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THE CRADLE OF THE COUNTERMAJORITARIAN DIFFICULTY

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

John W. Compton[2]

Political scientists and law professors have been debating over the normative implications of judicial review for the better part of six decades. The contours of the discussion took shape in the early 1960s, following the publication of Alexander Bickel's *The Least Dangerous Branch*.[3] Bickel's book launched a still-vibrant critical tradition that characterizes judicial review as an anomalous, "countermajoritarian force" in the American constitutional system.[4] On this view, the courts' power to invalidate democratically enacted statutes gives rise to a normative conundrum that is not easily resolved: How can "the people" be said to rule if their preferred policies—or those enacted by their representatives—are subject to veto by an unelected and unaccountable judiciary?

At roughly the same time that Bickel was formulating what came to be known as "the countermajoritarian difficulty," the political scientist Robert Dahl proposed a remarkably simple answer to Bickel's puzzle: So long as federal judges were appointed and confirmed by politicians affiliated with a durable partisan regime, there was little reason to fear that the judiciary's constitutional vision would, for any significant length of time, be at odds with the policy views of electoral majorities.[5] The

1. William Nelson Cromwell Professor of Politics, Princeton University.
2. Associate Professor and Chair, Department of Political Science, Chapman University.
3. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).
4. *Id.* at 16.
5. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as*

possibility of unelected judges thwarting the will of the people might be troubling in theory, but in practice it was likely to occur only rarely—for example, in the interim between the rise of a new dominant party coalition and the departure of the old regime's judges.

Both Bickel and Dahl's accounts have come in for serious criticism in recent years, but they continue to define the terms of the debate—at least for the moment. In his provocative new book, *Repugnant Laws*, Keith Whittington argues that both perspectives are marred by flawed understandings of the political dynamics surrounding judicial review, and that scholars would be well advised to move beyond them. This is an audacious claim, but it gains credibility from a remarkable new dataset, compiled by Whittington himself, consisting of every case in which the Supreme Court has reviewed the constitutionality of a federal statute, either in whole or in part. The end result is perhaps the most comprehensive guide to the actual *practice* of judicial review ever produced. Seen in its entirety, Whittington argues, the record of the Court's interactions with Congress suggests that Dahl's framework is useful but overly simplistic, while Bickel's is so divorced from reality as to be of little use at all (pp. 6, 9, 301–302).

On the first point, Whittington is entirely persuasive. Indeed, the evidence presented in *Repugnant Laws* should lay to rest, once and for all, the conception of the Supreme Court as the handmaiden of political parties. Relying on a combination of data analysis and narrative treatments of important Court decisions, Whittington shows that the Court has been neither as friendly to the dominant party nor as hostile to the out-of-power party as Dahl led his readers to expect. Although constitutional jurisprudence has undoubtedly evolved in tandem with changes in the party system, Whittington concludes that "[t]he justices are not lapdogs, and they have often bitten the hand of the party that placed them on the bench" (p. 291).

But if Whittington succeeds in debunking, or at least seriously modifying, Dahl's framework, his attempt to sketch an alternative resolution to the countermajoritarian dilemma is less convincing. The problem, in short, is that a dataset documenting the history of the Court's interactions with Congress is a better instrument for testing Dahl's relatively specific empirical

National Policy-Maker, 6 J. PUB. L. 279 (1957).

predictions than for evaluating Bickel's more sweeping, fundamentally normative concerns. As I argue below, the lack of fit between Whittington's methodology and his normative defense of judicial review is on full display in his chapters on the *Lochner* era—an era he aptly describes as "the cradle of the countermajoritarian difficulty" (p. 173). Knowing that the phrase "*Lochner* Court" has long served as shorthand for "judicial overreach," he sets out to show that the early-twentieth-century Court was neither as inflexible nor as anti-democratic as its many critics, including Bickel, have alleged. But the results are ultimately unpersuasive. Aside from demonstrating that the Court invalidated federal laws at a lower rate than conventional wisdom might lead one to expect, *Repugnant Laws* does little to absolve the *Lochner* Court of the charges of unpredictability and unprincipled decision-making that initially earned it the opprobrium of legal scholars and historians.

I.

Conventional accounts of the *Lochner* era—roughly speaking, the period between the mid-1890s and the New Deal—describe an all-or-nothing struggle between popular majorities determined to mitigate the human cost of industrialization and a judiciary bent on protecting corporations and the wealthy from the democratic mob. In recent years, however, this familiar narrative has come under increasing scrutiny from scholars determined to rehabilitate the *Lochner* Court's image.[6] *Repugnant Laws*, which devotes the better part of two lengthy chapters to this period, clearly belongs in the revisionist camp. Yet Whittington's aims are somewhat different than those of other recent revisionists. Instead of attempting to revive specific *doctrines* (such as dual federalism and economic due process) that flourished during the *Lochner* era, he challenges the broader characterization of the early twentieth-century Court as an erratic, unprincipled, and generally destabilizing force in the

6. *See* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2012); BARRY M. CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); 8 OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910 (1993); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993).

constitutional order. Seen in their entirety, he argues, the *Lochner* Court's interactions with Congress reveal a tribunal that steered a cautious middle course between upholding inherited constitutional commitments and accommodating the political demands of the present—a tribunal that salvaged what it could of nineteenth-century constitutional norms, but "rarely, if ever" at the expense of alienating "a clear majority of elected officials" (p. 148).

Whittington begins his defense of the *Lochner* Court by marshaling an array of quantitative evidence to show that the Court was more accommodating of Progressive legislative reforms than is usually believed. Prior to William Howard Taft's appointment as Chief Justice in 1921, he points out, the rate at which the Court invalidated federal laws was only slightly higher than in earlier historical periods (when taking into account Congress's increased statutory output), and many invalidated provisions were so insignificant as to make little impression on either Congress or the public (pp. 146–150). This is an important insight, and one that seems incontestable based on the evidence presented here. Yet Whittington's claims grow more tendentious as he moves from discussing the relative *frequency* of judicial invalidations to discussing these decisions' broader implications for constitutional theory. His larger argument, it soon becomes clear, is that even the *Lochner* Court's most notorious rulings—those that struck down important federal laws, and for reasons contemporaries found difficult to square with received doctrine—have been wrongly characterized as countermajoritarian.

Put more concretely, Whittington's thesis is that the *Lochner* Court reserved its landmark invalidations for cases where: (1) the law in question was widely viewed as constitutionally flawed; *and* (2) the sponsoring party was itself internally divided about either the wisdom or constitutionality of the statute (p. 151). Hence, while decisions striking down federal child labor or minimum wage laws may have come as a shock to left-leaning contemporaries, they were fully in keeping with the spirit of principled pragmatism that governed the Court's decision-making in this period. Believing that the challenged laws transgressed clear constitutional boundaries *and* that they lacked the support of mobilized partisan majorities, the justices took the opportunity to shore up threatened constitutional boundaries where they could. And—crucially—this was not a solo effort. Rather, the

Lochner-era justices “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” (p. 148).

If the *Lochner* Court was motivated by coherent constitutional commitments *and* attentive to the contemporary political environment, then one would be hard pressed to deny Whittington’s conclusion that the “countermajoritarian framework provides little leverage for evaluating the normative foundations of judicial review during [the *Lochner*] period” (p. 173). But does his account of *Lochner*-era judicial decision-making square with the historical record? To answer the question, we must look more closely at the circumstances surrounding Whittington’s list of important federal measures felled by judicial review.

Whittington observes that the Fuller and White Courts handed down five decisions invalidating or limiting federal laws that were of great interest to contemporary voters and politicians: *Pollock v. Farmers Loan & Trust I & II* (1895),[7] *U.S. v. E.C. Knight Co.* (1895),[8] *Employers’ Liability Cases* (1908),[9] and *Hammer v. Dagenhart* (1918)[10] (pp. 164–165). (Several other controversial decisions invalidating federal laws, including *Adair v. U.S.* (1908),[11] are relegated to a section on “less important measures” (pp. 164–165).) He discusses each of these cases at some length, and in each case concludes that the invalidated provision was both constitutionally suspect (in the view of prominent contemporary commentators) *and* opposed by a significant faction of the enacting party. The Populist-inspired income tax provisions invalidated in *Pollock*, for example, were initially denounced (on both constitutional and policy grounds) by Conservative Northeasterners from both parties, including President Grover Cleveland. When the Court invalidated them, it was not defying the clearly expressed will of an electoral majority, but rather reining in a regionally powerful movement (Populism) whose central aims were of dubious constitutionality (pp. 158–

7. Pollock v. Farmers’ Loan and Trust Co., 157 U.S. 429 (1895); Pollock v. Farmers’ Loan and Trust Co., 158 U.S. 601 (1895).
8. United States v. E. C. Knight, 156 U.S. 1 (1895).
9. Employers’ Liability Cases, 207 U.S. 463 (1908).
10. Hammer v. Dagenhart, 247 U.S. 251 (1918).
11. Adair v. United States, 208 U.S. 161 (1908).

160).

Aside from the reversal of the regional dynamics, the story was much the same in *Hammer v. Dagenhart*. Many prominent commentators, including President Woodrow Wilson, condemned proposals for a federal child labor law as unconstitutional (though Wilson eventually reversed his position), while Southern manufacturers viewed them as handouts to their Northeastern competitors (who faced higher production costs as a result of state child labor bans). Whittington thus concludes that *Hammer*, like *Pollock*, merely blocked a politically divisive constitutional experiment; it did not defy the clearly expressed will of the American people (pp. 160–161, 181–182).

Moving on to the Taft Court, Whittington acknowledges that the Court began invalidating federal laws at a faster clip in the 1920s, yet he insists that most of the invalidated measures were politically insignificant. Indeed, only two Taft Court decisions "fit neatly" into the familiar narrative of a Court committed to blocking broadly popular Progressive economic reforms (p. 181). The first, *Bailey v. Drexel Furniture Co.* (1922),[12] barred Congress from using its taxing power to restrict child labor; the second, *Adkins v. Children's Hospital* (1923),[13] invalidated a federal minimum wage law for women and children in the District of Columbia. Even in these cases, however, Whittington contends that the countermajoritarian narrative conceals crucial aspects of the story. He notes that the child labor tax, like the earlier child labor law, was of greater interest to "New England manufactur[ers]" than to the general public, and both it and the D.C. minimum wage law were widely regarded as constitutionally suspect (p. 182). No less than the White and Fuller Courts, then, the Taft Court seems to have shied away from dramatic confrontations with Congress, acting to curb the growing regulatory state only in cases where the odds of a sustained political backlash were remote.

Taken individually, these historical claims are undoubtedly valid, but it is far from clear that their collective effect is to fatally undermine the traditional understanding of the *Lochner* Court as a fickle and ultimately unprincipled tribunal. One reason for

12. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).
13. Adkins v. Children's Hosp., 261 U.S. 525 (1923).

skepticism is that Whittington's analysis suffers from what might be called, for lack of a better label, a "selecting on the dependent variable" problem. He spends a great deal of time explaining why apparently countermajoritarian decisions invalidating federal laws were either not really at odds with majority sentiment, or else why the reforms in question were so obviously unconstitutional (according to prevailing theories of constitutional interpretation) that their sponsors should have expected to lose in court. Meanwhile, decisions that *upheld* innovative federal regulations are discussed only in passing, or else summarized in tables (pp. 166–171).

The reader is therefore left with a number of unanswered questions: Were the reforms that survived the judicial gauntlet less controversial from the standpoint of constitutional theory than those that did not? Were they more likely to enjoy the backing of mobilized electoral majorities or unified political parties? Absent a serious effort to draw comparisons across cases invalidating and upholding major reforms, it is hard to know whether contemporaneous observers were really so misguided in thinking that the *Lochner*-era justices were neither principled nor pragmatic in their interactions with Congress.

II.

To be fair, Whittington's aim in these chapters is not so much to propose a comprehensive, predictive theory of judicial review as it is to poke holes in some crucial, but rarely examined, assumptions of the countermajoritarian framework. Moreover, an in-depth discussion of the political and doctrinal contexts of every federal measure *reviewed* by the early twentieth-century Court would have caused an already-long book to balloon into a multivolume work. Still, it is worth thinking briefly about what this type of analysis might have revealed.

Were the two federal child labor laws, for example, so obviously at odds with accepted federalism principles that their supporters should have predicted their demise? Whittington points out, correctly, that a number of commentators, including President Wilson, expressed doubts about the constitutionality of a federal child labor ban (p. 160).[14] At least in Wilson's case,

14. Whittington cites WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 177–178, 179, 187 (1908).

however, the remarks in question predated a slew of Court decisions that expanded Congress's interstate commerce power far beyond its nineteenth-century limits. In particular, the Court's 1913 decision upholding the Mann Act—which banned the interstate transportation of women for "immoral" purposes—convinced many skeptics (including, apparently, Wilson) that the commerce power could now reach any person or item that moved across state lines.[15] Such predictions turned out to be mistaken, as a bare majority of the Court held in *Hammer* that this power did not extend to products that were "of themselves . . . harmless."[16] But the larger question is why a group of justices motivated by a principled commitment to dual federalism did not invalidate *earlier* reforms, such as the Mann Act and the 1895 federal anti-lottery law, that provoked equally loud howls of protest from legal commentators.[17] If Whittington is right that the Court saw itself as the conscience of the Republican regime—pointing lawmakers back to the party's founding principles when those principles were temporarily jettisoned in the interest of partisan advantage—then it should have acted decisively to rein in Congress's commerce power long before 1918. Its failure to do so created an environment in which decisions such as *Hammer*, which attempted to reassert the old boundaries, were almost certain to be viewed as little more than fits of judicial pique.[18]

Of course, Whittington's claim is not that the *Lochner* Court's decisions were *uniformly* principled. Rather, it is that the Court acted on principle when political circumstances permitted, reserving its principled stands for cases where the challenged policy was of little interest to the public, or where the sponsoring party was itself divided (pp. 172–173). But is it true that the *Lochner* Court studiously avoided antagonizing "mobilized political majorit[ies]," advancing its constitutional commitments

15. Hoke v. United States, 227 U.S. 308 (1913); ALEXANDER M. BICKEL AND BENNO C. SCHMIDT, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–21, VOL. 9 231–232 (1971).

16. Hammer v. Dagenhart, 247 U.S. 251, 272 (1918).

17. GAINES M. FOSTER, MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY, 1865–1920, 144–145 (2002); JESSICA R. PLILEY, POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI 67–75 (2014); Thomas M. Cooley, *Taxation of Lotteries*, ATLANTIC MONTHLY 69, Apr. 1892 at 523–534 (describing the constitutionally dubious nature of Congress's attempts to reach the lottery industry via its enumerated powers).

18. John W. Compton, *Easing the Show Where It Pinches: The Lottery Case and the Demise of Dual Federalism*, 40 J. SUP. CT. HIST. 133, 139–149 (2015).

only "within the band of indifference established by other political actors" (pp. 172, 9)?

Again, the two child labor decisions would seem to contradict this claim, given that the anti-child labor movement, at its height, was among the most potent reform movements in American history. By the time of the *Hammer* decision, most non-Southern states (as well as several Southern ones) had already banned child labor, some via popular referenda that passed by overwhelming margins.[19] And although Southern manufacturers and a small coterie of allied politicians continued to oppose federal child labor laws, it is a stretch to say that the issue was a major cause of schism within either party.[20] By the time the Owen-Keating Act was signed into law in 1916, both major parties had incorporated support for a federal child labor ban into their platforms (as had the Progressives).[21] Six years later, when the *Bailey* decision made clear that the Court would never permit Congress to reach child labor via its enumerated powers, virtually the whole of American civil society—including the nation's largest membership groups and religious denominations—lined up in support of a constitutional amendment that would have overridden the Court's decision.[22]

Whittington acknowledges most of these facts, but concludes that the Court could safely block federal child labor laws because the "political costs" to current presidential administrations were minimal (pp. 172–173). It is hard to know what to make of this claim. When a proposed reform enjoys reasonably strong support from *both* political parties, it is true that voters are unlikely to punish the President's party for an adverse Court decision. But this insight makes the Court's decision not to block earlier expansions of Congress's enumerated powers—many of which enjoyed similarly strong bipartisan backing—all the more

19. Julie Novkov, *Historicizing the Figure of the Child in Legal Discourse: The Battle over the Regulation of Child Labor*, 44 AM. J. LEGAL HIST. 369, 373 (2000); Child Labor Bill: Hearings before the Committee on Labor, House of Representatives, H.R. 8234, 64th Cong. (1916).

20. JOHN A. FLITER, CHILD LABOR IN AMERICA: THE EPIC LEGAL STRUGGLE TO PROTECT CHILDREN 84–85, 87 (2018) (noting that most of the bill's opponents were "connected in some way to the Southern textile mills," and that, in the Senate, the only 'no' votes came from ten Southern Senators, plus two Senators from Pennsylvania, 'a state with one of the highest rates of child labor'.").

21. *Id.* at 81.

22. MOLLY LADD-TAYLOR, MOTHER-WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890–1930 96 (1994).

puzzling.

Moreover, from the perspective of the justices, the more pressing concern in cases invalidating broadly popular laws would seem to be how such decisions impact popular and elite perceptions of *the Court*, not how they affect the fortunes of the political parties. And in the case of the child labor decisions, the damage to the Court's prestige was significant. Not only did Congress quickly authorize a constitutional amendment overturning the Court's decisions (which was ratified by twenty-eight states before the New Deal-era constitutional revolution made it irrelevant), but—more to the point—*Hammer* and *Drexel* spawned an outpouring of academic and popular commentary alleging that the Court's federalism jurisprudence had become so convoluted that it could only be regarded as a smokescreen for the interests of big business.[23] No doubt the Court's critics would have advanced such arguments even in the absence of the child labor decisions, but the tortuous logic of Justice Day's *Hammer* opinion—which gamely attempted to square the Court's suddenly narrow view of the commerce power with a host of seemingly incompatible precedents—made their task easier.[24]

The case for a cautiously principled *Lochner* Court becomes even less compelling when one considers the many instances in which the justices missed what in retrospect appear obvious opportunities to reinforce threatened constitutional boundaries by taking advantage of partisan fissures or public indifference. A prime example is *McCray v. U.S.*,[25] the 1904 decision that effectively transformed Congress's taxing power from a means of revenue generation to a broader regulatory tool capable of reaching subjects that were traditionally classified under the states' police powers. The case centered on a federal oleomargarine tax, adopted in 1902, that was designed to shield politically connected dairy producers from unwanted competition. The brainchild of Republican lawmakers from New England (whose states produced the bulk of the nation's butter), the tax drew stiff opposition from Southern Democrats, and also

23. *Cf.* Compton, *supra* note 18, at 146–148.

24. *Cf.* Thurlow M. Gordon, *The Child Labor Law Case*, 32 HARV. L. REV. 45 (1918); William Carey Jones, *The Child Labor Decision*, 6 CAL. L. REV. 395 (1918); Thomas Reed Powell, *The Child Labor Law, the Tenth Amendment, and the Commerce Clause*, 3. S. L. Q. 175 (1918).

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

from a significant faction of Republicans who were either connected to the oleomargarine industry or whose constituents resented being asked to subsidize New England dairy producers. Dozens of prominent Republicans, including the chair of the relevant House committee, denounced the tax as unconstitutional.[26] Other party stalwarts, like Senator George Frisbee Hoar, reluctantly supported it while warning that such an obvious attempt to "usurp" the states' police powers was unlikely to survive judicial review.[27] When the measure emerged from committee, it sparked substantial opposition in the full House and Senate, in the latter case barely surviving a motion to recommit.[28] Given the fractured state of the parties and the lack of a supportive popular majority, the Court had little reason to fear that a decision reasserting a narrow interpretation of the taxing power would provoke a political backlash. It is therefore surprising—at least from the perspective of Whittington's framework—that the Court endorsed the measure's constitutionality in a 6–3 decision.

Nor was *McCray* the only missed opportunity. A similar situation arose in 1913, when Congress, under pressure from prohibitionists, made it a federal offense to ship liquor across state lines with the intent of violating state law. Although the Webb-Kenyon Act passed a Democratic-controlled House and a Republican-controlled Senate by comfortable margins, it sparked intense opposition from constitutional Conservatives in the Republican party, including President William Howard Taft and Attorney General George Wickersham, who argued that the law unconstitutionally delegated Congress's commerce power to the states, while also violating a longstanding norm mandating uniformity in interstate commerce regulations. Taft ultimately vetoed the measure, using his message to accuse Congress of unilaterally "amend[ing]" the Commerce Clause.[29] Congress then overrode the veto, at which point the debate shifted to the courts. Given that a Republican President well-versed in constitutional questions had expressed deep reservations about the law, one might expect a Court featuring seven Republican appointees (and

26. Herbert F. Marguiles, *Federal Police Power by Taxation: McCray v. United States and the Oleomargarine Tax of 1902*, 5 J.S. LEGAL HIST. 1, 6 (1997).
27. *Id*. at 16.
28. *Id.* at 26.
29. FISS, *supra* note 6, at 287.

four Taft appointees) to react with similar skepticism. Instead, the Court handed down a 7–2 decision upholding the Webb-Kenyon Act in its entirety, with Justice White, whom Taft had elevated to the Chief Justiceship, penning a majority opinion whose doctrinal pirouettes provided still more fodder for the Court's Progressive critics.[30]

III.

These examples call into question Whittington's claim that the *Lochner*-era justices hewed to "the straight and narrow path of conservative constitutionalism," wavering only in the face of intense political pressure (p. 151). More broadly, they cast doubt on his argument that the *Lochner* Court's interactions with Congress were fundamentally *predictable*. In fact, as many contemporary observers pointed out, the defining feature of the Court's output in this period was its unpredictability. When innovative federal laws appeared on the Court's docket, no one could say with certainty whether the justices would enforce traditional constitutional limitations or acquiesce in the expansion of federal regulatory capacities. In several pivotal cases, essentially random occurrences, such as illnesses or recusals, tipped the balance.[31] And even in cases unaffected by such factors, the lack of an ideological screening process for Court nominees yielded a combustible mix of incompatible judicial philosophies that made predicting outcomes all but impossible.[32] It was this sense of constant doctrinal flux, as much as the antidemocratic

30. Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311 (1917); *Cf.* Lindsay Rogers, *Webb-Kenyon Decision*, 4 VA. L. REV. 558 (1916–1917); Noel T. Downing, *Divesting and Article of Its Interstate Character: An Examination of the Doctrine Underlying the Webb-Kenyon Act*, 5 MINN. L. REV. 100 (1920–1921); Samuel P. Orth, *Webb-Kenyon Law Decision*, CORNELL L. Q. 283 (1916–1917).

31. Had Justice Gray not been forced from the bench by illness in 1902, the Court might well have struck down the 1895 federal lottery law, thus limiting the scope of the federal police power. Or had Justice Brandeis not recused himself in *Stettler v. O'Hara*, 243 U.S. 629 (1917), the Court likely would have delivered a clear affirmation of a state minimum wage law in 1917, thus potentially leading to a different outcome in *Adkins v. Children's Hospital*.

32. Consider that President Theodore Roosevelt nominated such ideological opposites as William Day (author of the majority opinion in *Hammer*) and Oliver Wendell Holmes, Jr. (whose dissent in the same case was a rallying cry for Progressives), while President Wilson nominated both James Clark McReynolds and Louis Brandeis. President William Howard Taft managed to select a more ideologically coherent cohort of justices, but the generally short tenures of his appointees blunted their impact on constitutional doctrine.

implications of the Court's decisions, that formed the core of the Progressive case against judicial authority.[33]

The importance of doctrinal stability was also a major, though often overlooked, theme of Bickel's *Least Dangerous Branch*. The book's argument that the Court should whenever possible use "passive devices" to avoid resolving abstract questions of constitutional authority was, to be sure, partly motivated by worries about the Court's democratic legitimacy (or lack thereof).[34] But it was also rooted in concerns about the unintended and often destabilizing effects of sweeping constitutional decisions like those that came to define the *Lochner* Era. Durable constitutional norms, Bickel argued, could only be articulated and sustained through an ongoing "colloquy" between the judiciary and the other branches of government.[35] When the Court closed off the interbranch conversation with grand, principled pronouncements, it was writing checks it could not cash; lacking the support of powerful political actors, the resulting norms would be fragile, if not altogether unenforceable; and their purported permanence and universality would leave the Court with no obvious means of retreat in the event that they proved unworkable, or were twisted to purposes not envisioned by their authors. For Bickel, judicial modesty was not only a means for maximizing democratic accountability; it was also a way of rendering the constitutional system more stable and predictable—and hence more "morally supportable."[36]

Repugnant Laws is a groundbreaking work, and the data on which it is based will prove invaluable to scholars of judicial politics. Whittington also deserves much credit for pointing the way toward a more nuanced understanding of the Supreme Court's relationship to political parties and electoral coalitions. And yet, in the end, readers inclined to view strong-form judicial review as a deviant force in the constitutional system are unlikely to derive much comfort from his concluding observation that the Court has typically reserved its fire for statutes that were the

33. As Edward Corwin wrote in an article documenting the twists and turns of Commerce Clause doctrine in the 1910s and 1920s, conflicting precedents concerning the scope of Congress's authority were so abundant that, depending on which "horse" the Court chose to "saddle," it could push doctrine in any "direction it wishes to ride." Edward S. Corwin, THE COMMERCE POWER VERSUS STATES' RIGHTS 167, 248–249 (1934).

34. BICKEL, *supra*, note 3, at 206.

35. *Id.* at 156.

36. *Id.* at 20.

products of "legislative logrolling, special-interest rent seeking, legislative ineptitude, . . . or political grandstanding," (pp. 301–302). Pointing out that Congress, too, is capable of subverting the "will of the people" is not the same as explaining why Americans should celebrate an institution whose interventions in the policymaking process have, historically speaking, been both highly unpredictable and very difficult to reverse. Or, as Bickel put the point, "impurities and imperfections . . . in one part of the system are no argument for total departure from the desired norm in another part."[37]

37. *Id*.