision. The rate of overrides found in this study is significantly higher than the rate found in a previous study of constitutional-interpretation overrides. This rate of overrides is also significantly higher than what has been found in studies focused on statutory overrides. Obviously, the low override rates found in studies focusing on statutory interpretation decisions fail to reflect the commonality of constitutional-interpretation overrides. This may indicate – despite commonly held beliefs – that it is actually easier for Congress to override a decision based on constitutional interpretation than it is a decision based on statutory interpretation. This frequency of overrides also directly challenges the belief that the Court has the final word in interpreting the Constitution. Further, the results of this study negate the notion that Congress's only option after the Court nullifies federal law based on constitutional grounds is amending the Constitution. Clearly, Congress can, and does, simply pass statues to modify constitutional-interpretation-decisions. Indeed, a review of the above information, indicates that interactions between the Court and Congress do not end with judicial review. It also signifies that theories of Court-Congress relations that do not account for constitutional-interpretation overrides are incomplete. It is important to note that the high rate of nullifications of federal law based on constitutional grounds, and the high rate of congressional overrides, both observed during the Rehnquist Court, do not necessarily reflect hostility between the two branches. In some instances, the Court struck down acts of Congress by inviting a congressional override. This clearly supports theories that the justices do not always seek to avoid being overridden. Override invitations suggest it is too simplistic to conclude that Court action nullifying federal law, or congressional attempts to override, automatically indicate strained relations between the branches.

At the same time, it is also important to note that not all congressional overrides are based on invitations. Supreme Court justices sometimes fail to avoid uninvited overrides. If the justices are acting strategically to avoid overrides, as rational choice scholars suggest, they often miscalculate. The interactions between the

Rehnquist Court and Congress also highlight a process involving multiple rounds of constitutional interpretation. As the process in the Metropolitan Washington Airports Act and *Boerne* show, interactions between Congress and the Court can continue after the first instance of judicial review. Current rational choice models fail to diagram this level of complexity, oversimplifying the interactions of the two branches. Overall, the three trends identified in this study seem likely to continue. Therefore, they should feature prominently in future theories on Court-Congress relations.

APPENDIX I

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART DURING THE REHNQUIST COURT[67]

(* Decisions marked with an asterisk were later overridden by Congress.)

1) Act of June 19, 1934, ch. 652, 48 Stat. 1088, § 316, 18 U.S.C. § 1304.
Greater New Orleans Broadcasting Ass'n v. United States (1999) – Section 316 of the Communications Act of 1934, which prohibits radio and television broadcasters from carrying advertisements for privately operated casino gambling regardless of the station's or casino's location, violates the First Amendment's protections for commercial speech as applied to prohibit advertising of private casino gambling broadcast by stations located within a state where such gambling is illegal.

2) Act of Aug. 29, 1935, ch. 814 § 5(e), 49 Stat. 982, 27 U.S.C. § 205(e).
Rubin v. Coors Brewing Co. (1995) – The prohibition in section 5(e)(2) of the Federal Alcohol Administration Act of 1935 on the display of alcohol content on beer labels is inconsistent with the protections afforded to commercial speech by the First Amendment. The government's interest in curbing strength wars among brewers is substantial, but, given the "overall irrationality" of the regulatory scheme, the labeling prohibition does not directly and materially advance that interest.

3) Act of Feb. 15, 1938, ch. 29, 52 Stat. 30.
Boos v. Barry (1988) – District of Columbia Code § 22-1115, prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute," violates the First Amendment.

4) Act of Aug. 16, 1954, ch. 736, 68A Stat. 521, 26 U.S.C. § 4371(1).
United States v. IBM Corp. (1996) – A federal tax on insurance premiums paid to foreign insurers not subject to the federal income tax violates the Export Clause, Art. I, § 9, cl. 5, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad.

5) Act of June 19, 1968 (Pub. L. 90-351, § 701(a)), 82 Stat. 210, 18 U.S.C. § 3501.

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[67] All information regarding acts held unconstitutional was taken directly from: *The Constitution: Analysis and Interpretation 2008 Supplement*, and , *The Constitution: Acts of Congress Held Unconstitutional 2002*, *supra* note 2. All cases from this dataset were entered into GPO Access' new Federal Digital System database called FDSYS. Using the "advanced search" function, all cases were checked for their appearance in "Congressional Bills," "Congressional Record," "History of Bills," and "Congressional Hearings." Each match was examined for bills intentionally introduced to respond to a Supreme Court case. Each identified bill number was then searched in the Library of Congress's database (Thomas.loc.gov) to establish the legislative history of the bill.

Dickerson v. United States (2000) – A section of the Omnibus Crime Control and Safe Streets Act of1968 purporting to reinstate the voluntariness principle that had governed the constitutionality of custodial interrogations before the Court's decision in *Miranda v. Arizona*, 384 U.S. 486 (1966), is an invalid attempt by Congress to redefine a constitutional protection defined by the Court. The warnings to suspects required by *Miranda* are constitution-based rules. While the *Miranda* Court invited a legislative rule that would be "at least as effective" in protecting a suspect's right to remain silent, section 3501 is not an adequate substitute.

6) Act of June 19, 1968 (Pub. L. No. 90-351, § 802), 82 Stat. 213, 18 U.S.C. § 2511(c), as amended by the Act of Oct. 21, 1986 (Pub. L. No. 99-508, § 101(c) (1)(A)), 100 Stat. 1851.
Bartnicki v. Vopper (2001) – A federal prohibition on disclosure of the contents of an illegally intercepted electronic communication violates the First Amendment as applied to a talk show host and a community activist who had played no part in the illegal interception, and who had lawfully obtained tapes of the illegally intercepted cellular phone conversation. The subject matter of the disclosed conversation, involving a threat of violence in a labor dispute, was "a matter of public concern." Although the disclosure prohibition well serves the government's "important" interest in protecting private communication, in this case "privacy concerns give way when balanced against the interest in publishing matters of public importance."

7) Act of Apr. 8, 1974, Pub. L. 93-259, §§ 6(a)(6), 6(d)(1), 29 U.S.C. §§ 203(x), 216(b).
Alden v. Maine (1999) – The Fair Labor Standards Amendments of 1974 subjecting non-consenting states to suits for damages brought by employees in state courts violates the principle of sovereign immunity implicit in the constitutional scheme. Congress lacks power under Article I to subject non-consenting states to suits for damages in state courts.

8) Act of Apr. 8, 1974 (Pub. L. No. 93-259, §§ 6(d)(1), 28(a)(2)), 88 Stat. 61, 74; 29 U.S.C. §§ 216(b), 630(b).
Kimel v. Florida Bd. of Regents (2000) – The Fair Labor Standards Act Amendments of 1974, amending the Age Discrimination in Employment Act to subject states to damages actions in federal courts, exceeds congressional power under section 5 of the Fourteenth Amendment. Age is not a suspect classification under the Equal Protection Clause, and the ADEA is "so out of proportion to a remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."

9) Act of May 11, 1976 (Pub. L. 94-283, § 112(2)), 90 Stat. 489; 2 U.S.C. § 441a(d)(3).
* *Colorado Republican Campaign Comm. v. FEC (1996)* – The Party Expenditure Provision of the Federal Election Campaign Act, which limits expenditures

by a political party "in connection with the general election campaign of a [congressional] candidate," violates the First Amendment when applied to expenditures that a political party makes independently without coordination with the candidate. Congress responded with a series of bills on campaign finance. This includes the Campaign Reform and Election Integrity Act of 1998, the Campaign Reform and Citizen Participation Act of 2001, the Bipartisan Campaign Finance Reform Act of 1999, and the Bipartisan Campaign Finance Reform Act of 2002.

10) Act of May 11, 1976, Pub. L. 92-225, § 316, 90 Stat. 490, 2 U.S.C. § 441b.
* *FEC v. Massachusetts Citizens for Life, Inc. (1986)* – Provision of Federal Election Campaign Act requiring that independent corporate campaign expenditures be financed by voluntary contributions placed into a separate segregated fund violates the First Amendment as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a business corporation or union. Congress responded through the Bipartisan Campaign Reform Act of 2002.

11) Act of Oct. 19, 1976 (Pub. L. 94-553, § 101(c)), 17 U.S.C. § 504(c).
Feltner v. Columbia Pictures Television (1988) – Section 504(c) of the Copyright Act, which authorizes a copyright owner to recover statutory damages, in lieu of actual damages, "in a sum of not less than $500 or more than $20,000 as the court considers just," does not grant the right to a jury trial on the amount of statutory damages. The Seventh Amendment, however, requires a jury determination of the amount of statutory damages.

12) Act of Jan. 12, 1983 (Pub. L. 97-459, § 207), 96 Stat. 2519, 25 U.S.C. § 2206.
* *Hodel v. Irving (1987)* – Section of Indian Land Consolidation Act providing for escheat to tribe of fractionated interests in land representing less than 2% of a tract's total acreage violates the Fifth Amendment's takings clause by completely abrogating rights of intestacy and devise.

13) Act of Apr. 20, 1983, 97 Stat. 69 (Pub. L. No. 98-21 § 101(b)(1) (amending 26 U.S.C. § 3121(b)(5)).
United States v. Hatter (2001) – The 1983 extension of the Social Security tax to then-sitting judges violates the Compensation Clause of Article III, § 1. The Clause "does not prevent Congress from imposing a non-discriminatory tax laid generally upon judges and other citizens . . . , but it does prohibit taxation that singles out judges for specially unfavorable treatment." The 1983 Social Security law gave 96% of federal employees "total freedom" of choice about whether to participate in the system, and structured the system in such a way that "virtually all"" of the remaining 4% of employees – except the judges – could opt to retain existing coverage. By requiring then-sitting judges to join the Social Security System and pay Social Security taxes, the 1983 law discriminated against judges in violation of the Compensation Clause.

14) Act of Oct. 30, 1984, (Pub. L. 98-608, § 1(4)), 98 Stat. 3173, 25 U.S.C. § 2206.
* *Babbitt v. Youpee (1997)* – Section 207 of the Indian Land Consolidation Act, as amended in 1984, affects an unconstitutional taking of property without compensation by restricting a property owner's right to pass on property to his heirs. The amended section, like an earlier version held unconstitutional in *Hodel v. Irving* (1987), provides that certain small interests in Indian land will escheat to the tribe upon death of the owner. None of the changes made in 1984 cure the constitutional defect. Congress responded with the Indian Land Consolidation Act Amendments of 2000. Subsequent congressional actions include the American Indian Probate Reform Act of 2004 amending the Indian Land Consolidation Act to require interest in land, or trust, subject to applicable federal law, that is not disposed of by a valid will shall descend through a tribal probate code, and remove the limitations of inheritance by a living Indian spouse.

15) Act of Jan. 15, 1985, (Pub. L. 99-240, § 5(d)(2)(C)), 99 Stat. 1842, 42 U.S.C. §2021e(d)(2)(C).
New York v. United States (1992) – "Take-title" incentives contained in the Low-Level Radioactive Waste Policy Amendments Act of 1985, designed to encourage states to cooperate in the federal regulatory scheme, offend principles of federalism embodied in the Tenth Amendment. These incentives, which require that non-participating states take title to waste or become liable for generators' damages, cross the line distinguishing encouragement from coercion. Congress may not simply commandeer the legislative and regulatory processes of the states, nor may it force a transfer of generators to state governments. A required choice between two unconstitutionally coercive regulatory techniques is also impermissible.

16) Act of Oct. 27, 1986 (Pub. L. 99-570, § 1366), 100 Stat. 3207-35, 18 U.S.C. § 981(a)(1).
* *United States v. Bajakajian (1998)* – Statute requiring full civil forfeiture of money transported out of the United States without amounts in excess of $10,000 being reported violates the Excessive Fines Clause of the Eighth Amendment when $357,144 was required to be forfeited. Congress responded to *Bajakajian* in the USA PATRIOT Act by inserting a criminal forfeiture provision of property that it believed would constitutionally permit the full forfeiture of currency despite the Court's $10,000 limit in *Bajakajian*.

17) Act of Oct. 30, 1986 (Pub. L. 99-591, title VI, § 6007(f)), 100 Stat. 3341, 49 U.S.C. App.§ 2456(f).
* *Metropolitan Washington Airports Auth v. Citizens for Abatements of Aircraft Noise (1991)* – The Metropolitan Washington Airports Act of 1986, which transferred operating control of two Washington, D.C., area airports from the federal government to a regional airports authority, violates separation of

powers principles by conditioning that transfer on the establishment of a board of review, composed of Members of Congress and having veto authority over actions of the airports authority's board of directors. Congress responded by passing the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991. Congress members were no longer on the Board of Review, however all members were now to be chosen from lists provided by the Speaker of the House and President pro tempore of the Senate. Additionally, if the Airport Authority approved an action opposed by the Board of Review, the proposed action could not be implemented until Congress was provided sixty legislative days to pass a joint resolution disapproving it.

18) Act of Nov. 17, 1986 (Pub. L. 99-662, title IV, § 1402(a)), 26 U.S.C. §§ 4461, 4462.
United States v. United States Shoe Corp. (1998) – The Harbor Maintenance Tax (HMT) violates the Export Clause of the Constitution, Art. I, § 9, cl. 5 to the extent that the tax applies to goods loaded for export at United States ports. The HMT, which requires shippers to pay a uniform charge of 0.125% of cargo value on commercial cargo shipped through the nation's ports, is an impermissible tax rather than a permissible user fee. The value of export cargo does not correspond reliably with federal harbor services used by exporters, and the tax does not, therefore, represent compensation for services rendered.

19) Act of Apr. 28, 1988 (Pub. L. 100-297 § 6101), 102 Stat. 424, 47 U.S.C. § 223(b) (1).
* *Sable Commn'cns of Cal. v. FEC (1989)* – Amendment to Communications Act of 1934 imposing an outright ban on "indecent" but not obscene messages violates the First Amendment, since it has not been shown to be narrowly tailored to further the governmental interest in protecting minors from hearing such messages. Congress responded by passing the Helms Amendment of 1989 (P.L. 101-166), which amended section 223(b) of the Communications Act of 1934 to ban indecent dial-a-porn, if used by persons under 18. The Helms Amendment broadened the application of section 223(b) from the District of Columbia or in interstate or foreign communications, to apply to all calls within the United States.

20) Act of Oct. 17, 1988 (Pub. L. 100-497, § 11(d)(7)), 102 Stat. 2472, 25 U.S.C. § 2710(d)(7).
Seminole Tribe of Fla. v. Fla. (1996) – A provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a state in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact violates the Eleventh Amendment. In exercise of its powers under Article I, Congress may not abrogate states' Eleventh Amendment immunity from suit in federal court. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), is overruled.

21) Act of Oct. 28, 1989 (Pub. L. 101-131), 103 Stat. 777, 18 U.S.C. § 700.
United States v. Eichman (1990) – The Flag Protection Act of 1989, criminalizing burning and certain other forms of destruction of the United States flag, violates the First Amendment. Most of the prohibited acts involve disrespectful treatment of the flag, and evidence a purpose to suppress expression out of concern for its likely communicative impact.

22) Act of Nov. 30, 1989 (Pub. L. 101-194, § 601), 103 Stat. 1760, 5 U.S.C. app. § 501.
United States v. Nat'l Treasury Employees Union (1995) – Section 501(b) of the Ethics in Government Act, as amended in 1989 to prohibit Members of Congress and federal employees from accepting honoraria, violates the First Amendment as applied to Executive Branch employees below grade GS-16. The ban is limited to expressive activity and does not include other outside income, and the "speculative benefits" of the ban do not justify its "crudely crafted burden" on expression.

23) Act of July 26, 1990 (Pub. L. No. 101-336, Title I), 104 Stat. 330, 42 U.S.C. §§ 12111-12117.
Bd. of Trustees of Univ. of Ala. v. Garrett (2001) – Title I of the Americans with Disabilities Act of 1990 (ADA), exceeds congressional power to enforce the Fourteenth Amendment, and violates the Eleventh Amendment, by subjecting states to suits brought by state employees in federal courts to collect money damages for the state's failure to make reasonable accommodations for qualified individuals with disabilities. Rational basis review applies, and consequently states "are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational." The legislative record of the ADA fails to show that Congress identified a pattern of irrational state employment discrimination against the disabled. Moreover, even if a pattern of discrimination by states had been found, the ADA's remedies would run afoul of the "congruence and proportionality" limitation on Congress's exercise of enforcement power.

24) Act of Nov. 28, 1990 (Pub. L. No. 101-624, Title XIX, Subtitle B), 104 Stat. 3854, 7 U.S.C. §§ 6101 et seq.
United States v. United Foods (2001) – The Mushroom Promotion, Research, and Consumer Information Act violates the First Amendment by imposing mandatory assessments on mushroom handlers for the purpose of funding generic advertising to promote mushroom sales. The mushroom program differs "in a most fundamental respect" from the compelled assessment on fruit growers upheld in *Glickman v. Wileman Brothers & Elliott* (1997). There the mandated assessments were "ancillary to a more comprehensive program restricting marketing autonomy," while here there is "no broader regulatory system in place." The mushroom program contains no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the

antitrust laws, and nothing else that forces mushroom producers to associate as a group to make cooperative decisions. But for the assessment for advertising, the mushroom growing business is unregulated.

25) Act of Nov. 29, 1990 (Pub. L. 101-647, § 1702), 104 Stat. 4844, 18 U.S.C. § 922q.
* *United States v. Lopez (1995)* – The Gun Free School Zones Act of 1990, which makes it a criminal offense to knowingly possess a firearm within a school zone, exceeds congressional power under the Commerce Clause. It is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." Possession of a gun at or near a school "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." In response, Congress adopted the nearly identical Gun Free School Zones Amendment Act of 1995; however, in this Act Congress cited that its authority to regulate the possession of firearms on school campuses was based on the premise that firearms and their components have been moved in interstate commerce.

26) Act of Dec. 19, 1991 (Pub. L. 102-242 § 476), 105 Stat. 2387, 15 U.S.C. § 78aa-1.
Plaut v. Spendthrift Farm, Inc. (1995) – Section 27A(b) of the Securities Exchange Act of 1934, as added in 1991, requiring reinstatement of any section 10(b) actions that were dismissed as time barred subsequent to a 1991 Supreme Court decision, violates the Constitution's separation of powers to the extent that it requires federal courts to reopen final judgments in private civil actions. The provision violates a fundamental principle of Article III that the federal judicial power comprehends the authority to render dispositive judgments.

27) Act of Oct. 5, 1992 (Pub. L. 102-385, §§ 10(b) and 10(c)), 106 Stat. 1487, 1503; 47 U.S.C. § 532(j) and § 531.
* *Denver Area Educ. Tel. Consortium v. FCC (1996)* – Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, which requires cable operators to segregate and block indecent programming on leased access channels if they do not prohibit it, violates the First Amendment. Section 10(c) of the Act, which permits a cable operator to prevent transmission of "sexually explicit" programming on public access channels, also violates the First Amendment. Congressional override with S.652, the Telecommunications Act of 1996.

28) Act of Oct. 24, 1992, Title XIX, 106 Stat. 3037 (Pub. L. 102-486), 26 U.S.C. §§ 9701-9722.
Eastern Enterprises v. Apfel (1998) – The Coal Industry Retiree Health Benefit Act of 1992 is unconstitutional as applied to the petitioner Eastern Enterprises. Pursuant to the Act, the Social Security Commissioner imposed liability on Eastern for funding health care benefits of retirees from the coal indus-

try who had worked for Eastern prior to 1966. Eastern had transferred its coal-related business to a subsidiary in 1965. Four Justices viewed the imposition of liability on Eastern as a violation of the Takings Clause, and one Justice viewed it as a violation of substantive due process.

29) Act of Oct. 27, 1992, Pub. L. 102-542, 15 U.S.C. § 1122.
College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd. (1999) – The Trademark Remedy Clarification Act, which provided that states shall not be immune from suit under the Trademark Act of 1946 (Lanham Act) "under the eleventh amendment . . . or under any other doctrine of sovereign immunity," did not validly abrogate state sovereign immunity. Congress lacks power to do so in exercise of Article I powers, and the TRCA cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. The right to be free from a business competitor's false advertising is not a "property right" protected by the Due Process Clause.

30) Act of Oct. 28, 1992, 106 Stat. 4230, Pub. L. 102-560, 29 U.S.C. § 296.
Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank (1999) – The Patent and Plant Variety Remedy Clarification Act, which amended the patent laws to expressly abrogate states' sovereign immunity from patent infringement suits is invalid. Congress lacks power to abrogate state immunity in exercise of Article I powers, and the Patent Remedy Clarification Act cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. Section 5 power is remedial, yet the legislative record reveals no identified pattern of patent infringement by states and the Act's provisions are "out of proportion to a supposed remedial or preventive object."

31) Act of Nov. 16, 1993 (Pub. L. 103-141), 107 Stat. 1488, 42 U.S.C. §§ 2000bb to 2000bb-4.
* *City of Boerne v. Flores (1997)* – The Religious Freedom Restoration Act (RFRA), which directed use of the compelling interest test to determine the validity of laws of general applicability that substantially burden the free exercise of religion, exceeds congressional power under section 5 of the Fourteenth Amendment. Congress' power under Section 5 to "enforce" the Fourteenth Amendment by "appropriate legislation" does not extend to defining the substance of the Amendment's restrictions, which the RFRA appears to define. RFRA "is so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Congress responded by passing the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 employing Congress's spending power and its power over interstate commerce to apply a strict scrutiny test on state and local zoning and landmark laws and regulations which impose a substantial burden on an individual's or institution's free exercise of religion.

32) Act of Nov. 30, 1993 (Pub. L. 103-159), 107 Stat. 1536.

Printz v. United States (1997) – Interim provisions of the Brady Handgun Violence Prevention Act that require state and local law enforcement officers to conduct background checks on prospective handgun purchasers are inconsistent with the Constitution's allocation of power between federal and state governments. In *New York v. United States*, 505 U.S. 144 (1992), the Court held that Congress may not compel states to enact or enforce a federal regulatory program, and "Congress cannot circumvent that prohibition by conscripting the State's officers directly."

33) Act of Sept. 13, 1994 (Pub. L. 103-322, § 40302), 108 Stat. 1941, 42 U.S.C. § 13981.
United States v. Morrison (2000) – A provision of the Violence Against Women Act that creates a federal civil remedy for victims of gender-motivated violence exceeds congressional power under the Commerce Clause and under section 5 of the Fourteenth Amendment. The commerce power does not authorize Congress to regulate "noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." The Fourteenth Amendment prohibits only state action, and affords no protection against purely private conduct. Section 13981, however, is not aimed at the conduct of state officials, but is aimed at private conduct.

34) Act of Feb. 8, 1996, 110 Stat. 56, 133-34 (Pub. L. 104-104, title V, § 502), 47 U.S.C. §§ 223(a), 223(d).
* *Reno v. ACLU (1997)* – Two provisions of the Communications Decency Act of 1996 – one that prohibits knowing transmission on the Internet of obscene or indecent messages to any recipient under 18 years of age, and the other that prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to anyone under 18 years of age – violate the First Amendment. Congress responded by enacting the Child Online Protection Act (COPA) of 1998, which banned "material that is harmful to minors" on websites that have the objective of earning a profit.

35) Act of Feb. 8, 1996 (Pub. L. 104-104, § 505), 110 Stat. 136, 47 U.S.C. § 561.
United States v. Playboy Entm't Grp., Inc. (2000) – Section 505 of the Telecommunications Act of 1996, which required cable TV operators that offer channels primarily devoted to sexually oriented programming to prevent signal bleed either by fully scrambling those channels or by limiting their transmission to designated hours when children are less likely to be watching, violates the First Amendment. The provision is content-based, and therefore can only be upheld if narrowly tailored to promote a compelling governmental interest. The measure is not narrowly tailored, since the government did not establish that the less restrictive alternative found in section 504 of the Act – that of scrambling a channel at a subscriber's request – would be ineffective.

36) Act of Apr. 9, 1996, 110 Stat. 1200 (Pub. L. 104-130), 2 U.S.C. §§ 691 et seq.

Clinton v. City of New York (1998) – The Line Item Veto Act, which gives the President the authority to "cancel in whole" three types of provisions that have been signed into law, violates the Presentment Clause of Article I, section 7. In effect, the law grants to the President "the unilateral power to change the text of duly enacted statutes." This Line Item Veto Act authority differs in important respects from the President's constitutional authority to "return" (veto) legislation: the statutory cancellation occurs after rather than before a bill becomes law, and can apply to a part of a bill as well as the entire bill.

37) Act of Apr. 26, 1996 (Pub. L. No. 104-134 § 504(a)(16)), 110 Stat. 1321-55.

Legal Services Corp. v. Valazquez (2001) – A restriction in the appropriations act for the Legal Services Corporation (LSC) that prohibits funding for any organization that participates in litigation that challenges a federal or state welfare law constitutes viewpoint discrimination in violation of the First Amendment. Moreover, the restrictions on LSC advocacy "distort [the] usual functioning" of the judiciary, and are "inconsistent with accepted separation-of-powers principles." "An informed, independent judiciary presumes an informed, independent bar," yet the restriction "prohibits speech and expression on which courts must depend for the proper exercise of judicial power."

38) Act of Sep. 30, 1996 (Pub. L. No. 104-208, § 121), 110 Stat. 3009-26, 18 U.S.C. §§ 2252, 2256.

* *Ashcroft v. Free Speech Coalition (2002)* – Two sections of the Child Pornography Prevention Act of 1996 that extend the federal prohibition against child pornography to sexually explicit images that appear to depict minors but that were produced without using any real children violate the First Amendment. These provisions cover any visual image that "appears to be" of a minor engaging in sexually explicit conduct, and any image promoted or presented in a way that "conveys the impression" that it depicts a minor engaging in sexually explicit conduct. The rationale for excepting child pornography from First Amendment coverage is to protect children who are abused and exploited in the production process, yet the Act's prohibitions extend to "virtual" pornography that does not involve children in the production process. Congress responds to the Court's ruling with the PROTECT Act of 2003 which continued to prohibit computer-based child pornography, but not other types of child pornography not produced with actual minors.

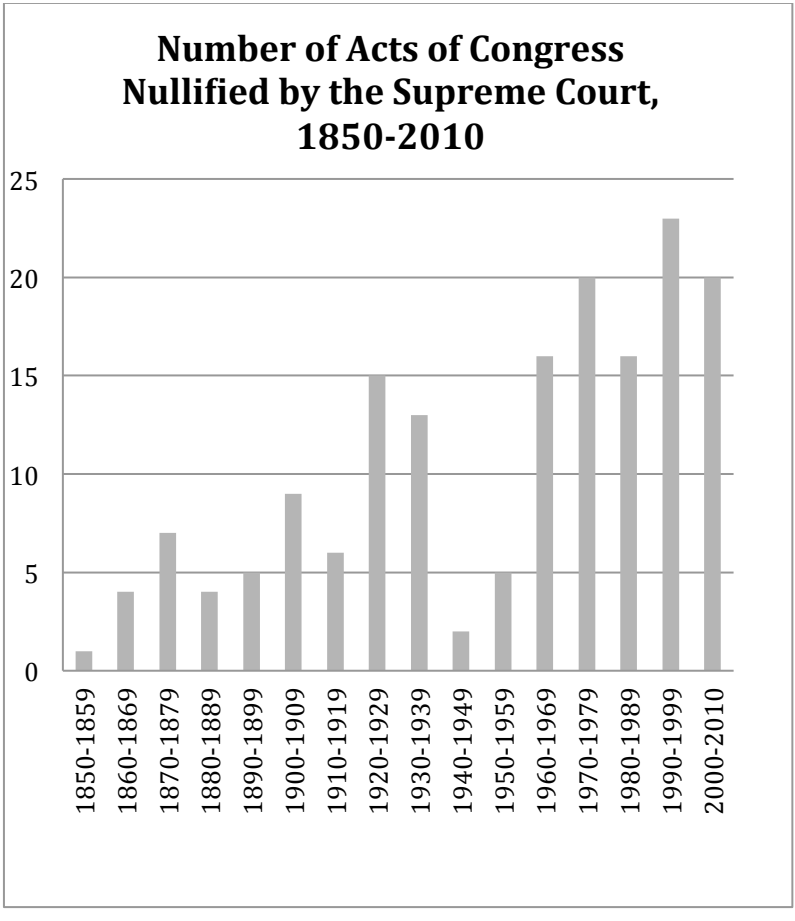
39) Act of Nov. 21, 1997 (Pub. L. 105-115, § 127), 111 Stat. 2328, 21 U.S.C. § 353a.

Thompson v. Western States Med. Ctr. (2002) – Section 127 of the Food and Drug Administration Modernization Act of 1997, which adds section 503A of the Federal Food, Drug, and Cosmetic Act to exempt "compounded

drugs" from the regular FDA approval process if providers comply with several restrictions, including that they refrain from advertising or promoting the compounded drugs, violates the First Amendment. The advertising restriction does not meet the *Central Hudson* test for acceptable governmental regulation of commercial speech. The government failed to demonstrate that the advertising restriction is "not more extensive than is necessary" to serve its interest in preventing the drug compounding exemption from becoming a loophole by which large-scale drug manufacturing can avoid the FDA drug approval process. There are several non-speech means by which the government might achieve its objective.

40) Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, §§ 213, 318; 2 U.S.C. §§ 315(d) (4),441k.
McConnell v. FEC (2003) – Section 213 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Federal Election Campaign Act of 1971 (FECA) to require political parties to choose between coordinated and independent expenditures during the post-nomination, pre-election period, is unconstitutional because it burdens parties' rights to make unlimited independent expenditures. Section 318 of BCRA, which amended FECA to prohibit persons "17 years old or younger" from contributing to candidates or political parties, is invalid as violating the First Amendment rights of minors.

41) Act of April 30, 2003, Pub. L. 108-21, §§ 401(a) (1), 401(d)(2),117 Stat. 667, 670; 18 U.S.C. §§ 3553(b)(1), 3742(e).
United States v. Booker (2005) – Two provisions of the Sentencing Reform Act, one that makes the Guidelines mandatory, and one that sets forth standards governing appeals of departures from the mandatory Guidelines, are invalidated. The Sixth Amendment right to a jury trial limits sentence enhancements that courts may impose pursuant to the Guidelines.


Number of Acts of Congress Nullified by the Supreme Court, 1850-2010
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1850-1859
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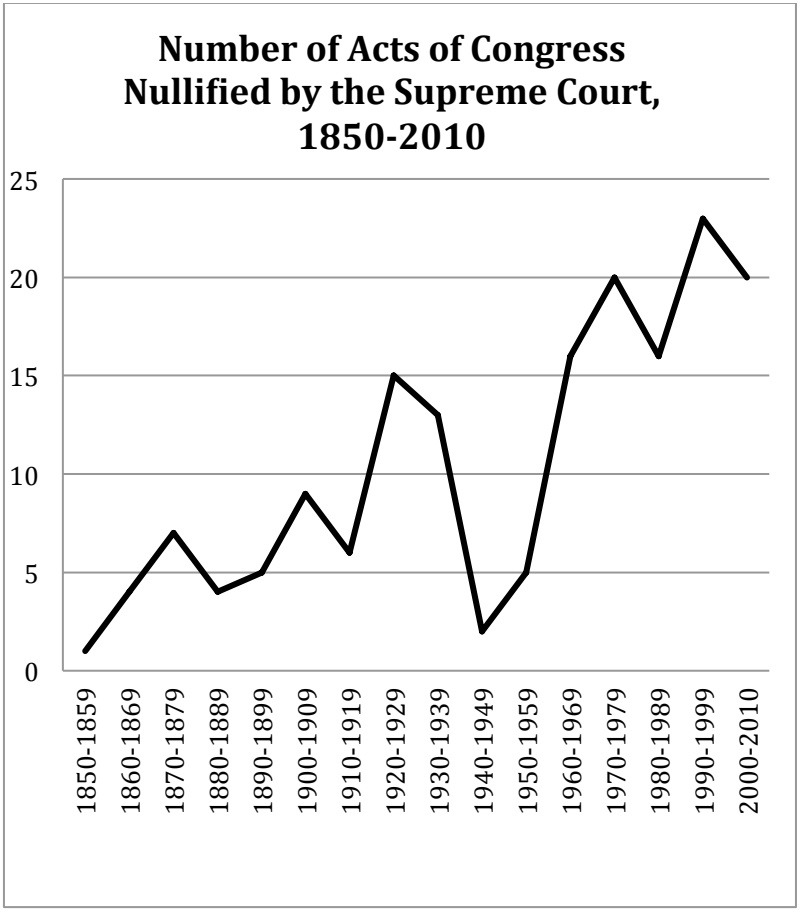
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A MAGIC MIRROR FOR STUDENT LOANS

Sarah C. Zearfoss, Joseph D. Pollak & Lorraine Lamey[†]

Early in 2013, the University of Michigan Law School created and published an online tool designed to allow current and prospective students to compare student loan repayment outcomes under a variety of potential postgraduate conditions. The idea came from a student. In a conversation with an admissions officer, a student said that she wished that she had a visual presentation of her student loan amortization schedule so that she could see what her repayment obligations would look like month-to-month. That simple idea led to more discussion with students and law school administrators, and the Law School's admissions office launched a far more ambitious project: the Debt Wizard.[1] The Debt Wizard helps students to visualize their postgraduate personal finances by balancing multiple factors and helps them anticipate the potential consequences of various career choices on their ability to manage educational debt.

I. BACKGROUND AND MOTIVATION

In the last two years, prospective students have begun asking for more, and more detailed, information about funding, and they do so progressively earlier in the admissions process. Students are in-

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[1] *See Welcome to Michigan Law's Debt Wizard!*, UNIV. OF MICHIGAN LAW SCHOOL, www.law.umich.edu/financialaid/debtwizard (last visited Aug. 8, 2013).

creasingly told by a variety of sources that they should eschew all other criteria and focus exclusively on choosing a law school with the lowest cost of attendance; minimizing debt is often touted as the most risk-averse course. With the national media providing nightmare scenarios of unemployed graduates[2] who will "never fully pay off their law school debt,"[3] it is no wonder that prospective students shrewdly consider finances. In the current economic climate, it is the rare candidate for whom cost is not a central factor in choosing a law school, and our conversations with prospective students almost always touch upon themes of educational debt and the impact of debt upon careers. Yet, despite the increased awareness of the importance of funding, many students tell us that they feel anxious about navigating their finances. Some students come to law school with a fair degree of financial sophistication, but many lack the experience, information, or propensity to vigorously investigate their options.

Although our primary concern was developing the Debt Wizard for prospective and current students of Michigan Law, the Debt Wizard is equally usable by students who are considering other law schools. As a public institution, with a broad mission of public service, we were committed to making the Debt Wizard available and accessible. And in an effort to achieve maximum transparency, the underlying data model relies on publicly available datasets, and all underlying assumptions are disclosed and discussed in detail in the Debt Wizard's instructions.

II.
MODEL DATA

To provide information that could be individually tailored to a student's personal choices, we used three main data sets: income, housing, and debt repayment. As a student adjusts the Debt Wizard's variables, the display updates to show how her choices for career type, location, salary, and repayment interact. Based on the user's selections, the Debt Wizard calculates and displays estimated

[2] John J. Farmer Jr., *To Practice Law, Apprentice First*, N.Y. TIMES, Feb. 18, 2013, at A17.
[3] Brian Z. Tamanaha, *How to Make Law School Affordable*, N.Y. TIMES, June 1, 2012, at A27.

monthly housing and student debt expenses, as well as after-tax income. Because almost 90% of Michigan Law graduates leave the state following graduation, we sought data with a national scope so that we could present accurate regional cost-of-living comparisons that were relevant for the cities where our graduates most commonly go.

A. Income

We assumed that our user was single, without dependents, and took standard income tax deductions and exemptions. We used an online paycheck calculator to calculate net income after federal and state income taxes (and city taxes for New York).

We used twelve income intervals ranging from $40,000 to $160,000, which approximate what a new lawyer is likely to earn. We chose the specific intervals based on the National Association for Legal Career Professionals ("NALP") salary survey for the class of 2010.[4] We attempted to simulate realistic salaries through interpretation of NALP's data. For example, when "public interest" is selected as the entry-level postgraduate employment option, the Debt Wizard "grays out" salaries of more than $75,000, making them unselectable in the interface, because there were virtually no entry-level public interest lawyers anywhere in the country in 2010 making more than $75,000.[5]

B. Housing

We used the Department of Defense's Basic Allowance for Housing ("BAH") as the starting point for our housing budget values. Service members receive BAH as a tax-exempt supplemental payment to account for rent in civilian areas, renter's insurance, and utilities, calculated according to service grade.[6]

We assumed that a lawyer with a high salary may spend more on housing than a lower-salaried attorney, so we settled on two levels of

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[4] *Starting Salaries - What New Law Graduates Earn - Class of 2010*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC. (Nov. 2011), www.nalp.org/starting_salaries_-_what_new_law_graduates_earn_-_class_of_2010.

[5] A future update to the Debt Wizard will include a customizable salary field.

[6] *Basic Allowance for Housing (BAH)*, DEFENSE TRAVEL MANAGEMENT OFFICE, DEPARTMENT OF DEFENSE, www.defensetravel.dod.mil/site/bah.cfm (last visited August 18, 2013).

housing allowances corresponding to the BAH for service members who make $60,000 and $80,000. Military service grade increments do not correspond exactly with the round numbers that we selected, so we had to recalculate some of the values for an approximation.

The Debt Wizard's calculations suggest that some graduates – those with very low salary and very high debt – simply cannot afford to pay for both their monthly debt and housing allowance if they live in New York City. And yet we know that in actuality, our graduates are able to find housing in New York City and pursue public interest work even at low salaries: anecdotal information suggests a number of strategies for reducing living expenses, including sharing housing costs with a spouse, partner, or roommate. We considered trying to account for various living arrangements, but including them would have excessively complicated our tax and Income-Based Repayment ("IBR") calculations.[7]

We considered but ultimately rejected including living expenses other than housing (along with taxes and debt repayment) in our income calculations. Food, clothing, transportation, and medical costs are obvious recurring expenses, but we had trouble finding reliable and locally calibrated data for these costs. Plus, these costs are highly variable between individuals, so adding expenses might have had the perverse effect of making our model less accurate and more difficult to interpret. Likewise, the addition of spouses, partners, and children, and the modeling of salary increases, would have made our tax and IBR calculations far more complex. We ultimately decided in favor of simplicity, and excluded these additional factors in order to focus on the most reliably determinable expenses and repayment options.

C. Debt Service

The Debt Wizard includes debt intervals between $60,000 and $250,000. We chose these intervals based on typical amounts that

[7] Under IBR, a graduate's monthly debt payment is limited to a percentage of her income with certain allowances for basic living expenses. *See* 34 C.F.R. § 685.221 (2013). Currently, monthly IBR payment is calculated as follows: 15% ([Adjusted Gross Income] - 150% [Poverty Rate]).

are borrowed by Michigan Law students. Among graduates with law school educational debt, the lowest total at graduation that our financial aid office typically sees is $60,000, while the highest amount that a hypothetical student could borrow is about $250,000, based on the current student budget. The average law school debt for a recent Michigan Law graduate was $117,000.[8] The Debt Wizard displays the four debt repayment options that Michigan Law alumni most commonly choose from: standard, 10-year repayment; extended, 25-year repayment; IBR; and Michigan Law's Debt Management Program.

The default repayment schedule for federal student loans requires equal monthly payments over 10 years. Graduates with more than $30,000 in student loan debt can elect an extended repayment schedule with a fixed, monthly payment for 25 years. Under both the 10-year schedule and 25-year schedule, the monthly payment amount is a fixed amount based on the graduate's debt balance.

IBR allows a graduate to cap her monthly payment at 15% of her disposable income.[9] The graduate must reapply for IBR annually and, in order to qualify, she must demonstrate a "partial financial hardship" – essentially, the IBR payment must be lower than her payment would be under the 10-year repayment schedule. We used gross income as an approximation for Adjusted Gross Income ("AGI") and plugged that figure into a nonprofit website's online IBR calculator to determine monthly IBR payment.[10] Since we used an approximation for AGI, the resulting calculations are just estimates, but we think that our model provides a more precise and accurate estimate than many students are likely to calculate on their own.

Recent Michigan Law graduates can receive repayment assistance

[8] Average debt at Michigan Law compares favorably to the average debt incurred by law students at peer schools and is among the lowest average debt loads at graduation for the Top 14 law schools according to data reported to the American Bar Association. In 2012, only 5 of the Top 14 law schools (including Michigan Law) reported average debt between $110,000 and $120,000. The lowest average debt in the Top 14 was $110,000, while the highest was $157,000.

[9] *See supra* note 7.

[10] *Income-Based Repayment Calculator (15% version)*, FINAID, www.finaid.org/calculators/ibr.phtml (last visited Aug. 18, 2013).

through the Michigan Law Debt Management Program.[11] Michigan Law covers all or a portion of the student's IBR payments on a sliding scale based on income for up to 10 years. Other law schools offer similar school-sponsored loan repayment programs, but some school-sponsored programs have significant barriers to entry or exit, are restricted to lawyers in qualifying public interest careers, only cover a fraction of law school loans, or have other qualification requirements. Qualification under the Michigan Law program is straightforward: any recent graduate with relatively low-income and legal employment is eligible to participate.[12] We used the monthly IBR payment generated by our IBR calculations to estimate the Michigan Law Debt Management Program payment.

The 25-year repayment and IBR options both reduce a graduate's monthly payment while extending the term of repayment. However, graduates who pursue qualifying public service employment and make on-time monthly payments for 10 years can apply for Public Service Loan Forgiveness from the federal government.[13] So, for graduates who are pursuing public service careers, it might make sense to minimize the monthly payment while waiting for forgiveness. For graduates in the private sector, loan forgiveness occurs at 25 years.[14]

III.
FUTURE DEVELOPMENTS

Although we have detailed cost-of-living information from the BAH rate data, we were unable to find career data of comparable breadth. Anecdotally, of course we know that a recent graduate in a secondary legal market probably has a lower income than her

[11] Michigan Law first implemented a Debt Management Program in 1985, and it has been through several iterations. Our current income-based Debt Management Program replaced a prior version that is still utilized by graduates of earlier years. *See Debt Management/Loan Repayment Assistance Program*, UNIVERSITY OF MICHIGAN LAW SCHOOL, www.law.umich.edu/alumniandfriends/giving/Pages/DebtManagementProgram.aspx (last visited Aug. 18, 2013).

[12] Graduates must first enter the program within five years of graduation. *See id.*

[13] *See* 34 C.F.R. § 685.221 (2013).

[14] *Id.*

counterpart in a larger city. But, to what extent are salaries lower in secondary markets? What is the degree of variation? While many law firms report salary data, comprehensive market-based salary data is hard to come by outside of the private legal practice context. The only distinction that we were able to derive from the available data was national, not market-specific: virtually no recent graduates find a public interest job making more than $75,000. However, beyond this basic distinction for public interest salaries, the Debt Wizard cannot tell a student how likely she is to receive a particular salary in a particular market. Unfortunately, NALP does not publish comprehensive salary data broken down by job type and location. This means that although the BAH data shows that, for example, students should expect housing in New York City to be more expensive than in Detroit, the available data does not tell us whether public interest lawyers are paid more in New York than in Detroit. The trend toward law schools publishing comprehensive, transparent graduate employment reporting[15] may well lead to the availability of more refined data in the future.

One challenge for maintaining the relevance of an undertaking like the Debt Wizard is the constantly evolving regulatory framework. New loans issued after July 1, 2014, will be eligible for a lower, monthly IBR payment capped at 10% of disposable income as opposed to the current 15% calculation. Additionally, debt forgiveness for graduates in the private sector will occur after 20 years instead of 25 years.[16] As a stopgap measure for 2012 and 2013, President Obama issued an executive order creating a new Pay As You Earn ("PAYE") program, which uses a 10% income-based monthly payment similar to the expected changes to IBR.[17] But, PAYE is a temporary program and, for future law students, it is unclear whether PAYE will be available as a separate program or be

[15] *See*, *e.g.*, Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Transparency at American Law Schools*, 32 PACE L. REV. 1 (2012); Kyle P. McEntee & Patrick J. Lynch, *Take This Job and Count It*, 2 J. of L. (1 J. LEGAL METRICS) 309 (2012).

[16] Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, § 2213 (2010); *see also* 20 U.S.C. § 1098e(e).

[17] *See* Tamar Lewin, *President to Ease Student Loan Burden for Low-Income Graduates*, N.Y. TIMES, Oct. 26, 2011, at A15.

merged into the existing IBR program after the statutory changes take effect in 2014. Many current law students appear to be eligible for lower monthly payments under these two programs, but the details of how these programs will be administered in the long-term are not settled. Once the government promulgates new regulations governing these changes, we will update the Debt Wizard to include a 10% option.

IV. CONCLUSION

Students have long had difficulty visualizing how student loan payments will affect their post-graduate financial outlook. Many students are planning to move to a new city after graduation, and compounding that uncertainty, a professional lifestyle is totally unfamiliar territory: some are expecting to be financially independent for the first time in their lives. This issue is not exclusive to law students, either. The U.S. Consumer Financial Protection Bureau has an initiative to educate student borrowers about their loan options and to encourage colleges and universities to provide plain-language counseling information precisely because some students have a hard time understanding their options.[18] Certainly many financial aid offices, including Michigan Law's, offer individual counseling to address concerns about budgets and funding, but the Debt Wizard creates a self-service option that allows students to grapple with the issues in fairly simple terms from the earliest stages of the process.

Still, while the financial outlay for tuition and living expenses is without question a key factor, it is but one aspect of a complicated picture. Focusing exclusively on the outlay ignores the opportunities of law school. Even from a purely financial perspective, many law school graduates come out ahead, because lawyers tend to earn more money than workers without law degrees. Of course, graduates of highly regarded law schools have higher earning potential: the median salary for a 2011 Michigan Law graduate was $147,500

[18] Richard Cordray, *Prepared Remarks in a Press Call about the "Financial Aid Shopping Sheet"*, CONSUMER FINANCIAL PROTECTION BUREAU (July 23, 2012), *available at* www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-in-a-press-call-about-the-financial-aid-shopping-sheet/.

for the first year of employment, compared to the national median starting salary for any law school graduate of $60,000.[19] However, even this relatively low median starting salary for all law school graduates is greater than $55,432, which is the national median for full-time, salaried workers with a bachelor's degree at *any experience level*.[20] Simply put, the outlay for law school can be daunting, but law school graduates potentially earn a lifetime of higher earnings.[21]

Further, an exclusive focus on the worst case financial scenario ignores important considerations for prospective students choosing whether to go to law school. A career in the law can be stimulating and fulfilling in a way that few fields can challenge – and for a student attracted to the relatively unique work of lawyering, the necessary first step is to attend law school. We encourage students to consider finances when making their decisions along with postgraduate career outcomes, student culture, fit, academic reputation, strength of alumni network, and other criteria which affect students' success in law school and in their future careers.

The Debt Wizard is only one tool for students to use in envisioning their futures. And, given the inherent uncertainties, the best that we can offer is an estimate of how we think things will look in those students' futures. However, we created the Debt Wizard because, despite its flaws, we think that it provides a more accurate and reliable model of debt repayment than other online tools that are currently available to students.

# # #

[19] *Salaries for New Lawyers: An Update on Where We Are and How We Got Here*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC. (Aug. 2012), www.nalp.org/august2012research.

[20] *Earnings and unemployment rates by educational attainment*, BUREAU OF LABOR STATISTICS (May 22, 2013), *available at* www.bls.gov/emp/ep_table_001.htm.

[21] For a more robust discussion on this point, *see* Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree* (Apr. 13, 2013) (working paper), *available at* ssrn.com/abstract=2250585.

THE INCREASINGLY LENGTHY LONG RUN OF THE LAW REVIEWS

LAW REVIEW BUSINESS 2012 – CIRCULATION AND PRODUCTION

Ross E. Davies[†]

This article is the latest in a series of simple annual studies of the sales of some leading law reviews, undertaken with an eye to getting an admittedly rough and partial sense of the state of publishing in the legal academy. Over the years, the data itself has turned out to be a little bit interesting in spots. More interesting (perhaps), and more amusing and worrisome (certainly), have been the continuing small discoveries that some law reviews report relatively low paid circulation numbers to the U.S. Postal Service (which appear only in tiny-type government forms buried in the rarely read front- or back-matter of the reporting law review), but then tout higher sales numbers in promotional sections of their websites. It is reminiscent of the way some law schools have number-fudged their presentation of other kinds of data to, for example, *U.S. News & World Report*.[1]

The law review-school comparison might prompt the reader to wonder light-heartedly how many law school deans were once law review editors. But answering that question would be too easy, and

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[1] *See, e.g.*, Ross E. Davies, *Law Review Circulation 2011: More Change, More Same*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 179 (2012); Ross E. Davies, *The Dipping Point: Law Review Circulation 2010*, *in* 2011 GREEN BAG ALM. 547; Ross E. Davies, *Law Review Circulation 2009: The Combover*, *in* 2010 GREEN BAG ALM. 419; *Law Review Circulation*, *in* 2009 GREEN BAG ALMANAC 164.

TOP 10 STUDENT-EDITED LAW REVIEWS
BASED ON TOTAL PAID CIRCULATION IN 2012

Harvard Law Review	1722
Yale Law Journal	1508
Cornell Law Review	1150
Columbia Law Review	1047
Michigan Law Review	925
University of Chicago Law Review	801
Stanford Law Review	727
Texas Law Review	663
Vanderbilt Law Review	650
NYU Law Review	599

too far afield from the focus here on publishing in the legal academy. There is, however, another question whose answer might be more interesting, and more likely to lead to intriguing comparisons. The question: How have the size and composition of law review editorial staffs changed over time, in absolute terms and in terms of their relationship to the product they put out? Possible comparisons will probably suggest themselves.

This year's report covers the usual ground relating to paid circulation and associated editorial behavior. It also offers a limited and tentative first take on the production question.

I.
TOTAL PAID CIRCULATION: EXCEPTION AND ACCURACY

Both circulation numbers and editorial behavior in 2012 generally suggest that neither the trend in circulation nor the character of editorial culture is changing much – with one small but notable exception on the circulation front.

But first a note about the presentation of circulation data. Appendix A at pages 259 to 262 below contains the usual "Total Paid Circulation" tables.[2] The coverage in those tables is not as comprehensive as it was last year. The tables are there simply to track trends and identify anomalies. For those purposes, limiting coverage to the past few decades (40 years this time around) and a substantial number of leading journals (18 this time around) seems – based on a few years' experience – like a reasonable way to keep an eye on trends without needlessly wasting paper and straining eyes with an excess of extra and extra-tiny names and numbers.

A.
The Notable Exception: Michigan

The bottom few rows of the "Total Paid Circulation" tables in Appendix A show that for most law reviews, the downward trend continues, mostly slowly and almost entirely without pause. But for one leading journal, 2012 saw a large uptick – large in proportion to 2011, not large in total quantity of issues sold, of course, in this world of scholarly journals with small total circulations. Nevertheless, small numbers can make a difference in things like rankings. (See, for example, the rankings of law schools by *U.S. News*.)

The *Michigan Law Review*, the flagship student-edited journal at the University of Michigan Law School, saw its paid circulation jump from 777 to 925 – a 19% increase – between 2011 and 2012. There is no obvious explanation for this development, but it is quite clear that the jump did not come from paid subscriptions. It came, oddly enough, from a separate category that tends to be at or near zero for most law reviews in most years: "Paid Circulation Outside the Mails Including Sales Through Dealers and Carriers, Street Ven-

[2] The tables are labeled "Total Paid Circulation" even though the caption of the line on U.S. Postal Service Form 3526 from which the data in the tables is drawn was changed to "Total Paid Distribution" a while ago. "Circulation" just seems like the more generally understood term for sales of a periodical. And it is the term that readers of this study are accustomed to using in this context. In any event, the USPS's changed terminology and this study's unchanged terminology do not affect the numbers themselves.

dors, Counter Sales, and Other Paid Distribution Outside USPS." Glance for a moment at Appendix B at pages 263 to 265 below, where details from the *Michigan Law Review*'s USPS Form 3526s for 2011 and 2012 are reproduced. The circled numbers boil down to this:

	2011	2012
Regular paid subscriptions	718	681
Sales through dealers, carriers, street vendors, etc.	59	244
Total paid sales	777	925

So, while the *MLR*'s regular paid subscriptions continued to decline in line with the overall law review market, its other sales moved counter to the market, and dramatically so. They more than quadrupled in a single year.

It will be interesting to see if this extraordinary little development is an early sign of a rebound in the market for ink-on-paper legal scholarship generally, or if the rebound is geographically limited – perhaps just to Michigan, or even just to Ann Arbor. And it might be equally interesting to learn just who has had so much success selling non-subscription copies of the *MLR*. Barnes & Noble? Amazon? Publishers Clearing House? Airport newsstands? Street vendors? Just imagine: "Extra! Extra! Read all about it! First-rate legal scholarship hot off the presses!" It sounds very good to me.

B.
The Elusiveness of Accuracy: Virginia and Stanford

Struggles with forthrightness persisted in 2012 at some top law reviews.

The *Virginia Law Review*, for example, continued to claim that it "has a circulation of over 1,700" despite the fact that its paid circulation has been less than that for more than a decade.[3] Indeed, the *VLR* has not even published, let alone sold, that many issues of itself since

[3] *See, e.g.*, Davies, *The Dipping Point*, note 1 above, at 547.

2002. Could it be a violation of the University of Virginia's justly famous code of honor for a student group to persistently post false data about itself – data contradicted by the student group's own federally mandated annual filings with the U.S. Postal Service – on a university website?[4] Unlikely, at least in this case. In order to be sanctionably dishonorable, a lie must be "[s]ignificant,"[5] and law review circulation data probably isn't. In addition, the offense must be an "[a]ct,"[6] and it seems likely that current and recent *VLR* editors are guilty of, at worst, the inaction of failing to correct a claim that was false when it was first made in 2005 and has merely been made more obviously false by the passage of time and the corresponding decline in the *VLR*'s paid subscriptions.[7]

But even if it is just an insignificant little lie, why do it? Besides, the increasing extremity of the "circulation of over 1,700" puffery (the real number for the year 2012 was 304) suggests that the editors are moved by a truthy sense of the extent to which high sales of

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[4] *Compare, e.g.*, Appendix A at page 261 below (compilation of data drawn from reports published in the *Virginia Law Review* about the *Virginia Law Review*'s paid distribution), *with* Appendix C at pages 266 to 267 below (reproducing details from the *Virginia Law Review*'s website from 2010, 2012, and 2013), *then see Overview, University of Virginia Honor Committee*, UNIVERSITY OF VIRGINIA, www.virginia.edu/honor/overview/ (last visited Aug. 17, 2013):

> By today's standard, an Honor Offense is defined as a Significant Act of Lying, Cheating or Stealing, which Act is committed with Knowledge. Three criteria determine whether or not an Honor Offense has occurred:
>
> - Act: Was an act of lying, cheating or stealing committed?
> - Knowledge: Did the student know, or should a reasonable University student have known, that the Act in question was Lying, Cheating, or Stealing?
> - Significance: Would open toleration of this Act violate or erode the community of trust?
>
> Although a student should always conduct himself honorably, a student is only formally bound by the Honor System in Charlottesville and Albemarle County, and elsewhere at any time when he identifies himself as a University of Virginia student in order to gain the reliance and trust of others.

[5] *Id.*

[6] *Id.*

[7] *See* Appendix C. Reasonable minds can and do differ, however, about whether inaction is subject to regulation. *See, e.g.*, *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012) (all four opinions).

the print edition of their journal are evidence of its importance and influence. And that makes them seem silly, not weighty.

And then there is the *Stanford Law Review*. Early in 2012, the *Wall Street Journal*'s *Law Blog* published a story about the 2011 edition of this study. The *WSJ Law Blog* reported that:

> this latest study[] tweaks the Stanford Law review, which says on its website that about "2,600 libraries, attorneys, judges, law firms, government agencies, and others subscribe to the print edition."
>
> But according to U.S. Postal Service records, the law review has a total paid distribution of 974 and has been printing a total of 1,206 copies.

The blog then quoted a response from the *Stanford Law Review*, whose president said

> the figure was "simply out of date." It has since been removed from our website.[8]

Alas, the *SLR* president's statement was half true, but also half false. The 2,600 figure was indeed gone from the *SLR*'s website. But it was not "out of date." It had never been up-to-date – had never been accurate – in the first place. According to the *SLR*'s own reports to the U.S. Postal Service, published in the *SLR*'s own pages, the *SLR*'s paid circulation has never exceeded 2,350 (which it reached, briefly, in the early 1980s), except for one wildly anomalous and almost certainly erroneous report of 8,850 subscribers in the year 2000. (The 8,850 count, if it were real, would have been more than twice the *Harvard Law Review*'s circulation at that time and more than triple the *Yale Law Journal*'s, as well as being both (a) not 2,600 and (b) more than triple the highest total the *SLR* has reported in any other year, before or since. For a chance to figure out what happened at the *SLR* in the year of the 8,850, see Appendix D at pages 268 to 269 below.) In other words, the 2,600 figure

[8] Joe Palazzolo, *Law Review Circulation: A New Low*, WSJ LAW BLOG (Feb. 29, 2012, 10:35 AM), http://blogs.wsj.com/law/2012/02/29/law-review-circulation-a-new-low/ (odd placement of quotation marks in the original).

was an exaggeration – and quite possibly a perfectly innocent, mistaken one – from the moment it came from wherever it came from to the moment it was removed from the *SLR*'s website.[9]

It might have been better for the *SLR* president to say something like, "I have no idea how we screwed up, but we did, and now we've fixed it." If the *WSJ Law Blog* does a follow-up story, one can only hope that its new president will give an answer of that sort (or even better, a plausible explanation for the mysterious 2,600), but will not then declare that the old president's earlier statement is now inoperative.[10]

Law reviews are famously and valuably committed to accuracy. They make vast investments of human resources in the checking and correcting of even the smallest and most peripheral of factual and legal claims in the articles they publish. (We law professors, all of whom are less than perfect and many of whom are aware of that fact, should be grateful.) Perhaps every law review with a website, or an obligation to report circulation data to the U.S. Postal Service, or both, should assign one editor responsibility for giving the journal's own reports and website the same kind of careful fly-specking that it bestows on the work of its authors. It would be a small price to pay (and a price paid in unpaid labor at that) to improve the accuracy of the journal's self-portrayal and reduce the chances of an embarrassing episode or two of inaccuracy.

II.
LAW REVIEW PRODUCTION:
A FIRST QUICK LOOK AT 1890 TO 2010

Speaking of the law reviews' extravagant investments of editorial time in the articles they publish, the data relating to law review productivity tabulated in Appendix E at pages 270 to 273 below seems to indicate that those investments have been at an all-time

[9] *See* Davies, *Law Review Circulation 2011*, note 1 above, at 182-84.

[10] *See* WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 346 (5th ed. 2008) ("inoperative"); *see also, e.g.*, Michael J. Towle, *On Behalf of the President: Four Factors Affecting the Success of the Presidential Press Secretary*, 27 PRESIDENTIAL STUD. Q. 297, 307-10 (1997).

high in recent years. Based on what is certainly a too-small sample – just ten leading law reviews, and just one year of numbers out of each decade for each journal since its founding – it appears that average student membership ballooned between 1960 and 1990, and has steadied since then. (See *Fig. 1: Law Review Size (staff), 1890-2010*, on the facing page.) During roughly the same period of time, the average size of the law reviews themselves – measured by simple page counts – appears to have trended upward pretty steeply as well, although not as steeply as staff size. (See *Fig. 2: Law Review Size (pages), 1890-2010*.)

With so little data to consider at the moment – and with so much more data likely to be available for next year's study – it would be a mistake to make any strong claims now. A few tentative observations, however, might not be out of order. Here are three:

1. Who should get the credit, or the blame? The shape of *Fig. 2* – the graph of journal size – suggests that the people primarily responsible for the great enlargement of law reviews are those who were editors during the period from the 1950s to roughly 1990. It appears, however, that the relatively junior folks who have edited the law reviews in recent years have managed to slow, even slightly reverse, that very long run of law review lengthening.

Whether responsibility for the great law review enlargement should be considered an honor or a source of embarrassment depends on your views about the form and content of modern legal scholarship. These sketchy initial results might be considered a caution, then, to those aging alumni of elite law reviews who are prone to complain about the profligacies of modern legal scholarship in general and law review culture in particular. It may be that next year's more detailed study will show that those gray-haired former law review editors met the enemy back in the good old days, and it was themselves.[11]

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[11] *Cf.* WALT KELLY, THE POGO PAPERS 1 (1953):

> There is no need to sally forth, for it remains true that those things which make us human are, curiously enough, always close at hand. Resolve then, that on this very ground, with small flags waving and tinny blasts on tiny trumpets, we shall meet the enemy, and not only may he be ours, he may be us.

FIG. 1: LAW REVIEW SIZE (STAFF), 1890-2010

The average size – by students on mastheads – of flagship law reviews at the Penn, Harvard, Yale, Columbia, Michigan, Boalt, Virginia, NYU, Chicago, and Stanford law schools, based on a one-year sample from each decade.

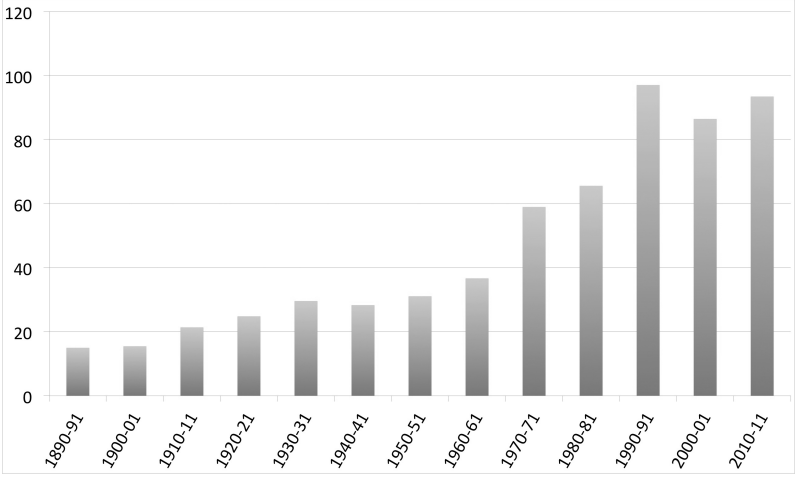
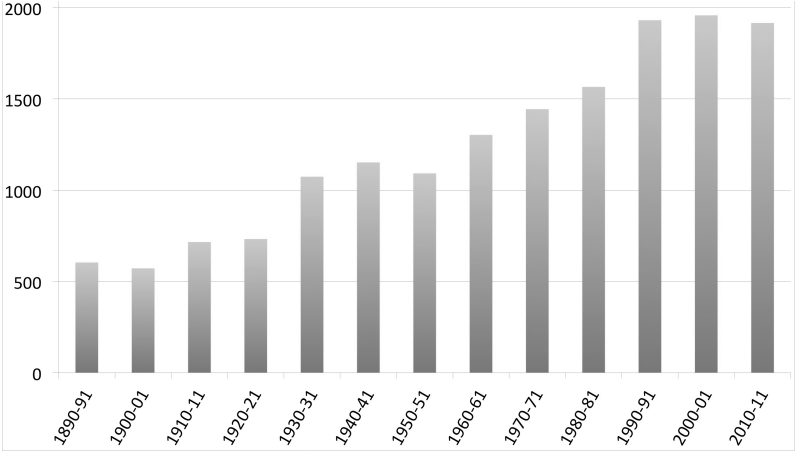


FIG. 2: LAW REVIEW SIZE (PAGES), 1890-2010

The average length – in pages – of flagship law reviews at the Penn, Harvard, Yale, Columbia, Michigan, Boalt, Virginia, NYU, Chicago, and Stanford law schools, based on a one-year sample from each decade.

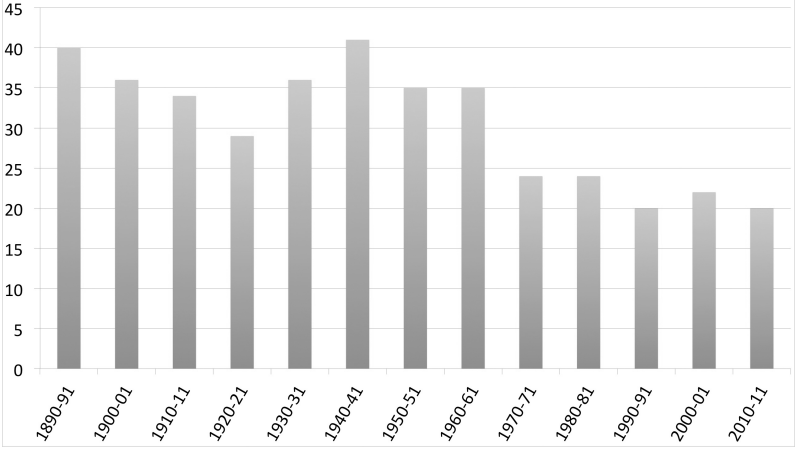


2. How much help is too much? It does not take a math whiz to figure out that if page counts are growing quickly, but staff sizes are growing even faster – as the graphs on the previous page show – then the ratio of pages to staff is going to decrease. That is, the average number of law review pages produced by the editorial effort of the average law review staffer will drop. And so it seems to have done, for most of the second half of the 20th century.

In 1940, it took on average 28 students to publish 1,152 pages of legal scholarship – about 41 pages per law review student staff member. In 1990, it took on average 97 students to publish 1,930 pages – about 20 pages per staffer. As the graph below – *Fig. 3: Law Review Efficiency, 1890-2010* – indicates, efficiency rates seem to have steadied in recent years. And so it may be that next year's more detailed study will show that middle-aged lawyers who remember the days when their lean law review boards worked long nights and weekends to publish their journals are misremembering the leanness, if not the long nights and weekends.

FIG. 3: LAW REVIEW EFFICIENCY, 1890-2010

The average pages published per member by flagship law reviews at the Penn, Harvard, Yale, Columbia, Michigan, Boalt, Virginia, NYU, Chicago, and Stanford law schools, based on a one-year sample from each decade.



Just as an increase in law review pages published can be good or bad (depending on your opinion of what is printed on those pages), so too an increase in the amount of staff resources law reviews devote to each page published can be a good or bad (depending on your opinion of the value of student editorial assistance).

3. What is, and who was, a law review editor? Measuring and comparing law review circulation is pretty easy (although actually finding the data can be a pain in the neck): a subscriber is a subscriber is a subscriber. Much the same can be said about law review size: a page is a page is a page (although the number of words on a page can vary substantially, depending on page size and type size, and a page that consists largely of footnotes filled with superfluous citation strings is different from a page that contains an original and useful thought).

The same cannot be said for law review staff size. An editor is not an editor is not an editor. For example, the much higher editorial productivity that shows up in patches before 1970 might be at least in part due to genuine faculty support for a law review – that is, faculty who actually pulled laboring oars as editors.[12] For another example, what are we to make of the separate "Editorial Board" and "Business Board" in the mastheads of the *Virginia Law Review* from the late 1950s to the late 1960s?[13] Both boards counted among their members highly accomplished students, or at least students who would go on to become highly accomplished lawyers. And how much does the work done by those old *VLR* Business Board members have in common with the work done by more recent law review members with titles that sound operational, such as the Treasurer and Social Chair of volume 101 (2001) of the *Columbia Law Review*? Finally, for yet one more example, how about the *NYU Law Review*'s long-gone "Evening Staff"?[14]

More research should and shall be conducted relating to all of these matters. Next year.

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[12] *See, e.g.*, Michigan Law Review, *About Us: History*, at www.michiganlawreview.org/information/about/history (vis, Aug. 18, 2013).

[13] *See* 44 VA. L. REV. masthead (1958) *through* 54 VA. L. REV. masthead (1968).

[14] *See, e.g.*, 36 NYU L. REV. masthead (1961).

III.
ERRATA

Law review editors are not the only people who make mistakes. If you find any inaccuracies in the data presented here, or any errors in the analysis, please say so. Email corrections to rdavies@greenbag.org. Errors will be flagged and fixed in the next study, with credit given where credit is due.

APPENDIX A

TOTAL PAID CIRCULATION

1972-2012 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

Many law reviews take advantage of the U.S. Postal Service's low rates for qualifying periodicals. In return, they must share some "Ownership, Management, and Circulation" information:

> The publisher of each publication authorized Periodicals mailing privileges . . . must publish a complete statement of ownership, containing all information required by Form 3526, in an issue of the publication to which that statement relates . . . .

USPS, Domestic Mail Manual § 707.8.3.3. It is not difficult. Form 3526 is straightforward, and a journal can simply paste its completed form into the back of an issue. The tables on pages 260 to 262 below contain the "Total Paid Circulation" (aka "Total Paid Distribution") data from Form 3526s published in some leading law reviews. As the tables show, some journals are more compliant than others. The price of non-reporting can be substantial:

> If a publisher does not comply with the filing or publishing standards of 8.3 . . . [the USPS] may suspend or revoke the Periodicals mailing privileges, as appropriate.

USPS, Domestic Mail Manual § 707.8.3.4. On the other hand, we know of no case in which a law review has been sanctioned. So maybe negligent law reviews can rest easy, at least until they hear from a postmaster. For law review editors whose noncompliance goes beyond negligence, however, the price of false reporting could be higher and more personal under, for example, 18 U.S.C. § 1722:

> Whoever knowingly submits to the Postal Service or to any officer or employee of the Postal Service, any false evidence relative to any publication for the purpose of securing the admission thereof at the second-class rate, for transportation in the mails, shall be fined under this title.

TOTAL PAID CIRCULATION

1972-2012 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

	Penn	Harvard	Yale	Columbia	Michigan	Boalt
1972-73	*	9608	4200	*	*	*
1973-74	*	*	4200	3907	2947	2723
1974-75	*	10193	4250	3831	*	*
1975-76	2000	9374	4275	3828	3038	2734
1976-77	2000	9559	4273	3780	3069	2716
1977-78	2200	10100	4330	3746	3020	2637
1978-79	2250	9064	4462	4014	2998	2497
1979-80	2176	8760	*	3795	2950	2549
1980-81	2150	8836	4051	3790	2979	2342
1981-82	2150	9767	4126	3790	2985	2342
1982-83	1900	8389	4199	3561	2844	2342
1983-84	2080	8762	4092	4046	2771	2200
1984-85	1996	7390	3950	3227	2727	2168
1985-86	*	7705	3755	3164	2657	2014
1986-87	1708	7694	3755	2938	2604	1990
1987-88	1762	7325	3700	2947	2535	1990
1988-89	1628	6995	3700	2337	2481	1816
1989-90	1864	7016	3700	2913	2426	*
1990-91	1719	7768	3700	2676	2382	1740
1991-92	1781	6517	3700	2798	2332	1694
1992-93	1673	6070	3600	2525	2263	1690
1993-94	1673	6018	3500	2463	2256	1701
1994-95	1551	5204	3300	2381	2227	1696
1995-96	1446	5029	3300	2497	2125	1595
1996-97	1408	5454	3300	2365	*	1507
1997-98	1334	4367	3300	2273	1925	1422
1998-99	1347	4574	3300	2227	2010	1639
1999-00	1191	4223	2705	2147	1841	*
2000-01	1043	4013	2705	2082	1697	1305
2001-02	1293	3735	2677	2069	1654	1253
2002-03	1233	3491	2577	2029	1571	1196
2003-04	1180	3451	2579	1875	1419	1045
2004-05	1056	2945	2712	1743	1207	1040
2005-06	1101	2837	2296	1638	925	992
2006-07	1093	2853	1782	1578	862	1178
2007-08	923	2610	1915	*	783	884
2008-09	844	2029	1725	1364	711	820
2009-10	669	2021	1615	1140	902	910
2010-11	569	1896	1520	1076	777	719
2011-12	478	1722	1508	1047	925	593

* Form 3526 report not found for this year.

TOTAL PAID CIRCULATION

1972-2012 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

	Virginia	NYU	Chicago	Stanford	Cornell	Duke
1972-73	*	*	*	1576	*	*
1973-74	3249	*	2009	1795	3496	1200
1974-75	3000	2222	1975	*	3378	1200
1975-76	2850	2179	1951	*	3410	*
1976-77	2750	2143	2033	*	3650	1200
1977-78	2650	*	2068	*	3350	1215
1978-79	2506	2105	2068	1546	3350	1326
1979-80	*	2100	2068	*	3350	1326
1980-81	2396	2173	1827	*	3350	1296
1981-82	2387	2092	1993	2056	*	1411
1982-83	2443	2074	2150	2350	3603	1440
1983-84	2400	2069	2300	*	*	1378
1984-85	2161	*	2617	*	*	1412
1985-86	*	*	*	*	3682	1445
1986-87	2200	*	*	*	*	1469
1987-88	2029	*	*	*	*	1335
1988-89	1958	*	*	*	*	1295
1989-90	*	*	2229	*	*	1268
1990-91	1882	*	2205	*	*	1255
1991-92	*	*	2454	*	*	1253
1992-93	1840	*	*	*	*	1187
1993-94	1680	*	1979	*	3250	*
1994-95	1670	*	2048	*	3252	*
1995-96	1550	*	1959	*	2958	*
1996-97	1552	*	1922	*	2890	*
1997-98	1536	1362	1875	*	2803	*
1998-99	*	1222	1872	*	2805	*
1999-00	*	1200	1870	8850	2859	*
2000-01	*	1183	2062	*	2845	*
2001-02	1849	1159	1769	1434	2816	*
2002-03	1068	1211	1845	1280	2288	*
2003-04	644	1209	*	1112	1766	*
2004-05	616	867	*	1112	1827	*
2005-06	483	999	*	1112	1712	*
2006-07	526	990	*	1089	1497	*
2007-08	530	956	1525	1008	1458	957
2008-09	542	763	1525	961	1319	790
2009-10	443	706	1485	974	1237	917
2010-11	428	662	951	915	1183	583
2011-12	304	599	801	727	1150	537

* Form 3526 report not found for this year.

TOTAL PAID CIRCULATION

1972-2012 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

	Georgetown	Vanderbilt	UCLA	Texas	Minnesota	Boston U
1972-73	*	1700	*	*	*	*
1973-74	1743	1775	1750	*	2130	*
1974-75	1766	2100	1850	2000	2342	4882
1975-76	1981	1984	*	2150	1732	4844
1976-77	1973	1995	1900	2275	1724	4699
1977-78	2100	1995	1351	2135	1608	4790
1978-79	3130	2046	1520	2220	1621	*
1979-80	3197	1995	1536	2349	1527	4691
1980-81	3058	2046	1563	2349	1501	4559
1981-82	2950	2046	1277	2347	1513	3749
1982-83	3100	1995	1251	2396	1421	3540
1983-84	3200	1995	1361	2396	1378	3433
1984-85	3000	2001	1400	*	1373	3961
1985-86	1116	2020	1400	1960	1345	2274
1986-87	1116	1996	*	1684	1282	2801
1987-88	*	1550	1192	*	1258	2767
1988-89	*	1359	1192	*	1262	2617
1989-90	3043	1253	1192	*	1230	3340
1990-91	2782	1281	1134	1548	1217	2701
1991-92	2260	1330	1192	1489	1251	2574
1992-93	3955	1220	1083	1407	1202	183
1993-94	1514	1252	940	1261	1163	1860
1994-95	1462	1252	940	881	1023	1636
1995-96	*	1267	990	1137	1184	784
1996-97	1536	1287	1000	1123	1053	602
1997-98	1487	1265	1000	1645	1014	550
1998-99	1471	1165	1000	1628	947	621
1999-00	*	952	921	1526	782	549
2000-01	1398	960	922	1488	757	879
2001-02	*	855	695	1449	868	547
2002-03	*	*	650	1372	802	538
2003-04	*	800	563	1125	768	538
2004-05	*	850	648	1056	728	538
2005-06	1027	850	520	963	1778	538
2006-07	924	850	521	963	732	538
2007-08	1068	850	684	941	690	538
2008-09	*	850	632	860	661	533
2009-10	546	650	435	804	609	533
2010-11	*	650	542	748	581	483
2011-12	*	650	529	663	527	*

* Form 3526 report not found for this year.

APPENDIX B

THE 925 MICHIGAN LAW REVIEWS

The next two pages contain details from the *Michigan Law Review*'s U.S. Postal Service Form 3526s for 2011 and 2012. The 2011 form shows a "Total Paid Distribution" of 777, which includes an unusually large (compared to most leading law reviews) 59 issues – roughly 8% of the total – sold via channels other than paid subscriptions. The 2012 form, however, is much more unusual. It shows a "Total Paid Distribution" of 925, which includes 244 issues – roughly 26% – sold via channels other than paid subscriptions.

UNITED STATES POSTAL SERVICE®

Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)

1. Publication Title	2. Publication Number	3. Filing Date
Michigan Law Review	3 4 5 - 2 0 0	July 18, 2011
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Monthly Except Jan, July, Aug, and Sept	8	$60.00/Domestic $70.00/Foreign

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4®)* — Contact Person: Maureen Bishop; Telephone *(Include area code)*: 734-763-6100

625 South State Street, Ann Arbor (Washtenaw County) MI 48109-1215

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*

625 South State Street, Ann Arbor, MI 48109-1215

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*

Michigan Law Review Association, 625 S State Street, Ann Arbor, MI 48109-1215

Editor *(Name and complete mailing address)*

Amy Murphy-625 South State Street, Ann Arbor, MI 48109-1215

Managing Editor *(Name and complete mailing address)*

Charles Weikel-625 South State Street, Ann Arbor, MI 48109-1215

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

Full Name	Complete Mailing Address
Michigan Law Review Association	625 S State Street, Ann Arbor, MI 48109-121
By the Regents of the University of Michigan	

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☒ None

Full Name	Complete Mailing Address

12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)*

The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:

☒ Has Not Changed During Preceding 12 Months

☐ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

13. Publication Title	14. Issue Date for Circulation Data Below
Michigan Law Review	June 2011 (Vol. 109, No.8)

15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*			1120	1100
b. Paid Circulation *(By Mail and Outside the Mail)*	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	718	724
	(2)	Mailed In-County Paid Subscriptions Stated on PS Form 3541 *(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)*	0	0
	(3)	Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	59	65
	(4)	Paid Distribution by Other Classes of Mail Through the USPS (e.g. First-Class Mail®)	None	None
c. Total Paid Distribution *(Sum of 15b (1), (2), (3), and (4))*			777	789

UNITED STATES POSTAL SERVICE® **Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)**

1. Publication Title	2. Publication Number	3. Filing Date
Michigan Law Review	3 4 5 - 2 0 0	July 18, 2012
4. Issue Frequency	**5. Number of Issues Published Annually**	**6. Annual Subscription Price**
Monthly Except Jan, July, Aug, and Sept	8	$60.00/Domestic $70.00/Foreign

7. Complete Mailing Address of Known Office of Publication *(Not printer)* *(Street, city, county, state, and ZIP+4®)*: 625 South State Street, Ann Arbor (Washtenaw County) MI 48109-1215 — Contact Person: Maureen Bishop — Telephone *(Include area code)*: 734-763-6100

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*: 625 South State Street, Ann Arbor, MI 48109-1215

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*: Michigan Law Review Association, 625 S State Street, Ann Arbor, MI 48109-1215

Editor *(Name and complete mailing address)*: Kimberly Ang, 625 South State Street, Ann Arbor, MI 48109-1215

Managing Editor *(Name and complete mailing address)*: Jack Morgan, 625 South State Street, Ann Arbor, MI 48109-1215

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

Full Name	Complete Mailing Address
Michigan Law Review Association by the Regents of the University of Michigan	625 South State Street, Ann Arbor, MI 48109-

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☒ None

Full Name	Complete Mailing Address

12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates)* *(Check one)*
The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
☒ Has Not Changed During Preceding 12 Months
☐ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

13. Publication Title	14. Issue Date for Circulation Data Below
Michigan Law Review	June 2012 (Vol. 110, No.8)

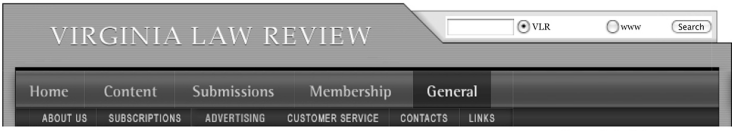
15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*			1088	1080
b. Paid Circulation *(By Mail and Outside the Mail)*	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	681	685
	(2)	Mailed In-County Paid Subscriptions Stated on PS Form 3541 *(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)*	0	0
	(3)	Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	244	240
	(4)	Paid Distribution by Other Classes of Mail Through the USPS (e.g. First-Class Mail®)	None	None
c. Total Paid Distribution *(Sum of 15b (1), (2), (3), and (4))*			925	925

APPENDIX C

THE 1,700 VIRGINIA LAW REVIEWS

The next page contains details from three screen shots of the "About VLR" page on the *Virginia Law Review*'s website made in December 2010 (top), January 2012 (middle), and August 2013 (bottom). The claim that the journal "has a circulation of over 1,700" is the same on all three. In fact, the whole text block of which that claim is a part seems to have been unchanged at least during the time covered by these three screen shots. It may be that the opening line of the paragraph in which the "1,700" claim appears is an indicator of the last time this "About VLR" material was revised: "In 2005, the *Virginia Law Review* entered its ninety-first academic year as one of the most respected student legal periodicals in the country. . . ." (The "1,700" claim was not accurate even in 2005, when the VLR had a paid circulation of 616.) Perhaps 2013 would be a good year in which to change "ninety-first" to "ninety-ninth" – and "1,700" to "300."

Virginia Law Review 12/19/10 11:41 AM



ABOUT VLR

On March 15, 1913, a meeting was held in Minor Hall at the University of Virginia to consider establishing a law journal, to be published by the students of the Law School. On April 23, 1913, the *Virginia Law Review* was permanently organized. Volume I carries this forward:

> With this number the *Virginia Law Review* begs to introduce itself to an indulgent public. The editorial work is entirely in the hands of . . . students, not one of whom has had previous experience with work of this character. It is hoped that the crudities of this first effort in the line of published comment on the work of the courts may be less glaring in the future numbers when the editors have become more experienced.

In 2005, the *Virginia Law Review* entered its ninety-first academic year as one of the most respected student legal periodicals in the country. Its objective is to publish a professional periodical devoted to law-related issues that can be of use to judges, practitioners, teachers, legislators, students, and others interested in the law. Only in the legal profession do students have the responsibility for publishing a majority of the contributions to the professional literature. The *Law Review* currently has a circulation of over 1,700 and, when the pass-along readership rate is added, surpasses 17,000. In addition, the *Law Review* appears in electronic databases, including Westlaw, LexisNexis, and HeinOnline.

Currently in Print:
Vol. 96, November 2010, Issue 7

The National Convention Constitutional Amendment Method: Defects, Federalism Implications, and Reform
by Michael Rappaport

Multiple Gatekeepers
by Andrew Tuch

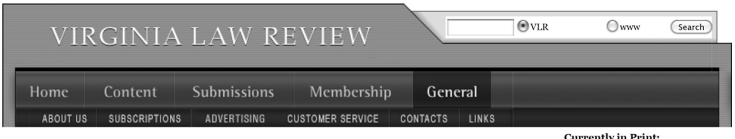
The Hidden Function of Takings Compensation
by Gideon Parchomovsky & Abraham Bell

Taking "Due Account" of the APA's Prejudicial Error Rule
by Craig Smith

***In Brief*:**
Recently Published Items

Schrödinger's Cross: The Quantum Mechanics of the Establishment Clause
Essay by Joseph Blocher

Virginia Law Review 1/20/12 10:55 PM



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Currently in Print:
Vol. 97, December 2011, Issue 8

Globalized Corporate Prosecutions
by Brandon L. Garrett

A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause
by Barry Friedman and Daniel T. Deacon

The Myth of Efficient Breach: New Defenses of the Expectation Interest
by Daniel Markovits and Alan Schwartz

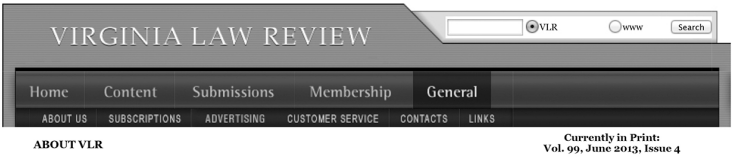
Reclaiming the Legal Fiction of Congressional Delegation
by Lisa Schultz Bressman

Securing Sovereign State Standing
by Katherine Mims Crocker

***In Brief*:**
Recently Published Items

PPACA in Theory and Practice: The Perils

Virginia Law Review 8/14/13 8:32 AM



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> With this number the *Virginia Law Review* begs to introduce itself to an indulgent public. The editorial work is entirely in the hands of . . . students, not one of whom has had previous experience with work of this character. It is hoped that the crudities of this first effort in the line of published comment on the work of the courts may be less glaring in the future numbers when the editors have become more experienced.

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Currently in Print:
Vol. 99, June 2013, Issue 4

Constitutional Privileging
by Michael Coenen

A Constitutional Theory of Habeas Power
by Lee B. Kovarsky

The Dark Side of Town: The Social Capital Revolution in Residential Property Law
by Stephanie M. Stern

The Principal Problem: Towards a More Limited Role for Fiduciary Law in the Nonprofit Sector
by Natalie Brown

***In Brief*:**
Recently Published Items

The Trouble With Dignity And Rights Of Recognition
Essay by Neomi Rao

Noel Canning v. NLRB - Enforcing Basic

APPENDIX D

THE 8,850 STANFORD LAW REVIEWS

The image on the following page is a detail from the U.S. Postal Service Form 3526 published in the back of the October 2000 issue of the *Stanford Law Review*. The caption at the top of the first column containing hand-written quantities is:

Average No. Copies Each Issue
During Preceding 12 Months

The caption at the top of the second column containing hand-written quantities is:

No. Copies of Single Issue
Published Nearest to Filing Date

The caption at the left of the sixth row is:

Total Paid and/or Requested Circulation . . .

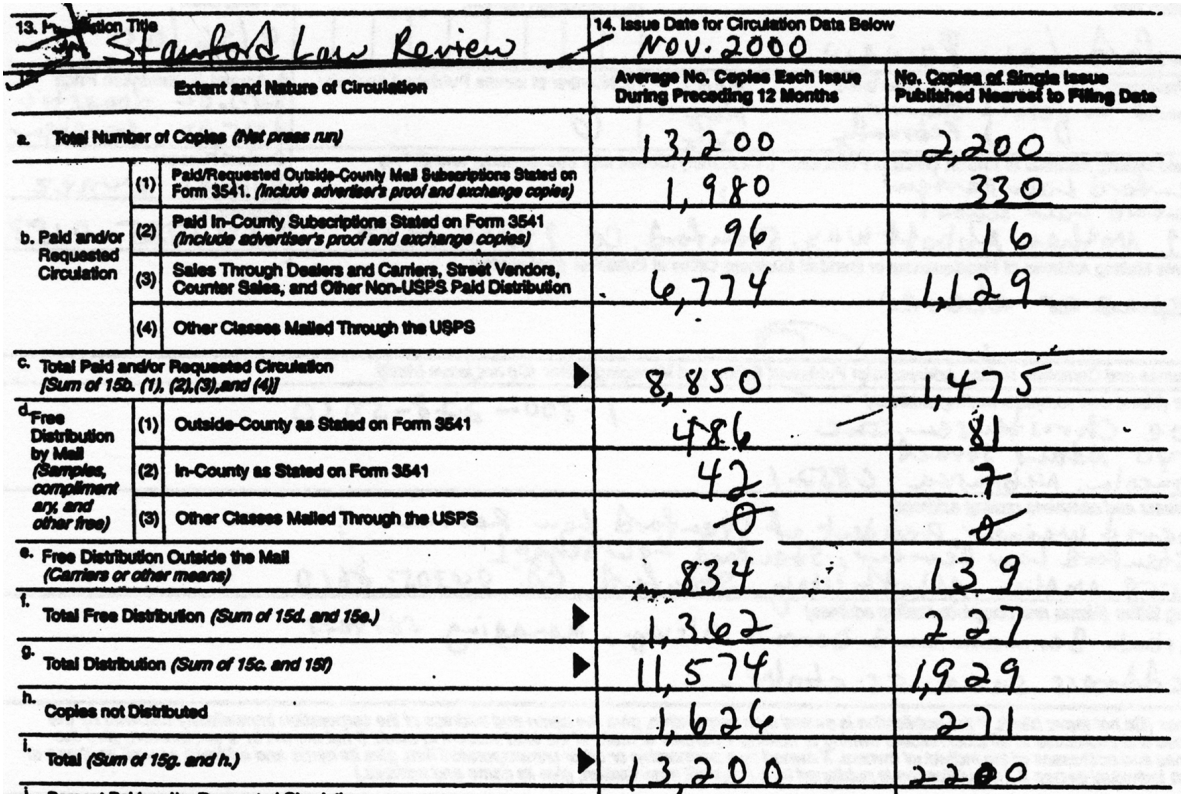
The quantity written in the sixth row of the first column is:

8,850

The quantity written in the sixth row of the second column is:

1,475

With that information about the form, and the knowledge that the *Stanford Law Review* published at that time (and still publishes today) six issues per year, the reader can probably figure out what happened.



13. Publication Title: Stanford Law Review			14. Issue Date for Circulation Data Below: NOV. 2000	
Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)			13,200	2,200
b. Paid and/or Requested Circulation	(1)	Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. (Include advertiser's proof and exchange copies)	1,980	330
	(2)	Paid In-County Subscriptions Stated on Form 3541 (Include advertiser's proof and exchange copies)	96	16
	(3)	Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	6,774	1,129
	(4)	Other Classes Mailed Through the USPS		
c. Total Paid and/or Requested Circulation (Sum of 15b. (1), (2),(3),and (4))			8,850	1,475
d. Free Distribution by Mail (Samples, complimentary, and other free)	(1)	Outside-County as Stated on Form 3541	486	81
	(2)	In-County as Stated on Form 3541	42	7
	(3)	Other Classes Mailed Through the USPS	0	0
e. Free Distribution Outside the Mail (Carriers or other means)			834	139
f. Total Free Distribution (Sum of 15d. and 15e.)			1,362	227
g. Total Distribution (Sum of 15c. and 15f)			11,574	1,929
h. Copies not Distributed			1,626	271
i. Total (Sum of 15g. and h.)			13,200	2200

APPENDIX E

LAW REVIEW PRODUCTION

1890-2010 FOR FLAGSHIP LAW REVIEWS AT SEVERAL FINE SCHOOLS

The tables on the following pages are a first take of a larger project to collect and present information on (1) the size, composition, and other key features of law review editorial staffs, and (2) the characteristics of the products law reviews put out. Here there is only a very sparse collection of data – just one year out of each decade since the late 19th century from ten of the most prominent law reviews now in existence, showing just the most basic of measures of:

- staffing (total headcount of student members of the law review, as listed on the masthead of the last – or best otherwise available – issue of each volume),
- output (total page count, as indicated by the last numbered page of the last substantive work in the last issue of each volume), and
- productivity (output divided by staffing).

It is a simple, crude, and incomplete presentation. But it is a start, and it does shed at least a glimmer of dim light on some of the essential features of the first commercial legal enterprise in which most of the participating students have been involved.

LAW REVIEW PRODUCTION

1890-2010 FOR FLAGSHIP LAW REVIEWS AT SEVERAL FINE SCHOOLS

year	U. PENN. LAW REVIEW				HARVARD LAW REVIEW			
	volume	staff	pages	rate	volume	staff	pages	rate
1890	39	*	808	*	4	15	399	27
1900	49	12	748	62	14	20	632	32
1910	59	19	664	35	24	28	687	25
1920	69	17	401	24	34	29	903	31
1930	79	43	1165	27	44	34	1325	39
1940	89	35	1125	32	54	40	1432	36
1950	99	44	1252	28	64	58	1408	24
1960	109	33	1194	36	74	57	1680	29
1970	119	57	1087	19	84	79	1976	25
1980	129	76	1540	20	94	89	1927	22
1990	139	91	1760	19	104	80	1964	25
2000	149	92	2191	24	114	82	2586	32
2010	159	106	2252	21	124	87	2134	25

year	YALE LAW JOURNAL				COLUMBIA LAW REVIEW			
	volume	staff	pages	rate	volume	staff	pages	rate
1890	*	*	*	*	*	*	*	*
1900	10	17	336	20	1	13	570	44
1910	20	18	675	38	11	22	807	37
1920	30	30	878	29	21	27	836	31
1930	40	35	1345	38	31	29	1399	48
1940	50	35	1516	43	41	36	1481	41
1950	60	27	1452	54	51	44	1077	24
1960	70	50	1414	28	61	26	1540	59
1970	80	64	1711	27	71	64	1557	24
1980	90	52	1904	37	81	67	1738	26
1990	100	156	2812	18	91	85	2122	25
2000	110	94	1545	16	101	88	2084	24
2010	120	105	2212	21	111	90	1932	21

year = year in which a volume began; **volume** = volume number; **staff** = number of students on the masthead; **pages** = last numbered page of last substantive work in a volume; **rate** = pages divided by staff; ***** = data not available.

LAW REVIEW PRODUCTION

1890-2010 FOR FLAGSHIP LAW REVIEWS AT SEVERAL FINE SCHOOLS

year	MICHIGAN LAW REVIEW				CALIFORNIA LAW REVIEW			
	volume	staff	pages	rate	volume	staff	pages	rate
1890	*	*	*	*	*	*	*	*
1900	*	*	*	*	*	*	*	*
1910	9	20	746	37	*	*	*	*
1920	19	21	906	43	9	17	520	31
1930	29	20	1129	56	19	24	659	27
1940	39	29	1444	50	29	13	799	61
1950	49	20	1265	63	39	12	618	52
1960	59	35	1289	37	49	42	1019	24
1970	69	38	1575	41	59	67	1591	24
1980	79	64	1619	25	69	71	1763	25
1990	89	76	2328	31	79	93	1642	18
2000	99	92	2061	22	89	91	1950	21
2010	109	96	1578	16	99	119	1743	15

year	VIRGINIA LAW REVIEW				NYU LAW REVIEW[†]			
	volume	staff	pages	rate	volume	staff	pages	rate
1890	*	*	*	*	*	*	*	*
1900	*	*	*	*	*	*	*	*
1910	*	*	*	*	*	*	*	*
1920	7	33	679	21	*	*	*	*
1930	17	31	858	28	8	21	707	34
1940	27	33	1116	34	18	14	632	45
1950	37	25	1185	47	26	33	1069	32
1960	47	51	1514	30	36	38	1596	42
1970	57	78	1650	21	46	69	1234	18
1980	67	57	1562	27	56	63	1313	21
1990	77	90	1673	19	66	88	2017	23
2000	87	90	2081	23	76	90	1897	21
2010	97	94	2101	22	86	87	2111	24

year = year in which a volume began; **volume** = volume number; **staff** = number of students on the masthead; **pages** = last numbered page of last substantive work in a volume; **rate** = pages divided by staff; ***** = data not available.

[†] The odd numbering of early *NYU Law Review* volumes was due to some doubling up on years during World War 2.

LAW REVIEW PRODUCTION

1890-2010 FOR FLAGSHIP LAW REVIEWS AT SEVERAL FINE SCHOOLS

	U. CHICAGO LAW REVIEW				STANFORD LAW REVIEW			
year	volume	staff	pages	rate	volume	staff	pages	rate
1890	*	*	*	*	*	*	*	*
1900	*	*	*	*	*	*	*	*
1910	*	*	*	*	*	*	*	*
1920	*	*	*	*	*	*	*	*
1930	*	*	*	*	*	*	*	*
1940	8	20	819	41	*	*	*	*
1950	18	17	830	49	3	*	758	*
1960	28	13	782	60	13	22	994	45
1970	38	26	885	34	23	48	1166	24
1980	48	57	1094	19	33	60	1192	20
1990	58	65	1540	24	43	147	1445	10
2000	68	61	1510	25	53	85	1667	20
2010	78	59	1685	29	63	92	1402	15

year = year in which a volume began; **volume** = volume number; **staff** = number of students on the masthead; **pages** = last numbered page of last substantive work in a volume; **rate** = pages divided by staff; ***** = data not available.