
CONGRESS BEFORE THE *LOCHNER* COURT

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INTRODUCTION

The *Lochner* Court is remembered as one of the great activist Supreme Courts of U.S. history. During the *Lochner* era judicial review took on its modern character. Constitutional review of legislation by the Supreme Court became a routine feature of the American political system. Although judicial review itself had, of course, been known for a century, it was only with the *Lochner* Court that we found the need to develop a particular term to refer to the practice of the judiciary nullifying statutes. Though a variety of terms were floated by commentators of the time, including judicial supremacy, judicial veto, judicial nullification, and judicial paramountcy, “judicial review,” a term associated with the judicial supervision of the new administrative state, caught on.¹

It was also during the *Lochner* era that the now-ubiquitous “countermajoritarian difficulty” was formulated.² The Populist complaint, that

* Professor of Politics, Princeton University. I am grateful for the research assistance of Justin Crowe and the financial support of the Princeton University Committee on Research in the Humanities and Social Sciences and the Mamdouha S. Bobst Center for International Peace and Justice at Princeton University for this project. The identification here of constitutional challenges to federal statutes is somewhat provisional and reflects the very initial stages of research toward a more comprehensive political history of the judicial review of federal legislation.

¹ Matthew Franck has identified a few scattered earlier uses of the term in the constitutional context, but Edward Corwin seems to have popularized it. See MATTHEW J. FRANCK, STRICT SCRUTINY (forthcoming 2006); Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 660 (1909) (using the term “judicial review”). Some competing terms are noted in CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 19-28 (2d ed. 1932).

² See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three:*

the constitutional decisions of the judiciary should be criticized not simply because they were wrong as a matter of law but also because they ran counter to the expressed will of the people and were antidemocratic, has become commonplace. Every blow that the Court rained down on the legislature became another occasion to question the legitimacy of judges armed with such an absolute veto, and perhaps of a Constitution that would authorize such a practice. The regular use of the power of judicial review against legislation of high political saliency focused attention not only on the creativity of the Court's doctrinal innovations but also on the simple fact of judicial activity.³

The case of *Lochner v. New York*⁴ has appropriately been taken as emblematic of the era. The doctrine of substantive due process at the heart of *Lochner* reflected the more general commitment of the Court in the late nineteenth and early twentieth centuries to aggressively supervise the actions of political officials.⁵ In the face of a new activism on the part of American governments and in the wake of post-abolitionist sensibilities about the threat that legislatures and democratic majorities could pose to individual liberty, the Court was not disposed to heeding the Thayerian call for deference.⁶ In particular, the Fourteenth Amendment, the constitutional touchstone for *Lochner* itself, reinforced the Court's historic willingness to monitor the state governments and insure the supremacy of national constitutional commitments against local backsliding.⁷ Though the exercise of the power of judicial review against the states was familiar in the early republic, the number of state statutes invalidated by the U.S. Supreme Court jumped from less than one per decade prior to the Civil War to more than three per decade at the end of the nineteenth century to nearly one per year in the thirty years after the *Lochner* decision.⁸ Historically speaking, the states did not fare well before the

The Lesson of Lochner, 76 N.Y.U. L. REV. 1383, 1428 (2001) (introducing the idea of the countermajoritarian difficulty).

³ See generally WILLIAM G. ROSS, A MUTED FURY 49 (1994) (illustrating the vast amount of commentary surrounding *Lochner*); Barry Friedman, *supra* note 2, at 1420-28 (demonstrating the widespread interest in the court's activities during the *Lochner* era).

⁴ 198 U.S. 45 (1905).

⁵ See generally HOWARD GILLMAN, THE CONSTITUTION BESIEGED (1993).

⁶ WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY 1830-1900, at 68 (1982) (observing the Court's willingness to find legislation unconstitutional); Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1289-90 (1982) (discussing the court's disinclination to defer to the legislature). James Bradley Thayer had advocated judicial deference. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155-56 (1893).

⁷ See *Lochner*, 198 U.S. at 53 (explaining that part of the liberty guaranteed by the Fourteenth Amendment is the freedom to contract).

⁸ CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2035-2113 (Johnny H. Killian & George A. Costello eds., 1996), available at <http://www.gpoaccess.gov/constitution/browse.html#96supp> (last accessed April 20, 2005).

Lochner Court.

How Congress fared before the *Lochner* Court is less often explored. Judicial review of federal statutes, however, offers distinct and valuable insights into the *Lochner* Court specifically and the Supreme Court more generally. From a historical perspective, judicial review of federal statutes during this period gives us a somewhat different perspective on the Court's constitutional jurisprudence during this period. The *Lochner* Court's elaboration of substantive due process and consequent supervision of the states has understandably received the lion's share of attention. The Court's other interests have tended to be overshadowed. From a normative perspective, the judicial review of federal statutes may provide a somewhat clearer perspective on the Court's activism during this period. The countermajoritarian character of Supreme Court invalidation of state statutes is complicated by federalism. While state laws may reflect local political majorities, it is not always clear that they represent the will of national majorities, and the judiciary is importantly charged with the task of insuring the supremacy of national constitutional and policy commitments over those of states and localities.⁹ Judicial review of federal statutes more directly pits the democratic credentials of the national legislature against the constitutional responsibilities of the national judiciary. From a political perspective, judicial review of federal statutes provides valuable information regarding the extent and nature of judicial independence from elected politicians and the authority and power of the Court vis-à-vis coordinate national institutions.

This article examines the political history of the judicial review of federal statutes by the *Lochner* Court, in particular between the years of 1890 and 1919. In doing so, it situates this notorious Court within its political context and suggests the extent to which the Court was operating in cooperation, rather than in conflict, with other national political officials during this period. While the Court occasionally struck down provisions of politically important statutes or limited their scope with constitutional rules, the Court's exercise of judicial review during this period was usually routine, uncontroversial, and normatively unobjectionable. Moreover, the invalidation of federal action rarely, if ever, pitted the Court against a clear majority of elected officials. The Court's constitutional interventions, even in such notorious instances as the sugar trust case or the income tax cases, did not generally impose heavy political costs on national political leaders. By taking a close look at the politics surrounding the laws the Court invalidated during this period, we can gain a new appreciation of how the activism of the *Lochner* Court emerged and how it was sustained. The *Lochner* Court worked hand-in-hand with the conservative political leaders in both parties to realize a common constitutional vision of limited government within a decentralized federal system. The first section of this article lays out some of the relevant analytical framework for

⁹ See KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (forthcoming 2006).

understanding the political history of judicial review. The second section provides a broad overview of the Supreme Court's consideration of constitutional challenges to acts of Congress between 1890 and 1919. The third section focuses more specifically on the Court's invalidation of federal statutes during this period and on the relationship between the Court and rest of the national government during this era.

I. THE REGIME PERSPECTIVE ON JUDICIAL REVIEW

Political scientists seeking to understand the Supreme Court and its constitutional decisions tend to emphasize externalist explanations for the Court's behavior, and I will do so here as well, recognizing, however, that this provides but a partial perspective on the Court's work.¹⁰ Externalist accounts would observe, as the Legal Realists did, that the constitutional controversies the Supreme Court is generally asked to resolve do not admit to clear legal answers. Traditional legal tools such as the careful attendance to text, history, and precedent may provide a useful starting point for approaching such controversies, and provide firm boundaries as to the range of plausible resolutions that might be imposed, but they rarely lead all unbiased observers to a single, determinate conclusion. An adequate understanding of why the justices act as they do in such cases requires supplementing an analysis internal to the law with one that seeks to relate the justices to broader biographical, intellectual, social, and political influences that might help explain why a majority of the justices found one side of the controversy more compelling than the other.

Institutionalist analyses of judicial politics have become prominent in recent years and have sought to move beyond a more traditional focus on the behavior and attitudes of individual justices in order to place the Court within a broader political context.¹¹ Broadly speaking, these institutionalist approaches to judicial politics are concerned with investigating the influence of the political context within which judges make decisions.¹² This political context may be understood quite broadly, so as to include items ranging from procedural rules to other powerful political actors to informal norms to intellectual discourses

¹⁰ For overviews on political science approaches to Supreme Court behavior, see Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 265 (1997) (explaining the attitudinal model, which suggests that judicial judgments are based on politics), Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466 (2001) (explaining the view of many social scientists that judges based their decisions on policy), and Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 601 (2000) (explaining the breadth of political science inquiry into judicial behavior).

¹¹ See Whittington, *supra* note 10, at 608-16 (explaining institutionalist analyses).

¹² See *id.* at 608.

that might structure, constrain, or guide judicial action. The rational choice strain of the new institutionalism is particularly likely to emphasize the ways in which judges are constrained by other actors and so must act strategically to advance their goals in their interactions with others.¹³ The historical or interpretivist strain of the new institutionalism is less likely to emphasize the strategic choices to be made as such, and more likely to emphasize the commitments and purposes that judges, and other actors, come to accept.¹⁴ For those operating within this tradition, Supreme Court justices are not simply political actors and constitutional law is not simply politics by other means, but the ways in which law and politics interact need to be appreciated and politics must be understood broadly, to include contests over constitutional meaning.

An important precursor to this institutionalist turn was Robert Dahl's 1957 examination of "the Supreme Court as a National Policy Maker."¹⁵ Dahl emphasized that the policymaking of the Supreme Court could only be understood in the context of the broader political system or partisan regime.¹⁶ In particular, a politicized appointments process could be expected to link the values and interests of those who serve on the bench with those who serve elsewhere in the national government.¹⁷ Pushing the idiosyncrasies of individual justices into the background, Dahl focused our attention on the number of justices that a given political coalition could expect to place on the Court.¹⁸ With regular opportunities to appoint new justices and a modest degree of stability in their own electoral fortunes, a lawmaking majority could

¹³ See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 12-17 (1998) (explaining the "strategic interaction" that judges perform); Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625, 626 (2000) (explaining that many scholars now view judicial decision-making through the lens of "strategy"); Forrest Maltzman et al., *Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING 43 (Cornell W. Clayton et al. eds. 1999) (introducing the idea of judges' strategic behavior).

¹⁴ Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, in SUPREME COURT DECISION-MAKING, *supra* note 13, at 32 (explaining that interpretive methodologies examine personal obligations and perspectives of judges); Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING, *supra* note 13, at 43 (explaining the interpretivist strain, which views judicial decisions in light of the understandings of the justices themselves); Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 91 (1988) (defining "institutions" to include values and beliefs).

¹⁵ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279, 279 (1957) (arguing that the Supreme Court is a national policy making institution).

¹⁶ *Id.* at 294.

¹⁷ *Id.* at 284-285.

¹⁸ *Id.* at 285 tbl.1.

expect to win over the Court through generational replacement in fairly short order.¹⁹ It was simply “unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”²⁰ As a result, “the Supreme Court is inevitably a part of the dominant national alliance” and could be expected to behave accordingly.²¹

Dahl’s particular concern in that essay is of immediate interest: investigating the plausibility of the view that the Court would consistently act in a countermajoritarian fashion.²² A basic test of this proposition, he proposed, was to be found in the Court’s treatment of federal statutes when it exercised the power of judicial review.²³ While the judicial nullification of a federal statute is *prima facie* evidence of the Court acting in conflict with the wishes of a national lawmaking majority, Dahl expected that the Court would be most likely to nullify a statute and most successful in doing so only “against a ‘weak’ majority; e.g., a dead one, a transient one, a fragile one, or one weakly united upon a policy of subordinate importance.”²⁴ After examining the entire history of the Court’s invalidation of federal statutes, Dahl concluded that those expectations were largely borne out.²⁵ The New Deal was a historic outlier, a rare instance of the Court immediately bucking the major policies of a legislative majority.²⁶ More often the Court addressed older policies (more than four years after enactment) or contemporary policies of minor significance to lawmakers. If the Court did act contrary to a current legislative majority, the Court’s decisions were eventually reversed or otherwise circumvented (as indeed was the case with the New Deal).²⁷ Far from exercising a power of absolute veto, the Court, like “a powerful committee chairman in Congress,” could only “determine important questions of timing,

¹⁹ With a historical average of one appointment every twenty-two months, a president could reasonably expect to tip the Court over the course of two terms of office. *Id.* at 284.

²⁰ *Id.* at 291; *see also* TERI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 80-132 (1999). Jack Balkin and Sanford Levinson have recently given this a harder edge, recasting this process as one by which current coalitions entrench themselves on the bench with long-tenured judges. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1060 (2001) (arguing that justices can be understood to be long-serving members of the political coalitions that placed them on the bench).

²¹ Dahl, *supra* note 15, at 293.

²² *Id.* at 282-283 (noting the asserted role of the Court in defending minorities).

²³ *Id.* at 284 (using the Court’s treatment of federal statutes as an indirect test of whether the Court acts in a countermajoritarian manner).

²⁴ *Id.* at 286.

²⁵ *Id.* at 291 (arguing that “lawmaking majorities generally have had their way”).

²⁶ The New Deal statutes were all invalidated within four years of their passage (compared to all other invalidated statutes, of which only 38 percent were invalidated within four years of passage). As of Dahl’s writing, the New Deal statutes accounted for 32 percent of all the statutes invalidated within four years of passage. *Id.* at 286.

²⁷ *Id.* at 286-290.

effectiveness, and subordinate policy.”²⁸ The Court might be able to act “when the coalition is unstable with respect to certain key policies,” but the “main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition.”²⁹ The Supreme Court wields the rubber stamp.

In recent work, Mark Graber in particular has extended Dahl’s analysis by elaborating the ways in which the Court’s constitutional jurisprudence can serve the political interests of the dominant political coalition.³⁰ Graber has urged us to look beyond the dichotomous view of judicial review as either sustaining or rejecting the policies of the lawmaking majority and “pay closer attention to the constitutional dialogues that take place between American governing institutions on crosscutting issues that internally divide the existing lawmaking majority.”³¹ Important members of the governing coalition may call upon the judiciary to “resolve those political controversies that they cannot or would rather not address.”³² With Dahl, Graber concluded that the Supreme Court’s countermajoritarian rejection of the early New Deal was an outlier from the historic pattern.³³ More generally, Supreme Court invalidations of federal policy indicated that “no prevailing national majority clearly supported that policy.”³⁴ Where Dahl suggested that rejected policies were likely to be of low political salience or to reflect the wishes only of displaced majorities, Graber emphasized that they may also be the product of heavily cross-pressured majorities that had little capacity to sustain a united front behind challenged legislation.³⁵ In close study of the constitutional jurisprudence of the early nineteenth century, for example, Graber has argued that the Court’s actions are often “best understood as efforts to resolve conflicts that divided members of the dominant national coalition, and not as efforts to revisit the conflicts that divided the governing majority from the political minority.”³⁶ Judicial review survives political challenge by operating within the interstices of national politics, not by throwing itself against lawmaking majorities.

This “regime” perspective on judicial review, in which the Supreme Court is understood as an actor operating within the logic of a broader partisan regime rather than in antagonism to it, is being developed by a range of scholars with a variety of particular interests.³⁷ Scot Powe has described the constitutional

²⁸ *Id.* at 294.

²⁹ *Id.*

³⁰ Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 36 (1993).

³¹ *Id.*

³² *Id.* at 36.

³³ *Id.*, at 38, 68.

³⁴ *Id.* at 71.

³⁵ *Id.* at 39-44.

³⁶ Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 *STUD. AM. POL. DEV.* 229, 233 (1998).

³⁷ See e.g., Mark A. Graber, *Constitutional Politics and Constitutional Theory: A*

activism of the Warren Court as an extension of the New Frontier/Great Society program of the 1960s.³⁸ Michael Klarman has situated the Court's twentieth century civil rights decisions in national political developments.³⁹ Ken Kersch and Tom Keck have traced the relationships between the constitutional ideologies of twentieth-century justices and the political commitments of political leaders and activists.⁴⁰ Gerald Rosenberg has argued that the Court is only an effective policymaker when it works in cooperation with the other two branches of the federal government.⁴¹ Howard Gillman has laid bare the manner in which late nineteenth century Republicans sought to entrench themselves in an expanded and more energetic federal judiciary.⁴² John Gates has cataloged the ways in which judicial review has tracked partisan fortunes in national politics.⁴³ George Lovell has followed Graber's lead directly in locating ways in which a divided legislative coalition might turn difficult policy questions over to the courts through statutory compromises.⁴⁴ In keeping with Dahl's analysis, Mitch Pickerill has detailed the extent to which Congress has been able to circumvent post-New Deal judicial invalidations of federal statutes to achieve its policy objectives while leaving the constitutional doctrine in place.⁴⁵ I have examined the ways in which the judicial authority to interpret the Constitution has generally served the interests of, and been bolstered by, presidents and party leaders over the course of American history.⁴⁶

This emerging literature provides the analytical framework for evaluating judicial review of congressional statutes during the late nineteenth and early twentieth centuries. Although this era of the Supreme Court's history is most

Misunderstood and Neglected Relationship, 27 LAW & SOC. INQUIRY 309, 332 (2002) (concluding that constitutional theory is about maintaining political regimes).

³⁸ LUCAS A. (SCOT) POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 215 (2001) (acknowledging the link between the Warren Court and the politicians who created the New Frontier and Great Society).

³⁹ MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 443 (2004) (arguing that political and social changes influenced Court decisions).

⁴⁰ THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004); KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES* 1-2 (2004).

⁴¹ GERALD N. ROSENBERG, *THE HOLLOW HOPE* 13-14 (1991).

⁴² Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 515-17 (2002) (illustrating how late nineteenth century Republicans sought to use the federal courts to entrench their party); see also RAN HIRSCHL, *TOWARDS JURISTOCRACY* 39 (2004) (explaining how politicians can profit "from an expansion of judicial power").

⁴³ JOHN B. GATES, *THE SUPREME COURT AND PARTISAN REALIGNMENT* 6-7, 12 (1992) (providing an overview of four distinct periods where judicial review impacted political fortunes).

⁴⁴ GEORGE LOVELL, *LEGISLATIVE DEFERRALS* 8 (2003).

⁴⁵ J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS* (2004).

⁴⁶ See WHITTINGTON, *supra* note 9.

known for the unprecedented activism of the Court and conservative resistance to populist and progressive legislative accomplishments, we would do well to attend to how the Court fit into its partisan environment. If the Court was a countermajoritarian obstacle to progressive reform, then we should want to know how the Court managed to sustain itself against the forces of democracy. If the Court boldly struck down the preferred policies of a coordinate branch of the national government, then we would want to know how and why it behaved as such an “extremely anomalous institution from a democratic point of view.”⁴⁷

II. JUDICIAL REVIEW OF FEDERAL STATUTES, 1890-1919

When focusing on the statutes rejected by the courts, it is tempting to view the judiciary as a colossus standing athwart the government sweeping away a large measure of the legislature’s handiwork. The criticisms of judicial review that ring down from the populist and progressive eras suggest conservative judges actively blocking reformist legislatures at every turn.⁴⁸ Perhaps with the New Deal struggle in mind, we easily imagine the Court having ample opportunity to review every congressional action and exercising an absolute veto over those policies that do not meet the approval of a majority of the justices. In short, judicial review can be imagined as an absolute veto, unconstrained by the possibility of legislative override or calculations of electoral consequences.

Of course, such a vision would be highly misleading. For instance, the courts are rarely as unrelenting as the statutory invalidations suggest. Our general psychological tendency is to regret the things we lose more than we value the things we retain, and our perception of judicial review is likely to be shaded by a similar mental bias. The instances, however infrequent, in which the judiciary strikes down government actions are felt far more keenly than the instances in which the judiciary upholds government actions. Certainly it is the veto that has high political salience and attracts the attention of the contemporary media and later commentators.

This tendency to overvalue loss has particularly shaped accounts of the first historic period of sustained judicial review. Carefully cataloging each rejection of a railroad regulation or working-hour limitation, histories portray an all-out struggle between the judicial forces of reaction and the popular forces of reform during the *Lochner* era.⁴⁹ The judicial historian Charles

⁴⁷ Dahl, *supra* note 15, at 291.

⁴⁸ See ROSS, *supra* note 3, at 1 (discussing persistent populist and progressive criticism of judicial review).

⁴⁹ See, e.g., ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1960); ROSS, *supra* note 3, at 10 (outlining the overall struggle between those for reform and those for deference); WILLIAM F. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY, 1889-1932*, at 114 (1969) (illustrating the differences between traditionalists and progressives).

Warren offered a contemporaneous revision of this emerging standard narrative.⁵⁰ Hearing the growing din of denunciations of the state and federal judiciaries, Warren urged the “Bar and the law reviews [to] set the real facts constantly before the people.”⁵¹ Critics

who claim that the Court stands as an obstacle to “social justice” legislation, if asked to specify where they find the evil of which they complain and for which they propose radical remedies, always take refuge in the single case of *Lochner v. New York*. . . . Yet a single case does not necessarily prove the existence of an evil.⁵²

Warren found that between 1887 and 1911, the Supreme Court had issued 560 decisions reviewing the constitutionality of state statutes under the Fourteenth Amendment.⁵³ An examination of these cases as a whole, he thought, “conclusively proves that the alleged evil in the trend of the Court is a purely fancied one.”⁵⁴ In these 560 decisions, the Court had invalidated state actions involving “general social or economic conditions” in only three cases and those involving specific property rights in only another thirty-four.⁵⁵ Far from being reactionary, the Supreme Court was progressive, upholding the constitutionality of state laws in over ninety-four percent of its decisions in this controversial area.⁵⁶ In an additional analysis of 302 cases involving state statutes challenged on interstate commerce or contract clause grounds during a similar period, Warren found state laws struck down in only thirty-six instances.⁵⁷ Between these various classes of cases, the states had a success rate of defending their police powers in the Supreme Court of over ninety-one percent.⁵⁸ Some recent scholars have similarly made note of the Court’s record. As Robert McCloskey observed, “Most of the important legislative measures that were really demanded by public opinion did pass and did manage to survive the gauntlet of judicial review.”⁵⁹ The “drift of American economic policy during this period” was determined far more by electoral and legislative politics than by courts.⁶⁰ While the Court was more active than it

⁵⁰ Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294-95 (1913) (attempting to correct the historical record as to the character of the court).

⁵¹ *Id.*

⁵² *Id.* at 294.

⁵³ *Id.* at 295.

⁵⁴ *Id.*

⁵⁵ *Id.* at 308 (detailing the situations where the Court invalidated state statutes).

⁵⁶ *Id.* at 309.

⁵⁷ Charles Warren, *A Bulwark to the State Police Power – The United States Supreme Court*, 13 COLUM. L. REV. 667, 695 (1913) (observing that during this period the Supreme Court substantially upheld state action in both the due process and commerce context).

⁵⁸ *See id.*

⁵⁹ ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 151 (1960).

⁶⁰ *Id.*; *see also* MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY* 31-89

had been earlier in its history, *Lochner* was a mere activist island in a sea of judicial passivity.⁶¹

While *Lochner* and decisions affecting state legislation were getting all the attention during the Progressive period, the record of Congress before the Court was much the same. Between 1890 and 1919, the Supreme Court seriously entertained constitutional challenges to federal statutes in at least 158 cases.⁶² The total number of cases is somewhat provisional, in part because the Court is not always clear as to whether it is engaging the constitutional question and because during this period the Court frequently ducked the substantive constitutional issues raised by litigants while dismissing the case on jurisdictional or other technical grounds.⁶³

When it considered the constitutional issues raised by a case, the Court most often upheld the congressional assertion of its power. The Court struck down federal action in only twenty-three of these 158 decisions, giving Congress a success rate of eighty-five percent. Warren's judgment from the record of state cases seems equally valid in the context of federal cases; "[t]he actual record of the Court thus shows how little chance a litigant has of inducing the Court to

(2001); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, in YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 53 (1983).

⁶¹ Of course, this ignores the anticipatory reactions of legislatures, which may have defeated or altered bills that they expected to run afoul of the Court given its announced doctrine. It is unclear how significant an effect this might have been (or might now be). It is at least possible that the *Lochner* Court had a larger effect than the litigation success rate of the states suggests due to a more general depressing effect that the few invalidations might have had on progressive reform efforts. This possibility is ignored in the analysis contained in this article.

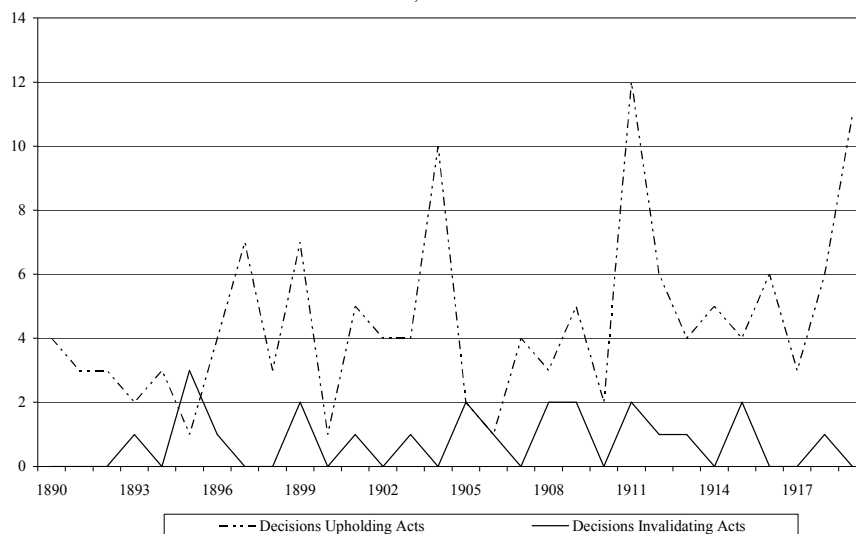
⁶² More accurately, this accounting includes 158 decisions with opinions addressing constitutional challenges to federal statutes. Several of these opinions involve several consolidated cases. To select these cases, my research assistant and I first performed an electronic search on the text of all Supreme Court opinions issued between 1890 and 1919 included in the Lexis-Nexis database for the terms "Congress" and "constitution!" This sampling technique has the merit of capturing all those cases traditionally included on lists of Supreme Court decisions invalidating federal provisions during this period. This sample of opinions was then read to locate all those majority opinions including a substantive discussion the constitutionality of a federal statute or its application in the case at hand. We excluded cases in which the Court merely noted that the constitutional issue had been adequately resolved in some earlier case or in which the Court did not reach the merits of the constitutional question. This produced a set of 158 decisions. Note that this set does not include every case in which a litigant asked the justices to deliberate on the constitutionality of a federal statute, only those in which the justices did in fact do so. Cf. Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, 57 POL. RES. Q. 131, 133-34 (2004) (examining briefs of litigants to identify cases in which the Court was asked to invalidate state or federal law between 1985 and 1994).

⁶³ Future work will incorporate an additional set of cases captured with a somewhat different sampling technique.

restrict” the power of the federal government.⁶⁴

Over this three-decade span, the Court regularly heard a fairly large number of constitutional challenges to the actions of the federal government, as Figure 1 illustrates. The Court showed a consistent willingness to invalidate federal actions. During this period, an average of just under one legislative provision was struck down by the Court every year. With the exception of a three-year period at the opening of the 1890s, the Court did not let more than two years go by without nullifying a federal action. Nonetheless, the Court turned back far more constitutional challenges to federal law than it sustained. In an average year during this period, the Court heard over five constitutional challenges to the federal government and upheld the government in more than four of them. No term of the Court passed without the Court deciding at least one constitutional case involving a federal law. There is an upward trajectory in the number of such cases heard by the Court over the course of this period, though there was no similar pattern in the number of decisions invalidating acts.⁶⁵

Figure 1: Number of Constitutional Challenges of Federal Statutes before the U.S. Supreme Court, 1890-1919



Dahl particularly highlighted the temporal dimension of the Court’s consideration of federal statutes.⁶⁶ Given his emphasis on the appointments process as the primary mechanism for linking the policy preferences of the justices and legislative majorities, Dahl argued that the Court would generally invalidate old statutes that no longer reflected the preferences of then-current

⁶⁴ Warren, *supra* note 50, at 310.

⁶⁵ See *supra* notes 50-58 and accompanying text.

⁶⁶ Dahl, *supra* note 15, at 285-88.

majorities.⁶⁷ Thus, he generally assumed a statute reflected “live” majorities if it came before the Court within four years of its enactment.⁶⁸ Dahl took particular note of the fact that New Deal statutes accounted for many of the measures struck down within that span, when the justices were clearly still “holdovers” from the old coalition.⁶⁹ This is a reasonable, if rough, approximation. More recent “strategic” accounts of judicial decision-making would place the emphasis somewhat differently.⁷⁰ Very recent statutes might reflect the preferences of the current majority, but the personnel of the Court evaluating those statutes may or may not reflect the influence of that majority (as the New Deal example indicates). The strategic account would suggest that the Court might nonetheless be reluctant to strike down such statutes out of fear of congressional retribution.⁷¹

We might also wonder, however, how quickly statutes normally reach the Court. While Dahl found that the New Deal statutes accounted for a high proportion of the statutes struck down relatively soon after their enactment, it is possible that this result is less the effect of political calculation than institutional sluggishness. The highly salient New Deal statutes might simply have been pushed through the litigation process much more quickly than the average statute. Without a broader sense of when the Court normally addresses itself to federal legislation and whether it is more likely to *uphold* recent legislation, it is hard to know how to evaluate Dahl’s findings.

⁶⁷ *Id.* at 293 (arguing that stable political systems are dominated by cohesive alliances and that the Court becomes part of whatever “dominant national alliance” exists at the time).

⁶⁸ *Id.* at 287.

⁶⁹ *Id.* at 286 (observing that the New Deal statutes accounted for 32 percent of all the statutes invalidated within four years of passage).

⁷⁰ See Epstein & Knight, *supra* note 13, at 9-12 (discussing the Supreme Court as a strategic actor).

⁷¹ See Epstein & Knight, *supra* note 13, at 139-45; Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 125 (2003) (explaining that the Court is sensitive to the currently sitting Congress); Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt’s Court-Packing Plan*, 12 INT’L REV. L. ECON. 45, 46 (1992) (finding that the Court follows Congress to an extent when making constitutional decisions).

Figure 2: Time from Enactment of Federal Statute until Court Decision, 1890-1919

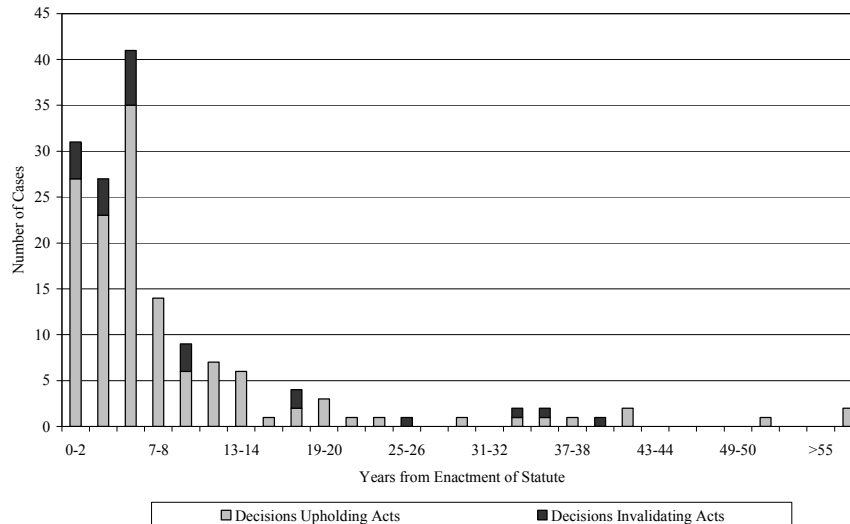


Figure 2 shows how soon after enactment the Supreme Court rendered a decision in the 158 cases in which it considered the constitutionality of federal statutes during this period. In fact, most constitutional objections to statutes were raised before the Court in fairly short order. Roughly 37 percent of all constitutional challenges were considered within four years of the statute's enactment, and 63 percent of all challenges were resolved within six years of enactment. The median statute invalidated or upheld was just under five years old. Parties affected by questionable statutes did not have to wait long to learn whether the Court would come to their aid. Dahl's inference is strengthened by knowing that most statutes do reach the Court in a timely fashion and likely before they become politically irrelevant.⁷² Those statutes considered relatively soon after enactment do fare somewhat better than those considered later. Eighty-eight percent of statutes considered within eight years of enactment were upheld, but that success rate drops to eighty percent for those considered more than eight years after enactment. Looked at differently, thirty-five percent of all the rejected statutes were less than four years old, but thirty-nine percent were over eight years old. Older statutes in litigation were slightly less constitutionally secure than newer statutes under challenge. Even so, a significant number of apparently contemporary statutes were struck down, which belies any easy claim that the Court will always agree with a recent Congress.

The overall amount of constitutional litigation over federal statutes before the Supreme Court is also indicative of a fairly robust legal support system. As

⁷² Dahl, *supra* note 15, at 291-93.

has been recently emphasized by Charles Epp's cross-national study of constitutional rights adjudication, even sympathetic judges need a steady stream of appropriate cases in order to develop a significant body of constitutional jurisprudence.⁷³ Effective use of the courts is time-consuming and costly, and an appropriately organized and extensive bar must be available to usher the right kind of cases before the Court.⁷⁴ The cases reflected in Figure 2 are indicative of an active litigation environment, in which lawyers are willing and able to aggressively challenge the government in the courts. Indeed, the number of decisions involving the constitutionality of federal statutes rises steadily through this period, as reflected in Figure 1, though this increasing number of challenges does not result in more invalidations. It is notable, however, that the great bulk of the constitutional challenges during this period are brought by businesses. While a large number of individuals and other organizations (e.g., Indian tribes, churches) did bring such challenges, the absence of an organized public interest bar surely affected the mix of cases that reached the Court.

III. INVALIDATING FEDERAL STATUTES

Focusing just on the statutes that the Court struck down, it becomes readily apparent that the Court did invalidate important pieces of legislation during this period, often shortly after enactment. These important episodes of judicial review do not fit easily into Dahl's primary expectation of statutes falling victim to a Court that is lagging electoral trends.⁷⁵ Graber's related framework of the Court allying itself with the presidential wing of the ruling coalition is generally more helpful.⁷⁶

During this period, the Supreme Court was largely a Republican Court. Twenty-five justices served on the Court during these years. Fifteen of them were Republicans, and eighteen were originally appointed by Republican presidents.⁷⁷ Over the course of the eighteen "natural courts" that existed during this period, there was never a majority of Democratic justices and never

⁷³ CHARLES R. EPP, *THE RIGHTS REVOLUTION* 18 (1998) (arguing that to get the right type of cases to achieve a rights revolution requires both a society willing to undertake widespread, sustained litigation in support of civil rights and a consistent stream of cases which will achieve many incremental developments leading to constitutional change).

⁷⁴ *Id.* at 44-70 (discussing the role of different elements of the legal profession in performing the strategic litigation necessary to affect constitutional change).

⁷⁵ *See supra* notes 66-69 and accompanying text.

⁷⁶ *See supra* notes 30-36 and accompanying text.

⁷⁷ Republican presidents chose four Democratic justices – Stephen Field (Abraham Lincoln), Howell Jackson (William Henry Harrison), Horace Lurton (William Howard Taft), Joseph Lamar (William Howard Taft). Only one Republican justice was nominated by a Democrat – Louis Brandeis (Woodrow Wilson). The Democratic Associate Justice Edward White was elevated to Chief Justice by William Howard Taft, who replaced him with a Republican, Willis Van Deventer.

more than three justices appointed by a Democratic president sitting together on the bench. During the long Republican era between the Civil War and the New Deal, the Court would seem to have been set to provide Dahl's passive legitimation of the acts of Congress. Lawmaking majorities were not quite as stable as Dahl implied in his article, however, and Dahl's neglect of the Supreme Court as a judicial institution, as well as a policymaking institution, leaves much of the Court's work during this period in obscurity.

We can begin to understand the importance of the Court's exercise of the power of judicial review by considering another variable that Dahl expected to matter, the relative importance of the policy under review.⁷⁸ We might expect that the importance of the statute under consideration would affect the willingness of the Court to strike it down. Certainly, our evaluation of just how consequential judicial review is in practice would depend in some degree on how important the affected policies might be. There is no single way to identify major legislative enactments, but Stephen Stathis of the Congressional Research Service has recently produced a list and description of all "landmark" federal statutes passed from the founding through 2002.⁷⁹ This provides an independent measure of Supreme Court cases involving the constitutionality of important legislation as well as notable provisions of such legislation (those provisions mentioned in Stathis's description of the landmark statutes).

Incorporating information on the importance of the statutory provision nullified by the Court dramatically alters the picture of the exercise of judicial review during this period. Table 1 indicates that a rather surprising seventy percent of all the cases invalidating federal action during this period involved landmark legislation. This result becomes less surprising, however, when it is recognized that only half of those cases, or thirty-five percent of the total, specifically involved notable provisions of landmark statutes.⁸⁰ Table 2 breaks this down further by the party in power when invalidated legislation was passed. Interestingly, most of the statutory provisions invalidated by the Court were products of Republican government. Once we separate the thirty-five percent of cases involving notable provisions of landmark legislation from all others, however, we get the striking finding in Table 3. When the Court struck down a provision of a Democratic statute, it was almost always a notable

⁷⁸ Dahl found that Congress was more likely to circumvent the Court's decision in the case of "major policy issues from the point of view of the lawmaking majority." Dahl, *supra* note 15, at 288. The congressional response to the Court is not of immediate concern here.

⁷⁹ STEPHEN W. STATHIS, *LANDMARK LEGISLATION, 1774-2002* (2003). See also DAVID R. MAYHEW, *DIVIDED WE GOVERN* 34-74 (1991) (providing another influential list of important postwar legislation); William Howell et al., *Divided Government and the Legislative Productivity of Congress, 1945-94*, 25 *LEGIS. STUD. Q.* 285 (2000) (using a variation of Mayhew's list of landmark legislation to determine congressional productivity).

⁸⁰ Overall, the Court upheld eighty-two percent of the notable provisions of landmark statutes that were subjected to constitutional challenge during this period (a total of forty-four cases), roughly the same as the overall success rate of federal statutes before the Court.

provision of an important statute. When the Court struck down a provision of a Republican statute, it was rarely a notable provision of an important statute.⁸¹ This pattern becomes all the more stark in Table 4, which accounts for the age of the statute at the time of the Court's action. Not only were invalidated Democratic provisions likely to be more important than invalidated Republican provisions, but they were also more likely to be recent. The Court during this period rarely crossed the Republicans on an important policy of contemporary interest.

Table 1: Cases Invalidating or Limiting Statutes by Type, 1890-1919

	All Statutes	"Landmark Legislation"	Notable Provisions
Number of Cases	23	16	8
Percent of Total		70 %	35 %

Table 2: Cases Invalidating or Limiting Statutes by Type and Party, 1890-1919

	Republican	Democratic	Divided
Landmark Legislation	12	3	1
Not Landmark	5	1	1

⁸¹ Overall, the Court upheld notable provisions of Republican landmark statutes in eighty-one percent of the cases that came before it (twenty-seven cases). By contrast, such provisions of Democratic statutes had a success rate of only sixty-seven percent (nine cases). Notable provisions of landmark legislation that emerged from divided government were always upheld (eight cases).

Table 3: Cases Invalidating Statutory Provisions by Type and Party, 1890-1919

	Republican	Democratic	Divided
Notable Provision	5	3	0
Not Notable	12	1	2

Table 4: Cases Invalidating Notable Statutory Provisions by Party and Age, 1890-1919

	Republican	Democratic
Statute Less Than Four Years Old	1	3
Statute More Than Four Years Old	4	0

IV. STRIKING DOWN IMPORTANT REPUBLICAN POLICIES

Only five cases invalidating federal legislation between 1890 and 1919 involved notable provisions of landmark legislation passed during a Republican government. Assuming Dahl's expectation of shared preferences between the judicial branch and the elected branches of the federal government during Republican control, even five cases is rather surprising. A closer look at these cases reveals a more nuanced picture of how the Republican-dominated Court related to important Republican policy initiatives. The basic theme of this picture, however, is still one of a relatively friendly Court.

The one instance in which the Supreme Court invalidated an important Republican measure soon after its adoption involved the Employers' Liability Act of 1906, which the Court struck down in January of 1908.⁸² The legislative and political damage of the Court's action was minimal, however, and Congress quickly responded by passing the Employers' Liability Act of

⁸² See *Employers' Liability Cases*, 207 U.S. 463 (1907) (finding the Employer's Liability Act of 1906 unconstitutional because it regulates people engaged in interstate commerce in all capacities, not just those capacities impacting interstate commerce).

1908, which satisfied the Court's objections.⁸³

Labor unions had long sought changes in the rules affecting the liability of employers for workplace injuries suffered by employees. Among these were the common-law doctrines of fellow servant and contributory negligence, which insulated employers from liability when workplace injuries were partly the product of the negligence of the injured worker or a fellow worker. They had long been contested in statehouses and courthouses, and when sitting as a federal judge William Howard Taft himself helped rewrite some of these doctrines, which Roosevelt later cited to union leaders during the 1908 presidential campaign as evidence of Taft's sympathy for labor.⁸⁴ The Employers' Liability Act was intended to override such doctrines and make common carriers operating in federal jurisdictions liable for workplace deaths and injuries, building on earlier statutes passed during the McKinley and Roosevelt administrations.⁸⁵ While Roosevelt often had a prickly relationship with labor unions during his presidency, the adjustment of employer liability undoubtedly fell within the scope of his views stated to Senator and former Attorney General Philander Knox, that "[w]e must not only do justice, but be able to show the wage worker that we are doing justice."⁸⁶ If the "friends of property" were to be "shortsighted, narrow-minded, greedy and arrogant," they were inviting an "explosion."⁸⁷ To Roosevelt's mind, few actions were more calculated to set the working class against the courts and the rule of law than a judge who shows "in an employer's liability or a tenement house factory case . . . that he has neither sympathy for nor understanding of those fellow citizens of his who most need his sympathy and understanding."⁸⁸ Roosevelt felt strongly enough about the issue to attempt to lobby Justice William Day as the Court deliberated on the *Employer's Liability Act Cases*, warning him that if the "spirit" behind *Lochner*-type decisions were to spread "we should not only have a revolution, but it would be absolutely necessary to have a revolution, because the condition of the worker would become intolerable."⁸⁹ His missive came too late, as the justices had already voted to strike down the law, but his larger hopes were realized as the majority of the justices did not

⁸³ Employers' Liability Act, 45 U.S.C. § 51 (2000).

⁸⁴ HENRY F. PRINGLE, 1 THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 139-143 (1939) (illustrating an example of Taft's defense of workers); Letter from Theodore Roosevelt to P.H. Grace (Oct. 19, 1908), in 6 THE LETTERS OF THEODORE ROOSEVELT 1298 (Elting E. Morison ed., 1952) (depicting Taft as a union advocate).

⁸⁵ See *Employers' Liability Cases*, 207 U.S. at 499 (explaining the Congressional purpose for the act).

⁸⁶ See GEORGE E. MOWRY, THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA, 1900-1912, at 142 (1958).

⁸⁷ *Id.*

⁸⁸ Letter from Theodore Roosevelt to Charles Joseph Bonaparte (Jan. 2, 1908), in 6 THE LETTERS OF THEODORE ROOSEVELT, *supra* note 84, at 889.

⁸⁹ Letter from Theodore Roosevelt to William Rufus Day (Jan. 11, 1908), in 6 THE LETTERS OF THEODORE ROOSEVELT, *supra* note 84, at 903-04.

adopt the spirit of *Lochner*.

In his opinion for the Court, Justice Edward White turned back the most fundamental challenges to the Act. White assured the government that Congress could readily reach the relationship between employer and employee as an appropriate means for regulating interstate commerce.⁹⁰ Congress erred, however, in writing the statute so as to attempt to control generally “common carrier[s] engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States,”⁹¹ thus apparently seeking to regulate those who “engage in interstate commerce” rather than to “regulate the business of interstate commerce.”⁹² Without further qualification, the statute “includes subjects wholly outside of the power of Congress to regulate” – namely, the purely local activities of businesses who happen to also engage in interstate commerce.⁹³ The Court declined the invitation of government lawyers to rewrite the statute to limit it to federally cognizable subject matter, but it invited Congress in turn to fix the statute with the proper words of limitation.⁹⁴ Given the results of his commerce clause analysis, White thought it unnecessary to address due process challenges, except to note that the Court had previously upheld similar state statutes against such challenges.⁹⁵ Day concurred with White, but Peckham, joined by Fuller and Brewer, concurred only in the local activities analysis while explicitly distancing himself from the claim that Congress could regulate master-servant relationships.⁹⁶ Moody noted that a full dissent would not generally be necessary given that Congress could easily rewrite the law to fix the constitutional problem, but he wanted to go on record to observe that in the actual case before the Court – involving interstate carriers whose employees were in fact engaged in interstate transportation at the time of their deaths – the federal rule would easily be constitutional while warning his brethren against taking even “well-settled doctrines of law” that reflect “the economic opinions of [the] judges and their views of the requirements of justice and public policy” as having “constitutional sanctity” that could “control legislators.”⁹⁷ Harlan, McKenna, and Holmes would have interpreted the Act to conform to Congress’s constitutional limitations despite the apparent overreach of the

⁹⁰ *Employers’ Liability Cases*, 207 U.S. 463, 495 (1907) (explaining that Congress can regulate the master and servant relationship in the context of interstate commerce).

⁹¹ *Id.* at 490 (quoting from the statute).

⁹² *Id.* at 497.

⁹³ *Id.* at 498.

⁹⁴ *Id.* at 500-501 (arguing that the Court should not and will not write into the statute limiting words that are not present).

⁹⁵ *Id.* at 503.

⁹⁶ *Id.* at 504 (concurring, but stating that Congress does not necessarily have the power to regulate the master-servant relationship).

⁹⁷ *Id.* at 505, 537.

statutory language.⁹⁸

While a five-justice majority struck down the Employers' Liability Act as written, six justices clearly signaled their willingness to uphold a rewritten statute that in fact matched what Congress had intended all along. Congress responded immediately, and four months later the president signed the Employers' Liability Act of 1908 that corrected the error, which the Court later upheld as promised.⁹⁹ In his next, and final, annual message to Congress, Roosevelt called for a broader liability statute for all workers squarely within federal jurisdiction that would bring the United States up to "par with the most progressive governments in Europe" and that would be a model for the states.¹⁰⁰ In chiding legislators for "slovenly haste and lack of consideration" in producing flawed statutes that were vulnerable to evasion or constitutional objection, the outgoing president referred to the Employers' Liability Law of 1906 as the "striking illustration of the consequences of carelessness in the preparation of a statute."¹⁰¹ Roosevelt observed that the statute was "adjudged unconstitutional by a bare majority of the court" even though "six out of nine justices of the Supreme Court held that its subject-matter was within the province of congressional action. . . . [i]t was surely a very slovenly piece of work to frame the legislation in such shape as to leave the question open at all."¹⁰²

The Sherman Anti-Trust Act of 1890 ("Sherman Act") took rather longer to reach the Court. The Court did not limit its applicability until nearly five years after its passage.¹⁰³ By that time, Benjamin Harrison, the Republican President who signed the statute, had long since left the White House, and the conservative Democrat Grover Cleveland was serving his second term as president. While the Sherman Act was an important piece of legislation, trust busting could hardly be regarded as a central Republican commitment in the late nineteenth century.

Since the demise of Reconstruction, Democrats had strongly challenged the Republican hold on the federal government. The G.O.P. had an effective lock on the Senate in the late nineteenth century; however, in 1890 the Republicans held the House of Representatives for only the second time since Union troops had been withdrawn from the South. Moreover, no Republican presidential candidate since Ulysses S. Grant had captured a majority of the popular vote. With the election of Benjamin Harrison, Republicans had only just recovered

⁹⁸ *Id.* at 540-541 (that the Act should just be interpreted more narrowly, and not overruled).

⁹⁹ *See* Second Employers' Liability Cases, 223 U.S. 1, 53, 59 (1911).

¹⁰⁰ Theodore Roosevelt, Eighth Annual Message (December 8, 1908), in 15 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 7215-16 (James D. Richardson ed., 1900).

¹⁰¹ *Id.* at 7216.

¹⁰² *Id.* at 7216-17.

¹⁰³ *See* United States v. E.C. Knight, 156 U.S. 1 (1895).

from their first postbellum loss of the presidency to Cleveland's first victory in 1884 and, even then, only managed an Electoral College majority but not a popular vote plurality.

Anti-monopoly planks were central features of the platforms of several fairly successful (in the context of a closely divided electorate) "third parties," including the Greenbacks and Prohibitionists, which often ran with a former Republican at the head of their tickets.¹⁰⁴ Former Republican congressional leader and 1884 Greenback presidential candidate Ben Butler denounced the Republicans as the "Party of Monopolists."¹⁰⁵ During his first term, Democrat Grover Cleveland had tried to harness anti-monopoly sentiment for his tariff reform crusade. Protectionist tariffs were a central commitment of the Republican Party, and the Democrats were only too happy to argue that voters who were angry that "trusts and combinations are permitted to exist, which, while unduly enriching the few that combine, rob the body of our citizens by depriving them of the benefits of natural competition" should blame "unnecessary taxation" – that is, protectionist tariffs – for the problem.¹⁰⁶ For Cleveland's Democrats, free trade was the best federal response to the trust problem.

With the Sherman Act, the Republicans hoped to deflate the trust issue. As Finance Committee chairman, Ohio Senator John Sherman explained to his colleagues that the trusts were now threatening to subvert "the policy of the Government to protect and encourage American industries by levying duties on imported goods."¹⁰⁷ While state courts could and did regulate monopolies in restraint of trade within states, Congress would need to pass a statute to authorize federal courts to do the same with "contracts etc. in restraint of commerce between the states."¹⁰⁸ Congress, however, well recognized the constitutional and policy difficulties involved. While Sherman himself favored a broad reading of federal power in this area – "as broad as the earth" – others were more skeptical, and the Senate Judiciary Committee rewrote Sherman's bill so that the result "should be clearly within our constitutional power . . . and would leave it to the courts in the first instance to say how far they could carry it."¹⁰⁹ In doing so, the Committee dropped all references to "trade and production," in favor of "trade and commerce," and influential Democratic

¹⁰⁴ See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* 85 (1965).

¹⁰⁵ *Id.* at 86.

¹⁰⁶ DEMOCRATIC PARTY PLATFORM (June 5, 1888), *reprinted in* THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL PARTIES, 1789-1901, at 235 (Thomas Hudson McKee ed., 1901).

¹⁰⁷ 19 CONG. REC. 6041 (1888); *see also* LETWIN, *supra* note 104, at 87-88.

¹⁰⁸ See LETWIN, *supra* note 104, at 92-94 (quoting Senate Judiciary Committee Chairman George Edmunds).

¹⁰⁹ See 21 CONG. REC. 2460 (1890) (quoting Sherman's response that the bill would not confer constitutional broad jurisdiction to the federal courts); 21 CONG. REC. 3148 (1890) (explaining that the Judiciary Committee carefully considered the jurisdictional issue).

Senator James George, who had made the motion to send the bill to the Judiciary Committee and argued that Sherman's original bill was "utterly unconstitutional," praised the result as "very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress" while admitting that there "is a great deal of this matter outside of that."¹¹⁰ One reason why the constitutionality of the Sherman Act did not reach the Supreme Court more quickly was precisely because the Harrison administration was less than vigorous in pursuing prosecutions under it and was rarely successful in winning indictment or conviction when it did pursue a case.¹¹¹

The Cleveland administration could not have been disturbed when the Court limited the Sherman Anti-trust Act in 1895. In his second inaugural address, Cleveland was careful to qualify his promised effort against the trusts to "the extent that they can be reached and restrained by Federal power."¹¹² Attorney General Richard Olney was a longstanding critic of the Sherman Act.¹¹³ Although Olney was unable to persuade the administration to take on that cause, he had "taken the responsibility of not prosecuting under a law [he] believed to be no good."¹¹⁴ Olney initiated no new anti-trust cases during his tenure as Attorney General.¹¹⁵ Instead, he determined only to move forward, as a test case, *E.C. Knight*, a case against the sugar trust that had been prepared by the previous administration, and many observers thought his prosecution of the sugar trust before the Supreme Court was less than robust.¹¹⁶ When Cleveland-appointed Chief Justice Melville Fuller wrote the opinion sharply limiting the federal government's constitutional power to reach manufacturing, Olney noted that he "always supposed" that would be the outcome.¹¹⁷ The President likewise raised no complaint. Instead, in his next annual message to Congress, the President explained that it was "not because of any lack of disposition or attempt to enforce" anti-trust measures on the part of the administration that the monopoly problem remained unaddressed.¹¹⁸ It was

¹¹⁰ 21 CONG. REC. 1768 (1890) (Sen. James George); 21 CONG. REC. 3147 (1890) (Sen. James George). See also DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION 148-49 (1966); Graber, *supra* note 30, at 50-53.

¹¹¹ See LETWIN, *supra* note 104, at 106-116.

¹¹² Grover Cleveland, Inaugural Address (March 4, 1893), in 11 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, at 5823 (James D. Richardson ed., 1900)

¹¹³ See CARL BRENT SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 428 (1943) (stating that Olney "entered the cabinet without anti-monopoly sentiment of any kind and with the record of having appeared against the government in the whiskey trust case").

¹¹⁴ *Id.* at 430.

¹¹⁵ *Id.* at 428.

¹¹⁶ *Id.* at 428-29 (discussing *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)).

¹¹⁷ See LETWIN, *supra* note 104, at 122 (quoting Olney's reaction to the *E.C. Knight* opinion).

¹¹⁸ Grover Cleveland, Annual Message (Dec. 7, 1896), in 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 745 (James D. Richardson ed., 1900).

simply that “the laws themselves as interpreted by the courts do not reach the difficulty.” Following the “decision of our highest court on this precise question” of the scope of federal authority over the trusts, the president urged Congress to limit itself to the proper and narrow sphere of “transportation or intercourse between States” and leave the rest to the states.¹¹⁹

Cleveland’s second Attorney General, Judson Harmon, did just that with some success.¹²⁰ Under political pressure to bring a suit against a railroad pool, Harmon, who thought interstate railroads properly fell under federal jurisdiction, was willing to file the necessary papers though observing to the district attorney that if application for an injunction failed “the responsibility w[ould] be on the court and not on us.”¹²¹ After Republican William McKinley took office in 1897, his Attorney General never tired of pointing out to those pressing for action against the trusts that the administration was “governed only by a sincere desire to enforce the law” but that its hands were tied by the “well-defined limits of Federal jurisdiction so clearly laid down by the Supreme Court in cases already decided.”¹²²

In other cases, the Supreme Court struck down provisions of important statutes when their political support had long since waned. The Court struck down stray elements of Reconstruction-era statutes in three early twentieth-century cases, well after Reconstruction had been abandoned and Jim Crow had been imposed. In 1903, the Court held that the Force Act of 1870 exceeded congressional authority under the Fifteenth Amendment in reaching to attempted bribery of black voters by private individuals, as opposed to state actors.¹²³ Following the lead of government attorneys, the Court invited Congress to act to prohibit bribery in federal elections under its general power to regulate elections, but averred that the Force Act was not written to do so.¹²⁴ Three years later, the Court, over the dissent of Justices John Marshall Harlan and William Day, elaborated that acts by private individuals violating the rights of blacks were not thereby subject to federal jurisdiction.¹²⁵ The Court held that black citizens must take “their chances with other citizens in the States where they should make their homes” and seek redress for private wrongs from state officials.¹²⁶ In 1913, the Court swept away the last of the Civil Rights Act of 1875.¹²⁷ In a case involving the segregation of black

¹¹⁹ *Id.*

¹²⁰ See LETWIN, *supra* note 104, at 130-31 (observing that Harmon felt his hands were largely tied except for cases involving interstate commerce).

¹²¹ See *id.* at 134.

¹²² See *id.* at 139.

¹²³ See *James v. Bosman*, 190 U.S. 127, 142 (1903).

¹²⁴ See *id.*

¹²⁵ See *Hodges v. United States*, 203 U.S. 1 (1906).

¹²⁶ *Id.* at 20; see also Pamela S. Karlan, *Contract the Thirteenth Amendment: Hodges v. United States*, 85 B.U. L. Rev. 783 (2005).

¹²⁷ See *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126, 138 (1913) (holding the

passengers to inferior accommodations on a coastal ship operating under federal jurisdiction, the Court concluded that though Congress had the authority to regulate such ships, the Civil Rights Act was unconstitutional on its face in attempting to establish a uniform regulation across the country.¹²⁸ The congressional purpose in the Act was invalid, and that invalid purpose was fatal even where the particular application might otherwise be within congressional authority.¹²⁹ The Court left Congress free to revisit the civil rights issue in a more narrowly tailored statute, if it were to choose to do so.¹³⁰

V. STRIKING DOWN IMPORTANT DEMOCRATIC POLICIES

During the *Lochner* period, the Court decided three cases invalidating central provisions of important Democratic statutes, all of which were decided soon after the passage of the affected legislation. Partisan judicial obstructionism is not the whole story in these cases. Closer inspection reveals intra-coalitional struggles even here, as the Court sided with more conservative elements in the Democratic Party against more populist or progressive elements.

The Court's invalidation of the income tax provisions of the Tariff Act of 1894 offered a remarkable display of judicial aggressiveness similar to its posture during the New Deal. Free trade had been a central commitment of the Democratic Party since the passage of the Compromise Tariff of 1833 during Andrew Jackson's presidency.¹³¹ During his presidency, Democrat Grover Cleveland railed against the protective tariff as an example of government corruption and an injury to consumers, and the Tariff Act was a legislative centerpiece of his second term.¹³² When Republicans controlled the federal government during the Civil War, they adopted many of the economic policies of their Whig predecessors, including the protective tariff. The protective tariff soon became a key plank in the Republican platform, and the Republicans kept

Civil Rights Act of 1875 "altogether invalid").

¹²⁸ *See id.* at 133-36 (declining to construe Congress' broad language narrowly or introduce limitation on the statute's operation where Congress intended none).

¹²⁹ *See id.* at 133-38.

¹³⁰ *See id.* at 132-33. The Court cited the *Civil Rights Cases*, 109 U.S. 3, 19 (1883), in which the court left the door open to such applications, stating:

We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us. . . . And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us.

See id.

¹³¹ *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 93-106 (1999).

¹³² RICHARD E. WELCH, JR., THE PRESIDENCIES OF GROVER CLEVELAND 129-30 (1988).

duties on imported goods high whenever they held power, until their conversion to free trade after the Second World War.

In the midst of economic depression and pending budget deficits, tariff reform was a tough sell.¹³³ Nonetheless, Cleveland was actively engaged in designing a reform bill and pushing it through Congress.¹³⁴ During his first administration, Cleveland had been stung by the complaints of northeastern manufacturers who would feel the pinch of radical tariff reform, and his second-term reform bill was mindful of both manufacturing interests and fears of worsening budget conditions. The President worked with William Wilson, Chairman of the House Ways and Means Committee, to design a carefully balanced bill, but Populists on the House floor denounced the bill as “a robber tariff” little better than what the Republicans would have done and pushed hard for more radical reform.¹³⁵ The Populists were generally unsuccessful, but they did manage to add sugar to the list of duty-free imports while balancing the revenue loss with an income tax amendment that hit corporate profits, inheritances, and personal income over \$4000.¹³⁶ In the Senate and in conference, Cleveland completely lost control of the bill, which was soon festooned with new protections.¹³⁷ Months later, Wilson read a letter from the President on the House floor admitting that “[e]very true Democrat and every sincere tariff reformer” knew that the bill “falls far short,” but it was now “so interwoven with Democratic pledges and Democratic success” that it had to be accepted.¹³⁸ Though Cleveland disapproved of the income tax provisions, the provisions did not “violate a fixed and recognized Democratic doctrine” and Cleveland was willing “to defer to the judgment of a majority” if that was the price of tariff reduction.¹³⁹ Judging the bill to be a lost opportunity and a perversion of his original goals but nonetheless essential to the health of the nation and his party, a morose Cleveland allowed it to pass into law without his signature a few months before the midterm elections.¹⁴⁰

The income tax provisions in the bill were harshly denounced as purely sectional class measures, as indeed they were. Nebraska Representative

¹³³ See *id.* at 131.

¹³⁴ See *id.* at 131-32.

¹³⁵ See *id.* at 132.

¹³⁶ See *id.* at 132-33 (explaining that placing sugar on the duty-free list resulted in the Populists’ “major accomplishment, the income-tax amendment” which would be necessary to offset the revenue loss from sugar duties).

¹³⁷ See *id.* at 133-37 (describing the final bill as the “mangled remains” of the original House bill with, among other things, more than six hundred amendments, only two raw materials on the duty-free list, increased duties on a number of other raw materials, and import duties on sugar).

¹³⁸ See *id.* at 136.

¹³⁹ Letter from Grover Cleveland to William L. Wilson (July 2, 1894), in *LETTERS OF GROVER CLEVELAND, 1850-1908*, at 357 (Allan Nevins ed., 1933).

¹⁴⁰ See WELCH, *supra* note 132, at 137.

William Jennings Bryan, the emerging leader of the populist wing of the Democratic Party, was a primary sponsor of the amendments.¹⁴¹ Although the tax was small, it introduced a greatly feared principle of progressive taxation of income (rather than the traditional basis of federal government revenue, consumption taxes and the sale of national resources), and it was expected that the entire burden of the tax would be borne by the residents of only four eastern states (New York, New Jersey, Pennsylvania, and Massachusetts).¹⁴² Two of these states (New York and New Jersey) happened to also be important swing states in Gilded Age presidential elections, and New York in particular was essential to Democratic Electoral College calculations. It was the centrality of New York that led to reformist New York Governor Grover Cleveland's own Democratic presidential nomination in 1884, 1888, and 1892, and the integration of the Mugwumps (a breakaway group of Republican professionals and businessmen centered in New York) into the Cleveland coalition.¹⁴³ Democratic New York Senator David Hill warned his Populist colleagues: "The times are changing; the courts are changing, and I believe that this tax will be declared unconstitutional. At least I hope so."¹⁴⁴ The business community in New York was apoplectic over the income tax. While some in the New York City press labeled it a Cleveland tax, others defended the President as an opponent of the tax and a victim of the Populists.¹⁴⁵

Within just a few months, the income tax was before the Supreme Court. The Court first struck down the tax on income from real estate and state and local bonds,¹⁴⁶ and a month later a narrow majority struck down the rest.¹⁴⁷ Attorney General Richard Olney, by all accounts, offered an able defense of the measure, calling on the Court to respect Federalist-era precedent and the appropriate sphere of legislative discretion over the proper exercise of the taxing power.¹⁴⁸ Despite this defense, Chief Justice Melville Fuller, a Cleveland appointee, wrote both opinions striking down the provisions as violating basic constitutional efforts "to prevent an attack upon accumulated property by mere force of numbers."¹⁴⁹ The decision set off enormous

¹⁴¹ See PAUL, *supra* note 49, at 161 (stating that Bryan "succeeded in attaching the income tax to the tariff bill, thus making the tax a party measure").

¹⁴² See *id.* at 161-64.

¹⁴³ On the centrality of New York to national Democratic politics and policymaking in the Gilded Age, see SCOTT C. JAMES, *PRESIDENTS, PARTIES, AND THE STATE* 42-56 (2000).

¹⁴⁴ 26 CONG. REC. 6637 (1894).

¹⁴⁵ See *Clevelandism Again*, N.Y. TIMES, Nov. 21, 1896, at 4 (explaining that "President Cleveland never recommended such an income tax" but that William Jennings Bryan and Benton McMillan "with the assistance of other advocates" added the income tax provision to the bill and that "Mr. Cleveland did not recommend or favor it, and did not sign the bill").

¹⁴⁶ See *Pollack v. Farmers' Loan and Trust*, 157 U.S. 429 (1895).

¹⁴⁷ See *Pollack v. Farmers' Loan and Trust*, 158 U.S. 601 (1895).

¹⁴⁸ See *Pollack*, 157 U.S. at 502, 513 (1895).

¹⁴⁹ *Id.* at 583.

criticism of the Court, led by Bryan, who routed the Cleveland forces to capture the Democratic nomination the next year. The President, however, refrained from adding to the din, and his loyalists, in a breakaway party convention, denounced Bryan for his attacks on the judiciary.¹⁵⁰ When income-tax dissenter Howell Jackson died just months after the decision, Cleveland replaced him with conservative New York corporate attorney, Rufus Peckham, whose nomination the president first cleared through Senator Hill and who would later gain notoriety as the author of *Lochner*.¹⁵¹

The situation was somewhat different when the Court made its other quick strike against a major piece of Democratic legislation, nullifying the Keating-Owen Act, which prohibited the shipment of goods made with child labor.¹⁵² The Democratic Congress passed the child labor bill on the eve of the election of 1916. Both the Republican and Democratic platforms, boasting their progressive credentials, endorsed federal action on child labor. Nonetheless, President Woodrow Wilson had helped push such measures off the legislative agenda during his first term in favor of other priorities. Despite his embrace of a “living Constitution,” Wilson had written just a few years earlier that judicial approval of federal child labor legislation would require “obviously absurd extravagancies of [constitutional] interpretation” that would leave no effective limits on congressional power other than “the limitations of opinion and of circumstance.”¹⁵³ He admitted that “the very stuff of daily business, forced [such issues] upon Congress,” but it was for “statesmanship” to resist reading the Constitution “arbitrarily to mean what we wish it to mean” and rushing in with “a temper of mere impatience.”¹⁵⁴ The Democratic caucus initially gave in to the demands of the Southern senators who threatened a filibuster if the Democrats attempted to pass a child-labor bill during the election-year opening. The President, under threat from independent-minded Progressives and facing a tough reelection campaign, traveled to the capitol to emphasize the importance of adhering to the recently adopted party platform.¹⁵⁵ With a

¹⁵⁰ See DONALD GRIER STEPHENSON, JR., *CAMPAIGNS AND THE COURT* 107-28 (1999).

¹⁵¹ Letter from Grover Cleveland to Senator David B. Hill (Nov. 18, 1895), in *LETTERS OF GROVER CLEVELAND*, *supra* note 139, at 415.

¹⁵² See *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

¹⁵³ See WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 179 (1908).

¹⁵⁴ See *id.* at 177-78, 187; see also HENRY F. PRINGLE, 2 *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 622 (1939) (stating that as president, William Howard Taft felt similar pressures, endorsing the creation of a federal children’s bureau in his reelection year even as he privately griped at the “disposition to unload everything on the federal government that the states ought to look after”).

¹⁵⁵ See ARTHUR S. LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA, 1910-1917*, at 226-27 (1954) (discussing “the manner in which Wilson forced the passage of the . . . child-labor bill” by going to Capitol Hill to “plead[] with the Democratic Senate leaders to allow the measure to come to a vote”); STEPHEN B. WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA* 65-67 (1968) (discussing Wilson’s fight for the child labor bill as part of

flourish, the President completed the passage of the bill into law with a public signing ceremony at the White House. The next day he formally accepted the Democratic nomination to run for a second term of office.

The Court heard a test case of the statute within two years of its enactment. The administration aggressively defended the act, but lost in a narrowly divided vote in *Hammer v. Dagenhart*.¹⁵⁶ Two of Wilson's three appointees to the Court were among the dissenters.¹⁵⁷ The majority, however, bore the strong mark of Wilson's predecessor, William Howard Taft, who had resisted the progressive wing of his own party.¹⁵⁸ Taft had appointed three of the justices in the majority and was close friends with the opinion's author, William Day.¹⁵⁹ The Wilson administration continued to support efforts to find a way around the Court's decision until the end of his term in office. While a federal child labor law was popular, its policy significance was limited. Most states had already adopted such regulations, though enforcement varied and the ambitions of reformers expanded once they achieved their initial legislative aims.¹⁶⁰ Manufacturers in states with such regulations chafed at competition from states allowing child labor, and the moral principle of limiting child labor was a winning one. Even so, other legislation emerging from Congress, notably the Adamson Act establishing eight-hour workdays for railroads, was judged more newsworthy,¹⁶¹ and the Court's decision in *Dagenhart* did not provoke anything like the popular reaction to the *Pollack*

the party platform in the lead-up to the difficult upcoming election he faced, and in light of some southern senators' use of Senate procedure to stall the bill).

¹⁵⁶ 247 U.S. 251 (1918).

¹⁵⁷ President Wilson appointed Justices McReynolds, Brandeis, and Clarke to the Supreme Court. Justices Brandeis and Clarke joined Justices Holmes and McKenna in dissent.

¹⁵⁸ See WOOD, *supra* note 155, at 156 (stating that "[t]he greatest triumph in the decision . . . was reserved for William Howard Taft [because] [t]hree of the justices who helped make up the narrow majority – White, Van Devanter, and Pitney – bore his commission, and a fourth – the opinion writer, Day, his intimate friend and former colleague on the circuit court bench – owed his place primarily to Taft's recommendation to Theodore Roosevelt").

¹⁵⁹ See *id.* at 156-157.

¹⁶⁰ See William Graebner, *Federalism in the Progressive Era: A Structural Interpretation of Reform*, 64 J. AM. HIST. 353, 353-54 (1977) (explaining that by 1909 almost all states had child labor legislation in place and that the legislation itself as well as enforcement was moving towards uniformity). *But see* WOOD, *supra* note 155, at 22-25 (explaining that almost all states had child labor legislation in place but that enforcement and uniformity from state to state varied).

¹⁶¹ See *Wilson v. New*, 243 U.S. 332 (1917) (upholding the Adamson Act within just a few months of its enactment, more than a year before the Court decided on the child labor law); see also WOOD, *supra* note 155, at 77-78 (discussing the relative newsworthiness of the two bills).

income tax case.¹⁶²

VI. AND THE REST

With a single exception, the remainder of the federal provisions the Court struck down during this period were products of Republican legislatures.¹⁶³ None of them had the contemporary political significance of the statutes already considered, however, and few of them created significant disagreements among the justices. While the *Employers' Liability Cases*,¹⁶⁴ *Pollock*,¹⁶⁵ and *Dagenhart*¹⁶⁶ were closely divided decisions, only two other constitutional invalidations created significant division among the justices. While both involved recently enacted statutes, it would be difficult to see them as representing a serious clash of constitutional visions between Congress and the Court. While the Court's actions in the fifteen less politically charged cases that compose the bottom row of Table 3 reflected the particular constitutional sensibilities of the majority of the justices serving during this period, they indicate a Court concerned with upholding deeply rooted jurisprudential principles against a sometimes careless Congress rather than a politically activist Court.

The Court, in a 6-3 decision, struck down a provision of the Immigration Act of 1907 just over two years after its enactment.¹⁶⁷ The 1907 statute was a modest step between the late nineteenth-century Chinese Exclusion Act and the later adoption of national origins quotas during the 1920s in the Progressive-era movement toward the restriction and control of immigration. The primary battle of 1907 was over a proposed literacy test for immigrants and a restriction, favored by President Theodore Roosevelt and others, on the number of Japanese immigrants. Pro-immigration forces led by Speaker Joseph Cannon managed to delay both proposals with a stripped-down bill that created an investigatory commission and an immigrant head tax.¹⁶⁸ Among its other provisions, however, was a measure anticipating the 1910 Mann Act, forbidding the importation of "any alien woman or girl for the purpose of prostitution, or for any other immoral purpose" and making it a felony to support or harbor such an alien for up to three years after her entry into the

¹⁶² See Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 510-517 (2001); see also text accompanying notes 146-150.

¹⁶³ The exception was the 1894 Joint Resolution Authorizing the Secretary of the Interior to Approve a Certain Lease made in Polk County, Minnesota, which had been made by Mon-Si-Moh to Ray Jones. It was invalidated in *Jones v. Meehan*, 175 U.S. 1 (1899).

¹⁶⁴ *Employers' Liability Cases*, 207 U.S. 463 (1907).

¹⁶⁵ *Pollack v. Farmers' Loan and Trust* 158 U.S. 61 (1895).

¹⁶⁶ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

¹⁶⁷ See *Keller v. United States*, 213 U.S. 138 (1909).

¹⁶⁸ For background on the statute and its politics, see DANIEL J. TICHENOR, *DIVIDING LINES* 124-28 (2002).

United States.¹⁶⁹ Two brothel owners from Chicago brought the constitutionality of the measure before the Court after their federal conviction for harboring a Hungarian prostitute.¹⁷⁰ While Justice Brewer, a relative judicial ally of immigrants and writing for the majority in this case, accepted the federal government's authority to prohibit the immigration of such women, he found the harboring provision, detached from the actual importation, to exceed congressional authority to regulate immigration and to encroach on the police powers of the states.¹⁷¹ Congress had no general police power, and it could not claim the authority "to control generally dealings of citizens with aliens."¹⁷² Justice Oliver Wendell Holmes, often a judicial supporter of immigration restriction, wrote a dissent joined by Justices Harlan and Moody. Though admitting that "a period of three years seems to be long," he was willing to give Congress the leeway to put the burden on citizens to learn the "fact and date of a prostitute's arrival" in order to deter their "cooperation" in her "unlawful stay."¹⁷³ Beyond hampering federal raids on houses of ill repute in Illinois, however, the case was of little consequence.

The Court likewise split in its 5-4 decision invalidating a provision of the War Revenue Act, nearly three years after its enactment and two years after the proclamation of the Treaty of Paris that ended the short-lived Spanish-American War.¹⁷⁴ The affected provision imposed a stamp tax on "bills of lading or receipt . . . for any goods, merchandise or effects, to be exported from a port or place in the United States to any foreign port or place."¹⁷⁵ Justice Brewer, again writing for the majority, observed that a prohibition on the powers of Congress, just as much as a grant of power, "should be enforced in its spirit and to its entirety."¹⁷⁶ Though the government argued that it was not taxing the exported goods themselves but merely a "stamp duty on a document not necessarily though ordinarily used in connection with the exportation of goods," the majority found the distinction too fine to be maintained while still respecting the "fidelity to the spirit and purpose" of the constitutional prohibition on export taxes.¹⁷⁷ While the principle defended by the Court seems clear enough, the case generated substantial disagreement among the justices and required an extended discussion by Brewer on the proper degree of deference owed to Congress by the Court, because similar taxes had a long history in the United States and relevant precedents were somewhat

¹⁶⁹ See Immigration Act of 1907, ch. 1134, § 3, 34 Stat. 898, 899-900 (1907).

¹⁷⁰ See *Keller v. United States*, 213 U.S. 138, 139-40 (1909).

¹⁷¹ See *id.*

¹⁷² See *id.* at 148.

¹⁷³ See *id.* at 149-51; see also ROGERS M. SMITH, CIVIC IDEALS 443-45 (1997) (providing the general record of Brewer and Holmes in immigration cases).

¹⁷⁴ See *Fairbank v. United States*, 181 U.S. 283 (1901).

¹⁷⁵ See War Revenue Act of June 13, 1898, ch. 448, 30 Stat. 448, 459.

¹⁷⁶ *Fairbank*, 181 U.S. at 289.

¹⁷⁷ See *id.*

conflicting. As Justice Harlan vigorously argued in dissent, Congress had, without constitutional objection, imposed such a stamp tax on bill of lading for goods for export as early as 1797 (repealed by the Jeffersonians) and again in 1862 (repealed at the end of Reconstruction).¹⁷⁸ Nonetheless, the majority concluded that “when the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged,” especially since judicial challenges may have been unlikely before the “burdens of taxation” had been enlarged by the “great expenses of government” making the “objects and modes of taxation . . . a matter of special scrutiny.”¹⁷⁹

No other invalidation of federal law during this period provoked even as many as three dissenters. Half of all the decisions striking down federal legislation during this period were filed without a recorded dissent.¹⁸⁰ The Court unanimously decided all but one of the remaining cases that invalidated statutory provisions less than seven years old. The exception was the affirmation of the decision of the Oklahoma Supreme Court to uphold 1910 state legislation moving the state capital from Guthrie to Oklahoma City, which conflicted with a provision of the Oklahoma Statehood Enabling Act designating Guthrie as the state capital until at least 1913.¹⁸¹ Against the assertions of the federal government that this was a political question, the Court emphasized that newly admitted states were on an equal footing with preexisting states and that the location of the state capital was an essential state

¹⁷⁸ See *id.* at 312-23 (Harlan, J., dissenting).

¹⁷⁹ See *id.* at 311-12.

¹⁸⁰ See, e.g., *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915) (invalidating 1898 stamp tax); *United States v. Hvoslef*, 237 U.S. 1 (1915) (invalidating stamp tax provision of War Revenue Act of 1898); *Butts v. Merchants & Miners Transp. Assoc.*, 230 U.S. 126 (1913) (invalidating provision in Civil Rights Act of 1875); *Choat v. Trapp*, 224 U.S. 665 (1912) (invalidating law regulating taxation of Indian lands); *Muskrat v. United States*, 219 U.S. 346 (1911) (invalidating law regulating Indian lands); *United States v. Evans*, 213 U.S. 297 (1909) (invalidating a criminal law); *Rasmussen v. United States*, 197 U.S. 516 (1905) (invalidating law that required only six jurors on misdemeanor trials in Alaska); *Jones v. Meehan*, 175 U.S. 1 (1899) (invalidating law regarding sale of Indian lands); *Wong Wing v. United States*, 163 U.S. 228 (1896) (invalidating provisions of Chinese Exclusion Act); *Monongahela Navigation v. United States*, 148 U.S. 312 (1893) (invalidating congressional expropriation of a lock and dam). A norm favoring public unanimity by the Court may have reduced the number of instances of published dissents in these cases. See Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001) (discussing such a Court norm in the late nineteenth and early twentieth centuries).

¹⁸¹ Before passing the Removal Act changing the state capital, the Oklahoma legislature facilitated judicial resolution of the constitutional issue by passing a statute giving the Oklahoma Supreme Court original jurisdiction to hear objections to the legality of the removal of the state capital from Guthrie. See *Coyle v. Smith*, 221 U.S. 559, 563 (1911).

power.¹⁸² Justices McKenna and Holmes dissented without filing an opinion. Other such cases appear to have been even easier calls for the Court.

The Court had no difficulty voiding a provision of the Indian Services Appropriation Act of 1907, by which Congress sought to create a jurisdictional fast track and to pay the litigation costs for a suit questioning the constitutionality of earlier statutes affecting land titles, as not comporting with the judicial power to hear actual cases and controversies.¹⁸³ Similarly, the Court recognized that a congressional directive to expropriate a lock and dam from a private company without compensating it for the lost income from tolls was an unconstitutional taking that inappropriately sought to preclude a full judicial determination of just compensation.¹⁸⁴ Furthermore, a congressional directive to approve a disputed lease in possible contradiction to the terms of a previous cession of the land by treaty was an interference with the judicial determination of vested property rights.¹⁸⁵ The congressional effort to take back the tax-exempt status of lands previously allotted to the Choctaw and Chickasaw tribes was readily rejected as an unconstitutional taking of a vested property right.¹⁸⁶ The Court likewise rejected a particularly harsh provision of the Chinese Exclusion Act of 1892 that subjected illegal aliens to confinement at hard labor without a jury trial, though it had earlier upheld various other, more central elements of the Act that authorized the summary deportation of resident aliens.¹⁸⁷ The Court unanimously clarified that its earlier decision exempting the Philippines, as a held possession, from the full coverage of the Constitution could not be extended to territories fully integrated into the United States, like Alaska.¹⁸⁸ Therefore, despite the assistant attorney general's pleas that the Sixth Amendment could not possibly apply "to this barren and desolate region, peopled as it is by savages and an alien race," the Court invalidated a provision of a congressional code for Alaska that subjected criminal defendants to trial with only a six-person jury.¹⁸⁹

Those laws invalidated more than six years after enactment displayed a similar hodgepodge of constitutional infirmities and were likewise of limited political salience. Sometimes, it was not clear how much real support the

¹⁸² See *id.* at 565-566.

¹⁸³ See *Muskrat*, 219 U.S. at 346.

¹⁸⁴ See *Monongahela Navigation*, 148 U.S. at 312.

¹⁸⁵ See *Jones*, 175 U.S. at 1.

¹⁸⁶ See *Choat v. Trapp*, 224 U.S. 665 (1912).

¹⁸⁷ See *Wong Wing v. United States*, 163 U.S. 228 (1895); see also *Lem Moon Sing v. United States*, 158 U.S. 538 (1894); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

¹⁸⁸ *Rasmussen v. United States*, 197 U.S. 516, 518 (1904).

¹⁸⁹ See *id.* at 518 (distinguishing the situation in Alaska from the situation of holdings acquired by the Spanish-American war including Hawaii (*Hawaii v. Mankichi*, 190 U.S. 197 (1903)), Puerto Rico (*Downes v. Bidwell*, 182 U.S. 244 (1901)), and the Philippines (*Dorr v. United States*, 195 U.S. 138 (1904))).

disputed measures ever had. In *Adair v. United States*,¹⁹⁰ decided in 1908, the Court nullified a provision of the 1898 Erdman Act.¹⁹¹ As a liberty-of-contract case striking down a federal prohibition on the use by railroads of “yellow-dog” contracts barring union membership and union blacklists, *Adair* would seem to be the closest thing to a congressionally targeted *Lochner*.¹⁹² The Court extended the protection of yellow-dog contracts to the states a few years later,¹⁹³ and soon thereafter authorized the use of injunctions against unions seeking to organize employees who had signed such contracts.¹⁹⁴ The Erdman Act was the legislative response to the infamous Pullman Strike four years earlier, which the Cleveland administration had broken up through court injunction and military force. The heart of the Act was the establishment of an arbitration system to resolve labor disputes in the railroad industry. Section 10 of the Act, however, “was less than peripheral to the political conflicts” that gave birth to the statute.¹⁹⁵ The policies contained in Section 10 had been suggested by the United States Strike Commission, which was formed after the Pullman Strike, and had been incorporated by Cleveland’s Attorney General Richard Olney into the original bill that eventually became the Erdman Act. These policies, however, received virtually no attention in Congress and were considered unimportant and virtually unenforceable by labor leaders.¹⁹⁶ More generally, the Act was a largely symbolic measure that provided the first statutory sanction for labor injunctions, and it was bitterly denounced by mainstream labor leaders such as the American Federation of Labor’s Samuel

¹⁹⁰ 208 U.S. 161 (1908).

¹⁹¹ See Erdman Act, ch. 370, 30 Stat. 424 (1898); *Adair*, 208 U.S. at 161.

¹⁹² *Adair* included an extended discussion of whether Congress could reach unionization of railroads under the interstate commerce clause, with the majority concluding that it could not. The commerce clause analysis tended to soften the effect of the liberty-of-contract claim, especially as the Court’s conclusions in this case seemed idiosyncratic. Thus, Charles Warren found the decision surprising and thought that it would soon be overruled “with further enlightenment of the Court” on the factual relationship between labor disputes on railroads and the smooth flow of interstate commerce. See CHARLES WARREN, 2 THE SUPREME COURT IN UNITED STATES HISTORY 175 (1926); see also BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 109-12 (1998).

¹⁹³ See *Coppage v. Kansas*, 236 U.S. 1 (1915).

¹⁹⁴ See *Hitchman Coal & Coke v. Mitchell*, 245 U.S. 229 (1917).

¹⁹⁵ See GEORGE I. LOVELL, LEGISLATIVE DEFERRALS 71 (2003) (stating that the Erdman Act “was the first piece of railroad labor legislation passed in the aftermath of the dramatic Pullman Strike of 1894, [where] [t]he intervention of federal judges . . . signaled an increase in both federal and judicial involvement in labor disputes”).

¹⁹⁶ See *id.* at 78-80. Although Olney simply incorporated this provision from the Commission’s proposal, it appears that by then he had concluded that, while “an ordinary employer was and ought to be entirely free in his choice of his employees,” a properly organized union could prevent the economic disruption encouraged by more radical labor leaders such as Eugene Debs. See HENRY JAMES, RICHARD OLNEY AND HIS PUBLIC SERVICE 62-69 (1923).

Gompers and his congressional allies.¹⁹⁷ When Section 10 was finally invoked and then struck down by Justice Harlan and a majority of his brethren a decade later, the Erdman Act as a whole was largely moribund and there was little concern in Congress or the administration over the fate of this side provision.¹⁹⁸

Other invalidated statutory provisions were not so rooted in a particular political moment, but they also were not of great political interest to current majorities. The Court struck down the conviction of Albert Heff for selling alcohol to a Native American, John Butler, on the grounds that Butler, by virtue of earlier legislation, had become a full citizen and could no longer be placed under the special guardianship of the federal government, and therefore Heff's conviction encroached on the exclusive police powers of the states.¹⁹⁹ The code for the District of Columbia allowed the government to appeal errors in criminal trials, though acquittals could not be overturned.²⁰⁰ The Solicitor General argued that such appeals could usefully clarify the law, but the Court rejected the code provision as inappropriately seeking an advisory opinion from the courts.²⁰¹ In two separate opinions, the Court struck down additional provisions of the 1898 War Revenue Act as indirectly seeking to tax exports.²⁰² Finally, in 1899 the Court nullified a provision of the federal criminal code that made, in trials of those accused of receiving stolen property of the United States, the separate conviction of those charged with the theft conclusive evidence that the goods were in fact stolen, holding that such a rule denied defendants the right to confront their accusers.²⁰³

CONCLUSION

This review of the Supreme Court's constitutional supervision of Congress during these years provides not only a somewhat different perspective on the

¹⁹⁷ See LOVELL, *supra* note 195, at 83-89.

¹⁹⁸ Olney himself published a brief law review article observing that a judicial reaction against growing national intervention in economic affairs was to be expected, but that the Court in *Adair* underestimated the fact that individual liberty was "necessarily liberty regulated by law" and, more importantly, that efforts by employers to dismiss unionized employees would only lead to violent strikes and economic disruption. See Richard Olney, *Discrimination Against Union Labor – Legal?*, 42 AM. L. REV. 161, 164-66 (1908).

¹⁹⁹ See *In re Heff*, 197 U.S. 488 (1905).

²⁰⁰ See *United States v. Evans*, 213 U.S. 297 (1909).

²⁰¹ See *id.* at 300-01 (finding that while some state constitutions require their high court justice to provide "their opinions on important questions of law upon solemn occasions, when required by either branch of the legislature, or governor and council . . . no such requirement obtains in Federal jurisprudence").

²⁰² See *United States v. Hvoslef*, 237 U.S. 1 (1915) (invalidating tax on charter parties); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915) (invalidating tax on marine insurance).

²⁰³ See *Kirby v. United States*, 174 U.S. 47 (1899).

Lochner Court but also a window into the Supreme Court's use of judicial review power over the course of American history and the relationship of the Supreme Court to the politics of the current era. Ultimately, I hope it sheds some light on both the empirical practice of judicial review and the normative debates surrounding the judicial veto.

Perhaps 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 a misleading impression of how judicial review was exercised. The “*Lochner* era” implies a concerted assault on government power by a determined, conservative majority. Such a period of activism suggests the frenetic obstruction of the conflicts over the New Deal between 1934 and 1936, the wholesale re-imagining of the constitutional landscape of the Warren Court in the 1960s, or the sustained drumbeat of the Rehnquist Court's federalism offensive of the late 1990s. The Court at the turn of the twentieth century does not match those images. Its actions were informed by a coherent constitutional vision, but few of its decisions were of great political moment and the overall pattern does little to suggest an orchestrated campaign against the government.

The Court's record during this period reflects concrete judicial review in its classic sense. Unlike many twentieth-century constitutional systems in which the power of constitutional review is entrusted to a specialized body, often charged with answering abstract questions of constitutional meaning, the United States developed a system of decentralized, concrete judicial review in which every judge is authorized to take the Constitution into account in resolving the ordinary, individual disputes that come before the bench. While the turn-of-the-century Court was sometimes mobilized by an organized litigation campaign to render a decision on a key matter of public policy, it often simply reached out to stay the hand of the state from acting against a particular individual. In doing so, the Court would set out a constitutional rule, but the rule was often relatively uncontroversial and of limited effect. In many instances, the Court's constitutional judgment was highly fact specific.

The invalidations of federal statutes during this period were informed by a general constitutional vision, but it is hard to see them as part of a broader campaign against the government. Rather than building cumulatively, the Court dissipated its energy across a variety of doctrinally disconnected cases. While some particularly prominent decisions loom above the others, those decisions stand out precisely because they were so isolated. Even so, the Court effectively, though temporarily, obstructed some of the government's notable policy innovations during the period, primarily the federal income tax and federal child labor regulation. More generally, the Court's decisions against the government were less reflections of a party platform than of a legal sensibility. Insulated from political pressures and immersed in legal tradition, the Court was less likely than Congress to look with approval on the suspension of traditional elements of criminal due process or backdoor efforts

to raise revenue or to extend federal police powers.

The Court rarely blocked a mobilized political majority on an important point of public policy. When it acted against such measures, it sometimes came in late and long after the majority had demobilized. Such was most obviously the situation in the case of the black civil rights, where the Court proved no more committed to Reconstruction-era statutes than was the rest of the federal government.

The Court sometimes acted only tangentially. The Court might act in a subject area of significant public debate such as labor disputes or immigration, but on legislative details that were marginal to those debates. When it was willing to act against legislative provisions embodying salient political principles, it did so with little risk of reprisal. The federal income tax, antitrust prohibitions, and child labor regulation involved high-profile issue areas and were powerful political symbols, but the Court moved either in sympathy with the sitting administration, as in the situations of income tax or antitrust, or where the political costs to the administration were minimal, as in the situation of child labor.

Dahl instructs us that judges will share the principles and preferences of elected political leaders.²⁰⁴ The president is, of course, unlikely to place a justice on the bench who disagrees with his central program. But once safely ensconced on the court, the justices will not share the same incentives to pander or compromise. While the president cannot undo a legislative package and must sometimes accept necessary logrolls in order to win passage of his favored policies, the justices can afford to excise disfavored provisions long after the legislative votes have been counted or the electoral campaigns waged. As Dahl emphasized, justices are likely to share the most salient principles of their appointing president and party. They are unlikely to share the principles of all members of the party, however. While Grover Cleveland might be forced to do business with the populists in his party, he and his justices strongly disagreed with many of their views. When the Republicans failed to hold the elected branches of the federal government in the face of a Progressive defection, their judicial appointees were unsympathetic to elements of the Democratic interregnum. The outputs of the legislature are too varied, and the points of agreement among partisans too few, to expect the Court to always fall in line. The Court's most politically salient decisions during this period reflected the constitutional commitments of successful presidential coalitions, sometimes to the dismay of their outlying wings.

Although the *Lochner* era was the cradle of the countermajoritarian difficulty, the countermajoritarian framework provides little leverage for evaluating the normative foundations of judicial review during this period. The Court interposed itself into complicated political environments, not stark majoritarian ones. In toting up the gains and losses of judicial review, Mark Tushnet concluded that it had little significance, mostly amounting to

²⁰⁴ See *supra* notes 15-29 and accompanying text.

adjustments around the margins of politics.²⁰⁵ Composing the judicial balance sheet might require that we tote up the costs of the delay of the federal income tax, for example, against the benefits of the protection of illegal aliens from summary incarceration and hard labor. While the former receives the attention and lightly affects large numbers, the latter demands the attention of relatively few who might have felt its burden more heavily. The power of judicial review of acts of Congress, when placed in proper perspective, may be less dramatic, but it may remain a useful check on government power nonetheless.

²⁰⁵ See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURT* 153 (1999).