

WHAT WE DID NOT KNOW ABOUT  
JUDICIAL REVIEW: ON KEITH  
WHITTINGTON'S *REPUGNANT LAWS*

**REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT.** By Keith E. Whittington.<sup>1</sup> University Press of Kansas. 2019. Pp. xxi + 410. \$39.95 (Cloth).

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Keith Whittington's new book, *Repugnant Laws*, provides a comprehensive overview and quantitative analysis of all the times the U.S. Supreme Court examined the constitutionality of a federal statute (a practice termed "horizontal judicial review"). As one has come to expect from this author, it is a fine piece of research, elegantly presented, and certainly worth a read by all who teach Constitutional Law. Some of what it has to tell us is familiar, but much is new.

I. THE BIG PICTURE

Here is the big picture as it emerges in the book. Before 1920, few federal laws were struck down or constitutionally restricted via Supreme Court interpretation. Over its first 130-year period, these judicial restrictions of Congress averaged just under one per year (pp. 27–28). In the years from 1920 through 1932 this number jumped to average 3.1 per year. During the peak activism of the anti-New-Deal Court, from 1933 through 1936, the Court struck down as many as five federal statutory provisions per year. The well-known "switch in time" during FDR's second term began nearly two decades of exceptional quiescence toward federal laws wherein the post-New-Deal Court of 1937–1954 returned nearly

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all the way back to its pre-1920 levels, averaging around one restriction of federal statutory provision per year (p. 179, Table 6-1).

After this, the numbers inch upward: Warren Court activism against Congress rose back up nearly to Taft Court levels, with 2.6 restrictions per year; the Burger Court took it a bit past the Taft Court, to 3.17 per year; the Rehnquist Court kicked it up to 3.6 per year; then the Roberts Court through 2017 sharply cut back on the level of overturnings/judicial restrictions to just about two federal laws per year, below the Warren Court level (p. 238, Table 7-1). Departing sharply from previous Court practice, the Roberts Court upheld even fewer federal laws than it struck down.

An important fact, quantified for the first time in this book, is that the Supreme Court has used its power of judicial review far more often to strengthen, rather than cut back on, Congress's legislating power. On average, three out of every four times that the Supreme Court reviewed a provision of federal law, it upheld, rather than voiding or providing a restricting interpretation of, the provision at issue (p. 25).

In terms of the big normative picture (i.e., looking at the question of whether the Court is ultimately an impediment to a well-functioning democracy), Whittington finds that it is not easy to find a theory that justifies horizontal judicial review, wherein the Court blocks a concerted policy commitment of nationally elected officials, but also he notices the rarity of such a practice. Instead, the Supreme Court "is often doing the political work that some political leaders want it to do. It is acting as a player *within* democratic politics, not simply as an institutional guardian standing outside of democratic politics" (p. 314, emphasis added). But he qualifies this description, using a metaphor: "The Supreme Court is not a lapdog; it has often bitten the hand of the party that put it on the bench" (p. 291). I would add the metaphor deployed by Martin Shapiro for constitutional courts: Management sometimes puts in place a "junkyard dog," knowing that the animal's general ferociousness will cause it to keep in line potential miscreants, even at the risk that such a dog will occasionally also nip at its own patron.<sup>3</sup>

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3. Martin Shapiro, *The European Court of Justice: Of Institutions and Democracy*, 32 *ISR. L. REV.* 3 (1998).

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## II. INTERESTING FACTOIDS

*Repugnant Laws* is chockful of interesting factoids that most of us constitutional law professors did not know before: *e.g.*, in its first 72 years of operation (up to the Civil War), the Supreme Court reviewed Congressional legislation 62 times, and in 22 of those cases either restricted potential applications of the law on constitutional grounds or declared part of the law void for unconstitutionality (p. 62). *Marbury* was *not* the first such instance; it was the third (p. 81).

Second, the post-Civil-War Supreme Court contrasts with the Court of its first 72 years in that antebellum Justices tended to review laws from the earliest Congresses—Congress of the relatively distant past—whereas the Reconstruction and post-Reconstruction courts under Chief Justices Chase and Waite focused primarily on legislation of the Civil War and Reconstruction Congresses. As the Republican Party split into radical and liberal factions, the Supreme Court of Republican appointees became a player siding with one or another faction of the still dominant Republican coalition (pp. 122–123).

Third, in a 1907 case *Ellis v. United States*,<sup>4</sup> the Court *upheld* a federal law requiring all federal contractors to provide an eight-hour work day (p. 170); this was two years after *Lochner*<sup>5</sup> and a year *before* *Muller v. Oregon*.<sup>6</sup> Perhaps the Court had abandoned its *Lochner* thinking even before hearing the argument about women that we professors had thought was what swayed them in *Muller*.

Fourth, whereas I have always thought of the “*Lochner* era” as running from the late 1890s through 1936, Whittington periodizes *Lochner* as running from 1885–1919, and informs us that even in this period the Court upheld far more Congressional statutes than it struck down (pp. 25–26). This fact of judicial support for federal laws also holds for what he calls the Taft Court period of 1920–1932, and *even* for the anti-New-Deal Court of 1933–1936 (pp. 25–26, Figure 1-1).

Fifth, certain courts stand out from the rest. The anti-New-Deal Court (of 1933–1936) stands out as extremely obstructionist—whether measured in number of provisions struck

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4. *Ellis v. United States*, 206 U.S. 246 (1907).

5. *Lochner v. New York*, 198 U.S. 45 (1905).

6. *Muller v. Oregon*, 208 U.S. 412 (1908).

down, in number of whole laws struck down, in number of notable laws struck down, or in the recent-ness of the laws that were struck down (pp. 178–180, Table 6-1). The Roberts Court of 2005–2018 has been unique in *not* upholding more federal laws than it struck down. No prior Supreme Court over 200 years has produced this pattern (p. 269). On average, the Supreme Court has upheld three times as many laws as they struck down.

As the anti-New-Deal Court of 1933–1936 was uniquely obstructionist, so the pro-New Deal Court of October 1936 to June 1942 was uniquely compliant with Congress. One extreme begat another. In five of those six terms (October 1936–June 1942), the Court struck down no provision of a federal law and over these six terms the Court upheld federal laws against 81 challenges to them (p. 209).

Of the Warren Court, Whittington observes a distinction between its treatment of federal law and state law found repugnant to the Constitution. In cases examining problematic federal law, the Warren Court typically, rather than simply strike it down, would read the law, irrespective of its actual wording, in a way that rendered it compatible with the Bill of Rights provision that had given rise to the court challenge (pp. 221, 229, 237). A prominent example of this judicial approach with which many of us might be familiar is the *United States v. Seeger*<sup>7</sup> conscientious objector case. What one may not have known prior to reading this book is that under the Warren Court this active rewriting of federal law in order to avoid a declaration of unconstitutionality was more typical than outright declarations of unconstitutionality.

The history of striking down statutes from the Civil War to the mid-1990s was mainly about using the Fourteenth Amendment to strike down state and local laws. From the mid-1990s onward, however, the Supreme Court under Chief Justices Rehnquist and Roberts have voided as many federal laws as state laws (p. 237, Figure 7-1). This is a new phenomenon.

### III. DISAGREEMENTS

There are a number of examples where I did not agree with Whittington's interpretation of a given case or of its political import, but this would probably be true of my reaction to any

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7. *United States v. Seeger*, 380 U.S. 163 (1965).

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comprehensive account given by any author other than myself. Rather than recounting my various small, particular disagreements, I would leave it to others to read the book and come up with their own.

My most overarching disagreement would be that I am not convinced that the pro-New Deal Court of 1937–1942 broke with precedent so thoroughly that it brought about a “constitutional revolution,” as Whittington suggests (pp. 174–175). Or, to say it another way, I see the course of economy-related precedents prior to 1937 as having exhibited more zigzagging than he acknowledges. For instance, the Court allowed Congress to ban “impure” food or drugs from interstate commerce<sup>8</sup> and to tax the shipping of yellow margarine in order to suppress interstate sales of it,<sup>9</sup> but disallowed Congress to ban<sup>10</sup> or tax the shipping across state lines of the products of child labor.<sup>11</sup> The Court permitted Congress to regulate the business of transforming livestock to meat in slaughterhouses, because the business fell within the “current of commerce” that flowed from one state to another,<sup>12</sup> and, on similar grounds, to regulate the local stockyards where such livestock was held prior to slaughter.<sup>13</sup> On the other hand, the Court forbade Congress to regulate the slaughtering of poultry that had crossed state lines in order to be slaughtered.<sup>14</sup> Although the Court declared in 1914 that “in all matters having such a close and substantial relation to interstate commerce . . . that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule,”<sup>15</sup> the anti-New Deal Court, nonetheless, forbade Congress to regulate working conditions in the nationwide coal-mining industry in order to stabilize interstate commerce in coal.<sup>16</sup> When the Court in 1937 opted to go with the pro-Congressional-power zigs rather than the anti-Congressional-power zags of this list, it was hardly wreaking revolution.

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8. *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

9. *McCray v. United States*, 195 U.S. 27 (1904).

10. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

11. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

12. *Swift & Co. v. United States*, 196 U.S. 375 (1905).

13. *Stafford v. Wallace*, 258 U.S. 495 (1922).

14. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

15. *Houston East & West Texas Railway Co. v. U.S. (Shreveport Rate Case)*, 234 U.S. 342 (1914).

16. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

My particular interpretive disagreements were often prompted by Whittington's style of reporting the decisions, which is to follow very closely the Court's own language. This style can be both a plus and a minus. On the plus side, this approach can provide a refreshing reminder of how different the past is from the present; some cases that would be seen one way today were described quite differently by the Court at the time. For instance, *In re Heff*<sup>17</sup> in 1905 struck down a federal law limiting alcohol sales to Indians. The Supreme Court said that once Indians had become full American citizens under the process established by the Dawes Allotment Act of 1887,<sup>18</sup> they could no longer be restricted by Congress any more than other citizens could. I had viewed this case from afar as an equal protection decision. Immersed in the Court's own language, Whittington notes that in the Court's terms this decision, rather than upholding Indian rights as such, upheld the state's right to regulate its own citizens, free from interference by Congress. Controversial at the time, *Heff* was overruled eleven years later by *United States v. Nice*.<sup>19</sup>

Whittington's close-to-the-language approach, however, can also produce problems, including the problem of misrepresentation of the fundamental impact of a decision. On the 1842 case, *Prigg v. Pennsylvania*,<sup>20</sup> Whittington quotes Justice Story upholding the federal Fugitive Slave Act of 1793: Story ruled "[the Act is] clearly constitutional in all its provisions, with the possible exception of that part which confers authority on state magistrates."<sup>21</sup> Whittington concludes: "The Court was consistently on the wrong side of the slavery question" (p. 117). But, in fact, Story also went on to say in *Prigg* that state magistrates (the term referred to low-level judges) may act to help Congress enforce the law "*unless prohibited by state legislation*."<sup>22</sup> In other words, the state lawmakers may keep state officials from carrying out the Fugitive Slave Act, as Pennsylvania already had done, in direct violation of the terms of that Act. Northern states promptly enacted more such prohibitions, and the Fugitive Slave Act, as predicted in the partial dissents to Story's ruling, became

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17. *In re Heff*, 197 U.S. 488 (1905).

18. Dawes Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (current version at 25 U.S.C. ch. 9, § 331–334, 339, 341–342, 348–349, 354, 381 (1994)).

19. *United States v. Nice*, 241 U.S. 591 (1916).

20. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

21. *Id.* at 542.

22. *Id.* (emphasis added).

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widely unenforceable due to the paucity of federal judges (e.g., for all of Pennsylvania, there were only two federal judges). This unenforceability provoked political pressure from the South, which eventually led to the Compromise of 1850, wherein Congress created many federal magistrates to get around the problem that the *Prigg* decision had created for slaveowners. Both Joseph Story and his good friend Charles Sumner called the *Prigg* opinion a major blow for liberty.<sup>23</sup>

## IV. FRUITFUL REMINDERS

Whittington's book offers a number of fruitful reminders of things about judicial review that may have been pointed out elsewhere. For one, he usefully reminds us that Congress's interpretation of the Constitution also matters. For instance, although the constitutionality of a federal bank was not seriously questioned after 1819, the broader interpretation of federal powers enunciated by John Marshall in *McCulloch v. Maryland*<sup>24</sup> became "in practice a political dead letter," because Congress restrained itself to a narrow reading of its own powers from the time of the first Jacksonian Congress until the Civil War (p. 95).

The book also usefully reminds us that the Missouri Compromise, notoriously declared unconstitutional in the *Dred Scott* decision,<sup>25</sup> was by the time of that decision a long-defunct provision. The 1820 Missouri Compromise line above which slavery could not spread had been replaced by the Kansas Nebraska Act of 1854, which imposed popular sovereignty for allowing slavery to spread or not.

More than once, *Repugnant Laws* mentions that after the Supreme Court had struck down a particular law (for instance, the legislative veto) Congress then developed an alternative "work-around." This is an important fact, supporting Alexander Bickel's assertion<sup>26</sup> that what generally goes on is a "colloquy" among the Court and the elected branches. I would have liked to see in the book more detailed information about the successful congressional responses to negative Court decisions. In a similar

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23. For a far more detailed account, see Leslie F. Goldstein, *A "Triumph of Freedom" After All? Prigg v. Pennsylvania Re-Examined*, 29 *LAW & HIST. REV.* 763, 763 (2011).

24. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

25. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

26. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1970).

vein, the book would have benefitted from a bit of discussion of the movement for a Child Labor Amendment to the Constitution, which built up considerable momentum prior to the Court's change of position on Congress's power to regulate industrial labor in *NLRB v. Jones & Laughlin*<sup>27</sup> and *U.S. v. Darby*.<sup>28</sup>

In a telling footnote (p. 364 n. 69), Whittington points out that Congress inadvertently probably prolonged its trouble with the anti-New-Deal Court justices by cutting federal retirement salaries in half in 1932. It restored these salaries in 1937, the same year as the unsuccessful Court-packing plan. Not only did Congress restore the salaries in that pivotal year, but it made available senior status to the Supreme Court, which status would allow salaries to rise in the future, unlike official retirement.<sup>29</sup> Five of the six vacancies filled by FDR after 1936 were opened up by justices taking senior status. Plainly, carrots worked better than sticks.

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27. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

28. *United States v. Darby*, 312 U.S. 100 (1941).

29. The Retirement Act of March 1, 1937, Pub. L. No. 10, 50 Stat. 24; Minor Myers III, *The Judicial Service of Retired United States Supreme Court Justices*, 32 J. SUP. CT. HIST. 46, 47 nn.9–18 (2007).