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HOW THE UMPIRES REMAKE THE GAME

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).

Julie Novkov[2]

The relationship between the Supreme Court and Congress is both analytically and normatively controversial. To what extent has the Court checked Congress by overturning or modifying legislation through its interpretive practices? Under what circumstances is it likely to do so, and have some courts more aggressively policed their conceptions of constitutional boundaries than others? Does the Court thwart the democratic will of the people when it invalidates or modifies congressional legislation? And if so, under what circumstances is this kind of checking appropriate?

These concerns rest on an examination of constitutional history. A stock narrative presents judicial activism toward Congress as almost non-existent in the Antebellum Era, significant in limiting the scope of Reconstruction, reaching a crescendo prior to 1937 to thwart the early New Deal, and then resurfacing with the Rehnquist Court. In this narrative, as the Court has shifted to a more conservative makeup, it has at times thwarted the democratic will of Congress, but these democratic failures can also be laid at the door of a national legislature that is increasingly dysfunctional and has great difficulty in crafting successful policy interventions to resolve the major problems facing the nation.

Running through this narrative is a normative debate about the proper role of the Court in reviewing congressional

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legislation. Concerns about the antidemocratic nature of judicial review appear as a constant across history, with any invalidation of an Act of Congress understood as potentially anti-democratic. *Dred Scott v. Sandford*[3] takes on the cast of an original sin, and scholars writing from different ideological perspectives identify their favorite stalking horses (often *Lochner*[4] for the right and *Roe*[5] for the left) as its legitimate progeny. The key debate is over what constitutes illegitimate judicial activism, and which ideological sides of the Court are engaging in judicial activism improperly.

A second narrative within political science identifies Justices as political and strategic actors whose aim is to achieve their policy preferences. The theory that "judges decide cases in light of their sincere ideological values juxtaposed against the factual stimuli presented by the case" seems to hold best for Supreme Court Justices, who do not face as many potential checks on their behavior as do lower federal court judges.[6] The strategic approach imagines judges, including Justices, as driven by their rational preferences, but inclined to pursue those preferences through a conscious recognition of competing interests and boundaries.[7]

Scholars of American constitutional development have encouraged a more nuanced discussion of this relationship. Mark Graber's germinal article in 1993 challenged the narrative concerning countermajoritarianism, asking instead whether legislatures might at times write statutes that invite judicial interpretation to solve the legislatures' political problems.[8] Barry Friedman develops a historicized account of the variety of ways in which the Court and Congress have both engaged in contestation and collaboration over the years; he shows that the countermajoritarian difficulty itself is a historically contingent construction.[9] George Lovell's work shows that late nineteenth- and early twentieth-century legislators did indeed "deliberately

3. Dred Scott v. Sanford, 60 U.S. 393 (1857).

4. Lochner v. New York, 198 U.S. 45 (1905).

5. Roe v. Wade, 410 U.S. 113 (1973).

6. Jeffrey A. Segal, *Judicial Behavior*, THE OXFORD HANDBOOK OF L. & POL. 19, 25–26 (Keith E. Whittington et al., eds., 2008).

7. *See* Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decision-Making*, THE OXFORD HANDBOOK OF L. & POL. 34, 35 (Keith E. Whittington et al., eds., 2008).

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

9. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N. Y.U. L. REV. 333 (1998).

create . . . conditions that empowered judges to make important substantive decisions on labor policy."[10]

This literature has also interrogated how political regimes line up with judicial time. Judges and Justices with life tenure may be out of alignment with the current dominant elected coalition in national politics. This has sometimes caused friction, but often when the Court acts against legislation, it does so to restrict the bargains made by previous governing coalitions, aligning policy more directly to current legislative and public preferences.[11] Congress has also strengthened or added capacity to the court system, conscious of the federal courts' capacity to collaborate with extant regimes and protect their policy innovations.[12]

Here lies Keith Whittington's intervention. He has collected and reviewed *all* of the cases in which the Court has directly considered the constitutionality of congressional legislation. His review provides a dimension to these questions that previous analyses have missed, while seconding the challenges that analyses of constitutional development present to the stock narratives. It articulates and defends a conception of the Court largely as a collaborator—but an active and engaged collaborator, which at times drives the developmental process.

Whittington's analysis is comprehensive. Rather than analyzing only those cases that have come to be accepted as landmarks, he has collected the entire universe of cases that "explicitly considered a constitutional challenge to the scope of federal legislative authority and rendered a substantive judgment" (p. 317). The dataset excludes cases in which the Court did not engage in explicit constitutional deliberation when applying or interpreting a law, nor does it include cases "in which the Court made trivial references to Congress's constitutional authority to pass the law being applied or dismissed a constitutional challenge without elaboration as fully resolved in an earlier case" (p. 317). By including cases in which the Court considered but did not invalidate statutes on constitutional grounds, Whittington can better assess the Court's overall impact on the course of congressional legislation and its important efforts

10. GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 45 (2003).

11. *See* THOMAS KECK, JUDICIAL POLITICS IN POLARIZED TIMES (2014).

12. *See* JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT (2012).

to reinforce the constitutional basis for contested laws.

Whittington's analysis identifies three broad eras. First was the antebellum period, when invalidations were sporadic but a steady rate of considerations kept the Court in the conversation. Between the Civil War and World War I, the Court engaged in many more confrontations with Congress, striking down statutes and provisions at a rate of almost one per year. The final period, since World War I, has seen a higher rate of invalidations, reaching nearly three per year. Within his eras, Whittington confirms that many of the periods identified by other scholars as particularly active ones for Court invalidations of statutes fulfilled that reputation (pp. 27–28).

Whittington concludes that the Court is neither a lapdog (pace Dahl[13]) nor a purely political actor (pace Segal and Spaeth[14]). Rather, it sometimes supports regimes, but often shapes the ways that these regimes legitimize their political actions. While Whittington's Court often acts as a regime partner, it does so on its own terms from its distinctive institutional place. Whittington's Court is an independent institutional collaborator, one that is both active and engaged. His work aligns with those who study constitutional development through an institutional /political development lens, but his analysis provides a deeper confirmation of these insights.

The project's scope is impressive. The rulings included span the entire course of constitutional history and constitute more than 1300 cases, and he has generously made his database available for future scholars.[15] On the whole, these cases show the range of debates that the Court identified as setting the boundaries of constitutional controversy; even the cases in which the Court upheld acts of Congress illustrate the presence of a debate and the Court's own judgment that it had a duty to weigh in to settle it. Scholars have largely not recognized generally how contested acts of Congress tend to be, even in moments when the Court is supporting congressional actions. The comprehensive

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

14. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

15. *See* Keith Whittington, *Judicial Review of Congress Database*, https://scholar.princeton.edu/kewhitt/publications/judical-review-congress-database (last visited Nov. 13, 2019).

nature of the study also facilitates critical insights about when and how the Court was a partner versus a challenger in its relationship with Congress.

The large number of cases reviewed necessarily focuses attention on trends and patterns. Whittington confirms the insight of regime analysts: the Court is less likely to review contemporary legislation and much of its "actual exercise of the power of judicial review involves considering statutes that have been in place for some time" (p. 33). This finding also suggests that the Court comports in part with the judicial modesty best expressed in Justice Brandeis's *Ashwander* rules,[16] only very infrequently opting to consider a statute before litigants are available who can express a conflict over the concrete effects of its operation. While looking only at the time that has passed does not indicate whether the Court is collaborating with a current regime or has simply waited until an issue has been fully aired in the lower federal courts, both factors might often drive in the same direction, contributing to his finding that more than half of the cases in which the Court constitutionally reviewed congressional legislation addressed statutes that were more than eight years old.

One significant question is what we might learn from the dogs that don't bark. A ruling that raises a constitutional question only to resolve it in favor of the statute's constitutionality sends a signal of regime support if the statute is relatively recent. It may likewise signify the continued vitality of a prior regime's imperatives, or may update the foundational supports for a particular legislative or administrative system. Constitutional issues may, however, be raised in the lower federal courts only to have the Supreme Court decline to address them or dispose of them in so summary a fashion as to exclude them from the cases in Whittington's analysis. Such disposals may send a stronger signal about constitutionality to Congress than a case that produces a lengthy but positive analysis alongside a vigorously argued dissent in a divided Court.

The Court's deliberate refusal to engage such arguments can serve as an important signaling device. From our contemporary vantage point, in a few key precedents after 1937 the Court laid

16. Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936). Whittington notes, however, that the Court often interpreted the Constitution to settle statutory issues rather than reading statutes to avoid constitutional collisions (p. 318).

out comprehensive justifications for its retreat from searching investigations of the limits of state police power and federal regulatory authority in the face of challenges based in liberty of contract and claims of illegitimate class legislation.[17] The case was closed. From the vantage point of the lawyers arguing cases in the years shortly afterward, however, the Court's abandonment of these frameworks was not immediately evident. Thus in 1942, a Minnesota manufacturer protested the enforcement of overtime pay and timekeeping regulations against it under the Fair Labor Standards Act. Carleton Screw Products invoked liberty of contract to challenge the act's validity, claiming that it constituted an "unconstitutional usurpation of power by Congress," that was unsustainable under the Commerce Clause and, further, that they had been denied equal protection.[18] The Supreme Court never bothered addressing these claims, which the Eighth Circuit simply dismissed summarily as "without merit."[19]

This example raises important questions about litigation dynamics. How and when can the Court signal that certain kinds of arguments simply might not be worth making any longer, and what kinds of signals are most effective in indicating that a recent Court decision was indeed jurispathic[20]—a jurisprudential dead end that cannot be further activated or manipulated, even in modified fashion? This question demands investigation of the legal frameworks underlying cases, and how these frameworks are employed in later litigation.

This concern raises a related question. What is going on when the Court either upholds or strikes down legislation? Simply knowing that the Court has supported or thwarted Congress may not tell us everything that we need to know. These umpires can remake the game when they call their balls and strikes. At times the Court's reasoning in opinions either trammels or redirects the flow of congressional authority. Further, by shaping the permissible logics that undergird congressional action, the Court influences not only whether Congress can act, but how Congress acts, and reinforces the avenues through which congressional power can flow freely or may be blocked entirely.

17. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); W. Coast Hotel v. Parrish, 300 U.S. 379 (1937); United States v. Darby Lumber Co., 312 U.S. 100 (1941).

18. Carleton Screw Prods. Co. v. Fleming, 126 F.2d 537, 541 (8th Cir. 1942).

19. *Id.*

20. *See* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

Three historical examples bear this out: the Court's response to congressional efforts to transform the South in the post-Civil War era, its response to New Deal legislation, and its handling of Tenth Amendment challenges in the period between revitalizing federalism in *National League of Cities v. Usery*[21] in 1976 and its termination of the experiment in *Garcia v. San Antonio Metropolitan Transit Authority*[22] in 1985. This Essay concludes by showing that *how* the Court upheld or invalidated acts of Congress mattered.

We might assume that when the Court invalidates a statute or its application, it intends to end a debate as well, but this is not always how invalidation works. We can observe this phenomenon more closely by looking at a misunderstood example in constitutional history: the common belief that in the years following the passage of the Reconstruction Amendments, the Court acted aggressively to rein in congressional capacity to transform the South and destroy the remnants of slave power. Pamela Brandwein's analysis supports a different narrative.[23]

Whittington argues that the Chase and Waite Courts were "constitutionally activist" in ways that countered what models of judicial change might predict. An empowered Republican Party reformed the court system, providing the opportunity for a rapid makeover to benefit their regime. During the war, the Court largely dodged constitutional confrontations. Afterward, though, invalidations of congressional legislation reached "an unprecedented rate" (p. 125). Whittington explains the Court's positioning as its navigation of fissures within the Republican Party, siding with more conservative party members who had lost their appetite for mobilizing the federal government to challenge private discrimination (p. 144).

Brandwein argues that the famous cases of the 1870s and 1880s that have traditionally been read as the Court's abandonment of the project of Reconstruction were rooted in Antebellum distinctions lost in history. The Justices, led by Justice Bradley, attempted to mobilize distinctions between the types of rights that the Reconstruction Amendments protected to determine the boundaries of appropriate congressional

21. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

22. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

23. *See* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011).

management and federal enforcement.[24] One of the most notorious rulings, the Court's 1876 decision in *Cruikshank*,[25] overturned the convictions of whites responsible for the brutal murder of black voters in Louisiana. Whittington notes the ruling as an instance of an invalidation of congressional authority as applied, and this outcome is one of the primary pieces of evidence supporting the abandonment narrative (pp. 134–135).

Brandwein, however, reads the case differently. Situating it in the uncertainty preceding the election of 1876, she argues that Chief Justice Waite crafted the opinion carefully to accommodate the possibility of either a Democratic or a Republican victory. While the Democratic supporters of Cruikshank had pressed for a complete invalidation of the federal enforcement mechanism, Waite invalidated it only as applied, relying on but not reiterating Bradley's earlier full analysis to criticize the federal prosecutors' failure to allege that Cruikshank's actions were based on racial motivations.[26] This narrower ruling provided crucial information to federal prosecutors and directed their use of enforcement mechanisms. Brandwein traces this evolutionary process through the infamous *Civil Rights Cases* of 1883.[27] Whittington's database acknowledges that the *Civil Rights Cases* involved the invalidation of legislation as applied, but Brandwein's historically grounded reading reveals the significance of the ruling. The majority's famous limitation of congressional power to address only state action incorporated the idea that the states had the responsibility to enforce their laws equally, protecting the rights and privileges of all state citizens. Their failure to do so, in Brandwein's convincing rereading, constituted state neglect and justified federal intervention that could reach private wrongs.[28] The true villains who strangled the Fourteenth Amendment's grant of regulatory power to Congress were the members of the Fuller Court, not the Waite Court,[29] a recognition rendered possible only by understanding the differences in the ways that each Court grappled with these laws.

The famous struggle over New Deal legislation provides a

24. *See id.* at 97–99.
25. United States v. Cruikshank, 92 U.S. 542 (1876).
26. *See* BRANDWEIN, *supra* note 23, at 118–19.
27. The Civil Rights Cases, 109 U.S. 3 (1883).
28. *See* BRANDWEIN, *supra* note 23, at 165–68.
29. *See id.* at 184–205.

second example. Whittington does not present the simplistic narrative that a conservative Court thwarted the New Deal at every turn until threatened by the Roosevelt Administration with the court-packing plan, causing the Court to relent. He does, however, frame the Court as "balky," explaining the problem as a core cohort of four conservatives who could sometimes bring the Court's two centrists (Charles Evan Hughes and Owen Roberts) into play on their side (pp. 193–194). Whittington details the Court's curbing of Congress, culminating in the invalidation of several major planks of the New Deal by spring 1936, and setting the stage for a post-electoral confrontation between a determined and empowered President and a recalcitrant Court (pp. 195–206). He then describes the Court's retreat after the announcement of the Court-packing plan, which itself collapsed as the Court drew back. As he notes, the Court, whose membership had also changed due to two critical retirements, invalidated no provisions of federal statutes in 1937, 1938, or from 1940–42 (pp. 208–209).

A deeper consideration of the terms on which the Court thwarted regulation complicates this narrative. Scholars of constitutional development, including Howard Gillman and myself, have argued that the period prior to the 1937 transformation featured developmental struggles and shifts as the Court wrestled with jurisprudential frameworks that proved increasingly difficult to apply to the changing terms and conditions of American labor.[30] Barry Cushman, writing to debunk the conventional political reading of the 1937 volte face, argues that the Court's series of rulings in the late 1920s and early 1930s established a trajectory that led to the collapse of a previously integrated body of doctrine in the 1934 case of *Nebbia v. New York*,[31] which addressed a state rather than a federal statute.[32] Further, he observes, the early New Deal statutes were hastily drafted by "politicians, bureaucrats, and lobbyists who had paid little attention to thorny questions of constitutionality."[33] The drafters of the National Industrial Recovery Act, which fell

30. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS (2001).

31. Nebbia v. New York, 291 U.S. 502 (1934).

32. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 41–43 (1998).

33. *Id.* at 162.

victim to the Court in *Schechter Poultry Company v. United States*[34] in 1935, gave no serious consideration to constitutionality, believing that its limited timeframe would allow it to achieve its objectives before reaching the Court.[35] The Guffey Coal Act, invalidated in *Carter v. Carter Coal*,[36] was so sloppily drafted that the House Ways and Means Committee raised questions about its constitutionality and the overwhelmingly Democratic Congress passed it narrowly.[37]

As the Court was preparing its devastating blow to the New Deal legislative agenda, Congress was already working on next steps. The most important of these was the Wagner Act, which sought to establish a new nationally managed system of regulating the relationship between capital and labor. Members of Congress had learned from the Court's interventions to take more care, and the Wagner Act's drafters were lawyers rather than politicians and lobbyists.[38] Still, when the Court released its ruling in *Schechter*, Senator Wagner recommitted his bill to the House Labor Committee for changes to shore up its claim to constitutionality.[39] NLRB lawyers, aware that the legislation would face constitutional challenge, proactively identified strong test cases.[40] The Court, which had ruled against the government by a vote of 9–0 in *Schechter* and 5–4 in *Carter v. Carter Coal*, ruled 5–4 in favor of the Wagner Act in *NLRB v. Jones and Laughlin Steel* in 1937.[41]

While Cushman's analysis comports with Whittington's understanding of the Court as an empowered institutional actor, it complicates the narrative. Unlike the Waite Court, which signaled to Congress and the executive path through its invalidations that the political branches had to use more care and precision in exercising power, the Hughes Court issued sharp rebukes to Congress. These rebukes, however, were jurisprudential. While the Court did ultimately shift its understanding of constitutional standards, it pushed Congress to conform to a more cautious exercise of national regulatory

34. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
35. *See* CUSHMAN, *supra* note 23, at 37.
36. Carter v. Carter Coal Co., 298 U.S. 238 (1936).
37. *See* CUSHMAN, *supra* note 23, at 161.
38. *See id.* at 162.
39. *See id.* at 163.
40. *See id.* at 170–71.
41. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

authority, thereby laying the groundwork for more successful collaboration in the late 1930s and 1940s around the next wave of congressional reforms.

A third example illustrates that cases that uphold legislation may also have significance that goes beyond their positive outcomes. A closer reading of the cases may reveal important jurisprudential dynamics within the Court. Standards may shift subtly even when the rulings themselves are upholding legislation. The tangled path that led from *National League of Cities* to *San Antonio Metropolitan Transit Authority* illustrates this phenomenon. Justice Rehnquist's opinion for the Court in *Cities* in 1976 overruled a 1968 case, *Maryland v. Wirtz*,[42] which had validated the extension of the Fair Labor Standards Act to public employees and established a new standard for understanding the proper extent of Congress's authority to regulate under the Commerce Clause. The narrow majority in *Cities* that invalidated this provision of the Fair Labor Standards Act certainly appeared to represent the destabilizing of a regime; President Nixon's appointees, led by Chief Justice Burger, sought to revitalize federalism and re-establish the Tenth Amendment as a critical counterweight to Congress's authority under the Commerce Clause.

Whittington's description of this history acknowledges *Wirtz* as the Court's stalking horse in *Cities*, which he characterizes as a "rare victory" for Justice Rehnquist on the Burger Court (pp. 253–254). The victory was short-lived, however; Whittington describes the collapse of the Nixon-appointee-led majority nine years later as a result of Justice Blackmun's having "soured on *National League of Cities*," causing him to switch sides in *Garcia*, which overruled *Cities* (p. 254). *Cities*' primary significance in this analysis was simply as a standalone precursor to the Rehnquist Court's federalist revival in the 1990s (p. 259).

David Louk's review of the Justices' papers during this era illustrates the negotiations that took place behind the scenes, tracking Justice Blackmun's shift in *Garcia* and other Justices' voting shifts after conference votes.[43] Concerns about the Tenth Amendment pre-dated *Cities*. In *Wirtz*, decided in 1968, Justice

42. Maryland v. Wirtz, 392 U.S. 183 (1968).

43. *See* David Scott Louk, *Repairing the Irreparable: Revisiting the Federalism Decisions of the Burger Court*, 125 YALE L.J. 682, 688 (2016).

Douglas's dissent (which Justice Stewart joined) raised the issue, and in the 1975 case, *Fry v. United States*[44] (which Whittington recognizes as a victory for Congress's amendment of the 1950 Defense Production Act), a struggle occurred behind the scenes. While Justice Marshall's majority opinion for seven of the nine Justices was brief, his original draft embraced a much broader validation of Congress's exercise of commerce power to impose emergency wage controls. To retain his majority with the support of three of the four new Nixon appointees, Justice Marshall scaled back his own rendering of congressional power drastically.[45] This set the stage for the conservative victory in *Cities*, in which Justice Rehnquist, who had been the sole dissenter in *Fry*, was able to build a majority around revitalizing the Tenth Amendment.[46]

Cities itself restricted congressional authority, but the Court did not continue to shore up the beachhead it had established. As Louk observes and Whittington's database confirms, "the Court never once relied on *Cities* to overturn a federal law . . . [f]ar from disagreeing on how to apply *Cities*, the Court's decisions during this period appear to be a concerted exercise in avoiding its application."[47] In the first post-*Cities* confrontations between congressional authority and federalism, the Court upheld Congress's authority to regulate coal mining and sustained the Railway Labor Act, narrowing the potential range of Tenth Amendment claims. These rulings, however, revealed fractures within the pro-federalism conservative coalition between those who wanted to limit the federal government and those who favored private enterprise.[48]

In 1982 and 1983, the Justices struggled with the concrete implications, despite the definitive tone of the opinions and dissents. Justice Sandra Day O'Connor replaced Justice Stewart and established herself as a defender of federalism.[49] Justice O'Connor's enthusiasm for expanding federalism nearly drew enough support to cut back on the authority of the Federal Energy

44. Fry v. United States, 421 U.S. 542 (1975).

45. *See* Louk, *supra* note 43, at 691–92.

46. *See id.* at 694.

47. *See id.* at 705.

48. *See id.* at 705–08 (discussing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) and United Transp. Union v. Long Island R.R. Co., 455 U.S. 678 (1982)).

49. *See id.* at 708–13.

Regulatory Commission on federalism grounds.[50] The struggle continued when the Court considered the Age Discrimination in Employment Act in 1983; the 1967 statute survived the challenge, in part because Justice Brennan incorporated the *Cities* balancing test, finding that the statute passed muster. Justice Stevens' concurrence, retreating to a framework of deference to Congress, drew strong objections from Justice Powell, joined by Justice O'Connor.[51]

The critical reversal in *Garcia* almost didn't happen. Justice Blackmun, who was to write the opinion for a five-person majority striking down the FSLA's application on Tenth Amendment grounds, asked his clerk, Scott McIntosh, to develop a clear standard for identifying traditional government functions. McIntosh's considerations led him to suggest that Justice Blackmun abandon this enterprise and join the four Justices seeking to overturn *Cities*. Justice Blackmun ultimately concluded that he could not create a workable, principled test that would clear up confusion in the lower federal courts. His initial draft of an opinion upholding the statute tried to sidestep *Cities*, but he was ultimately convinced to abandon *Cities*.[52]

The deep story of the trajectory from *Cities* to *Garcia* reveals dynamics within the Court that reflect the changing personnel on the Court and the Court's efforts to provide clear guidance to lower federal courts in interpreting their rulings. The discussions that didn't make it into the opinions further reflect the Justices' concerns about policy and concrete consequences. In isolation, Congress would be expected to attend to the signals the Court sent by upholding several extensions of its power post-*National League of Cities*, but, as Louk notes, Congress responded to the controversy by amending the FLSA to make it more flexible and accommodating of state interests—after the reversal in *Garcia*.[53] We can only understand these dynamics and how they laid the groundwork for federalism's revival in the 1990s by looking more carefully at the signals the Court was sending even while it was upholding legislation.

These examples highlight a peculiarity of reported appellate

50. *See id.* at 708–11 (discussing Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982)).

51. *See id.* at 708–15 (discussing EEOC v. Wyoming, 460 U.S. 226 (1983)).

52. *See id.* at 722–23.

53. *See id.* at 724.

opinions. Appellate courts generally do not write lengthy opinions to explain settled law or pronounce uncontroversial consensus viewpoints. With a Supreme Court that has almost complete control over its docket, this phenomenon is even more pronounced. The outcomes in cases are important, but the Court's choice to take a case, even if it ultimately upholds a questioned statute, signals the Justices' view that the controversy may serve as a platform for broader institutional work. Tracking how the Court does this work and the signals its rulings send to lawmakers, policymakers, mobilized groups, other courts, and the public may be as valuable as tracking the outcomes that these cases produce.

Finally, Whittington's analysis reflects a Court that understands itself as a distinctive institution, but one that nonetheless conducts political work. His comprehensive review replaces the picture of an insulated, powerful, and potentially dangerous countermajoritarian institution with a more nuanced picture of an institution that works with political majorities. Its rulings, whether in favor of or against the will of Congress, inevitably please some and infuriate others. Whittington argues that the political realities of the Court's institutional position and role necessarily temper its capacity to serve as an idealized defender of constitutional values.

The current high degree of partisanship and the increased politicization of judicial nominations, however, raise concerns. While the Court has never been "a constitutional guardian standing outside of democratic politics," Whittington suggests that it generally operates as a legitimate part of a legitimate democratic system, exercising its particular form of authority to intervene in and resolve political problems through legal means (p. 314). In 2016, for the first time in recent memory, the Supreme Court's membership was a campaign issue. More than one quarter of Trump voters reported that the Supreme Court was the most important factor in their voting, and the composition of the Supreme Court was highly salient for Republican voters.[54] While Americans have historically trusted in the Court as an institution, the bitterness of partisan struggle over the Court and its membership will likely affect how Americans understand it and

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

its role. Its capacity to continue to collaborate actively with a Congress that itself is increasingly struggling with partisan conflict may diminish, as may Americans' trust in it as the final sentinel for the rule of law. Depending on its actions, concerns about its capacity to continue in this role may well be warranted.