# 2025-2026 Topic Proposal: Court Reform

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## Summary

### Why Debate Court Reform?

#### **1. IT MATTERS.**

**Court reform matters: *a lot*.**

With recent high-profile Supreme Court rulings on issues like healthcare, voting rights, and reproductive rights, the public's attention is increasingly focused on the composition, decision-making processes, and overall functioning of the courts. This spotlight has amplified discussions about potential reforms, including proposals to expand the number of justices on the Supreme Court, enhance transparency and accountability measures, and address concerns about partisan polarization within the judiciary. These debates not only provide valuable educational opportunities for debaters to understand the complexities of the legal system but also underscore the importance of ensuring that the courts remain impartial, accessible, and reflective of the diverse perspectives of the American populace.

HLR 24 – Harvard Law Review.

Harvard Law Review, “Chapter One: Confusion and Clarity in the Case for Supreme Court Reform,” HLR, Volume 137, Issue 6, April 2024, https://harvardlawreview.org/print/vol-137/confusion-and-clarity-in-the-case-for-supreme-court-reform/

Supreme Court reform is in the air.1 Different people want different changes for different reasons, but they come together in an excited buzz about changing the Court. This excitement is out of the ordinary. Over at least the last fifty years, people have supported the Court more than they have Congress or the presidency,2 and movements to reform the Court rarely win the attention of politicians, let alone ordinary people.3

The current, unusual interest in reforming the Court did not appear overnight. It grew in the late 2010s and early 2020s, as the public’s relationship to the Court changed. Faith in public and private institutions had declined for Americans across the political spectrum.4 Justices Scalia and Ginsburg were dead.5 President Trump had appointed three Justices, each to the outrage of liberals and progressives: Justice Gorsuch (after Senator Mitch McConnell stalled consideration of President Obama’s nominee to replace Justice Scalia),6 Justice Kavanaugh (after Professor Christine Blasey Ford testified before the Senate that he sexually assaulted her in high school),7 and Justice Barrett (under circumstances similar to those invoked by Senator McConnell to delay consideration of President Obama’s nominee).8 Most importantly, as its membership changed, the Court started a new era in which it declined to protect abortion9 and voting rights10 and invalidated affirmative action,11 environmental protection,12 and gun control13 policies, among other cases with profound consequences for the nation.

Because the pro-reform moment coincides with the Court’s rightward turn, one might think that Supreme Court reformers are progressives who lost the judicial game and want to change its rules so that they win — not that different from the conservative congresspeople who objected during the count of Electoral College votes in 2020.14 Selfish disregard for the rules would not be a very persuasive reason to change the Court, so an important question for reformers is why, other than competing political interests, the Court ought to be changed.

That question can be answered by two kinds of arguments. Formal arguments are abstract ideas about the Court’s structure and role in our democracy. They answer questions like: How much power should the Court have over other branches of government? How should Justices be appointed? How and when can the Court’s power or membership be changed? Substantive arguments are reactions to the Court’s actual decisions, both in the past and anticipated for the future. They answer the question: Is the Court doing the right thing?

Many reformers focus on formal arguments.15 They begin with principles that are widely accepted in our democracy, citing support from the Constitution,16 historical practice,17 or political design,18 and they persuasively explain how those shared principles favor Court reform. Formal arguments have nothing to do with the Court’s current decisions, so they make Court reform into a politically neutral project. They refute the objection that Court reformers are nothing but sore losers. However, the formal debate is complicated, with reasonable perspectives on all sides. By itself, it does not provide a conclusive answer to how the Court ought to be structured — or why that structure ought to change.

Furthermore, **our judicial system affects every other policy issue at a fundamental level**. Combatting the climate crisis requires a judiciary that protects and enforces environmental statutes. Labor reform depends on a judiciary that’s structurally designed to uphold statutory protections and reforms. Foreign policy of all kinds depends on a judiciary that produces the right balance of executive flexibility and authority, whether to economically engage China, diplomatically engage Latin America, or submit to international legal obligations.

HLR 24 – Harvard Law Review.

Harvard Law Review, “Chapter One: Confusion and Clarity in the Case for Supreme Court Reform,” HLR, Volume 137, Issue 6, April 2024, https://harvardlawreview.org/print/vol-137/confusion-and-clarity-in-the-case-for-supreme-court-reform/

Whereas the above stories of discontent with the Court do not explicitly state concerns about consequences, others are openly motivated by fear of what the Court will do. These objections, which parallel the New Deal–era objections to the Court’s interference in President Roosevelt’s agenda, reveal the true emergency of the current moment. What makes the push for Court reform so potent in this moment is not a sudden interest in the intricacies of Senate procedure or a philosophical take on the institutional competence of the Court. It is that the Court has already sanctioned “the further erosion of environmental protections . . . during a climate crisis . . . [and the] authoriz[ation] [of] expansive state intrusion into the lives and medical decisions of those who can give birth,”112 and that such rulings “presage[] . . . harmful outcomes on issues ranging from contraception to same-sex marriage to immigration to climate change.”113 In other words: the Court is simply “[b]roken.”114

As one illustration of how facially neutral justifications for reform are paired with substantive fear of the Court, consider the following preamble to Court reform proposals by the American Constitution Society:

Put simply, we no longer have a Supreme Court that can be trusted to uphold constitutional rights, democratic principles, and judicial norms in this country. This is the result of . . . the Court’s . . . conservative supermajority being driven by a staunchly partisan agenda that is increasingly hostile to fundamental rights and judicial norms.

. . . [O]ur right to vote is in jeopardy . . . .

. . . [The] Court is a proven threat to fundamental rights. It has already . . . wip[ed] out the federal constitutional right to abortion . . . . The Court’s decision in Dobbs v. Jackson Women’s Health also effectively serves as an invitation for states and plaintiffs to pursue litigation to rewrite constitutional law in this country in the interests of white supremacy, sexism, and misogyny. This could include efforts to overturn the Court’s previous decisions on same-sex marriage, inter-racial marriage, and contraception.115

A sense of alarm about the consequences of the Court’s actions is palpable, and although language about “rights” and “norms” makes an appearance, it is secondary to fear about the Court’s “staunchly partisan agenda.”116

#### **2. IT’S TIMELY.**

It goes without saying that we are living in unprecedent times. Our community has spent the past month contemplating how we can craft a viable topic under Trump 2.0: how to empower students to grapple with the challenges of the current moment while, at the same time, avoiding 10 hours of doomscrolling every day. It would, of course, be doing ourselves a great disservice to stick our heads in the sand and pretend Trump isn’t happening. Yet, at the same time, we need a topic that preserves stable and reasonable ground for both the aff and neg.

Court reform is the perfect topic for our current moment. It strikes the optimal balance of being “Trump-relevant” yet still “Trump-resistant.” Because our proposal is focused on structural reform to the federal judiciary, it offers timely yet solvent affirmatives while preserving stable ground via core topic functional limits. Put differently: Trump is reason to debate court reform, not a reason to turn away from it.

“But what if Trump starts ignoring court orders?”

**A. That’s irrelevant for *our* *version* of this topic.**

Trump ignoring Court orders interferes with a topic about court decisions; it does not affect a topic about structurally reforming the federal judiciary.

Topical affs would include structural changes like restructuring district courts, personnel changes like adding seats to the Supreme Court or jurisdictional that end judicial review or strip the federal bench of particular authorities.

None of these affs become moot by Trump ignoring a particular court order. If anything, the Trump administrations’ continued assault on the courts is a reason stripping the federal judiciary of jurisdiction over important areas and establishing new specialized courts is more essential now than ever.

**B. It’s *just as likely* he:**

-Invades Mexico or strengthens devastating sanctions against Venezuela.

-Fires Jerome Powell, substantially curtails the authority of the fed, or permanently shatters dollar hegemony.

-Removes troops from Asia, ends the US nuclear umbrella, or withdraws from NATO.

-Rolls back foundational legal protections for workers or bans unions.

**C. There are tons of ways the Courts can force compliance.**

Noll 25 – Professor of Law, Rutgers Law School. Co-author of Vigilante Nation: How State-Sponsored Terror Threatens Our Democracy.

David Noll, “If the Marshals Go Rogue, Courts Have Other Ways to Enforce their Orders,” Democracy Docket, 03-14-2025, https://www.democracydocket.com/opinion/if-the-marshals-go-rogue-courts-have-other-ways-to-enforce-their-orders/

One of the most alarming developments in the second Trump administration is agencies’ apparent defiance of court orders barring them from implementing illegal executive orders. As agencies including the State Department have ignored, evaded or slow-walked judicial decrees, courts have issued increasingly stronger warnings that compliance with their orders is not optional, and litigants have urged them to hold the responsible government officials in contempt of court.

Yet the prospect of holding executive branch officials in contempt threatens a fresh constitutional crisis.

Courts’ power of contempt — the inherent power to compel compliance with orders and punish actions that obstruct the administration of justice — is ultimately backstopped by their ability to jail people who defy their orders. There’d be no issue if judges themselves made arrests, but the courts’ enforcement arm, the U.S. Marshal’s Service, reports to both the courts and the attorney general. The marshals’ position within the executive branch has led commenters to predict that, if a court orders the arrest of a defiant executive branch official, the White House or Attorney General Pam Bondi will revoke the order and the courts will “run out of options.”

As Berkeley Law School Dean Erwin Chemerinsky argues, “the hard truth for those looking to the courts to rein in the Trump administration is that the Constitution gives judges no power to compel compliance with their rulings — it is the executive branch that ultimately enforces judicial orders.”

But do the courts really lack authority to jail contemnors — people who defy court orders — if the marshals go rogue? A close look at the courts’ enforcement powers makes clear that judges don’t need to rely solely on the marshals to ensure their orders are enforced.

Even a rogue marshal’s service is not an insurmountable obstacle to courts enforcing the rule of law.

Contempt of court is classified as either civil or criminal depending on whether a court seeks to compel compliance with its orders or punish obstruction of justice. When it comes to criminal contempt, the executive really does hold a veto over contempt proceedings. While Supreme Court caselaw and the Federal Rules of Criminal Procedure recognize the courts’ authority to appoint a private attorney to prosecute contempt, the president may pardon the contemnor, rendering the prosecution an academic exercise.

Civil contempt is different. The Supreme Court has long held that “a pardon cannot stop” courts from punishing cases of civil contempt. And while the marshals have traditionally enforced civil contempt orders, the courts have the power to deputize others to step in if they refuse to do so.

This authority is recognized in an obscure provision of the Federal Rules of Civil Procedure, which govern proceedings in federal trial courts. Rule 4.1 specifies how certain types of “process” — the legal term for orders that command someone to appear in court — are to be served on the party to which they are directed. The rule begins in section (a) by instructing that, as a general matter, process “must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose.”

The next section, Rule 4.1(b), is entitled, “Enforcing Orders: Committing for Civil Contempt.” It sets some geographical limits for where “[a]n order committing a person for civil contempt of a decree or injunction” may be served based on the federal vs. state nature of the underlying lawsuit. But it does not say who may enforce such an order, and it never modifies the general rule that process may be served by a marshal, deputy marshal or person specially appointed for that purpose. Thus, by its plain terms, Rule 4.1 contemplates that the court may appoint individuals other than the marshals to enforce civil contempt orders.

This understanding of the courts’ powers is consistent with other provisions of the rules that allow them to make use of other parties as a backstop to enforcement by the marshals. For example, the rules governing civil forfeiture provide that when the court takes control of property, “the warrant and any supplemental process” may be enforced by marshals and “someone specially appointed by the court for that purpose.”

**D. *If anything*, the courts are the last remaining institution that can check Trump. That’s a reason we should spend a year grappling with their structural design!!!**

Megerian 25 – Reporter, Associated Press.

Chris Megerian, “How the courts have (so far) pushed back on Trump’s attempts to expand presidential power,” PBS News, 02-07-2025, https://www.pbs.org/newshour/politics/how-the-courts-have-so-far-pushed-back-on-trumps-attempts-to-expand-presidential-power

The spotlight on the judiciary is brighter because the Republican-controlled Congress has essentially abdicated its role of serving as a check on the presidency. Lawmakers from Trump’s party have acceded to his demands to unilaterally cut spending and fire government watchdogs without proper notice.

That leaves only the courts as a potential guardrail on the president’s ambitions.

**The time to debate courts is now.**

Thirion 25 – interim co-president and vice president of strategy at Alliance for Justice. Graduated summa cum laude from American University with a B.A. in Political Science and CLEG: Communications, Law, Economics and Government

Kieth Thirion, “Lower Courts Are Saving The Rule of Law — Now the GOP Wants to Stop Them,” Democracy Docket, 04-24-2025, https://www.democracydocket.com/opinion/lower-courts-are-saving-the-rule-of-law-now-the-gop-wants-to-stop-them/

What is happening in 2025 is something very different — not activist judges bending the law to their will, but rather judges preventing Trump from doing just that. In a mere few months, this administration has committed countless acts that are unlawful on their face. It is an intentional effort to see just how much they can get away with, just as they did with multiple Muslim ban attempts during Trump’s first term. We need courts that can respond swiftly to these harms — before more dutiful workers are fired, before more sensitive data is compromised, and before more innocent people are abducted and disappeared to a foreign prison.

There are sensible reforms to preliminary injunctions that may be worth considering at another time. But by casting dozens of judges as “rogue” for simply upholding the rule of law, Republican lawmakers do not have justice in mind. They want to dismantle every obstacle to authoritarianism they can find. Like their plants on Texas’ courts, they only care about their agenda winning — damn the consequences for the rest of us.

Our courts are our last defense for democracy and the rule of law, and NORRA should die in the Senate. We can’t always count on our courts to do the right thing, but we certainly need them to be empowered to try. With new attacks every day, we’re bleeding out; it’s hardly the time to discuss a ban on tourniquets.

**The bottom line is: Trump is going to interfere with every topic to some extent. Court reform, however, is the most well-structured to both meet the current moment while avoiding a fundamental and abrupt shift in aff and neg ground the night before the Shirley.**

#### 3. IT’S NEW & NOT STALE.

The debate community has quite literally never debated court reform (unless you count the judicial procedure topic in the mid 90's, but even that was wildly different in both form and content compared to what is being proposed here). We think this is a disservice to the community when the topic is so urgent, timely, ubiquitous, and all-encompassing in its impact. Instead of rehashing the assurances DA or cutting rate hikes updates, let’s embrace the chance to dive into a new area!

#### 4. IT’S GREAT FOR NOVICES & PROGRAMS!

Court reform is the perfect topic for both recruiting and retaining college novices.

Court reform is a timely, significant controversy that arises in the news on a consistent basis. No matter what issue novices are passionate about – whether civil liberties, women’s and LGBTQ rights, climate policy, financial regulations, or more – court reform is a pivotal issue to grapple with. This means novices are likely to be eager and excited about engaging with research throughout the season.

Additionally, court reform is incredibly accessible to novices who are learning how to research. The core debates in the literature are not dense or legalistic, nor do they require wading through the details of intricate market mechanisms or relying on prior knowledge from economics classes. Instead, core debates can be found in common news articles and policy journals and are readily understood by anyone, regardless of their background.

Furthermore, the topic is very manageable. Our proposed wording preserves aff innovation, while ensuring a reasonable burden for the negative. By building in the judicial self-restraint counterplan as a core functional limit, the topic guarantees novices have a reliable, high-quality weapon at their disposal that is, unlike recycled process counterplans, a relevant controversy discussed in the literature. This will allow them to keep up with the pace of aff innovation, all while mastering their counterplan and disadvantage debating.

### Core Topic Design

The topic should be designed such that **affirmatives** must externally impose reforms on the federal judiciary, falling into one or more of three broad categories:

1. Changes in the structure of the courts (e.g. mandate creation of a new specialized Art. III court with sole jurisdiction over X issue area, increase the number of district courts, have a rotational lottery system for judges hearing Supreme Court cases).

2. Reform to court personnel (e.g. term limits, packing).

3. Limits on the court's jurisdiction (e.g. general or issue-specific jurisdiction-stripping, legislative overrides).

The set of available mechanisms is expansive and may affect the Supreme Court, lower federal courts, or both.

The **negative** gets the core functional limit of CP to have the judiciary unilaterally make the change in question (essentially judicial self-restraint, basically a mirror of the executive self-restraint CP in 2013-14 and 2018-19). Other core negative strategies include Congress CP to Adv CP out of components of the Aff by, for example, clear statementing a given issue; or have Congress threaten the plan/court-curbing but don't actually do it. Lots of other interesting high-quality and diverse mechanism ground for the Neg here, too, for 2Ns who want to get into it.

Great case debates, including link turns to most things. The negative has available a range of strong core topic DAs, which are also net-benefits to the CPs above (JSR, Threaten, Adv), enumerated in detail below.

### Topic Rotation

We believe this topic fits in the “Domestic” rotation.

### AT: It’s Too Legal

While some may be concerned this topic will be too legal, particularly on the heels of antitrust and legal personhood, the core controversies in court reform are policy, not legal, proposals. Affirmatives would impose new policies that shape the structure and jurisdiction of the court. Affirmatives will not – and cannot – be about particular court rulings or legal reasoning.

Furthermore, because this is a salient political issue, there is a well of recent and forthcoming academic literature on each affirmative proposal.

Unlike many previous topics, the literature for this area is primarily found in think tank articles, policy journals, and news articles from publishers such as Vox. To the extent the literature does involve law reviews, those articles are primarily normative, and policy-oriented. Ultimately, every important policy issue has legal implications. Court reform captures legal controversies in a way that is relevant, engaging, and accessible.

### AT: But, Trump?

See: “IT’S TIMELY” above.

The bottom line is: Trump is going to interfere with every topic to some extent. Court reform, however, is the most well-structured to both meet the current moment while avoiding a fundamental and abrupt shift in aff and neg ground the night before the Shirley.

### Proposed Wording

#### We believe any wording should enable the following:

1. Affirmatives should be allowed to enact reforms of a) the Supreme Court only, b) lower federal courts only, or c) both.

2. In order to ensure that a strong functional limit is retained while preserving the ability to word the topic expansively, the topic should build in at least the core functional limit of judicial self-restraint/self-reform. Put differently, the Affirmative should be required to be an actor external to the federal judiciary.

3. Affirmatives should be allowed substantial flexibility regarding mechanisms. Specifically, they should be able to adopt an expansive, non-enumerated universe of proposals, so that they can find the best “congress key”/”jurisdiction key”/etc. warrants.

4. Topical affirmative proposals must include options across all three of the following categories: a) structure, b) makeup, and c) jurisdiction/judicial power.

5. Actor: It is recommended that the topic actor be “the United States.” The “U.S.” as actor helps best ensure topical K Aff ground, and best resolves the potential issue of the Con-Con CP: it is much better for Constitutional amendment to be an Affirmative mechanism than a Negative one, as Con-Con likely avoids the link to Art. III DAs (and maybe Hardball?) \*BUT\* at the cost of massive links to other strategies (proof-of-concept included in Appendix), at which point this Affirmative mechanism flexibility becomes a feature not a bug.

6. It is recommended that the object of reforms be “Art. III courts.” Alternatives risk being either under- or over-inclusive. (For example, “federal courts” would include Affirmatives which restrict Art. I tribunals created by Congress, which ought not be allowed as it circumvents this topic’s core controversies.) Definitions are available in appendix.

#### Strong jumping-off points for wording options:

The United States should substantially reform the federal judiciary by at least altering the size, structure, and/or makeup of Article III courts and/or restricting the judicial power to decide cases and controversies.

The United States should enact substantial structural, personnel, and/or jurisdictional reform of Article III courts.

The United States should enact structural reform of its Article III courts, substantially alter their size and/or composition, and/or enact substantial limits on judicial review.

The United States should enact court curbing measures reforming the federal judiciary.

\*Definitions are available in appendix.

### Affirmative Ground

Broadly, affirmatives should be forced to have an external actor (likely Congress, but potentially also the Executive branch) impose a restraint or reform on Article III courts. These reforms largely fall into one of three categories (see: Appendix: Aff [Policy]):

1. **Structural Reforms**: Structural reforms refer to changes in the organization, composition, or design of the federal court system. This category includes proposals such as:

* Creating new specialized courts or restructuring existing ones (e.g., establishing a separate immigration court system)
* Re-organizing the district courts

2. **Personnel Reforms**: Personnel reforms focus on changes related to the individuals serving as judges in the federal judiciary. This category includes proposals such as:

* Establishing term limits for justices
* Requiring the Supreme Court to be ideologically split
* Requiring rotations on the Supreme Court
* Adding or removing seats on the Supreme Court (court-packing or court-unpacking)

3. **Jurisdictional Reforms**: Jurisdictional reforms involve changes to the types of cases or subject matters that federal courts can hear and decide. This category includes proposals such as:

* Expanding or contracting the jurisdiction of federal courts over specific areas of law (e.g., expanding or limiting federal jurisdiction over state election laws)
* Ending judicial review
* Increasing Congressional review over the courts

These three categories encompass a wide range of potential reforms that could reshape the structure, personnel, and authority of the federal judicial system.

### Negative Ground

Negative ground on a court reform topic would be diverse and strong. There are a variety of reasons why court reform would be a potentially bad idea and several strong alternatives (See: Appendix: Neg [Policy].

Core CPs

**Judicial Self Restraint CP:** This CP argues that instead of an external actor (e.g., Congress of the Executive branch) imposing a limitation on federal courts, the court should impose it itself. This can take the form of policies like altering judicial codes of conduct or ruling on issues in certain ways. Judicial self-restraint is an actual practice found in the court system, and we believe that it is a core controversy. (In case of concern that the CP is too good, there are a variety of actions that the courts cannot do, and a large amount of reasons why it might be preferable for external actors to do the things that the courts can do [trust, signal, durability, etc.]).

**Threaten CP:** This CP would have Congress of the Executive branch threaten to do the plan, instead of outright doing the plan. Negative teams would argue that this would result in the desired change of the plan without altering legal precedent.

Core DAs

**Hard-Ball DAs:** Making sweeping changes to the federal courts could set precedents that future administrations or Congresses may exploit for their own political ends. This could lead to a cycle of retaliatory reforms, further undermining the independence and integrity of the judiciary.

**Legal Spillover DAs:** Reforms to the federal judiciary could establish precedents that lead to further reforms with increasingly negative impacts. For example, reforms might undermine Article III authority writ large or on specific issues, with large consequences.

**Judicial Independence DAs:** Any reforms that are perceived as encroaching on the independence of the judiciary risk damaging the credibility of the courts and compromising their ability to serve as impartial arbiters of the law.

**Court Legitimacy DA:** Significant reforms could erode public trust in the judiciary, especially if they are perceived as partisan maneuvers rather than genuine efforts to improve the administration of justice.

**Legal Uncertainty DA:** Businesses and investors rely on a stable and predictable legal environment to make decisions. Radical changes to the federal courts could introduce uncertainty into the legal system, potentially deterring investment and economic growth. This is also true for specific court reforms. For example, imposing term limits could create significant legal uncertainty due to the fact that it might accelerate how quickly the federal courts shift their opinions on legal issues.

**Politics DAs:** This would be one of the best topics ever for politics DAs. Any proposed reforms to the federal courts are often seen through a deeply partisan lens. Changes could be perceived as attempts by one political party to gain an advantage over the other, leading to accusations of politicizing the judiciary. This is all the more true for specific versions of Politics DAs: DAs like Filibuster Removal and Horse-Trading actually have very strong links on this topic.

**Elections DAs:** With a recent set of incredibly controversial rulings (e.g., Dobbs) and more on the way (e.g., Loper Bright v. Raimondo and Relentless v. Department of Commerce), the court is at the front of the news cycle, and attempts to alter it would likely dominate media attention and conversations leading into the election.

**Biz Con DA:** Changes to the composition or jurisdiction of the federal courts could have wide-ranging implications for businesses, particularly those involved in interstate or international commerce. Uncertainty about the legal landscape could disrupt business operations and increase compliance costs.

**Checks and Balances DA:** Altering the structure or composition of the federal courts could upset the delicate balance of power between the executive, legislative, and judicial branches of government. Critics may argue that such changes undermine the system of checks and balances enshrined in the Constitution.

### Negative Ground---Is It Guaranteed?

Yes. No one has done court reform. No one is seriously considering doing court reform. Court reform was studied by Biden in 2021 through a commission, but the committee ended up being composed of largely conservatives and moderates. This led them to propose only modest recommendations, and even those have failed to make any progress on account of partisanship, competing priorities, fear of alienating moderates and anti-Trump Republicans, concern about tit-for-tat escalation once the other side is back in power, concerns about the Constitutionality and potential precedent-setting nature of doing so, and so on. (\*Note: this is a case where the reasons that the proposal hasn’t been adopted and the reasons it is potentially a bad idea/the disads are one and the same.)

### K Ground

Court reform ensures a wide range of critical literature and literature debates.

See: Appendix: Neg---K and Appendix: Aff---K.

Every popular and common critical literature field---from feminist legal studies to settler colonialism studies---has something valuable to say about the federal courts and the legal system. There are many robust critiques of existing legal structures, norms, and practices, as well as lively debates about whether or not the courts are a redeemable institution that we should attempt to reform in the first place.

Debates can center around the central role of the judiciary in slavery, segregation, Jim Crow, and continued mass incarceration. They can touch on landmark decisions surrounding indigenous rights and governance. They can critique legalism and faith in institutions. The complexity of court reform encompasses issues ranging from procedural fairness to systemic biases, inviting rigorous examination from diverse scholarly viewpoints.

One particularly valuable field of study that is not necessarily explored on other topics includes critical legal studies, critiques of legal normativity, and demosprudence. The literature bases for these fields have only grown as the role of the Supreme Court has grown more contentious in recent years.

# Appendix: Supporting Evidence

## Literature Review

### What the Topic Will Look Like:

#### One core locus of neg ground is Congressional assertions of power over the Courts. The negative is guaranteed DAs about durably fiating expansive understandings of Congressional Art. III power which would currently be struck down as unconstitutional, which also serve as net-benefits to the in-built functional limit of the judicial self-restraint/self-reform CP.

Weinberg 2k – Bates Chair and Professor of Law, The University of Texas

Louise Weinberg, “The Article III Box: The Power of “Congress” to Attack the “Jurisdiction” of “Federal Courts,”” Texas Law Review, 2000, https://law.utexas.edu/faculty/publications/2000-The-Article-III-Box-The-Power-of-Congress-to-Attack-the-Jurisdiction-of-Federal-Courts/download

In what follows, I point out that both the theorists and critics of the standard model of Congress’s power tend to measure that power by Article III. For this reason, proponents as well as critics see the problem as one of separation of powers—in other words, of constitutional crisis. But this alarmed perspective blurs the reality that it is the Supreme Court rather than Congress that is the more active agent in denials of access to courts. Moreover, the orthodox focus on federal courts has been seriously mis- leading. Since in most cases the consequence of stripping federal courts of power over cases raising federal questions is only to confide those cases to state courts, the more serious danger obviously lies in denials of access to all courts, state as well as federal. It follows that the question of the power of Congress over all courts is the better question. That being so, due process becomes (urgently) the prime subject of salient constitutional inquiry, rather than Article III. These points ought to have been obvious and in a sense have been obvious; the wonder is that our leading theorists nevertheless go on thinking inside the Article III box.

In making these points I identify particular problematic aspects of the current theoretical framework that render it unrealistic and simplistic. I argue that for purposes of the inquiry into the power of Congress to attack the lower courts, the category “federal courts” is not a wholly rational category. I shift the context of the assault on constitutional litigation away from the paradigm of constitutional crisis, identifying the impulse under-lying the phenomenon as a species of tort reform—“ Constitution reform” if you like. I compare Article III with due process for purposes of limiting “Constitution reform.” I argue that a broader range of cases than is provided by the separation-of-powers canon can be brought to bear on the constitutionality of legislative denials of court access. But because the Supreme Court has been the more important actor in stripping the lower courts of power, it is unlikely that the current Court could or would find strong constitutional limits on the power of Congress to do so. In all of this, in short, I hope to show that the traditional proprietary formulation of the problem as one of “federal” courts has been unhelpful. So also has been the consequent resort to Article III for answers. We have been getting unconvincing answers because the question we have been ask-ing is somewhat unreal, somewhat too easy, and somehow wrong. II. Four Reasons Why the Question Seems Unreal The question before us, the power of Congress to limit access to the federal courts of first instance, seems somewhat unreal. This power of Congress is too extensive and too familiar to make it the subject of very anxious inquiry now. “Jurisdiction,” after all, is not necessarily the rigorously narrow technical concept that experts on the subject would have it. Speaking loosely but more realistically, Congress obviously limits federal “jurisdiction” every time it limits federal remedies—every time it enacts, say, a criminal statute and provides no civil cause of action for a violation; or repeals an existing statutory cause of action; or authorizes injunction suits but not damages suits; or does anything else to shape federal remedies. We understand that Congress has to have power to do (2000) 78 Tex. L. Rev. 1408 such things. There is a widespread perception that Congress rarely acts to limit federal judicial power. But that is not the case. It is only the Supreme Court cases on the subject that are rare.3 Yet even if we examine Congress’s jurisdiction-stripping in a broader way, we would still be dealing with a relatively unimportant phenomenon. The Supreme Court is by far the more 3. The familiar casebook examples include Lauf v. E.G. Shinner & Co., 303 U.S. 323, 329-30 (1938) (sustaining the constitutionality of § 7 of the Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 71, 29 U.S.C. § 107). Norris-LaGuardia stripped federal district courts of “jurisdiction” to issue injunctions in labor disputes. See id. at §§ 101-107, n.b. § 4. Also on this list of rarities is Yakus v. United States, 321 U.S. 414 (1944) (sustaining in a criminal prosecution the constitutionality of the Emergency Price Control Act of 1942 § 204(d), ch. 26, 56 Stat. 23, 50 U.S.C. §§ 901-906 (expired 1947), which confided to a special administrative court all challenges to price control regulations). See also Lockerty v. Phillips, 319 U.S. 182, 189 (1943) (same, in an action to enjoin enforcement of the regulations). active source of door-closing rules in constitutional and other federal cases. It is the Supreme Court, not Congress, that has been limiting federal “jurisdiction.”4 There is no disagreement about this, nor is it some surprising new development. At least since the demise of the Warren Court, the Supreme Court has been a veritable fount of door-closing and access-limiting rules.5 To speak loosely but realistically, the Court limits federal “jurisdiction” every time it fashions new barriers to federal adjudication or new limits to federal causes of action, or new constraints on federal remedial power.6 A course (2000) 78 Tex. L. Rev. 1409 in Federal Courts today is largely a course in Supreme Court cases con-straining federal judicial powers—adjudicatory, remedial, lawmaking. That the Court takes the more active part undercuts the relevance of such separation-of-powers arguments as might be used to address the problem of curbs on federal jurisdiction. I do not suggest that the Court will declare unconstitutional the “course” it is “pursuing.”7 But I do suggest that the Court’s door-closing jurisprudence must, however imperfectly,8 be relevant to any consideration of Congress’s door-closing powers.9 4. See, e.g., Jackson, supra note 1, at 2453 (also noting that Congress has simply been “weighing in on behalf of the Supreme Court in its efforts to curtail the perceived activism of the lower federal courts”). 5. For this development in the Burger Court, see Louise Weinberg, The New Judicial Federalism, 29 STAN. L. REV. 1191 (1977), surveying then-current trans-substantive limits on access to federal courts. 6. To select a very few examples, consider Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72 (1996) (holding that Congress has no Article I power to abrogate a state’s Eleventh Amendment immunity from suit in federal court; also disapproving use of an officer suit instead when Congress has supplied a “detailed remedial scheme,” id. at 74); Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) (unifying the Court’s heterogeneous “abstention” doctrines, id. at 716-17, with the net effect of making the federal-question jurisdiction of the federal district courts discretionary with them; holding that whereas even dismissal is within the discretion of the trial court in actions for prospective or declaratory relief, because in those cases relief is always discretionary, id. at 717, “only” stay is within their discretion in actions at law for damages, id. at 719-20); Dalton v. Specter, 511 U.S. 462, 472-74 (1994) (holding that not all statutory claims against an official, there the President, are constitutional claims); Federal Deposit Ins. Co. v. Meyer, 510 U.S. 471 (1994) (holding that federal agencies may not be sued for damages for their constitutional torts, either under Bivens v. Six Unknown Agents, 403 U.S. 388 (1972), id. at 486, or under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1994), id. at 477); Nixon v. United States, 506 U.S. 224, 238 (1993) (reinvigorating the “political questions” doctrine thought to be moribund after Powell v. McCormack, 395 U.S. 486 (1969) and Baker v. Carr, 369 U.S. 186 (1962)); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (stripping Congress of previously presumed power to confer standing to sue on individuals who otherwise would not satisfy the requirements of Article III, id. at 577; holding the Court’s recently elaborated requirements for standing—injury-in-fact, “but-for” causation, and redressability—to be constitutionally required, id. at 560); Will v. Michigan, 491 U.S. 58, 65 (1989) (holding that a state is not a defendant “person” within the meaning of the Civil Rights Act of 1871, 42 U.S.C. § 1983). 7. Cf. Erie R. Co. v. Tompkins, 304 U.S. 64, 77-78 (1938) (holding unconstitutional “the course pursued” by federal courts under the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)). 8. The power of the Court is greater than that of Congress to determine what standards of adjudication are required for a given constitutional claim. See City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding in a challenge to the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. §§ 2000bb et seq., that Congress lacks power under § 5 of the Fourteenth Amendment to place a heavier burden upon a state defendant than the burden the Court has held sufficient in cases challenging failures of the state to grant religious exemptions). Moreover, the Court has more power than Congress to determine the finality of decided cases. See, e.g., Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (holding that Congress may not exercise its substantive commerce powers to reopen federal judgments). The power of the Court is also greater than that of Congress to determine what adjudication a given constitutional claim requires. See National Private Truck Council, Inc. v. Oklahoma Tax The question in hand is rendered even more unreal, notwithstanding the legislation that inspired this Symposium,10 by the fact that Congress seems more interested in expanding than in contracting “jurisdiction”—again, speaking loosely. Congress enlarges the docket of the federal district courts every time it federalizes a crime. Obviously the dockets of (2000) 78 Tex. L. Rev. 1410 both sets of courts, and of the Supreme Court as well, swell whenever Congress enacts yet another new law giving rise to new federal rights. And, interestingly, it is here that the Supreme Court is tracing out new ground for judicial review—in striking down not diminutions, but expansions of federal judicial power. I refer, of course, to the Court’s rediscovery of federalism as a constraint on the federalization of crimes, first seen in the Lopez case11 and extending to this Term’s “rape”12 and “arson”13 cases. And our question seems unreal for yet another, more telling, reason. Because we focus, naturally, on the proprietary category of “federal courts,” we habitually take scant account of the Comm’n, 515 U.S. 582, 592 (1995) (holding that a state court need not adjudicate the state’s violation of the Commerce Clause under the Civil Rights Act of 1971, 42 U.S.C. § 1983, although a federal court would, if the state furnishes an adequate remedy for the constitutional tort “under state law”); cf. Dennis v. Higgins, 489 U.S. 439, 451 (1991) (holding cognizable actions for damages for violations of the dormant Commerce Clause under § 1983). In addition, the Court’s power is greater than that of Congress to determine what remedies the Constitution independently requires for a given violation. See, e.g., McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 31 (1990) (holding that due process requires “meaningful backward-looking relief” in a state-court action for state taxes collected in violation of the Commerce Clause). 9. The connection between judicial and legislative powerlessness is probably most familiarly made by Justice Brandeis in Erie R. Co. v. Tompkins, 304 U.S. 64, 72 (1938), holding that federal courts are without power to displace otherwise applicable state legal rules with other state-like rules available only in federal courts: “The federal courts assumed, in the broad field of ‘general law,’ the power to declare rules of decision which Congress was confessedly without power to enact as statutes.” Id. 10. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles of U.S.C. (Supp. IV 1998)); cf. Felker v. Turpin, 518 U.S. 651, 661- 64 (1996) (sustaining in a death penalty case AEDPA’s preclusion of an appeal from a denial of leave to file a “successive petition” for a writ of habeas corpus; reasoning that the Supreme Court retains direct statutory habeas power). See also Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-546, 3009- 607, 8 U.S.C. § 1252 (Supp. IV 1998) (codified in scattered titles of U.S.C. (Supp. IV 1998)) (precluding judicial review of a decision to deport even a legal resident, if at any time she has been convicted of a felony); cf. Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 491 (1999) (sustaining the constitutionality of IIRIRA’s preclusion of review of an INS decision to deport). 11. United States v. Lopez, 514 U.S. 549, 551, 567 (1995) (holding that Congress lacks power under the Commerce Clause to criminalize the possession of guns near schools). My views on Lopez are in a symposium contribution, Fear and Federalism, 23 OHIO N.U. L. REV. 1295 (1997). 12. United States v. Morrison, 120 S. Ct. 1740 (2000) (holding that Congress lacks sufficient power under either the Commerce Clause or § 5 of the Fourteenth Amendment to criminalize violence against women). 13. Jones v. United States, 120 S.Ct. 1904, 1908 (2000) (unanimously construing the federal arson statute, Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1102, 84 Stat. 952, 18 U.S.C. § 844(1), as not encompassing arson to a single-family dwelling in order to avoid the constitutional question presented by Lopez, supra). state courts. Yet as long as there is access to state courts for enforcement of federally-created rights, much of our concern about legislation denying access to federal courts must inevitably seem overblown. And this suggests, further, that the more interesting question is the one we rarely reach, the question of denials of access to all courts. The further implication of the state courts for analysis is that Article III cannot be our exclusive constitutional referent. We could be asking Article III questions when what is wanted are due process answers. III. Why the Question Is Too Easy: The Standard Model and Its Discontents But even taken seriously, this question of the power of Congress to limit federal jurisdiction seems too easy to occupy us for long today. The classic statements of the position14 still describe the standard model.15 The position is simply that the power of Congress to control access, at least to the federal trial courts16—within the constraints of the Bill of Rights and other extrinsic constitutional limits—is plenary.17 That which (2000) 78 Tex. L. Rev. 1411 Congress hath power to give,18 Congress hath power to take away.19 In theory, whether we like it or not, Congress has the raw power to put the lower federal courts wholly out of business. This would be an imprudent thing to do, but most of us believe that the sheer legislative power is there to do it. The prospect of an apocalyptic shut-down of the lower federal judiciary might be disturbing, but according to the standard model we are not supposed to be disturbed. Under the Supremacy Clause the states have an obligation to try federal cases.20 As Henry Hart memorably concluded 14. See Gunther, supra note 1; Hart, supra note 1. 15. See, e.g., Harrison, supra note 1, at 206 (“the orthodox, or traditional, interpretation”). 16. See supra note 3 and accompanying text. 17. See Hart, supra note 1, at 1363-64 (“Congress seems to have plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court.”). 18. See U.S. CONST. art. III, § 1, (allocating to Congress the power of establishing lower federal courts); id. art. I, § 8, cl. 9 (giving Congress power to establish tribunals inferior to the Supreme Court). 19. Justice Story’s view to the contrary has not prevailed. Story took the position that Article III’s “shall be vested” language imposes a “mandatory” obligation upon Congress to create lower federal courts. See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 328 (1816) (“manifestly designed to be mandatory”); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 588 (Carolina Academic Press 1987) (1833) (same). 20. The states may dismiss federal claims if they would evenhandedly dismiss analogous state-law claims. To avoid the effect of federal supremacy, the grounds for such dismissals must be procedural or otherwise detached from the merits. See Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1, 5 (1950) (holding that states may dismiss federal claims on grounds of forum non conveniens); Douglas v. New York, N.H. & Hartford R.R., 279 U.S. 377, 387- 88 (1929) (holding that the state’s forum non conveniens statute provided the state court with “an otherwise valid excuse” to dismiss a federal claim). But a state may not apply its rules so as to discriminate against those relying on federal law. See Howlett v. Rose, 496 U.S. 356, 372 (1990); Testa v. Katt, 330 U.S. 386, 394 (1947). See generally LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER (1994 and 1998 Supp.) (reviewing and discussing the position); Louise Weinberg, The Federal/State Conflict of Laws: Actual Conflicts, 70 TEXAS L. REV. 1743, 1778-84 (1992) (same). I have raised the question whether even nondiscriminatory procedural rules ought to excuse the states from their Supremacy Clause in his celebrated Dialogue, it is precisely because Congress can do away with the lower federal courts that the state courts are the ultimate guardians of the rule of law in this country.21 Recently theorists reluctant to accept the implications of the standard model have reopened the debate. Also relying on Article III,22 these (2000) 78 Tex. L. Rev. 1412 writers characteristically claim that some feature of the text of Article III requires Congress to vest the national judicial power in some federal court. Professor Sager made the seemingly plausible textualist point that once federal courts do exist, the tenure and salary provisions of Article III require that they go on existing;23 but of course it might be enough simply for Congress to go on paying the salaries.24 Professor Clinton goes much further, calling to mind Joseph Story’s view that all the judicial power must be vested.25 Clinton argues that it is the “shall be vested” obligation to adjudicate federal questions. See Louise Weinberg, The Power of Congress over Courts in Nonfederal Cases, 1995 BYU L. REV. 731, 789 n.189 (1995) [hereinafter Weinberg, The Power of Congress]. For the new exception to these rules, see infra notes 99-123 and accompanying text. 21. See Hart, supra note 1, at 1401 (stating that the state courts are the “primary guarantors” of constitutional rights). 22. Article III of the Constitution of the United States provides: SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. U.S. CONST. art. III. 23. See Sager, supra note 1, at 61. 24. Whether or not in the extreme instance of a total shut-down of preexisting courts even the salaries of Article III judges would have to continue is not clear to me. The point of Article III life tenure is an independent judiciary, and if we do not have a judiciary at all life tenure becomes pointless. Very probably the judges’ reliance on life tenure might bind the country to go on paying them, but if so that would be because of principles of contract, rather than of constitutional law. Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803), (Paterson, J.), which sustains repeal of legislation creating federal circuit courts after judges had been appointed to them, does not shed light on this question. That ruling was based on the Supreme Court Justices’ own continued practice of circuit riding under previous law, and contains no discussion of the tenure provisions of Article III. language of Article III that requires Congress to vest all of the federal judicial power.26 He also relies on originalist arguments and a close study of the scanty Supreme Court jurisprudence in proposing that when Congress makes “Exceptions”27 to the Supreme Court’s appellate jurisdiction, juris-diction over the excepted federal questions must be vested in a lower federal court.28 It is a difficulty for such a conclusion that little in our subsequent history or tradition supports it.29 Until after the Civil War and Reconstruction, Congress permitted the Supreme Court to exercise only a part of its Article III power over federal questions,30 at the same time (2000) 78 Tex. L. Rev. 1413 declining to vest in the lower federal courts a general jurisdiction over cases arising under federal law. The federal trial courts did not have general federal-question jurisdiction until 1875.31 This history is not conclusive, of course, but it weighs heavily against Professor Clinton’s interpretation and in favor of the standard model. Professor Amar also has offered a much discussed contribution to Article III theory. Relying heavily on the Framers’ use of “all” in Article III, Professor Amar argues that jurisdiction must be vested in some federal court over the “Cases” enumerated in Article III, all of which the Consti-tution precedes with the word “all,” but not over the “Controversies,”32 none of which share that feature. Perhaps the Framers did mean something by that distinction.33 But, again, little in our history or tradition supports Professor Amar’s thesis. The first Congress reserved to the states significant exclusive jurisdiction over cases in the “all Cases” category; as 25. See supra note 19. 26. See Clinton, supra note 1, at 753, n.22. 27. The reference is to the “Exceptions and Regulations” Clause of Article III: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2. 28. See Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 COLUM. L. REV. 1515, 1518 (1986). 29. See Meltzer, supra note 1, at 1570, 1586 (also noting the absence of subsequent historical support for Professor Clinton’s view). 30. The chief example is the feature of the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85, which, throughout the 19th century, limited Supreme Court review of state judgments to cases in which the party relying on federal law lost below. This dispensation remained substantially the same until the Judiciary Act of 1916, ch. 448, § 2, 39 Stat. 726, 726-27, which provided for discretionary review of cases going the other way. 31. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470; see also the abortive jurisdictional grant of 1801, Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, repealed by Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132. 32. See Amar, The Two-Tiered Structure, supra note 1, at 1507-08. 33. But see William R. Casto, An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction, 7 CONST. COMMENTARY 89, 91-93 (1990) (arguing that the distinction appears to be without significance and was not made at the Constitutional Convention or in the ratification debates); id. at 90 (noting an alternative view, infra note 36, that to the Framers “Cases” may have been criminal as well as civil, while “Controversies” may have been civil only). we have already recalled, the First Judiciary Act gave no general federal-question jurisdiction to federal trial courts.34 And we recall, too, that this was at a time when the Supreme Court’s appellate jurisdiction over federal questions was sharply curtailed.35 Yet, under Article III, the judicial power of the United States extends to “all Cases” arising under federal law. This history weighs against Professor Amar’s conclusion.36 The standard model remains the working hypothesis.

Both the theorists and critics of the standard model look to Article III as the measure of the power of Congress. This traditional emphasis leads federal-courts theorists to treat the problem of jurisdiction-stripping as one of separation of powers. That may seem an obvious thing to do when we are asking a question about the power of Congress over federal courts. And it lends the question the glamour of constitutional crisis.37 But arguments from the separation of powers have very little to do with the Rehnquist Court’s own war on the power of the lower federal courts, or its war on constitutional and other federal claims in all courts.38 To be sure, little in the Constitution can control the Supreme Court’s zeal for door-closing. It is not often that the Court has declared “the course pursued” by itself as unconstitutional.39 But at the very least what the Court itself is doing should be relevant to the question of Congress’s power to do similar things. It is unrealistic if not misleading to ignore the Supreme Court’s greater potency and energy in the door-closing game. And when Congress merely codifies or even expands upon judicially fashioned curbs on jurisdiction, it becomes somewhat unconvincing to argue that the act of Congress is unconstitutional.

To be sure, minute scrutiny of Article III continues to yield ingenious suggestions.40 Yet, however excellent, such work in the end does not convince us that the standard model is wrong. Perhaps that is because the characteristic emphasis on Article III is problematic; and, in turn, that may be because the focus on “federal courts” that also goes with this territory is problematic too. For purposes of considering the problem of jurisdiction-stripping, as I will explain below,41 “federal courts” is simply an insufficiently rational category.

Increasingly writers are looking at the old question in a pragmatic as well as a theoretical way. There is a greater tendency now to focus on the actual jurisdictional curbs Congress occasionally does attempt in specific classes of cases, rather than on the hypothesis of some improbable total shut-down. Almost always regarding such selective door-closing as impermissibly substantive in intention, particularly where constitutional claims are at stake,42 these writers have combed the whole Constitution for whatever helps it might offer.43 But even these analyses may seem somewhat metaphysical to readers who cannot shake a sturdy inner conviction that Congress must be able to select and shape federal remedies, even federal constitutional remedies.44

More importantly, these pragmatists, like the Article III theorists, tend to say very little about the state courts.45 Yet as long as there is access to state courts for enforcement of federal law, the question with which they are so preoccupied cannot have much bite. The more serious question is whether Congress can deny litigants, in selected cases, access to federal and state courts both. Could Congress close the doors of one set of courts to a federal claim to which the other set of courts is also closed?46 Could Congress, for example, bar federal actions in equity in cases against federal officials—even though, as is widely believed, state courts have no injunctive power in federal officer suits?47 Could Congress make jurisdiction exclusively federal, when federal courts, under prevailing doctrine, would decline it? If the dual-court question is the salient question, it follows that in either or both sets of courts the Due Process Clause of the Fifth Amendment, and not Article III, is the mean-ingful limit on Congress’s jurisdiction-stripping power. The question of legislative power over court access is indeed raised sharply today by the recent legislation on immigration and habeas corpus which has furnished the immediate occasion for this Symposium.48 It would be a mistake, however, to try to derive a general theory from such examples. Judicial review of federal agency action, and federal habeas corpus, are both specialties of federal courts. A state has significant parallel power over post-conviction remedies for its own prisoners, but for federal prisoners, and non-citizens, the cases affected by this legislation are all but exclusively federal. In such cases the category “federal courts” is a more rational category than it can be in the general case.

IV. Why the Category “Federal Courts” Is Not a Wholly Rational Category

The question before us is traditionally framed as a question of Congress’s power to circumscribe the jurisdiction of “federal courts.” An inquiry into the power of Congress over “federal courts” makes up a nice section in a casebook or a treatise on federal courts. It provides a special angle for intensive study of Article III. But the category “federal courts” is not a wholly rational category; and the consequent Article III focus is not a wholly rational focus. I say this because the assumptions on which the category and the focus are based are not dependably rational assumptions.

Writers not unreasonably tend to start with the presumption that Congress has substantive intentions when it acts to curb federal juris-diction. So let us imagine a Congress eager to stifle suits challenging public school prayer. And let us imagine that this Congress enacts a statute which provides that no federal court shall have jurisdiction in any case challenging the constitutionality of a religious exercise under the auspices of a public school. Now let us ask: What must this Congress’s assumptions have been?

The Congress in our hypothetical may have believed that it had no power over the jurisdiction of state courts. This belief is understandable, given our habit of consulting the text of Article III or perhaps the Tribunals Clause49 as sources of legislative power. But in fact Congress has massive substantive powers to effectuate national policy, and any of these could ground statutory limits on jurisdiction in both sets or either set of courts. Just as Congress can confer jurisdiction on “any court of competent jurisdiction,”50 state or federal, in any class of cases falling within its Article I or Fourteenth Amendment powers, Congress can provide that no court, state or federal, shall have jurisdiction to hear any such case. This past Term the Court sustained the constitutionality of just such a provision.51 Such door-closing legislation, being an exercise of delegated powers, is effective in both sets of courts under the Supremacy Clause. Congress could limit existing state-court jurisdiction in myriad other ways. Congress could delete an existing civil cause of action, choosing to rely for enforcement of national policy upon criminal prosecutions, or upon injunction suits by the Attorney General. It could attach a statute of limitation to a cause of action, explicitly making the new period of limitation binding in all courts. Congress could repeal jurisdiction it has previously granted to any court of competent jurisdiction. Congress could make jurisdiction over the subject matter exclusively federal. These sketchy suggestions are hardly exhaustive.52

At least eight other possible assumptions might be attributed to our imaginary Congress, all of which would seem even more doubtful than its assumption of its own powerlessness over state courts. Perhaps our imaginary Congress thought state courts would be more favorable to school prayer than federal; or that litigation challenging school prayer is invariably federal- court litigation; or that state courts are more free to disregard Supreme Court authority than federal; or that there is less chance of Supreme Court review of state-court judgments than of federal. Although any of these things can happen in a given case, there is nothing in the dual court system to support the view that such malfunctions describe the structure. More plausibly, Congress might have identified a “procedural” interest in limiting cases burdening the federal docket. Yet even that explanation of the legislation seems problematic. Why school prayer cases and not other cases even more burdensome to the federal judiciary? Even a procedural interest in federal docket clearing might not furnish a wholly satisfactory basis for door-closing legislation, when the costs to the enforcement of national substantive policies are taken into account. Perhaps Congress was acting in the interest of comity, of a deferential federalism. Congress might very well have thought it best that a matter as “local” as school prayer be left to state courts in the first instance.53 But here, too, the possibility remains that the state court will strike down the act of Congress. In whatever way we try to justify the legislation in our minds, any substantive policy concern of this Congress could only be part, at best, of the motivational mix behind the jurisdictional curb. To be sure, a legislature need not do everything at once. A Congress bent on limiting school prayer litigation might be permitted to confine the new limits, for the time being, to federal courts. We must allow a substantial exception to the point I am making for a prudent hesitancy. But, that acknowledged, we are left with this: We cannot rationally understand jurisdiction-stripping legislation confined to federal courts—when state courts have concurrent power—without qualifying our premise of a legislature motivated by a substantive bias.

#### On the aff, many proposals will center on whether or not the Supreme Court should have the power to invalidate other branches. Other proposals tackle questions of procedural fairness, partisanship, and political polarization.

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Harvard Law Review, “Chapter One: Confusion and Clarity in the Case for Supreme Court Reform,” HLR, Volume 137, Issue 6, April 2024, https://harvardlawreview.org/print/vol-137/confusion-and-clarity-in-the-case-for-supreme-court-reform/

A. Formal Reasons for Reform

Reformers identify several formal reasons to reform the Court — that is, abstract reasons that the Court’s structure and role in our system of government could or should change.19 Disempowerment arguments take the position that the Constitution permits or even requires reducing the Court’s power to invalidate actions of the other branches of government. Procedural-fairness arguments take the position that the way that Justices are currently selected is too partisan or arbitrary to be consistent with justice. Political-power arguments take the position that it is acceptable for the Court to be directly contested and controlled by political parties.

This section surveys these arguments and the reasons given for them. It then describes counterarguments to those potential reforms. In general, formal arguments for reforming the Court are well supported, but so are counterarguments against it. The few reforms that have consensus support face other hurdles, including the need for a constitutional amendment or skepticism from progressives. In total, this debate does not clearly resolve the question of whether or how the Court should be reformed. It shows that favoring reform is reasonable, but so is opposing it — and that the proposals that are most exciting to the pro-reform camp also meet the strongest objections from the anti-reform camp.

1. Disempowerment. — Since the 1950s,20 the Supreme Court has claimed to be and has been treated as the “ultimate expositor of the Constitution.”21 This practice, which treats the Court as having the final word on constitutional meaning, is called judicial supremacy. It is an expansion of the Court’s judicial review power to interpret the Constitution,22 which it first asserted in the 1803 case Marbury v. Madison.23 Today, judicial supremacy empowers the Court to undermine or entirely invalidate legislative and agency action as inconsistent with the Constitution.24

Because judicial supremacy gives the Court a trump card over the popularly elected legislative and executive branches, reformers object that it is antidemocratic25 and likely to slow the pace of change.26 In order to address these problems, reformers propose a variety of modifications to the Court’s power of judicial review.27 These include exempting certain federal statutes from judicial review28 and giving the legislative or executive branches greater voice in debating the limits of constitutional meaning.29

Debate on disempowering reforms raises two questions: whether disempowering the Court would be constitutional and whether it would be a good idea. Many scholars have weighed in on the constitutional debate, applying legal reasoning tools to decide whether and how the Court’s power could be taken away without amending the Constitution. The debate around so-called jurisdiction-stripping proposals “defies brief summary because . . . [it] encompasses diverse elements.”30 The methods used to resolve the constitutional question include original intent, textual meaning, and historical practice.

There are varying perspectives on the intent of the Constitution’s drafters. Professor Larry Kramer concludes that the power of “judicial review was never imagined.”31 Professors Saikrishna Prakash and John Yoo disagree, concluding that “there is a wealth of evidence that the Founders believed that the courts could exercise some form of judicial review over federal statutes.”32

Scholars also differ on whether the text of the Constitution clearly empowers the Court to engage in judicial review. Professor Keith Whittington writes: “It is a bit of an embarrassment that [judicial review,] such a fundamental aspect of American constitutionalism[,] was not explicitly incorporated into the [Constitution’s] text[] . . . .”33 Prakash and Yoo differ: “A careful examination shows that the constitutional text and structure allow — indeed require — the federal and state courts to refuse to enforce laws that violate the Constitution.”34

Finally, there is disagreement on whether the Court exercised a judicial review power in the nation’s early years. Professor Michael Klarman notes that, after Marbury, “[t]he Court[] . . . fail[ed] to invalidate a single state law until 1810 and a second federal law . . . until 1857. Thus, the judicial review power . . . mattered little until the Court had acquired sufficient political clout.”35 Whittington disagrees, writing that accounts like Klarman’s are “[not] true. The power of judicial review developed gradually during the first half of the nineteenth century . . . through the back-and-forth dialogue between the branches over time.”36

Regardless of whether taking away the power of judicial review would be constitutional, scholars also differ on whether judicial review is a good idea in the first place. As long as the other branches function properly,37 Professor Jeremy Waldron thinks that “judicial review is inappropriate for reasonably democratic societies . . . . Ordinary legislative procedures [are enough, and] . . . an additional layer of final review by courts adds little . . . except . . . disenfranchisement and a legalistic obfuscation of the moral issues at stake.”38 Professor Richard Fallon disagrees: as long as some assumptions are true, “judicial review is reasonably defensible within the terms of liberal political theory.”39

Read in its conflicting entirety, the evidence on whether the Court’s current power of judicial review could or should be altered does not resolve the question beyond doubt in either direction. One could reasonably conclude, supported directly or indirectly by robust scholarship, either that jurisdiction-stripping would be a constitutionally permissible good idea or that it would be an unconstitutional bad idea.

2. Procedural Reform. — Another reason for reforming the Court is that the process for selecting Justices causes the Court’s decisions to be influenced by the wrong factors. A few trends underlie this argument. Regarding the selection process, a potential nominee’s partisan affiliation plays an important role in judicial selection in both the Supreme Court and lower federal courts.40 Politicians now treat the Court as a prize to be contested, which they do by engaging in gamesmanship,41 appointing younger judges to maximize their life tenure,42 and framing nomination hearings as political contests.43 Perhaps as a consequence of the politicization of the Court, the Justices often divide according to the party of the President who appointed them when deciding cases.44

To address these problems, scholars and politicians have advanced a variety of proposals. One popular idea is to implement staggered eighteen-year terms for Justices, which would regulate the number of Supreme Court Justices that each President is able to appoint.45 Another is to create a nonpartisan committee to select Supreme Court Justices46 or, somewhat relatedly, to have five Republican- and five Democrat-appointed Justices appoint five visiting Justices annually.47 One more idea is to divide the Court’s business among panels of Justices or, relatedly, to compose the Court of a rotating set of judges.48 What all of these proposed reforms have in common is that they seek to stan­dardize the “ideological makeup of the Supreme Court” in one way or another49 and as a result reduce the link between partisan politics and judicial interpretation.

The potential benefits of procedural reforms are clear. However, procedural reforms face two serious hurdles: they may be impossible without amending the Constitution, and they are not favored by progressive advocates of reform. The Constitution may prohibit any change to the Court’s status as an “apex juridical body that operates in some meaningful sense as a single court,”50 that shortens Justices’ terms of service,51 or that alters the process by which Justices are selected.52 Amending the Constitution would moot the issue, but it would also require immense political will. Further complicating matters is the fact that some progressives, who are enthusiastic supporters of Court reform more broadly,53 might not be mobilized by reforms that prioritize a Court whose membership simply splits the difference between conservative and liberal.54

A separate category of proposals is ethical reforms, which are also procedural in the sense that they seek to regulate the factors that influence the Court’s decisionmaking. Reporters have described close relationships between Justices or their family members and parties who sometimes have direct or indirect interests in cases before the Court.55 Ethical reforms target the rules governing Justices, including more rigorous disclosure obligations for Justices, external oversight of Justices’ finances, and more stringent recusal rules.56 These efforts are in their early stages and may yet succeed, but they have already been met by arguments that the judiciary should be free to regulate itself.57 Further, because they regulate only the way the Court conducts its business, they are unlikely to satisfy those seeking a larger-impact reform.

3. Political Power. — Lastly, there is a camp of arguments for reform that treat the Court through a political lens, as just another source of law that should be contested, manipulated, and controlled according to the same scruples (or lack thereof) as are outcomes in Congress or the White House.58 Proponents of these ideas reject that the Court’s business can be removed from politics.59 They would alter the Court to preserve their own political interests because politics are already governing the Court — and, presumably, permit their opponents to do the same.60 This theory of Court reform justifies proposals such as packing the Court61 or obstructing judicial nominations.62 Political-power justifications have something of a tit-for-tat quality: one side played politics with the Court, so now the other side will do the same. Progressives point to Senator McConnell’s chicanery in the failed confirmation of then–Chief Judge Merrick Garland63 and the successful confirmation of Justice Barrett64 as an example that Republicans are playing this game; conservatives point to past statements by Democratic officials in favor of similar strategies65 as evidence that the thinking goes both ways.

The political-power justification for reform is emotionally resonant, especially with those who feel wronged by the Court’s change in membership over the last decade and a half. But it is reasonable to worry about a race to the bottom.66 For this reason, political-power arguments for reform are volatile: they invite one’s opponents to engage in the same behavior should they lose power,67 and they remove the Court as a safeguard to uphold the rule of law when a majority seeks to ignore it.68 Because the future allocation of political power is uncertain, even people who find themselves in the majority now could be wary of normalizing that behavior in the future.

#### Here’s a great piece of evidence that precisely captures the above rationale for debating court reform.

Epps & Sitaraman 21 Daniel Epps is Associate Professor of Law, Washington University in St. Louis. Ganesh Sitaraman is Professor of Law and Director of the Program in Law and Government, Vanderbilt Law School. Supreme Court Reform and American Democracy, 3-8, Yale Journal Forum, https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2221&context=faculty-publications

Fundamental reforms to the Supreme Court were once the exclusive domain of scholars of constitutional design and theory. But in recent months, they have become a major part of policy debates as many point to a legitimacy crisis engulfing the Court. Underscoring the shift, both Joe Biden and Kamala Harris, as candidates for president and vice president in 2020, would not say whether Democrats would expand the size of the Supreme Court.1 Then-candidate Biden announced instead that, if elected, he would create a bipartisan commission that would provide “recommendations as to how to reform the court system.”2 Such developments would have been unimaginable just a few years ago, as “packing” the Supreme Court was long seen as a third rail in American politics.3 Clearly, the Overton Window has shifted—dramatically.

To be sure, major reform remains unlikely in the near term. Although the Democrats now control both the Presidency and Congress, the Senate is closely divided, likely dashing liberals’ hopes for Court expansion and other bold initiatives.5 Nonetheless, the dramatic change in the plausibility of Supreme Court reform is striking. What changed? The most immediate answer turns on politics. Republicans refused in 2016 to give a hearing to President Obama’s nominee, Judge Merrick Garland, on the grounds that it was an election year. Democrats were outraged at this break from norms and were apoplectic over Republicans’ bare-knuckle tactics in confirming three of President Trump’s appointees to the Court—and, in particular, over their hypocrisy in confirming then-Judge Amy Coney Barrett mere days before the presidential election. Facing a solid 6-3 conservative majority on the Court—and thus the possibility of their legislative, regulatory, and policy preferences being blocked for a generation—progressives and Democrats increasingly question the legitimacy of the Court and call for its reform.6 Republicans, for their part, say Democrats are the ones threatening the Court’s legitimacy by calling for Court expansion and other reforms simply because they are unhappy that Republicans have the advantage on the Court.7

Whatever one makes of this immediate crisis, we think it is best understood as the current manifestation of a deeper problem. In 2019, we published How to Save the Supreme Court8 in this journal, identifying the legitimacy challenge facing the Court and tracing it to a set of structural flaws that are putting increasing strain on the Court and its role in our democracy. The problem, we argued, lies in the interaction between growing political polarization in the parties and constitutional practices and traditions that are hard to justify. Lifetime appointments raise the stakes of individual Court nominations and turn essentially random occurrences like the death of a Justice into watershed events that can reshape constitutional law for a generation. Confirmation battles have, as a result, become death matches, with each side seeking to politicize and bury the other’s picks. Moreover, the Court faces a growing democracy deficit: the Electoral College and the role of the Senate in confirming would-be Justices mean that a majority of the Justices on the Court were nominated by presidents who initially lost the popular vote9 and four were confirmed by a narrow Senate majority that represents a minority of the U.S. population.10 In our earlier piece, we outlined two different ways to redesign the Supreme Court—what we called the Balanced Bench and the Lottery Court.11 Our aim was to offer structural proposals that would address what we identified as the key legitimacy problems with the Court while being practically capable of implementation via ordinary statute.

In the year-plus since our piece went to press, the “looming threat” to the Court’s legitimacy that we described has grown ever more apparent.12 And with it has grown interest in structural change to the Supreme Court.13 At the same time, commentators on both the left and the right have criticized our proposals. Some say we err by politicizing the Court too much;14 others accuse us of trying to depoliticize a fundamentally political institution.15 Some think that our changes are radical and unnecessary; others say that they do not go far enough to disempower or transform the Court.16

In this Essay, we continue the conversation about Supreme Court reform by engaging with critics. Our goal, however, is not to defend our specific proposals, which we are content to let stand on their own merits. Nor will we seek to persuade readers of our diagnosis of the particulars of the legitimacy crisis facing the Court. Although we think that crisis has only worsened since we published our first piece, one’s assessment of the situation may be difficult to disentangle from how one feels about the current composition of the Court.

Instead, we will start by trying to identify common ground with our critics in order to justify our general approach to structural reform of the Supreme Court. The current crisis of the Supreme Court is, we believe, inextricably linked to what is perhaps the central question in American constitutional law and theory: what is the role of the Supreme Court in a democracy? For generations, this question has occupied constitutional scholars, who have debated why and when it is legitimate for unelected judges to overturn the will of majorities. Much of constitutional theory has amounted to an effort to find a principled way to solve this “countermajoritarian difficulty” and reconcile judicial review and democracy.17

Today, there are almost as many constitutional theories as there are constitutional scholars. And there are many different attitudes among theorists toward judicial review. Some seek to expand judicial review beyond its present domain,18 while others would abolish it entirely,19 with many other views lying in between those extremes. What unites most constitutional theories today, however, is at least some lip service to the primacy of democracy. While a few theorists disclaim any particular interest in the will of the people, most try to anchor their theories in some account of how the Court’s role proceeds from American democracy. Put slightly differently, most scholars thinking about the role of the Court recognize that the Court’s role must ultimately be constrained by, and consistent with, democracy—even if they differ wildly in their prescriptions for how to achieve that result.

#### Here are further reasons for reform and a glimpse into relevant controversies.

HLR 24 – Harvard Law Review.

Harvard Law Review, “Chapter One: Confusion and Clarity in the Case for Supreme Court Reform,” HLR, Volume 137, Issue 6, April 2024, https://harvardlawreview.org/print/vol-137/confusion-and-clarity-in-the-case-for-supreme-court-reform/

C. Substantive Fear of the Court Is a Valid Reason to Reform It

The previous section argued that our current moment of reformism exists because a significant portion of the population simply believes that the Court is reaching results that are dangerously wrong. At first glance, the idea that the Court should be disciplined for nothing more than offending some people’s consciences seems to lack rigor and neutrality, an inference that may be particularly appealing when substantive objections are contrasted with neutral, formalist justifications for reform. But society and legal academia alike have long recognized that there are external, justice-based limits on what the Court may do. There exists a basic principle that the Court must receive a minimum amount of buy-in from citizens in order to validly impose its law on them, and there exists another that some decisions can be wrong not because of improper legal reasoning but because of despicable consequences. The first principle is called “moral legitimacy” in legal and political philosophy, and the second describes what legal scholars call the “anticanon.”

1. Moral Legitimacy. — Moral legitimacy explains what one can do when the Court transgresses basic moral requirements. It starts by asking if the Court has the power to alter people’s moral obligations — whether, and why, one really ought to follow the law announced by the Court, even if she disagrees with it.117 The difference between a Court with moral legitimacy and one without it is whether one follows the law because she feels she ought to or because she is coerced to. For example, someone residing in the United States must follow the law announced by the government,118 but so must someone living under a totalitarian dictator. What sets the United States apart is that it seeks to secure compliance with its laws not through the threat of state violence but by a lawmaking process that earns the buy-in of those it governs.119 (The story of its founding is, in part, the story of getting out from under the thumb of a strange and alien ruler.120) When the Court faithfully gives effect to laws that are the result of public deliberation, even people who are disadvantaged by its interpretations can recognize their moral persuasiveness.121

The concept of moral legitimacy can support compliance with the Court’s decisions, but only if the Court is, in fact, morally legitimate. Scholars generally assume that it is,122 because, they reason, “decent human lives would be impossible without government and law,” so we have a “moral duty to support any . . . legal regime” that is “reasonably just.”123 But for this to be true, the government must provide “rights of democratic participation,” “fair[] . . . application” of laws, and, crucially, a “set of institutions and rights guarantees [that is] reasonably just.”124 Those are real limits, and if the Court is failing to meet them, people can reasonably call on it to change. In a moment when the Court’s decisions are opposed with language of moral outrage125 and decried for eroding basic rights,126 such objections can be conceptualized as claims that the Court has failed to provide the minimal justice necessary to receive the moral respect of its citizens.

2. The Anticanon. — Another way of describing the collective alarm that precipitates reformism is through the anticanon. The anticanon refers to a select set of cases that were “wrong the day [they were] decided.”127 “[A]ll legitimate constitutional decisions must be prepared to”128 explain how they are unlike the anticanon cases. The anticanon cases are regarded as fundamentally wrong, despite the fact that they contained plausibly defensible legal reasoning,129 because they violated ethical commitments that are essential to our national identity.130

The anticanonical cases — which denied citizenship to Black people,131 affirmed the constitutionality of Jim Crow segregation,132 invalidated a state’s attempt to protect its workers from exploitation,133 and permitted the internment of Japanese Americans under the President’s executive power134 — show that the Court can issue decisions whose rejection is essential to our nation’s constitutional identity.135 The wrongness of the anticanon has been affirmed and invoked by judges and politicians across the political spectrum.136 People have rebuked those cases despite them being plausible as matters of legal interpretation and issued by the highest Court in the land, endowed with final authority on questions of constitutional meaning.137 Therefore, it is possible for the Court to do something that, in time,138 will come to stand for everything our nation rejects.

In this way, the current crisis of faith in the Court could come from a particular kind of duty to ethical commitments that support our constitutional order. Opposition to the Court’s recent rulings is far from unanimous. Many have celebrated Dobbs, for example.139 But opposition to each case in the anticanon was also far from unanimous.140 Perhaps the current substantive outcry against the Court should receive the same admiration as would a historical attempt to thwart the Court that decided Plessy. Or perhaps not. Either way, the relevant question is whether what the Court is doing — for example, to women’s bodily autonomy141 — is fundamentally wrong as a matter of substance.

#### There’s a rich history underlying court reform. Learning about this history is essential to understanding how we got to where we are today.

HLR 24 – Harvard Law Review.

Harvard Law Review, “Chapter One: Confusion and Clarity in the Case for Supreme Court Reform,” HLR, Volume 137, Issue 6, April 2024, https://harvardlawreview.org/print/vol-137/confusion-and-clarity-in-the-case-for-supreme-court-reform/

Yet there is another explanation for the current excitement about reform. In this moment, and in other notable moments in the last century, calls for reform resound powerfully because the Court is at the center of deep substantive disagreements about the future of American life. Using the examples of President Franklin D. Roosevelt’s court packing plan and Southern politicians’ attempt in the Southern Manifesto69 to reject the Court’s ruling in Brown v. Board of Education,70 this section argues that moments of Supreme Court reformism arise when a large part of the country perceives a crisis between its deeply held values and the Court’s course of action. It then traces the multiple stories that gave rise to the current moment of interest in Supreme Court reform. It concludes that the unstated context for today’s Court reformism is the fear that the Court is causing grave and irreversible harm.

1. Twentieth-Century Reformism. — The paradigmatic71 attempt to reform the Supreme Court occurred in the late 1930s, when President Roosevelt proposed a bill that would have added six new seats to the Court.72 The basic problem facing President Roosevelt was this: he was elected by an enormous share of the country and controlled both chambers of Congress,73 yet the Supreme Court repeatedly invoked the Constitution to constrain his implementation of landmark planks of his platform.74 President Roosevelt’s court packing proposal never came to pass, perhaps in part because its novelty and perceived radicalism75 made it politically unwise,76 and in part because the Court, when faced with overwhelming political threats to its structure, reached outcomes that released enough pressure to avoid structural change.77

The proposal’s ultimate failure is less relevant to understanding our current moment than is the social and political context in which it arose. A few points are worth emphasizing about President Roosevelt and the New Deal era. At that time, the nation was confronting the perceived excesses of the Gilded Age and the vast disparities in wealth and income that arose from the monopolies, automation, and labor-force transformation of the Industrial Revolution.78 The United States was emerging from the Great Depression, and many Americans were struggling financially.79 The late-1930s policies that President Roosevelt pursued were part of a second phase of the New Deal that moved from immediate, experimental attempts at relief to more pragmatic, less experimental reform and regulation programs.80

Public opinion of Supreme Court reform was directly related to whether a person favored the second-phase New Deal programs.81 Professor Alex Badas, using contemporary methods to analyze 1937 survey data,82 finds that “individuals who had high support for New Deal policies were more likely to support . . . [Supreme] Court-packing.”83 Examining the relationship of results from the same 1937 survey84 to trends in the media, judicial decisions, and presidential speech,85 Professor Gregory Caldeira finds that public support for the Supreme Court–packing plan diminished after (1) the Court ruled in favor of the President’s agenda in NLRB v. Jones & Laughlin Steel Corp.86 and (2) Justice Van Devanter, the “intellectual leader of the Supreme Court’s conservatives”87 and a staunch opponent of the New Deal agenda,88 retired.89 As a result, he concludes that public opposition to the Court in the New Deal era was driven in large part by the Court’s blocking of policies by the legislative and executive branches that were popular with the public — and that public support began to rebound once the Court “retreat[ed]” on those issues.90

All told, the New Deal era is one prominent example of rare public interest in Court reform, which arose out of a sense that the Court was getting things wrong in a moment where the stakes were especially high. Yet it is not the only such moment. In 1956, nineteen senators and seventy-seven congresspeople signed the Southern Manifesto.91 The Manifesto declared that Brown v. Board of Education represented the Supreme Court “substitut[ing] naked power for established law,”92 and it pledged to “use all lawful means to bring about a reversal of [Brown] . . . and to prevent the use of force in its implementation.”93

Although the gesture at “all lawful means” was the closest the document came to a concrete proposal for Court reform, it nonetheless evoked two pro-reform ideas. First, “all lawful means” could reasonably be interpreted to include the kinds of pressure, including proposals for structural change, that President Roosevelt had mustered two decades prior in order to change the Court’s direction. Second, the Manifesto’s stated commitment to preventing the forceful implementation of the Court’s ruling could be restated as an objection to the Court’s exercise of jurisdiction over the states94 — the vertical separation of powers analogue to current proposals that would adjust the horizontal separation of powers and prevent the Court from interfering with federal legislation.95 And in the Manifesto’s aftermath, proposals for Supreme Court reform abounded,96 many of which paralleled those in currency today.97

As one author writing shortly after the Southern Manifesto’s publication observed, there was a certain “irony that liberals and conservatives . . . adopted views completely the reverse of those each held in the constitutional crisis of the 1930’s.”98 Unlike Roosevelt-era Supreme Court reformers, who objected to the Court’s hampering of the national will for greater federal government involvement in the recovery from the Depression,99 the Southern Manifesto signatories objected to the Court’s enforcement of national trends against the racist habits of their region.100 Their movement was abhorrent. But the fact remains that both moments of reformism arose from deep substantive disagreement with the policies being enacted by the Court.

### AT: Why Not Just Supreme Court?

#### Allowing the aff to modify any aspects of the federal judiciary, not *just* the Supreme Court, is likely key to meaningfully reforming the court system, because most of the federal cases end up in the lower courts. For example, most jurisdiction stripping affs wouldn’t make sense if the aff can ONLY modify the power of review at the Supreme Court level.

Alicia Bannon 20 Director, Judiciary Program, Democracy @ Brennan Center for Justice, Court Reform Gets New Attention, 12-30, https://www.brennancenter.org/our-work/research-reports/court-reform-gets-new-attention

The vast majority of federal cases end in lower courts, and many lawsuits involving the Trump admin­is­tra­tion have shown that district and circuit courts can shape national policy. How do these courts fit into a reform agenda?

There’s a lot to be concerned about on the lower courts. Pres­id­ent Trump has left a huge conser­vat­ive imprint on the judi­ciary. Civil rights lawyers and public defenders are virtu­ally absent from the bench right now. There’s also a stark lack of demo­graphic diversity. Nearly three-quar­ters of federal judges are white, and more than two-thirds are male.

### Court Reform k2 Financial Regs

#### Court reform is needed to prevent constant strike down of progressive economic regulations.

Mathews 18 – Senior correspondent, Vox

Dylan Matthews, “Court-packing, Democrats’ nuclear option for the Supreme Court, explained,” Vox, October 5, 2018, https://www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court

There is nothing in the Constitution mandating that the Supreme Court have nine members, and a simple act of Congress could increase that number to 11, or 15, or even more. That effectively creates a way for a political party in control of the House, Senate, and presidency to add a large number of ideologically sympathetic justices to the Court, all at once.

To many leftists and left-liberals, such drastic action is needed if any progressive legislation in the future is to survive. The concerns in question have less to do with hot-button social issues like abortion and LGBT rights and more to do with the constitutionality of economic regulation and redistributive programs. Just this past Wednesday, the Supreme Court effectively gutted public sector unions under the guise of the First Amendment. In 2012, there were four votes on the Supreme Court (including Anthony Kennedy) for striking down the Affordable Care Act in full. And there’s an emerging movement of judicial conservatives, championed prominently by Donald Trump’s appellate appointee Don Willett, which wants the courts to become much more aggressive in blocking economic regulation.

If that kind of judicial conservatism comes to dominate the Supreme Court, then even winning back the White House and Congress won’t be enough for programs like a $15 minimum wage, or Medicare-for-all, or a free college plan, to be passed and secured. The Supreme Court would stand ready to rule them unconstitutional nearly as soon as they are passed. In such a scenario, court-packing starts to look like a reasonable defensive measure.

The prospect of a Court slapping down progressive economic measures brings to mind the last time court-packing was seriously considered. In 1937, Franklin Roosevelt was facing off with a hostile Supreme Court that routinely ruled aspects of the New Deal unconstitutional on the same grounds. During that era, the Court interpreted the due process clauses of the Fifth and 14th Amendments as sharply limiting economic regulation and ruling out things like federal bans on child labor, minimum wage laws, and legislation limiting work weeks to 60 (!) hours.

#### And, court reform is urgently needed to prevent unlocking a far-right agenda that risks unraveling the modern administrative state and a host of worker protections, consumer safeguards, and financial regulations.

Ombres 24 – Senior Director for Courts and Legal Policy at CAP.

Devon Ombres, “The Supreme Court’s Assault on Government Could Make the Far-Right’s Dreams Come True,” Center for American Progress, 02-15-2024, https://www.americanprogress.org/article/the-supreme-courts-assault-on-government-could-make-the-far-rights-dreams-come-true/

After two terms in which a radical majority on the Supreme Court has clawed back long-cherished rights, precedents, and laws, the court has now set its sights on grabbing power from voters and gutting the ability of the government to serve American families. It is hearing a series of cases that, individually, would undermine core functions and operations of the federal government and, together, would incapacitate governance. Ultimately, this would thwart the will of voters by grabbing power away from the elected branches of government and instead resting them with unelected judges with lifetime tenure. The outcome of these cases could potentially allow judges to substitute their own political and policy preferences for those of Congress; disempower career civil servants, who are experts in their fields; and hamper the president’s ability to implement their agenda. Effective governance has delivered bedrock promises—air free of smog; water free of contamination; a safe and reliable banking system; and even a 40-hour workweek. All could be at risk.

This report paints a picture of how the cases would interact to undermine basic benefits and protections for Americans:

Securities Exchange Commission (SEC) v. Jarkesy could make it harder to enforce laws and to allow administrative law judges (ALJs) to hear cases in which monetary penalties can be imposed. ALJs perform a critical function as civil courts can take years to penalize lawbreakers. The court is also considering eliminating their independence from political removal.

Consumer Financial Protection Bureau (CFPB) v. Community Financial Services Association (CFSA) challenges the funding structure for the CFPB establish by Congress, which mirrors that used for many decades by other banking regulators. A bad ruling in this case would imperil the entire system designed to prevent a financial crisis and predation on consumers by banks and financial institutions, irrevocably harming regulators that ensure banks are safe and sound.

Loper Bright v. Raimondo and Relentless v. Department of Commerce (Loper/Relentless) could overturn a 40-year-old precedent by which Congress has enacted laws and agencies have functioned. It will allow unelected, life-tenured judges to impose their policy preferences over the career civil servants who act at the directive of Congress and the president.

Corner Post v. Board of Governors of the Federal Reserve (Federal Reserve) could allow for unceasing litigation and infinite attempts for monied interests to challenge regulations, no matter when they were created, that lower costs for consumers, protect them from bad actors, and provide steadfast guidance that keep corporations in line.

These cases are the culmination of a decadeslong effort by billionaires and right-wing interests to roll back bedrock worker protections; consumer safeguards against financial predators; public health and environmental protections; and much more.1 In full, these cases could pave the way for advancing the far-right agenda set forth in the Heritage Foundation’s “Project 2025 Mandate for Leadership” that will also decimate the federal workforce that acts a bulwark against bad actors.2 In combination, these cases and “Project 2025” set the stage for entrenching a corrupt corporatocracy that will drive government decision-making with no interest in protecting or serving American workers and families.

### Court Reform k2 Civil Rights

#### Reforming the Supreme Court is the greatest Civil Rights issue of our day.

Gans 23 – Director of the Human Rights, Civil Rights, and Citizenship Program at the CAC. J.D. from Yale Law School.

David H. Gans, “BLOG: How Do We Fix an Ailing Court? Lessons From Reconstruction,” Constitutional Accountability Center, 01-23-2023, https://www.theusconstitution.org/blog/blog-how-do-we-fix-an-ailing-court-lessons-from-reconstruction/

None of this will be easy, of course. But reforming the Supreme Court is perhaps the greatest civil rights issue of the day. If we do nothing, the conservative supermajority will likely continue to strip away bedrock rights and gut landmark statutes passed to make our nation more free, equal, and just. Progressives must convince Americans and their elected representatives that the Supreme Court’s conservative majority is dead wrong about the Constitution and that changes are necessary to restore the Court’s ability to serve as an impartial arbiter willing to respect the whole Constitution’s safeguards and promises.

When the Supreme Court abandons its obligation to respect our whole Constitution’s promises of freedom, equality, and democracy—as the Roberts Court has repeatedly done—Congress need not stand idly by. The Constitution gives Congress broad powers to reform the federal judiciary and ensure that the Supreme Court upholds our fundamental constitutional ideals. Reconstruction, a period in which Congress repeatedly exercised these powers, provides a model for court reform today.

### Court Reform k2 Climate

#### Court reform is a necessary first step for confronting climate change. Absent reform, the Supreme Court will continue to hamstring the federal government’s ability to tackle the climate crisis. Action now is key.

Lieu and Young 23 – Representative from California’s 36th District; California Environmental Voters political and organizing director.

Ted Lieu and Mike Young, “Reform the Supreme Court to advance environmental progress,” The Hill, 09-14-2023, https://thehill.com/opinion/congress-blog/4204984-reform-the-supreme-court-to-advance-environmental-progress/

Embroiled in controversy and a crisis of ethics, the United States Supreme Court continues to hand down decisions in direct opposition to precedent, the Constitution, and public opinion. The court has taken a MAGA right turn because of extremists’ concerted effort to transform it into their political weapon. What was once intended to be an apolitical body of reason has now become an arm of partisan extremism. The overturning of affirmative action and abortion rights are just the most glaring aspects of their agenda to thwart decades of progress and precedent. Something that gets less attention — but is no less important — is the court’s march to restrict action on the climate crisis.

Over the last two years, this court has handed down major decisions attacking our ability to protect our air and water. The court’s anti-environmental agenda could not have come at a worse time with unprecedented wildfires in Maui, heat domes across the U.S., and oceans reaching their hottest temperatures in recorded history. And now, the court is considering hamstringing the government’s ability to take action on the climate crisis by overturning deference to federal agencies in Loper Bright Enterprises v Raimondo. This legal precedent, called the Chevron doctrine, instructs the court to defer to federal agencies who have scientific and policy expertise, like the Environmental Protection Agency (EPA), when considering a statute that agency administers.

Throwing out four decades of legal precedent would be corporate polluters’ greenlight to, with a flurry of litigation, delay or defeat federal agencies’ actions to fight climate change. Not only would overturning Chevronlimit agencies’ ability to protect the environment, individuals would be forced to sue for every infraction on their rights because agencies would not be required to protect them in the first place.

This is of the right-wing’s design. For decades, the corporate-polluter funded Federalist Society has worked to stack the judiciary with anti-government and anti-environmental judges. Senate Republicans have played along, distorting and delegitimizing the judicial nomination process, and ultimately opening the floodgates for judicial extremism by enabling President Trump to fill one-third of the Court.

Meanwhile, right-wing billionaires have been taking advantage of the court’s lack of public accountability, providing justices with luxury trips and gifts to influence their decisions away from the public eye. Justice Clarence Thomas shamefully accepted lavish gifts from billionaires with business in front of the court, failed to disclose the gifts, and violated federal law by failing to disclose private jet travel — all while being used for tax breaks. Justice Samuel Alito’s wife leased land to an oil and gas firm while he joined majority opinions diluting the EPA’s authority. Without a code of ethics, the judiciary is inviting more corruption.

What can be done to hold the Court accountable? People from across the country are uniting to support the Supreme Court Ethics Act, which would institute a code of conduct for Supreme Court justices. Members of Congress have requested the Department of Justice to open an investigation into Justice Thomas’ alleged staggering violations of the Ethics in Government Act. Reps. Ro Khanna (D-Calif.) and Don Beyer (D-Va.) have introduced legislation to place term limits on justices. And bicameral legislation, the Judiciary Act, would add four more seats to undo the MAGA hijacking of our nation’s highest court. Organizations like California Environmental Voters are working to restore the court’s balance and protect the planet we leave to future generations. If we don’t act now, corporate polluters will continue to use this court to strip our rights away and eventually expand the court with their own choices.

The American people need to be able to trust that the court works for them — not partisan special interests or corporate polluters. We can’t stand by while the court threatens to upend decades of precedent with cases like Loper Bright. Future generations will want to know what we did in this moment to fight back and protect our environment. Together we can create a legacy that we are proud to share.

## Definitions

### Taxonomies

#### We certainly should allow changes to composition and power of the court.

Vladeck 24 – Law Professor, UT Austin

Steve Vladeck, A Taxonomy for Court Reform, 15 April 2024, https://stevevladeck.substack.com/p/76-a-taxonomy-for-court-reform

The One First “Long Read”: How to Think About Court Reform

Whatever else might be said about last week’s news that both Senator Schumer and Senator McConnell have introduced (very different) legislation that purports to address the problem of litigants seeking nationwide relief from outlier district judges, it seems like an unalloyed good thing that the legislature is once again thinking about the courts. There’s also been some grumbling behind the scenes about Supreme Court-specific reforms. Together, these developments provide a good excuse to think a bit more holistically about the various calls for reforming the Supreme Court, specifically—including the different types of reforms that are being discussed.

One of the points that, to my mind, has been missing thus far from Supreme Court reform conversations is a genuine effort to distinguish between different classes of reforms. Lots of individual ideas are getting bandied about (including by me), but my goal today is to try to step back and look at the reform conversation more comprehensively—to offer a way in which we might sort all possible reforms into different categories based upon the effects that they would produce and the political and/or legal pushback that they would (likely) provoke. Reasonable minds are surely going to differ about what (if anything) Congress can and should do. My point in this post is that we ought to at least be nuanced in differentiating among the possibilities, both in how we describe them and in how we think about the low and high politics surrounding them. Indeed, with such nuance underfoot, my own view is that it becomes clear why Congress can and should gravitate toward one specific set of proposals.

The Supreme Court, as pictured from the Capitol Dome

Category I: Composition-Changing Reforms

Perhaps the most aggressive set of reform proposals involves reforms geared toward changing the current composition of the Court—most typically by “expanding” the Court to 13 justices through a statute that would add four new seats to the bench. Whether justified as recalibrating the Court’s size to the number of circuits (something Congress did from 1789 to 1801 and 1802 to 1866); or, more transparently, as retaliation for the political machinations of the 2016–2020 era; or, most brazenly, as a way to arrest the Court’s shrinking caseload, Court expansion tends to be at the top of a lot of progressive reformers’ wish list.

Changing the size of the Court is something that is clearly within Congress’s constitutional authority (indeed, it’s done it seven times after initially creating a six-justice bench in 1789). But these proposals, as much as any, are perhaps the most overtly partisan, since they are designed and intended not only to limit the power of the current Republican-appointed majority, but to give that power to a more ideological balanced Court.

I’ve written before about why I’m wary of Court expansion, specifically. For present purposes, even if reforms aimed at changing the Court’s composition were politically viable (and it’s hard to see how that could ever be possible without a Democratic trifecta that includes a filibuster-proof majority in the Senate—and perhaps not even then), the principal objection to such reforms, in my view, is that they would only reinforce the perception of the Court as a font for the exercise of partisan political power—a race to the bottom in which no one (except those who would like for the Court to be irreparably damaged as an institution) wins. Put another way, reforms in this category would tend to have (1) high political barriers to entry; and (2) potentially high institutional costs, even if the short-term result were to make the Court more ideologically heterogeneous.

Category II: Power-Limiting Reforms

A second major category of reforms are those focused not on the composition of the Court, but on its power. For instance, “jurisdiction-stripping” proposals (to prevent the Court from deciding certain types of cases); or proposals to require a supermajority vote before the justices can invalidate government action (a measure that the House of Representatives actually passed in 1868, only to have it die in the Senate); or proposals to impose a higher standard of review in certain cases, all circle around this same basic idea: That Congress can and should reassert its ability to keep cases away from the Court and/or to limit the Court’s ability to act against the democratically elected branches in the cases that it hears.

The devil is really in the details in this category. Congress has pretty broad power over the Court’s appellate jurisdiction (there’s a debate as to whether that power is plenary; I’m of the view that it probably isn’t). And Congress also has broad power over standards of review—especially for statutory claims. To me, the harder question about reforms falling into this category is about their efficacy. Unlike Court expansion (which, were it to happen, could produce pretty immediate effects), here, the more dramatic the effects of the reforms, the more serious the constitutional objections to them would become.

For instance, a statute barring the Supreme Court from striking down any gun control regulation on the ground that it violates the Second Amendment would raise grave constitutional questions; a statute that limits when and how the Court can entertain such cases may not, but at the expense of actually cutting the Court out of the loop. And the Court could frustrate a supermajority requirement (assuming it were constitutional) simply by internally agreeing that anytime a majority votes to strike down a statute, a supermajority of justices will approve at least that part of the ruling. Finally, with regard to imposing higher standards of review, that assumes that the justices will faithfully abide by such new standards. One of the recurring critiques of the Court’s behavior with respect to emergency applications in recent years is that the majority regularly flouts even the standards the Court has previously articulated.

Put another way, if, like me, you think that the Constitution wouldn’t allow Congress to keep an entire category of constitutional cases away from the Court, or to tell the Court how to do its job in cases properly before it, then reforms in this space would likely have to be (significantly) less than 100% effective in order to be constitutional. At that point, the question becomes whether the benefit is worth the cost (and, it should be said, the political capital). Reforms in this category may not come across quite so transparently as partisan as those geared toward the composition of the Court, but they would still almost surely involve a Democratic trifecta reining in a Republican Court, and one can imagine how that will be portrayed, fairly or not.

Category III: Accountability-Enhancing Reforms

This leads to the third category—and the one I’ve written about the most in prior issues of this newsletter: Reforms designed to enhance the Court’s accountability without changing its composition or reducing its formal power. There are a lot of examples here, but these would include: (1) expanding the Court’s mandatory docket; (2) an Article III Inspector General along the lines I’ve previously proposed; (3) codification of existing standards (as opposed to raising the standards) for emergency relief; (4) more public congressional oversight of the Court (including of its budget); and (5) at a more basic level, more congressional engagement in the Court’s day-to-day work.

None of these are as visible or, at least to this point, as popular as reforms geared more directly toward changing who’s on the Court or how much power it has. In that respect, they won’t have nearly the short-term impact for which many of the Court’s critics are clamoring. Nor will they prevent the current Court from taking the cases that at least four of the justices want them to take—or directly stop the Court’s majority from doing … whatever it wants to do … in those cases.

But it’s possible that those realities can be viewed as a feature, rather than a bug. Reforms that will have subtler, longer-term effects, and that are less about stopping the Court from doing specific things than about pushing the Court to situate its work against a better and healthier interbranch dynamic should properly be perceived as less partisan.

#### Categorizing types of proposals and debates on this subject.

HLR 24 – Harvard Law Review.

Harvard Law Review, “Chapter One: Confusion and Clarity in the Case for Supreme Court Reform,” HLR, Volume 137, Issue 6, April 2024, https://harvardlawreview.org/print/vol-137/confusion-and-clarity-in-the-case-for-supreme-court-reform/

A. Formal Reasons for Reform

Reformers identify several formal reasons to reform the Court — that is, abstract reasons that the Court’s structure and role in our system of government could or should change.19 Disempowerment arguments take the position that the Constitution permits or even requires reducing the Court’s power to invalidate actions of the other branches of government. Procedural-fairness arguments take the position that the way that Justices are currently selected is too partisan or arbitrary to be consistent with justice. Political-power arguments take the position that it is acceptable for the Court to be directly contested and controlled by political parties.

This section surveys these arguments and the reasons given for them. It then describes counterarguments to those potential reforms. In general, formal arguments for reforming the Court are well supported, but so are counterarguments against it. The few reforms that have consensus support face other hurdles, including the need for a constitutional amendment or skepticism from progressives. In total, this debate does not clearly resolve the question of whether or how the Court should be reformed. It shows that favoring reform is reasonable, but so is opposing it — and that the proposals that are most exciting to the pro-reform camp also meet the strongest objections from the anti-reform camp.

1. Disempowerment. — Since the 1950s,20 the Supreme Court has claimed to be and has been treated as the “ultimate expositor of the Constitution.”21 This practice, which treats the Court as having the final word on constitutional meaning, is called judicial supremacy. It is an expansion of the Court’s judicial review power to interpret the Constitution,22 which it first asserted in the 1803 case Marbury v. Madison.23 Today, judicial supremacy empowers the Court to undermine or entirely invalidate legislative and agency action as inconsistent with the Constitution.24

Because judicial supremacy gives the Court a trump card over the popularly elected legislative and executive branches, reformers object that it is antidemocratic25 and likely to slow the pace of change.26 In order to address these problems, reformers propose a variety of modifications to the Court’s power of judicial review.27 These include exempting certain federal statutes from judicial review28 and giving the legislative or executive branches greater voice in debating the limits of constitutional meaning.29

Debate on disempowering reforms raises two questions: whether disempowering the Court would be constitutional and whether it would be a good idea. Many scholars have weighed in on the constitutional debate, applying legal reasoning tools to decide whether and how the Court’s power could be taken away without amending the Constitution. The debate around so-called jurisdiction-stripping proposals “defies brief summary because . . . [it] encompasses diverse elements.”30 The methods used to resolve the constitutional question include original intent, textual meaning, and historical practice.

There are varying perspectives on the intent of the Constitution’s drafters. Professor Larry Kramer concludes that the power of “judicial review was never imagined.”31 Professors Saikrishna Prakash and John Yoo disagree, concluding that “there is a wealth of evidence that the Founders believed that the courts could exercise some form of judicial review over federal statutes.”32

Scholars also differ on whether the text of the Constitution clearly empowers the Court to engage in judicial review. Professor Keith Whittington writes: “It is a bit of an embarrassment that [judicial review,] such a fundamental aspect of American constitutionalism[,] was not explicitly incorporated into the [Constitution’s] text[] . . . .”33 Prakash and Yoo differ: “A careful examination shows that the constitutional text and structure allow — indeed require — the federal and state courts to refuse to enforce laws that violate the Constitution.”34

Finally, there is disagreement on whether the Court exercised a judicial review power in the nation’s early years. Professor Michael Klarman notes that, after Marbury, “[t]he Court[] . . . fail[ed] to invalidate a single state law until 1810 and a second federal law . . . until 1857. Thus, the judicial review power . . . mattered little until the Court had acquired sufficient political clout.”35 Whittington disagrees, writing that accounts like Klarman’s are “[not] true. The power of judicial review developed gradually during the first half of the nineteenth century . . . through the back-and-forth dialogue between the branches over time.”36

Regardless of whether taking away the power of judicial review would be constitutional, scholars also differ on whether judicial review is a good idea in the first place. As long as the other branches function properly,37 Professor Jeremy Waldron thinks that “judicial review is inappropriate for reasonably democratic societies . . . . Ordinary legislative procedures [are enough, and] . . . an additional layer of final review by courts adds little . . . except . . . disenfranchisement and a legalistic obfuscation of the moral issues at stake.”38 Professor Richard Fallon disagrees: as long as some assumptions are true, “judicial review is reasonably defensible within the terms of liberal political theory.”39

Read in its conflicting entirety, the evidence on whether the Court’s current power of judicial review could or should be altered does not resolve the question beyond doubt in either direction. One could reasonably conclude, supported directly or indirectly by robust scholarship, either that jurisdiction-stripping would be a constitutionally permissible good idea or that it would be an unconstitutional bad idea.

2. Procedural Reform. — Another reason for reforming the Court is that the process for selecting Justices causes the Court’s decisions to be influenced by the wrong factors. A few trends underlie this argument. Regarding the selection process, a potential nominee’s partisan affiliation plays an important role in judicial selection in both the Supreme Court and lower federal courts.40 Politicians now treat the Court as a prize to be contested, which they do by engaging in gamesmanship,41 appointing younger judges to maximize their life tenure,42 and framing nomination hearings as political contests.43 Perhaps as a consequence of the politicization of the Court, the Justices often divide according to the party of the President who appointed them when deciding cases.44

To address these problems, scholars and politicians have advanced a variety of proposals. One popular idea is to implement staggered eighteen-year terms for Justices, which would regulate the number of Supreme Court Justices that each President is able to appoint.45 Another is to create a nonpartisan committee to select Supreme Court Justices46 or, somewhat relatedly, to have five Republican- and five Democrat-appointed Justices appoint five visiting Justices annually.47 One more idea is to divide the Court’s business among panels of Justices or, relatedly, to compose the Court of a rotating set of judges.48 What all of these proposed reforms have in common is that they seek to stan­dardize the “ideological makeup of the Supreme Court” in one way or another49 and as a result reduce the link between partisan politics and judicial interpretation.

The potential benefits of procedural reforms are clear. However, procedural reforms face two serious hurdles: they may be impossible without amending the Constitution, and they are not favored by progressive advocates of reform. The Constitution may prohibit any change to the Court’s status as an “apex juridical body that operates in some meaningful sense as a single court,”50 that shortens Justices’ terms of service,51 or that alters the process by which Justices are selected.52 Amending the Constitution would moot the issue, but it would also require immense political will. Further complicating matters is the fact that some progressives, who are enthusiastic supporters of Court reform more broadly,53 might not be mobilized by reforms that prioritize a Court whose membership simply splits the difference between conservative and liberal.54

A separate category of proposals is ethical reforms, which are also procedural in the sense that they seek to regulate the factors that influence the Court’s decisionmaking. Reporters have described close relationships between Justices or their family members and parties who sometimes have direct or indirect interests in cases before the Court.55 Ethical reforms target the rules governing Justices, including more rigorous disclosure obligations for Justices, external oversight of Justices’ finances, and more stringent recusal rules.56 These efforts are in their early stages and may yet succeed, but they have already been met by arguments that the judiciary should be free to regulate itself.57 Further, because they regulate only the way the Court conducts its business, they are unlikely to satisfy those seeking a larger-impact reform.

3. Political Power. — Lastly, there is a camp of arguments for reform that treat the Court through a political lens, as just another source of law that should be contested, manipulated, and controlled according to the same scruples (or lack thereof) as are outcomes in Congress or the White House.58 Proponents of these ideas reject that the Court’s business can be removed from politics.59 They would alter the Court to preserve their own political interests because politics are already governing the Court — and, presumably, permit their opponents to do the same.60 This theory of Court reform justifies proposals such as packing the Court61 or obstructing judicial nominations.62 Political-power justifications have something of a tit-for-tat quality: one side played politics with the Court, so now the other side will do the same. Progressives point to Senator McConnell’s chicanery in the failed confirmation of then–Chief Judge Merrick Garland63 and the successful confirmation of Justice Barrett64 as an example that Republicans are playing this game; conservatives point to past statements by Democratic officials in favor of similar strategies65 as evidence that the thinking goes both ways.

The political-power justification for reform is emotionally resonant, especially with those who feel wronged by the Court’s change in membership over the last decade and a half. But it is reasonable to worry about a race to the bottom.66 For this reason, political-power arguments for reform are volatile: they invite one’s opponents to engage in the same behavior should they lose power,67 and they remove the Court as a safeguard to uphold the rule of law when a majority seeks to ignore it.68 Because the future allocation of political power is uncertain, even people who find themselves in the majority now could be wary of normalizing that behavior in the future.

#### Reform in the context of the court refers to structural changes to the Court----this excludes the use of existing appointments process or court rulings

Adrian Vermeule 6 Bernard D. Meltzer Professor of Law, University of Chicago, THE FUTURE OF THE SUPREME COURT: INSTITUTIONAL REFORM AND BEYOND: Essay: Political Constraints on Supreme Court Reform, 90 Minn. L. Rev. 1154

Many proposals to reform the rules of the Supreme Court game are currently under discussion. 1 Which of these proposals lie within the politically feasible set, and which are ruled out by political constraints? In what follows, I will sketch the shape of those constraints and describe the main political mechanisms that produce them. I use the failure of Roosevelt's court-packing plan in 1937 as a running example, supplemented by comparisons with the flurry of reform plans - mostly unsuccessful - offered during Reconstruction. The main thesis is that reform of the Court requires political conditions that have a self-negating tendency. The very conditions that produce demand for structural reform of the Court also tend to produce counterforces that block the movement for reform. The point is not of course that structural reform is impossible, in the sense that it is always ruled out by political constraints. In particular cases, the demand for reform may be just strong enough, and the counterforces produced by that demand just weak enough, that a reform proposal can slip through. Yet reform cannot be predicted in advance or relied upon; it is systematically unlikely to occur. The stronger the movement for reform, the higher the obstacles that must be surmounted.

My principal interest is in detailing the mechanisms that produce political constraints on Supreme Court reform, regardless of how tight those constraints turn out to be. However, I will also suggest, without attempting to provide systematic evidence, that the constraints are in fact quite restrictive. The ash heap of history is piled high with reform proposals that have attracted no supporters (other than those who formulated them), attracted academic supporters but no political backers, or attracted political backers but no popular following. Almost all ideas for Supreme Court reform die in committee, literally or metaphorically. The constitutional and statutory rules governing the Court - the number of its members, their terms of tenure, the voting and quorum rules that govern their actions, and so on - have in most cases remained unchanged, at least since Reconstruction, and in some cases since the first Judiciary Act of 1789. 2 Not everything has held constant - the switch to discretionary certiorari jurisdiction in 1925 is a salient example 3 - but in the broad, structural reform of the Court is exceedingly rare. All else equal, the higher the stakes of a reform proposal, the more opposition it will generate and the less likely it is to succeed. The reform proposals that do succeed, conversely, are likely to be of marginal importance, at least when compared to the ambitious model of the court-packing plan.

Part I defines "reform" as structural change in the constitutional and statutory rules that govern the Supreme Court game, as opposed to substitution of new players for old ones (through appointments) or new behavior by old players under the old rules (a "switch in time"). Parts II through V turn to the mechanisms that constrain reform by provoking counterforces to the reform movement. Although some of these mechanisms apply to institutional reform generally, some apply only to reform of the Court. Court reform both partakes in the general difficulty of institutional reform and presents additional difficulties of its own.

Part II discusses the problem of multidimensional politics. The large, national coalitions necessary for Supreme Court reform will typically be assembled on other issue dimensions and will fracture when judicial reform comes to the fore. Part III considers the problem of the optimal majority. Reform movements must steer between Scylla and Charybdis: a majority that is too small will be blocked at the vetogates of the legislative process, while a majority that is too large will provoke a backlash spurred by fears of tyranny. Part IV discusses the basic trade-off between impartiality and motivation. Structural reforms adopted behind a veil of uncertainty will be and seem impartial, but in general, no politically influential group will be motivated to support them. Conversely, proposals that produce short-term benefits for particular groups will attract motivated supporters but will also provoke opposition. Part V suggests that political crisis is both a precondition for and an obstacle to reform of the Court. In a brief conclusion, I consider the relevance of political constraints from the standpoints of both analysts and advocates of reform. Although analysts should consider political constraints, advocates of reform should not.

I.

"REFORM"

We may define reform both by reference to paradigm cases and at the conceptual level. I will take as the paradigm of reform Roosevelt's 1937 court-packing bill. So far as relevant here, the proposal would have added one Justice, up to a total membership of fifteen, for each Justice over the age of 70 who had served ten years and who did not retire within six months of his 70th birthday. 4 Roosevelt had carried forty-eight states in the 1936 election and commanded filibuster-proof majorities in both the House and Senate (although we will see that the Democratic coalition would fracture along the fault line of Supreme Court reform). 5 My main thesis about the episode will be that the very conditions that produced such obvious potential for reforming the Court also produced the political constraints that blocked reform.

At the conceptual level, I will generalize from the court-packing example to stipulate that "reform" means a proposal for change in the rules of the Supreme Court game. This definition makes reform synonymous with structural reform, including the number of Justices, their tenure, voting rules, and so forth. It excludes both (1) a substitution of new players for old players through the appointments process and (2) a change in the actions that the old players take under the old rules.

This definition has the consequence that the indirect effects of the court-packing plan did not produce reform in the structural sense I have indicated. Roosevelt eventually obtained no less than seven Supreme Court appointments, producing a cadre of like-minded Justices. 6 For reasons discussed below, however, this does not count as reform. Furthermore, if the selection of new players does not count, a change in the behavior of the old players does not count either. Suppose that the threat of court packing - or the anticipation of some threat of that kind - produced a "switch in time," in which Justice Roberts changed his vote to uphold politically controversial economic and social legislation. 7 (Here, I am bracketing a set of historical controversies over whether there was any such switch and whether, if there was, it was caused by the court-packing plan). 8 This change in the actions taken by old Justices under the old rules is not structural reform; it is tacking with the prevailing political winds. Besides the court-packing plan, another example involves the proposal, floated during both Reconstruction and the New Deal, to require a two-thirds vote of the Justices to invalidate legislation on constitutional grounds. 9 During Reconstruction, the proposal lacked a critical mass of support, in part because the Court ducked many of the central constitutional issues posed by Reconstruction legislation and thus vented away the growing pressure for reform. 10

Why define reform so narrowly? If Roosevelt obtained much of what he wanted through the switch in time and through appointments, why classify the court-packing plan as a failure? Roosevelt himself said that although he lost the court-packing battle, he won the broader war. 11 From an even broader perspective, however, the problem is that changes not amounting to structural reform are only a temporary palliative. As long as the rules themselves remain unchanged, later periods can see a recurrence of the problems that motivated reform in the first place. Even if the outcome of the court-packing fight was good for Roosevelt or the New Deal in the short run, 12 it may have been bad for the polity in the long run.

### --“reform”

#### It excludes confirmation process

Michelle Adams et al 21 Professor of Law at Benjamin N. Cardozo School of Law, Presidential Commission on the Supreme Court of the United States, https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf

We do not analyze at length the confirmation process or proposals for how the Senate might reform it. The Commission recognizes that the processes by which individuals are nominated to the Court by the President and considered by the Senate are central to today’s debate. However, the Commission’s charge was to address proposals for reforming the Court itself, not for reforming the confirmation process. At the same time, given the extensive and bipartisan testimony we received concerning the intense conflict that now characterizes that process, generating widespread concern that it has become dysfunctional, we have attached an Appendix to this Report that discusses specific reform proposals presented to the Commission—proposals we believe merit close attention and consideration.42

#### Structural reform must be initiated outside of the Court

Thomas E. Baker 94 Florida International University College of Law, An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals, 28 Ga. L. Rev. 863 (1994).

My nomenclature needs explanation by way of introduction. This Article will evaluate reforms designated here "extramural" or "structural." Although the distinction between "intramural" and "extramural" reforms may seem a bit metaphysical, the line can be defended in terms of the separation of powers. An *intramural* reform is a change in the way the courts of appeals hear and decide an appeal. These changes amount to procedural shortcuts, resulting in an abbreviated appellate process, justified for the most part by the press of a growing docket.1 New internal operating procedures, screening and inventorying, the nonargument calendar, dispositions without opinion, larger numbers of staff attorneys and law clerks, and other related court-initiated reforms have allowed the courts of appeals to cope with the large increases in the numbers of appeals over the last generation. I believe that intramural reforms have all but played out and that the proposals for additional procedural reforms being considered do not represent sufficient additional efficiencies to allow the courts of appeals to continue to cope with projected increases in the numbers of appeals. The subject ofthis Article is *extramural* reforms. These require congressional action. Unlike intramural reforms, which are changes in the way the courts of appeals perform their traditional role, extramural reforms purposively and directly change the role of the intermediate court in the federal system. This Article will discuss the historical methods Congress has used to come to the aid of the federal courts under threat of caseload. Separate sections will consider: Reducing Original Jurisdiction; Alternative Dispute Resolution; Creating Circuit Juageships; Dividing Courts of Appeals; Creating Specialized SubJect Matter Courts; and Improving the Quality of Federal Legislation. The worry expressed here is that these familiar reforms may no longer be feasible, for various reasons which will be discussed, or may not be sufficient to deal with the worsening problems of the U.S. Courts of Appeals.

#### It excludes intramural changes

Thomas E. Baker 85 Florida International University College of Law, A Compendium of Proposals to Reform the United States Courts of Appeals, https://ecollections.law.fiu.edu/cgi/viewcontent.cgi?article=1153&context=faculty\_publications&httpsredir=1&referer=

This essay considers first the ideal role of the intermediate court in the federal judicial institution. Against this ideal, the article explores the seriousness I of the threat presented by workload growth. The focus of this presentation is on reform. Intramural reforms are distinguished from extramural reforms. 12 Intramural reforms, both accomplished and proposed, involve changes in how the courts of appeals themselves choose to perform within their traditional role I itself. Extramural reforms, both accomplished and proposed, involve congressional changes in the role. A few editorials have been included along the way, expressing preferences for one type of reform and for some choices within each type.

### “Enact” = Congress / No Courts

#### “Enact” must be Congress—Clear intent to define and exclude

Berman 94 – Judge on the Superior Court of New Jersey, citing to prior precedent and dictionaries

Opinion by Glenn J. Berman, Superior Court of New Jersey, Law Division, Civil, Middlesex County, South Brunswick Associates v. Township Council of Tp. of Monroe, 285 N.J. Super. 377, Decided 17 May 1994, Lexis

Miller's conduct would be permissible under N.J.S.A. 40A:9-22.5i if the representation were regarding the "enactment of any ordinance, resolution or other matter required to be voted upon or which is subject to executive approval or veto." Id. (emphasis added). However, this language suggests legislative, not quasi-judicial action.2 If the Legislature intended to allow public officials [\*381] to represent others in quasi-judicial proceedings, it could have stated that public officials may participate in any proceeding which would not result in material or monetary gain to them. Cf. N.J.S.A. 40A:9-22.5i

[FN 2]

"Enactment" is defined as the act or action of enacting: passing of a bill by the legislature; something that has been enacted as a law, bill, or statute. Webster's Third New International Dictionary 745 (3d ed. 1986). "Enact" is defined as to enter into public records; to establish by legal and authoritative act, make into law, especially to perform the last act of legislation that gives the validity of law. Ibid.

[End FN]

#### Specifically excludes the Courts—Most precise and predictable: they ‘adopt’ but do NOT ‘enact’. That word was chosen deliberately—Must read it in a way that gives it meaning

McMurdie 20 – Judge on the Arizona Court of Appeals

Paul J. McMurdie, delivering the opinion of the Court, Netherlands v. Md Helicopters, 1 CA-CV 19-0019 (Ariz. Ct. App. 2020), https://www.courtlistener.com/opinion/4737531/netherlands-v-md-helicopters/

MD Helicopters’ argument regarding the meaning of the terms “enact” and “adopt” is similarly unpersuasive on the question of whether A.R.S. § 12-3252(B)(2) refers only to acts of a foreign country’s legislative body, and not of its courts as well. The common usage of the term “enact” does not generally include the actions of a court. See, e.g., 2015 Ariz. Sess. Laws, ch. 170, § 1 (1st Reg. Sess.) (“Be it enacted by the Legislature of the State of Arizona . . . .” (emphasis added)); Cronin v. Sheldon, 195 Ariz. 531, 537 (1999) (“[T]he legislature has the authority to enact laws.”). But the term “adopt” is not nearly so limited. Courts make law through the adoption of rules or common-law principles. See, e.g., Carrow Co. v. Lusby, 167 Ariz. 18, 24 (1990) (“We adopt the modern common law view that an owner of livestock owes a duty of ordinary care to motorists traveling on a public highway in open range.” (emphasis added)); Judson C. Ball Revocable Tr. v. Phoenix Orchard Grp. I, L.P., 235 Ariz. 519, 523–24, ¶¶ 11, 16 (App. 2018) (Finding Delaware courts’ decision to “adopt” rule of standing for shareholder suits “as a matter of common law” persuasive and deciding to “adopt” that rule as well). Executive agencies are also frequently empowered by the legislature to “adopt” rules and regulations. See, e.g., A.R.S. § 23-361 (Industrial Commission “may adopt such rules and regulations as necessary” to administer and enforce statutes governing the payment of wages (emphasis added)). And the use of both the terms “enact” and “adopt” must be read to contemplate different things, or one term will be rendered superfluous. See Cont’l Bank, 131 Ariz. at 8.

#### It’s a legal term of art. Even if agencies or court decisions are equivalently legally-binding, they are not “enacted”.

Carlson 4 – Justice of the US Supreme Court of MS, citing to prior federal court precedent and Black’s Law Dictionary

Opinion by George C. Carlson Jr., Supreme Court of Mississippi, Gulf Ins. Co. v. Neel-Schaffer, Inc., 904 So. 2d 1036, Decided 9 December 2004, Lexis

In so holding, we note that Neel-Schaffer's argument is not altogether unreasonable. Neel-Schaffer argues that in instances where a legislative branch has delegated its authority to regulate to an administrative agency and where that agency is considered the final regulatory authority, the agency's regulations should be considered the legal equivalent to statutes. Nevertheless, Neel-Schaffer presents no compelling argument as to why this Court should not adopt the view held by the local federal courts. Further reasoning to reject Neel-Schaffer's argument is the fact that the Act incorporates the term "enact." The use of this term seemingly denotes a legislative enterprise.12

[FN 12]

"Enact" is defined as follows: "To establish by law; to perform or effect; to decree. The common introductory formula in making statutory laws is, 'Be it enacted.' See Enacting clause." Black's Law Dictionary (5th ed. 472).

[End FN]

#### Courts cannot enact—Only construct and interpret

Hanna 12 – Justice of the Supreme Court of New Mexico

Opinion by J. Hanna, Supreme Court of New Mexico, Terr. of N.M. v. Davenport, 17 N.M. 214, 1912

Penal statutes are to be strictly construed and the courts all uniformly so hold. It is true, in some of the states, this rule has been abrogated by statute, but in New Mexico we have no statute authorizing us to depart from the strict rule of the common law in this respect. Hence we must give to the statute now under consideration a strict construction, according to its letter, and nothing must be regarded as being included within it, that is not both within the letter and spirit of the statute. "And where a statute of this kind contains such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of life or liberty is to be preferred." Lewis' Sutherland Statutory Construction, 2nd ed. sec. 520. The above statute is peculiarly [\*\*\*\*6] worded and from our research we have been unable to find a similar statute in any other state. Its meaning and intent are not clear and it is very ambiguous. The Legislature of New Mexico [\*218] should enact a statute upon Sunday observance that would plainly express the prohibited acts, so that the people would be able to know, without construction by the courts, what it was intended to prohibit. Courts cannot enact laws and are limited simply to their construction and interpretation, and under well defined rules.

#### That deals with the *effects* of an enactment—But is not an ‘enactment’ itself

Bennion 9 – Lecturer in Law at Oxford

F. A. R. Bennion, former Parliamentary Counsel, barrister, and Chief Executive of the Royal Institution of Chartered Surveyors, Basic concepts I: common law statutes; the enactment; legal meaning; factual outline and legal thrust; implied ancillary rules, printed 2009, DOI:10.1093/acprof:oso/9780199564101.003.0002, https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199564101.001.0001/acprof-9780199564101-chapter-2

This chapter explains the concept common law statutes, stressing that the laws governing common law countries are now mostly enactments of a democratic parliament, mediated by common law rules of interpretation. The basic unit of legislation is the enactment, consisting of a distinct proposition of law. It needs an informed construction, which is explained. Legislation is what the legislator says it is; while the legal meaning of legislation, that is the one corresponding to the legislator's intention, is what the court says it is. The chapter explains in detail the importance of the legal meaning. The usual effect of an enactment is that, when the facts fall within an indicated area called the factual outline, specified consequences called the legal thrust ensue. Elements in the legal thrust may be left unexpressed by the drafter. These implied ancillary rules are to be treated as imported.

#### Can’t “enact”

Meyers 19 – Professor Emerita of Philosophy at the University of Connecticut

Edited by Diana T Meyers, Kenneth Kipnis, Steve Griffin, Chapters from Philosophical Dimensions Of The Constitution, Routledge/Taylor Francis & Group, 2019

Judicial review of legislative enactments, so the popular analysis has it, is fundamentally antidemocratic. Nine justices, appointed for life, have the power to tell us, inter alia, where our children will go to school, that organized prayer in public schools is impermissible, that the several states cannot outlaw abortion. Moreover, this extraordinary power1 can be, and all too often is, exercised in the face of clear expressions of the will of the elected representatives of the people. The very institution of judicial review (or, more exactly, the products of that institution that invalidate legislative enactments2) seems to be inconsistent with democracy. "This," John Hart Ely concludes at the end of a civics sermonette, "in America, is a charge that matters. We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government."3 Judicial review, the legacy of John Marshall and Marbury v. Madison, is now a deeply ingrained part of U.S. political practice. Given that the courts will engage in judicial review, the standard of review remains a matter of some debate. Current debates about the legitimacy of judicial policymaking divide theorists into two dominant camps: the interpretivists represented by Raoul Berger, William Rehnquist, and Robert Bork, and the noninterpretivists represented by Thomas Grey, Owen Fiss, William Brennan, and Michael Perry. Most of the current debates about constitutional interpretation are misleading because they suggest that there are exactly two positions, exclusive and exhaustive, that one may adopt: the clausebound literalism of Raoul Berger and William Rehnquist (hereafter called positivist interpretivism) and the value imposing noninterpretivism of Michael Perry and Thomas Grey (hereafter called nonpositivist, noninterpretivism}.4 My goal in this chapter is to defend a theory of judicial 96 Between Clause-bound Literalism and Value Imposition 97 review that stands as an alternative to the dominant theories in current legal/philosophical debates. The theory I argue for is faithful to the central tenets of legal positivism, yet it sanctions the imposition of extraconstitutional values. This chapter is divided into three sections. In the first two sections I show why both positivist interpretivism and nonpositivist noninterpretivism are inadequate theories of constitutional interpretation. While I address the shortcomings of these theories, I also attempt to demonstrate that each has important contributions to make toward an adequate theory of judicial review. In the third section I outline the position of the positivist noninterpretivist. Primary emphasis is placed on explicating the position (showing why it is both positivist and noninterpretivist) and on distinguishing it from positivist interpretivism. I also consider the major objection against any theory of noninterpretive review: How are the values that the Court may impose to be determined? The answer I provide to this question has a legacy traceable through Alexander Bickel back to Edmund Burke: consensus of the citizenry. THE FAILURE OF POSITIVIST INTERPRETIVISM Positivist interpretivists argue that when engaging in judicial review of legislative enactments, the criterion of constitutionality to be applied by the courts is the express language of the Constitution. If only judges would follow the criterion of constitutionality recommended by the positivist interpretivists, there would be no cause for popular resentment of the judiciary. A true positivist interpretivist judge would follow the suggestion of Justice Roberts in U.S. v. Butler, that when exercising judicial review the Court should simply "lay the article of the constitution which is invoked beside the statute which is challenged and determine whether the latter squares with the former."5 Only if the act cannot be squared with the relevant constitutional provision should the Court strike the act. Roberts's suggestion as to how courts should act when reviewing legislative enactments is appealing, but it simply does not work. His approach looks nice until one tries to figure out how to implement it when the constitutional provision involved is not completely clear. The Eighth Amendment protection against cruel and unusual punishment says nothing about which punishments are cruel and unusual, the due process clauses of the Fifth and Fourteenth amendments say nothing about how much process one is due, nor does the Equal Protection Clause indicate how much protection citizens are to enjoy. In short, many of the operative clauses of the Constitution simply are not amenable to interpretivist analysis. Accordingly, one faces a dilemma. Either one must abandon interpretivism or one must be willing to concede that certain constitutional provisions that appear to place some restraints on the actions of both state and federal government officials do not, in fact, 98 H. Hamner Hill have any force at all. 6 Those unwilling to surrender so powerful a tool as the Equal Protection Clause cheerfully conclude that interpretivism must be abandoned and that some form of noninterpretivism must be embraced. Such a rejection of interpretivism, however, is too quick. It fails to ask what motivates one to embrace interpretivism at all. It fails to realize that at one level at least, interpretivism seems to follow from a positivist conception of law. There are two distinct theses that are central to contemporary legal positivism. First there is the famous separability thesis: the view that there is no noncontingent link between law and morality. The separability thesis is the most widely noted feature of legal positivism, and it is the target of most of the philosophical attacks directed at legal positivism.7 Despite the attention that separability has drawn, it is not of great moment to this discussion. Rather, I want to focus on the other thesis central to legal positivism-what Joseph Raz calls the sources thesis8 and what Hans Kelsen calls the doctrine of authorization. 9 Put roughly, the sources thesis states that for a norm to be a valid law, that norm must have been issued (posited) by a particular source (the exact source being relative to a legal system). A norm, regardless of its form or its moral force, that does not issue from sources recognized as legitimate within a legal system simply is not a valid legal norm within that system. In a government of limited, delegated lawmaking authority, the importance of the sources thesis for a theory of constitutional adjudication should be clear. Only those governmental bodies charged with lawmaking functions can make law, and then only within the scope of the authority delegated. As the judiciary is not charged with lawmaking, the courts are not proper sources of law. But when the courts engage in noninterpretive review, they do make law. Striking an act as unconstitutional is no less an act of lawmaking than is the original promulgation of the act. Thus the sources thesis appears to cut against noninterpretive review. It is, I believe, the sources thesis that underlies the philosophical allure of positivist interpretivism, and it is the sources thesis that ultimately leads me to develop a positivist noninterpretivism. What, then, is wrong with positivist interpretivism, given the powerful brief the sources thesis appears to provide against noninterpretivism? Why even attempt to retain the sources thesis and still condone noninterpretive review? Because positivist interpretivists adopt an overly restrictive concept of sovereignty. Following Bentham, positivist interpretivists contend that valid law must be tied directly to the will of the sovereign in a state. As Bentham puts it: "A law may be defined as an assemblage of signs declarative of volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power."10 When a law is viewed with respect to its source, Between Clause-bound Literalism and Value Imposition the will of which it is the expression must, as the definition intimates, be the will of the sovereign in a state. Now by a sovereign I mean a person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience .... A mandate [law] is either referable to the sovereign or it is not: in the latter case it is illegal, and what we have nothing to do with here.11 99 The lesson drawn from Bentham is that law is an expression of the will of the sovereign. Any expression of will other than that of the sovereign, regardless of the form of the expression, is not, indeed cannot be, law. Law is created when and only when the sovereign expresses its will. The only modification of the basic Benthamite theory of law necessary to make it applicable to a constitutional democracy is that lawmaking organs to whom the sovereign has delegated lawmaking powers may make valid laws only when acting within the scope of the authority delegated to them. Thus, only the sovereign and agents of the sovereign may make law, and, then, in the case of the agents, only when acting within the scope of delegated authority. But where is the sovereign will expressed and where is political authority delegated? For positivist interpretivists, the constitutional text is the sole expression of the sovereign will; that text, and that text alone, is determinative of law and of legitimate delegations of lawmaking power (authority). Any piece of legislation or court action that contravenes constitutional requirements is, eo ipso, subject to judicial invalidation as is any delegation of lawmaking authority (on the federal level) not sanctioned by the text. The text of the Constitution, for positivist interpretivists, serves the function of Kelsen's Grundnorm: It underwrites the legitimacy of all other laws or delegations of lawmaking authority. 12 Given that the fundamental expression of sovereign will is contained in the text of the Constitution, one may still ask of whose will is the document an expression? Put another way, who is sovereign? The positivist interpretivist answers this question in an unacceptably narrow way. The will of which the constitutional text is an expression is the will of the framers of the document. 13 The excessive narrowness of the Benthamite concept of sovereignty, which is adopted by modem positivist interpretivists, can be seen in Bentham's few remarks concerning the institution of judicial review. Being wed to the idea of an unlimited sovereign, Bentham finds the institution of judicial review inconsistent with the very idea of sovereign authority. "By this unicompetence, by this negation of all limits, this also is to be understood, namely, that let the legislature do what it will, nothing that it does is to be regarded as null and void: in other words, it belongs not to any judge so to pronounce concerning it: for, to give such powers to any judge would be to give the judge . . . a power superior to that of the legislature itsel£."14 Bentham's dislike for the institution of judicial review can be traced directly to his theory of unlimited sovereign power-a theory of sovereignty expressly rejected 100 H. Hamner Hill by the framers of the Constitution. Accordingly, any theory of constitutional interpretation applicable to a government of limited powers must reject the Benthamite theory of sovereign power. Despite this clear need, positivist interpretivists at least tacitly accept Bentham's concept of sovereignty. In the third section of this chapter I develop a theory of sovereignty that is markedly different from Bentham's, but one that is nonetheless consistent with Bentham's positivist theory of law. 15 For the positivist interpretivist, having adopted both a Benthamite theory of law and a Benthamite (though not Bentham's) theory of sovereignty, determining what a particular constitutional provision requires-what the standards of legal validity under that provision arerequires looking first to the express text and then, if the text is not selfexplanatory, to the intentions of the framers of the provision. To be sure, the positivist interpretivist program is an inviting one, but it cannot, as will be demonstrated shortly, succeed. At first blush, the positivist interpretivist project is quite alluring. Using the positivist interpretivist criterion for judging legislative enactments unconstitutional, only those enactments that violate clear passages in the Constitution could legitimately be struck by the courts as unconstitutional. Judicial review, as an institution, would thus be immune from charges of government by judiciary and improper judicial policymaking. If the positivist interpretivist project were viable, only those enactments that, to borrow a Quinean aphorism, wear their unconstitutionality on their sleeves could, and would, legitimately be struck as unconstitutional. There are few, if any, legal theorists who could find fault with judicial invalidation of legislative acts running afoul of so stringent a criterion of constitutionality.16 Unfortunately, adopting such a criterion of unconstitutionality is unacceptable on several grounds. First, assuming, arguendo, that the position of the positivist interpretivist does not fall into the intentionalist fallacy, there are still good reasons for believing that the project cannot succeed. Gary Sherman states the case with admirable clarity and eloquence: Christopher Hogwood has a simple goal: the reinterpretation of all major Western symphonic works according to "original intention," using original instruments, original ensembles, original stylistic methods and so forth. Which is a laudable effort that, if carried out with Maestro Hogwood's usual skill, should contribute greatly to aesthetic enlightenment. However, there is one aspect of the original performance that cannot be duplicated: None of us can listen to the result with 18th or 19th-century ears or feel its effects with 18th or 19th-century hearts. The world has changed and we cannot pretend that Antonio Dvorak, Bela Bartok, Aaron Copeland, jazz and rock 'n' roll never happened. Irrespective of the purity of the presentation, we will not hear what our forebears heard. 17 Even if one could determine the original intention of the legislators who enacted a provision, it is not clear that that intention would be of any Between Clause-bound Literalism and Value Imposition 101 use to a modem court attempting to apply a two hundred year-old provision of the Constitution to one of today's problems. Even politically honest18 positivist interpretivists seem to miss the importance of this point. William W. Crosskey, a much neglected proponent of positivist interpretivism, was fond of quoting Justice Holmes on the true nature of legal interpretation. Holmes said that when interpreting a provision: "We ask not what this man meant, but what those words would mean in the mouth of the normal speaker of English, using them in the circumstances in which they were used."19 The Holmes approach to interpretation lends support to the positivist interpretivist just in case the speaker whose words were in need of interpretation was one of the framers of the provision. If the question raised by a party challenging some governmental action as unconstitutional were "Would this action, had it been undertaken in 1789, have been unconstitutional?" then emphasizing original intentions would be completely correct. But such is not the question asked. Rather, the question is whether a particular governmental action, undertaken today, in the last quarter of the twentieth century, is unconstitutional. Today's "normal speaker of English" speaks the language of the late twentieth century, not the late eighteenth. The crucial words are used in the context of today, not two hundred years ago. The approach of the positivist interpretivist is thus not so much wrong as it is wrongheaded. Second, positivist interpretivism, taken seriously, makes hash of accepted Supreme Court practice. Regardless of the political bent of the decisions involved, interpretivism holds that most of the major decisions in constitutional law, including Marbury v. Madison, 20 are illegitimate because, inter alia, there is no clear expression in the Constitution that the Court may review the constitutionality of acts of Congress. Among the cases other than Marbury that end up being illegitimate on an interpretivist basis are Lochner v. New York, 21 Brown v. Board of Education, 22 Griswold v. Connecticut,23 Mapp v. Ohio,24 and Roe v. Wade. 2s The difficulty with positivist interpretivism is that it is not at all faithful to actual legal practice. Courts do not, and have not in the U.S. legal experience, behaved as the positivist interpretivists would have them behave. A theory of constitutional adjudication that bears precious little relevance to the phenomena of which it is a theory or that seriously misdescribes the phenomena to be explained is, at best, a poor theory. Finally, positivist interpretivism leaves no role for courts to play as agents of social change. Legal scholars have, over the past thirty years, gradually, sometimes grudgingly, come to recognize the legitimacy of the claim of the American Legal Realists that courts can, do, and should act as agents of social change and social reform. The clearest example of such action by the courts is the Brown decision and its progeny. Other examples can be found in the areas of criminal procedure, voting rights, and freedom of expression. In the positivist interpretivist model of constitutional adjudication, there is no place for such action. Anyone 102 H. Hamner Hill committed, as I am, to defending at least some role for the courts to play as agents of social change must reject positivist interpretivism. Adequate explication of Supreme Court behavior and support of the courts as agents of social change require a theory of judicial review that allows the courts to impose extraconstitutional values. Simply rejecting positivist interpretivism does not, however, settle the issue. One must develop a theory that allows judicial imposition of values not expressed in the Constitution. One such theory is nonpositivist noninterpretivism. In the next section I show why such a theory cannot succeed. THE FAILURE OF NONPOSITIVIST NONINTERPRETIVISM Nonpositivist noninterpretivism sanctions judicial imposition of extraconstitutional values. In so doing, this theory underwrites the legitimacy of Brown and similar decisions. The difficulty with this theory is that one needs a defense of the values one would have the courts impose when engaging in judicial review. One obvious approach to defending nonpositivist noninterpretivism lies in natural law theory. Natural law, so the argument goes, provides a legitimate source for extraconstitutional values. Michael Perry provides a sophisticated natural law defense of nonpositivist noninterpretivism in The Constitution, the Courts, and Human Rights. Perry's natural law defense of non positivist noninterpretivism is limited to human rights cases. He contends that noninterpretive review serves a special political function that cannot be served by any other institution or practice. For Perry, "[t]he function of noninterpretive review in human rights cases, then, is the elaboration and enforcement by the Courts of values, pertaining to human rights, not constitutionalized by the framers; it is the function of deciding what rights, beyond those specified by the framers, individuals should and shall have against government."26 Deciding what rights people should and shall have against government involves deciding what is, at heart, a political-moral question. What is more, if the decision is to be politically legitimate, then the decision on the matter must be correct. 27 But what, one must ask, is the criterion to use in judging the correctness of an answer to a political-moral question? For Perry, the criterion with which to judge the correctness of an answer to a political-moral question, and the ultimate source of extraconstitutional values, is "a particular conception of the American polity that seems to constitute a basic, irreducible feature of the American people's understanding of themselves. The conception can be described, for want of a better word, as religious."28 Perry recognizes that his answer to the question invites misunderstanding. The religious self-understanding that lies at the heart of Perry's defense of nonpositivist noninterpretive review is in no sense sectarian or theistic. Rather, it involves a commitment "to the notion of moral Between Clause-bound Literalism and Value Imposition 103 evolution,"29 a commitment that recognizes that the will of the people is not the definitive answer to moral questions: The people may be (and often are) mistaken in their moral appraisal of certain questions. What is more, Perry believes that the people recognize their fallibility and are committed to a search for right (or at least better) answers to fundamental moral questions. The people have a commitment to a higher law, a law that determines the correctness of an answer to a political-moral question "independently of what a majority of the American people [believes or] comes to believe in the future."30 Thus, "noninterpretive review in human rights cases enables us to take seriously-indeed is a way of taking seriously-the possibility that there are right answers to political-moral problems."31 The possibility that there are right answers, Perry argues, is one to which the American people are "religiously" committed. Assuming that Perry's views on the religious self-concept of U.S. citizens is correct, what problems follow from entrusting to the courts the task of moving popular moral beliefs in the direction of correct moral beliefs? At least two quite distinct challenges can be leveled at Perry's delegation of moral decisionmaking. The first concerns political theory (why the courts rather than the legislature?); the second concerns the epistemological worries raised by skepticism. To the charge that the courts are institutionally less competent to make moral decisions (or to reach decisions on difficult moral questions) than are legislatures, Perry gives a predictable answer in terms of political insulation. The courts, Perry argues, being free from the will of the voters, are less likely to decide moral questions through reference to established moral conventions than are legislators. To be sure, Perry's claims seem to be susceptible of empirical confirmation. A detailed study of judicial as opposed to legislative behavior concerning decision of moral issues should allow one to determine whether courts do in fact reach correct moral decisions more often than do legislatures. Of course, this suggestion leads directly to the epistemological problems presented by skepticism. On the epistemological level, Perry's thesis raises serious questions about how the courts can come to know one of the right answers to a moral question. An ethical skeptic or a moral relativist would simply challenge Perry's assertion that there are context-independent right answers to moral questions. The ethical skeptic argues that even if there are right answers to moral questions (if there is moral truth), those answers are beyond the scope of human knowledge. There may well be moral truth, but human beings cannot obtain it and judges certainly have no better claim to it than do electorally responsible legislators. Because judges have no better claim to moral truth than do legislators, and because judges are electorally unaccountable, entrusting to the courts the task of determining which moral standards a society shall adhere to runs the risk of a moral dictatorship by the judiciary. Hence the 104 H. Hamner Hill rejection of noninterpretive review on skeptical grounds. Perry recognizes that the skeptic presents serious difficulties for his view, and he attempts to reject the position (Perry seems unaware of just how worthy an opponent the Pyrrhonic skeptic has proven in the history of philosophy). Unfortunately, Perry simply rejects the position of the ethical (and, in passing, epistemological) skeptic without arguing against it. To be sure, Perry notes that many people reject ethical skepticism on many different grounds. Perry's response to the skeptic smacks of question begging. Unless Perry can provide a stronger refutation of moral skepticism, nonpositivist noninterpretivism seems to be indefensible on theoretical grounds. What emerge then are strong reasons for rejecting both positivist interpretivism and nonpositivist noninterpretivism. What is needed is a middle ground position, one that accepts the strengths of the extremes of the spectrum without embracing the critical defects inherent in each. Such a position, a positivist noninterpretivism, is set forth in the next section. POSITIVIST NONINTERPRETIVISM The central defect in positivist interpretivism is that that theory does not sanction judicial imposition of any extraconstitutional values. Nonpositivist noninterpretivism remedies this defect, but at too high a price. The justification of judicial imposition of extraconstitutional values provided by Perry rests on unstable epistemic foundations, runs the risk of justifying a judicial moral tyranny, and pays no heed at all to the sources thesis or the principle of electorally accountable policymaking. For Perry, the moral principles that underwrite noninterpretive review exist and determine correct answers to moral questions independently of what a majority of the people believe or come to believe. What is needed, then, is a theory of judicial review that remains faithful to the sources thesis and the principle of electorally responsible policymaking while sanctioning the judicial imposition of some extraconstitutional values. Positivist noninterpretivism is just such a theory. Central positivist noninterpretivism is the development of a coherent version of legal positivism that does not tie sovereignty exclusively to the intentions of the framers. Such a development requires major modifications of the concept of sovereignty adopted by the positivist interpretivists. The remainder of this section is divided into four subsections. The first deals with the concept of sovereignty. The second deals with the nature of the extraconstitutional values that the courts may impose under the concept of sovereignty developed in the first subsection. The third discusses the role of the courts as agents of social change under a positivist noninterpretivist theory of judicial review. Finally, the fourth subsection discusses some of the difficulties presented by the theory I advocate. Between Clause-bound Literalism and Value Imposition 105 The Concept of Sovereignty The defects noted above with positivist interpretivism can be traced directly to the overly restrictive concept of sovereignty adopted by adherents of that theory. The locus of sovereignty, for the positivist interpretivists, is the will of the framers of the Constitution. Law must be an expression of the will of the sovereign, fundamental law is expressed in the Constitution, and the will of which the Constitution is an expression is the will of the framers. Accordingly the emphasis placed on original intentions. Positivist noninterpretivism, on the other hand, identifies the locus of sovereignty as the will of a consensus of the people (the will of the people, for short). The people are sovereign, and it is the will of the people, not the framers, that is determinative of law. At first this does not seem like a major modification, but it has far reaching implications for legal theory. Simply shifting the locus of sovereignty from the will of the framers to that of a consensus of the people allows one to see at least two critical differences between interpretivist and noninterpretivist versions of positivist constitutional theory. Two areas in which important differences are readily visible are changes in the sovereign will and the determination of the meaning of constitutional provisions. Can the will of the sovereign, with respect to issues of fundamental law, change over time? To this question both the interpretivist and noninterpretivist positivists answer in the affirmative. Their answers differ, however, with respect to the ease with which change is possible and with respect to the mechanism of change. For the positivist interpretivist, the will of the sovereign, being linked to the will of the framers, is relatively fixed and static. The will of the sovereign on issues of fundamental law is fixed in the Constitution. Changes in fundamental law, revisions in the will of the sovereign, require amending the Constitution. If fundamental law is to be created or changed, the positivist interpretivist insists that such changes should be made in the legislature, through the amendment process, not in the courts. 32 For the positivist noninterpretivist, on the other hand, the will of the sovereign, even with respect to questions of fundamental law, is fluid and mutable; it changes as the will of the people changes. Times and social conditions change, and law, even fundamental law, if it is to be of service to the people, must be able to change in response to changing circumstances. As Dean Harry W. Jones puts it, It has become a truism that law must be kept up to date, responsive to the continuing processes of social change. Present-day judges are very much aware that concepts and categories received from law's past-privity of contract, sovereign immunity, "fault" in divorce actions and many more-may not order contemporary phenomena effectively and justly. It is not that these concepts were necessarily wrong when they were handed down; we are, I think, too quick to assume that. It is simply that, whatever their original justification, they offer the wrong answers for today's problems. 106 H. Hamner Hill One hates, in a way, to see old friends like negligence, consideration and "state action" withering away in vitality and influence, but, to borrow a phrase from Justice Roger Traynor, "the number they have called is no longer in service. "33 Jones's observations apply no less to questions of fundamental law than they do to questions of more mundane areas of substantive law.34 For the positivist noninterpretivist, when the will of a consensus of the people changes with respect to a particular issue, the law on that issue has changed, and the courts should be both empowered and required to enforce the new understanding. The reason underlying such an empowerment and such a requirement should be clear: A positivist theory of law, in which sovereignty is explicated in terms of the will of a consensus of the governed, requires it. Law is an expression of the will of the sovereign, and sovereignty resides in the governed. As the role of courts is to enforce the laws of the sovereign, it follows that if the will of the sovereign on a particular issue conflicts with the will expressed in a particular statutory or even constitutional provision, then the courts should enforce the current will as against the will expressed in the provision. The will expressed in the provision, not being reflective of the will of the sovereign, has lost the force of law. If courts were to act on the will expressed in the provision, they would be acting contrary to the will of the sovereign, contrary to law. Such behavior on the part of courts no doubt takes place, but such actions are clearly ultra vires. The will of the sovereign is determinative of law. If the will of the sovereign is clear, and a court knows that will and disregards it, for whatever reason, then that court has exceeded its legitimate authority and has acted illegally. In many instances, of course, when a question comes before a court for decision the will of a consensus of the people may not be clear. It may be that people have failed to consider the issue or it may be that a consensus from a previous era is undergoing reexamination. In such cases, the role of the courts will be rather different than that described in this subsection. Such situations are discussed in the third subsection. The second area in which important differences between the interpretivist and noninterpretivist versions of legal positivism appear is in the determination of the meaning of various constitutional provisions. For the positivist interpretivists, ideally, a constitutional provision wears its meaning on its sleeve. All that one need do in order to determine precisely what a constitutional provision requires is to read the provision.35 When the meaning of a provision is unclear, then the courts should look to the legislative history of the provision to determine the original intent. If, as in the case of the liberty clauses of the Fifth and Fourteenth amendments, the meaning of the provision is unclear, and there is no legislative history indicating what the framers intended, the courts should refrain from imbuing the provision with their own values. Although there is a certain appeal to such a program, it has the unfortunate and Between Clause-bound Literalism and Value Imposition 107 unacceptable effect of deoperationalizing many important provisions in the Constitution. Positivist noninterpretivism, on the other hand, has the court look to the understanding and will of a consensus of the people with respect to unclear constitutional provisions in order to determine the meaning of such provisions. The precise meaning of a constitutional provision depends upon the understanding of a consensus of the people with respect to that provision. As times change, and as the people's understanding of a constitutional provision changes, the legal requirements imposed by that provision change. An example of this sort of change can be seen in the attitudinal change with respect to equal protection that took place in the United States between 1896 (Plessy v. Ferguson) and 1954 (Brown). As the people, prompted by the courts, gradually came to the view that the requirements of the Equal Protection Clause were inconsistent with state-enforced racial segregation (a view shared by a consensus of the people at least by the late 1960s), the meaning of the Equal Protection Clause changed. That the framers of the Fourteenth Amendment did not intend to outlaw segregated public schools is of little importance. The will of the sovereign (the people) in 1954 was different than it had been in 1867. If the will of the people concerning a constitutional provision at one moment in history is at odds with the will of an earlier generation, so much the worse for the previous generation. Sovereign will, for the positivist noninterpretivist, is determined through reference to a consensus of the governed. In order to make sense of the continued legal validity of old (sometimes ancient) statutory or constitutional provisions that cannot properly be understood to be a part of the will of the current sovereign, one needs a Lockean doctrine of tacit consent or tacit reauthorization. Unless the current sovereign specifically overrules actions of a previous sovereign, those actions remain in force. There are no major difficulties with this part of the consensus approach to sovereignty. Difficulties arise in determining what the consensus is on controversial issues like abortion. I address those difficulties in the third subsection. Assuming that I can construct a positivist theory of constitutional interpretation in which the concept of sovereignty is not tied to the intentions of the framers, what makes such a theory noninterpretivist? I address that question in the next subsection. Determining the Values Courts May Impose In the previous subsection I discussed modifications in the concept of sovereignty necessary to divorce the will of the sovereign from the will of the framers. So doing sets the stage for a positivist theory of constitutional adjudication that is noninterpretivist. The theory being developed is positivist in that it adheres to the sources thesis and, as 108 H. Hamner Hill will be demonstrated shortly, to the separability thesis. But it is also noninterpretivist. The central feature of any noninterpretivist theory of judicial review is that the courts are empowered legitimately to impose extraconstitutional values-values that are not clearly stated in the Constitution nor intended by the framers to be imbedded in it. Because the concept of sovereignty outlined above locates sovereignty in the will of a consensus of the people, it should be clear that legal values need not be restricted to those expressly stated in the Constitution. The text of the Constitution simply is not the final word on questions of fundamentallaw. 36 Because law is but an expression of the will of the sovereign, for a norm to become law all that is required is that that norm be a part of the will of the sovereign. Thus, with certain exceptions, for a value to become law, all that is required is that that value become a part of the will of the sovereign. Even if these values are clearly extraconstitutional, such as the value of racial equality vis-a-vis the Fourteenth Amendment, that value becomes law, becomes legally binding, when incorporated into the value scheme willed by a consensus of the people. Once a value, even an extraconstitutional value, is so willed, the courts may legitimately apply that value. If and when a consensus determines that, say, equal protection of the laws is inconsistent with, inter alia, state-imposed racial discrimination, despite a deafening silence on such issues within the text of the Constitution, the value judgment adopted by the people becomes legally applicable by the courts. Accordingly, the version of positivism being considered here is noninterpretivist. One might worry that this theory runs roughshod over constitutional protection of minority rights against majority tyranny. In the last subsection I discuss this problem and a solution to it that involves restrictions placed on majority rule by the sovereign. Care must be taken at this point not to confuse the positivist noninterpretivism that I advocate with the nonpositivist natural law theory advocated by Perry. In my view only those values that are part of the will of a consensus of the people are legally binding. If the people fail to incorporate a particular moral principle into their will, then that principle ultimately lacks legal force and can play, at most, a very limited role in legitimate judicial decisionmaking. That is not to say, however, that such a principle has no role at all, as will be discussed in the next subsection. To deny that principles, regardless of their moral validity, not willed by the sovereign lack legal force would be to deny both the sources and separability theses. That I am unwilling to do. Perry, on the other hand, straightforwardly denies the separability, and, eo ipso, the thesis. Perry argues that there are legally binding moral principles that exist and determine the correct answers to political-moral questions "independently of what a majority of the American people [believes or] comes to believe in the future." 37 And, for Perry, those principles should govern Supreme Court behavior when engaging in noninterpretive review. Between Clause-bound Literalism and Value Imposition 109 Courts as Agents of Social Change Even if one concedes that courts should apply the value scheme adopted by the sovereign as described here, it is not at all clear that there is a role for the courts to play as agents of social change. Moreover, it is unclear that there is any role for moral principles not incorporated into the will of the sovereign in judicial review. If one were to hold, as I do not, that the consensus on a particular moral question determinative of law at any given moment in history is the actual consensus of a prereflective or unreflective citizenry, neither of the roles mentioned above would exist. The courts would, in such a view, properly reflect change, but they would not initiate it. Moreover, such a view would result in the standards of constitutionality being held hostage by popular sentiment. In such a view, the decision in Korematsu v. U.S. might well turn out to be fully legitimate, the ruling reflecting the will of the majority at the time, while the decision in Brown would be illegitimate in that it failed, at the time the decision was made, to reflect a consensus. 38 Such results, however, can be avoided by allowing the courts to act as agents of social change, not merely as reflectors of it. Claiming that there are instances in which courts should be allowed to act as agents of social change, where social change means a change in the will of the sovereign, has significant implications for legal theory. The claim suggests that a case sometimes comes before a court even though there is no clear law governing the case. The simple fact of the matter is that there are cases in which either the law is unclear or in which there is no law on the matter. Situations of this sort can arise when cases are unforeseen or when the people realize that what was once an accepted solution to a problem no longer "orders the phenomena justly and fairly." In either case, a court is faced with a very difficult task-it must decide a case39 in the absence of clear law (perhaps in the absence of law at all). This claim amounts to saying that there are gaps (lacunae) in the law that courts must attempt to fill. 40 A gap exists in the law whenever a case falls within the jurisdiction of a court and there are no clear legal rules for its resolution. 41 To be sure, the existence of legal lacunae has been much debated, and the existence or nonexistence of the same is a major question for legal theory. Even though this chapter is not a proper forum for exploring the issue of legal lacunae in depth, I do think it important to point out that my version of positivist noninterpretivism requires their existence. Moreover, positivist noninterpretivism makes it the province of the courts to fill such gaps. When a court seeks to fill in a gap in the law, when it seeks to find/ make the law, what the court must do is attempt to determine, or to help in the determination of, the will of a consensus of the people. If the court were to do otherwise, it would be abandoning the sources thesis and, accordingly, acting ultra vires. Thus saying that a court may, indeed has to, decide cases in the absence of law does not amount to 110 H. Hamner Hill a rejection of the sources thesis. In the absence of a dear consensus, in the absence of law, a court should attempt to determine the consensus or to shape it, whichever is appropriate to the case. Determining the consensus of the people is never an easy task. The task is made all the more difficult when the issue involves a moral problem that the people have not subjected, or will not subject, to critical examination. The consensus determinative of law should be a reflective rather than a prereflective or unreflective one. It is in the provocation of critical reflection on difficult issues that the court has a role to play as an agent of social change. By tackling some tough issues, and attempting to find acceptable solutions to them, the courts have an extraordinary power to force critical evaluation or reevaluation of moral beliefs. The courts have the ability to act as agents provocateurs of a developing moral consensus. When there is no dear consensus on a particular moral question, or when the consensus appears to be unreflective, the task of the courts should be to try to determine an appropriate principle for resolving the issue and then see whether, upon reflection, a consensus develops that embraces the principle articulated. What is more, should a court fail to articulate a principle on which there is a consensus, or should it articulate a principle that runs counter to the reflective consensus, there are a number of ways in which such a principle can be denied legal force. Several examples should help clarify this point. Three important cases dealing with difficult moral issues exemplify the nature of the role that courts should play as agents of social change. The cases are Brown, Roe v. Wade, and Lochner, representing, respectively, the court successfully acting as an agent of social change, the court urging a moral prindple on which there is not yet a consensus, and the court urging a moral principle rejected by the people. Depending upon how one reads the social science data, a strong case can be made to the effect that in 1954 there was no consensus concerning racial equality and the Equal Protection Clause. The Court, however, saw that there was a need to address the issue of state-sponsored racial segregation and undertook to articulate a moral principle for dealing with the issue. To be sure, the princple articulated by the Court in Brown prompted neither instant nor universal assent, but it did force a critical evaluation of attitudes concerning racial discrimination. And, importantly, within twenty years a dear consensus had developed, a reflective consensus, agreeing with the principle articulated by the Court. In dear contrast to the Court's success in changing social attitudes in Brown stands its limited success in dealing with the abortion issue. In Roe the Court accepted the task of attempting to articulate a moral principle for dealing with the problem of abortion that would be acceptable to a consensus of the people. The principle it articulated, however, far from coalescing a consensus, appears to have split public opinion. Few people are happy with the principle underpinning Roe. Those who favor Between Clause-bound Literalism and Value Imposition 111 the decision often feel that the right to abort should be stronger than the one the Court articulated; those who oppose the decision feel that there should be no such right. The ultimate fate of the decision still hangs in the balance, awaiting the development of a reflective consensus. The Court clearly succeeded in Roe in provoking critical examination of moral beliefs, but it has not yet and may never, succeed in discovering a moral principle governing the problem of abortion acceptable to a consensus of the people. Should a consensus fail to develop, the Court should return the issue to the states for determination in more homogenous forums. In my view the courts simply cannot provide answers to all questions and on those where they cannot, they should refer the questions to an organ of government more competent to decide. Lochner provides a clear example of what happens when the courts identify a political-moral principle that is actually, or upon reflection, ultimately, rejected by the consensus. There are good reasons to believe that even in 1905 a majority of the people would have rejected the applicability of laissez-faire economics to many of the then current social problems. When the Court embraced laissez-faire, over Holmes's objections that the Constitution was written for people of fundamentally differing views, public rejection of the principle adopted by the Court was swift and overwhelming. Legislators continued to pass legislation that flew in the face of laissez-faire principles (much of it was subsequently struck), and President Harry Truman threatened to pack the Court with justices who would reverse Lochner. Within thirty years the Court saw the error of its ways and reversed. Had the Court not reversed, the people had and have other means at their disposal with which to reject court decisions (short of a court-packing plan). Perhaps the most powerful of these means is the amendment process. One of the much overlooked features of the U.S. political landscape is the relation between the amendment process and rejection of Supreme Court decisions. There have been, of course, but twenty-six amendments to the Constitution of which ten accompanied the original document and were necessary for ratification, and yet another two were a serious mistake and its correction (prohibition). Of the remaining fourteen, five of the amendments are clear repudiations of Supreme Court decisions. The Eleventh Amendment reverses the decision in Chisholm v. Georgia, 42 the Thirteenth and Fourteenth reverse Scott v. Sanford, 43 the Sixteenth reverses Pollock v. Farmer~ Loan and Trust Co., 44 and the Twenty-sixth reverses Oregon v. Mitchell. 45 The amendment procedure is a powerful tool that the people can and have utilized to correct what are, in the eyes of the people, serious mistakes on the part of the Court when it comes to answering difficult political-moral issues. When the Court errs, there are remedies.46 Having outlined a theory of judicial review that is both positivist and noninterpretivist, and that retains a role for the courts to play as agents but not the sole determiners of social change, several problems 112 H. Hamner Hill remain to be considered. The problems addressed in the next subsection fall into two broad categories: those dealing with the determination of a consensus and those dealing with the problem of majority tyranny. Difficulties with Positivist Noninterpretivism The core of my positivist noninterpretivist theory of judicial review is the location of sovereignty in the will of a consensus of the people. Consensus theories, however, face several serious difficulties, not the least of which involves determining what the consensus is and whose views are to count toward the consensus. There are at least two approaches to determining a consensus: Everyone's views are to count and to count equally (a moral one-person, one-vote principle), or the views of some count more than, and perhaps to the exclusion of, the views of others. The former approach has been adopted by Edmund Burke and by Alexander Bickel in his later writings; the latter by modern-day contractarians, John Rawls, and others. Each of these approaches presents difficulties. If, on the one hand, the views of some are to count more than the views of others in the determination of the consensus, two problems arise. First, as the views of some persons are valued more highly than the views of others, the charge that the consensus is elitist is hard to defeat. Even if those whose views are to be taken more seriously are identified as "competent judges" according to Rawls,47 the consensus that emerges from the competent judges is in no way democratic. In a society at least nominally committed to democratic policymaking, this is a serious difficulty. The second difficulty involves the determination of who is to count as a competent judge in moral matters. The identification of competent judges in any area of inquiry often smacks of questionbegging or stacking the deck. Determining who is a competent judge is often a question of power politics, a determination geared toward maintaining the status quo. Even in objective realms like physical science, Thomas Kuhn, Paul Feyerabend, and their followers argue that people who disagree with the majority power brokers are, despite their objective competence, ruled incompetent. Disagreement with the majority becomes a pretext for banishment to the gulag of incompetence. One should recall Bertrand Russell's conjugation of the highly irregular verb: I am firm, you are obstinate, he is a pig-headed fool. Although there may well be acceptable answers to the problem of determining who is to count as a competent judge (though I, I should confess, am dubious of even that modest prospect), I can see no way to counter the charge that entrusting policymaking exclusively to competent judges is inherently antidemocratic. It is, of course, disturbing that unqualified (not to say incompetent) persons take part in the democratic process, but democracy may well require not only a right to be wrong but a right to be stupidly wrong. To paraphrase Oliver Wendell Holmes, a commitment to democracy Between Clause-bound Literalism and Value Imposition 113 seems to require that the people are entitled to go to hell in a handbasket, so long as they vote themselves there. Of course, embracing the other option, namely, that everyone's views count equally toward the consensus, poses a clear danger of majority tyranny. Burke noted long ago that there is nothing sacred in the concept of majority rule. It applies, where it does, as a result of history and habit, not because it is in any way an objectively superior form of government. Pure majority rule subjects the standards of legality and constitutionality to the sentiments rampant in the citizenry.48 Protection of minority rights becomes, to put it mildly, a very serious problem. Despite the serious nature of problems such as the protection of minority rights, my positivist noninterpretivist theory commits me to what Bill Nelson has called "radical democracy." Ultimately the exclusive determinant of what law is is the will of a consensus .of the people. If the people will unwise, politically unsound, or clearly immoral laws into existence, then we are stuck with unwise, unsound, or immoral laws as sovereignty is located in the will of the people. As Justice Stewart said, dissenting in Griswold v. Connecticut, the silliness, or stupidity, or even asininity of a law does not, in itself, make such a law unconstitutional. 49 I wholeheartedly embrace Stewart's position. The courts simply are not the place within our system to seek protection from unwise, immoral, or blatantly discriminatory legislation. To be sure, such protection must be sought somewhere, but, as Learned Hand so ably argues: "This much I think I do know-that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."50 To be sure, a society needs to try and protect itself against majority tyranny. But such protection lies chiefly outside the courts.51 There is, however, a limited role for the courts to play in providing such protections. One way the courts can aid in protecting society against majority tyranny is through the enforcement of self-imposed limits on majority power or action, that is, empowering courts to force the majority to abide by rules to which it, the majority, has agreed-rules that effectively disable the majority from asserting its will in certain areas. The restrictions on state and federal government actions found in Article I, Sections 9 and 10, and in the Bill of Rights count as instances of disabling rules that the courts could enforce. To be sure, such a move promotes protection of minority rights, but it does not guarantee them absolutely. Ultimately, of course, the protection offered by the courts is minimal in that the courts are empowered to enforce only those limitations on majority power that the majority accept. Should a super-majority (the two-thirds of the people needed to amend the Constitution-a number itself the product of self-imposed restraint) decide to free itself from the fetters of current constitutional restraints, then the courts can offer no protection. 114 H. Hamner Hill Though I find the idea repugnant, I can see no good reason to suppose that the people could not free the states from the restrictions of the Fourteenth Amendment through the repeal process. If there were to be any protection from such action, it would lie outside the courts. One thing that a positivist noninterpretivist theory of judicial review cannot guarantee, and does not pretend to guarantee, is that the courts will articulate correct moral values, or that the consensus that emerges will embrace correct values. There is no protection against morally bad, yet legally valid, laws. And there is no guarantee that a future decision like Brown would be legitimate while one like Lochner would be illegitimate. Those decisions and decisions like them stand on the same footing: Each is potentially legitimate. Where they differ is in the verdict history has passed on them. To ask for a guarantee that all decisions in cases of noninterpretive review will be morally correct is to ask too much from a theory of judicial review. To seek, as so many constitutional theorists seek, a theory that guarantees Brown while protecting against Lochner is truly the elusive quest. NOTES 1. Alexander Bickel begins his classic defense of nonpositivist noninterpretive review, The Least Dangerous Branch, with the observation "The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known. The power which distinguishes the Supreme Court of the United States is that of constitutional review of actions of the other branches of government, federal and state." A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Indianapolis, Ind.: Bobbs-Merrill, 1963), p. 1. 2. Critics of judicial review (Ely among them) frequently fail to discuss one of the important functions of judicial review-legitimation. Whenever the Court upholds a legislative enactment (a far more common result than invalidation), that enactment gains an air of legitimacy. For a discussion of the legitimating function, see, A. Bickel, supra note 1, p. 29 ff. 3. J. H. Ely, Democracy and Distrust: A Theory of Judicial Review (New Haven, Conn.: Yale Univ. Press, 1980), p. 5. 4. For excellent contemporary statements of the positivist interpretivist position, see, R. Berger, Government by Judiciary (Cambridge: Harvard, 1977) and R. Bork, Traditional Morality in Constitutional Law (Washington D.C.: American Enterprise Institute, 1984); R. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana L. J. 1 (1971). Excellent contemporary statements of the nonpositivist noninterpretivist position can be found in A. Bickel, supra note 1; M. Perry, The Constitution, the Courts, and Human Rights (New Haven, Conn.: Yale Univ. Press, 1977); T. Grey, "Do We Have an Unwritten Constitution," 27 Stanford L. Rev. 703 (1975). 5. U.S. v. Butler, 297 U.S. 1, 63 (1936). 6. One is reminded of the Vince Lombardi theory of equal protection. "Sure," Coach Lombardi is reported to have said, "I treat all my players equally. They're all scum." On a strict interpretivist reading of the Equal Protection Clause, as neither the language of the constitutional provision nor the intent of the framers Between Clause-bound Literalism and Value Imposition 115 gives any guidance, a court would be compelled to rule a legislative equivalent to the Lombardi approach constitutional. Similarly, whenever a legislature says, "But that is all the process she is due," the court would be compelled to hold whatever minimal process the legislature provided as adequate. 7. See, for example, Lon L. Fuller, The Morality of Law (New Haven, Conn.: Yale Univ. Press, 1964); "Positivism and the Fidelity to Law," 71 Harvard L. Rev. 593 (1958). 8. Joseph Raz, "Legal Reasons, Sources, and Gaps," in Joseph Raz, The Authority of Law (Oxford: Clarendon Press, 1979), p. 53. 9. For a full statement of Kelsen's doctrines of authorization, see Stanley Paulson, "Material and Formal Authorization in Kelsen's Pure Theory," 39 Cambridge L. ]. 172 (1980). 10. Jeremy Bentham, Of Laws in General, H.L.A. Hart ed. (Oxford: Oxford Univ. Press, 1970), p. 1. 11. Ibid., pp. 18 ff. 12. For a discussion of the Constitution as Grundnorm see Paulson, supra note 9. Paulson makes the important point that the Constitution serves both a validating and an invalidating function; that is, the Constitution allows one both to determine which laws are invalid and which are valid. As noted above, the legitimating function of judicial review is a much neglected feature of the practice, neglected primarily by critics. 13. Robert Bork has noted that whenever possible judges talk as if they were searching for the intent of the framers ("Neutral Principles and Some First Amendment Problems," supra note 4 at pp. 3-4). Other authors insist that judges should be bound by the intent of the framers. Berger, supra note 4; T. Diamond, "Democracy and 'The Federalist': A Reconsideration of the Framers' Intent," 53 Am. Pol. Sci. Rev. 52 (1959); J. P. Frank and R. F. Monroe, "The Original Understanding of 'Equal Protection of the Laws,'" 50 Columbia L. Rev. 131 (1950); H. Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation," 2 Stanford L. Rev. 140 (1949); C. Warren, "The New Liberty Under the Fourteenth Amendment," 339 Harvard L. Rev. 431 (1926). There are, of course, many who reject the quest for the original understanding. A. Bickel, "The Original Understanding and the Segregation Decision," 69 Harvard L. Rev. 1 (1955); P. Brest, "The Misconceived Quest for the Original Understanding," 60 Boston Univ. L. Rev. 234 (1980); A. S. Miller and R. F. Howell, "The Myth of Neutrality in Constitutional Adjudication," 27 Univ. of Chicago L. Rev. 661 (1960). 14. J. Bentham, "The Constitutional Code," in The Works of Jeremy Bentham, vol. 9, R. Bowring, ed. (London: Simpkin, Marshall, and Co., 1843), p. 121. 15. In large part I take my task here to be similar to that of Hart in his acceptance of a positivist theory of law while rejecting Austin's command theory of law and material reduction theory. I accept the basic Benthamite position on the nature of law, but I adopt a non-Benthamite, noninterpretivist theory of sovereignty. 16. One criticism of the interpretivist criterion of unconstitutionality is that it is too stringent. Felix Cohen argues that the interpretivist criterion, expressed in James Bradley Thayer's famous rule of clear mistake, amounts to a rule that what is rational is constitutional. "Taken seriously, this conception makes of our courts lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren." F. Cohen, "Transcendental Nonsense and the Functional Approach," 35 Columbia L. Rev. 809, 819 (1935). 116 H. Hamner Hill 17. G. Sherman, "Keeping Alive a 2-century-old Document," National L. ]., Monday, October 13, 1986, p. 13. 18. One of the problems that one encounters in current debates about constitutional interpretation is that various theories of interpretation are often used to mask political convictions. The work of William Winslow Crosskey, for example, is almost totally ignored by current proponents of positivist interpretivism. This is odd in that Crosskey provides a careful and detailed study of the meaning of various constitutional provisions as they were understood by the framers in the context of the late eighteenth century. Crosskey's analysis, however, reveals that provisions like the Commerce Clause were originally intended to grant the federal government extraordinarily broad regulatory powers. Such a reading of the original intention of the Constitution is at odds with the political motives of many positivist interpretivists, so it comes as little surprise that Crosskey's work is virtually ignored. See, W. W. Crosskey, Politics and The Constitution in the History of the United States, 3 vol. (Chicago: Univ. of Chicago Press, 1980). 19. 0. W. Holmes, "The Theory of Legal Interpretation," 12 Harvard L. Rev. 418 (1899). Crosskey, supra note 18, uses this quote from Holmes on the frontispiece of the first two volumes of Politics and the Constitution. 20. 5 U.S. (1 Cranch) 137 (1803). 21. 198 u.s. 45 (1905). 22. 347 u.s. 483 (1954). 23. 381 u.s. 469 (1965). 24. 367 u.s. 643 (1961). 25. 410 u.s. 113 (1973). 26. Perry, supra note 4, p. 93. 27. Perry does not subscribe to the view that there is a uniquely correct answer to each political-moral question-there may be several. Thus he rejects a moral version of Dworkin's right answer thesis. What Perry desires is a process of dispute resolution likely to reach one of the right answers to difficult politicalmoral questions. He believes that the process most likely to succeed is noninterpretive review. 28. Perry, p. 97. 29. Perry, p. 99. 30. Perry, p. 115. This passage in Perry clearly identifies his nonpositivist views. He requires neither that the moral values that underwrite correct legal decisions in hard human rights cases be enacted by the sovereign (made part of the law), nor that they be accepted by the sovereign. Such moral values exist and determine the correct answers to legal questions independently of what the sovereign believes or comes to believe. Perry thus rejects both the sources thesis and the separability thesis. Rejecting these theses identifies his view as one that is nonpositivist. 31. Perry, p. 102. 32. The positivist interpretivist's response to bad laws is "Get the legislature to change them." This view has been expressed in several important Supreme Court decisions concerning the standard of review. Justice Black, discussing a Kansas debt adjustment statute noted, "The Kansas debt statute may be wise or unwise. But relief, if any be needed, lies not with this body but with the body constituted to pass laws for the State of Kansas." Ferguson v. Skrupa 372 U.S. 726, 732 (1963). Similarly, Justice Potter Stewart said of Connecticut's birth control statute, "I think this is an uncommonly silly law. . . . But we are not Between Clause-bound Literalism and Value Imposition 117 asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do." Griswold v. Connecticut 381 U.S. 469, 527 (1965) (Justice Stewart dissenting). 33. H. Jones, "An Invitation to Jurisprudence," 74 Columbia L. Rev. 1023, 1031 (1974). 34. It should be noted that Jones's reference to state action doctrines implicitly endorses my view in that state action, as explicated for purposes of Fourteenth Amendment analysis, is a question of fundamental law. 35. Of course, such a reading of the First Amendment would support Justice Black's rather extreme view that "no law" means no law and, accordingly, that all libel and slander laws are unconstitutional. 36. The text is, however, the best place to start, and, frequently, the final word on the matter. The constitutional text has a very special place in U.S. political and legal theory, and any theory of judicial review that fails to take account of or that obscures that place is defective. Perhaps the single most devastating challenge that can be leveled against the American Legal Realists is that they give no account of the importance of legal texts, including the constitutional text, in their account of law. 37. Perry, supra note 4, p. 115. 38. Some constitutional theorists have managed to read the available social science data so as to find that in 1954 the decision reached in Brown was, in fact, reflective of an actual consensus existing in the U.S. public. Although I would like to believe that we do, in fact, live in an enlightened society, the data do not support such a belief. To be sure, there was in 1954 a growing uneasiness with state-enforced racial segregation, and the Court in Brown took an active role in the reconsideration of a social policy. I think it at best fanciful, however, to suggest that the Brown decision actually reflected the views of a consensus of the people at the time that the decision was handed down. The Court in Brown initiated and shaped a new consensus, it did not reflect a newly developed one. 39. The principal task of the judge is to decide cases properly brought before the court. One aphorism familiar to most beginning law students is that the judge is often in error but never in doubt. As disturbing as the claim may seem, a wrong decision from a judge is, for systematic reasons, better than no decision at all. 40. A full discussion of the problem of normative gaps or normative closure is far beyond the scope of the present chapter. For those interested in this problem, however, some of the leading works on the topic are Carlos Alchourron and Euginio Bulygin, Normative Systems, (Wein: Springer-Verlag\_ 1971); Logique et Analyse N.S. 9 (1966) is devoted to the problem; Joseph Raz, The Authority of Law, ch. 5; and Julius Stone, Legal Systems and Lawyer's Reasonings (Stanford, Calif.: Stanford Univ. Press, 1964). 41. One implication of embracing the existence of normative gaps in legal systems is that one must reject ~onald Dworkin's famous right answer thesis. The existence of legal gaps requires that there be cases within the jurisdiction of courts for which there is no uniquely correct legal resolution. Whether one treats the existence of gaps as a beneficial or detrimental feature of a legal system is a separate question. What one must do, however, is accept that there are cases for which there is no right answer. 42. 2 Dall. 419 (1793). 118 H. Hamner Hill 43. 19 How. 393 (1857). 44. 157 u.s. 429 (1895). 45. 400 u.s. 112 (1970). 46. One should also recall President Andrew Jackson's rebuff of Chief Justice John Marshall: "Mr. Marshall has made his decision, let him enforce it." 47. J, Rawls, "Outline of a Decision Procedure for Ethics," 60 Phil. Rev. 177 (1951). 48. Stability in law, particularly constitutional law, is a desirable trait. One does not want the standards of what is legal to change too rapidly. Accordingly, a tedious process like the amendment process, while allowing for expressions of the popular will, slows the rate of change. 49. See note 32, supra. 50. Learned Hand, "The Contribution of an Independent Judiciary to Civilization," in The Spirit of Liberty, I. Dillard, ed. (New York: Knopf, 1953), p. 165. 51. James Bradley Thayer, long an opponent of "judicial activism," argued at the tum of the century that "under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere." Thayer, unfortunately, did not indicate just where "elsewhere" might be. J. B. Thayer, "The Origin and Scope of the American Doctrine in Constitutional Law," in Legal Essays (Boston: Boston Book Co., 1908), p. 39. SIX Toward a Public Values Philosophy of the Constitution STEPHEN M. GRIFFIN A relatively new type of constitutional theory involves applying moral and political philosophy to explain, justify, and criticize aspects of constitutional law. This chapter addresses a recent development in this category of constitutional theory-the effort to construct a public values or "neorepublican" philosophy of the Constitution.1 The development of this philosophy is an attempt to articulate a distinct alternative to the democratic relativism that has dominated U.S. political and constitutional thought in this century. 2 The proponents of a public values philosophy reject the political theory of interest group pluralism that awards political victory to the greatest aggregation of private preferences. They argue that the Constitution and the Bill of Rights presume "a conception of the political process as an effort to select and implement public values."3 Public values can be understood as the common goals or aspirations of the American community, exemplified by the values contained in the Constitution. Despite the historical appeal of neorepublicanism, its proponents have not so far been able to provide much content to the concept of a public value. A public values approach may also be usefully contrasted with traditional constitutional theory (which concerns itself with reconciling judicial review and democracy) in that this approach seeks not merely to influence the constitutional practices of government, but to find a new audience for constitutional discussion among the citizens of the United States. The general idea is that public discussion over issues of constitutional principle should be encouraged in the hopes of providing a more secure basis for the maintenance of freedom and equality. This encouragement of public discussion on constitutional, matters can be regarded as a democratization of political and constitutional theory, the aim of which is a greater degree of awareness of constitutional values and participation in constitutional and political change. 119 120 Stephen M. Griffin The idea of a public values philosophy presents certain difficulties. For example, it is not immediately clear how the notion of a "public value" is to be distinguished from a purely private preference. Further, because the objective of the political process from a public values viewpoint is to select those values, the question arises as to the nature of the institutions and practices required to ensure that this process is not unduly influenced by powerful aggregations of private preferences. To see how these difficulties might be addressed and a public values philosophy elaborated, this chapter explores the public values alternative within the framework of Rawls's theory of justice.4 Five main topics are considered: the justification of "public" values, the structure of Rawls's system of constitutional rights, the worth of liberty, whether judicial review can be justified within Rawls's theory, and the contrast between democratic relativism and a public values philosophy. PUBLIC VALUES AND THE ORIGINAL POSITION How are public values to be distinguished from mere preferences? Rawls's theory provides a straightforward solution to this problem: A public value is a value that would be affirmed from the perspective of the original position. Unfortunately, Rawls's idea of an original position has proved problematic, as it is the source of many misunderstandings. I will therefore offer an account of the original position that I hope will be less vulnerable to some standard objections. The original position is a set of appropriate conditions to govern the selection of principles of justice for the basic structure of society. In trying to accurately and completely describe these conditions, the conception of the original position will inevitably appear as a philosophical ideal. But it is important to understand that the conditions specified are intended to be the restrictions on argument we try to adhere to every time we reason about questions of social justice. When Rawls first introduces the concept of the original position, it is in terms of a social contract metaphor, an assembly of persons gathering to choose principles of justice.5 In the main, he continues to use the original position as a social contract metaphor, speaking of "the parties" in the position and the like. But Rawls makes it quite clear that the original position should be interpreted so that anyone can assume its perspective at any time: [O]ne or more persons can at any time enter this position, or perhaps, better, simulate the deliberations of this hypothetical situation, simply by reasoning in accordance with the appropriate restrictions .... To say that a certain conception of justice would be chosen in the original position is equivalent to saying that rational deliberation satisfying certain conditions and restrictions would reach a certain conclusion. . . . It is important that the original position be interpreted so that one can at any time adopt its perspective. 6 A Public Values Philosophy of the Constitution 121 This is how I regard the original position: It is a collection of restrictions on the kinds of arguments we may use to advocate or oppose given principles of justice. If we find these restrictions persuasive, we will employ them in reasoning about questions of justice, and they will affect the arguments we make in a real and nonhypothetical fashion. One may think that what is hypothetical about the original position is the agreement that is made there, the hypothetical contract Rawls speaks of.7 Rawls is actually somewhat ambiguous on this point. When he tries to explain specifically why his theory is a social contract theory, he justifies the term by referring to the fact that the theory must apply to many persons, must be a public conception of justice, and that persons are expected to adhere to the agreed principles. 8 But all of these conditions can be built into the original position as appropriate conditions for argument without a contract ever occurring, real or hypothetical. Given the severe restrictions on information appropriate to reasoning about justice, there is no basis for bargaining or negotiation in the original position. The original position is thus the standpoint of one person, who by virtue of the restrictions imposed on his or her reasoning (some of which are inspired by the social contract tradition), can be assured that his or her favored principles would be chosen by anyone adopting that standpoint. 9 It is thus misleading to characterize Rawls's theory as a social contract theory if what is meant is that the principles of justice are derived from or justified through a contract, real or hypothetical. If the question is one of justification, Rawls is not best understood as a contractarian, and his theory is not best understood as a social contract theory. The principles of justice do not acquire their initial justification from a hypothetical contract but from the moral force of the conditions on argument that make up the original position. The condition on argument that ensures the values selected will be public values is the requirement that we must exclude the effects on our reasoning of information that prevents us from achieving an objective standpoint free of prejudice and bias (the "veil of ignorance"). It is not necessary to speak of hypothetical parties laboring under a sudden, mysterious denial of knowledge. We simply take care not to support the arguments we make in favor of our preferred principles of justice (public values) with certain kinds of information. The information that Rawls excludes essentially relates to the characteristics of persons that form the basis for personal preferences.10 Due to this restriction on information, the values selected in the original position are substantially independent of existing preferences. They are public values. For a public values philosophy, the question then arises whether the political system can be designed to approximate the fairness of the original position. If this can be done, the political system will be able to properly fulfill its role of selecting public values. The next three sections explore aspects of Rawls's constitutional scheme in order to 122 Stephen M. Griffin determine how the political system must be structured to fulfill this role. RAWLS'S SYSTEM OF CONSTITUTIONAL RIGHTS Rawls's first principle of justice, the principle of equal liberty, states that the social primary goods known as the basic liberties should be arranged to form the most extensive set of liberties justifiable from the standpoint of the original position, and that the set of liberties should be distributed equally to all citizens. The content of the set of basic liberties is as follows: (1) liberty of conscience (including religious freedom); (2) the political liberties and freedom of association (including the right to vote, to run for public office, freedom of speech, press, and assembly); (3) the liberty and integrity of the person (including the right to hold personal property, freedom from slavery, and freedom of movement and occupation); and (4) the rights and liberties covered by the rule of law (including freedom from arbitrary arrest and seizure and all other liberties that may be usefully summarized under the heading of "due process"). 11 It appears that Rawls intends all of the basic liberties to be thought of as constitutional rights, rights that any just constitution must contain. As Rex Martin has observed, however, Rawls does not provide us with an account of what he takes a "right," constitutional or otherwise, to be.12 Following Martin's Rawls-like theory. of rights then, we may define a right for Rawls as "an individual's legitimate expectation as to what he would receive in a just institutional distribution of social primary goods."13 Further, in virtue of the list of basic liberties Rawls gives, we may characterize rights as things that belong to individuals as persons, "which can be individuated (parceled out, equally, to the individuals within a certain class) in some determinate amount or to some determinate degree, under publicly recognized rules, such that the distribution of that [social primary] good can be guaranteed to each and every member of that class."14 All of Rawls's basic liberties-constitutional rights meet these criteria. In his most recent articles, Rawls has used the fundamental capacities and highest order interests of moral persons to have an effective sense of justice and to form, revise, and pursue a conception of the good to justify recognition of his general categories of constitutional rights.15 Rawls tends to think in terms of three categories: rights that are supported by the interest in having an effective sense of justice; rights that are supported by the interest in having a conception of the good; and rights that are necessary so that the foregoing rights may be properly guaranteed.16 Thus, the political liberties and freedom of thought are supported primarily on the basis that they enable citizens to express their sense of justice. Liberty of conscience and freedom of association are supported primarily on the basis that they enable citizens to have a conception A Public Values Philosophy of the Constitution 123 of the good. The rights connected with the liberty and integrity of the person and the various due process rights are necessary if the other rights are to be guaranteed.17 Together, these different rights form a family or system of rights. As conflicts among the rights are inevitable, any right may be limited in the process of achieving a coherent system, and so no right is "absolute." There are no "preferred" rights in Rawls's theory. Further, Rawls does not assume that the entire system of rights can be derived solely from the universal interests of a moral person. Deriving a more specific system is a complex process involving arguments from the perspective of the original position, establishing scopes and weights for the different rights, taking into account constitutional considered judgments, and any appropriate facts and circumstances.18 Rawls simply remarks: "The historical experience of democratic institutions and reflection on the principles of constitutional design suggest that a practicable scheme of liberties can indeed be found."19 Rawls therefore holds that the priority of the basic constitutional rights is not infringed by drawing limits to regulate them into a coherent system of rights. Rules of order and regulations of "time, place, and manner" are all appropriate. Rights may also be restricted, which is to say that they may be limited for the purpose of securing an even more extensive system of rights. There are two sorts of cases envisioned by Rawls: restrictions on the rights of political participation to protect other rights through the mechanisms of constitutionalism, and restrictions of an emergency nature necessary to protect the entire system of rights in time of war or other constitutional crisis.20 Both cases are familiar enough in our constitutional law. Rawls sees "[t]he traditional devices of constitutionalism-bicameral legislature, separation of powers mixed with checks and balances, a bill of rights with judicial review"21-as being adopted for a just constitution on the grounds that by limiting majority rule, the system of rights is made more extensive or more secure. The restriction is thus built directly into the constitution.22 By contrast, restricting constitutional rights in an emergency involves interests extraneous to the system of rights, and such restrictions do not appear in the constitution. The sort of emergency Rawls has in mind is a very rare one, a constitutional crisis requiring "the more or less temporary suspension of democratic political institutions, solely for the sake of preserving these institutions and other basic liberties."23 In a well-ordered society (or even in our own), such a crisis is unlikely to occur because such a society is a stable political order with a constitutional system flexible enough to handle "normal" emergencies such as foreign wars or even internal rebellions. Rawls is skeptical of Supreme Court decisions that imply such a crisis existed at some point in U.S. history, and he concludes that such a crisis is unlikely to ever occur in the United States or in any well-ordered society.24 124 Stephen M. Griffin THE WORTH OF LIBERTY So in a Rawlsian well-ordered society, all citizens possess a determinate bundle of guaranteed constitutional rights. Given the inequalities in economic goods allowed by the second principle of justice, however, each citizen does not enjoy the same opportunity to exercise those rights. It appears that some citizens will be more able to pursue expensive conceptions of the good and that some citizens will have a greater ability to influence the political process. Rawls thinks of this difference between possessing a right and the ability to exercise it as a distinction between liberty and the worth of liberty. The basic liberties (or, as we have seen, all basic rights) are guaranteed to even the most poor and uneducated in an equal manner by the first principle of justice. The inequalities allowed by the second principle permit the worth of liberty to vary among the groups who possess different amounts of economic goods. 25 It is at this point that egalitarian or Marxist critics of Rawls pose a strong objection. Rawls appears to assume too easily that inequalities in economic goods are compatible with equality in basic rights. What will the real "worth" of liberty be to someone who is one of the leastadvantaged members of society? What will prevent powerful individuals or economic interests from unduly influencing the political process? Inadequate material means will often translate into a lack of political power. Why doesn't Rawls simply stipulate that all of the social primary goods be distributed so that the worth of the basic liberties is equal for everyone? Rawls attempts to meet this objection through his guarantee of the "fair value" of the political liberties. In A Theory of Justice, his introduction of this idea seemed somewhat ad hoc. 26 Once we better understand the nature of Rawls's argument for the political liberties, however, we can see that his theory in fact requires that the worth of the political liberties be made as equal as possible for all. Further, the requirement that the equal worth of the political liberties be guaranteed has important egalitarian implications for Rawls's theory as a whole. Although there are no rights with a preferred position in Rawls's system, the political liberties do hold a special place. If we keep in mind several themes in the preceding discussion, it is not hard to understand why this is the case. The moral interest that chiefly supports the political liberties is the interest in exercising our sense of justice. Our sense of justice is the capacity that allows us to attain the perspective of the original position and therefore to understand and apply the principles of justice. It thus has a central place in Rawls's theory. When we add to this the fact that the political process is responsible for the implementation of the two principles, the special role of the political liberties becomes apparent. So far as possible, we want the political process to mirror "the fair representation of persons achieved by the A Public Values Philosophy of the Constitution 125 original position."27 Allowing inequalities in the political process would be similar to allowing inequalities between persons in the original position. Such inequalities would be a severe violation of the equal status and dignity of individuals. Inequality would imply that those favored by it are somehow more worthy of exercising their sense of justice and governing society than those less favored. We therefore arrive at the conclusion that the worth of the political liberties to all citizens must be equal, or as equal as possible. This guarantee of the "fair value" of the political liberties is similar to the idea of fair equality of opportunity in the second principle of justice.28 Absolute equality is not to be expected, but we take whatever steps we can to ensure that everyone has a fair chance to hold public office, to be informed about political issues, to place items on the public agenda, and to generally influence the political process. Rawls suggests that the following measures be considered: "Property and wealth must be kept widely distributed" ;29 and political parties must be kept independent of concentrations of private economic power, public financing of campaigns and elections, limits on political contributions, and subsidies to encourage a full airing of opinions on public issues.30 He remarks Historically one of the main defects of constitutional government has been the failure to insure the fair value of political liberty. The necessary corrective steps have not been taken, indeed, they never seem to have been seriously entertained. Disparities in the distribution of property and wealth that far exceed what is compatible with political equality have generally been tolerated by the legal system. Public resources have not been devoted to maintaining the institutions required for the fair value of political liberty. 31 The concept of guaranteeing the fair value of the political liberties is a powerful one. Under certain assumptions, it can become a mighty egalitarian engine. Rawls implies at some points that the inequalities allowed by the full operation of the second principle will still be too great to be tolerated under the fair value standard.32 The fair value argument implies that if a completely equal distribution of social primary goods is the only means of attaining the equal worth of the political liberties, then that is what ought to be done. Perhaps this is why Rawls puts his main emphasis on policies that compensate for inequality (rather than working on inequality directly) in his suggestions for how to implement the fair value guarantee. In any case, the fair value argument is an important one for a public values philosophy. For to carry out the public values vision, we must have a political process that is free of the distorting inequalities caused by private power. The general character of Rawls's discussion suggests just how far our current political process is from ensuring the fair value of the political liberties, and thus just how much of a critical perspective a public 126 Stephen M. Griffin values philosophy must have. A recent careful study of U.S. politics produced this sobering conclusion: The power shift that produced the fundamental policy realignment of the past decade did not result from a conservative or Republican realignment of the voters; nor did it produce such a realignment after the tax and spending legislation of 1981 was enacted. Rather, these policy changes have grown out of pervasive distortions in this country's democratic political process. These distortions have created a system of political decisionmaking in which fundamental issues . . . are resolved by an increasingly unrepresentative economic elite.33 Rawls's theory may be described in many ways, but one inappropriate description is that it is a defense of the status quo. It is quite clearly a powerful critique of our political system, a critique all the more compelling because its theoretical base is firmly within the domain of liberalism.34 JUSTIFYING JUDICIAL REVIEW In designing just institutions for a Rawlsian constitutional system, the fundamental principle to bear in mind is the guarantee of equal, basic rights to all. All considerations of constitutional and political design are subordinate to this principle. The general objective is to establish a governmental system that will preserve the most extensive system of basic rights possible and lead to just legislation. To do this, we try insofar as possible to reproduce the fairness of the perspective of the original position within the constitutional system. As just discussed, this implies strong measures to keep the legislative-political process free from the influence of concentrations of private power. As we have already seen, Rawls thinks it plausible that the traditional mechanisms of constitutionalism can be justified as desirable elements of a just constitution. Note, however, the nature of this justification. As prima facie restrictions on the equal political liberties, all of the devices of constitutionalism (a written constitution, bicameral legislature, separation of powers, a bill of rights, judicial review) are equally suspect. All must be justified on the ground that the restrictions they entail provide a greater degree of protection to the other liberties than would be available under a system of bare majority rule. Majority rule as such has no special place. It is dependent for its justification on the fundamental importance of the political liberties. If those liberties are not guaranteed, then the conditions of background political justice are not met, and the justness of any legislation enacted by the majority is in severe doubt. 35 So judicial review is justifiable for Rawls if it ensures a more extensive system of rights. But can we be more specific than this? We must bear in mind that, at best, Rawls's theory can only provide us with a general justification for judicial review. This means a justification for a practice that allows the judicial branch of government to nullify acts of legislation. A Public Values Philosophy of the Constitution 127 Rawls's theory does not provide us with a basis for saying whether the judiciary should be elected, how it should construe the constitution, whether a special vote of the legislature could override certain judicial decisions, and so on. These are matters that lie beyond the theory of justice, matters of practical constitutional design. We can say that, in comparison to the legislature, it is easier for the judiciary to mirror the fair representation of persons achieved by the original position. This is the ideal we are trying to achieve in designing the constitutional system. Striving for this ideal in the legislative process requires a complex system of restraints and compensatory devices. By contrast, the nature of constitutional adjudication is such that formally, persons are already equal. As Lawrence Sager has said of this process: "It is irrelevant that a claimant is despised or revered, or even that his is a claim shared by many or held in solitude."36 Judges are commonly said to have a duty to act fairly, impartially, objectively, and to exercise their sense of justice wisely. This perspective is precisely the one persons adopt in the original position. If this perspective is already at least partially built into the institution of the judiciary, then we have strong grounds for saying that judicial review is compatible with Rawls's theory and stands on as firm a footing as the power of the legislature to enact legislation. Of course, the courts cannot play the same role as the legislature in guaranteeing the system of rights. The courts cannot enact legislation or act on their own to create cases. Further, Rawls makes it clear that no branch of government has a monopoly on constitutional interpretation: In a democratic society, then, it is recognized that each citizen is responsible for his interpretation of the principles of justice and for his conduct in the light of them. There can be no legal or socially approved rendering of these principles that we are always morally bound to accept, not even when it is given by a supreme court or legislature. Indeed each constitutional agency, the legislature, the executive, and the court, puts forward its interpretation of the constitution and the political ideals that inform it. Although the court may have the last say in settling any particular case, it is not immune from powerful political influences that may force a revision of its reading of the constitution. The court presents its doctrine by reason and argument; its conception of the constitution must, if it is to endure, persuade the major part of the citizens of its soundness. The final court of appeal is not the court, nor the executive[,) [n)or the legislature, but the electorate as a whole.37

#### That distinction rests at the core of our Constitutional system.

Fowler 16 – Attorney

David Fowler, After Obergefell, Can Courts Rewrite Laws? 2016, https://www.wordfoundations.com/2016/10/24/after-obergefell-can-courts-rewrite-laws/

The Founders of the United States of America designed a balanced system of government that sets the stage for limiting the power of each of its three major divisions, or branches. We call this a system of checks and balances. It is a system that rests on the principle of the separation of powers.

According to this model, courts cannot enact or rewrite laws; they can only interpret them or rule them unconstitutional. Only legislators—lawmakers—can write laws.

### “United States”

#### United States refers to the federal government

Francesca L. Procaccini 21 Climenko Fellow and Lecturer on Law, Harvard Law School; Visiting Lecturer in Law, Yale Law School; Visiting Fellow, Information Society Project at Yale Law School, RECONSTRUCTING STATE REPUBLICS, 89 Fordham L. Rev. 2157

The clause makes clear that one vehicle for exercising this general grant of power is through congressional legislation. The Constitution attaches the guarantee obligation to "The United States." The Necessary and Proper Clause of Article I grants Congress the authority to "make all laws" necessary for carrying into execution the powers the Constitution vests in "the United States." 207In addition, the Constitution uses the term "United States" when referring to the federal government as a sovereign whole, comprised of three branches, each exercising a separate core governing function. 208 A general grant of authority to "the United States," therefore, is a grant to each branch to exercise its constitutionally assigned function in enforcing that provision. Under the Guarantee Clause, it is for Congress to legislate against unrepublican practices, the executive to enforce that legislation, and the judiciary to adjudicate any resulting disputes.

#### It's most likely the federal government

John T. Cross 00 Professor of Law, University of Louisville School of Law, SUING THE STATES FOR COPYRIGHT INFRINGEMENT, 39 Brandeis L.J. 337

The amendment speaks in terms of the judicial power "of the United States." In all constitutional provisions that deal with the allocation of authority between the federal and state governments, the phrase "United States" is consistently interpreted as a reference to the federal government.

#### But it can also encompass state actions (more cards like this are available from the legalization topic)

Oakley 9 American Civil Procedure: A Guide to Civil Adjudication in US Courts, Edited by John Bilyeu Oakley, Professor of Law at the University of California, Davis, and Vikram D. Amar, Professor of Law and Associate Dean for Academic Affairs of the School of Law of the University of California at Davis, Kluwer Law International, 2009, page 19

Although it is commonplace today to refer to “the United States” as a single entity and as the subject of statements that grammatically employ singular verbs, it is important to remember that “the United States” remains in many important ways a collective term. The enduring legal significance of the fifty states that together constitute the United States, and their essential dominion over most legal matters affecting day-to-day life within the United States, vastly complicates any attempt to summarize the civil procedures within the United States. Within the community of nations, the United States is a geopolitical superpower that acts through a federal government granted constitutionally specified and limited powers. The organizing principle of the federal Constitution,1 however, is one of popular sovereignty, with governmental powers distributed in the first instance to republican institutions of government organized autonomously and uniquely in each of the fifty states. Although there are substantial similarities in the organization of state governments, idiosyncrasies abound.

### “Art. III courts”

#### “Art. III courts” is best---Limits out Affs which affect Art. I courts, which are disconnected from this topic’s core controversies.

Lampe and Deal 23 – legislative attorney for the CRS; law librarian for the CRS

Joanna R. Lampe and Laura Deal, “Federal and State Courts: Structure and Interaction,” Congressional Research Service, 8-2-23, https://crsreports.congress.gov/product/pdf/R/R47641

Federal courts fall into two broad categories: courts established pursuant to Article III of the Constitution, sometimes called Article III courts, and other adjudicative bodies that are sometimes called non–Article III courts, legislative courts, or Article I courts.

Article III of the Constitution vests the federal judicial power in the judicial branch, sets the outer boundaries of that power, and seeks to protect the judiciary from undue political influence. Federal courts established pursuant to Article III include the Supreme Court, the U.S. Courts of Appeals, the federal district courts, and certain specialized tribunals. 25 In addition to Article III courts, Congress has established other tribunals pursuant to its powers under Article I of the Constitution.26 These courts may handle specialized subject matter, or they may have jurisdiction over federal areas such as U.S. territories and the District of Columbia.27

#### It includes what we want included and excludes what we don’t.

Henning 09 – legislative attorney, CRS

Anna C. Henning, “Supreme Court Appellate Jurisdiction Over Military Court Cases,” Congressional Research Service, 3-5-09, https://sgp.fas.org/crs/misc/RL34697.pdf

Article III vests judicial power in the Supreme Court and “such inferior courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III. Article III courts include the U.S. Supreme Court, federal courts of appeals, federal district courts, and the U.S. Court of International Trade

### “federal judiciary”

#### The federal judiciary is more expansive

Harris et al. 22 – Director in GAO's Information Technology and Cybersecurity team

Carol C. Harris, Emily Kuhn (assistant director at GAO), Jordan Adrian, et al., “The Judiciary Should Improve Its Policies on Fraud, Waste, and Abuse Investigations,” United States Government Accountability Office, November 2022, https://www.gao.gov/assets/gao-23-105942.pdf

The federal judiciary consists of a system of courts that has the critical responsibility of ensuring the fair and swift administration of justice. Specifically, the federal judiciary consists of the Supreme Court, 13 appellate courts, 94 district courts (organized into 12 regional circuits), 90 bankruptcy courts, and two special trial courts (the U.S. Court of Federal Claims and the U.S. Court of International Trade).

#### Does include specialized courts

Jenkins et al. 95 – Assistant Director, Administration of Justice Issues

William O. Jenkins, Jr., Douglas M. Sloane (Assistant Director, Design, Methodology, and Technical Assistance), Barry J. Seltser (Assistant Director, Design, Methodology, and Technical Assistance), “The Federal Judiciary Observations on Selected Issues,” Briefing Report to the Chairman, Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, U.S. Senate, United States General Accounting Office, September 1995, https://www.gao.gov/assets/ggd-95-236br.pdf

The federal judiciary consists of the Supreme Court, 12 regional circuit courts of appeals, the Court of Appeals for the Federal Circuit, 94 district courts, 91 bankruptcy courts, the Court of International Trade, and the Court of Federal Claims. The Judicial Conference of the United States, a body of 27 judges over which the Chief Justice of the United States presides, is the judiciary’s principal policymaking body and does most of its work through about 25 committees. The AOUSC, operating under the direction and supervision of the Conference, provides a wide range of administrative, legal, and program support to the courts, including budgeting, space and facilities, automation, statistical analysis and reports, financial audit, and management evaluation. FJC, the judiciary’s research and education agency, operates under the direction of its own eight-member board, which has two permanent members, the Director of the AOUSC and the Chief Justice, who chairs the board. By statute, AOUSC and FJC have some similar responsibilities in supporting and evaluating court operations and supporting implementation and evaluation of the Civil Justice Reform Act of 1990.1

Regionally, each of the 12 circuits has a circuit judicial conference, chaired by the chief judge of the circuit, whose purpose is to provide a forum for judges and members of the bar to exchange ideas and discuss the administration of the courts in the circuit. Each circuit also has a judicial council of the circuit, also chaired by the chief judge of the circuit, which is charged with making all necessary and appropriate orders for the effective and expeditious administration of justice within the circuit.

#### Does not include specialized courts

Kryzanek 23 – Professor Emeritus of Political Science and currently Special Assistant to the President of Bridgewater State University for Global Engagement and University Priorities

Michael Kryzanek, “The Supreme Court and the Federal Judiciary,” Bridgewater State University, 6-29-23, https://www.bridgew.edu/stories/2023/supreme-court-and-federal-judiciary#:~:text=The%20federal%20judiciary%20is%20organized,final%20arbiter%20of%20what%20the

The federal judiciary is organized into three levels — 94 district courts (often termed the courts of first entry), where many of the legal issues and arguments begin, 13 appellate courts, which as the name suggests, decide appeals to lower court decisions, and the Supreme Court, the final arbiter of what the Constitution says and means. There are nine Supreme Court justices. Judges to the federal courts are appointed by the President and approved by the Senate; they enjoy lifetime service with little possibility of removal through impeachment, and their secretive deliberations and professional and personal conduct often keeps them protected from public scrutiny and criticism.

#### Includes agencies and administrative bodies for helping the courts

Jenkins et al. 95 – Assistant Director, Administration of Justice Issues

William O. Jenkins, Jr., Douglas M. Sloane (Assistant Director, Design, Methodology, and Technical Assistance), Barry J. Seltser (Assistant Director, Design, Methodology, and Technical Assistance), “The Federal Judiciary Observations on Selected Issues,” Briefing Report to the Chairman, Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, U.S. Senate, United States General Accounting Office, September 1995, https://www.gao.gov/assets/ggd-95-236br.pdf

The federal judiciary includes several agencies and judicial bodies that provide for its administration, self-governance, research, education, and training. At the national level, these include the Judicial Conference of the United States and its committees, the Administrative Office of the U.S. Courts (AOUSC), and the Federal Judicial Center (FJC). (See briefing section II for more information on the AOUSC and FJC.) Regionally, they include the circuit judicial conferences, each of which includes all the active appellate, district, and bankruptcy judges of the circuit,9 and the circuit judicial councils, whose membership each circuit may designate within statutory requirements. See briefing section IV for more information on the judicial councils and conferences of the circuits.

#### Includes specialized courts

GU Library 23

“Government Information (US),” Georgetown University Library, last updated 11-29-23, https://guides.library.georgetown.edu/c.php?g=76031&p=489275

About Federal Judiciary

The Federal Judiciary is comprised of the Supreme Court, the Circuit Courts of Appeal and the District Courts. Also included are special courts of limited jurisdiction for bankruptcy cases and tax cases as well as others.

### Should NOT say “federal courts”

#### “Federal court” means what it says on the tin---That includes Art. I courts

Court of Appeals Ninth Circuit, 96

IN RE: Merritt YOCHUM and Rose Marie Yochum, Debtors. UNITED STATES of America, Appellee, v. Merritt YOCHUM and Rose Marie Yochum, Appellants.

Second, the legislative history suggests that Congress intended the statute to have broad application.   The Conference Report on the amendment notes that “a taxpayer who prevails in civil tax litigation in the federal courts, including the U.S. Tax Court, may be awarded reasonable attorney fees and other litigation costs.”   H.R. Conf. Rep. 97-760, 98th Cong., 2d.   Sess. (1982), reprinted in, 1982 U.S.C.C.A.N. 781, 1449 (emphasis added).   Use of the term “federal courts,” not just “courts of the United States,” implies that Congress did not mean to constrict the statute's application to only Article III courts because “federal court” has been defined as “courts of the United States (as distinguished from state, county, or city courts) as created either by Art. III of U.S. Constitution, or by Congress.”   Black's Law Dictionary 611 (6th ed.1990);  see also Webster's Ninth New Collegiate Dictionary 454 (9th ed.1985) (defining “federal court” as “a court established by authority of a federal government;  esp.:  one established under the constitution and laws of the U[nited] S[tates].”)

### Should allow “Lower-Courts-Only” Affs

Weinberg 2k – Bates Chair and Professor of Law, The University of Texas

Louise Weinberg, “The Article III Box: The Power of “Congress” to Attack the “Jurisdiction” of “Federal Courts,”” Texas Law Review, 2000, https://law.utexas.edu/faculty/publications/2000-The-Article-III-Box-The-Power-of-Congress-to-Attack-the-Jurisdiction-of-Federal-Courts/download

One preliminary point: In this paper I will limit discussion to the lower courts insofar as they comprise courts of first instance. Although writers are chronically deflected from the lower courts by their interest in the Supreme Court, only a focus on the lower courts is likely to engage with any clarity the constitutional and other issues raised by politically inspired attacks on court access. In any event the question of the power of Congress to curb the jurisdiction of the Supreme Court is an analytically distinct question requiring separate treatment,2 beyond the scope of this paper.

### “court curbing”

Moyer and Key 18 – Professor of Political Science and an affiliate faculty member of Women’s, Gender, and Sexuality Studies at the University of Louisville with a Ph.D. in Political Science from the University of Georgia; Associate professor in the Government and Justice Studies Department with a Ph.D. from Stony Brook University.

Laura P. Moyer and Ellen M. Key, “Political Opportunism, Position Taking, and Court-curbing Legislation,” Justice System Journal, Volume 39, Issue 2, 03-28-2018, https://doi.org/10.1080/0098261X.2017.1420503

6 Clark (2010, 19) defines court curbing as “the introduction of legislation that threatens to restrict, remove, or otherwise limit the Court's power.” Similarly, Rosenberg (1992, 377) defines it as “legislation introduced in Congress having as its purpose or effect, either explicit or implicit, Court reversal of a decision or line of decisions, or Court abstention from future decisions of a given kind, or alteration in the structure or functioning of the Court to produce a particular substantive outcome.”

### “restrictions on judicial review”

Cooper 23 – Prospect’s managing editor, and author of *How Are You Going to Pay for That?: Smart Answers to the Dumbest Question in Politics*

Ryan Cooper, “Congress Can Defeat Judicial Overreach,” The American Prospect, 5-31-23, https://prospect.org/economy/2023-05-31-congress-can-defeat-judicial-overreach/

My colleague David Dayen has already outlined the details of the deal here. So I’d like to dive into one small detail: its restrictions on judicial review. It turns out that when the politics line up, Congress has powerful options to restrict judicial overreach.

I have previously argued against the very concept of judicial review altogether, but there are many other options to rein in the Court short of that step. One of them is controlling or removing the jurisdiction on specific legislation, in keeping with the Constitution’s stipulation that the Court has final appellate jurisdiction but “with such Exceptions, and under such Regulations as the Congress shall make.”

### Maybe including limiting judicial review. Not a disaster.

#### This wording allows things like limiting judicial review to solve Major Questions Doctrine issues, but constrained very powerfully by the functional limits of the Negative being able to say 1) Judicial Self-Restraint CP: the courts should simply overrule the MQD/decide differently and 2) Congress Adv CP: Congress should enact legislation clarifying its intent on XYZ subject areas such that the court will decide it properly. SO, in order to be viable, Affirmatives will require an extramural restraint key warrant/advantage.

Sweeney 23 – Managing Attorney at the Sweeney Law Firm. LLM, Environment, Natural Resources, and Energy Law, Lewis and Clark Law School.

Ryan M. Sweeney, “Seizing the Engines of Government Power: The Major Questions Doctrine and Limits of Judicial Review in the Roberts Juristocracy,” Environmental, Natural Resources, and Energy Law Blog, 05-18-2023, https://law.lclark.edu/live/blogs/224-seizing-the-engines-of-government-powerthe-major

The Roberts Juristocracy and its newly adopted major questions doctrine pose existential threats for administrative agencies, in addition to posing serious concerns for the American people who rely on the efficient operation of those agencies and the industries they regulate. The Collins model could lay the track necessary for shepherding administrative agencies through the Roberts Juristocracy, limiting judicial review and application of the major questions doctrine. There are certainly many unknowns, not least of which is the extent of the major questions doctrine. But Congress still retains significant authority to limit judicial review, and there are opportunities for creative appellate and regulatory lawyering to find the path forward. It is critical to identify and test potential statutory, litigation, and regulatory solutions that can put our important engines of government and industry back on track.

## Aff---Structural Reform

### Structural---Court Packing

#### Affirmatives can defend classic strategies for court packing, which would allow Democrats to even the ideological balance of the court.

Kramer 20 – Former Dean of Stanford Law School.

Larry Kramer, “Pack the Courts,” New York Times, 10-27-2020, https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html

Democracy depends on norms as well as law, and respecting established norms is essential in a diverse society. The norms that get layered on top of laws are what enable groups with fundamentally different ideas and objectives to live and work together. And if the past decade has taught us anything, it is that a politics of abandoning norms to win today’s battle is mutilating our democracy.

So, yes, Republicans had the legal power to refuse a hearing to Judge Merrick Garland even though he was nominated nearly eight months before the 2016 election, just as they had the legal power to ram Amy Coney Barrett’s nomination through the Senate Judiciary Committee two weeks before the Nov. 3 election.

And yes, they had the legal power to do so even while offering disgracefully hypocritical justifications: denying Judge Garland a hearing because, they said, legitimacy required waiting for an election that was close in time, while rushing through a last-minute appointment for Judge Barrett lest they lose an election that’s much, much closer. But both acts betrayed a ruthless willingness to politicize judicial selection in extreme ways that upended long-established norms.

Liberals say that if Joe Biden wins the election, Democrats should answer by adding justices to the Supreme Court. Republicans respond with faux outrage that this would politicize the judiciary. But they have already politicized the judiciary. The question is whether only one side should play that game. Besides, not only is enlarging the Supreme Court legal, its size has changed seven times over its history.

Adding judges would be a political response to a political act. But the extremes to which Republicans have been willing to go leave the Democrats no other choice. Not for revenge or because turnabout is fair play, but as the only way back to a less politicized process.

This is a lesson we learned decades ago from economists and game theorists: Once cooperation breaks down, the only play to restore it is tit-for-tat. It’s the only way both sides can learn that neither side wins unless they cooperate.

President Trump and the Republicans are unapologetic about discarding longstanding cooperative rules for making judicial appointments. Should they lose the election after succeeding in putting Judge Barrett on the court, it becomes incumbent upon Democrats to respond in kind. Paradoxical as it sounds, tit-for-tat, hard ball for hard ball, would set the stage for constructing a judiciary we can once again respect.

Adding two to four new justices is one way to do this, but there are others that are less disruptive and just as effective. Democrats could also create a fair process that regularizes Supreme Court appointments in a way that removes the incentives to play these games.

In 2005, the law professors Roger Cramton of Cornell and Paul Carrington of Duke proposed adding a new justice each Congress, with the nine most recent appointees deciding cases on the court’s regular docket. The others would remain on the bench, with their full salaries and tenure, and perform all the other duties of Article III judges: filling in when one of the nine is recused or unavailable, deciding cases in the district or circuit courts, helping administer the judicial branch, and possibly participating in the process of selecting cases for the Supreme Court to decide.

It’s an easy fix that creates de facto term limits without running afoul of the Constitution, reduces the stakes for any single appointment, and assures that cases are not being decided by judges who are well past their useful shelf life. It protects judicial independence and is fair to all sides, while reducing the likelihood of a court that is ideologically extreme or out of sync with the rest of society.

#### There are many benefits to a court packing approach; however, there are also important objections to this proposal, as well as germane political controversies.

Berger and Root 19 – Vice President of Democracy and Government Reform at CAP and former senior policy adviser at the White House Domestic Policy Council with a J.D. from Yale Law School; Associate director of Voting Rights for Democracy and Government at CAP with a J.D. from the George Washington University Law School.

Sam Berger and Danielle Root, “Structural Reforms to the Federal Judiciary,” Center for American Progress, May 2019, https://www.americanprogress.org/article/structural-reforms-federal-judiciary/

Addressing conservative court packing by adding justices to the Supreme Court

Another approach is to address conservative court packing head-on. On March 16, 2016, following the death of conservative Justice Antonin Scalia, President Obama nominated Merrick Garland, chief judge of the U.S. Court of Appeals for the District of Columbia Circuit, to fill Scalia’s vacant seat on the Supreme Court.66 At the time, Republicans controlled the Senate—the congressional body responsible for confirming federal judicial nominees. In theory, this should not have been a problem, since Supreme Court justices had often been confirmed during times of divided government in the past.67

Yet while constitutional norms demanded consideration of Garland’s nomination, Senate Majority Leader McConnell and his fellow conservative senators refused to do so. An Obama nominee would have altered the balance of the Supreme Court so that, for the first time in nearly 50 years, conservative appointees would not be the majority on the court.68

The refusal to even consider Garland’s nomination drew widespread criticism across the political spectrum. In a letter to Senate leadership, 350 legal scholars warned that the refusal to consider Supreme Court nominees “is contrary to the process the framers envisioned in Article II, and threatens to diminish the integrity of our democratic institutions and the functioning of our constitutional government.”69 In a Time op-ed, former Gov. Jon Huntsman Jr. (R-UT) and former Sen. Joseph Lieberman (I-CT) wrote: “There is no modern precedent for the blockade that Senate Republicans have put in place. Even highly-contentious nomination battles in the past … followed the normal process of hearings and an up-or-down vote.”70 A March 2016 poll found that two-thirds of Americans, including 55 percent of Republicans and 67 percent of Democrats, wanted the Senate to hold a hearing for Garland’s nomination, with most Americans saying that he should be confirmed to the Supreme Court.71

The effort to steal this Supreme Court seat had real implications for the American people. Because of the Senate’s refusal to fill Scalia’s vacancy, the Supreme Court operated with only eight justices for over a year. During that time, it deadlocked on important cases, including one that would have prevented the inhumane deportation of immigrant families.72 Ultimately, however, conservative efforts to pack the courts paid off for them. Justice Neil Gorsuch was appointed by President Trump and confirmed by the Senate on April 7, 2017, securing conservative control over the Supreme Court.73

To address this conservative court packing, policymakers could seek to undo its effects by expanding the size of the Supreme Court under the next progressive president in order to allow for the appointment of additional justices.

This approach is wholly consistent with the Constitution, which provides that, “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish,”74 but does not set the size of the court. In fact, the size of the Supreme Court has fluctuated; since the court was set at six members in 1789, Congress has altered the Supreme Court’s size seven times.75

[Figure 3 Omitted]

Correcting prior partisan court packing has historical precedent. In 1800, after Thomas Jefferson was elected president, the outgoing majority party in Congress—the Federalists—decreased the size of the Supreme Court from six to five members in order to prevent him from filling a vacancy on the court. Once Jefferson’s party assumed control of Congress, it restored the six-member Supreme Court, so that Jefferson could make an appointment, and eventually increased the court to seven members in 1807.76

The more well-known historical example, however, is that of former President Franklin Delano Roosevelt. In 1937, Roosevelt threatened to expand the Supreme Court from nine justices to as many as 15.77 He had grown frustrated by the court’s obstruction of his New Deal initiatives. By stacking the court with appointees of his choice, Roosevelt hoped that New Deal policies would be implemented without delay. While Roosevelt faced significant political opposition to this proposal, shortly after announcing his intentions, conservative Justice Owen Roberts joined with the progressive justices in West Coast Hotel Co. v. Parrish.78 Roberts’ decision to switch allegiances in upholding minimum wage requirements in West Coast Hotel Co., and his subsequent votes to uphold New Deal policies in a number of other cases, is known as “the switch in time that saved nine.”79

This approach has the benefit of directly addressing the issues caused by conservative court packing, including harmful precedents established by the current packed Supreme Court. However, there are worries that adding justices to the court could result in a judicial arms race between conservatives and progressives in which each side seeks to expand the size of the court when it has the ability to do so.80 Indeed, concerns about a judicial arms race deserve careful consideration. If the court is expanded, it is possible—or even likely—that upon retaking power, conservatives would seek to further expand it. At some point, a continued back and forth might lead to public frustration and concern. Therefore, compared with other reforms, this approach would likely be less stable over time and could potentially harden the recent politicization of the court.

The American public could also end up viewing the Supreme Court as nothing more than another political body, weakening respect for and trust in its rulings. Because it lacks both the “purse” and “sword,” the federal judiciary relies upon the perceived legitimacy of its decisions.81 The public could construe the addition of more justices as another political power grab and, in turn, lose confidence in the third branch. This risk is likely heightened by the significant public attention that would attach to any effort to add justices. Moreover, adding justices would not reduce the significant role that chance plays in the makeup of the Supreme Court, as an unexpected vacancy could shift the power balance in the court to either direction.

But these concerns must be viewed in light of the current reality: Conservatives are already engaged in a massive court packing effort that has politicized the judiciary to an unprecedented degree. The question is not whether to pack the courts but how to respond to it.

Following conservatives’ successful efforts to prevent Garland’s nomination from being considered, the impact of changes to the number of justices on the Supreme Court on people’s respect for the rule of law is uncertain. While there are no recent examples, policymakers can note that the Supreme Court’s size has been altered in the past and that these changes have neither undermined its authority nor its ability to function. Moreover, they should consider that concerns about the court are likely to arise in the absence of any action too, as the conservative-packed Supreme Court overturns or undermines popular long-standing rights and democratically enacted laws.

It is worth noting that this proposal has application beyond the Supreme Court as well; given conservative efforts to pack the appellate courts, policymakers could adopt a similar approach to that issue by adding new circuit judgeships.

### Structural---Constitutional Court

#### The affirmative could create a new Constitutional Court, which would decide all issues that turn on Constitutional interpretation.

Greenfield 20 – Professor and the Dean’s Distinguished Scholar at Boston College Law School. J.D. from the University of Chicago Law School.

Kent Greenfield, “Create a New Court,” New York Times, 10-27-2020, https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html

The way to save the court is to create another one.

The United States should join scores of other nations, including Germany and France, and create a specialized court to decide constitutional questions. The most contentious and important legal issues — whether states can ban abortion, or whether the president can refuse subpoenas or mandate travel bans — should be shifted from the Supreme Court to a new court created to decide such issues.

Creating a United States Constitutional Court is the big idea that has evaded Democrats looking for possible cures to the court’s politicization.

This court would be made up of judges from other federal courts, selected by the president from a slate generated by a bipartisan commission to create legitimacy and balance. The judges would serve limited terms, then return to their previous courts. Staggered terms would guarantee each president several appointments.

There are other approaches to restore the court’s legitimacy, but they all have problems. If Democrats retake the Senate and the White House, they could add new justices, but “court packing” would worsen the problem and invite a response by Republicans when the tide turns. Term limits for justices would require a constitutional amendment and would not cure the court’s imbalance for decades.

In contrast, a special constitutional court can be achieved by statute, adopted by Congress and signed into law by a new president. And it is unquestionably constitutional.

Congress is squarely within its authority to create a constitutional court, just as it has created the federal courts of appeals, the district courts and the United States Court of International Trade.

Congress also has control, as Article III of the Constitution makes clear, over the Supreme Court’s jurisdiction to review decisions of lower courts. Its appellate authority is subject to “such exceptions, and under such regulations as the Congress shall make.” Congress has taken advantage of this power a number of times in history, making major adjustments to the scope of the court’s appellate review as recently as 1988.

How would the new court gets its cases?

With few exceptions, the Supreme Court now hears only those cases it chooses. Most of those — about two out of three — turn on interpretations of federal statutes or regulations. Those sorts of cases would remain at the court. If the court gets them wrong, Congress can respond with new laws or regulations.

But the court’s constitutional mistakes cannot so easily be rectified. Nor can the taint of partisanship that now accompanies them. Congress can require the Supreme Court to refer cases it accepts that turn on constitutional questions to the constitutional court. This would mimic the main structural benefit of Supreme Court supremacy — establishing a national uniformity in matters of constitutional rights and authority.

In addition, Congress could amend an existing but seldom-used law allowing federal courts to ask the Supreme Court for advice on constitutional questions embedded in pending cases. Instead, the constitutional questions could be referred to the Constitutional Court and then sent back to the referring court after resolution.

The new court should have an even number of judges (eight is good), ensuring it would never rule with a bare majority. The court would be powerless to strike down a statute on constitutional grounds with a tie vote. When the constitutional court did reach a decision, Congress could limit the Supreme Court’s ability to hear an appeal unless a supermajority of justices, seven of nine, voted to hear it. (Now it takes only four votes to hear a case.)

Congress could also create a sunset provision for the court — 20 years perhaps, after which the court would end unless Congress renewed it. In the meantime we can reform the Senate’s confirmation process, pushing the Supreme Court to become the dispassionate body that the Constitution’s framers envisioned.

The Supreme Court needs a breather — a chance to reboot. The United States Constitutional Court would give it that.

### Structural---Expand Lower Courts

#### Affirmatives could expand the number of lower federal courts to prevent backlog and regional polarization.

Litman 20 – Assistant professor at the University of Michigan Law School.

Leah Litman, “Expand the Lower Courts,” New York Times, 10-27-2020, https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html

The vast majority of cases never reach the Supreme Court. They are resolved in the federal trial courts and federal courts of appeals: The appeals courts alone handle more than 50,000 cases each year. Since the Supreme Court hears arguments in fewer than 100 cases each year, almost all of these lower-court decisions will be final. Any court reform — indeed, any democracy reform — requires more lower federal courts.

So while most of the attention on court reform has focused on the Supreme Court, revamping the lower federal courts is important, too.

A larger roster of lower federal courts would ensure that more cases are resolved by judges who better reflect the democratic values and diversity of our country. It would also decrease the likelihood of the increasingly conservative lower federal courts significantly altering the law without the kind of public scrutiny that accompanies Supreme Court decisions.

Article III of the Constitution gives Congress the power to expand the number of lower federal courts. But in the last 30 years, it has not authorized any additional court of appeals judgeships and has added only a few dozen or so district court judgeships.

Yet in that time, the population of the United States has grown by almost a third, the number of cases in district courts has increased by 38 percent and appeals court filings have increased by 40 percent. The number of felony cases is also up by 60 percent. As a result, in some places, litigants must wait over three years after filing a case to have their day in court.

Expanding the lower federal courts also provides a necessary counterweight to Senate Republicans’ efforts to place as many of their preferred judges on those courts as possible. While much attention has focused on Senator Mitch McConnell’s success in stacking the Supreme Court, he has been equally, if not more, successful in stacking the lower federal courts. President Trump has appointed over 160 judges to the federal trial courts, and more than 50 judges to the courts of appeals. Democrats have not yet been able to respond in kind.

By way of comparison, President Barack Obama appointed only 55 judges to the courts of appeals over eight years. This is no accident. The Republican-controlled Senate refused to consider any of the seven court of appeals nominees that Mr. Obama advanced in the final two years of his presidency.

Senators Mike Lee, Lindsey Graham and John Cornyn accused President Obama of attempting to “pack” the lower federal courts when he merely nominated judges to fill vacancies; Senator Chuck Grassley and Tom Cotton, then in the House, supported bills that would have reduced the number of judgeships on the Court of Appeals for the District of Columbia Circuit to prevent Mr. Obama from filling vacancies there. Last year, Senator McConnell claimed credit for preserving judicial vacancies for President Trump.

Amy Coney Barrett ultimately filled one of those seven appeals court openings after Senator McConnell refused to consider Mr. Obama’s nominee to that seat, Myra Selby, the first woman and the first African-American to serve on the Indiana Supreme Court.

Appointing a large number of judges from different professional backgrounds to appeals courts would help ensure a deep bench of diverse potential nominees when vacancies arise on the Supreme Court.

Increasing the number of lower federal courts is also an essential component of democracy reform. If the Democrats take the Senate, they will need to attend to the lower courts as part of their efforts to ensure fair elections. Consider just a few recent decisions where federal courts have undermined democracy. In Texas League of United Latin American Citizens v. Hughs, three of President Trump’s appointees on the Fifth Circuit Court of Appeals allowed the governor of Texas to limit the number of absentee ballot drop boxes to one per county.

In Democracy North Carolina v. North Carolina State Board of Elections, a Republican-appointed district judge blocked a state measure that would have made it easier for voters to correct missing witness signatures on their ballots. As one court of appeals judge ominously warned, these decisions are part of “the concentrated effort to restrict the vote” and authorize disenfranchisement. Expanding the federal courts to include more civil rights lawyers and public interest lawyers on the bench would mean that the courts would not be controlled by judges unwilling to enforce democratic principles.

The Constitution undoubtedly gives Congress the power to expand the lower federal courts. At this point, the health and well-being of our constitutional democracy require Congress to exercise that power.

### Structural---Ideologically Balance

#### There are several different ways the affirmative can expand the size of the Supreme Court while making it ideologically balanced. These proposals vary in their details and present many important controversies and negative objections.

Berger and Root 19 – Vice President of Democracy and Government Reform at CAP and former senior policy adviser at the White House Domestic Policy Council with a J.D. from Yale Law School; Associate director of Voting Rights for Democracy and Government at CAP with a J.D. from the George Washington University Law School.

Sam Berger and Danielle Root, “Structural Reforms to the Federal Judiciary,” Center for American Progress, May 2019, https://www.americanprogress.org/article/structural-reforms-federal-judiciary/

Creating an ideologically split Supreme Court

The Supreme Court’s nine-justice composition guarantees complete power and authority over the nation’s laws—and millions of people’s lives—to any five justices who share the same beliefs. This, of course, says nothing of the immense power wielded by “swing” justices, such as retired Justices Anthony Kennedy and Sandra Day O’Connor.54 Reliable voting blocs mean that the majority does not have to engage in meaningful debate or discussion with the other justices. As a result, ideological majorities have been able to establish extreme precedent that hurts everyday Americans.

For instance, during an era of unprecedented mass shootings and corporate power, the Supreme Court’s conservatives have limited gun safety laws and ~~crippled~~ unions.55 Voting rights laws have been curtailed, while voter suppression tactics reminiscent of Jim Crow have been upheld.56 These cases could have turned out differently had the conservative majority been compelled to persuade at least one of the more liberal justices to join them.57 Since Chief Justice Roberts joined the Supreme Court in 2005, its conservative justices have handed down 79 5-4 decisions along partisan lines.58

To address this, the Supreme Court could be expanded to ensure an equal number of justices appointed by presidents of the two major political parties.59 Such an approach could also seek to correct for conservative court packing by adding two justices appointed by the next Democratic president and then having the next Republican president appoint one more justice, resulting in a 12-person split court.

An evenly split Supreme Court would eliminate the unfettered power of ideological majorities and result in fewer extreme decisions, since it would require justices to compromise and engage robustly with those on the bench who do not share their ideological views. To reach majority consensus, justices would have to find middle ground or narrow the scope of their rulings. However, an ideologically split Supreme Court would likely lock in many troubling precedents since it would be less likely that this newly formed court would reach consensus to overturn them.

Some critics also worry that such an arrangement would effectively render the Supreme Court unable to operate and create problems with legal uniformity across the country. But law professor and Supreme Court scholar Eric Segall argues that this fear is likely overstated:

“The Supreme Court decides only about 75 cases a year, amounting to fewer than 1 percent of all federal cases. We don’t worry about uniformity in the 99 percent of cases the Court never hears … Moreover, if a national rule is urgently needed for economic or other reasons, the justices will in all likelihood recognize that need and act accordingly, especially if an evenly divided court were to be a permanent aspect of our legal system.”60

One very significant concern with this approach is how to ensure that the balance would be maintained over time, given that it would either require presidents of both parties to honor the system or the partisan representation requirements to be written into statute, raising challenging legal issues.

One option is to have a bipartisan commission provide presidents with a list of potential nominees from which to choose. For instance, if a Democratic president needed to appoint a Republican justice to balance out the Supreme Court, the commission’s Republican members could provide a list of options.61 Alternatively, the list could be drafted by Senate leadership of the opposing party.62 This arrangement, however, would either give rise to the potential for gaming or, if the president was required to choose from the provided list, raise serious constitutional concerns and likely invite a court challenge.

Another proposal along these lines is to expand the size of the Supreme Court to 15, with five justices appointed by a Republican president, five justices appointed by a Democratic president, and five justices selected unanimously or by supermajority from the lower courts by the other 10 members.63 The additional justices would be appointed two-years in advance before decisions on certiorari are decided and would be limited to one-year nonrenewable terms.64 If the 10 members were unable to unanimously select five judges to serve with them, then the Supreme Court would hear no cases that term.

Requiring sitting Supreme Court justices to reach unanimous or supermajority consent on new appointees would help to ensure that only judges with moderate temperament round out the court, as they would have to be acceptable choices to most of the sitting justices. However, this proposal raises the same concern about how the balance would be maintained over time, and perhaps most importantly, there are serious questions as to how the 10 members could select the remaining five justices in a constitutionally defensible manner.65

## Aff---Personnel Reform

### Personnel---Rotating Panel

#### The affirmative can create a Supreme Court comprised of a rotating panel of Justices from the appellate courts. This would help prevent political polarization and judicial favoritism. There are, however, negative objections such as introducing judicial volatility and increasing politicization.

Berger and Root 19 – Vice President of Democracy and Government Reform at CAP and former senior policy adviser at the White House Domestic Policy Council with a J.D. from Yale Law School; Associate director of Voting Rights for Democracy and Government at CAP with a J.D. from the George Washington University Law School.

Sam Berger and Danielle Root, “Structural Reforms to the Federal Judiciary,” Center for American Progress, May 2019, https://www.americanprogress.org/article/structural-reforms-federal-judiciary/

Creating a Supreme Court comprised of a rotating panel of justices from the appellate courts

In responding to concerns over individual justices’ immense power and the bias of the current Supreme Court, one approach is to create a Supreme Court made up of a rotating panel of justices—including judges from lower federal courts—responsible for hearing cases.46 Under this proposal, every Court of Appeals judge would also be an associate justice of the Supreme Court. A panel would be chosen at random from among the pool of all appellate judges and current justices, and that panel would hear and decide cases for a set time period, after which a new panel would be constituted. A separate panel would be responsible for reviewing and granting certiorari.

During this time, selected judges could temporarily vacate their positions on lower federal courts so that they would not be responsible for two full caseloads. Any vacancies left on lower federal courts would be filled by judges serving in semi-retired “senior status.” Alternatively, if the term were short enough, selected judges could retain their lower court caseloads while traveling to hear oral arguments and deciding certiorari.47 This proposal could be combined with a requirement that judges reach supermajority consensus to overturn a federal statute.48

Such a proposal would limit the ability of any one justice to exercise outsize influence, as they would hear and vote on only a limited number of cases. It would make it harder for ideological judges to drive certain views through the certiorari process, since it would be a different panel that would hear the cases. In addition, it is possible that such an approach would lead to a more modest Supreme Court that more closely hews to precedent, given that the members would only temporarily be hearing cases as members of the Supreme Court before returning to their appellate circuits.

Rotating panels would also help prevent the judicial favoritism toward certain lawyers or groups that currently plagues the court.49 Incorporating judges from different jurisdictions would mitigate this problem since new justices would likely be less familiar with the usual power players and therefore less inclined to grant them special treatment. Moreover, because the panel’s composition would change regularly, patterns of favoritism would be less likely to emerge. Ultimately, the result would be a fairer and more objective bench.

Furthermore, rotating panels could help address diversity concerns. Although a number of circuit court judges attended Ivy League law schools, many did not, hailing instead from state and local universities.50 Judges from lower federal appellate courts also have a broader array of professional experiences: Some have previously served in the military, been employed as public defenders, worked as policy experts, or had jobs in state and local government.51

Creating a rotating panel of justices does not raise significant constitutional concerns since it would allow for judges to “hold their Offices during good Behaviour,” as required by the Constitution.52 The only change would be to add a significant number of judges from the lower federal courts to the Supreme Court and then create a means of having the larger court hear cases, in line with how other federal courts operate.53 However, it is worth noting that some questions about this approach have been raised, particularly with respect to whether the role that the current justices would have on such a court would be consistent with the office to which they were appointed.

There is also the concern that, rather than eliminating politicization, this approach could actually expand it with respect to circuit nominations. Nomination fights over appellate judgeships would be more intense given the greater influence any one appellate judge could wield as part of a Supreme Court panel. Conservatives have already targeted and prioritized appellate court openings—hence their efforts to prevent Obama from appointing appellate judges and then change the rules to ram through Trump’s nominees. This proposal could exacerbate those fights and lead conservatives to try to appoint even more extreme nominees.

In addition, this proposal would not address the harmful effects of conservative court packing to date since the precedents set by the current packed Supreme Court would remain, and likely prove much more difficult to overturn.

There are practical considerations as well. Establishing a rotating panel of Supreme Court justices could instill greater randomness into court decisions, causing significant swings in the law that would be detrimental to society as a whole. It could lead to far too many Supreme Court precedents being overturned, or far too few. Furthermore, it is always possible that the composition of a randomly selected bench would end up being even more extreme or less diverse than the current court—though with the addition of a supermajority requirement for overturning statutes, the extent of the negative impact of such a panel would be lessened.

### Personnel---Term Limits

#### The affirmative could establish term limits to modernize the Supreme Court. This policy would bring the U.S. in line with many other democracies which do not enjoy life tenure.

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Sam Berger and Danielle Root, “Structural Reforms to the Federal Judiciary,” Center for American Progress, May 2019, https://www.americanprogress.org/article/structural-reforms-federal-judiciary/

Establishing term limits for Supreme Court justices and federal judges

Setting term limits for Supreme Court justices and federal judges is a particularly popular reform among legal scholars and the public alike.82 The United States is unique in that it is the only democracy whose federal judges enjoy life tenure.83 Moreover, significant changes in life expectancy since the late 18th century mean that the impacts of judicial life tenure are far different than at the time of the nation’s founding. Over the past 170 years alone, average life expectancy in the United States has increased from an average of about 38 years to nearly 80 years.84 As a result, Supreme Court justices are serving significantly longer terms than their early predecessors.

U.S. Supreme Court justices who served between 1789 and 1828, on average, held their posts for less than 10 years, vacating the bench before the age of 60.85 Meanwhile, justices appointed after 1980 who have since left, on average, served for more than 25 years and remained on the Supreme Court until they were close to 80 years old.86 If these trends persist, nearly half of the justices currently serving on the Supreme Court will remain on the bench until at least 2035.87

A July 2018 Morning Consult/Politico poll found that 61 percent of Americans approve of term limits for Supreme Court justices, including 67 percent of Democrats and 58 percent of Republicans.88 Even some current Supreme Court justices, such as Chief Justice John Roberts and Justice Stephen Breyer, have expressed support for term limits.89 In a 1983 White House memo, Roberts wrote, “Setting a term of, say, 15 years would ensure that federal judges would not lose all touch with reality through decades of ivory tower existence.”90

Congress does not necessarily need to pass a constitutional amendment to establish term limits for federal judges. Rather, term limits may be established through simple legislation. Article III, Section 1 of the U.S. Constitution states that federal judges “shall hold their Offices during good Behavior.”91 This provision has been interpreted as granting life tenure to federal judges. The Constitution is noticeably silent, however, on what is meant by “Offices.” In other words, the Constitution is clear that federal judges must remain on the judiciary until death, retirement, or impeachment but says nothing about judges remaining at their original posts.

A number of proposals for term limits have emerged over the years, but the most popular is for 18-year nonrenewable terms.92 Supreme Court justices who complete their term would be assigned senior nonactive status and fill in for other justices who are forced to recuse themselves. Alternatively, they could choose to be reassigned to one of the circuit or district courts. Judges serving on other federal courts could similarly be delegated to senior nonactive status once their term expires. Regardless of their new posts, judges would retain their original salaries. And if they were to die or retire before their term expired, the sitting president would be empowered to appoint a temporary justice from the circuit or district courts to fill the open position until the term of the former justice was set to expire. Once a permanent replacement was appointed, temporary judges would go back to serving on the federal court from which they came.

With 18-year nonrenewable term limits, new Supreme Court justices would be appointed every couple years, giving presidents of both major parties equal opportunity to influence the court’s composition. This would help to avoid the problem of allowing a single president to dictate the makeup of the federal judiciary for a generation simply by entering office at an opportune time. It should also help to alleviate “the destructive warfare” that has become commonplace in Supreme Court confirmation fights.93 Under the current nine-member configuration, presidents serving consecutive terms could have an outsized influence on the Supreme Court, particularly if sitting justices retire or pass away unexpectedly. To the extent this is a concern, however, term limits could be coupled with an expansion of the Supreme Court to ensure that no single president is able to appoint a substantial percentage of justices.

There are a number of benefits to term limits. They have the potential to increase diversity by allowing for new appointments while simultaneously diminishing the influence of any one judge, since judges would be cycled in and out more frequently. Term limits could also ease concerns over elderly judges with health problems presiding over cases late in life.94

However, term limits would not directly address the current partisanship on the Supreme Court and, given that most conservative justices were recently appointed, would not reduce the impact of conservative court packing.

They would also have the potential to increase partisanship and create conflicts of interest. One of the strongest arguments in favor of life tenure is that it insulates federal judges from such conflicts, especially from potential employers who come before their chambers.95 For judges who choose to seek employment elsewhere—particularly in the private sector—strong ethics requirements must exist to protect against conflicts of interest. Once they retire, judges could be prohibited from working on behalf of corporations or organizations, including subsidiaries, that were parties in any case they oversaw.

Lifetime bans of this kind may seem harsh but are vitally important in protecting the integrity of the judiciary, given federal judges’ immense power. Judges vacating the bench should be required to recuse themselves in cases where potential employment has been discussed with one of the parties. Recusals should apply regardless of whether a hard offer has been extended.

The more challenging issue is how to deal with judges who view their limited time on the bench as an audition for political office or some other position within the political ecosystem. It is not clear how to design recusal requirements to address this concern, and it could create an even more politicized judiciary than already exists.

## Aff---Jurisdictional Reform

### Jurisdictional---End Judicial Review

#### The affirmative could end judicial review.

Cooper 22 – The Prospect’s managing editor.

Ryan Cooper, “The Case Against Judicial Review,” The American Prospect, 07-11-2022, https://prospect.org/justice/the-case-against-judicial-review/

In just a one-week span in June, the Supreme Court dealt several terrific blows to American freedom and self-government. It overturned a century-old New York law restricting the concealed carry of firearms; it overturned Roe v. Wade, allowing about 26 states to ban abortion, with more to come if Republicans win the congressional midterms; and it sharply limited the ability for the executive branch to regulate greenhouse gas emissions from power plants, which could eventually hamstring the administrative apparatus that has governed the United States for well over a century.

The Court also recently agreed to hear a case on the “independent state legislature doctrine,” which holds that state legislatures have total power over their electoral systems. If the ruling goes conservatives’ way again, it would allow gerrymandered Republican legislatures to hand the presidency to their own party in 2024, striking another blow against democracy itself.

This disaster is being perpetrated by perhaps the least democratically legitimate Supreme Court in history. Five of the six right-wing justices were appointed by presidents who took office after losing the popular vote. The other, Clarence Thomas, is married to an avowed conservative activist who actively agitated to overturn the 2020 election. In 2016, Senate Republican leader Mitch McConnell held one seat open for a year, in violation of all precedent and the text of the Constitution, to ensure his preferred replacement. Republicans have had a Court majority since the Nixon administration, even though they have won the presidential popular vote just once since 1989.

The inexorable march of tradition and timidity on the part of the government’s other branches has given this pack of conservative apparatchiks what amounts to monarchical powers over the American people. It’s no wonder that their decisions are so terrible—and so ominous for the country’s future.

What is to be done? I propose to attack the problem at the root and abolish judicial review. The Court does not have the sole power to interpret the Constitution, nor the power to strike down any law it choses, and it’s time to say so.

Even fairly hard-bitten progressives are often unsettled by this idea. Most Americans learn in high school civics that the Supreme Court gets final say on whether laws are constitutional, and that this is core to the functioning of the constitutional system.

Yet this view is incomplete. Judicial review does not appear in the Constitution and is not firmly rooted in American tradition. For roughly the first three-quarters of the 19th century and the middle third of the 20th, those powers were heavily circumscribed by tradition and competition from the other branches of government. And for good reason: When the Court has exercised sole power to interpret the Constitution, with rare exceptions it has used that power to obliterate Americans’ constitutional rights, uphold white supremacy, and protect abusive corporations from unions and the regulatory state.

While challenging the judiciary is commonly associated with Andrew Jackson, the two best presidents in history, Abraham Lincoln and Franklin Roosevelt, had no choice but to directly confront the Court in order to advance justice. If America does not follow their lead, presidential powers will evaporate along with those of Congress and the freedom of the American people.

LET ME BEGIN WITH THE TEXT of the Constitution. It grants by far the most formal authority to Congress—the power to tax, regulate foreign trade and interstate commerce, coin money, declare war, create patents and a post office, and much else. The president executes the laws as written by Congress, serves as commander in chief of the military, and conducts foreign policy.

The Supreme Court, by contrast, only has “judicial Power” that “shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”

As often in the Constitution, this is exceptionally vague, but as far as the Court being able to overturn acts of Congress, the justices arrogated that privilege to themselves in Marbury v. Madison in 1803.

Though some founders, like Alexander Hamilton, did argue in favor of judicial review, support was by no means unanimous. As historian Michael Kammen explains in A Machine That Would Go of Itself: The Constitution in American Culture, Marbury was highly controversial at the time and remained so for decades, which restricted judicial review in practice. “[It] is not widely appreciated,” Kammen writes, “that the procedure and its supporting doctrine developed gradually, was used sparingly for almost a century, and has never lacked critics who were both harsh and astute: Presidents Jefferson, Monroe, Jackson, and Van Buren, for example.”

One of the few times during the antebellum period the Court did exercise judicial review in a high-profile case, the resulting controversy was so explosive it helped touch off the Civil War. In Dred Scott v. Sandford (1857), Chief Justice Roger B. Taney infamously ruled that African Americans had “no rights which the white man was bound to respect,” and added for good measure that the carefully constructed Missouri Compromise—which had kept a rough balance of power between slave and free states, and banned slavery from the territories—was unconstitutional, even though it had nothing to do with the specifics of the case.

This was a raw exercise of political power. Taney was a partisan Democrat, defender of slavery, and die-hard racist, and was using rule-by-decree in an attempt to settle the slavery question in favor of the planter class. The Constitution didn’t enter into the equation.

Judicial review does not appear in the Constitution and is not firmly rooted in American tradition.

But the rest of the country did not submit to Taney’s despotism. Northern voters and leaders reacted with furious outrage, and multiple state legislatures passed measures defying the Court. Arguments against Dred Scott and the lawless Court were a central part of the new Republican Party’s messaging, and in Lincoln’s 1860 campaign for president.

In his inaugural address, Lincoln directly attacked judicial review: “[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court … the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.” In this, Lincoln followed the thinking of Jefferson, who argued that judicial review makes the Constitution “a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.”

Lincoln got to the core of the problem. Under a strong form of judicial review, the Court has despotic powers by definition. Congress and the president theoretically check one another, and more importantly have to face voters at regular intervals. But justices are appointed, serve for life, can overrule both the legislature and the president, and can’t be removed from office aside from impeachment (which, as Donald Trump proved beyond any question, is virtually a dead letter in our hyper-partisan times). Indeed, the Court doesn’t even have an ethics code of any kind. It would be completely legal for a justice to hold an auction for his or her vote outside the Court building.

During the war, Taney attempted to reverse President Lincoln’s suspension of habeas corpus, despite the fact that the Constitution explicitly authorizes doing so “in Cases of Rebellion.” Taney then tried to hold Gen. George Cadwalader in contempt for refusing to obey his ruling. Both times, the Lincoln administration ignored him. As the president pointed out in a later message to Congress, Taney’s tendentious nitpicking would destroy the foundations of the Constitution itself: “Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?” (That said, Lincoln still got Congress to pass a law supporting his action once it came back into session, just for good measure.)

Unfortunately, this spirit did not last. Supreme Court highlights of the Gilded Age included tossing the convictions of white supremacist mass murderers for violating their victims’ civil rights (United States v. Cruikshank), giving legal sanction to Jim Crow apartheid (Plessy v. Ferguson), inventing the idea of corporate personhood without even providing an argument for it (Santa Clara v. Southern Pacific Railroad), and spending 40 years striking down any economic regulation that interfered with the free market (most notably in Lochner v. New York).

The Lochner era extended through the early New Deal period, when the Court struck down several of President Roosevelt’s attempts to fight the Depression, leading him to propose a measure to add additional justices to the Court in 1937. The plan did not pass, but shortly after FDR proposed it, conservative Justice Owen Roberts switched his position to upholding New Deal laws. Though historians debate how much Roberts was motivated by FDR’s plan, the president’s goal was accomplished, and for the next couple of decades the Court was relatively sparing with its review powers. Once again, fighting American history’s greatest calamities required bringing the Court to heel.

ONE OF THE WORST ASPECTS of judicial review is that it ultimately corrupts law itself. By placing constitutional interpretation in the hands of a council of unaccountable ideologues, the temptation to use that power for political purposes is overwhelming. The very idea that it is possible to interpret language or assemble facts in a neutral fashion gives way to fabricated reasons why the Constitution mandates whatever specific political goal the justices happen to have.

To be sure, there has been one period of a couple decades when the Court was a force for good, from striking down segregation in Brown v. Board of Education to establishing the right to an abortion in Roe v. Wade. However, these actions were not nearly as effective as legislation—the Civil Rights Act and Voting Rights Act actually ended Jim Crow, not Brown, and in any case half the reason Jim Crow got going can be attributed to the Court itself, through Plessy. Furthermore, deciding questions of medical policy should be a matter for Congress; we’re seeing today the fragility of judicially established protections that can be torn up one by one.

Today, an entrenched conservative majority, lifetime appointments, the de rigueur trend of strategic retirement, and the distortions of the Electoral College mean that the Court is all but immune from democratic accountability. It has not sunk in yet among many liberals, especially the Democratic Party leadership, how doomed they are under the status quo. Absent aggressive reform, it is vanishingly unlikely that Democrats will get a majority on the Court for the foreseeable future.

The majority simply has to hold on long enough for Republicans to win the Senate and the presidency, in which case the oldest members can retire. To break this majority, Democrats would have to hold the presidency continuously for something like 20 years, which hasn’t happened since the New Deal. In the meantime, the Court has been hacking away at the voting rights of liberal demographics, making it hard for Democrats to maintain state legislative or House majorities. If they aren’t stopped, another Plessy-style decision blessing an updated version of Jim Crow is coming soon.

Groups like Demand Justice have opted to advocate for adding justices as a reform solution. Packing the Court is completely in keeping with previous law and tradition; indeed, it was FDR’s preferred option. But at bottom, it would preserve the principle of judicial review, while mostly abolishing it in a cumbersome manner with an unclear resolution.

Changing the makeup of the Court by stacking it with partisans would still leave the judicial branch free to overturn laws, but only with the approval of whichever party held Congress and the White House last. If Democrats pack the Court, Republicans will of course return the favor at the earliest possible moment. Under such a system, ultimately it will be elections that settle questions of constitutional law. If that is the objective, it is both more honest and dramatically easier to simply attack judicial review head-on.

#### There are many reasons to oppose judicial review, each of which connect to ample advantage ground.

Cooper 22 – The Prospect’s managing editor.

Ryan Cooper, “The Case Against Judicial Review,” The American Prospect, 07-11-2022, https://prospect.org/justice/the-case-against-judicial-review/

The key thing is to attack the Court head-on. The other branches cannot just sit there and take the arrant fake-legal decrees, because that will only embolden the justices. The plain and undeniable fact is that unfettered judicial review is a violation of basic principles of American democracy, and no court can be trusted with it.

Under any government, there is always a danger of its power being abused. Democratically elected legislatures are not immune from this problem. It must be admitted that, should Republicans take control of Congress and the White House without any constraint from the Court, there’s a strong chance they’d pass all manner of abusive stuff. The Florida legislature, for example, recently passed a bigoted “don’t say gay” bill that blatantly violates the civil rights of LGBT teachers.

But the risk of theoretically unconstrained congressional majorities must be set against the current fact of the Court steadily stealing the powers of Congress, eroding the freedom of the people—and, of course, doing nothing to protect gay Florida teachers from a feral state legislature. It’s far from the first time American courts have ignored the Bill of Rights, and it won’t be the last.

The relevant question when it comes to constitutional design is what kinds of government institutions are most likely to abuse their power. Common sense and history teach us that elected representatives who must seek re-election at regular intervals are the least likely to abuse their power. Totally unaccountable courts where the judges can essentially pick their successors have much greater opportunity.

A judicial system that limits itself to adjudicating criminal and civil cases, and making sure that legislation is interpreted consistently, can fill a necessary and proper role. The Supreme Court, drunk on unchecked power for too long, must be brought to heel.

### Jurisdictional---Edit Judicial Review

#### The affirmative could also establish constraints judicial review, without ending the practice entirely.

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Ryan Cooper, “The Case Against Judicial Review,” The American Prospect, 07-11-2022, https://prospect.org/justice/the-case-against-judicial-review/

No other functioning democracy has anything like the wretched American spectacle of the last decade, where minority interest groups spend millions trying to get through the courts what they could not get through the legislature, and the people wait on tenterhooks during each session of the top court to see which of their freedoms might vanish next. And we don’t have to live with that.

Reversing what can seem like an iron law of judicial supremacy in the U.S. is admittedly hard to imagine happening. But there are also options that stop short of this. As Joshua Zeitz recently suggested at Politico, Congress could limit judicial review over certain issues. Or it could add a supermajority requirement for the Court to overturn laws or take away previously granted constitutional rights. Indeed, Article III states that the Supreme Court holds appellate jurisdiction in all cases, but “with such Exceptions, and under such Regulations as the Congress shall make.”

Again, this is practically equivalent to my suggestion—if Congress were to just append jurisdiction-stripping language to every law, as it has done in a handful of cases in the past, judicial review would be ended. But if preserving a scrap of tradition is necessary to get people behind the basic idea, so be it.

#### Congress could use Article III power to qualify Judicial Supremacy.

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Christopher Jon Springman, “Jurisdiction Stripping as a Tool for Democratic Reform of the Supreme Court,” Written Testimony for The Presidential Commission on the Supreme Court of the United States, 08-15-2021, https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf

The judicialization of our politics should lead us to ask anew whether it is necessary that judges possess, in every case, the final word on the Constitution’s meaning. One alternative is for Congress to use its Article III power to establish “qualified” judicial supremacy: that is, a more flexible form of democratic constitutionalism where the political branches retain the power to re-claim interpretive authority where it is obvious that values, and not law, are at stake.

JURISDICTION STRIPPING IS CONSTITUTIONAL

The Constitution provides a textual foundation for Congress’s power to strip the jurisdiction of federal courts. Article III, section 1 gives Congress discretion over whether to create the lower federal courts, 16 a power that Congress has used from the founding to limit lower courts’ jurisdiction.17 And Article III, section 2, clause 2 explicitly empowers Congress to make “exceptions” to the Supreme Court’s appellate jurisdiction18—that is, to pick and choose for approximately 99% of the Supreme Court’s total docket what cases the Court has the power to hear. As I explain in an article published in 2020 in the New York University Law Review, Congress can remove the Supreme Court’s appellate jurisdiction over particular cases, or particular issues, largely without constraint.19

These parts of Article III, taken together, add up to something potentially profound: they give Congress the power to take back from the courts, and in particular from the Supreme Court, final authority to determine the Constitution’s meaning. That is, Article III establishes a legislative power to qualify judicial supremacy. Using this power, Congress is empowered to override particular judicial interpretations of the Constitution. It may do so by passing a law that embodies its own interpretation, and that strips the courts’ jurisdiction to review the enactment for constitutionality.

Can Congress really do this? There is no obvious textual barrier to Congress’s exercise of the power. Nor is there a clear historical or precedential barrier. The Court has remarked in dicta that Congress eliminating judicial review of “colorable constitutional claims”20 raises a “serious constitutional question.””21 And in its 2018 decision, Patchak v. Zinke, 22 a plurality of the Court stated, again in dicta, that Congress could not eliminate judicial review of a statute that would violate the Constitution.23 But the Court has never actually held that. And the Court has, in other instances, signaled deference to enactments stripping courts’ jurisdiction: In its 1869 decision in Ex Parte McCardle, 24 the Court gave effect to a jurisdiction-stripping provision, holding that “[w]ithout jurisdiction the court cannot proceed at all in any cause”25 and refusing to inquire whether Congress was motivated to strip jurisdiction by the desire to insulate unconstitutional legislation from review. “We are not at liberty,” the McCardle Court held, “to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.”26

McCardle is only one decision, and the Court’s discussion there of Congress’s power is thin. But it is the clearest, most relevant precedent we have.

Some may assert that the Supreme Court would strike down any attempt by Congress to use its Article III power to strip courts’ jurisdiction. But that assertion, in a very important sense, misses the point. The Constitution’s text gives Congress a more-than-plausible claim to this power, and neither history nor precedent refute the claim. A Congress committed to its own understanding of Article III would simply insist on it, and the Supreme Court would have little power to resist. The federal courts are utterly dependent on the political branches, in the very practical sense that they control neither their own budgets nor even their own facilities.27 Similarly, the courts are dependent on the executive for execution of their orders.28 Hamilton acknowledged the dependence of the courts quite plainly in Federalist 78:

The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.29

It is also worth remembering that there is not a word in the Constitution that provides explicitly for judicial review, and the Constitution certainly does not mandate unqualified judicial supremacy—i.e., judicial supremacy in every case, and on every issue. In fact, Article III provides Congress with a power over courts’ jurisdiction which points in the opposite direction.

In the absence of a commanding argument limiting Congress’s Article III power, a dose of realism is in order. There is nothing standing in the way of Congress asserting its power to override judicial decisions save the will to do so and the political judgment to do so successfully. As a matter of practical politics, Congress can draw the outlines of its own authority by using its Article III power effectively and in ways that voters approve. As Richard Fallon notes, “[t]he foundations of law lie in practices of acceptance.”30 This is especially true now, when many Americans are asking uncomfortable questions about how, and how well, our constitutional democracy works. Two centuries ago, at a time of deep political division, Chief Justice John Marshall claimed for the Supreme Court the power to declare invalid laws duly enacted by the people’s elected representatives.31 The Constitution presents Congress with an opportunity to take back a measure of that power.

### Jurisdictional---Jurisdiction Strip---Broad

#### Affirmatives could limit the jurisdiction of the Supreme Court by engaging in court stripping measures.

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Limiting the jurisdiction of the Supreme Court

Rather than reduce the partisanship of the Supreme Court itself, a more extreme proposal would simply limit the ability of the court to hear certain cases.

Congress has the authority to narrow federal courts’ jurisdiction, otherwise known as court stripping. Article III, Section 2 of the U.S. Constitution requires the Supreme Court to have original jurisdiction over limited classes of cases.107 Specifically, the Supreme Court has original jurisdiction “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction.”108 Congress’ authority to limit the appellate jurisdiction of other federal courts derives from the “judicial vesting clause” and the “congressional powers clause” found in articles I and III of the U.S. Constitution.109 Article III, Section 2’s “exceptions clause” gives Congress power to limit the Supreme Court’s appellate jurisdiction.110

The Supreme Court has occasionally recognized Congress’ power to limit its and other courts’ appellate jurisdiction.111 That said, there is limited case law on the subject. As a result, the line between permissible and unconstitutional court stripping is unclear and hotly debated among legal experts.112 For example, the Supreme Court has said that Congress cannot direct judges to decide cases in specific ways but can amend federal law in ways that are determinative of active cases.113 In other instances, the Supreme Court has asserted that court stripping is limited in situations implicating due process rights and regarding the applicability of retroactivity to final judgements.114 Even here, however, precedent is vague at best.

Debate in the Supreme Court over Congress’ court-stripping power

The 2018 case Patchak v. Zinke illustrates the lack of clarity on Congress’ court-stripping powers.115 Patchak involved the legality of a 2009 statute—the Gun Lake Trust Land Reaffirmation Act—which prohibited federal courts from hearing cases involving an ongoing dispute between the U.S. Department of the Interior (DOI) and a parcel of land called the “Bradley Property.” The statute went further, directing that any federal cases related to the Bradley Property “shall be promptly dismissed.”116 The central question was whether the Gun Lake Act was an abuse of Congress’ power. A plurality of the Supreme Court found that the act was constitutional, reasoning that it simply modified existing law; whereas federal courts previously had authority to review cases involving DOI and the Bradley Property, “Now they do not.”117 In other words, the statute did not go as far as requiring federal courts to decide cases for one party over another. The dissent saw things differently. To them, Congress violated Article III of the Constitution when it required judges to dismiss cases like Patchak outright. Although the act did not direct courts to find for plaintiffs or defendants per se, automatic dismissal has the practical effect of benefiting one party over another.118 Justices Sonia Sotomayor and Ruth Bader Ginsburg wrote a separate concurrence, arguing that the law was not a court-stripping statute at all but merely restored the United States’ sovereign immunity.

#### There are ample advocates for broad court stripping proposals.

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Christopher Jon Springman, “Stripping the Courts’ Jurisdiction,” The American Prospect, 05-05-2021, https://prospect.org/justice/stripping-the-courts-jurisdiction/

Last week, we learned that Justice Amy Coney Barrett, whom the GOP put on the Supreme Court in the dying days of Trump’s presidency, will be paid a $2 million advance for a book about how judges are not supposed to bring their personal feelings into how they rule. Set aside for a moment the unseemliness of Barrett so rapidly cashing in on her new position. More important is the signal Barrett’s book deal sends about the Supreme Court. If it weren’t for the Court’s extraordinary power—to create rights, and, as Roe v. Wade and the right to legal abortion hang in the balance, to take them away—no publisher would pay that kind of money for a novice judge’s opinions.

All of which should lead us to ask why nine unelected judges are given the power to make so many important decisions in the first place. Most Americans perceive the Court as an integral part of our democracy. But in reality, the relationship of judges to democracy is more complicated, and at times, antagonistic.

By enforcing constitutional rules, judicial review helps to smooth out democracy’s rough edges. But when they overturn democratically enacted laws, judges also shrink our capacity to make decisions for ourselves. And if judges overdo it, judicial review can preempt necessary democratic development. At the extreme, instead of making democratic life more decent and predictable, interventionist courts can spark long-lasting and intense conflict.

When they overturn democratically enacted laws, judges shrink our capacity to make decisions for ourselves.

That’s what happened in 1857 when the Supreme Court stepped in to stop Congress from prohibiting slavery in U.S. territories. It hoped its decision in the Dred Scott case would lead the nation away from conflict. But if anything, Dred Scott hastened our descent into civil war.

That’s also what happened in 1973 when the Supreme Court stepped in to preempt the democratic debate and declare abortion a right in Roe v. Wade. The backlash from that decision became a defining feature of American politics. The English language itself became a field of battle, with “pro-life” and “pro-choice” sides unable to agree even on nomenclature.

But the deepest threat that judicial review poses for democracy lies ahead of us. Republicans have built their recent political strategy around stocking the federal bench with right-wing partisans. And they’ve done so for a reason: Demographic change is making it increasingly difficult for the GOP to win elections, but a conservative judiciary can stand in the way of much of what Democrats and a majority of Americans hope to accomplish. The conservative Supreme Court would likely intervene, for example, to limit attempts to address global warming, to expand health care, to enforce rational public-health laws, or to tax the very wealthy. In all these cases, the Supreme Court would not be enforcing any clear text in the Constitution. It would be exercising raw power.

For any committed small-d democrat, this sort of politicized judging is unacceptable. And opposition is starting to build: We’ve seen a slew of recent court reform proposals, including judicial term limits, Supreme Court supermajority voting requirements, and, perhaps most prominently, court-packing.

In the end, though, none of these get to the heart of the problem, which isn’t that judges are too liberal or too conservative. It’s that judges are simply too powerful.

We need a deeper reform, one that the Constitution specifically authorizes. Article III of the Constitution gives Congress the power to strip federal courts’ jurisdiction: a power that can be employed to rein in politicized courts and even to override judges when they stand in the way of change that a substantial and enduring political majority wants.

How would jurisdiction-stripping work? Article III, Section 1 gives Congress complete discretion on whether to create the lower federal courts, a power that Congress has used from the founding to limit lower courts’ jurisdiction. And Article III, Section 2, Clause 2 explicitly empowers Congress to make “exceptions” to the Supreme Court’s appellate jurisdiction—that is, to pick and choose within approximately 99 percent of the Supreme Court’s total docket what cases the Court has the power to hear.

So, imagine Congress passes the John Lewis Voting Rights Act, which would put an end to a looming wave of GOP-sponsored voter suppression laws. Given the Supreme Court’s hostility to voting rights (demonstrated in cases like 2013’s Shelby County v. Holder, where a 5-4 majority of the Court struck down provisions of the 1965 Voting Rights Act), Congress would be well-advised to include in its new legislation language stripping the federal courts’ authority to review it. In so doing, Congress would be advancing its own understanding of its power to guarantee the voting rights of all Americans—and telling courts to stay out. If voters disagree, either with the federal government’s interference in states’ decisions about election rules, or with Congress’s decision to limit judicial review, they can discipline Congress in the next election.

Crucially, Congress’s power to rein in the courts through jurisdiction-stripping isn’t partisan: It can be used by Republicans as well as by Democrats. In the end, the jurisdiction-stripping strategy isn’t about which side wins in any particular political struggle—although

The Wall Street Journal editorial page, characteristically, has given the basest partisan spin to the idea by recommending that Republicans use it as revenge if Democrats pack the Supreme Court. The legitimate use of jurisdiction-stripping, by contrast, would be a way to strike a better balance between judicial review and democracy. Which would return us to a saner world where Amy Coney Barrett doesn’t wield the kind of unreviewable judicial power that gets her a $2 million book deal.

### Jurisdictional---Jurisdiction Strip---Specific

#### Court stripping can be done in a broad, or sector specific manner.

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Sam Berger and Danielle Root, “Structural Reforms to the Federal Judiciary,” Center for American Progress, May 2019, https://www.americanprogress.org/article/structural-reforms-federal-judiciary/

There are a few different approaches to court stripping: Congress could potentially prohibit the Supreme Court from hearing certain types of cases or try to revoke its appellate jurisdiction altogether and permit the court to hear only those cases the Constitution explicitly requires.119

#### **There are advocates for stripping the Supreme Court of authority over cases involving patent law.**

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Catherine Taylor, The Cessation of Innovation: An Inquiry into Whether Congress Can and Should Strip the Supreme Court of Its Appellate Jurisdiction to Entertain Patent Cases, Chicago-Kent Law Review, Vol. 92, Art. 13, Iss. 2, 92 Chi.-Kent L. Rev. 679 (2017), Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol92/iss2/13

Throughout the history of the United States, Congress has attempted to limit the Supreme Court’s appellate jurisdiction.1 Many academics have analyzed jurisdiction-stripping statutes, examining both their constitutionality and their policy implications.2 Although these statutes often elicit controversy, Congress derives its textual power to limit jurisdiction under the Exceptions Clause of the Constitution.3 Although Congress has not exercised this power often, it has most successfully limited the jurisdiction of U.S. federal courts in certain habeas corpus cases. While the Supreme Court has never entertained a statute that stripped its ability to hear cases in an entire area of law, these habeas cases still give guidance in determining the constitutionality of such statutes. One area of law that could benefit from a jurisdiction-stripping statute is patent law.

According to Article I, Section 8, Clause 8, of the United States Constitution, Congress has the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” This clause gives Congress the power to govern patent rights. Patent law is a very niche field. In fact, to prosecute patents in the United States, an individual must be admitted to practice in front of the United States Patent and Trademark Office. To pursue this career path, aspiring patent attorneys and patent agents must possess the requisite scientific education and pass the Patent Bar Examination. No legal training is needed to take the exam, only scientific and technical training. The Model Rules of Professional Conduct even recognize the long-established policy of the Patent and Trademark Office, and allow admitted attorneys to designate themselves as a “Patent Attorney.” Since the field is specialized, and the science is so intertwined with the law, this technical requirement is necessary to provide proper service to inventors filing for patent applications.

Federal judges are not required to specialize in a particular field of law, let alone be technically educated and trained. Since federal law exclusively governs patents, the Supreme Court may hear final appeals to all patent cases, including disputes over validity and infringement. Supreme Court Justices interpret the law of the land. Some may argue that interpreting patent law is no more complex than interpreting any other form of law, and the law is just the law, no matter the factual background. However, in a field with expert attorneys and innovative subject matter, an unspecialized judge’s legal analysis and application may overly simplify a complex issue, thereby leaving confusing precedent in the Supreme Court’s wake.

In fact, as later explored by this note, the Supreme Court has recently been issuing opinions that have made it harder for an inventor to obtain a patent and easier for an accused infringer to invalidate a patent.13 This jeopardizes the strength of the American patent system, which in turn, directly jeopardizes American scientific innovation.14 Patents are essential to the American economy because they encourage the proliferation of technological advancement. Muddied patent jurisprudence hinders America’s competitiveness in the global market.15 Perhaps it is time for a more specialized court to be the final arbiter of patent matters.

This note aims to answer the following questions: 1) can Congress strip the Supreme Court’s appellate jurisdiction with respect to hearing patent appeals; and 2) should Congress strip this jurisdiction? More specifically, Part II of this note analyzes important Supreme Court cases that examine jurisdiction-stripping statutes before considering whether curtailing the Court’s jurisdiction from hearing patent cases would pass constitutional muster. This part also considers any ideological and policy concerns associated with this type of statute. Part III explores the importance of patent law, and assesses recent Supreme Court patent law jurisprudence. The note then concludes in Part IV with a reflection on whether this recent precedent warrants a consideration of a jurisdiction-stripping statute.

II. Congress Can Strip Appellate Jurisdiction from the Supreme Court Jurisdiction-stripping legislation is not novel.16 Throughout history, the Court has considered various statutes attempting to limit its jurisdiction. Many of these statutes have pertained to habeas corpus challenges, and the Court has frequently narrowed its ruling to the specific facts in each case. In order to synthesize the case law and apply their holdings to the patent world, it is important to examine some of these jurisdiction-limiting statutes more in depth. This section first analyzes Supreme Court precedent; it subsequently examines the different ideological and policy concerns associated with jurisdiction-stripping statutes, coupled with an argument that these concerns would not apply to the present inquiry. A. Supreme Court Case Law on Jurisdiction-Stripping Statutes One of the first times the Court grappled with a jurisdiction-stripping statute was after the Civil War. In 1867, Congress passed an Act that gave the Supreme Court appellate jurisdiction over habeas corpus actions.17 William McCardle, who was imprisoned for publishing allegedly “incendiary and libelous” articles, invoked habeas corpus and appealed the decision of the lower court to the Supreme Court.18 Before the Supreme Court issued its opinion in 1868, Congress repealed the provision that gave the Court appellate jurisdiction in these matters.19 The Court noted that under the Exceptions Clause, Congress had the power to alter appellate jurisdiction of the Supreme Court.20 The case was dismissed for want of jurisdiction; however, Justice Chase explained, “[t]he act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867.”21 Therefore, the Court’s appellate power in cases of habeas corpus was not completely eradicated.22 Another pivotal attempt to restrict appellate review from the Supreme Court came in 1996 when the Court granted certiorari in Felker v. Turpin.2 With strong support from President Bill Clinton, Congress enacted The Antiterrorism and Effective Death Penalty Act (“AEDPA”) of 1996.24 The Act contained a provision that restricted the Supreme Court’s appellate power.25 More specifically, the AEDPA contained a provision that prevent-ed the Supreme Court from reviewing a Court of Appeals order denying leave to file a second habeas petition by appeal or by writ of certiorari. In Felker, the Supreme Court ruled on a narrow construction of the provision. In this case, the petitioner—convicted of murder, rape, false imprisonment, and aggravated sodomy—filed both a motion for stay of execution and a motion for leave to file a second or successive federal ha-beas corpus petition under 28 U.S.C. § 2254 Code in the Eleventh Circuit. The court denied both motions, and the petitioner filed a petition for writ of habeas corpus for appellate review and for stay of execution in the U.S. Supreme Court. The Court first inquired whether or not the provisions of Title I of the AEDPA, which amended existing federal habeas corpus law, applied to petitions for habeas corpus filed as original matters under 28 U.S.C. §§ 2241 and 2254; it concluded that, while § 2244(b)(3)(E) prohibited it from reviewing a judgment on an application for leave to file a second habeas petition in district court, Title I did not repeal the Court’s ability to entertain original habeas petitions. Therefore, the Court held, “since [the Act] does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2.” The AEDPA was soon challenged again in conjunction with the Ille-gal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”). These two acts contained amendments to the Immigration and Nationality Act (“INA”), which raised questions concerning their ef-fect on the availability of habeas corpus jurisdiction under 28 U.S.C. § 2241. In I.N.S. v. St. Cyr, the respondent, a lawful permanent resident of the United States, pled guilty in state court to a charge of selling a con-trolled substance, which made him deportable. At that time, the AEDPA had not yet been enacted, and, at the discretion of the U.S. Attorney Gen-eral, the respondent would have been eligible for a waiver of deportation. However, his removal proceedings had not begun until after both the AEDPA and IIRIRA had become effective, and accordingly, the Attorney General interpreted the acts to mean that he no longer had discretion to grant a waiver. The Attorney General also argued that under these stat-utes, there was no judicial forum available to decide whether these statutes deprived him of the power to grant this relief. According to the Immigration and Naturalization Service (“INS”), four sections of the 1996 statutes stripped the courts of jurisdiction with respect to the respondent’s habeas corpus application. The Court noted that in order for the INS to succeed, it had to over-come “both the strong presumption in favor of judicial review of adminis-trative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.” Additionally, the Court stated, “Congress must articulate specific and unambiguous statutory directives to effect a repeal.” The Court indicated that 1) when a certain interpretation of a statute “invokes the outer limits of Congress’ power,” there should be a “clear indication that Congress intended that result,” and 2) if “an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’” the Court would be obligated to construe the statute to avoid the constitutional problems. “A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.” The Court ulti-mately concluded that habeas jurisdiction under § 2241 was not repealed by AEDPA and IIRIRA since the absence of a judicial forum, “coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions.” In a similar vein, the Supreme Court reviewed a provision of the INA that limited judicial review of the Attorney General’s discretionary judg-ments regarding detention or release of any alien.46 The respondent in Demore v. Kim was convicted of first-degree burglary and “petty theft with priors”; consequently, the INS detained him and charged him with being deportable from the United States.47 The respondent filed a habeas corpus action challenging the constitutionality of 8 U.S.C. § 1226(c),48 arguing that his detention violated due process.49 The Court first addressed the argument that 8 U.S.C. § 1226(e) de-prived the Court of jurisdiction to entertain the case.50 Section 1226(e) stated that “[t]he Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review.”51 It further stated that “[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien.”52 With regard to the Act’s provisions, the Court held that they did not strip the federal courts of the power to review a constitutional challenge to § 1226(c).53 First, the respondent challenged the constitutionality of the statutory framework permitting his detention without bail; he did not challenge the “discretionary judgment” or “decision” by the Attorney General.54 Second, the Court “has held that ‘where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.’”55 The Court further stated, “where a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that Court stated that if it were to conclude the writ was no longer available in the present situation, its holding would be a “departure from historical practice in immigration law.” It is also worth mentioning that although the title of section 401(e) seems to show intent to preclude judicial review, the Court noted that the actual text “merely repeals a subsection of the 1961 statute amending the judicial review provisions of the 1952 Immigration and Nationality Act,” and that neither the title nor the text mentions 28 U.S.C. § 2241. Id. at 308-09. 46. Demore v. Kim, 538 U.S. 510, 516 (2003). 47. Id. at 513. 48. 8 U.S.C. § 1226(c) (dealing with mandatory detention and stating that “the Attorney General shall take into custody any alien who” is removable based on a conviction of a specified crime). 49. Demore, 538 U.S. at 514. 50. Id. at 516. 51. Id. 52. Id. 53. Id. at 517. 54. Id. at 516-17. 55. Id. at 517; see also Webster v. Doe, 486 U.S. 592, 603 (finding that the language and structure of § 102(c) of the National Security Act indicated that Congress intended to commit individual employee discharges to the Director of the CIA’s discretion, and that § 701(a)(2) precludes judicial review of these decisions under the Administrative Procedure Act, but also holding that a constitutional claim based on an individual discharge may be judicially reviewed by the District Court). such is Congress’ intent.”56 Consequently, the Court explained that § 1226(e) did not explicitly bar habeas review, and further, its “clear text” also did not bar the respondent’s constitutional challenge.57 A more recent challenge to ajurisdiction-stripping provision appeared in 2006. In Hamdan v. Rumsfeld, the President deemed the petitioner, who was held in custody at Guantanamo Bay, eligible for trial by military com-mission.58 The petitioner filed for a writ of habeas corpus and argued that the military commission the President convened lacked authority because 1) “neither congressional Act nor the common law of war supported trial by this commission for the crime of conspiracy,” and 2) the procedures adopted by the President to try the petitioner violated the most basic tenets of military and international law, which included the standard that a defendant must be permitted to see and hear the evidence against him.59 The Court first addressed the Government’s motion to dismiss the writ of certiorari under the Detainee Treatment Act of 2005 (“DTA”).60 The Government argued that certain subsections of the DTA repealed federal jurisdiction over both pending and future detainee habeas actions.61 The Court noted that Congress has expressly provided that sections 1005 (e)(2) and (e)(3) of the Act, which give exclusive, but lim- ited,jurisdiction to the Court of Appeals for the District of Columbia Cir-cuit to review “final decision[s]” of combatant status review tribunals (“CSRTs”) and military commissions, applied to pending cases; on the contrary, Congress chose not to expressly provide whether or not subsec-tion (e)(1), which addresses jurisdiction in habeas cases and other actions “relating to any aspect of the detention,” applied to claims pending on the date of enactment.62 Subsequently, the Court concluded that Congress’ silence gave rise to a negative inference in favor of jurisdiction, and it de-nied the Government’s motion to dismiss.63 After the Hamdan decision, Congress enacted the Military Commis-sions Act of 2006 (“MCA”), section 7 of which amended 28 U.S.C. § 2241(e).64 The amendments provided that 1) no court, justice, orjudge will have jurisdiction to hear an application for a writ of habeas corpus filed by 56. Demore, 538 U.S. at 517. 57. Id. 58. Hamdan v. Rumsfeld, 548 U.S. 557. , 566. 59. Id. at 567. 60. Id. at 572. 61. Id. at 574. 62. Id. at 576-84. 63. Id. 64. Boumediene v. Bush, 553 U.S. 723, 723-24 (2008). an alien detained as an enemy combatant, and 2) except as provided in sections 1005(e)(2) and (e)(3) of the DTA, no court, justice, or judge will have jurisdiction to hear any other action against the United States relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of a such alien. Section 7(b) of the MCA provided that any amendments made by 7(a) would apply to all cases, relating to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien, pending on or after the date of the enactment. In Boumediene, the petitioners, detainees of Guantanamo Bay, pre-sented the question of whether or not they were entitled to the “constitu-tional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause.” The Court ultimately held that the Suspension Clause had full effect at Guantanamo Bay, and if Congress wanted to deny the privilege of habeas corpus to the detainees, it must act in accordance with the requirements of the Suspension Clause. The Court also decided that section 7 of the MCA was an unconstitutional suspension of the writ of habeas corpus under the Suspension Clause because the DTA review process was not an adequate substitute for the writ of habeas corpus; the Court specifically pointed out that the detainees did not have the opportunity to present relevant exculpatory evidence not made part of the record in earlier proceedings. It is important to note that Congress’ power to strip jurisdiction is still subject to Constitutional limitations, such as due process, equal protection, and separations of powers. For example, in United States v. Klein, Klein, an administrator of the deceased V. F. Wilson, brought a claim in the Court of Claims to recover the proceeds of cotton belonging to Wilson, which came into the possession of agents of the Treasury Department as captured or abandoned property during the Civil War. Prior case law had held that a presidential pardon was proof an individual was innocent in law; it would be as if the individual never participated in the rebellion, and therefore, his property would be dismissed from any penalty that he might have incurred.72 Before the case could reach the Supreme Court, Congress passed a statute abandoning this precedent, stating that without a disclaimer of guilt, acceptance of a presidential pardon evidenced a person’s support of the rebellion.73 Furthermore, Congress stated that this pardon would be taken as conclusive evidence of the act recited, and the court would not have jurisdiction on proof of pardon or acceptance, summarily made on motion or otherwise.74 It also provided that the Supreme Court would have no jurisdiction when the Court of Claims rendered a judgment based on the pardons, without other proof of loyalty.75 The Court stated that Congress had “passed the limit which separates the legislative from the judicial power.”76 It noted that Congress cannot “prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor.”77 Moreover, the Court noted that the proviso infringed the constitutional power of the Executive to grant a pardon; it “impairs the executive authority and directs the court to be instrumental to that end.”78 Essentially, there was a separation of powers issue, and the statute was held to be unconstitutional.79 B. Application of Case Law to the Present Inquiry A reasonable question to ask would be: how would these cases apply to statutes limiting the Court’s appellate review of patent disputes? First, it is important to note that McCardle and Felker are narrow holdings; alt-hough the Court discussed the Exceptions Clause, it recognized that the statutes in question did not deprive the Court from entertaining all habeas corpus petitions. So, what would happen if Congress wanted to strip juris-diction from the Court with respect to all patent matters? Boumediene v. Bush addressed these questions. 72. Id. at 132-33. 73. Id. at 133-34. 74. Id. 75. Id. 76. Id. at 147. 77. Id. 78. Id. at 148. 79. Id. In Boumediene, the Court held that the MCA deprived the federal courts of jurisdiction to hear the contested habeas corpus actions. As previously stated, the Court based its decision on the Suspension Clause, which states, “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” The privilege of the writ of habeas corpus is a privilege enumerated in the Constitution, and the MCA deprived the federal courts from hearing the detainee’s actions. If Congress were to strip jurisdiction from the Supreme Court for patent cases, an inventor would still have access to the district courts and the Court of Appeals for the Federal Circuit. There would be no denial of access to a judicial forum, and no denial of a Constitutional right. Since Boumediene is distinguishable, we can look for guidance in I.N.S., Demore, and Klein. I.N.S. and Demore do not speak to the constitutionality of limiting the Court’s patent jurisdiction; however, if Congress were to pass a jurisdiction-stripping statute, the cases illustrate that Congress must have clear intent to do so. Additionally, unlike in Klein, the present inquiry would pass constitutional muster since it does not implicate constraints on due process, equal protection, and separations of powers. The federal courts, including the Federal Circuit, would still abide by the basic principles of equal protection and due process. Moreover, although Congress’ power to grant patents is rooted in the Constitution, most patent challenges fall under statutory claims, not constitutional claims—a point spelled out in further detail below. Finally, there is no a separation of powers issue since Congress has the constitutional power to govern patent rights. Therefore, there is no case law that directly precludes a statute of this nature. C. Addressing Ideological and Policy Concerns of Jurisdiction- Stripping Statutes Because there is no case law that directly precludes Congress from completely stripping the appellate jurisdiction from the Supreme Court with respect to patent cases, this Note examines the ideological and policy concerns of similar statutes. In the United States, judicial power is enumerated in Article III of the Constitution.86 Article III Section II defines the scope of the Supreme Court’s appellate review in the Exceptions Clause.87 This clause is the basis for the textual argument that Congress may restrict Supreme Court’s appellate jurisdiction.88 Supporters of a broad interpretation of Congress’ jurisdiction-stripping powers believe that this power serves as a check on the unelected judiciary.89 It allows members of Congress, a branch elected by the people, to restrain a branch insulated from shifts in political winds.90 Oppositionists to this broad interpretation also look to the text of Article III to make their argument, contending that the wording and structure of Article III demonstrate a mandatory federal court jurisdiction beyond the Supreme Court’s original jurisdiction.91 Even if Article III does not mandate the existence of lower federal courts, other scholars have argued that all cases and controversies included under the judicial power in Article III would still need to be heard by a federal court; consequently, if no inferior federal courts existed, claims would need to be heard by the Supreme Court on appeal.92 In his article, Weiman contends that these arguments are weakened in light of the Judiciary Act of 1789, which failed to “fully vest the Article III judicial power in federal courts.”93 He argues that federal courts have historically been unable to hear certain cases (e.g., cases that do not meet the amount-in-controversy requirements), even though they are covered in Article III; therefore, the federal judiciary is not necessarily the final arbiter in all matters anyhow.94 Furthermore, the Weiman article references Professor Richard H. Fal-lon, who has identified two models of judicial federalism: the federalist model and the nationalist model.95 Individuals who prescribe to the nationalist model believe in the principles of federal supremacy; they may disagree with limiting federal court jurisdiction because they believe that 86. U.S. CONST. art. III, §§ 1-2. 87. U.S. CONST. art. III, § 2. 88. Weiman, supra note 1, at 1684. 89. Id. at 1679. 90. Id. at 1685. 91. Id. at 1685-86 (referring to Justice Story’s dictum in Martin v. Hunter's Lessee, 14 U.S. 304, 331 (1816) (“It would seem, therefore, to follow, that congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognisance (sic).”). 92. Id. at 1686. 93. Id. 94. Id. at 1686-87. 95. Id. at 1692. federal courts are more apt at enforcing constitutional rights than state courts. Likewise, Weiman argues that stripping jurisdiction from the federal courts, specifically the Supreme Court, is that jurisdictional curtailment would hinder the Court’s “essential functions.” This idea of “essential functions” revolves around the theory that the Supreme Court maintains the supremacy of federal law and consistency in legal application. For example, Professor Ratner has argued the “essential appellate functions under the Constitution are: (1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authori- ty.” Through this theory, Professor Ratner contended that procedural limitations restricting a litigant’s access to Supreme Court review would not normally disrupt the essential functions; however, “legislation denying the Court jurisdiction to review any case involving that subject would effectively obstruct those functions in the proscribed area.” Despite the aforementioned ideological and policy concerns, Congress should retain the right to limit the Supreme Court’s jurisdiction. First, it is important to note that Congress does not always have a partisan motive when it attempts to strip jurisdiction from the federal courts; rather, it’s motive is much more practical. Furthermore, a complete bar to this congressional power would be direct hindrance to Congress. Congress has the constitutional right to govern patents; under the Exceptions Clause, Congress also has the power to utilize this right to govern patent law by shifting final adjudication of patent appeals from the Supreme Court to another court. The two main arguments against stripping jurisdiction from the Supreme Court are that 1) under a nationalist model of judicial federalism, federal courts are better at enforcing constitutional rights than state courts; and 2) stripping jurisdiction from the Supreme Court to entertain cases regarding an entire area of law would obstruct the Court’s essential functions. The first issue would not be relevant in the present inquiry. Title 35 of the United States Code codifies substantive patent law; cases and controversies primarily deal with infringement and validity matters, rather than constitutional challenges. Even if a constitutional challenge were to arise, there would not be an issue of “federal supremacy,” considering that patent law is governed exclusively by federal law. Therefore, patent law is not subject to discrepancies between state courts and federal courts. With respect to the second issue, there is no concern regarding the presence of “a tribunal for the ultimate resolution of inconsistent or con-flicting interpretations of federal law by state and federal courts.” As stated above, a state court does not have jurisdiction to hear a patent case. However, one may argue that there still may be conflicts among the different district courts. This is obviated by the existence of the Federal Circuit, a congressionally created court that has appellate jurisdiction over the district courts with respect to patent cases. The Federal Circuit may behave as the tribunal for the ultimate resolution of inconsistent or conflicting interpretations of patent law; it can set precedent, thereby unifying the lower courts. III. Congress Should Consider a Statute Stripping the Supreme Court’s Appellate Review of Patent Cases After determining that Congress likely can strip appellate jurisdiction from the Supreme Court with respect to patent cases, it is now time to turn to the following question: should Congress strip this jurisdiction? As examined below, the Supreme Court has taken an increasing interest in patent law in recent years, which has seemingly engendered anti-patent precedent. Before delving into the case law, it is essential to understand why patent law is important to the American public. After that analysis, we will examine how recent decisions by the Supreme Court have had adverse effects on the current state of patent law. This will help us consider whether or not jurisdiction-stripping legislation would be appropriate. A. Patent Law is Essential for Innovation and Vital for the Economy Technological advancements and scientific discoveries are imperative for societal progression. In fact, “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’” Anti-patent sentiment and muddied jurisprudence is lethal to the patent system, which for two centuries has been vital to the American economic success. According to the U.S. Department of Commerce, innovation has ac-counted for almost 75% of the economic growth in the U.S. since World War II.111 Furthermore, “economists contend that as much as 80% of growth in the gross domestic economy stems from the introduction of new technologies.”112 This economic growth is important for American businesses because it creates competitiveness in global markets. The World Bank has reported that the world’s greatest economic gains have come from developing nations that “aggressively opened their economies to foreign technologies and business methods and protected the intellectual property rights of their developers.”113 Additionally, from I960 to 2000, a study of patenting and growth in ninety-two countries showed an association between a 20% increase in the annua! number of patents granted and an increase of3.8% in output.114 Patents encourage innovation for a multitude of reasons. First, a patent is an exclusive right.115 With this exclusive right, a patentee is able to reduce his or her competition in the marketplace.116 Furthermore, having little competition in the marketplace facilitates the commercialization of the invention. This, in turn, usually leads to high monetary rewards, either through the sale of the invention or a licensing agreement.117 Patent protection is also important because it allows small-time inventors to invent without fear of being taken advantage of by a large corporation.118 Although the United States is still the preferred venue for patent enforcement, some practitioners believe that Europe may eventually take America’s place on the patent stage.119 Because patent law is so important to both the American https://www.ftc.gov/system/files/documents/public\_statements/958603/160608strongpatentsystem.pdf, (“First, as the Brookings Institute observed in 2013, ‘patents are correlated with economic growth across and within the same country over time’ and ‘R&D spending since 1953 is highly correlated with patenting and the patent rate[.]’”). 111. ARTI RAI ET AL., U.S. DEP’T OF COMMERCE, PATENT REFORM: UNLEASHING INNOVATION, PROMOTING ECONOMIC GROWTH & PRODUCING HIGH-PAYING JOBS 2 (2010). 112. William Hubbard, Competitive Patent Law, 65 FLA. L. REV. 341, 349 (2014). 113. Robert Shapiro & Kevin Hassett, The Economic Value of Intellectual Property, INTELLECTUAL PROP. REP. 5 (Oct. 2005) http://www.sonecon.com/docs/studies/IntellectualPropertyReport-October2005.pdf. 114. Id. (citing Derek H.C. Chen and Carl Dahlman, Knowledge and Development: A Cross-Section Approach, (The World Bank Pol’y Res., Working Paper No. 3366, 2004.)). 115. Reasons for Patenting Your Invention, WIPO, http://www.wipo.int/sme/en/ip\_business/importance/reasons.htm. 116. Id. 117. Id. 118. John Villasenor, Why Patents and Copyright Protections Are More Important Than Ever, SCIENTIFIC AM. (NOV. 14, 2013), http://www.scientificamerican.com/article/why-patents-copyright- protections-are-more-important-than-ever/. 119. Peter Leung, Will Europe Become the Center of the Patent World? Not Yet, INTELL. PROP. BLOG, BLOOMBERG BNA, http://www.bna.com/europe-become-center-b57982067812. The EU Unified and global economy, it is imperative that courts, at the least, remain neutral when deciding patent cases—even preferably erring on the side of the patentee. Anti-patent sentiment could spell out danger for both American innovation and the American economy. B. The Current State of Patent Law Now that this Note has illustrated the importance that patents hold in our society, we must turn our attention to the Supreme Court’s objectionable treatment of patent law. First, the Supreme Court has been reversing very important decisions by the Federal Circuit, a court Congress specifically created to hear specialized cases. Next, the Supreme Court has been misinterpreting Congress’ interpretation of Title 35 as well as the scientific and technical facts behind certain cases. These reversals, as well as the ongoing legal and factual misinterpretations, have created confusion in patent law jurisprudence, which in turn has made it more difficult for an inventor to both obtain and retain a patent. 1. The Supreme Court and the Federal Circuit: A Love Story Gone Wrong. In the beginning, the Supreme Court mainly left the Court of Appeals for the Federal Circuit at peace; however, in recent years, the Supreme Court has ostensibly been disregarding Federal Circuit jurisprudence.120 In 1982, Congress established the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”). Congress created the Federal Circuit in order to Patent Court Agreement is a treaty between certain European Union member states creating a single Unified Patent Court system; the UPC will handle infringement and validity cases for participating EU states. For more information on the Unified Patent Court, see An Enhanced European Patent System, UPC (Jan. 20, 2016), http://www.unified-patent-court.org/images/documents/enhanced-european- patent-system.pdf;20, 2016; see also UP & UPC FAQs, FISH & RICHARDSON (July 12, 2016), http://www.fr.com/global/unitary-patent-faqs/.http://www.fr.com/global/unitary-patent-faqs/. 120. Since its creation, the Federal Circuit has elicited strong criticism among legal scholars. One argument is that since the Federal Circuit has exclusive jurisdiction over patent law appeals, there is little room for different legal interpretations to be tried and tested among the various circuits. Many people feel that the Federal Circuit is very pro-patent, arguing that a specialized court with exclusive jurisdiction would be inherently biased. See Zachary Shapiro, Patent Law, Expertise, and the Court of Appeals for the Federal Circuit, BILL OF HEALTH BLOG (July 14, 2015), http://blogs.law.harvard.edu/billofhealth/2015/07/14/patent-law-expertise-and-the-court-of-appeals-for- the-federal-circuit.). However, this bias pales in comparison to the confusing and seemingly anti-patent precedent set by the Supreme Court. Furthermore, critics of the Federal Circuit also argue that patent law should not be treated “differently” from other areas of law. The argument is that patent cases are actually not inherently more challenging than any other type of law. See Wood, supra note 11. On the contrary, patent law is a distinct field, whose jurisprudence affects the American economy. Additionally, it is still one of the few fields that requires a separate bar examination, which further demonstrates its legal uniqueness. provide more “certain areas of federal jurisdiction and relieve the pressure on the dockets of the Supreme Court and the courts of appeals for the re-gional circuits.” The Federal Circuit was formed after years of extensive research and study. Results of this study pointed to problems associated with the lack of uniformity in specialized areas of law, including patent law. Congress extended the jurisdiction of the Federal Circuit so that they “had the power to review appeals from the U.S. Court of International Trade, the Merit Services Protection Board, the board of contract appeals, and certain administrative decisions of the secretaries of Agriculture and Commerce, as well as all appeals related to patents.” The Supreme Court and the Federal Circuit have a recent history of tension. For example, between 2005 and 2015, the Supreme Court heard 27 patent appeals from the Federal Circuit, and the Court reversed 22 of them. The Supreme Court grants certiorari to many of these cases in attempts to synchronize patent law with the rest of the law. The Federal Circuit, however, narrowly applies these rulings. For instance, the Federal Circuit held that isolated DNA was patentable twice before the Supreme Court finally reversed Myriad. Speaking about the uniformity of circuit court decisions, Chief Justice John Roberts even joked, “Well, they don’t have a choice, right? They can’t say, ‘I don’t like the Supreme Court rule, so I’m not going to apply it—other than the Federal Circuit.’” A recent example of the tension between the Federal Circuit and the Supreme Court can be seen in the Federal Circuit’s opinion in Apple v. Samsung, which collides with the Supreme Court’s ruling in eBay v. MercExchange. In eBay, the Supreme Court stated that Court of Appeals did not correctly apply the traditional four-factor framework that governs the award of injunctive relief, but instead used a unique “general rule that a permanent injunction will issue once infringement and validity have been adjudged.” The Circuit felt injunctions should only be denied in the “‘unusual case’, ‘under ‘exceptional circumstances’ and ‘in rare instances ... to protect the public interest.’” The four-factor test that the Court applied is the same four-factor test applied in other civil cases involving awarding permanent injunctive relief. This four-factor test states that A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. In the aftermath of this case, patentees acquired far fewer injunctions, and “[t]hey also found it nearly impossible to obtain an injunction when an infringed patent was just a tiny part of a large, complex product or ser- vice.” This was because courts have consistently held that an infringing element must drive consumer demand in order for irreparable harm to ex- ist. This holding is in tension with the recent Apple v. Samsung deci- sion. In its opinion, the Federal Circuit adopted a pro-patentee interpretation of “irreparable harm.” Furthermore, in relation to the last factor of the test, the Federal Circuit went on to say that [w]e base this conclusion not only on the Patent Act’s statutory right to exclude, which derives from the Constitution, but also on the importance of the patent system in encouraging innovation. Injunctions are vital to this system. As a result, the public interest nearly always weighs in favor of protecting property rights in the absence of countervailing factors, especially when the patentee practices his inventions. This pro-patentee sentiment contrasts with the sentiment set out in eBay, which advocated for a more neutral approach. In her dissenting opinion, Chief Judge Prost even mentions the incompatibility of the majority’s opinion with the Supreme Court’s decision in eBay.Ui Although Congress created this special court to analyze patent cases, the Supreme Court has been trying to enforce its own patent interpretations upon the Federal Circuit. This lack of deference has created a tension between the two courts. This tension likely stems from the fact that the Federal Circuit has a more formal approach in expressing rules of law. While some feel that this ‘formality’ has had adverse effects on patent law, it arguably promotes certainty and uniformity in patent law, while the Supreme Court’s fascination with abstraction and flexibility has made it easier to invalidate patents. For example, the Supreme Court has made it easier for a patent to be found invalid on the basis of obviousness. KSR Int’l Co. v. Teleflex Inc. has considerably influenced the law of obviousness under 35 U.S.C. §103 (hereinafter “103”). In this case, Teleflex alleged that KSR International had infringed its patent for an adjustable pedal system. KSR counter claimed that the patent was obvious under 103. The Court ruled in favor of KSR, and established principles to help determine obviousness. In its opinion, the Court held that the “teaching-suggestion-motivation test” utilized by the Federal Circuit was helpful insight to identify a reason for combining prior art; however, the Court stated that it should not be used as a strict rule. The Court stated that it would be necessary for a court to look to “in-terrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue.” Moreo-ver, according to the Court, a court may take into account the “inferences and creative steps that a person of ordinary skill in the art would em- ploy.” This shows that, according to the Court, combination patents de-serve extra scrutiny, which may present a concern of hindsight bias. According to an article from the Albany Law Journal, district courts stud-ied in the article were over seven times more likely to find patents obvious based on the KSR holding, and the Federal Circuit was 40%-57% more likely to find a patent obvious on review. Consistency is important for a field that is so closely tied with the American economy. As this Note will explore further in its next section, these flexible approaches not only create inconsistency, but they also are purportedly harmful for patents. Furthermore, by setting these new stand-ards, the Court is not just rejecting the Federal Circuit’s patent law juris-prudence; it is also declining to take into account Congress’ legislative intent. 2. The Supreme Court’s Dearth of Congressional Deference Along with disavowing the congressionally created Federal Circuit, the Supreme Court has also refused to defer to Congress with respect to statutory interpretation. Title 35 governs aspects of patent law. 35 U.S.C. § 101 (hereinafter “§ 101”) states that “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” A pivotal case interpreting this statute is Diamond v. Chakrabarty. In this case, the Court stated that the relevant legislative history supported a broad construction of § 101. When authoring the Patent Act of 1793, Thomas Jefferson held true to his belief that ingenuity should be treated liberally, and he defined statutory subject matter as ’’any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement [thereof].” In 1952, patent law was recodified, and in the accompanying Committee Reports, Congress stated that it intended patentable subject matter to “include anything under the sun that is made by man.” Embracing this principle, the Court still decided that there were three inherently patent-ineligible subject matters: laws of nature, physical phenomena, and abstract ideas. Despite Congress’ intended liberal interpretation, the Supreme Court has recently been taking a more conservative approach to § 101 interpreta-tions. For example, the Court decided to further limit patent-eligibility in the recent Mayo Collaborative Services v. Prometheus Laboratories, Inc. In this case, the Court held that the process claims at issue were patent- ineligible; according to the Court, the claims were directed to a process for determining whether a given dosage level of thiopurine to treat patients with autoimmune diseases was too low or too high. The idea behind the patents was to look at the correlation between the level of metabolites in a patient’s bloodstream and the effectiveness of the drug against autoimmune diseases, like Crohn’s disease. The Court held that these claims covered phenomena of nature, and any additional steps were “well-understood, routine, conventional activity already engaged in by the scientific commu- nity.” In this decision, Justice Breyer admitted that the additional steps in the claim “are not themselves natural laws;” however, he continued that the additional steps still did not transform the nature of the claim. This interpretation seemingly goes against Congress’ legislative intent for a broad construction of § 101. Further interpreting the test delineated in Mayo, the Court decided Alice Corp. v. CLS Bank in 2014. In this case, the Supreme Court held that the claims on review contained patent-ineligible subject matter. The Court relied on a two-part test to determine eligibility set out in Mayo. First, the Court determined whether the claims were directed to an abstract idea. In Alice, the Court turned to Bilski v. Kappos to analyze the category of abstract ideas. In Bilski, the Court concluded that the claims were directed to a method for hedging against the financial risk of price fluctua- tions. Using this precedent for its decision, the Court stated that the claims in Alice were directed to “using a third-party intermediary to mitigate settlement risk.” Much like the claims in Bilski, the Court felt the claims in Alice encompassed “a fundamental economic practice long prevalent in our system of commerce.” Next, the Court searched for an inventive concept, reasoning that if an idea is abstract, there must be additional elements of the claim, either alone or in an ordered combination, to transform the abstract claim into patentable subject matter. At the end of this decision, the Court held that, “the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.” Therefore, the Court held that the petitioner’s system and media claims added nothing of substance to the underlying abstract idea; consequently, they were patent-ineligible under § 101. This case has been a hallmark decision in the patent world, mainly because of its dismal effects on patent eligibility. One big issue with this decision is that the Court stated, “[i]n any event, we need not labor to delimit the precise contours of the ‘abstract ideas’ category in this case.” The problem with this is that the Court gave a very ambiguous definition of the term abstract, leaving little guidance to the lower courts, and opening the doors for a very broad interpretation. Moreover, the Court gave no clear definition of a generic computer. As of June 19, 2015, about 72% of Federal Circuit and district court decisions heard on § 101 grounds have invalidated the patents at issue in whole or in part; furthermore, there is an extremely high success rate of motions on the pleading. When a motion on the pleadings is granted, a case can be adjudicated before discovery, and even sometimes before claim construction, which gives a patentee less of a chance to defend his or her property rights. Additionally, based on an article from June 2016, over 36,000 patent applications had been rejected based on Alice, and over 5,000 applications had been abandoned. If an application is abandoned before publication, the public does not benefit because there is no disclosure; however, if it is abandoned after publication, a company risks disclosing an unpatented invention to a competitor. Moreover, one of the most shocking parts of the Alice decision is that in no part of the opinion does the Court mention the word “software.” This is noteworthy due to Alice's dire effects on software patents. Soon after Alice, the Federal Circuit issued an opinion holding in fa-vor of the patentee. In this case, the court stated that the claims satisfied step two of the test delineated in Mayo/Alice.119 The court held that the claims were patent-eligible because They do not merely recite the performance of some business practice known from the pre- Internet world along with the requirement to perform it on the Internet. Instead, the claimed solution is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks. Although this decision seemed to be a beacon of hope for patent owners, an article written in 2015 stated that only nine district court opinions have used DDR as precedent to find patent eligibility, while over thirty court opinions have cited DDR as inapplicable. Moreover, in the year since the article published, the Federal Circuit decided more than twice as many cases as the previous year, yet it still found very few cases with patent-eligible claims; this means that since Alice, there has been little case law a patent owner can rely on if his or her software patent is challenged. This high rate of invalidation raises concerns for inventors. Why would an inventor waste his or her time and money filing for a patent ap-plication, when there is a high likelihood that it will be invalidated? Fur-thermore, what does this new jurisprudence do to the presumption of validity?183 Is this presumption merely a hollow word? Innovation is vital to the wellbeing of society. Furthermore, the Constitution enumerates Congress’ power to promote the sciences;184 therefore, courts should not be weakening patent rights, they should be encouraging patent rights. Besides invalidating patents with its broad approach to § 101, the Su-preme Court also seems to intermix the analysis for patent eligibility under § 101 with the analysis for patentability under 35 U.S.C. §§ 102 and 103 (hereinafter “§ 102” and “§103,” respectively).185 According to § 102, an invention must be novel.186 This means that the claimed invention cannot have been “patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.”187 Section 103 states that an inventor may not receive a patent if the “subject matter as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which said subject matter pertains.”188 The sec- the specific asserted improvement in computer capabilities (i.e., the self-referential table for a computer database) or, instead, on a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool.”). In another recent case, the Federal Circuit discussed the problems with abstraction, and proceeded to analyze the claims at issue by examining earlier cases “in which a similar or parallel descriptive nature can be seen.” Amdocs (Israel) Ltd. v. Openet Telecom, Inc., No. 2015-1180, 2016 WL 6440387 at \*4, (Fed. Cir. Nov. 1, 2016) (“The problem with articulating a single, universal defini-tion of ‘abstract idea’ is that it is difficult to fashion a workable definition to be applied to as-yet- unknown cases with as-yet-unknown inventions. That is not for want of trying; to the extent the efforts so far have been unsuccessful it is because they often end up using alternative but equally abstract terms or are overly narrow.”). See also id. at \*4 n.1 (“For examples, compare [In re Bilski] reaffirming ‘ma- chine-or-transformation’ as the § 101 test for process claims, with [Bilski v. Kappos] indicating that ‘machine-or-transformation’ is perhaps one possible test, but not the only one. See also the several opinions in this court’s [CLS Bank International v. Alice Corp.].”). 183. See 35 U.S.C. § 282 (2016). 184. U.S. CONST. art. I, § 8, cl. 8. 185. Eric Guttag, Ignorance Is Not Bliss: Alice Corp. v. CLS Bank International, IP WATCHDOG (July 25, 2014), http://www.ipwatchdog.com/2014/07/25/ignorance-is-not-bliss-alice-corp-v-cls-bank- international/id=50517. See also Mayo, 132 S. Ct. at 1304. (“We recognize that, in evaluating the significance of additional steps, the §101 patent-eligibility inquiry and, say, the §102 novelty inquiry might sometimes overlap.”). 186. 35 U.S.C. § 102. 187. Id. The claimed invention also cannot have been described in a patent issues under section 151, or in an application for a patent published under 122(b), wherein the patent or application was filed before the effective filing date of the claimed invention. It is important to note that this is the language used post-American Invents Act of 2011. 188. 35 U.S.C. § 103; see Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 1 (1966) (deline-ating factors to determine the obviousness framework). ond part of the analysis in the Alice decision, which is the quest for the inventive concept, seems to combine the analyses required under each statute. In part two of the test, the Court states that abstract ideas are patent- ineligible when the additional steps of the claims are routine and well understood by those in the scientific community. By its very nature, determining whether or not steps are routine and well understood by those skilled in the art requires consideration of novelty and non-obviousness. When the § 101 patent-eligibility inquiry overlaps with the § 102 and § 103 analyses, there is a risk of creating significantly greater legal uncer-tainty. This combination of sections makes it easier to challenge a patent’s validity on § 101 grounds. For example, a challenger could use a combination of the written description and the prior art to allege that the patent claims are routine and conventional. It also ignores the legislative history behind Congress’ 1952 Patent Act, which states that anything under the sun made by man is patentable. Furthermore, by re-codifying the patent law, Congress has shown that patent eligible subject matter is only one requirement needed to obtain a patent. Finally, when the Supreme Court weakens patent rights, it affects Congress’ enumerated ability to promote science. The Supreme Court’s declaratory judgment jurisprudence arguably weakens patent rights. In order to file a declaratory judgment action in the district courts, the party filing the suit must establish the existence of an actual case or controversy between itself and the opposing party. In a patent case, a declaratory judgment is a legally binding declaration, in which a court conclusively affirms the rights of a party (e.g., determines a patent’s validity or declares non-infringement). A cornerstone case in the interpretation of this law occurred in Medimmune, Inc. v. Genentech, Inc. In Medimmune, Inc. v. Genentech, Inc., Medimmune had a licensing agreement with Genentech, which covered an existing patent and a then- pending patent application. When the USPTO granted the pending application, Genentech sent MedImmune a letter stating it expected them to pay royalties. Medlmmune alleged that Genentech’s patent was invalid and that their product did not infringe its claims; however, they still paid royalties on the patent. The petitioner then sought declaratory relief. The Court considered whether a patent licensee had to first terminate its licensing agreement in order to satisfy the actual controversy requirement under the Declaratory Judgment Act. The Court reversed the Federal Circuit’s decision and held that MedImmune was not required to break its licensing agreement in order to seek a declaratory judgment in federal court, which would render the underlying patent invalid, unenforceable, or not in- fringed. Before this case, the Federal Circuit applied a reasonable apprehen-sion standard in order to determine whether or not the case-or-controversy requirement had been satisfied. In its place, the Court held that they must consider “whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” By considering all the circumstances, the Court has essentially lowered the bar for bringing a declaratory judgment action. In lowering the bar for bringing a declaratory judgment action, a licensee has the advantage of remaining in good standing, all while attacking the validity of a patent. The consequence of this is that the bargaining power of both parties entering a licensing agreement is greatly shifted. Ultimately, the shift in negotiation power creates a huge imbalance. As of now, there are not many consequences to challenging the validity of a licensor’s patent. This may discourage potential licensing agreements, which, in turn, could possibly hinder future innovation. Essentially, “the overhead cost associated with licensing a patent is now greater because of the imbalance of power between patentees and licensees, which decreases the value of a patent sought to be licensed.” Another major issue with the MedImmune decision is that it makes it more difficult to monetize patents. After MedImmune, there is now a risk of having a patent declared invalid before licensing or litigation ever occurs. This results in a shift in the balance of power in licensing negations; “the risk partially shifts away from the licensee to the patent holder.” Because value is a function of risk, the value of the patent could be adversely affect- ed. Additionally, attorneys will now have to consider alternative contract provisions in order to avoid declaratory judgments actions. This could greatly increase transactional costs and add risk to the licensing process since parties may be apprehensive to enter into a licensing agreement with these provisions. Furthermore, the possibility of litigation increases, as a licensee has little to lose from accepting a license before turning immediately to the courts. Companies are discouraged from seeking licenses for their patents to an expansive group, considering they may be faced with multiple validity and non-infringement challenges. Potential licensors will have to take extra time to consider each and every possible licensee before entering into any agreement. This could cause a problem because patents may be transferred to the least risky user instead of a valuable enti- ty. In sum, the Supreme Court has not given the proper deference to Congress, and has in turn made it difficult for an inventor to enforce his or her patent- an effect contrary to Congressional intent. 3. The Supreme Court’s Interpretation of Science Besides misinterpreting the legal aspects of patent law, the Court has also misinterpreted the science behind certain cases. In order to make a proper judicial decision, courts are required to understand the facts of a case. In patent law, the facts of a case can rely heavily on scientific analy-sis. The Supreme Court has had difficulty fully comprehending scientific analysis, as perfectly demonstrated in Association for Molecular Pathology v. Myriad Genetics, Inc, Myriad Genetics located, isolated, and se-quenced two human cancer susceptibility genes, BRCA1 and BRCA2; mutations in these two genes can greatly increase the risks of breast and ovarian cancer. On appeal, the Supreme Court had to answer the following questions: 1) whether or not isolated DNA was patentable under § 101 and § 102 and 2) whether or not patent claims relating to cDNA were eligible under § 101. In this decision, the Supreme Court held that isolated DNA is not patentable subject matter since it fell within the law of nature exception. The Court argued that Myriad did not “create or alter any of the genetic information encoded in the BRCA1 and BRCA2 genes,” nor did they alter the genetic structure of DNA. According to the Court, Myriad did not create anything; “[t]o be sure, it found an important and useful gene, but separating that gene from its surrounding genetic material is not an act of invention.” On the contrary, the Supreme Court also held that “cDNA is not a ‘product of nature’ and is patent eligible under § 101, except insofar as very short series of DNA may have no intervening introns to remove when creating cDNA.” The Court reasoned that cDNA differed from natural DNA since in cDNA, “the non-coding regions have been removed”; therefore, a “lab technician unquestionably creates something new when cDNA is made.” There are divided opinions on the policy implications behind patenting isolated DNA; however, the main issue is not necessarily the Court’s ultimate conclusion, but rather the reasoning behind it. Perhaps most members of the Court fell asleep during their freshman year biology course, as perhaps some of this Note’s readers did.228 Consequently, it is important to briefly discuss both isolated DNA as well as cDNA. Genes carry the instructions to make proteins.229 They are made up of DNA, and they can vary in size from a few hundred bases to more than two million bases.230 In nature, the human genome contains about 3 billion base pairs in total.231 These base pairs reside in the twenty-three pairs of chromosomes contained in the nucleus of our cells.232 Chromosomes consist of hundreds to thousands of genes.233 “Each of the estimated 30,000 genes in the human genome makes an average of three proteins.”234 In nature, genes clearly do not exist in a vacuum. An isolated fragment of DNA is not naturally occurring, and locating, sequencing, and isolating one specific gene out of 30,000 genes can be a rigorous process. The Supreme Court even points out, “isolating DNA from the human genome severs chemical bonds and thereby creates a nonnaturally occurring molecule.”235 But still, the Court holds that the isolated DNA claims cover naturally occurring phenomena, which seems somewhat paradoxical.236 The Court comes to this conclusion because the genetic information encoded in the BRCA1 and BRCA2 genes itself was not altered.237 Assuming, arguendo, that this is the proper analysis, and that judges should look to the underlying genetic information, the Court should have come to a different conclusion with respect to the patentability of cDNA. Here, the antidote to the politics of the human gene patenting debate, SCOTUSBLOG (Feb. 6th, 2013), http://www.scotusblog.com/2013/02/an-antidote-to-the-politics-of-the-human-gene-patenting-debate/ (arguing that patenting isolated human DNA does not 1) inhibit innovation, 2) inhibit genetic research, or 3) inhibit future technologies, such as personalized medicine). 228. It is worth mentioning that the syllabus of the decision refers to synthetically created “exons- only strands of nucleotides” as “composite DNA (cDNA).” Myriad, 133 S. Ct. at 2109. In molecular biology, cDNA stands for complementary DNA; Noah Feldman, The Supreme Court’s Bad Science on Gene Patents, BLOOMBERG LAW, (June 13 2013), http://www.bloombergview.com/articles/2013-06- 13/the-supreme-court-s-bad-science-on-gene-patents; Noam Prywes, The Supreme Court’s Sketchy Science, SLATE, http://www.slate.com/articles/health\_and\_science/science/2013/06/supreme\_court\_patent\_case\_science \_the\_justices\_misunderstand\_molecular\_biology.html. 229. The Human Genome Project Completion: Frequently Asked Questions, NAT’L HUMAN GENOMERESEARCH INST. (Oct. 30, 2010). 230. Id. 231. Id. 232. Id. 233. Id. 234. Id. 235. Myriad, 133 S. Ct. at 2118. (emphasis added). 236. Myriad, 133 S. Ct. at 2116-19. 237. Id. Court argues that a person creates something new when cDNA is made, mostly because cDNA differs from natural DNA in that cDNA does not contain the non-coding regions. The Court focuses more on how the cDNA is made, rather than its underlying genetic information. cDNA is made from mRNA. During transcription, RNA polymer-ase II uses a strand of DNA as a template to make a complementary strand of RNA, called pre-mRNA. In nature, pre-mRNA undergoes a process called splicing. The purpose of splicing is to remove introns, which are sequences of RNA that do not contain instructions for protein construc- tion. The remaining segments are called exons, which are the part of the mRNA that contain instructions for protein assembly. The spliced mRNA can be referred to as primary mRNA. How does this relate to cDNA? Well, cDNA is usually generated by the enzyme reverse transcrip-tase, which uses the information in primary mRNA to produce a comple-mentary DNA strand. Complementary DNA contains the same protein- coding information found in a segment of “natural” DNA; therefore, the analysis for cDNA should really be no different from the Court’s analysis for isolated DNA.

It is worth mentioning that, in his concurring opinion, Justice Scalia wrote, “I join the judgment of the Court, and all of its opinion except Part I-A and some portions of the rest of the opinion going into fine details of molecular biology. I am unable to affirm those details on my own knowledge or even my own belief.” In a criminal or any other civil case, the judge is expected to know and fully understand the facts and how they apply to existing law. Why shouldn’t the same standard be held for a patent matter? In a case that affects genetic researching and the biotechnology industry,248 the Court should have been able to understand the actual biological facts in order to make a proper decision.249

[Footnote 248] 248. See Esteban Burrone, Patents at the Core: the Biotech Business, WIPO, http://www.wipo.int/sme/en/documents/patents\_biotech\_fulltext.html (“Compared with other major industries that also rely on research and development (R&D), such as the chemical industry, for which the ratio of R&D expenditure to total revenues is approximately 5%, or the pharmaceutical industry, for which the equivalent figure is generally no more than 13%, biotechnology companies generally invest a significantly higher proportion of their revenues in R&D (often between 40% and 50%). As in any research-based industry, the protection of research results becomes a major issue.”). [End FN]

IV. Conclusion

Innovation is the key to success in this globalized world. Over the past few years, the Supreme Court has made many errors in patent jurisprudence, which has put innovation at risk.250 [Footnote 250] 250. See Ryan Davis, Kappos Calls for Abolition of Section 101 Of Patent Act, LAW360 (Apr. 12, 2016, 4:32 PM), http://www.law360.com/articles/783604/kappos-calls-for-abolition-of-section-101-of- patent-act. According to this article, David Kappos, the former director of the USPTO, called for the abolition of Section 101 of the Patent Act, stating decisions like Alice on the issue are a “real mess” and threaten patent protection for key U.S. industries. He stated that the Supreme Court’s decisions in Mayo, Myriad, and Alice, along with the lower interpretations of these decisions by the lower courts, have made it too difficult to procure patents on biotechnology and software inventions. According to Kappos, foreign patent officials have reacted with “bemusement” while watching the U.S. invalidate patents under Section 101. According to Kappos, foreign companies competing with American busi-nesses see a golden opportunity in the reduced patent protection for software and biotechnology. [End FN] Is stripping jurisdiction from the Supreme Court the answer? Congress would not be precluded from passing this type of jurisdiction-stripping legislation. Furthermore, certain ideological and policy concerns stimulated by previous jurisdiction-stripping statutes are not at issue here. In the simplest scenario, the Federal Circuit would be the final arbiter of patent appeals, still allowing for uniform jurisprudence and judicial checks on any equal protection, due process, or separation of powers claims, if any constitutional claims ever were to arise.

Although the Supreme Court can strip jurisdiction with respect to the Court’s ability to entertain patent appeals, the real question lies in whether or not Congress should pass this legislation. Stripping jurisdiction is a controversial idea, and some may argue that it may be too soon to make that judgment. What is clear, however, is that there needs to be some reform in the Supreme Court’s patent law jurisprudence. Maybe a simple solution would be to ensure that at least one justice on the Court is registered to practice before the USPTO. Or, another possible solution would be to appoint a technical advisor to the justices, who could assist the Court in interpreting any scientifically complex case.

The idea of having a scientifically trained person on a patent court is not novel. For example, in the German patent system, there are twenty-nine boards in which judges of the Federal Patent Court can sit, which include nullity boards, technical boards of appeal, boards of appeal for trademarks,

249. Mayo and Myriad have also impacted the ability to acquire and secure biotech related patents. Sachs, supra note 13 (displaying figure directed to patents challenged in Federal Courts, which shows that 53% of biotech related patents have been invalidated under § 101).

a juridical board of appeal, a board of appeal for utility models, and a board of appeal in plant variety cases. On this court, there are currently 118 judges; these judges are a mixture of lawyers and scientists. These technical judges have all the same duties and privileges of a professional judge; they sit on all cases involved in the properties of a technical invention. The implementation of technically trained judges has existed in specialized patent courts in various countries, like Germany, Sweden, Switzerland, and Denmark. In the United Kingdom, patent law judges usually have scientific and technical training; however, they are not officially referred to as technical judges. Actually, an advantage to stripping jurisdiction could be that Congress would have the power to alter the Federal Circuit so that is better emulates the European system.

It might be worth Congress’s time and energy to study the patent systems of other countries; however, that is for another note. Although there may be other solutions to an increasingly foreboding situation, stripping jurisdiction from the Supreme Court is a rational consideration. Due to their importance in the American and global economy, patents should at least be analyzed neutrally. Supreme Court opinions in recent years have put patent law on shaky grounds. The Supreme Court has not granted deference to the congressionally created Federal Circuit, nor has it granted deference to Congress’ legislative intent. Furthermore, the Court occasionally misunderstands the science behind the case law, thereby limiting its ability to communicate clear, uniform rules. It’s time to reform the judiciary in order to stop the cessation, and promote innovation.

#### There are also sector-specific advocates for issues such as women’s health and climate issues.

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Ryan Doerfler and Elie Mystal, “The Supreme Court Is Broken. How Do We Fix It?” The Nation, 06-06-2022, https://www.thenation.com/article/society/how-to-fix-supreme-court/

With this parade of horribles about to be realized, progressives are returning with even greater urgency to the question of what to do about the conservative leviathan that is the Supreme Court. As in earlier moments, the temptation is merely to replace that leviathan with a progressive one, packing the court with benevolent justices who will wield the institution’s power for good. Real progress, though, requires the beast to be slayed, stripping the court of its authority and returning our society’s most pressing and important questions to the democratic arena—where progressive causes, backed by popular movements, stand the best chance.

Considering the history of the federal right to abortion helps to reveal the severe limitations of relying on a juricentric approach to securing fundamental rights. Just four years after the court recognized that right in Roe, a nearly identical court declared in Maher v. Roe that the state was under no obligation to make abortion economically feasible. Even at the height of its support for reproductive health care, in other words, the court ensured that the right to abortion would be one in name only for millions of women without the financial means.

The Supreme Court’s refusal to guarantee meaningful, positive rights to US citizens (let alone noncitizens) goes far beyond abortion. Even during the Warren Court era, the historical anomaly to which so many defenders of juristocracy cling, liberal justices failed to extend constitutional protections to America’s economic underclass, thereby abandoning an ideal of substantive equality in favor of formal equality.

In addition to failing to provide positive rights, the Supreme Court has, throughout its history, actively impeded Congress from providing such rights through ordinary legislation. Most famously, the court struck down the Civil Rights Act of 1875 in the Civil Rights Cases, undercutting Congress’s primary effort to guarantee the rights of Black Americans in the aftermath of the Civil War. Much more recently, in a decision hailed by liberal media as “upholding” the Affordable Care Act, the Supreme Court invalidated Congress’s expansion of Medicaid, once again depriving poor people of the affirmative right to health care they are so desperately owed.

What this history suggests is that the most plausible path to a meaningful right not only to abortion but also to education or racial equality or climate justice is through federal legislation rather than judicial edict. As history also suggests, such progressive legislation would face eventual judicial resistance—unless Congress were to strip the Supreme Court (and other courts) of its authority to decide on the constitutionality of that law.

By invoking its power under Article III to make “exceptions” to the Supreme Court’s jurisdiction over most cases and its total discretion over the existence of “inferior” federal courts, Congress could—and should—insulate legislation like the Women’s Health Protection Act from judicial invalidation by including a provision withdrawing from any court the right to consider challenges to the constitutionality of that law. Deploying such jurisdiction-stripping provisions broadly would ensure that the meaning of our Constitution and, more fundamentally, what rights exist within our constitutional order would be determined by (at least somewhat) democratically responsive officials in Congress and the White House, as opposed to democratically insulated philosopher kings.

Removing issues like health care or climate from the courts would have the further advantage of placing responsibility at the feet of elected officials. Rather than speculating about whether some judicial nominee would respect stare decisis, “moderates” in the Senate would have to explain why they do or do not support a right to choose. Similarly, rather than promising, as President Biden has since his election, to enact federal abortion legislation if the Supreme Court overrules Roe, he and his party would have to explain why they are not protecting women’s reproductive freedom right now.

Finally, although jurisdiction stripping is often characterized as an alternative to court expansion, the two are not mutually exclusive. Given its history, though, merely adding progressive justices to the Supreme Court would yield limited benefits in the short term and leave in place an undemocratic behemoth that would wreak further havoc in the end.

### Jurisdictional---Legislative Overrides

#### The affirmative could fiat Congress pass a Congressional Review Act for the Supreme Court, which would allow it to overturn Supreme Court decisions that interpret legislation. This would mirror the CRA for the executive branch and would enable Congress to overturn decisions with greater speed and ease.

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Ganesh Sitaraman, “How to Rein in an All-Too-Powerful Supreme Court,” The Atlantic, 11-16-2019, https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/

The United States may soon find itself in the uncomfortable position of having a Supreme Court whose ideological majority is at odds, on a number of key issues, with well more than half the country. Depending on the outcome of the next election, it may be similarly at odds with congressional majorities and a new president. Anticipating the potential impending crisis of an activist Court reshaping American law and striking down legislation, many of the current Democratic presidential candidates have suggested restructuring the Court, and advocacy groups are pushing to expand its size to allow for the appointment of additional justices.

These ideas for structural reform (some of which I have proposed) get a lot of attention. But there is another way to rein in the Court’s power. Congress could pass a Congressional Review Act for the Supreme Court, which would enable it to overturn Court decisions on legislative matters with greater speed and ease.

Something similar already exists for executive-branch decisions. The Congressional Review Act (CRA), passed in 1996, allows Congress to review federal-agency regulations and overturn them through a “fast track” process, in which both houses of Congress pass a resolution on a given regulation through an expedited process and the president signs it. The idea behind the CRA is simple: Congress makes the laws, and agencies implement them. If Congress doesn’t approve of how an agency has implemented a law, it should be able to review and reject the agency’s approach.

A Congressional Review Act for the Supreme Court would be similar, but it would apply to Court decisions that interpret legislation. Such a law would be constitutional, because Congress already has the power to overturn these decisions, by simply passing new laws.

It’s worth emphasizing that this power only applies to Supreme Court decisions that interpret statutes, not those that interpret the Constitution. But the majority of cases that come before the Court do not concern constitutional matters. Of the 71 cases heard by the Court during its 2017–18 term, for example, only 25 involved the Constitution. Forty-six cases—almost 65 percent—were about other issues.

These cases are often extremely important. Through its recent interpretation of the Federal Arbitration Act, the Court restricted the ability of workers to bring class-action lawsuits. In 2015, it interpreted the Clean Air Act to overturn the Obama Administration’s regulation of hazardous pollutants. The Court case challenging the Trump administration’s travel ban involved questions of statutory interpretation, as does this year’s case on the meaning of the term “sex” in Title VII of the Civil Rights Act.

Despite the significance of these cases, the hurdles to passing legislation of any kind make revisiting Court opinions a challenge, and some of the cases fly under the political radar. All too often, the Supreme Court acts as the final voice on issues of policy that are, under our constitutional system, squarely within the purview of Congress.

A CRA for the Supreme Court would address these problems. Here’s how it would work: If the Court issued a decision interpreting a statute or regulation, Congress would have 30 days to vote on whether to open a reconsideration process. If Congress voted yes, the speaker of the House, the Senate majority leader, and the minority leaders would appoint a special committee in each chamber (with proportional party membership) to design a legislative fix for the full body to vote on within the next 30 calendar days. The bill would then go to the other house, where it would be voted on within 10 days through a privileged, fast-track process, which would avoid common legislative snags like the filibuster and committee hearings. The president would then sign the law or veto it, as with any ordinary piece of legislation.

Practically, such a process would operate only in limited situations. There would have to be a majority in both the House and the Senate to vote for the new proposal, and the president would have to sign the legislation. This means that the CRA for the Supreme Court would likely be effective only when the government was unified under one party or when there was strong bipartisan consensus. This minimal review is desirable; a popular majority or bipartisan political consensus would be a precondition for deciding that the Court was out of step.

A CRA approach would also be likely to make U.S. public policy more responsive to the views of the electorate. Despite the current representation problems in Congress—from the skewed structure of the Senate to gerrymandering in the House—Congress is still more representative of the public than the unelected, lifetime-serving Supreme Court. Forcing a vote through expedited consideration would prevent interest groups and lobbyists from quietly killing legislative reforms. There would be a public vote, members would have to take a position, and voters would be able to hold them accountable.

One of the concerns with a CRA for the Supreme Court is that it might push the Court to become less charitable to Congress. The justices might rein in their decisions for fear of disrupting policy or wading too far into politics, because they know Congress could not practically act (say, because of partisan gridlock in Congress). For example, some analysts have suggested that Chief Justice John Roberts sided with the liberal justices in some of the Obamacare cases for this reason. The CRA for the Supreme Court would give the Court less reason to be charitable, because Congress would get a quick bite at the apple to overturn decisions.

It is certainly possible that the Supreme Court would react in this way—but it is unclear how big a change that would be from the way things work now. At present, the justices are only infrequently accommodating. Indeed, the Court has even said explicitly that Congress could overturn decisions in some politically controversial cases, knowing that Congress would not, in fact, be able to do so. The choice going forward is between a world in which the Court might be magnanimous in one or two cases and a world in which Congress can reassert its constitutional powers and assess (and possibly overturn) a large number of Court decisions each year.

A related problem is that an activist Court might start to rely more on constitutional claims, because they would not be covered under the fast-track process. But with every unpopular constitutional decision, the Court would be inviting greater popular scrutiny and increasing the pressure for structural reforms like Court restructuring and expansion.

Unelected judges on the Supreme Court were never intended to be policymakers. Congress—the most representative branch, the one closest to the people—was meant to drive basic questions of public policy. Congress—the most representative branch, the one closest to the people—was meant to have this power. Formally, it still does. But the reality is that the Court plays a large role in the policy process because of how difficult it is for Congress to act. A Congressional Review Act for the Supreme Court would help revive the legislative branch’s proper role in our constitutional system.

#### A Supreme Court Review Act would create a fast track process for overriding SCOTUS decisions that misinterpret statutes or restrict constitutional rights.

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Aaron-Andrew P. Bruhl, “The Supreme Court Review Act: Fast-Tracking the Interbranch Dialogue and Destabilizing the Filibuster,” Journal of Constitutional Law, Vol 25:5, April 2023, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1040&context=jcl\_online

The relationship between the Supreme Court and Congress has often been described as a dialogue.1 One problem with this conception is that it is hard for Congress to find its voice. Individual members can speak out for or against judicial decisions, of course, and many do. But for Congress as an institution to speak authoritatively, through legislation, is hard, and it is especially hard in an age that features party polarization and narrow majorities.2 A major impediment to legislative responses is the Senate filibuster, the now-routine use of which means that a supermajority is required for most ordinary legislation.3

Having an arduous legislative process gives the courts more freedom of action.4 Suppose that a Supreme Court decision misinterprets a statute as judged by what the enacting Congress intended and what the current Congress wants. A majority of the House opposes the Court’s interpretation, as does a majority of the Senate (fifty-five senators, say), as does the president. That alignment is not sufficient to override the decision. The filibuster requires sixty votes to overcome, and that is not even to mention limited space on the congressional agenda, conflicting visions of how to fix the decision, and other barriers to enactment. And that is in the best-case scenario, when all three lawmaking bodies oppose the Court’s decision. Judicial decisions will therefore often “stick” even when they represent minority positions in Congress.

This reality should cast some doubt on a common rhetorical move in judicial opinions interpreting statutes, namely that if the legislature does not like a result, it can change it.5 That is true as a formal matter, and sometimes Congress in fact does just that, as in the Lilly Ledbetter Fair Pay Act, which overrode a decision restricting employees’ ability to bring pay-discrimination claims.6 But given the difficulty of congressional response, the invitation to Congress often comes across as hollow or even cynical.

Enter the proposed Supreme Court Review Act (“SCRA”).7 Introduced in 2022 by Senators Sheldon Whitehouse and Catherine Cortez Masto, the bill would create a streamlined congressional procedure for legislation that responds to Supreme Court decisions interpreting federal statutes or restricting constitutional rights. As compared to some other proposals for reforming the Court or reducing its authority—term limits for Justices and expanding the Court’s membership, to pick two—the SCRA is decidedly modest. It does not change the Court itself, and it does not require anything unprecedented. One might even say that this is a measure that the Court itself has requested, through its reminders of Congress’s power to legislate in response to decisions Congress dislikes.

To put my cards on the table, I think the SCRA is a good concept and hope something like it passes. My aim in this Essay, however, is to describe the proposal and its antecedents, address its constitutionality, and raise a couple of questions about its operation.

I will not try to predict the SCRA’s odds of passage, except to the following extent. The SCRA would eliminate the filibuster for legislation responding to recent Supreme Court decisions, but as long as the filibuster remains in place for most legislation, the SCRA itself will face that sixty-vote hurdle, a sort of catch-22. Absent the rare filibuster-proof Senate majority, enacting the SCRA would therefore need bipartisan support even under unified government. The bill does have a feature, noted below, that is meant to make it attractive to the minority party in the Senate. Like other legislation, the SCRA’s odds of passage could increase through packaging it with must-pass legislation or other inducements, approaches that, again, are necessary now because the ordinary legislative process does not work in the way the SCRA would decree.

II. HOW IT WORKS: MECHANICS AND ANTECEDENTS

The SCRA would create a streamlined set of internal rules of debate applicable to qualifying bills. A qualifying bill is one that responds to a new Supreme Court decision by amending a federal statute that the Court interpreted or by creating statutory protections for a constitutional right the Court “diminish[ed].”8 The most important feature of the streamlined procedures is that qualifying legislation would not be subject to the filibuster in the Senate.9 The SCRA would also establish several statutory timetables in both houses for action in committee and on the floor, which is important because neglect and delay are commonly fatal for bills.10 The result of all of this is a speedier, more majoritarian process, particularly in the Senate, for legislation that responds to new Supreme Court decisions. If SCRA had been in place in the summer of 2022, it is plausible that Congress could have responded to the Dobbs abortion decision by passing a bill that would have largely reinstated the pre-Dobbs law, as such a bill apparently had the support of a majority in the Senate, though not 60 votes.11

### Jurisdictional---Chevron

#### Congress can strengthen Chevron deference through Article III power

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As a last sally, the perhaps less gentle, more incredulous reader may argue that Congress's powers to limit judicial jurisdiction or remedies and to change legal standards that apply to pending cases do not allow Congress to circumscribe a court's plenary review of a matter that it has permitted courts to consider. But Congress can. And does.

First, Congress can limit judicial review of factual findings. Congress has expressly done just that under the APA, whereby courts review factual findings for either substantial evidence or arbitrariness. 223 Congress has explicitly adopted the substantial evidence test for more than a century, 224 and the Supreme Court has "often [called for the standard to apply] when a statute did not explicitly incorporate the test." 225The Supreme Court in Crowell v. Benson approved of Congress's ability to limit de novo review of factual matters for private rights that Congress created. 226 Likewise, the Court permitted limited review of factual matters as part of the statutory scheme in Schor concerning state law counterclaims - noncongressionally created private rights. 227Despite occasional scholarly concern over deferential review's constitutionality, 228deferential factual review has a significant statutory and judicial pedigree. If one accepts limited judicial review of facts, then the sphere of "independent judgment" that Article III requires narrows considerably by excluding factual questions concerning the merits of a case. At most, it can extend only to de novo interpretation of legal matters.

Yet, Congress also limits Article III judicial review of legal interpretations. It does so in three prominent contexts: habeas, qualified immunity, and arbitration. Because these examples do not consider an agency's statutory interpretation, they are distinguishable from Chevron in some way. Nonetheless, they are fundamentally similar to Chevron because all demonstrate that federal courts either can or must decide a matter without basing that decision on courts' preferred legal interpretations.

## Aff---Advantage Themes

### Modeling

#### U.S. judiciary gets modelled.

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David P. Fidler, “Supreme Court Decisions and U.S. Foreign Policy on Global Health,” Think Global Health, 07-13-2022, https://www.thinkglobalhealth.org/article/supreme-court-decisions-and-us-foreign-policy-global-health

The federal judiciary receives less attention than the legislative and executive branches as a domestic source of U.S. foreign policy. Federal courts decide cases that involve foreign affairs, but the courts are generally deferential to the president and to Congress, which tends to produce rulings that do not dramatically affect how the political branches conduct foreign policy.

The federal courts have been more important in foreign policy as an exemplar of an independent judiciary's role in maintaining the rule of law in a free society. U.S. promotion of democracy globally has supported judicial independence in other countries. The jurisprudence of federal courts has historically had global influence that few other judicial systems have achieved. This impact allowed the federal judiciary to contribute to the persuasiveness and attractiveness of American culture, values, and policies that purportedly create soft power for the United States in international relations.

Constitutional Rulings on Guns and Abortion

In cases involving the Constitution, the Supreme Court expanded the right to bear arms and eliminated the right to an abortion. The decision in New York Rifle & Pistol Association Inc. v. Bruen struck down a gun control measure after the mass shooting in Uvalde, Texas, triggered another national reckoning with gun violence—a long-standing public health concern. The Supreme Court's expansion of the right to bear arms brought accusations that it would produce more gun-related mayhem. The holding in Dobbs v. Jackson Women's Health Organization that the Constitution did not contain a right to abortion triggered public health fears about the consequences for women, especially those facing socioeconomic inequities.

The United States has long been an outlier among high-income democracies on gun rights, ownership, and violence, but this status has been no barrier to U.S. global health engagement. Constitutional jurisprudence on the right to bear arms has remained peculiar to the United States and has not undermined judicial contributions to American soft power.

However, the juxtaposition of mass shootings across the country and the expansion of gun rights could signal that the Supreme Court has chosen a side in the dysfunctional politics of gun violence. The danger that Bruen poses is less about U.S. global health engagement than deteriorating perceptions of the independence of the federal judiciary and the attractiveness of American culture, values, and policies.

Dobbs ended nearly fifty years of American women having a constitutional right to abortion. The right accorded in Roe v. Wade (1973) and affirmed in Casey v. Planned Parenthood (1992) disappeared overnight, with scarcely any preparations by government authorities to address the health consequences for women that the immediate termination of a constitutional right will create. Post-Roe controversies over abortion affected foreign policy, as seen in the different stances by Republican and Democratic administrations on using U.S. global health funding for reproductive health services. Dobbs reinforces this impasse and, as a result, will change little about U.S. foreign policy concerning abortion in other countries.

However, Dobbs has reinforced concerns that the Supreme Court has been sucked into the polarization that defines abortion politics. American democracy has been unable to find common political ground on gun rights and abortion for so long that federal courts have taken on disproportionate importance. Like Bruen, Dobbs could adversely affect perspectives on the federal judiciary's independence and the nature of American culture, values, and policies.

Decisions Concerning Vaccine Mandates and Climate Change

The Supreme Court also decided two cases with public health consequences when it ruled that Congress had not delegated federal agencies the power to impose a COVID-19 vaccinate-or-test mandate on large employers (National Federation of Independent Business v. Occupational Safety and Health Administration) or to broadly regulate greenhouse gas emissions (West Virginia v. Environmental Protection Agency). Both cases heralded heightened judicial scrutiny of agency claims of authority to address policy problems. Of the two, the climate change case has the most significant implications for U.S. foreign policy on global health.

As part of his COVID-19 strategy, President Joe Biden imposed vaccine mandates on health facilities supported by federal spending and on employers with more than one hundred workers. Both mandates were challenged. In Biden v. Missouri, the Supreme Court held that the power Congress had given the Department of Health and Human Services to protect Medicaid and Medicare patients authorized the health facility mandate. However, in National Federation, the court found that Congress had not granted the power to impose a vaccinate-or-test mandate on large employers under the Occupational Safety and Health Administration's delegated authority to set workplace health and safety standards.

During COVID-19, the biggest foreign policy controversy associated with vaccines centered on accusations that the United States was not sharing its vaccine supplies sufficiently with low- and middle-income countries. Whether federal agencies had the authority to impose vaccine mandates on Americans was not a top concern of foreign governments seeking vaccine doses. At most, the Supreme Court's decisions in the vaccine mandate cases proved that the United States was not using its vaccine supplies most effectively—more evidence that the pandemic revealed serious political divisions in the United States over public health.

The climate change case has more direct consequences for U.S. foreign policy on global health. In West Virginia, the Supreme Court ruled that Congress had not granted the Environmental Protection Agency the authority to require fossil fuel-powered electricity generating facilities to shift production to renewable energy sources. The court based its reasoning on the "major questions doctrine," which requires an agency to show it has clear congressional authorization for issuing regulations of such scope. The decision's grounding in this doctrine means that it is a precedent for challenging regulatory actions by any federal agency.

Prior to this case, congressional opposition to the Biden administration's strategies stymied its efforts to demonstrate U.S. global leadership on climate change. As Alice C. Hill and Madeline Babin at the Council on Foreign Relations argued, West Virginia provides "further evidence of the limited ability of the United States, the largest historical emitter and the second-largest current emitter, to meaningfully combat climate change at the federal level."

A House Divided

Exigent issues in domestic or foreign policy do not escape constitutional law, and the National Federation and West Virginia decisions do not prevent congressional action on urgent public health problems. But in the current political context, whether Congress can take effective action on infectious disease threats and climate change, including delegating appropriate authority to federal agencies, is subject to serious doubt.

As with the gun and abortion cases, the controversies surrounding National Federation and West Virginia demonstrate how COVID-19 and climate change are mired in—and have exacerbated—the hyperpolarization of U.S. politics. This phenomenon spills over into fears that toxic partisanship now infects the federal courts, undermining the rule of law within a fragmented United States and American soft power in a more dangerous world. A democracy divided against itself on public health cannot credibly claim global health leadership.

#### Reforms have international implications.

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Can court-packing be a legitimate measure to help repair the democratic system after a significant period of democratic decay? This is a central question for constitutional democrats in the US right now, and has serious implications for how we approach, and understand, repairs to remedy democratic decay worldwide. My sincere thanks to the IACL Blog for hosting this symposium on my paper ‘‘Good’ Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay’. It is forthcoming in the German Law Journal and subject to revisions, but the text is available here in a new Working Paper series on Repairing Decayed Democracies also launching today, hosted by the global knowledge platform Democratic Decay & Renewal (DEM-DEC). Starting today and continuing for the coming weeks, this Blog symposium will feature responses to different dimensions of the paper by Mark Tushnet, Ros Dixon, David Kosař and Katarína Šipulová, Josh Braver, Oren Tamir, Aslı Bâli, and Rivka Weill. I am very grateful to each of them for engaging with this paper and offering such valuable commentary and critique. In this introduction I sketch the main argument in the paper and explain why the US court-packing debate on Supreme Court reform has much broader international implications. To date, the US debate – especially controversial arguments to break the norm against court-packing to repair the democratic system – has generally focused on historical precedents in the domestic system, with scant comparative analysis. However, the debate raises fundamental questions for comparative constitutional lawyers regarding the paradoxes of democratic restoration in contexts of democratic decay, framed here as a distinct category of constitutional transition. In the paper, I pursue a central argument that understanding such reparative reforms requires a novel comparative, methodological, and theoretical approach taking seriously the experiences of Global South states and constructing new analytical frameworks. Calling for a significant shift in our methodological approach, I argue that: (i) the US debate can be understood as taking place in a ‘transitional’ context of (highly contested) democratic restoration in response to democratic decay; (ii) that the lack of instructive comparative experiences among the world’s long-established liberal democracies (e.g. the UK, Australia, Germany) requires us to explore the value of Global South experiences, including states that are not generally seen as comparators for the US; and (iii) that understanding reform to repair democratic decay as a distinctive form of constitutional transition – separate from both ‘ordinary’ constitutional reform and post-authoritarian democratic transition – requires us to re-examine, and connect, the many insights across four somewhat overlapping but siloed research fields: democratic decay, constitution-building, democratisation, and transitional justice. At the theoretical level, by identifying key issues and insights through case-studies of Turkey and Argentina, the paper seeks to provide a broader analytical framework for thinking through the legitimacy of reparative measures, focusing on five dimensions: (i) democratic context; (ii) articulated reform purpose; (iii) reform options; (iv) reform process; and (v) repetition risk. The aim here is not to present a rigid check-list for evaluating the legitimacy of contested reforms, but rather to foreground important dimensions of such reforms. None of this is to elide the very real differences between the US and states such as Argentina and Turkey. It is simply an argument that there are valuable insights to be gained from studying experiences in such states as well as the rich literature on transitional contexts. Applying this framework to the US I make the case that there can be democratic justifications for court-packing, but only if a range of baseline criteria are met, especially related to the interlinked factors of public justification and process. However, there are clearly no easy answers here, and time – namely, the potentially very narrow ‘window’ for reform – presents a serious obstacle to achieving a tailored reform process that can signal the exceptionality of such a measure and mitigate the risk of repetition. (Importantly, the paper was written before the Biden commission on Supreme Court reform issued its 288-page final report in December 2021. That report presents little more than a lengthy ‘pros and cons’ list, and no recommendations, and as such has been sharply criticised – although it must be noted that this reflects the commission’s terms of reference.) Importantly, the US is not alone in these struggles. The paradoxes and challenges of democratic restoration are already on the agenda in many other states that have suffered democratic decay, especially with the prospect of anti-democratic incumbents being ousted in forthcoming elections in states such as Hungary, Poland, Brazil, and Turkey (although this is very far from guaranteed). We may even tentatively speak of a new paradigm (or at least a potential mini-wave) of constitutional transition.

### Court Legitimacy

#### There is much at stake for court legitimacy. A collapse of court legitimacy in the eyes of the public deprives it of the ability to enforce its rulings, threatens a constitutional crisis, collapse of our democracy and electoral system, instability, and outright civil violence.

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Zack Beauchamp, “What happens when the public loses faith in the Supreme Court?” Vox, 06-26-2022, https://vox.com/23055620/supreme-court-legitimacy-crisis-abortion-roe

The Worcester case illustrates something vital about the Supreme Court: It only has power inasmuch as people believe it does. Constitutionally speaking, the Court does not have the hard authority of the presidency or Congress. It cannot deploy the military or cut off funding for a program. It can order others to take actions, but these orders only hold force if the other branches and state governments believe they have to follow them. The Court’s power depends on its legitimacy — on a widespread belief, among both citizens and politicians, that following its orders is the right and necessary thing to do.

That legitimacy has been slowly eroded in recent years. The unprecedented blockade of President Barack Obama’s Supreme Court nominee Merrick Garland in 2016, the bitter fight over Brett Kavanaugh’s 2018 nomination, the GOP’s brazen disregard of the Garland precedent in 2020 to appoint Amy Coney Barrett after Justice Ruth Bader Ginsburg’s death, and the increasingly hardline conservative tilt of Court rulings have combined to do significant damage to the idea that the Court is somehow above politics. As a result, many Americans favor radical reforms to the Court: 66 percent favor term limits for justices, and a 45 percent plurality favors packing, or expanding, the Court.

The Supreme Court’s decision to strike down Roe v. Wade is likely to be yet another significant blow to Court legitimacy. The issue is not just that a majority of Americans disagree with the ruling, though recent polling tells us that they almost certainly do. It’s that the process that led to this outcome has repeatedly exposed the Court as a vessel for politics by other means.

In that context, Justice Samuel Alito’s ruling in Dobbs v. Jackson Women’s Health — a wholesale reversal of perhaps the most prominent Supreme Court ruling of the past few decades, one with longstanding majority support — will hit differently than previous controversial Court rulings. The damage could be severe and lasting, worse even than nakedly political decisions like Bush v. Gore.

While it may be tempting to cheer the collapse of the Court’s legitimacy given its track record, that prospect should give us some pause. In the American system, for better or for worse, the Court is supposed to serve as the final arbiter of political disagreements. If it lacks the legitimacy to play that role, it sets the stage for a constitutional crisis — especially if former President Donald Trump runs again in 2024.

How overturning Roe will damage the Court’s legitimacy Political scientists who study the sources of Court legitimacy generally find that it stems from the perception that the Court is not a political body. The idea that justices are interpreting the law to the best of their abilities, rather than simply finding a justification for imposing their political preferences, is fundamental to the public’s faith in the institution as a whole. For decades, this belief has been fairly widespread in the American public, allowing the Court to weather some very controversial rulings. In 2000’s Bush v. Gore, for example, the Court divided along transparently partisan lines to elevate George W. Bush to the presidency, infuriating pretty much the entire Democratic Party. But the damage was not permanent: A 2007 study found that “the Court seems as widely trusted today as it was a decade ago,” with no significant divisions by partisan affiliation. The single best predictor of faith in the Court was not party, but an individual’s ideological commitment to the rule of law. Since then, the American political system has come apart at the seams. Rising political polarization has led partisans on both sides to view politics in more zero-sum terms; rising distrust in mainstream institutions, particularly on the Republican side, has contributed to a general decline in confidence in government. In theory, the Court may have been able to survive these anti-establishment headwinds. But since 2016, Republicans have taken a series of steps that have made it hard for anyone to see the Court as standing above politics. When Justice Antonin Scalia died in February 2016, GOP Senate Majority Leader Mitch McConnell infamously refused to even schedule hearings for Obama’s replacement nominee, current Attorney General Merrick Garland, until after the 2016 election. McConnell’s argument was that no justice should be appointed in an election year, but the rationale was clearly political: Garland is a moderate liberal and would have tipped the Court from a 5-4 conservative majority to a 5-4 liberal one. Then Donald Trump won the 2016 election despite losing the popular vote and proceeded to remake the Court along McConnell’s preferred lines. First, he appointed staunch conservative Neil Gorsuch to the Court instead of Garland — preserving a 5-4 conservative majority on the court. Then longtime Republican operative Brett Kavanaugh was confirmed amid a furious battle over Christine Blasey Ford’s allegations that Kavanaugh sexually assaulted her, one of the most bitter and polarizing hearings in Supreme Court history. And when Justice Ginsburg died in September 2020, McConnell and Trump rushed Amy Coney Barrett onto the Court before the 2020 vote — giving conservatives a 6-3 advantage, and revealing the alleged principle behind the Garland blockade to be a partisan fiction. (McConnell’s attempt to square this circle, citing an alleged norm against the Senate confirming nominations from opposite-party presidents in election years, was risible.) By September 2021, the Supreme Court’s approval rating had fallen to 40 percent, the lowest number recorded in over 20 years of Gallup polling. The decline was largest among Democrats but also visible among Republicans — who seem to be turning against institutions writ large in the wake of Trump’s 2020 defeat and subsequent claims that the election was rigged against him. Another September poll from Quinnipiac gave the Court an even lower approval rating, 37 percent, the lowest point in the firm’s polling since 2004. Just days before the Dobbs decision came out, another Gallup poll found that public confidence in the Court was at an all-time low, with only 25 percent saying they have a “great deal” or “quite a lot” of confidence in the Court. In an April article, political scientists Miles Armaly and Elizabeth Lane show evidence linking the decline in Court legitimacy to the past few years of partisan warfare. By sheer luck, the authors began fielding a survey on the effect of confirmation battles on Court legitimacy in the weeks before Ginsburg died, allowing them to follow up with the same participants immediately after her death. They found that McConnell’s rush to fill the position with a Trump appointee decreased Democratic voters’ faith in the Court on a variety of measures, without improving it among Republicans. “Our results suggest the Senate’s increased politicization of Supreme Court confirmation hearings harm the Court’s legitimacy,” they conclude. “Attitudes regarding the Court — often marked by their stability — are impacted by the actions of the elected branches.” Of course, the Court itself hasn’t helped matters. Since the Trump appointments, the Court’s jurisprudence has lurched hard right. Chief Justice John Roberts, seemingly the sole conservative concerned with the Court’s above-politics reputation, can no longer join four liberals to rein in his colleagues’ policy ambitions. Though he voted with the majority in Dobbs, Roberts wrote a concurrence that sought a more limited ruling. This is the context in which the Supreme Court decided to make one of the most politically controversial rulings in its history — one likely to further damage its already precarious public standing. A recent paper by Logan Strother and Shana Gadarian, political scientists at Purdue and Syracuse, respectively, argues that the rise of extreme partisanship has changed the Court’s ability to issue controversial rulings and maintain its legitimacy afterward. In the current climate, they find, “policy disagreement with Supreme Court decisions leads individuals to view that decision, and the Court itself, as being political in nature” — which, they also show, damages the Court’s fundamental legitimacy. Since 1989, every Gallup poll on Roe v. Wade has found steady public support for keeping the ruling in place. In the closest poll, conducted in 2008, supporters outnumbered opponents by 19 percentage points (52 to 33). By 2021, that difference had risen to 26 points (58 to 32). Several other recent polls found even stronger support for keeping Roe. The consistency of these results over time, together with the visibility of the abortion issue, suggests the public’s views are deeply held. In this context, it’s fair to think Alito’s maximalist ruling will further erode the Court’s already weakened legitimacy in the eyes of the public.

You’ll miss Court legitimacy when it’s gone

One reaction to a loss in Court legitimacy, increasingly popular among liberals and leftists, is to basically say good riddance.

The Supreme Court is a fundamentally undemocratic institution, one that has a long track record of reactionary decisions and a limited-at-best ability to promote progressive social change. Why shouldn’t a turn against it be cheered?

“Diminished public trust in the Court is a good thing,” as my colleague Ian Millhiser recently put it. “This institution has not served the American people well, and it’s time to start treating it that way.”

I agree with much of Millhiser’s critique of the Court. There’s a compelling argument that weakening its powers of judicial review — by, for example, adapting a model used in Canada, the UK, and New Zealand that gives legislators power to reject court rulings — could lead to both superior policy outcomes and a more democratically legitimate system. In theory, a decline in public faith in the Court could pave the way for fundamental reforms to its practices.

But changes to judicial review are exceedingly unlikely to happen in the near term, as are liberal proposals to add more seats to the Court or to end lifetime tenure. For now, we have to operate in a context where the Supreme Court still plays an essential role in the American political system. And especially in the context of a 2024 election where Donald Trump is likely to run again, the Court’s inability to credibly perform that role could precipitate a democratic crisis.

It is likely that there will be significant litigation surrounding the 2024 contest. The Supreme Court has final say on voting procedures, and the nature of its rulings will affect the way the public views the legitimacy of the election itself.

In the nightmare scenario, the Supreme Court could be called on to adjudicate a Republican effort to overturn the results of a Biden victory at the state level. The groundwork for such an effort, as Barton Gellman wrote in the Atlantic, has already begun:

For more than a year now, with tacit and explicit support from their party’s national leaders, state Republican operatives have been building an apparatus of election theft. Elected officials in Arizona, Texas, Georgia, Pennsylvania, Wisconsin, Michigan, and other states have studied Donald Trump’s crusade to overturn the 2020 election. They have noted the points of failure and have taken concrete steps to avoid failure next time. Some of them have rewritten statutes to seize partisan control of decisions about which ballots to count and which to discard, which results to certify and which to reject. They are driving out or stripping power from election officials who refused to go along with the plot last November, aiming to replace them with exponents of the Big Lie. They are fine-tuning a legal argument that purports to allow state legislators to override the choice of the voters.

If the Supreme Court rules in favor of Trump’s claims on anything like an issue of this significance, there is a very real chance that large numbers of Democrats do not accept the ruling as legitimate or even binding, regardless of the merits.

This is not implausible, even though the federal judiciary held firm in the litigation surrounding the 2020 election. Gellman notes that four conservative justices have already signaled support for the so-called “independent state legislature doctrine,” which would give state legislatures untrammeled authority to set election rules and even toss out election results. If they used this idea to effectively authorize such an undemocratic action, who could blame Democrats for rejecting the Court’s decision?

Nor does the Roberts Court’s pro-GOP tilt guarantee legitimacy if it rules in favor of Biden. In that scenario, Trump and his allies will almost certainly claim the Court has been corrupted — and will likely persuade most Republican partisans. Think about the way Trump has turned against staunch Republican officials, like Georgia Gov. Brian Kemp and Secretary of State Brad Raffensperger, who had the temerity to accurately conclude that the 2020 election was on the level.

Indeed, Republican Ohio Senate candidate J.D. Vance has already proposed ignoring Court rulings that might get in the way of a second Trump term’s agenda:

I think that what Trump should do, if I was giving him one piece of advice: Fire every single midlevel bureaucrat, every civil servant in the administrative state, replace them with our people. And when the courts stop you, stand before the country, and say “The chief justice has made his ruling. Now let him enforce it.”

If any major faction rejects a Court ruling in the way that Jackson rejected Worcester, we will be thrust into a constitutional crisis. That’s a recipe for instability, even outright civil violence — something we all now know to be a real possibility.

It’s important to be clear on who deserves blame for this state of affairs: It’s McConnell, Trump, and the Court’s conservative majority. They chose to politicize the Court and turn it into an unelected legislative body enacting conservative policy preferences. Seizing control of the Court for this purpose is one of the biggest reasons — arguably the single biggest — why Republican elites decided to embrace Trump as fully as they have.

So, yes, it is good in one sense that the American people are recognizing what has happened to the Court. But the fact that it’s happened at all is a tragedy: The Court may not be a great institution in the long arc of history, but it performs a necessary function in our system as currently designed. What we’re seeing now is a particularly important example of the degree to which America’s democratic institutions are degrading — and even at risk of failure.

#### There are many different internal links that affs could generate, but they fundamentally rely on the premise that the current composition of the court needs to be re-balanced because of its partisanship---here’s a great card that talks about the need to re-structure the court to revitalize democracy:

IAN MILLHISER 19 Justice Editor at ThinkProgress and the author of Injustices: The Supreme Court’s History of Comforting the Comfortable and Afflicting the Afflicted. Let’s Think About Court-Packing, https://democracyjournal.org/magazine/51/lets-think-about-court-packing-2/

The case for court-packing is clear, and the course of action is obvious, if the Supreme Court tries to rig elections so that only Republicans can win nationally. But what happens if the Court wages a subtler war on democracy? What if, rather than stripping away Democrats’ right to vote, the Court leaves them, in the words of Dr. Martin Luther King, with “nothing for which to vote”?

Now imagine that Kavanaugh succeeds, as he appeared eager to do in his confirmation hearing, in exacting revenge against Democrats. In such a world, Democrats are shut out of national political power and unable to regain control of Congress or of the White House. It won’t take long before Republicans figure out that they are locked into power and do not need to worry about the consequences of passing unpopular legislation—legislation like the Republican health-care bills that would strip care from tens of millions of Americans. Meanwhile, Republicans on the Supreme Court could become similarly emboldened once they realize that they have a permanent majority. A new Lochner era could soon follow.

In such a world, the millions of Americans deprived of health benefits, job security, freedom from discrimination, or a secure retirement by right-wing policies are unlikely to rally behind democratic solutions. In his masterwork, The Great Transformation, economic historian Karl Polanyi blamed the rise of fascism in Europe on the failure of early twentieth century governments to offer their people real solutions. “The moment would come,” Polanyi wrote, “when both the economic and the political systems were threatened by complete ~~paralysis~~ demobilization.” In this moment, “Fear would grip the people, and leadership would be thrust upon those who offered an easy way out at whatever ultimate price. The time was ripe for the fascist solution.”

The opposite is also true. As University of California, Berkeley economist Barry Eichengreen notes in The Populist Temptation, during the period between 1939 and 1975, when the world’s most advanced nations saw a flowering of democracy, progressive regulation, and an expanded welfare state, “[N]o anti-system party, defined as one actively seeking to subvert the established political system, formed a government” in the United States, Canada, Australia, Japan, or in 16 European nations.

An anti-democratic Court, in other words, is likely to breed an illiberal nation. The spectacle of our nation running election after election where the result is predetermined will not inspire faith in constitutional democracy. It will only increase the allure of radical populism. Indeed, a Court committed to both voter suppression and laissez-faire social Darwinism could pave the way for a leader much like Donald Trump, but without the goonish incompetence that, thus far, has prevented Trump from fully consolidating power.

Worse, this death spiral may occur even if the Court limits its moves to substantive attacks on Democratic policy. So even if the Voting Rights Act remains in place, progressives are likely to lose faith in democracy if duly elected Democratic majorities are unable to govern. In other words, if the Supreme Court chooses the Lochner-ian path, court-packing may also be necessary.

#### Restructuring the court is particularly important for resolving democratic backsliding.

Robert C. Lieberman 22 Krieger-Eisenhower Professor of Political Science at Johns Hopkins University, The Supreme Court and the Dynamics of Democratic Backsliding, The ANNALS of the American Academy of Political and Social Science. 2022;699(1):50-65.

This article has described the role of the Supreme Court as an element of contemporary democratic backsliding. To an extent that it is currently underappreciated, I have suggested, the judicial facilitation of backsliding occurs across a range of doctrinal fronts. It is centrally concerned with the terms on which economic or sociocultural power can be arbitraged into durable political power. It seems thus plausible to say that even if the Court is not the underlying force propelling backsliding, it has still played a vital role in weaving together the interconnecting fibers of political, sociocultural, and economic action that have been its pathways over the last two decades.

A final word is warranted about “reforms” to mitigate the backsliding dynamic described here. In the immediate term, a Democratic coalition in Congress might (if it had political will) use its control over substantive law and jurisdiction to mitigate the Court’s power to enable antidemocratic arbitrage. There are many ways to do so within the bounds of law; only political will is likely lacking. For example, the Court’s jurisdiction could be narrowed; a higher voting threshold could be established by law for constitutional cases; or certain questions could be channeled to non-Article III bodies. In the longer term, a more substantial rethinking of the relationship between judicial power and democracy is required. There is in American political culture a deep-rooted tendency to think about government institutions in their ideal form, and not in terms of their actual political economy. In respect to the courts at least, this is a disabling kind of analytic myopia in American constitutional law circles. Until law professors, and lawyers more generally, pivot from their attitude of unquestioning veneration for the courts, and start to think more critically about the positive contributions that a judicial system should make to democratic stability, this is unlikely to occur. Rather than assuming that federal courts instantiate an ideal of judicial independence, both lawyers and politicians need to look more closely at the actual effects of judicial intervention on the quality of democracy.

### Predictability

#### Judicial predictability is key to the economy.

Perryman 23 – Counsel of Record; President & CEO, Democracy Forward Foundation

Skye L. Perryman, formerly practed at WilmerHale, former Chief Legal Officer and General Counsel of the American College of Obstetricians and Gynecologists, et al., “Brief of Small Business Associations as Amici Curiae in Support of Respondent,” *Corner Post, Inc., v. Board of Governors of the Federal Reserve System*, in the Supreme Court of the United States, on writ of cert. to the U.S. Court of Appeals for the Eighth Circuit, December 2023, https://www.supremecourt.gov/DocketPDF/22/22-1008/293837/20231220125019472\_2023.12.20%20FOR%20FILING%20-%20DF%20Corner%20Post%20Brief.pdf

Amici have a strong interest in ensuring the right conditions exist for entrepreneurs to grow their small businesses into thriving forces in local economies. Federal regulations can foster such conditions in two 3 ways. First, federal regulations bring much needed predictability, nationwide consistency, and stability to the business landscape, allowing small business owners to more confidently plan and prepare for the future. Second, regulations play an important role in ensuring small businesses can compete against large corporations: Appropriately tailored regulations can level the playing field to allow all businesses to compete and thrive, producing a more equitable and just economy. Amici recognize that an interpretation of the Administrative Procedure Act’s (“APA”) statute of limitations that would allow for new facial challenges to longstanding regulatory regimes as urged by Petitioner would needlessly expand regulatory uncertainty and destabilize business expectations. Amici write to express their concern about the particularly harmful consequences for small businesses if Petitioner’s interpretation of the APA is embraced by the Court. INTRODUCTION AND SUMMARY OF ARGUMENT The question before this Court—whether to discard the longstanding interpretation of the Administrative Procedure Act’s (“APA”) statute of limitations provisions—has profound implications for the nation’s small businesses and the country’s economy as a whole. Adopting Petitioner’s invitation to disregard the APA’s six-year statute of limitations for facial challenges to federal regulations as beginning to accrue when a federal agency takes final agency action would create chaos, uncertainty, and inconsistent regulatory regimes for the nation’s regulated industries and the American people the regulations 4 seek to serve. It would enable a host of regulations to be challenged decades after they were finalized, creating an unstable regulatory environment. While such an environment would have negative consequences for all of the nation’s regulated industries, much of the burden would fall on small businesses, which rely on regulatory certainty to grow, thrive, and compete in the United States economy. Amici therefore urge the Court to reject Petitioner’s attempt to undermine the APA’s statute of limitations and regulatory certainty and to affirm the lower court’s ruling. Small businesses are critical to the United States economy. The vast majority—99.9 percent—of businesses in the United States are small.2 Small businesses also employ nearly half of the nation’s workers.3 Likewise, small businesses have created the majority of new jobs in the United States since 1995.4 Small businesses are especially important for the advancement of women and people of color, who own more than 40 and 30 percent of such businesses, respectively.5 Opening and sustaining a small business, however, is not easy, particularly in recent years. Small businesses face risk and challenges at every turn, from securing the capital necessary to open their doors to making payroll each month. Many small businesses are unable to surmount these challenges. Less than half survive to the five-year mark.6 And small businesses’ survival can be even more challenging when forced to weather changing economic and political conditions, such as the COVID-19 pandemic, supply chain disruptions, inflation, or a tight labor market.7 Stability, predictability, and consistency can enable small businesses to survive and thrive. In a stable environment, entrepreneurs considering opening a business can evaluate likely compliance obligations and build systems and business models that efficiently account for these obligations from the start. Business owners in a stable environment can more confidently allocate scarce resources to the next best strategic investments for their business. And a well-structured regulatory environment can help put small businesses on more even footing with larger corporations, allowing Main Street to compete with Wall Street. Petitioner’s attempt to dramatically expand the use of facial legal challenges to longstanding regulatory regimes would introduce substantial uncertainty and instability into existing regulatory frameworks. While amici certainly believe some federal regulations could be revisited, altered, or strengthened in ways that would be favorable to small businesses, permitting new facial challenges to settled regulatory regimes does not achieve those goals. On the contrary, expanding judicial review of longstanding regulatory regimes is likely to contribute to the sorts of instability that can be fatal to small businesses. Ruling for Petitioner would subject rules to which small businesses have long adapted (and many that they may have fought for) to challenge and potential vacatur, either inconsistently across different federal jurisdictions, or nationwide, creating sudden and substantial changes in businesses’ rights and obligations, and new and uncertain timelines for replacement regulations. Other vehicles for regulatory changes exist that are more deliberative, more tailored, and less disruptive to the needs of small businesses. In contrast to Petitioner’s proposed approach, these other vehicles are also consistent with the law.

This Court should embrace the rule that controls in a majority of the nation’s circuit courts (including all but one of the circuit courts to have examined this issue) and affirm the judgment of the Eighth Circuit that the APA’s limitations period for facial challenges begins to run at final agency action. ARGUMENT Petitioner urges this Court to reshape the APA and disregard the widely-understood trigger for the law’s six-year statute of limitations—the date that an agency took a challenged action. Petitioner instead argues for a rule that would enable new facial challenges 7 years—even decades— after a regulation has been finalized. Petitioner’s interpretation was rightfully rejected by the lower court and a majority of the nation’s circuit courts that have considered this issue. As outlined below, if endorsed by this Court, Petitioner’s view would threaten the viability of small businesses throughout the nation and create a chaotic economic and regulatory ecosystem. The Court should, therefore, affirm the Eighth Circuit and reject Petitioner’s invitation to unwind the proper limits on facial challenges under the APA. I. Regulatory certainty is essential for small businesses to grow, thrive, and compete. Every business must manage its day-to-day operations while also planning for the future, making decisions about investments, savings, growth, and resilience. Small businesses are no exception. Federal regulation can affect many aspects of a small business’s plans and operations, ranging from regulatory lending programs that provide necessary capital to requirements that small businesses report their beneficial owners. Some of these regulations, such as those that implement lending programs, directly facilitate the success of small businesses.8 Others may impose compliance requirements, which must be designed to be predictable and fair to avoid unduly burdening small businesses. 8 See, e.g., Bipartisan Pol’y Ctr., The Role of Government in Small Business Finance (Feb. 9, 2023), https://bipartisanpolicy.org/blog/government-role-in-sbf/. 8 Polling data has shown that small business owners believe in the need for some regulation of business in our modern economy.9 Many small businesses owners recognize that federal regulation of Wall Street and the financial services industry is necessary to protect their businesses from unfair competition.10 Regulations—and the certainty they provide—can help all small businesses navigate a complex business environment. Congress has recognized the need for small businesses to have a voice in federal regulation. To mitigate the disproportionate regulatory burdens on small businesses, Congress passed the 1996 Small Business Regulatory Enforcement Fairness Act (“SBREFA”) to better engage small businesses in the regulatory process and find constructive solutions to manage the regulatory burden. Pub. L. No. 104-121 §§ 202-203, 110 Stat. 847, 857 (1996). While regulatory changes can be destabilizing, federal rulemaking at least affords small businesses an important opportunity to shape forthcoming regulations in ways that are thoughtful about different stakeholders’ needs. Indeed, amici have frequently worked through the comment process provided under federal law to help tailor regulatory changes to account for the particular needs of small businesses, by encouraging, for example, later effective dates to allow small businesses time to adapt to compliance with new regulations, and 9 Small Business Owners Say Commonsense Regulations Needed To Ensure A Modern, Competitive Economy, Small Business Majority (May 22, 2018), https://tinyurl.com/4kkx5fxn. 10 Id. 9 greater outreach and education efforts to small businesses to facilitate compliance.11 Uncertainty, regulatory or otherwise, hinders the ability of businesses to plan effectively. The impacts of uncertainty are particularly acute for small businesses, which often operate on exceedingly thin margins and lack the resources to hire a stable of experts to monitor and advise on the consequences of every state or federal regulatory action. Research has repeatedly found that the economic and employment effects of uncertainty are higher for small businesses than large ones, in part because small businesses have more constrained access to finance and credit (a particularly acute problem for businesses owned by people of color and women).12 Businesses with stronger access to capital during periods of uncertainty are less likely to be forced into precautionary behavior that can affect their long-term prospects, 11 See, e.g., John Arensmeyer, Founder & CEO, Small Business Majority, Comment Letter on Federal Register 1235-AA39, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (Nov. 7, 2023), https://www.regulations.gov/comment/WHD-2023-0001-25965. 12 See Vivek Ghosal and Yang Ye, Uncertainty and the Employment Dynamics of Small and Large Businesses, 1, 8–9, 20–23 (Int’l Monetary Fund, WP/15/4, 2015), https://www.imf.org/external/pubs/ft/wp/2015/wp1504.pdf; Giovanni Favara et al., Uncertainty, Access to Debt, and Firm Precautionary Behavior, 141 J. Fin. Econ. 436 (2021), https://tinyurl.com/3ysmp7ss; Small Bus. Majority, Small Businesses Share Concerns with Recent Banking Closures, Access to Capital Challenges 2 (May 3, 2023), https://tinyurl.com/4rmphh7f; Robert W. Fairlie and Alicia M. Robb, U.S. Dep’t of Com., Disparities in Capital Access between Minority and Non-Minority-Owned Businesses 5 (Jan. 2010), https://tinyurl.com/mr94tr82. 10 such as delaying investments in order to build cash reserves. 13 While “deregulation” is sometimes portrayed as an unqualified good for businesses,14 research has shown that hasty or thoughtless deregulation can contribute to uncertainty, and make the business environment more challenging for regulated entities.15 Uncertainty associated with litigation over regulations can have similar negative effects on the abilities of businesses to plan and make long-term investments.16 And the sudden withdrawal of federal regulations designed to provide national standards can leave businesses newly-subject to a patchwork of inconsistent state and local requirements. Cf., e.g., 13 Favara et al., supra n. 12, at 438. 14 See, e.g., A Win for Deregulation: NFIB Defends the President’s 2 for 1 Policy, NFIB (Mar. 5, 2018), https://www.nfib.com/content/legal-blog/regulatory/a-win-for-deregulation-nfib-defendsthe-presidents-2-for-1-policy/. 15 See, e.g., Randall S. Billingsley and Carl J. Ullrich, Regulatory Uncertainty, Corporate Expectations, and the Postponement of Investment: The Case of Electricity Market Deregulation 1, 12, 22–23 (2011), https://ssrn.com/abstract=1944217 (finding that market deregulation initially decreased investments in energy markets for years until additional rules and guidance concerning implementation were finalized); Seth A. Blumsack et al., Lessons from the Failure of U.S. Electricity Restructuring 1 (Carnegie Mellon Elec. Ind. Ctr. Working Paper CEIC-05-09 2009), https://www.cmu.edu/ceic/assets/docs/publications/working-papers/ceic-05-09.pdf (finding that electricity market deregulation caused “a large increase in the cost of capital due to increased uncertainty.”). 16 See Maxine Joselow, ‘Deregulation is not always helpful for manufacturing jobs,’ E&E News (Nov. 30, 2018), https://www.eenews.net/articles/deregulation-is-not-always-helpful-for-manufacturing-jobs/. 11 Watters v. Wachovia Bank, N.A., 550 U.S. 1, 11 (2007) (upholding the power of the Office of the Comptroller of the Currency to issue regulations preempting the application of state banking laws to state-based affiliates of national banks, in part to “shield[] national banking from unduly burdensome and duplicative state regulation.”). After a federal agency finalizes a regulation, the APA authorizes challenges to that regulation to ensure that the agency acted reasonably and in accordance with law. These challenges can lead to revisions on remand or regulations being vacated altogether.

Under the majority approach and longstanding interpretation of the APA, facial challenges to a regulation may be brought up to six years after the agency takes final action. This statutory limit ensures some stability in the regulatory landscape, enabling judicial review of an agency’s action but cabining the opportunity for untimely and destabilizing judicial intervention.

### Judicialization

#### Judicialization---the court has final say over many constitutional and policy issues---affirmatives will argue that letting the judicial branch decide on these issues will embolden judicial activism and negatively affect the progressive agenda.

Douglas J. Amy 20 Professor Emeritus of Politics @ Mount Holyoke College, The Immense and Disturbing Power of Judicial Review, https://www.secondratedemocracy.com/the-problem-of-judicial-review/

Most state and federal courts spend most of their time adjudicating criminal and civil cases – deciding who is innocent or guilty, who is responsible for damages, etc. But some courts have a special power: judicial review. The pre-eminent example of this is the ability of the U.S. Supreme Court to review the actions and policies of the legislative and administrative branches of both the states and the federal government to determine if they are consistent with the U.S. Constitution. If not, those actions and policies may be invalidated. But this power of judicial review does not fit comfortably into democratic theory. How can it be legitimate to have an unelected body with the power to routinely overturn popularly enacted laws? At the core of every democracy is the notion that it is the people, through their elected representatives, who should determine the policy decisions that will affect their lives. How can a society be seen as democratic when it routinely substitutes the will of a handful of justices for the will of the public and their representatives? Why should the political views of an unelected branch of government have supremacy over the views of branches directly accountable to the people? Is it legitimate to have an unelected body with the power to routinely overturn popularly enacted laws? It would surely be an exaggeration to suggest that we have devolved into an undemocratic “juristocracy” – rule by unelected jurists or judges. But it can also not be denied that American Supreme Court justices are among the most powerful in the world, and that the consequences of their decisions now reach into almost every area of American life. Judicial review has allowed the Court to become the final arbiter in a whole host of public policy areas. Should women be allowed to have abortions? Should the government be able to control guns? Should corporations be allowed to outspend everyone in financing campaigns? Should Americans have universal health care? We the people do not make these decisions. Nor do our elected representatives. The nine justices on the Court do. Or often, five justices do. And these examples are merely the tip of the iceberg. The Court now has the final say in an ever-widening area of public policies, including free speech, gay rights, capital punishment, environmental protection, criminal rights, discrimination, property rights, surveillance and privacy issues, corporate constitutional rights, racial segregation, presidential powers, local policing practices, civil rights, the power of unions, freedom of the press, treatment of terrorism suspects, church-state separation, regulation of the internet, voting rights, affirmative action, end of life decisions, and immigration policy. Some political scholars have argued that American politics has now become “judicialized” with many of the key policy decisions increasingly being made in the courts instead of by elected policymakers. This problem of judicialization has worsened as judicial “activism” has become the rule for the Supreme Court. The Court has increasingly abandoned restraint and reliance on precedent and extended its rule into more and more policy areas. This kind of activism was once thought to only be the province of liberal Courts, who broke new ground in the 20th century to promote the rights of minorities, women, criminals, etc. The pro-abortion Roe v Wade decision was seen by many as a classic example of an attempt to use judicial power to enact a more liberal vision of society. But today, conservative Courts have also become activist and increasingly intent on promoting conservative ideology and values into more and more areas. For example, the Roberts’ Court’s decision to allow unlimited corporate spending in election campaigns overthrew a century of precedent and furthered its increasingly pro-business political agenda. This kind of judicial activism has made it clear that justices are in fact “lawmakers in robes” whose rulings are strongly affected by their personal political and ideological views.

#### There’s flexibility in the scope of the affirmative’s fiat---targeted actions can disempower the courts in particular contexts, whereas more comprehensive actions implement mechanisms to decrease the power of the courts as a whole.

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In this Section, we consider proposals to strip courts of their jurisdiction to review the constitutionality of federal and state legislation. Jurisdiction-stripping legislation might also seek to shield executive action from judicial review, though we are aware of fewer proposals to do so. Our analysis necessarily takes a selective approach, given the many possible kinds of jurisdiction-stripping measures. We focus mostly on issue-specific jurisdiction-stripping legislation that would seek to disempower courts from ruling on a specific law or type of law. Examples include proposals that would bar jurisdiction over challenges to a wealth tax or to a law regulating abortion. We omit discussion of most general jurisdiction-stripping bills, such as those that exclude relatively unimportant cases (as measured by dollar amount, for example) from the federal courts. We do consider general jurisdiction-stripping efforts insofar as they would seek to temper or eliminate the federal courts’ authority to declare legislation unconstitutional, and thereby to decrease the courts’ power relative to other institutions of government.

#### Here's a “laundry-list” card that defends more general checks on the court---they can access multiple existential threats.

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Making the Supreme Court Safe for Democracy$HL:Beyond packing schemes, we need to diminish the high court's power. The death of Supreme Court justice Ruth Bader Ginsburg has sent the already fraught politics of Supreme Court confirmation into crisis. But the panic that followed the news of Ginsburg's death, given the heightened stakes of the 2020 election, has served one useful purpose: It's made it clearer than ever that Supreme Court reform is an urgent democratic cause, one that requires rethinking the federal judiciary from the ground up. The mandate for this reconsideration could not be more glaring. President Donald Trump has nominated ardent conservative Amy Coney Barrett to fill Ginsburg's seat, and Senate Majority Leader Mitch McConnell is seizing the opportunity to consolidate right-wing control of the institution for generations. Democrats have decried Republicans' decision to fast-track Barrett's confirmation prior to the election--an act of brazen hypocrisy, given Republicans' refusal to consider Merrick Garland's nomination in 2016 on the grounds that an election-year confirmation would deprive the American people of the opportunity to exercise their democratic will. Still, McConnell's shameless power grab has inadvertently triggered a once-in-a-century opportunity to truly confront and repair the damage that the high court's incredible power has done to the workings of American politics. As with other structural challenges, however, success can only be achieved if Democrats play their hand more astutely than their opponents do. Ginsburg became iconic for her extraordinary feminist accomplishments as advocate and judge. Yet the timing of her death was catastrophic, casting a pall on her legacy. In 2013, with the Democrats still holding both the presidency and the Senate, Ginsburg made a bet on her own longevity. It is now left to the rest of us to pay the Republicans their winnings. But rather than criticize Ginsburg for her decision, it is far more productive to ask how best to reimagine the Supreme Court in her honor. No one should be surprised, after all, that Ginsburg held fast to power that no judge in a democracy should have. Thomas Jefferson pointedly observed in the first decade of the nineteenth century that treating the Supreme Court as "the citadel of the law" would encourage those losing power by democratic means to "retreat into the judiciary as into a stronghold." Jefferson all but sketched McConnell's quest for judicial power centuries in advance. McConnell is banking on the right's demonstrated ability to maintain political control from the Supreme Court's commanding heights--to the point that he's prepared to lose his own Senate majority to consolidate right-wing judicial rule. Democrats can either play into McConnell's strategy or make a better move. Reviving their best traditions, the left should not aim merely to reverse McCon-nell's successes. That course of action will serve chiefly to lock in a broken status quo--preserving the standing of Supreme Court justices as royalty but vying to confirm left-leaning monarchs rather than right-wing ones. Instead, Democrats should work to undo the long-running transformation of our democracy into glorified judicial politics--a conversion Democrats helped to bring about over the course of the past century. This may mean storming and occupying the citadel of law. But it would end the high court game of thrones in order to reimagine the core mission of the judiciary in American democracy. Every American law student learns that the Supreme Court's authority to invalidate legislation--the storied power of "judicial review"--was established in the landmark decision Marbury v. Madison (1803). But the scope of judicial review wasn't settled law from the start: In fact, before liberals in the middle of the twentieth century embraced the court's broad power to invalidate legislation, there had been plenty of debate about the propriety of rendering Congress's laws null and void. The debate was theoretical for a long while, because the court used its power only sparingly. But in 1857, shortly before the Civil War, Dred Scott v. Sanford denied Black Americans the rights of federal citizenship. The decision prompted Abraham Lincoln to disregard and marginalize the court. Still, Congress didn't follow Lincoln's lead; the legislative branch failed to curtail the high court's authority. Until the late nineteenth century, Marbury was not widely cited. That changed when laissez-faire conservatives turned to the court to check states' ability to regulate employment contracts for the good of industrial workers, and sought allied authority to preempt the powers of the federal government--especially to tax income. As free-market evangelists were extending their rule over the American political economy, the judicial control of democratic choice took on a new national significance. At the same time, Marbury became enshrined as a "great case" in our history, making it seem as though counter-majoritarian judicial power was a necessary element of American constitutional rule. Our political system reoriented itself in compliance with this new consensus on high court sovereignty. Granting constitutional writ to the laissez-faire vision of freedom of contract meant not only that employers enjoyed a new uncontested power; the Supreme Court itself did as well. The court's authoritative interpretation of the Constitution may have always been politics by other means, but thanks to the newly entrenched power of judicial review, the court itself was now at the center of national politics. Then as now, it was not obvious how those who disliked the emergent juristocracy could or should respond. Harvard Law School professor James Bradley Thayer offered a brilliant democratic solution to this dilemma, one that defined the first half of the twentieth century. When the Supreme Court began perverting the Fourteenth Amendment, passed after the Civil War to protect African Americans from local majorities, Thayer surmised that a frontal attack on judicial authority made as little strategic sense as telling Americans that apple pie was not really their birthright. Instead, fresh back from a trip to England where he witnessed the birth of popular democracy, Thayer hoped to see Americans reach the same set of outcomes not by getting rid of the Supreme Court, but by reinterpreting its role in the American constitutional system. Thayer proposed that judges who were never elected could invalidate only laws that were genuinely beyond the pale. "It is a common opinion that courts should declare laws unconstitutional when they think them so," he wrote in The Nation in 1884. But the "judicial function," he explained, was instead to "determin[e] whether the Legislature has transgressed the limits of reasonable interpretation." The question, in other words, wasn't whether the Supreme Court liked a given law, or even whether it read the Constitution to forbid it, but whether the legislature could conceivably reach a different view. Without rejecting what Marbury had come to mean, Thayer attempted to make judicial power safe for democratic self-rule. Thayer remains less well known today than those he influenced--storied Supreme Court justices such as Louis Brandeis, Felix Frankfurter, and Oliver Wendell Holmes Jr. who attempted to put his proposal into practice. "I agree heartily with it," Holmes remarked of Thayer's plan. But there was an essential limitation few saw at the start. Thayer's approach required judges to engage in self-restraint, by deciding when or even whether to adhere to the default position of letting the legislature rule. In the decades that followed, both Progressives and socialists devised a wide range of plans for Supreme Court reform--but the mainstream of liberal legal opinion sought to realize Thayer's noble dream. When the Supreme Court struck down Franklin Roosevelt's earliest New Deal legislation, the National Industrial Recovery Act, in its 1935 A.L.A. Schechter Poultry v. United States ruling, Roosevelt faced a momentous dilemma of principle and strategy. Other important New Deal statutes, especially the National Labor Relations Act, which allowed collective bargaining for unions, and the Social Security Act, appeared to be in serious jeopardy after the NIRA was invalidated. As Roosevelt surveyed his options, he came up with a plan to add a new justice to the Supreme Court for each that was over 70, thereby fundamentally changing the institution's balance of power, and securing a likely majority in support of New Deal legislation. Enemies of Roosevelt's plan dubbed it "court-packing." They challenged its constitutionality, even though the number of justices had varied over the nineteenth century. Ultimately the Senate voted down FDR's plan in the summer of 1937, after its most important supporter, Arkansas Senator Joseph Robinson, suffered a fatal heart attack. Most historians agree, however, that the specter of an expanded court was enough to persuade the existing justices to adopt a more accommodating stance on the New Deal. And more important, the court ultimately embraced Thayer's conception of how courts should reason through disputed legislation in a new set of freedom of contract cases. "Regulation which is reasonable in relation to its subject and is adopted in the interests of the community" passes constitutional muster, the court held in the landmark 1937 case of West Coast Hotel Co. v. Parrish. The crisis passed, and the New Deal survived--but only because a majority of the Supreme Court agreed to intervene rarely in its progress. Over the ensuing half-century, however, this regimen was continually tested and broke down easily. The limits of Thayer's dream of self-restraint became all too clear, not because it was spurned but because it was realized. Judges could not stop themselves from making policy in the name of interpreting the Constitution, and they had understandable reasons to do so.In the face of totalitarianism during World War II, the justices--within five short years of 1937's de facto accord on New Deal regulation--moved to make exceptions to the principle of restraint when state tyranny threatened. In its most dramatic reversal, the Supreme Court pivoted in 1943 to overturn an 8-1 decision three years earlier that found the political process offered adequate protection to Jehovah's Witnesses asserting rights of free religious exercise. Now, the justices said, it was up to them to protect those rights. What was at stake was whether to make exceptions to the hard-won promise of deference, returning the justices to the realm of policymaking they had supposedly renounced. Frankfurter, loyal to his hero Thayer to the end, warned the court that it was repeating the very mistake it had promised never to make again. Part of the reason Frankfurter lost the argument was that, after World War II, liberals faced the temptation to use Supreme Court power to advance the cause of racial justice beyond a point where Democrats could convince a fickle people to go. In the 1930s, Roosevelt struck unpalatable compromises with Democrats in the South who were a lynchpin of his electoral coalition. After World War II, with America facing the Soviet Union's denunciation of its racism, national elites opted to risk everything to enable the court to do their hardest work for them. The stimulus the Supreme Court gave to the civil rights movement redeemed it from its own racist past, but also provided a fairly direct path to imposing controversial policy. It was an understandable move. With moderate California Republican Earl Warren in the chief justice's seat, the Supreme Court helped break the Democrats' intraparty deadlock on race with Brown v. Board of Education (1954). Widely decried by racist Southerners, Brown also drew doubting commentary from senior liberal judges like Learned Hand, together with liberal scholars hewing to the Thayer tradition. The decision helped consolidate the idea that judges must defect from Thayer's principle of judicial restraint for a good cause. Brown went on to become a canonical decision in modern liberal jurisprudence, allowing liberals to join in on the eager deference to Marbury that conservatives had endorsed decades earlier. Warren's Supreme Court continued to consolidate the new liberal position in a series of landmark rulings on criminal justice and anti-discrimination law. In the 1970s, Ginsburg, Pauli Murray, and other activists invoked the same principles of federally guaranteed equal protection that Brown had consecrated to advance the cause of gender equality. Despite these high-profile successes, the truth was that, even at the zenith of liberal power over the courts, congressional action actually led to a greater expansion of rights protection in American society. (Some historians maintain that Brown had done its most important work by helping to enable and direct these new rights-protecting enactments.) The federal legislature was the motivating force behind what progress ensued in the realm of school desegregation, and played an indispensable role in the removal of obstructions to voting. But the experience of judicial power as a successful political shortcut had begun to exert enormous influence over the liberal mind, since it proved easier to organize and simpler to maintain than transient popular support for liberal policies. In retrospect, there were two serious problems with liberal reliance on judicial fiat. One was that the ascendancy of liberal inclusion was class-free and shied away from the structural foundations of inequality. This meant that court rulings could invoke formal equality in majestic language but never ensure the basis for full citizenship in America's political economy. As a result, the liberal reliance on judicial power produced, over time, a form of liberalism benefiting the well-off, not the truly vulnerable. As the public schools were resegregated, liberals could not or would not forge a popular movement for a transracial majority of the kind Roosevelt enjoyed among the white working class. It was no accident that the cult of Ginsburg became most fervent in an era of a class-free, "lean-in" feminism. Second, the reign of the liberal juristocracy was astonishingly short-lived. Richard Nixon's presidency slowly built up conservative power on the court, starting with Warren's successor as chief justice, Warren Burger, in 1969. Nixon made a series of transformative appointments--such as Lewis Powell and William Rehnquist--in the early 1970s that effectively stopped the liberal judicial project in its tracks. Republicans made 10 appointments to the Supreme Court between 1969 and 1992, and four since (presuming Barrett is confirmed)--that's compared to the Democrats' four appointments between 1969 and today. Where Democrats had little to show for their brief stint in the citadel, once Republicans took over, the results were catastrophic.It wasn't just that racial justice went backward. The very rights that liberals had set out to defend by unleashing judicial power were often those conservatives deliberately reappropriated and harnessed in pursuit of devastating policy ends. Free speech was converted into a set of protections for the powerful and wealthy, including within elections, as in Citizens United v. Federal Election Commission (2010), or in labor disputes, as in Janus v. American Federation of State, County, and Municipal Employees (2018). With liberal connivance, indeed, the Supreme Court has in our time become more business-friendly than at any other point in nearly a century. And in interpreting another clause of the First Amendment, the Roberts court has converted the right to free exercise of religion from a principle of toleration in a secular state to one that exempts believers and their institutions from anti-discrimination law and allows governments to fund them. The Equal Protection clause was audaciously deployed as well. After proving instrumental to the defeat of formal racial apartheid and gender discrimination, it has come increasingly to shield white people from affirmative action and desegregation plans. In exchange for their limited successes, liberals allowed conservatives to parody Thayer's positions, inviting the rampant charge of "judicial activism" from the right. "A lesson that some will take from today's decision," reactionary Supreme Court Justice Samuel Alito surmised in one case, "is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means." Of course, conservatives such as Alito have turned to judicial power in service of their own preferred political ends; but it's no less true that liberals had embraced the same brand of activism, and for much paltrier gains.This history raises two fundamental questions for the left going forward. If Thayer's noble dream has turned into a nightmare, is there an alternative to it? And when and how could the forces of the left accept that constitutional law, even when pronounced by a powerful Supreme Court, is no alternative to majoritarian political success? Ginsburg's death has raised both questions with existential urgency for American democracy. Faced with McConnell's flagrant actions, many on the left end of the political spectrum feel wholly certain that either Gorsuch's or Barrett's seat is rightly theirs--either, they reason, the Senate is justified in confirming a justice as an election nears or it isn't. It will be tempting for Democrats to respond to a Barrett confirmation by creating and filling two additional seats on the court: one to cancel Gorsuch's or Barrett's vote and another to re-create Garland's seat, or whatever nominee Biden might have selected if he'd had the opportunity.Alternatively, Democrats could be much more aggressive. If the real takeaway from McConnell's behavior is that there simply are no norms constraining judicial appointments, and instead that courts are a pure instrument of power politics, Democrats could add four or more seats to the court--however many are necessary to ensure a stable liberal majority long into the future. (In The Atlantic, Take Back the Court director Aaron Belkin calls for six; in The Nation, Elie Mystal proposes adding a whopping 10 new Supreme Court justices.) Such an approach would have the advantage of clearing judicial obstructions before any impending Democratic legislation. More still, it would promise to entrench left-liberal values for years if not decades to come--much as conservatives have managed to do on the high court for nearly a half-century. Adding even only two seats would--without additional reform--set off a partisan spiral, with Republicans adding two (or more) seats the next time they retake the White House and the Senate, and so on. Worse still, adding two seats would do little more than return us to an unacceptable baseline. Each June, Democrats would wait anxiously to see if John Roberts or Neil Gorsuch will side with them on this or that critical issue. Apparent "victories" such as NFIB v. Sebelius (which saved the individual mandate of the Affordable Care Act while invalidating its Medicaid expansion) or June Medical v. Russo (which preserved a pared-down version of the federal right to reproductive choice) would continue to be "pyrrhic," as law professor Leah Litman has remarked. In this brand of decision, liberal justices have bargained away crucial protections in the name of avoiding catastrophe. The inevitable review of complex legislation like a renewed Voting Rights Act or a Green New Deal would surely present just such a Hobson's choice, as the censors at the Supreme Court--even one with two additional liberals--cut ambitious legislation down to suit the center right. The more aggressive response might be called the "Polish" option, because it is reminiscent of the gargantuan expansion of that country's Supreme Court by the Law and Justice Party. Adding four or more seats to the court would establish a stable Democratic judicial majority indefinitely. In the short term, social democratic legislation would be safe from invalidation, and civil liberties would, in all likelihood, be enforced more aggressively. But within a few years, Republicans would predictably retaliate by doing the same, adding sufficiently many justices (and judges) to regain effective control. And so the spiral would go. Some of court-packing's more emphatic proponents embrace or at least tolerate this consequence. Most, however, find it disturbing, reasoning at least in part that the court, and courts generally, perform some important nonlegislative function that they wish to shelter from political gamesmanship. Meanwhile, for those who regard the court purely as an unelected "super-legislature," the question becomes one of both principle and strategy: Why continue to channel political disputes into the judicial arena, where policy arguments must be distorted into interpretive legal ones? And why continue to leave ultimate political decisions to legislators in robes who remain completely unaccountable to the public? Regardless of which approach to court-packing Democrats might adopt, judicial appointments, and the Supreme Court generally, would continue to be a site of existential political confrontation. The reason is straightforward: No matter the number of justices, the court would remain empowered to decide many of our society's most contentious and most consequential disputes. The stakes of judicial appointments would thus remain extraordinary, leaving actors within the political arena no choice but to battle aggressively for judicial control. The only hope of bringing stability to the situation, then, is to find some way of lowering the stakes. Adding or proposing to add seats could have this effect in the short term; one could imagine the Roberts court, consisting of however many justices, responding to this era of institutional crises by entering a period of dormancy. As it has at points in the past, the court may take a more deferential stance toward the political branches in the hopes of restoring its reputation as something other than an ideological or partisan branch. And yet, we've been here before. The earlier failure of Thayer's dream shows that even under a best-case scenario, any period of judicial self-regulation would unravel sooner or later. As the memory--or threat--of court-packing faded, the justices would again be tempted to pursue their own policy interests--or, to put things more charitably, to advance their own senses of justice. Beyond the justices themselves, proponents of various causes, both noble and ignoble, would continue to pursue legal strategies aimed at policy outcomes they were unable to secure through majoritarian politics. Allowing a forum for policymaking separate from the political branches--even if restricted to the language of impartial legal reason--inevitably draws political actors there to struggle within. This dynamic would be made even worse by strong incentives discouraging other branches of government from open conflict over difficult issues. For much of its modern run, the high court has functioned as an arbiter for disputes that don't admit to ready political resolution, since it can (on however selective a basis) grant institutional cover to political leaders who desperately need it. (This temptation would remain strong so long as the nation continues to be both polarized and closely divided, with swing legislators in each party eager to avoid difficult votes.) Amid this combination of temptation and pressure, Thayerian self-restraint is bound to give way. Remember, too, that this is the optimistic scenario. An all-too-plausible pessimistic one involves the justices disregarding any inclination to "depoliticize" the court, with the spiral of partisan retribution continuing apace. The broader aim of advancing substantive reform within the country at large makes a much more pressing case for not merely capturing, but marginalizing, the court. The nation is now beset with multiple, intersecting economic and environmental crises, and the overwhelming priority for incoming Democrats is to muster a historically unprecedented policy response. The coronavirus pandemic and climate horrors have laid bare the pervasive and deep failings of the American welfare state. All the while, huge numbers of Americans, especially the young, are ravaged by economic insecurity, whether because of crushing student or medical debt, the lack of affordable housing, or punishing workplace precarity. The only plausible way of addressing these crises is through massive and far-reaching legislation, beyond the scale of anything we have ever seen--even under FDR. Such action is hard to imagine, given that, in recent decades, America's legislature has grown ever more dysfunctional. And yet with Democrats poised to reclaim the political branches and at least some indication that Democratic officials understand the enormous scale of the challenges we face, this may be our last, best opportunity to start down the road to a more egalitarian and ecologically sustainable future. Under our constitutional system, Democrats face additional hurdles. Most obviously, the Senate's disproportionate representation of citizens in less populous states makes the politics of anything like a Green New Deal frustratingly difficult. Democrats could take steps to improve the situation--adding the District of Columbia and Puerto Rico as states, for example. But even under the best of circumstances, enacting such legislation would require mass political mobilization on a scale without modern precedent. Given this almost impossible task, the question becomes: Why leave open that a democratically unaccountable Supreme Court might invalidate such hard-won democratic political victories, either all or in part? When it comes to creating enormous governmental programs, the court can only hurt. Courts generally are unwilling to instruct governments to make significant expenditures. Partly for that reason, it is unimaginable that even a liberal Supreme Court would "discover" in the Constitution a positive right to, say, real environmental justice. Instead, all the court can do, constitutionally speaking, is get out of the way. Here again, we see the wisdom of the old socialists and Progressives at the turn of the twentieth century: far better to disempower the court than to hope that it rules in your favor.$ If courts are an impediment to widespread economic security or a livable future, one might object that they are nonetheless a critical protector of women and minorities. But we must also acknowledge the limits of court-administered breakthroughs. For all the gains in formal equality we have witnessed, real equality remains a distant dream. As Keeanga-Yamahtta Taylor has written, "the pace at which African-Americans are dying" from Covid-19 "has transformed this public-health crisis into an object lesson in racial and class inequality." Likewise, critics of Ginsburg's class-free feminism contend that we will never arrive at true equality of the sexes so long as poor women bear the brunt of the patriarchy's abuses. The only way to achieve anything approaching real equality, then, is through significant reallocation of resources by means of ambitious legislation. As Michelle Alexander concludes, "We cannot achieve racial justice and create a secure and thriving democracy without also transforming our economic systems." And this is another fundamental realm of justice in which the Supreme Court can only help by getting out of the way. With Barrett's confirmation, Democratic court-packing may become both inevitable and justified. But the tactic of adding and filling seats can only yield meaningful reform if the Supreme Court's authority is simultaneously curtailed. To disempower the court, Democrats in Congress will have various tools: limiting the jurisdiction of the federal courts (known as "jurisdiction stripping"), erecting a parallel judiciary inside the executive branch to enforce new laws, or requiring supermajority consensus among the justices to void federal legislation. Without such a thoroughgoing agenda of legal reform, Democrats would condemn themselves to a perpetual cycle of battling over judicial confirmations and--worse--confronting an array of counter-majoritarian threats to any ambitious policies they organize to pursue. Thayer understood that in order to have a democratically accountable and legitimate judicial system, we need not return to Jefferson, wholly rejecting a Supreme Court vested with the power of judicial review. But that hardly means reconciling ourselves to a supra-democratic court exercising its current, expansive legislative veto. Taking into account the full sweep of the institution's modern history--including Thayer's failed dream--we must set about reforming the Supreme Court by reducing its authority, not praying that its justices will somehow refrain from using it. No other course of action is equal to the urgent crises and the democratic imperative of our present.

#### There are also debates over whether judicial review is net-positive for protecting minority rights.

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The confirmation of Ketanji Brown Jackson to the Supreme Court on Thursday was as noteworthy for what it didn’t change as for what it did. Upon taking office, she will become the first Black woman to join the court in its 233-year history. At the same time, her arrival will not tip the ideological balance of the court or move it off its current trajectory as a vehicle for the conservative movement. The soon-to-be Justice Jackson may be able to persuade her new colleagues not to move too aggressively, but there’s nothing that she or the other liberals on the court (or Chief Justice John Roberts, for that matter) can do to restrain a hard-right conservative majority that seeks to unravel what’s left of postwar jurisprudence. On this point, we got another glimpse of what this world will look like when, on Wednesday, the Supreme Court issued a 5-4 “shadow docket” order reviving a Trump administration regulation that limited the ability of states and sovereign tribes to restrict projects that might damage waterways or reduce water quality. The conservative majority (minus Roberts) did not write an opinion or otherwise explain its decision. Nonetheless, it undermined the Clean Water Act and upended decades of settled law, without so much as a note, to say nothing of hearings and arguments. In her dissent, Justice Elena Kagan wrote that by “granting relief” to the plaintiffs in the case without a demonstration of “irreparable harm,” the court went “astray.” We should expect to see it continue on that mistaken path. Here, it is worth thinking about the doctrine that actually gives the court its power to make these decisions — judicial review. The traditional view is that the Supreme Court’s power of judicial review grew out of Chief Justice John Marshall’s decision in 1803’s Marbury v. Madison, an ostensibly minor dispute that provided Marshall — as skilled a politician as he was a jurist — an opportunity to both assert the authority of the Constitution over ordinary legislation (in this case the Judiciary Act of 1789) and establish the court’s authority to decide the meaning of the Constitution. As Marshall wrote when he struck down the relevant section of the Judiciary Act as unconstitutional, “It is emphatically the province and duty of the judicial department to say what the law is.” But that traditional view has its problems. To begin with, judicial review (or something like it) had been part of the Anglo-American legal tradition for decades before Marbury. In Virginia, Massachusetts and other colonies, juries and judges held considerable power to say what the law was and even overturn laws handed down from legislatures and other authorities. When judges and juries “exercised power to determine the law, they sometimes used their power to nullify legislation, even acts of Parliament, and to refuse obedience to other commands of Crown authorities,” the legal historian William E. Nelson explains in “Marbury v. Madison: The Origins and Legacy of Judicial Review.” For example, in a 1761 case concerning the issuance of a writ of assistance — a kind of generalized and practically unlimited search order — in Massachusetts, the lawyer James Otis Jr. urged the state superior court to nullify the act of Parliament that authorized the writ in question. His argument, and the claim that would presage the practice of judicial review as we came to understand it, was that the act itself violated the “Fundamental Principles of Law.” “As to acts of Parliament,” Otis said, according to notes kept by a young John Adams, who was present for the trial, “an act against the Constitution is void: an act against natural equity is void: and if an act of Parliament should be made, in the very words of this petition, it would be void. The Executive courts must pass such acts into disuse.” Otis published his views in a pamphlet, “The Rights of the British Colonies Asserted and Proved,” which became influential throughout the colonies during the Stamp Act crisis several years later, as judges and juries used his arguments to declare the act void, if not a violation of those “Fundamental Principles” of British law. “Lawyers up and down the Atlantic coast advanced this argument during the fall, winter, and spring of 1765-1766,” Nelson writes. “And every court that accepted the argument made the argument less marginal and brought it increasingly into the mainstream of American constitutional thinking.” Judicial review continued to take shape in the years after independence. A number of cases — in Virginia, New Jersey and North Carolina — dealt with the question of what to do when the act of a legislature appeared to violate the state constitution. In one case involving the pardoning of three Loyalists who had been convicted of treason, George Wythe of the Virginia Court of Appeals stated his view that he had a “duty to protect a solitary individual against the rapacity of the sovereign” as well as to “protect one branch of the legislature, and consequently, the whole community, against the usurpations of the other.” If the time came to overturn a law, he said, “I shall feel the duty; and, fearlessly, perform it.” By the time of the Philadelphia Convention in 1787, judicial review was an established part of American jurisprudence. It was also controversial, opposed on democratic grounds. One delegate, John Dickinson of Pennsylvania, thought “no power ought such exist.” John Mercer of Maryland, likewise, said that he “disapproved of the Doctrine that the Judges as expositors of the Constitution should have the authority to declare a law void.” And James Madison, the most influential figure at the convention, thought the practice would make “the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper.” Madison’s push for a federal “negative” on state legislation — a congressional veto on any state law that contravened “in the opinion of the national legislature the articles of union” — was in essence an attempt to put the power of judicial review into the hands of an elected and representative body, rather than an unelected tribunal. This was also true of his plan for a “council of revision” that would have the authority to examine and possibly veto every act of the national legislature. (Both plans, for what it’s worth, are testaments to the deep hostility Madison felt for state governments at this point in his life.) The convention rejected both proposals in favor of what would become the Supremacy Clause of the Constitution, which elevated federal law over state law and gave the federal judiciary the power to enforce compliance. And although the delegates did not discuss judicial review at length during the convention, it was this decision that essentially guaranteed the Supreme Court would develop something like it. “Once the framers decided to turn to the courts to ensure the supremacy of federal law over state law,” Nelson writes, “they inevitably delegate to those courts jurisdiction to determine the meaning of federal law. And in determining the meaning of federal law in the event of a conflict between an act of Congress and the Constitution, courts had to have the power to give effect to the Constitution and to invalidate the congressional act.” Marbury v. Madison may have been the first time that the Supreme Court struck down a federal law as unconstitutional, but John Marshall did not, as we have seen, invent the practice. Instead, it emerged organically out of the legal culture of the American colonies and was written, implicitly, into the federal Constitution. What Marshall did was to give shape to the practice of judicial review, as well as navigate the court through its first major conflict with the executive branch, leaving its power and authority intact, if not enhanced. Of course, the evolution of judicial review did not end with Marbury. Following Marshall’s precedents, the court of the first half of the 19th century understood itself as enforcing the line between politics and law, between what the state can touch and what belongs to the fixed structure of society. In practice, this meant the strict defense of private property (including the enslaved) from the actions of elected legislatures. This made sense in a largely agrarian country where most citizens — or at least most adult white men — owned land or expected to own it at some point in their lives. But with the growth of industrial capitalism in the second half of the 19th century and the transformation of American economic life that it brought about, the court’s role changed, or rather, was forced to change. “As vast accumulations of commercial wealth, which conferred monopoly power on its holders and enabled them to dominate others’ lives, grew in the late nineteenth century,” Nelson writes, “demands for redistributive regulation grew, and those who demanded the new regulation came to see the judiciary’s constitutional protection of established rights as controversial and political rather than as legal and immutable.” Marshall’s distinction between law and politics collapsed under the weight of material change, and judicial review took a new form in its wake. This brings us back toward the present, where judicial review is used to resolve social and political disputes as well as more narrowly legal ones. The liberal mythology around the Supreme Court — the idea that it stands in defense of marginalized groups and underrepresented minorities — took shape when the court changed to meet the demands of the New Deal and the postwar welfare state. What is interesting to consider is that in the hands of the current conservative majority, the court will most likely remain a defender of minority rights that adjudicates social and political conflict. But rather than marginal and oppressed minorities, this court will turn its attention to the interests and prerogatives of powerful political minorities — you might call them factions — that seek to dominate others free of federal interference. Americans fighting to defend their voting rights or reproductive rights or the right to live free of discrimination will not find many friends on this Supreme Court. Large corporations, right-wing activists and conservative religious groups, on the other hand, will approach the court knowing a majority of justices are almost certainly on their side. Much as it may frustrate the many Americans who think the court is too influential, judicial review is not going away. It may not be in the Constitution, but it is an emergent property of our constitutional order with deep roots in our colonial history. The best we may be able to do, then, is to restrain judicial review — to place it under greater democratic control and remind our power-hungry Supreme Court that it exists within the constitutional system, not above it.

#### These will also involve research over constitutional paradigms that shift the attention away from the court---like popular constitutionalism.

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Many observers, progressive and conservative alike, have come to see the federal courts as too politicized. But the criticism of a politicized judiciary has flipped its political valence in recent years. For decades, conservatives complained that the Supreme Court was a political body controlled by liberals, as the Court expanded criminal defendants' protections and afforded constitutional protection to progressive causes like abortion and gay rights. Now, it is liberals who rightly worry that a Court controlled by conservatives will be too overtly political. Different as they are substantively, each of these complaints emanate from the same premise: that interpreting the Constitution is a task just for the Supreme Court. To be sure, a rich historical tradition supports that idea. The longstanding theory of judicial supremacy says it is the courts, and ultimately the Supreme Court, that determine the Constitution's meaning. But there is another equally rich tradition of constitutional interpretation that deserves our attention today: popular constitutionalism. That's the idea that ordinary people act through politics, and not the courts, to articulate and advance their understandings of the Constitution. They go into the streets with sloganeering placards, attempting to convince their fellow citizens. Over time, as these social movements gain strength, they lead other Americans, including judges, to accept their constitutional viewpoints. Popular constitutionalism is constitutional interpretation via social movements—not via legal scholarship. It deserves fresh consideration for several reasons. It offers a more accurate description of how constitutional change has actually happened. Re-invigorating popular constitutionalism might also turn down the heat in our discussions of the Supreme Court, by making the Court less important in debates about constitutional meaning. The core advantage of popular constitutionalism is simple: It expresses democracy's core commitment to popular self-government. Judicial supremacy, by contrast, expresses a commitment to government by black-robed elites.

### Politicization

#### There are also arguments about the politicization of the judicial nomination process.

San Francisco Attorney magazine 18, The Politicization of the Judiciary: Our Too-Powerful Supreme Court, 6-19, https://www.sfbar.org/blog/our-too-powerful-supreme-court/

It is time to face reality: the centrality of the Supreme Court and the federal judiciary in politics is dangerous, it is undermining American democracy, and it is on track to get much worse. It’s no secret that the Supreme Court nomination and confirmation process, like everything else in Washington, has become more polarized in recent years. But the speed and magnitude of the change are breathtaking. A generation ago, Justices Scalia and Ginsburg were confirmed by overwhelming bipartisan majorities. Fast-forward to today: Merrick Garland never even received a vote. Democrats sought to filibuster Neil Gorsuch’s nomination, so Republicans eliminated it—just as Democrats had done to fill the D.C. Circuit with President Obama’s nominees. It is doubtful whether any Supreme Court nominee in the foreseeable future will be confirmed when the White House and Senate are in opposite hands. (Perhaps not coincidentally, Justice Kennedy was the last one to be confirmed in that situation.) The animosity has trickled down to the circuit court level, where confirmation votes have become increasingly party-line affairs. Perversely, the most qualified nominees often attract the strongest opposition, since they are seen as potential future Supreme Court picks. Just ask Gibson Dunn partner Miguel Estrada, whose nomination to the D.C. Circuit Democrats blocked, or California Supreme Court Justice Goodwin Liu, whose Ninth Circuit nomination suffered the same fate at the hands of the GOP. It is easy to lament this state of affairs; it is harder to say what can be done about it. While contemporary judicial politics may be unseemly, demeaning, and nasty, they are not irrational. Politicians, voters, and advocacy groups have made judicial nominations into scorched-earth battles because they rightly perceive that much is at stake. More and more high-profile questions of public policy are resolved at the constitutional level by the Supreme Court, cementing certain outcomes into place for decades. In a democracy, the people will have their say one way or another. If they can’t do it by electing representatives, they will do it by demanding their representatives ensure the nomination and confirmation of like-minded Justices. Ask conservative legal advocacy groups why they care so much about the Court, and you are likely to hear about overturning Roe v. Wade, preserving and extending Second Amendment rights, and ending affirmative action. Ask liberal groups the same question, and you are likely to hear about protecting Roe, overturning Citizens United and Heller, ending capital punishment, and promoting LGBT rights. To be sure, these are not the only reasons people care about the Supreme Court, but they are all near the top of the list—and collectively, they account for the lion’s share of the intense energy surrounding judicial confirmation battles. What do these things have in common? They all involve areas in which the Supreme Court has interpreted, or is being asked to interpret, the Constitution in a way that prevents one side or the other from achieving important policy goals through the normal legislative process. The Court then becomes more important than legislation. If the Court is effectively settling major policy disputes through constitutional interpretation, ordinary people are going to care a lot about who sits on the Court. Viewed in this way, the consensus confirmations of Justices Scalia and Ginsburg were an unsustainable vestige of an earlier era in which—partly because the two parties themselves were ideologically diverse—the Supreme Court rarely engaged in constitutional interpretation in a way that clearly favored the policy goals of one side or the other. Political norms often lag behind on-the-ground reality, but the politics of judicial confirmation have now fully adapted to the modern era. To be clear, this is not to suggest the Justices are attempting to enact their own policy preferences into law. There is no reason to believe that any Justice in recent times has generally done anything other than follow his or her own sincere understanding of what the Constitution means. But it turns out that the constitutional views of Justices tend to overlap—not perfectly, but to a very large extent—with the policy preferences of the political coalition that shepherded them into office. That is not surprising, given the overwhelming incentives that presidents and senators have to pick Justices who will please their voters. In light of the far-reaching disagreements Americans have over what many constitutional provisions mean, faithful adherence to “the Constitution,” on its own, is not a formula for calming the wars over the federal judiciary. It’s what gotten us to where we are.

## Aff---AT: CPs

### AT: Self-Restraint---Congress Key

#### Congressional action is key. Variety of Reasons.

Sachs 14 – Associate Professor, Duke University School of Law.

Stephen E. Sachs, “How Congress Should Fix Personal Jurisdiction,” Northwestern University Law Review, Vol. 108 No. 4, 2014, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5496&context=faculty\_scholarship

B. Why Look to Congress?

In the story so far, the villains have been the Supreme Court’s due process jurisprudence and the Court-issued Rule 4(k). That being the case, why does Congress need to act at all? Why can’t the Court just clean up its own mess?

There are two reasons. First, this Article takes the Court’s due process jurisprudence as given. Critiquing a decision is a different activity than proposing policy reforms. A judicial opinion might be good policy or not, but first it has to be right on the law. Personal jurisdiction is complex enough that the right answers, constitutionally speaking, are usually less obvious than the right policies. And jurisdiction’s inherently conflicting goals mean that some problems are almost certain to stick around—until Congress chooses to fix them.

Second, while the Court can always amend Rule 4(k), that isn’t a substitute for new legislation. Fixing the problems of expanded jurisdiction means changing our venue statutes. Maybe the Court could do that on its own—using its statutory powers to permit new interlocutory appeals,238 and employing the Rules Enabling Act’s supersession clause to override the venue statutes.239 But that would be a dramatic break from the Court’s current refusal to “extend or limit” venue through the Federal Rules,240 which might provoke Congress to block the change.241 And because the draft bill’s changes to choice of law would alter the ultimate rules of decision, they might be considered substantive and outside the scope of the Rules Enabling Act, 242 even if they’re clearly within Congress’s power to legislate. Perhaps Congress could give the Court additional authority to get things done, but that still requires some kind of legislation. In the end, fixing personal jurisdiction by judicial rulemaking is only a second-best solution, a legally shaky means to implement changes that would be better negotiated by Congress.

But would Congress ever reform personal jurisdiction? Occasionally it succeeds in implementing technical changes that have no obvious constituencies, other than people who want to see the system work well. (Think of the Federal Courts Jurisdiction and Venue Clarification Act of 2011,243 which was designed to remove confusing language in existing law and not to advantage either side.) But nationwide personal jurisdiction implicates far too many interests to fall in that category.

What kind of political coalition, then, might support the change? Obviously plaintiffs have something to gain, namely additional options for suit. But defendants could benefit, too. The new options would all be in federal courts, which many defendants find more congenial than state ones. And guaranteeing that nearly all cases can be brought in a convenient forum somewhere would relieve the hydraulic pressure that encourages states to expand their long-arm statutes, and that encourages state judges to play fast and loose with the constitutional rules.244

In fact, guaranteeing a federal forum may be the best way to put teeth into jurisdictional doctrine at the state level. If, in the end, the Constitution permits a narrower scope for jurisdiction than state courts currently exercise, it’s difficult to envision five Justices signing onto that vision if it means kicking too many plaintiffs out of court. Reforming federal jurisdiction frees the Court to pursue the doctrine by its best lights at the state level, without the added pressure of leaving some plaintiffs without a remedy.

CONCLUSION

Personal jurisdiction is a quagmire for a reason: the doctrine has been relied on to do too much. Because its textual underpinnings seem weak, jurisdiction has become a field of battle among multiple conflicting visions, each with arguments in its favor and each mutually incompatible with the others. Rather than hope that one side wins, the best solution is to stop fighting and to use different tools to achieve each side’s different goals. That means turning to the federal courts for sovereign authority, employing venue statutes to achieve convenience, and relying on due process only when fundamental fairness is really at stake.

That transition won’t be easy, as the discussion of the draft bill shows. Doctrines of state personal jurisdiction are deeply embedded in federal procedure; just removing them isn’t the same as removing them safely. And the rules that should replace them, both of venue and of choice-of-law, are hardly obvious.

But this Article seeks to begin a conversation on these questions, not to end one. Four decades have passed since Albert Ehrenzweig declared that “[j]urisdiction must become venue.”245 Jurisdiction won’t become venue just by our wishing it, or by the steady erosion of jurisdictional rules—at least, not in a way that anyone should like. Jurisdiction will only become venue if we choose to make it venue. If so, there’s a great deal of work to be done.

#### Fiating the court to self-restrain its power is a voting issue---it fiats the object of the resolution which is illogical and unrealistic---independently, the CP is a series of incoherent judicial rulings

Richard A. Posner 12 Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School, The Rise and Fall of Judicial Self-Restraint, California Law Review, Vol. 100 June 2012 No. 3, http://www.californialawreview.org/wp-content/uploads/2014/10/01-Posner.pdf

EXPLAINING THE DEATH OF THAYERISM

I have tried to explain the vulnerability of Thayerian theory (it might better be called a rhetoric than a theory), but I have not explained its death. It died on two fronts: in the academy (except for the handful of hyperThayerians), and in the courts. Its academic death is attributable in part to its incoherence, but more to the rise of the constitutional theories that I mentioned earlier, which claim to show how “correct” constitutional decisions can be generated confidently. They highlight the weakest part of Thayer’s theory: that it tells judges to uphold statutes that they consider unconstitutional. If they knew a statute was unconstitutional they’d have to strike it down even in Thayer’s account; and the modern theorists have proved (though only to their own satisfaction) that they can tell judges which outcomes in constitutional cases are correct and which incorrect. The rise in academics’ confidence that they have the keys to unlocking the Constitution’s secrets is related to the vastly increased number of professors specializing in constitutional law (because the reach of that law expanded significantly during the 1960s and has continued to expand) and to the rising intellectual ambition of legal academics as they draw further and further apart from legal practice.99 Thayerism’s judicial demise preceded and was independent of, though it contributed to, its academic demise. Its judicial demise is attributable to the exuberant activism of the Warren Court, which in the 1950s and 1960s powered a major, left-leaning expansion of constitutional law. Its best-known decision, Brown v. Board of Education, quickly became an icon despite the opinion’s analytical weaknesses. One is still permitted to criticize the opinion, but if you doubt publicly that the case was decided correctly you’ll be hurled into the outer darkness. The doctrine of “incorporation,” pushed very hard by the liberal Justices (led in this domain by Justice Black), was the antithesis of judicial self-restraint because it imposed uniform rules on the states and could not be thought compelled by the Constitution. It not only preempted state legislative decisions but ended experimentation by the states in the preempted areas. Professor Vermeule argues that Brown v. Board of Education flunks Thayer’s test and was therefore wrongly decided.100 If Vermeule is right, he’s driven the last nail into Thayer’s coffin. In evaluating his argument we need to distinguish between a decision (or doctrine) and the reasons given in a judicial opinion to justify it. The opinion in Brown is weak because the Court was unwilling, for compelling political reasons,101 to be frank about racial segregation of public schools: that it was part of a system of apartheid and was meant, like separate public drinking fountains and swimming pools for whites and blacks and laws against miscegenation, to brand blacks as racial inferiors of whites. Whether a “reasonable” dissent could have been written to a majority opinion that stated the Justices’ views candidly may be doubted (a dissent that said: this is a loathsome system but fifty-seven years ago we said that racial segregation in trains is okay and that gave Jim Crow a green light and the South built its social system in reliance on our ruling and so we must not disturb it), but also reminds us that the line between incorrect and unreasonable, like the line between erroneous and clearly erroneous, is indistinct. The conservative successors to the liberal Justices of the Warren Court were not about to embrace the ratchet theory of judicial restraint (urged, naturally, by liberals) that I mentioned earlier: unrestrained liberals expand constitutional rights; restrained conservatives preserve those rights by complying scrupulously with precedent in order to limit their own judicial discretion. One can imagine judicial self-restraint as an equilibrium (a stable point, from which a departure will occur only if there is an external shock), and judicial activism as another equilibrium; but it’s hard to imagine alternation, in which periods of activism and periods of restraint succeed one another, as an equilibrium.102 Alternation would require a degree of self-abnegation that could not realistically be expected of Supreme Court Justices. It’s no fun to be the conservator of a constitutional tradition one abhors, especially when the overruling of activist decisions can be defended as restoring a true judicial restraint,103 rather than a misnamed restraint that gives controlling weight to activist precedents. Increasingly after President Ronald Reagan’s appointments to the Supreme Court, conservative Justices rolled back many of the initiatives of the Warren Court, and having done so—and with the bit thus between their teeth—kept moving rightward (with a boost from appointments by the two Presidents Bush), as in the recent gun ownership104 and campaign finance105 decisions. What one can expect, however, as shown in Lee Epstein and William Landes’s Essay, is a transition period between successive waves of activism. The optimal strategy for a new majority may be an initial period of restraint, intended to bolster claims that the old majority was recklessly activist, followed by a period of activism intended to erase and then replace the activist jurisprudence of the old majority. One might have expected that the rightward turn, which began in the 1980s and has accelerated since the appointment to the Court of John Roberts and Samuel Alito, would give rise to a robust liberal revival of the doctrine of judicial self-restraint—as in the era of conservative judicial activism that lasted from Thayer’s day to its abrupt end in 1937 when the Supreme Court, frightened by President Franklin D. Roosevelt, threw in the towel. But there has been no such revival, because that would imply a repudiation of the doctrine of incorporation and the Supreme Court’s landmark Warren-era decisions. In liberal quarters the search was on for a theory of judicial review that would legitimate those decisions while delegitimating the growing conservative activism of the modern Court. The search has failed. The liberal academic theories of constitutional decision making, widely derided as mush, have little appeal even to liberal Justices, who have been unable to project a coherent vision of a liberal constitutional jurisprudence, while the right has gotten away with garbing its activism in legalistic rhetoric. Judicial self-restraint has ceased to be a contender.

#### Rollback

Samuel Moyn 21 Henry R. Luce Professor of Jurisprudence and Professor of History @ Yale University, Presidential Commission on the Supreme Court of the United States Hearing on “The Court’s Role in Our Constitutional System”, 6-30, https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf

Proposed by Thayer decades before as an intrajudicial check on the institution’s power, a self-restraint regime for limiting Supreme Court power was embraced by the justices in the 1930s, at least rhetorically. Even so-called “bifurcated” review, which arose in stages after, was supposed to privilege deference as a default. A commitment to such intrajudicial restraint differs from some form of extrajudicial intervention, however, because it leaves whether to exercise conclusive and unaccountable power ultimately up to the justices themselves and no one else. And unsurprisingly, self-control did not last. Indeed, if this commission can take advantage of any intellectual learning since earlier debates around Supreme Court reform, it is the lesson that intrajudicial checks do not guarantee limits for long. Self-imposed rules are bracketed sooner or later, out of the best intentions, or because power corrupts. Indeed, the erosion of deference since the 1930s is the main novelty to consider since the last major Supreme Court reform debate in the country, before the experiment with a deference regime to curb the institution’s power occurred. And the old regime has broken down. For both sides of America’s partisan spectrum, “decades of attempts to restrain th[e] Court’s abuse of its authority have failed.”13 It is not merely that the most familiar way of talking about how to keep the Supreme Court to a defensible role in our democratic polity, “[p]reaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility,” cannot “compete with the temptation to achieve what is viewed as a noble end by any practicable means” — though that is true.14 It is also that constitutional law is, now, more openly politics by other means than some once believed or hoped. It is for the same reasons that extrajudicial constraints, including structural reforms that fine-tune jurisdiction, are more credible now than ever.

#### Signal/Democracy---legislative assertion is key

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Constitutional judicial review is the extraordinary power of judges to invalidate policy choices made by other officials of government on the ground that they are prohibited by the Constitution. Evaluation of the power should begin with recognition that all constitutional restrictions on policy choices by government are problematic in a democracy in that their effect is to substitute policy choices made by people in the past for the different choices preferred by people of today. It is not rational to decide a current issue of public policy, for example gun control, by seeking to determine the views of people from a time when many of the relevant considerations, including the nature of guns, were very different. Further, many constitutional restrictions, such as the "natural born Citizen" requirement for the presidency, 3 often serve only to needlessly create problems. If the norm is self-government, constitutional restrictions should be disfavored, not expanded or multiplied.

The principal problem with the power of judicial review, however, is not judicially enforced constitutionalism, which raises the problem of rule by the dead, but judges abusing the power by holding unconstitutional policy choices that the Constitution does not clearly forbid, which raises the problem of rule by judges. The Constitution, a very short document, was wisely meant to preclude very few policy choices. 4 Most constitutional cases involve state, not federal, law and nearly all of them purport to be based, like Obergefell, on a single sentence of the Fourteenth Amendment, which the Court has wrongfully converted from a guarantee of basic civil rights to blacks to a grant of virtually unlimited policymaking power. 5 The Court thereby gave itself the power to remove from the ordinary political process any policy issue (libel law, term limits, abortion) it chose and assign it to itself for final decision. The result is to make the Court the most powerful institution of American government in terms of domestic social policy, thereby depriving the states of the "Republican Form of Government" guaranteed them by the Constitution 6 and undermining representative self-government by giving citizens less and less reason to participate in the political process.

The effect, as Judge Learned Hand famously protested, is to create a system of government similar to Plato's government by philosopher kings 7 except with the philosophers replaced (unfortunately) by lawyers to maintain the fiction that the decisions are based on the Constitution. The decisions are necessarily based on only the Justices' policy preferences, however, when, as is almost always the case, they undertake to invalidate as unconstitutional a policy choice that the Constitution does not clearly forbid or, typically, even refer to. That these decisions are based on ideology, not law, should also be clear enough simply from observation of the current Justices' highly predictable voting patterns, with one group of four 8 consistently voting for the "liberal" result and another group of four 9 voting almost as consistently for the "conservative" result, almost regardless of the issue. Although presumably equally competent to read the Constitution, the two groups consistently reach directly opposite conclusions as to its meaning, and their conclusions, even more remarkably, are almost invariably consistent with their apparent political preferences. 10

The result of this situation is, of course, to make the vote of the ninth Justice, Justice Kennedy, decisive. Thus, the "Constitution" gives us an individual right to own a gun, 11 prohibits Congress from restricting corporate campaign contributions, 12 and prohibits public school districts from considering race to increase integration in assigning students to schools, 13 because in each of those cases Justice Kennedy chose to vote with the four conservatives instead of the four liberals who took the opposite position. On the other hand, the Constitution prohibits the states from imposing term limits on their federal representatives 14 and, as we have just learned, restricting marriage to one man and one woman, 15 because in those cases he voted with the liberals, with the four conservatives left to dissent. The result is that in a nation of over 300 million people, the most basic and controversial issues of domestic social policy are ultimately decided by the vote of one unelected government official, leaving the rest of us diminished, the ultimate in rule by an elite that the Framers sought to abolish.

Judicial review, unknown to British law where Parliament is supreme, is not specifically provided for in the Constitution. It was defended by Alexander Hamilton 16 and established by Chief Justice Marshall 17 with the expectation, no doubt, that it would be a conservative force, as it proved to be for most of its history, serving primarily to protect property and contract rights. Its legitimacy was therefore severely questioned by liberals. 18 The ultimate success of the 1954 Brown decision, 19 prohibiting racial segregation, however, followed by a series of other society-changing decisions uniformly moving social policy to the left by the Warren Court (e.g., criminal procedure, 20 prayer in the schools, 21 pornography, 22 libel 23 ) and the Burger Court (e.g., abortion, 24 busing, 25 capital punishment 26 ) convinced many liberal constitutional law scholars and others of the superiority of policymaking by the Court to policymaking by elected representatives. Some of the Court's more recent decisions, however, such as Bush v. Gore, 27 seemingly settling the year 2000 presidential election controversy in favor of the Republican candidate, and Citizens United, 28 removing restrictions on corporate campaign contributions, plus the near death of the Affordable Care Act 29 and the Court's hostility to affirmative action, 30 have caused some prominent academic supporters of judicial review to have second thoughts, 31 perhaps making consideration of a means of limiting the Court's power a realistic possibility.

Alexander Hamilton's defense of judicial review on the ground that the Supreme Court, having, he argued, "merely judgement," not will, and "no influence over either the sword or the purse," 32 was the "least dangerous" branch of the federal government, 33 has proved to be entirely mistaken. Alexis de Tocqueville's insight that the Court was, on the contrary, potentially the most dangerous 34 proved to be prescient when the Court's Dred Scott decision, 35 invalidating a congressional compromise on the slavery issue, confirmed his warning that an imprudent decision could lead the country to civil war. That one decision should have been enough, one might think - as perhaps should also the Court's more recent decisions on abortion, forced busing, and same-sex marriage - to establish that judicial review is not an improvement on democracy.

Obergefell shows, Justice Alito stated in dissent, that "decades of attempts to restrain this Court's abuse of authority have failed." 36 That was and is no doubt inevitable given the current understanding of judicial review as effectively authorizing the Justices to substitute their policy preferences for policies they strongly disapprove that are adopted in the ordinary political process. The Justices' effective lifetime tenure makes them more, not less, susceptible than other government officials to the corrupting effect of unrestrained power. The availability of impeachment and the Court's dependence on Congress for enforcement of its decisions have not provided the complete assurance against the Court's abuse of power that Hamilton expected. 37 The Justices know that they have no reason to fear impeachment or that their decisions will not be enforced. Seeking Supreme Court nominees willing to assert their commitment to judicial restraint - our only present method of addressing the problem - is clearly not effective.

Judicial review could be eliminated, as it has been in, for example, the Netherlands, by constitutional amendment. 38 Because judicial review, much less judicial supremacy, is not explicitly provided for in the Constitution, however, an amendment should not be necessary. In theory at least, Congress could announce the view, contrary to the view of the Court, 39 but in agreement with Thomas Jefferson, 40 and James Madison, 41 that the Court's interpretation of the Constitution is not superior to that of Congress. Congress could then officially express the view that the Constitution does not prohibit the states from refusing to recognize same sex unions as marriage and that Congress, therefore, will not act to enforce such a prohibition. As radical and drastic as this may sound, an assertion of legislative over judicial supremacy should not be shocking - should be seen as essential - in a republic. The immediate effect will be that the decisive vote on national policy and the policy of each of the states on this issue will no longer be in the hands of a single unelected government official.

The question presented by judicial review is not the question endlessly and misleadingly debated by constitutional law scholars: How should the Court interpret the Constitution? Very few, if any, rulings of unconstitutionality turn - any more than in Obergefell - on an issue of interpretation. The issue is simply who should decide issues of basic public policy, a question of the proper form of government. Should they be decided by the process of representative self-government, usually on a state-by-state basis, created by the Constitution or by majority vote of a committee of nine unelected, life-tenured lawyers pretending to interpret the Constitution in Washington, D.C.? The effect of abolishing judicial review would be not to lessen the importance of the Constitution, but to reestablish it as the basis of our system government.

#### Process---rule by judicial review is inherently unpredictable---undermines coherent development of constitutional law

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Were this not enough, "judicial supremacy" is an implausible - indeed, in certain aspects ridiculous - process on which to rely for construing the Constitution. Under "judicial supremacy," the promulgation of constitutional "law" is always unpredictable. Many potential constitutional questions the Supreme Court has never decided, and perhaps never will decide. And those it has addressed cannot be said to be settled with finality, because the court often changes its collective mind. See, e.g., Payne v. Tennessee, 501 U.S. 808, 827-830 & note 1 (1991).

Moreover, nothing guarantees that the Supreme Court's actual consideration of some case or controversy will result in the correct constitutional question being answered - or even asked. For one reason, the court indulges a policy of avoiding constitutional questions if at all possible. See, e.g., Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345 (1936) (opinion of Brandeis, J.). To this end, it may dismiss a litigant's case because of an ostensible lack of "standing" (as the recent cases challenging Barack Obama's eligibility for the office of president have been handled), or because the complainant supposedly seeks nothing but an "advisory opinion" or raises only a nonjusticiable "political question." Inasmuch, though, as ignorance and uncertainty as to the meaning of "the supreme Law of the Land" equate with vagueness, this doctrine plainly promotes lawlessness because it renders the meanings of large portions of the Constitution, or their applications in particular circumstances, unknown for indefinite periods of time, no matter what the consequences for individuals or even the country as a whole. The constitutionally correct approach should be along the lines described by Justice Stephen Field:

The law of Congress being of a public nature, affecting the interests of the whole community, and attacked for its unconstitutionality in certain particulars, may be considered with reference to other unconstitutional provisions called to our attention upon examining the law, though not specifically noticed in the objections taken in the records or briefs of counsel, that the Constitution may not be violated from the carelessness or oversight of counsel in any particular. [Pollock v. Farmers' Loan & Trust Company, 157 U.S. 429, 604 (1895) (separate opinion).]

But the court has never adopted Justice Field's admonition as its institutional policy.

For another reason, even where a constitutional issue is not avoided, the likelihood of its being presented and settled in a definitive manner is not high - precisely because of the many serious practical shortcomings of litigation. For example:

\* The identity, character, and peculiar special interests of the particular litigant may have a significant bearing on what issues may be raised, when, how, and to what extent. For example, litigants defending a statute banning so-called assault weapons will surely refrain from informing the Supreme Court that "the right of the people to keep and bear Arms" ultimately relates to Americans' service in "well regulated Militia," the members of which must be supplied with personal firearms at least equivalent to what the regular armed forces employ. If the opponents of the statute fail to emphasize this point (as almost all "gunrights" advocates invariably do), and if the court itself fails to perform independent research (as it quite often does), the case will be decided from an angle decidedly skewed against a proper constitutional result.

\* The economic, political, and social circumstances in which the litigation arises may predispose or prejudice the judges toward a decision not in keeping with what the Constitution demands - the old saw, "the Supreme Court follows the election returns," having more than a little cut to it.

\* Counsel on one side or both may not be competent in constitutional law, in general trial litigation (particularly with respect to the use of expert witnesses), or in appellate practice.

\* Through the insouciance or blunders of counsel, or the inadvertence or even malevolence of the trial judge, the full factual record necessary to frame the constitutional issue properly may not be prepared.

\* In the Supreme Court itself, the decision may very well turn upon the historical quirk of which particular justices happen to hear the case. "The living Constitution," after all, depends upon who is then living: a John Marshall's grasp of the Constitution may be expected to be quite different from a Thurgood Marshall's - and increasingly so these days,

\* The Court's decision may very well turn on the quality of the legal research and advice proffered to the justices by their law clerks, fresh from the establishment's leading law schools where professors have filled their heads with the latest legalistic fads and folderol.

#### AND-the court can’t simply refuse review

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Given judicial review, however, the Court probably could not avoid deciding the case; another unfortunate aspect of judicial review is that a decision the other way would inevitably be seen as an endorsement of segregation. A better answer is that as even a stopped clock is right twice a day, and even as a lawless decision can have a good result, this does not justify endorsing lawless decision-making. The best answer is probably that Brown should be considered sui generis: a case without precedent or precedential value, in effect an act of judicial civil disobedience arguably justifiable by the unique circumstances of the seriousness and intractability of the problem. 96 There are no analogies to the black historical experience in American law. How far Brown is from an ordinary constitutional decision is shown by the fact that for the first and only time, the Court created a constitutional right that did not have to be immediately enforced and found a violation without providing a remedy, permitting the "successful" plaintiffs to be returned to the unconstitutionally segregated schools. As important as Brown was for its decision, it proved to be even more so for the change it made in the meaning of judicial review, making living constitutionalism seemingly defensible. It served to convince many people, including at least some of the Justices, of the superiority of decision-making by the Court ostensibly on the basis of principle and morality to decision-making by politicians subject to popular control. It in effect gave the Court a quasi-clerical role as the nation's ultimate moral as well as legal authority. The Court then used this new understanding of its power to make decisions, such as on the abortion issue, where the alleged moral advance is much less clear. On the race issue itself, the accolades for Brown led the Court to move from Brown's prohibition of segregation as unlawful race discrimination to a much more ambitious and questionable requirement of race discrimination to increase integration. Because it could not openly defend it as such, the Court has always denied that there is such a constitutional requirement, insisting that the requirement is not integration for its own sake but only "desegregation," the undoing of the de jure segregation prohibited in Brown. 97 This new requirement led to the nation's largest and most destructive social experiment--one that could never have been imposed but apparently could not be stopped by the political process--a nation-wide program of compulsory transportation of public school children away from their neighborhood schools to more distant schools to increase school "racial balance." The result, due to the flight of the mostly white middle class, was almost always not more but less integration, transforming the public school systems of the nation's major cities--sometimes almost overnight--from majority white to majority non-white. 98 There can be no greater tribute to the power of the Court than that this program, bitterly and sometimes violently opposed by the American people, imposing enormous costs on school districts and states 99 with no known educational benefit, was nonetheless carried out and is to some extent still being carried out, 100 across the country. Unless limited as famously advocated by James B. Thayer at the end of the nineteenth century 101--which would reduce it to a matter of little more than academic interest--judicial review is essentially a prescription for rule by judges inconsistent with the rule of law, representative self-government, separation of powers and federalism. Great Britain 102 and the Netherlands 103 show that it is possible to get by quite well without it; its abolition here would be the greatest improvement that could be made in our political system. It would allow the states to return to the "Republican Form of Government" guaranteed them by the Constitution, 104 quieting interest in secession. If, however, the belief of living constitutionalists that leaving all or some social policy issues for final decision by the Supreme Court is an improvement on democracy, 105 it should be advocated openly and honestly, not misrepresented as a matter of how to interpret the Constitution.

#### The deficit can be applied for a particular issue---here’s unpredictability/signaling argument in the context of health care reform

CHRISTOPHER JON SPRIGMAN 11 Murray and Kathleen Bring Professor of Law @ NYU, First Do No Harm Why judges should butt out of the fight over health care reform, 2-11, https://slate.com/news-and-politics/2011/02/why-judges-should-butt-out-of-the-fight-over-health-care-reform.html

Since it became law less than a year ago, almost two dozen lawsuits have been filed challenging the constitutionality of President Obama’s health care reform plan. Federal district court judges have reached decisions in four of those cases. The law has twice been upheld, and twice struck down. Both judges upholding the law were appointed to the bench by Bill Clinton. Both judges striking down the law are Republican appointees. In all likelihood, the lawsuits still pending will continue to be decided along partisan lines. And when the issue finally reaches the Supreme Court, the justices are likely to vote in the same manner. If they do, many believe the law will be struck down, 5-4. Whether one favors or opposes the law, it’s troubling that the fate of a scheme designed to improve a badly broken industry that consumes almost 18 percent of U.S. GDP depends wholly on the political preferences of a few federal judges. No one voted to allow judges to make these decisions. Judges possess no special expertise in assessing health care policy. And because they enjoy high-quality and relatively low-cost government-provided health care, they also have no direct experience of the health care crisis. Worse yet, the undeniably political tenor of judicial review in the context of health care reform is being replicated across a huge range of pressing policy questions, including the constitutionality of gun control, abortion, affirmative action, and laws against homosexual sodomy. In each instance, the Constitution offers no clear directive. Judges are left free to rule according to their political instincts. Blame the Founding Fathers. And blame us for our absurd fetishization of them and the increasingly time-worn document they created. Because we’re determined to run a post-industrial democracy by reference to a vague, terse, pre-industrial Constitution, we get judicial opinions that read like political arguments. We can’t cure this by resorting to “apolitical” judicial methodologies, like originalism, that are touted as constraining judicial discretion. They don’t constrain it; they obscure it. Nor can we cure the problem by appointing only “apolitical” judges who “apply the law.” We might as well try to appoint a unicorn, because neither creature exists.Failing a wholesale renovation of our Constitution, the only cure is *less* judicial review. Judges must be made to understand that there is a difference between a plausible constitutional argument and a compelling one. And unless the constitutional argument against health care reform is compelling, judges should step away and let the political debate unfold. In cases in which the Constitution does not speak clearly, judges have nothing to add—except another political opinion nobody wants.This is especially true if you favor liberal policy outcomes. Aside from the brief Warren Court interregnum, judicial review has been a largely conservative force. Liberals’ love affair with judicial review is long overdue for reconsideration. One possible silver lining—should the Roberts Court strike down health care reform next year—may be that liberals finally discover the nerve to walk out. A quick review of the diverging rulings on Obamacare’s constitutionality is illustrative: The judicial attack on health care reform focuses on the “individual mandate,” a provision that will, starting in 2014, require all Americans to have adequate health insurance or pay a stiff fine. The purpose of the mandate is simple. The law prohibits denial of coverage for pre-existing conditions. But eliminating that problem creates a new one: Unless people are obliged to purchase insurance, the young and healthy will choose not to insure (if they get sick, they can opt in at any time). Without a mandate, the insurance risk pool will consist mostly of older, sicker people. Health insurance will become more expensive for everyone. For this reason, the individual mandate is a vital piece of the health care reform scheme. It’s also—or so it appears at the moment—the law’s greatest constitutional vulnerability. Health care reform opponents maintain that the mandate is beyond the federal government’s constitutional power. The most obvious source of federal authority is the Constitution’s Commerce Clause, which grants Congress the power “[t]o regulate Commerce … among the several States … .” The text of the Commerce Clause is bare, the historical understanding of the framers’ intent is hardly helpful, and as a result courts have veered sharply over time in interpreting the scope of the federal Commerce power. Back in the mid-1930s, the Supreme Court enforced a narrow reading and struck down several parts of Franklin Roosevelt’s New Deal. But just a few years later—after Roosevelt threatened to pack the Court with new (and presumably more sympathetic) justices—the Court reversed course. In a series of decisions upholding New Deal statutes, the Court held that federal regulation, even of purely noncommercial and intrastate activity, would be upheld if the regulated activity had some effect on interstate commerce. The wide scope of federal Commerce power established by the post-New Deal consensus has lasted, mostly undisturbed, until now. Which brings us back to the district court decisions examining health care reform. Clearly, the private decision to purchase health insurance has a huge effect on interstate commerce—many insurance providers operate in more than one state, their risk pools are made up of people everywhere, and the price of insurance depends on individuals’ decisions about whether to purchase coverage. So shouldn’t the insurance mandate be comfortably within Congress’ power? The GOP-appointed judges think not. They reason that although the Commerce Clause gives Congress constitutional authority to regulate activity affecting interstate commerce, what the insurance mandate regulates is inactivity—i.e., an individual’s decision not to purchase insurance. These judges argue that Congress has no power to force an individual to purchase something, so the insurance mandate must fail. Is this right? The answer to that question is surprisingly difficult to know. In fact, given the tools at judges’ disposal, it’s impossible to know with any confidence. Let’s consider those tools in turn. Some judges rely on textualism—i.e., they seek to enforce the plain meaning of constitutional text. Does Congress’ power “[t]o regulate Commerce … among the several States” include a power to regulate inactivity that imposes costs on interstate commerce? The text doesn’t rule that in, or rule it out. There is no “plain meaning” of the relevant text that bears on the question at hand. The same is true of originalism, another tool used by many (especially conservative) judges. An originalist would ask whether the framers of the Constitution intended the Commerce power to authorize congressional regulation of inactivity that affects interstate commerce. That’s an easy question to pose, but one searches in vain for an answer. There is no evidence that suggests the framers considered the activity/inactivity distinction, either in the Commerce Clause context or anywhere else. Nor can the Court rely on its own precedent to provide an answer. There is no precedent upholding a forced-purchase regulation enacted under the Commerce Clause. Nor does any prior decision invalidate such a regulation. Opponents of reform argue that this absence of precedent means that the federal government lacks power. But that’s stretching argument by negative implication way too far. Regulation of economic inactivity has simply not been on Congress’ agenda. The individual mandate makes sense as a way of preventing adverse selection in health insurance markets. But forced purchases are not a commonplace in economic regulation. The historical absence of such regulation is, therefore, unsurprising. So, too, is the absence of judicial precedent. If it is impossible to determine definitively the constitutionality of the individual mandate, what should judges do when faced with uncertainty? In his confirmation hearings, Chief Justice John Roberts famously said that the job of a judge was “to call balls and strikes.” That analogy is wrong for several reasons, but it illustrates perfectly the problem judges have here. A baseball umpire must make a call on every pitch. But judges have a choice. If the Constitution doesn’t give clear directions, they can decide not to decide. They need not strike the law down, nor uphold it. They should just admit, instead, that the Constitution does not direct any result. They should then step aside and let the political process unfold. In the case of the health care reform law, where the Constitution gives no clear direction, judicial review is inherently and inescapably political. In our system, political decisions are the province of the elected branches—Congress and the president. Judges are charged with enforcing constitutional limits on government power when those limits can be discerned. But when the Constitution doesn’t speak, judges have no authority to displace democratically made policy decisions with their own preferences. That means, in sum, that the debate over health care reform doesn’t belong in the courts. It should proceed in Congress, in election campaigns, and around workplace water coolers. Already, we see this happening. The Tea Party movement was born, in large part, in opposition to health care reform, and the movement’s political adherents continue to push in Congress for the law’s repeal or defunding. They may or may not succeed, but the important point is that the struggle over health care reform must be fought out by politicians and the voters who elect them. The best thing for judges to do in the absence of textual, interpretive, or any other wisdom about the constitutionality of health care reform? Nothing.

### AT: Self-Restraint---Disempowerment Key

#### Disempowering reforms are key. Judicial self-restraint fails.

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Ryan D. Doerfler and Samuel Moyn, “Democratizing the Supreme Court,” California Law Review, Vol 109:1703, 2021, https://doi.org/10.15779/Z38TX3571X.

Finally, unlike personnel reforms, disempowering reforms do not rely on judicial self-restraint as a mechanism to ensure democratic choice. Thayer's proposal relied on judicial self-restraint, and Carolene followed suit insofar as it ultimately consecrated a purely judicial determination as to when to cross the line from rationality review to heightened forms of scrutiny. The result was, arguably, a Supreme Court in which both sides of a partisan split exercised judicial authority selectively and opportunistically. Judges allowed democratic will-formation, blocking it contingently (sometimes for better, regularly for worse) based on their own evolving doctrines of intervention. What all of these reforms shared was a rejection of Thayerian deference de facto, and an expansion of judicial authority uncontemplated and undesired in the middle of the twentieth century.1 97 "A lesson that some will take from today's decision," one conservative justice remarked bitterly at the end of the day, "is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means."1 98 If he was right, however, it was because judicial self-restraint failed to ensure conservative (not just liberal) self-policing. Even with personnel reforms, any bench will face the temptation to overstep, whereas disempowering reforms specifically deprive them of the temptation. Disempowering reforms limit the Court's power to act or abstain from acting in the first place.

### AT: Threaten---Fails

#### At most, even if fully credible, it would still only produce some occasional changes in which direction the Supreme Court rules. It could not and would not provide clear legal standards, nor solve the vast majority of cases seeing as they don't go before the SCOTUS, nor solve any advantages about legal precedent.

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Ryan Doerfler and Samuel Moyn, “Democratizing the Supreme Court,” California Law Review, *Forthcoming*, 07-29-2020, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3665032

A less conceptually ambitious but equally commonplace framework for evaluating a reform scheme is pragmatic: it will lead to good enough results case by case. This criterion is not oriented to the legitimacy of the Supreme Court either as an institution saved for apolitical neutrality or as one made safe for democratic life. It could be said to appeal to a narrower kind of legitimacy: one of output. Are the results of Supreme Court decision-making good (enough), or at least not bad (enough)? But the truth is that, as our parentheticals indicate, such a criterion is overwhelmingly oriented to a criterion of harm avoidance, pointing not to good results but to ones that are a tolerable mix or—even more modestly—do not incur grievous enough harm.191

[FN 191]

191 Interpreted not as actual proposals but as credible threats, of course, not only might any distinction between personnel and disempowering reforms melt away, but their feasibility as threats would increase with their legality no longer relevant—but absent some sort of climactic confrontation as in the 1930s, such threats would merely produce inadequate pragmatic betterment, in particular by shifting Roberts’ vote in high-profile cases.

[End FN]

## Aff---K

### Tribal Decision-Making Aff

#### A topical affirmative could have either Congress or Indian nations themselves reject current judicial assertions of authority to impose on tribal decision-making.

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Robert J. Miller, “Tribal Sovereignty and Economic Efficiency Versus the Courts,” Washington Law Review, Volume 97, Number 3, 10-01-2022, https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5229&context=wlr

My third suggestion is that Indian nations could consider lobbying Congress for an act to prevent state and even federal courts from addressing or attempting to limit tribal sovereign rights. Such a law would be a powerful protective step for Indian nations and their rights. The Supreme Court has long held pursuant to the Interstate/Indian Commerce Clause that state governments have no role at all in Indian affairs and policies.311 The Supreme Court has also held that Congress is all powerful over the other branches of the federal government in Indian affairs.312 There are analogous and relevant examples in current acts of Congress for what I am suggesting. In 1968, Congress enacted the Indian Civil Rights Act,313 and required Indian nations to extend to their own citizens and all persons “within its jurisdiction” most of the protections of the Bill of Rights and some other provisions of the U.S. Constitution.314 But Congress did not expressly create a federal cause of action under ICRA for aggrieved parties to sue tribal governments in federal courts. Lower federal courts began implying a cause of action in the ICRA and began hearing ICRA cases versus Indian nations.315 But in 1978 the Supreme Court stopped that improper judicial conduct. Since ICRA did not expressly waive tribal sovereign immunity to federal courts, or expressly create a federal cause of action, such claims could not be heard in federal courts.316 In addition, Congress enacted the Indian Child Welfare Act in 1978,317 and granted tribal courts exclusive jurisdiction over state courts in foster care and adoption cases for Indian children who are domiciled on a reservation.318 Congress further mandated that even for Indian children who are domiciled off a reservation that state courts should transfer those cases to tribal courts unless there is “good cause to the contrary.”319 In light of just these two examples, convincing Congress to enact a law preventing state and even federal courts from hearing certain cases regarding tribal immunity and tribal economic affairs is not an outlandish suggestion.

My fourth suggestion also concerns an act of Congress. It appears that Congress could enact a removal type statute motivated by the same comity and respect issues as demonstrated in National Farmers Union. Under the current federal removal statutes, defendants sued in state courts are allowed to remove cases raising federal law issues to federal courts.320 But Congress has mandated that certain categories of cases cannot be removed to federal courts at all.321 Obviously, Congress thought it was justified for valid policy reasons to force such cases to be heard only in state courts. Perhaps Congress could be convinced that there are equally valid policy justifications to keep tribal sovereign immunity issues out of state courts. In addition, once such cases were in federal courts, or were filed there initially, perhaps National Farmers Union, or Congress itself, would require federal courts to force the parties to exhaust their tribal court remedies first and address questions regarding sovereign immunity to the proper tribal court. If Congress considered such a bill, it would be pursuing the same comity and respect ideas that motivated the Supreme Court rulings in National Farmers Union and Iowa Mutual. If Congress does not adopt the later provision, perhaps the Supreme Court could be convinced to extend its case law and require the same as a matter of common law.

These preliminary ideas appear to be viable starting points for Indian nations and Congress to begin resisting what I have defined as judicial overreach and state and federal court intrusions into the purview of the federal legislative branch and into the executive and legislative branch decisions of Indian nations.322 Further research and debate on these topics will help flesh out these and perhaps other valid strategies.

There is no question that federal and state court decisions are intentionally or incidentally forcing tribal governments to operate their business concerns, and even their governmental departments, inefficiently, unprofitably, and in violation of solid economic principles. The state and federal courts are intruding on Congress’ authority, congressional Indian policies, and Supreme Court precedent in not respecting and granting comity to Indian nations’ sovereign decisions and their inherent powers of sovereign immunity. State courts have arguably vastly exceeded their constitutional and proper roles by intruding into areas of federal Indian law and Indian nations’ sovereign decisions. Courts possess no particular expertise or proper role in reviewing the economic development policies and decisions of Indian nations and enacting policies that infringe on tribal rights. These courts should exercise proper judicial modesty and get out of the “business” of mandating how tribal legislative and executive branches create, manage, and operate their governmental departments, bureaucracies, and economic entities.

CONCLUSION

Today, 574 federally recognized Indian nations govern themselves and their territories pursuant to long established tribal and federal law principles. Prominent among those legal rules are that Indian nations are governments that possess and exercise inherent sovereign rights and powers. One of those important rights is to be as free as possible from federal control, and to be completely free of state infringements on tribal sovereignty. Sovereignty includes the right of sovereign immunity. Consequently, Indian nations are almost totally protected by immunity from being sued in federal, state, or tribal courts without their express consent.

Indian nations have also long used their sovereign powers to engage in a multitude of tribally owned business and economic endeavors to try to rid themselves and their communities of the pernicious effects of endemic poverty. Tribal sovereignty, the history of federal and tribal legal principles supporting that sovereignty, and sovereign immunity, should prevent states, state law, and state and federal judicial incursions into tribal executive and legislative branch economic decisions and operations. In contrast, though, federal and state judges have intervened into the field of tribal sovereign authority, and interfered with tribal economic efficiency, profitability, federal Indian policies, and even with common sense. These courts appear to have acted beyond the proper judicial role and have mandated how tribal executive and legislative branches must create, control, and manage their economic operations. “The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”323 Consequently, instead of being mandated to and ordered about, Indian nations should be the only entities authorized, and they are obviously the best suited in the United States political system, to determine how best to serve the economic goals of Indian Country, economic efficiency, and the needs of Indian Country.

Indian nations should resist this judicial overreach just as they have battled for centuries against federal and state incursions into tribal sovereignty. Political strategies and legal arguments need to be developed to keep state and federal courts out of decision-making about the best and most efficient ways for tribal economic development to proceed and how best to operate tribal economic entities. Indian nations, tribal governments, and tribal courts are best suited to undertake these tasks and they must be the governmental entities that deal with these critical issues and needs in the future.

### Settler Colonialism Aff

#### The court system is foundationally settler colonial---it depends upon a systematic erasure of indigenous sovereign governance and a forcible imposition of Eurocentric legal norms. Only reconstruction of the legal system in line with decolonial principles solves.

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Geena Holding, "Decolonization and Court – Decolonization and Justice: An Introductory Overview," 2022, University of Regina, https://opentextbooks.uregina.ca/decolonizingjustice/chapter/chapter-3-justice-for-all-decolonizing-courts-through-indigenous-justice/

Colonization has shaped court systems around the world erase and exclude Indigenous values and justice practices. Eurocentric institutions predicated on colonial policies have reinforced systemic racism and inequalities, creating a system that impedes Indigenous access to justice. Token gestures, such as sweat lodges within prisons and cultural diversion programs for minor offences, only serve as distractions to focus attention away from a criminal justice system that forcibly imposes Eurocentric beliefs onto diverse First Nations and Indigenous communities (McGuire and Palys, 2020). Because historically embedded colonial ideologies run so deep, decolonization is the only solution to the inequalities and social problems that stem from colonization. This implies taking the power back through active resistance against ongoing colonization by embracing the resurgence of Indigenous cultures, laws, and governing systems (Palmater, 2018). The process of decolonizing colonial court systems has already begun, with the establishment of Indigenous legislative frameworks and courts.

Examining the introduction of Indigenous courts introduced in the U.S., Canada, and Australia reveals both structural differences and recurring themes. The Navajo Nation Peacemaking Courts of the U.S., the First Nations/Indigenous Courts of Canada, and the Aboriginal Courts of Australia all serve as examples of implementing Indigenous justice practices into the mainstream court system, and there has been a positive response to their implementation so far. There continue to be limitations, however, including lack of funding and recognition, narrow participation criterion, and the restrictions for these courts within colonial legal frameworks. Applying the assessment tools included in Asadullah’s (2021) decolonization tree framework indicates that, although a movement towards decolonization has begun, there is an ongoing need for fundamental systemic changes and formal recognition of Indigenous sovereignty. This paper aims to provide a comparative analysis and further recommendations for decolonizing these court systems.

Impact of Colonization

Colonization describes the permanent settler occupation of lands based on the continuing displacement of Indigenous peoples and the creation of systems and infrastructures that make the land productive from a Eurocentric capitalist perspective (Bonds and Inwood, 2016). The appropriation of these lands has denied Indigenous peoples’ access to resources and prosperity, while the creation of systems and infrastructures designed to enrich settlers and their mother nation by limiting Indigenous rights and other governance changes, expropriating their land, using them and others as colonial labour in the export of natural resources, has played a significant role in the marginalization of Indigenous populations. To this day, legal institutions rooted within colonial systems results in the overincarceration of Indigenous peoples and disproportionate rates of apprehension among Indigenous children (Blagg, 2017; Boothroyd, 2019; Cunneen, 2018; EagleWoman, 2019).

Zion (2006) notes that postcolonial state institutions are hierarchical and impersonal, based on social stratification, rooted in colonization, that excludes and marginalizes Indigenous membership. Eurocentric governance structures are based on an ideology that differs significantly from Indigenous worldviews, while the justice system deflects attention away from societal injustice and towards the criminalization of the poor (Monchalin, 2015). Legal hierarchies are dominated by associations that require graduation from approved law schools, which has led to a bench and bar being dominated by the Anglo middle-class (Zion, 2006). The growth of Indigenous and restorative justice movements has been a response to the increasing recognition that these systems serve to reinforce structural inequalities and the marginalization of minority groups (Monchalin, 2015; Zion, 2006). The impacts of colonization are embedded within a state’s social structure, from racialized policing to substantial employment, income and housing disparities (Bonds & Inwood, 2016; EagleWoman, 2019; Monchalin, 2015).

As a part of the criminal justice system, courts were also established based on colonial policies and practices. EagleWoman (2019) identifies the lack of culturally appropriate judicial forums, the failure to recognize Indigenous methods of justice, and systemic racism as key contributors to the overincarceration of Indigenous peoples. For example, judges are known to hand down the harshest sentences to Indigenous offenders when exercising their discretion (EagleWoman, 2019), and prisons around the world show an overrepresentation of Indigenous peoples (Archibald-Binge et al., 2020; Bureau of Justice Statistics, 1999; EagleWoman, 2019). The colonial impact on courts was wrought through the development of legislation and sentencing procedures that do not reflect the values and practices of Indigenous populations. Decolonization of the courts is necessary to repair the dysfunctional relationship between the justice system and Indigenous peoples.

Defining Decolonization

Decolonization involves recognizing and understanding the colonialism embedded in a State’s policies and infrastructures, challenging colonial-induced manifestations, and reclaiming Indigenous identity and lands (McGuire & Palys, 2020). It is a process that requires an overhaul of the state’s legal and political systems, and for settlers to recognize the benefits they continue to reap from the historical displacement and marginalization of Indigenous peoples. Indigenous groups have made it clear that what is most important is the recognition of their rights – to be able to legislate and govern under their own principles – is key (EagleWoman, 2019; McGuire & Palys, 2020; Palmater, 2018). Decolonization can be visualized as a tree, with growth obtained from listening to and consultation with marginalized groups all the way to building relationships into a non-hierarchical model:

Source: (Asadullah, 2021, p. 19)

A non-hierarchical model would be one that respects Indigenous law and justice practices as independent from the State legal system. Building relationships would mean addressing the inequalities between Indigenous and non-Indigenous people, taking concrete steps to remedy them, and rebuilding legal and political systems in a way that will benefit everyone.

The courts play an important role in the criminal justice system. They apply the law to the cases brought before them in order to determine an appropriate sentence or resolution. This effectively makes them an extension of the dominant legislative body, which becomes problematic when state laws have been created according to a Eurocentric perspective. Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) outlines the right of Indigenous peoples to promote, develop and maintain institutional structures based on their customs, spirituality, traditions and practices, including juridical systems. This points to the need for a self-administered court system that would allow Indigenous communities to enforce their own interpretation of the law (EagleWoman, 2019).

Decolonizing the courts would require a “radical break that is profoundly unsettling to the settler colonial state” (Boothroyd, 2019, p. 906). In other words, the Indigenous harm reduction and diversion programs favoured by courts are not to be confused with true decolonization, as they serve to reinforce the power of colonial state structures through mollification (Boothroyd, 2019; EagleWoman 2019). An essential step in decolonization is the creation and recognition of independent Indigenous courts that are able to set their own criterion for participation and sentencing procedures (Boothroyd, 2019; Cunneen, 2018; EagleWoman, 2019), which would require a complete reconceptualizing of the court system. This may sound unreasonable to those accustomed to living under one central justice system, but it is important to remember that Indigenous communities across the world had been successfully practicing their own justice methods and systems before the Eurocentric practices were inflicted upon them. Decolonization must involve a recognition and revival of these systems because Indigenous peoples have clearly been failed by colonial institutions.

In summary, decolonizing requires: 1) implementing UNDRIP recommendations; 2) nurturing Indigenous courts as legally independent systems; 3) recognizing Indigenous sovereignty and land rights as well as the impacts of colonialism in relation to them; and 4) providing the necessary supports and resources for the creation and maintenance of these systems. The result would be a court system that functions significantly differently, with Indigenous legal authority granted equal status to State authority.

#### The invocation of legal authority is a recursive technology of settler colonialism that obliterates indigenous authority---decolonization demands a dismantling of colonial legal orders

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Shiri Pasternak, “Jurisdiction and Settler Colonialism: Where Do Laws Meet?” 2014, Canadian Journal of Law and Society, Volume 29, no. 2, pp. 145 – 161

To engage in the question of what it means to decolonize law, we must ask by what authority a law has the authority to be invoked and to govern. In this paper, I describe the conditions necessary for the exercise of Canadian law as the work of jurisdiction, and I call into question Canada’s legality and legitimacy in making jurisdictional claims. Decolonizing law means deconstructing the state’s grounds to inaugurate law on lands acquired through colonial settlement. By critically examining law’s geography and scope, I also call into question the modern definition of territory itself.

In this paper, I draw attention to jurisdiction as a conceptual framework for understanding the specificities of settler colonialism; illustrate jurisdiction as a historical concept, distinct from territory and sovereignty; and show some of the ways in which jurisdiction is enacted to govern across multiple scales and issues. I situate this work within the emerging field of settler colonial studies and the field of critical legal geography. Settler colonial studies is a field of inquiry that examines a specific type of European colonialism premised on land acquisition and population replacement , in contrast to a colonialism premised on resource exploitation and surplus labour markets. 2 Unlike colonials in South Asia and Africa, settlers in Canada did not “return” to the metropole. Rather, they stayed, seeking eventually to replace Indigenous societies with their own. Replacement is embedded in the institutional logic of settler colonialism and in the structure of jurisdiction. 3 But to render jurisdiction visible, we must place it in the context of geographical studies, otherwise we risk “the presentation of law and space as pre-political categories.” 4 A critical legal, geographic perspective secures an interdisciplinary approach to jurisdiction as a spatial category, while allowing for the examination of the production of colonial space through the work of jurisdiction. By production of space , I mean, here, the ways in which place is socially, politically, and legally produced by the political status gained through spatial divisions of the world into nation states, or by the imperial drawing and re-drawing of regional boundaries.

Decolonizing law requires both recognition and repudiation. Identifying and respecting Indigenous peoples’ jurisdiction over their lands decolonizes Canadian law, in the important sense that it challenges Canadian law’s claim to being the only legal order and foregrounds the multiplicity of forms of governance across the country that are embodied in Indigenous culture, language, and politics. Decolonizing law also means repudiating the doctrine of discovery and other racist narratives that drive the assertion of European legal orders and render their competing local forms irrelevant. As McNeil puts it, it is one thing to accept the reality of governmental power “but quite another to hold . . . that acquisition of that sovereignty virtually obliterated indigenous governance authority as a matter of law.” 5 Canadian assertions of sovereignty did not obliterate Indigenous governance authority, and as such, encounters between settler and Indigenous law reveal the unfinished project of perfecting settler colonial sovereignty claims.

#### Court jurisdiction inaugurates settler sovereignty by universalizing law across differentiated epistemological and ontological terrain---a refusal of sovereignty demands a refusal of settler common law altogether

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Shiri Pasternak, “Jurisdiction and Settler Colonialism: Where Do Laws Meet?” 2014, Canadian Journal of Law and Society, Volume 29, no. 2, pp. 145 – 161

As a concept, jurisdiction has much to contribute to discussions of law and colonialism and the ways in which the state’s legal authority is ordered. Emile Beneviste’s etymology of jurisdiction links the Latin noun ius (law), in its performative and adverbial form, with the verb dictio (the saying or speech of law). 6 First and foremost, jurisdiction is the power to speak the law. As Shaunnagh Dorsett and Shaun McVeigh write, “In some formulations jurisdiction inaugurates law itself. Th us to exercise jurisdiction is to bring law into existence,” and in so doing, to draw law’s boundaries and its subjects. 7

Canada’s assertion of jurisdiction over all lands and resources within its national borders presumes the forms that law will take, despite the multiplicity of Indigenous governance systems embedded within their own ecologies of law. Tensions between settler and Indigenous regimes arise from these overlapping claims. The concept of jurisdiction offers a coherent vocabulary with which to express these encounters and where sovereignty discourses fall short. As Benton writes: “Empires did not cover space evenly but composed a fabric that was full of holes, stitched together out of pieces, a tangle of strings.” 8 These “imperfect geographies” were a fundamental aspect of imperialism; full (or perfected) territorial control has never been realized as a straight chronological progress towards absolute sovereignty, as many claim. 9 Rather, new kinds of differentiated legal zones have emerged where Indigenous territorial jurisdiction forms lumps that betray patterns of partial and uneven state sovereignty.

Just as the technical production of maps has the potential to erase contestation over lands, so too jurisdictions are masked when a plurality of legal systems are mapped as a single sovereign space. 10 Yet simultaneous operations of law may take place in a single area, across distinctive epistemological and ontological frameworks. To visualize the dense jurisdictional overlap of legal pluralities, readers may recall the image of a human body tucked into the back of old encyclopedias. Bodies are comprised of a dozen transparent pages, each page printed with a singular set of parts such as organs, the circulatory system, bones, and skin. 11 As each transparent page is laid atop the other, the overlap of components form the whole organism. Jurisdiction can be said to function in much the same way, except that each component part represents one kind of governing authority. Those living within the territorial boundaries of Canada are already presumed to exist within a particular body of law. But this picture of legal authority that holds us captive, repeated to us inexorably in the language of modern territorial sovereignty, erases the multiplicity of Indigenous legal orders exercised daily across the land. 12

As with any metaphor, a surplus of meaning spills out. To avoid misconstruing layers of jurisdiction as detached from one another, where no layer disturbs the other, we need to be attentive to the nodes of connection where authorities meet and where conflict may or may not be reconciled. Layers of authority become thicker or thinner as peoples’ movements through space produce new arrangements and negotiations of power. 13

Thus, jurisdiction raises important conceptual issues about the geography and scope of the law. 14 With the establishment of settler colonies, the space of law was expanded from imperial European centers to geographies far from the localized context and authority from which it arose. By asking where and to what or to whom distinct bodies of law apply, we are also inquiring into the definition of territory itself. 15 We can see this in the common phenomena of criminal extradition. The deportation of alleged criminals across national borders poses questions concerning the authority of law over individual bodies as well as the meaning and scope of citizenship relative to one’s location. As law moves, the boundaries of national sovereignty and, therefore, the sources of authority to govern in particular places, shifts, too. 16

Jurisdiction’s relationship to territory is a crucial one, since the idea of jurisdiction is a historical concept whose political and legal content has accumulated over a long period of time and through a significant transversal of space. Approaching jurisdiction from a historical perspective allows us to make key distinctions between the oft -conflated concepts of sovereignty and jurisdiction. Within a settler colonial context, this conflation is itself a political expression of authority, because it fuses multiple forms of life into one “empire of uniformity.” 17 “Perfect settler sovereignty” is the legal obliteration of Indigenous customary laws through the collapse of distinctions between these terms. 18

To begin, jurisdiction predates modern state sovereignty in the common law. 19 As Dorsett writes: “Bodies of law self-authorised and regulated their relations with each other long before the emergence of the modern nation state. Even after the development of notions of national sovereignty, non-common law jurisdictions continued to function alongside the common law, both in England and the colonies.” 20 Lisa Ford describes how sovereignty came to universalize jurisdiction. Whereas jurisdiction was understood for centuries as claiming authority over people in particular places or over those engaged in particular activities, through settler colonialism, it claimed authority over territorial space.

Citing case law from America and Australia, Ford traces the transition from a settler legality that claimed jurisdiction over Indigenous bodies to the period when territorial jurisdiction became a necessary exercise of sovereignty at the turn of the nineteenth century. Until this later period, an uneasy legal pluralism had existed between overlapping Indigenous and settler social orders. Ford’s research shows that the emergence of territorial state sovereignty was introduced in colonial courts through a generalization of the common law as the singular national law. 21 Likewise, Dorsett notes how intolerant Australia’s High Court has been towards parallel law-making systems, regarding “any attempt to argue multiple jurisdictions” as “an attack on singular sovereignty.” 22

Sovereignty has been defined by its claims to “final and absolute political authority” 23 and has dominated modern society as the “key ordering principle of political organizing since the collapse of ecclesiastical forms of authority.” 24 But authority is not pre-given to sovereignty. Sovereignty, we must appreciate, “depends on authority, and authority is something more than physical control over territory.” 25 It must be matched with a conviction that the exercise of sovereignty is legitimate. 26 Forming national law is one way in which legitimacy is sought.

Though the common law comes to take the shape of the state, the fit is never total or complete. For the common law has no mystical or transcendental authority that connects it to territory in the “New World.” When the common law of England became the national law in the colonies, its content and jurisdiction were deliberately confused. The common law’s universalist principles of equality were and have been intentionally articulated against the local and particular formations of Indigenous legalities. 27 Peter Fitzpatrick comments on Brennan J’s reasoning in Mabo , where the Justice rejects the common law doctrine of terra nullius only to rehabilitate the common law to “recognize” native title: “In such a miasma, not to say vacuity, is the settler’s law accorded the impenetrable solidity that would secure its completeness and exclusiveness and utterly subordinate any competing indigenous legality.” 28 The common law’s universalism is further comprised of its reliance on precedent—those serial decisions that embody the force of changing social relations from which it takes its content. 29

Territorial sovereignty, modern sovereignty, state sovereignty—all synonymous terms—arose in the context of late European imperialism, re-spatializing the exercise of jurisdiction into a colonial context over national territories. 30 This new spatial form required the inauguration of new forms of law (or new applications of old forms of law), as jurisdiction was transferred repeatedly between European powers and exercised over the colonies. The “territorial imperative” of sovereignty emerged specifically in the nineteenth century. As Ford writes, before the War of 1812 in America, “[a]ny attempt to define state sovereignty as a territorial measure effected through the exercise of jurisdiction foundered on the plurality of indigenous legal status.” 31 But this legal status became threatening to a settler sovereignty increasingly marked by territorial rights. 32 Imperialism created the definitive boundaries of sovereignty: it raised the questions that persist in its name, such as who could exercise what kinds of power over land, and what constitutes a political community. What remains to be examined are the “internal arrangements for organising [ sic ] and exercising authority,” arrangements that are the work of jurisdiction. 33

### Disengage Aff

#### Popular rejection of Supreme Court jurisdiction is the best political strategy---threatening refusal alone overcomes resistance to structural change

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Eric J. Segall, “Aggressive Judicial Review, Political Ideology, and the Rule of Law,” 2019, Studia Iuridica, https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=3803&context=faculty\_pub

There are two possible ways to limit the damage caused by an overly aggressive Court. One is to put in place structural reforms to weaken the institution itself. Most of the recent suggested reforms, however, such as imposing term limits, or requiring two-thirds of the Justices to agree before a law would be struck down, would likely take a constitutional amendment which in the United States requires a super-majority of both Congress and the states and is therefore highly unlikely to happen.

Another possible solution to the problem of judicial overreaching is to select more deferential judges or perhaps even by political protest or even an unwillingness on the part of politicians or the people to obey Supreme Court decisions. The mere threat of the latter might just encourage the former. If something does not encourage more humble, modest, and deferential judicial review in the near future, the United States may well find itself in the midst of a constitutional crisis.

### Decoloniality Aff

#### Black and native peoples are the proper subject of sovereign authority---the “People of the United States” is a contradiction only resolved through a decolonial reframing of legal authority

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Gregory Ablavsky and W. Tanner Allread, “WE THE (NATIVE) PEOPLE?” March 2023, Columbia Law Review , MARCH 2023, Vol. 123, No. 2, pp. 243-318

Writing in the name of the “People of the United States,” white men drafted the U.S. Constitution in 1787.1 The following year, white men, chosen by an almost exclusively white, male, property-holding electorate, voted to ratify the Constitution.2

These historical facts have important implications for constitutional law. They have led many commentators to question or reject the authority of the Constitution because it rests on such an undemocratic conception of the people.3 They also mean that present efforts to discern the Constitution’s historical meaning have focused almost exclusively on the views of the document’s drafters and elite interpreters.4

Yet the actual “People of the United States” were far less homogenous than the circumscribed group who claimed to represent them. Like the nation today, the United States in 1787 was strikingly diverse, polyglot, and pluralistic. The nation’s more than three million residents of European descent5—who had only recently begun to conceive of themselves as a cohesive “white people”—encompassed a startling array of nationalities, faiths, and languages.6 Even those white people excluded from the franchise—most women, poor men, and laborers7—could, and did, actively participate in what was known as politics “out of doors.”8 Roughly 750,000 people whom Anglo-Americans labeled “Black” also lived within the United States.9 This number included nearly 700,000 enslaved peoples from throughout Africa—some recently arrived, others descended from long-standing enslaved communities—alongside a small, though growing, free Black population of 50,000 people.10 Meanwhile, roughly half the purported territory of the new nation was legally “Indian country,” the homelands of at least 150,000 Indigenous people organized into powerful, loosely centralized confederacies like the Haudenosaunee and Muskogee.11

At the core of the new Constitution, then, was a contradiction: a narrow political elite attempting to govern, in the name of the people and popular sovereignty, a much more diverse nation. That elite sought to resolve this hypocrisy through exclusion. As scholars have amply shown, the Constitution placed most of the actual people of the United States outside the bounds of the body politic and sought to limit their access to political power.12 Moreover, the increasing democratic inclusion of white men further entrenched whiteness and maleness as the defining boundaries of political participation.13

Recent literature captures how thoroughly such exclusionary efforts succeeded. Racialized and gendered exclusion entrenched itself throughout much of antebellum constitutional law, which vindicated chattel slavery, Native dispossession, and women’s supposed subservience.14 The protests of those deemed political outsiders could be, and were, brutally suppressed through state-sanctioned and state-sponsored violence.15

But these exclusionary efforts also failed. The United States never was, nor could be, a solely white or male nation. Despite efforts to suppress their voices, those excluded from whiteness and maleness nonetheless engaged with the law, including constitutional law. Historians have recently and effectively reconstructed the legal consciousness of many marginalized groups and their impact on Anglo-American law, including constitutional law.16

### Wake Work Aff

#### Refuse normative jurisprudence in favor of lawyering in the wake---in the midst of the singularity of anti-Blackness the aff is a fugitive weaponization of legal technologies towards a politics of care and survival

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James Stevenson Ramsey, Winter 2021, "Lawyering in the Wake: Theorizing the Practice of Law in the Midst of Anti-Black Catastrophe," CUNY Academic Works, https://academicworks.cuny.edu/clr/vol24/iss1/7/

However, there may be alternative theories and praxes for lawyers seeking to live and encourage life in the wake. In her work, Sharpe names “aspiration” as a form of wake work, and this form can itself take several different shapes.55 Referring to this concept of aspiration, she writes, “What is the word for keeping and putting breath back in the body?”56 I add: How might lawyers participate in this guarding and return of the breath? She writes further:

What is the word for how we must approach the archives of slavery (to “tell the story that cannot be told”) and the histories and presents of violent extraction in slavery and incarceration; the calamities and catastrophes that sometimes answer to the names of occupation, colonialism, imperialism, tourism, militarism, or humanitarian aid and intervention?57

And how might lawyers in particular tell these untellable stories or make space for their telling in a system that does not want to hear them? What other words, lexicons, and media might we employ? Sharpe probes more: “What are the words and forms for the ways we must continue to think and imagine laterally, across a series of relations in the hold, in the multiple Black everydays of the wake?”58 Relatedly, what are the ways in which lawyers might be able to help build and develop relationships in the wake and not just intervene in their abuse? And what are ways of addressing abuse that do not replicate the punitive impulses and harms of the carceral state?

The stakes of this—of aspiration—for Sharpe are no less than life itself:

I’ve been thinking about what it takes, in the midst of the singularity, the virulent antiblackness everywhere and always remotivated, to keep breath in the Black body. What ruttier, internalized, is necessary now to do what I am calling wake work as aspiration, that keeping breath in the Black body?59 Elsewhere, Sharpe mentions the guilty verdict returned for Ted Wafer, Renisha McBride’s murderer, describing it as something that “brought, perhaps, a little breathing room before the next onslaught, the next intake of air, the held breath.”60 She goes on to qualify this, though: “In the weather of the wake, one cannot trust, support, or condone the state’s application of something they call justice, but one can only hold one’s breath for so long.”61 Like Sharpe, I think guilty verdicts for murderers of Black people can feel like breathing room to some of us, giving us a sense of relief, because harm was recognized. But I do not think that guilty verdicts such as these can sustain our people. They feel like false breaths to me, like breathing in air that has insufficient oxygen, not quite enough for our lives and potentially toxic. And importantly, they are only retrospective; punishment will not raise the dead, and its deterrent effect is minimal in a society that knows itself through the death of Black people.62

But are there ways that lawyers can cultivate the recognition of harm that are not motivated by a desire to punish? And are there ways lawyers can participate in the prevention of harm—insisting on the sacredness of Black breath—that are more effective than punishment? Protest and shame have long been tools of liberation movements all over the world, and lawyers have defended those protestors.63 However, if survival is the question (and it is), lawyers in the wake ought to broaden their scope and consider desperate actions for these desperate circumstances, taking less timid steps toward helping people survive, even and especially those who are not meant to. For example, what would it look like for more lawyers to be the disruptors in court? To be willing to be held in contempt? What would it mean for lawyers, alongside (and accountable to) the communities they serve, to overrun media outlets, legislative offices, law firms, and prosecutors’ offices? To occupy judges’ chambers?

Similarly, if we have to fight for our breath, if violent self-defense (and violent resistance, more generally) is a preventative solution that a community embraces, what might the lawyer’s role be? Of course, the lawyer can defend members of this community in court. But perhaps, at times, what survival demands, what wake work is, is for lawyers to be willing to take up arms themselves, as Mandela was during his own legal practice.64 There is a practical bar to widespread violent rebellion here; Black people in the United States are not likely to survive a war with the United States, and regardless, that is not what I am thinking of here. I am more interested in the question of framing and of which principles—with all of their philosophical legacies and racialized baggage—emerge victorious when survival in the wake is the guiding theory for legal practice. Along these lines, and within the hold, non-violence may appear to more closely resemble an available strategy than an ethic to be adhered to, and lawyers should think critically about their role in participating in and, if appropriate, helping in the strategic guidance of violence and nonviolence. Within Sharpe’s conception of aspiration, there is also the question of fugitivity. In Stolen Life, Fred Moten explicates the always-fugitive quality of Black existence as expressed in Black artistic and aesthetic formations:

Fugitivity, then, is a desire for and a spirit of escape and transgression of the proper and the proposed. It’s a desire for the outside, for a playing or being outside, an outlaw edge proper to the now always already improper voice or instrument. This is to say that it moves outside the intentions of the one who speaks and writes, moving outside their own adherence to the law and to propriety.65

What would it mean for wake lawyers to harness this fugitivity, this breath-in-secret, to embrace it and weaponize it? We may consider this as an extension of abolitionist resistance to the Fugitive Slave Acts of 1793 and 1850,66 where, today, lawyers—again, in consultation with and with consent and input from communities to which they are accountable—can truly act as accomplices to the cause of freedom and survival for those who resist. I think of those like Assata Shakur and Angela Davis. Are there more Assatas—the already persecuted, already convicted (truth be damned),67 already dead, who yet dare to resist and/or escape—to be found and supported? Might lawyers more often expand and support the fugitivity inherent in Blackness? Consider Judge Shelley Joseph, the Massachusetts district court judge accused of helping an immigrant elude U.S. Immigration and Customs Enforcement agents.68 Might her alleged behavior be an available blueprint for lawyering in the wake, a way for lawyers to subversively embody the “ordinary note of care” Sharpe is concerned with in her work?69

### Anti-Domination Aff

#### There are a variety of ways to get at anti-domination aff themes in this topic.

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Nikolas Bowie, “The Contemporary Debate over Supreme Court Reform: Origins and Perspectives,” Presidential Commission on the Supreme Court of the United States, Written Statement, 06-30-2021, https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf

1 Presidential Commission on the Supreme Court of the United States The Contemporary Debate over Supreme Court Reform: Origins and Perspectives Written Statement of Nikolas Bowie Assistant Professor of Law, Harvard Law School June 30, 2021 Co-Chair Rodriguez, Co-Chair Bauer, and members of the Commission, thank you for inviting me to testify. You have asked for my opinion about the causes of the current public debate over reforming the Supreme Court of the United States, the competing arguments for and against reform at this time, and how the commission should evaluate those arguments. The cause of the current public debate over reforming the Supreme Court is longstanding: Americans rightfully hold democracy as our highest political ideal, yet the Supreme Court is an antidemocratic institution. The primary source of concern is judicial review, or the power of the Court to decline to enforce a federal law when a majority of the justices disagree with a majority of Congress about the law’s constitutionality.

I will focus on two arguments for reforming the Supreme Court, both of which object to the antidemocratic nature of judicial review. First, as a matter of historical practice, the Court has wielded an antidemocratic influence on American law, one that has undermined federal attempts to eliminate hierarchies of race, wealth, and status. Second, as a matter of political theory, the Court’s exercise of judicial review undermines the value that distinguishes democracy as an ideal form of government: its pursuit of political equality. Both arguments compete with counterarguments that judicial review is necessary to preserve the political equality of so-called discrete and insular minorities. But even accepting that the political equality of all Americans should be protected, the justification for judicial review is not persuasive as a matter of practice or theory. I believe you should evaluate the proposals for reforming the Supreme Court by asking whether they will make the United States more democratic. That is, you should ask whether the reforms will extend or protect the political equality of all Americans, so that each one of us possesses equal political and social standing to share in controlling our national community. You should advocate for reforms that will help bring democracy to our workplaces, our legislatures, and our fundamental law before we lose what democracy we have.

1. The cause of the current debate over reforming the Supreme Court Nearly two hundred years ago, when Alexis de Tocqueville described his observations of democracy in America, he observed that the United States had rejected monarchy but embraced aristocracy. “If you asked me where I place the American aristocracy, I would answer without hesitating,” he wrote: “The American aristocracy is at the lawyers’ bar and on the judges’ bench.”1 Even in the 1830s, Tocqueville observed that American jurists considered themselves a “privileged class among intelligent people” by virtue of “[t]he special knowledge that jurists acquire while studying the law.”2 When given the protection of “irremovability from office,” Tocqueville added, they held themselves in “an elevated position” and a “rank apart” from their peers.3 American jurists thought of themselves as belonging to a “superior political class and the most intellectual portion of society.”4 In the courtroom and outside of it, they held their own powers of political judgment above “a certain contempt for the judgment of the crowd.”5

For Tocqueville, this sense of aristocratic superiority was in tension with the rest of America’s democracy. Tocqueville admired democracy, which he defined by its pursuit of political equality.6 When Tocqueville compared white American men to the subjects of European monarchies, he praised how the Americans treated one another as political equals, and how they organized their legislatures around the idea that each person should be equally qualified to make decisions.7 Yet Tocqueville wrote that American judges opposed these “democratic instincts” with “their own aristocratic tendencies.”8 “Armed with the right of declaring laws unconstitutional, an American magistrate enters constantly into public affairs,” he wrote.9 “The more you think about what happens in the United States,” Tocqueville continued, “the more you feel persuaded that in this country the body of jurists forms the most powerful and, so to speak, the sole counterweight of democracy.”10 Even though all literate Americans could read and understand their Constitution, American judges treated the document as inscrutable to all but themselves. Like “the priests of Egypt,” they considered themselves “the sole interpreter of an occult science.”11 Even though American legislators were as capable as anyone else of evaluating which laws were consistent with constitutional values, American judges routinely translated political questions into judicial questions that they alone could answer.12 By disguising their own values in the purposefully arcane language of constitutional law, judges acted as if their “superstitious respect for what is old,” their “natural love of forms,” and their “great distaste for the actions of the multitude” were mandated not by themselves, but by constitutional text.

13 Tocqueville could not help but conclude that “in a society where jurists occupy without dispute the elevated position that [they claim] belongs to them naturally, their spirit will be eminently conservative and will show itself to be antidemocratic.”14 Tocqueville was an early observer of the antidemocratic nature of judicial review, which I’ll define here as the power of a federal court to decline to enforce a federal law when a majority of the court disagrees with a majority of Congress about the law’s constitutionality. (As I’ll discuss later, the power of a federal court to enforce federal law is different and raises fewer objections from democracy, even when the result invalidates a state law.) But Tocqueville was hardly the last critic to question whether judicial review belongs in a democracy. In the decades since his observations, the Supreme Court has invalidated dozens of federal laws designed to expand political equality. These include: - Dred Scott\* in 1857 (prohibiting Congress from banning the spread of slavery or extending citizenship rights to black people); - Cruikshank in 1876, Reese in 1876, Harris in 1883, and Giles\* in 1903 (restricting Congress from protecting voting rights from lynch mobs and state disenfranchisement); - The Civil Rights Cases in 1883 (restricting Congress from passing an antidiscrimination law); - Pollock in 1895 (restricting Congress from taxing income or wealth); - Hammer\* in 1918 and the Child Labor Tax Case in 1922 (prohibiting Congress from banning child labor); - Myers in 1926, Chadha in 1983, and Zivotofsky in 2015 (restricting Congress from regulating or supervising the president); - Buckley v. Valeo in 1976 and Citizens United in 2010 (restricting Congress from regulating campaign financing); - Adarand in 1995 (restricting Congress from enacting race-conscious remedies for racial discrimination); - City of Boerne in 1997 and Garrett in 2001 (restricting Congress from interpreting the Constitution to protect more civil rights than the Supreme Court is willing to protect); - Lopez in 1995, Printz in 1997, and Morrison in 2000 (restricting Congress from protecting the safety and civil rights of citizens); - NFIB in 2012 (restricting Congress from inducing states to expand health insurance coverage); and - Shelby County in 2013 (restricting Congress from protecting voting rights from discriminatory or disenfranchising state laws).

5 All but the starred decisions continue to restrict Congress’s constitutional power. Along with other exercises of judicial review, they have led modern observers to join Tocqueville in questioning whether judicial review serves political equality or whether it compromises it. The problem posed by judicial review is distinct from whether constitutional limits should be enforced; in each of the above cases, the president and majorities of Congress believed that their laws were constitutional. Instead, the problem posed by judicial review is whether the constitutional interpretation held by a majority of Supreme Court justices should be “superior” to the interpretations held by majorities of the other branches.15

2. Two arguments for reform The problem of judicial review takes two forms: a historical problem and a theoretical problem. a. History To illustrate the historical problem posed by judicial review, consider the Supreme Court’s relationship to America’s racial caste system. In one of the first cases to invalidate a major federal law, the Supreme Court held in the 1857 Dred Scott decision that the Constitution forbade Congress from restricting the spread of slavery—nor could Congress give black people rights of citizenship. 16 The reaction to the decision was so harsh that it helped precipitate the Civil War. In his inaugural address four years later, President Abraham Lincoln rejected the idea that the Court’s interpretation of the Constitution was superior to that of Congress. “If the policy of the Government upon vital questions . . . is to be irrevocably fixed by decisions of the Supreme Court,” Lincoln said, “the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.”17 15 Cf. James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129 (1893). 16 Dred Scott v. Sandford, 60 U.S. 393 (1857). 17 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3210 (James D. Richardson ed. 1897).

6 Congress followed Lincoln’s example by repudiating the Court within a year of Lincoln’s speech. In 1862, Congress passed a law abolishing slavery west of the Mississippi—precisely what the Court said Congress could not do.

18 Congress later extended citizenship to black people—even though the Court said that such an extension was constitutionally impossible.19 To ensure that the Court would never again interfere with its own interpretation of the Constitution, Congress also proposed the Fourteenth Amendment, which gave it the power to protect the civil rights of all Americans. By 1875, Congress passed laws to bring lynch mobs to justice, to protect the right of black men to vote, and even to ban racial discrimination in public places like hotels and train cars.20 Yet rather than learn humility from Dred Scott, the Supreme Court “deprived [this] enforcement legislation of nearly all its strength” in what W.E.B. Du Bois later called a “counter-revolution of property.”21 Most notably, in the 1883 Civil Rights Cases, the Supreme Court interpreted the constitutional amendments written by Congress and concluded that none of them empowered Congress to pass its antidiscrimination law. When Congress defended its antidiscrimination law as a logical response to its abolition of slavery, the Court replied that Congress was “running the slavery argument into the ground.”22And when Congress added that an antidiscrimination law was necessary to protect all citizens in their civil and legal rights, the Court held that Congress was unfairly treating black people as “the special favorite of the laws.”23 Southern states responded to these cases predictably. Even though black residents represented the majority of many southern states, white vigilantes violently intimidated black voters away from the polls.24 Once in control of state legislatures, these same white residents purged black voters from the 18 An Act to Secure Freedom to All Persons Within the Territories of the United States, ch. 112, 12 Stat. 432 (1862). 19 Civil Rights Act of 1866, ch. 31, 14 Stat. 27. 20 See, e.g., Civil Rights Act of 1875, ch. 114, 18 Stat. 335. 21 W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 690 (1935). 22 The Civil Rights Cases, 109 U.S. 3, 25 (1883).

23 Id. at 25.

24 ERIC FONER, THE SECOND FOUNDING 143–46 (2019).

7 rolls.25 They also enacted segregation laws to codify their racial hierarchy.

26 And when black residents invoked federal laws to challenge these actions, the Supreme Court dismissed the black residents’ concerns. For example, when white participants in Louisiana massacred dozens of black voters, the Court held that Congress had no power to punish lynch mobs.27 When Alabama adopted its 1901 constitution explicitly “to establish white supremacy in this State,” the Court held that the federal government was powerless to respond if “the great mass of the white population intends to keep the blacks from voting.”28 And when Louisiana required black residents to ride “equal but separate” train cars, the Court upheld the state’s law in 1896’s Plessy v. Ferguson.

29

This is a sorry legacy, one that might be better known today if not for the decision most often invoked in defense of judicial review: 1954’s Brown v. Board of Education. 30 After a generational change among Supreme Court personnel, Brown overruled Plessy and declared that racial segregation was “inherently unequal.”31 Since the 1950s, most American law professors have argued that Brown shows why the “counter-majoritarian difficulty” of judicial review is an essential feature of modern democracy.32 Absent judicial review, the argument goes, nothing would have stopped legislatures from entrenching America’s racial caste system permanently. But Brown is not an example of the Supreme Court disagreeing with Congress about the constitutionality of a federal law. To the contrary: the Brown Court enforced the Ku Klux Klan Act of 1871, one of the federal laws the Supreme Court had earlier gutted, but which nominally prohibited 25 Richard H. Pildes, Democracy, Anti-Democracy, and the Canon, 17 CONST. COMMENT. 295, 303–04 (2000). 26 STEVE LUXENBERG, SEPARATE 471–90 (2019). 27 United States v. Cruikshank, 92 U.S. 542 (1876). 28 Giles v. Harris, 189 U.S. 475, 488 (1903); see also Hunter v. Underwood, 471 U.S. 222, 229 (1985) (quoting the president of the convention). 29 Plessy v. Ferguson, 163 U.S. 537 (1896). 30 Brown v. Board of Education, 347 U.S. 483 (1954). 31 Id. at 495. 32 ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962); Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 YALE L.J. 153, 155 (2002).

8 southern states from discriminating against black people.33 (In a companion decision, Bolling v. Sharpe, the Court also ended segregation in the District of Columbia, but such segregation had not been the product of any congressional statute.34) What Brown actually illustrates is how federal legislation has successfully expanded American democracy when the Supreme Court has stopped interfering with Congress. As Michael Klarman has observed, southern schools remained almost as racially segregated in 1964 as they had been ten years earlier, when Brown was decided.35 Formal segregation drew to a close in the South only after Congress enacted the Civil Rights Act of 1964 and the Voting Rights Act of 1965.36 Yet both federal laws stood in the face of earlier Supreme Court precedents that restricted Congress’s power to protect civil rights and voting rights.37 Because the Supreme Court continued to hold itself as the supreme interpreter of the Constitution, it had to give Congress permission to evade the Court’s own bad precedents before Congress could codify multiracial democracy. Yet while the Supreme Court allowed Congress’s civil and voting rights acts to stand, it has abandoned its deferential posture since President Richard Nixon appointed four justices in the early 1970s. Just as the Civil Rights Cases invalidated the first federal antidiscrimination law in 1883, the Court prohibited Congress from enacting race-conscious remedies to racial discrimination in 1995.38 Indeed, the Court has since emphasized that the Civil Rights Cases remain good law, and therefore Congress has little power to interpret the scope of the Constitution to be more protective of civil rights than the Court’s restrictive interpretations. 39 In 2013’s Shelby 33 Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13; see United States v. Harris, 106 U.S. 629 (1883) (invalidating part of the Act). 34 Bolling v. Sharpe, 347 U.S. 497 (1954). 35 Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 VA. L. REV. 7, 9 (1994). 36 OWEN THOMPSON, SCHOOL DESEGREGATION AND BLACK TEACHER EMPLOYMENT 1, 2 (2019). 37 See South Carolina v. Katzenbach, 383 U.S. 301, 333 (1966) (citing Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45 (1959); Heart of Atl. Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (citing the Civil Rights Cases, 109 U.S. 3 (1883)). 38 Adarand Constructors v. Pena, 515 U.S. 200 (1995). 39 City of Boerne v. Flores, 521 U.S. 507, 524–25 (1997).

9 County decision, the Court applied this logic to invalidate a key section of the Voting Rights Act of 1965—the law that had finally enfranchised most of America’s adult population for the first time.40 And in Citizens United and related cases, the Court invalidated decades-old federal laws designed to prevent the wealthy from dominating national elections.41 As modern-day Tocquevilles have evaluated this history, it is understandable why some have reached the conclusion that judicial review of federal legislation is in dire need of restriction. 42 Indeed, once Brown and other cases enforcing federal law are removed from the equation, it is not clear whether there exists a strong historical counterargument demonstrating why judicial review is necessary. As alluded to above, the general argument for judicial review is that the intervention of federal courts may be necessary to protect political minorities from a dysfunctional political process (such as the system of racial apartheid that characterized the South between the Civil Rights Cases in 1883 and the decisions upholding the Civil Rights Act and Voting Rights Act almost a century later). Because the Supreme Court is insulated from partisan politics, the argument goes, the Court is in a strong institutional position to police “prejudice against discrete and insular minorities . . . , which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”43 This argument is strengthened, at least in theory, by the prospect that Congress might act rashly during wars and other national emergencies. Federal courts might 40 Shelby County v. Holder, 570 U.S. 529, 550–51 (2013); see Ellen D. Katz, Dismissing Deterrence, 127 HARV. L. REV. F. 248, 249 (2014) (“Immobilized by Shelby County, preclearance had been vulnerable to attack since 1997 when the Supreme Court decided City of Boerne v. Flores. That decision and its progeny demanded a far tighter connection between constitutional violations and congressionally crafted remedies than prior precedent had required.”) 41 Citizens United v. FEC, 558 U.S. 310 (2010); see Buckley v. Valeo, 424 U.S. 1 (1976). 42 See, e.g., Adrienne Stone, Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law, 60 U. TORONTO L. REV. 109 (2010); RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM (2007); JEREMY WALDRON, LAW AND DISAGREEMENT (1999); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); GIRARDEAU SPANN, RACE AGAINST THE COURT (1994). 43 United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

10 therefore ensure that Congress respects the same rights that it would be trusted to observe in peacetime. Yet if you look at the history of the judicial review of federal legislation, the principal “minority” most often protected by the Court is the wealthy.44 In contrast with electoral politics—where all citizens are formally equal in their possession of a single vote—wealthy litigants can muster the skills, time, money, influence, and capacity to challenge the same piece of legislation over and over again in court. 45 For example, in 1895’s Pollock v. Farmers’ Loan and Trust Co., the Court held after a series of challenges that Congress had no power to enact an income tax because such a tax would violate “one of the bulwarks of private rights and private property.”46 This decision remains a constitutional barrier to a twenty-first century wealth tax—not because such a wealth tax is good or bad policy, but because the late-nineteenth century Supreme Court disagreed with Congress about the tax’s constitutionality.47 By contrast, in cases in which Congress has harmed racial, religious, or ideological minorities, the Court has almost exclusively adopted a posture of deference. There is no question that Congress has adopted horrific legislation over the past 250 years. But there are few examples of the Supreme Court intervening in a timely fashion, as widespread popular prejudices against minorities are likely to be shared by a significant proportion of judges as well.48 For example, the Court has been silent at best when Congress and the president have violently dispossessed Native tribes,49 excluded Chinese immigrants, 50 persecuted political dissidents,51 withheld civil rights from U.S. citizens in territories,52 and banned Muslim 44 BELLAMY, supra note 42, at 40–44. 45 Id. 46 Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429, 583 (1895). 47 See Daniel Hemel & Rebecca Kysar, The Big Problem with Wealth Taxes, N.Y. TIMES (Nov. 7, 2019), https://www.nytimes.com/2019/11/07/opinion/wealth-taxconstitution.html. 48 BELLAMY, supra note 42, at 40–46. 49 Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). 50 Chinese Exclusion Case, 130 U.S. 581 (1889). 51 Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919). 52 Balzac v. Porto Rico, 258 U.S. 298 (1922).

11 refugees.53 Far from policing Congress during wartime emergencies, the Court has also allowed the federal government to round up whichever ethnic or religious groups they think are suspicious.54 When these false negatives are compared with the false positives of cases like Dred Scott and Shelby County, it becomes pretty evident that the Court is, at best, unreliable at protecting politically marginalized groups. 55 The best examples of judicial review working as anticipated by its proponents— true positives—are cases such as the 2013Windsor decision that invalidated the Defense of Marriage Act of 1996, 56 the 2008 Boumediene decision that guaranteed minimal due process protections for Guantanamo detainees,57 and decisions in the 1970s that prohibited Congress from “protecting” women by engaging in sex discrimination. 58 Comparing the United States with other established democracies also demonstrates that judicial review is not a necessary feature of modern democracy. Many countries with strong traditions of protecting civil rights—from the common-law United Kingdom and New Zealand to the civil-law Netherlands and Switzerland—do not permit courts to invalidate national legislation.59 These departures from the U.S. model have not resulted in societal collapse or widespread rights violations. To the contrary: the quality of debate in these nations’ legislatures “make nonsense of the claim that legislators are incapable of addressing such issues responsibly,” just as their legalization of rights like abortion and same-sex marriage “cast doubt on the familiar proposition that popular majorities will not uphold the rights of minorities.”60 By contrast, judicial review in the United States directly contributed to the rise of Jim Crow—a point that cannot be emphasized enough.

b. Theory Everything so far represents a historical case against judicial review. But as Tocqueville observed even before this history began, judicial review is also antidemocratic as a matter of theory. What has long characterized democracy as a distinct form of government is its pursuit of political equality.61 From classical Athens through the American Revolution, a democracy has been understood as a community of political equals.

62 In an ideal democracy, each and every member of the community, or demos, is treated as if they are equally qualified to make decisions about how the community will exercise its power, or kratos.

63 Indeed, the etymology of the term demos refers not only to the community as a whole, but also more particularly to the members of the community who are the most likely to be marginalized because of their lack of status, wealth, or education.64 In the eighteenth century, the pursuit of political equality formed the basis for the Declaration of Independence’s argument that “all men are created equal.” Such an argument rejects the alternative premise that some people are born to rule. In the nineteenth century, the pursuit of political equality formed the basis for Abraham Lincoln’s argument that the United States is a “government of the people, by the people, for the people.” Such an argument rejects the alternative premise that government should be the responsibility of Platonic guardians who claim superiority by virtue of their race, education, or expertise. In the twentieth century, the pursuit of political equality formed the basis for Barbara Jordan’s argument that the Constitution’s “We, the People” includes black women like her. And in the twenty-first century, the pursuit of political equality forms the basis for familiar democratic procedures such as popular voting, majority rule, elections, sortition, rotation in office, and deliberation. All of these methods of resolving disagreement treat all participants as equals, in contrast with hierarchical methods of resolving disagreement that privilege some people more than others.

66 The democratic conception of political equality is a relational theory of equality. In the words of philosopher Elizabeth Anderson, “democratic equality regards two people as equal when each accepts the obligation to justify their actions by principles acceptable to the other, and in which they take mutual consultation, reciprocation, and recognition for granted.”67 This idea gains its shape when it is contrasted with communities built around social hierarchies, like aristocracies or monarchies. Democratic advocates of political equality critique hierarchies of authority in which occupants of higher rank exercise arbitrary and unaccountable power over their inferiors.

68 They critique hierarchies of esteem in which occupants of higher rank extract tokens of deferential honor from those of lower rank, such as bowing, scraping, and other rituals of self-abasement.69 And they critique hierarchies of standing, in which the interests of those of higher rank count in the eyes of others, whereas the interest of inferiors do not.70 The political theorist Danielle Allen has interpreted the Declaration of Independence to make five distinct arguments about why the political equality of democracy is intrinsically and instrumentally preferable to institutions built around social hierarchy.71 First, political equality recognizes the profound lack of freedom someone experiences when they’re subject to the domination of a superior in a hierarchy. Second, it recognizes the moral entitlement of all people, no matter how wealthy or educated, to make political judgments. Third, it recognizes that the collective supply of knowledge in a community is improved when everyone contributes. Fourth, 66 See Albert Weale, Three Types of Majority Rule, 90 POLITICAL Q. 62, 65–66 (2019); WEALE, supra note 61, at 51–63; CARTLEDGE, supra note 64, at 309–11. 67 Elizabeth Anderson, What Is the Point of Equality, 109 ETHICS 287, 313–14 (1999). 68 ELIZABETH ANDERSON, PRIVATE GOVERNMENT 3–4 (2017). 69 Id. 70 Id. 71 DANIELLE ALLEN, OUR DECLARATION 268–69 (2014). 14

it recognizes that only relationships characterized by reciprocity can secure the conditions in which no one dominates anyone else. And fifth, it recognizes that such relationships are themselves secure only when everyone can participate in creating their community together.72 All five of these arguments for political equality challenge the legitimacy of judicial review.

i. Freedom as nondomination. — Consider first the Supreme Court’s domination of the American public, starting with our national legislature. Domination refers to the arbitrary power one person possesses over another’s choices—as when an employer has uncontrolled discretion to discipline a worker for expressing a political opinion.73 Advocates of democracy recognize that people who are dominated are not free in the sense that they cannot enact their own choices. To employ a metaphor used by the political theorist Phillip Pettit, the rider of a horse dominates the horse by controlling it with a bridle.74 Even when the rider gives the horse “free rein” and allows the horse to go where it pleases, the horse is not actually free. Instead, the rider remains in control at all times by wielding the “reserve power” to rein in the horse.75 Applying this metaphor to judicial review, the Court’s relationship to Congress is not that of an umpire overseeing a batter, but of a rider overseeing a horse. Most of the time, the Court gives Congress free rein to act as it pleases. But the Court remains in the saddle, ready to pull on the reins when Congress moves to disrupt hierarchies of wealth or status. Either way, as Abraham Lincoln feared, “the policy of the Government upon vital questions” is fixed not by any democratic process or even by the Constitution, but by “the decisions of the Supreme Court.” Even when the Court is permissive, Congress can make no law without the Court’s permission.

Since Marbury v. Madison, judges engaged in judicial review typically respond that they are merely interpreting the Constitution, not enforcing their own will. But this response “beg[s] the question-in-chief, which [is] not whether an act repugnant to the Constitution [sh]ould stand, but who should be empowered to decide that the act is repugnant.”76 Put in an extreme form, the question presented by judicial review is what should happen when the president, over five hundred members of Congress, and four justices of the Supreme Court interpret the Constitution to permit a particular law, yet five justices of the Court disagree and think the law is unconstitutional. This was the scenario in 2013, when the Supreme Court voted 5–4 to invalidate the Voting Rights Act of 1965—decades after an earlier Court first ratified it, and seven years after Congress and the president nearly unanimously reauthorized it.

Resolving this interpretive disagreement between the five justices and everyone else does not depend on what the Constitution actually says; all five hundred–plus people involved in the matter take an oath to support the Constitution.77 Nor can the disagreement be resolved by allowing everyone to follow their own interpretation; we all expect presidents, federal officials, and state officials to comply with federal law regardless of whether they personally believe the law is constitutional.78 Rather, resolving the disagreement depends on whether the will of the five justices should prevail over the will of their federal colleagues. That the five justices do prevail is evidence of domination: they hold the reins of power.79 What makes the Court’s domination arbitrary is that the justices themselves are unbridled. Federal laws stand and fall on the votes of nine unaccountable lawyers, all of whom are appointed for life because of their educational backgrounds and relationship to the governing elite. Where federal juries are disciplined by the democratic procedures of sortition and rotation in office, no similar procedure requires the justices to think of themselves as political equals with everyone else.80 And while later generations of Supreme Court justices can revisit and overrule any of their precedents by a 5–4 vote, Congress has the formal power to overrule exercises of judicial review only if two-thirds of both houses and three-quarters of the fifty states approve a constitutional amendment.

81 This is a stacked deck.82 What this means for those of us not in Congress is that the political choices available to us as a country depend not on our collective will, but on the will of people who hold their offices until they resign or die. This is precisely what the Declaration of Independence protested. As absurd as it was then for a continent to be perpetually governed by an island, it is equally absurd now for a nation of 300 million to be perpetually governed by five Harvard and Yale alumni. As we debate new legislation to expand the franchise and protect the right to vote, the threat of judicial invalidation has forced our elected representatives to lower their expectations about how democratic our nation can become. At the same time, the knowledge that the Court will step in encourages legislators to feel no responsibility for evaluating the constitutionality of their proposals on their own merits.83 In this respect, judicial review makes each of us less than equal and, therefore, less than free.

ii. Moral and epistemic equality. — This relates to the second and third arguments: judicial review violates the premise that we are all morally entitled to make political judgments and that we should all be able to contribute to our collective supply of knowledge. In a community of political equals, every person is presumed to be the best judge of their own happiness.84 Being subjected to an unwanted guardianship—having someone else make decisions for you—reflects a disastrous loss of moral standing.85 Because governments are essential for securing our happiness, it follows that we should presume that each of us is the best judge of how government affects our lives. Being subjected to rule by Platonic guardians implies that we lack the moral capacity to evaluate the ethical judgments involved in governance.86

This is not to reject the need for expertise. Even a community of political equals needs experts to provide advice about community decisions. As Plato argued in the Republic, passengers rely on the expertise of captains to navigate their vessels, while patients rely on the expertise of physicians to advise them on their health.87 But such expertise is no replacement for what John Dewey called the “immense intelligence” of the public: “The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied.”88 Or, to appropriate Plato’s metaphor, “When I charter a vessel or buy passage on one, I leave it to the captain, the expert, to navigate it— but I decide where I want to go, not the captain.”89 Moreover, the democratic ideal of political equality recognizes that expertise can mean little when it comes to ethical judgments about justice or how to make tradeoffs between competing normative values. As Elizabeth Anderson has written, expertise at resolving ethical or normative questions “must be demonstrated to the satisfaction of those who offer their support: they must be persuaded by arguments and evidence, not bullied into submission by those who claim epistemic superiority as a birthright.”90 The same is true for people who claim expertise by virtue of their race, their gender, their profession, or their educational background. It is a category error to ascribe cognitive authority to someone merely because of their dominant social status as opposed to the content of their contributions.91 The “We, the People,” that begins the Constitution recognizes the validity of this epistemic equality. All of us, as a people, are capable of evaluating the document and contributing to our collective knowledge about how to advance the priorities named in the preamble.

92 We can assess for ourselves not only whether a wealth tax, a healthcare law, a carbon tax, or any other legislation is compatible with the rest of the Constitution, but also, more importantly, whether such legislation is just or needed. So when the Supreme Court claims to be the supreme interpreter of the Constitution, the implication is there is something about the justices that make their interpretive or ethical judgment superior to that of everyone else. This implication is difficult to justify.

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### Judicial Self-Restraint CP

#### Judicial self-restraint is far preferable to external constraints

Gotham 20 – J.D., Georgetown University Law Center (expected May 2021)

Olivia Gotham, “Avoiding Institutional Corruption Through a Self-Regulating Federal Judiciary,” The Georgetown Journal of Legal Ethics, Vol. 33:517, 2020, https://www.law.georgetown.edu/legal-ethics-journal/wp-content/uploads/sites/24/2020/09/GT-GJLE200021.pdf

Introduction

The federal judiciary is largely a self-regulated institution, a point of controversy among Americans that has long sparked debate.1 The Constitution allows Congress to regulate the judiciary through the impeachment power,2 but otherwise protects judicial tenure during “good behavior” and prohibits Congress from lowering judges’ salaries.3 In addition to these constitutional provisions, federal judicial conduct is subject to a regulatory regime including a Code of Conduct promulgated by a body within the judiciary as well as Congressional statute, but this system allows for significant self-regulation and applies only to the lower federal courts.4 The Supreme Court lacks formal external regulation and considers formal internal judicial regulations like the Code of Conduct only guidelines for its purposes.5

Recent commentary has highlighted that self-regulation is inherently corrupting.6 This may particularly be the case in the context of the judiciary, an insular institution with lifetime tenure during good behavior.7 In order to maintain the integrity of judicial review, ensure judges conduct themselves properly, and promote judicial legitimacy in the eyes of the public, critics argue the federal judiciary should be regulated by a third party.8 Based on existing constitutional provisions and the concept of separation of powers, regulation by Congress, a coordinate political branch, seems an obvious choice. Recently, many debates have centered around the possibility of Congress increasing the number of Justices on the Supreme Court. Specifically, if a President from the American Democratic Party is elected in the United States 2020 election, some Democrats argue that a Democratic-majority Congress should work with the President to add seats to the Court in order to gain an ideologically sympathetic majority.9 By exercising its power to control the number of Justices on the Court, Congress would be expanding its direct regulation over the Court’s numbers, composition, and decisions. As this Note will discuss, Congress has a number of constitutional and statutory means at its disposal for increasing its ability to regulate judicial conduct, decision-making, and administrative processes, including court packing. However, this Note argues external regulation of the judiciary by a coordinate political branch beyond what the system currently allows is not desirable because political influence is more corrupting than the existing scheme of self-regulation. The judiciary should remain largely self-regulating in order to stay insulated from the negative consequences that could result from increased political regulation, particularly potential damage to individual rights and liberties.

Part I of this Note explains the American debate between a self-regulated judiciary and one externally regulated by a coordinate political branch. This section then discusses the means Congress has for extending its regulatory control over the judiciary. In light of relevant contemporary debates in American society, particular attention is given to the possibility of regulating the judiciary through increasing the number of Justices on the Supreme Court. Part II engages in a case study of Poland in order to illustrate the corrupting potential of judicial regulation by a coordinate political branch, using the impact on abortion access in Poland to demonstrate the danger such regulation may pose to individual rights and liberties. Finally, Part III draws on outcomes in Poland as well as elements of the American regulation debate to argue against increasing regulation of the judiciary by a coordinate political branch.

#### Even if judicial self-restraint isn’t perfect, it’s far preferable to external accountability

Gotham 20 – J.D., Georgetown University Law Center (expected May 2021)

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Conclusion

While leaving the judiciary to regulate itself has corrupting potential that concerns many Americans, external regulation by a coordinate political branch like Congress is actually cause for far greater concern. If political bodies increase their regulation of the judiciary’s conduct, processes, administration, funds, age limits, numbers, or ideological composition, the judiciary could become subject to the political preferences of those bodies and lose its independence.

Political control over the judiciary, particularly the Supreme Court, may seem attractive to some parties in some instances. This is especially the case for members of Congress’ majority party when a majority of Supreme Court Justices hold opposing ideological viewpoints. In these cases, political operators may sincerely believe that regulating the judiciary will work in service of the individual rights and liberties they value. However, political regulation can just as easily be abused by later actors and effect the restriction or elimination of those same rights and liberties. The fate of abortion access in Poland as a result of judicial regulation by a coordinate political branch demonstrates this risk. Furthermore, the corrupting potential of political regulation is not worth risking in light of the current system’s operation, especially considering the institutional accountability measures to which the judiciary is subject. Through constitutionally-imposed checks and balances and other regulatory powers the political branches have the option of using, the judiciary as an institution is kept within certain bounds even if regulation of individual judges and court functions are largely left to its own determination. Additionally, the possibility of authorized political intervention may also encourage the judiciary to self-regulate with greater care than it might if it was truly unchecked by any external source.163

Critics of judicial self-regulation and Democratic proponents of a 2020 court-packing scheme must consider the current system’s relative stability and the great risks that could result to individual rights and liberties if the judiciary were regulated by a coordinate political branch. In these circumstances, political regulation is likely to be far more corrupting of the judiciary as an institution than self-regulation currently is. The federal judiciary should continue to self-regulate in order to insulate itself from the negative and potentially long-lasting consequences of political influence.

#### Judicial Self-Restraint CP is an actual thing in the literature (it really happens, and is an opportunity cost usually adopted specifically to ward off the need for externally-imposed restraints):

Gerstein 24 – POLITICO’s Senior Legal Affairs Reporter.

Josh Gerstein, “Federal courts move against ‘judge-shopping’,” Politico, 03-12-2024, https://www.politico.com/news/2024/03/12/federal-courts-move-against-judge-shopping-00146594

A litigation tactic that has helped fuel a series of conservative victories in cases ranging from abortion to immigration to gun rights suffered a setback Tuesday after the federal judiciary’s policymaking body said it will require federal courts to take steps to combat so-called judge-shopping.

The move is aimed at reining in a growing practice of lawyers and interest groups — and even states — trying to guarantee that the lawsuits they file wind up in front of a judge they expect to be friendly to their arguments.

Liberal critics have howled with outrage in recent years as cases seeking to knock a key abortion drug off the market, to challenge Biden administration immigration policies and to nullify gun-safety regulations have all been filed in federal judicial divisions where conservatives knew the case was certain or highly likely to be assigned to particular staunchly conservative judges.

Now, judges themselves have moved to crack down on that tactic by adopting a new policy that mandates that all federal suits aimed at invalidating a national policy or statute or a state law or executive order be randomly assigned among judges throughout the judicial district where the case is filed.

“I’m really proud that we did this,” 6th Circuit Chief Judge Jeffrey Sutton said of the action taken Tuesday by the Judicial Conference of the United States, which sets policies for the federal judiciary.

The change means that challenges to state or federal government policies or laws filed in any of the nation’s 94 federal judicial districts will be subject to random assignment among all judges accepting civil cases in those districts, rather than being retained in the particular geographic division where they are filed and assigned only to the judge or judges in that division.

Speaking with reporters by videoconference after a Judicial Conference meeting in Washington, Sutton called the new policy “an elegant solution” to a problem he said was fueled by an increasing number of nationwide injunctions — orders in which a single federal judge blocks a policy across the country.

Justice Department officials over the last three administrations have complained that bids to knock federal policies out nationwide put the federal government at a disadvantage because of the phenomenon of judge-shopping and because multiple litigants could file suits in different venues with a single victory putting the challenged policy on ice nationally.

“The current issue relates to nationwide injunctions or statewide injunctions,” said Sutton, an appointee of President George W. Bush. “So, when it comes to those claims, it’s a little hard to say you need one division of one state to handle it since, by definition, it extends at a minimum throughout the state and possibly to the whole country.”

“The random case-assignment policy deters judge-shopping and the assignment of cases based on the perceived merits or abilities of a particular judge,” Judicial Conference secretary and District Court Judge Robert Conrad added in a statement announcing the change. “It promotes the impartiality of proceedings and bolsters public confidence in the federal Judiciary.”

The issue has drawn particular attention in Texas, where the state’s attorney general’s office and conservative activists have filed dozens of cases challenging Biden administration policies in divisions with few — or even just one — judge. One particular favorite of conservatives has been Judge Matthew Kacsmaryk, who sits in Amarillo, is the only judge in that division and was appointed by President Donald Trump.

Last April, Kacsmaryk — a former litigator for abortion-rights opponents — suspended the Food and Drug Administration’s approval of mifepristone, which is used for medication abortions. The action had the potential to knock the medicine off the market. An appeals court lifted part of that ruling, and the Supreme Court put the remainder on hold while it considers the case, set for argument March 26.

In 2021, Chief Justice John Roberts urged action to counter an effort to steer many of the country’s patent cases before a specific judge in Texas. Last year, Sen. Mazie Hirono (D-Hawaii) proposed legislation that would require challenges to national policies or federal laws be filed in Washington, D.C.

The Justice Department has sought changes of venue in some cases to protest what it considered unjustified moves to get cases before specific federal judges in Texas. A DOJ official also wrote to the Judicial Conference in December asking it to rein in judge-shopping.

Backers of so-called “single-judge divisions” have said they allow litigants to seek justice in or near their community, and that those interests are particularly acute in some large states like Texas. However, critics say recent cases have had tenuous connections to the places where they’re filed.

Liberal groups and Democratic officials in blue states also tried to seek favorable judges for their litigation against the Trump administration by often filing those cases in northern California or Brooklyn, where they were virtually certain to be assigned to appointees of Democratic presidents. However, taking that step could not typically guarantee a choice of a specific judge because those districts have larger numbers of judges in each division.

Sutton stressed that under the new policy individual litigants seeking relief solely for themselves could still ensure their cases are heard in a nearby courthouse. The judge also said videoconferencing has made it easier for lawyers and judges to conduct many sorts of proceedings remotely, lessening some of the impact of a case being assigned to a distant judge.

“Technology has changed some of the imperatives,” Sutton said.

#### Institutional mechanisms prevent rogue judges from causing jurisprudential harm

Grindrod 24 – Assistant Federal Public Defender, Eastern District of Virginia

Andrew W. Grindrod (J.D., University of Chicago Law School), “Bottom-Up Federal Sentencing Reform,” William and Mary Law Review, Volume 65, Iss. 4, Art. 3, March 2024, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=4018&context=wmlr

3. Entrusting Lower Courts with Too Much Power

Even if sentencing law renders district court reform efforts legal, there is still the question whether it is problematic from a structural standpoint to have trial judges engage in policy-based decisions (at least outside the context of the Guidelines). Structural concerns, however, are superficial. Although bottom-up reform requires trial judges to engage at a policy level, they do so in the context of an individual case and without purporting to label the policy they reject as illegal or improper in all cases.295 This limits the broader fallout from a single instance of bottom-up reform. The sentencing judge rejects a premise, a Guideline provision, or a theory of punishment based on engaged analysis.296 But she does not purport to hold the Guideline provision unconstitutional and certainly does not purport to enjoin the use of that provision in other cases.297 Thus, this use of lower court power does not present the concerns that accompany more wide-reaching exercises of that authority, such as the issuance of universal injunctions.298

Moreover, a central premise of the reform suggested in this Article is that district judges will be clear about what they are doing and why. Thus, if the Department of Justice disagrees with a district judge’s exercise of authority in a case, prosecutors can appeal and all interested parties will learn relatively quickly whether the district court’s approach constitutes an abuse of discretion.299 If federal sentencing law develops to cabin this kind of judicial engagement, district judges will be bound to adhere to that law.300 So, the problem of too much power amassing in the hands of district judges is modest in the first instance. And, if abused, such power will be short-lived.301

#### The court can voluntarily decline to review certain areas of law OR vote in a particular way to stave off high-profile controversy---this would provide a good functional limit to “judicial power” as an area because affirmatives would have to find “judicial review key” solvency deficits in response to these CPs.

Adam S. Chilton 18 Assistant Professor of Law and Walter Ma nder Research Scholar, The University of Chicago Law School, Courts’ Limited Ability to Protect Constitutional Rights, The University of Chicago Law Review [85:293, https://lawreview.uchicago.edu/publication/courts%E2%80%99-limited-ability-protect-constitutional-rights

B. Judicial Self-Restraint

Courts also have ways to steer clear of high-profile political confrontations in the first place. First, they can employ avoidance doctrines, such as “passive virtues” in the United States95 and the “margin of appreciation” doctrine developed by the European Court of Human Rights (ECtHR), which allow them to avoid highly charged political questions.96 Second, courts can delay the application of their decisions through the use of deferral techniques to avoid direct clashes with the political branches.97 This technique is commonly used by courts in many countries.98 In our case study on religious freedom in Russia, we found that one of the biggest victories for religious groups came when the constitutional court denied retroactive application of a law that would otherwise have revoked the registration of new religious groups.99 In this case, the Constitutional Court of Russia did not declare the law to be unconstitutional, but rather interpreted it to neutralize its most harmful effects. In the same vein, Professors Yonatan Lupu, Pierre Verdier, and Mila Versteeg show that national courts are more successful in enforcing the International Covenant on Civil and Political Rights (ICCPR) when they interpret domestic laws in line with the ICCPR than when they strike these laws entirely, exactly because the former allows courts to avoid high-profile political confrontations.100 These various forms of self-restraint may allow courts to build legitimacy so that they can occasionally spend their political capital on a particularly egregious violation. In some cases, such self-restraint is built into the constitution. Professor Stephen Gardbaum argued in favor of “weak-form” judicial review, such as the notwithstanding mechanism in Canada, whereby the legislature has the ability to override judicial rulings.101 According to Gardbaum, weak-form judicial review produces fruitful dialogue between the political and judicial branches, but ultimately leaves the final word on the constitution to the political branches, thereby preserving the long-term independence of the courts.102 He suggests that such weak forms are particularly desirable in new democracies that do not have a long tradition of judicial independence. Professor Mark Tushnet has similarly suggested that weak forms of judicial review are desirable in the enforcement of social rights, which is inherently more political in nature.103 In these cases, constitutional designers shelter courts from high-profile clashes with the political branches by giving the political branches the final say on the constitution. While these various techniques can ensure the independence of courts in the longer run, their usage implies that courts, in many cases, will steer clear from rendering high-profile decisions that enforce constitutional rights.

### Judicial Self Restraint CP---Change Jurisprudence

#### Judicial self-restraint in legal reasoning solves court reform without distortionary interference

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Andrew W. Grindrod (J.D., University of Chicago Law School), “Bottom-Up Federal Sentencing Reform,” William and Mary Law Review, Volume 65, Iss. 4, Art. 3, March 2024, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=4018&context=wmlr

Conclusion

Federal district judges possess the power to develop factual records exploring important foundational questions that lie at the heart of federal sentencing.313 Of course, the principle of party presentation will preclude district courts from reaching these questions unless criminal defense lawyers raise these arguments.314 But when foundational questions are presented by the parties and subjected to rigorous examination, judges may reach novel conclusions about how the statutory objectives of sentencing are best accomplished.315 They may reject Guideline provisions or depart from traditional assumptions about the relationship between imprisonment and the ultimate goals of sentencing.316 Such assessments will be subject to review only for abuse of discretion.317 These decisions may generate conflict in the lower courts, spur top-down reform proposals endorsing or rejecting those views, or merely contribute to the public debate over what the system is accomplishing by sending so many people to prison for so long. In some way, even small, these decisions have the capacity to reform federal sentencing from the bottom up.

### Judicial Self Restraint CP---Code of Conduct

#### Judicial self-restraint via a stricter code of conduct sufficiently restores court credibility

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Sam Berger and Danielle Root, “Structural Reforms to the Federal Judiciary,” Center for American Progress, May 2019, https://www.americanprogress.org/article/structural-reforms-federal-judiciary/

Expanding judicial ethics requirements and extend them to Supreme Court justices

The Judicial Conference of the United States, comprised of federal judges and headed by the chief justice of the Supreme Court, creates and periodically updates a code of conduct for U.S. judges.123 The code, which is not applicable to Supreme Court justices and is largely aspirational, includes general guidance on how federal judges should conduct themselves on and off the bench.124 It includes five ethical canons with which federal judges are expected to comply:

1. Judges should uphold the integrity and independence of the judiciary, including by conducting themselves honorably both personally and professionally.

2. Judges should avoid impropriety and the appearance of impropriety in all activities, including by avoiding conflicts of interest and membership in any group or organization “that practices invidious discrimination on the basis of race, sex, religion, or national origin.”

3. Judges should perform the duties of the office fairly, impartially, and diligently, requiring recusal when their impartiality “might reasonably be questioned.”

4. Judges may engage in extrajudicial activities that are consistent with the obligations of judicial office but may not participate in extrajudicial activities that interfere with their judicial duties or “reflect adversely on [their] impartiality.”

5. Judges should refrain from political activity, such as holding political office, publicly endorsing parties or candidates, or making speeches for political organizations or politicians.125

Each of the five ethical canons has subcanons providing additional guidance on judicial conduct. The Judicial Conference has additional requirements for judges receiving gifts or outside income.126 And the Ethics in Government Act of 1978 requires federal judges and Supreme Court justices to file annual financial disclosures.127

Enforcement mechanisms for ensuring compliance with these rules and obligations are limited. The Judicial Conduct and Disability Act allows individuals to file complaints against lower court judges for alleged unethical behavior.128 These complaints may be reviewed by a special committee of judges, but like the code of conduct, the law does not apply to Supreme Court justices.129

Congress also has the power to impeach federal judges for bad behavior.130 However, since 1800, only 15 federal judges have been removed by Congress through impeachment.131 The lack of standards and enforcement mechanisms for judicial ethics means that federal judges are largely responsible for policing themselves.

For instance, there is nothing stopping judges from accepting exorbitant speaking fees from corporations and interest groups with stakes in federal cases. In 2008, Supreme Court Justice Clarence Thomas accepted an all-expense-paid speaking engagement in Palm Springs, California, funded by the Federalist Society and Koch Industries.132 Two years later, Thomas ruled in favor of corporate interests, along with the other conservative justices in Citizens United v. FEC, which benefited the Koch brothers.133 Government watchdogs had urged Thomas to recuse himself from the case, but he refused.134

Similarly, corporate-funded interest groups are permitted to pay federal judges to attend seminars where they hear the industry perspective on issues facing the courts. Often, these are all-expense-paid trips to lavish resorts—extended free vacations. Like speaking fees, all-expense-paid trips can cloud judges’ judgement, particularly if the trip’s financiers come before their chambers. From 2004 to 2014, Justice Scalia took more than 250 trips that were paid for by various groups and individuals, including trips to Hawaii, Ireland, and Switzerland.135 Hefty speaking fees and all-expense-paid trips are an unsubtle attempt to make judges more amenable to the arguments that corporations and other moneyed interests make in court. As opined by law professor Stephen Gillers, “the greater the luxury, the greater the risk of public suspicion.”136

In reforming judicial ethics, it is of paramount importance that ethics requirements apply equally to Supreme Court justices and other federal judges.137 Chief Justice Roberts claims that ethics codes are not necessary for the Supreme Court because justices already voluntarily adhere to codes of conduct.138 But the above examples negate that argument. In addition to ensuring they apply to the Supreme Court, ethics requirements should be clearly specified and expanded upon.139

For instance, federal judges and justices could be banned from owning individual stocks or required to disclose private events they attend, as well as the name of the individual or entity responsible for financing their appearance and travel.140 Lavish all-expense-paid trips and speaking engagements could be banned, except for reasonable reimbursements for legitimate educational events. Alternatively, any judicial travel or speaking engagement funded by private entities could be subject to preapproval by a judicial ethics committee such as the one explored in the next section. Going further, Congress could ban judicial junkets and other gifts to sitting judges altogether. Imposing a binding code of ethics on the Supreme Court raises constitutional questions.141 However, some scholars have pointed to Congress’ ability to make other institutional changes, such as altering the court’s size, as evidence that codes of conduct are constitutional.142

Besides strengthening ethics standards for sitting judges, elected officials must pay more attention to the ethical and professional competency of judicial nominees. For instance, a number of federal judges nominated by President Trump have prior associations with the Alliance Defending Freedom, which the Southern Poverty Law Center has designated as an anti-LGBTQ hate group.143 Judges with ties to hate groups cannot be relied upon to render fair and impartial judgements in cases affecting historically underrepresented communities. Even if judges can separate themselves from personal biases, their association with such groups bring into question their objectivity—and, in turn, the legitimacy of their rulings.

Potential judges receiving “not qualified” ratings from the ABA’s standing committee on the federal judiciary should also have their nominations withdrawn or voted down.144 The ABA rating system considers a nominee’s integrity, professional competence, and judicial temperament and has been relied upon by presidents to varying degrees since the 1950s.145 Within just his first two years in office, President Trump has nominated six judges who received “not qualified” ratings by at least a majority of the ABA.146 Four of the judges were ultimately confirmed to the federal bench.147 ABA ratings provide the most basic assessment of a nominee’s ability to serve on the federal judiciary; a nominee who cannot meet the ABA’s baseline requirements does not merit confirmation.

Finally, no judicial nominee should be confirmed if an investigative panel concludes that ethics complaints made against them merit further review.148 In 2018, the Senate majority rushed to confirm Brett Kavanaugh while he was being reviewed by a judicial panel for 83 ethics complaints. Once Kavanaugh was appointed, the investigative panel was forced to dismiss all of the complaints because although they were deemed “serious,” the panel lacked statutory authority over Supreme Court justices.149

#### Counterplan solves court accountability and transparency when combined with effective enforcement mechanisms

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Sam Berger and Danielle Root, “Structural Reforms to the Federal Judiciary,” Center for American Progress, May 2019, https://www.americanprogress.org/article/structural-reforms-federal-judiciary/

Creating a panel responsible for enforcing recusals and other ethics requirements

Strong ethics requirements must be coupled with effective enforcement mechanisms. Enforcement is needed for recusals and to ensure compliance with other ethical requirements. Although judicial ethics urge judges to recuse themselves in certain cases, they currently cannot be forced to do so. The appeals process offers litigants one option for holding judges that refuse to recuse themselves accountable. In 2009, the U.S. Supreme Court reversed a decision by the Supreme Court of Appeals of West Virginia in Caperton v. A.T. Massey Coal Co. after one of the judges received a large campaign contribution from Massey’s CEO, ruling that the potential conflict of interest violated plaintiff party’s due process rights.150 Of course, this is not an option for the Supreme Court, whose decisions cannot be appealed. For the most part, recusals fall solely within judges’ discretion.

Lack of enforcement on recusals leads to failures of justice. In 2008, Judge Linda R. Reade, chief judge of the U.S. District Court for the Northern District of Iowa, oversaw the imprisonment of hundreds of undocumented immigrants in government and private detention centers following the raid of an Iowa slaughterhouse.151 The event raised suspicions once it was revealed that Reade’s husband owned stock in two of the country’s largest prison companies.152 Even worse was the fact that Reade’s husband bought additional stock in the two companies—collectively worth between $30,000 and $100,000—days before the raid, after Reade had already been notified that the raid would occur.153 By the time Reade’s husband sold the stocks a few months later, they were collectively worth between $65,000 and $150,000.154 It is hard to know whether Judge Reade’s advance knowledge of the raid was the impetus for her husband’s last-minute acquisition of additional stocks. Regardless, stories such as these damage the courts’ legitimacy.

Supreme Court justices have also refused to recuse themselves in important cases. In 2004, the Sierra Club sued then-Vice President Dick Cheney in Cheney v. United States District Court for the District of Columbia to access the records of a White House energy task force comprised of corporate lobbyists.155 Scalia, a close friend of Cheney, refused to recuse himself, suggesting that friendship was not grounds for recusal “where the personal fortune or the personal freedom of the friend” is not at issue.156 Although Cheney was not at risk of imprisonment or heavy fines, he had an undeniable stake in the case’s outcome. Scalia and the court ruled in Cheney’s interest.157

Beyond recusals, strong penalties must exist for violating ethics laws and codes of conduct. For example, Justice Clarence Thomas failed to disclose on his federal disclosure filings the six-figure salary his wife received from conservative groups such as the Heritage Foundation.158 The conservative organizations had stakes in several important cases before the Supreme Court, including those pertaining to the Affordable Care Act and Citizens United v. FEC.159 It is important that judges’ financial disclosures be complete and accurate so that litigants and the public are aware of potential conflicts. Other judges have gone against protocol by letting their political preferences be known or by making comments perceived as racist and sexist.160

One way to enforce recusals and other ethical requirements is to create a permanent independent panel tasked with investigating ethics complaints and taking disciplinary action. Complaints of judicial ethics violations would be automatically referred to the panel, which would have broad investigative power. The panel could be comprised of retired judges and those serving in senior status. Its members would be subject to strict recusal requirements if the subject of an investigation served as one of their clerks or if there were other social connections.

Some express concern that an independent panel of this kind would be unconstitutional under Article III, Section 1 of the Constitution.161 However, because the panel would not be able to overturn cases or order retrials, it would not endanger the Supreme Court’s core responsibilities. Establishing a panel of this type could significantly improve accountability and transparency in the judicial system.

#### Counterplan restores public faith in the courts without linking to the net benefits

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Sam Berger and Danielle Root, “Structural Reforms to the Federal Judiciary,” Center for American Progress, May 2019, https://www.americanprogress.org/article/structural-reforms-federal-judiciary/

Strengthening judicial accountability

In addition to reducing partisanship on the Supreme Court by changing its makeup, steps can be taken to ensure that the justices and other federal judges are less susceptible to special interest influence.

There is currently no binding code of conduct for Supreme Court justices.120 At the same time, the aspirational code applicable to other federal judges is inadequate. The absence of strong ethics requirements and enforcement mechanisms results in conflicts of interests being left unaddressed, leading to potential miscarriages of justice.

Federal judges have overseen cases in which they, their friends, or their family members stand to personally benefit.121 Others are wined and dined by wealthy corporations and special interests who come before the courts.122 That judicial decisions may be unduly influenced by conflicts of interest or personal prejudice is deeply problematic for anyone who values an impartial justice system. Even the mere appearance of impropriety is enough to raise significant concern. Instances of corruption or questions about a judge’s objectivity damages public faith in the third branch. Ethics reform is needed to ensure that judicial decision-making is based on law, not financial interests or personal relationships.

### Threaten CP

#### Threatening the court with structural reform incites moderation and restores court legitimacy but avoids the hardball DA

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Aaron Tang, “(Threaten) to Pack the Courts,” in “How to Fix the Supreme Court,” New York Times, 10-27-20, https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html

Calls by Democrats to expand the Supreme Court are certainly understandable. But they also carry risk. Republicans would surely retaliate at the next opportunity, escalating a destructive cycle of constitutional hardball.

That doesn’t mean Democrats should unilaterally disarm, however. It may sound counterintuitive, but serious threats to name more justices to the court could lead to a more moderate and legitimate court.

A credible threat to pack the court would create powerful incentives for the current justices to moderate their views on important issues and preserve the court’s credibility.

That is what happened in 1937, when President Franklin D. Roosevelt threatened to add six justices to neutralize the court’s conservative majority. Faced with the prospect of serving the rest of his career in the minority of a delegitimized court, Justice Owen Roberts became more restrained in his antagonism to the New Deal.

The path to a self-correcting court is steeper today than it was in 1937. Conservatives held a bare 5-4 majority then; with Amy Coney Barrett on the bench, two conservative justices would have to rein in their views. Moreover, today’s court faces a wider array of deeply divisive social and political controversies. How can the court decide these cases in a way that earns the public’s approval?

In a forthcoming law review article, I identify a promising approach supported by a surprisingly rich tradition of the court’s own precedents: In hard cases, rather than relying on theories like originalism or living constitutionalism, the court often rules against the side that has the strongest options for avoiding harm after defeat. By ensuring that the losing group can protect its interests in other ways, the court minimizes the harmful effects — and backlash — from its decisions. I call this approach the “least harm” principle.

Significantly, three of the court’s conservatives followed this very approach to decide some of the last term’s most important cases. Two of these decisions involved subpoenas seeking financial records about President Trump. Chief Justice John Roberts wrote them; he was joined by Justices Neil Gorsuch and Brett Kavanaugh.

The court ruled against the president in Trump v. Vance, permitting a New York prosecutor’s subpoena to proceed. It did so precisely because Mr. Trump could “avail himself of the same protections available to every other citizen” by challenging the subpoenas as overbroad or in bad faith.

By contrast, the court ruled in Mr. Trump’s favor in a second case involving subpoenas issued by the Democratic-controlled House of Representatives. Those subpoenas were challengeable, the court explained, to the extent that the House had better ways to obtain the information it needed, either from other sources or by subpoenas that were narrower in scope.

Justice Gorsuch’s landmark opinion protecting L.G.B.T. employees from discrimination also drew on the least harm principle by explaining that religious employers who oppose the ruling might avoid harm by seeking exemptions under the Religious Freedom Restoration Act or Free Exercise Clause.

And Chief Justice Roberts followed the same approach in the DACA case, which blocked the Trump administration’s attempt to end a program protecting roughly 700,000 young immigrants known as Dreamers from deportation. The court noted that the administration could try to rescind DACA again, so long as it offered a more well-reasoned explanation for doing so.

Each of these cases raised legal questions on which reasonable people disagreed. Given this uncertainty, the Supreme Court respectfully acknowledged each side’s interests and ruled against the group with the best strategies for minimizing harm from its loss — leaving the losing side little reason to assail the court.

No wonder, then, that the court concluded last term with its highest public approval rating in over a decade, including the narrowest partisan gap Gallup has ever recorded between Republicans (60 percent) and Democrats (56 percent). Each side’s losses felt temporary — and thus bearable — precisely because the court’s decisions reminded them that there were other ways to protect their interests.

Of course, progressives won’t win every case before a harm-minimizing Supreme Court. But the primary goal shouldn’t be liberal victory by any means necessary. That is the attitude that conservatives weaponized.

Instead, progressives should play the long game. By threatening to pack the court, they can put much-needed pressure on the conservative justices to moderate their views and to consider which side will suffer the least harm — and thus earn the public’s confidence.

If they don’t, there will be time to turn to other options.

#### Rather than implement an actual reform, Congress can threaten or seriously push for reform measures---the perceived fear of court reform will cause the court to moderate.

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After four congressional Democrats introduced a bill expanding the Supreme Court, Senate Minority Leader Mitch McConnell accused Democrats of trying to pressure the current Justices. “It’s not just about whether this insane bill becomes law. Part of the point here are the threats themselves,” said the Kentucky Republican who always evinces a tender concern for the sanctity of the Court. “The left wants a sword dangling over the Justices when they weigh the facts in every case.”

Well, yeah.

I agree with McConnell that packing the Court would be insane. Allowing one party to determine control of the Supreme Court whenever it controlled the White House and Senate would destroy the legitimacy of the entire judiciary, if not the underpinning of our constitutional government. Threatening to pack the Court, however, is perfectly sane, and may already be working. Count me in.

Prior ideologically driven attempts to either pack the Court or strip powers from the Court never became law. But they appear to have influenced Court behavior. As my colleague Daniel Block explained last fall, “In the mid-1950s, the liberal Warren Court backed away from protecting victims of McCarthyism because a popular Senate bill threatened to strip the Court’s powers. Throughout the 1970s and 1980s, conservative politicians flooded Congress with legislation to stop the Court from ruling on racial integration. The justices retreated from enforcing busing regulations.”

Franklin D. Roosevelt’s 1937 court-packing scheme came in response to rulings that shut down New Deal programs and curtailed federal government power. FDR’s bill was rejected by Congress—even though Democrats controlled 71 of 96 seats in the Senate. But after its introduction the Court began to uphold New Deal laws. Historians continue to debate whether FDR lost the battle but won the war. Understanding what happened then is instructive for determining how far Democrats should go today.

In the June 1936 Tipaldo case, decided on a 5-4 vote, the Supreme Court struck down a women’s minimum wage law in New York State. The decision was part of a long line of rulings based on the principle that employers and employees have the “freedom” to forge contracts, and any “[l]egislative abridgement of that freedom can only be justified by the existence of exceptional circumstances.”

Roosevelt announced his plan to expand the Court on Feb. 5, 1937. Fifty-two days after FDR’s move, the Supreme Court ruled in the Parrish case that Washington State’s minimum wage for women was constitutional. As the law was very similar to the one struck down nine months before, the ruling amounted to a complete reversal. Between the two cases, Justice Owen Roberts moved from the conservative to liberal position, a move that became known as the “switch in time that saved nine.”

Parrish was followed in April with the Court’s upholding of FDR’s National Labor Relations Act. Then in May, Social Security was also deemed constitutional. Even though in July the Senate sent the court-expansion bill back to committee, to be filleted, the Court was no longer an obstacle to the New Deal.

That chronology of events suggests FDR’s bill moved the Court. Roosevelt himself championed that narrative in an introduction to a volume of his public papers: “The Court began to interpret the Constitution instead of torturing it. It was still the same Court, with the same justices. No new appointments had been made. And yet, beginning shortly after the message of February 5, 1937, what a change!”

But FDR left out two key data points. One (most likely unbeknownst to FDR) is that Roberts executed his switch in December 1936—before FDR’s message. In a 1945 memo, Roberts explained that the December vote wasn’t immediately made public because one Justice was ill. The Court could have deadlocked 4-4 and still have upheld Washington State’s minimum wage law, because it would have left in place a lower court ruling, but the Justices knew their absent colleague would also support the law and they wanted a majority 5-4 vote.

We can say that FDR’s announcement did not pressure Roberts to switch, since the switch came first. What remains a source of scholarly debate is whether speculation in the press about a forthcoming court-packing plan, in the immediate aftermath of FDR’s landslide 1936 re-election win, nevertheless pressured Roberts to switch. If not, was there already evidence of doctrinal evolution by Roberts, and other Justices, in the midst of Depression and modernization, which culminated with the springtime 1937 liberal rulings? (For a deep dive into this debate, read this series of essays in the October 2005 edition of the American Historical Review.)

Roberts himself gives conflicting evidence. On one hand, he insisted in his 1945 memo (published posthumously 10 years later) that in the two minimum wage cases, he didn’t switch at all. He just wasn’t asked in Tipaldo, the first case, to overrule the 1923 Adkins opinion—which struck down a law passed by Congress establishing a minimum wage for Washington, D.C. But the second case, Parrish, did confront Adkins directly, and then Roberts made his view known. He admitted he could have taken the “proper course” and written his own concurring opinion for Tipaldo plainly stating his view, and neglected to give a reason why he didn’t.

FDR biographer Kenneth S. Davis, in FDR, Into the Storm 1937-1940, found Roberts’ belated explanation “disingenuous” and “desperately contrived … made solely for the purpose of protecting the Court against a probable attempt to drastically limit its powers.” And, as Block noted, Roberts acknowledged in congressional testimony that he was “fully conscious” of how the “court-packing plan” put “tremendous strain and threat to the existing Court.” Roberts didn’t say he switched because of that strain, but those dots seem very connected.

The other data point FDR left out of his narrative is the political damage he suffered as a result of his bill’s decisive rejection by the Senate. Many FDR allies in the chamber urged him to stand down after the switch, but he greedily persisted and paid a steep price.

In Roosevelt’s Purge, the historian Susan Dunn explained how the defeat emboldened the conservative anti-New Deal wing of the Democratic Party, mere months after Roosevelt’s historic 24-point election victory in 1936: “Gleefully, they banded together to sabotage the rest of the New Deal, voting down Roosevelt’s progressive tax measures, abolishing the graduated tax on capital gains, killing his proposal for seven regional agencies patterned after the TVA, tearing apart his executive reorganization plan and burying in committee his Fair Labor Standards Act.” Davis sharply concluded, “his sadly mistaken court-packing effort effectively ended the New Deal as a reforming, transforming social force[.]” FDR can’t cheerily claim he won the war for the Court, if in the process he lost the war for his agenda.

How should Democrats apply the FDR lessons? As the chess adage goes, “the threat is stronger than the execution.”

We can’t cleanly separate and sort out what factors influenced Roberts, but we do know that FDR’s announcement wasn’t one of them, because it was after the fact. Moreover, FDR’s proposal was immediately unpopular: 47 percent in favor, 53 percent opposed in an early March 1937 Gallup poll. After the “switch” became public, support further declined. Despite FDR’s electoral mandate, his attempted power grab depleted his strength. But beforehand, the landslide election and speculation over court-packing was likely helping to move the Court his way. If FDR hadn’t announced a specific proposal, he probably would have gotten the same results from the Supreme Court, without shattering his congressional coalition.

Today’s congressional Democratic leadership has kept their distance from the court-packing bill. Leaning on the President’s new blue ribbon commission exploring non-specific judicial reforms, House Speaker Nancy Pelosi said she has “no plans to bring [the bill] to the floor.” This is wise. FDR couldn’t move public opinion in favor of the bill, and he won his election by 20 more points than Biden. While there are far fewer conservative Democrats today than in 1937, a move to a floor vote could well have split the Democrats and harmed the rest of their agenda.

But McConnell is correct that the threat still looms—which is a good thing. What if the Supreme Court moved in a radical right-wing direction now that it has a 6-3 conservative majority? What kind of backlash would materialize? Could it lead to big Democratic gains in the upcoming elections and give Biden a greater mandate to pack the Court than FDR had? The conservative Justices can’t know for sure, and they may not want to test the proposition with a slew of provocative rulings.

John Roberts has shown for almost a decade that he’s happy to lead the march in a conservative direction, but not too quickly, avoiding some incendiary cases and defusing others—most notably, preserving Obamacare in 2012. This could explain why the Court has kept punting on the Mississippi 15-week abortion ban case. If the Court’s conservatives are ready to overturn Roe v. Wade, right now they would take the case. If they want to avoid needless divisiveness and protect their legitimacy, they will leave it alone.

So long as the latter strategy appears to be in effect, that strongly suggests the conservative Justices see the dangling sword. Biden, Pelosi and Schumer are wise to keep it sheathed, and keep them guessing.

#### Maintaining a credible threat of reform causes the courts to moderate

Block 20 (Daniel Block, executive editor of the Washington Monthly, The Case for Threatening the Courts, December, https://washingtonmonthly.com/magazine/november-december-2020/the-case-for-threatening-the-courts/, y2k)

Throughout modern U.S. history, the Supreme Court has proved susceptible to outside pressure. FDR’s proposal is just one of many successful institutional attacks. In the mid-1950s, the liberal Warren Court backed away from protecting victims of McCarthyism because a popular Senate bill threatened to strip the Court’s powers. Throughout the 1970s and ’80s, conservative politicians flooded Congress with legislation to stop the Court from ruling on racial integration. The justices retreated from enforcing busing regulations.

For Democrats worried about being railroaded by a 6–3 conservative bench, these conflicts should be instructive. In none of these instances did Congress or the president truly enact laws that changed the Court. In each of them, the Court changed anyway. These attacks can exact costs, as FDR discovered; his particularly aggressive push weakened his power within Congress. But they also have clear payoffs. Threats to expand, strip, or otherwise limit the Court—done with credibility—can influence judicial behavior.

“Historically, I think we have found that the Court gets the message,” Keith Whittington, a political scientist at Princeton University who studies the politics of the judiciary, told me. “When conservatives are pressing these types of bills, the Court becomes a little more conservative. When liberals are pressing these types of bills, the Court becomes a little more liberal.”

If Joe Biden takes office in January, he will confront a landscape not unlike the one FDR faced in 1937. Biden, like Roosevelt, will grapple with an economic downturn of historic dimensions. He’ll have won promising to enact a variety of sizable spending and welfare programs. In interviews, Biden has explicitly cited the Roosevelt presidency as a template.

But, much like FDR, Biden will have to contend with a Supreme Court stacked with six conservatives. For Roosevelt, these six men were perhaps his most powerful enemies. With large majorities in both the House and Senate, the president moved transformative economic legislation—from minimum wages to maximum hours—with remarkable ease, only to have it struck down by justices who didn’t abide by the bromide of not “legislating from the bench.” These activist rulings infuriated Roosevelt, who in 1935 declared that the Court was creating a “ ‘no-man’s-land’ where no government—state or federal—can function.” They also stirred up popular sentiment. Much like today, the Supreme Court hung over the 1936 presidential election.

FDR won that election with more than 60 percent of the vote. Emboldened, he decided to confront the Court. Within weeks of his inauguration, Roosevelt announced an initiative to add six justices to the body. The Supreme Court was furious. Privately, Chief Justice Charles Hughes remarked that the bill would “destroy the Court as

an institution.”

At first, the public was closely divided over Roosevelt’s plan, as was Congress. Republicans, southern conservatives, and some liberals came out against the idea. But Senate Majority Leader Joseph Robinson, who was promised a seat on the expanded bench, backed the president. After a fireside chat on March 8, so did a large plurality of Americans. “We cannot yield our constitutional destiny to the personal judgment of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present,” Roosevelt said.

As FDR spoke, the Court was preparing to rule on perhaps the biggest case of his tenure, National Labor Relations Board v. Jones & Laughlin Steel Corporation. The decision would determine the constitutionality of the National Labor Relations Act, landmark New Deal legislation that made it significantly easier to join and form a union. Legal observers widely expected that the act, like its predecessors, would fall. So did the president.

Instead, in mid-April, the Court upheld it in a 5–4 decision, with Hughes and Roberts in the majority. Almost immediately afterward, public support for adding justices dipped. Then, at the end of May, the Court upheld the creation of Social Security, again in a surprise 5–4 ruling. The plan grew even more unpopular. In a May 25 cartoon in the Rochester Times-Union, Roosevelt’s “Supreme Court Packing Case” was depicted as a large crate, collapsing as the Court’s various liberal decisions, each representing an underlying plank, toppled beneath it. By the end of July, FDR’s proposal was dead.

There’s a vigorous academic debate about the extent to which the Court’s pivot had to do with pressure from Roosevelt versus organic jurisprudential development. There’s no doubt that the Court’s constitutional doctrine was already evolving in ways that made siding with the president easier. The Court that had struck down child labor laws and FDR’s National Recovery Act was evolving into a body more deferential to Congress. But it’s hard to see how the swing justices couldn’t have been touched by Roosevelt’s attacks and the resulting public discourse. As The New Yorker sarcastically wrote in 1937, the only way the Supreme Court could not have been impacted was if its then-new building, completed in 1935, “has a soundproof room, to which the Justices retire to change their minds.”

Does that mean that if Democrats win in November, they could be equally effective by threatening to expand the size of the bench? There are reasons to be skeptical. If he wins, Biden will not enter the White House backed by more than 500 electoral votes. If Democrats control 52 Senate seats come 2021, they will consider it a roaring success. In 1937, the party held more than 70. (It’s also unclear if the Roberts Court will aggressively strike down Biden legislation.)

But some of the differences between Roosevelt’s era and today’s could actually work to the advantage of modern Democrats. In the 1930s, the Democratic Party was a sprawling entity, featuring both New Deal liberals and the southern right. The latter were some of the most tenacious opponents of court expansion. They included, for example, former Texas Congressman John Nance Garner—Roosevelt’s own vice president.

Today, the Democratic Party is far more unified. The southern conservative constituencies that once fought Roosevelt now almost all vote Republican. Unlike FDR’s vice president, Kamala Harris won’t go AWOL. She expressed openness to expanding the size of the Supreme Court during the Democratic primaries, well before the death of Ruth Bader Ginsburg led Biden to soften his opposition.

FDR was not the first person to intimidate the Supreme Court. In the Progressive Era, major politicians put forth all kinds of proposals to curb the power of a judiciary they viewed as in thrall to big businesses, from allowing voters to override Supreme Court decisions to making it easier to recall justices. None passed, but scholars believe that the clamor may have kept the Court from making it impossible for reformers to reshape economic power. They’re not alone in that assessment. “I may not know much about law,” President Theodore Roosevelt remarked in 1905, “but I do know that one can put the fear of God in judges.”

In the latter half of the 20th century, politicians toyed with more targeted attacks. According to Article III, Section 2 of the Constitution, the Supreme Court has appellate jurisdiction over all cases “with such exceptions, and under such regulations as the Congress shall make.” Conservative congressmen and senators seized on this language to propose bills that would “strip” the Court of its right to rule on racial integration. These bills, for the most part, went nowhere. But, much like FDR’s court-expansion attempt, they still made a difference. During the tenure of Chief Justice Warren Burger from 1969 to 1986, the justices kept careful track of “jurisdiction-stripping” legislation, circulating them to one another whenever they came up. Burger himself kept a file of all these proposals as they moved through Congress. In both the 1970s and 1980s, the Court retreated from many attempts to force integration, even as it gave a yellow light to affirmative action.

Part of that change, no doubt, stems from personnel; the Burger Court had more conservative membership than the Warren Court that preceded it. But academics argue that congressional pressure also had a clear role. In a memo to eight of the Court’s justices, for example, one law clerk noted that a major busing case had attracted great political and congressional controversy. He recommended that the judges deny a petition to hear it. They followed his advice.

“The clerk is writing for eight of the nine justices,” said Tom Clark, a political scientist at Emory University and the author of The Limits of Judicial Independence. “[It] tells me that the clerk was aware the justices would want to know that.”

During the tenure of Chief Justice Warren Burger from 1969 to 1986, the justices kept careful track of “jurisdiction-stripping” legislation, circulating them to one another whenever they came up.

It’s unclear exactly why John Roberts decided in 2012 to uphold the Affordable Care Act, but it’s entirely possible that his vote was one of institutional deference: He didn’t want to nullify a sitting president’s greatest accomplishment. And so far, under Donald Trump, Roberts has sided with liberals on a number of surprising occasions, including an abortion case. Perhaps that’s to keep the Court from being dragged into the country’s partisan slugfest. Perhaps, and relatedly, it’s because of Democrats’ heated rhetoric about the need to bend the judiciary.

“I think he takes those threats seriously,” Princeton’s Whittington said.

But once Amy Coney Barrett is confirmed (her nomination is pending as of this writing), Roberts will no longer be the Court’s swing justice. That title will instead likely belong to either Neil Gorsuch or Brett Kavanaugh. Both were elevated to their jobs by a conservative judicial movement increasingly incensed that the Supreme Court won’t tack further right, even though Republicans have appointed 12 of the last 16 justices. Barrett clerked for Antonin Scalia. With such a rock-solid conservative majority, this bench will be more hostile to liberal policies than the one that came before. Can we really expect it to show any restraint?

The behavior of some leading jurists suggests that the answer is no. In a speech before Notre Dame Law School (where Barrett used to teach), Attorney General Bill Barr summarized much of the legal right’s thinking in astonishingly blunt terms. “Militant secularists,” he warned, “seem to take a delight in compelling people to violate their conscience.” He cited as evidence a now-struck-down Affordable Care Act provision requiring that employers cover contraception.

On the other hand, many of the justices who fought Roosevelt’s New Deal had similarly apocalyptic visions. The sweeping programs FDR thought necessary for the economy were, to them, a tyrannical violation of the Constitution. Dissenting from a case that upheld Congress’s power to heavily regulate gold, four of the era’s justices declared that the government’s actions “annihilate its own obligations” and destroy “the very rights” the Constitution was supposed to protect. That passion didn’t stop two justices from bowing to popular reality. As Justice Owen Roberts said after Roosevelt’s reelection, “the Court took cognizance of the popular will.”

Today’s Chief Justice Roberts is also clearly concerned with the Court’s legitimacy and does not want it to be seen as a purely partisan body. And despite their impeccably conservative credentials, Kavanaugh and Gorsuch have both shown a willingness to break with orthodoxy on high-profile occasions—including, in the case of Gorsuch, a seismic expansion of LGBTQ rights.

Whether the Court can be pressured, then, may ultimately come down to just how much muscle Democrats are willing to employ. To truly constrain the Court, the party must, of course, win both the presidency and the Senate. But winning is not enough. They must be willing to credibly threaten the Court, something that requires a bold, unified front on the judiciary. Right now, such tenacity and unity are lacking. But that may well be changing. Senate Minority Leader Chuck Schumer, a procedural moderate, told reporters in late September that should Republicans fill Ginsburg’s seat, “nothing is off the table.” Biden, a former court-expansion opponent, now ducks court-expansion questions. Even Pennsylvania Senator Bob Casey, one of the only congressional Democrats who support overturning Roe v. Wade, told reporters he wants “to get through the election” before taking a stance.

Barrett’s confirmation is not the only thing radicalizing Democrats. Support for reining in the Supreme Court will become fevered if it actually strikes down, rather than “simply” menaces, cornerstone liberal policies. Not long after the election (and during whatever chaos comes next), the bench will hear its third challenge to the Affordable Care Act. If Democrats win the White House and Senate, and the Court still invalidates the ACA in the midst of a pandemic, the party of FDR may not be able to resist retaliatory measures. Biden famously called the act’s passage, which came while he was vice president, a “big fucking deal.” It is unlikely that he will let it go gentle into that good night.

Today’s justices, of course, know this. Like their counterparts in the 1930s, they do not exist in a soundproof room. If they nonetheless begin an aggressive assault on whatever New Deal–style social policies liberals enact—like a public health insurance option, major climate change legislation, or heavy regulations on internet giants—they will be wagering that Democrats are just full of hot air. They may well be right. The Court is generally more popular than Congress or the president, making attacks on it very risky. Even Roosevelt, operating at the peak of his powers, paid a political cost for battling the bench. Roosevelt’s plan helped save laws he had already passed. But it alienated many congressional Democrats, and his New Deal was effectively ended by the election of conservatives in 1938.

Nonetheless, modern Democrats cannot shy away from intimidation. The justices FDR confronted were almost all in their 70s; he might have been able to wait them out. Today’s conservatives are substantially younger. Barrett is 48, and if she’s confirmed and stays on the Court until Ginsburg’s age, she’ll be ruling until 2059. And as the 1970s showed, politicians don’t need to threaten the Court with expansion to get a response. Stripping legislation that limits the Court’s powers could also help Democrats send a powerful message. The party may not need to go as far as Roosevelt did to make their point.

But if they face serious defeat at the Court, they can learn from his resolve. “You’ve got to really rattle the saber,” Whittington said. “Then you get the justices to respond.”

#### Pressure gives ammunitions to the moderate wing of the court

McCarthy 22 (Andrew C. McCarthy is a senior fellow at National Review Institute, Biden's court-packing theater could tame the Supreme Court's conservatives, 4-14, https://thehill.com/opinion/judiciary/547782-bidens-court-packing-theater-could-tame-the-supreme-courts-conservatives, y2k)

These fraught confirmation battles have already influenced Chief Justice Roberts. He occasionally has joined with the court’s liberal bloc in big cases, other times used his power to assign opinions to ensure that potential conservative victories were as narrow as possible, and still other times influenced his court not to grant review of cases that presented controversial questions.

With the confirmation of Justice Amy Coney Barrett, Trump’s final appointee, the putative conservative majority is now stronger. This theoretically reduces Roberts’ influence — shifting the court’s “swing” hinge from Roberts to the more reliably conservative Justice Brett Kavanaugh.

Still, the court’s emerging center is a trio formed by Roberts, Kavanaugh and Justice Elena Kagan, an Obama appointee. Throughout the Trump years, Justice Kagan played her minority hand deftly. Biden’s commission, and the continued saber-rattling about drastically “reforming” the judiciary, aims to strengthen her position, as Roberts and — the left hopes — Kavanaugh become increasingly cautious.

#### Threat of packing solves

Kilgore 22 (Ed Kilgore, political columnist for New York magazine and the managing editor of the Democratic Strategist, Justice Breyer Is Missing the Point on Court Packing, 4-7,

https://nymag.com/intelligencer/2021/04/justice-breyer-court-packing.html, y2k)

The original “court-packing” initiative is a case in point. FDR’s 1937 proposal to expand the Supreme Court was wildly controversial, often spurned by conservative Democrats, and unsuccessful legislatively. It led to the creation of the bipartisan “conservative coalition” in Congress that halted New Deal experimentation despite continued Democratic control of Congress. But it also arguably produced the “switch in time that saved nine,” the flip-flop by Justice Owen Roberts that began to let FDR’s legislation stand against conservative judicial challenges that had led to the court-packing scheme to begin with. Some historians think there were other reasons for the Roberts “switch,” and there’s no question that the backlash was powerful. But the fact remains that the credible threat of “structural changes in the judiciary” served as a warning to judges that coequal branches of the federal government would not tolerate the kind of grossly political ideology that governed the Court for four decades prior to 1937, making progressive social and economic legislation virtually impossible.

Given the Court’s current 6-3 conservative majority, controlled by justices carefully vetted before confirmation to serve as loyal foot soldiers of the conservative movement, we could be in for a similar era of politicized jurisprudence (notwithstanding Chief Justice John Roberts’s own fears of the Court looking too “partisan”). If Justice Breyer wants to mitigate the damage to the judiciary’s reputation, he would do well to make sure that 6-3 majority doesn’t expand to 7-2 via his own failure to retire while there is a Democratic president and Senate to replace him.

### Change Laws CP

#### Simply amending the laws driving lack of trust in the court solves and avoids court disads

HLR 24 – Harvard Law Review

“Chapter Two: Reform Congress, Not the Court,” 137 Harv. L. Rev. 1653, April 2024, https://harvardlawreview.org/print/vol-137/reform-congress-not-the-court/

As a result, those seeking reform should focus on the heart of the issue: the legal texts themselves. Amending these texts would not only result in different substantive outcomes but would also preserve the judiciary’s integrity, independence, and legitimacy.

3. The Text Itself. — The good news for those unhappy with the Supreme Court’s interpretations of statutes and the Constitution is that the legal texts that the Justices are interpreting are not carved in stone. New statutes can be passed and old ones amended by congressional action and a presidential signature.134 The Constitution is (unsurprisingly) much harder to amend, requiring the support of two-thirds of each chamber of Congress and then three-fourths of state legislatures.135

Those seeking reform should focus their efforts on the legal texts at issue rather than the Supreme Court for two reasons. First, focusing on the underlying legal texts is directly responsive to the root of the dispute: How determinate are our legal texts? Congress cannot simply declare an answer to that question from on high. But Congress can change the texts that are being debated, making them either more or less determinate.136 Congress cannot dictate legal outcomes to the courts, but it can change the law.137 Judges are bound to follow those legal changes.138

Second, focusing reform efforts on the underlying legal texts allows those unhappy with recent Supreme Court rulings to change the law without hampering the independence of a distinct branch of government in the process. Both structurally reforming the Court and amending existing legal texts are political fixes. But there is a critical difference. Focusing reform efforts on the law itself — rather than on those who interpret the law — allows reformers to achieve all the same goals without infringing upon the independence of the judiciary. To return to the same Fourteenth Amendment example from section A, both (1) adding new Justices who share one’s views regarding that Amendment’s determinacy as it relates to, say, abortion, and (2) codifying the abortion right will reach the same real-world result: the right receives legal protection. But while the destination is the same (at least while that same political party remains in power), the journeys differ in critical respects. In the codification scenario, the Court would remain independent. Congress would engage in lawmaking. And — assuming Congress were to draft statutes anywhere close to as carefully as it has proven able139 — the determinacy dispute would be avoided altogether, as both sides of the dispute would agree on the meaning of clear text.140

### Congressional Reforms CP

#### Congressional reform like eliminating first-past-the-post and the filibuster solves comparatively better than court reform

HLR 24 – Harvard Law Review

“Chapter Two: Reform Congress, Not the Court,” 137 Harv. L. Rev. 1653, April 2024, https://harvardlawreview.org/print/vol-137/reform-congress-not-the-court/

Conclusion

Much like fish do not realize they are swimming in water,146 we do not appreciate how the weakness of Congress as an institution heightens the stakes of our disputes about legal determinacy. Renewed congressional capacity could blunt the salience of the Court’s internal disputes about determinacy. Consider the Court’s most controversial constitutional holdings as of late, relating to hot-button issues like abortion147 and gun control.148 Thanks to its Commerce Clause and Spending Clause powers, Congress remains capable of passing a good deal of national abortion legislation — on both the pro-life and the pro-choice sides of the ledger.149 And even as the Supreme Court grows more protective of Second Amendment rights150 — which elicits critiques of the Court, including from within,151 as gun violence spikes and mass shootings become an all-too-common facet of American life152 — some of the most effective gun violence–reduction tools lie within Congress’s power (and do not run afoul of the Second Amendment).153

Yet Congress has been rendered a dead letter thanks to a mix of partisanship and its own institutional rules. Reforming procedures like our first-past-the-post partisan primary structure and the de facto supermajority voting requirement of the Senate filibuster would do a great deal to open up space for citizens to achieve their policy objectives through congressional legislation — and thus take some pressure off the Supreme Court.154 The Court would no longer effectively have the final say on the political issues that matter the most. If citizens are displeased with a Court ruling on one issue or another, there would be a more fruitful response available than lambasting the Supreme Court: Congress could be called upon to author the necessary changes in the relevant law.

In short, citizens are directing their frustrations toward the wrong branch of government. The very fact that the Harvard Law Review’s Developments in the Law series this year is focused on Supreme Court reform, as opposed to congressional reform, is part and parcel of a recurring mistake: We can feel that something is off with our law and politics, but we are misdiagnosing the illness. As a result, our proposed cures are consistently off the mark. The Court is not the problem. Congress is. If Congress were revived, disputes about determinacy in our courts of law would persist, as they always have.155 But their real-world stakes would be lowered, and the undue strain on the Court would dissipate.

The Supreme Court does not need to be weakened. Congress needs to be strengthened.

#### Reforming Congress solves court legitimacy by reversing the current trend of court decisions as a final word on political controversies

HLR 24 – Harvard Law Review

“Chapter Two: Reform Congress, Not the Court,” 137 Harv. L. Rev. 1653, April 2024, https://harvardlawreview.org/print/vol-137/reform-congress-not-the-court/

Public approval of the Supreme Court has fallen to historic lows.1 The Court is not alone. Trust in government has collapsed.2 Only twenty-six percent of Americans have a favorable view of Congress.3 Four percent of Americans believe that our political system is working very well.4 Our body politic is not healthy, and we can feel it.

Something has got to give. But structurally reforming the Supreme Court is not that something. Institutions garner public trust when they perform a particular task and mold their members in the process.5 Institutions lose public trust when they are perceived as stepping outside their lane.6 The Supreme Court’s lane is law.7 The Court itself is cognizant of the fact that when a court of law plays politics, it loses public trust.8 Despite the precipitous drop in the Court’s public approval rating as of late, this Chapter argues that the Supreme Court has in fact stayed in its lane. In recent years, the Court has been engaged in interpretive bouts — as it always has been. Within the Court and the legal community more broadly, there exist long-running, good faith disagreements about how determinate our legal texts are. While the conservative majority on the Supreme Court today is more apt to interpret the Constitution as, in the words of then-Judge Kavanaugh, “a document of majestic specificity,”9 the Court’s critics have long read our Constitution as instead marked by what Justice Robert Jackson famously termed “majestic generalities.”10 The divide centers on how determinate a legal text the Constitution is. And these disputes are not confined to questions of constitutional law; they reappear in the context of statutory interpretation and administrative deference as well. This Chapter terms these disagreements “disputes about determinacy.”

But if the Court is staying within its lane as it fights the same old fights over legal determinacy, why has the public lost so much faith in it? Because as Congress fades from the policymaking scene, the Court’s legal rulings amount to the last word on the most politically salient issues of the day.11 “Congress has become a ‘parliament of pundits,’” incapable of legislating on what citizens care most about.12 Although Congress steps up to the legislative plate here and there to respond to crises13 and to authorize certain crucial government programs and activities,14 Congress has grown incapable of responding to the most politically salient issues of our time in the form of legislation.15 Meanwhile, as Congress lies dormant, the Court has grown less solicitous of the Executive’s attempts to leverage old statutes to resolve new social problems.16 As a result, when the Supreme Court hands down a constitutional holding or reverses executive action on issues like abortion, affirmative action, guns, gay rights, health care, student loan debt, and the like, the Court’s decision threatens to amount to the final word from the federal government not only regarding the concrete case or controversy at hand, but also regarding the relevant subject matter more broadly. Even if the Court’s conclusions are the product of good faith legal reasoning, Congress’s retreat from relevance leaves the Court as having occupied the field of politics.

In short, Congress’s fecklessness hurts the Court’s legitimacy and engenders public distrust in the Court because it leads the public to wrongly perceive the Court as having stepped outside its legal lane and into the realm of politics. This Chapter contends that such perceptions are misguided; the divides on the Court are fundamentally legal disputes — specifically, disputes about the determinacy of legal texts. Then, the Chapter explains why structurally reforming the Court will not help resolve those legal disputes or the crisis of confidence in the Court. Instead, reform advocates should direct their efforts toward strengthening Congress as an institution.

#### Congressional reform solves any reason for structural reforms like jurisdiction stripping but avoids the net benefits of court independence/legitimacy

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It is true that a structural reform like jurisdiction stripping could negate some of the determinacy debates simply by ensuring that the Court cannot decide questions in certain areas of law. This might even be viewed as a sort of democratic correction, allowing Congress more leeway to step up and legislate unchecked by judicial review. But this suggestion is susceptible to the same critique that can be leveled against this Chapter’s overarching point that Congress should be crafting legal texts to be more or less determinate: How reasonable is it to expect that our current Congress can actually strip jurisdiction and then legislate in that area? Perhaps not very. Thus, even if one is firmly committed to structurally reforming the Supreme Court in order to vest Congress with more authority to shape the meaning of arguably indeterminate legal texts, that would likely also require reforming and reinvigorating Congress. And those congressional reforms would likely obviate the need for Supreme Court reform (including stripping the Court of jurisdiction), as a functional Congress could simply alter the legal texts at the heart of the most contested determinacy debates. Crucially, making those alterations would not entail threatening the Court’s independence and legitimacy in the process. Before Congress strips another branch of power it has long held, Congress should first try passing substantive laws. That requires strengthening Congress as an institution. In short: before advocating that Congress play constitutional hardball,115 Americans should first reempower Congress to play ball at all.

## Neg---Link UQ

### No Court Reform Now

#### Court reform is dead---this assumes expanded Democratic seats.

Ford ’20 Nov 13, Matt Ford is a staff writer at The New Republic. “The Supreme Court Is in Charge Now” https://newrepublic.com/article/160178/supreme-court-biden-judicial-gridlock

After Ruth Bader Ginsburg’s death in September, liberals spent seven weeks before the presidential election discussing the merits of Supreme Court reform. Should Democrats respond to Amy Coney Barrett’s confirmation—and the GOP’s four-year campaign to reshape the federal courts—by adding more seats to the nation’s highest court? Should they adopt extraordinary measures like jurisdiction stripping to limit the conservative justices’ influence? In some ways, it was one of the most prominent policy debates of the general election. Then came Election Day. While Joe Biden managed to capture the presidency, Democrats saw their majority in the House of Representatives whittled down to a handful of seats. Democratic challengers toppled incumbent GOP senators in Arizona and Colorado but failed to secure toss-up seats in other states. Control of the Senate now hinges on two runoff races in Georgia in January, which Democrats would need to win to get a narrow 50–50 majority with Vice President-elect Kamala Harris as the tie-breaker. Even if that happens, however, court reform is effectively dead for the foreseeable future. Democrats would have had an uphill battle to pack the Supreme Court even with a substantial majority in the House and a few extra seats in the Senate; the current margins will make it impossible even if they secure control of the Senate.

#### Courts would invalidate it now.

LDAC 18 – Legislation Design and Advisory Committee.

Legislation Design and Advisory Committee, “Excluding or limiting the right to judicial review,” LDAC Annual Report, 2018, https://www.ldac.org.nz/guidelines/supplementary-materials/excluding-or-limiting-the-right-to-judicial-review/

Judicial review is the means by which courts fulfil their constitutional role of ensuring public powers are exercised in accordance with law. The possibility of judicial review provides incentive for decision-makers to take into account appropriate matters and follow proper process. Legislation removing the right to judicial review could be seen to immunise unlawful exercise of power from judicial scrutiny. For this reason, legislation attempting to oust judicial review is, in practice, narrowly interpreted by courts and rarely achieves its objective.\*

[Footnote]

\* Legislation Guidelines, chapter 28.1, “[b]ecause ouster clauses undermine fundamental principles of constitutional law, the courts give them a narrow interpretation to preserve their ability to review decisions in at least some circumstances. As a result, ouster clauses may not be fully effective even if included.”

[End FN]

### AT: Biden Reform Commission

#### Biden reform commission didn’t make any controversial recommendations and likely won’t be implemented by Biden or Congress.

Totenberg ’21 Nina, NPR Court Reporter, Dec 6, “Biden's Supreme Court commission steers clear of controversial issues in draft report” https://www.npr.org/2021/12/06/1061959400/bidens-supreme-court-commission-releases-draft-report

The Presidential Commission on the Supreme Court is to vote Tuesday on its final report and recommendations, but the panel steers clear of taking a position on many of the most controversial suggestions for changing the court. Still, the report states pretty unequivocally that Congress does have the power to enlarge the court, but it takes no position on doing so. On term limits, it seems to suggest that a constitutional amendment is likely necessary, and it points to the practical difficulties of implementing term limits at the same time that there are sitting justices with life terms on the court. The report does take positions on lesser topics, clearly endorsing at least an advisory code of ethics for the justices, advising changes in the management of the court's emergency docket, and recommending that all public audio of court arguments and opinion announcements be simultaneously released. This is a document that, according to those familiar with it, tries to put various proposals in context, for example, explaining the practical difficulties of implementing term limits, as well as the benefits. The report by the commission, which was established by President Biden to study what changes might be needed at the Supreme Court, is almost certain to face criticism from the right and the left. It likely won't please any of the major players in the debate over the court's make-up, how justices are picked and confirmed, and whether it is time to expand the number of justices or enact term limits. As the report noted in its executive summary: "Mirroring the broader public debate, there is profound disagreement among Commissioners on these issues." Rather, those familiar with the report say it is intended to provide a thorough history and context for debate on these topics. Biden set up the commission in April, keeping a campaign promise he made when repeatedly pressed on whether he would expand the Supreme Court to pack it with justices more aligned with his worldview. Candidate Biden said he opposed expanding the court but said he favored the kind of bipartisan commission that the White House set up. The commission, co-chaired by former White House counsel Bob Bauer and former Deputy Assistant Attorney General Cristina Rodríguez, includes legal and other scholars as well as former federal judges and practitioners who have appeared before the court; advocates for the reform of democratic institutions and of the administration of justice; and experts on constitutional law, history and political science. With 34 members, the panel is racially, ethnically and ideologically diverse. It is unclear whether and when Biden will act on the commission's recommendation. He would need congressional action to approve any changes to the nation's highest court, but lacks the numbers to bring about such change.

### AT: Jurisdiction Stripping

#### Jurisdiction stripping was invalidated

HLR 24 – Harvard Law Review.

Harvard Law Review, “Appalachian Voices v. United States Department of the Interior,” HLR Vol. 137, Issue 6, April 2024, https://harvardlawreview.org/print/vol-137/appalachian-voices-v-united-states-department-of-the-interior

^See, e.g., Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 896–97 (1984); Presidential Comm’n on the Sup. Ct. of the U.S., Final Report 156 (2021). Since the 1950s, Congress has regularly considered legislation that would prohibit the Supreme Court, the lower courts, or both from hearing cases on “hotly contested and politically salient constitutional issues.” Id. at 157. Only one of those proposals was enacted into law, and it was subsequently invalidated. Id.; see also Boumediene v. Bush, 553 U.S. 723, 792 (2008).

### AT: Patchak/Appalachian Voices/Mountain Valley Pipeline

#### Existing precedent is Neg. Any alleged thumpers aren’t actually thumpers at all. The plan would almost certainly get struck down by the Supreme Court on appeal. Durable fiat would preclude that, constituting a watershed both legally and politically.

HLR 24 – Harvard Law Review.

Harvard Law Review, “Appalachian Voices v. United States Department of the Interior,” HLR Vol. 137, Issue 6, April 2024, https://harvardlawreview.org/print/vol-137/appalachian-voices-v-united-states-department-of-the-interior

Jurisdiction stripping has long been controversial.1 And lately, it has taken on a renewed salience with political progressives calling to strip the federal courts of jurisdiction to rein in a perceived conservative judiciary.2 Article III of the U.S. Constitution vests the judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”3 This language has commonly been taken to allow Congress to vest the lower federal courts with narrower jurisdiction than what Article III would permit,4 though the extent of that power has not been fully adjudicated.5 There is generally a consensus that Congress can restrict the jurisdiction of federal courts over a particular matter.6 However, the power to strip jurisdiction over particular pending litigation is still a largely unsettled issue.7 Recently, in Appalachian Voices v. United States Department of the Interior,8 the Fourth Circuit held that a provision of the Fiscal Responsibility Act of 2023 9 had effectively stripped the court of authority to hear environmental groups’ pending challenges to the Mountain Valley Pipeline. The provision did so by stripping all courts of jurisdiction over challenges to the pipeline and vesting exclusive jurisdiction over all challenges to the jurisdiction-stripping provision with the D.C. Circuit.10 Because the panel failed to analyze the provision vesting exclusive jurisdiction with the D.C. Circuit as a jurisdiction-stripping provision, the court missed the opportunity to review the merits of section 324 and potentially obtain greater clarity from the Supreme Court in a confused area of law.

The Fourth Circuit granted the motions to dismiss.16 Writing for the unanimous panel, Judge Wynn first held as a threshold matter that the court had jurisdiction to determine its own jurisdiction over the underlying petitions.17 Proceeding from the threshold question, the panel further held that section 324 “eliminated [the court’s] jurisdiction over the underlying petitions in two ways.”18

First, section 324 ratified and approved all agency actions and approvals necessary for the completion of the Mountain Valley Pipeline “[n]otwithstanding any other provisions of law”19 and “supersed[ing] any other provision of law . . . that is inconsistent with the issuance of any . . . approval for the Mountain Valley Pipeline.”20 Because the agency actions challenged by the petitioners fell within the domain of section 324, Judge Wynn held that Congress had amended the legal standards governing the petitioners’ challenges.21 He wrote that “Congress has the power to ratify agency action”22 but can only do so by changing the underlying law rather than by “impermissibly tell[ing] this Court how to apply existing law.”23 Here, Congress had done the former. He concluded that, because the petitioners were challenging agency actions as inconsistent with prior statutes, but Congress had superseded those statutes by ratifying the agency actions, “there [was] no longer a live controversy and the underlying petitions [were] moot.”24

Second, section 324 stripped the court of jurisdiction over the underlying petitions by providing that “no court shall have jurisdiction to review any action taken by” specified agencies “that grants” any authorization or approval “necessary for the construction and initial operation at full capacity” of the pipeline, including “any lawsuit pending in a court as of the date of enactment of this section.”25 Judge Wynn acknowledged that while the Constitution undoubtedly grants Congress the power to limit the jurisdiction of the lower federal courts,26 “the exact confines of [that power] are still being debated, especially when it comes to jurisdiction-stripping efforts that appear to dictate the outcome of pending litigation.”27 The panel cited the divided Supreme Court opinion in Patchak v. Zinke28 for the proposition that the Court’s jurisprudence in this area is unclear.29

Although Judge Wynn seemed receptive to the petitioners’ argument that section 324(e) “‘manipulates’ jurisdiction to direct entry of judgment for a particular party . . . in pending litigation,”30 which at least four Justices found constitutionally questionable in Patchak,31 he concluded that the Fourth Circuit was not the court to consider these constitutional issues because section 324(e)(2) vested the D.C. Circuit with “original and exclusive jurisdiction over any claim alleging the invalidity” of section 324.32 Thus, the petitioners must bring these arguments in that court.33 Based on its conclusions that the Fourth Circuit lacked jurisdiction over the petitions, the panel granted the motions to dismiss.34

Judge Gregory concurred in the judgment but wrote separately to call attention to the novelty of the statutory scheme at work in section 324.35 While Judge Gregory agreed that the Fourth Circuit lacked jurisdiction over these cases and was obligated to dismiss them,36 he called section 324 a “mandate to enforce [Congress’s] will ‘without regard for [its] validity.’”37 Judge Gregory extolled the constitutional separation of powers as central to the American Republic38 and argued for safeguarding the judicial role from legislative encroachment.39 He also questioned whether section 324 was really a change in the law or rather an instruction that “‘the court must deny to itself the jurisdiction’ originally granted to it by Congress ‘because and only because its decision, in accordance with settled law,’ is averse to the Mountain Valley Pipeline and favorable to its opponents.”40 Judge Gregory concluded that “Section 324 is a blueprint for the construction of a natural gas pipeline by legislative fiat” and wondered if it was “a harbinger of erosion not just to the environment, but to our republic.”41

Judge Thacker concurred in the court’s conclusion that Congress had acted within its legislative authority when it enacted section 324 but wrote separately to highlight how “Congress’s use of its authority in [that] manner threatens to disturb the balance of power between co-equal branches of government.”42 Judge Thacker took issue with the fact that Congress, by restricting challenges to the constitutionality of section 324 to the jurisdiction of the D.C. Circuit, required the Fourth Circuit “to allow another co-equal court to answer questions central to [the Fourth Circuit’s] own jurisdictional inquiry.”43 She then accused Congress of denying the Fourth Circuit jurisdiction over this issue for the purpose of manipulating the outcome of the pending litigation.44 Judge Thacker questioned whether this case implied that a future Congress could, “with particular pending litigation in mind, strip a particular court of jurisdiction . . . when it disagrees politically with the view of the law that court has taken in the past” and further insulate that provision from judicial review by enacting a law like section 324(e).45 Finally, she bemoaned the lack of clear guidance from the Supreme Court on “where the line between legislative and judicial power lies” and called for “a firm limit on Congress’s intrusion into the judicial branch.”46

The provisions to ratify all agency actions and to strip all courts of jurisdiction in section 324(c) and section 324(e)(1) are closely analogous to the statute at issue in Patchak, which ratified all agency actions with regard to a parcel of land and stripped all courts of jurisdiction to challenge those actions.47 The Supreme Court upheld that statute, albeit with no clearly controlling opinion. However, the Fourth Circuit too quickly upheld the provision in section 324(e)(2) vesting the D.C. Circuit with exclusive jurisdiction of challenges to the statute without analyzing that provision under the same jurisdiction-stripping framework it used to analyze section 324(e)(1) in its dicta. Had the court done so, it may have caused the Supreme Court to clarify its fractured opinion in Patchak and establish a well-defined rule for jurisdiction stripping over pending litigation.

While the panel acknowledged that section 324(e)(2) was itself a jurisdiction-stripping provision, stripping the Fourth Circuit of jurisdiction to assess the validity of the rest of section 324,48 the panel neglected to evaluate section 324(e)(2)’s constitutionality in any meaningful way.49 Judge Wynn wrote that “[p]etitioners have pointed to no authority that prohibits Congress from vesting a particular court . . . with jurisdiction over a class of claims,”50 but the court failed to analyze the provision under the same test for jurisdiction stripping over pending litigation under which the panel previously analyzed section 324(e)(1). Section 324(e)(2) also extinguished the court’s jurisdiction over the pending litigation.51 Even though it was not directly analogous to the statute at issue in Patchak, section 324(e)(2) still should have been analyzed under the framework the Supreme Court used in that case.

The Supreme Court has previously articulated the limit to stripping jurisdiction over pending litigation as the point where Congress “usurp[s] a court’s power to interpret and apply the law to the [circumstances] before it.”52 The basic formulation is that Congress cannot pass a law that says in a case Smith v. Jones, “Smith wins.”53 Based on that formulation alone, it would appear that section 324 impermissibly usurped the court’s power by saying that “Mountain Valley Pipeline wins.” However, when presented with a case with remarkably similar statutory language in Patchak five years ago,54 the Supreme Court upheld it.55 In that case, Justice Thomas’s plurality opinion explained that Congress cannot dictate to courts how to apply existing law, but Congress can change the law governing pending cases.56 When Congress strips jurisdiction over pending litigation, it is just changing the underlying law: before, the court had jurisdiction; now, it does not.57 This does not violate Article III even if applying the change to pending suits “effectively ensures that one side wins.”58 Under that reasoning, even though section 324 has the practical effect of proclaiming, in the underlying petitions, “Mountain Valley Pipeline wins,” it is just a retroactive change in substantive law and thus within Congress’s prerogative.

The Patchak Court did not actually settle the question of permissible jurisdiction stripping, however, because five Justices did not conclude that the relevant statute permissibly stripped federal courts of jurisdiction. Justice Ginsburg, joined by Justice Sotomayor, concurred only in the judgment on the grounds that the statute reasserted the federal government’s sovereign immunity, not that it stripped jurisdiction of the federal courts.59 While Justice Ginsburg declined to reach the issue of jurisdiction stripping, Justice Sotomayor wrote separately to join the dissent’s conclusion that stripping jurisdiction over the underlying petitions would have been impermissible.60 While a four-Justice plurality held that the jurisdiction-stripping provision “changes the law,” the same number of Justices disagreed with that proposition entirely.61 Whatever the precedential value of Patchak,62 it certainly does not provide a clear rule for the limits of jurisdiction stripping.

Furthermore, the insulation created by section 324(e)(2) pushes this jurisdiction-stripping scheme beyond the statute in Patchak, which at least four Justices found to be of questionable constitutionality. After all, when read in its totality, the statute essentially says, “a) in Environmentalists v. Mountain Valley Pipeline, Mountain Valley Pipeline wins, b) no court can hear Environmentalists’ challenge to this statute, and c) only the D.C. Circuit can hear challenges to the legality of this provision.”63 Although the panel in Appalachian Voices ultimately decided it lacked jurisdiction on statutory grounds,64 the judges’ opinions highlighted that something seemed improper about the scheme in section 324 65 but that there was also no clearly established rule for the limits of legislative jurisdiction stripping.66 If given the opportunity to review section 324, perhaps the current Supreme Court would determine that its provisions pushing beyond Patchak reached those limits. Though the contours of the constitutional limit to permissible jurisdiction stripping, especially with regard to pending litigation, have not been well articulated, the thoroughness with which section 324 insulated the Mountain Valley Pipeline from judicial review may cross that ill-defined line.67

It is unlikely that the D.C. Circuit will have the opportunity to review section 324’s application to pending litigation under this framework. While it is true that new challenges to section 324 may be brought in the D.C. Circuit, the petitioners here do not have a right to appeal the Fourth Circuit’s decision in that forum. Furthermore, the only pending challenge to the Mountain Valley Pipeline in the D.C. Circuit filed before section 324’s passage68 is not expected to consider these issues.69 Any new challenges to the Mountain Valley Pipeline would not be able to challenge section 324’s application to pending litigation and thus would have to argue that Congress does not have the power to ratify agency actions, which is well settled to be within its legislative power.70

More clarity is needed from the Supreme Court as to what the limits of legislative jurisdiction stripping are, and the Fourth Circuit’s decision not to decide the merits of section 324 may have delayed that clarity. The lack of a well-defined rule for when and how Congress can restrict the jurisdiction of federal courts over pending litigation71 is particularly problematic at a time when calls to limit the jurisdiction of the courts are becoming more prevalent.72 By applying section 324(e)(2) without reviewing its constitutionality as a jurisdiction-stripping statute,73 the panel missed the opportunity to review section 324’s novel jurisdictional gamesmanship. Had the panel chosen to do so, the Supreme Court may have had to revisit Patchak and provide a definitive rule on this issue.

[Footnote 72]

^Progressives have most recently sought to use jurisdiction stripping to advance their political positions. See, e.g., Caroline Vakil, Ocasio-Cortez, Progressives Call on Schumer, Pelosi to Strip SCOTUS of Abortion Jurisdiction, The Hill (July 15, 2022, 4:02 PM), https://thehill.com/homenews/house/3561533-ocasio-cortez-progressives-call-on-schumer-pelosi-to-strip-scotus-of-abortion-jurisdiction [https://perma.cc/Y6G9-X3AJ]; Jamelle Bouie, Opinion, The Supreme Court Is the Final Word on Nothing, N.Y. Times (July 1, 2022), https://www.nytimes.com/2022/07/01/opinion/dobbs-roe-supreme-court.html [https://perma.cc/V6V7-MGCL]. However, it was not long ago that conservatives were the ones attempting to rein in what they saw as an activist Court. Adam Freedman, Congress Can and Should Return Jurisdiction over Marriage to the States, Nat’l Rev. (July 17, 2015, 6:35 PM), https://www.nationalreview.com/2015/07/obergefell-congress-same-sex-marriage-states [https://perma.cc/KG8K-YFQJ].

[End FN]

## Neg---DA

### Hardball DA

#### Fear of Republican re-packing is exactly why top Democrats aren’t advocating for court packing now

Feldman 20 – Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming

Stephen M. Feldman, “Court Packing Time? Supreme Court Legitimacy and Positivity Theory,” 68 Buff. L. Rev. 1519, 2020, https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=4892&context=buffalolawreview

Unquestionably, many judges, legal scholars, and other Americans still believe in a law-politics dichotomy—the idea that law and politics must remain separate and independent—rather than a law-politics dynamic.18 From this more traditional vantage, the justices must decide cases by neutrally applying the rule of law. Politics is a disease that threatens the health of the judicial process.19

[[Begin FN 19]]

19. Therefore, regardless of public perceptions of the Court, many commentators worry that court-packing will politicize the Court—by undermining the law-politics dichotomy—and therefore destroy the Court’s legitimacy (this legitimacy is legal or moral rather than sociological). See FALLON, supra note 12, at 22–24. Unsurprisingly, then, some Democrats nowadays worry that if they seize an opportunity to pack the Court, the Republicans will respond tit-for-tat, re-packing the Court with new conservative justices when they get the opportunity; once the Court is politicized, there will be no going back. See Daniel Epps & Ganesh Sitaraman, How to Save the Supreme Court, 129 YALE L.J. 148, 172 (2019); David E. Pozen, Hardball and/as Anti-Hardball, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 949, 950 (2019); Mark Tushnet, The Pirate’s Code: Constitutional Conventions in U.S. Constitutional Law, 45 PEPP. L. REV. 481, 499–502 (2018) (questioning the tit-for-tat reasoning). Joe Biden has opposed court-packing partly because of a concern that Republicans will respond in kind. Jordain Carney, Democrats Warn Biden Against Releasing SCOTUS List, THE HILL (June 12, 2020, 6:00 AM), https://thehillcom/homenews/senate/502380-democratswarn-biden-against-releasing-scotus-list. Bernie Sanders worried about the Republicans responding to Democratic court-packing tit-for-tat and delegitimizing the Court. Millhiser, supra note 10. Notice that if the Court decides cases pursuant to a law-politics dynamic—and the law-politics dichotomy is a myth—then the worry that court-packing will politicize the Court’s decisionmaking process is misplaced.

[[End FN 19]]

If politics infects a Supreme Court case, then the decision is tainted.20 Even so, an increasing number of legal scholars and political scientists have repudiated the law-politics dichotomy and have subscribed to some notion of a law-politics dynamic.21 They view the notion that the Court decides cases pursuant to pure law, bereft of politics, as a myth. Crucially, though, the reality of the law-politics dynamic in Supreme Court decision making does not lessen concerns about the Court’s sociological legitimacy. In other words, court-packing might still undermine the public’s faith in the Court, even if the law-politics dichotomy is a myth.

#### Disad’s never-ending impacts outweigh the aff’s time-limited advantages

Seligman 22 – Fellow, Constitutional Law Center, Stanford Law School

Matthew A. Seligman, “Court Packing, Senate Stonewalling, and the Constitutional Politics of Judicial Appointments Reform,” Arizona State Law Journal, 54:585, December 2022, https://arizonastatelawjournal.org/wp-content/uploads/2022/12/Seligman\_Publication.pdf

Declining to respond in kind to the Garland obstruction and Barrett confirmation may be a bitter pill for Democrats to swallow, but it is not prospective unilateral disarmament as long as the binding cooperative solution of a constitutional amendment is in place. Moreover, though the impact of the difference between a hypothetical Justice Garland and the actual Justice Gorsuch will last for decades, it will not last forever. By contrast, an escalating cycle of court packing and Senate stonewalling plausibly could. And, most importantly from the perspective of this Article’s analysis, in light of certain Republican retaliation there is no other realistic option that is superior to seeking to cooperate now.

#### Hardballing structurally turns the case while destroying the court in the process

Seligman 22 – Fellow, Constitutional Law Center, Stanford Law School

Matthew A. Seligman, “Court Packing, Senate Stonewalling, and the Constitutional Politics of Judicial Appointments Reform,” Arizona State Law Journal, 54:585, December 2022, https://arizonastatelawjournal.org/wp-content/uploads/2022/12/Seligman\_Publication.pdf

Finally, some may perceive a Democratic move to pack the Court or stonewall a future Republican nominee in the Senate as a warranted response to Republicans’ stonewalling of Judge Garland’s nomination on what they view as unprecedented obstructionist grounds along with the obviously hypocritical confirmation of Justice Barrett just days before the presidential election. Adding seats to the Supreme Court or future stonewalling of a Republican nominee could be viewed, in this framing, as a legitimate move to counteract the improper shift in the ideological balance of the Court that Republicans’ prior obstructionist move entailed. Whatever the justice or fairness of that response, however, it is unlikely to work. Republicans are certain to reject any framing that legitimates a single round of packing or stonewalling by Democrats, even (or especially) if it were to be followed by a proposed binding cooperative solution. Republicans would surely respond to a first round of court packing or a next round of Senate stonewalling by Democrats, however framed, with a round of re-packing or stonewalling— and thus begins the endless escalation. As a result, the only realistic options for Democrats are either (a) to pursue a binding cooperative solution without responding to the Garland obstruction and Barrett confirmation, or (b) to attempt to remedy that obstruction through packing, thereby initiating an escalating cycle that would undermine that attempted remedy by re-shifting the ideological balance back (and forth) and would cause much collateral damage besides.

#### Court reform causes political hardball that collapses constitutional democracy---the link is unique

Barnett 20 – Mr. Barnett is a professor at the Georgetown Law Center

Randy Barnett, “Keep the Courts the Same,” in “How to Fix the Supreme Court,” New York Times, 10-27-20, https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html

In the past two decades, both Republicans and Democrats have repudiated several important Senate norms governing “advise and consent” to judicial selection. First came the Senate Democrats’ widespread use of the filibuster to oppose President George W. Bush’s judicial nominations. When Republicans did the same to President Barack Obama’s judicial nominees, Democrats changed Senate rules by a simple majority, or what was called the “nuclear option” — itself a violation of a Senate norm — to abolish the filibuster for lower-court judges.

Then it was the Republicans’ turn to escalate. First, they denied Judge Merrick Garland of what had come to be a Senate norm in 20th century: a hearing and a vote on his Supreme Court nomination — leaving the seat open for 11 months. They then used the “nuclear option” procedure to end the filibuster for Supreme Court nominations.

Bad as these breaches to Senate norms have been, they did not alter our most fundamental constitutional norms. But this is not true of some proposals now being made by some Democrats, which could effectively change our form of government.

The norm against court packing

For over 150 years, the Supreme Court has consisted of nine justices, a number set by Congress. This norm of nine is supported by another that is more fundamental: the norm against changing the number of justices solely to achieve a partisan or ideological advantage. Violating this norm is called “court packing.”

When President Franklin Roosevelt proposed to expand the court to stop it from obstructing his political agenda, he was spurned by his own party, which held a huge majority in Congress. He ultimately achieved his aim by normal means: appointing eight new justices (and elevating one to chief justice) who shared his constitutional vision.

The aim of court packing, then and now, is to enlist the court as a politically partisan actor. Once packed, the court will let the partisan majorities in Congress that packed it exercise unconstitutional powers; and it will impose the ideological agenda of one party on states that are controlled by its rival.

But once the norm against court packing is gone, there is no limit on how often it will be used by each party when it controls both Congress and the presidency. If Democrats expand the number of justices in 2021, Republicans will do the same when they have the power.

The rulings of such a court would be rightly be perceived as entirely dependent on the will of the political branches. Once politicized in this way, it is hard to see how the perceived legitimacy the Supreme Court as a court of law could be sustained — or why a court so composed should have power to review the constitutionality of laws.

The norm of judicial independence

Supreme Court justices have always held their offices on “good behavior.” This means they can be removed only by impeachment in the House and conviction in the Senate, which has never happened.

From both the left and the right, we hear calls for “term limits” for justices. This should require a constitutional amendment, but some claim it can be accomplished legislatively by moving older justices to a form of “senior status” or by some other device.

Lifetime tenure serves the fundamental norm of judicial independence in many ways. For instance, justices do not concern themselves with life after being a justice. But if justices are demoted to judges, they will be more inclined to retire after their demotion. Without the norm of lifetime service, justices are more likely to rule in ways that will maximize their future employment prospects. Once again, this will decrease their independence and increase the political nature of their rulings, undermining the perceived legitimacy of the court.

The norm of bipartisanship in the Senate

Neither of these proposals is likely to be adopted without ending the norm that it takes 60 votes in the Senate to close debate on legislation. While the judicial filibuster is now gone forever, some form of supermajority requirement to end a filibuster of proposed legislation has remained a norm of the Senate for some two centuries. The legislative filibuster requires bipartisan agreement before major legislation can be passed. Ending it will lead to a fundamental change in the norm that the Senate provides a bipartisan check on the partisanship of the House of Representatives.

Taken together, the repudiation of these three constitutional norms strikes at the fundamental “checks and balances” that are a defining characteristic of our constitutional structure. Without them, we will have something approximating a parliamentary government — the political system favored by many academics over that provided by our Constitution.

The tit-for-tat violations of Senate norms that have led us to this point — bad as they have been — simply do not justify so sweeping a transformation of our form of government. At the least, such a change should be openly acknowledged and debated. We should not pretend that the way to preserve our constitutional norms is to destroy those that are the most precious.

And once these fundamental norms are abandoned for partisan advantage today, there is no natural stopping point. We simply cannot know what other of our most basic norms will then be called into question. As we have seen in countries such as Venezuela and Poland, that’s how constitutional norm destruction works. The United States is not immune from its effects.

Some people believe that the court already acts “politically,” so why not treat it as such? They may believe that our norms have already been busted beyond repair and that politics is already a brutish war of all-against-all.

But the reality is that things can quickly get much, much worse. Court packing and term limits for justices are just the first steps down a steep and slippery slope.

#### It turns discussions on all legal rights into a “free-for-all”

Sandefur 21 – vice president for litigation at the Goldwater Institute

Timothy Sandefur, “The Supreme Court Isn’t Broken,” Discourse, 12-1-21, https://www.discoursemagazine.com/politics/2021/12/01/the-supreme-court-isnt-broken/

What cannot be justified are politically motivated efforts to change the judiciary to obtain particular outcomes. Those who designed the checks and balances of our Constitution were determined to prove that the people can both create the law and also obey it. An independent judiciary is the key element of their solution to that problem—crucial for protecting the rights of those who lack the political influence to defend themselves at the ballot box. It is the feature that distinguishes our constitutional republic from the volatile majoritarianism that destroyed the democracies of ancient Greece. To rewrite the rules of our judiciary would reduce legal limits on the power of Congress and the president, rendering all legal rights insecure—particularly the rights of those who are already most vulnerable. That would transform our political system into a free-for-all in which nothing shields the individual from the power of political authorities. And that would effectively end the promise of our Constitution.

#### The ensuing political firestorm collapses the basic stability of democracy

Siegel 21 – David W. Ichel Professor of Law, Professor of Political Science, Duke Law School

Neil S. Siegel, “Written Statement of Neil S. Siegel,” Presidential Commission on the Supreme Court of the United States, Public Meeting on “Composition of the Supreme Court,” 7-20-21, https://www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf

Regardless, Court-packing remains an extreme act—a break-the-glass-and-pull-the-lever-only-in-case-of-emergency sort of act. Court-packing would significantly undermine the Court’s independence and, in almost all circumstances, risk its legal and public legitimacy. Undermining the Court’s legitimacy would in turn impair its ability to perform critical functions that no other governmental institution in the United States is likely to perform more effectively. Courtpacking should therefore be reserved for extreme situations, in which adding seats would respond to a previous instance of Court-packing, restore the Court’s legitimacy, or meet a national crisis more important than the Court’s legitimacy. And even when an extreme situation exists, Court-packing should be the last resort, not the first.

Current proposals to add seats to the Court are not advisable on good-government grounds. They are instead Court-packing plans. The strongest argument in favor of Courtpacking now is that it is justified by the stark politicization of the Supreme Court confirmation process by Senate Republicans that began with their refusal to consider the nomination of thenChief Judge Garland and that culminated with their confirmation of Justice Barrett. The conduct of Senate Republicans was indeed problematic for many of the same reasons that Court-packing is almost always problematic, but it is not clear why their conduct would potentially justify adding four seats, as opposed to two. Moreover, it is not clear that adding two seats would be a proportionate response to the actions of Senate Republicans given the different nature of Courtpacking and the greater magnitude of the harm it would likely do to the Court’s ability to perform its functions. Nor is the Court squandering its legitimacy. Nor is the country facing a crisis situation that might justify Court-packing. Even assuming for purposes of analysis that such a crisis exists, Congress has not first resorted to less-judicial-legitimacy-reducing means. That is, it has not legislated to advance its compelling interest and awaited the Court’s response to the legislation.

The recent conduct of Senate Republicans might justify the refusal of Senate Democrats to consider any Republican Supreme Court nominees in the years ahead. It might justify a decision of Senate Democrats to confirm a Democratic nominee just before a set of elections or even in the lame-duck session after them. Republican “constitutional hardball” also helps to explain current public consideration of Court-packing, including through the work of this Commission.3 But actually pulling the trigger and packing the Court would risk severe damage not just to the progressive Court that would presumably result, but to the progressive and conservative Courts of the future. It would also damage American politics by injecting threats or promises of Court-packing into each and election cycle, every and by unleashing subsequent rounds of Court-packing whenever the political opportunity arose.

The framework of analysis developed in this statement will not appeal to those who approach issues like Court-packing from the vantage point of the substantive rightness of their own political party on controversial questions of law and policy, and on the urgent need they perceive for their side to prevail on these questions. This statement instead aspires to offer a less politically charged framework for determining whether and when Court-packing would be justified, a framework that both political parties could use, even if they would disagree over how it should apply in situations such as the past several years of confirmation politics. This framework is offered in the conviction that the basic stability of American constitutional democracy is of immense social value; that restraints on partisanship, including self-restraints, are essential to maintaining the stability of this regime; and that extraordinary actions that undermine core structural values and institutions of government threaten its stability.

### Hardball DA---Court Packing Link

#### Packing ensures conservative retaliation that collapses court legitimacy

Millhiser 20 – senior correspondent at Vox, focusing on the Supreme Court

Ian Millhiser, “Bernie Sanders’s radical plan to fix the Supreme Court,” Vox, 2-11-20, https://www.vox.com/2020/2/11/21131583/bernie-sanders-supreme-court-rotation-lottery

Which brings us back to the proposal Sanders has already rejected: court-packing.

The downsides of court-packing are myriad. Sanders is right that it is likely to inspire retaliation — Republicans can add justices too if they regain control of Congress and the White House. And Sanders is also right that court-packing will tend to delegitimize the Supreme Court.

Red states are likely to engage in massive resistance against a Supreme Court packed with Democratic appointees. And, as the Jim Crow South’s massive resistance to Brown v. Board of Education (1954) demonstrates, such resistance can be very effective even when most of the country accepts the legitimacy of the Court.

But Republicans also believe that they won control of the Supreme Court fair and square, and are likely to treat any effort to strip away that control as illegitimate. If the Roberts Court overrules Roe v. Wade (1973), red states are likely to engage in massive resistance if Roe is reinstated by a packed Court. They are also likely to do the same if Roe is reinstated by a panel of liberal justices chosen by a lottery.

All of which is a long way to say that there probably isn’t any way to change the makeup of the Supreme Court that won’t be met with resistance. If Sanders believes that a lottery system is preferable to a packed Court on the merits, then he should push the policy that he believes to be best.

But he shouldn’t expect the same partisans who wouldn’t let President Obama appoint anyone at all to a Supreme Court vacancy to accept a new system where Republicans aren’t guaranteed control of the judiciary. One the Supreme Court becomes a partisan prize, it is devilishly hard to take that prize away from the party that captured it.

### Legal Spillover DA

#### Jurisdictional reforms undermine the basis for broad Article III authority and judicial review

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Ryan D. Doerfler and Samuel Moyn, “Democratizing the Supreme Court,” 109 CAL. L. REV. (forthcoming 2021), written 7-29-20, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3665032

2. Disempowering Reforms

Disempowering reforms are also contestable, legally speaking. Jurisdiction stripping is perhaps the most aggressive reform and famously raises numerous constitutional questions—questions that become more difficult the more comprehensive the strip. In particular, the Supreme Court has remarked repeatedly that “serious” concerns “would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”229 Such worries apply to specific constitutional issues, let alone to broad categories of claims.

Despite this controversy, stripping courts of jurisdiction, even over constitutional challenges, has strong textual footing. As numerous scholars have observed, Article III’s grant of authority to Congress to “make … Exceptions” to the Supreme Court’s appellate jurisdiction while at the same time placing the existing of “inferior” federal courts entirely within congressional control suggests that Congress enjoys sweeping authority concerning which cases federal courts are permitted to hear.230 And as to state courts, both the Supremacy Clause and the Necessary and Proper Clause appear to provide Congress substantial discretion there as well.231 Taken together, Christopher Sprigman argues that these features indicate the Constitution “gives to Congress the power to choose whether it must answer, in a particular instance, to judges or to voters,” relying in some instances on political rather than judicial checks to enforce constitutional constraints.232

Voting rules present different issues. Sachs, for instance, argues that a supermajority rule for constitutional invalidation would amount to Congress “pick[ing] and choos[ing] among different substantive holdings,” requiring a “supermajority to express one legal conclusion,” but allowing a “minority of Justices” to uphold another.233 Similarly, Evan Caminker worries that “Article III implicitly mandates that the Supreme Court decide cases by bare-majority rule.”234 And likewise, Epps and Sitaraman acknowledge that some read Article III as granting the Court exclusive or final authority to “decide how to resolve its own cases.”235

Jed Shugerman has offered the most comprehensive response to these objections. He begins by noting that the Court already makes various decision pursuant to non-majority rules—whether to grant certiorari, for example.236 In addition, Shugerman observes, Congress already exercises authority over how the Court operates, defining by statute, for example, how many justices constitute a quorum.237 Last, as to the concern about Congress dictating substantive holdings, Shugerman argues, channeling Frank Easterbrook,238 that a supermajority rule should be conceived as a constraint on the Court’s jurisdiction, depriving it of jurisdiction to pass on a constitutional question if only a bare majority of justices vote in favor of unconstitutionality.239

Finally, proposals for a legislative override raise fundamental questions about the constitutional basis of judicial review. In its weaker form, judicial override would amount to an assertion of constitutional departmentalism, respecting individual judicial judgments but reserving to Congress the right to interpret the Constitution independently. Departmentalism has a strong legal240 and historical241 pedigree. At the same time, this sort of limited override would leave the Supreme Court as the final arbiter on most constitutional matters, especially in areas such as climate change in which only a single judgment could substantially undermine federal policy.242 By contrast, allowing for legislative override that displaces or precludes future contrary judicial judgments requires, by definition, a rejection of what Mark Tushnet calls “strong-form” judicial review.243 It is widely (though not universally) accepted that the Constitution provides for that form of review with respect to individuals judgments, making displacement of judgments an uphill constitutional battle. 244 With respect to future contrary judgments, however, one could fashion a legislative override as a forward-looking strip of jurisdiction, depriving courts of the opportunity to issue analogous judgments going forward. Such an override would, of course, inherit the constitutional questions surrounding jurisdiction stripping more generally.245

#### Jurisdictional reforms spillover to Exceptions and Regulations Clause changes

Liebman and Ryan 98 – Professor of Law, Columbia University School of Law; Associate in Law, Columbia University School of Law

James S. Liebman and William F. Ryan, “Some Effectual Power: The Quantity and Quality of Decisionmaking Required of Article III Courts,” 98 COLUM. L. REV 696, 1998, https://scholarship.law.columbia.edu/faculty\_scholarship/121/

For some, the solution to Article III's riddle lies in the reference in its first sentence to "the judicial Power," although there is sharp disagreement over the phrase's meaning and its interchangeability, or not, with the word "jurisdiction." 39 This debate has shaded into another over the meaning of Section 2, Clause 1, which provides that "the judicial Power shall extend to" three categories of "Cases" and six categories of "Controversies," with "all" modifying only the first three "Cases" categories. Most importantly, does "extend to" mean "reach," in essence establishing a ceiling on the cases and controversies federal courts can hear, 40 or "be," establishing a floor as well as a ceiling? 41 Are "Cases" (meaning, for example, criminal and civil actions, thus perhaps explaining the use of "all" with "Cases") 42 different from "Controversies" (meaning, for example, only civil suits)? 43 Or does the use of the word "all" before "Cases" require that some federal court have authority to "decide finally" every lawsuit coming within that category of disputes? 44

Also hotly contested is the meaning of the second clause of Article III, Section 2, which lists categories of "Cases" in which the Supreme Court "shall have original Jurisdiction" and provides that, "in all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Does the Exceptions and Regulations Clause grant Congress plenary power over the scope of the Supreme Court's appellate jurisdiction, 45 or limit that power only by the proviso that the "Exceptions" not swallow the rule that the Court generally has jurisdiction in such cases? 46 Or is Congress's power to "except" limited to questions of fact, 47 or simply an authorization to Congress to reallocate "excepted" cases to the Supreme Court's original jurisdiction, 48 or to the lower federal courts' original or appellate jurisdiction, 49 while still requiring some federal judicial say in "all" such cases?

These "words and phrases" disputes pose a more fundamental question: To what source should we look for help in discerning the meaning of the disputed terms? References in the ratification debates - the preferred source of the Constitution's original meaning - are sparse and rarely interesting, 50 while mainly normative arguments reveal little more than how much is at stake in the debate. We accordingly turn to a different, surprisingly underutilized, source - the records of the Constitutional Convention. In using these records, we do not ignore the preference for original understanding over intent nor the risk posed by records meant to be kept secret, 51 nor do we even claim that the proceedings always provide a useful guide when no other is available. We do, however, conclude that the recorded deliberative process that produced the texts of Article III and the Supremacy Clause is an unusually authoritative (i.e., accurate and legitimate) source of the meaning of those texts.

#### Structural court reforms have legal spillover effects for Article III, the Appointments Clause, and/or the First Amendment

Doerfler and Moyn 20 – Professor of Law and Herbert and Marjorie Fried Research Scholar, University of Chicago Law School; Henry R. Luce Professor of Jurisprudence, Yale Law School and Professor of History, Yale University

Ryan D. Doerfler and Samuel Moyn, “Democratizing the Supreme Court,” 109 CAL. L. REV. (forthcoming 2021), written 7-29-20, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3665032

After court packing, the legality of personnel reforms gets murkier. Panel systems, for example, typically require individuals to be appointed both as a federal circuit court judge and as an associate justice. As Epps and Sitaraman concede, one could argue that such dual appointments would be unconstitutional, reasoning that both Article III214 and the Appointments Clause215 understand those two offices as distinct and so not to be combined or jointly held by some individual.216 Maybe more worrisome, transitioning to a panel system could be characterized as effectively removing sitting justices from office in violation of Article III.2

Term limits for Supreme Court justices are vulnerable to analogous objections. Imposing term limits on all federal judges would plainly require constitutional amendment. For the Supreme Court, the proposed workaround is for appointees to serve as active justices for a fixed term, after which those individuals would transition either to “senior” status, sitting only in event of recusal or temporary disability, or to acting as judges on the federal courts of appeals.218 The senior status proposal invites charges of effective removal from office. Rotating justices to circuit court judges is more promising (though not without concern219). And even that approach leaves the issue of sitting justices, who would either have to be removed without being “removed” or allowed to depart the Supreme Court over time.

Partisan balance reforms are open to challenge as well. Partisan balance is a familiar feature of agency design and has generally been upheld by courts, though we lack a definitive endorsement along the lines of Humphrey’s Executor.220 Partisan balance on courts, however, raises distinctive questions. For one, the Supreme Court is, unlike the Federal Elections Commission or the Securities and Exchange Commission, a creature of the Constitution,.221 suggesting that Congress may have less discretion in setting qualifications for the office of Supreme Court justice. More still, depending on the formulation, conditioning appointment to the Court upon the party affiliation of the appointee or the appointing President or on the approval of some congressional block222 would present either First Amendment223 or Appointments Clause concerns.224

Last, merit selection presents obvious Appointments Clause worries insofar as the recommendations of the selection committee are binding.225 Epps and Sitaraman cleverly try to avoid this worry by assigning appointment of a subset of justices to the other, regularly appointed justices, and then limiting the pool of potential additional justices to judges previously appointed to lower federal courts.226 In so doing, Epps and Sitaraman attempt to mirror the widely accepted practice of federal judges sitting “by designation” in different jurisdictions and at different levels of the judicial hierarchy.227 Even here, though, the Supreme Court’s current hostility to institutional innovation poses a serious challenge,228 as no lower court judge has ever sat by designation on the Supreme Court.

#### The link is unique and fiat causes it

Doerfler and Moyn 20 – Professor of Law and Herbert and Marjorie Fried Research Scholar, University of Chicago Law School; Henry R. Luce Professor of Jurisprudence, Yale Law School and Professor of History, Yale University

Ryan D. Doerfler and Samuel Moyn, “Democratizing the Supreme Court,” 109 CAL. L. REV. (forthcoming 2021), written 7-29-20, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3665032

\*\*\*Note: italics in original\*\*\*

In sum, both personnel and democratic reforms are vulnerable to constitutional objection. Few if any of those objections are knockdown, however, which is to say that both types of reform are, broadly speaking, legally plausible. To call both types of reform plausible, of course, is not to say that the current Court would rule in their favor. Especially given its hostility to institutional innovation, a Court protective of its present character and authority would be presumptively hostile most any [[sic]] of these proposals. As we see today, though, the Court is also acutely aware of its relative institutional power. Ultimately, then, whether any of these plausible *legal* theories would succeed likely depend upon the *political* support in their favor.

### Legal Spillover DA--- Constitutional Challenges Link

#### Stripping jurisdiction to hear constitutional challenges to state laws spills over to broader court packing/stripping efforts and Article III power by undermining the foundation of the essential functions theory that justifies SCOTUS review of constitutional challenges to state law

Dorf 18 – Robert S. Stevens Professor of Law, Cornell Law School

Michael C. Dorf, “Congressional Power to Strip State Courts of Jurisdiction,” 97 Texas Law Review 1, November 2018, https://core.ac.uk/download/pdf/250625676.pdf

D.

Thus we come to a category of jurisdiction stripping that warrants, but has not received, special attention. When Congress divests state (and federal) courts of jurisdiction to hear constitutional challenges to state (and local) laws (and policies), it acts beyond its enumerated powers. Because such a jurisdiction-stripping measure does not protect the jurisdiction of the lower federal courts, it cannot plausibly be described as necessary and proper to ordaining and establishing those courts-by contrast with the measures described in category A. And because constitutional challenges to state laws involve neither the application nor the validity of any federal statute, such a jurisdiction-stripping provision cannot plausibly be described as necessary and proper to the exercise of any federal power that could be said to warrant such a statute-by contrast with the measures described in categories B and C. As there is no other viable candidate for the affirmative power that Congress might be exercising in this fourth category, such laws are accordingly void.

This seemingly modest conclusion nonetheless has potentially important consequences because in modern times jurisdiction-stripping provisions have been most likely to be proposed for cases involving "cultural" issues-such as desegregation, abortion, the Pledge of Allegiance, and same-sex marriage 9 -where local regulations and state laws reflecting local, state, or regional cultural differences are more likely to resist national norms than are federal laws. To be sure, challenges to federal statutes on such issues also sometimes generate important constitutional decisions,"10 but the landmark rulings tend to come in cases that challenge state or local laws and policies." As Professor Michael Klarman has explained, the Supreme Court is less of a countermajoritarian institution than commonly assumed; rather, it tends to impose an emerging national consensus on laggard states and regions.12

Does the conclusion that Congress lacks the power to strip state courts of jurisdiction to entertain federal constitutional challenges to state laws really matter? One might think not. After all, the very forces that make the substantive laws of a state an outlier will likely be felt in the state's courts as well. Accordingly, the right to challenge a restrictive South Carolina abortion law only in the South Carolina courts or to challenge a restrictive Massachusetts gun-control law only in the Massachusetts courts may not be worth very much. Why should we care about Congress exceeding the bounds of its affirmative power by eliminating state court jurisdiction to hear federal constitutional challenges to state laws if state courts were not going to give a sympathetic hearing to such challenges anyway?

The short answer is that this objection is overstated. For one thing, state courts often take seriously their role as guarantors of federal constitutional rights, even in controversial cultural cases and even at potential professional cost to the state judges.' 3

Moreover, the limit identified here on Congress's affirmative power to strip state courts of jurisdiction to hear federal constitutional challenges interacts with other possible limits on jurisdiction stripping. As explained in greater detail below,1 4 the least controversial of the various theories that deny Congress an absolute power to strip federal courts of jurisdiction holds that the Supreme Court must retain so much of its power as to perform its essential role of ensuring the supremacy and uniformity of federal law." The so-called essential functions theory-which, by contrast with some of the more sweeping proposals for limits on congressional jurisdiction-stripping power, is not much embarrassed by the Judiciary Act of 1789-would require that the Supreme Court be permitted to review state court judgments rejecting constitutional challenges to state laws. Accordingly, the conclusion that Congress lacks the affirmative power to strip state (along with federal) courts of the power to hear federal constitutional challenges to state laws could have real and important consequences by preserving access to the U.S. Supreme Court for such challenges.

That conclusion could take on greater urgency in our current era of political polarization, because the norms that have generally stopped Congress from flexing its muscles under Article III have been breaking down. Consider court packing. Although scholars continue to debate whether the Supreme Court's so-called "switch in time" led to the defeat of President Roosevelt's court-packing plan,16 since that episode, most politicians have understood court packing to be beyond the pale. Lately, however, courtpacking proposals have emerged both from the right" and the left." Political actors who deem court packing thinkable will have little reason to hesitate to consider jurisdiction stripping as well. Tracing the outer limits on congressional power over the federal courts could well become an exercise with important practical consequences.

### Judicial Independence DA

#### Congressional interference represents an unprecedented, existential threat to the independence of the Article III courts---this is represents a “core” topic DA to any proposals that try to substantively reform the courts.

Ronald J. Krotoszynski 21 John S. Stone Chair, Director of Faculty Research & Professor of Law, University of Alabama School of Law, AGAINST CONGRESSIONAL CASE SNATCHING, 62 Wm. & Mary L. Rev. 791

B. Congressional Case Snatching Endangers Both the Independence and the Authority of the Article III Courts One could reasonably ask, "Why should we care if Congress intervenes in a case and prescribes a rule of decision that dictates a particular outcome in a pending case?" Does permitting Congress to intervene legislatively to make specific assets available to satisfy a judgment, 446 to prevent challenges to an administrative agency's decision to hold land in trust for the benefit of a Native American tribe who wished to operate a casino on the parcel, 447 or to permit a nervous litigant to remove a case from the Article III courts to an administrative agency 448 really present an existential threat to the independence of the Article III courts? At the risk of sounding unduly alarmist, we believe that the answer to this question is clearly yes. Considered individually and in isolation, the incursions that have occurred to date on the institutional power and authority of the federal courts might seem to be harmless - utterly picayune. Nevertheless, permitting Congress to usurp the constitutional authority of the federal courts in any fashion effectively opens the door to larger scale incursions on the independence and autonomy of the Article III courts. Judge Irving Kaufman, of the U.S. Court of Appeals for the Second Circuit, has observed that "the essence of judicial independence [consists of] the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality." 449He argued, with some force, that maintaining the independence of the federal courts requires that the federal courts resist "all significant intrusions upon the exercise of the judicial power." 450Kaufman insisted that "the ultimate power of decision, the judicial power of the United States, remain in the third branch." 451 These considerations, if applied to statutes that impose a rule of decision in a case sub judice in an Article III court, should require that such a law be held unconstitutional on separation of powers grounds. 452So too, a law that authorizes a disgruntled litigant to short circuit pending judicial proceedings by effectively transferring an outcome-determinative legal question pending before an Article III court to a federal administrative agency, removes the "ultimate power of decision" from the federal judiciary. 453 In both instances, the ultimate power of decision no longer rests with the federal courts - it instead rests with Congress (in circumstances such as those in Patchak and Bank Markazi) or with a federal administrative agency (in circumstances such as those in Oil States Energy).

#### Structural reforms imperil court independence and legitimacy by making judges susceptible to political retaliation---turns case

HLR 24 – Harvard Law Review

“Chapter Two: Reform Congress, Not the Court,” 137 Harv. L. Rev. 1653, April 2024, https://harvardlawreview.org/print/vol-137/reform-congress-not-the-court/

2. Structurally Reforming the Court Would Hamper the Court’s Independence and Set a Dangerous Precedent. — Imposing structural reforms on the Court like jurisdiction stripping and Court packing would hyperpoliticize an ostensibly apolitical branch of government, thereby further imperiling its legitimacy.116 The proposed reforms amount to attempts to change the way in which the Court currently analyzes legal questions so that it ultimately reaches different outcomes. The reforms would therefore function as a heavy thumb on the scale favoring the legal methodology that is preferred by the political party currently in power.117 Allowing the political branches to have this much control over the Court would destroy the Court’s independence and set a dangerous precedent: interpret legal texts as we see fit or there will be consequences. To be sure, the political branches are already able to promote their preferred legal ideology when they appoint new Justices to replace other Justices. But the process of replacing Justices does not serve to influence other Justices’ decisionmaking in the way that the specter of jurisdiction stripping or Court packing would.

By increasing political control over the Court, these reforms also risk making the Court appear even more political. In the words of Justice Breyer: “[S]tructural change represents a temptation better resisted. For if the public comes to see judges as merely ‘politicians in robes,’ its confidence in the courts, and in the rule of law itself, can only decline.”118 The more that politicians are seen as having sway over the Court’s decisions, the more the Court will look like it is composed of quasi politicians.

Some have argued that structurally reforming the Court is a reasonable response to the Senate’s inconsistent treatment of the Supreme Court nominations of then–Chief Judge Garland and then-Judge Barrett.119 Not so.

Our Constitution enshrines protections for federal judges so that they will not be unduly influenced by political considerations.120 Specifically, Article III provides that federal judges “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”121 This means that (1) federal judges can be removed from office only if they are impeached by the House of Representatives and convicted by the Senate, and (2) Congress cannot cut federal judges’ salaries. The purpose of these protections is to ensure that federal judges decide cases on the merits without fear of political retaliation.

Structurally reforming the Court to promote one judicial philosophy over another is the sort of political retaliation that Article III’s protections were meant to prevent.122 To be sure, the Constitution does not specify how many Justices should be on the Supreme Court. Congress has changed the size of the Court several times throughout history.123 And President Franklin D. Roosevelt famously sought to pack the Court before the “switch in time that saved nine.”124 But many of the early fluctuations in the size of the Supreme Court can be attributed to institutional concerns. For example, during the early years of the Court, each Justice “rode circuit” by serving as a judge on a lower federal court in different parts of the country.125 “In 1789, Congress created a six-member Supreme Court” — one Justice for each of the existing federal circuits.126 But as the country expanded, “it became clear that more judges were needed, particularly in newly admitted states such as Kentucky, Tennessee, and Ohio, and (later) Louisiana, Illinois, Alabama, and Missouri.”127 In response, Congress created a seventh federal circuit in 1807 and continued with an eighth and ninth in 1837.128 For each new circuit created, one additional Justice was added to the Supreme Court.129 These early expansions therefore served a practical purpose, ensuring that each federal circuit had a Supreme Court Justice.

This Chapter does not mean to suggest that previous structural reforms to the Court were completely apolitical. They were not. The reforms in the early 1800s may have been motivated by, first, the desire to prevent President Thomas Jefferson from appointing a Justice and then, second, by the desire to ensure that he could appoint a Justice.130 And Congress’s manipulation of the Court’s size after the Civil War and the assassination of President Lincoln may have been “an effort to restrict President [Andrew] Johnson’s power,”131 though it “may well . . . have been aimed mainly at producing a Court of more manageable size, evidently with the [J]ustices’ support.”132

This Chapter does mean to suggest, however, that structural reform should not be taken lightly. And here it should not be undertaken at all. Not only would it threaten the Court’s independence — the very independence that enables the Court to protect the individual rights our Constitution has placed “beyond the reach of majorities”133 — but it would also set a dangerous precedent: get with the program or else. The party in power would be able to effectively bend the Court to its will by adding new Justices or by stripping the Court of jurisdiction to hear certain cases. Once that party is voted out of office, the new party in power would follow suit. And so on.

Whichever side imposes the first structural reform will certainly enjoy an immediate victory. For example, suppose that Congress is upset with the Court, and so it creates several new seats to be filled by judges whose judicial philosophies seem to most align with the governing majority’s political objectives. That Congress will of course be happy when the newly constituted Court begins to issue rulings in line with its political objectives. But that happiness will be fleeting. Once control of the political branches inevitably switches hands, the other party will return the favor. The size of the Court will be changed to better suit that party’s desires, and any jurisdiction that was previously stripped will be restored. And around and around we will go. Although structurally reforming the Court might provide a brief but immediate boost for the party in power — something of a sugar high — it always will prove to be short-lived. The other side will enjoy their own sugar high soon enough, and we will be right back where we started: disputing the determinacy of legal texts.

#### Judicial independence is unbroken, but court reforms cause far-reaching and unforeseen consequences

Sachs 21 – Antonin Scalia Professor of Law, Harvard Law School

Stephen E. Sachs, “Closing Reflections on the Supreme Court and Constitutional Governance,” Presidential Commission on the Supreme Court of the United States, 7-20-21, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3889558

I am honored to testify before the Commission and to offer reflections on the Supreme Court and constitutional governance. In considering potential reforms, the Commission should take care to do the following:

• Preserve judicial independence. The courts’ job is to apply the law to cases before them. We rely on courts, not only to reach individual judgments of guilt or civil liability, but to enforce the limited powers of different governments and different branches. Correcting for judges’ errors, even serious ones, by shifting these powers to another department would not make that enforcement more reliable. But it would harm the courts’ ability to act as neutral tribunals in particular cases—a crucial element of the rule of law, and for that reason a frequent target of autocracies the world over. America has a nearly unbroken tradition of judicial independence, and we should not break it today.

• Put politics in its place. If you want a less political judiciary, you need a more political amendment process. You need to move political fights out of judicial conference rooms and into the statehouses and the halls of Congress. A “court reform” that ignores Article V is reform only in name—because a Court that practices constitutional amendment on the cheap, evading the Constitution in the guise of interpreting it, will forever be a target for partisan capture.

• Beware unforeseen consequences. It is much harder to build than to destroy. Traditions of judicial independence built up over time can be demolished rather quickly, and many proposed reforms would have consequences far beyond what we expect. These might include:

o measures that are likely unconstitutional absent amendment, such as supermajority requirements or 18-year terms;

o measures that would be constitutional but dangerous and irresponsible, such as court-packing or jurisdiction-stripping;

o measures that would be lawful but unwise, such as cameras in the Court.

The Commission’s greatest contribution might be to raise the profile of smaller-bore reforms, whose consequences can be better assessed (and, if necessary, more easily reversed).

There is much that could be improved about the Supreme Court. Over the last century, the Justices have too often mistaken their own rulings for the law they are charged to enforce. But these problems are not yet matters of universal agreement, and they can only be solved by the slow work of persuading others. There are no drastic policy changes that would avoid the need for this work, and there is no sudden crisis that calls out for major reform. Rather, the Commission’s first rule should be to do no harm.

#### Judicial independence is key to democracy and rule of law

Aldana 24 – president of the National Judicial College; former chief trial judge of the U.S. Coast Guard

Benes Z. Aldana, “Judicial Independence Is Imperative This Election Year,” Law360, 3-21-24, https://www.law360.com/immigration/articles/1815298/judicial-independence-is-imperative-this-election-year

In the ever-evolving landscape of American politics, an independent judiciary remains vital to the functioning of our democracy.

As our nation prepares for the upcoming trials involving former President Donald Trump, the role of judges in those trials is becoming more precarious, especially because the trials are now likely to take place within weeks — possibly days — of the election. Emotions among voters will likely be at their highest.

It is imperative that we recognize the importance of keeping judges out of the political fray and ensure that they can perform their duties without the shadow of violence or threats looming over them.

The principle of judicial independence is the cornerstone upon which our legal system rests. It means judges must be free and safe to make decisions based solely on the merits of the cases before them — and that they actually do so.

This judicial independence is at risk when judges are intimidated by the threat of violence, including by some supporters of Trump.

For instance, last year, after special counsel Jack Smith indicted the former president for election subversion, Trump took to his Truth Social platform to promise, "If you go after me, I'm coming after you!"

The next day a woman left a message on the voicemail of U.S. District Judge Tanya Chutkan, a Black woman who is the federal judge assigned to the case in the U.S. District Court for the District of Columbia.[1] The caller used a racist slur and said, "If Trump doesn't get elected in 2024, we are coming to kill you. So tread lightly, b----."

The caller was arrested. But as most people know, the candidate she apparently favors, who has called Judge Chutkan a "biased, Trump-hating judge," without offering any evidence of that accusation, has not been arrested.

Obviously, threats like this can erode judicial independence because judges may feel forced to choose between faithfully discharging the duties of their job, or protecting their safety and that of their families.

Judges must be shielded not only from threats of violence, but they must also be immune to political pressure and all other potential external influences: the glare of the media, the echo chambers of social media, the fervor of political rallies. A judge's job is, at least in theory, simple: Interpret the law, uphold the U.S. Constitution and provide a check on the other branches of government.

The recent history of political violence underscores the need to protect judges from threats and intimidation. The storming of the U.S. Capitol on Jan. 6, 2021, was a chilling reminder of the potential dangers faced by those in the public eye. But there are many lesser-known threats.

A report last month by Reuters looking at data collected by the U.S Marshals Service,[2] which is responsible for protecting federal judges, found that since Trump launched his first campaign for president in June 2015 and began his well-documented practice of criticizing judges and courts,[3] "the average number of threats and hostile communications directed at judges, federal prosecutors, judicial staff and court buildings has more than tripled."

This is not to say that all threats have come from Trump and his supporters. In 2022, an armed man was arrested near the home of conservative U.S. Supreme Court Justice Brett Kavanaugh. Evidence suggests that the man had come to kill or kidnap the justice. The incident occurred amid increased protests outside the homes of the justices after the leak of a draft opinion in Whole Woman's Health v. Jackson, overturning Roe v. Wade.

Whatever a judge's political leanings, safety should never be compromised as a result of the cases before them. Because when a justice system cannot guarantee the security of its own arbiters, justice itself is endangered.

There are basically two ways for people to exist in a community. One is what we think of as civilization: People consent to live under laws they feel are fair and applied to everyone equally. Courts are responsible for that equal application.

The other is the rule of the jungle: Might makes right. The strongest get to do whatever they want.

If judges can be intimidated by violence or threats of violence, or if they are corrupt and trade favors or take bribes to rule a certain way, the effect is the same as "might makes right."

To safeguard judicial independence and uphold the rule of law, several steps are necessary.

First, judges should be insulated from pressure through tenure and safeguards against removal except for proven misconduct. This is not a new idea. Think of trials involving mobsters or the owner of the largest employer in a small town. The judge needs to be able to decide the case according to the facts and the law, knowing that, whatever the decision, they will still have a job and a life at the end.

Second, public officials and leaders must refrain from making inflammatory statements about ongoing cases or the judges involved. The importance of upholding the separation of powers cannot be overstated.

Enhanced security measures should be taken to protect judges. Law enforcement agencies and relevant authorities must collaborate to ensure the safety of those who dedicate their lives to upholding justice. This includes monitoring and addressing online harassment and threats.

Lastly, it is incumbent upon citizens to respect the judiciary's role and decisions, even if they disagree with the decisions. Public discourse should focus on engaging in constructive debates over policies and ideas rather than vilifying the individuals tasked with interpreting the law.[4]

As the nation prepares for the upcoming trials that have potential political ramifications, we must collectively prioritize the preservation of an independent judiciary. Judges must be free to dispense justice without fear of violence or the undue influence of political pressures.

Our democracy hinges on the strength of its institutions. By safeguarding the role of judges, we can reinforce the integrity of the justice system and protect the principles upon which this nation was founded.

#### Judicial independence is key to global democracy

ABA 20 – American Bar Association

“Assault on judicial independence is worldwide problem,” American Bar Association, September 2020, https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-september-2020/assault-on-judicial-independence/

In Mexico, the threat to independent judges comes from drug cartels. In Poland, it comes from the president and parliament. And in the United States, it comes from voters and politicians who would turn impartial judges into partisan political actors.

In other words, the fight for judicial independence has no international boundaries.

That was the takeaway at a program July 31 at the virtual American Bar Association Annual Meeting, where judges from Mexico, Poland, Texas, Iowa and Wisconsin compared notes.

“From Des Moines to Mexico City to Medellin to Krakow, the languages may be different, the procedures may be different, but the concerns are very much the same,” said Judge Richard Ginkowski, a municipal court judge in Pleasant Prairie, Wisconsin.

“Protecting the independence of judges and the judiciary is mission crucial for the ABA, in the United States and around the world,” said co-moderator Laurence Pulgram, a San Francisco lawyer and co-chair of the ABA Committee on the American Judicial System. “Democracy depends on it.”

### Judicial Independence DA---Court Packing Link

#### Court reform efforts like court packing collapse the rule of law and judicial independence

Jipping 21 – Senior Legal Fellow for the Edwin Meese III Center for Legal and Judicial Studies

Thomas Jipping, “The Left’s Push to “Reform” the Courts Only Will Politicize Them,” The Heritage Foundation, 1-29-21, https://www.heritage.org/courts/commentary/the-lefts-push-reform-the-courts-only-will-politicize-them

President Joe Biden has announced the creation of a commission to examine “reforming” the courts. This move is not only a “solution” in search of a problem, but will itself likely damage the rule of law and the independence of the judiciary.

It is based on the dangerous idea that the political branches should manipulate the very design and structure of the judiciary until it produces decisions that fit a particular ideological or political agenda.

That is no exaggeration. In August 2019, five Senate Democrats—four of whom serve on the Judiciary Committee—filed a legal brief written by Sen. Sheldon Whitehouse, D-R.I., in a Supreme Court case challenging a New York state law that restricted transport of a licensed firearm outside of one’s home.

The brief closed with these words: “The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be ‘restructured in order to reduce the influence of politics.’”

Then in March 2020, as the Supreme Court was to hear arguments in an abortion-related case, then-Senate Minority Leader Charles Schumer, D-N.Y., delivered his warning in person. Speaking on the Supreme Court steps, he proclaimed:

I want to tell you, [Justice Neil] Gorsuch. I want to tell you, [Justice Brett] Kavanaugh. You have released the whirlwind, and you will pay the price … You won’t know what hit you if you go forward with these awful decisions.

One version of Whitehouse’s restructuring is commonly called “court packing,” and Biden stated flatly during the 2020 presidential campaign that the American people “don’t deserve” to know his position on it. Court packing is Congress’ creation of new judicial positions that the president can immediately fill.

The term was coined in 1937 during debate on President Franklin Roosevelt’s court packing proposal, which the overwhelmingly Democratic Congress rejected as a plan to politicize the judiciary and destroy its independence.

The president, with the Senate’s consent, has the power to appoint judges. Even without expanding the Supreme Court, Roosevelt changed it the old-fashioned way, by replacing eight of its nine members in less than six years.

Court packing is different in two major ways. First, because federal judges have unlimited terms, they decide when most vacancies occur. Court packing gives that power to the political party controlling the executive and legislative branches.

Second, Congress’ periodic creation of new judgeships has been driven by the judiciary’s administrative needs. The Supreme Court has had nine members since 1869 and decides fewer than half the cases each year than it did just a few decades ago.

Court packing expands the judiciary not because it needs additional positions, but deliberately to change the judiciary’s ideological composition and, therefore, to make more likely decisions that serve certain political interests.

While candidate Biden said in a town hall event that he was “not a fan of court packing,” he would not rule it out.

Many who supported Biden’s election, however, have not been so cagey. The group Demand Justice, for example, has already launched a campaign to convince the now-forming commission to endorse adding four seats to the Supreme Court.

One week before the November 2020 election, The New York Times published a bevy of pieces about how to “fix the Supreme Court.” Its ideas included creating a new national court of appeals, judicial term limits, removing the Supreme Court’s discretion over the cases it considers, and significantly expanding the lower courts.

Biden is now fulfilling a pledge he made during an October 2020 interview broadcast on “60 Minutes.” He proposed a bipartisan commission to make “recommendations as to how to reform the court system because it’s getting out of whack—the way in which it’s being handled and it’s not about court packing.”

He did not explain how the court system is “getting out of whack,” though he did comment that the “last thing we need to do is turn the Supreme Court into just a political football, whoever has the most votes gets whatever they want.”

According to news reports, the commission will have between nine and 15 members. Three individuals have reportedly been chosen for the panel: Caroline Fredrickson, former president of the American Constitution Society; Harvard Law School professor Jack Goldsmith, who served as an assistant attorney general in the George W. Bush administration; and Cristina Rodriguez, a deputy assistant attorney general during the Obama administration.

Presidents create commissions for different reasons. These panels can ensure that proposals never see the light of day, or they can give the appearance of independence or legitimacy to ideas that would be too politically hot coming directly from an administration. Commissions can be also be formed and staffed as ways for outside groups to have outsized influence on the development of policy.

The group Take Back the Court pulls no punches. “Congress must add seats to the Supreme Court,” it says, in order to “restore the right to vote, ensure reproductive freedom, halt our climate emergency, and save democracy.”

Whatever these objectives mean, or whether the appointment of a few judges can achieve them, the point is that court “reform” is all about manipulating the judiciary, almost creating a new judiciary, so that it delivers the political goods.

The problem with this commission is its supposed reason for being: that there is some crisis in the courts that requires “reform.” The crisis is simply that the left does not like some of the Supreme Court’s decisions or many recent judicial appointees.

Not getting your way every time, however, is not a crisis. Nor is this the first time that folks at a certain place on the ideological spectrum have grumbled about the judiciary.

Judicial independence is literally one of the reasons for American independence. The Declaration of Independence’s list of grievances includes that King George was manipulating the courts. The Constitution addressed that by giving judges unlimited terms and prohibiting Congress from cutting judicial pay.

Alexander Hamilton wrote that the independence of the courts is “essential” in our system of government. And in 1937, Democrats said that no political objective is more important than the independence of the judiciary.

The Biden administration and Congress should follow that advice today.

### Judicial Independence DA---Stripping Link

#### Any incursion on Article III authority opens the door to court independence collapse

Krotoszynski and DeProspro 21 – John S. Stone Chair, Director of Faculty Research & Professor of Law, University of Alabama School of Law; Law Clerk to the Hon. Peter W. Hall, U.S. Court of Appeals for the Second Circuit

Ronald J. Krotoszynski and Atticus DeProspro (J.D., University of Alabama School of Law; M. Phil., University of Cambridge), “Against Congressional Case Snatching,” 62 Wm. & Mary L. Rev. 791, 2021, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3885&context=wmlr

\*\*\*Note: italics in original\*\*\*

B. Congressional Case Snatching Endangers Both the Independence and the Authority of the Article III Courts

One could reasonably ask, “Why should we care if Congress intervenes in a case and prescribes a rule of decision that dictates a particular outcome in a pending case?” Does permitting Congress to intervene legislatively to make specific assets available to satisfy a judgment,446 to prevent challenges to an administrative agency’s decision to hold land in trust for the benefit of a Native American tribe who wished to operate a casino on the parcel,447 or to permit a nervous litigant to remove a case from the Article III courts to an administrative agency448 really present an existential threat to the independence of the Article III courts? At the risk of sounding unduly alarmist, we believe that the answer to this question is clearly yes.

Considered individually and in isolation, the incursions that have occurred to date on the institutional power and authority of the federal courts might seem to be harmless—utterly picayune.

Nevertheless, permitting Congress to usurp the constitutional authority of the federal courts in *any* fashion effectively opens the door to larger scale incursions on the independence and autonomy of the Article III courts.

#### Even “small affs” spillover to broader Congressional incursions on court authority

Krotoszynski and DeProspro 21 – John S. Stone Chair, Director of Faculty Research & Professor of Law, University of Alabama School of Law; Law Clerk to the Hon. Peter W. Hall, U.S. Court of Appeals for the Second Circuit

Ronald J. Krotoszynski and Atticus DeProspro (J.D., University of Alabama School of Law; M. Phil., University of Cambridge), “Against Congressional Case Snatching,” 62 Wm. & Mary L. Rev. 791, 2021, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3885&context=wmlr

If the Supreme Court fails to defend the federal courts from congressional efforts to reassign, or snatch, duties that the Constitution vests with the judiciary, the federal courts are very likely to see more examples of such congressional power grabs—and these enactments will undoubtedly affect an ever-growing swath of judicial business. The surest and most reliable way to safeguard the institutional independence, autonomy, and dignity of the Article III courts would be to categorically and resolutely reject any and all forms of congressional case snatching.

### Judicial Independence DA---Small Affs Link

#### Even small shifts are perceived as revisionist history by the Democrats

Miller 21 – J.B. Stombock Professor of Law at the Washington & Lee University School of Law

Russell Miller, “We Don’t Need to Reform the Supreme Court,” Just Security, 2-12-21, https://www.justsecurity.org/74655/we-dont-need-to-reform-the-supreme-court/

The proposed reforms under discussion also might contribute to shoring up the judiciary’s public standing. But I fear they risk looking more like bald Democratic attempts to neutralize the present Republic-leaning advantage in judicial appointments. As former Justice Ruth Bader Ginsburg explained not long before her death,

If anything would make the court look partisan it would be that — one side saying, “When we’re in power, we’re going to enlarge the number of judges, so we would have more people who would vote the way we want them to.”

### Court Legitimacy DA

#### Perception of an over-intrusive Congress destroys court legitimacy

Virelli 12 – Associate Professor of Law, Stetson University College of Law

Louis J. Virelli III (J.D. and M.S.E., University of Pennsylvania; B.S.E., Duke University), “Congress, the Constitution, and Supreme Court Recusal,” Washington and Lee Law Review, Vol. 69, Iss. 3, Art. 5, 6-1-12, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4291&context=wlulr

Recognition of the proper division of constitutional responsibility over recusal also promotes legitimacy by signaling public trust in the integrity and professionalism of the Court. This signal is valuable for at least two reasons. First, it is factually accurate, at least in the majority of cases. Although ethics and recusal at the Court have become a hotly discussed issue, even the strongest critics of the Court's practices concede that in the overwhelming majority of instances in which recusal decisions are required, the Justices either get it right or make responsible decisions. 219

Second, it facilitates a sense of interbranch comity and respect that is essential to the integrity of a tripartite government. 220 Under the current arrangement, Congress appears to be calling into question the legitimacy of the Court without either the imprimatur of a binding legal standard to initiate change or a means of addressing the unique institutional concerns associated with Supreme Court recusal. Expressly acknowledging the constitutional reality that the Court may, at minimum, exercise significant discretion in its recusal decisions promotes public understanding of, and confidence in, the separation of powers. This argument is made even more powerful by the fact that the benefit is available virtually free of cost. As it currently stands, Supreme Court recusal decisions are entirely dependent on the Justices' individual judgment and integrity. 221 Acknowledgment that the Court is the sole arbiter of its own recusal questions (subject only to those constitutional checks clearly assigned to Congress) could serve as a powerful endorsement of the Court's competence and integrity without requiring that Congress relinquish any actual authority.

#### Reforms collapse court legitimacy and re-politicizes the court

Grove 19 – Professor of Law, William & Mary Law School

Tara Leigh Grove, “The Supreme Court’s Legitimacy Dilemma,” 132 Harv. L. Rev. 2240, June 2019, https://harvardlawreview.org/print/vol-132/the-supreme-courts-legitimacy-dilemma/

External causes call for external solutions. But many of the solutions offered to “fix” the Court’s current legitimacy deficit may do more harm than good. That is, these solutions may simply increase the partisan squabbling that has damaged the Court’s reputation. As noted, critics most commonly call for court packing. Commentators argue that as soon as Democrats control the House, Senate, and presidency, they should expand the Supreme Court by adding two (or more) Justices.154 Such packing, the argument goes, would “fix” the wrongdoing of Senate Republicans and restore the former balance on the Court.

There are a few difficulties with these arguments. First, notions like “fix” and “restore” presume a clear normative baseline of “wrongdoing.” To progressives, it may be clear that the Republican-controlled Senate in 2016 acted disgracefully in refusing to hold hearings on an eminently qualified jurist. But to many conservatives, the delay on Judge Garland was justified by prior Democratic wrongdoing — including the abolition of the filibuster for lower court judicial nominations,155 and perhaps even going back to the rejection of Judge Bork.156 I do not seek to weigh in on which narrative is more accurate; I suggest only that what qualifies as “wrongdoing” and “restoration” depends tremendously on one’s perspective.157

Second, and relatedly, we should keep in mind the political science teachings about sociological legitimacy. In our polarized political climate, the Court has maintained its public reputation in large part because it has issued a mix of “progressive” and “conservative” decisions in high-profile cases. But court packing by Democrats seems unlikely to restore that “balanced” Court. Instead, it seems more likely that the Court would transform into an institution that reliably issued “progressive” rulings in salient cases. Many in the legal community might be happy with that result. But it is important to recall that “legitimacy is for losers.”158 It is crucial that those who disagree with the Court’s decisions view the institution as legitimate. It seems doubtful that conservatives today would view a Court “packed” by progressives as any more legitimate than the “losers” in 1937 would have viewed a fifteen-member “Roosevelt Court.”

Instead, it seems likely that conservatives would launch attacks on the Supreme Court (much like those we hear from progressives today) — demanding an end to life tenure, jurisdiction stripping, disobeying federal court orders, and perhaps even additional “packing.”159 In that event, some members of the newly constituted Court might feel pressure to moderate their decisions — lest the Court seem too “one sided” to a substantial portion of the country. That would take us back to the first legitimacy dilemma: one or more members of the Court might compromise the legal legitimacy of their judicial decisions to preserve the sociological legitimacy of the Court.

### Court Stability DA

#### Jurisdictional reforms create legal chaos

Millhiser 15 – columnist for ThinkProgress, and the author of *Injustices: The Supreme Court's History of Comforting the Comfortable and Afflicting the Afflicted*

Ian Millhiser, “Ted Cruz Threatens To Take Away The Supreme Court’s Power To Decide Marriage Equality Cases,” ThinkProgress, 4-6-15, https://archive.thinkprogress.org/ted-cruz-threatens-to-take-away-the-supreme-courts-power-to-decide-marriage-equality-cases-bcd327be39a/

The second reason why lawmakers should be cautious of jurisdiction stripping generally is that such legislation could potentially cast the law into chaos. Suppose that the Supreme Court sides with marriage equality this June, for example, and that Congress responds by enacting Cruz’s bill. If the Court loses jurisdiction over marriage equality cases, that will mean that it does not even have the power to rescind its previous decision supporting equality, which will mean that every judge in the country will remain bound by a decision of the highest Court in the land, even if that Court can no longer enforce its own decision.

Some judges are likely to decide, as Alabama’s supreme court has suggested that it would, that they are free to go their own way from the Supreme Court of the United States. Other judges are likely to believe, correctly, that they are still bound by a higher Court’s decision. In some states, lower court judges will be forced to decide between contradictory rulings from their state supreme court and the federal justices. In others, local officials will disagree, leading to a situation where a same-sex couple’s access to a particular right will hinge upon who runs the office that administers or enforces that right. Eventually, statewide officials may step in to resolve these conflicts, but it may not be clear who within the state — the governor? the attorney general? the state’s highest court? — has the power to do so. And even if one official does emerge as the dominant player in this struggle, their resolution of the issue could change if they are replaced in the next election.

### Court Stability DA---Term Limits Link

#### Imposing term limits destabilizes jurisprudence and reliance interests

Miller 21 – J.B. Stombock Professor of Law at the Washington & Lee University School of Law

Russell Miller, “We Don’t Need to Reform the Supreme Court,” Just Security, 2-12-21, https://www.justsecurity.org/74655/we-dont-need-to-reform-the-supreme-court/

Old But Not Forgotten

I am least persuaded by proposed term limits. In a culture of judicial politics already steeped in legal realism, it is dangerous to ignore the benefit we gain from the stability resulting from lifetime appointments. If it’s really true that the justices just follow their political instincts and policy preferences, which seems to be a base-level assumption of the reformers, then increasing the frequency of turnover on the Court also risks increased instability in the Court’s jurisprudence.

Stability is a fundamental legal value and a core component of justice. This is especially true in a common law system like America’s, where constancy among the Court’s justices also reinforces respect for precedent and reliance on the law. Fix the Court nevertheless urges the abandonment of life-tenure to be replaced by an 18-year term limit. It’s possible that we would maintain the requisite stability on the Court with this change. But it promises to introduce a greater degree of tumult into the Court’s work and jurisprudence. Under the current life-tenure regime, the same nine justices sat together from 1994 to 2005, a remarkable decade during which the justices’ views on controversial issues were well known. This consistency permitted litigants and society to frame their expectations and reliance on the controlling rules. Even if there was some partisan drift and realignment among the justices over their long careers on the Court, the presence of a stable cohort meant radical reversals were rare. This stability also gave the Court’s new precedents the chance to put down roots rather than face immediate rethinking by a routinely reconstituted bench. With the rash of new appointments to the Court – five in the last decade – we’ve seen as more precedents reversed in the last three years than in the stable decade around the turn of the century. That Court’s stability was achieved with four new appointments in the early 1990s. An 18-year term limit would have cut that 10-year run in half and involved twice as many appointments.

### Rights DA

#### *Rights DA*---The neg can also read arguments about judicial review being good for X rights---this can also be paired with a CP that reforms the structure of the court but leaves the power of judicial review intact.

Daniel Epps 19 is Associate Professor of Law, Washington University in St. Louis. Ganesh Sitaraman is Chancellor Faculty Fellow, Professor of Law, and Director of the Program in Law and Government, Vanderbilt Law School. How to Save the Supreme Court, 129 Yale L.J. 148

There is clear cause for concern about the looming threat to the Supreme Court’s legitimacy. A Supreme Court that is viewed as illegitimate by a significant portion of the American people will be less able to settle important questions, and particularly less able to exercise the power of judicial review. Of course, for many on the left today, that may seem like a desirable goal. Those who favor Moyn’s critique of “juristocracy,” for example, or who are drawn to Tushnet’s arguments against judicial review, would likely welcome developments that would weaken the Court’s ability to stand up to the other branches of government. On one level, we have sympathy for some of these critiques. Judicial review is inescapably antidemocratic. 77 And while it has served important purposes at key moments in American history, it is also a power that the Court has abused. At a minimum, most observers would agree the Justices have sometimes taken on responsibility for resolving thorny questions that would have been better left to elected officials—even if there is little consensus about which uses of judicial review prove the point.78 Nonetheless, we have deep reservations about the long-term consequences of a powerless Supreme Court. First, if the Supreme Court suddenly became unable to exercise judicial review, the American constitutional system would look significantly different. Such a development would not spell the end of American democracy. Indeed, countries like England, the Netherlands, and Canada either lack written constitutions, do not permit courts to enforce their written constitutionsthrough judicial review, or have mechanisms by which the legislature can (at least in theory) reenact laws that the courts have struck down.79 These examples suggest that it is possible to have a well-functioning democracy that respects individual rights without giving courts the final word over the constitutionality of legislation. Moreover, the Supreme Court itself barely exercised judicial review of federal statutes during the nation’s early years, doing so only twice before the Civil War.80 But even if other democracies function well without judicia lreview, it doesn’t follow that our own system would function equally well if the Court’s power to check the political branches were abolished or significantly curtailed. Whatever its merits, judicial review has been a longstanding and integral part of the American constitutional system. No one can know what would happen if it disappeared tomorrow. Perhaps the political branches would, more or less, safeguard basic rights, the way legislatures do in other democracies. But perhaps political actors have become so accustomed to being reined in by courts that, once set free, they would trample important rights. On this point, it bears note that in some of the cases where the Supreme Court is thought to have erred most grievously, it is because the Court failed to exercise the power of judicial review and defend individual rights from political actors. 81 Ultimately, however, the implications for judicial review are secondary concerns when it comes to the Supreme Court’s legitimacy. The larger problem is this: the Supreme Court plays a significant role in the public imagination as a citadel of justice. For many Americans, given the Supreme Court’s salience, faith in the Court may be deeply intertwined with feelings about the very idea of law.82 In a world where the Supreme Court is widely seen as just another political institution, how will people think about law itself? Our fear is that in such a world, the very idea of law as an enterprise separate from politics will evaporate. The rule of law is a critical element of a healthy democracy. If it erodes, our fears for democracy become more concrete. Can a democratic society long survive if the citizenry loses faith in law? Will the notion of the rule of law survive if people stop believing that judges are doing something other than exercising political will when deciding cases? Will political actors cease to give credence to the results of any legal proceeding that does not validate their preexisting beliefs? We do not know the answers to these questions. But we are not eager to run the experiment required to answer them. Instead, we think it is imperative to save the Supreme Court as an institution above the political fray.

### Politics DAs [General]

#### Court reform comes with massive political costs including political capital, floor time, public messaging risks that outweigh the aff

Coan 24 – Milton O. Riepe Chair in Constitutional Law and Associate Dean for Research, University of Arizona, James E. Rogers College of Law.

Andrew Coan, “What is the Matter With Dobbs?” Journal of Constitutional Law, Vol. 26:2, February 2024, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1858&context=jcl

Until then, any push for reform is almost certain to fail. Political capital, legislative time, and public attention are all scarce resources, so this failure would come at some difficult to quantify opportunity cost to other priorities– the harder the push for reform, the more significant the costs. A serious push for reform might also have substantial political costs for liberals and progressives, even when the public is unsympathetic to the Supreme Court ideologically. The current polling on this question is subject to varying interpretations and will inevitably change over time. But Franklin Roosevelt’s court-packing bill illustrates the potential for political disaster even under much more propitious circumstances than any Democratic president is likely to enjoy in the foreseeable future.166

However Court reform plays out with the public generally, conservatives seem certain to view any serious effort of this kind as an attempt to rig the basic rules of the constitutional game in favor of liberals and progressives. Coming just at the moment when conservatives have gained firm control of the Court after decades of single-minded effort, this would constitute a provocation of major proportions. At the very least, it seems likely to fuel an already thriving conservative narrative that liberals and progressives are ready and willing to overthrow the Constitution to achieve their aims.167 Given the intense polarization of the country and the growing threat—and existing reality—of political violence, this prospect ought not to be taken lightly. If Court reform is unsuccessful, there will be precious few, if any, benefits to justify these risks.

A successful push for Court reform would carry many of the same risks. Indeed, the risks might be even greater, since the provocation of reform would be real rather than hypothetical. On the other hand, successful reform would also generate real benefits from a liberal and progressive perspective. Those benefits would be different with different types of reform, but they might be profound, potentially including the reversal of Dobbs; the invalidation of partisan gerrymandering; the elimination of the nondelegation doctrine as a threat to the modern administrative state; and much more. These gains, however, seem likely to be short-lived, with conservatives enacting countervailing reforms when they regain power. Such a retaliatory cycle has no clear endpoint. This would not only reduce the benefits of reform to liberals and progressives by shortening their duration. It would also constitute a potentially catastrophic flashpoint for political conflict.168

#### Court reform is a “legislative third rail”

Menell and Vacca 20 – Koret Professor of Law and Director, Berkeley Center for Law & Technology, University of California, Berkeley, School of Law; Professor of Law, University of New Hampshire School of Law

Peter S. Menell and Ryan Vacca, “Revisiting and Confronting the Federal Judiciary Capacity ‘Crisis’: Charting a Path for Federal Judiciary Reform,” California Law Review Vol. 108:789, 2020, https://www.law.berkeley.edu/wp-content/uploads/2021/03/Menell-and-Vacca-Revisiting-and-Confronting-the-Federal-Judiciary-Capacity-Crisis.pdf

The proposal was initially greeted with enthusiasm, but it ultimately failed to survive the legislative gantlet. No major structural changes to the federal appellate system came to pass then or since. Apart from the substantial repeal of three-judge district courts,9 the division of the Fifth Circuit (creating the Eleventh Circuit),10 the creation of specialty courts for bankruptcy and patent appeals,11 and increases in the number of district court and appellate court slots,12 the fundamental structure of the federal appellate system has remained the same.

We are now another half century past Professor Carrington’s clarion call. Have the problems that galvanized attention many decades ago been abated or addressed through other means? The data on caseloads and capacity constraints suggest otherwise: district and appellate court caseloads per judge have continued to mount and the number of certiorari petitions has more than doubled.13 The major impediments to judiciary reform are political, institutional, and human. Judiciary reform has become a legislative third rail, too dangerous for politicians—or even academics—to discuss.14

### Politics DAs---Small Affs Link

#### The opponents of court reform will label ANY proposal as court packing

Tushnet 20 – the William Nelson Cromwell Professor of Law at Harvard Law School

Mark Tushnet, “Signing Off on Discussing Court Reform,” Balkanization, 10-11-20, https://balkin.blogspot.com/2020/10/signing-off-on-discussing-court-reform.html

(3) Finally, what’s the point of these discussions right now? Pretty clearly, it’s to widen the Overton window. We can see from Republican rhetoric that they don’t want it to open even a crack – not surprising: Having gained control of the Court and the lower courts, they don’t want court reform of any sort. In fact, I’m pretty sure that they will describe *every* proposed reform as Court-packing. (If so, my view is that it’s better to be hanged for a sheep as for a lamb.) For people who think that the Court needs reform, I doubt that proposing to open the Overton window a little bit but not too much is a good strategy. But, once the Overton window has been opened pretty wide, I’ll leave to the politicians to figure out what to do.

### Agenda DAs

#### Political costs are extremely high, especially in the court context. The plan must overcome legislative barriers that have consistently prevented Congress from infringing on court authority for decades

Grove 11 – Assistant Professor, Florida State University College of Law

Tara Leigh Grove, “The Structural Safeguards of Federal Jurisdiction,” 124 Harv. L. Rev. 869, February 2011, https://harvardlawreview.org/print/vol-124/the-structural-safeguards-of-federal-jurisdiction/

These bicameralism and presentment requirements have two important effects on the development of federal law. First, they tend to favor the status quo by making federal legislation more difficult to enact.58 Furthermore, by imposing these supermajority requirements, the lawmaking procedures of Article I “unmistakably afford” political factions — even political minorities — “extraordinary power to block legislation.”59

The Constitution also authorizes each chamber of Congress to supplement these constitutional veto gates by setting “the Rules of its Proceedings.”60 Each chamber has invoked these rules to adopt procedures that accentuate the protection of political minorities.61 For example, the House and Senate typically delegate matters to committees, whose members may not be representative of the views of the entire body.62 These committees can often prevent (even popular) legislation from going to the House or Senate floor for a vote. Furthermore, the Senate has established Rule 22, which allows one member to filibuster a bill, absent a cloture vote by three-fifths of the Senate (sixty members).63 Such rules create additional hurdles for legislation and thus give political factions alternative ways to veto their opponents’ proposals.64

Although these lawmaking processes make enactment of any sort of federal legislation difficult, there is good reason to believe that they are especially effective at preventing restrictions on federal jurisdiction. Drawing on two strands of recent legal and social science literature, I argue that political factions are particularly likely to veto jurisdictionstripping legislation favored by their opponents.

First, scholars have urged that an independent judiciary is more likely to flourish in a politically competitive society, like the United States. In such a political system, risk-averse politicians favor an independent judiciary as a useful means of controlling their political opponents during periods when their own side is out of power.65 Accordingly, the faction in power will often adhere to an adverse judicial decision, with the expectation that its opponents will do the same when they are in control.66 Each political faction relies on the judiciary as a long-term “check” on its political opponents.

This system of “mutual cooperation” “resembles an indefinitely repeated Prisoner’s Dilemma,” with each side “implicitly agreeing to use cooperative strategies” to achieve some long-term objective (here, an independent judiciary).67 However, as Professor Mark Ramseyer has pointed out, “[p]arties to [such] indefinitely repeated Prisoner’s Dilemmas do not necessarily cooperate.”68 Instead, in some contexts, the party in power may react to an adverse judicial decision by engaging in court-curbing efforts, like jurisdiction stripping.69 I contend that, in such instances, the opposing political faction has a strong incentive to veto that jurisdiction-stripping legislation to ensure that the judiciary can continue to “check” the actions of its political opponents.

Second, social scientists who dub themselves scholars of “American Political Development” (APD)70 offer a set of arguments that further underscore why politicians may be inclined to veto jurisdictionstripping proposals. APD scholars assert that, in our politically divided society, the overall content of federal court decisions is generally favored by at least one major political faction.71 APD scholars have relied on this theory to explain why the political branches empower the judiciary (by, for example, expanding the size and jurisdiction of the courts)72 or defer matters to the judiciary.73 These scholars further argue that political leaders place “special importance”74 on empower- ing the Supreme Court because its “decisions . . . establish the legal and ideological framework within which [the lower courts] operat[e].”75 In short, APD scholars argue that at least one major political faction generally supports the judiciary. I contend that this same faction should also have an incentive to veto jurisdiction-stripping proposals.

Although it may seem surprising that the federal judiciary consistently has the support of at least one major political faction, this historical reality is largely a result of our constitutional structure. The appointment and confirmation process established by the Constitution (requiring both presidential and senatorial approval) effectively guarantees that each federal judge has been selected by a dominant political group.76 Thus, our process helps ensure that, at least at the outset, a judge’s views on constitutional and other legal issues align to some degree with those of political leaders. Notably, as APD scholars concede, the fact that judges are chosen by a dominant political faction does not mean that federal courts always issue decisions that accord with the views of that faction.77 But this political group does tend to support the overall content of federal court decisions. The selection process of Article II thus gives a major political faction an incentive to support the relatively “friendly” judiciary that it put in place.

For example, in the late nineteenth century, economic nationalists in the Republican Party sought to use the judiciary to advance their pro-business economic goals. Accordingly, this faction used its control over the Presidency and the Senate to appoint judges who were likely to be sympathetic to the concerns of large corporations. And when this faction had sufficient political support in Congress, it sought to expand the size of the federal judiciary and the scope of federal jurisdiction.78 In the mid- to late twentieth century, social progressives (primarily in the Democratic Party) sought to use the judiciary to advance progressive goals, such as racial civil rights. Accordingly, progressive Presidents appointed judges who seemed likely to issue decisions that would accord with progressive values.79 And the Department of Justice under progressive Presidents filed briefs encouraging the courts to issue such “favorable” decisions.80

Notably, these political factions had a particularly strong incentive to appoint jurists to the Supreme Court who were sympathetic to their views. The Court has the power to “establish the legal and ideological framework within which [the lower courts] . . . operat[e].”81 Thus, to the extent that these political factions sought to advance their goals through the judiciary, they could most effectively do so if they had the support of the Supreme Court.

As these examples illustrate, a political faction often seeks to empower the judiciary during periods when its side is in control. This dynamic has an important impact on that faction’s political incentives once it is no longer in power. These supporters of the judiciary have a strong incentive to veto jurisdiction-stripping legislation that could undermine the authority of this “friendly” judiciary.

Social scientists and legal scholars argue that the above political incentives (that is, ongoing political competition and the support of a major political faction) are necessary conditions for the empowerment and long-term maintenance of an independent judiciary.82 But, as these scholars themselves suggest, these political incentives are not sufficient short-term protections for federal jurisdiction, especially if the political faction in power opposes the judiciary.83

I argue that the lawmaking requirements of Article I provide a crucial structural safeguard. These procedures give the political faction supporting the judiciary — even if it is only a political minority — multiple opportunities to veto jurisdiction-stripping legislation favored by its opponents. The constitutional structure thus gives supporters of the judiciary the tools to do what they are already inclined to do: protect the federal judiciary that they sought to empower.

This structural argument (as discussed below in Parts III and IV) has considerable historical support. In the late nineteenth and early twentieth centuries, economic nationalists in the Republican Party repeatedly used their structural veto in the Senate (along with procedural tools like the filibuster) to block efforts to restrict federal jurisdiction over suits involving corporations. In more recent times, social progressives (primarily in the Democratic Party) have used their veto points in both the House and the Senate (along with procedural tools like committee blockage) to preserve federal jurisdiction over constitutional claims. Furthermore, supporters of the judiciary have been especially inclined to veto attempts to strip the Supreme Court’s appellate jurisdiction in order to preserve the Court’s “special” role in “establish[ing] . . . the legal . . . framework”84 for the lower federal and state courts.

Thus, the historical evidence seems to support my contention that, although the Article I lawmaking process makes it difficult to enact any legislation, it is especially hard to enact jurisdiction-stripping proposals. The Article II appointment process gives political factions an opportunity to “invest” in the judiciary and to construct a judiciary that will issue favorable decisions. These supporters of the judiciary then have a strong incentive to use their structural veto in the House or in the Senate to protect the scope of federal jurisdiction.85

### Agenda DAs---Term Limits Link

#### Term limits take considerable PC

Sitaraman and Epps 21 – Associate Professor of Law, Washington University in St. Louis; Professor of Law and Director of the Program in Law and Government, Vanderbilt Law School

Ganesh Sitaraman and Daniel Epps, “The Future of Supreme Court Reform,” 134 Harv. L. Rev. F. 398, May 2021, https://harvardlawreview.org/forum/vol-134/the-future-of-supreme-court-reform/

A. “Skinny” Court Reform Through Legislation

Legislative action is the most obvious way to reform the Court. One major structural reform that some Democrats seem interested in advancing right now is Supreme Court term limits. Perhaps some may imagine that term limits could pass despite narrow divisions in Congress, given their apparent popularity with voters.17 But there are reasons to doubt the viability of statutory term-limits reform. The leading Democratic proposal would not impose term limits on currently serving Justices.18 That would likely mean that Democrats would not obtain a majority on the Court for years.19 Why would Democrats waste considerable political capital on a major reform that would not benefit their agenda?20 Moreover, such a reform could even provide a windfall to Republicans: if President Biden were able to appoint two Justices, term limits would make it likely that any of his appointees would serve for shorter periods than they would otherwise, especially relative to President Trump’s three appointees.21 One could imagine Republicans recognizing what they had to gain by going along with the proposal, but that same fact seems likely to preclude sufficient support among Democrats. Term limits have other drawbacks as well. They might make the Court more political, rather than less, by guaranteeing Court nominations are an election issue every two years; that would be even more true if, as some fear, the Justices themselves might shape their opinions with an eye toward a post-Court political career.22 On top of all that, whether term limits can be imposed via statute (rather than constitutional amendment) is deeply controversial.23 These concerns are another reason to question whether term limits could obtain sufficient support to be enacted into law.

### Filibuster DA

#### Court reform requires eliminating the legislative filibuster

Barnett 20 – Mr. Barnett is a professor at the Georgetown Law Center

Randy Barnett, “Keep the Courts the Same,” in “How to Fix the Supreme Court,” New York Times, 10-27-20, https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html

The aim of court packing, then and now, is to enlist the court as a politically partisan actor. Once packed, the court will let the partisan majorities in Congress that packed it exercise unconstitutional powers; and it will impose the ideological agenda of one party on states that are controlled by its rival.

But once the norm against court packing is gone, there is no limit on how often it will be used by each party when it controls both Congress and the presidency. If Democrats expand the number of justices in 2021, Republicans will do the same when they have the power.

The rulings of such a court would be rightly be perceived as entirely dependent on the will of the political branches. Once politicized in this way, it is hard to see how the perceived legitimacy the Supreme Court as a court of law could be sustained — or why a court so composed should have power to review the constitutionality of laws.

The norm of judicial independence

Supreme Court justices have always held their offices on “good behavior.” This means they can be removed only by impeachment in the House and conviction in the Senate, which has never happened.

From both the left and the right, we hear calls for “term limits” for justices. This should require a constitutional amendment, but some claim it can be accomplished legislatively by moving older justices to a form of “senior status” or by some other device.

Lifetime tenure serves the fundamental norm of judicial independence in many ways. For instance, justices do not concern themselves with life after being a justice. But if justices are demoted to judges, they will be more inclined to retire after their demotion. Without the norm of lifetime service, justices are more likely to rule in ways that will maximize their future employment prospects. Once again, this will decrease their independence and increase the political nature of their rulings, undermining the perceived legitimacy of the court.

The norm of bipartisanship in the Senate

Neither of these proposals is likely to be adopted without ending the norm that it takes 60 votes in the Senate to close debate on legislation. While the judicial filibuster is now gone forever, some form of supermajority requirement to end a filibuster of proposed legislation has remained a norm of the Senate for some two centuries. The legislative filibuster requires bipartisan agreement before major legislation can be passed. Ending it will lead to a fundamental change in the norm that the Senate provides a bipartisan check on the partisanship of the House of Representatives.

Taken together, the repudiation of these three constitutional norms strikes at the fundamental “checks and balances” that are a defining characteristic of our constitutional structure. Without them, we will have something approximating a parliamentary government — the political system favored by many academics over that provided by our Constitution.

#### Filibuster elimination is an intrinsic and “necessary” step to court reform

Sitaraman and Epps 21 – Associate Professor of Law, Washington University in St. Louis; Professor of Law and Director of the Program in Law and Government, Vanderbilt Law School

Ganesh Sitaraman and Daniel Epps, “The Future of Supreme Court Reform,” 134 Harv. L. Rev. F. 398, May 2021, https://harvardlawreview.org/forum/vol-134/the-future-of-supreme-court-reform/

Now-President Biden has named a commission, consisting of distinguished scholars and jurists.13 The Commission is tasked with providing, among other things, “[a]n analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals.”14 Given that the commission was designed to be bipartisan, it may be unlikely to endorse bold structural reform, at least to the extent that such reform would have a partisan valence. In addition, the slim margin of Democratic control in the Senate — Democrats have only fifty seats, with Vice President Kamala Harris breaking ties — means the prospects for an aggressive partisan move to add Justices are dim at best. That’s all the more so given that at least some Democratic Senators are apparently unwilling to abandon the legislative filibuster15 — surely a necessary first step were Democrats to seek to expand the Court on a party-line vote or pursue other muscular reforms aimed at reining in the conservative majority, such as stripping the Court’s jurisdiction. We expect the Commission to assess all reform options, but given this political context, major reform appears hard to imagine for at least the next two years.

#### The filibuster is a key barrier to any court reform

Bruhl 23 – Rita Anne Rollins Professor and Special Advisor to the Dean, William & Mary Law School.

Aaron-Andrew P. Bruhl, “The Supreme Court Review Act: Fast-Tracking the Interbranch Dialogue and Destabilizing The Filibuster,” Journal Of Constitutional Law, Vol. 25:5, April 2023, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1040&context=jcl\_online

I. Introduction

The relationship between the Supreme Court and Congress has often been described as a dialogue.1 One problem with this conception is that it is hard for Congress to find its voice. Individual members can speak out for or against judicial decisions, of course, and many do. But for Congress as an institution to speak authoritatively, through legislation, is hard, and it is especially hard in an age that features party polarization and narrow majorities.2 A major impediment to legislative responses is the Senate filibuster, the now-routine use of which means that a supermajority is required for most ordinary legislation.3

Having an arduous legislative process gives the courts more freedom of action.4 Suppose that a Supreme Court decision misinterprets a statute as judged by what the enacting Congress intended and what the current Congress wants. A majority of the House opposes the Court’s interpretation, as does a majority of the Senate (fifty-five senators, say), as does the president. That alignment is not sufficient to override the decision. The filibuster requires sixty votes to overcome, and that is not even to mention limited space on the congressional agenda, conflicting visions of how to fix the decision, and other barriers to enactment. And that is in the best-case scenario, when all three lawmaking bodies oppose the Court’s decision. Judicial decisions will therefore often “stick” even when they represent minority positions in Congress.

### Horsetrading DA

#### Any amendment process would involve political horse-trading

Gilbert 17 – Sullivan & Cromwell Professor of Law, University of Virginia

Michael D. Gilbert, “Entrenchment, Incrementalism, and Constitutional Collapse,” Virginia Law Review, Vol. 103, No. 4, pp. 631-671, June 2017, https://www.jstor.org/stable/26400253

In addition to constitutional failure, these ideas cast light on an important question of constitutional evolution: When to amend and when to convene? Article V authorizes two methods for changing the text of the Constitution: amendments and conventions.146 Other constitutions offer the same basic choice.147 Amendments are more likely to fit the spatial models, which assume decisions happen on one issue at a time. Thus, changing law through amendment will more likely produce the incrementalism and instability described above. Conventions, on the other hand, often involve bargaining across multiple issues. Such bargaining can generate meaningful change. Returning to Figure 5, voter 1 will not, without more, approve replacing SQ with a law at m. She might, however, support such a change if she gets a change on another issue in exchange. Suppose the dimension in Figure 5 reflects rights for religious minorities, and another unpictured dimension reflects the right to education. Voter 1 opposes moving rights for religious minorities further from her ideal point—which going from SQ to m would do—but she would nevertheless support it as part of a deal that simultaneously moves the right to education closer to her ideal point. Thus, bargaining can produce large change even when law is entrenched and the incrementalism and pace principles operate.

In short, the solution to the constitutional predicament described above is a convention. Voters or their representatives must bargain across issues, not vote individually on each one. Returning to the case of France, after the constitution collapsed in 1958, General de Gaulle's government drafted a new one. Voters cast one vote on the complete package; they did not vote on each provision. According to a key parliamentarian, the new constitution "embodied] the reforms envisaged earlier," meaning the amendments considered but rejected during the Fourth Republic.148 Revision accomplished what amendment could not. France's Fifth Republic endures to this day.

### Appointments DA

#### Court reform removes the necessary political capital for pushing Democratic judicial nominees that otherwise solve the aff and trades off with broader political objectives

Miller 21 – J.B. Stombock Professor of Law at the Washington & Lee University School of Law

Russell Miller, “We Don’t Need to Reform the Supreme Court,” Just Security, 2-12-21, https://www.justsecurity.org/74655/we-dont-need-to-reform-the-supreme-court/

Still, even if Senate Majority Leader Chuck Schumer calls Supreme Court reform “the big one,” it’s more relevant to ask whether this agenda urgently demands the administration’s attention. With luck, Biden can tackle one or two big structural issues in the honeymoon prior to the 2022 mid-term elections. I don’t see how partisan court packing can be one of his top priorities. In any case, it’s not clear to me that judicial reform would attract secure support from the Democratic Caucus. More profoundly, considering Biden’s commitment to the cause of social and racial justice, it might be better to have launched a commission to explore a second round of criminal justice reform for which there has been immense political support in the public and functional bipartisan consensus for new policy. No one can doubt that the need on that point remains enormous, especially as regards racial injustice in America’s judicial processes.

Of course, another way for the Biden administration and Schumer to respond to the Republicans’ judicial advantage would be to invest the same political capital in an energetic appointments effort as Trump and Mitch McConnel did. Instead of focusing on widening the goals or adding minutes to the game-clock, the Democrats might accept the rules as they are, seize their present political advantage, and work to ensure some partisan balance in the federal judiciary by single-mindedly pushing through their judicial appointments. There are reports that Biden’s team is doing just that.

But beating the Republicans at this game will require the Democrats to make judicial appointments a more central feature of their national political strategy. The Republicans have clearly succeeded in making the judiciary a part of their platform and political appeal in ways that the Democrats have not. It is one of the factors that keeps Evangelical Christians so firmly in the Republican camp, even as they may have doubted Trump’s Christian scruples. The Republicans have a concerted and coordinated program fueled by the so-called “moral majority” reaction to the Warren Court’s progressive jurisprudence and then radicalized by the Democrats’ success in defeating President Ronald Reagan’s nomination of Robert Bork to the Supreme Court.

If the Democrats’ efforts to reform the Supreme Court look like an attempt to restore partisan balance to the judiciary, it’s because that’s what they are. That’s an unfortunate and cynical concession to the politicization of the judiciary and to a brand of legal realism that is informed by a superficial approach to assessing the work of the Supreme Court. It is little more than an attempt to stuff the judicial ballot to the advantage of the Democrats.

To be sure, the reform agenda is not being driven by concern for a troubling decline in the quality of American jurisprudence. And so far there isn’t evidence of a Trumpist capture of the judiciary that is now filled with loyalists and hacks. But beyond all of this, maybe the most troubling part of the reform movement is that it is a concession by the Democrats that they can’t win the contest for the heart of the American judiciary without changing the rules, and changing the judiciary along the way.

### Elections DA

#### Court reform could decide the election.

Gannon 23 – Reporter for Spectrum News.

Maddie Gannon, “How the Supreme Court could impact the 2024 election – and vice versa,” Spectrum News, 10-05-2023, https://ny1.com/nyc/all-boroughs/news/2023/10/05/how-the-supreme-court-could-impact-election-

Supreme Court justices are rounding out the first week of a fresh term in which cases involving the Second Amendment, politicians and social media and challenges to federal bureaucracy will see their day in the high court.

The 2023-24 term follows two previous ones that saw blockbuster decisions on issues ranging from abortion and affirmative action to gun rights and President Joe Biden’s student loan forgiveness program.

The significant and controversial rulings – not to mention the conversations on ethics surrounding the institution – have invoked reactions across the nation and left the court under heightened attention.

Heading into the new term, its approval rating stands near record lows, with 41% approving of its job performance in a September Gallup poll.

Last week marked three years since then-President Donald Trump tapped now-Justice Amy Coney Barrett to replace the late Ruth Bader Ginsburg on the bench. The move, which shifted the court's ideological balance significantly, paved the way for one of the court's most contentious recent decisions: Dobbs v. Jackson Women’s Health Organization, which overturned Roe v. Wade and allowed states across the country to implement tighter restrictions and even outright bans on abortion.

The appointment also cemented the court’s current 6-3 conservative majority and, as Georgetown Law professor Cliff Sloan points out, proved to be an example of the consequential footprint a president can leave on the highest court in the land.

“President Trump had an enormous impact on the Supreme Court with the three appointments that he had,” said Sloan, author of "The Court at War," a book about President Franklin Delano Roosevelt's impact on the court. “It has led to this conservative supermajority on the Supreme Court that already is a fundamentally different Supreme Court from the one that preceded it.”

And heading into the next election, Sloan said the impact a president can have on the court will not be lost on voters, adding the overturning of Roe v. Wade in particular will continue to weigh on their minds.

“The direction of the Supreme Court is an extremely important issue that will be on the ballot. And I think that voters will recognize that,” he said. “We've seen it as a tremendous motivator for voters in the midterms, in the judicial election in Wisconsin.”

Todd Belt, a professor and the Director of Political Management at George Washington University, agrees.

“I think this is going to be really important, because we have some justices who are getting up there in age – not as many as we had last time around, but I think it's becoming more and more important, especially in the wake of the Dobbs decision,” Belt said. “I think it will affect voters’ considerations more.”

#### Robust empirical and theoretical evidence proves there are massive electoral costs to undermining judicial autonomy

Vanberg 15 – Department of Political Science, Duke University

Georg Vanberg, “Constitutional Courts in Comparative Perspective: A Theoretical Assessment,” Annual Review of Political Science, Vol. 18: 167-185, first published as Review in Advance on 1-19-15, https://www.annualreviews.org/content/journals/10.1146/annurev-polisci-040113-161150

Exogenous Explanations for Judicial Independence and Authority

In contrast to endogenous explanations, exogenous explanations for judicial authority point to factors that constrain executives and legislators to respect judicial authority even if they would prefer to resist or attack the judiciary. Policy makers respect judicial authority not because doing so provides a positive benefit but because attacking the court or ignoring its decisions is too costly (e.g., Epstein et al. 2001; Vanberg 2001, 2005). The most common explanation of this type stresses public support for independent courts as the critical factor (Vanberg 2001, 2005; Staton 2006, 2010). 13 The intuition behind this explanation is simple. Considerable empirical evidence suggests that citizens in democratic polities hold courts in high regard, often in higher regard than policy makers in other branches (e.g., see Gibson et al. 1998). If the integrity of the judiciary and respect for its decisions are values that a sufficient number of citizens are willing to defend by withdrawing support from policy makers who attack judicial independence, policy makers are likely to conclude that disciplining the court or resisting unwelcome decisions is not worth the potential costs of a public backlash. Public support provides a shield for judicial independence. A remarkably frank quote by a member of the German Bundestag illustrates this logic: “There is not a single deputy here who thinks it would be advisable to move against the court. A serious confrontation would just create a public discussion in which one could easily get a bloody nose” (quoted in Vanberg 2005, p. 121).

Exogenous explanations that stress the importance of public support raise an obvious question: What explains public support for courts as independent institutions, especially if courts constrain popularly elected and accountable policy makers? This question takes a back seat in much work in this tradition (e.g., Epstein et al. 2001; Vanberg 2001, 2005; Staton 2006, 2010) because the focus of the analysis is on understanding how judges and legislators behave if public support is the key enforcement mechanism for judicial opinions (a point to which I return in the next section). But “closing the loop” for these exogenous explanations requires an explicit theory of the origins of public support for judicial authority.

One argument begins from the fact that the political process in democracies represents complex preference aggregation and delegation problems rather than the simple representation of “the people's will” (or even a homogeneous majority's will) of high school civics. 14 Competing interests vie for power in a policy process that divides authority among various institutions and often induces principal–agent relationships between citizens and officeholders. In this environment, recourse to elections offers one method for holding policy makers accountable (see Powell 2000), but given the imperfections of the electoral connection and majoritarian processes (see Buchanan & Tullock 1962, Riker 1982), citizens concerned with limiting the possibility for abuses of power may favor imposing additional limits on the exercise of political power. An independent judiciary can play a crucial role in enforcing such limits.

For example, Carrubba (2009)—in the context of international courts—develops a model in which citizens who observe the interactions between their government and an independent court can use court decisions (and the government's reaction to these decisions) to detect whether their government is unduly beholden to special interests. Over time, this dynamic can generate sufficient public support to provide the court with considerable leverage vis-à-vis the other branches. Stephenson (2004) develops a similar argument in the context of a domestic court. In this three-player model, a government can legislate, and if it does so, a court reviews the proposed bill and accepts or vetoes it. The government can respond to a judicial veto by respecting the court's authority or by implementing its policy despite the veto and disciplining the court. Finally, a voter can choose to discipline a government for failing to legislate, for attacking the judiciary, or both. The challenge confronting the voter is that she is not certain whether the government's and the judiciary's preferences coincide with hers or diverge. Moreover, the voter has limited information about the policy environment and is uncertain about which policies are in her interest. As a result, when a government adopts a specific policy, the voter cannot be sure whether the government is acting in her interest or promoting a policy that hurts her (for example, because it serves a special interest). Stephenson demonstrates that if judicial opposition to legislation is a more informative signal about the desirability of the policy than the government's support for it, voters will prefer an independent judiciary and punish noncompliance with judicial rulings.

A second explanation for the willingness of citizens to defend judicial authority in the face of executive and legislative challenges builds on Weingast's (1997) seminal paper on the origins of “democracy and the rule of law.” Weingast's central claim is that constitutional boundaries on political power are ultimately enforced by public backing, that is, by a sufficiently widespread willingness of citizens to withdraw support from policy makers who transgress these boundaries. In the face of such a potential reaction, policy makers either stay within constitutional boundaries in anticipation of public censure or are dismissed from power. Naturally, such citizen backing poses a significant coordination problem. For a particular action X to be deterred, it must be likely that if a policy maker does X, a sufficient number of citizens will come to a coordinated understanding that X is “out of bounds” and withdraw support. (There is—in addition—a potential collective action problem in acting on such an understanding. Like Weingast, I leave this issue aside for the moment. As long as the costs of withdrawing support are low, e.g., a refusal to vote for a candidate, this is not a major barrier.)

In Weingast's account, a critical advantage of written constitutions, as well as of prominent historical events in a country's political history, is that they can facilitate coordinated understandings of constitutional boundaries. Yet, it is apparent that written constitutions often fail to resolve the coordination problem confronting citizens; they can instead give rise to a second-order coordination problem. In the face of competing plausible interpretations of constitutional provisions, there may arise legitimate disagreement about whether action X is in or out of bounds. Such disagreements are constitutional in nature but may often be fueled by the narrow partisan implications of choosing one interpretation rather than another. Such disagreements work against coordinated citizen responses to policy maker actions and thus undermine the ability of citizens to enforce a constitution.

The difficulty of achieving spontaneous coordination of citizen understandings in the face of competing constitutional interpretations opens up one way to think about the role and power of courts that has been developed most fully by Sutter (1997) and Vanberg (2011). By resolving a dispute between competing constitutional interpretations, judges provide a clear focal point around which citizens can coordinate their responses to disputed policy maker actions. Once a court has announced that action X is out of bounds, all citizens have received the same signal regarding the appropriate response and, more importantly, all know that all others have received the same signal. As Vanberg (2011, p. 314) puts it, the importance of a judicial decision

…derives from the fact that a judicial verdict (whether “right” or “wrong” in some deeper sense) can serve as an unambiguous signal around which citizens can coordinate their evaluation of sovereign actions. Irrespective of the details of a particular decision, the fact that a decision has been made, and that a policymaker refuses to follow that decision, can send a clear signal that the policymaker is no longer committed to respecting the constitutional order, and should be resisted. Once the Supreme Court announces that Nixon must turn over the tapes, refusal to do so can no longer be explained by divergent interpretations of executive privilege—refusal to comply clearly reveals an attempt to play outside the rules.

### Elections DA---Messaging Link

#### Biden’s strategy to restrain the courts is succeeding now but aggressive court reform measures paint him as a radical leftist

Linkins 23 – deputy editor at The New Republic

Jason Linkins, “Look Who’s Defying the Supreme Court Now,” The New Republic, 8-19-23, https://newrepublic.com/post/175071/defying-supreme-court-voting-rights

I wonder how the political media will respond if Republicans revive the George Wallace/Andrew Jackson style of court opposition. Back in May, I observed that the rancid coverage of the debt ceiling crisis was emblematic of the asymmetrical way the media treats the two parties, where Republicans are “allowed to exert maximal power” to get what they want while Democrats are “forced into the role of helpmate, permitted to step up occasionally to buffer the GOP’s excesses but not to exert maximal power themselves.” It’s a fairly consistent pattern that puts Democrats in a bind while granting the GOP broad permission to test the limits of our norms and institutions.

So it’s not a great sign that The New York Times covered these goings on in Alabama with a piece headlined, “Alabama Lawmakers Decline to Create New Majority-Black Congressional District”—as if the court had merely offered a suggestion that could be opted out of instead of issuing a ruling. It is hard to believe that the same paper would have treated Biden as mildly if he had, say, refused to comply with the Supreme Court’s decision to scuttle his student loan relief plan. The political press seems overly vigilant about what Democrats might do in response to a wayward Supreme Court. (Even Epps is hard-pressed to deliver the examples of court defiance on the left that his piece promises.) During the last presidential campaign, they treated the mere notion that Biden might countenance court-packing as radical beyond words—this after largely treating the GOP’s refusal to grant Merrick Garland a hearing as the normal stuff of politics.

In any event, Democrats aren’t in any rush to impose those kinds of radical reforms on SCOTUS, and as TNR contributor Simon Lazarus explains, they have good reason: For the time being, the rhetorical and political campaigns they’ve waged against an unpopular court, coupled with some creative policy responses, have proven to be sufficient to mitigate some of the damage done. What’s more, liberals seem to be having an influence on the justices themselves: In Allen v. Milligan, Roberts was able to temper his previously well-documented hostility to the Voting Rights Act, which Lazarus chalks up to the fact that liberals have been highly effective politically of late, even as they’ve faced adversity from the court. Still, if that adversity ever gets to be too much, it will be worth remembering that the GOP has made it fair game to openly defy the court’s rulings.

#### The plan will be spun by the media to paint Biden as the “radical left”

Shephard 20 – staff writer at The New Republic

Alex Shephard, “Joe Biden Doesn’t Have to Answer Your Court-Packing Question,” The New Republic, 10-9-20, https://newrepublic.com/article/159730/joe-biden-doesnt-answer-court-packing-question?mc\_cid=7f018049a5&mc\_eid=UNIQID

The Trump campaign keeps hounding Biden and Harris about this because it wants to paint the Democrats as radicals. Journalists, it seems, want the same thing. Instead of drilling down on Biden’s contingency plan for the court, they’re obsessing over the fact that he allegedly “didn’t answer the question,” which suggests some sort of underhandedness or lack of transparency. A more detailed understanding of Biden’s court reform options would be useful in the lead-up to the election, but the question of whether Biden supports “court-packing” has become a distraction from that.

The larger problem with the coverage of Biden’s court-packing nonresponse is that it omits what’s driving his campaign’s thinking. As Jess Coleman wrote in his newsletter, the way it’s asked about by the media, “court packing is just another policy proposal on par with Medicare for All or a wealth tax.” But court-packing is not really like those things at all. A conversation about court-packing requires a discussion about the increasingly anti-democratic tilt of the Republican Party and the fact that three Supreme Court justices were nominated by a president who lost the popular vote (five, if you include George W. Bush, who lost it during his first presidential campaign but won it during his second, after which he nominated two justices). And it requires addressing the extraordinary power grab happening right now in the Senate, with Mitch McConnell rushing through a Supreme Court justice with less than a month before the election.

## Neg---AT: Case

### AT: SCOTUS Politicized

#### The judiciary is not structurally politicized

Miller 21 – J.B. Stombock Professor of Law at the Washington & Lee University School of Law

Russell Miller, “We Don’t Need to Reform the Supreme Court,” Just Security, 2-12-21, https://www.justsecurity.org/74655/we-dont-need-to-reform-the-supreme-court/

Counting the Court or Courting the Count

I have another, more fundamental, objection to these plans. The reformers argue that they are responding to the increasing politicization of the judiciary. But that conclusion largely depends on quantitative research that makes claims about the Court’s conduct, and the political leanings of the justices, almost entirely by counting the justices’ votes and coding them for the supposed partisan polarity of issues the Court decides. This approach to thinking about and studying the Court is part of a larger trend in legal research involving the ascendance of social science methods borrowed from political science. The approach has found popular voice in reporting at the SCOTUS Blog and the New York Times. But it is becoming a staple of academic legal scholarship as well. Quantitative studies tell us something, perhaps even something about the politicization of the judiciary. But they also crudely oversimplify the Court’s work, reducing it to a set of binary inputs derived from justices’ votes: yes-no; conservative-liberal.

Isn’t the Supreme Court’s jurisprudence something more than that? Even the use of the reductive term “vote” to describe the justices’ work is problematic. What’s the point of all those long, sometimes long-winded, “opinions” if it only boils down to vote counting? Significantly, the justices themselves studiously resist efforts to assign them and their work to partisan columns on a scorecard.

It’s beyond dispute that the political tilt of the judiciary frames legal outcomes. And it’s true that legal outcomes matter in ways that affect Americans’ every-day lives. Access to health care or participation in one’s cherished religious services or the right to enter the country or the autonomy to marry who one loves, among so many other central issues of life, hang on the justices’ votes. The cumulation of those outcomes, produced by a judiciary now leaning rightward, have the potential to change America overtime and in an enduring way. The partisan character of that effect, however, can’t be the basis for an intrusive overhaul of the apparatus of justice. It is, after all, the natural consequence of shifting political winds and the role the Constitution assigns to the political branches in structuring and assembling the judiciary. The Framers understood how important it would be to anchor the independent and powerful judiciary in democratic and accountable processes. With rising resentment for remote and elite institutions, the need for that popular anchor is not less resonant today. It’s the wisdom behind Mr. Dooley’s conclusion that “the Supreme Court follows the election returns!” Of course, the Democrats understand this. The same levers of judicial politics made the progressive achievements of the New Deal Court and later the Warren Court possible.

The quantitative research informing the reform movement tells us very little about the quality of the Court’s recent jurisprudence. Counting votes doesn’t engage closely with the reasoning, analysis, and methods deployed by the justices. But judicial reasoning is exactly what makes a judge’s “vote” something altogether different to a legislator’s vote. The latter can and should be informed by politics and power, and beyond that need not be justified according to any other kind of logic. Neglecting the very essence of judicial decision-making as it does, quantitative, results-centric critiques of the Court are not a claim that the Court’s work has become shoddy. That would have been a more compelling summons to sweeping judicial reform? To ascertain whether there has been a dramatic decline in the integrity and soundness of judicial reasoning – whether it produces right-leaning or left-leaning results – requires a more traditional engagement with the Court’s cases. That approach involves close readings of the opinions and critical interpretation of the reasoning deployed by the justices. It is a sleeves-rolled-up, painstaking exegesis of the Court’s richly nuanced opinions, and it is bound to produce a different perspective and understanding of the Court’s decisions than that which can be achieved by merely studying vote tallies.

Let me offer an example. I’m doing a big study of the Court’s recent jurisprudence around the doctrine of stare decisis, the longstanding principle that courts are bound by previous decisions of higher-ranking courts on similar matters. A simple conservative-liberal assessment of the votes in the relevant cases permits the superficial conclusion that the Court’s liberal wing favors adherence to precedent while the conservative wing is more willing to depart from the doctrine of stare decisis. So far, so good. But a close reading of the many opinions in that line of cases reveals a surprising convergence around the notion of law’s determinacy among justices as politically divergent as Justices Clarence Thomas and Elena Kagan. Far more than their votes in those cases, an understanding of the justices’ vision of the law that emerges from what they actually wrote in support of their votes is an insight of greater long-term significance. It also shows that there are curious departures from the standard left-right politicization critique of the Court. Beneath the votes, and at the level of the justices’ reasoning, there were nuanced strains of jurisprudential agreement that remain un-excavated if we operate only at the level of vote counting. On top of it all, the opinions turned out to be admirably sophisticated. They involved a wide variety of interpretive approaches, clear and coherent reasoning, and lively rhetoric. Whatever the outcome of the votes on the question of the fate of stare decisis, it is impossible to say that the quality of the Court’s engagement with the issue is somehow lacking.

In fact, even as quantified studies show an increasing rightward tilt on the Court, there is no suggestion that the jurisprudential quality of the Court’s decision-making has collapsed in a manner that requires urgent, dramatic structural reform. Some excellent and well-qualified legal minds have found their way to the bench in the last years, under administrations led by both parties. And the Court always had some weak links, even the revolutionary Courts led by Chief Justice John Marshall and Chief Justice Earl Warren. The debates at the Court over the meaning of law, foundational legal principles, and judicial method (as a proxy for discussion about judicial power itself) remain rich, informed, and intense.

#### SCOTUS isn’t a conservative think tank

Miller 21 – J.B. Stombock Professor of Law at the Washington & Lee University School of Law

Russell Miller, “We Don’t Need to Reform the Supreme Court,” Just Security, 2-12-21, https://www.justsecurity.org/74655/we-dont-need-to-reform-the-supreme-court/

Protecting Against a Judicial Capture?

The Democrats largely admit that their interest in reform is driven by, as the progressive think tank Take Back the Court puts it, the partisan interest in “re-balancing the Court after its 2016 theft.” But the reformers also seem convinced that the judiciary is at risk of being captured in the sense that it is now dangerously loyalist to the Republican Party or former President Donald Trump. The non-partisan advocacy group Fix the Court, for example, worries that the Court is “not only highly political, it also is polarized along partisan lines.” If these concerns were justified, then reform would be necessary because we would see that the judiciary is set – not on following the law – but on ruling only to benefit Trump personally or the cause of his residual political movement.

It’s an admittedly small sample, but we didn’t see anything like that in the handful of courts that were called upon to review Trump’s challenges to the 2020 election. Instead, up and down the judicial hierarchy and involving judges endorsed or appointed by both parties – including Trump himself – we saw judges doing their work admirably, applying the law in an objective and temperate manner. Chief Justice John Roberts was right when, in reaction to Trump’s twitter-broadside against an “Obama judge,” the Chief Justice insisted that

we do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.

The fact that Trump managed to make a significant haul of appointments in his single four-year term is not the same thing as demonstrating that there has been a Trumpist capture of the judiciary. The numbers are well known: 234 confirmed Article III judicial appointments, including three Supreme Court justices and 54 Court of Appeals judges. In his eight years in office, President Barack Obama only managed 329 confirmed Article III judicial appointments, including two Supreme Court justices and 55 Court of Appeals judges. There should be no doubt that this will be one of Trump’s most enduring legacies. If I had to to characterize the policy and political leanings of such a large number of judges, I would point to the respectable core of the Federalist Society, which espouses constitutional conservatism, a pro-business and small-government agenda, and sends signals on social issues that win support from Evangelical Christians and libertarians. Those are Republican values and the Democrats understandably oppose them. But there are legitimate and reasonable interpretative approaches to the law that might give those policy positions priority in the work of a judge. Results favoring Republican policies are not the same thing as blind, extra-judicial fealty to a political party or personality.

### Alt Causes

#### Good-faith legal disputes mean structural reform inevitably fails

HLR 24 – Harvard Law Review

“Chapter Two: Reform Congress, Not the Court,” 137 Harv. L. Rev. 1653, April 2024, https://harvardlawreview.org/print/vol-137/reform-congress-not-the-court/

\*\*\*Note: “Disputes about determinacy entail disagreements between interpreters about just how many legal questions a good faith reading of legal texts (like the Constitution and statutes) answers when those interpreters consult the same pieces of evidence,” (from earlier in article)\*\*\*

Recognizing that disputes about determinacy lie at the heart of structural reform proposals counsels against reform for three reasons. First, Court reform will do nothing to resolve that interpretive debate, which might be irresolvable at any rate.114

[[Begin FN 114]]

Cf. Kavanaugh, supra note 65, at 2137 (“Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way.”).

[[End FN 114]]

Second, Court reform will strike at the independence of the judiciary, as it attempts to coax the Justices to interpret legal texts not by their own lights, but by the lights of fleeting political majorities. Third, for those concerned with the real-world stakes of these legal fights, this Chapter proposes amending the legal texts in question as an alternative and more effective remedy. This path forward has the virtue of being responsive to the reality that disputes about determinacy compose the core of the current interpretive clash. And it helps focus attention on reforming the branch of government that most needs it: Congress.

1. Structurally Reforming the Court Would Not Resolve the Underlying Interpretive Dispute. — Increasing the size of the Supreme Court would do nothing to close the gap between those who view the Constitution as more determinate and those who view it as less determinate. Nor would imposing term limits or stripping the Court of its appellate jurisdiction. Implementing these reforms would be like treating someone’s broken leg with morphine. The pain may subside for a bit, but the underlying injury would still remain. Reforms that would reorient the Court away from a body that sees much determinacy in legal texts toward one that sees less would likely have an immediate impact. In concrete terms, several of the recent controversial cases likely would have come out the other way had there been a majority on the Court that viewed the Constitution as more indeterminate. But the impact would be fleeting. And it would do nothing to quell the underlying (and good faith) debate about the best way to interpret legal texts.

### Term Limits Neg

#### Term limits make the court more partisan and fail to create structural change

Sitaraman and Epps 21 – Associate Professor of Law, Washington University in St. Louis; Professor of Law and Director of the Program in Law and Government, Vanderbilt Law School

Ganesh Sitaraman and Daniel Epps, “The Future of Supreme Court Reform,” 134 Harv. L. Rev. F. 398, May 2021, https://harvardlawreview.org/forum/vol-134/the-future-of-supreme-court-reform/

A. “Skinny” Court Reform Through Legislation

Legislative action is the most obvious way to reform the Court. One major structural reform that some Democrats seem interested in advancing right now is Supreme Court term limits. Perhaps some may imagine that term limits could pass despite narrow divisions in Congress, given their apparent popularity with voters.17 But there are reasons to doubt the viability of statutory term-limits reform. The leading Democratic proposal would not impose term limits on currently serving Justices.18 That would likely mean that Democrats would not obtain a majority on the Court for years.19 Why would Democrats waste considerable political capital on a major reform that would not benefit their agenda?20 Moreover, such a reform could even provide a windfall to Republicans: if President Biden were able to appoint two Justices, term limits would make it likely that any of his appointees would serve for shorter periods than they would otherwise, especially relative to President Trump’s three appointees.21 One could imagine Republicans recognizing what they had to gain by going along with the proposal, but that same fact seems likely to preclude sufficient support among Democrats. Term limits have other drawbacks as well. They might make the Court more political, rather than less, by guaranteeing Court nominations are an election issue every two years; that would be even more true if, as some fear, the Justices themselves might shape their opinions with an eye toward a post-Court political career.22 On top of all that, whether term limits can be imposed via statute (rather than constitutional amendment) is deeply controversial.23 These concerns are another reason to question whether term limits could obtain sufficient support to be enacted into law.

#### Term limits fail to increase the quality of the court

Miller 21 – J.B. Stombock Professor of Law at the Washington & Lee University School of Law

Russell Miller, “We Don’t Need to Reform the Supreme Court,” Just Security, 2-12-21, https://www.justsecurity.org/74655/we-dont-need-to-reform-the-supreme-court/

I also doubt the suggestion that an 18-year term limit will spare us the “political circus” that accompanies today’s Supreme Court appointments. The political stakes of those appointments clearly are elevated by life-tenure. But it is the Court’s power in our political system that makes Court appointments such a combustible event. Marginally shorter terms won’t change that fact.

There’s also a nasty bit of ageism percolating in the term limits proposal. Fix the Court worries that many justices now serve “past their intellectual prime.” But we just had the oldest-ever presidential ballot and elected the oldest-ever president. If we can live with a septuagenarian president, then there is no reason to categorically exclude older jurists from service on the bench. All of us can name several Supreme Court justices who served vigorously and admirably right up to their deaths in office. And all of us can name several Supreme Court justices whose relative youth did not enhance the integrity of their legal reasoning.

### Lottery System Neg

#### A lottery system solves nothing but links to hardball and legal spillover

Millhiser 20 – senior correspondent at Vox, focusing on the Supreme Court

Ian Millhiser, “Bernie Sanders’s radical plan to fix the Supreme Court,” Vox, 2-11-20, https://www.vox.com/2020/2/11/21131583/bernie-sanders-supreme-court-rotation-lottery

Epps and Sitaraman’s other proposal is a “Supreme Court lottery.”

It works like this: Evert one of the 179 active circuit judges would receive a promotion to associate justice of the Supreme Court. For the most part, this promotion wouldn’t change their day-to-day work very much — they’d continue to hear cases on their current court, and they’d continue to do more or less the same work they’ve been doing as circuit judges.

But there would be a catch. Under Epps and Sitaraman’s lottery proposal, “the Supreme Court would hear cases as a panel of nine, randomly selected from all the Justices” — meaning that this panel would be randomly selected from among the nine current justices plus the 179 new justices. Epps and Sitaraman would also reshuffle this panel very frequently — a new panel of nine would be chosen every two weeks — although the proposal could be modified so that a particular panel would sit for a longer period of time.

The advantage of this “lottery” proposal is that it might be constitutional. Barring extraordinary events, Congress cannot strip a sitting justice of their “office,” but it can give the same office to a whole bunch of additional people. Under the lottery proposal, Gorsuch would remain an associate justice of the Supreme Court. He’d just have 179 new colleagues.

Moreover, it’s hardly unheard of for judges to hear cases on randomly assigned panels. The overwhelming majority of cases heard by federal circuit courts are heard by randomly assembled three-judge panels, not by the full appeals court. So if a small panel of appeals court judges can decide a case on behalf of their court, perhaps a panel of Supreme Court justices could do so as well.

To be clear, the constitutional case for a Supreme Court lottery is hardly airtight. Recall that the Constitution provides that federal judges “shall hold their offices during good behaviour.” The current justices might argue that one of the essential attributes of their office is the right to sit permanently on the nation’s most powerful panel of judges — and thus any legal regime that strips them of that right is unconstitutional.

It’s also far from clear that rotating judges would prevent the Supreme Court from undercutting Sanders’s agenda. In just three years in office, Trump’s appointed more than a quarter of the federal appellate judiciary, and many of his judges hold views that are well to the right of the current median justice.

One danger of randomly selecting members of the Supreme Court is that there’s no guarantee that the lottery won’t select James Ho, Neomi Rao, and three other Trump judges who are well to the right of the Roberts Court. Such a panel would only serve temporarily, under the lottery system, but that could be all the time they need to declare much of Sanders’s accomplishments — and potentially many of the New Deal and the Great Society policies — unconstitutional.

Which brings us back to the proposal Sanders has already rejected: court-packing.

The downsides of court-packing are myriad. Sanders is right that it is likely to inspire retaliation — Republicans can add justices too if they regain control of Congress and the White House. And Sanders is also right that court-packing will tend to delegitimize the Supreme Court.

Red states are likely to engage in massive resistance against a Supreme Court packed with Democratic appointees. And, as the Jim Crow South’s massive resistance to Brown v. Board of Education (1954) demonstrates, such resistance can be very effective even when most of the country accepts the legitimacy of the Court.

But Republicans also believe that they won control of the Supreme Court fair and square, and are likely to treat any effort to strip away that control as illegitimate. If the Roberts Court overrules Roe v. Wade (1973), red states are likely to engage in massive resistance if Roe is reinstated by a packed Court. They are also likely to do the same if Roe is reinstated by a panel of liberal justices chosen by a lottery.

All of which is a long way to say that there probably isn’t any way to change the makeup of the Supreme Court that won’t be met with resistance. If Sanders believes that a lottery system is preferable to a packed Court on the merits, then he should push the policy that he believes to be best.

But he shouldn’t expect the same partisans who wouldn’t let President Obama appoint anyone at all to a Supreme Court vacancy to accept a new system where Republicans aren’t guaranteed control of the judiciary. One the Supreme Court becomes a partisan prize, it is devilishly hard to take that prize away from the party that captured it.

### Stripping Neg

#### Jurisdiction stripping fails to disempower the courts

Epps and Trammell 23 – Professor of Law, Washington University in St. Louis; Associate Professor of Law, Washington & Lee University School of Law

Daniel Epps and Alan M. Trammell, “The False Promise of Jurisdiction Stripping,” Columbia Law Review, Vol. 123: 2077, 2023, https://columbialawreview.org/wp-content/uploads/2023/11/Epps-Trammell-The\_false\_promise\_of\_jurisdiction\_stripping.pdf

Conclusion

For all that academics have debated constitutional constraints on Congress’s power over jurisdiction, they have paid far too little attention to the question of whether jurisdiction stripping could actually effectuate Congress’s goals. Proponents and skeptics alike seem to assume that the strong form of jurisdiction stripping will work. This Essay has shown that it won’t. Jurisdiction stripping can have indirect benefits as a policy tool. It might succeed in allowing Congress to sequence how and when issues are litigated and thus buy time for policies to become entrenched. And it can raise the salience of issues and put the Court on the defensive.

But as a straightforward strategy for wresting control of the Constitution from the Court, jurisdiction stripping almost assuredly will fail. Its effects are chaotic and unpredictable; the Court can find a way to overcome a jurisdiction strip if it so desires; and the judiciary is ultimately needed to enforce, and to make durable, federal guarantees. To overcome a hostile judiciary, Congress and the President cannot simply get the Court out of the way. They may have no choice but to transform the Court. In this way, understanding jurisdiction stripping’s limitations offers a rejoinder to those who argue that Court reformers should seek to disempower courts rather than pursuing institutional change.373

Beyond this practical takeaway, clarifying how jurisdiction stripping will and won’t work as a policy tool has implications for deeper normative questions. Even among those who subscribe to the plenary view of Congress’s jurisdiction-stripping power, many argue that taking whole classes of cases away from the courts in pursuit of a political agenda is fundamentally unwise and even dangerous.374 Professor Charles Black offered one of the few normative defenses of jurisdiction stripping. He supported the plenary view of Congress’s power for a “reason primarily of a political kind,” arguing that, leaving to one side the Supreme Court’s original jurisdiction, every federal court exercises jurisdiction only upon an explicit congressional directive.375 And this, he contended, “is the rock on which rests the legitimacy of the judicial work in a democracy.”376

If our arguments are right, then Black’s normative defense takes on new relevance. Jurisdiction stripping can’t subvert the constitutional order. But it can create space for a dialogue between the political and judicial branches. In its soft and subtle form, it can allow federal innovations—from Reconstruction to labor laws—to take root and even blossom rather than being prematurely cut down by the judiciary. Professor Black perhaps overstated the role that this congressional power plays in legitimizing the judiciary’s work. But seen in its proper and humble light, jurisdiction stripping can be consistent with—rather than a grievous affront to—the separation of powers.

There is a broader lesson, though. In our nation, at any given point there have been, and will be, those who believe the Supreme Court has lost faith with true constitutional values. Today that describes progressives, but it could describe others yesterday or tomorrow. For those out of power, looking for easy answers is tempting. Jurisdiction stripping’s allure lies in its supposed promise as a constitutional loophole that Congress can exploit to ~~disable~~ disarm a hostile judiciary. But there are no constitutional cheat codes. The Supreme Court is, for all else, a political institution. Those who seek to tame and control it can do so only by building political coalitions, winning elections, and ultimately retaking control of the judiciary. That is a long and grueling path, and it is one for which the Constitution provides no shortcuts.

#### It backfires and makes Congressional policy-making more difficult

Epps and Trammell 23 – Professor of Law, Washington University in St. Louis; Associate Professor of Law, Washington & Lee University School of Law

Daniel Epps and Alan M. Trammell, “The False Promise of Jurisdiction Stripping,” Columbia Law Review, Vol. 123: 2077, 2023, https://columbialawreview.org/wp-content/uploads/2023/11/Epps-Trammell-The\_false\_promise\_of\_jurisdiction\_stripping.pdf

[[Begin Abstract]]

Jurisdiction stripping is seen as a nuclear option. Its logic is simple: By depriving federal courts of jurisdiction over some set of cases, Congress ensures those courts cannot render bad decisions. To its proponents, it offers the ultimate check on unelected and unaccountable judges. To its critics, it poses a grave threat to the separation of powers. Both sides agree, though, that jurisdiction stripping is a powerful weapon. On this understanding, politicians, activists, and scholars throughout American history have proposed jurisdiction-stripping measures as a way for Congress to reclaim policymaking authority from the courts.

The conventional understanding is wrong. Whatever the scope of Congress’s Article III power to limit the jurisdiction of the Supreme Court and other federal courts, jurisdiction stripping is unlikely to succeed as a practical strategy. At least beyond the very short term, Congress cannot use it to effectuate policy in the face of judicial opposition. Its consequences are chaotic and unpredictable, courts have tools they can use to push back on jurisdiction strips, and the judiciary’s active participation is ultimately necessary for Congress to achieve many of its goals. Jurisdiction stripping will often accomplish nothing and sometimes will even exacerbate the problems it purports to solve.

Jurisdiction stripping can still prove beneficial, but only in subtle and indirect ways. Congress can regulate jurisdiction to tweak the timing of judicial review, even if it cannot prevent review entirely. Jurisdiction stripping also provides Congress a way to signal to the public and the judiciary the importance of an issue—and, possibly, to pressure courts to change course. But these effects are contingent, indeterminate, and unreliable. As a tool to influence policy directly, jurisdiction stripping simply is not the power that its proponents hope or its critics fear.

[[End Abstract]]

#### Court stripping fails and is bad.

Berger and Root 19 – Vice President of Democracy and Government Reform at CAP and former senior policy adviser at the White House Domestic Policy Council with a J.D. from Yale Law School; Associate director of Voting Rights for Democracy and Government at CAP with a J.D. from the George Washington University Law School.

Sam Berger and Danielle Root, “Structural Reforms to the Federal Judiciary,” Center for American Progress, May 2019, https://www.americanprogress.org/article/structural-reforms-federal-judiciary/

This proposal to limit the reach of the current Supreme Court raises a number of serious concerns. It would make it difficult to undo existing precedent that would still be binding on lower courts. There is also a high risk of partisan escalation if the Supreme Court were stripped of jurisdiction over a limited set of cases, as opposed to being restricted only to original jurisdiction. Conservatives would likely respond by stripping the court of jurisdiction over more cases, and progressives would later likely respond in kind—eventually leading to very limited jurisdiction for the court.

In addition, court stripping would lead to diverging legal policy across the country since the Supreme Court could not address circuit splits. While other proposals would make it harder for the Supreme Court to overturn lower court decisions, this approach would make it impossible. So even in the most egregious cases, lower court decisions would be the final word.

There are real concerns that such an approach could disproportionately affect historically underrepresented groups. For instance, in certain regions, lower federal courts could severely limit reproductive rights or the rights of LGBTQ people. Leaving determinations of law in the hands of regional courts would not be a problem for Americans privileged enough to move to more favorable areas, but it would leave vulnerable people without critical resources and access to justice.

## Neg---K

### Overview

#### In particular, the topic renews interest in critical legal studies, critiques of legal normativity, and demosprudence. Here’s a great piece of evidence that presents an “overview” of the literature which questions the structures of law as being inherently ideological.

Darren Lenard Hutchinson 5 Professor of Law, Washington College of Law, American University, Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics, 23 Law & Ineq. 1

2. Critical Theory and Judicial Majoritarianism

Popular legal and nonlegal culture conceives of the Court as a guardian of vulnerable, disadvantaged, and powerless classes. 116 Liberal critics who acquiesce in countermajoritarian fears have, in fact, argued that the protection of politically powerless minorities justifies heightened judicial review, 117 thus contributing to the notion that the Court counters democracy to help subordinate groups. The work of critical theorists, however, complicates this prevalent image of the Court. Critical theorists argue that rather than offering solicitude to historically disadvantaged groups, Court doctrine favors majoritarian views on questions of race, gender, sexuality, and class.

Contemporary critical theorists do not view the Court as an unbiased decision maker. Influenced by postmodernism, poststructuralism, and legal realism, these scholars have uncovered the many ways in which legal analysis permits judges to impose their own ideological viewpoints, rather than reaching some "neutral," "correct" legal outcome. The critical legal studies movement 118 has made this point most persuasively and exhaustively. According to critical legal studies scholars, the law is indeterminate, malleable, open to discretionary interpretation, and, consequently, a reinforcer of social hierarchy. 119 These themes of critical legal studies mirror to a great extent the arguments made by earlier members of the legal realist movement, who uncovered the judicial biases of the Lochner Court and urged judges to utilize social science research to provide empirical justification for their decisions. 120

Critical legal studies, however, has less faith than legal realists in the ability of law to find the "right" outcomes, arguing that the structure of law itself is ideological and a mask for majoritarian concerns. 121 Some critical legal studies scholars, embracing a more cynical approach to the law, believe that the law is inherently biased and that the existence of "rights" deadens progressive activism, a result of false consciousness among subordinate classes who incorrectly believe that the law protects them. 122 Consequently, many critical legal studies scholars have argued that critical theorists should abandon a rights-centered approach to social justice, replacing it with more informal, often undefined, mechanisms for the attainment of justice. 123

Critical race theorists, 124 feminist legal theorists, 125 and gay and lesbian legal theorists 126 accept many of the arguments of critical legal studies scholars: they distrust legal structures and believe that law reinforces power inequities, constructs race, gender, sexuality, and class hierarchies and changes sluggishly, if at all. 127 Yet these scholars depart from critical legal studies because, despite their skepticism, they embrace law as a vehicle for social change. Critical race theorists, in particular, have openly discussed the complexity of their approaches to law, 128 and a body of works in feminist and gay and lesbian legal theory embraces law as an instrument of social change. Nevertheless, these critics have also deconstructed legal structures, demonstrating how Court doctrine preserves majoritarian privilege against the efforts of subordinate groups to challenge this privilege through civil rights litigation.

#### There are many different entry points to the critical legal research depending on the side---this evidence points to different dimensions of the CLS literature that may be relevant.

NICHOLAS F. STUMP 21 Faculty Member & Head of Reference and Access Services, George R. Farmer Jr., Law Library, West Virginia University College of Law. "NON-REFORMIST REFORMS" IN RADICAL SOCIAL CHANGE: A CRITICAL LEGAL RESEARCH EXPLORATION, 101 B.U. L. Rev. Online 6

I. CRITICAL LEGAL RESEARCH FRAMEWORK

This Essay explores CLR vis-à-vis four constituent dimensions. These include deconstructing the legal research regime, an intensive practitioner reliance on critical legal theory-steeped resources, the cultivation of a nonhegemonic grassroots approach (i.e., as involves radical cause lawyering and related praxis modes), and an ultimate focus on true systemic reformations of the ecological political economy over mere intrasystemic law reform. This Part provides a synopsis on each dimension: note, however, that such condensed coverage is necessarily intended for introductory purposes only.

A. Deconstructing Legal Research

Deconstructing legal research is perhaps the most robustly developed CLR dimension. 5Most basically, critical commentators assert that the legal research and analysis regime is not normatively neutral but instead insidiously reflects and indeed perpetuates hegemonic societal interests along lines of class, race, gender, LGBTQ+ status, Indigenous status, the Global South and North divide (i.e., as implicating neo-imperialist and neo-colonialist structures), and so forth: or the fundamental values of white patriarchal capitalism. 6Such dominant societal interests are reified through mechanisms including centuries' old legal classification systems embedded within legal research platforms--as embodying hegemonic legal categories (e.g., the West classification system). 7Other reification mechanisms include search algorithm biases 8and, increasingly, related biases in artificial intelligence as incorporated within legal research technology. 9

Additionally, deconstructing legal research extends beyond legal research platforms per se--i.e., as practitioners are indoctrinated with hegemonic legal categories through U.S. institutional training and norms. 10As a prime example, the West classification system, in fact, informed the structural underpinnings of the Langdellian law school curriculum as developed in the late nineteenth century. 11Consequently, regardless of the research platform utilized, problematic legal categories are "inscribed in our minds" and thus insidiously homogenize research outcomes towards hegemonic ends 12--in effect, essentially "predetermin[ing] research outcomes." 13And, as a final point, note that all contemporary work discussed above on deconstructing legal research has been deeply influenced by the foundational "triple helix dilemma" framework developed by Professors Richard Delgado and Jean Stefancic. 14

B. Reliance on Critical Legal Theory Resources

Beyond deconstructing legal research--as positively operationalized, for instance, vis-à-vis educational efforts aimed at unveiling the insidious biases of the U.S. legal research regime 15--numerous critical commentators have put forth accompanying "reconstruction" methods designed to catalyze genuinely emancipatory legal and broader socio-legal research outcomes. One such reconstruction method is an intensive reliance on theoretical resources. 16More specifically, CLR commentators advocate for reformist-minded lawyers to reach beyond traditional primary and secondary legal resources (e.g., treatises) and to instead rely on critical legal theory and related critical-theoretical resources from other disciplines, such as sociology, to pursue true doctrinal and systemic change. 17Such methodologies ultimately allow practitioners to "look outside of the system box in which we are conceptually housed." 18This approach initially was grounded in notions relating to legal indeterminacy, the myth of legal reasoning, problematic legal categories, and other core insights from the 1980s Critical Legal Studies movement and from schools such as post-structuralism. 19That said, an approach in the Marxist-steeped tradition implicates more societal-transformative theoretical analyses such as those in the context of "radical cause lawyering" theory, practice, and praxis 20--as discussed below.

C. Non-Hegemonic Grassroots Approach

A third CLR dimension--which also constitutes a "reconstruction" method--entails a collectivist approach to legal and broader socio-legal research and analysis, as embedded in a bottom-up, grassroots approach to transformative social change. Liberal public interest lawyering, for instance, often is grounded in atomistic-individualist lawyering modes (i.e., as involves traditional legal research and analysis practices). 21A prime example is liberal attorneys engaging in public interest litigation, as steeped in hierarchal attorney-client relationships with the attorney serving as the institutional-elite "champion." 22In contrast, alternatives such as community lawyering involve attorneys fundamentally supporting those grassroots movements actually driving the social change process. 23Moreover, Marxist- and socialist-steeped "radical cause lawyering" entails such a grassroots-supportive role in the explicit context of more revolutionary social change efforts steeped in class conflict--as necessarily coordinated from local to global scales. 24Accordingly, the CLR influence on radical cause lawyering involves a "collectivist" legal research and analysis approach wherein lawyers eschew individualist research modes--and instead collaboratively engage with organizers, grassroots movements, the broader citizenry, and other parties (e.g., academics) as an inherently collective and emancipatory project. 25

D. Systemic Reformations over Intrasystemic Law Reform

A radical CLR approach aims for true systemic reformations, or transformative change of the ecological political economy, and thus eschews mere intrasystemic change (including "law reform") as an end in and of itself; 26such an approach ultimately is grounded in Marx's influential distinction between the economic "base" and the legal and political "superstructure" that merely supports that base. 27Contemporary ecosocialist systemic reformations--i.e., ecosocialism constituting a leading Left school in the Capitalocene era 28--involve discussions on various collective ownership modes of the means of production and democratic economic planning from local to global levels. 29Moreover, ecosocialist approaches demand ending perpetual economic growth--as is functionally required under the capitalist mode of production, which subordinates both nature and labor through its logic of ceaseless accumulation of capital and "deliberate progressive commodification of everything" (thus producing a "metabolic rift" in natural processes). 30In contrast, strongly ecologically sustainable post-growth ecosocialist modes, 31for instance, center on production for "use value" rather than "exchange value" in the market. 32And such Left thought as materialist ecological socialist feminism 33and the Black Radical Tradition 34target other intertwined subordination systems under white patriarchal capitalism providing related yet distinctive approaches to systemic reformations. 35

As discussed above in Sections I.B and I.C, the CLR influence on such systemic reformations entails, through "reconstruction" methodologies, an exploration of how legal and broader socio-legal research methods can intersect with such collected Left theory, practice, and praxis. Thus, intensive practitioner reliance on critical theory resources and praxis-oriented work such as CLR-infused radical cause lawyering modes--of course, as combined with rich allied organizing work beyond legal and socio-legal dimensions singularly--can help catalyze such truly transformative futures. 36

#### These approaches are also grounded in alternative frameworks that refuse to start from institutional reforms---they explicitly criticize the traditional model of debate around questions of court reform.

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While many progressive and left legal scholars reach for meaningful change, most of us lack alternative frameworks. 23 Like the DOJ reports, even when the scale of our critique is large, our visions for change are often too small. We have focused on a narrow picture of law and law reform while sidestepping questions about the structure of the society, the state, and the market. These movements make these questions central to their work. 24 They do not have it all worked out. But they are making powerful sketches of much-needed alternative frameworks.

Imagining with social movements seeking to transform the state would invest law scholarship in a project of reconstruction and transformation. 25 For radical racial justice movements, the primary commitment is not to law, its legitimacy, rationality, or stability: It is to people. 26 The motivations are to protest an enduring set of social structures rooted in European and settler colonialism and the Atlantic slave trade; to fight for transformative change, justice, and liberation; and to invest in a redistributive and transformative project, one demanding a more equal distribution of resources and life chances, 27 with a focus on the most intersectionally marginalized people. 28

Imagining with social movements acknowledges how social change occurs beyond the courts. Social change happens on the streets and in formal and informal domains where power and legitimacy circulate. Most law scholarship is invested in centering rationality and reason as the terrain for decision-making, and courts, executives, and legislatures as the places where reform happens. Law scholarship generates a world that relies on law-making and enforcing bodies as the repositories of understanding law's functioning and meaning, and as the central targets for change. 29 The way to reform law, law scholarship suggests in form and substance, is to convince these legal institutions through superior argumentation and appeals to rationality. This comports with the predominant marketplace-of-ideas metaphor, which in turn borrows from capitalism's ideological commitments to the superiority of the market in producing optimal results: The best arguments will rise to the top. In this way, law scholarship minimizes the relationship between power and the ideas that govern; 30 erases how power circulates through and benefits from formal law-making and law-executing channels; and ignores the disconnect between legal institutions and the public, from which power and legitimacy should flow in a democratic society. Moreover, it is this framework that propels the law professor as a legitimate, free-standing expert. Imagining with social movements creates an alternative practice of contestation and solidarity, pointing to the different vectors through which ideas are formulated, and the terrain on and means through which they are fought over. 31

### Legal Proceduralism K

#### The idea that “strict procedural rules are necessary to address pervasive anxiety about state power” is a proceduralist way of thinking about checks and balances in government. The idea that universally applicable procedural rules are required to constrain bad court decisions justifies Republican efforts to curb the administrative state.

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Nicholas Bagley, “The Procedure Fetish”, 12-7-21, Niskan Center, https://www.niskanencenter.org/the-procedure-fetish/

America has a procedure problem.

Now and in the coming decades, the country faces a daunting set of challenges: transitioning to renewable energy, forestalling financial crises, increasing housing supply, and preparing for the next pandemic. Yet our public infrastructure is in tatters, as suggested by the staggering governmental failures associated with our COVID-19 response. Institutional distrust is at historically high levels; the number of public employees relative to the U.S. population has plummeted; and government agencies struggle to discharge their basic responsibilities, much less do big things.

Despite the mismatch between the scope of the challenges and the fragility of our institutions, there is little appetite on either the right or the left to rethink public administration and administrative law. Republicans and Democrats instead are locked in the same tired pas de deux that has characterized their approach to state capacity for five decades.

The right’s familiar move, pressed with increasing urgency in recent years, is to call for new procedural rules to discipline a regulatory state that does too much with too little care. Conservative reform proposals travel under an array of names and acronyms, but they embrace a common tactic: They stack procedure on procedure to create a thicket so dense that agencies will either struggle to act or give up before they start. The proposed Regulatory Accountability Act, which would require agencies to hold trial-like proceedings before issuing some rules, reflects that impulse, as do similar laws that have been proposed and adopted at the state level. By tilting the scales against agency action, Republicans hope to end “job-killing regulations” and invigorate the free market.

Democrats have generally opposed these anti-statist measures, which would frustrate their efforts to protect the environment, consumers, and workers. But Democrats do not usually ask the obvious follow-up. If new administrative procedures can be used to advance a libertarian agenda, might not relaxing existing administrative constraints advance progressive ones?

That question deserves an answer. Inflexible procedural rules are a hallmark of the American state. The ubiquity of court challenges, the artificial rigors of notice-and-comment rulemaking, zealous environmental review, pre-enforcement review of agency rules, picayune legal rules governing hiring and procurement, nationwide court injunctions — the list goes on and on. Collectively, these procedures frustrate the very government action that progressives demand to address the urgent problems that now confront us.

But attention on the left is elsewhere. In today’s political landscape, “regulatory reform” is strictly the province of Republican policymakers, so much so that the phrase has acquired an anti-regulatory connotation. Republicans have a reform agenda. Democrats don’t.

What gives? Part of the answer, I think, is that our legal and political culture is in thrall to the belief that strict procedural rules are necessary to address pervasive anxiety about state power. This belief is rooted in at least two stories we tell about the regulatory state. The first is about legitimacy: Robust, legally mandatory procedures are necessary to legitimize an administrative leviathan that rests on a precarious constitutional foundation and that the public views with suspicion. The second is about accountability: that procedural rules, by stitching the public into agency decision-making, guard against the risk that influential minorities will wield undue influence.

Gauzy claims about legitimacy and accountability serve as ready-made arguments in defense of most any procedure. No one can prove that relaxing procedural constraints won’t damage the legitimacy of the administrative state. No one can prove that agency capture won’t come roaring back. Why roll the dice? We should be thankful for the procedures we have and nervous about their elimination.

Yet these beliefs are wildly overdrawn; indeed, they are myths. Procedural rules have a role to play in preserving legitimacy and discouraging capture, but they advance those goals more obliquely than is commonly assumed and can even exacerbate the problems they’re meant to solve. Addressing our common problems and achieving our collective aspirations will require us to revive a much more positive vision of the administrative state — one in which its legitimacy is measured not by the stringency of the constraints under which it labors, but by how well it works.

#### Rejecting the idea that court/government reform should begin with changes to procedure makes government way more effective in solving a slew of 21st century problems.

Bagley 21 – Law professor at the University of Michigan, expert in administrative law.

Nicholas Bagley, “The Procedure Fetish”, 12-7-21, Niskan Center, https://www.niskanencenter.org/the-procedure-fetish/

Stop fetishizing procedure

The central dogma of administrative law is that strict procedural rules are essential to agency legitimacy and necessary for public accountability. That dogma is false. Mandatory legal procedures have a complex, contingent, and ambiguous connection to legitimacy and capture. The dogma is also pernicious. Endlessly wringing our hands over agency legitimacy and accountability breeds contempt for governance. Instead of the instruments of public aspirations, agencies become the bastard stepchildren of a damaged constitutional system, rife with corruption and inside dealing. That dyspeptic vision aligns neatly with the libertarian’s suspicion of government action. But it is difficult to harmonize with a belief in effective governance.

In time, too, the political right may come to regret their efforts to enfeeble the American state. Whatever conservative elites may think, the public has high hopes for what government can deliver. Endlessly frustrating government action may enhance the appeal of a strongman who promises to meet the demands of real Americans by flouting limits on his power. (Donald Trump: “I alone can fix it.”) The end result might be the accumulation of arbitrary powers in the executive branch — exactly the result that conservatives hope to avoid.

Instead of defending procedures at a high level of abstraction (legitimacy! accountability!), we need to take a more granular look at the effects that legally imposed procedures have on the task of governance. Minimalism should be the watchword. New procedures should be greeted with suspicion and old procedures should be revisited, with an eye to cutting them back or eliminating them. Some will be worth retaining: No one wants a latter-day Robert Moses bulldozing neighborhoods with impunity. It’s reasonable, for example, to require agencies to offer reasons for major actions. History and international experience suggest the need for rules protecting the civil service. And some targeted judicial review is appropriate to prevent agencies from flouting legal constraints. Beyond that, however, we should be cautious. Administrative law could achieve more by doing less.

We also need to revive a strain of thinking that connects the legitimacy of the administrative state to its ability to satisfy public aspirations. That means building up our agencies, not devising ever-more elaborate means of tying them down. Antiquated rules that make it hard to hire and retain qualified personnel should be scrapped. Legislatures need to appropriate the funds to expand an overstretched bureaucracy and to pay for top talent, much as some independent agencies can already do. Fewer tasks should be outsourced to poorly supervised contractors; more functions should be brought in-house. And we must make large investments in the information technology that forms the backbone of competent governance.

These aren’t tasks for lawyers, with their fetish for procedural rules. They are tasks for legislators, managers, and policy experts. They are the ones who will drive real regulatory reform and — perhaps — build the government institutions that will allow us to cope with the challenges of the 21st century. The lawyers need to get out of the way.

#### Alternatives could embrace some form of moral pragmatism or alternative ideas about how the legal system should operate. For example, there’s plenty of great evidence that explicitly contrasts a case-by-case approach with a focus on producing universally applicable formulaic rules to constrain government.

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Luke Herrine, 4-5-2019, "On Reuniting Legal Realism with Moral Pragmatism", LPE Project, https://lpeproject.org/blog/on-reuniting-legal-realism-with-moral-pragmatism/

In 1987 Robert Gordon recounted finding among those “in the center or left of American liberalism…this paralysis, founded in their sense that legal and social realities are frozen, that we have reached the end of history and that the possibility of fundamental change is now forever closed to us.” Gordon’s experience is not unique, of course. The critical project of “unfreezing legal reality” to make it more pliable for egalitarian restructuring has had to confront not only the legal system’s own defense mechanisms but a set of discourses that make it hard to think outside the current system.

As many members of this blog have noted, neoclassical economics has been the most powerful such discourse, but moral philosophy—even that produced by egalitarians—has been similarly unforgiving. Most debates in Anglo-American moral and political philosophy have taken place in the realm of the ideal. Political morality amounts to articulating the constitution reasonable persons would agree to ideal conditions. Legal reasoning requires “rational reconstruction” of existing institutions to understand their moral structure. Egalitarianism is about figuring out how to set up idealized (read: using neoclassical assumptions) insurance markets to correct for inequalities of luck while maintaining room for agency. The idealizations of the debates tend to vacillate between being so unlike our actual world as to be difficult to make sense of or so like our actual world as to “freeze” it by moralizing existing institutions. They may help clear up some of our ideas, but they do not give us much to work with in the project of dismantling oppressive institutions and building democratic ones in their place.

Many critical legal theorists sought alternatives in deconstructive theories, which more often than not were so totalizing that they left little sense that one anybody (except perhaps judges) could do anything productive to reshape society.

Elizabeth Anderson has been the foremost advocate of a pragmatic alternative that treats moral theory like realists treat law: as a going concern. Following a venerable American tradition starting with Peirce, James, and Dewey, she understands moral debate as happening in media res, between socially and historically situated actors attempting to make sense of their attitudes about the world in the process of acting on it. Concepts like “freedom”, “equality”, and “exploitation” evolve out of historically embedded attempts to express attitudes about certain institutional arrangements; they necessarily evolve as arrangements change and as we reflect on what we really ought to care about regarding them. Moral philosophy is merely an extension of everyday reflective and discursive practices, and, if it strays too far from those practices, it results in concepts and arguments that have little or confused relevance to the real world. The process of deciding on ends is not separated from the evaluation of available means in any given context, and both are tied to our evolving understandings of how the world works. It is a process of ongoing recalibration.

This way of going about things gives moral inquiry a more democratic orientation without descending into mere majoritarianism. What is moral is not what some decontextualized agents would agree to, nor is it whatever the majority of people actually agree to: it is the best current way of making sense of “what we care about and what it makes sense to care about, in ways we can reflectively endorse and successfully adopt in practice.” Who counts as part of this “we”—who gets to raise objections and present new arguments—is inextricable from the substantive questions at issue. In an egalitarian account, there is a role for expertise in sussing out bad arguments and in investigating the empirical assumptions built into moral reasoning, but the process of moral reasoning must be open to all who are open to it. Moral philosophy opens space for critique, imagination, and experimentation without insisting that critique be totalizing or an articulation of moral obligations be grounded in a conceptual analysis of foundational moral concepts.

### Legalism K

#### There are legalism critiques of even negative state action. For example, Agamben’s idea of destituent power which is the idea that even actions to resist the state can reinforce sovereign power by relying on constructing “a new law”.

Anonymous 20 – an anonymous anarchist writer

Anonymous, “Revolution & Destituent Power: An Introduction,” 2-28-2020, The Anarchist Library, https://theanarchistlibrary.org/library/anonymous-revolution-destituent-power

I. Introduction

Revolution and Destituent Power: How do we de-activate the State without founding a new one?

Historically, the revolutionary process in the West has centered on violently destroying a certain order and then re-founding a new order based on that prior violence. From the revolutionary terror of the French Revolution, and the writing of the American constitution in the wake of revolutionary war, to the authoritarian nightmare of the Soviet Union, to contemporary demands in Chile for a constitutional assembly, it seems impossible for revolutions to escape the logic of sovereignty, constituency, and security.

How do we escape what Giorgio Agamben calls the vicious spiral of terrorism and the State? Seeking a way out of the traps of modernity, some theorists and revolutionary movements have proposed an idea of destituent power: a revolutionary process that breaks the law not in order to found a new law, but to do away with the logic of law altogether. This talk presents an overview of Italian philosopher Giorgio Agamben’s writing on the question of destituent power, tracing the history of the idea from Walter Benjamin and Georges Sorel, through the Italian Autonomia movement and the refusal of work, and into present theories of destituent power.

Finally, we briefly discuss the interesting points of intersection between the largely European concept of destituent power, and the decidedly Black and North American concepts of fugitivity and the undercommons, rooted in Fred Moten’s work.

II. Constituent & Constituted Power

We’ll start with the most exciting part, the etymology: destitution, or destituent, is posed directly against constituent power and we’ll talk about that soon but in order to talk about it we’ll first talk about the roots. Constitute comes from the Latin, means to stand or make firm together or to enter into formation as a necessary part. So, “com-”: together with, “statuare” is to stand, to set up, to make firm. Incidentally the indo-european root of statuare which is “sta” is also the root of state. Opposed to constitute, to destitute would be to abandon, to forsake, or to stand apart.

Destitute has a slightly different etymology and history than the way that it usually gets used in an American or English context—simply impoverishment or poverty. While a constituent power would be a group of constituents coming together to create a political body that represents them, a destituent power would abandon, deactivate, and forsake political power or representations entirely. The easiest place to understand destituent power is starting with constituent and constituted power. In order to do that we have to start with some controversial thinkers. Thomas Hobbes who is a 17th century English social philosopher and Carl Schmitt a 20th century German jurist. Neither of them are particularly sympathetic. Thomas Hobbes was nasty, British, and short. Carl Schmitt was a Nazi. However their ideas have been enormously influential to modern conceptions of politics and if we don’t understand them we may not realize how trapped we are within the frameworks that they established.

Consider Thomas Hobbes 1651 book Leviathan for which he’s famous. This book was written in the wake of the English Civil War and on the cover we can see the image of the sovereign made up by the multitudinous bodies of the populace. So in this image and in the book Leviathan the sovereign is constituted by the people. The sovereign is the head that manages the body politic. He wields force to protect the people from outside threats but also from themselves. in Hobbes the state of nature—a war of all against all—everyone is out for themselves and it’s only through a social contract enforced by the lethal power of a sovereign (Leviathan) that we get to have nice things like borders and cities and cars and cops and private property

That is the heart of constituted power. The sovereign is the state. The sovereign represents the interests of the people. Whatever the sovereign does in the interest of the people is therefore legitimate. This is the root of arguments like those of Alan Dershowitz at Trump’s impeachment hearing who said “anything your President does to stay in power is in the national interest” and there was kind of a liberal panic over this. If you look at sovereignty and look at the history you’re like yeah totally that makes sense. You can compare this with a quote from Thomas Hobbes in Leviathan where he says “he that complaineth of injury from his sovereign complaineth that whereof he himself is the author, and therefore ought not to accuse any man but himself, no nor himself of injury because to do injury to one’s self is impossible.”

Another way of framing this is if the police are beating you, you have nothing to complain about because you gave the sovereign his power. This is the extreme version of the liberal favorite: ‘if you didn’t vote you can’t complain’. Except in this case it’s more like if you were born into the social contract—and you were—then you can’t complain because it’s better than the alternative.

But constituted power or the power of the sovereign has to emerge from something or at least make a claim for its legitimacy. That claim is constituent power. If you think about how politicians and the mainstream talk about politics they talk about constituents all the time. Who are the constituents of a senator or a representative? How our politicians accountable to their constituents? And so on. You can also think of constituency as entangled with and inseparable from representation. Imagine the ways that the media treats every social movement. They want to know who the subjects are and what demands they’re making of politicians. They treat them as constituents and they regard the work of elected representatives as being that weighing and balancing the needs of all their constituents. To the extent that liberals launch critiques against the government or inequality it is limited to critiquing the state for not treating all of their constituents equally.

Below is a diagram of the relationship between the sovereign and the people, or between constitutive power and constituent power. In this framework we have the people and we have the possibility of constituent power, what Walter Benjamin calls “lawmaking violence”. but the endpoint of a constituent power is a new constituted power—a sovereign, which is concerned with preserving the new status quo. This sovereign is able to deploy law-preserving violence in threat or in actuality which is the famous “monopoly on violence”. And so this cycle of constituent and constituted power goes as follows. There exists a regime which after a period of contestation via revolution or civil war loses its legitimacy. Once the revolutionary demand (i.e. “the people want the fall of the regime”) is met, ‘the people’ assemble and decide on a path forward. This can look like a new round of elections, or like a constituent assembly to create a new constitution, or like a military leader coming in and promising to restore order. Whatever the outcome the process of constitution dissolves the people as a political force and then it reframes them instead as a source of legitimacy for the new regime which then promises to defend the gains of the previous movement.

But once the legitimate government is established we return to a framework of sovereignty and ‘law preserving violence’ and the wheel of history keeps on turning. There are a couple of quotes that perhaps helpful for framing a cycle. One is from The Invisible Committee which says “Constituent power is a fiction retrojected by constituted powers beginning from the moment they have succeeded in stabilizing the situation.” Referring to the Arab Spring, they say what has happened in Egypt in recent years is an exemplary case for understanding this. “In no time at all the people are again being massacred in the name of ‘The People’”. And then from [Giorgio] Agamben’s book Stasis on civil war he says “that the very instant that the people choose the sovereign, [the people] dissolves itself into a confused multitude.” This happens not only in a monarchy but even in a democracy or an aristocracy where as soon as the council has been constituted, the people simultaneously dissolve.

You can read this in the present moment with regards to Trump very easily, as the rhetoric around the impeachment saying ‘We’ll let the people decide in the election. We shouldn’t have an impeachment. We shouldn’t prosecute him for any crimes.’ And so the people become this abstract source of legitimacy that have no actual real power except in these brief moments of constitution. So hopefully that clarifies at least a little bit the concept of constituent and constituted power and I’ll keep returning to that. I want to talk now about sovereignty. Hobbes did a lot to theorize sovereignty but perhaps the most influential thinker on the subject was Carl Schmitt who was a German legal theorist who among other things was instrumental in helping Hitler develop the legal theories that legitimized the Nazi regime. You can see Schmitt as a villain and he certainly was an enemy. But you can also see him as explaining more clearly the underlying logic of the state even within liberal democracy and thereby revealing something important and damning about the whole thing.

Schmitt famously just defined the sovereign as he who decides on the exception and so it was interesting after September 11th when George W. Bush constantly referred to himself as ‘The Decider’—acting outside of the norm to decide what was best for the nation in a state of emergency. For Schmitt the power of the sovereign rests precisely in what he calls the state of exceptions. While the sovereign manages a nation bounded by the rule of law, he can always suspend the law in order to protect that nation. This is the logic that allowed Hitler to suspend the Weimar Constitution and to act outside of it while never formally abolishing it. This is what allowed Bush the second to detain enemy combatants at Guantanamo Bay outside the laws of both due process and the conventions of prisoners of war. It’s what allowed Obama to assassinate US citizens with drones abroad and so on. Schmitt’s contribution here is important because he recognizes that every state, every sovereign ultimately rests on this state of exception regardless of how democratic it appears. Even the most liberal democratic state will eventually face an existential crisis that can only be solved by suspending the norms of that democratic state.

The sovereign decides who is friend and who is enemy, protects its subjects from enemies. Laws and constitutions aside this is the heart of the sovereigns power and the logic of the state. This also means importantly, that the sovereign can decide which lives are expendable and which are not. What is a crisis and what is not. that crisis might be terrorism or may be climate change or it may be a pandemic, but whatever the crisis the following logic is the same: expendable lives are confronted directly by lethal force with no mediation by the law. And remember for Hobbes and Schmitt and therefore for Western political thought writ large, the sovereign is necessary because the state of nature is a war of all against all. It’s the specter of civil war or disorder that legitimizes the state and sovereignty.

The political combat that has been playing out in DC over Trump’s impeachment is simply a demonstration that understand sovereignty and the Democrats don’t. When Democrats say that Trump is not above the law they’re making a moral argument but at the same time demonstrating its falsity. Trump is above the law because he did what he wanted and got away with it because he’s consolidated enough power to erode any challenges. No matter how dearly you hold your democratic principles, power is about power. Interestingly when Senator Lamar Alexander voted against witnesses his reasoning to the media was that the impeachment would pour gasoline on cultural fires. Which is yet another example of the fear of civil war that haunts the state and legitimizes the sovereign.

This lawlessness that at the heart of the law is critical to its functioning, and it’s a lawlessness that liberal, Marxist, and anarchist traditions all tend to miss. Which is one of the useful parts of thinking of destituent power and Agamben scholarship. To quote Agamben again: “Walter Benjamin once wrote that there’s nothing more anarchic than the bourgeois order.” In the same sense Pasolini has one of the officials in the film Salò say that “true anarchy is the anarchy of power”. “Because power is constituted through the inclusive exclusion of anarchy, the only possibility of thinking a true anarchy coincides with the lucid exposition of anarchy internal to power anarchy is what becomes thinkable only at the point when we grasp and render destitute the anarchy of power.” (The Use of Bodies by Giorgio Agamben)

So, in some ways we may thank Trump for his lucid exposition of the anarchy internal to power but I think that this is a point that we often miss when we describe the state, or we think about how it functions. We think that it functions more or less according to its own laws or rules and we think of anarchy or anarchism as something completely separate and alien from it that would solve the problem. The argument here is that anarchy or a foundationlessness is central to the exercise of power and helps to define it and constitute it. If we don’t recognize that we’re going to be caught in this dialectic between the two.

To sum it up and return to our diagram we can add that the sovereign can always act outside the law in order to preserve it and can also decide who can be killed in the interest of security. Constituent power depends on the concept of a body of people defined by identity: a nation, or a constituency, or even the working class, asserting its identity and then demanding representation or power. In this sense the workers’ movements of the 20th century were all rooted in constituent power, as were the anti-colonial struggles and revolutions around the world. The communist and socialist revolutions by and large centered the working-class as new constituents rather than doing away with the concept of work or with constituency altogether. The problem is that once the constituent power resolves into constituted power the logic of sovereignty takes hold and the power of a sovereign ultimately rests on its ability to decide on an exception. It’s important to add here that the state of exception is not a one-off event or an all-or-nothing affair. You can see the state of exception as both constantly internal to the logic of governance but also gradually becoming more and more permanent, more and more totalizing as governance, where the sovereign uses each crisis to assume more emergency powers, declare more and more things outside the law.

This is all overview so far of constituent power and sovereignty. Hopefully it’s helpful but I haven’t yet defined destituent power. So we’ll take a shot.

III. Destituent Power

Italian philosopher Giorgio Agamben introduces destituent power as follows: he says “if revolutions and insurrections correspond to constituent power—that is to a violence that establishes and constitutes the new law—in order to think of destituent power we have to imagine completely other strategies whose definition is the task of becoming politics. A power that was only just overthrown by violence will rise again in another form. In the incessant inevitable dialectic between constituent power and constituted power. Violence which makes the law and violence that preserves it.”

When he introduces destituent power in his texts, Agamben very specifically references Walter Benjamin’s work on Critique of Violence, in which he links law-making and law-preserving violence and says that “the distinction between law-making violence and law-preserving violence is however deconstructed in the body of the police and in capital punishment. Whereby the rotten core of the law is revealed. Namely that law as a manifestation of violent domination for its own sake.”

Walter Benjamin in writing Critique of Violence was influenced directly by Georges Sorel and by his theory of the proletarian general strike, which as opposed to a specific kind of strike with a demand for more wages or shorter hours, was instead a total general strike with only the end of work as its aim. In Sorel’s general strike, or Benjamin’s divine violence, or Agamben’s destitution the workers abandon the factory not in order to pressure the owners for change nor even to take over the factories and seize the means of production, but in order to end the world of factories and work altogether. Likewise a destitution of state power does not result in a new state or a new constitution, not even a federated egalitarian one, but in a desertion or abandonment of the constituent and constituted power dialectic altogether.

The question of destitution is not how to lay claim to power and make it more democratic, but how to become powerful in a different sense—to abandon the logic of sovereignty entirely and to render it inoperable and powerless. This has some immediate strategic or political consequences for us. It means first of all that political movements and revolutions that seek to seize the state cannot help but fail. At the most basic level this is because any revolution immediately concerns itself with the counter-revolution. The question of securing the revolution enters the equation and down that path leads exception, terror, and sovereignty. and so the revolts of The Movement of the Squares and the left parties that were swept into power in Greece and in Spain subsequently could not help but fail, especially when faced with the disciplining power of a global economy.

By contrast The Invisible Committee says of destitution that “its characteristic gesture is exiting just as the constituent gesture is taking by storm.” There’s an additional insight here which realizes that real power no longer even exists within the palaces or the centers of governance that past revolutions once sought to take by storm. Real power exists in the infrastructure of the built environment and the flows of commodities and the flows of capital and this is another insight that helps to explain why Greek and Spanish left parties like Podemos or Syriza failed. They were able to seize power but they were immediately faced with the disciplining power of the European Union and IMF which made it impossible for them to actually implement reforms and turned them into a machine for implementing austerity instead.

Going back to our etymology, the closest words we have in English that give a real sense of destitution are abandonment or desertion. I would add a third here—drawing from a different tradition—fugitivity. Destitution does not entrench symmetrical conflicts with power. It does not kill the king in order to put a democratically elected sovereign or assembly on the throne. It simply walks away leaving the king, the police, and the economy to govern an empty house.

Destitution asks how do we rob the power structures that exist of their power over us? Certainly there are times that violence does this. I’m not making a pacifist argument in any way. Riots and looting are often destituent. The police lose their ability to enforce the law. People play with the materials of the city. A liquor store becomes a communal free bar, a limousine becomes a barricade and a source of heat. A supermarket becomes a kitchen. But,riots are temporary and they can just as easily turn into a legitimizing factor for a security force, or become so focused on an antagonism with the police that the forms of life created within them are lost. This is the danger of fetishizing militancy, of delinking the war-machine from the care-machine.

Desertion has a long and proud history. The earliest states in Mesopotamia failed over and over again through desertion, not through revolution. In many ways the longevity of the modern state and the economy has been achieved through the eradication of zones to flee to, the destruction of refuges, the elimination of ways of life that allow people to live on their own terms.

We are in a hostage situation and you don’t resolve a hostage situation by frontal combat with an enemy. You resolve it by sneaking the hostages out the back door.

George Jackson summed up this approach in his letter to Fay Stender from Soledad prison saying “I may run but all the time that I am I’ll be looking for a stick! a defensible position.” Deleuze and Guattari famously paraphrased Jackson when elaborating their concept of lines of flight and escape rather than confrontation, saying “I may take flight but all the while I’m fleeing I will be looking for a weapon.” Within those very short phrases there is this paired idea of fleeing and militancy, of building a life and continuing to fight, and linking the two together constantly, rather than separating them into different functions.

And so I think that the destituent approach here shares a logic with the history of fugitivity—of Maroons in the Caribbean and Florida, in the great dismal swamp—of rebel communities fleeing slavery and disappearing into illegible terrain. I think that there’s a great deal of power in allowing these two trajectories to speak to each other and realizing that both of these ideas from very different traditions and contexts are pointing towards similar strategies and tactics.

But there’s no longer a swamp to flee to there are no longer stateless lands and they never really could hold all those who wanted to flee anyway. The beauty of what Fred Moten has termed the undercommons, and the beauty of destitution, is the realization that we have to build the commune. We have to build the escape hatch, but we don’t have to build it from nothing. There is always an undercommons. There are always practices of sharing. There are already resources put in common and there may be co-conspirators and unsuspecting places.

To destitute the world is not to build a brand new world and the ashes of the old. Nor is it to seize the means of production and continue producing the exact same world simply minus capitalism. To destitute, in the words of The Invisible Committee, is not primarily to attack the institution, but to attack the need we have of it.

Destitution has another sense which is to deactivate or to render inoperative. To remove something’s ability to function without destroying it. So, inclusive exclusion is the norm in Western ontology. As Agamben describes the process, he says “something is divided excluded and pushed to the bottom and precisely through this exclusion is included as a foundation.” And so anarchy is the excluded foundation of sovereignty as both a justification and an internal logic. Constituent power is the excluded foundation of constituted power. The lives of migrants or detainees are the excluded foundation of citizenship. Domestic labor and the home is the excluded foundation of the political sphere or the factory and so on.

Attempting to invert these exclusions will only perpetuate them. We cannot valorize labor over capital, anarchy over sovereignty, because they co-constitute one another. The destituent gesture asks instead how do we deactivate the apparatuses that control our lives and open them up to new and common use? How do we liberate a building, a relationship, a community—halve it from its single function and instead play with it in common?

Unfortunately it is often at this point that philosophy fails us as revolutionaries or as destituents. The examples that Agamben gives us of destitution are centered on poetry, dance, Sabbath, and feasting. Poetry renders inoperative the communicative function of language, combining sounds and images for the sake of play but not toward any end. Dance destitutes the functions of the body, creating movement with no particular productive purpose. The Sabbath renders all activity inoperative, forbidding work that is aimed toward a productive end. These are all beautiful examples and certainly any destituent process should be full of poetry and dancing and feasting but it often feels hard to translate from the world of literary examples to the world of real struggles that we find ourselves embedded in.

A better example might be found in the streets of Santiago, where amidst ongoing anti-austerity protests and riots people began to loot grocery stores and set up communal kitchens, sharing their immediate needs and sustaining their everyday lives. Distinct from the efforts to establish a constituent assembly, these neighborhood assemblies sought to feed one another and share their lives together in the present.

To destitute the courts might not be to burn them to the ground, but to become powerful enough that we can be indifferent to them. To show up to hearings and carry on our own conversations and laugh at the performances of the judges when they attempt to discipline us. Destituting the police might not always look like attacking them, but like attacking their credibility and legitimacy. A riot might do that in the right situation but it may also increase their legitimacy.

Destitution asks us to consider in each moment what action will give us the most power and minimize the power of the police or the economy or whatever apparatus we’re trying to escape. Destitution has an affinity for fleeing, but it also has an affinity for mockery. As some friends said “The destituent gesture does not oppose the institution. It doesn’t even mount a frontal fight. It neutralizes it. Empties it of substance. And then steps to the side and watches it expire.”

Growing a destituent power is challenging because it demands illegibility towards the state and towards reform, but at the same time it must demonstrate its common sense and its potential to those who aren’t already militants or converts.

#### There are several alternative ideas about how the world should work in the absence of a legal ethics: for example, Agamben’s Messianism. There’s a robust back and forth over whether Agamben’s state of exception explains anything and whether his alternative is coherent.

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William Stahl, “The exception and the paradigm: Giorgio Agamben on law and life.” 2019. Contemporary Political Theory, https://link.springer.com/article/10.1057/s41296-019-00344-w

This is exacerbated by the insubstantiality of the ethical experience Agamben envisions. Though his ‘messianism’ is steeped in Judeo-Christian references,11 he adopts no particular ethics. Instead, his aim is to render the law ‘inoperative’ and reveal that we do not ‘have-to-be’ anything. He wants to recover the original freedom of ethical experience, our ‘being-able-to-be’ anything. Beyond this, Agamben does not suggest concrete habits that might form a universal community. His emphasis is on the fact that habit as such maintains an essential link to humanity’s potentiality. This leaves us wondering what habit in particular could maintain this crucial link to potentiality while at the same time forming the practical basis for a community that lacks a foundation in law.

This brings me to the final point of criticism that I wish to raise concerning ‘form-of-life’: this idea rests on the presumption that violence in social and political life is due to the force of law. Agamben interprets the Holocaust, for instance, as a paradigmatic case of the ‘state of exception.’ Thus, if we render the force of law ‘inoperative,’ the result should be an end to legal violence. This may be the case, but there is no reason to think that this would be the end of violence per se. In fact, the lack of legal enforcement would certainly make possible all kinds of ‘ethical’ violence. To give a hyperbolic example, imagine if the ‘coming community’ turned out to be a fight club. Participation might be elective, and there might be ethical ‘rules’ without any legal enforcement, but nonetheless this entire community would be shot through with violence from top to bottom. The point is not that this is likely to happen; it is that Agamben lacks the criteria to reject this idea. Though it is understandable that his main concern is to render the violence of the law ‘inoperative,’ there is good reason to doubt that disarming the force of law will free us from the grip of violence.

### Settler Colonialism K

#### Affirmative teams could argue that judicial power must be constrained because it is a colonial technology of elimination that seeks to permanently replace indigenous authority and jurisprudence.

Cross & Peace ‘21 [Natalie Cross @ Carleton University; Thomas Peace @ Huron University College. “My Own Old English Friends”: Networking Anglican Settler Colonialism at the Shingwauk Home, Huron College, and Western University.” Historical Studies in Education / Revue d’histoire de l’éducation 33, 1, Spring / printemps 2021. https://doi.org/10.32316/hse-rhe.v33i1.4891]

Scholars of settler colonialism have framed the concept broadly. Lorenzo Veracini identifies settler colonialism as a process “where an exogenous collective aims to locally and permanently replace indigenous ones.… [It is] culturally non-specific,” and can “occur at any time.”14 Veracini’s work builds upon Patrick Wolfe’s in emphasizing that, at its core, settler-colonial systems of power function by controlling access to Land and territory. The concept’s “irreducible element” is the “logic of elimination” of Indigenous Peoples from their Lands.15 Though technologies and methods might vary, this collective act of removing Indigenous Peoples, either physically or legally, from access to political and judicial power has shaped emergent national and provincial jurisdictions in North America. With institutions of higher education and the church, however, these ideas need to be re-examined. These were institutions that preached and promised the language of social inclusion, while actively building systems that limited political agency and power.

Schools have long been identified as one of the key technologies facilitating “the elimination of the native.” Wolfe extends such a concept to include processes of assimilation, where schools function within a paradigm of inclusion that enables cultural genocide, a point made abundantly clear in the Truth and Reconciliation Commission of Canada’s final report.16 Maori scholar Linda Tuhiwai Smith argues that, in its broadest form, nineteenth-century colonialism involved “the imposition of Western authority over indigenous lands, modes of production and law and government, as well as Western authority over all aspects of indigenous knowledges, languages and cultures.”17

#### The court system is foundationally settler colonial---it depends upon a systematic erasure of indigenous sovereign governance and a forcible imposition of Eurocentric legal norms. Only reconstruction of the legal system in line with decolonial principles solves.

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Geena Holding, "Decolonization and Court – Decolonization and Justice: An Introductory Overview," 2022, University of Regina, https://opentextbooks.uregina.ca/decolonizingjustice/chapter/chapter-3-justice-for-all-decolonizing-courts-through-indigenous-justice/

Colonization has shaped court systems around the world erase and exclude Indigenous values and justice practices. Eurocentric institutions predicated on colonial policies have reinforced systemic racism and inequalities, creating a system that impedes Indigenous access to justice. Token gestures, such as sweat lodges within prisons and cultural diversion programs for minor offences, only serve as distractions to focus attention away from a criminal justice system that forcibly imposes Eurocentric beliefs onto diverse First Nations and Indigenous communities (McGuire and Palys, 2020). Because historically embedded colonial ideologies run so deep, decolonization is the only solution to the inequalities and social problems that stem from colonization. This implies taking the power back through active resistance against ongoing colonization by embracing the resurgence of Indigenous cultures, laws, and governing systems (Palmater, 2018). The process of decolonizing colonial court systems has already begun, with the establishment of Indigenous legislative frameworks and courts.

Examining the introduction of Indigenous courts introduced in the U.S., Canada, and Australia reveals both structural differences and recurring themes. The Navajo Nation Peacemaking Courts of the U.S., the First Nations/Indigenous Courts of Canada, and the Aboriginal Courts of Australia all serve as examples of implementing Indigenous justice practices into the mainstream court system, and there has been a positive response to their implementation so far. There continue to be limitations, however, including lack of funding and recognition, narrow participation criterion, and the restrictions for these courts within colonial legal frameworks. Applying the assessment tools included in Asadullah’s (2021) decolonization tree framework indicates that, although a movement towards decolonization has begun, there is an ongoing need for fundamental systemic changes and formal recognition of Indigenous sovereignty. This paper aims to provide a comparative analysis and further recommendations for decolonizing these court systems.

Impact of Colonization

Colonization describes the permanent settler occupation of lands based on the continuing displacement of Indigenous peoples and the creation of systems and infrastructures that make the land productive from a Eurocentric capitalist perspective (Bonds and Inwood, 2016). The appropriation of these lands has denied Indigenous peoples’ access to resources and prosperity, while the creation of systems and infrastructures designed to enrich settlers and their mother nation by limiting Indigenous rights and other governance changes, expropriating their land, using them and others as colonial labour in the export of natural resources, has played a significant role in the marginalization of Indigenous populations. To this day, legal institutions rooted within colonial systems results in the overincarceration of Indigenous peoples and disproportionate rates of apprehension among Indigenous children (Blagg, 2017; Boothroyd, 2019; Cunneen, 2018; EagleWoman, 2019).

Zion (2006) notes that postcolonial state institutions are hierarchical and impersonal, based on social stratification, rooted in colonization, that excludes and marginalizes Indigenous membership. Eurocentric governance structures are based on an ideology that differs significantly from Indigenous worldviews, while the justice system deflects attention away from societal injustice and towards the criminalization of the poor (Monchalin, 2015). Legal hierarchies are dominated by associations that require graduation from approved law schools, which has led to a bench and bar being dominated by the Anglo middle-class (Zion, 2006). The growth of Indigenous and restorative justice movements has been a response to the increasing recognition that these systems serve to reinforce structural inequalities and the marginalization of minority groups (Monchalin, 2015; Zion, 2006). The impacts of colonization are embedded within a state’s social structure, from racialized policing to substantial employment, income and housing disparities (Bonds & Inwood, 2016; EagleWoman, 2019; Monchalin, 2015).

As a part of the criminal justice system, courts were also established based on colonial policies and practices. EagleWoman (2019) identifies the lack of culturally appropriate judicial forums, the failure to recognize Indigenous methods of justice, and systemic racism as key contributors to the overincarceration of Indigenous peoples. For example, judges are known to hand down the harshest sentences to Indigenous offenders when exercising their discretion (EagleWoman, 2019), and prisons around the world show an overrepresentation of Indigenous peoples (Archibald-Binge et al., 2020; Bureau of Justice Statistics, 1999; EagleWoman, 2019). The colonial impact on courts was wrought through the development of legislation and sentencing procedures that do not reflect the values and practices of Indigenous populations. Decolonization of the courts is necessary to repair the dysfunctional relationship between the justice system and Indigenous peoples.

Defining Decolonization

Decolonization involves recognizing and understanding the colonialism embedded in a State’s policies and infrastructures, challenging colonial-induced manifestations, and reclaiming Indigenous identity and lands (McGuire & Palys, 2020). It is a process that requires an overhaul of the state’s legal and political systems, and for settlers to recognize the benefits they continue to reap from the historical displacement and marginalization of Indigenous peoples. Indigenous groups have made it clear that what is most important is the recognition of their rights – to be able to legislate and govern under their own principles – is key (EagleWoman, 2019; McGuire & Palys, 2020; Palmater, 2018). Decolonization can be visualized as a tree, with growth obtained from listening to and consultation with marginalized groups all the way to building relationships into a non-hierarchical model:

Source: (Asadullah, 2021, p. 19)

A non-hierarchical model would be one that respects Indigenous law and justice practices as independent from the State legal system. Building relationships would mean addressing the inequalities between Indigenous and non-Indigenous people, taking concrete steps to remedy them, and rebuilding legal and political systems in a way that will benefit everyone.

The courts play an important role in the criminal justice system. They apply the law to the cases brought before them in order to determine an appropriate sentence or resolution. This effectively makes them an extension of the dominant legislative body, which becomes problematic when state laws have been created according to a Eurocentric perspective. Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) outlines the right of Indigenous peoples to promote, develop and maintain institutional structures based on their customs, spirituality, traditions and practices, including juridical systems. This points to the need for a self-administered court system that would allow Indigenous communities to enforce their own interpretation of the law (EagleWoman, 2019).

Decolonizing the courts would require a “radical break that is profoundly unsettling to the settler colonial state” (Boothroyd, 2019, p. 906). In other words, the Indigenous harm reduction and diversion programs favoured by courts are not to be confused with true decolonization, as they serve to reinforce the power of colonial state structures through mollification (Boothroyd, 2019; EagleWoman 2019). An essential step in decolonization is the creation and recognition of independent Indigenous courts that are able to set their own criterion for participation and sentencing procedures (Boothroyd, 2019; Cunneen, 2018; EagleWoman, 2019), which would require a complete reconceptualizing of the court system. This may sound unreasonable to those accustomed to living under one central justice system, but it is important to remember that Indigenous communities across the world had been successfully practicing their own justice methods and systems before the Eurocentric practices were inflicted upon them. Decolonization must involve a recognition and revival of these systems because Indigenous peoples have clearly been failed by colonial institutions.

In summary, decolonizing requires: 1) implementing UNDRIP recommendations; 2) nurturing Indigenous courts as legally independent systems; 3) recognizing Indigenous sovereignty and land rights as well as the impacts of colonialism in relation to them; and 4) providing the necessary supports and resources for the creation and maintenance of these systems. The result would be a court system that functions significantly differently, with Indigenous legal authority granted equal status to State authority.

#### The invocation of legal authority is a recursive technology of settler colonialism that obliterates indigenous authority---decolonization demands a dismantling of colonial legal orders

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Shiri Pasternak, “Jurisdiction and Settler Colonialism: Where Do Laws Meet?” 2014, Canadian Journal of Law and Society, Volume 29, no. 2, pp. 145 – 161

To engage in the question of what it means to decolonize law, we must ask by what authority a law has the authority to be invoked and to govern. In this paper, I describe the conditions necessary for the exercise of Canadian law as the work of jurisdiction, and I call into question Canada’s legality and legitimacy in making jurisdictional claims. Decolonizing law means deconstructing the state’s grounds to inaugurate law on lands acquired through colonial settlement. By critically examining law’s geography and scope, I also call into question the modern definition of territory itself.

In this paper, I draw attention to jurisdiction as a conceptual framework for understanding the specificities of settler colonialism; illustrate jurisdiction as a historical concept, distinct from territory and sovereignty; and show some of the ways in which jurisdiction is enacted to govern across multiple scales and issues. I situate this work within the emerging field of settler colonial studies and the field of critical legal geography. Settler colonial studies is a field of inquiry that examines a specific type of European colonialism premised on land acquisition and population replacement , in contrast to a colonialism premised on resource exploitation and surplus labour markets. 2 Unlike colonials in South Asia and Africa, settlers in Canada did not “return” to the metropole. Rather, they stayed, seeking eventually to replace Indigenous societies with their own. Replacement is embedded in the institutional logic of settler colonialism and in the structure of jurisdiction. 3 But to render jurisdiction visible, we must place it in the context of geographical studies, otherwise we risk “the presentation of law and space as pre-political categories.” 4 A critical legal, geographic perspective secures an interdisciplinary approach to jurisdiction as a spatial category, while allowing for the examination of the production of colonial space through the work of jurisdiction. By production of space , I mean, here, the ways in which place is socially, politically, and legally produced by the political status gained through spatial divisions of the world into nation states, or by the imperial drawing and re-drawing of regional boundaries.

Decolonizing law requires both recognition and repudiation. Identifying and respecting Indigenous peoples’ jurisdiction over their lands decolonizes Canadian law, in the important sense that it challenges Canadian law’s claim to being the only legal order and foregrounds the multiplicity of forms of governance across the country that are embodied in Indigenous culture, language, and politics. Decolonizing law also means repudiating the doctrine of discovery and other racist narratives that drive the assertion of European legal orders and render their competing local forms irrelevant. As McNeil puts it, it is one thing to accept the reality of governmental power “but quite another to hold . . . that acquisition of that sovereignty virtually obliterated indigenous governance authority as a matter of law.” 5 Canadian assertions of sovereignty did not obliterate Indigenous governance authority, and as such, encounters between settler and Indigenous law reveal the unfinished project of perfecting settler colonial sovereignty claims.

#### Court jurisdiction inaugurates settler sovereignty by universalizing law across differentiated epistemological and ontological terrain---a refusal of sovereignty demands a refusal of settler common law altogether

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Shiri Pasternak, “Jurisdiction and Settler Colonialism: Where Do Laws Meet?” 2014, Canadian Journal of Law and Society, Volume 29, no. 2, pp. 145 – 161

As a concept, jurisdiction has much to contribute to discussions of law and colonialism and the ways in which the state’s legal authority is ordered. Emile Beneviste’s etymology of jurisdiction links the Latin noun ius (law), in its performative and adverbial form, with the verb dictio (the saying or speech of law). 6 First and foremost, jurisdiction is the power to speak the law. As Shaunnagh Dorsett and Shaun McVeigh write, “In some formulations jurisdiction inaugurates law itself. Th us to exercise jurisdiction is to bring law into existence,” and in so doing, to draw law’s boundaries and its subjects. 7

Canada’s assertion of jurisdiction over all lands and resources within its national borders presumes the forms that law will take, despite the multiplicity of Indigenous governance systems embedded within their own ecologies of law. Tensions between settler and Indigenous regimes arise from these overlapping claims. The concept of jurisdiction offers a coherent vocabulary with which to express these encounters and where sovereignty discourses fall short. As Benton writes: “Empires did not cover space evenly but composed a fabric that was full of holes, stitched together out of pieces, a tangle of strings.” 8 These “imperfect geographies” were a fundamental aspect of imperialism; full (or perfected) territorial control has never been realized as a straight chronological progress towards absolute sovereignty, as many claim. 9 Rather, new kinds of differentiated legal zones have emerged where Indigenous territorial jurisdiction forms lumps that betray patterns of partial and uneven state sovereignty.

Just as the technical production of maps has the potential to erase contestation over lands, so too jurisdictions are masked when a plurality of legal systems are mapped as a single sovereign space. 10 Yet simultaneous operations of law may take place in a single area, across distinctive epistemological and ontological frameworks. To visualize the dense jurisdictional overlap of legal pluralities, readers may recall the image of a human body tucked into the back of old encyclopedias. Bodies are comprised of a dozen transparent pages, each page printed with a singular set of parts such as organs, the circulatory system, bones, and skin. 11 As each transparent page is laid atop the other, the overlap of components form the whole organism. Jurisdiction can be said to function in much the same way, except that each component part represents one kind of governing authority. Those living within the territorial boundaries of Canada are already presumed to exist within a particular body of law. But this picture of legal authority that holds us captive, repeated to us inexorably in the language of modern territorial sovereignty, erases the multiplicity of Indigenous legal orders exercised daily across the land. 12

As with any metaphor, a surplus of meaning spills out. To avoid misconstruing layers of jurisdiction as detached from one another, where no layer disturbs the other, we need to be attentive to the nodes of connection where authorities meet and where conflict may or may not be reconciled. Layers of authority become thicker or thinner as peoples’ movements through space produce new arrangements and negotiations of power. 13

Thus, jurisdiction raises important conceptual issues about the geography and scope of the law. 14 With the establishment of settler colonies, the space of law was expanded from imperial European centers to geographies far from the localized context and authority from which it arose. By asking where and to what or to whom distinct bodies of law apply, we are also inquiring into the definition of territory itself. 15 We can see this in the common phenomena of criminal extradition. The deportation of alleged criminals across national borders poses questions concerning the authority of law over individual bodies as well as the meaning and scope of citizenship relative to one’s location. As law moves, the boundaries of national sovereignty and, therefore, the sources of authority to govern in particular places, shifts, too. 16

Jurisdiction’s relationship to territory is a crucial one, since the idea of jurisdiction is a historical concept whose political and legal content has accumulated over a long period of time and through a significant transversal of space. Approaching jurisdiction from a historical perspective allows us to make key distinctions between the oft -conflated concepts of sovereignty and jurisdiction. Within a settler colonial context, this conflation is itself a political expression of authority, because it fuses multiple forms of life into one “empire of uniformity.” 17 “Perfect settler sovereignty” is the legal obliteration of Indigenous customary laws through the collapse of distinctions between these terms. 18

To begin, jurisdiction predates modern state sovereignty in the common law. 19 As Dorsett writes: “Bodies of law self-authorised and regulated their relations with each other long before the emergence of the modern nation state. Even after the development of notions of national sovereignty, non-common law jurisdictions continued to function alongside the common law, both in England and the colonies.” 20 Lisa Ford describes how sovereignty came to universalize jurisdiction. Whereas jurisdiction was understood for centuries as claiming authority over people in particular places or over those engaged in particular activities, through settler colonialism, it claimed authority over territorial space.

Citing case law from America and Australia, Ford traces the transition from a settler legality that claimed jurisdiction over Indigenous bodies to the period when territorial jurisdiction became a necessary exercise of sovereignty at the turn of the nineteenth century. Until this later period, an uneasy legal pluralism had existed between overlapping Indigenous and settler social orders. Ford’s research shows that the emergence of territorial state sovereignty was introduced in colonial courts through a generalization of the common law as the singular national law. 21 Likewise, Dorsett notes how intolerant Australia’s High Court has been towards parallel law-making systems, regarding “any attempt to argue multiple jurisdictions” as “an attack on singular sovereignty.” 22

Sovereignty has been defined by its claims to “final and absolute political authority” 23 and has dominated modern society as the “key ordering principle of political organizing since the collapse of ecclesiastical forms of authority.” 24 But authority is not pre-given to sovereignty. Sovereignty, we must appreciate, “depends on authority, and authority is something more than physical control over territory.” 25 It must be matched with a conviction that the exercise of sovereignty is legitimate. 26 Forming national law is one way in which legitimacy is sought.

Though the common law comes to take the shape of the state, the fit is never total or complete. For the common law has no mystical or transcendental authority that connects it to territory in the “New World.” When the common law of England became the national law in the colonies, its content and jurisdiction were deliberately confused. The common law’s universalist principles of equality were and have been intentionally articulated against the local and particular formations of Indigenous legalities. 27 Peter Fitzpatrick comments on Brennan J’s reasoning in Mabo , where the Justice rejects the common law doctrine of terra nullius only to rehabilitate the common law to “recognize” native title: “In such a miasma, not to say vacuity, is the settler’s law accorded the impenetrable solidity that would secure its completeness and exclusiveness and utterly subordinate any competing indigenous legality.” 28 The common law’s universalism is further comprised of its reliance on precedent—those serial decisions that embody the force of changing social relations from which it takes its content. 29

Territorial sovereignty, modern sovereignty, state sovereignty—all synonymous terms—arose in the context of late European imperialism, re-spatializing the exercise of jurisdiction into a colonial context over national territories. 30 This new spatial form required the inauguration of new forms of law (or new applications of old forms of law), as jurisdiction was transferred repeatedly between European powers and exercised over the colonies. The “territorial imperative” of sovereignty emerged specifically in the nineteenth century. As Ford writes, before the War of 1812 in America, “[a]ny attempt to define state sovereignty as a territorial measure effected through the exercise of jurisdiction foundered on the plurality of indigenous legal status.” 31 But this legal status became threatening to a settler sovereignty increasingly marked by territorial rights. 32 Imperialism created the definitive boundaries of sovereignty: it raised the questions that persist in its name, such as who could exercise what kinds of power over land, and what constitutes a political community. What remains to be examined are the “internal arrangements for organising [ sic ] and exercising authority,” arrangements that are the work of jurisdiction. 33

### Anti-Domination K

#### Refuse the imperative to place faith in the Supreme Court---it’s a hermetically sealed box with an undemocratic hold on constitutional politics. Only mass movement-building towards popular constitutional dialogue and lawmaking solves.

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Aziz Rana, 11-8-2023, "A National Seminar," Drift, https://www.thedriftmag.com/a-national-seminar/

American constitutional politics has a terrible bottleneck problem. Virtually all meaningful debate and reform is funneled into the judiciary. Its dominance is often defended on the grounds that, as law professor and diplomat Eugene Rostow contended in the 1950s, the bench — with the Supreme Court at the top — oversees a “national seminar.” According to this view, the Court, through a reasoned and conscientious engagement with a broad range of perspectives, offers a form of public education. But what judges care about and what moves Americans has always been an uncomfortable fit. At a time when the country is wracked by profound racial injustice, with extreme disparities in health, housing, education, employment, and incarceration, none of these issues are likely to face meaningful constitutional inquiry. They are not of interest to conservative legal activists, so cases around them won’t be heard or debated at the Supreme Court.

The vagaries of the Electoral College and the extreme overrepresentation of rural and white communities in the Senate have made Supreme Court nominations a profoundly undemocratic process. With a vise grip over this process, the Republican Party backed appointees who promote deeply conservative political, cultural, and socioeconomic views. Those justices have the power to determine what counts as a topic worth discussing, in part through the Court’s ability to select its own cases. The result is an almost hermetically sealed box, in which conservative legal activists work out their internal disagreements.

Nearly two thirds of Americans may support Roe v. Wade, for instance, but the Court will take as given that the case was wrongly decided, and then debate how comprehensively states can limit reproductive rights. Mass shootings may be transforming schools into dystopian settings, but the Court will discuss how absolute individual gun rights should be, following the lead of the NRA and gun activists. These advocates influence which arguments the Court takes seriously, as they did with New York State Rifle & Pistol Association v. Bruen, in 2022, when the justices struck down a New York state law limiting concealed carry permits. And while about 70 percent of Americans support same-sex marriage, what’s on the Court’s mind is whether a white Christian majority feels threatened. In a recent case, 303 Creative LLC v. Elenis, right-wing justices were so worried about how an anti-discrimination law might infringe on the religious beliefs of a Christian wedding website designer that they essentially ignored the fact that the supposed request from an LGBTQ+ client, on which the case was based, may have been faked.

Tweaks to legal doctrine, or the appointment of a centrist or even left-liberal justice, will not save the country from the institutional dominance of the right or unjam our constitutional system. Americans have to reclaim authority over their basic legal and political discourse. And this means displacing the Court as the center of our constitutional conversation, by reducing the authority of the bench and by strengthening avenues of popular lawmaking.

Unlike other countries, the United States has no functional amendment process that would allow constitutional conversations to be pursued outside the courts, through mass movements or national referenda. Elsewhere, systems further limit the power of their judges through larger constitutional courts, term limits, ethics oversight, requirements that certain judicial decisions be reached by a supermajority, and even legislative overrides of court rulings. We should also pursue electoral reforms to defuse the most anti-democratic effects of the constitutional structure. These include reforming campaign finance, expanding voting rights, ending the Senate filibuster, eliminating the Electoral College, adding Washington, D.C. as a state, combatting gerrymandering and partisan election interference, and implementing multimember House districts to counterbalance the unrepresentative winner-takes-all format of Senate elections.

While none of these reforms on their own are particularly radical, their success requires a collective commitment to systemic change across American institutions. It also requires rejecting the long-standing deification of the Court and the individual justices. To make these changes real — and to reclaim the constitution from the Court — will necessitate nothing less than large-scale movement-building and mass political action. But however obstacle-ridden and potentially unruly this path may be, it is the only route for reshaping who owns the Constitution and for truly broadening what horizons our institutions allow us to imagine.

### Redaction K

#### Vote negative to embrace a Black annotation and redaction of the law---the alternative is an imagining otherwise, a simultaneous reduction and expansion upon traditional legal imaginaries that speaks the unspeakable realities of Black life.

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James Stevenson Ramsey, Winter 2021, "Lawyering in the Wake: Theorizing the Practice of Law in the Midst of Anti-Black Catastrophe," CUNY Academic Works, https://academicworks.cuny.edu/clr/vol24/iss1/7/

In addition to aspiration, Sharpe also raises the twin practices of Black annotation and Black redaction as forms of wake work. She takes these practices as ways of refusing “to accede to the optics, the disciplines, and the deathly demands of the antiblack worlds in which we live, work, and struggle to make visible (to ourselves, if not to others) all kinds of Black pasts, presents, and possible futures[.]”70 In other words, they are methods of reducing (i.e., redacting) or expanding and/or commenting on (i.e., annotating) words, images, stories, and worlds of and about Black people, which are often shrouded in anti-Black rhetoric and/or violence, in order to illuminate possibilities for resistance in the wake and Black lives as they are lived: “Redaction and annotation toward seeing and reading otherwise; toward reading and seeing something in excess of what is caught in the frame; toward seeing something beyond a visuality that is . . . subtended by the logics of the administered plantation.”71

In Sharpe’s book, one example of these kinds of practices is the independent autopsy of Michael Brown’s body along with her meditations on the story it tells—of an unarmed teenager shot down as he surrendered.72 Another example she points to is filmmaker Julie Dash’s representation of the violence of slavery in her film Daughters of the Dust through indigo dye, with which Sharpe contrasts the mutilated bodies often featured in other films about slavery.73 In sum, Black annotation and redaction are about “say[ing] more than what is allowed by an archive that turns Black bodies into fungible flesh and deposits them there, betrayed.”74

Lawyers can also participate in this wake work. There are particular archives lawyers must access and manipulate as a part of our profession: case law, statutes, narratives, police reports, evidence, testimony, and documents produced in discovery, to name a few. What new things might be revealed, what untellable stories might be articulated, when lawyers break free of traditional forms and norms of legal and academic discourse and into something like Sharpe’s notions of annotation and redaction? If lawyers approached the law and its materials less as talismans to hide behind and more as a set of materials to be creatively grappled with and severed and spliced? The task of lawyers is to parry the legal record, to render Black life visible as it exists, which means fostering a counterhegemonic imagination, even and especially against our systems and the narratives grounding them: “Put another way, with our own Black annotations and Black redactions, we might locate a counter to the force of the state . . . .”75 For lawyers, this annotation may look like poetry or visual art in the middle of a brief, or a song in the middle of a trial, or more editorializing of the law in arguments, using the law as an occasion to speak to, see, and honor Black life, as opposed to a divine tablet to be enshrined.76 Black annotation for lawyers is to insist on the speaking of the unspeakable thing.

As the other side of Black annotation, Black redaction for lawyers may resemble something like focus, a cutting away of noise in order to foreground what matters. What radical forms of focus are available to lawyers in the wake, and how might they be implemented? Which archives may be distilled, and to what? In what form? As in annotation, lawyers should seek to not only uncover the hidden through the act of covering, as in Sharpe’s focusing on the eyes in the pictures of enslaved people,77 but they should also seek to resist the necropolitics of Black hypervisibility. There is a real temptation to broadcast Black suffering in an attempt to shock the powers that be into submission or into being moved to a particular remedy.78 However, as Sharpe and many others have observed, such portrayals normalize the Black suffering that is already a constitutive part of the world in which we live: “That is, these images work to confirm the status, location, and already held opinions within dominant ideology about those exhibitions of spectacular Black bodies whose meanings then remain unchanged.”79 Black redaction as a frame and method, then, may allow lawyers to tell Black stories and bear witness to Black lives in the fullness of their hardship and beauty, without adding to the atmospheric suffering around us. This might mean that photographic evidence needs to be curated or portrayed in some other way. It could involve different, innovative objections being raised in court proceedings, more than objections to graphic evidence for being unfairly prejudicial, but objections on the grounds of dignity and to the kind of suffering we will accept as normal. As a strategic matter, Black redaction may mean subversive resistance through concealing something (e.g., from prosecutors, police, the courts, and other state actors and apparatuses —again, in partnership with and deference to the community to which the lawyer is accountable) that would bring about death.

But Black redaction does not merely limit—it also offers us a way to see differently, to imagine otherwise. Here, lawyers may explore what new stories may be told through the act of limiting and reducing. For example, what might a judicial opinion or police report generate if everything were redacted but the words “Black” and “resist” (as in resisting arrest)? What if we could perform some sort of statistical study on the relationship between these words in government documents? The Department of Justice (although they must never be mistaken for performers or proponents of wake work) did something like this in their investigation of Ferguson, Missouri: African Americans [67% of Ferguson’s population] account for 95% of Manner of Walking charges; 94% of all Fail to Comply charges; 92% of all Resisting Arrest charges; 92% of all Peace Disturbance charges; and 89% of all Failure to Obey charges.80 In the officers’ view, the man resisted arrest by pulling his arms away. The officers drive-stunned him in the side of the neck.81 Officers pushed him to the ground, began handcuffing him, and announced, “stop resisting or you’re going to get tased.” It appears from the video, however, that the man was neither interfering nor resisting.82

And, apart from empirics, Black annotation and Black redaction in legal practice ought to challenge the law itself; to highlight its inconsistencies, its technologies of death, and its deadly foundations and underpinnings; to constrict the narratives that uphold oppression and loosen the stories that honor and help those on the margins survive.83 The task for lawyers would be to implement such practices in those venues where we have particular access and privilege alongside communities that do not. However, these challenges to Black suffering will themselves be challenged; because they are inherently destabilizing to a world stabilized by anti-Blackness, these stories are not the stories the law is inclined to tell nor will always allow to be told.84 However, for us to survive, they must be told—by any means necessary.

### Reformism K

#### There’s also an extensive debate about reformist vs. non-reformist reforms

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The hallmarks of non-reformist reforms are three. First, non-reformist reforms advance a radical critique and radical imagination. 74 Reform is not the end goal; transformation is. 75Non-reformist reforms are "conceived not in terms of what is possible within the framework of a given system and administration, but in view of what should be made possible in terms of human needs and demands." 76In advancing an agenda to meet human need, non-reformist reforms advance a critique about how capitalism and the carceral state structure society for the benefit of the few, rather than the many. They also posit a radical imagination for a state or society oriented toward meeting those needs.

By contrast, reformist reforms draw on and advance critiques of our system -- whether that be capitalism or the carceral state -- that do not question underlying premises or advance alternative futures. In fact, reformist reforms "reject[] those objectives and demands -- however deep the need for them -- which are incompatible with the preservation of the system." 77Here, one can think of the quick rejections by so many of defund the police or the Green New Deal -- despite the mounting evidence that liberal reforms have done little to limit police violence or to slow the speed at which we are hurtling toward increasingly frequent environmental disasters. 78 Liberal reformism effectively shields the status quo from deep critique. 79The end goal of liberal reformism is just that: reform.

The non-reformist reform then provides a framework for demands that will undermine the prevailing political, economic, social system from reproducing itself and make more possible a radically different political, economic, social system. For abolitionists, the underlying system to undermine is the prison industrial complex and the horizon to build toward is abolition democracy. For socialists, the underlying system is capitalism and the horizon socialism. In theory and practice, these are intertwined, variegated, and debated political projects. 80

I am suggesting neither a false neatness within nor artificial distinctions between rich left traditions. But I mention it to make a point so obscured in legal discourse: that approaches to reform reflect ideological commitments, critiques of or acquiescence to underlying systems, aspirations for the future, and theories of change. Reforms communicate analyses of our conditions, tell stories about possibilities, and contribute to dynamic relations of power. So the target and object of the non-reformist framework will depend on one's political project and analysis, as will whether one accepts a reformist or non-reformist orientation.

Whereas reformist reforms aim to improve, ameliorate, legitimate, and even advance the underlying system, 81 non-reformist reforms aim for political, economic, social transformation: for example, socialism or abolition democracy. They seek to delegitimate the underlying system in service of building new forms of social organization. Rather than relegitimate, they seek to sustain ideological crisis as a way to provoke action and develop public consciousness about the possibilities of alternatives and our collective capacity to build them together.

Second, non-reformist reforms must draw from and create pathways for building ever-growing organized popular power. 82They aim to shift power away from elites and toward the masses of people. This is a matter of substance and process, from where the demand comes, the vision it advances, and the space it creates. Whether through demands on the state or the workplace, non-reformist reform " always requires the creation of new centers of democratic power[,] . . . a restriction on the powers of State or Capital, an extension of popular power, that is to say, a victory of democracy over the dictatorship of profit." 83In their focus on power, non-reformist reforms challenge liberal legal frameworks that tend to obscure power relations. 84Non-reformist reforms are about building the power of people to wage a long-term struggle of transformation.

In contrast to reforms formulated by expert elites, non-reformist reforms come from social movements, labor, and organized collectives of poor, working-class, and directly impacted people making demands for power over the conditions of their lives and the shape of their institutions. 85 People living under perilous conditions must generate analysis of those conditions, and advance solutions, in collective formations. 86 Collective processes -- whether in organizations, unions, or assemblies -- become schools of democratic governance in action: processes of enfranchisement and exercises in self-determination that build power and motivate further action. 87

Third, non-reformist reforms are about the dialectic between radical ideation and power building. Non-reformist reforms come from contestatory exercises of popular power. 88They attempt to expand organized collective power to build pathways for transformation. As such, they are not in themselves about finding an answer to a policy problem: They are centrally about an exercise of power by people over the conditions of their own lives. They aim to create "a vast extension of democratic participation in all areas of civic life -- amounting to a very considerable transformation of the character of the state and of existing bourgeois democratic forms." 89

Because the end goal is building power rather than identifying a policy fix, non-reformist reforms can only be effective when pursued in relation to a broader array of strategies and tactics for political, economic, social transformation. That includes protests and strikes as well as political education, mutual aid, organizing, and the building of alternative institutions.

Along with other strategies and tactics, reforms are in dialectical relationship with transformation: deepening consciousness, building independent power and membership, and expanding demands. 90As Gorz put it, reforms have to be imagined as part of a longer-term "strategy of progressive conquest of power by the workers." 91

### Juristocracy K

#### The aff’s opportunistic collusion with the imperial judiciary serves to legitimize and uphold juristocracy at the expense of democracy --- only an embrace of lawmaking can challenge democratic reversion and regressive politics.

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Samuel Moyn, “Resisting the Juristocracy,” The Boston Review, 10-05-2018, https://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy

That Democrats fought the nomination of Brett Kavanaugh to the Supreme Court tooth and nail was entirely understandable, especially after Christine Blasey Ford’s allegations of sexual assault. With yesterday's events making Kavanaugh’s confirmation a near certainty today, everything now depends on how liberals and progressives decide to respond to the hard fact of right-wing control of the imperial judiciary. The answer is obvious: the United States is supposed to be a democracy, not an empire.

Affirmative action will be the first to go, with Justice Kavanaugh’s vote. A federal abortion right is also on the chopping block, with the main question remaining whether it will die in a single blow or a succession of smaller ones. The First Amendment will continue to be “weaponized” in the service of economic power, as Justice Elena Kagan put it last term. And the rest of constitutional law will turn into a defense of business interests and corporate might the likes of which the country has not seen in a century.

Which brings us back to Franklin Roosevelt’s mistake and our opportunity. The last time the court was converted into a tool of the rich and powerful against political majorities, Roosevelt tried to pack the court. Once the Democrats had finally gathered enough political will to stand the Court down, Roosevelt told the American people in March of 1937 that it was time to “save the Constitution from the Court and the Court from itself.”

But the Constitution is what got us here, along with longstanding interpretations of it such as Marbury v. Madison that transform popular rule into elite rule and democracy into juristocracy. Only because of the constitution do Democrats have to battle in a political system in which minorities take the presidency—twice in our lifetime. Only because of a cult of the higher judiciary do Democrats find themselves facing an all-powerful institution set to impose its will on a majority of Americans who would decide things differently.

And only because everyone knows that our system empowers constitutional judges to an extraordinary extent to make enormous policy decisions did Americans have to live through this latest national drama. Ironically, in this recent circus, the topic of the law itself disappeared as the lens focused successively on whether an assault occurred, what kind of investigation was proper, and if judicial “temperament” mattered. But then, prior confirmation battles had already pushed the actual legal views of nominees for the Supreme Court out of view.

The United States, Roberto Unger once wrote, is distinguished by “the single-minded focus upon the higher judges and their selection as the most important part of democratic politics.” This syndrome is reflected in the left as well as the right, and their choice over the decades “to obtain from judges, under the cover of improving interpretation, the advances popular politics fail to deliver.” Yet, in democracies, it is the people who are supposed to write their own laws. The limits of this longstanding judicial strategy were clear long before the left failed to block Kavanaugh, which means the only progressive move now is to reclaim democracy.

Consider the alternatives. In the face of a solid conservative majority for years to come, there is no doubt that many (both inside and outside the court) will look hopefully to Chief Justice John Roberts as the new swing vote and treat him, as they did Anthony Kennedy, as the new “centrist” to lure. But Roberts will defect far less regularly than Kennedy. For the more radical, it will seem tempting to complain—as Roosevelt did—of the betrayal of the Constitution. Yet the last constitutional revolution in the name of democracy, at the height of the New Deal, ended up setting the stage for fifty years of illicit judicial empowerment, in part because it merely pushed judges into promising to exercise restraint.

In the face of an enemy Supreme Court, the only option is for progressives to begin work on a long-term plan to recast the role of fundamental law in our society for the sake of majority rule—disempowering the courts and angling, when they can, to redo our undemocratic constitution itself. This will require taking a few pages from the conservative playbook of the last generation. It is conservatives who stole the originally progressive talking point that we are experiencing “government by judiciary.” It is conservatives who convinced wide swathes of the American people that it is the left, not the right, that too routinely uses constitutional law to enact its policy preferences, no matter what the text says. The truth is the reverse, and progressives need to take back the charge they lost. To do so, they need to abandon their routine temptation to collude with the higher judiciary opportunistically. Progressives must embrace democracy and its risks if they want to avoid the stigma of judicial activism that still haunts them from the past.

Even though the right turned to judicial fiat far more frequently, liberals have taken a long time to give up on black-robed power to enact their preferences. This was most notable in decisions around the right to privacy and so-called “substantive due process.” In making such choices in cases ranging from Roe v. Wade (which secured abortion rights) to Obergefell v. Hodges (which legalized same-sex marriage), liberals entered an unholy alliance with Kennedy, Kavanaugh’s predecessor, to advance gay and women’s rights on a libertarian rationale—defending the free choice of individuals independent of state control—even though that rationale mostly serves business interests in most areas of law. The endangerment or even loss of precedents that the left cares about (such as Roe) is going to be a grievous blow, and no one should celebrate that outcome. But if it is going to happen anyway, then it is time to pivot to a democratic strategy to protect what we care about.

Instead of terrorizing the court into moving through various court-packing schemes, it is a much better and bolder choice for the left to stand up for reforms that will take the last word from it. Jurisdiction-stripping statutes, tools to bar the judiciary from considering cases on certain topics such as abortion or affirmative action, are not clearly unconstitutional even under current legal doctrine. Indeed, the right has used such statutes for years to limit access to courts for immigrants and prisoners. Other changes in customs and precedent could also weaken judicial supremacy. For example, by choice under pressure or compulsion through law, the Supreme Court could evolve into an advisory body, especially when the justices disagree. Such steps would force progressives to take their case to the people to win majorities for their policies, including in places across the country they have given up for lost.

The United States still looks to the higher judiciary to act on behalf of the country’s principles and values, even when basic study proves that judges are partisan and that partisanship only increases when they are given the power to decide the highest stakes questions. The mythology of constitutional law dies hard. The notion that empowering judges would serve progressive outcomes is a flickering star that collapsed long ago, and it is long since time to accept the dying of the light. A legal culture less oriented to the judiciary and more to public service in obtaining and using democratic power in legislatures at all levels is the sole path to progress now. In fact, it always has been.

#### The Supreme Court is transhistorically and inherently antithetical to progress --- investing in it as a site of leftist politics cements invisible authoritarianism and papers over racism.

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Keeanga-Yamahtta Taylor, “The Case for Ending the Supreme Court as We Know It,” The New Yorker, 08-25-2020, https://www.newyorker.com/news/our-columnists/the-case-for-ending-the-supreme-court-as-we-know-it

The insistence that the Supreme Court is not a political body is a principle of high folly in American politics. Just last fall, Chief Justice John Roberts lamented the perception that the Court was politicized, saying, “When you live in a polarized political environment, people tend to see everything in those terms. That’s not how we at the Court function, and the results in our cases do not suggest otherwise.” In reality, appointments to the nation’s highest court reflect the current balance or imbalance of political power, making it impossible to neatly untie them from the political bodies that determine who sits on the Court and who does not. Anyone who doubts this need look no further than the partisan rage displayed by Justice Brett Kavanaugh during his Senate confirmation hearing, in late 2018. From blaming an inquiry into his personal history on “revenge on behalf of the Clintons” to proclaiming “What goes around, comes around” to Senate Democrats, the future Justice arrogantly flexed raw Republican power.

Moreover, as the branch of government that is least accountable to the American public, the Supreme Court has tended, for most of its history, toward a fundamental conservatism, siding with tradition over more expansive visions of human rights. Indeed, at the most significant moments in African-American history, the Court reflected the most reactionary elements of the culture in its efforts to abridge, degrade, or simply eliminate the rights of African-Americans. In 1857, it famously ruled, in Dred Scott v. Sandford, that African-Americans were not and could not be citizens of the United States; Chief Justice Roger Taney concluded that African-Americans were “so far inferior, that they had no rights which the white man was bound to respect.” It took a civil war and its revolutionary upending of American society to reverse the Supreme Court’s damaging ruling, leading to the passage of the Civil Rights Act of 1866, which guaranteed to all, including the formerly enslaved, the same rights that are “enjoyed by white citizens.” The Fourteenth Amendment, guaranteeing birthright citizenship to all and creating the legal principle of equal protection before the law, was built on the foundation of the Civil Rights Act of 1866. In combination with the Thirteenth Amendment, which abolished slavery, and the Fifteenth Amendment, which prohibited racial discrimination as an obstacle to voting, these acts of Congress were intended to elevate African-Americans into the role of citizens, equal before the law and empowered by the ballot to shape the world in which they lived.

But, within a generation of the passage of this historic legislation, the Supreme Court slowly and assuredly denuded that legislation’s most potent power: constructing the personhood of those who were once property. The Court’s decisions in the aftermath of Reconstruction reduced the amendments to their most literal meanings, ignoring their expansive conceptions as means to protect the rights of newly freed people and guarantee them—indeed, all people born in the United States—the privileges and protections of U.S. citizenship. In 1883, the Supreme Court heard a group of cases that had been bound together to test the constitutionality of the Civil Rights Act of 1875, which prohibited discrimination in hotels, trains, and other public accommodations and “places of public amusement.” In an 8–1 decision, the Court ruled that it was legally permissible to ban African-Americans from public accommodations and decried African-American demands to participate in the public sphere as “special” rights to which they were not entitled. Though the stench of slavery still polluted the air, the Court offered willfully ignorant proclamations of color blindness. In response to African-Americans’ demands for equality, the majority opined, “There must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men’s rights are protected.” Of course, “other men” had not been enslaved, nor subjected to savage acts of violence and harassment, nor banished from public life as an affront to their claims of citizenship.

On the eve of the twentieth century, the Court’s ruling in Plessy v. Ferguson transformed the regional injustice of Jim Crow into the national lie that separate could be equal, codifying the racial apartheid of the South as the law of the land. For decades, freed African-Americans had worked arduously to define the meaning of Black citizenship; the retrograde Court worked quickly to foreclose it. In doing so, it eviscerated, for millions of African-Americans, any notion that justice is blind, compelling one observer to describe the Court as the “grave of liberty.”

The accomplishments of the Court while led by Chief Justice Earl Warren, from 1953 to 1969, stand out as exceptions in the body’s long history of regression. But even the decisions from this period that we now laud for upholding or defending freedom were made within a larger climate of social unrest or revolt, and were often aimed at reversing damage that the Court had done in the first place. The Court is celebrated for its historic decision in Brown v. Board of Education, in 1954, which banned segregation in public education, but it was merely undoing policies and practices that it had set in motion with Plessy. It was also responding to the broader dynamics of the emerging civil-rights movement, which threatened to embarrass the United States on the global stage just as the country was attempting to project itself, during the Cold War, as a beacon of democracy. In 1952, the Truman Administration submitted an amicus brief to the Supreme Court encouraging it to rule against segregation. As the brief noted, “The United States is trying to prove to the people of the world of every nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by man. . . . The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills.” The Brown decision was a public indicator of progress, but its decree was quickly undermined when, the following year, the Court prescribed that school desegregation be undertaken with “all deliberate speed.” Without a directive that the ruling should take effect immediately, the South was provided legal cover to drag its feet, as the racist “massive resistance” to school integration began to take hold.

At other moments, the coercive power of a mass social movement compelled the Court to act in proactive, even radical, ways. Jones v. Alfred H. Mayer Co., a landmark case addressing housing discrimination, was decided in June of 1968, just months after a series of uprisings catalyzed by the assassination of Martin Luther King, Jr. The decision surpassed the Fair Housing Act, which was signed that April and set to be phased in over a two-year period, by making racial discrimination in the buying, selling, renting, or financing of housing illegal, effective immediately. The majority’s ruling looked to the Thirteenth Amendment and the Civil Rights Act of 1866, and declared that housing discrimination, regardless of whether the source was public or private, was a “badge and incident” of slavery. Justice Potter Stewart, writing for the majority, compared racial discrimination in housing to the “Black Codes” enacted at the end of the Civil War, saying that “when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”

But, just six years after the Jones decision, the Court, led by a new Chief Justice, Warren Burger, stymied the progress of civil rights. In Milliken v. Bradley, the Court was asked to decide if Detroit suburbs were required to include Black children from the city in a metropolitan-area-wide school-desegregation plan. With the Black movement in retreat, and the political winds moving decidedly to the right—characterized by then President Richard Nixon’s description, in 1971, of “fair housing” as “forced integration”—the Court came to a remarkably different conclusion than it did in 1968. Burger, writing for the majority, claimed that racial segregation in Detroit was “caused by unknown and perhaps unknowable factors,” and concluded that there was no evidence that “governmental activity” had played any role in the “residential patterns within Detroit.” The Court had not forgotten its Jones ruling, in which it plainly described the existence of segregation and linked its origins to state action and private discrimination. Instead, the changing political climate cast similar facts in a different light. It was also a different Court. By the end of his disgraced Presidency, Nixon had appointed four Justices, conjuring a conservative majority that stemmed the momentum from the “rights revolution” for decades.

The Court retains this penchant to shape politics, even with issues seemingly settled by law. Take voting rights. African-Americans in the South finally secured unobstructed access to the ballot box with the Voting Rights Act of 1965, which was intended to end the shameful legacy of race-based voter suppression in the region. But, in fact, the question was not settled. In 2013, Chief Justice John Roberts wrote the majority opinion for the landmark reversal in Shelby County v. Holder, which ended the act’s key enforcement provisions. Just three weeks before George Zimmerman was acquitted of the murder of Trayvon Martin, compelling Alicia Garza to utter the phrase “Black lives matter” for the first time, Roberts argued that these civil-rights protections were no longer necessary because “our country has changed.” Predictably, states across the South began to implement new voting restrictions that overwhelmingly affected African-Americans. Alabama announced that it would require voters to present photo identification, and then, in Black-majority counties, proceeded to close Department of Motor Vehicles offices.

#### Investing social and activist energy is disempowering towards AND mutually exclusive with progressing lawmaking.

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David Kaplan, “People are hoping the Supreme Court will save American politics but they're looking in the wrong place,” Business Insider, 08-21-2019, https://www.businessinsider.com/supreme-court-power-danger-to-american-values-2018-8

Abortion, gun control, campaign finance, gay marriage—these are among the difficult issues that the Court chooses to resolve. So why bother to fight them in elections — the results of which can be overturned the following November—when a victory in the Supreme Court can cement an outcome for a lifetime? Why attempt to persuade millions of citizens to endorse a position when all you need is five of nine unaccountable justices? Each time demonstrators convene outside the Court, they surely miss the irony that they're marching right past the Capitol across the street.

When the Court anoints itself as arbiter, the winning side exalts the courage of the justices. The losers holler about "an imperial judiciary." What exactly is the difference between "making the law" and "interpreting the law"? It's merely about whether you like the way the justices voted in today's case.

We all favor "judicial restraint" and oppose "judicial activism"—except, naturally, when we don't, in which case we just call them by the opposite label. "Judicial restraint"—and its cousin, "strict construction" of the Constitution— are the chameleons of American law, instantly able to change philosophical color when expediency requires. "Judicial activism" is what the other guy does. But in truth, everybody's an activist now.

The corrosive result is twofold: an arrogant Court and an enfeebled Congress that rarely is willing to tackle the toughest issues.

Each feeds on the other. The justices frequently step in because they believe the members of Congress—elected by the people though they may be—act like fools or, like cowards, fail to act.

Happy to stay off the battlefield, Congress seldom raises a peep, other than to crowd the cameras during occasional Senate confirmation hearings on a new justice. The result is dwindling public faith in both institutions.

The Most Dangerous Branch

The triumphalism of the Court—its eagerness to be in the vortex of social and political disputes, its wholesale lack of deference to the other branches of government—explains in part the cynical uses to which it has been subjected by presidents and senators. That cynicism, masquerading as "fidelity to the rule of law," is understandable.

But the Court's drop in standing among the public in recent decades—the reason opinion surveys and mainstream commentary have so often reflected an attitude that the justices are partisans-in-robes—is a mostly self-inflicted wound. Forget the robes—maybe the job should come with tights and a cape.

That reflects not a liberal or conservative sentiment, but a growing conviction that the Court has squandered its institutional capital.

It is altogether possible to be politically liberal and to oppose an aggressive Court. It is entirely consistent to be politically conservative and to oppose an aggressive Court.

Political ends do not justify judicial means.

Under Chief Justice John G. Roberts Jr., there is a now-ascendant conservative "bloc" of justices, appointed by Republicans, and there is a liberal "bloc," appointed by Democrats. The tendency toward viewing judges as political proxies has only accelerated during the Trump presidency.

When journalists write about a justice, they routinely include the party of the president who appointed the justice—as if members of the Court were little different than stand-ins at the Department of Agriculture. When the votes of justices in controversial cases can be predicted at the outset, constitutional law simply becomes partisan politics by another name.

If you usually know beforehand how justices will come out—and if it's a function of the political party of the president who appointed them—why have a Court at all?

A month before the Constitution was ratified in 1788, Alexander Hamilton explained the source of the new Court's authority. The other branches—and the people—would obey the Court because of its prestige. Rulings would be based "neither on force nor will, but merely judgment," he wrote in Federalist No. 78. The Court lacked infantry and warships. It had no source of revenue except what Congress gave it. By Hamilton's reckoning, whereas the president "holds the sword" and Congress "commands the purse," the U.S. Supreme Court would be "the least dangerous branch.

That's no longer so. We know that Congress can pass unwise laws. We've come to realize that a president can initiate foolish wars, abuse his executive authority, and spread lies.

But the Supreme Court's power grab in recent decades is more insidious, more destructive of American values in the long term. Impatiently, myopically, with deep distrust in our elected representatives, we have come to believe democracy is broken. And too often we've come to see the justices as our saviors. With so much dysfunction in government, the justices see themselves that way, too. But we need more politics, not less politics.

We do not need, nor should we want, the court to save us from ourselves.

#### The affirmative’s judicial victory reinvigorates judicial nostalgia and the premise of judicial redeemability, which dooms leftism writ large.

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\*Samuel Moyn and \*\*Ryan Doerfler, “Democratizing the Supreme Court,” California Law Review, 07-29-2020, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3665032

The blocked nomination of Merrick Garland and the confirmation of Neil Gorsuch after the death of Justice Antonin Scalia in February 2016 —and then Brett Kavanaugh’s divisive confirmation in early fall 2018—mainstreamed Supreme Court reform among progressive activists.24 The earlier breakdown of the confirmation process after the failed appointment of Robert Bork in the 1980s raised intermittent calls for term limitation to avoid the repeated national dramas of Senate hearings and mobilization prior to votes.25 But only the new events — and evolution of the Republican party and the election of Donald Trump with which they were bound up — made these calls begin to seem less theoretical, and inspired an expansion of reform proposals beyond the tried and true one of term limitation. They played a significant role in the Democratic party presidential nomination process.26

But there is no doubt that the biggest factor in the emergence of progressive skepticism towards Supreme Court lay elsewhere. It was not just retrospective; rather, the emergence of a progressive left on the national stage with the breakthrough candidacy of Bernie Sanders for the Democratic party nomination in 2016 and the unexpected victory in a New York congressional race of Alexandra Ocasio-Cortez as generational icon in 2018 opened up expectations of a progressive moment at the end of Donald Trump’s term in office like no other in a half century or more.27 Progressive activists accused the American politics system as sclerotic and vowed to overturn it, not least in view of pressing economic and environmental demands on hold for their lifetimes.28

As progressives gained strength in the country and Congress, and calling for a “Green New Deal” to integrate new priorities connecting environmental to working class politics, it was easy to foresee that the Supreme Court might stand in the way. American progressives had to think back not to the 1960s— the last great era of progressive legislation, but when the Supreme Court worked in reformist tandem with the political branches—but to the 1930s for the situation they believed they faced. How would they respond if the Supreme Court blocked the Green New Deal, beginning with H.R. 1 (the much debated first congressional bill of a Democratic party majority in Congress and perhaps even with a friendly president)?29

Under the prior Democratic administration of Barack Obama, no one on his side of the political aisle had anticipated the threat the Supreme Court posed to the signature domestic legislative reform, health care reform. Indeed, it was shocking to most when that threat emerged, modest though it was.30 This fact redoubled the fears of the role the Supreme Court might play if even more

ambitious legislative enactments were attempted.

It also mattered enormously that the academic left followed the reawakening of the political left in the country. For decades, the almost universal consensus of progressives had been to treat the Supreme Court as a pivotal actor in progressive change. Nostalgia for a moment of judicial activism for some progressive causes remained orthodox far longer than the moment itself lasted. A reawakened academic left, by contrast to earlier ones, prioritized economic and environmental structural justice.31 Given their priorities, it seemed decreasingly plausible to justify Supreme Court power, since its jurisprudence mostly adhered to economically neoliberal or socially conservative outcomes, even integrating them into the time-honored protection of rights like freedom of speech or of religious exercise.32 The very rights protection academic liberals had been most identified with defending now turned out to be the doctrinal Trojan horse for the structural empowerment of the wealthy. New voices rose to challenge the Supreme Court’s doctrines in areas like First Amendment, as well as to reemphasize traditional liberal complaints in areas like campaign finance and voting rights.

#### Endorsing the court as legitimate in any instance ensures it commits violence in all instances --- it’s also inherently depoliticizing AND undermines forms of mutual aid and collectivism that are necessary to resolve structural violence.

**Stahly-Butts et al. 22** – \*Executive Director of Law for Black Lives, J.D. from Yale Law School; \*\*Richard and Lois Cole Professor of Law at Cornell University, PHD in Political Science from Harvard University, J.D. from Yale Law School; \*\*\*Charles W. Ebersold & Florence Whitcomb Ebersold Professor of Constitutional Law at the Moritz College of Law at The Ohio State University, J.D. from the University of Michigan Law School; \*\*\*\*Host of The Dig.

\*Marbre Stahly-Butts, \*\*Aziz Rana, and Amna A. Akbar, interviewed by Daniel Denvir, “The Supreme Court Has Always Been a Reactionary Body,” Jacobin, 07-11-2022, https://jacobin.com/2022/07/supreme-court-working-class-women-abortion-carceral-state-law

Marbre Stahly-Butts

I am skeptical of court-packing. Ruth Wilson Gilmore has said that we have to assume we will win. **The idea that we can use court-packing as a stepping-stone for the next fight to delegitimize the court is questionable. Over and over again**, **we end up settling for reformist reforms in the name of stepping toward transformation**, **but never reach that transformation.**

**This moment has created a possibility for desanctifying these institutions. Just like capitalism gets mystified as inherent and ahistorical, so**, **too**, **does the Supreme Court. But**, **this is not a sanctified institution or one that has served us.** We need both judicial review and an amendment process. Because our constitution is so difficult to amend, the nine people who are appointed get to change the Constitution in the different ways that they read it. So we also need to make sure that if they can use judicial review, that they do it with a supermajority.

**We shouldn’t take steps to put Band-Aids on a bullet wound.** This means that we might lose. But having fifteen people on the same court doesn’t do me as a black woman any good in thirty years if there isn’t a shift in the ways that the court wields power. Court-packing would allow liberals and even some leftists to claim a victory when there isn’t one.

Amna A. Akbar

Aziz, what is the mechanism for a sign for creating more seats?

Aziz Rana

There is a constitutional amendment process, but that is foreclosed. There is also a legislative process. Congress has the ability to establish inferior courts and create a legislative scheme for appointments. There could be, for example, a legislative package that would provide new federal judges, and those federal judges would circle on and off the Supreme Court. There would still be lifetime appointments to the federal courts under Article III, but the time you could spend on the Supreme Court would be limited. This way, the number of justices would dramatically expand, and they would serve on the Supreme Court for shorter periods of time. But, the problem is that the constitutionality of a legislative fix would then get litigated on the courts.

Amna A. Akbar

Pushing Democrats in Congress to go that far would require mass politics and engagement. For these reforms, it matters what stories we tell, the movements we build around them, and the people we organize. If we support court-packing, we need to do so in a way that questions the role of the court and reminds the public that these are political institutions we can withdraw our legitimacy from to build new things.

Daniel Denvir

Marbre, do you see a possibility of linking court politics to emancipatory left and black political projects that include economic justice and the end of the carceral state?

Marbre Stahly-Butts

**Abolitionists have posed the question of whether there is a Supreme Court in their future. The answer is: not this Supreme Court.** But, there remains the question of what the role of the state in justice is when the state has so long been affiliated with violence against black and brown and poor people. I oppose court-packing with transformational reform because **the court, as long as it’s seen as legitimate, will commit violence against people. The court is not a legitimate actor to pursue justice for black and brown individuals.**

Over the past few months, partly because of COVID-19 and the uprisings, **there has been an expansion of mutual aid outside the state and the courts. People are finding ways to ensure justice and healing that have nothing to do with the court system because that court system has never actually supported justice for black Americans. Organizing around abolition has happened outside of the courts for a long time with good reason.**

**The COVID-19 crisis, the uprisings, and** now **the Supreme Court makeup has laid bare how the failures of our institutions are multiplying. The systems we have aren’t meant to solve our problems.** I don’t know that there can be a relationship between abolition, defund, and the courts.

Aziz Rana

**The judges**, including Ginsburg, **are state actors invested in state violence.** The abolitionist agenda does not appear before the court because they decide the cases that come to them. Then, they write their opinions, which are taught to them in a constitutional law class at an elite school. [By allowing this,] **the public has handed authority over the Constitution’s meaning to a small set of jurists who are themselves officers of the state engaged in violence. We need to extract constitutional politics from the court and de-emphasize the legal conversations that take place on the courts as our primary way of thinking about racial justice or economic reform.**

Daniel Denvir

Should the Left believe in a form of law that is insulated from politics? Or should we toss out the liberal notion that the judiciary should protect individual and group rights against the tyranny of the majority?

Aziz Rana

Law and politics are not separate. Law is infused with power relations that sustain injustice and inequality. But that doesn’t mean that we should collapse law into politics domestically or internationally. That collapse often unleashes the existing forms of power. An example is Trump, who violated basic international human rights abroad and defended his own impunity.

The Right has, for a long time, made arguments that pure politics should dominate the national security arena. We should instead defend rights and use law as a tool to hold those with absolute impunity accountable to the very rules that they established. But law is not the tool for emancipation. The language of rights does not have to be driven by litigation; it can be driven through legislative or popular means as it has been done so historically.

Amna A. Akbar

The carceral state has such a deep footprint that it’s difficult to imagine the law without the state’s carceral apparatus. There is also little regulation over corporate power and what Ruth Wilson Gilmore has called “organized abandonment.” These pulls together make it hard to do something different with the law.

But, right now the Left must embrace law as a terrain of politics. Movements right now have an intuition about the anti-populist, anti-majoritarian nature of the courts, something evident in the fact that they are focused on local politics and city budgets rather than the courts. Their focus on questions of redistribution fundamentally dislodges the centrality of the rights debates, and these movements are transforming what we think of as a “reform agenda.”

Marbre Stahly-Butts

**There hasn’t been any time when the law has been apolitical. Slavery, apartheid, colonialism, and genocidal antisemitism were all regimes organized through laws. Law does not exist outside of the will of the people, who are political beings, and society, which is a political endeavor.**

**The Left project understands that law is deeply political, ahistorical, and unsanctified. Therefore**, **it must be changed. Mitigating harm through law is important, but we cannot use the master’s tools. Law cannot be the only terrain on which we wage battle. People give much time and energy trying to fight the law inside the court rooms**, **but the revolution will not happen in a courtroom.**

Amna A. Akbar

Most people experience the law through their local courthouses, which evict them, prosecute them for courts, or charge them a ticket. So, the Left project is by and for working class people. Because the legal process produces so much exploitation and violence through eviction, deportation, and incarceration, we can’t disavow the courts as a site of battle. But when you focus only on the Supreme Court, you forget the more real and practical way the law shows up in people’s everyday lives.

Marbre Stahly-Butts

**Courts** also **limit who can act inside of them to limit mass movement.** You need to have a law degree, for instance, to speak inside of these systems. This elitism reproduces itself from the nine people on the Supreme Court down to the criminal courts, in which you need a lawyer and you cannot operate on your own benefit.

**The Supreme Court has never protected and will never protect in this form.** Even if we pack the court, **we are the ones who protect ourselves through mass movements and organizing. Legal experts are not the ones who actually enact change.** Fights in court are relevant, but we need to pay attention to the fight that has been happening in the streets all summer, decade, and century. This fight dictates all other decisions.

#### Progressive action from the Court is never what it seems. Rights cannot come from a corrupted institution— this hope only empowers the Court and prevents real change.

Taylor 20 – Professor of African American Studies at Princeton University.

Keeanga-Yamahtta Taylor, “The Case for Ending the Supreme Court as We Know It,” The New Yorker, 08-25-2020, https://www.newyorker.com/news/our-columnists/the-case-for-ending-the-supreme-court-as-we-know-it

Even when the Court has ruled in ways that appear to be in the interest of minorities or socially and economically marginalized populations, its decisions can be ephemeral, susceptible to partisan shifts, while creating the dangerous illusion of permanence. The Roe v. Wade decision, in 1973, was made in the midst of the women’s-liberation movement, in which reproductive freedom and access to abortion were central demands. In subsequent decades, the changing political climate, including the strategic decisions of liberal feminist organizations to focus their resources and organizing on electoral politics, and not on the street-level mobilizations that won the right to abortion in the first place, has contributed to the erosion of support for abortion rights. The idea that sympathetic politicians were the key to maintaining access to abortion missed the historical lesson that pressure generated by social movements has the greatest potential to overcome the inherently conservative bent of the Court. We now live with the reality that a man accused of sexual assault by multiple women will have the power to make life-altering decisions about our lives, including whether we will retain the right to a legal abortion. The fluidity with which rights can be bequeathed and taken away, in fact, reduces rights to privileges. In a truly democratic society, civil rights should not be contingent on a fortuitous combination of Supreme Court Justices.

#### Contingently challenging particular court decisions strengthens the court’s institutional position. Only rejecting the Supreme Court *as such* solves.

Doerfler 20 – Professor of Law at the University of Chicago, PhD in Philosophy from Harvard University, J.D. from Harvard University.

Ryan Doerfler, “The Supreme Court rules us. Here’s how to curb its power,” The Washington Post, 08-29-2020, https://www.washingtonpost.com/outlook/2020/09/29/supreme-court-reform-packing-jurisdiction-democracy/

Even before Justice Ruth Bader Ginsburg’s death, significant voices on the left had embraced the idea of “packing” the Supreme Court: increasing its size, if former vice president Joe Biden wins and Democrats take the Senate, to dilute the impact of President Trump’s appointees and to counterbalance the seat “stolen” from President Barack Obama. Now that President Trump has nominated Judge Amy Coney Barrett and committed himself to a swift nomination — and Republicans have reversed themselves on election-year confirmations — that talk has intensified. And so has debate over ways of taking power away from the court.

Over the past several decades, worries about excessive judicial power have been associated mostly with the political right: Unelected, life-tenured justices, conservatives said, were inventing rights to abortion or same-sex marriage under the guise of “discovering” them in the constitutional text. More recently, though, concern with the outsize role courts play in our life has migrated to the political left. The New York Times columnist Jamelle Bouie recently argued that the United States should not be a “judgeocracy,” making the case that “protecting the right of the people to govern for themselves” may require “curbing judicial power.” Similarly, in the socialist magazine Jacobin, Princeton historian Matt Karp called for leftists to take inspiration from Abraham Lincoln’s aggressive confrontation of a hostile Supreme Court and its infamous Dred Scott decision, which held that Black Americans could not be citizens. “It is not enough,” Karp argued, “to question the decisions, the justices, or even the structure of the current court — we need to challenge, as Lincoln did, the foundation of its power to determine the law.”

Shifting from a 5-4 to a 6-3 Supreme Court majority could be seismic

In part, the left’s newfound respect for judicial constraint is a predictable reaction to an imminent conservative takeover that could last decades. Just as enthusiasm for executive power waxes and wanes depending on the occupant of the White House, opinions on the Supreme Court vary depending on who has a majority of seats. But the embrace of a lesser role for the court also reflects a growing consensus that judicial conservatives may have had a point: Except perhaps in the most clear-cut cases of constitutional violation, the social and economic policies of the nation should not be determined by a small, unrepresentative, unaccountable body of legal elites.

A generational shift helps to explain how the left got to this place. For older liberals, the tremendous civil rights advances by the Warren Court — the desegregation of schools in Brown v. Board of Education and the recognition of a right to interracial marriage in Loving v. Virginia, for example — loom larger in historical memory than they do for younger citizens. Drawing on those memories, the older cohort came to view the court as a bulwark against the rise of Movement Conservatism — even as the court grew more conservative, owing in part to Republican presidents having more nomination opportunities. Older liberals still clung to the view that their values were better advanced or preserved by appealing to democratically unaccountable judicial elites, as opposed to the unruly masses.

#### Only we have offense --- pushing for democratic policymaking resolves the aff and its harms, BUT the plan and perm fall for the ruse of redeemability.

Hamburger 20 – Tocqueville 21 Author.

Jacob Hamburger, “The Supreme Court Is Smothering American Democracy,” Jacobin, 10-20-2020, https://www.jacobinmag.com/2020/10/supreme-court-amy-coney-barrett-juristocracy

As the Supreme Court is set to welcome a fifth justice nominated by a president who lost the popular vote, it seems we are living in a democracy that would be more than acceptable to Tocqueville’s aristocrats. Under chief justice John Roberts, the court has mastered the art of protecting the interests of conservative elites and the owners of capital against mass democracy. It has allowed the wealthy to spend unlimited money on influencing elections, undermined the legal framework protecting voters against disfranchisement, given states permission to gut public-sector unions, and twisted itself into knots to excuse the Trump administration’s racist immigration policies. With the addition of Amy Coney Barrett — almost certainly chosen for her opposition to popular positions on health care, abortion, and climate — we can expect it to continue on this path, only getting bolder in its defiance of the popular will.

The twenty-first-century juristocracy has also helped consolidate power in the presidency, while the legislature has virtually disappeared as a democratic body. Over and over, the Supreme Court has decided that the executive branch’s discretion to act in the name of “national security” can justify nearly any outcome: from banning Muslims from entering the country to shooting Mexican children across the border.

In an age of imperial presidencies and all-powerful courts, Congress has all but abdicated its role as the main policy-making body. Sweeping legislation creating lasting popular programs is mostly a thing of the past. With only a few exceptions, Congress today mostly prefers to let the president decide to make war, and to let agencies and the courts fight over what is possible under statutes passed decades ago. And one of those notable exceptions, the Affordable Care Act, is currently on the chopping block before the Supreme Court once again. Without organized resistance to judicial supremacy, the United States will remain a democracy only in the barest sense, with the least representative institutions empowered to make wildly unpopular decisions.

There are a variety of strategies to challenge this state of affairs, from packing the court to stripping the nine justices of their power to review statutes to simply ignoring the Supreme Court if it makes an egregiously bad decision. (Though this final path risks strengthening the unilateral power of the presidency, as evidenced by Donald Trump’s refusal to issue new DACA grants this summer despite multiple court orders.)

Whatever the specific strategy, the first step toward mounting a popular movement against the Supreme Court must be to demand that a Democratic congressional majority start playing hardball against the right-wing judiciary. With a contingent of socialists and progressives set to take their seats in Congress, leftists and even rank-and-file Democrats ready to mobilize, and the political nature of the judiciary laid bare, the moment is ripe to dismantle the juristocracy and start to build a system of majority rule.

But we cannot rely on Democratic leaders to confront the power of the Supreme Court without popular pressure. As Dianne Feinstein showed with her softball questioning during Amy Coney Barrett’s confirmation hearings — followed by her maskless embrace of Republican counterpart Lindsey Graham — plenty at the party’s heights are perfectly happy to preside over the disappearance of anything vaguely resembling a left-wing legislative force. Gushing over the qualifications of judges, or over cordial relations with the far right, is cover for the Democratic establishment’s desire to let lawyers govern in their place. Or, rather, in our place.

#### Our goal should be to end the Court’s undemocratic role, not to rehabilitate it --- movements of struggle and acts of solidarity solve.

Taylor 20 – Professor of African American Studies at Princeton University.

Keeanga-Yamahtta Taylor, “The Case for Ending the Supreme Court as We Know It,” The New Yorker, 08-25-2020, https://www.newyorker.com/news/our-columnists/the-case-for-ending-the-supreme-court-as-we-know-it

Those with the most to lose from a reactionary Trump Court have the least access to the levers of power that could slow this fast-moving process. But they can still attempt to interrupt it with popular protest and resistance. Even if popular resistance is not successful in stopping Trump’s nominee, it will be crucial in the long, ongoing struggle to expand the rights of the people of the United States. As the historian and writer Howard Zinn, whom Donald Trump disparaged in his speech at the National Archives, once wrote,

Knowing the nature of the political and judicial system of this country, its inherent bias against the poor, against people of color, against dissidents, we cannot become dependent on the courts, or on our political leadership. Our culture—the media, the educational system—tries to crowd out of our political consciousness everything except who will be elected President and who will be on the Supreme Court, as if these are the most important decisions we make. They are not. They deflect us from the most important job citizens have, which is to bring democracy alive by organizing, protesting, engaging in acts of civil disobedience that shake up the system.

This doesn’t mean that it is unimportant who wins the Presidency or who is appointed to the Supreme Court. What it does mean is that ordinary people are not powerless to challenge the political and economic élite who have such disproportionate authority over our lives. But our power is often located outside of the institutions of tradition and influence. It is through acts of solidarity and struggle that we have been able to secure our rights and liberties in the United States, and, from the shape of things to come, that is how those rights and liberties will have to be defended. This means building movements to pressure an increasingly right-wing Supreme Court, making it more difficult for that body to further usurp the rights of regular people. It also means calling into question the fundamentally undemocratic nature of the Court. If Trump is successful in adding another right-wing Justice, he will only continue to erode the Court’s legitimacy, adding further evidence that it can be brazenly used to achieve what could not be accomplished through legislative means. The multiplying failures of our existing society have led many of us to reconsider institutions, policies, and practices that have continued to reproduce racial and economic inequalities. In this moment of exalting uprisings and reëmergent social movements, we cannot overlook the disturbing history of the Supreme Court and its regressive role in American society.

What do we do about the Court? There is an obvious and pressing need now to do whatever is politically permissible in stopping Trump from further distorting its composition. But, beyond that, there is also a need to make it part of our national reckoning with the history and traditions of racism in the United States. It is long overdue to end the Court’s undemocratic role in U.S. society.

### Biopolitics K

#### Court size and structure renews nuanced debates about biopolitics.

Brindisi ‘15 [Gianvito Brindisi; Research fellow in Public Law at the Università degli Studi di Napoli “Parthenope”. He collaborates with the Chair of Philosophy of Law at the Università degli Studi di Napoli “Suor Orsola Benincasa.” JUDICIAL POWER AND GOVERNMENTALITY IN MICHEL FOUCAULT: A Method for Considering the Form of Rationality of Judicial Governance. 2015. Soft Power, 2(1), 96–114]

The Judicial Power in Foucauldian Method

Since the debate on the global expansion of judicial power has exploded, towards the end of the 20th century, a wide literature has attempted to grasp its most significant aspects, also by reactivating old categories (government of judges), or inventing new ones (judicial governance).1 With this study we would like to add some considerations to the debate by emphasizing the capability of social regulation exercised by judges in a complex field of governmentality. And we would like to do this through Michel Foucault’s methodology, because we believe that judicial governmentality is a field in which his thought may express its hermeneutic power. An analysis which starts from Foucault’s categories requires, however, a preliminary determination of the methodological core through which Foucault considered transformations of the judicial power. Therefore, the Foucault’s method will be synthetically illustrated and then we will show through some examples how the judicial power was and is still part of a governmental device that has contributed in production of social order through its function of partage, which today is quantitatively and qualitatively changed.

On different occasions Foucault underlined the importance of law for the creation of our forms of experience.2 This interest was made concrete in a series of analyses in which we believe a constant methodological core can be found, according to which the space of the trial is one of the places in which the strategic game which might prelude to a possible re-articulation of a regime of truth is decided and that can be inscribed, in short, in the “games of truth and error through which being is historically constituted as experience”.3 From the Foucauldian point of view, judgment is ‘populated’ by different forces whose genesis needs to be investigated, which make judgment a pièce in the dramaturgy of the real. That means, in short, that judgment and trial are a sort of litmus test for understanding the changes of the juridical and moral experience and them political consistency.4

Judicial practices are made up of what Foucault called moral technologies, a concept involving the political technology of the body, the technologies of truth, the political technology of individuals, the technologies of the self, etc. In a certain circumstance Foucault defined the concept of governmentality like the interdependence between these technologies5, and in another one he explained that each correlation system between these technologies is qualified by the dominant technology6, with its rules, knowledge and forms of subjectivity.7 Indeed, the character of these technologies is in their being matrixes of practical reason. Their value is not ontological, but genealogical and strategic: they are the object of movements and re-uses which give them an importance which from time to time differs within the system in which they are used. The conditions which make one practice or another socially acceptable and legitimate in a given historical period are, for Foucault, an autonomous field of research because of their regularity, of their “reason” — a word which, for Foucault, does not refer to the extra temporal foundation of a phenomenon but to the strategy, which should be understood as the justification for phenomenal changes.

The strategic dimension of technologies emerges in the anti-Hobbesian conception of the civil war belonging to Foucault, for which it always works within the established power. An example is the constitution, in the 19th century, of a “dangerous class” which led to a transformation of legal rationality, because the criminological transcription of the crime and the re-codification of moral notions in criminal categories offered to power to punish the possibility of its extension to anomalies which were not included in the field of punishment. This was one of the uses of imprisonment, a practice which has allowed new procedures for objectification of the subject which, in relation to the higher ‘describability’ of subjectivity, have not only determined a lowering of the threshold of acceptability of punishing and being punished, but also a new awareness of judging in relation to the division between normal and abnormal subjects, normal and dangerous classes.8

#### Negative teams can critique sovereign line-drawing that curtails judicial power.

Nashef ‘17 [Hania A.M. Nashef is a professor at the Department of Mass Communication at the American University of Sharjah, UAE. HOMO SACER DWELLS IN SARAMAGO'S LAND OF EXCEPTION. Angelaki, 22:4, 147-160, 12-5-17. DOI: 10.1080/0969725X.2017.1406053]

Giorgio Agamben defines the sacred or accursed man as the one who is not worthy of sacrifice. Sacred life is essentially a life that can be killed but not sacrificed. The term Homo Sacer or more accurately the accursed individual characterizes the one who has been banished by the law, and having lost all rights that have thus far guaranteed the person’s humanity, the person is reduced to the non-human. Denied rights, this person becomes the non-entity, paradoxically a person whose life cannot be sacrificed, yet can be eliminated. The position of Homo Sacer dwells best in the state of exception. At the center of the state of exception is “an empty space, in which a human action with no relation to law stands before a norm with no relation to life” (Agamben, Homo Sacer 86). In modern times, banishment or banning by the law occurs when a state of exception is sanctioned by a sovereign or a totalitarian supremacy; the latter, which is capable of suspending judicial power, defines boundaries between inside, outside, and the ambiguous region in between.

Agamben argues that the state of exception does not lie within or outside the boundaries of the judicial order, but rather in a zone of indifference, a blurry threshold in which meaning and law are muted, continually defined and redefined by the necessities deemed by the regime. Moreover, the state of exception in which the norm is annulled represents the inclusion, which in turn captures the space in which law becomes suspended. Invariably, necessity lies at the foundation of the state of exception, but as “necessity has no law” it can be interpreted “in two opposing ways: ‘necessity does not recognize any law’ and ‘necessity creates its own law’” (Agamben, State 24). In this paper, I will argue how Portuguese Nobel Laureate José Saramago’s novels Blindness (1997 – English) and The Cave (2002 – English) offer startling examples of totalitarian authorities that insist on functioning within the law of exception, confining and defining space, and ultimately naming and marking the Homo Sacer. Although totalitarian practices are portrayed differently in the novels, the underlying concerns of these allegorical works reside in authorities that are blind to their own excesses, and apathetic to the rule of the law. Furthermore, the necessity that is enacted by the authorities renders the illicit licit, and justifies acts of transgression through the state of exception that it has created by its claim that it is acting solely for the benefit of the people (Agamben, State 24).

### Neoliberalism K

#### The discursive power of judicial agents is used to enshrine basic beliefs about the world that shape public life – exemplified in the neoliberal rhetoric of Supreme Court decisions

Winslow et al. 2018 [Justin, Assoc. Professor of Communication @ San Diego State University, “The neoliberal conquest of the Supreme Court,” Communication and the Public, 2018, Vol. 3 No. 3 205-217, doi:10.1177/2057047318794962]

To oppose the entrenched dominance of progressive legal liberalism, neoliberalism sought to roll back the scope of government intervention into economic arenas, even to the point where courts could be charged with striking down measures passed by voters and supported by elected representatives(MacLean, 2017). Herein lies the circumscription of democracy established by neoliberalism’s legal conquest. Along with rolling back progressive legal principles, neoliberalism needed to also roll out an alternative vocabulary to take its place. This required a more proactive stance for the federal courts and aggressiveness from conservative litigators (Teles, 2010). Neoliberalism could no longer just play defense, in other words. It went on the offensive, constructing and circulating a set of neoliberal arguments that reshaped the US Supreme Court for decades to come. The discursive features of neoliberal jurisprudence Elevating the market To accuse the Warren Court of “overreaching” implied a constitutional betrayal of the American government’s scope and function. Neoliberal jurisprudence framed such a betrayal as an infringement on the freedom and liberty of American citizens. More specifically, neoliberalism sought to roll back government interventions in specific economic areas to produce a market orientation where individuals could compete freely and fairly, unencumbered by interference from the state. As a result, the market became the firm ground upon which freedom, justice, and liberty should be civically constructed. Today, examples of neoliberal market elevation abound in American public conversations: many Americans struggle to talk about the lives saved by the Affordable Care Act apart from the seemingly more relevant fact that healthcare occupies “one-sixth of the economy.” Likewise, Americans cannot talk about the civic value of higher education apart from increased wages college graduates can expect to earn with a degree; Americans cannot talk about how to help areas struck by natural disasters apart from being urged to visit and spend money; Americans cannot talk about why teenage boys should be wary of consuming pornography apart from the amount the women are paid for each sex act; Americans cannot talk about the number of Chinese and Indian people killed by air pollution apart from the billions of dollars of lost labor output each year. Market elevation then grants moral blessing to existing hierarchies of wealth and power. Note the significant departure from the Warren Court’s assumption that the structural oppression of the marginalized could only be redressed through active legal interventions. In contrast, neoliberalism assumes the wealthy and powerful are wealthy and powerful by virtue of their superior performance in the free marketplace. Their intelligence, character, and work ethic are rewarded in an environment where individuals succeed and fail according to their own merits. Consequently, the marginalized deserve their penury. A significant part of the Supreme Court’s rollback of Warren-era protections included the enshrinement of the marketplace as the final and best arbiter of how wealth should be distributed. Ultimately, such a naturalization of market outcomes undermines the Warren-era principle that the courts have a positive obligation to remedy inequalities and care for the most marginalized. The acceptance of an elevated market reveals important legal consequences. If the current distribution of resources is natural and fair, the court has no legal justification to infringe on the market to redistribute the fruits of the wealthy’s labor. The rich deserve to be rich and the poor deserve to be poor because of the work of the free market. America is a meritocracy, the argument goes, with people rising in and out of poverty according to their own efforts. If the distribution of wealth is based on personal effort—not random chance or structural forces—then there is no constitutional basis for legal intervention. Of course, the existence of a stable and well-defined underclass would be a powerful counterexample to the belief the American economy is meritocratic. This is where the Warren court sought to intervene, and this is also where neoliberalism needed to tell a fresh—and more compelling—story. For example, consider the case of San Antonio Independent School District v. Rodriguez in which the Court ruled unequal funding of school districts with property taxes did not violate the Fourteenth Amendment’s Equal Protection Clause (San Antonio Independent School District v. Rodriguez, 1972). The appellees argued partially funding schools with property taxes denied an equal education to children who lived in the poorest districts with the lowest property taxes, as those children were more likely to be poor. The appellees showed that the poorest school district in Texas received US$356 per pupil while the wealthiest district received US$594 per pupil (San Antonio Independent School District v. Rodriguez, 1972). Such unequal educational funding was a violation of the students’ First Amendment rights, preventing students from meaningfully or effectively exercising their First Amendment right to freedom of speech. But the US Supreme Court argued that the group of people affected by the unequal funding did not constitute a coherent and identifiable group whose constitutional rights deserved stricter scrutiny. It was legally (and rhetorically) important for a neoliberal Supreme Court to deny the existence of “the poor.” To be clear, the Court did not deny the existence of individuals who were impoverished. Instead, it denied the existence of the poor as a class distinct from the middle or upper-classes. The Court argued: [f]irst, in support of their charge that the system discriminates against the ‘poor,’ appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. (San Antonio Independent School District v. Rodriguez, 1972, p. 22) In order for a group’s rights to be protected under a higher standard of scrutiny, that group needed to have unifying characteristics binding them together. Random or temporary associations did not form the sort of unit that could qualify for enhanced Constitutional protections. The Court contended that the students and families harmed by the unequal funding were too heterogeneous, and their similarities too transient, to be the sort of group whose rights need to be protected by heightened scrutiny. Simply put, a “marginalized” constituency does not count. The Court rejected the appellees argument because “the absence of any evidence that the financing system discriminates against any definable category of ‘poor’ people [means] the disadvantaged class is not susceptible of identification in traditional terms” (San Antonio Independent School District v. Rodriguez, 1972, p. 26). In order for the current distribution of wealth to be fair, there must not be a well-defined group of “poor” people. In its decision, the Court referred to those living in the poorest school districts as “a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts” (San Antonio Independent School District v. Rodriguez, 1972, p. 29). The Court revealed a potent neoliberal tactic here by rejecting the argument that the families in the poorest districts constituted a unique class of persons. This derision is further evidenced by the use of scare quotes around the word “poor” nine times in the decision. As part of its dismissal of the existence of the “poor” as an identifiable class, the Court argued “Defining ‘poor’ families as those below the Bureau of the Census ‘poverty level,’ the Connecticut study found, not surprisingly, that the poor were clustered around commercial and industrial areas with high property taxes” (San Antonio Independent School District v. Rodriguez, 1972, p. 24). In other words, the poor did not receive a substandard education because they happen to live near industrial areas that have high property taxes. Thus, there was no identifiable class of “poor” persons who were systemically disadvantaged. The Court even seemed to suggest being poor might sometimes be an advantage. The quotes are a continual reminder of the skepticism, even contempt, the Court held for the proposition that there was a semi-permanent underclass in America. Today, such skepticism would surprise no one. The belief that there is not a class of poor people in America is the lynchpin that holds the ruse of the “free” market and neoliberalism together. Consider how effective market elevation is for inhibiting class-based solidarity and political activism. Collective political action often begins with an awakening that a distinct socioeconomic position is being forced upon a group people beyond their control. Market elevation sweeps the legs out from underneath that awakening. In turn, the Court has no grounds for economic intervention. Expanding the market San Antonio Independent School District v. Rodriguez indicated that unequal funding was not unconstitutional discrimination as long as every student received a minimally adequate public education. Even if Texas school districts were funded unequally, the Court argued, that was not the sort of inequality requiring positive intervention—a marked departure from the Warren court. Justice Lewis Powell argued, “We have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice” (San Antonio Independent School District v. Rodriguez, 1972, p. 116). It was the job of the Court to respond to absolute deprivation rather than relative inequality, in other words. Justice Powell continued: [w]hatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved. (San Antonio Independent School District v. Rodriguez, 1972, p. 38) It seemed relative inequality only became a significant problem if it became intergenerational. If the relative inequality of one generation became the relative inequality of their children, then the effects can compound over the years. It became clear why it was so important for the US Supreme Court to claim the people living in the poorest school districts were an amorphous class of people. Since people moved in and out of underfunded school districts, and in and out of poverty, the unequal access to education did not become a permanent intergenerational problem. Thus, the Court had no constitutional basis to intervene. Even families were not immune from the Court’s new reluctance to redress relative inequalities. In the 1960s, an Aid to Families with Dependent Children (AFDC) program in Maryland gave needy families a monthly benefit that was partially determined by the number of children. Families with more children would receive larger payments, but each successive child brought a smaller increase in benefits until a limit was reached. Two families sued Maryland arguing the formula discriminated against large families and violated the Equal Protection Clause of the Fourteenth Amendment (Dandridge v. Williams, 1970). While the Court did not deny the harm done to those families because of the benefits cap, it argued the resulting inequality was not the sort that merited legal action. Writing for the majority, Justice Potter Stewart defended Maryland, arguing, “[i]t is enough that the State’s action be rationally based and free from invidious discrimination. The regulation before us meets that test” (Dandridge v. Williams, 1970, p. 487). As long as the law met a minimal nondiscrimination standard, it was constitutional and the Court would decline to intervene. This argument was part of a broader refusal by the Court to intervene in problems arising from the distribution of wealth. Justice Steward narrowed the Court’s scope of concern because “the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court” (Dandridge v. Williams, 1970, p. 488). The Court defined inequality and discrimination in a way that almost entirely absolved it of intervening in problems arising from an unequal distribution of resources. In its efforts to naturalize the current distribution of wealth, the Court invoked common stereotypes about large families collecting public benefits. In defending the cap on benefits, the Court listed state interests served by reducing benefits for larger families, such as “encouraging gainful employment” and “providing incentives for family planning” (Dandridge v. Williams, 1970, p. 484). In other words, the benefits were deliberately inadequate to encourage poor people to have fewer children and return to work quicker. The argument relied on the canard that poor families were more likely to be lazy and more likely to have more children to exploit the welfare system. The Court was not required to intervene in whatever inequality resulted in capping benefits for large families because the inequality was the consequence of their own immoral behavior. The Court did not stop with subjecting the family to the dictates of the market. Political communication and advertisements must also be subject to market forces. The 2010 Citizens United decision rolled back regulations governing political advertising to make politics more market-like. The case centered around a federal law that restricted independent expenditures by both nonprofit and for-profit corporations. The conservative nonprofit organization Citizens United produced an anti-Hillary Clinton video and sought to advertise it in the run-up to the 2008 Democratic presidential primary (Citizens United v. Federal Election Commission, 2010). Federal law at the time prohibited both electioneering communication too close to the date of the primary as well as independent expenditures advocating for or against specific candidates. The Court ruled 5-4 that these restrictions violated the First Amendment (Citizens United v. Federal Election Commission, 2010). The Court justified striking down these restrictions in the name of protecting a free political marketplace of ideas. More information is always preferable to less information, the argument goes, because it helps voters (i.e. consumers) make a more rational decision within the market. Justice Kennedy, writing for the majority, argued that in “suppressing the speech of manifold corporations, both for-profit and non-profit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests” (Citizens United v. Federal Election Commission, 2010, pp. 38–39). Kennedy framed such independent expenditures not as an attempt to curry favor with or gain access to politicians, but as a good faith attempt to persuade the voting public. There was no need to worry about the corrupting effects of such expenditures because a “corporation, or any other speaker, [being] willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials,” (Citizens United v. Federal Election Commission, 2010, p. 44). The Court appealed to a free market logic of persuasion to defend its deregulation. Chief Justice Roberts made a similar argument in his concurring opinion. He rejected limits on independent expenditures because “[a] speaker’s ability to persuade, however, provides no basis for government regulation of free and open public debate on what the laws should be” (Citizens United v. Federal Election Commission, 2010, p. 11). Both justices framed the ability to spend money on political advertisements as persuading voters. Independent expenditures, according to the Court, were neither distortionary nor corrupting. Instead, expenditures are arguments that attempt to persuade the voting public—individuals are free to accept or to reject the arguments on their merits. This faith in the openness and fairness of the marketplace of ideas is reflected in Kennedy’s description of the founding of the United States. In characterizing the state of political speech in the eighteenth-century, Kennedy asserted “speech was open, comprehensive, and vital to society’s definition of itself; there were no limits on the sources of speech and knowledge” (Citizens United v. Federal Election Commission, 2010, p. 37). Unequal access to the marketplace of ideas was not a concern for the Court. In a maximally free, minimally regulated marketplace, ideas succeed or fail based on their merits. To defend this idealistic conception of the marketplace of ideas the Court had another challenge. If there were no limits on independent expenditures by corporations, then does that give more power in the marketplace of ideas to those who are more successful in the economic marketplace? The answer from the Court was a resounding “No!” Here is why: “[a] ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech” (Citizens United v. Federal Election Commission, 2010, p. 35). Because everyone uses money to fund their speech, regulating how or when that money is used was futile. By extension, any disparities in the amount of money an entity has to fund its speech was beyond the purview of the Court. As a result, the neoliberal conquest of the US Supreme Court functioned to entrench existing divisions of wealth and reaffirm hierarchies of power. If the Court refused to take action to address inequalities in how people access markets and focused on maximizing freedom within the market, then those who already have wealth, power, or information would be able to leverage those advantages into even greater wealth, power, and information. Those who had a better education, were born wealthy, or had more socioeconomic power would have nearly insurmountable advantages in such a “free” market. These advantages accrue intergenerationally and compound over the years. The neoliberal conquest of the Supreme Court rhetorically props up a fictional economy where actors are maximally free to operate in the marketplace and will succeed or fail according to their own efforts. The net effect oftheir rulings, however, has been to favor the enrichment of established powers. Advertising the market Finally, if the Courts should aim to facilitate market supremacy (and the hierarchies of power it produces) neoliberal jurisprudence had to roll back legal interventions into the arena of speech. Consider the 1977 case of Bates v. State Bar of Arizona. At the time, the state bar of Arizona banned advertising by lawyers. Bates argued the law violated his First and Fourteenth Amendment rights. The Supreme Court sided with Bates and ruled barring lawyers from advertising their services and prices violated the First Amendment. The crux of their ruling was this: economic speech, in the form of advertising, was protected by the Constitution because of the important function it played in America’s free market system. The Court argued, “Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system” (Bates v. State Bar of Arizona, 1977, p. 365). The Court went further, contending that protecting the free flow of commercial speech might be more important than protecting political speech. The First Amendment’s protections are vital for free markets because, “the consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue” (Bates v. State Bar of Arizona, 1977, p. 365). In other words, it is important for commercial speech to be minimally regulated because access to advertising is key to keeping markets maximally free. The neoliberal turn of the US Supreme Court is illuminated in their interpretation of advertising. The Court suggested that ads provided valuable information to consumers helping them make rational decisions in the allocation of scarce resources in a free market economy. Writing for the majority, Harry Blackmun argued, “It seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision” (Bates v. State Bar of Arizona, 1977, p. 375). Protecting consumers from misleading or inaccurate advertisements became interpreted as an infringement on the freedom and liberty of the advertiser. Of course, advertisements are often misleading or inaccurate. Advertisers have a wide array of techniques for presenting information, even if it is true in a very narrow sense, that it misleads or misinforms customers about the nature of the product or service. The Court recognized this as a possibility, but dismissed it as not requiring further intervention. Of course, it is naïve to assume that any amount of incomplete information is preferable to no information. Accurate but incomplete information can easily be used to make misleading, untrue, or unethical arguments. As long as people have access to some minimal amount of education and some minimal amount of advertising information, any preexisting or resulting inequalities are understood to simply be market forces at work. The Court’s interpretation went far beyond lawyers advertising on bus-stop benches. The US Supreme Court furthered this neoliberal principle in its 2011 decision in Sorrell v. IMS Health. Pharmaceutical companies often buy prescriber identifying information for marketing purposes, including what medications and in what doses a doctor prescribes. That information is given to “detailers” who take it and use it to sell expensive, name-brand drugs to doctors (Sorrell v. IMS Health, 2011). Vermont banned the practice, prohibiting the selling of prescriber-identifying data for marketing or drug promotion. The Supreme Court ruled against Vermont, ruling “[s]peech in aid of pharmaceutical marketing … is a form of expression protected by the Free Speech Clause of the First Amendment” (Sorrell v. IMS Health, 2011, p. 1). Although several decades have passed and the makeup of the Court changed, the reasoning in the Sorrell decision closely mirrored the reasoning in the Bates decision. The decision interpreted marketing by pharmaceutical companies as providing accurate information that increased the effectiveness of doctors’ medical decisions. As part of its rejection of Vermont’s law, the Court contended, “[T]he law’s express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs” (Sorrell v. IMS Health, 2011, p. 9). The Court continued “Vermont’s law thus has the effect of preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner” (Sorrell v. IMS Health, 2011, p. 9). Here again we see the argument that marketing provides important and accurate information, which increases the ability of markets to rationally allocate scarce resources. Inequalities in the ability to access or use information are beyond the purview of the Court and would only serve to make markets less free. As long as everyone has maximally free access to markets, the markets themselves will serve a regulatory function. More specifically, there is minimal need to outlaw misleading advertising because the free market will reward honest companies and punish dishonest ones. The conditions under which people come to access markets— including inequalities in wealth, power, information, and education—are outside the purview of the courts. However, markets do not arise independently of the laws that shape them (Lazzarato, 2009; Van Horn & Mirowski, 2009). Only seeking to maximize access to markets while refusing to examine the broader inequalities limiting how people are engaging in those markets serves to entrench existing inequalities. Again, consider these cases in relation to the “free” market ruse neoliberalism promotes. Neoliberalism sought to further the argument that the relationship between the state and the market is flawed. These cases are supposed to function as prime examples of that flaw. Redressing that relationship demands less state interference at sites of profitable corporate intervention. But less state interference does not apply where regulation protects corporate profitability, including legal protections for pharmaceutical patents or licensing requirements. This inconsistency is revealing. State interference is a given in an advanced industrial economy. The question is not if the state will intervene, but on whose behalf? The Warren Court was transparent with how it answered this question: it prioritized equality over liberty, and thus, rationalized active legal interventions on behalf of society’s most marginalized. Conversely, the US Supreme Court cases examined here reflect a rolled back version of neoliberalism where protecting the free speech of corporations is more important than protecting the wellbeing of consumers. Implications and conclusions The effectiveness of neoliberal arguments in reshaping the Supreme Court must be understood as a product of the dynamic oscillation between public messaging and public beliefs. Recall David Zarefsky (2004) encouraging scholars to examine how arguments emerge in alignment with shifting political realities to reshape definitions and plead particular causes. Following Zarefsky’s lead, we are reminded that neoliberalism’s legal conquest was not simply the result of effective arguments operationalized by neoliberal politicians and their sympathetic American Supreme Court appointees. The Court does not operate like that. As Adam Winkler (2011) wrote, “Historically the Supreme Court lags behind social movements rather than leads them” (p. 296). This essay’s findings encourage any exploration into the relationship among neoliberal jurisprudence, the composition of the US Supreme Court, and the arguments the Court produces to account for the wider contextual factors influencing what is ultimately ruled at 1 First Street in Washington D.C. With that qualifier in mind, this essay encourages further scholarship that can theorize neoliberal discourses in the public sphere. Future scholarship should pay close attention to both the composition of the US Supreme Court and the arguments produced to justify neoliberal jurisprudence. The composition of the Court surely informs the influence of neoliberal thought as a backdrop for adjudication. The current US Supreme Court is made up of the most business friendly composition in the last several generations. Justices like Antonin Scalia were extremely friendly to the neoliberal project (Jackson, 2016). Scholars studying Scalia made clear that he espoused a philosophical viewpoint whereby individual freedoms have been historically linked to a free market economic perspective that “eschews contemporary distinctions that separate property and civil rights” (Schultz & Smith, 1996, p. 6). In other words, for Scalia, the free market presupposed other broad political freedoms for individuals. Freedoms such as free speech and property rights “appear linked to the free market and respect for economic autonomy” (Schultz & Smith, 1996, p. 7). At the same time, he was emphatically against judicial intervention in economics and economic policy. After Scalia unexpectedly died in 2016, and Neil Gorsuch ended up filling his seat, it seems the neoliberalism’s conquest of the US Supreme Court will not slow down any time soon. Future Donald Trump nominees will likely reflect neoliberal discourse (Denbow, 2017). Communication scholars are well equipped to theorize how the arguments put forth to justify continued neoliberal legal interventions resonate with wider evolutions in the public sphere.

#### There is a controversy about whether courts can be counterhegemonic powers in the face of neoliberalism.

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The second interpretation critically analyzes judicial power as a functional apparatus and means of legitimizing neoliberal strategies.17 From this perspective, the judicial protection of social rights gives the impression that neoliberalism will not impede the attainment of social inclusion or the struggle against inequality. However, this perspective fails to acknowledge that judicial protection of social rights would neither allow the full guarantee of these rights nor inhibit the advancement of neoliberal policies. Accordingly, social rights protection would be reduced to the concession of meaningless legal victories, which would not constitute a real challenge to neoliberalism. Moreover, those victories would have the perverse effect of deviating attention—through their emphasis on the legal strategy—away from the true political and counterhegemonic struggle that could resist neoliberalism. Thus, far from being counterhegemonic, this perspective posits that social rights protection would become an important part of hegemonic globalization in a neoliberal sense.

### Queer Legal Studies K

#### Many queer legal theorists question the structures/framework of a Supreme Court and the constitutional system

KIM BROOKS 4 Assistant Professor of Law, Queen's University, Queering Legal Education: A Project of Theoretical Discovery, 27 Harv. Women's L.J. 89, 89

7. Uncovering Perspectives

In property law, we're discussing Aboriginal land claims. The professor has raised one of the leading cases in the area, which contains an extremely offensive depiction of Aboriginal peoples. The class discusses the legal nuances of the decision for some time, with white students dominating the discussion. No one raises the passage or its effect on the legal decision. We have managed to pretend that that part has no bearing on the remainder of the decision, which we parse with some care. A few of us are standing outside the classroom when the class ends. One of our friends, an Aboriginal woman, comes out of the room enraged at us for abandoning her in the class--for failing to raise the important issues about the judge's characterization of the plaintiffs in the case and the effect of his characterization on the legal reasoning.

As we noted earlier, the call to neutrality in law is a powerful one. 186 It is used to disguise the fact that real things happen to real people in law. In developing these principles, we wondered how we could, in Jane Schacter's words, "pose[] . . . relatively abstract, doctrinal question[s] without losing sight of the excruciatingly human dimension of . . . case[s]." 187 In designing a queer legal pedagogy we need to ensure that students are not required to pretend that they lack identities beyond the classroom. Instead, those identities should be used powerfully to advance arguments for equality in society.

This principle requires resisting the idea that the law school curriculum is neutral and, instead, calls us to recognize when the material we study and teach must be unpacked to expose particular ideologies and assumptions. 188 It requires questioning what makes us believe that certain decisions are correct. If a court's holding is in line, for example, with the Constitution, we need to question whether the decision is still correct if it undermines our social justice goals. Where the law is applied to an individual plaintiff in accordance with established precedent or legislation, we should ask whether it matters that a marginalized group may suffer as a result of the decision. The story above highlights how painful neutrality can be. We need to make sure that students are not abandoned or forgotten in class discussions. We must also explore how assumptions that underlie judges' reasoning affect their interpretation of the law. Finally, this principle requires us to examine the cases and articles that constitute our "legal canon" and to consider the assumptions that underlie our choices of which cases to teach and the cases themselves.

The principle that perspectives must be uncovered fits well with a number of the other principles. In our view, fundamental to an acceptance of the role of narrative in queer legal pedagogy is a recognition that legal discourse and pedagogy are neither neutral nor objective (nor lacking in stories). When told, these stories provide competing texts that may challenge dominant narratives and ultimately change the nature of traditionally used texts altogether.

8. Responding to Changing Contexts, Periods, and Climates

I am at a meeting of a women's organization. The members have recently had an application for a position on their board from a transgender woman. They are trying to figure out if "woman" in their governing documents includes a transgender woman. This is a question that has not been asked of the organization before, and it strikes me as a question I should be able to answer easily given my legal training. However, what we might have learned about queers in law school ten years ago does not help to answer this question--any issues confronted by transgender people simply weren't addressed.

These principles of queer legal pedagogy cannot and do not make any claim to paradigmatic status. Our theory and practice of queer legal pedagogy must reflect changing contexts, periods, and climates. What seems like a good pedagogical approach now may not be as useful in five years. We need to ensure that we are always open to change. For example, while we might agonize about what exactly we mean by the word "queer" (Do we mean a particular identity? Do we mean an approach to transcending that particular identity?), our current theoretical climate suggests that asking questions about what we mean by that word is part of centering queer experience. However, the influence of this question on what we teach in the classroom might not be as relevant in ten years as it is now.

This principle also requires the active use of imagination. When discussing the value of a lesbian Supreme Court Justice, Robson states,

the desire for a lesbian Supreme Court Justice also exhibits a startling lack of imagination . . . . It is . . . difficult for us to imagine the most radical changes, changes that are not merely inserting lesbian interests into the existing structure. Imaginings that do not take for granted a Supreme Court, or even a constitutional system, or even the "rule of law." 189

It will take imagination to re-envision legal education in a more thorough way so that queers are not just inserted but included.

The perspectives on and methods of creating queer legal pedagogy will necessarily grow and evolve as progress is made. One way to avoid the stagnation of queer legal pedagogy is to resist a queer canon in our curricula. 190 In other words, instead of developing a set of materials that are viewed as the essential queer law building blocks, we should aim to keep fresh the choices of articles, thoughts, theories, and contexts at the center of the curriculum. While a canon is helpful because it ensures there is a common ground for debate among legal thinkers, it can stifle new ideas. Because queer legal theory is still in its relative infancy, we have the advantage of not having to break old molds. Instead, we are free to continue to explore how queer legal pedagogy may affect our strategies for the broader goal of social justice.

### Abolition Constitutionalism K

#### One genre of CLS literature advocates for abolition constitutionalism, which may be conceived as a “Non-traditional” reform of the Supreme Court

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B. Imagining a Freedom Constitutionalism

Abolitionists always have their eyes set on a future they are in the process of creating. At the very same time they are deconstructing structures inherited from the past, they are constructing new ones to support the future society they envision. Abolitionists are engaged in a collective project of radical speculative imagination -- what Rodríguez calls "[i]nsurgent abolitionist futurity." 743If anything, it is the innovative rather than the destructive that marks abolitionist thinking. We should understand abolition not as the "elimination of anything but . . . as the founding of a new society." 744 The relationship between prison abolition and the Constitution, then, should be seen less as the condemnation of our existing abolition constitutionalism and more as the genesis of a new one.

A new abolition constitutionalism could seek to abolish historical forms of oppression beyond slavery, including settler colonialism, patriarchy, heteronormativity, ableism, and capitalism, and strive to dismantle systems beyond police and prisons, including foster care, regulation of pregnancy, and poverty. 745It could extend beyond the United States' borders to challenge U.S. deportation policies and U.S. imperialism and to connect to freedom struggles around the world. 746The purpose of a new abolition constitutionalism would not be to improve the U.S. state but to guide and govern a future society where prisons are unimaginable. Its objective could extend beyond abolishing particular systems to establishing freedom for all -- a new freedom constitutionalism.

As antebellum abolitionists and civil rights activists showed, constitutional meaning is shaped by social and political action outside of traditional forums and separate from Supreme Court decisions. 747 Prison abolitionist praxis emphasizes the need to decentralize power currently residing in privileged institutions in order to empower communities most vulnerable to state violence to make change in nontraditional forums and spaces. 748 How that vision will be made real -- as a transformed interpretation of the U.S. Constitution, as an amendment to the existing text, 749or as an alternative charter for freedom that extends beyond the bounds of the U.S. state 750-- is yet to be seen.

CONCLUSION

This Foreword makes the case for revitalizing abolition constitutionalism by engaging the ideas and activism of antebellum slavery abolitionists with those of twenty-first-century prison abolitionists. I argue that, despite the dominant anti-abolition constitutionalism, scholars and activists should consider the abolitionist history of the Reconstruction Amendments as a usable past to help move toward a radical future. Today's activists can deploy the Constitution's abolition provisions instrumentally to further their aims and, in the process, construct a new abolition constitutionalism on the path to building a society without prisons. In this way, the prison abolition movement can reinvigorate abolition constitutionalism. In turn, prison abolitionists' rethinking of constitutional meaning can further the struggle to create a more humane, free, and democratic world.

In arriving at this conclusion, I grappled with the tension between two approaches to abolition constitutionalism. On the one hand, there is good reason to renounce the Constitution because constitutional law has been critical to upholding the interests of the racial capitalist regime while advancing legal theories that justify its inhumanity. On the other hand, there is utility in demanding that the Reconstruction Constitution live up to the liberation ideals fought for by abolitionists, revolutionaries, and generations of ordinary black people. As they must with respect to so many aspects of abolition consciousness, those who are building a society without prisons must engage dynamically with this tension. Abolitionists can craft an abolition constitutionalism that both condemns the dominant jurisprudence that legitimizes the carceral state and makes constitutional claims strategically to help dismantle carceral systems. In the process, abolitionists might imagine a new freedom constitutionalism to guide and govern the radically different society they are creating.

### Feminist Legal Studies K

#### Feminist legal theorists talk about the composition of the court and question judicial power as being an exercise of masculinity

Sally J. Kenney 12 CHOOSING JUDGES: A BUMPY ROAD TO WOMEN'S EQUALITY AND A LONG WAY TO GO, 2012 Mich. St. L. Rev. 1499, 1500

Why do so few women serve as judges? Why has the torrent of women's entry into the legal profession not produced a pipeline to power for women in the judicial branch of government? What will it take to move women from minority to parity? Answering these questions provides an excellent vehicle for exploring concepts in gender theory such as the myth that women have already achieved equality or are making great progress, the qualified labor pool, disparate impact, the pipeline, the pyramid, tokenism, backlash, and the difference women make-all of which are important to understand the underrepresentation of women more generally. Judgeships, like executive offices, may be more difficult for women to attain, as voters may be more comfortable including a woman in legislative deliberations of a group rather than making her commander-in-chief. The exercise of judicial power is enmeshed in powerful cultural norms of masculinity. It is no accident that women's exclusion from juries was one of the last sex-based classifications the U.S. Supreme Court declared to be unconstitutional.

In the summers of 2009 and 2010, the nominations and confirmations of U.S. Supreme Court Justices Sonia Sotomayor and Elena Kagan rekindled public discussion about the gender and ethnic identities of judges and senators. In their opening statements at Sotomayor's confirmation hearings, for example, senators burst with pride about a great country where anyone can achieve anything, regardless of gender, class, ethnicity, or national origin, while some equated empathy with prejudice and difference with par tiality. 1 Despite the vitriol opposition directed at Sotomayor, the Senate confirmed her by a vote of 68-31 and Kagan by a vote of 63-37. 2 In the end, both hearings squelched rather than explored the questions of what feminist legal theorist Martha Minow has so aptly named "the dilemma of difference"-how women can be both equal to and different from men 3 -and the nature of judging-how one's social location and life experiences inevitably shape judgment. 4 The dullness of the Sotomayor hearings stood in sharp contrast to the euphoria in the Latino community, where many sported the latest fashion: t-shirts emblazoned with "Wise Latina Woman," which dispelled any doubt about the symbolic importance of such appointments. 5

#### This involves a broader debate about the composition of the court

Abigail Hester 20 Associate Editor, Michigan Journal of Race & Law, SUPREME COURT REFORM: EXPANSION, BALANCE, LIMITS, Vol. 26, https://mjrl.org/2020/11/12/supreme-court-reform-expansion-balance-limits/

The Supreme Court is in crisis. With the death of Ruth Bater Ginsberg and the rushed confirmation of Amy Coney Barrett, the national attention is on the Supreme Court like never before.[i] Now is the time to act to reform the Supreme Court. Now is also the time to move past whether or not the court should be reformed, instead focusing on how. That’s a big topic, one we can’t fully unpack here. But I will introduce three proposals for court reform and an analysis of the merits for each. Court Expansion There is nothing in the Constitution that determines the number of Justices on the Supreme Court.[ii] Congress has previously changed the number of Justices on the Court eight times, although 9 Justices has been the norm since 1869.[iii] An adjustment would require Congressional action, but would be one of the easier reform measures available.[iv] As such, it has become relatively popular, endorsed by various Democrats including Vice President-elect Kamala Harris.[v] Additionally, some of the attraction to this proposal is a kind of vengeance; new appointments would combat the ‘illegitimate’ appointments of Gorsuch (should’ve been Garland), Kavanaugh (sexual assault) and Barrett (rushed during an election season).[vi] Detractors caution that this approach could result in a tit-for-tat partisan spiral that would dimmish any lingering legitimacy the Court may have.[vii] Additionally, while there is no explicit Constitutional text on the number of justices, certain scholars, such as Professor Richard Primus, point out that such measures are “not constitutional in the small-c sense of the term” because they “depart[] from long-settled norms and understandings about how American government is conducted.”[viii] Norms aside, if the Democrats were to get into power and stay in power, there’s a chance that expanding the court could establish a new, progressive equilibrium. However, there’s an almost equal chance that no equilibrium is met, and the Court’s legitimacy gets thrown out the window. Expanding the court may have an easier political route, but the risks are high.[ix] The “Balanced Bench” This proposal would rethink how we choose Justices altogether. A “Balanced Bench” begins with 10 Justices, 5 chosen from each party.[x] Those justices would together select 5 additional justices to hear cases for the year, coming to a total of 15.[xi] This proposal is also known as the 5-5-5 plan.[xii] This plan attempts to make the bench less partisan, since the 5 judicially elected Justices would need to be agreed upon by a quorum of the party-determined 10.[xiii] According to “Balanced Bench” proponents, rather than partisanship ruling the judiciary, ideological interests would instead rule the court. This idea was recently endorsed by Pete Buttigieg and is gaining popularity.[xiv] The “Balanced Bench” proposal faces steep constitutional barriers for implementation. The Constitution’s Appointments Clause – which states that the President nominates and the Senate confirms justices – could kill the idea before it even gets off of the ground.[xv] By assigning seats to each party, this could enshrine, rather than dispense, the partisanship of the Court. Term Limits Applying term limits to justices has been a reform consideration for over a decade.[xvi] Term limits are currently one of the most popular measures for reform, perhaps because they are more easily understood by the public.[xvii] Since the Constitution is widely understood to grant life tenure to Justices, term limits could not impose retirement (without an amendment).[xviii] Instead, a current proposal would impose an 18 year term on serving on the Supreme Court.[xix] After the 18 years, Justices would then return to their previous judicial appointment.[xx] If the number on the Court remains at 9, there would be a vacancy roughly every 2 years.[xxi] Proponents of this idea point to the increased regularity of new appointments it would encourage, rather than having to wait for Justices to retire or pass. Most recently, even Justice Breyer has expressed support for the idea.[xxii] However, such a change is not likely to improve public perception of the court in the short term, as the effects of term limits will not be seen for years. Additionally, the balance of the court would be necessarily tied to presidential elections, risking further enshrining the partisanship of the bench. Another consideration is the impact that this change would have on the Justices. If they knew their time was limited, they may be motivated to make more extreme decisions. These efforts are laudable in their goals for a more progressive, democratic court. However, a progressive, democratic court will not be established through these measures alone. Along with structural reform, the composition of the judiciary needs to diversify. Compared with the rest of the country, the judiciary is exceptionally nondiverse.[xxiii] This lack of diversity entrenches both the favoritism towards the majority class as well as distrust in the system by minorities.[xxiv] As noted by Daniel Goldberg, legal director at the Alliance for Justice, “In an increasingly diverse country, citizens have a right to walk into a courtroom and see judges who are deciding life-and-death issues that look like them.”[xxv]

### Judicial Racism/Antiracism K

#### Racist and antiracist ideas are realized through judicial power

DeVaughn Jones 20 Associate - Davis Wright Tremaine LLP, Judicial Racism And Judicial Antiracism: Retelling The Dred Scott Story, In Discourse, 11-4, https://www.uclalawreview.org/judicial-racism-and-judicial-antiracism-retelling-the-dred-scott-story/

This Essay retells the Dred Scott story as a set of intersecting stories about judicial racism and judicial antiracism. Part I defines racism and antiracism, then discusses how racist and antiracist ideas are realized through government power. Next, this Essay visits one of the most prominent moments of judicial racial history: the story of Dred Scott. Part II walks through the procedural history of the entire legal battle using the antiracist lexicon. In so doing, this Essay shows how racist and antiracist ideas are realized with judicial power. Part III finally proceeds to the seminal case of Dred Scott v. Sandford. Throughout, the reader will observe courts as institutions with racist or antiracist character. This Essay concludes by emphasizing that U.S. courts are still battlegrounds where racist and antiracist ideas compete for realization. There has been no scholarly treatment of judicial racism or antiracism, despite ample academic discussion of race and the law. Therefore, this Essay advances two goals by making the first academic foray into those issues. First, it promotes antiracist lawmaking by opening a space for academic discussion of judicial racism and antiracism. Second, it advocates for historically-tested methods of antiracist lawmaking that do not rely on U.S. courts. Introduction Summertime in Egypt is hot and dry. Its capital is Cairo—one hundred miles south of the Mediterranean and seventy-five miles west of the Gulf of Suez. To the west: over five-thousand miles of desert. Thermometers touch 104 in the summertime. Locals seek shade, and travelers seek other destinations. Yet in the summer of 1964, Malcom X knelt in the heat, reflecting on his recent months[1]. In March, he met the Rev. Dr. Martin Luther King, Jr. in Washington, D.C. By April, he was in Saudi Arabia beginning his hajj. He had toured the whole of Africa by August. At summer’s peak he was in Egypt, professing his change of heart in local papers. “I no longer subscribe to sweeping indictments of any one race,” he wrote.[2] Racism was a ghost, invisible to the eye but illuminated by the mind. His mind, for decades, was guided by the ideals of the Nation of Islam. When he severed from the Nation, creating room for new ideas, the ghost changed form before his eyes. What had he really been fighting all those years? Nearly sixty years later, racism is still a ghost. In the United States, courts struggle to define and regulate racist behavior. The result is the feeling of a bifurcated universe: On one side, racialized socioeconomic inequality is racism; on the other, that inequality is not racism without clear racial animus. International courts similarly struggle to catch the ghost;[3] after World War II, global negotiations over United Nations (UN) treaties on racism stalled when Saudi and Israeli diplomats disagreed on whether antisemitism was racism or religious persecution.[4] In either case, the issue is that a person’s vision of racism is informed by the ideas animating their mind at that time. Scholars have recently reframed racism with great effect.[5] Under modern frameworks, racism is best understood as describing the character, rather than the motivation, of an object or action. A racist is a person whose actions produce racial inequality. Comparatively, an artist is a person whose actions produce a lot of art—even if the person has never intended to make art. The word racism can certainly describe a state of mind, but properly used, it always describes a state of being—racism is a condition, not an objective. The racist/antiracist lexicon popularized by Dr. Ibram X. Kendi gives new life to traditional narratives about race, especially American Black history. Dr. Kendi’s language turns tales of slavery and revolution into stories about racism and antiracism. Black history thus becomes a history of ideas competing to become real—a story of different forces seeking to possess the soul of government. Judicial history has never been told as a history of judicial racism and antiracism. Judicial academia has treated judicial racism as a regulatory matter, but never a concept. Judicial antiracism has received no treatment at all. Consequently, the grand struggle to catch the ghost of racism receives no support from legal academia. This Essay cracks open the academic discussion on judicial racism and judicial antiracism, hoping to give antiracist ideas an opening to flow inland into the plains of contemporary judicial thought. Part I defines racism and antiracism, then discusses how racist and antiracist ideas are realized through government power. Next, this Essay visits one of the most prominent moments of judicial racial history: the story of Dred Scott. Part II walks through the procedural history of the entire legal battle using the antiracist lexicon. In so doing, this Essay shows how racist and antiracist ideas are realized with judicial power. Part III proceeds to the seminal case, Dred Scott v. Sandford.[6] Therein, the Essay continues to describe judicial conduct in racist/antiracist terms, and it further emphasizes the different qualities of judicial actors: lawyers, parties, and judges. Throughout, the reader observes courts as judicial institutions whose conduct can take on racist or antiracist character. In conclusion, this Essay exhales with thoughts of racism’s shifting nature. I encourage future advocates of equality to give less faith to the U.S. judicial system as a reliable vehicle for empowering antiracist ideas. Instead, nontraditional paths must be considered. I. Institutional Character Picture sweeping red curtains framing a wood-patterned stage. The space is large, empty, and dark, but for the illuminate cone of a single, centered spotlight. In that light, a single tuxedoed man sits. He is holding a trumpet—it gleams in the light. The silence ripples: Underneath it, all possible sounds percolate at the edge of reality. The musician is the center of the ripples. He grips his trumpet with the familiarity only afforded by expertise. A light glimmers—he moved the trumpet to his face. His head is tilted down a degree. He is reading sheet music, for the notes will guide his conduct, and his conduct will guide his instrument. Silent still, he briefly considers the faceless composer who put the notes to paper. That faceless man now reaches through time and space to guide the musician, note-by-note. The musician’s eyes tilt up: A nine-headed conductor holds his baton in the air. Nature, silent, is disturbed by a deep inhale through the nostrils. The conductor swings his hands and his robe flutters like a jumping shadow. Still-ephemeral music launches off the sheet and into the musician. He obeys; he exerts the composer’s will onto his instrument in-time with the flailing conductor. The ritual culminates: The players’ collective power imbues empty air with their will, pulling the silent sounds through the instrument’s tubes. At last, the trumpet’s cries fill the silence. Each person, the musician, the composer, and the conductor, is an actor in a musical institution: the symphony. Their collective action—playing the trumpet, writing the notes, and conducting—is the symphony’s action. Institutional action is simply the aggregated actions of the underlying institutional actors. The goal, of course, is to realize something grander than what the actors can realize as individuals. The individual actors are of course useful as individuals—they each have unique powers. The musician’s expertise, for example, is the power to turn a trumpet into a tool, rather than a wonky bronze paperweight. The composer’s expertise is the power to turn ink and thoughts into the legible notes on sheet music. Likewise, the conductor’s power is to turn sweeps and flicks of a wand into instructions for the musician—almost like hypnosis. With their powers combined, the symphony makes music. Without an institution to organize their powers, each actor’s ability to create is more limited. Sheet music is just paper. A musician is a man who can play an instrument. A conductor looks more like a magician if he is not standing near a symphony. Separated, they have less power to change the world—a world whose natural state is quiet. Together, they have the power to make the world a musical place. The institution of symphony thus possesses the power to impose music onto silence. Law, like music, is an expression of power. As music disturbs the natural state of silence, law disturbs the natural state of freedom. Without power, an actor has no way to influence his world. In that case, any ideas the actor has are irrelevant to the extent that they are not consistent with the natural state of things. An idea with no power has no way to be realized as law. But if an actor with an idea gains access to power, then the idea can be realized, and imposed on others. Stated otherwise, law is the use of power to realize an idea; to realize an idea, things as they are (reality or status quo) must either be preserved (if the status quo is consistent with the idea) or changed (if the status quo is inconsistent with the idea).[7] The ideas animating U.S. law change over time, but they are frequently unnatural. It follows that the power of the U.S. government—the sum of executive, legislative, and judicial powers—are imposed onto an otherwise naturally free people. Like notes guiding a symphony’s intrusion into silence, U.S. law guides the American institutions’ intrusion into people’s lives. The result is not a state of music, but a state of American law.[8] The United States’s judicial power is guarded by the judicial branch, a judicial institution. The judiciary are the collective courts of the nation, and in each court U.S. power is exerted through judicial conduct. Writing a legal opinion, for example, is given power only through proper judicial conduct: the set of actions required to animate a document with legal force.[9] The relevance of a judicial opinion invalidating gay marriage varies greatly on the level of the issuing court: If issued by a high court, that opinion is backed by great judicial power. A lower court, conversely, exercises a lesser power and has less authority. The court with the most consequential conduct, and indeed the court with the most judicial power, is the U.S. Supreme Court. It alone possesses the power to interpret the meaning of the U.S. Constitution—America’s supreme judicial text. This is not to say that state law and state courts are irrelevant; rather, it is to say that those courts simply lack the power to issue final, nationally-binding legal interpretations. Conversely, with a bit of ink and a majority consensus, the Supreme Court has the power to tell the President and Congress what freedom means.[10] The Supreme Court’s character, like anything else’s character, is a description of the nature of its conduct. Character is the glow radiating off the edges of a jar of fireflies: In the jar, each firefly’s glow depends on what and how it is. As more fireflies fill the jar, the jar aggregates their individual glows and shines. The color of the jar’s light will depend on the individual glow of each firefly it contains, and the color of the jar becomes discernible as more fireflies give it their light. As another example, picture a man who did ten thousand things in his life, but only painted once. His obituary will probably not read: “artist dead.” Conversely, Basquiat died an artist. A court is the same—its character is reflective of the things it does. So too, the character of courts is consistent with the conduct of courts. Racist, like artist, is a descriptor earned with consistent conduct.[11] The animating force defining racist conduct is a racist idea. Remember our first analogy: A musical idea would be a concept that, if realized, would create music reflecting the idea. Similarly, a racist idea is a concept that, if realized, would promote or sustain racial inequality.[12] The idea of white supremacy, for example, is a racist idea because it promotes the superiority of one race over any other.[13] The opposite of a racist idea is an antiracist idea: a concept that, if realized, would promote or sustain racial equality.[14] Concepts like birthright citizenship have been realized as law, advancing the idea that people of all races have an equal right to citizenship.[15] Not unlike how a musical idea is realized as music through musical conduct, a racist idea is realized through racist conduct. Racist conduct gives power to racist ideas—seventeenth through nineteenth-century slavery in America was racist conduct because it gave power to the idea that one race was superior to another; that idea was realized as America’s racially-targeted mass human trafficking and slave-labor industries.[16] American antiracism exists. In a 1954 case, the Supreme Court held that all races were equally entitled to protection by the Fourteenth Amendment.[17] Issuing that holding was antiracist conduct because it gave power to the idea that constitutional protection should be equally accessible to all races.[18] If an institution’s conduct tends to be racist, then the institution is racist. The converse is true for antiracism—persistent antiracist conduct makes an antiracist. What makes a hip-hop album a hip-hop record? The genre of the music waiting to be played; when I play a Snoop Dogg record, I anticipate hearing hip hop music. When I engage with a racist actor, I anticipate racist conduct. Regrettably, I anticipate racist judicial conduct when I look toward the Supreme Court today. The Court’s marble walls are oversaturated with hate—centuries of ink shaping hateful judicial phrases seep out of the bench’s wood and slowly drip over its edges to tile floors below. The Supreme Court is not a court of exclusively racial issues, though—it is a court of many issues. It follows that America’s judicial character is not only defined by its racist tendencies. Nonetheless, some moments in judicial history involved race more than others. In those moments, racial questions are subject to judicial answers. In those moments, racist and antiracist ideas claw at the edge of the justices’ pens. In those moments, judicial racism or judicial antiracism occurs. Viewed as such, judicial history becomes a history of judicial racism and judicial antiracism. One such story is the story of Dred Scott.[19]

### FW---Pedagogy

#### It is more pedagogically valuable to debate and study democratic engagement than constitutional politics --- AND, debate is a key space for challenging the juristocracy itself.

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Samuel Moyn, “The Court Is Not Your Friend,” Dissent, Winter, https://www.dissentmagazine.org/article/the-court-is-not-your-friend

The risk of seeing your means end up serving the ends of your enemies applies, of course, to democracy itself, but the risk is not the same in extent or in principle. As its progressive critics have always insisted, juristocracy is clearly more subject to the risk of capture by the powerful and wealthy than democratic mobilization is. Much more important, whereas judicial empowerment is defensible only as a tool that succeeds or fails on balance in advancing democratic ends (at the price of antidemocratic means), wins as well as losses in democratic contestation are defining and valuable features of collective self-rule. You might well lose when you make a case to your fellow citizens. But you will definitely lose if you don’t try.

In the academy, we need less preparation for constitutional politics and more for democratic engagement. Finishing schools for elites whose graduates, in the New Deal, once set themselves the goal of serving the people’s legislature have become anterooms to the judiciary, whispering in the ear of a judge as a clerk the highest initial reward, and ascent to the Supreme Court (now totally controlled by justices who studied at either Harvard or Yale law schools) the ultimate prize.

More training for democratic practice among citizens would also counter the prestige of “constitutional theory” among scholars. That activity rose over the timespan of progressive defeat under juristocracy, but spiked in the 1980s and 1990s, as kind of a cheerleading section intended to buck up liberal spirits in an age of slow-motion political collapse. To read its main works is to find a lot of longing for a lost past or yearning for an unavailable future—pining for Earl Warren’s Court, or the New Deal, or a legendary period of “republican” virtue, syncopated with vague hopes for a future when friendly judges will rule.

### Alt---Popular Rejection

#### Popular rejection of Supreme Court jurisdiction is a more potent solution to overreach---threatening refusal alone overcomes resistance to structural change

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Eric J. Segall, “Aggressive Judicial Review, Political Ideology, and the Rule of Law,” 2019, Studia Iuridica, https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=3803&context=faculty\_pub

There are two possible ways to limit the damage caused by an overly aggressive Court. One is to put in place structural reforms to weaken the institution itself. Most of the recent suggested reforms, however, such as imposing term limits, or requiring two-thirds of the Justices to agree before a law would be struck down, would likely take a constitutional amendment which in the United States requires a super-majority of both Congress and the states and is therefore highly unlikely to happen.

Another possible solution to the problem of judicial overreaching is to select more deferential judges or perhaps even by political protest or even an unwillingness on the part of politicians or the people to obey Supreme Court decisions. The mere threat of the latter might just encourage the former. If something does not encourage more humble, modest, and deferential judicial review in the near future, the United States may well find itself in the midst of a constitutional crisis.

#### Black and native peoples are the proper subject of sovereign authority---the “People of the United States” is a contradiction only resolved through a decolonial reframing of legal authority

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Gregory Ablavsky and W. Tanner Allread, “WE THE (NATIVE) PEOPLE?” March 2023, Columbia Law Review , MARCH 2023, Vol. 123, No. 2, pp. 243-318

Writing in the name of the “People of the United States,” white men drafted the U.S. Constitution in 1787.1 The following year, white men, chosen by an almost exclusively white, male, property-holding electorate, voted to ratify the Constitution.2

These historical facts have important implications for constitutional law. They have led many commentators to question or reject the authority of the Constitution because it rests on such an undemocratic conception of the people.3 They also mean that present efforts to discern the Constitution’s historical meaning have focused almost exclusively on the views of the document’s drafters and elite interpreters.4

Yet the actual “People of the United States” were far less homogenous than the circumscribed group who claimed to represent them. Like the nation today, the United States in 1787 was strikingly diverse, polyglot, and pluralistic. The nation’s more than three million residents of European descent5—who had only recently begun to conceive of themselves as a cohesive “white people”—encompassed a startling array of nationalities, faiths, and languages.6 Even those white people excluded from the franchise—most women, poor men, and laborers7—could, and did, actively participate in what was known as politics “out of doors.”8 Roughly 750,000 people whom Anglo-Americans labeled “Black” also lived within the United States.9 This number included nearly 700,000 enslaved peoples from throughout Africa—some recently arrived, others descended from long-standing enslaved communities—alongside a small, though growing, free Black population of 50,000 people.10 Meanwhile, roughly half the purported territory of the new nation was legally “Indian country,” the homelands of at least 150,000 Indigenous people organized into powerful, loosely centralized confederacies like the Haudenosaunee and Muskogee.11

At the core of the new Constitution, then, was a contradiction: a narrow political elite attempting to govern, in the name of the people and popular sovereignty, a much more diverse nation. That elite sought to resolve this hypocrisy through exclusion. As scholars have amply shown, the Constitution placed most of the actual people of the United States outside the bounds of the body politic and sought to limit their access to political power.12 Moreover, the increasing democratic inclusion of white men further entrenched whiteness and maleness as the defining boundaries of political participation.13

Recent literature captures how thoroughly such exclusionary efforts succeeded. Racialized and gendered exclusion entrenched itself throughout much of antebellum constitutional law, which vindicated chattel slavery, Native dispossession, and women’s supposed subservience.14 The protests of those deemed political outsiders could be, and were, brutally suppressed through state-sanctioned and state-sponsored violence.15

But these exclusionary efforts also failed. The United States never was, nor could be, a solely white or male nation. Despite efforts to suppress their voices, those excluded from whiteness and maleness nonetheless engaged with the law, including constitutional law. Historians have recently and effectively reconstructed the legal consciousness of many marginalized groups and their impact on Anglo-American law, including constitutional law.16

### Alt---Delegitimization

#### The alternative is to embrace the 1AC sans its advocacy for anti-democratic juristocracy. Even if the aff’s policy is good, its process legitimizes the court and crushes the possibility of transformative social change.

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Samuel Moyn, “The Court Is Not Your Friend,” Dissent, Winter, https://www.dissentmagazine.org/article/the-court-is-not-your-friend

It has been over a year since Brett Kavanaugh took his seat on the Supreme Court. More evidence of his assault of Christine Blasey Ford, though by no means conclusive, has been presented in the first of several slated books about the newest oracle of the law and the pitched battle around his confirmation. Yet such attention to any justice, and his ideology or indiscretions, risks missing the point: that it is only because the Supreme Court is so powerful that the national obsession with either a judge’s character or views can become so intense. Whatever else it involves, juristocracy is also a form of politics by other means. And it is not one that progressives should want.

Yet in the past half century they have been principally responsible for it. From its late nineteenth-century conservative beginnings to the mid-twentieth-century liberal attempt to make it their own, juristocracy has been a triple failure of authority, process, and substance. It has been a disaster for the democratic premise that the people themselves choose their own arrangements, shunting decision-making to a council of elders supposedly possessed of unique wisdom. And in exchange for its antidemocratic premises, juristocracy has not delivered the goods that popular interests and needs require. Only democratic politics can.

We will always have judges. Any interpretation of law is a form of rule, and there is no way—contrary to what many of the founders believed—of disentangling “judgment” and “will.” It is for that reason that democrats from Jeremy Bentham (or even Thomas Hobbes before him) through our time have attacked interpretations of judicial power that conceal the ideological choices that saying “what the law is” inevitably involves. No wonder, then, that democratic theorists have long insisted on restraining judges, even while acknowledging that their activity necessarily involves some interpretive freedom to use and abuse. There are disputes to settle under rules, laws to apply to new fact patterns, and overreaching executives to contain.

But juristocracy is a congenitally American malady. Turning to judges as secret agents of political transformation is quite another matter. When the U.S. Constitution first became attractive in the late nineteenth century, it was among conservatives facing the frightening prospect of mass suffrage and finding in James Madison’s handiwork a device for potentially weathering the coming tempest. Englishman Sir Henry James Sumner Maine, to take one example, sang the praises of the U.S. Constitution as “the most important political instrument of modern times” in his Popular Government (1885), for it “proved” the existence of “several expedients” that would allow the “difficulties” besetting any country “transforming itself” into a democracy to be “greatly mitigated” or “altogether overcome.” Unsurprisingly, the powers of the U.S. Supreme Court ranked high on the list of such “expedients.”

American constitutional practice in this era reflected these antidemocratic virtues. American conservatives retrieved from obscurity the case of Marbury v. Madison (1803), which according to myth proclaimed the power of judicial review of legislation under the Constitution (though in reality it did no such thing). Judges suddenly began invalidating more statutes, throwing out progressive legislation at both federal and state levels. It took the strife of the Great Depression, and fear of Franklin Roosevelt, to cow the institution into getting with the progressive program.

Political scientists who have studied the conditions for the exercise of judicial power have claimed it generally follows the democratic will. But no one should minimize the energy and time it can take for judiciaries to catch up to majorities. As a triumphant FDR observed in 1937, “Ultimately the people and the Congress have had their way. But that word ‘ultimately’ covers a terrible cost.”

Within the span of two decades, unfortunately, progressives had embraced a judiciary they once scorned. Fears of a conservative minority imposing itself on democratic legislatures gave way, during the Second World War, to concerns about a tyrannical majority overriding civil liberties. Lost were liberal convictions that the tyranny of powerful and wealthy minorities was more likely to win in the courts. Then, in the postwar era, phobias about mass politics mounted as Western governments sought to distinguish themselves from fascism in the past and communism in the present. Anxious progressives looked to the judiciary to guard against mob rule while ushering in modest reforms, laying the groundwork for the golden age of liberal activism.

Since then, in the popular mind of Americans, the judicial supremacy that liberals embraced in the middle of the twentieth century has been seen as a civic necessity of any democracy, just as it has been a self-evident good in its outcomes. For most of modern history, progressives around the world would have blanched at the first assumption; historians and lawyers in the know have spent the last generation watching conservatives rule from the throne that liberals constructed, wondering whether the second is actually true.

The returns for converting democratic politics into judicial selection have been very meager for the left. The point is not to gainsay some good things that judges did at the zenith of liberal power. But it is worth asking whether the courts were necessary to the outcomes—and whether it was worth depending on an antidemocratic power that the right has now turned against progressives.

On race, to take the most romanticized accomplishment, school integration in the South didn’t genuinely begin until a full ten years after the Supreme Court’s landmark decision Brown v. Board of Education (1954), precisely because it ultimately required federal legislative action. And yet, more than sixty years after Brown, apartheid is institutionalized functionally rather than formally. There are a mere three years of progress (between 1964 and 1967) to show for those running victory laps for the judiciary. Distressingly, data shows that school integration in the North, achieved only partially there to begin with, has been even more undone.

As for the struggle for women’s and gay rights, there is also no doubt the Supreme Court played a role. But the counterfactual is always: compared to what alternative method? Feminists abroad made greater strides than ever occurred in the United States without generalized recourse to judges, while there is no telling what democratic mobilization for gay rights would have gotten under its own power had not the Supreme Court intervened in Obergefell v. Hodges in 2015—without allowing conservatives to pose along the way as the best friends of democratic choice, as Justice Antonin Scalia did constantly, with Chief Justice John Roberts following suit in Obergefell itself.

The objection that there may be territories in the country that would surely reject abortion (as well as gay marriage) if it were opened to a vote is a serious one. But the Supreme Court has, as with school integration before it, already acted to allow those states to eliminate abortion (though not gay marriage) de facto. And the reactionary judicial power that liberals helped conjure does not respect the boundary between red and blue America. Bush v. Gore picked a catastrophic president for the whole country. In more recent years, Citizens United converted national elections into contests pitting oligarch-funded candidates against each other. Janus v. AFSCME pounded another nail in the coffin of public unions. And if a fair verdict on juristocracy is to be reached, it is also worth recalling when an empowered judiciary undermined democracy by failing to act, with the effect of ratifying a near monopoly of executive power on issues like securing the borders against immigrants and fighting enemies endlessly beyond them.

It would be lovely to rely on juristocrats if they patrolled the procedures of the democratic process itself, making sure winners could not lock in their gains by gaming the rules in elections. Surely the judicial affirmation in the United States of basic principles—since they are absent from the Constitution itself—that everyone’s vote ought to be treated equally is worth flagging. But the judiciary has never done much to reinforce the representation of racial minorities. Its more recent track record on this subject has been particularly abysmal.

Then there is class. The drive for the moderation of economic inequality was the central explanation for the democratic victory of progressives under Roosevelt, and the success of their campaign essentially required judges to get out of the way. But even at the high tide of their political ascendancy, liberals couldn’t get the Supreme Court to commit to distributive entitlements of any kind. Neither a welfare state for the least advantaged, nor broader egalitarian justice in the country, is there for even the most creative judges to find under the Constitution’s authority—even assuming a transformed bench.

In short, progressives have little to lose and much to gain by leaving juristocracy to the enemies of democracy. Abandoning judicial politics in a kind of “unilateral disarmament” may seem like a foolish move. But liberals have already lost the race for the heavy weaponry of judicial control of democracy, and they can advocate for the people more consistently and less hypocritically if they press their policies democratically. There is simply no way to restrict judicial activism to one’s preferred causes any more than you can introduce a weapon in a fight with the guarantee that it will only hurt your enemies.

Some have supposed that turning to judicial power to entrench popular victory in “cycles” or “regimes” of politics is inevitable. If it happened under the watch of Roosevelt’s justices, so the next progressive coalition—after declaring war on the Supreme Court if necessary—would witness judges claw back power, or even invite them to do so. But if it was a progressive mistake the first time around to incur the risk of judicial empowerment, whatever the short-term gains, why not learn from it?

The risk of seeing your means end up serving the ends of your enemies applies, of course, to democracy itself, but the risk is not the same in extent or in principle. As its progressive critics have always insisted, juristocracy is clearly more subject to the risk of capture by the powerful and wealthy than democratic mobilization is. Much more important, whereas judicial empowerment is defensible only as a tool that succeeds or fails on balance in advancing democratic ends (at the price of antidemocratic means), wins as well as losses in democratic contestation are defining and valuable features of collective self-rule. You might well lose when you make a case to your fellow citizens. But you will definitely lose if you don’t try.

In the academy, we need less preparation for constitutional politics and more for democratic engagement. Finishing schools for elites whose graduates, in the New Deal, once set themselves the goal of serving the people’s legislature have become anterooms to the judiciary, whispering in the ear of a judge as a clerk the highest initial reward, and ascent to the Supreme Court (now totally controlled by justices who studied at either Harvard or Yale law schools) the ultimate prize.

More training for democratic practice among citizens would also counter the prestige of “constitutional theory” among scholars. That activity rose over the timespan of progressive defeat under juristocracy, but spiked in the 1980s and 1990s, as kind of a cheerleading section intended to buck up liberal spirits in an age of slow-motion political collapse. To read its main works is to find a lot of longing for a lost past or yearning for an unavailable future—pining for Earl Warren’s Court, or the New Deal, or a legendary period of “republican” virtue, syncopated with vague hopes for a future when friendly judges will rule.

Lately the enthusiasm for judicial empowerment has taken the form of unseemly heroine worship, with Ruth Bader Ginsburg and Sonia Sotomayor elevated to the status of secular saints. It is a kind of juristocratic feminism among legal elites to match the reigning neoliberal one among the professional class in general. But instead of merely reviling judges on the other side of the ideological divide while worshiping one’s own, in a pantheon of angels and demons, any serious democrat should reject the religion of the judiciary itself. Other liberals trying to get through a dark night are clinging to the hope that, cajoled by strategic genius Elena Kagan, John Roberts might tack to the center in a few crucial cases. The truth is that the prospect of a “centrist” coalition is more of an anxious fantasy than a political opportunity. Even if it works, it is a distinct improvement on full-scale reaction at the Supreme Court in the same way that a chronic disease is better than a terminal diagnosis.

The important problem to solve in the years ahead is exactly which reform to rally around to chasten the institution. There is a coming healthy debate about which of the different schemes on offer makes best sense, philosophically and strategically, in the short and long term. The Democratic presidential primary shows that some movement is possible, as candidates routinely speak against the Supreme Court, and a few even toy with reform alternatives like court-packing or partisan balance.

Among imaginable reforms, some do indeed risk what worrywarts have taken to calling “hardball” counterattacks, to which the sensible response is that the quest for power has never been softball. But if progressives without an enduring majority in the political branches add some justices to achieve balance as they define it, or “unsteal” the Supreme Court from Mitch McConnell, they should expect the other side to add some more seats when it wins. Reformers should also be wary of borrowing tactics that have already been used by authoritarians abroad. When I taught a seminar on Supreme Court reform at Yale Law School last spring, an Eastern European student always raised his hand to remind the class that the device to contain the judiciary under discussion had already been tried where he is from—and not for the sake of democratic empowerment.

But beyond the pros and cons of reform options lies the still divisive question of principle that progressives should face first. Is a Supreme Court lost to the right indefinitely—even assuming Ginsburg lives long and prospers—in need of reclamation or repudiation?

Many reform schemes circle around restoring partisan equilibrium and undergirding the “legitimacy” of the institution that right-wing hijinks have eroded. That approach would be less embarrassing had liberals not spent generations ceding reform arguments, like the democratic premise itself, to the right, in their zeal to present the Supreme Court as a legitimate source of rule as long as they controlled it. Yet the real problem with the liberal cause is not really that it lost control of the judicial power it built but that it built it in the first place.

Beyond the juristocratic mistake lies a democratic opportunity without parallel in recent times. Juristocracy or democracy? It is an easy call.