# MASTERING THE CASES AND DELINEATING THE ROLE OF THE SUPREME COURT[1]

**REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT.** By Keith E. Whittington.[2] University Press of Kansas. 2019. Pp. xxi + 410. $39.95 (Cloth).

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The first thing readers of Keith Whittington's remarkable book should notice is its title, *Judicial Review of Acts of Congress from the Founding to the Present.* What he has done is to carefully read and evaluate 1308 cases decided over the entire history of the United States Supreme Court, from the beginning until the end of the 2017 Term in the spring of 2018, all of which involve "judicial review of acts of Congress." Whittington does not consider any of the myriad of cases, most famously including *Brown v. Board of Education,* invalidating state legislation. Oliver Wendell Holmes famously opined that "I do not think that the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[4] In some ways, Whittington's book is a wonderful examination of the validity of Holmes's assertion with regard to Acts of Congress.

Of the cases considered, 345 "involve invalidations or limitations of statutory provisions [based on a desire to avoid a constitutional conflict], while another 963 upheld federal

1. This article is a lightly revised version of my *Foreword* to KEITH WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT (2019). My thanks to the Press for permission to republish the Foreword.

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4. O. W. HOLMES, *Law and the Court*, *in* COLLECTED LEGAL PAPERS 295–96 (1920).

legislation against constitutional challenge" (p. 25). I have been teaching constitutional law for over forty years, and I can confess that I have not read the multitude of cases surveyed by Whittington; an unscientific check with colleagues who also teach the subject leads me to believe that I am not an outlier. The late University of Chicago Law Professor David Currie is famous for having read every case while writing his multivolume study of the Constitution as interpreted by the Supreme Court, but he may well be close to unique. And, as much to the point, he was not testing hypotheses in the way that the social scientist Whittington is.

So Whittington is presenting a book almost certainly unprecedented in its scope and ambition. In addition to Currie's almost literally idiosyncratic enterprise, there may be "period" histories of the Supreme Court whose authors read all of the cases within what now seems a relatively brief period. But none of the more comprehensive one-volume general histories can claim the authority that Whittington evokes on almost every page. It is unimaginable that any professional academic, whether teaching law, political science, or American political history, will not treat this book as an indispensable source. But, fortunately, it is also written in a manner that should interest the general reader as well who wants to know how important the Supreme Court has really been throughout the course of American history. It is altogether fitting that Whittington was announced in November 2019 as the recipient of the Thomas M. Cooley Book Prize, and I suspect that will be only the first such award.

One often reads stories in the press—and occasionally even in the academic literature—proclaiming that Sandra Day O'Connor and then Anthony Kennedy were the most important political decisionmakers in America. In their role as the "median justices" on the Court, they often provided the "swing votes" in 5–4 decisions otherwise comprised of four highly predictable conservatives and four equally predictable liberals. For those who unthinkingly quoted Tocqueville's observation, during the 1830s, that all political issues in America ended up being legalized and ultimately decided by the judiciary, this meant a) that what the Supreme Court did was surpassingly important and b) that the "median justice" along the spectrum of the Court was especially important. Tocqueville's first observation may have been true: Americans *do* have a tendency to treat political issues as raising

questions about what the Constitution permits or prohibits. But he was almost certainly wrong in his second observation. Many extraordinarily important issues never come before the Court or, should a lawyer be so bold as to bring a case, they are dismissed on a variety of grounds that allow the Court to avoid issuing a decision. As Frederick Schauer notably demonstrated well over a decade ago in the pages of the *Harvard Law Review,* the issues that most Americans tell pollsters are principal sources of concern and anguish rarely come before the judiciary, including, most vividly, decisions that involve basic issues of war and peace or arguable "solutions" to problems posed by a globalized economy or global warming.[5] Even if many more constitutional challenges are filed regarding legislation simply because Congress, at least until recently, was passing so many more acts, that does not at all mean that the Supreme Court will be receptive, or even choose to grant arguments the dignity of a full hearing. The Court has steadily been reducing the actual number of cases it is willing to decide, so that in recent years it has issued opinions in only roughly 70–75 cases, many of them of interest only to the litigants or specialists in arcane areas of the law.

As Whittington demonstrates, echoing an earlier analysis by the late Charles Black, the principal role of the Supreme Court over our history is to legitimate actions, particularly by the national government, rather than to strike them down. My own beloved mentor, the late Robert G. McCloskey, once wrote that "the essential business of the Supreme Court is to say 'no' to government."[6] For better or worse, this is almost certainly false, especially if by "government" one means the national government, the focus of Whittington's attention. It may be true that the significance of the legitimation that comes through saying "yes" depends on the possibility that it might instead offer a McCloskeyan "no," but one ought not confuse the possibility with the overall likelihood of judicial action. The most truly "essential" business of the Court has been legitimation, not invalidation.

It is worth asking, though, under which circumstances the Court can successfully legitimate governmental actions that are opposed by significant sectors of the public. The Court itself once

5. *See* Frederick Schauer, *The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4 (2006).

6. ROBERT G. MCCLOSKEY, ESSAYS IN CONSTITUTIONAL LAW 5–6 (Robert G. McCloskey ed., 1957).

noted that Lincoln did not sue for a judicial declaration that secession by South Carolina was illegal; nor, of course, had James Buchanan, who agreed with Lincoln that secession was in fact unconstitutional. The reason, presumably, was simple: Even if one could imagine a federal court in 1861 issuing such a decree, it was unimaginable that South Carolina would in fact honor it, any more than Lincoln chose to honor the declaration by Chief Justice Taney in *Ex parte* Merryman[7] that he was without power unilaterally to suspend *habeas corpus*, a power not even enjoyed by the British Monarch (and granted Lincoln by Congress only in 1863). If anything, Lincoln's example—and the veneration accorded our 16th President—has served to delegitimate Taney and to legitimate presidential power. "Legitimacy" is a complex process, especially once we realize that it requires actual acceptance by target populations rather than what Madison might have dismissed as a "parchment barrier" of a judicial decision *per se*.

Whittington couches his book as in some way a test of Robert Dahl's famous propositions: first, that the Supreme Court must be understood as a basically political institution, and, secondly, that this means one must strive to understand the special circumstances under which the Court will invalidate a congressional act.[8] After all, no one joins the Court without the approval of the dominant political coalition at a given time, consisting of the President, doing the nominating, and then the Senate, doing the confirming. Thus, Dahl suggested, invalidation was most likely when a Court representing a new coalition would be considering legislation passed some years ago by the ruling coalition then exercising political hegemony. By definition, what would be rare would be the invalidation of recent legislation, unless there was what might be termed a "regime lag," whereby the Court was still dominated by veterans of the now-supplanted coalition who would valiantly, if often unsuccessfully, try to stave off the reality of the fact that elections really do have consequences. Perhaps it should not be surprising that Whittington demonstrates serious flaws in Dahl's argument, given that his article, now well over a half-century old, was the first serious attempt to offer an empirical analysis of the circumstances

7. *Ex parte* Merryman, 17 F. Cas. 144 (1861).

8. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

under which the Court would invalidate acts of Congress.

Even if Whittington demonstrates that the Court is more of an active political player than Dahl might be read to have suggested, he nonetheless reinforces the position taken by Gerald Rosenberg in his classic book, *The Hollow Hope,* which suggested that political activists were wrong to put too much hope in the Court to deviate very much from the general drift of American public opinion or, perhaps more to the point, the views of political elites who in fact dominate the American political system by winning elections and taking office.[9] Rosenberg was writing especially about progressive forces who hoped the Court would be an all-important ally and, therefore, make it far less important to win actual political victories in elections and then legislatures. But it can apply as well to conservatives who hoped, as in the 1930s, that the Court could prevent the reforms of the New Deal or, more recently, strike down the hated Affordable Care Act that, among other things, threatens to entrench medical care as an "entitlement" in the same sense that has become true of Social Security, one of the key pieces of New Deal legislation. Other targets of conservative ire, including the use of racial preferences in a variety of contexts or the protection of reproductive choice, have much more to do with *state* legislation and the meaning of the Fourteenth Amendment than with the domain of national legislative power. Perhaps the ascent of Brett Kavanaugh to the Court to replace Anthony Kennedy will invalidate the premise of this last sentence regarding the hesitation to limit national power, but Whittington's own analysis allows us to wonder, especially given potential election results.

It would be a mistake, which Whittington certainly does not make, to dismiss the Court as unimportant. That would be carrying revisionism much too far! What is crucial, both for the academic scholar and the general reader simply trying better to understand the American political system, is to get a well-founded sense of those occasions in which the Court has acted in a fairly determinative manner, with regard to other political forces, and when, on the contrary, it has basically chosen to keep its powder dry by refusing to engage in fights that it believes it cannot win. Here Whittington is invaluable.

9. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

In addition to the grand theme of trying to figure out how the Court has navigated potential conflicts with Congress over the past 225 years, Whittington offers a host of valuable insights along the way. Begin only with the hoary story that *Marbury v. Madison*[10] "created" judicial review and that, after the 1803 decision in that case, the Court did not engage in another such act until the notorious *Dred Scott* case in 1857.[11] Both are untrue. Whittington notes first that there were several cases before *Marbury* that presupposed the power of the Court to invalidate congressional acts thought to be in violation of the Constitution, even if the Court came up with the "happy ending" that no such invalidation was required in the case at hand (pp. 38, 60–77). *Marbury,* of course, was different, though it is essential to note that the actual statute invalidated was remarkably unimportant, save in terms of the political actualities of the moment. The real question was whether the Court would order Secretary of State James Madison to deliver a judicial commission to William Marbury in defiance of the determination of President Thomas Jefferson not to do so. The nascent Court could scarcely countenance open defiance or, just as ominously, the prospect of Jeffersonian efforts at impeachment as a means of disciplining an out-of-control Federalist Court determined not to recognize the so-called "Revolution of 1800" that displaced the prior Federalist hegemony. What was easiest was to declare that the Court had no power to order the delivery because the statute allegedly giving it such power was unconstitutional. And, a week later, as Whittington notes, the Court almost laconically upheld the ability of the Jeffersonian Congress in effect to purge the federal judiciary of a number of Federalist judges simply by repealing the Act, passed in the waning days of the Adams Administration, to create an intermediate tier of Federal Circuit Courts, whose members had been quickly appointed and confirmed by the lame-duck Federalist Congress (pp. 79–80). It is an unfortunate truth that this second case, *Stuart v. Laird,*[12] is rarely taught alongside *Marbury,* even though it is surely at least as important if one is trying to understand the actual role (or ability) of the Supreme Court to resist an insistent political movement.

But what about the period 1803–1857? Building on the

10. Marbury v. Madison, 5 U.S. 137 (1803).
11. Dred Scott v. Sanford, 60 U.S. 393 (1857).
12. Stuart v. Laird, 5 U.S. 299 (1803).

valuable insights of Mark Graber (with whom Whittington has co-edited, along with Howard Gillman, a path-breaking casebook on American constitutional development[13]), Whittington demonstrates that there were a number of cases involving statutory interpretation in which one can understand the interpretations only against the background assumption that a contrary interpretation would have rendered the law unconstitutional, whether or not the Court actually uses such language (pp. 85–119). Many professors will have to revise their lectures in light of Whittington's scholarship. But he also demonstrates that there were relatively few occasions for judicial review, under any definition, because Congress just wasn't passing that much legislation to review. The cases Graber and Whittington rely on are known to extremely few academics because, frankly, they are not thought to be that important in terms of the substantive issues raised. But, as sources of genuine illumination of how judges were thinking during this period, they are invaluable. As Whittington writes, "The practice of judicial review was built up through the resolution of more mundane cases [than those emphasized by most scholars] in which the political stakes were relatively low" (p. 117).

Along with Dahl, Whittington is also assessing the all-too-influential argument of Yale Law School Professor Alexander Bickel that the Court's exercise of judicial review is "counter-majoritarian," in which the unelected judges substitute their judgment for that of an ostensible majority.[14] It is worth quoting Whittington at some length, for it is a decisive rejoinder to the more simplistic statements of Bickel's thesis, which rests on the clearly counterfactual assumptions that any act that receives a majority of votes in Congress necessarily represents even the strong endorsement of those voting "aye," let alone that of their constituents. Many cases, Whittington writes,

> could benefit the individual litigant and clean up the processes of government, but they had few larger policy ramifications. They spoke to no serious ideological or partisan disputes and disadvantaged no important political interests. They illustrated the justices bringing their lawyerly expertise to bear in

13. HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM: VOLUME II: RIGHTS & LIBERTIES (2d ed. 2016).

14. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

> resolving complex legal disputes. In doing so, they filled out the constitutional rulebook and took note of when Congress had stepped over the lines into foul territory. But such exercises of the power of judicial review were countermajoritarian only in the most formal sense of scrutinizing the work product of elected legislators and correcting its deficiencies and of being available to hear the complaints of individuals who were dissatisfied with how the government had treated them. (pp. 142–43)

Harvard political scientist Kenneth Shepsle in 1992 famously suggested that Congress is a "they," not an "it."[15] What this means is that political coalitions that pass legislation usually consist of multiple viewpoints that might vote together on a given piece of legislation; but for some members within the coalition, the affirmative vote is far more a matter of being a good team player, or recipient of a logrolling benefit with regard to legislation *they* really care about, than a statement of deep principle. So this in effect gives the Court some significant leeway to strike down even relatively recent legislation, passed by the same coalition that arguably placed the judges in office, at least so long as the legislation doesn't reflect a truly strong (and unified) party position. This is one more genuine insight that will require additional rewriting of lecture notes and revision of published textbooks that adopt a more holistic view of ostensibly dominant coalitions. This point is especially powerfully made with regard to the cleavages within the Democratic Party regarding the passage of an income tax, notoriously declared unconstitutional by the Court in 1894.

Still, as Whittington notes on the very same page from which the prior quotation comes, even these relatively "routine cases of judicial review were also more likely than not to come out in favor of the government" (p. 143). Constitutional challenges in fact were rarely successful; "the Court has more often been a handmaiden to the congressional exercise of power than an obstruction" (p. 25). And, yet again, "the most striking feature of the Court's exercise of judicial review vis-à-vis Congress is how mundane it seems to have been. History remembers the highlights—the income tax cases, *E.C. Knight,* the child labor case—but this was but a small part of the Court's work and leaves

15. Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

a misleading impression of how judicial review was exercised."[16]

As one would expect (and demand), Whittington includes full discussions of the canonical "highlights," including, of course, the epic struggle between the "Old Court" and FDR over the constitutionality of New Deal measures. But he is convincing in his overall thesis, which is, simply put, that we overemphasize the frequency of such cases and thus, concomitantly, overestimate the extent to which the exercise of judicial review has genuinely been highly controversial. At any given moment, as the political scientist James Gibson argued in a, for me, unforgettable lecture at the University of Texas Law School some years ago, it is highly likely that a majority of the population will in fact support *any* given decision. This is because, say, 35% of the population will support ideologically the result reached by the Court, as was probably true even during the New Deal shootout, given that Kansas Governor Alf Landon received 36.5% of the popular vote during FDR's landslide victory in 1936; another, say, 20–25% of the population might accord the Court what political scientists call "diffuse support," which boils down to the position, "I really don't know anything about the Constitution, and I trust the Supreme Court to know what it is doing when it declares something unconstitutional [or constitutional]," leaving only a probable minority that truly offers vigorous opposition to the substance of a Supreme Court decision. There may be some exceptions: Roughly 90% of those polled have registered their opposition to the 2010 decision of the Court in *Citizens United,*[17] which invalidated a century-old limitation on the ability of corporations to participate directly in political campaigns, but efforts to overturn the decision have gone nowhere. But it is possible that *Citizens United* is exceptional, even if it is far more the subject of scholarly attention, with regard to considering judicial review, than the more mundane cases that get equal treatment.

Whittington concludes this true magnum opus by writing as follows:

> The Court has rarely stood for universally embraced and historically enduring political principles, in part because there are not very many such principles—or at least not very many such principles that must be displayed to invalidate an action

16. *Id.* at 171.

17. Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

> of Congress. Congress rarely violates universally embraced and historically enduring political principles. Congress does, however, routinely violate principles that are more contested and less enduring but that nonetheless command substantial political support within a given historical era. When the Court intervenes to vindicate those principles against an errant national legislature, it is often doing the political work that political leaders would like it to do. It is acting as a player within democratic politics, but not simply as a constitutional guardian standing outside of democratic politics."[18]

Inevitably, readers may quibble with some of Whittington's specific judgments, particularly about what might be termed the "objective importance" of certain instances of judicial invalidation (or upholding questionable, albeit highly popular, legislation). But that does not really abate my enthusiasm for the book or lessen the encouragement of anyone interested in the actualities of the American political system to read it and ponder its findings carefully. The University Press of Kansas series within which Whittington's book appears is devoted to innovative approaches to "constitutional thinking." It fully deserves its placement in the series and unequivocal admiration for the deep scholarship it reveals. That it may also generate further argument is only added testament to its importance.

18. WHITTINGTON, *supra* note 1, at 314.