

## RECONSIDERING THE HISTORY OF JUDICIAL REVIEW

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

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Somewhat surprisingly, there are still things to learn about the history of judicial review. The practice might have started in some obscurity, but for more than a century it has been at the center of controversy. At the beginning of the twentieth century, the young constitutional historian, Edward Corwin, coined the term “judicial review” to refer to the increasingly prominent power of American courts to interpret and enforce constitutional requirements against overreaching legislatures.<sup>1</sup> Corwin was himself an important contributor to an active political and scholarly debate at the turn of the century over the origins and legitimacy of the practice. In a time when politicians were prone to warn judges that “the Supreme Court had usurped the power to pass on the constitutionality of acts of Congress” and would continue to exercise it only at the indulgence of Congress,<sup>2</sup> Corwin was among those who argued that judicial review was “the natural outgrowth of ideas that were common property in the period when the Constitution was established” and consequently as American as apple pie.<sup>3</sup> That early scholarship told us quite a bit about how American courts began to exercise the power to declare

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1. Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 660 (1909).

2. Franklyn Waltman, Jr., *Curtail Power of High Court, Lewis Advises*, WASH. POST, July 12, 1935, at 1.

3. Edward S. Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 538 (1914).

2            *CONSTITUTIONAL COMMENTARY*            [Vol. 35:1

statutes null and void and about the ideas and politics that gave rise to that.

Late in his career, Corwin was also instrumental in solidifying our canonical list of cases in which the U.S. Supreme Court has struck down a provision of an Act of Congress as unconstitutional. The Court itself does not keep track of such cases, and there was a surprising amount of disagreement about how often the Court had done so over the course of its history. With the Court playing an obviously important role in announcing and enforcing limits on legislative power, Congress decided that it needed a clearer picture of the constitutional rules of the road. Corwin was well suited to the task since he had already produced a popular text designed to explain “the real constitution of the United States,” the constitution as it “has come to be” through over a century of judicial interpretation, rather than the brief document that emerged from the Philadelphia Convention.<sup>4</sup> After World War II, Corwin was asked to provide Congress with an overview of the Court’s interpretation of the Constitution, including a list of cases in which the Court had struck down a federal statute.<sup>5</sup> The Congressional Research Service continues to maintain today that annotated Constitution and catalog of cases that have struck down laws.<sup>6</sup>

While the scholarship of the early twentieth century seemingly settled some issues about the origins and history of judicial review, recent years have seen a renewed burst of scholarly energy focused on the history of judicial interpretation and enforcement of constitutional texts. We have gained new insights into the English and colonial antecedents to American judicial review,<sup>7</sup> the activities of the courts in the early republic,<sup>8</sup> the rise of judicial review in the states,<sup>9</sup> and even the constitutional decision-making of the U.S. Supreme Court.<sup>10</sup> We have likewise

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4. EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* (2d ed. 1921).

5. LEGISLATIVE REFERENCE SERVICE, *THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION*, S. DOC. NO. 82-170, at 1241–54 (1952).

6. CONGRESSIONAL RESEARCH SERVICE, *CONSTITUTION ANNOTATED*, <https://constitution.congress.gov/>.

7. See, e.g., MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION* (2004); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

8. See, e.g., SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER* (2011); William Michael Treanor, *Judicial Review before Marbury*, 58 *STAN. L. REV.* 455 (2005).

9. See, e.g., JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS* (2012).

10. See, e.g., PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF*

gained better appreciation of the political and social contexts that shape the exercise of judicial review and the development of constitutional law.<sup>11</sup>

*Repugnant Laws* aims to tell us more about both how the U.S. Supreme Court has exercised the power of judicial review and how politics has shaped the course of the development of American constitutional law. For better or for worse, the book does take a truncated view of how the Court has sought to enforce constitutional requirements on elected officials. It excludes the work the Court has done in monitoring state legislatures, which has historically been an important and controversial part of how the Court has exercised the power of judicial review. It likewise excludes how the Court has enforced constitutional limits on the discretion of lower court judges and of executive officers. As a result, it does not provide anything like a comprehensive overview of how the Court has construed the Constitution and sought to preserve its commitments. Hopefully the tighter focus on how the Court has addressed itself to Congress allows us to see greater detail in what the Court has done in this particular area of activity and to gain greater insight into the political relationship between the Court, national partisan coalitions, and a powerful coordinate branch of the federal government.

Although the book untangles the politics surrounding various particular constitutional disputes and periods in time, there are three broad issues of special concern. First, the book reveals two centuries of judicial review that have largely been left in obscurity. Second, it details the relationship between the Court and national political coalitions and the extent to which the justices have acted as allies of national political leaders. Third, it lays the foundation for further thinking about the normative difficulties surrounding the practice of judicial review.

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RECONSTRUCTION (2011); LESLIE F. GOLDSTEIN, *THE U.S. SUPREME COURT AND RACIAL MINORITIES* (2017); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004).

11. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009); THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004); KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES* (2004); KEVIN J. MCMAHON, *RECONSIDERING ROOSEVELT ON RACE* (2004); LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008* (2009).

## THE LOST HISTORY OF JUDICIAL REVIEW

Everybody knows that the American courts exercise the power to evaluate the constitutionality of legislation and declare those laws that violate the Constitution to be legally void and of no effect. To a surprising degree, it has been unclear how the courts have exercised that power.

The problem started at the beginning. The U.S. Constitution is clear about such basic governance issues as whether the president has the power to veto bills, whether Congress can override that veto, and how bills become law. The Constitution famously does not say that the federal courts have the power of judicial review; it merely says that the “judicial Power of the United States” shall be vested in the Supreme Court and any inferior courts that Congress might create. It is a myth that Chief Justice John Marshall invented, created, or established the power of judicial review in his 1803 opinion in the case of *Marbury v. Madison*. Such a power was widely recognized in the years after the American Revolution and had been exercised by numerous courts, including the U.S. Supreme Court, prior to 1803. But Marshall did provide a compelling account of that power, and his opinion eventually became a touchstone for those seeking to explain, justify, or criticize such a power.<sup>12</sup>

Since the Constitution did not specify that there was such a power of judicial review, it also did not specify the form by which it should be exercised. The Constitution specified that presidential vetoes should be recorded in the journal of each legislative chamber. The number of vetoes could be numbered and counted. There is no such requirement when the courts strike down a law as unconstitutional. When, in 1792, the second Congress first heard the news from a constituent that a federal judge had declared a federal statutory provision unconstitutional, there was a brief debate over what kind of response might be appropriate and whether a system needed to be put in place so that the legislature would be promptly informed when such

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12. On *Marbury*'s relative importance, see ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989); Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111 (2001); Mark A. Graber, *Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609 (2003); Matthew P. Harrington, *Judicial Review before John Marshall*, 72 GEO. WASH. L. REV. 51 (2003); Keith E. Whittington & Amanda Rinderle, *Making a Mountain Out of a Molehill? Marbury and the Construction of the Constitutional Canon*, 39 HASTINGS CONST. L.Q. 823 (2012).

actions were taken.<sup>13</sup> But nothing was done. The courts made decisions and issued opinions, but no one designated instances of judicial review, reported such events to Congress, or put them down in an official record.

After the constitutional centennial, the Supreme Court's reporter, Bancroft Davis, took it upon himself to compile a list of cases in which the Court had struck down an Act of Congress as unconstitutional, and included it in a historical appendix to a volume of the Court's opinions in 1889.<sup>14</sup> The Davis list proved to be controversial, and the historical debate over the incidence of judicial review was politicized. Populists and Progressives argued that the Court had rarely exercised the power of judicial review—and thus should rarely exercise it in the future, since it was of dubious legitimacy. Conservatives argued that the Court had exercised the power of judicial review more often—and should keep on exercising it in the future, to temper the passions of popular majorities. Some argued that John Marshall created the power of judicial review out of whole cloth and that the Court rarely dared exercise the power afterwards. Some went further and denied that even *Marbury* itself could properly be understood as an example of judicial invalidation of a federal law. Others argued that *Marbury* was just one of many instances of judicial review and was just one example of a venerable judicial practice.<sup>15</sup>

The list that Edward Corwin put together for Congress in the mid-twentieth century largely put an end to such debates. It gave Congress a comprehensive catalog of the instances in which the Court had struck down federal legislation in whole or in part, and it provided scholars with a canonical statement of the incidence of judicial review. It reflects our baseline understanding of the history of judicial review, further refracted through lists of canonical cases that seem particularly important for politics, law, or teaching.<sup>16</sup>

The Corwin list is inadequate. The contours of judicial review

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13. 3 ANNALS OF CONG. 556–57 (1792).

14. 131 U.S. cxxxv–cclxiii (1889).

15. See, e.g., William Marshall Bullitt, *The Supreme Court and Unconstitutional Legislation*, 10 A.B.A.J. 419 (1924); Jackson H. Ralston, *Judicial Control over Legislatures as to Constitutional Questions*, 54 AM. L. REV. 1 (1920).

16. See, e.g., J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Tom Donnelly, *The Popular Constitutional Canon*, 27 WM. & MARY BILL RTS. J. 911 (2019); William M. Wiecek, *Is There a Canon of Constitutional History?*, 17 CONST. COMMENT. 411 (2000).

6            *CONSTITUTIONAL COMMENTARY*            [Vol. 35:1]

as it has been practiced are not clearly identified with bright lines. Corwin made implicit choices about what exactly he was going to count as an instance of judicial review for this purpose. Corwin's own list went through permutations, as he added and deleted cases until he settled on exactly what he wanted his list of cases to convey. He might also have made some mistakes. There is good reason to believe that his list is underinclusive of the total number of instances in which the Court has refused to apply a federal statutory provision because it transcended the boundaries of Congress's constitutional authority. Mark Graber, in particular, has contended that Corwin underestimated the extent of judicial review in the early republic.<sup>17</sup> More obviously, Corwin (and his predecessors) made no effort to identify all the cases in which the Court had upheld a statutory provision against constitutional challenge. We are left with a very one-sided impression of how the Court has used its power to review the constitutionality of federal legislation.

The backbone of *Repugnant Laws* is a new, hopefully comprehensive, catalog of all the cases in which the U.S. Supreme Court substantively reviewed the constitutionality of an application of a provision of a federal statute, whether the result was to uphold the statute against constitutional challenge or to refuse to apply it due to some constitutional deficiency. That dataset is now publicly available, along with a detailed explanation of how it was assembled and how variables were coded.<sup>18</sup> The book and the dataset detail over 1,300 cases in which the Court exercised the power of judicial review over Congress. Hopefully, it will provide scholars with a resource for more fully exploring the intricacies of how the Court has understood the scope of congressional power under the Constitution and how it has implemented that understanding over time.

*Repugnant Laws* seeks to put those cases in context and unpack their significance, but it demonstrates that we have underestimated the scope and extent of how the Court has supervised Congress across its history. When resolving constitutional challenges to congressional legislative authority,

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17. Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73 (2000); Mark A. Graber, *New Fiction: Dred Scott and the Language of Judicial Authority*, 82 CHI.-KENT L. REV. 177 (2007).

18. Judicial Review of Congress Database (<https://scholar.princeton.edu/kewhitt/judicial-review-congress-database>).

the Court has far more often upheld what Congress has done than reined it in. In hundreds of cases, the Court has worked to expand the scope of congressional authority and has endorsed controversial exertions of federal legislative power. It has far less often rejected components of federal law as being beyond the reach of Congress. Even so, the Court has been far more active in patrolling the boundaries of congressional power than our standard list of judicial invalidations would suggest. All across American history, including the first decades of the nation's existence, the Court has been willing to protect litigants from an overreaching Congress. Some of those cases have been lost to history because, unlike *Marbury*, they are obscure and politically relatively inconsequential. Others have been overlooked because the form with which the Court acted does not always match our expectations from cases like *Marbury*. We gain a skewed perspective on how the Court has actually exercised the power of judicial review by remembering the most salient instances of the justices striking laws down. Most of the constitutional work that the justices have done does not look like that, but it is that more routine marshalling of the judicial power to interpret and enforce constitutional provisions that has helped build the modern practice of judicial review.

#### THE COURT IN THE POLITICAL REGIME

A second interest of the book is in a set of empirical theories about how courts exercise the power of judicial review. One set focuses on the relationship of judges to their political environment and the implications for the incidence of judicial review and the substance of constitutional law. Another set focuses on the political sustainability of judicial independence, with judicial review being both an important by-product of judicial independence and a sign of judicial independence.

The book is in part a contribution to what is sometimes characterized as a political regimes school of judicial politics. As Tom Keck has characterized it, this body of literature has generally “traced the decisions of the U.S. Supreme Court to the policy and political commitments of governing partisan regimes.”<sup>19</sup> Rather than thinking about judges as oppositional

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19. Thomas M. Keck, *Part Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY 511 (2007).

figures to the forces of democratic politics, this literature situates judges within the broader political system where they are more likely to work as partners or allies to a governing partisan coalition.

The roots of this literature extend back to the foundational work of Robert Dahl and Robert McCloskey in the mid-twentieth century. Dahl was primarily a student of American political behavior and was generally skeptical of the importance of political institutions or constitutional forms in shaping political outcomes or preserving a free society. His signal contribution to judicial politics was to emphasize the role of the Supreme Court as a partner to majority coalitions. As political appointees, the justices could be expected to share the values and outlook of the governing elites who shaped government policy in the legislative and executive branches. In his examination of the history of judicial invalidations of federal laws, Dahl concluded that the Court had mostly been a passive bystander to federal policymaking, with the New Deal experience of an activist Court during Franklin Roosevelt's first term of office being notable for its exceptional, rather than its representative, nature.<sup>20</sup> McCloskey was primarily a student of American political thought and was more immersed in the constitutional jurisprudence of the Court. Where Dahl was inclined to reduce the Court's work to the decision of whether to veto a policy adopted by a legislative majority and to treat judges as just another set of policymakers within a complex political system, McCloskey did not want to lose sight of the extent to which the Court was not only "a willing, policy-making, *political* body," but also ultimately "a court."<sup>21</sup> Both tended to agree, however, that the Court's constitutional jurisprudence was shaped by and circumscribed by political forces off the Court.

A more recent literature, which has built on those foundations, has found that the judiciary's role within the political system is more complicated than the one imagined by Dahl and McCloskey. Being an effective ally with a governing coalition does not eliminate the possibility of independent and creative judicial activity. Where Dahl expected to see a passive Court deferring to the policy decisions made elsewhere, more recent

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

21. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 19, 21 (1960).



scholars have found that judges have often been empowered by their political circumstances. Elected officials and political leaders have found positive uses for the courts, and majority coalitions have often found themselves less organized, less harmonious, and less confident than a simplified model of majoritarian legislative lawmaking might suggest. There have been reasons for courts to be full partners in national governance and not just passive observers.<sup>22</sup>

Much of this recent work exploring regime politics has, unlike Dahl, advanced through close observation of a small set of case studies. *Repugnant Laws* attempts to return to Dahl's own favored ground, the full history of Supreme Court review of federal legislation, to reconsider how the practice of judicial review has fit within the ambitions and needs of electoral and lawmaking coalitions. To what degree was Dahl right that the overall pattern of judicial behavior is best characterized as one of passivity? To the extent that the Court has been more aggressive in actively deploying its power to nullify policies, has it done so primarily from the posture of a transitional partisan opposition to a newly ascendant political coalition? Although the Dahlian perspective is useful in helping us think about how the politics of judicial review has worked, it is misleading in guiding us toward the specific expectation that an allied Court will have little to do. The Court has been a meaningful player in American politics, using the power of judicial review to advance a constitutional vision that coheres with the interests and ideals of elected political leaders, but doing so in ways that require limiting as well as extending congressional authority.

A related but distinct empirical literature has been concerned with how courts achieve and maintain some form of independence from other political actors. Rather than taking judicial independence as being achieved through the formal creation of a

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22. For examples of the regime politics literature, see Cornell W. Clayton & J. Mitchell Pickerill, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. POL. 233 (2004); Howard Gillman, *Courts and the Politics of Partisan Coalitions*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 644 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira, eds., 2008); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993); Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229 (1998); Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321 (2007); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2009).

judicial system with appropriate characteristics, such as a secure tenure of office for individual judges, this literature takes effective judicial independence as an empirical puzzle. How can a politically weak institution like a judiciary exercise any real power, and how can an independent-minded judiciary preserve itself in the face of hostile political forces? Dahl's implicit answer is that it would not. Routine vacancies on a politically appointed Court would insure that judges will remain within the orbit of elected officials and not be inclined to act independently.

A more recent literature is more optimistic about the possibility of a politically sustainable independent judiciary. A politically dependent, independent judiciary can operate with some degree of influence and autonomy, but only within bounds and in limited circumstances. Judicial independence is something that has to be achieved within the confines of an ongoing political system, and it is not something that simply can be bequeathed or inherited. An independent judiciary ultimately needs allies who have their own reasons for supporting semi-autonomous courts, and the political influence to help protect the courts when they are at risk of being subverted. Much of that literature has developed in thinking about courts outside the United States, but the core insight that judiciaries are only powerful to the extent that other powerful political actors have reasons to tolerate judicial activity is as applicable to the American context as to any other.<sup>23</sup>

Hovering over the history of judicial review is how the United States Supreme Court has managed to build up the practice of judicial review and sustain some measure of independence and influence over time. As Court-packing is once again in the air, it is perhaps more obvious now than it might once have been that judicial independence is an ongoing political project, and that the exercise of judicial review can only occur

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23. For examples of the political judicial independence literature, see Frank Cross, *Judicial Independence*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 557 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira, eds., 2008); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 *S. CAL. L. REV.* 353 (1999); William M. Landis & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875 (1975); J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 *J. LEGAL STUD.* 721 (1994); Georg Vanberg, *Establishing and Maintaining Judicial Independence*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 99 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira, eds., 2008).

within bounds of political tolerance. Placing the Court within the framework of American political development requires assessing the sources of political support for the Court and significance of the Court's own actions for the larger flow of political events.

In showing how the Court has exercised judicial review over time and placing the Court's work in political context, we can also begin to see how the Court has been able to sustain political support for that practice. Although the Court has been quite active in invalidating statutes across its history, it has rarely made frontal assaults on core commitments of united political majorities. The Court has generally stayed within the political mainstream. In doing so, it has made adjustments on the margins of public policy and exploited fissures in governing coalitions. But when the Court has strayed too far into the political thicket and found itself isolated from powerful allies, it has shown itself to be vulnerable. The Court is allowed to gore some oxen, but it may not strike down any sacred cows.

#### REVISITING THE COUNTERMAJORITARIAN DIFFICULTY

Finally, the history of judicial review provides more material for thinking about the normative issues associated with judicial review. *Repugnant Laws* is a work of political history, not normative theory. But our normative theorizing about judicial review should be informed by how the practice actually works, which includes an appreciation of how the Court has realistically exercised the power of judicial review and how the Court's actions have fit within a political context. It makes little sense to develop normative theories regarding an idealized practice that is wholly divorced from the historical reality or that proceeds on the basis of assumptions that have little grounding in lived experience.

The hoary framing of the countermajoritarian problem rested on a set of empirical assumptions about the workings of American politics, as well as a set of normative values about how political action could be justified. It has the advantage of being intuitive and fitting an established narrative about judicial review. When invalidating a statute, a court does no doubt strike down a policy endorsed by a legislative majority, and such majorities are themselves put in place through electoral victories. The Populists, Progressives, and New Dealers all told themselves a story about intransigent courts overturning the will of the people.

There might be a kernel of truth in such narratives, and they might account for some examples of judicial review, but this does not seem like an adequate starting point for thinking about the phenomenon of judicial review more generally. The political regimes literature is sometimes read to suggest that, far from being an antidemocratic institution, the Court is simply a majoritarian one. That would seem to take things too far. The Court might be tethered to elected political coalitions, but the justices do not simply implement majoritarian policy preferences. The Court is a political institution within a democratic political system, but it is neither an immovable barrier to the majority will nor a simple instrument of electoral politics.

There are normative issues surrounding the practice of judicial review, both as to how judges ought to exercise such a power and how a power to set aside policies adopted by democratically accountable assemblies can be justified. The actual practice of judicial review shows the justices regularly rendering politically controversial decisions that can find support in the political movements that brought those justices to the bench. But if the justices sometimes look distinctly Republican or Democrat, conservative or liberal, they also routinely issue decisions that cannot be reduced to partisan or ideological shibboleths. The history of judicial review is a story of neither a democratic nor an antidemocratic court, and compelling normative theorizing will have to take into account the often complex and messy relationship between the courts and the politicians.