

# PAPERS

## The Supreme Court as a Symbol in the Culture War

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### ABSTRACT

*Repugnant Laws makes use of the Judicial Review of Congress database, a new, original, and publicly accessible database cataloging every case in which the U.S. Supreme Court substantially reviewed the constitutionality of the application of a provision of a federal statute. In doing so, it seeks to shed new light on how the Court has navigated the ever-changing political environment and how it has constrained, and empowered, Congress across American history. This still leaves a great deal of our constitutional landscape to be explored. Repugnant Laws provides only a passing glance at how the Court has interacted with the executive branch and the extent to which it has been an ally or foe of presidential power and particular presidents. This historical investigation also raises questions about the extent to which the Court has entered a new political era. Political battles over the federal judiciary have intensified in recent years, but it is not evident that the Court is a more significant political force now than it was in the past. Like many aspects of our modern politics, the Court has become a useful symbol in the culture war that can help heat up political passions and mobilize political activists, even if the stakes for public policy remain relatively small.*

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## INTRODUCTION

There is no higher honor a scholar can receive than having his or her work discussed and taken seriously. Researching and writing are often lonely tasks, and when the product is finally complete it is generally sent out into the world with little fanfare. One hopes that it might find an audience. One hopes that someone, somewhere might find it useful, or at least interesting. But you never know, and with the long lag times of academia there is usually a distressing silence after a work is published in which the author might wonder whether the book was actually distributed to anyone at all.

There is, then, a special pleasure in having a book be the subject of the annual Thomas M. Cooley Book Symposium. The Georgetown Center for the Constitution does a tremendous service to the interdisciplinary field of constitutional studies by highlighting recent works of scholarship and helping to bring them to the attention of a wider audience by awarding the Thomas M. Cooley Book Prize. It goes above and beyond all expectations in putting together an accompanying symposium to discuss the books that win the prize. These symposia have, thus far, been extraordinary events. They bring together excellent scholars with deep expertise relevant to the book. They connect a community of scholars in proximity to Georgetown University Law Center with those who hail from more distant locales. They set aside a busy day of sustained conversation not only about the book but about the issues raised by the book. They are the kind of intellectual events that one hopes to enjoy in academia but that are all too rare.

It is my misfortune that the third annual symposium organized to discuss *Repugnant Laws* was scheduled to take place at what turned out to be the beginning of a pandemic that has gripped the United States for over a year. As America went into lockdown, the event had to be hastily rescheduled, and as the pandemic wore on, eventually scuttled altogether. I regret not being able to spend a day in the company of colleagues talking about the book and the history and politics of judicial review in America. Unfortunately, this meant in particular missing the intended conversation with the many local participants who help make these symposia so interesting to attend in person. Nonetheless, I appreciate the willingness of my colleagues to take the time to write their papers for the symposium, and the opportunity to engage with them in this socially-distanced form.

I should also add that I am deeply appreciative of the Center for recognizing *Repugnant Laws* with the prize as well. The book is already in enviable company with the other prize-winners. I hope that my own contribution, while benefitting from the halo effect of inclusion in that group, will not reduce the luster of the prize too much. There is a tremendous amount of excellent work being produced in the field of constitutional studies, and it is a real honor to be seen as making a useful contribution to that body of work. I take some personal pleasure in receiving a prize bearing the name of Thomas M. Cooley. Cooley's great constitutional treatise was among the first scholarly works I ever read on the Constitution, and it helped spur my own interest in the field. After all these years, I continue to take new inspiration from Cooley's writings, which raise issues and arguments that I

puzzle over and explore. Cooley's accomplishments, both personal and scholarly, were monumental, and one can only hope to manage a fraction of it and earn the right to be associated with his name. I hope *Repugnant Laws* can stand the test of time and still be of interest to readers years from now, but it is wonderful for it to be deemed of having some significance now.

### I. JOSEPH STORY AND THE POLITICS OF JUDICIAL REVIEW

Adam Carrington's paper puts *Repugnant Laws* into dialogue with a "worthy respondent," Justice Joseph Story. It is a fascinating choice, and particularly apt for this symposium. Story, like Cooley, was a both an academic and political phenomenon. They were both giants of conservative jurisprudence in their day, Story in the age of Jefferson and Jackson and Cooley in the Civil War and postbellum years. They were both remarkably influential jurists, Story as Chief Justice John Marshall's right-hand man on the U.S. Supreme Court and Cooley as the chief justice of the Michigan Supreme Court. Both were pioneering figures in what would become leading law schools: Story at his alma mater Harvard University and Cooley at the University of Michigan (though he had not attended college himself). Their respective constitutional treatises were the dominant works of the first half and second half, respectively, of the nineteenth century.

Joseph Story also plays a notable role in *Repugnant Laws*. A key concern of the book is that we have tended to give too much attention to judicial opinions that use what Mark Graber has characterized as the "magic words" of judicial review.<sup>1</sup> Chief Justice John Marshall did not invent judicial review in *Marbury v. Madison*.<sup>2</sup> His court was not even the first to claim or make use of the judicial authority to refuse to give force to statutory provisions that were inconsistent with the requirements of the Constitution. Marshall did, however, give that judicial power its canonical form by boldly declaring that laws repugnant to the Constitution were "unconstitutional" and therefore "void."<sup>3</sup> We recognize the exercise of judicial review by a judge announcing that a law is null and void. But judges do not always do that, at least not in so many words. They might instead point out that the law is "inoperative,"<sup>4</sup> or that "it is not competent for Congress" to pass such a law,<sup>5</sup> or that the Constitution "conferred no power" on Congress to do the thing it was trying to do.<sup>6</sup>

In truth, it is not just that judges do not always use the magic words "null and void," or even "unconstitutional," and thus mislead us. It is also the case that judges have frequently leveraged the power of judicial review to impose and enforce constraints on the legislative powers of Congress while obscuring what

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1. Mark A. Graber, *The New Fiction: Dred Scott and the Language of Judicial Authority*, 82 CHI.-KENT L. REV. 177, 191 (2007).

2. 5 U.S. (1 Cranch) 137 (1803).

3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173, 177 (1803).

4. *City of Mobile v. Eslava*, 9 Port. 577, 604 (Ala. 1839) (quoted in Graber, *supra* note 1, at 191).

5. *Id.* at 603 (quoted in Graber, *supra* note 1, at 191).

6. *Pollard v. Hagan*, 44 U.S. 212, 230 (1845) (quoted in Graber, *supra* note 1, at 192).

they are doing.<sup>7</sup> They announce the constitutional limits on Congress and recognize that Congress cannot traverse those limits, but then cut away at statutory provisions that might be thought to do just that. They creatively reinterpret statutes to carve out exceptions, narrow their scope, condition their possible applications, or gut their legal enforceability. This too is how courts deal with laws that are repugnant to the Constitution, enforce constitutional limits on Congress, and free litigants from the legal effects of statutes on the book. If we overlook this history of judicial review in the shadows, we badly misunderstand the history of judicial review as it has in fact been exercised by American courts.

Story pointed out what was going on soon after arriving on the bench. He assumed his seat on the U.S. Supreme Court in the winter of 1812. Later that year, he was riding circuit and performing as a federal appellate court judge in his home state of Massachusetts. The case itself involved a mundane dispute over a debt, but Story was concerned with the procedural posture by which the case arrived before him and whether his court had adequate jurisdiction to hear the case. After reviewing the relevant federal statutes, Story thought that the matter might also take “a higher range” and involve “the exposition of a great constitutional right,” namely the scope of the right to a jury trial under the federal Constitution.<sup>8</sup> And at that point, Story became a bit cautious.

Whenever it becomes our duty to decide on the constitutionality of laws, sound discretion requires that the Court should not lightly presume an excess of power by the legislative body; nor so construe the generality of words, as to extend them beyond its lawful authority, unless the conclusion be unavoidable. . . .

As little reason could there be to imagine the Legislature would voluntarily transcend its constitutional authority. The language must be very clear and precise, which would impose on the Court the duty of declaring the solemn act of the Legislature to be void. The Court could never incline so to construe doubtful expressions, much less to seek astutely for hidden interpretations, which might darkly lead to such a result.<sup>9</sup>

The Court frequently avails itself of the strategies that Story suggested. Rather than declaring the solemn act of the legislature void, the Court has found ways to enforce constitutional limits without casting such aspersions on Congress or making so transparent what the Court is doing. “Doubtful” expressions, and a fair number of legislative expressions that are not so doubtful, are carefully construed so as to avoid the dark result of admitting the belief that Congress has transcended its constitutional limits. But Congress is kept within these limits all the same.

Story was no political naïf. He understood both the value of an independent judiciary in a democratic political system and the difficulty of sustaining functioning courts. As Adam Carrington effectively details in his paper for the symposium,

7. See KEITH E. WHITTINGTON, *REPUGNANT LAWS* 22–24 (2019).

8. *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812).

9. *Id.*

Story was convinced that the American judiciary had a special obligation to the people.<sup>10</sup> Judges must defend rights against rapacious politicians and despotic majorities alike. In doing so, courts were to enforce the limits on political power the people themselves, in their most deliberate moments, had put into place.

It has not been an easy task. Story thought an extended tenure of office was an essential condition to creating the kind of institution that would be able to resist the political tides and preserve enduring principles. But as Story himself was aware, American courts were not immune to political tampering. The state judiciaries had proven particularly vulnerable to the intervention of outside forces, but the federal judiciary was hardly invulnerable. Though a Jeffersonian himself, Story bemoaned the unfortunate measure “adopted in 1802 under the auspices of president Jefferson” that repealed the Judiciary Act of 1801, thus eliminating the offices of federal judges lawfully appointed by the outgoing Federalists. If the constitutionality of the repeal act “can be successfully vindicated,” then “the independence of all inferior judges” would be “prostrate[d] in the dust” and the Constitution itself would be a “miserable and vain delusion.”<sup>11</sup> If Congress could “at any time, by a mere act of legislation, deprive them of their offices at pleasure,” then the ability of the judiciary to stand up to those “in possession of power” was quite limited.<sup>12</sup> Fortunately, “when the passions of the day have subsided, few lawyers will be found to maintain the constitutionality of the act.”<sup>13</sup> That is small comfort when the passions of the day are raging and those in possession of power find themselves tormented by the judges. Story hoped we could appreciate the gravity of the mistake that the newly empowered Jeffersonians made, and the example could “warn us of the facility, with which public opinion may be persuaded to yield up some of the barriers of the constitution under temporary influences, and to teach us the duty of an unsleeping vigilance to protect that branch, which, though weak in its powers, is yet the guardian of the rights and liberties of the people.”<sup>14</sup> It is a lesson easily forgotten.

Over the course of its history, the Court has had to navigate dangerous political waters. Although life tenure might protect the individual Justices to a significant degree from personal political reprisals, it is hardly sufficient to protect the judiciary as a whole from being subordinated by a large and passionate, but transient, political majority. If those transient majorities prove durable enough, the Court will naturally fall in line. The process of regular political appointments brings to the bench jurists who share the perspective and values of electorally successful coalitions. Across American history, presidents could expect an average of roughly two vacancies on the Court per term, tethering the Court—and ultimately the content of constitutional law and the exercise of judicial review—to electoral

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10. Adam Carrington, *Story Time with Whittington: Judicial Review in Repugnant Laws and Commentaries on the Constitution*, 19 GEO J.L. & PUB. POL'Y 377 (2021).

11. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 494 (1833).

12. *Id.* at 495.

13. *Id.* at 495 n.3.

14. *Id.* at 496.

outcomes. Shared perspective and values, however, still leave a lot of room for independent judicial action to keep politicians within constitutional bounds. But, the Court is safest when it stays on the political margins and avoids direct confrontations with political majorities on the matters about which they care most passionately.

## II. THE EXECUTIVE AS AN ADDITIONAL VARIABLE

In some ways, *Repugnant Laws* is extraordinarily comprehensive. It aims to assess the entire history of the U.S. Supreme Court's efforts to identify and enforce constitutional boundaries on Congress's legislative power. That is a lot of time and plenty of cases, and such analysis involves an especially important aspect of both the Court's work and the constitutional framework. The constitutional framers were far more detailed and specific in identifying the powers and limits of Congress than in detailing the features of the federal judiciary. The Bill of Rights, pressed for inclusion in the Constitution by the anti-Federalists, imposed further limits on the federal legislature. Later amendments, most notably the Reconstruction Amendments, were more concerned with the dangers posed by state governments. However, for the founding generation, Congress was both the powerhouse of the new federal government and a serious risk to the liberties of the citizenry. The emergence of judicial review as an instrument to keep Congress under control has been an important aspect of American constitutional development.

The willingness and ability of the Court to resist congressional encroachments on the Constitution has especially important normative and empirical implications. For over a century, judicial resistance to legislative actions has been criticized and praised as antidemocratic. Legislatures have long been the epitome of American democracy, though the preeminence of legislatures as representative bodies has sometimes been challenged by elected executives and mechanisms of direct democracy such as referenda. If courts routinely set aside the policies put in place by legislative bodies, that would seem to pose particularly stark challenges to the workings of American democracy. Many normative theories of judicial review have been constructed on the assumption that the exercise of judicial review is fundamentally countermajoritarian and requires special justification. How the Court has reviewed the constitutionality of federal statutes should be particularly informative for such normative arguments since it provides direct insight into how the Court has responded to a coordinate branch representing a national political majority. But that the judiciary's relative weakness as an institution raises questions about how meaningfully independent the Court is when it comes to Congress. Understanding just how obstructionist the Court has been in practice is particularly important both for our appreciation of empirical judicial behavior and for our assessment of how antidemocratic the Court is.

The Court's actual history of exercising the power of judicial review against Congress has been left in obscurity. One goal of *Repugnant Laws* is to bring that history to light. The book provides the most comprehensive account of how the Court has related to the constitutional authority of Congress across history. In

doing so, it uncovers a large number of cases not included in traditional inventories of cases finding acts of Congress unconstitutional. Ignored or underappreciated cases are brought into the story of how the Court has constrained Congress. The book also reveals what turns out to be the far more frequent, and perhaps more important, way in which the Court has exercised its power to interpret the Constitution—by upholding laws against constitutional challenge. If we wish to know how obstructionist the Court has been to congressional majorities, we need to also grapple with how accommodating it has been. These cases have languished in obscurity. However, they provide much of the substantive content of constitutional law regarding congressional power and reveal an important aspect of the politics of judicial review.

As comprehensive as *Repugnant Laws* is, the book does not provide a complete picture of the history of American constitutionalism nor a complete picture of how the Court has understood and enforced limits on other government officials. It tells us nothing about the important but understudied topic of state constitutionalism and judicial review (which I hope will be the subject of a follow-up project). It lays aside how the U.S. Supreme Court has interpreted and applied constitutional constraints on judicial and executive officers. The original Constitution is much less specific about the powers and limits of the other two branches of government than the Bill of Rights, which is targeted to a significant degree at federal judges and to a lesser degree at federal executive officers. Much of constitutional criminal procedure has evolved to correct and guide judges and law enforcement officers without any direct implications for the scope of congressional legislative authority. Examining how the Court has bound Congress in constitutional constraints provides only a partial picture of how constitutional law has developed.

As Nancy Maveety emphasizes in her paper, this focus on Congress and statutes also tends to leave out the chief executive officer.<sup>15</sup> As the presidency has grown as a force in American politics and governance, how the Constitution confines the President and the extent to which the judiciary is willing and able to resist presidential encroachments on constitutional limits have become all the more salient. Of course, most of the Executive Branch's actions rely on statutory authority. To the extent that administrations have pushed the bounds of congressional statutes beyond what the Constitution could bear (if not necessarily beyond what the language of the statute bears), those cases are captured in the Judicial Review of Congress database<sup>16</sup> on which *Repugnant Laws* depends. For immediate purposes, such cases are examined for what they say about congressional

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15. Nancy Maveety, *Repugnancy and Restraint: A Commentary on Keith Whittington's Repugnant Laws*, 19 GEO. J.L. & PUB. POL'Y 425 (2021).

16. Keith E. Whittington, *The Judicial Review of Congress Database*, OPEN SCHOLAR @ PRINCETON (May 2019), <https://scholar.princeton.edu/kewhitt/judicial-review-congress-database> [<https://perma.cc/V37P-3AUA>]. For further background on the dataset and the issues addressed by the book, see Keith E. Whittington, *Reconsidering the History of Judicial Review*, 35 CONST. COMMENT. 1 (2020).

authority. However, they could also be fruitfully considered for what they tell us about the Court's relation to the Executive Branch.

The database is less informative of other ways in which the judiciary and the President, or the Executive Branch more broadly, come into conflict. There are likely relatively few cases in the U.S. Reports exclusively examining the limits on presidential authority under the Constitution. To the extent that the executive leans heavily on Article II, it is likely to do so in the context of nonjusticiable actions (such as the use of the war powers). More informative, I suspect, would be an examination of how the judiciary treats executive action in the context of statutory interpretation and administrative law. If the President and his Administration are to find their wings clipped by the courts, it most likely comes in a context other than through the interpretation, application, and enforcement of constitutional rules. Such judicial rebukes might be less durable than constitutional review in that political branches can more easily work around decisions grounded in statutory language or administrative procedure. These decisions, however, are consequential nonetheless in obstructing policies favored by the Executive Branch. Examining whether the Court has primarily served as a partner specifically to the President would likely require casting a net over the myriad activities in which the Executive Branch engages and analyzing how those reach the Court. Increasingly, presidents have engaged in the kinds of unilateral actions, including executive orders, which give rise to litigation. More commonly, presidents rely on policymaking tools further removed from the Oval Office. Thus, it would be helpful to know, for example, how much variation exists in the litigation rates and litigation success rates between the independent agencies and commissions largely beyond presidential control and the ordinary agencies and departments more immediately under presidential command. The Judicial Review of Congress database is limited in the extent to which it can illuminate how ambitious Congress is in drafting statutes. The legislative activities of some Congresses more often find their way to the Court, suggesting that those legislative sessions were particularly active and innovative. But it is not always easy to tell how aggressive Congress is in pushing constitutional boundaries, or how often executive officers stretch statutory language in ways that create constitutional difficulties where none might otherwise exist. Likewise, it would be difficult to disentangle the extent to which executive agencies find themselves at odds with the federal judiciary because of what they are doing, the litigation environment in which they are operating, the inadequate statutory tools they have been given, or the assertive nature of the courts. Partisans can easily allocate blame in such cases; scholarly observers cannot. Ultimately, *Repugnant Laws* provides a perspective on how obstructionist the courts have been to congressional policymaking, but it is a limited one. The courts interact with the other two branches more frequently in cases that do not involve constitutional claims. In that sea of cases, we could find important additional evidence about how much the judiciary gets in the way of the policies that Congress and the executive are trying to advance.

### III. WHAT DOES MITCH MCCONNELL KNOW?

In his paper, Howard Gillman poses a provocative and obviously important question: What does Mitch McConnell know that Keith Whittington does not?<sup>17</sup> The question has real significance for thinking about the findings of *Repugnant Laws* in multiple ways. The context, of course, is that Mitch McConnell has dedicated himself over the past several years to maximizing the mark that the Republican Party leaves on the federal judiciary. There were times during the Trump presidency when it seemed like the Republican Party cared about little else. Time will tell whether that focus on appointing judges will be of any lasting consequence, but such a focus at least suggests that McConnell thinks the federal courts matter. Is that a problem for *Repugnant Laws*?

Two overarching themes of the book are in potential tension with McConnell's recent actions. First, the book emphasizes that the Court has generally been an ally to the political coalition in power in the elected branches. McConnell's strenuous efforts to ensure that Republicans fill seats on the federal bench might imply that he thinks the courts will not so naturally align themselves with Republican administrations. Alternatively, Democrats fear that McConnell is setting the courts up to be a hostile force against Democratic administrations. If the then-Senate Majority Leader can so easily turn the judiciary into a weapon aimed at future political incumbents, then that might call into question the general conclusion that we should expect courts to be allies rather than foes of presidential administrations. Second, the book concludes that the Court has mostly been on the margins of national politics. Although the Court has intermittently asserted itself more aggressively and thrust itself into the political limelight, such episodes have been relatively rare and fairly brief. On the whole, the book finds that the Court has been less important than we tend to think.

So why is McConnell trying so hard? Of course, he might simply be mistaken about the likely effects of his actions. If he took the time to read *Repugnant Laws*, perhaps he would decide that he has been misallocating his limited political capital and would have been better off dedicating himself to other objectives. Alternatively, the book may have simply drawn the wrong lessons from its historical materials and missed something important about the American experience in concluding that the Court has been well off the main political stage.

Somewhat differently, we might conclude that *Repugnant Laws* has drawn the right lessons from history but that McConnell is differently situated. The past might not be prologue. It might instead be a foreign country, interesting to visit but of limited relevance to our present age. Does any of this still matter?

One answer to this puzzle is that the Republicans might be focused on something other than judicial review of Congress when prioritizing the Court. Judicial review of constitutional claims is important, but, as noted above, the judiciary is

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17. Howard Gillman, *Party Coalitions and Supreme Court Politics: Additional Lessons from Whittington's Repugnant Laws*, 19 GEO. J.L. & PUB. POL'Y 405 (2021).

involved in numerous other forms of policymaking. In his study of the conservative legal movement, Steven Teles pointed out that conservatives came to realize in the 1970s that electoral victory was not by itself sufficient to advance conservative policies—and not primarily because conservative policies were at risk of being struck down as unconstitutional. A liberal-minded judiciary might still engage in “social experimentation” from the bench and hamper conservative policymaking by executive appointees.<sup>18</sup> The courts in alliance with what some like to label the “deep state” could run with broadly worded economic and social regulatory statutes Democrats passed earlier in the twentieth century to generate new policies that run counter to the desires of Republicans.<sup>19</sup> The law-and-economics movement, for example, has said relatively little about constitutional interpretation but is instead interested in how courts act in other areas of law outside the scope of *Repugnant Laws*. Although originalist scholarship has in recent years taken a more libertarian turn that encourages the courts to be less deferential to legislatures, the conservative legal movement has long emphasized a goal of removing courts from the equation by getting them to adopt a more deferential posture.<sup>20</sup> In practice, the more conservative Court that a succession of Republican presidents created has made its most notable contribution to judicial review by dramatically reducing how many *state laws* it strikes down.<sup>21</sup> McConnell might not care about the federal judiciary because of what he anticipates, or hopes, it will do with the commerce clause or the Fourteenth Amendment but because of what it might do with the Clean Water Act, OSHA regulations, and Title IX.

There might be a rational political logic to McConnell’s focus even if we just focus on judicial review. *Repugnant Laws* finds that the activities of the Court are often on the margins of political life, but that perspective emphasizes the aggregate of the Court’s activities. From the perspective of a national coalition leader, the Court might sometimes be helpful, but it is not at the center of political life. However, not everyone can afford to adopt the perspective of a national coalition leader. The Populists led by William Jennings Bryant complained about the Court, in part, because they were electoral losers and the Court was aligned with the more conservative politicians who were winning national elections. But they also complained about the Court because they cared intensely about the specific policies that ran afoul of it. If you intensely care about the progressive income tax, then the *Income Tax Cases* take on an outsized significance. Similarly, the Southern segregationists of the mid-twentieth century could hardly be mollified by being told that the Warren Court was generally an ally of liberal Democrats. The segregationists had an intense interest in one particular policy, and the Court

18. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 1 (2008).

19. See especially R. SHEP MELNICK, *BETWEEN THE LINES* (2d ed. 1994); R. SHEP MELNICK, *REGULATION AND THE COURTS* (1983).

20. Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL’Y* 599 (2004).

21. Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 *NOTRE DAME L. REV.* 2219, 2230–32 (2014).

was on the wrong side of that issue. For them, the composition and commitments of the Court mattered a great deal.

McConnell might be responding to similar forces within his own coalition. For the modern Republican Party, there are important interests that intensely care about issues that are directly affected by the Court. Issues like gun rights and abortion inspire a core of single-issue donors, activists, and voters who fuel party politics, particularly in the Republican Party.<sup>22</sup> Such issues might particularly matter in Senate races, which are the races of greatest concern to the Republican Senate majority leader.<sup>23</sup> Moreover, those are issues in which the judiciary is directly implicated, at least for now. What might be characterized as “morality politics” or “culture war” issues are disproportionately issues that involve the courts.<sup>24</sup> Abortion politics helped lead many conservative activists to care about courts and constitutional rights more broadly.<sup>25</sup> Legislators often find it difficult to deliver to voters on culture war issues, but what politicians can provide are judges who, at the very least, can be sold as responsive on those issues.<sup>26</sup> Culture war issues might be primarily symbolic in national politics, but judges can be sold as a political response to such issues. If such issues are salient to Republican activists, then they can be kept energized and excited about Republican politics by feeding them a steady stream of judicial appointments. If a significant degree of modern Republican Party politics is primarily symbolic, or “ideological” as Matt Grossman and David Hopkins put it, then Republican politicians have a particular incentive to pander to that base with judges. When McConnell swung for the fences by holding up the nomination of Merrick Garland and putting judicial vacancies front and center for the 2016 elections, it was Republican voters who had judges on their mind in casting their presidential ballot.<sup>27</sup> Perhaps a different nominee to the Court in 2016 would have excited and mobilized the Democrats’ base. Instead, the Democrats largely ignored the Garland nomination as campaign season heated up, while Republicans continued to highlight the courts.<sup>28</sup> But notably this is primarily an electoral story rather than a story about governance,

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22. MATT GROSSMAN AND DAVID A. HOPKINS, *ASYMMETRIC POLITICS* 14-17 (2016).

23. See Laurent Bouton et al., *The Tyranny of the Single Minded: Guns, Environment, and Abortion*, 103 REV. ECON. & STAT. 1, 1 (2021); Benjamin Highton, *Policy Voting in Senate Elections: The Case of Abortion*, 26 POL. BEHAV. 181, 183 (2004).

24. RYAN L. CLAASSEN, *GODLESS DEMOCRATS AND PIOUS REPUBLICANS? PARTY ACTIVISTS, PARTY CAPTURE, AND THE “GOD GAP”* 4 (2015).

25. ANDREW R. LEWIS, *THE RIGHTS TURN IN CONSERVATIVE CHRISTIAN POLITICS* (2017).

26. Elizabeth A. Oldmixon, *Legislating Morality in the U.S. Congress . . . or Not: Religion, Polarization, and the Next Wave of Culture*, 17 THE FORUM (2019); see also KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007).

27. Philip Bump, *A Quarter of Republicans Voted for Trump to Get Supreme Court Picks—and It Paid Off*, WASH. POST (June 26, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off/> [https://perma.cc/RQ8K-RXPP].

28. Ariane de Vogue, *How McConnell Won, and Obama Lost, the Merrick Garland Fight*, CNN POLITICS (Nov. 9, 2016), <https://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/index.html> [https://perma.cc/44X5-EP7P].

though the modern Republican Party seems increasingly disinterested in issues of actual governance.

The particular circumstances of the Trump presidency also might have contributed to Mitch McConnell's overwhelming focus on judicial appointments. There is no question that judicial confirmations have been the most prominent accomplishment of the Republican-led Senate during the presidency of Donald Trump. The Senate Majority Leader himself pointed to judicial confirmations as the priority of the Republican-controlled Senate during the Trump presidency.<sup>29</sup> One significant reason for this single-minded focus on judges, however, is that Republicans had a limited legislative agenda to advance during the Trump presidency. Even when Trump enjoyed unified party control over both chambers of Congress, he suffered from the lack of overlap in policy priorities and ideological confluence between the congressional Republicans and the White House. The two found some agreement on conventional Republican priorities such as tax cuts, but they found few points of agreement on more distinctly Trumpian priorities like immigration restrictions.<sup>30</sup> While elected Republicans have not been in any position to actively oppose a president who remained popular with the Republican electorate, they have not been very inclined to actively support him on many policy matters.<sup>31</sup> Appointing conservative judges has been one major point of convergence between Trump and Senate Republicans. Once Trump pledged himself to nominating conventional conservative judges and demonstrated his willingness to faithfully adhere to that pledge, Senate Republicans could readily join him in bringing his appointments to fruition. Mitch McConnell does not have to think that the Court is particularly important in order to take advantage of one of the few areas of agreement with Donald Trump. It is possible that a Republican Senate would have equally prioritized judges under any Republican president after the procedural reforms that eased majoritarian judicial

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29. See Senator Mitch McConnell, Remarks on the Senate Floor, <https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-proud-senate-continues-confirming-more-of-president-trumps-well-qualified-judicial-nominees> [<https://perma.cc/PBY6-FUZL>]; Press Release, Senator Mitch McConnell, Leader McConnell on Hugh Hewitt (Oct. 2, 2020), <https://www.republicanleader.senate.gov/newsroom/press-releases/leader-mcconnell-on-hugh-hewitt> [<https://perma.cc/52H8-FXGE>]; Damon Root, *Mitch McConnell Thinks His Greatest Achievement Is the Judges His Senate Confirmed*, REASON (Feb. 5, 2018), <https://reason.com/2018/02/05/mitch-mcconnell-names-gorsuch-appointment/> [<https://perma.cc/QZR3-VQLQ>].

30. See Molly Ball & Philip Elliott, *Inside the GOP's Rocky Relationship with Donald Trump*, TIME (Jan. 11, 2018), <https://time.com/5098403/inside-the-gops-rocky-relationship-with-donald-trump/> [<https://perma.cc/Y4L6-CZWQ>]; Susan Davis, *Trump's Fractured Relationship with Congress Causes GOP Dread*, NPR (Aug. 24, 2017), <https://www.npr.org/2017/08/24/545628293/trump-s-broken-relationship-with-congress-causes-gop-dread> [<https://perma.cc/HU85-3QSU>]; Carl Hulse, *Trump and Congressional Republicans: It's Complicated*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/2017/07/25/us/politics/congress-trump-republicans.html> [<https://perma.cc/7SHQ-RRHK>].

31. Todd S. Purdum, *The Price of Trump Loyalty*, THE ATLANTIC (May 25, 2020), <https://www.theatlantic.com/politics/archive/2020/05/cory-gardner-trump-republicans/612007/> [<https://perma.cc/F2J2-UGTB>].

confirmations.<sup>32</sup> Even so, it seems likely that judicial appointments were a more prominent part of the story of the Trump presidency because there were fewer alternatives that could have been made part of the story.

The new Democratic focus on Court packing as a possible response to the Trump presidency would seem to suggest a different calculation. Activists on the left are concerned precisely that Republican-appointed judges might use judicial review to obstruct the Democratic policy agenda.<sup>33</sup> They imagine a New Deal-type showdown between holdover judges and a newly empowered progressive legislative majority. That kind of high-stakes initiative presumes that judges are indeed important and obstructionist from a policy perspective. *Repugnant Laws* would suggest that such a presumption is misguided. On the other hand, *Repugnant Laws* also highlights that judges strategically avoid confrontations with powerful political majorities, and saber-rattling on Court packing is one mechanism for deterring such confrontations. From a pure policy perspective, Democrats might not need to actually adopt a Court packing bill so much as make clear that they are willing to use extreme measures should the courts get in the way of their core agenda. Whether in our hyperpolarized age Democrats (like Republicans) get a boost from their most committed partisans from taking extreme symbolic measures like Court packing (or presidential impeachment) is a different question. If they do, there might be electoral benefits from posturing on Court-packing similar to the gains Republicans believed they received from prioritizing judicial confirmations. If Democrats remain an interest-group and policy-driven party, however, then *Repugnant Laws* would suggest that Court packing should take a back seat to other legislative priorities.<sup>34</sup>

#### CONCLUSION

*Repugnant Laws* aims to provide new insights into the history and politics of how the U.S. Supreme Court has exercised the power of judicial review. Hopefully the book, and the underlying database, will encourage future scholars to further examine the extent to which the Court has obstructed Congress and

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32. See Christina L. Boyd, Michael S. Lynch & Anthony J. Madonna, *Nuclear Fallout: Investigating the Effect of Senate Procedural Reform on Judicial Nominations*, 13 THE FORUM (February 24, 2016) <https://doi.org/10.1515/for-2015-0042> <https://doi.org/10.1515/for-2015-0042>; Mark E. Owens, *Changing Senate Norms: Judicial Confirmations in a Nuclear Age*, 51 AM. POL. SCI. ASS'N PROF. SYMP. 119, 119 (2018); Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POL'Y 521, 521 (2018).

33. See Charlie Savage, *G.O.P.-Appointed Judges Threaten Democracy, Liberals Seeking Court Expansion Say*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/us/politics/court-packing-judges.html> [<https://perma.cc/LQ6S-R8D3>]; Elaine Godfrey, *The Democrats' Supreme Court Hail Mary*, THE ATLANTIC (Sept. 24, 2020), <https://www.theatlantic.com/politics/archive/2020/09/democrats-case-court-packing/616446/> [<https://perma.cc/AZ9J-T9EN>]; Chris Talgo, *Will Democrats Attempt to Pack the Supreme Court Again?*, THE HILL (Sept. 26, 2020) <https://thehill.com/opinion/judiciary/518258-will-democrats-attempt-to-pack-the-supreme-court-again> [<https://perma.cc/8C4A-8BHB>].

34. GROSSMAN & HOPKINS, *supra* note 22.

how the Court has developed the effective constitutional rules that constrain and empower Congress.

Remarkably, there are still things to be learned about the history of the development of American constitutional law. We have not appreciated the extended process by which the power of judicial review was developed in the early republic. We have radically underestimated how often the Court has taken up challenges to the constitutionality of federal statutes and how often the Court has articulated and enforced limits on congressional power. We have mostly ignored the most frequent action that the Court has taken when hearing such constitutional challenges: upholding the validity of what Congress has done. As a consequence, we have minimized the ways in which the Court has contributed to the growth of the national state and overstated the ways in which the Court pushed back on the exercise of government power. We have imagined an obstructionist Court, when the reality is that the Court has generally been extraordinarily accommodating to national policymakers.

Such empirical misconceptions have consequences. Gerald Rosenberg once emphasized that courts were a “hollow hope” for those seeking substantial social reform.<sup>35</sup> The Court is also likely to be a hollow hope for those seeking an institution that will stand up to political majorities and defend a more robust conception of limited government or individual rights. The Court has defended these positions only when there was substantial support in the elected branches for doing so, and it has done so only in ways that were compatible with their political agendas. The Court is tethered to politics, and that prevents it from ever playing the role of the white knight. A philosophy of limited government must be fought for and won in the political arena, and courts might then be expected to follow. But there is little evidence that the Court will lead the way.

The empirical findings in *Repugnant Laws* should inform our normative thinking about the courts. We have too long been transfixed by the arguments of the Populists and the drama of the New Deal. The Court is less likely to play the countermajoritarian role than either its supporters or its critics tend to imagine. The Court has contributed to our politics, but the contribution cannot be readily characterized as countermajoritarian. When it comes to assessing the normative challenges of an institution like judicial review as it works in practice, we need a more nuanced perspective on how the Court relates to its political environment. When it comes to elaborating a normatively justifiable role for the Court to play in our political system, we need to take into account the political constraints on the Court and set realistic expectations about its future behavior.

There is a great deal more to learn about the American constitutional experience, and hopefully *Repugnant Laws* can encourage a deeper examination of even those things that we find familiar.

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35. GERALD N. ROSENBERG, *THE HOLLOW HOPE* (2d ed. 2008).