

DEVELOPMENTS IN THE LAW  
COURT REFORM

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*Don't ya know  
They're talking about a revolution?*

TRACY CHAPMAN, *Talkin' Bout a Revolution*,  
on TRACY CHAPMAN (Elektra 1988).

*I have been told that there is no precedent for admitting a woman  
to practice in the Supreme Court of the United States. The glory of each  
generation is to make its own precedents.*

Belva Lockwood,  
Address at the Woman Suffrage Association National Convention (1877),  
as reprinted in MARY VIRGINIA FOX, *LADY FOR THE DEFENSE:  
A BIOGRAPHY OF BELVA LOCKWOOD* 120 (1975).

*[T]he opinion today will serve only to highlight the Court's own  
impotence in the face of an America whose cries for equality resound.*

Students for Fair Admissions, Inc. v.  
President & Fellows of Harvard College,  
143 S. Ct. 2141, 2263 (2023) (Sotomayor, J., dissenting).

*When you're warring with me  
It's People's Court*

JAY-Z, *People's Court*, on D.J. CLUE?,  
BACKSTAGE: MUSIC INSPIRED BY THE FILM  
(Roc-A-Fella & Def Jam 2000).

*It's been a long  
A long time coming, but I know  
A change gon' come  
Oh yes it will*

SAM COOKE, *A Change Is Gonna Come*,  
on AIN'T THAT GOOD NEWS (RCA Victor 1964).

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## INTRODUCTION

Yeniifer Alvarez arrived in the United States from San Luis Potosí, Mexico, in 1998, when she was three years old.<sup>1</sup> Her family settled in Luling, Texas, about fifty miles south of Austin.<sup>2</sup> After her father was deported, her mother, Leticia, took on two jobs and Yeni, the eldest child, became “the nerve center of her extended-family operation”: Yeni helped raise her three siblings, one of whom was diagnosed with autism; she managed the family’s finances and helped a cousin file for disability benefits; she even kept her family up to date when politicians railed against undocumented immigrants.<sup>3</sup>

In December 2021, one month after she married, Yeni “announced with joy that she was pregnant.”<sup>4</sup> That same month, the Supreme Court allowed the enforcement of the Texas Heartbeat Act,<sup>5</sup> or S.B. 8, a private attorney general-style law allowing any person who is not a public official “to sue, for at least \$10,000 in damages, anyone who performs, induces, assists, or even intends to assist an abortion in violation of Texas’[s] [then-]unconstitutional 6-week ban.”<sup>6</sup> The Court did this despite the fact that the law had “the effect of denying the exercise of what [the Supreme Court had] held is a right protected under the Federal Constitution.”<sup>7</sup> After S.B. 8’s enactment, Luling’s only general hospital saw a surge in women giving birth in the emergency room (ER), many with “more varied and complex conditions” than before, leading the hospital into “uncontrolled chaos.”<sup>8</sup> Uninsured, Yeni came to rely on the Luling ER for regular medical treatment, and the staff became familiar with her medical conditions — Yeni suffered from hypertension, diabetes, and obesity, and was hospitalized with pulmonary edema after a COVID-19 wave in Luling.<sup>9</sup> Taken together, “when Yeni became pregnant she was a high-risk patient.”<sup>10</sup>

Less than two months into her pregnancy, Yeni began to have trouble breathing and experienced bleeding.<sup>11</sup> Though an ER ultrasound “showed normal fetal growth,” her blood pressure spiked to worrisome

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<sup>1</sup> Stephania Taladrid, *Did an Abortion Ban Cost a Young Texas Woman Her Life?*, NEW YORKER (Jan. 8, 2024), <https://www.newyorker.com/magazine/2024/01/15/abortion-high-risk-pregnancy-yeni-glick> [https://perma.cc/5ZNW-ZX5W].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Texas Heartbeat Act, 2021 Tex. Gen. Laws ch. 62 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2023)).

<sup>6</sup> *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 546 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (citing TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)).

<sup>7</sup> *Id.* at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

<sup>8</sup> Taladrid, *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

levels.<sup>12</sup> For a patient with risk factors like Yeni’s who becomes sick early in the pregnancy, a medical professional may need to consider whether the patient will be able to continue the pregnancy safely — as one maternal health specialist put it, “one needs to assume that as pregnancy progresses things only will get worse.”<sup>13</sup>

But Yeni’s medical records show that no doctor mentioned the possibility of a therapeutic abortion to her.<sup>14</sup> Though the Catholic hospital that housed the ER might direct a patient to another facility with fewer abortion restrictions when the pregnant person’s life is at risk, “that option effectively disappeared” after S.B. 8.<sup>15</sup> The law made an exception for abortions performed after the six-week limit due to “medical emergenc[ies],”<sup>16</sup> but a doctor seeking to invoke it could risk a civil lawsuit for “aid[ing] or abett[ing]” an abortion after six weeks and the possibility of a minimum \$10,000 fine,<sup>17</sup> a threat that “effectively chill[ed] the provision of abortions in Texas.”<sup>18</sup> When Yeni saw an ob-gyn at another Catholic hospital in nearby Kyle, Texas, who warned her that her hypertension was severe enough to require hospitalization — a cost she

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (quoting Dr. Uri Elkayam).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Even before S.B. 8, the abortion policies of Catholic hospitals had put the health of women and other pregnant people at risk. See, e.g., Molly Redden, *Abortion Ban Linked to Dangerous Miscarriages at Catholic Hospital, Report Claims*, THE GUARDIAN (Sept. 20, 2017, 2:31 PM), <https://www.theguardian.com/us-news/2016/feb/18/michigan-catholic-hospital-women-miscarriage-abortion-mercy-health-partners> [<https://perma.cc/X3E5-7JQ4>]. About one in seven hospital beds across the country are in Catholic hospitals, so these policies have a significant impact on reproductive care in the United States. Frances Stead Sellers & Meena Venkataramanan, *Spread of Catholic Hospitals Limits Reproductive Care Across the U.S.*, WASH. POST (Oct. 10, 2022, 6:00 AM), <https://www.washingtonpost.com/health/2022/10/10/abortion-catholic-hospitals-birth-control/> [<https://perma.cc/5JPL-28W7>].

<sup>16</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.0124 (West 2023).

<sup>17</sup> *Id.* § 171.208(b). Indeed, the medical exception to Texas’s near-total abortion ban, which went into effect in 2021, appears almost impossible to invoke: the Texas Supreme Court recently reversed a trial court order allowing Kate Cox, a woman whose fetus was diagnosed with fatal trisomy 18, to receive an abortion, stating that “[o]nly a doctor can exercise ‘reasonable medical judgment’ to decide whether a pregnant woman ‘has a life-threatening physical condition,’ making an abortion necessary to save her life or to save her from ‘a serious risk of substantial impairment of a major bodily function.’” *In re State*, No. 23-0994, slip op. at 2 (Tex. Dec. 11, 2023) (per curiam) (footnote omitted) (quoting TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2)); see also Eleanor Klibanoff, *Kate Cox’s Case Reveals How Far Texas Intends to Go to Enforce Abortion Laws*, TEX. TRIB. (Dec. 13, 2023, 5:00 AM), <https://www.texastribune.org/2023/12/13/texas-abortion-lawsuit/> [<https://perma.cc/L6AL-YJ3Y>]. “The courts cannot go further by entering into the medical-judgment arena.” *In re State*, slip op. at 6. In other words, a medical professional must make that determination themselves — without the protection of a court order — and risk prosecution for which they could face at least five years and up to life in prison, TEX. HEALTH & SAFETY CODE ANN. § 170A.004; TEX. PENAL CODE ANN. § 12.32 (West 2023), a civil penalty of at least \$100,000, TEX. HEALTH & SAFETY CODE ANN. § 170A.005, and loss of their medical license, *id.* § 170A.007, unless a Texas jury finds their “reasonable medical judgment” defense compelling, see *id.* § 170A.002. Such a determination is especially difficult since the Texas Medical Board has yet to issue guidance on these laws, leaving doctors without clarity for over a year and a half. See Klibanoff, *supra*.

<sup>18</sup> *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 544 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part).

could not afford — and put her “at risk of having a heart attack, a stroke, or a miscarriage,” the possibility of an abortion to alleviate the strain on her heart never came up.<sup>19</sup> According to Dr. Lorie Harper, the director of maternal-fetal medicine at the University of Texas at Austin, S.B. 8 had made it “much harder” to “recommend an abortion in order to prevent a maternal death.”<sup>20</sup> Though ob-gyns “have two patients” — the pregnant person and their fetus — who they care for throughout the pregnancy, those practicing in Texas had their “hands tied because the patient who [they] need[ed] to save is not the one that’s protected by law.”<sup>21</sup>

Of course, the right to an abortion *was* protected by the Constitution at the time: *Roe v. Wade*<sup>22</sup> held as much in 1973, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>23</sup> reaffirmed that right in 1992 — “precedent on precedent,” as one Justice put it.<sup>24</sup> Nonetheless, in permitting S.B. 8’s enforcement, the Supreme Court allowed that protection to be sidestepped by “some geniuses [who] came up with a way to evade the commands” of the Court’s precedent and “the even broader principle that states are not to nullify federal constitutional rights.”<sup>25</sup> What is a federal court to do when a state, in effect, takes away a constitutional right? “[N]othing at all, [said the] Court.”<sup>26</sup> Many took the decision as a sign that the Court was ready to overturn *Roe* and *Casey* entirely in *Dobbs v. Jackson Women’s Health Organization*,<sup>27</sup> which involved Mississippi’s fifteen-week abortion ban and was argued just nine days earlier.<sup>28</sup>

On May 9th, when Yeni was nearly twenty-three weeks pregnant, she arrived at the ER again struggling to breathe — she had been coughing for about a month, she couldn’t walk without experiencing shortness of breath, and her blood pressure once again spiked to “dangerously high” levels.<sup>29</sup> The doctors discovered she had redeveloped pulmonary edema and ordered her transferred to a hospital in Austin.<sup>30</sup>

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<sup>19</sup> Taladrid, *supra* note 1.

<sup>20</sup> *Id.* (quoting Dr. Lorie Harper).

<sup>21</sup> *Id.*

<sup>22</sup> 410 U.S. 113 (1973).

<sup>23</sup> 505 U.S. 833 (1992).

<sup>24</sup> *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 128 (2018) (statement of Judge Brett M. Kavanaugh).

<sup>25</sup> Transcript of Oral Argument at 57–58, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463).

<sup>26</sup> *Jackson*, 142 S. Ct. at 551 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

<sup>27</sup> 142 S. Ct. 2228 (2022).

<sup>28</sup> Seema Mohapatra, *The Supreme Court Revealed a Lack of Respect for Precedent and Women’s Health — And It Won’t Stop There*, MS. MAG. (Dec. 15, 2021), <https://msmagazine.com/2021/12/15/supreme-court-texas-mississippi-abortion-womens-health> [<https://perma.cc/2CZ3-SGK8>].

<sup>29</sup> Taladrid, *supra* note 1.

<sup>30</sup> *Id.*

On arrival, Yeni was deemed at “high risk for clinical decompensation/death” and was transferred to an intensive-care unit.<sup>31</sup> In a case like Yeni’s, doctors might consider an early delivery — which carries a less-than-fifty-percent chance of survival for the child and a significant chance of severe disabilities if the baby survives — or a late-term abortion, usually performed to protect the life of the mother.<sup>32</sup> Once her condition stabilized, however, doctors never began a discussion with her about the stress the pregnancy was placing on her body and the continuing risk it might pose to her life.<sup>33</sup> She was discharged after four days.<sup>34</sup>

Two months later, Yeni’s condition once again worsened, this time fatally.<sup>35</sup> When paramedics arrived at her house, Yeni’s blood pressure was “perilously high” and her “oxygen levels were falling.”<sup>36</sup> She was too far along into the pregnancy to be treated in Luling and was set to be taken to a hospital in Kyle by helicopter.<sup>37</sup> But by the time the ambulance got to the Luling ER, Yeni had no pulse.<sup>38</sup> The doctors performed CPR for four minutes before trying to save her baby, but when she “came to rest on the old baby warmer, she, too, was dead.”<sup>39</sup>

Yeniifer Alvarez-Estrada Glick died on July 10, 2022, just two weeks after the Supreme Court removed constitutional protection for the procedure that could have saved her life.<sup>40</sup>

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Since Yeni’s death, many of the doctors involved in treating her have asked whether her death was attributable to Texas’s new laws limiting abortion care — whether “fear of legal repercussions [had] trumped compassionate care.”<sup>41</sup> Four experts who reviewed Yeni’s file all found that her death was preventable and that an abortion “would probably have saved her life.”<sup>42</sup> As one plainly put it: “If she weren’t pregnant, she likely wouldn’t be dead.”<sup>43</sup> Another noted that the laws interfered with informed consent — Yeni had not “been made fully aware that she might die at twenty-seven” and “how an abortion might increase her chances of survival,” “crucial medical information that [she and her

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (quoting Dr. Joanne Stone).

family] had a right to know.”<sup>44</sup> Instead, the chill of Texas’s abortion restrictions led to “a very preventable maternal death.”<sup>45</sup>

Unfortunately, Yeni’s story is not unique. Since the Supreme Court’s decision in *Dobbs* overruling the constitutional right to an abortion, twenty-one states have banned the procedure or restricted it to earlier than the standard set by *Roe*, and courts in three other states are considering the legality of recently passed abortion bans.<sup>46</sup> Women and others with the capacity for pregnancy in abortion-banning states across the country have been forced to carry nonviable pregnancies to term,<sup>47</sup> nearly died as a result of not receiving abortion care,<sup>48</sup> and have even been criminally charged after experiencing a miscarriage.<sup>49</sup> It may be some time before we understand the full effects of *Dobbs* because maternal health data — including maternal mortality rates, which are already higher in the United States than in other high-income countries and are only rising — is difficult to track in the short term.<sup>50</sup> But in a recent nationally representative survey of 569 ob-gyns, 68% said *Dobbs* has “worsened their ability to manage pregnancy-related emergencies,” 64% believed the ruling has increased pregnancy-related mortality, and 70% said it has exacerbated existing racial inequities in maternal health.<sup>51</sup> In states with abortion bans, about 60% of ob-gyns report feeling less autonomy and more concern about legal risks in patient care decisions, and half say they have had patients who sought abortions but were unable to get one.<sup>52</sup> According to one report, just over half of the

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (quoting Dr. Thomas Traill).

<sup>46</sup> Allison McCann et al., *Tracking Abortion Bans Across the Country*, N.Y. TIMES (Jan. 8, 2024, 9:30 AM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [https://perma.cc/RC55-7YGS].

<sup>47</sup> See, e.g., Stephanie Emma Pfeffer, *Arizona Mom Forced to Carry Non-viable Pregnancy to Term Due to Abortion Law: “She Was Alive for 44 Hours,”* PEOPLE (May 12, 2023, 1:43 PM), <https://people.com/health/arizona-mom-forced-to-carry-non-viable-baby-to-term> [https://perma.cc/AM4Z-QW75].

<sup>48</sup> Jacqueline Howard & Tierney Sneed, *Texas Woman Denied an Abortion Tells Senators She “Nearly Died on Their Watch,”* CNN (Apr. 26, 2023, 8:24 PM), <https://www.cnn.com/2023/04/26/health/abortion-hearing-texas-senators-amanda-zurawski/index.html> [https://perma.cc/KDP5-KWBZ].

<sup>49</sup> Julie Carr Smyth, *A Black Woman Was Criminally Charged After a Miscarriage. It Shows the Perils of Pregnancy Post-Roe*, AP NEWS (Dec. 16, 2023, 1:01 PM), <https://apnews.com/article/ohio-miscarriage-prosecution-brittany-watts-b8090abfb5994b8a23457b80cf3f27ce> [https://perma.cc/75SX-KKGM].

<sup>50</sup> Kavitha Surana, *Maternal Deaths Are Expected to Rise Under Abortion Bans, But the Increase May Be Hard to Measure*, PROPUBLICA (July 27, 2023, 5:00 AM), <https://www.propublica.org/article/tracking-maternal-deaths-under-abortion-bans> [https://perma.cc/P6MM-K85H].

<sup>51</sup> BRITNI FREDERIKSEN ET AL., KFF, *A NATIONAL SURVEY OF OBGYNs’ EXPERIENCES AFTER DOBBS* 3 (2023), <https://files.kff.org/attachment/Report-A-National-Survey-of-OBGYNs-Experiences-After-Dobbs.pdf> [https://perma.cc/ZU8V-VF6H]; see also *id.* at 14 (“[Pregnancy-related mortality] is 3–4 times higher among women who are Black, Native American, and [Native Hawaiian and Other Pacific Islander] compared to White women.”).

<sup>52</sup> *Id.* at 3–4.

over 66,000 people estimated to have sought abortions in abortion-banning states were able to get one in another state — it’s unclear what happened to the other 31,180.<sup>53</sup>

The negative impacts of *Dobbs* on maternal health and abortion access have in turn had an outsized influence on state and national politics. In the 2022 midterm elections, fewer than five months after *Roe*’s undoing, voters in key swing states like Michigan and Pennsylvania ranked abortion as the single most important issue to them, and Democrats overperformed across Senate, House, and gubernatorial races in a year that was forecasted to be a “red wave.”<sup>54</sup> Abortion-related ballot measures have now been considered in seven states, and abortion advocates have won in all seven.<sup>55</sup> Reproductive rights seem poised to play a central role in the 2024 presidential election as voters on both sides of the aisle consider the possibility of future federal action on abortion access.<sup>56</sup> Literally and figuratively, abortion has been, and seemingly will continue to be, “on the ballot.”<sup>57</sup>

But organizing post-*Dobbs* has not stopped at the ballot box — ever since the Court “return[ed] the issue of abortion to the people and their elected representatives,”<sup>58</sup> many of those people and elected representatives are increasingly calling for reform of the Court itself.<sup>59</sup> Approval

<sup>53</sup> Maggie Koerth & Amelia Thomson-DeVeaux, *Over 66,000 People Couldn’t Get an Abortion in Their Home State After Dobbs*, FIVETHIRTYEIGHT (Apr. 11, 2023, 8:00 AM) <https://fivethirtyeight.com/features/post-dobbs-abortion-access-66000> [<https://perma.cc/G5B6-KA68>].

<sup>54</sup> Elena Schneider & Holly Otterbein, “*THE Central Issue*”: *How the Fall of Roe v. Wade Shook the 2022 Election*, POLITICO (Dec. 19, 2022, 4:30 AM), <https://www.politico.com/news/2022/12/19/dobbs-2022-election-abortion-00074426> [<https://perma.cc/C32X-X4AW>].

<sup>55</sup> Grace Panetta, *The States Where Abortion Could Be on the Ballot in 2024*, THE 19TH (Jan. 24, 2024, 2:34 PM), <https://19thnews.org/2023/12/abortion-states-election-2024-ballot-measures> [<https://perma.cc/PUL9-GX8Y>].

<sup>56</sup> Alice Miranda Ollstein, *Biden Leans into Abortion, Contraception as 2024 Campaign Strategy Takes Shape*, POLITICO (Jan. 22, 2024, 10:14 AM), <https://www.politico.com/news/2024/01/22/biden-abortion-contraception-campaign-2024-00136902> [<https://perma.cc/V8VH-M5NX>]; Caroline Kitchener et al., *Trump Wins Back Antiabortion Movement as Activists Plot 2025 Crackdowns*, WASH. POST (Jan. 5, 2024, 6:00 AM), <https://www.washingtonpost.com/politics/2024/01/05/trump-abortion> [<https://perma.cc/H45U-FQ7G>]; see also Mary Ziegler, *Opinion, How Trump Could Institute a Backdoor Federal Abortion Ban*, N.Y. TIMES (Jan. 29, 2024), <https://www.nytimes.com/2024/01/29/opinion/biden-trump-abortion-election.html> [<https://perma.cc/83SB-YCGC>].

<sup>57</sup> See *2022 Abortion-Related Ballot Measures*, BALLOTPEDIA, [https://ballotpedia.org/2022\\_abortion-related\\_ballot\\_measures](https://ballotpedia.org/2022_abortion-related_ballot_measures) [<https://perma.cc/Y6CN-Q5U8>]; *2023 and 2024 Abortion-Related Ballot Measures*, BALLOTPEDIA, [https://ballotpedia.org/2023\\_and\\_2024\\_abortion-related\\_ballot\\_measures](https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures) [<https://perma.cc/PY7J-PT34>]; Elizabeth Crisp, *Warren Says Abortion Will Be on the Ballot in 2024*, THE HILL (Jan. 18, 2024, 10:05 AM), <https://thehill.com/home-news/4415386-elizabeth-warren-abortion-2024-election> [<https://perma.cc/P6UN-T56A>].

<sup>58</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2279 (2022). For a discussion of the *Dobbs* Court’s “myopic” conception of democracy, see Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 760–76 (2024).

<sup>59</sup> See *Reform the Supreme Court*, DEMAND JUST., <https://demandjustice.org/priorities/supreme-court-reform> [<https://perma.cc/W7TD-Y4B8>]; Press Release, Off. of Rep. Ayanna Pressley,



of the Supreme Court reached a record low of 40% after the Court declined to block the enforcement of S.B. 8, and it has hovered around that historic low ever since.<sup>60</sup> That disapproval has extended to the rest of the judiciary — although Americans’ trust in the federal judiciary averaged 68% before 2022, since then it has dropped to just 49%.<sup>61</sup> 75% of voters now support a binding ethics code for the Justices, 66% believe in imposing age limits on them, and 60% think the Court should be structurally balanced along ideological lines.<sup>62</sup> Elected officials are taking note as well, as evidenced by the introduction of several bills in Congress,<sup>63</sup> mounting criticism from the President,<sup>64</sup> and recent congressional hearings exploring further action.<sup>65</sup>

At first blush, the increasing popularity of court reform might be ascribed to the political unpopularity of the *Dobbs* decision. According to a May 2023 survey, a record 69% of Americans believe that abortion should be legal in the first three months of pregnancy — that number has remained at or above 60% since 1996 — and 61% believe that overturning *Roe* was a “bad thing.”<sup>66</sup> The *Dobbs* opinion seemed to foresee

ICYMI: Pressley, Markey, Warren, Advocates Call for Major Supreme Court Reforms (Apr. 24, 2023), <https://pressley.house.gov/2023/04/24/icymi-pressley-markey-warren-advocates-call-for-major-supreme-court-reforms> [<https://perma.cc/LB29-ZL32>].

<sup>60</sup> See Megan Brennan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), <https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx> [<https://perma.cc/6BSF-P5HD>].

<sup>61</sup> *Id.*

<sup>62</sup> See Steven Shepard, *Faith in the Supreme Court Is Down. Voters Now Say They Want Changes.*, POLITICO (Sept. 30, 2023, 7:00 AM), <https://www.politico.com/news/2023/09/30/supreme-court-ethics-poll-00119236> [<https://perma.cc/F68W-ME4W>]. Though the Court recently adopted a “Code of Conduct,” that Code is neither binding nor enforceable. See *infra* ch. III, pp. 1677–700.

<sup>63</sup> See Press Release, Off. of Sen. Sheldon Whitehouse, Whitehouse, Booker, Blumenthal, Padilla Introduce New Supreme Court Term Limits Bill (Oct. 19, 2023), <https://www.whitehouse.senate.gov/news/release/whitehouse-booker-blumenthal-padilla-introduce-new-supreme-court-term-limits-bill> [<https://perma.cc/4CM4-J9YJ>]; Press Release, U.S. Senate Comm. on the Judiciary, Durbin, Whitehouse Statement on Senate Judiciary Committee Advancing Supreme Court Ethics Reform Bill to Full Senate (July 20, 2023), <https://www.judiciary.senate.gov/press/releases/durbin-whitehouse-statement-on-senate-judiciary-committee-advancing-supreme-court-ethics-reform-bill-to-full-senate> [<https://perma.cc/R4AL-E9LP>]; Press Release, Sen. Edward J. Markey, Sen. Markey, Rep. Johnson Announce Legislation to Expand Supreme Court, Restore Its Legitimacy, Alongside Sen. Smith, Reps. Bush and Schiff (May 16, 2023), <https://www.markey.senate.gov/news/press-releases/05/16/2023/sen-markey-rep-johnson-announce-legislation-to-expand-supreme-court-restore-its-legitimacy-alongside-sen-smith-reps-bush-and-schiff> [<https://perma.cc/H58E-CX4K>].

<sup>64</sup> See Holly Otterbein & Zach Montellaro, *Biden Still Won’t Nuke the Court. But He Is Upping His Criticism of It.*, POLITICO (June 30, 2023, 4:40 PM), <https://www.politico.com/news/2023/06/30/biden-supreme-court-reform-00104484> [<https://perma.cc/NPU9-DS8S>]; Emma Kinery, *Biden Says Supreme Court “Misinterpreted the Constitution” in Rejecting Student Loan Relief*, CNBC (June 30, 2023, 5:32 PM), <https://www.cnbc.com/2023/06/30/supreme-court-student-loan-ruling-white-house-strongly-disagrees.html> [<https://perma.cc/P77Y-KWXF>].

<sup>65</sup> See *Supreme Court Ethics Reform*, U.S. SENATE COMM. ON THE JUDICIARY, <https://www.judiciary.senate.gov/supreme-court-ethics-reform> [<https://perma.cc/7F4G-CZXM>].

<sup>66</sup> Lydia Saad, *Broader Support for Abortion Rights Continues Post-Dobbs*, GALLUP (June 14, 2023), <https://news.gallup.com/poll/506759/broader-support-abortion-rights-continues-post-dobbs.aspx> [<https://perma.cc/2WXD-E8EA>].

its own political unpopularity, noting that it could not allow the Court's "decisions to be affected by any extraneous influences such as concern about the public's reaction to [the Court's] work"<sup>67</sup> — even while it pointed to *Roe*'s effects on national politics as reason for its overruling.<sup>68</sup> It is true that the Court issues unpopular opinions all the time — sometimes unpopularity is part and parcel of a principled decision;<sup>69</sup> other times the Court is rightly criticized for shameful pronouncements.<sup>70</sup> But not every unpopular decision precipitates widespread calls for institutional reform.

There is something unique about the Court, "for the first time in history," "[r]escinding an individual right in its entirety and conferring it on the State," a right that was "part of society's understanding of constitutional law and of how the Court has defined the liberty and equality that women are entitled to claim."<sup>71</sup> That liberty stood for fifty years, forming the basis of several other core rights for marginalized groups that may now be in jeopardy.<sup>72</sup> The *Dobbs* majority refused to acknowledge "the overwhelming reliance interests" *Roe* and *Casey* had created in that time and the effects of disrupting them, "reveal[ing] how little it knows or cares about women's lives or about the suffering its decision w[ould] cause."<sup>73</sup>

Yet it is not only the substance of the *Dobbs* decision that is unique but also how it came to pass. Mississippi's fifteen-week abortion ban — well before fetal viability — was flatly unconstitutional under *Roe* and *Casey*, and there was no circuit split among lower courts for the Supreme Court to resolve.<sup>74</sup> Rather, the law seemed baldly designed

<sup>67</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2278 (2022).

<sup>68</sup> *Id.* at 2265 ("Roe fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since." (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 995–96 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part))); see also Richard M. Re, *Should Gradualism Have Prevailed in Dobbs?*, in *ROE V. DOBBS* 140, 152–53 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024).

<sup>69</sup> See *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring) ("The hard fact is that sometimes we must make decisions we do not like.").

<sup>70</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, [and] has been overruled in the court of history . . .").

<sup>71</sup> *Dobbs*, 142 S. Ct. at 2347 (Breyer, Sotomayor & Kagan, JJ., dissenting).

<sup>72</sup> John Hanna, *With Roe Over, Some Fear Rollback of LGBTQ and Other Rights*, AP NEWS (June 24, 2022, 6:25 PM), <https://apnews.com/article/abortion-us-supreme-court-health-government-and-politics-marriage-aocee537c6f9f10d29fa71f6e7a4d19d> [<https://perma.cc/RAS4-RLDG>]; see also *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."). But see *id.* at 2309 (Kavanaugh, J., concurring) ("Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.").

<sup>73</sup> *Dobbs*, 142 S. Ct. at 2343 (Breyer, Sotomayor & Kagan, JJ., dissenting). For a discussion of how this failure to recognize these reliance interests was inconsistent with the Court's stare decisis jurisprudence, see generally Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845 (2023).

<sup>74</sup> Mark Joseph Stern, *The Supreme Court Is Taking Direct Aim at Roe v. Wade*, SLATE (May 17, 2021, 12:24 PM), <https://slate.com/news-and-politics/2021/05/supreme-court-barrett-dobbs-ro.html> [<https://perma.cc/33UB-DV9F>].

as a vehicle for the Court to reconsider its abortion precedents,<sup>75</sup> and at least four Justices had no qualms about taking the bait: the Court rejected narrower questions in Mississippi’s petition that would have retained *Roe* and *Casey* and instead granted certiorari on the question of “[w]hether all pre-viability prohibitions on elective abortions are unconstitutional.”<sup>76</sup> The Court publicly voted to hear the case on May 17, 2021, just over six months after the death of Justice Ginsburg and subsequent appointment of Justice Barrett to the Court cemented a five-Justice majority hostile to *Roe*.<sup>77</sup> And just over six months earlier, a majority of the Court — the same five-Justice majority in *Dobbs* — had allowed S.B. 8 to stand, “let[ting] Texas defy th[e] Court’s constitutional rulings, nullifying *Roe* and *Casey* ahead of schedule.”<sup>78</sup> To cap off the procedural irregularities, a draft of Justice Alito’s majority opinion was leaked to *Politico* on May 2, 2022, which undercut any chance of a compromise decision and “helped lock in the result.”<sup>79</sup>

The seeming inevitability of *Dobbs* leaves a sense that the system was gamed to arrive at this outcome, that “a new majority, adhering to a new ‘doctrinal school,’ could ‘by dint of numbers’ alone expunge [people’s] rights.”<sup>80</sup> It is, of course, true that there are plenty of people who agree with the Court that “*Roe* was egregiously wrong from the start,”<sup>81</sup> nothing more than “an exercise of raw judicial power.”<sup>82</sup> But it is also true that the modern conservative legal movement, galvanized by that belief and armed with a new theory of legal interpretation designed to roll back progressive rights,<sup>83</sup> systematically captured law schools, public discourse, and the federal bench to secure the five votes on the Court

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<sup>75</sup> See *Dobbs*, 142 S. Ct. at 2349 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (“Mississippi — and other States too — knew exactly what they were doing in ginning up new legal challenges to *Roe* and *Casey*.”).

<sup>76</sup> Stern, *supra* note 74; see also Petition for Writ of Certiorari at i, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392); *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (mem.).

<sup>77</sup> Stern, *supra* note 74. Recent reporting has revealed that all five Justices in the *Dobbs* majority voted to hear the case as early as January 8, 2021, in Justice Barrett’s third month on the Court. Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of Roe v. Wade*, N.Y. TIMES (Dec. 15, 2023), <https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-roe-abortion.html> [<https://perma.cc/5FSE-LFD4>]. But at the behest of Justice Kavanaugh, the Justices decided to continue relisting the case on the public docket and wait several months to announce their decision, in part to “suggest the court was still debating whether to go forward” and “create the appearance of distance from Justice Ginsburg’s death.” *Id.* Justice Barrett ultimately switched her vote to a no, and Justices Thomas, Alito, Gorsuch, and Kavanaugh — none of whom, notably, are women — provided the four votes needed to grant the petition. *Id.*

<sup>78</sup> *Dobbs*, 142 S. Ct. at 2349 (Breyer, Sotomayor & Kagan, JJ., dissenting).

<sup>79</sup> Kantor & Liptak, *supra* note 77.

<sup>80</sup> *Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor & Kagan, JJ., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.)).

<sup>81</sup> *Id.* at 2243 (majority opinion).

<sup>82</sup> *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

<sup>83</sup> See Mary Ziegler, *The History of Neutrality: Dobbs and the Social Movement Politics of History and Tradition*, 133 YALE L.J.F. 161, 173–84 (2023) (tracing the antiabortion origins and development of a unitary history-and-tradition test in the conservative legal movement).

needed to overturn *Roe*.<sup>84</sup> Indeed, “[i]t is hard to imagine something more like an exercise of raw judicial power than the Court’s removal of the right to abortion, which is precisely what these Justices were put on the Court to achieve.”<sup>85</sup> Rather than reform the Supreme Court, the conservative legal movement remade it.

This Introduction does not mean to offer sour grapes or shame effective political strategies — similar critiques could be and have been raised against proponents of court reform. It does mean to argue that context matters in framing any discussion of court reform, and the current movement must be understood in the following context: the Supreme Court, swiftly, brazenly, and expectedly took away a popular constitutional right that had protected the autonomy and safety of women and people who can become pregnant for over fifty years; the removal of that right was the result of a successful, calculated political movement motivated by that singular goal; and the effects of that decision on maternal healthcare and abortion access have meant suffering and even death for people like Yeni and countless others. Regardless of whether one believes *Dobbs* was rightly decided, the ruling’s impact on American life — from national elections to individual pregnancy decisions — is undeniable, and it has plunged the Court into a serious legitimacy crisis from which it has yet to emerge.<sup>86</sup>

The Supreme Court broke something on June 24, 2022. This *Developments in the Law* Issue discusses one movement’s ideas of how to fix it.

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To set the stage, Chapter I builds out a novel analytical framework to understand Supreme Court reform arguments of past and present. Arguments for Court reform often focus on neutral legal and policy arguments about the Court’s abstract form. However, these formal arguments are rarely conclusive, because persuasive arguments can be

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<sup>84</sup> See Charlie Savage, *For Conservative Legal Movement, A Long-Sought Triumph Appears at Hand*, N.Y. TIMES (May 3, 2022), <https://www.nytimes.com/2022/05/03/us/conservative-legal-movement-roe-v-wade.html> [<https://perma.cc/7HF7-CS87>] (“*Roe* is the glue that held together the conservative legal movement . . .”); Jess Bravin, *The Conservative Legal Push to Overturn Roe v. Wade Was 50 Years in the Making*, WALL ST. J. (June 24, 2022, 6:54 PM), <https://www.wsj.com/articles/roe-v-wade-overturned-supreme-court-11656110804> [<https://perma.cc/Z3X2-UE2J>]; Emma Green, *How the Federalist Society Won*, NEW YORKER (July 24, 2022), <https://www.newyorker.com/news/annals-of-education/how-the-federalist-society-won> [<https://perma.cc/3NSG-EAGU>].

<sup>85</sup> Jeannie Suk Gersen, *When the Supreme Court Takes Away a Long-Held Constitutional Right*, NEW YORKER (June 24, 2022), <https://www.newyorker.com/news/daily-comment/when-the-supreme-court-takes-away-a-long-held-constitutional-right> [<https://perma.cc/5CMZ-M27S>].

<sup>86</sup> See *Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“[Justices O’Connor, Kennedy, and Souter] knew that ‘the legitimacy of the Court [is] earned over time.’ They also would have recognized that it can be destroyed much more quickly.” (second alteration in original) (citation omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.)).

mustered on both sides of a given issue. Chapter I argues that formal arguments alone cannot answer the question of why, or how, the Court should be reformed. Looking to history, it argues that Court reform movements arise in response to moments of emergency when the Court is apparently engaged in harming a significant group of people — more familiar to legal scholars in the concepts of legitimacy and anticanon. Court reformers, then, are motivated by a commitment to justice that they believe is in peril because of actions of the Supreme Court. If we hope to properly understand and resolve Court reform debates, the normative roots of those arguments must be acknowledged and engaged with.

Powerful as it may be, the Court is but one of three coequal branches in our divided system of government, and Chapter II argues that reformers have got the wrong guy. When reformers take issue with the Court's actions, it's not because the Court has somehow departed from its role of interpreting the law. Rather, reformers simply disagree about *how* the law should be interpreted — specifically, about the age-old question of whether the law is as determinate as the Court says it is. Recent faltering approval ratings don't stem from the Court "making law," but rather from Congress's failure to do so: because Congress has not acted on many of today's most pressing societal problems, the Court's pronouncements end up as the last word on those issues, and the public wrongly perceives the Court to be engaging in politics. Structural reform of the Court, then, would not resolve disputes about determinacy or the Court's legitimacy crisis — it's Congress that should be reformed.

Chapter III dives into the pressing question of regulating the conduct of individual Justices. Recent reporting exposed how several Justices, both liberal and conservative, have failed to adhere to ethics and financial disclosure rules, and the resulting public pressure led the Court to adopt its first-ever Code of Conduct.<sup>87</sup> But the Code largely excused the Justices' problematic conduct and provided no enforcement mechanism, underscoring the need for congressional action.<sup>88</sup> Whether Congress can regulate the conduct of individual Justices is a constitutional question that has been left open, and Chapter III argues that the time has come to answer it. Using ethics laws already on the books, Congress has a variety of existing avenues it can and should take to rein in the conduct of the Justices. Constitutional challenges to Congress's power raised by Justices and scholars are vague and unavailing, and

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<sup>87</sup> CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. (2023), [https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices\\_November\\_13\\_2023.pdf](https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf) [<https://perma.cc/HMV5-FP4H>].

<sup>88</sup> See Joshua Kaplan et al., *The Supreme Court Has Adopted a Conduct Code, But Who Will Enforce It?*, PROPUBLICA (Nov. 13, 2023, 4:47 PM), <http://www.propublica.org/article/supreme-court-adopts-ethics-code-scotus-thomas-alito-crow> [<https://perma.cc/L2SU-8C7N>].

there are several constitutional bases for Congress to act now to enforce ethics rules on the Justices.

The Supreme Court isn't the only part of the judiciary facing calls for change, and Chapter IV looks at one of the most prominent targets for reform in the lower courts: nationwide injunctions. Nationwide injunctions have been in the national spotlight since Judge Kacsmaryk of the United States District Court for the Northern District of Texas issued a nationwide stay of the FDA's twenty-year-old approval of mifepristone, one of the drugs used as part of a medication abortion.<sup>89</sup> Though scholars and jurists have debated the merits of nationwide injunctions for years, Chapter IV uses data from the Department of Justice to perform the first-ever empirical analysis of nationwide injunctions, definitively showing they have become significantly more common in recent years. This data provides three concerning takeaways: (1) nationwide injunctions impede the proper development of the law; (2) they are overwhelmingly issued by judges appointed by a president of a political party opposed to the policy in question; and (3) some judges are increasingly turning to vacatur to stop executive action. In light of the increase in policymaking through the executive and the polarization of the judiciary, the federal court system should be restructured to disincentivize forum shopping to reduce the negative policy implications of nationwide injunctions.

The American judiciary system may be in the midst of a legitimacy crisis, and Chapter V encourages us to seek counsel from our oft-neglected northern neighbor. Canada's constitutional bill of rights contains a clause allowing the federal and provincial legislatures to enact a law "notwithstanding" courts' constitutional interpretations to the contrary, a tool of popular constitutionalism that gives the people the right to decide the ultimate meaning of their constitution.<sup>90</sup> Though the Notwithstanding Clause has never been used by Canada's federal government, it has been invoked by provinces in service of largely discriminatory ends.<sup>91</sup> Based on lessons from Canada's experience with the Notwithstanding Clause, Chapter V argues that the United States should adopt a "constrained override," which would give Congress a limited power to override Supreme Court decisions on constitutional questions. That power would be exclusive to Congress, not the states; could be used only for legislation that has already been declared unconstitutional; and would be subject to a "double override" by a consensus of the Supreme Court. Despite concerns about its effectiveness, the constrained override presents the best opportunity to combat the dangers

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<sup>89</sup> All. for Hippocratic Med. v. FDA, No. 22-cv-223-Z, 2023 WL 2825871, at \*41 (N.D. Tex. Apr. 7, 2023), *aff'd in part*, 78 F.4th 210 (5th Cir. 2023).

<sup>90</sup> Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>91</sup> *See, e.g.*, Marriage Amendment Act, R.S.A. 2000, c M-5, § 5 (Can. Alta.); An Act Respecting the Laicity of the State, S.Q. 2019, c 12, § 34 (Can. Que.).

of granting the Court exclusive say over the Constitution and returns that power to the people.

## CHAPTER ONE

### CONFUSION AND CLARITY IN THE CASE FOR SUPREME COURT REFORM

Supreme Court reform is in the air.<sup>1</sup> 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,<sup>2</sup> and movements to reform the Court rarely win the attention of politicians, let alone ordinary people.<sup>3</sup>

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.<sup>4</sup> Justices Scalia and Ginsburg were dead.<sup>5</sup> President Trump had appointed three

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<sup>1</sup> For examples in academic literature, see generally Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019); Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022). For examples in popular discourse, see generally Keeanga-Yamahtta Taylor, *The Case for Ending the Supreme Court As We Know It*, NEW YORKER (Sept. 25, 2020), <https://www.newyorker.com/news/our-columnists/the-case-for-ending-the-supreme-court-as-we-know-it> [<https://perma.cc/DX8W-3AZG>]; Janelle Bouie, Opinion, *This Is How to Put the Supreme Court in Its Place*, N.Y. TIMES (Oct. 14, 2022), <https://www.nytimes.com/2022/10/14/opinion/supreme-court-reform.html> [<https://perma.cc/H378-8Y2P>]; Ezra Klein, Opinion, *What a Reckoning at the Supreme Court Could Look Like*, N.Y. TIMES (July 10, 2022), <https://www.nytimes.com/2022/07/10/opinion/supreme-court-biden-reform.html> [<https://perma.cc/45V3-CLKT>]; Ryan Doerfler & Elie Mystal, Opinion, *The Supreme Court Is Broken. How Do We Fix It?*, THE NATION (June 6, 2022), <https://www.thenation.com/article/society/how-to-fix-supreme-court> [<https://perma.cc/Q7UM-C3TR>]; Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, THE ATLANTIC (June 8, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212> [<https://perma.cc/96D7-CFKR>]. For examples in government, see generally PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021) [hereinafter PRESIDENTIAL COMMISSION REPORT]; *Supreme Court Ethics Reform*, U.S. SENATE COMM. ON THE JUDICIARY, <https://www.judiciary.senate.gov/supreme-court-ethics-reform> [<https://perma.cc/2G9B-BSP9>].

<sup>2</sup> See RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 156 (2018).

<sup>3</sup> See Adrian Vermeule, Essay, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1155 (2006); cf. J. Patrick White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 19 MD. L. REV. 181, 181 (1959) ("More than most institutions of American government, the judiciary has commanded the respect and reverence of the American nation.").

<sup>4</sup> See Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), <https://news.gallup.com/poll/508169/historically-low-faith-institutions-continues.aspx> [<https://perma.cc/6TH6-MMA6>].

<sup>5</sup> Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> [<https://perma.cc/2J37-Z9ZE>]; Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html> [<https://perma.cc/U7HL-BBZ7>].



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),<sup>6</sup> Justice Kavanaugh (after Professor Christine Blasey Ford testified before the Senate that he sexually assaulted her in high school),<sup>7</sup> and Justice Barrett (under circumstances similar to those invoked by Senator McConnell to delay consideration of President Obama's nominee).<sup>8</sup> Most importantly, as its membership changed, the Court started a new era in which it declined to protect abortion<sup>9</sup> and voting rights<sup>10</sup> and invalidated affirmative action,<sup>11</sup> environmental protection,<sup>12</sup> and gun control<sup>13</sup> 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.<sup>14</sup> 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*

<sup>6</sup> See Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> [<https://perma.cc/9879-NJFQ>].

<sup>7</sup> See Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html> [<https://perma.cc/BQ5X-EQ7N>]; Adam Liptak, *Confirming Kavanaugh: A Triumph for Conservatives, But a Blow to the Court's Image*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/conservative-supreme-court-kavanaugh.html> [<https://perma.cc/5DJX-PT2B>].

<sup>8</sup> See Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html> [<https://perma.cc/VHQ4-JU2V>].

<sup>9</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

<sup>10</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

<sup>11</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162–63 (2023).

<sup>12</sup> *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022).

<sup>13</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

<sup>14</sup> See Jason Willick, Opinion, *The "Next" Jan. 6 Is Happening, And the Supreme Court Is the Target*, WASH. POST (June 9, 2022, 6:16 PM), <https://www.washingtonpost.com/opinions/2022/06/09/next-january-sixth-target-supreme-court/> [<https://perma.cc/LET4-ZQCR>]; Karen Yourish et al., *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html> [<https://perma.cc/8P9V-RZ7S>]; cf. KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT I* (2019) (observing a contemporary trend in favor of the position that "[c]ourts should be restrained from doing the wrong thing, but they should be active in doing the right thing").

*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.<sup>15</sup> They begin with principles that are widely accepted in our democracy, citing support from the Constitution,<sup>16</sup> historical practice,<sup>17</sup> or political design,<sup>18</sup> 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.

This Chapter argues that looking to the substance of the Court's decisions brings a more complete case for Court reform into view. The complete argument for Court reform has two parts: First, the Court's recent decisions have been substantively wrong, so wrong that some intervention is needed to undo them and to avert similar decisions in the future. Second, the existing formal arguments for Court reform identify a set of potential changes, consistent with widely held political values, that would answer that need.

It may seem that invoking substantive disagreements to justify Court reform amounts to an admission that Court reformers are simply sore losers. But the kind of substantive emergency that would require Court reform is different in kind from mere political disagreement. It represents a claim that the Court is crossing a moral line, beyond which its decisions can no longer be respected. For an extreme example, consider a world in which the Court repudiated *Brown v. Board of Education*: those calling for reform would be invoking a substantive disagreement with the Court, but one different in kind from mere political squabbling. Of course, many would dispute that this Court has transgressed that kind of boundary. They may be correct. The bottom line, however, is that the current movement for Court reform arises from a belief that the Court is causing grave substantive harm — and that belief must be

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<sup>15</sup> See Doerfler & Moyn, *supra* note 1, at 1722–25 (surveying proposals justified on grounds of ideological moderation and depoliticization); *id.* at 1721, 1737 (surveying proposals justified on grounds of promoting democracy). As Professors Ryan Doerfler and Samuel Moyn note, even court packing, despite being “nakedly partisan,” *id.* at 1721, purports to “promote democracy in the short term,” *id.* at 1737 (emphasis omitted), by “get[ting the judiciary] out of the way of progressive majorities,” *id.*

<sup>16</sup> See, e.g., Bowie & Renan, *The Separation-of-Powers Counterrevolution*, *supra* note 1, at 2024–26.

<sup>17</sup> See, e.g., *id.* at 2041–47.

<sup>18</sup> See, e.g., Epps & Sitaraman, *How to Save the Supreme Court*, *supra* note 1, at 167–69.

considered on its terms, rather than be reduced to a proxy argument about form.

The Chapter proceeds in three sections. Section A surveys the major formal arguments for Court reform and shows that the formal debate on reform is complicated and unresolved. Section B looks to historical context to explore the role of substantive disagreement with the Court in past moments of national interest in Court reform and in the present moment. Section C argues that the notion that the Court could be so wrong that it needs to be stopped by disruptive means is not new or radical — rather, it has a long history in law and academic discourse.

### 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.<sup>19</sup> 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.

*i. Disempowerment.* — Since the 1950s,<sup>20</sup> the Supreme Court has claimed to be and has been treated as the “ultimate expositor of the Constitution.”<sup>21</sup> 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,<sup>22</sup> which it first asserted in the 1803 case *Marbury v.*

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<sup>19</sup> The categories proposed here are a modification of those proposed by Professors Doerfler and Moyn. See Doerfler & Moyn, *supra* note 1, at 1720–21.

<sup>20</sup> See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Professors Nikolas Bowie and Daphna Renan suggest that at least where the separation of powers is concerned, the “juristocratic turn” began earlier. See Bowie & Renan, *The Separation-of-Powers Counterrevolution*, *supra* note 1, at 2077.

<sup>21</sup> See Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1062 (2010).

<sup>22</sup> See Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886, 888 (2008).

*Madison*.<sup>23</sup> Today, judicial supremacy empowers the Court to undermine or entirely invalidate legislative and agency action as inconsistent with the Constitution.<sup>24</sup>

Because judicial supremacy gives the Court a trump card over the popularly elected legislative and executive branches, reformers object that it is antidemocratic<sup>25</sup> and likely to slow the pace of change.<sup>26</sup> In order to address these problems, reformers propose a variety of modifications to the Court's power of judicial review.<sup>27</sup> These include exempting certain federal statutes from judicial review<sup>28</sup> and giving the legislative or executive branches greater voice in debating the limits of constitutional meaning.<sup>29</sup>

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."<sup>30</sup> 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."<sup>31</sup> 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."<sup>32</sup>

<sup>23</sup> 5 U.S. (1 Cranch) 137, 177–78 (1803).

<sup>24</sup> See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022); *Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013); *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

<sup>25</sup> See PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 152; Bowie & Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, *supra* note 1; Doerfler & Moyn, *supra* note 1, at 1735; Nikolas Bowie, *The Supreme Court, 2020 Term — Comment: Antidemocracy*, 135 HARV. L. REV. 160, 162, 201–02 (2021) ("There is nothing democratic about giving five lawyers — chosen for life because of their educational backgrounds and their relationship to the governing elite — . . . discretion to decide the meaning of our fundamental law . . . . It is, instead, a profoundly aristocratic power premised on a deep distrust of democracy." *Id.* at 201.).

<sup>26</sup> See Doerfler & Moyn, *supra* note 1, at 1739–43.

<sup>27</sup> See *id.* at 1725–28 (surveying proposals).

<sup>28</sup> See Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1780–85 (2020).

<sup>29</sup> See Bowie & Renan, *The Separation-of-Powers Counterrevolution*, *supra* note 1, at 2107–08 (outlining a "republican" approach to the separation of powers, *id.* at 2107); Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 UCLA J. INT'L L. & FOREIGN AFFS. 250, 261–69 (2005) (describing a hypothetical congressional-veto model).

<sup>30</sup> Fallon, *supra* note 21, at 1133.

<sup>31</sup> Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4, 24 (2001).

<sup>32</sup> Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 891 (2003).

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[] . . . .”<sup>33</sup> 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.”<sup>34</sup>

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.”<sup>35</sup> 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.”<sup>36</sup>

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,<sup>37</sup> 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.”<sup>38</sup> Professor Richard Fallon disagrees: as long as some assumptions are true, “judicial review is reasonably defensible within the terms of liberal political theory.”<sup>39</sup>

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.

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<sup>33</sup> Keith E. Whittington, *The Power of Judicial Review*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 387, 387 (Mark Tushnet et al. eds., 2015).

<sup>34</sup> Prakash & Yoo, *supra* note 32, at 890.

<sup>35</sup> Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1125 (2001) (footnotes omitted).

<sup>36</sup> WHITTINGTON, *supra* note 14, at 61.

<sup>37</sup> *But cf. infra* ch. II, pp. 1654–55 (arguing that Congress has failed to fulfill its duty, exposing the Court to misplaced criticism).

<sup>38</sup> Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006).

<sup>39</sup> Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1735 (2008).

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.<sup>40</sup> Politicians now treat the Court as a prize to be contested, which they do by engaging in gamesmanship,<sup>41</sup> appointing younger judges to maximize their life tenure,<sup>42</sup> and framing nomination hearings as political contests.<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> Another is to create a nonpartisan committee to select Supreme Court Justices<sup>46</sup> or, somewhat relatedly, to have five Republican- and five Democrat-appointed Justices appoint five visiting Justices annually.<sup>47</sup> 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.<sup>48</sup> 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

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<sup>40</sup> See Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POL’Y 521, 524–33 (2018); cf. Emma Green, *How the Federalist Society Won*, NEW YORKER (July 24, 2022), <https://www.newyorker.com/news/annals-of-education/how-the-federalist-society-won> [<https://perma.cc/B5CP-Q3Q9>] (highlighting the power of the Federalist Society in securing clerkships and judgeships for conservative lawyers). Partisan affiliation may now be more important than conventional measures of judicial qualification. See Patrick L. Gregory, *Trump Picks More “Not Qualified” Judges (1)*, BLOOMBERG L. (Dec. 19, 2018, 1:11 PM), <https://news.bloomberglaw.com/us-law-week/trump-picks-more-not-qualified-judges-1> [<https://perma.cc/Y9KZ-8KMA>].

<sup>41</sup> See Robin Bradley Kar & Jason Mazzone, Essay, *The Garland Affair: What History and the Constitution Really Say About President Obama’s Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 55–58 (2016).

<sup>42</sup> See Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [<https://perma.cc/84MP-PR9A>].

<sup>43</sup> See Molly Ball & Tessa Berenson, *Brett Kavanaugh’s Confirmation Fight Exposes Major Problems with the Nation’s Most Powerful Court*, TIME (Sept. 27, 2018, 6:13 AM), <https://time.com/5407920/supreme-court-problems> [<https://perma.cc/89DK-DDHM>].

<sup>44</sup> See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301, 309, 317–21 (2017).

<sup>45</sup> See PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 111; ALICIA BANNON & MICHAEL MILOV-CORDOBA, BRENNAN CTR. FOR JUST., SUPREME COURT TERM LIMITS 1–4 (2023).

<sup>46</sup> See Doerfler & Moyn, *supra* note 1, at 1724 (discussing Theodore Voorhees, *It’s Time for Merit Selection of Supreme Court Justices*, 61 ABA J. 705 (1975)).

<sup>47</sup> See *id.* (discussing Epps & Sitaraman, *How to Save the Supreme Court*, *supra* note 1, at 193–200).

<sup>48</sup> See PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 84; Doerfler & Moyn, *supra* note 1, at 1723.

another<sup>49</sup> 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,"<sup>50</sup> that shortens Justices' terms of service,<sup>51</sup> or that alters the process by which Justices are selected.<sup>52</sup> 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,<sup>53</sup> might not be mobilized by reforms that prioritize a Court whose membership simply splits the difference between conservative and liberal.<sup>54</sup>

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.<sup>55</sup> Ethical reforms target the rules governing Justices, including more rigorous disclosure obligations for Justices, external oversight of Justices' finances, and more stringent recusal rules.<sup>56</sup> These efforts are in their early stages and may yet succeed, but they have already been met by

<sup>49</sup> Doerfler & Moyn, *supra* note 1, at 1723. As Doerfler and Moyn note, the particular ideological makeup of the Court under each proposed reform would be different.

<sup>50</sup> PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 85; *see* U.S. CONST. art. III, § 1. *But see* PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 89 ("[W]e cannot conclude that the Constitution precludes rotation and panel reforms, at least as long as processes exist to ensure that a juridical body operates in some meaningful sense as a single 'Court.'").

<sup>51</sup> *See* Doerfler & Moyn, *supra* note 1, at 1754–55; U.S. CONST. art. III, § 1.

<sup>52</sup> *See* Doerfler & Moyn, *supra* note 1, at 1755; Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J.F. 93, 99 (2019); PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 89; U.S. CONST. art. III, § 1.

<sup>53</sup> *See, e.g.*, Russ Feingold, *The Heart of the Progressive Legal Movement*, AM. CONST. SOC'Y (Sept. 28, 2023), <https://www.acslaw.org/inbrief/the-heart-of-the-progressive-legal-movement> [<https://perma.cc/889P-6T42>].

<sup>54</sup> *See* Doerfler & Moyn, *supra* note 1, at 1752.

<sup>55</sup> *See infra* ch. III, pp. 1680–83; Justin Elliott et al., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court> [<https://perma.cc/7A2F-V3BP>]; Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow> [<https://perma.cc/WK7H-BV2E>]; Karl Evers-Hillstrom, *Supreme Court Justices Continue to Rack Up Trips on Private Interest Dime*, OPEN SECRETS (June 13, 2019, 6:05 PM), <https://www.opensecrets.org/news/2019/06/scotus-justices-rack-up-trips> [<https://perma.cc/443Q-NH2D>]; Carl Hulse, *Senate Panel Approves Supreme Court Ethics Bill with Dim Prospects*, N.Y. TIMES (July 20, 2023), <https://www.nytimes.com/2023/07/20/us/politics/senate-supreme-court-ethics-rules.html> [<https://perma.cc/4866-FQ2J>].

<sup>56</sup> *See* Hulse, *supra* note 55; *Supreme Court Ethics Reform*, *supra* note 1.

arguments that the judiciary should be free to regulate itself.<sup>57</sup> 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.<sup>58</sup> Proponents of these ideas reject that the Court’s business can be removed from politics.<sup>59</sup> 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.<sup>60</sup> This theory of Court reform justifies proposals such as packing the Court<sup>61</sup> or obstructing judicial nominations.<sup>62</sup> 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 Garland<sup>63</sup> and the successful confirmation of Justice Barrett<sup>64</sup> as an example that Republicans are playing this game; conservatives point to past statements by Democratic officials in favor of similar strategies<sup>65</sup> as evidence that the thinking goes both ways.

<sup>57</sup> See Olivia Gotham, *Avoiding Institutional Corruption Through a Self-Regulating Federal Judiciary*, 33 GEO. J. LEGAL ETHICS 517, 519–21 (2020).

<sup>58</sup> See Doerfler & Moyn, *supra* note 1, at 1746 (“[S]o long as Supreme Court justices continue to wield tremendous authority, it is both predictable and *appropriate* that political actors will fight aggressively for control of the Court.”).

<sup>59</sup> See, e.g., *id.* at 1708 (“Saving the Supreme Court is not a desirable goal; getting it out of the way of progressive reform is.”).

<sup>60</sup> See *id.* (“Both parties, and the rival sets of judges, concurred more than they differed, above all about elevating the Supreme Court, even at the price of making judicial appointments national politics by other means.”).

<sup>61</sup> See Kermit Roosevelt III, *I Spent 7 Months Studying Court Reform. We Need to Pack the Court Now*, TIME (Dec. 10, 2021, 7:00 AM), <https://time.com/6127193/supreme-court-reform-expansion> [<https://perma.cc/U3BL-578U>]; Quinta Jurecic & Susan Hennessey, *The Reckless Race to Confirm Amy Coney Barrett Justifies Court Packing*, THE ATLANTIC (Oct. 4, 2020, 3:50 PM), <https://www.theatlantic.com/ideas/archive/2020/10/skeptic-case-court-packing/616607> [<https://perma.cc/RN8A-9VTC>].

<sup>62</sup> Carrie Budoff Brown, *Schumer to Fight New Bush High Court Picks*, POLITICO (July 27, 2007, 5:33 PM), <https://www.politico.com/story/2007/07/schumer-to-fight-new-bush-high-court-picks-005146> [<https://perma.cc/2SSV-UUPK>].

<sup>63</sup> See Kar & Mazzone, *supra* note 41, at 55–57.

<sup>64</sup> See Caitlin McFall, *Dem Sen. Markey Claims Trump, McConnell “Stole Two Supreme Court Seats”*, FOX NEWS (Oct. 27, 2021, 2:01 PM), <https://www.foxnews.com/politics/markey-claims-trump-mcconnell-stole-supreme-court-seats> [<https://perma.cc/T9S5-HFLQ>].

<sup>65</sup> Top congressional Democrats had considered similar approaches under the two Republican presidencies that preceded President Obama — Presidents Bush Senior and Junior. See Julie Hirschfeld Davis, *Joe Biden Argued for Delaying Supreme Court Picks in 1992*, N.Y. TIMES (Feb. 22, 2016), <https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html> [<https://perma.cc/XKE2-834G>] (“As a senator more than two decades ago, Vice President Joseph R. Biden Jr. argued that President George [H.W.] Bush should delay filling a



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.<sup>66</sup> 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,<sup>67</sup> and they remove the Court as a safeguard to uphold the rule of law when a majority seeks to ignore it.<sup>68</sup> 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.

### B. Substantive Reasons for Reform

Asking value-neutral questions about the abstract form of the Supreme Court — what it does and how it is structured — results in a mixed picture. There are good reasons to reform it, but most can be met with reasonable, good faith disagreement, and the ideas that achieve the most consensus might require amending the Constitution and enjoy little enthusiasm from progressives. If the reasons that are most exciting to reformers can all be met by plausible counterarguments, the case for Supreme Court reform is somewhat murky.

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 Manifesto<sup>69</sup> to reject the Court's ruling in *Brown v. Board of*

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Supreme Court vacancy, should one arise, until the presidential election was over, and that it was 'essential' that the Senate refuse to confirm a nominee to the court until then."); Brown, *supra* note 62 ("[Senator Schumer] said his 'greatest regret' in the last Congress was not doing more to scuttle [Justice Alito's nomination]. . . . 'I think we should have twisted more arms and done more.'"). And in 2016, Kathryn Ruemmler, who previously served as White House Counsel to President Obama, reportedly told an ABA panel that she would have advised Democrats to pursue the strategy employed by Senator McConnell if the tables were turned. See Eugene Volokh, *Former Obama White House Counsel Would Have Advised Blocking Scalia's Replacement If Tables Had Been Turned*, REASON: VOLOKH CONSPIRACY (Nov. 18, 2016, 4:45 PM), <https://reason.com/volokh/2016/11/18/former-obama-white-house-couns> [<https://perma.cc/LEQ2-J9ZC>].

<sup>66</sup> See Frederick A.O. Schwarz, Jr., *Saving the Supreme Court*, BRENNAN CTR. FOR JUST. (Sept. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/saving-supreme-court> [<https://perma.cc/3P2Z-A8QT>].

<sup>67</sup> See *id.* ("Any possible court packing would be correctly perceived as a partisan power grab. And when party fortunes change, the party that lost the first packing vote would proceed to pack the court in its favor.")

<sup>68</sup> Cf. Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 80–86 (2022) (asserting that the Court's counter-majoritarian makeup is a feature rather than a bug).

<sup>69</sup> 102 CONG. REC. 4459–61 (1956) (statement of Sen. Walter George) [hereinafter Southern Manifesto].

*Education*,<sup>70</sup> 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.

*I. Twentieth-Century Reformism.* — The paradigmatic<sup>71</sup> 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.<sup>72</sup> The basic problem facing President Roosevelt was this: he was elected by an enormous share of the country and controlled both chambers of Congress,<sup>73</sup> yet the Supreme Court repeatedly invoked the Constitution to constrain his implementation of landmark planks of his platform.<sup>74</sup> President Roosevelt's court packing proposal never came to pass, perhaps in part because its novelty and perceived radicalism<sup>75</sup> made it politically unwise,<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup> The United States was emerging from the Great Depression, and many Americans were struggling financially.<sup>79</sup> The late-1930s policies that President Roosevelt pursued were part of a second phase of the New Deal that moved from immediate,

<sup>70</sup> 347 U.S. 483 (1954); Southern Manifesto, *supra* note 69, at 4460. These two moments are identified by the Presidential Commission on the Supreme Court of the United States as key reform epochs of the twentieth century. See PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 54–59.

<sup>71</sup> Vermeule, *supra* note 3, at 1156.

<sup>72</sup> See *id.* at 1156, 1165.

<sup>73</sup> *Id.* at 1156.

<sup>74</sup> See Alex Badas, *Policy Disagreement and Judicial Legitimacy: Evidence from the 1937 Court-Packing Plan*, 48 J. LEGAL STUD. 377, 384 (2019) (“While Roosevelt and the Democratic Congress faced little political opposition to passing their legislative agenda, they were consistently rebuked by the Supreme Court.”); see also Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1140–41 (1987) (reviewing the history).

<sup>75</sup> See Badas, *supra* note 74, at 386–87.

<sup>76</sup> See Vermeule, *supra* note 3, at 1160–61.

<sup>77</sup> See *id.* at 1159.

<sup>78</sup> See KIRAN KLAUS PATEL, *THE NEW DEAL 10–12*, 43 (2016).

<sup>79</sup> See Aaron D. Purcell, *Historical Interpretations of the New Deal and the Great Depression*, in 2 INTERPRETING AMERICAN HISTORY: THE NEW DEAL AND THE GREAT DEPRESSION 4, 5 (Aaron D. Purcell ed., 2014).

experimental attempts at relief to more pragmatic, less experimental reform and regulation programs.<sup>80</sup>

Public opinion of Supreme Court reform was directly related to whether a person favored the second-phase New Deal programs.<sup>81</sup> Professor Alex Badas, using contemporary methods to analyze 1937 survey data,<sup>82</sup> finds that “individuals who had high support for New Deal policies were more likely to support . . . [Supreme] Court-packing.”<sup>83</sup> Examining the relationship of results from the same 1937 survey<sup>84</sup> to trends in the media, judicial decisions, and presidential speech,<sup>85</sup> 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.*<sup>86</sup> and (2) Justice Van Devanter, the “intellectual leader of the Supreme Court’s conservatives”<sup>87</sup> and a staunch opponent of the New Deal agenda,<sup>88</sup> retired.<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup> The Manifesto declared that *Brown v. Board of Education* represented the Supreme Court “substitut[ing] naked power for established law,”<sup>92</sup> 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.”<sup>93</sup>

Although the gesture at “all lawful means” was the closest the document came to a concrete proposal for Court reform, it nonetheless

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<sup>80</sup> See Jennifer Ego, *The Economy and the New Deal*, in 2 INTERPRETING AMERICAN HISTORY: THE NEW DEAL AND THE GREAT DEPRESSION, *supra* note 79, at 81, 85.

<sup>81</sup> See Badas, *supra* note 74, at 400–01.

<sup>82</sup> *Id.* at 389–90.

<sup>83</sup> *Id.* at 401.

<sup>84</sup> See Caldeira, *supra* note 74, at 1140. Both Badas and Caldeira use responses from a 1937 Gallup survey that included questions about Court packing. Caldeira relies on responses collected from February 3 to February 10, *see id.*, whereas Badas relies on responses collected from February 17 to February 22, *see* Badas, *supra* note 74, at 389.

<sup>85</sup> See Caldeira, *supra* note 74, at 1141–42.

<sup>86</sup> 301 U.S. 1 (1937); *see* Caldeira, *supra* note 74, at 1148.

<sup>87</sup> Caldeira, *supra* note 74, at 1142.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1148.

<sup>90</sup> *Id.* at 1150.

<sup>91</sup> See Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1054 (2014).

<sup>92</sup> Southern Manifesto, *supra* note 69, at 4460.

<sup>93</sup> *Id.*

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 states<sup>94</sup> — 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.<sup>95</sup> And in the Manifesto’s aftermath, proposals for Supreme Court reform abounded,<sup>96</sup> many of which paralleled those in currency today.<sup>97</sup>

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.”<sup>98</sup> 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,<sup>99</sup> the Southern Manifesto signatories objected to the Court’s enforcement of national trends against the racist habits of their region.<sup>100</sup> 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.

2. *Court Reform Today.* — The above accounts have suggested that moments of excitement about Supreme Court reform begin not because people suddenly care deeply about the formal structure of the Court but because they suddenly regard the Court as dangerous. Today, the Court experiences near-record-low popularity<sup>101</sup> as a result of several distinct narratives. Underneath them all, however, is a sense of alarm about the results that this Court has and will likely continue to reach.

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<sup>94</sup> Cf. White, *supra* note 3, at 185 (describing “the South’s immediate purpose of frustrating for the indefinite future total compliance with the law of the land”).

<sup>95</sup> See Doerfler & Moyn, *supra* note 1, at 1725–28 (surveying various proposals that would “disempower[]” the Court).

<sup>96</sup> See White, *supra* note 3, at 187 (surveying proposals); PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 57–58 (same).

<sup>97</sup> Cf. Doerfler & Moyn, *supra* note 1, at 1724–25 (providing an overview of modern Court reform proposals).

<sup>98</sup> White, *supra* note 3, at 196.

<sup>99</sup> See Badas, *supra* note 74, at 383–86.

<sup>100</sup> See White, *supra* note 3, at 196–97.

<sup>101</sup> See, e.g., Megan Brenan, *Views of Supreme Court Remain near Record Lows*, GALLUP (Sept. 29, 2023), <https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx> [<https://perma.cc/483C-UGT5>].

Some people are angry because, they claim, the current Court is the product of improper maneuvering by actors in the elected branches.<sup>102</sup> Regarding then–Chief Judge Garland’s failed nomination, followed by the successful confirmation of Justice Gorsuch, the popular narrative goes: “Mitch McConnell stole a Supreme Court nomination from Barack Obama and gave it to Donald Trump.”<sup>103</sup> In stalling consideration of Chief Judge Garland, Senator McConnell cited the imminence of the 2016 election — which led to a second claim of stolen seats when, in October 2020, Justice Barrett was confirmed to replace Justice Ginsburg days before the 2020 election.<sup>104</sup> But Democrats have previously endorsed similar strategies to those employed by Senator McConnell,<sup>105</sup> suggesting that the fervor against Republican gamesmanship comes more from the ends it advances than the means by which it does so.

Others believe that the Court has structural features that make it more likely to produce undemocratic outcomes, and its recent results have simply thrown those features into stark relief.<sup>106</sup> Proponents of this “antidemocracy”<sup>107</sup> view emphasize that recently, the Court has reached conservative results and wielded the Constitution to hamper popular legislation,<sup>108</sup> but they believe that those actions result from its inherently antidemocratic nature.<sup>109</sup> Proponents point out that even when the Court reached consistently progressive results under Chief Justice Warren, it “struggle[d] to legitimate” its actions with regard to democracy.<sup>110</sup> Progressive proponents of this view contend that, like a benevolent king being replaced by an evil one, today’s Court is using its antidemocratic power to cause bad effects in the world.<sup>111</sup>

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

<sup>102</sup> See, e.g., David Daley, Opinion, *Republicans Have Hijacked the US Supreme Court. It’s Time to Expand It*, THE GUARDIAN (June 27, 2022, 2:27 AM), <https://www.theguardian.com/commentisfree/2022/jun/27/us-supreme-court-abortion-roe-v-wade-justices-expansion> [https://perma.cc/4YBF-EYC3].

<sup>103</sup> John Nichols, *McConnell Explains How He’ll Steal Another Supreme Court Pick from Another Democratic President*, THE NATION (June 15, 2021), <https://www.thenation.com/article/politics/mcconnell-biden-supreme-court> [https://perma.cc/H9YU-ZN6H].

<sup>104</sup> See McFall, *supra* note 64.

<sup>105</sup> See sources cited *supra* note 65.

<sup>106</sup> See, e.g., Doerfler & Moyn, *supra* note 1, at 1711 (“[T]he problem is . . . not only . . . institutional capture by the right . . . Rather, the problem is that the institution is undemocratic in role and output.”).

<sup>107</sup> For a discussion of the antidemocracy view, see Bowie, *supra* note 25.

<sup>108</sup> See *id.*; Doerfler & Moyn, *supra* note 1, at 1718–19.

<sup>109</sup> See Doerfler & Moyn, *supra* note 1, at 1719–20.

<sup>110</sup> *Id.*; cf. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 927, 939–40 (1973) (arguing *Roe* was unjustifiable because it resolved a contested moral and political question about which the Constitution said nothing).

<sup>111</sup> See, e.g., *Supreme Court Reform*, AM. CONST. SOC’Y, <https://www.acslaw.org/projects/supreme-court-reform> [https://perma.cc/RS5Q-Y78V] (connecting the Court’s structural problems to “harm imposed” by it).

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,”<sup>112</sup> and that such rulings “presage[] . . . harmful outcomes on issues ranging from contraception to same-sex marriage to immigration to climate change.”<sup>113</sup> In other words: the Court is simply “[b]roken.”<sup>114</sup>

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.<sup>115</sup>

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.”<sup>116</sup>

### 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

<sup>112</sup> Kaitlin Byrd, *The Supreme Court Is Profoundly Broken*, DAME (June 13, 2023), <https://www.damemagazine.com/2023/06/13/the-supreme-court-is-profoundly-broken> [https://perma.cc/6SZH-GAA3].

<sup>113</sup> Doerfler & Mystal, *supra* note 1.

<sup>114</sup> *Id.*

<sup>115</sup> *Supreme Court Reform*, *supra* note 111.

<sup>116</sup> *Id.*

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.”

*I. 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.<sup>117</sup> 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,<sup>118</sup> 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.<sup>119</sup> (The story of its founding is, in part, the story of getting out from under

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<sup>117</sup> See FALLON, *supra* note 2, at 23–24. The word “legitimacy” serves two other related purposes in discussion of the Court. *Id.* at 21. Sociological legitimacy refers to whether people approve of the Court and adhere to its rulings. *Id.* at 21–22. Legal legitimacy refers to whether the Court’s interpretations are permissibly within the rules of the legal system. *Id.* at 35.

<sup>118</sup> See *id.* at 23–24. For an illustration of the coercive power behind the Court’s proclamations, see Conor Friedersdorf, *Enforcing the Law Is Inherently Violent*, THE ATLANTIC (June 27, 2016), <https://www.theatlantic.com/politics/archive/2016/06/enforcing-the-law-is-inherently-violent/488828> [<https://perma.cc/S2RE-GZE9>], quoting Professor Stephen Carter for the proposition that:

Every law is violent. . . . [E]ven a breach of contract requires a judicial remedy; and if the breacher will not pay damages, the sheriff will sequester his house and goods; and if he resists the forced sale of his property, the sheriff might have to shoot him.

. . . .  
 . . . Behind every exercise of law stands the sheriff . . . . Is this an exaggeration? Ask the family of Eric Garner, who died as a result of a decision to crack down on the sale of untaxed cigarettes.

*Id.* (quoting Professor Stephen L. Carter). There are several recent examples of the coercive power of law. See *Jones v. Hendrix*, 143 S. Ct. 1857, 1877 (2023) (Sotomayor & Kagan, JJ., dissenting) (“[T]oday’s decision yields disturbing results. . . . A prisoner who is actually innocent, imprisoned for conduct that Congress did not criminalize, is forever barred . . . from raising that claim, merely because he previously sought postconviction relief.”); Morgan Carmen, *Abortion Snitching Is Already Sending People to Jail*, MS. MAG. (Sept. 23, 2023, 8:15 AM), <https://msmagazine.com/2023/08/19/celeste-burgess-abortion-snitching-privacy-police-illegal> [<https://perma.cc/D82Q-FNVB>] (describing a mother who is serving a two-year prison sentence for helping her seventeen-year-old daughter obtain and use abortion pills).

<sup>119</sup> See FALLON, *supra* note 2, at 29.

the thumb of a strange and alien ruler.<sup>120</sup>) 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.<sup>121</sup>

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,<sup>122</sup> 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."<sup>123</sup> 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."<sup>124</sup> 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 outrage<sup>125</sup> and decried for eroding basic rights,<sup>126</sup> 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."<sup>127</sup> "[A]ll legitimate constitutional decisions must be prepared to"<sup>128</sup> 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,<sup>129</sup> because they violated ethical commitments that are essential to our national identity.<sup>130</sup>

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<sup>120</sup> Cf. *Boyd v. United States*, 116 U.S. 616, 625 (1886) (describing England's colonial practice "of issuing writs of assistance . . . [empowering] revenue officers . . . to search suspected places for smuggled goods" without warrant, which John Adams called the birth of the Revolution).

<sup>121</sup> See FALLON, *supra* note 2, at 26.

<sup>122</sup> See, e.g., *id.* at 31 ("In going forward, I shall assume, as I have said, that the American legal regime is morally legitimate in its relationship to most if not all citizens, but not without anxiety that the question, 'morally legitimate with respect to whom?' deserves more searching examination than I can give it here.")

<sup>123</sup> *Id.* at 28.

<sup>124</sup> *Id.* at 29.

<sup>125</sup> See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2350 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting); *West Virginia v. EPA*, 142 S. Ct. 2587, 2626–27 (2022) (Kagan, J., dissenting); *Shelby County v. Holder*, 570 U.S. 529, 593–94 (2013) (Ginsburg, J., dissenting).

<sup>126</sup> See, e.g., sources cited *supra* note 1.

<sup>127</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018); see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

<sup>128</sup> See Greene, *supra* note 127, at 380.

<sup>129</sup> See *id.* at 463.

<sup>130</sup> See *id.*



The anticanonical cases — which denied citizenship to Black people,<sup>131</sup> affirmed the constitutionality of Jim Crow segregation,<sup>132</sup> invalidated a state’s attempt to protect its workers from exploitation,<sup>133</sup> and permitted the internment of Japanese Americans under the President’s executive power<sup>134</sup> — show that the Court can issue decisions whose *rejection* is essential to our nation’s constitutional identity.<sup>135</sup> The wrongness of the anticanon has been affirmed and invoked by judges and politicians across the political spectrum.<sup>136</sup> 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.<sup>137</sup> Therefore, it is possible for the Court to do something that, in time,<sup>138</sup> 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.<sup>139</sup> But opposition to each case in the anticanon was also far from unanimous.<sup>140</sup> 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 autonomy<sup>141</sup> — is fundamentally wrong as a matter of substance.

### Conclusion

The purpose of this Chapter has been to change the kinds of reasons that are invoked in favor of stasis or change. If what is really at issue is a disagreement about values, talking in circles about the content or applicability of neutral principles is as pointless as is an argument between spouses about the dishes. And, like in arguments between spouses, getting down to the real, unspoken issue can yield several

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<sup>131</sup> See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>132</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

<sup>133</sup> See *Lochner v. New York*, 198 U.S. 45, 64 (1905).

<sup>134</sup> See *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

<sup>135</sup> See Greene, *supra* note 127, at 463.

<sup>136</sup> See *id.* at 405; see also *id.* at 460 (explaining that the anticanon is referenced “by all sides of modern political and legal controversies”).

<sup>137</sup> See *id.* at 463.

<sup>138</sup> See *id.* at 460.

<sup>139</sup> See, e.g., Sherif Girgis, *Dobbs’s History and the Future of Abortion and Privacy Law*, SCOTUSBLOG (June 28, 2022, 1:53 PM), <https://www.scotusblog.com/2022/06/dobbs-history-and-the-future-of-abortion-and-privacy-law> [<https://perma.cc/Z5JX-MZVD>].

<sup>140</sup> See Greene, *supra* note 127, at 408–09, 415, 419–20, 425–26.

<sup>141</sup> See, e.g., Rachel Shelden, *What Dred Scott Teaches Us About the Draft Abortion Ruling*, WASH. POST (May 7, 2022, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/05/07/what-dred-scott-teaches-us-about-supreme-courts-abortion-ruling> [<https://perma.cc/4JV6-WJ3Y>].

benefits, even if it does not immediately resolve the conflict. The process of deliberating the underlying merits can help both sides to reach consensus, and simply airing the equities can create a feeling of fairness and being heard.

This Chapter has argued that pro-reform movements arise from profound substantive disagreements with the Court. Although neutral arguments about the Court's formal structure provide the language through which reformers state their case, the reason why they advance those arguments is that they fear the Court. A person opposing this argument for reform can do one of two things. She can address the substantive objection directly, by explaining why the Court's actions are not substantively wrong (or at least not so substantively wrong as to require immediate intervention). Alternatively, she can explain why reform would not solve the substantive problem — or propose an alternative that would solve it more effectively. But it is not enough for opponents to reform to continue to fall back on neutral principles concerning the Court's structure.

What matters about today's Court is more than simply how many Justices sit on it, how and why they were appointed, or what role it occupies in our constitutional order. What matters is also what it is doing: forcing people, including children, to carry unwanted and dangerous pregnancies;<sup>142</sup> creating new limitations on the federal government's ability to address the climate crisis;<sup>143</sup> and hampering efforts to promote racial equality.<sup>144</sup> Proponents of reform should be clear that this is why they object — and defenders of the Court's status should be made to answer these objections directly.

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<sup>142</sup> See, e.g., Nicole Walker, Opinion, *My Abortion at 11 Wasn't a Choice. It Was My Life.*, N.Y. TIMES (Aug. 18, 2022), [www.nytimes.com/2022/08/18/opinion/abortion-pregnancy-child-roe.html](https://www.nytimes.com/2022/08/18/opinion/abortion-pregnancy-child-roe.html) [<https://perma.cc/29HU-879J>]; David N. Hackney, Opinion, *I'm a High-Risk Obstetrician, And I'm Terrified for My Patients*, N.Y. TIMES (July 5, 2022), <https://www.nytimes.com/2022/07/05/opinion/ob-gyn-roe-v-wade-pregnancy.html> [<https://perma.cc/MVM5-LT9W>].

<sup>143</sup> See David Wallace-Wells, Opinion, *The Supreme Court's E.P.A. Decision Is More Gloom than Doom*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/opinion/environment/supreme-court-climate-change-west-virginia-epa.html> [<https://perma.cc/WCN8-RBGH>].

<sup>144</sup> See Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done.*, N.Y. TIMES (July 8, 2023), <https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html> [<https://perma.cc/V2TZ-4QSZ>].

## CHAPTER TWO

### REFORM CONGRESS, NOT THE COURT

Public approval of the Supreme Court has fallen to historic lows.<sup>1</sup> The Court is not alone. Trust in government has collapsed.<sup>2</sup> Only twenty-six percent of Americans have a favorable view of Congress.<sup>3</sup> Four percent of Americans believe that our political system is working very well.<sup>4</sup> 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.<sup>5</sup> Institutions lose public trust when they are perceived as stepping outside their lane.<sup>6</sup> The Supreme Court's lane is law.<sup>7</sup> The Court itself is cognizant of the fact that when a court of law plays politics, it loses public trust.<sup>8</sup> 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

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<sup>1</sup> Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (July 21, 2023), <https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low> [<https://perma.cc/9SAX-UE5J>].

<sup>2</sup> See *Public Trust in Government: 1958–2023*, PEW RSCH. CTR. (Sept. 19, 2023), <https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023> [<https://perma.cc/Q6DP-58ZN>].

<sup>3</sup> PEW RSCH. CTR., *AMERICANS' DISMAL VIEWS OF THE NATION'S POLITICS* 34 (2023), [https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2023/09/PP\\_2023.09.19\\_views-of-politics\\_REPORT.pdf](https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2023/09/PP_2023.09.19_views-of-politics_REPORT.pdf) [<https://perma.cc/54D9-7WVB>].

<sup>4</sup> *Id.* at 5.

<sup>5</sup> Yuval Levin, Opinion, *How Did Americans Lose Faith in Everything?*, N.Y. TIMES (Jan. 18, 2020), <https://www.nytimes.com/2020/01/18/opinion/sunday/institutions-trust.html> [<https://perma.cc/A9HS-GTJN>].

<sup>6</sup> See *id.*

<sup>7</sup> See STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* 85 (2021) (tying “the public’s confidence in the Court itself” to its role “as a legitimate interpreter of laws”); *id.* at 64 (“The job of constitutional judges is to interpret or to apply the legal phrases that we find either in a statute or in the Constitution itself.”); see also LAWRENCE LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION* 42 (2019) (“If a court decides a case one way on day one and a different way on day two, it erodes confidence in the court as an institution applying the law in a proper manner.”).

<sup>8</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (“The Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”).

majestic specificity,<sup>9</sup> the Court's critics have long read our Constitution as instead marked by what Justice Robert Jackson famously termed "majestic generalities."<sup>10</sup> 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.<sup>11</sup> "Congress has become a 'parliament of pundits,'" incapable of legislating on what citizens care most about.<sup>12</sup> Although Congress steps up to the legislative plate here and there to respond to crises<sup>13</sup> and to authorize certain crucial government programs and activities,<sup>14</sup> Congress has grown incapable of responding to the most politically salient issues of our time in the form of legislation.<sup>15</sup> 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.<sup>16</sup> As a result, when the Supreme Court hands down a constitutional holding or reverses executive action on issues like abortion,

<sup>9</sup> Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, 2017 Walter Berns Constitution Day Lecture at the American Enterprise Institute (Sept. 18, 2017), <https://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf> [<https://perma.cc/5NZD-BW48>]; see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 846 (2015) (Roberts, C.J., dissenting) ("Justice Jackson once wrote that the Constitution speaks in 'majestic generalities.' In many places it does, and so we have cases expounding on 'freedom of speech' and 'unreasonable searches and seizures.' Yet the Constitution also speaks in some places with elegant specificity." (citations omitted) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); U.S. CONST. amends. I, IV)).

<sup>10</sup> *E.g.*, *Barnette*, 319 U.S. at 639.

<sup>11</sup> Cf. Ganesh Sitaraman, *How to Rein In an All-Too-Powerful Supreme Court*, THE ATLANTIC (Nov. 16, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/> [<https://perma.cc/VQS5-BL6W>] ("[T]he reality is that the Court plays a large role in the policy process because of how difficult it is for Congress to act.").

<sup>12</sup> SARAH ISGUR, DAVID FRENCH & JONAH GOLDBERG, NAT'L CONST. CTR., RESTORING THE GUARDRAILS OF DEMOCRACY: TEAM CONSERVATIVE 5 (2022), [https://constitution-center.org/media/files/Team\\_conservative\\_final.pdf](https://constitution-center.org/media/files/Team_conservative_final.pdf) [<https://perma.cc/W46H-P5BU>].

<sup>13</sup> See Philip Wallach, *Crisis Government*, 44 NAT'L AFFS., Summer 2020, at 31, 31.

<sup>14</sup> See, e.g., *Congress Passes Contentious Defense Policy Bill Known as NDAA, Sending It to Biden*, CBS NEWS (Dec. 14, 2023, 10:53 AM), <https://www.cbsnews.com/news/senate-passes-defense-policy-bill/> [<https://perma.cc/YB94-CZY6>].

<sup>15</sup> For discussions and empirical proof of Congress's growing inability to pass legislation that is responsive to the most politically salient issues of the day, see, for example, SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2003); Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 91–94 (2015); Sarah Binder (@bindersab), TWITTER (Mar. 3, 2022, 2:58 PM), <https://twitter.com/bindersab/status/1499474222271320071> [<https://perma.cc/B852-T3Y8>].

<sup>16</sup> See generally Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014). For a recent example of the Court preventing an executive agency from leveraging an old statute to respond to a new problem, see *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

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.

Section A contends that today's arguments surrounding the Court's holdings boil down to interpretive disputes. It draws upon Roberts Court case law and contemporary academic debates. By surveying academic writings, it underscores that the Court is not alone in fighting over the determinacy of legal texts. The very fact that some of the most consequential fights in the academy collapse into disputes about determinacy indicates that such disputes are a core feature of legal disagreement today — whether in the pages of law reviews or the *U.S. Reports*.

Section B pinpoints three principal reasons why it would be a mistake to impose structural reforms on the Supreme Court. First, implementing the most common reform suggestions — increasing the number of Justices, imposing term limits, and restricting the Court's jurisdiction<sup>17</sup> — would do nothing to resolve the underlying dispute over how to properly interpret the Constitution and statutes. Second, imposing these types of reforms would impair the Supreme Court's independence and send a clear (and dangerous) message to the judiciary: interpret legal texts as political majorities see fit or there will be consequences. As Justice Breyer has explained, such reforms would have the perverse effect of labeling the Court as a political institution and hampering its legitimacy in the long run.<sup>18</sup> Third, to the extent that citizens and elected officials care about disputes about determinacy because the Court's current approach to such disputes may result in unsatisfactory legal and political arrangements, We the People are not powerless. The

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<sup>17</sup> See, e.g., PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 20-21 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/N9GR-KME8>]; cf. *supra* ch. I, section A, pp. 1637-43 (summarizing popular arguments for and against structural reform).

<sup>18</sup> BREYER, *supra* note 7, at 63.

legal texts at the center of the determinacy debate can be revised to be more or less specific. To be sure, such revisions seem unthinkable right now. But our seeming inability to enact such meaningful legal changes should nudge us toward reforming Congress, not the Supreme Court. With Congress reformed and resurgent, the political stakes of the Court's inescapable disputes about determinacy will lower. The Court will remain in its lane; the public will be more apt to perceive the Court accordingly; and Americans' judgment that the Court isn't trustworthy can be reversed.

A. *Roberts Court Case Law & Academic Debates*

1. *Defining Disputes About Determinacy.* — At the outset, we must define “disputes about determinacy.” 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. Consider disputes about determinacy in the constitutional context. When confronted with the same set of evidentiary materials (like Founding-era debates, historical context, and early political practice), two camps engaged in a dispute about the Constitution's determinacy emerge: (1) those who view the Constitution as an open-textured document that provides a flexible framework for government and few clear-cut answers to contemporary legal questions; and (2) those who view the Constitution as a document filled with provisions of rich, constraining meaning when read in context — which, in turn, offer fixed answers to many contemporary legal questions.<sup>19</sup>

The first camp reads the Constitution as an inherently indeterminate document. This camp points out that the Constitution was written well over two centuries ago in deliberately imprecise language, making it difficult — if not impossible — to find many concrete answers within its general provisions, no matter how hard one looks.<sup>20</sup> According to this camp, there are few concrete answers. And even if there *were* more concrete answers that could somehow be mined from the document, applying those answers to twenty-first-century legal and social problems would still involve making discretionary judgments.<sup>21</sup> Temporal hurdles aside, this camp believes that the Constitution is fundamentally a charter for governance — a document that should be interpreted so that

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<sup>19</sup> Of course, determinacy runs along a spectrum, and different members of the two “sides” or “camps” fall along different points on that spectrum. But for purposes of clarifying the nature of the dispute, articulating the two poles is most helpful. That is, oversimplification helps clarify the concepts.

<sup>20</sup> See, e.g., Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1498–99 (2021) (collecting such critiques).

<sup>21</sup> Cf. *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (arguing in favor of an “interest-balancing inquiry” weighing the interests protected by the Second Amendment against the government's interest in modern public safety).

it “really truly can last over time.”<sup>22</sup> Under this view, the Constitution established a basic framework of government, and the document’s Framers expected the Constitution’s many indeterminacies to be worked out over time.<sup>23</sup> This side of the divide’s operating premise has long been constant: the Constitution is fundamentally indeterminate, and it has some play in the joints. But members within this camp often disagree about the upshot of this insight: Should judges fill in the Constitution’s gaps themselves? Or should judges instead take a deferential view and allow the political process to fill in the gaps?

By contrast, when canvassing the same historical and legal materials, the other camp is likely to ascribe more determinate answers to the Constitution. They are less apt to find irresolvable ambiguity in legal texts — regardless of whether they are looking at the Constitution or at a statute. On this view, there is a singularly correct, findable answer to most legal questions. The Constitution either prevents the government from doing something or it does not. A statute either empowers an administrative agency to promulgate a particular regulation or it does not. It will require hard work, but there is an answer to be found. And the tools available to find that answer — dictionaries, canons of construction, corpus linguistics, deep dives into the historical context in which the text was drafted and ratified, inferences from the structure of the constitutional or statutory scheme at issue — are up to the task more often than not.

Across several different areas of constitutional law, the dividing line between majority opinions and dissents often closely tracks the question of just how determinate our Constitution is. The fact that these same disputes routinely surface in fights over statutory interpretation further supports framing these constitutional bouts as legal, interpretive disagreements. And it is no coincidence that these very same arguments are reproduced in the legal academic literature focused on constitutional interpretation: both the law reviews and the U.S. Reports overflow with disputes about determinacy.

By putting a finger on a dynamic that’s long been percolating beneath the surface of interpretive debates, perhaps this Chapter can help both sides of those debates better grasp one of the primary drivers of their disagreements. That enhanced understanding could lead to more fruitful dialogue, and most importantly for present purposes, it cuts against the notion that these disputes — which undergird so much of the disagreement with the Supreme Court’s recent holdings — warrant structural reform of the Supreme Court.

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<sup>22</sup> Sandra Knispel, *Justices Appear in Oxford*, MISS. PUB. BROAD. (Feb. 3, 2020), <https://www.mpbonline.org/blogs/news/justices-appear-in-oxford> [<https://perma.cc/H87H-KUXV>] (quoting Justice Kagan).

<sup>23</sup> See, e.g., *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

2. *Roberts Court Case Law.* — With a conservative majority on the Court that tends to be more comfortable reading the Constitution as determinate,<sup>24</sup> dissenting Justices are often left contending that this centuries-old document's answers to the questions at hand are far less clear than the majority acknowledges. For the dissenters, the Constitution has more play in the joints than the majority credits, and either judges or the political branches have leeway to make decisions and craft doctrine within those gaps. This dispute about constitutional determinacy holds true across different areas of constitutional law, from unenumerated constitutional rights to structural questions. Nor is the dispute confined to constitutional questions; it routinely bubbles to the surface in the context of fights over statutory interpretation and judicial deference to administrative agencies.

(a) *Unenumerated Rights.* — Recent case law regarding the scope of unenumerated constitutional rights and the provisions that give rise to them, such as the Due Process Clause of the Fourteenth Amendment, have laid bare disputes about determinacy. With the Privileges or Immunities Clause long dormant as the mechanism for enforcing individual rights against state infringement under the Fourteenth Amendment,<sup>25</sup> the Due Process Clause — particularly substantive due process — has filled the void.

Substantive due process is an area where the side that sees more determinacy in the Constitution — a perspective that commands a majority on the Court today<sup>26</sup> — sees *fewer* answers and thus fewer constraints on the political branches. More determinacy does not always result in more governmental constraints. For those on this side of the determinacy divide, when read in its historical context, the meaning of the phrase “due process of law” is clear enough: it primarily provides for procedural due process (fair notice, an impartial decisionmaker, and so forth). One wrinkle to that clear-cut rule is that the Due Process Clause can also protect certain well-defined, long-recognized fundamental rights.<sup>27</sup>

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<sup>24</sup> An interpreter's assessment of a text's determinacy might flow from, or at least be wrapped up with, the interpreter's other commitments and predilections. For example, judicial conservatives' willingness to read the text of the Constitution as largely determinate might itself be wrapped up with or flow from conservatives' traditional reticence toward judicial discretion. Compare Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1125–26 (1998) (advocating strict textualist interpretation for judges, but not necessarily for others engaged in interpretation, like Congress, students, and the like), and ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 9–12 (Amy Gutmann ed., Princeton Univ. Press 2018) (1997), with Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947) (“In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment.”).

<sup>25</sup> See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74–80 (1873).

<sup>26</sup> See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240, 2242 (2022).

<sup>27</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).



By contrast, the camp that interprets the Constitution as more of an indeterminate document reads the Due Process Clause as home to open-ended, grand language. The Fourteenth Amendment’s prohibition on depriving persons of “liberty” without “due process of law” is said to be a central piece of the Constitution’s implied promise of “liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”<sup>28</sup> The guarantee’s contours are far more indeterminate (and thus potentially more extensive) than, say, its protection against being thrown in jail without fair notice of the alleged crime and a hearing before an impartial tribunal.<sup>29</sup> Instead, the liberty it safeguards “extend[s]” to an undefined range of “personal choices central to individual dignity and autonomy.”<sup>30</sup>

Consider how this divide came to the fore in recent years in the context of abortion rights. The *Roe*<sup>31</sup> right rested on a premise of indeterminacy: the Court viewed the “right of privacy” as “founded in the Fourteenth Amendment’s concept of personal liberty,” and reasoned that the privacy right was sufficiently broad and open-ended — not fixed — to encompass “a woman’s decision whether or not to terminate her pregnancy.”<sup>32</sup> Then-Justice Rehnquist’s dissenting opinion critiqued the majority for resorting to “judicial legislation.”<sup>33</sup> The majority and concurring opinions drew upon precedents that called on the Court to work out what they took to be the inherently open-ended meaning of the Due Process Clause. The liberty protected by the Due Process Clause was a “rational continuum” that protected against “all substantial arbitrary impositions and purposeless restraints”;<sup>34</sup> it provided a broad “concept of liberty” that, in conjunction with the penumbral emanations from the specific guarantees of the Bill of Rights, protected a right to privacy whose contours would be fleshed out gradually.<sup>35</sup> In reworking *Roe*’s framework while still retaining constitutional protection for the core of the abortion right, the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>36</sup> adopted a similar view of the Due Process Clause’s guarantee — one that is imprecise and

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<sup>28</sup> *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015).

<sup>29</sup> See, e.g., *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

<sup>30</sup> *Obergefell*, 576 U.S. at 663 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965)).

<sup>31</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>32</sup> *Id.* at 153.

<sup>33</sup> *Id.* at 174 (Rehnquist, J., dissenting); see also *Doe v. Bolton*, 410 U.S. 179, 221–22 (1973) (White, J., dissenting).

<sup>34</sup> *Roe*, 410 U.S. at 169 (Stewart, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

<sup>35</sup> *Id.* at 152–53 (majority opinion) (citing, inter alia, *Griswold*, 381 U.S. at 484–85; *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

<sup>36</sup> 505 U.S. 833 (1992).

inconclusive. According to *Casey*, the “liberty” of which the Due Process Clause speaks entails “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>37</sup>

In overturning *Roe* and *Casey*, *Dobbs v. Jackson Women’s Health Organization*<sup>38</sup> returned to the *Roe* dissenters’ original premise — that the relevant constitutional language had a more well-defined, more historically bounded, and less woolly meaning. Justice Alito’s majority opinion began by stressing that “the Constitution makes no mention of abortion.”<sup>39</sup> That mattered because according to the majority, the Constitution’s text “offers a ‘fixed standard’ for ascertaining what our founding document means.”<sup>40</sup> Nor did abortion satisfy the test for unenumerated rights laid out by Chief Justice Rehnquist in *Washington v. Glucksberg*<sup>41</sup>: the abortion right was not sufficiently “deeply rooted in this Nation’s history and tradition” so as to be “implicit in the concept of ordered liberty.”<sup>42</sup> *Glucksberg*’s restrictive standard helps resolve the indeterminacy that stems from opening the door at all to constitutional protection of unenumerated rights: the otherwise vague concept of ordered liberty is bounded by discrete historical facts.<sup>43</sup> The *Dobbs* majority explicitly noted *Glucksberg*’s capacity to cut down on indeterminacy (and thus judicial discretion): the tightly bounded historical inquiry is “essential” to hem in judges and prevent them from reading their own preferences into the Constitution when they interpret a term as potentially “capacious” as “liberty.”<sup>44</sup> Thus, the answer was straightforward for the *Dobbs* majority: without a textual basis or a strong historical pedigree, the abortion right fell outside the Fourteenth Amendment’s protections.<sup>45</sup>

In their defense of the *Roe-Casey* line of cases, the *Dobbs* dissenters stressed how *Casey* had recognized the open-ended nature of “liberty” under the Due Process Clause: “That guarantee encompasses realms of

<sup>37</sup> *Id.* at 851.

<sup>38</sup> 142 S. Ct. 2228 (2022).

<sup>39</sup> *Id.* at 2240; *see also id.* at 2304 (Kavanaugh, J., concurring) (“The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion.”).

<sup>40</sup> *Id.* at 2245 (majority opinion) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 399, at 383 (1833)).

<sup>41</sup> 521 U.S. 702, 720–21 (1997).

<sup>42</sup> *Dobbs*, 142 S. Ct. at 2242 (quoting *Glucksberg*, 521 U.S. at 721).

<sup>43</sup> *See Glucksberg*, 521 U.S. at 721 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

<sup>44</sup> *Dobbs*, 142 S. Ct. at 2247–48; *cf. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2166 (2023) (quoting *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2211 (2016)) (requiring asserted interests be “sufficiently measurable” to facilitate judicial review under the strict scrutiny standard); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) (“[I]t is easier to arrive at categorical rules if one acknowledges that the content of evolving concepts is strictly limited by the actual practices of the society.”).

<sup>45</sup> *Dobbs*, 142 S. Ct. at 2242–43.

conduct not specifically referenced in the Constitution,”<sup>46</sup> and it “encompasses conduct today that was not protected at the time of the Fourteenth Amendment.”<sup>47</sup> In other words, the clause’s vague contours are not fixed and defined; they evolve over time as judicial precedent, social norms, and political practice fill in the gaps.

(b) *Separation of Powers*. — Disputes about determinacy have not been confined to matters of individual constitutional rights. These fights permeate majority and dissenting opinions regarding the separation of powers, too. One camp — more willing to read legal texts as determinate — relies on history and constitutional structure to infuse terms like “legislative power” and “executive power” with thick meanings so as to constrain contemporary political actors’ ability to establish novel governing arrangements.<sup>48</sup> That camp’s detractors accuse them of using these open-ended phrases as “textual hooks” upon which they hang more meaning than such sparse text can bear.<sup>49</sup>

Consider the Court’s removal cases, including *Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>50</sup> and *Seila Law LLC v. CFPB*.<sup>51</sup> The dividing line in these cases tracked the Justices’ answers to an underlying dispute about determinacy: Was the combination of the Take Care Clause and Vesting Clause sufficiently determinate so as to constitutionally bar Congress’s for-cause removal protections for certain executive branch officers? Or was there sufficient play in the joints in the meaning of these provisions — coupled with Congress’s extensive authority under the Necessary and Proper Clause — to enable Congress to insulate the executive officers from presidential removal?

In *Free Enterprise Fund*, Chief Justice Roberts’s majority opinion began from the premise that the “Decision of 1789” largely controlled the question: in setting up the new federal government, the First Congress concluded that a broad presidential removal power flowed from the text of Article II and the overarching structure of separated powers.<sup>52</sup> So too in *Seila Law*, where the Chief Justice — again writing for the majority — reiterated that a broad removal power was grounded in “the text of Article II, was settled by the First Congress,”<sup>53</sup> and had

<sup>46</sup> *Id.* at 2321 (Breyer, Sotomayor & Kagan, JJ., dissenting) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–48 (1992)).

<sup>47</sup> *Id.* at 2321–22 (citing *Casey*, 505 U.S. at 848).

<sup>48</sup> See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment); *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

<sup>49</sup> See Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1319–22 (2019).

<sup>50</sup> 561 U.S. 477 (2010).

<sup>51</sup> 140 S. Ct. 2183 (2020).

<sup>52</sup> *Free Enterprise Fund*, 561 U.S. at 492 (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986)).

<sup>53</sup> *Seila Law*, 140 S. Ct. at 2191.

been confirmed by longstanding precedents like *Myers v. United States*.<sup>54</sup>

The dissents in *Free Enterprise Fund* and *Seila Law* rejected the notion that the meaning of the Take Care and Vesting Clauses was thick enough to cover a presumptive presidential removal power.<sup>55</sup> For example, at the outset of her *Seila Law* dissent, Justice Kagan stressed that “[n]othing in [the Constitution’s text] speaks of removal.”<sup>56</sup> Thus, explained Justice Kagan, in the face of this “telltale silence,” the majority was really drawing inferences from the structural separation of powers.<sup>57</sup> Not only were those inferences unfounded,<sup>58</sup> but also “the separation of powers is, by design, *neither rigid nor complete*.”<sup>59</sup> This constitutional silence — paired with Congress’s power under the Necessary and Proper Clause<sup>60</sup> — should have left Congress with extensive leeway to “structure administrative institutions as the times demand.”<sup>61</sup> Given that “the Constitution . . . does not lay out immutable rules” in this context, “then neither should judges.”<sup>62</sup> On this point, Justice Kagan was mounting arguments reminiscent of her well-known *Presidential Administration* article, published in these pages.<sup>63</sup> There, then-Professor Kagan noted that “[t]he original meaning of Article II is insufficiently precise . . . to support the unitarian position” regarding the President’s removal power.<sup>64</sup>

(c) *Statutory Interpretation: Textualism, Purposivism, and Chevron*. — The claim that so many of the most heated legal disagreements about the Constitution’s meaning boil down to disputes about the

<sup>54</sup> 272 U.S. 52 (1926); *Seila Law*, 140 S. Ct. at 2192.

<sup>55</sup> See, e.g., *Seila Law*, 140 S. Ct. at 2227 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (“The majority relies for its contrary vision on Article II’s Vesting Clause, but the provision can’t carry all that weight.” (citation omitted)); *id.* at 2228 (“Nor can the Take Care Clause come to the majority’s rescue.”).

<sup>56</sup> *Id.* at 2225.

<sup>57</sup> See *id.* at 2228–29; see also *id.* at 2237 (“The [Constitution] — with great good sense — sets out almost no rules about the administrative sphere.”).

<sup>58</sup> *Id.* at 2226 (“The text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance — all stand against the majority’s opinion.”).

<sup>59</sup> *Id.* (emphasis added); cf. Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2028–29 (2022) (“As a principle of constitutional governance, the separation of powers is historically contingent, institutionally arbitrary, and inherently provisional. It comprises a set of broad, vague, conflicting, and contested political ideas (thinly connected to sparse and ambiguous constitutional text) and a set of overlapping, interacting institutions that participate in the messy work of national governance. There is no essential or immutable separation of powers.” (footnotes omitted)).

<sup>60</sup> *Seila Law*, 140 S. Ct. at 2228 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (citing John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1967, 1971 (2011)).

<sup>61</sup> *Id.* at 2226.

<sup>62</sup> *Id.* at 2237; cf. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 858 (2015); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 386 (2013).

<sup>63</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>64</sup> *Id.* at 2326.

extent of the document’s legal determinacy rings equally true in other areas of interpretive contention. Disputes about determinacy in the context of constitutional interpretation are just one piece of a much broader, comprehensive legal fight. The battle lines largely remain the same, but now the differences of opinion are brought to bear on statutes, not the Constitution. The very fact that constitutional arguments can be framed as pieces of a broader interpretive debate provides further evidence that many modern constitutional bouts are interpretive ones at their core.

To begin with, the underlying divide between textualists and purposivists can be framed in part as a dispute about determinacy. As then-Judge Kavanaugh once observed in these pages, a “critical difference between textualists and purposivists is that, for a variety of reasons, textualists tend to find language to be clear rather than ambiguous more readily than purposivists do.”<sup>65</sup> As purposivists are more apt to find statutory text ambiguous, they more readily “resort . . . to ambiguity-dependent canons and tools of construction such as constitutional avoidance, legislative history, and *Chevron*.”<sup>66</sup> Textualists like Justice Kavanaugh, by contrast, are more apt to find a sufficiently clear legal answer after bringing the very same tools of statutory interpretation to bear on the question at hand.<sup>67</sup>

*Chevron*<sup>68</sup> deference is one especially contentious area in statutory interpretation that showcases a deep dispute about determinacy. *Chevron* teaches that judges should defer to the reasonable statutory interpretations of an administrative agency when the agency’s organic statute is too indeterminate to clearly support or preclude an agency’s regulation.<sup>69</sup> *Chevron*’s domain extends to questions about which Congress has *not* expressed an intent, such that Congress has empowered the agency to fill gaps and exercise its discretion within whatever bounds the statute does set.<sup>70</sup>

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<sup>65</sup> Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2129 (2016) (book review); see also Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 269 (2022) (noting textualists’ “continuing assurances . . . that their method brought . . . determinacy to statutory cases”).

<sup>66</sup> Kavanaugh, *supra* note 65, at 2129.

<sup>67</sup> See Denise Wager, *ND Law Review Symposium Features Q&A with Supreme Court Justice Brett Kavanaugh*, UNIV. OF NOTRE DAME (Jan. 26, 2023), <https://law.nd.edu/news-events/news/2023-law-review-federal-courts-keynote-justice-brett-kavanaugh> [<https://perma.cc/FK62-NV5E>] (quoting Justice Kavanaugh referring to himself as a “footnote 9 *Chevron* person”); see also Doerfler, *supra* note 65, at 270 (arguing that textualists are “left to act as if statutory language admit[s] of only one plausible reading,” having abandoned *Chevron*). As Professor Caleb Nelson points out, even when textualists do concede that statutory language is ambiguous, “textualists tend to be quicker than intentionalists to settle upon the more rule-like meaning.” Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 350 (2005).

<sup>68</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>69</sup> See *id.* at 845.

<sup>70</sup> See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516; see also Transcript of Oral Argument at 12–13, *Relentless, Inc. v. Dep’t of Com.*,

Disputes about determinacy undergird disagreements about when and whether *Chevron* deference should be triggered. When confronted with the very same statute, one judge may see a fundamentally indeterminate provision allowing for agency discretion and gap-filling, while another judge may see an admittedly complex statute but nonetheless one with clear-cut legal meaning — meaning with which the agency has no choice but to comply.<sup>71</sup> As then-Judge Kavanaugh once put it: “One judge’s clarity is another judge’s ambiguity.”<sup>72</sup> Indeed it is.<sup>73</sup> While Supreme Court Justices have at times chided their lower court colleagues for too readily concluding that statutes are indeterminate,<sup>74</sup> some lower court judges profess to have *never* found a statutory ambiguity warranting resort to *Chevron* Step Two.<sup>75</sup>

(d) *Stare Decisis*. — In addition to motivating so many of our interpretive disagreements in the constitutional and statutory contexts, disputes about determinacy also shape emergent conflicts over the role that *stare decisis* should play in our law: How much respect is precedent due? As Professor Caleb Nelson explains, “the more determinate one considers the external sources of the law that judicial decisions seek to apply, the less frequently one might deem precedents binding.”<sup>76</sup> If one is more apt to view a particular legal provision’s meaning as clear and determinate, one will more readily set aside precedent in tension with that constitutional or statutory provision’s supposed meaning. One need look no further than the jurisprudence of Justice Thomas to grasp that this intuitive point plays out as expected in the real world.<sup>77</sup> By contrast, if one believes that a legal provision’s meaning deduced from the work of interpretation can only take us so far, then when deciding the case at hand one is more ready to look to the weight of precedent to help tip the scales.

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No. 22-1219 (U.S. Jan. 17, 2024), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2023/22-1219\\_e2p3.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-1219_e2p3.pdf) [<https://perma.cc/E77C-9SKJ>] (Justice Kagan stating that “sometimes law runs out. Sometimes there’s a gap. Sometimes there’s a genuine ambiguity.”).

<sup>71</sup> See, e.g., Transcript of Oral Argument, *supra* note 70, at 65–66 (Justice Jackson voicing a concern that some judges will mistake policymaking for legal interpretation).

<sup>72</sup> Kavanaugh, *supra* note 65, at 2137.

<sup>73</sup> Granted, it is unclear whether the divergence always tracks with partisanship or ideology. Disputes about determinacy in the constitutional realm often track with judicial ideology (with “conservatives” reading the document as more determinate and “liberals” reading it as less determinate). Though often presumed to be true in the *Chevron* context as well, see, e.g., Scalia, *supra* note 70, at 521, this connection between determinacy and judicial ideology might not always hold true in that context, see Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1515–17 (2018).

<sup>74</sup> See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

<sup>75</sup> See, e.g., Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017).

<sup>76</sup> Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 4 (2001).

<sup>77</sup> See, e.g., Jeremy Rozansky, *Precedent and the Conservative Court*, 46 NAT’L AFFS., Winter 2021, at 34, 37.

3. *The Mirror of Academic Debates.* — Disputes about determinacy are not unique to the Supreme Court; they pervade our legal discourse. Upon close examination, some of the most consequential fights in the academy — like the merits of originalism — collapse into disputes about determinacy. The centrality and importance of disputes about determinacy to academic debate indicate that judicial dialogue about determinacy is just one piece of an ongoing, broader conversation within our law.

Consider the countless pages of law review articles penned by legal academics about constitutional interpretive theory, such as the merits of originalism. Opposing sides in this debate often share certain interpretive premises in the abstract yet reach fundamentally different conclusions about legal outcomes based on how determinate a text they believe the Constitution to be. Professor Jack Balkin, for example, claims the mantle of originalism. He emphasizes that “fidelity to *original meaning* does not require fidelity to *original expected application*.”<sup>78</sup> On this front, Balkin is aligned with most modern-day originalists.<sup>79</sup> As leading originalist Professors William Baude and Stephen Sachs explain in response to Professor Adrian Vermeule’s recent critiques of originalism,<sup>80</sup> as a legal rule’s “designated inputs change, the outputs change accordingly.”<sup>81</sup> In the past, such claims would have been more apt to come from the likes of Professor Lawrence Lessig rather than mainstream originalists.<sup>82</sup> But now most modern originalists take no issue with the distinction between original meaning and original expected application.<sup>83</sup>

<sup>78</sup> Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009).

<sup>79</sup> See, e.g., Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), <https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution> [<https://perma.cc/CK7Y-Q9FY>] (“Originalism teaches only that the Constitution’s original meaning is fixed; meanwhile, of course, new applications of that meaning will arise with new developments and new technologies.”).

<sup>80</sup> See, e.g., ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 97–98, 105, 110–11 (2022).

<sup>81</sup> William Baude & Stephen E. Sachs, *The “Common-Good” Manifesto*, 136 HARV. L. REV. 861, 879 (2023) (reviewing VERMEULE, *supra* note 80).

<sup>82</sup> See Jack Goldsmith (@jackgoldsmith), TWITTER (Oct. 31, 2023, 6:30 PM), <https://twitter.com/jackgoldsmith/status/1719482120890921048> [<https://perma.cc/R9UU-M3HQ>] (characterizing Professor Robert Leider’s proffered “distinction between replacing old law with new law and adapting old law to new situations” as “[s]ound[ing] like @lessig originalism from three decades ago” (quoting Robert Leider (@LeiderRob), TWITTER (Oct. 31, 2023, 10:57 AM), <https://twitter.com/LeiderRob/status/1719368020630675948> [<https://perma.cc/DCQ2-UGN8>])).

<sup>83</sup> See, e.g., Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 564 (2006); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 27, 184 (2021); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 20–21 (2015).

Although Balkin and most originalists now share this interpretive premise,<sup>84</sup> they soon sharply diverge. The root of that divergence is a dispute about determinacy. To use his own phrasing, Balkin is a framework originalist.<sup>85</sup> Skyscraper originalists see the Constitution “as more or less a finished product,” albeit one amendable by way of the Article V process.<sup>86</sup> “Framework originalis[ts], by contrast, view[] the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction.”<sup>87</sup> Thus, “these two types of originalism differ in the degree of constitutional construction and implementation that later generations may engage in.”<sup>88</sup> In other words, skyscraper originalists read the Constitution as a more determinate document than framework originalists do.

Skyscraper and framework originalists’ dispute about determinacy is at the heart of their disagreements about the most consequential legal questions of our day. Balkin contends, for example, that a right to abortion is grounded in the Constitution’s original *meaning*, if not its original *expected application*.<sup>89</sup> Interestingly enough, this is a paradigm case to which Baude and Sachs, in rebutting Vermeule, point as evidence of progressives reading the Constitution as too abstract and too vague:

Perhaps . . . *in practice*, progressive activists are likely to read general provisions in excessively abstract ways, and then to use their incorrect political morality to fill in the abstractions. But the proximate cause of this problem is the excessively abstract reading. One can say that the Equal Protection Clause adopted an anticaste principle extending to abortion rights and same-sex marriage, but saying it doesn’t make it *true*, and for originalism the truth matters very much. How general a provision really was, and which abstractions it really invoked or ignored, are falsifiable claims about the law of the past.<sup>90</sup>

Faulting others for reading the Constitution “in excessively abstract ways”<sup>91</sup> is a way of saying that one’s interpretive foes are reading the Constitution as excessively indeterminate.

The disagreement here does not center on the point that legal outcomes may sometimes change as social facts and norms change. The divergence takes root at a later step in the analytical process, when one must decipher just how determinate the legal rule in question is. The more determinate the provision, the less room it leaves for

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<sup>84</sup> See, e.g., Sachs, *supra* note 62, at 852.

<sup>85</sup> See Balkin, *supra* note 78, at 550.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007).

<sup>90</sup> Baude & Sachs, *supra* note 81, at 881.

<sup>91</sup> *Id.*



“construction”<sup>92</sup> or updating with new social facts.<sup>93</sup> No matter how hard one tries, new social facts are not going to change the constitutional requirement that the President be at least thirty-five years old; the text is too clear, too determinate.<sup>94</sup> But if a provision is particularly indeterminate, its legal meaning may be nominally “fixed”<sup>95</sup> yet give rise to novel and unforeseen legal outcomes as the legally relevant norms and social facts change. Thus, as Professor Thomas Colby recognizes, if “originalists” read the Constitution as an *indeterminate* text, then there is often very little difference in practice between such originalists and living constitutionalists.<sup>96</sup> This, of course, is the very same point Vermeule was making that in turn triggered Baude and Sachs’s response.<sup>97</sup> And it is the ground upon which mainstream originalists critique Balkin specifically.<sup>98</sup>

The upshot is that these interpretive disagreements ultimately revolve around the determinacy of the Constitution’s text. After all, “[M]ost non-originalists treat the original meaning as the starting point for any interpretive inquiry, but are willing to look elsewhere . . . to construct constitutional meaning *when the text is vague or indeterminate*.”<sup>99</sup> The more willing originalists grow to read the Constitution’s text as indeterminate,<sup>100</sup> the less daylight is left between originalists and their alleged foes. That conundrum is explicitly why originalist Professors John McGinnis and Michael Rappaport argue that “[w]hile many constitutional provisions seem to be indeterminate,” when “the Constitution is properly understood . . . these provisions become more determinate.”<sup>101</sup> And perhaps it helps explain the prevalence of originalist scholars examining what have long been thought of as open-ended, indeterminate constitutional provisions and infusing them with more definite, determinate original meanings.<sup>102</sup> In sum, these disputes boil down to disputes about determinacy. The less determinate a document the Constitution

<sup>92</sup> See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 495–99 (2013).

<sup>93</sup> See John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 *NOTRE DAME L. REV.* 919, 920, 922 (2021); Balkin, *supra* note 78, at 553 (“If the text states a determinate rule, we must apply the rule in today’s circumstances. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle.”).

<sup>94</sup> See U.S. CONST. art. II, § 1, cl. 5.

<sup>95</sup> See Solum, *supra* note 83, at 1.

<sup>96</sup> Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 754–55 (2011).

<sup>97</sup> See VERMEULE, *supra* note 80, at 97–98, 105, 110–11; Baude & Sachs, *supra* note 81, at 879.

<sup>98</sup> See, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 *UCLA L. REV.* 1343, 1371 (2009).

<sup>99</sup> Peter J. Smith, *How Different Are Originalism and Non-originalism?*, 62 *HASTINGS L.J.* 707, 723 (2011) (emphasis added).

<sup>100</sup> Cf. Sachs, *supra* note 62, at 858.

<sup>101</sup> McGinnis & Rappaport, *supra* note 93, at 921.

<sup>102</sup> See, e.g., John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 *NW. U. L. REV.* 1739, 1767 (2008).

is, the more decades-long interpretive battle lines begin to collapse into one another.

Some of the foremost critics of originalism, like Professor Richard Fallon, have explicitly pointed out the centrality of disputes about determinacy in this context. Fallon concludes that Supreme Court Justices enjoy “significant authority to shape the law,”<sup>103</sup> as the ultimate legal rules governing the disposition of Supreme Court cases today are consistently “vague, indeterminate, or open-textured.”<sup>104</sup> He notes that this conclusion “will disturb other observers,” including originalists in particular, “who hold an ideal of the rule of law that calls for more legal determinacy.”<sup>105</sup>

Finally, originalists themselves ground their preferred interpretive method in the determinacy of the Constitution’s original meaning. Consider the defense of originalism recently offered by Fifth Circuit Court of Appeals Judge Oldham in these pages:

The best (dare I say only?) way to define and defend originalism against its critics is to show that some (dare I hope all?) provisions of the Constitution have determinate or “thick” original meanings — that is, that we can find the true, genuine, and objectively correct meaning of a constitutional provision with greater ease than a hound blindly searching for a truffle.<sup>106</sup>

Whichever side has the better of the argument, the point is that the two camps are battling it out on a playing field of determinacy. What is true in the *U.S. Reports* is true in the law reviews. Disputes about determinacy pervade our legal discourse. The Supreme Court is not alone.

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One cannot propose a sound solution without correctly understanding the problem. That is why pinpointing disputes about determinacy as a critical motivator behind the actual battles on the Court matters. Understanding the tension as such — as a *legal* argument at its core — should shape any political response to that tension.

#### *B. Disputes About Determinacy Do Not Call for Structural Reforms*

Having pinpointed how criticisms of the current Court rest on disputes about determinacy in the end, this Chapter now assesses whether those objections justify reforming the Supreme Court. The Presidential Commission on the Supreme Court recently engaged in a similar endeavor.<sup>107</sup> Over the course of several months, the Commission

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<sup>103</sup> Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1136 (2008).

<sup>104</sup> *Id.* at 1154.

<sup>105</sup> *Id.* at 1136.

<sup>106</sup> Andrew S. Oldham, *On Inkblots and Truffles*, 135 HARV. L. REV. F. 154, 156 (2022).

<sup>107</sup> See PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., *supra* note 17, at 12.

considered different ways to respond to those who believe that — in the words of one Commissioner — something about the Supreme Court is “broken.”<sup>108</sup> One idea was to change the size and composition of the Supreme Court.<sup>109</sup> Another was to alter the Justices’ tenure, such as by imposing term limits.<sup>110</sup> A third involved limiting the Court’s jurisdiction so that it could not hear certain types of cases.<sup>111</sup> A fourth proposal that the Commission considered was whether the Justices should adopt new procedures regarding “judicial ethics and transparency with respect to recusals and conflicts.”<sup>112</sup> Several Justices have already weighed in on that topic.<sup>113</sup> The first three proposals are ones that would alter the institutional *structure* of the Supreme Court. The fourth proposal, by contrast, is one that would alter the internal processes and procedures of the Court.

This Chapter focuses on the first three proposals — the structural ones — because the stakes of implementing these reforms are higher than the stakes of mandating an ethics code. In so doing, this Chapter does not mean to minimize the importance of judicial ethics. But the structural reforms that have been proposed could work serious and swift damage to the judiciary.

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.<sup>114</sup> 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.

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<sup>108</sup> See, e.g., Kermit Roosevelt III, *I Spent 7 Months Studying Supreme Court Reform. We Need to Pack the Court Now*, TIME (Dec. 10, 2021, 7:00 AM), <https://time.com/6127193/supreme-court-reform-expansion> [<https://perma.cc/8TBT-ZMKW>].

<sup>109</sup> PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., *supra* note 17, at 20.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 21.

<sup>113</sup> See, e.g., Adam Liptak, *Justice Kagan Calls for the Supreme Court to Adopt an Ethics Code*, N.Y. TIMES (Sept. 22, 2023), <https://www.nytimes.com/2023/09/22/us/supreme-court-kagan-ethics.html> [<https://perma.cc/NP9A-ARG2>]; Abbie VanSickle, *Justice Barrett Calls for Supreme Court to Adopt an Ethics Code*, N.Y. TIMES (Oct. 16, 2023), <https://www.nytimes.com/2023/10/16/us/politics/supreme-court-ethics-code-amy-coney-barrett.html> [<https://perma.cc/JA2L-5JE3>].

<sup>114</sup> 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.”).

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.

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,<sup>115</sup> Americans should first reempower Congress to play ball at all.

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,

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<sup>115</sup> See generally Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004).

thereby further imperiling its legitimacy.<sup>116</sup> 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.<sup>117</sup> 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.”<sup>118</sup> 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.<sup>119</sup> Not so.

Our Constitution enshrines protections for federal judges so that they will not be unduly influenced by political considerations.<sup>120</sup> 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.”<sup>121</sup> 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'

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<sup>116</sup> See, e.g., James F. McHugh & Lauren Stiller Rikleen, *The Politicization of SCOTUS Threatens Its Legitimacy*, BLOOMBERG L. (June 30, 2022, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/the-politicization-of-scotus-threatens-its-legitimacy> [<https://perma.cc/AS4Z-RTNX>].

<sup>117</sup> See Stephen Breyer, *Comments on Robert Post's Supreme Court History of the Taft Court, Part IV, The Taft Court as an Institution*, BALKINIZATION (Feb. 15, 2024, 9:30 AM), <https://balkin.blogspot.com/2024/02/comments-on-robert-posts-supreme-court.html> [<https://perma.cc/M8AE-WBRE>].

<sup>118</sup> BREYER, *supra* note 7, at 63.

<sup>119</sup> See, e.g., Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html> [<https://perma.cc/M6TA-YX7E>].

<sup>120</sup> See generally THE FEDERALIST NO. 78, at 463–71 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>121</sup> U.S. CONST. art. III, § 1.

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.<sup>122</sup> 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.<sup>123</sup> And President Franklin D. Roosevelt famously sought to pack the Court before the "switch in time that saved nine."<sup>124</sup> 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.<sup>125</sup> "In 1789, Congress created a six-member Supreme Court" — one Justice for each of the existing federal circuits.<sup>126</sup> 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."<sup>127</sup> In response, Congress created a seventh federal circuit in 1807 and continued with an eighth and ninth in 1837.<sup>128</sup> For each new circuit created, one additional Justice was added to the Supreme Court.<sup>129</sup> 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.<sup>130</sup> 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,"<sup>131</sup> though it "may well . . . have been aimed mainly at producing a Court of more manageable size, evidently with the [J]ustices' support."<sup>132</sup>

<sup>122</sup> *But cf.* Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975) (arguing that Congress's ability to jurisdiction strip helps provide political legitimacy to the practice of judicial review).

<sup>123</sup> PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 17, at 67.

<sup>124</sup> *Id.*; John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine,"* 73 OKLA. L. REV. 229, 229 (2021).

<sup>125</sup> PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 17, at 68, 131.

<sup>126</sup> *Id.* at 68.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUD. CTR., *CREATING THE FEDERAL JUDICIAL SYSTEM* 14 (1989).

<sup>132</sup> *Id.*

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”<sup>133</sup> — 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.

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.<sup>134</sup> 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.<sup>135</sup>

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

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<sup>133</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

<sup>134</sup> U.S. CONST. art. I, § 7.

<sup>135</sup> U.S. CONST. art. V. The Constitution also permits two-thirds of state legislatures to call a new constitutional convention. *Id.* That route has never been taken.

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.<sup>136</sup> Congress cannot dictate legal outcomes to the courts, but it can change the law.<sup>137</sup> Judges are bound to follow those legal changes.<sup>138</sup>

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 able<sup>139</sup> — the determinacy dispute would be avoided altogether, as both sides of the dispute would agree on the meaning of clear text.<sup>140</sup>

It may seem like cold comfort to respond to frustrations with the Supreme Court by saying “change the law” and “amend the Constitution,” in particular. At the time of the Constitution’s ratification, the fact that the Framers explicitly allowed for the possibility of legal change to our fundamental law was itself radical: “Americans had in fact institutionalized and legitimized revolution.”<sup>141</sup> Even if the Framers thought popular sovereignty allowed for simple-majoritarian

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<sup>136</sup> Cf. *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (plurality opinion) (quoting *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438 (1992); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)).

<sup>137</sup> *Id.*

<sup>138</sup> Cf. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (“Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”); Kavanaugh, *supra* note 65, at 2135.

<sup>139</sup> See, e.g., 33 U.S.C. § 1311 (precise statutory standards on effluent limitations); 26 U.S.C. § 132 (precise statutory standards regarding tax consequences of certain fringe benefits).

<sup>140</sup> Congress can also codify its preference for indeterminacy. For example, “Congress might assign an agency to issue rules to prevent companies from dumping ‘unreasonable’ levels of certain pollutants.” Kavanaugh, *supra* note 65, at 2152. Here, what counts as “unreasonable” is a policy judgment. *Id.* One can stare at the text as long as she likes and a clear numerical threshold will not jump off the page. Different presidential administrations can take different views of what rises to the level of an “unreasonable” level of pollution. And in these circumstances, as then-Judge Kavanaugh explained, “courts should be leery of second-guessing that decision.” *Id.*

<sup>141</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 614 (Univ. of N.C. Press 1998) (1969).



alteration of the Constitution in theory,<sup>142</sup> they purposefully made the bar for constitutional amendment high.<sup>143</sup> Prudence demanded no less.<sup>144</sup> Today, that bar seems insurmountable. The means of institutionalized revolution have become a tool of stagnation.<sup>145</sup> But there is a solution to the perceived disconnect between the popular will and the legal regime under which We the People currently live. It lies in neither the Constitution nor the Court — but in Congress.

### Conclusion

Much like fish do not realize they are swimming in water,<sup>146</sup> 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 abortion<sup>147</sup> and gun control.<sup>148</sup> 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.<sup>149</sup> And even as the Supreme Court grows more protective of Second Amendment rights<sup>150</sup> — which elicits critiques of the Court, including from within,<sup>151</sup> as gun violence spikes and mass shootings become an all-too-common facet of American life<sup>152</sup> — some of the

<sup>142</sup> See, e.g., Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1050 (1988); see also *id.* at 1051 n.21 (collecting primary sources).

<sup>143</sup> See THE FEDERALIST NO. 43, *supra* note 120, at 275 (James Madison) (“[Article V] guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (characterizing the Constitution as a document “intended to endure for ages to come”).

<sup>144</sup> See THE FEDERALIST NO. 43, *supra* note 120, at 275 (James Madison).

<sup>145</sup> Perhaps this is why those who read the Constitution as a particularly rigid, rule-like, determinate document have often called for lowering the bar for formal constitutional amendment. See, e.g., Sarah Isgur, Opinion, *It's Time to Amend the Constitution*, POLITICO (Jan. 8, 2022, 7:00 AM) <https://www.politico.com/news/magazine/2022/01/08/scalia-was-right-make-amending-the-constitution-easier-526780> [<https://perma.cc/MA9C-CF95>] (recounting Justice Scalia's support for lowering the bar for constitutional amendment).

<sup>146</sup> See David Foster Wallace, Commencement Speech at Kenyon College (May 21, 2005), in THIS IS WATER: SOME THOUGHTS, DELIVERED ON A SIGNIFICANT OCCASION ABOUT LIVING A COMPASSIONATE LIFE 3–4 (2009).

<sup>147</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>148</sup> See *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>149</sup> See generally KEVIN J. HICKEY & WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10787, CONGRESSIONAL AUTHORITY TO REGULATE ABORTION (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10787> [<https://perma.cc/GQ8A-YDY2>].

<sup>150</sup> See, e.g., *Bruen*, 142 S. Ct. at 2156.

<sup>151</sup> See *id.* at 2163–64 (Breyer, J., dissenting).

<sup>152</sup> John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Apr. 26, 2023), <https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about->

most effective gun violence–reduction tools lie within Congress’s power (and do not run afoul of the Second Amendment).<sup>153</sup>

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.<sup>154</sup> 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 authorize 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.<sup>155</sup> 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.

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gun-deaths-in-the-u-s [<https://perma.cc/8AZJ-9ULE>]; see also Roni Caryn Rabin, *Gun Deaths Rising Sharply Among Children, Study Finds*, N.Y. TIMES (Oct. 6, 2023), <https://www.nytimes.com/2023/10/05/health/gun-deaths-children.html> [<https://perma.cc/CW9H-APGJ>] (summarizing data finding that guns are the leading cause of death for Americans under the age of twenty, excluding certain infant deaths).

<sup>153</sup> See, e.g., Greg Sargent, *Why Expanding Background Checks Would, In Fact, Reduce Gun Crime*, WASH. POST (Apr. 3, 2013, 12:49 PM), <https://www.washingtonpost.com/blogs/plum-line/wp/2013/04/03/why-expanding-background-checks-would-in-fact-reduce-gun-crime> [<https://perma.cc/C63B-VGNF>]; John Yoo, *A Universal-Background-Check Law Would Not Violate the Second Amendment*, NAT’L REV. (Aug. 9, 2019, 6:30 AM), <https://www.nationalreview.com/2019/08/universal-background-check-law-would-not-violate-second-amendment> [<https://perma.cc/3MVL-ZGLF>].

<sup>154</sup> See, e.g., Thomas Harvey & Thomas Koenig, *The Case for Filibuster Reform*, 57 NAT’L AFFS., Fall 2023, at 86, 89–91 (tying filibuster reform and enhanced congressional capacity to reduced political pressure on the Supreme Court); Thomas Harvey & Thomas Koenig, *A Madisonian Proposal for Filibuster Reform*, THE DISPATCH (Oct. 2, 2023), <https://thedispatch.com/article/a-madisonian-proposal-for-filibuster-reform> [<https://perma.cc/BZ3F-V8MT>].

<sup>155</sup> Cf. THE FEDERALIST NO. 10, *supra* note 120, at 73 (James Madison) (“As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed.”).

## CHAPTER THREE

### JUDICIAL ETHICS

*[T]he [S]upreme [C]ourt . . . [will] have a right, independent of the legislature, to give a construction to the [C]onstitution and every part of it, and there is no power provided in this system to correct their construction . . . .<sup>1</sup> Men placed in this situation will generally soon feel themselves independent of heaven itself.<sup>2</sup>*

— Brutus

Starting in the spring of 2023 and continuing into the summer, media outlets reported that some Supreme Court Justices had received undisclosed gifts valued at hundreds of thousands of dollars from wealthy benefactors — and failed to recuse themselves when those benefactors' matters went before the Court, or otherwise misused their positions and influence for personal gain. With each exposé, Supreme Court ethics gradually became a matter of public concern to a degree not seen since 1969 — when Justice Fortas resigned in a scandal over receiving \$20,000 from a Wall Street financier.

These recent scandals have sparked discussion about the adequacy of existing ethical standards and financial disclosure rules for Supreme Court Justices, and how best to enforce them. The Court first responded to these discussions with claims, expressed both implicitly and explicitly, that any sort of ethics reform imposed by Congress would violate constitutionally required separation of powers principles. Then, in November 2023, the Court promulgated an ethics code that excused the Justices' problematic conduct and included no enforcement mechanism, leaving the status quo largely intact.

Several of the open constitutional questions related to Supreme Court ethics reform are a result of Congress historically giving the Court a wide berth, and it is time to resolve those questions once and for all. This Chapter argues that constitutional challenges to Congress's power to regulate the Court are vague, unavailing, and should not stop Congress from acting to enforce ethics standards on the Supreme Court. Congress has a variety of avenues it can and should take to regulate the extrajudicial behavior of Justices. Section A explores past and present movements for Supreme Court ethics reform. Section B provides an overview of the ethics guidelines that currently govern judicial conduct in the lower federal courts and, to an extent, at the Supreme Court. Section C contextualizes these lapses within a framework, espoused by

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<sup>1</sup> Essays of Brutus (No. XV), *reprinted in* THE ANTI-FEDERALIST 185 (Herbert J. Storing & Murray Dry eds., 1985).

<sup>2</sup> *Id.* at 183.

the Court, that it is above regulation by Congress. Section D refutes that framework by examining the constitutional bases for Congress's power to regulate Supreme Court ethics and provides ways in which Congress can act now, without waiting for future legislation.

*A. Billionaires and Benefactors:  
The Past and Present of Supreme Court Ethics*

Since its creation over two centuries ago, the Supreme Court has confronted a range of ethical dilemmas that persist to this day. Section 1 begins by examining the early years of the judiciary, which were marked by vague ethical obligations and the absence of clear boundaries for judicial conduct. Section 2 transitions into a discussion of recent Supreme Court ethics lapses. Section 3 addresses the significance of these ethical lapses and the necessity for ethics reform to restore confidence in the Supreme Court.

*1. The History of Ethical Issues on the Court.* — The Judiciary Act of 1789,<sup>3</sup> which established the federal court system, only loosely addressed the ethical obligations of judges and Justices; the legislation simply required that judges and Justices take an oath to “do equal right to the poor and to the rich” and “faithfully and impartially” discharge the duties of the office.<sup>4</sup> Then, in 1792, Congress enacted the nation's first federal disqualification statute, which required judges to recuse themselves in cases where they had an interest in the proceeding.<sup>5</sup>

These efforts to impose boundaries on judicial conduct did little to constrain the next century and a half of political extrajudicial behavior by Supreme Court Justices. For example, in 1795, Chief Justice Jay ran for election as Governor of New York while serving as Chief Justice of the Court.<sup>6</sup> Justice McLean was a presidential candidate, though he never won the nomination, in 1836, 1848, 1852, 1856, and 1860, all while serving on the Court.<sup>7</sup> And, in 1868, Chief Justice Chase sought the presidency while serving as Chief Justice of the Court.<sup>8</sup>

The early 1920s saw a notable and surprising turning point for judicial ethics: a major league baseball scandal. A federal judge was appointed as the Commissioner of Baseball to address a 1919 incident of game fixing,<sup>9</sup> leading the public to question whether one person could execute the duties of both offices while remaining faithful to the ethical

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<sup>3</sup> Ch. 20, 1 Stat. 73.

<sup>4</sup> *Id.* § 8, 1 Stat. at 76 (codified as amended at 28 U.S.C. § 453).

<sup>5</sup> See Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79 (codified at 28 U.S.C. § 455).

<sup>6</sup> 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 275 (Cosimo Classics 2011) (1923).

<sup>7</sup> Peter Alan Bell, Note, *Extrajudicial Activity of Supreme Court Justices*, 22 *STAN. L. REV.* 587, 593 n.41 (1970).

<sup>8</sup> *Id.*

<sup>9</sup> See JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 180–82 (1974).

obligations set forth in the Judiciary Act of 1789.<sup>10</sup> The scandal spurred the American Bar Association (ABA) to form a commission on judicial ethics, headed by Chief Justice Taft,<sup>11</sup> which in turn formulated the advisory Canons of Judicial Ethics (“the Canons”) in 1924.<sup>12</sup> The Canons aimed to regulate all manner of extrajudicial activities from political activities<sup>13</sup> to business promotions,<sup>14</sup> but did not have any enforceable, legal effect over state or federal judges.<sup>15</sup>

The Canons’ lack of bite made them an ineffective stopgap for judicial misbehavior. After the Canons’ publication, Chief Justice Taft himself “rode roughshod over the [C]anons’ injunction against political activity”<sup>16</sup> by remaining involved in the Republican Party, openly vocalizing support for political candidates, and advising sitting presidents on a broad range of topics.<sup>17</sup> Justice Douglas routinely offered political advice to President Franklin D. Roosevelt<sup>18</sup> and was nearly ousted from the Court for receiving a stipend from a nonprofit foundation.<sup>19</sup>

The 1960s brought with them controversies that catalyzed renewed efforts to reform ethics regulations. In 1968, Justice Fortas was not confirmed as Chief Justice after stirring controversy by advising President Lyndon B. Johnson on political matters and receiving \$15,000 for speaking engagements.<sup>20</sup> Though Justice Fortas remained on the Court, evidence of his receipt of outside income finally forced his resignation in 1969.<sup>21</sup> Fortas’s resignation and society’s increasing focus on the (mis)conduct of public officials<sup>22</sup> likely spurred the ABA to create the 1972 Code of Judicial Conduct.<sup>23</sup> A year later, the Judicial Conference

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<sup>10</sup> *See id.*

<sup>11</sup> Jeremy Fogel & Noah Bookbinder, *Building Public Confidence: How the Supreme Court Can Demonstrate Its Commitment to the Highest Ethical Standards*, CITIZENS FOR RESP. & ETHICS IN WASH. (Aug. 9, 2023), <https://www.citizensforethics.org/reports-investigations/crew-reports/building-public-confidence-how-the-supreme-court-can-demonstrate-its-commitment-to-the-highest-ethical-standards> [<https://perma.cc/2PYM-MDD3>].

<sup>12</sup> *See* CANONS OF JUD. ETHICS pmbl. (AM. BAR ASS’N 1924).

<sup>13</sup> *Id.* Canon 28.

<sup>14</sup> *Id.* Canon 25.

<sup>15</sup> Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 273 (2007).

<sup>16</sup> *See* MACKENZIE, *supra* note 9, at 16.

<sup>17</sup> ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 279–84 (1965).

<sup>18</sup> Diary of Supreme Court Justice William O. Douglas (Mar. 19, 1939–Oct. 19, 1940), in Sheldon S. Cohen & Philip E. Urofsky, *The Court Diary of Justice William O. Douglas*, 1995 J. SUP. CT. HIST. 77, 94–95.

<sup>19</sup> *See* JOSHUA E. KASTENBERG, THE CAMPAIGN TO IMPEACH JUSTICE WILLIAM O. DOUGLAS: NIXON, VIETNAM, AND THE CONSERVATIVE ATTACK ON JUDICIAL INDEPENDENCE 5–7 (2019).

<sup>20</sup> *See* Dagmar Hamilton, *Murphy on Fortas: The Tragedy of an Ambitious Man*, 68 TEX. L. REV. 673, 675, 685–86 (1990) (book review).

<sup>21</sup> *Id.* at 686.

<sup>22</sup> *See* Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 853 (1989).

<sup>23</sup> CODE OF JUD. CONDUCT (AM. BAR ASS’N 1972); *see also* Lievens & Cohn, *supra* note 15, at 274–76.

followed suit and adopted the Code of Conduct for United States Judges (“the Code”),<sup>24</sup> which was functionally identical to the ABA’s code save for some slight modifications.<sup>25</sup>

Though the Code explicitly governs the conduct of lower court judges, it does not include Supreme Court Justices within its purview.<sup>26</sup> Consequently, recent reform efforts have centered on the Supreme Court, particularly following the 2000 presidential election recount decision in *Bush v. Gore*.<sup>27</sup> The late Justice Scalia’s hunting excursion with Vice President Cheney,<sup>28</sup> whom Justice Scalia voted in favor of in *Cheney v. United States District Court for the District of Columbia*,<sup>29</sup> elicited accusations of extrajudicial and politically motivated impropriety.<sup>30</sup> The late Justice Ginsburg’s scathing critiques of then-presidential candidate Donald Trump drew similar public scrutiny.<sup>31</sup>

2. *Recent Supreme Court Ethics Lapses.* — The spring and summer of 2023 brought particularly jarring Supreme Court ethics lapses to the fore. This section provides a brief overview of 2023’s most widely reported Supreme Court ethics lapses and, consequently, focuses on Justices Thomas, Gorsuch, Alito, and Sotomayor.

(a) *Justice Thomas.* — On April 6, 2023, *ProPublica* revealed that Justice Thomas had joined billionaire Republican megadonor Harlan Crow on undisclosed luxury trips for more than two decades.<sup>32</sup> These trips included flights on Crow’s private jet, vacations aboard his superyacht, and stays at his resorts.<sup>33</sup> In fact, in only three decades on

<sup>24</sup> CODE OF CONDUCT FOR U.S. JUDGES (JUD. CONF. OF THE U.S. 2019).

<sup>25</sup> These modifications included (1) clarifying the role of existing federal statutes, (2) deleting commentary about supplemental judicial income, and (3) addressing certain bankruptcy issues, among others. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10 (1973). Since 1973, the Code has been revised nine times: in 1987, 1992, 1996 (twice), 1999, 2000, 2009, 2014, and 2019. *Code of Conduct for United States Judges*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> [<https://perma.cc/9MD3-2LHD>].

<sup>26</sup> JOANNA R. LAMPE, CONG. RSCH. SERV., LSB11078, THE SUPREME COURT ADOPTS A CODE OF CONDUCT 1 (2023).

<sup>27</sup> 531 U.S. 98 (2000); see generally, e.g., Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606 (2002).

<sup>28</sup> Timothy J. Goodson, Comment, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181, 182 (2005).

<sup>29</sup> 542 U.S. 367, 372 (2004); see also Goodson, *supra* note 28, at 184.

<sup>30</sup> Goodson, *supra* note 28, at 183.

<sup>31</sup> Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a “Faker,” He Says She Should Resign*, CNN (July 13, 2016, 7:45 AM), <https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html> [<https://perma.cc/3QEG-UFV9>]. Three days later, Justice Ginsburg apologized for her comments about Trump. See Jessica Taylor, *Ginsburg Apologizes for “Ill-Advised” Trump Comments*, NPR (July 14, 2016, 10:44 AM), <https://www.npr.org/2016/07/14/486012897/ginsburg-apologies-for-ill-advised-trump-comments> [<https://perma.cc/VU9F-DLNN>].

<sup>32</sup> Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 7, 2023), <https://www.propublica.org/article/clarence-thomas-sotomayor-undisclosed-luxury-travel-gifts-crow> [<https://perma.cc/44WY-G6Q5>].

<sup>33</sup> *Id.*

the Court, Justice Thomas was treated to at least thirty-eight destination vacations funded by a cadre of industry billionaires.<sup>34</sup> He did not report any of these trips in the financial disclosures he filed each year.<sup>35</sup>

*ProPublica* also reported that in 2014, Crow paid Justice Thomas and his family \$133,363 in exchange for three properties in Georgia, one of which was the house where the Justice's mother lived and reportedly continued to reside as of April 2023.<sup>36</sup> Crow also donated half a million dollars to a conservative political organization founded by Justice Thomas's wife<sup>37</sup> and paid for the private school education of Justice Thomas's grandnephew.<sup>38</sup> The *New York Times* also revealed that Justice Thomas failed to repay a "significant portion" of a quarter of a million dollar loan from wealthy businessman Anthony Welters.<sup>39</sup> The loan was inexplicably forgiven nine years later.<sup>40</sup>

Some ethics law experts say that these failures to report were clear violations of the Ethics in Government Act of 1978<sup>41</sup> (EGA), which was intended to apply to all federal officials and requires disclosure of both real estate transactions and most gifts.<sup>42</sup>

(b) *Justice Gorsuch*. — On April 25, 2023, *Politico* reported that in 2017, Justice Gorsuch sold a forty-acre property to Brian Duffy, the chief executive of major law firm Greenberg Traurig.<sup>43</sup> Justice Gorsuch's property had languished on the market for two years before finally being purchased just nine days after his appointment to the bench.<sup>44</sup> Justice

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<sup>34</sup> Brett Murphy & Alex Mierjeski, *Clarence Thomas' 38 Vacations: The Other Billionaires Who Have Treated the Supreme Court Justice to Luxury Travel*, PROPUBLICA (Aug. 10, 2023, 5:45 AM), <https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizengano-velly-supreme-court> [<https://perma.cc/VBP6-R3MK>].

<sup>35</sup> *Id.*

<sup>36</sup> Justin Elliott et al., *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal*, PROPUBLICA (Apr. 13, 2023, 2:20 PM), <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus> [<https://perma.cc/A2JG-EEVS>].

<sup>37</sup> Kaplan et al., *supra* note 32.

<sup>38</sup> Joshua Kaplan et al., *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition*, PROPUBLICA (May 4, 2023, 6:00 AM), <https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus> [<https://perma.cc/NTK2-82MD>].

<sup>39</sup> Jo Becker, *Justice Thomas's R.V. Loan Was Forgiven, Senate Inquiry Finds*, N.Y. TIMES (Oct. 26, 2023), <https://www.nytimes.com/2023/10/25/us/politics/clarence-thomas-rv-loan-senate-inquiry.html> [<https://perma.cc/CHC4-LJ4Z>].

<sup>40</sup> *Id.*

<sup>41</sup> Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, and 28 U.S.C.).

<sup>42</sup> Letter from Walter M. Shaub, Jr. & Sarah Turberville, Representatives of the Project on Gov't Oversight (POGO), to Brian M. Boynton, Principal Deputy Assistant Att'y Gen. of the Civil Div. of the U.S. Dep't of Just. (Apr. 16, 2023), [https://s3.amazonaws.com/docs.pogo.org/letter/2023/POGO\\_Letter\\_DOJ-Investigate-Clarence-Thomas-Seek-Civil-Penalties.pdf](https://s3.amazonaws.com/docs.pogo.org/letter/2023/POGO_Letter_DOJ-Investigate-Clarence-Thomas-Seek-Civil-Penalties.pdf) [<https://perma.cc/XK8R-DR9F>].

<sup>43</sup> Heidi Przybyla, *Law Firm Head Bought Gorsuch-Owned Property*, POLITICO (Apr. 25, 2023, 4:30 AM), <https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579> [<https://perma.cc/H46T-SMRV>].

<sup>44</sup> *Id.*

Gorsuch made between \$250,001 and \$500,000 from the sale, according to federal disclosure forms.<sup>45</sup>

Though Justice Gorsuch reported the sale on his federal disclosure forms, he failed to disclose the identity of the land's purchaser and left that box on the form blank.<sup>46</sup> After the sale, Greenberg Traurig was involved, as either an amicus brief filer or representative counsel, in at least twenty-two cases that came before or were presented to the Court; Justice Gorsuch sided with the firm at least eight times.<sup>47</sup> While Justice Gorsuch's property sale may not be a clear violation of existing ethics laws, the conflict of interest presented by the transaction underscores the need for financial disclosure reform for Supreme Court Justices.<sup>48</sup>

(c) *Justice Alito*. — On June 20, 2023, *ProPublica* reported that in 2008, Justice Alito took a luxury fishing trip to a remote corner of Alaska and stayed at the King Salmon Lodge.<sup>49</sup> He flew to the lodge for free aboard a private jet owned by Republican megadonor Paul Singer.<sup>50</sup> His three-day stay was paid for in full by Robin Arkley II, another wealthy conservative donor.<sup>51</sup> Leonard Leo, the then-leader of the conservative legal group the Federalist Society, helped organize the fishing vacation and arranged Justice Alito's spot aboard Singer's jet.<sup>52</sup> Justice Alito failed to disclose the entire excursion in his end-of-year federal disclosure forms.<sup>53</sup> Justice Alito also did not recuse himself from reviewing the numerous cases involving Singer's hedge fund that came before the Court after his Alaska trip.<sup>54</sup>

(d) *Justice Sotomayor*. — On July 11, 2023, the *Associated Press* revealed that taxpayer-funded staffers of Justice Sotomayor routinely prodded public institutions to buy “hundreds, sometimes thousands” of copies of Justice Sotomayor's books in anticipation of the Justice's speaking engagements.<sup>55</sup> These mass purchases were often presented by staffers as the implicit price of a speaking appearance by Justice Sotomayor.<sup>56</sup> Such conduct is prohibited for members of Congress and

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Justin Elliot et al., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court> [<https://perma.cc/7V3K-XX4J>].

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor's Staff Prodded Colleges and Libraries to Buy Her Books*, AP NEWS (July 11, 2023, 5:14 AM), <https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02> [<https://perma.cc/ME68-N2MX>].

<sup>56</sup> *See id.*



the executive branch, who are statutorily barred from using government resources, such as their staffers, for personal financial gain.<sup>57</sup> Such conduct also plainly violates the Code of Conduct for United States Judges, which prohibits the substantial use of “chambers, resources, or staff” to further such private interests.<sup>58</sup>

Additionally, when the Court considered several cases that involved her publisher, Penguin Random House, Justice Sotomayor failed to recuse herself.<sup>59</sup> Though the Justice had no direct financial interest in the outcome of the Penguin Random House cases, her continuing receipt of royalties from the company likely merited disqualification because her “impartiality might reasonably be questioned.”<sup>60</sup>

3. *Judicial Ethics and Public Confidence.* — Efforts to downplay these lapses in ethical conduct have taken several forms. Justice Thomas’s attorney, Elliot S. Berke, decried news reports of the Justice’s behavior as “political blood sport . . . motivated by hatred for his judicial philosophy, not by any real belief in any ethical lapses.”<sup>61</sup> Conservative pundits such as the Heritage Foundation’s Thomas Jipping have expanded the charge of partisan witch hunt to include the Court as a whole, calling the Left’s hand-wringing over Court conduct a “smokescreen” and “misdirection” driven by those who consider the Court’s “independence an obstacle to be overcome.”<sup>62</sup>

However, recent Supreme Court ethics reform proposals would apply to *all* Supreme Court Justices, no matter which party’s President appointed them. Increased transparency would allow the Court to subvert any anticonservative narratives perpetuated by the media and ensure an unbiased account of *all* Justices’ activities and ethics breaches. And most importantly, ethics reform would create guardrails for the institution itself and reinstate public confidence. Though some change has finally come from within the Court,<sup>63</sup> that change is insufficient to properly address the recent problematic conduct of several Justices, and Congress must create enforceable ethics rules for the Justices to follow.

### B. Current and Proposed Ethics Rules

This section begins by delving into the intricacies of existing judicial

<sup>57</sup> *Id.*

<sup>58</sup> CODE OF CONDUCT FOR U.S. JUDGES Canon 4G (JUD. CONF. OF THE U.S. 2019).

<sup>59</sup> Slodysko & Tucker, *supra* note 55.

<sup>60</sup> 28 U.S.C. § 455(a); *see also* Slodysko & Tucker, *supra* note 55.

<sup>61</sup> Press Release, Elliot S. Berke, Managing Partner, Berke Fara LLP, Statement on Behalf of Client Justice Clarence Thomas (Aug. 31, 2023), <https://www.berkefara.com/news/2023/8/31/elliott-s-berke-releases-statement-on-behalf-of-client-justice-clarence-thomas-1> [<https://perma.cc/75BU-8WKR>].

<sup>62</sup> *See* Thomas Jipping, *Judicial Decisions, Not Judicial Ethics, Are the Real Target*, HERITAGE FOUND. (May 3, 2023), <https://www.heritage.org/courts/commentary/judicial-decisions-not-judicial-ethics-are-the-real-target> [<https://perma.cc/26J9-WMFF>].

<sup>63</sup> *See* CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. (2023) [hereinafter SCOTUS CODE], [https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices\\_November\\_13\\_2023.pdf](https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf) [<https://perma.cc/6P8U-VMUX>].

ethics statutes and their applicability to the federal judiciary, with a focus on the Supreme Court. Section 2 discusses the Court's responses to external judicial ethics reform efforts. Section 3 concludes by examining the Court's new Code of Conduct. This section aims to underscore the urgent need for Congress to establish a formal, enforceable code of ethics for the Supreme Court.

*I. Ethics Regulations in the Federal Judiciary.* — As mentioned previously,<sup>64</sup> the Code of Conduct for United States Judges provides guidance on a broad range of judicial conduct; for example, it advises judges to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”<sup>65</sup> Though the Code applies to most lower-level judges, it does not explicitly apply to Justices of the U.S. Supreme Court.<sup>66</sup>

In 2011, Chief Justice Roberts assured the public that members of the Court “do in fact consult [the Code] in assessing their ethical obligations.”<sup>67</sup> He noted that the Justices also have several avenues in addition to the Code at their disposal, including the Judicial Conference's Committee on Codes of Conduct, the Court's Legal Office, and their fellow Justices.<sup>68</sup> They may also turn to “judicial opinions, treatises, scholarly articles, and disciplinary decisions.”<sup>69</sup> Thus, said Chief Justice Roberts, “the Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance.”<sup>70</sup> However, like other federal judges, the Court's consultation of the Code is voluntary.<sup>71</sup> And in his 2011 report, Chief Justice Roberts was careful to note that while the Justices complied with Congress's requirements pertaining to financial reporting and limitations on the receipt of gifts and outside earned income, Congress's constitutional authority to include the Justices in those laws had never actually been established.<sup>72</sup>

Outside of the Code, some statutes impose ethical requirements on the Justices. For example, 28 U.S.C. § 455 requires all federal judges, including Supreme Court Justices, to recuse themselves from cases under particular circumstances such as when they “ha[ve] a personal bias or prejudice concerning a party”<sup>73</sup> or “a financial interest in the subject

<sup>64</sup> See *supra* 1679–80.

<sup>65</sup> CODE OF CONDUCT FOR U.S. JUDGES Canon 2A (JUD. CONF. OF THE U.S. 2019).

<sup>66</sup> See *id.* intro.

<sup>67</sup> JOHN G. ROBERTS, JR., U.S. SUP. CT., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/Z9RH-2W9H>].

<sup>68</sup> *Id.* at 5.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> VALERIE C. BRANNON & JOANNA R. LAMPE, CONG. RSCH. SERV., R45300, QUESTIONING JUDICIAL NOMINEES: LEGAL LIMITATIONS AND PRACTICE 5–6 (2022).

<sup>72</sup> ROBERTS, *supra* note 67, at 6.

<sup>73</sup> 28 U.S.C. § 455(b)(1).

matter in controversy.”<sup>74</sup> Congress, through the Ethics in Government Act of 1978 and the Ethics Reform Act of 1989,<sup>75</sup> also directs high-ranking officials in all three branches to file annual financial disclosure reports and observe limits on the acceptance of gifts.<sup>76</sup> The Judicial Conference has also issued regulations concerning statutory reporting<sup>77</sup> and gift acceptance.<sup>78</sup> Chief Justice Roberts has noted that the Court voluntarily complies with these laws.<sup>79</sup>

Unfortunately, these ethics rules are rife with ambiguities. Though the Judicial Conference recently clarified that “transportation that substitutes for commercial transportation,” such as private jet rides, must be disclosed under the Ethics Reform Act of 1989, that rule does not apply to stays at luxurious resorts due to the Act’s “personal hospitality” exemption.<sup>80</sup> Further, there is no limit on how much “personal hospitality” wealthy benefactors can lavish upon a Justice, all of which can legally go undisclosed today.<sup>81</sup>

Additionally, 28 U.S.C. § 455 does not provide a clear enforcement mechanism to challenge a Justice’s failure to recuse, giving each Justice leeway to decide whether they will recuse themselves from a particular case. While most federal judges’ failure to recuse in response to a motion or sua sponte is appealable,<sup>82</sup> there is no appellate court with the power to assess a Supreme Court Justice’s failure to recuse.<sup>83</sup> Thus, the Justices’ recusal decisions are almost always made without public explanation and are unreviewable.<sup>84</sup>

2. *The Court’s Reactions to Ethics Reform.* — On April 20, 2023, Senator Richard Durbin, Chairman of the Senate Judiciary Committee, sent a letter to Chief Justice Roberts, inviting him or one of his fellow Justices to testify before a panel considering changes to current ethics

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<sup>74</sup> *Id.* § 455(b)(4).

<sup>75</sup> Pub. L. No. 101-194, 103 Stat. 1716 (codified as amended in scattered sections of the U.S. Code).

<sup>76</sup> 5 U.S.C. §§ 7351, 7353, 13103, 13104.

<sup>77</sup> 2 GUIDE TO JUDICIARY POLICY, pt. D (Admin. Off. of the U.S. Cts. 2023).

<sup>78</sup> *Id.* ch. 3, § 330.

<sup>79</sup> ROBERTS, *supra* note 67, at 6–7.

<sup>80</sup> 2 GUIDE TO JUDICIARY POLICY, *supra* note 77, pt. D, ch. 1, § 170.

<sup>81</sup> *See id.*

<sup>82</sup> *See* 28 U.S.C. § 455 (allowing judges to disqualify sua sponte); *id.* § 144 (allowing judges to disqualify on a party’s motion); *Litigation, Overview — Motion to Disqualify/Recuse a Federal Judge*, BLOOMBERG L., <https://www.bloomberglaw.com/document/X4617L7G00000> [https://perma.cc/V64R-NL4G].

<sup>83</sup> Russell Wheeler, Commentary, *Justice Thomas’s Failure to Recuse May Be Wrong But It’s Not Judicial Misconduct*, BROOKINGS INST. (Mar. 29, 2022), <https://www.brookings.edu/articles/justice-thomass-failure-to-recuse-may-be-wrong-but-its-not-judicial-misconduct> [https://perma.cc/9E6M-FEFK].

<sup>84</sup> John Crawley & Kimberly Strawbridge Robinson, *Alito, Kagan Top Justices in Supreme Court Recusal “Black Box,”* BLOOMBERG L. (Feb. 13, 2023, 4:46 AM), <https://news.bloomberglaw.com/us-law-week/alito-kagan-top-justices-in-supreme-court-recusal-black-box-1> [https://perma.cc/P4MF-KT2C].

rules.<sup>85</sup> “The time has come for a new public conversation on ways to restore confidence in the Court’s ethical standards,” Senator Durbin wrote, “I invite you to join it, and I look forward to your response.”<sup>86</sup>

Five days later, Chief Justice Roberts sent a letter to the committee declining its invitation.<sup>87</sup> Chief Justice Roberts wrote that such appearances by a Chief Justice before Congress were “exceedingly rare, as one might expect in light of separation-of-powers concerns and the importance of preserving judicial independence.”<sup>88</sup> Chief Justice Roberts affixed to the letter a “Statement on Ethics Principles and Practices” signed by all nine Justices and to which, he said, “all of the current Members of the Supreme Court subscribe.”<sup>89</sup>

Chief Justice Roberts’s message was clear: the existing guidance around gifts, travel, and other financial disclosures was sufficient and need not be changed. Senator Durbin publicly rejected the Chief Justice’s reasoning for refusing to testify.<sup>90</sup> First, while a Chief Justice testifying before the Senate Judiciary Committee has only occurred twice, sitting Justices of the Court have appeared at ninety-three congressional hearings since 1960.<sup>91</sup> In fact, in 2019, Justice Kagan testified at a congressional hearing where she revealed that the Supreme Court was looking into adopting a judicial code of conduct at that time.<sup>92</sup> Second, the Chief Justice’s letter ignored the obvious: the flurry of reports throughout early 2023 demonstrated, quite publicly, that the Justices *hadn’t* adhered to existing ethics laws and standards.

<sup>85</sup> Carl Hulse, *Senate Democrats Invite Chief Justice to Testify on Supreme Court Ethics*, N.Y. TIMES (Apr. 20, 2023), <https://www.nytimes.com/2023/04/20/us/politics/roberts-testify-supreme-court-ethics.html> [<https://perma.cc/38H9-3M99>].

<sup>86</sup> Press Release, U.S. Senate Comm. on the Judiciary, Durbin Invites Chief Justice Roberts to Testify Before the Judiciary Committee Regarding Supreme Court Ethics (Apr. 20, 2023), <https://www.judiciary.senate.gov/press/dem/releases/durbin-invites-chief-justice-roberts-to-testify-before-the-judiciary-committee-regarding-supreme-court-ethics> [<https://perma.cc/FZW8-TBTT>].

<sup>87</sup> Abbie VanSickle, *Chief Justice Declines to Testify Before Congress Over Ethics Concerns*, N.Y. TIMES (Apr. 25, 2023), <https://www.nytimes.com/2023/04/25/us/politics/justice-roberts-supreme-court-ethics.html> [<https://perma.cc/TW4X-8Q3U>].

<sup>88</sup> *Id.*

<sup>89</sup> Letter from John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct., to Richard J. Durbin, Chair of the U.S. Senate Comm. on the Judiciary (Apr. 25, 2023) [hereinafter Chief Justice Letter to Chair Durbin], <https://int.nyt.com/data/documenttools/supreme-court-ethics-durbin/cf67ef8450eao24d/full.pdf> [<https://perma.cc/KA6K-J7CP>].

<sup>90</sup> Press Release, U.S. Senate Comm. on the Judiciary, Durbin Statement on Chief Justice Roberts Declining to Testify Before the Judiciary Committee Regarding Supreme Court Ethics (Apr. 25, 2023), <https://www.judiciary.senate.gov/press/dem/releases/durbin-statement-on-chief-justice-roberts-declining-to-testify-before-the-judiciary-committee-regarding-supreme-court-ethics> [<https://perma.cc/J85C-QV7K>].

<sup>91</sup> BARRY J. MCMILLION & JENNIFER E. MANNING, CONG. RSCH. SERV., IN12155, APPEARANCES BY SITTING U.S. SUPREME COURT JUSTICES AT CONGRESSIONAL COMMITTEE AND SUBCOMMITTEE HEARINGS (1960–2022) 1 (2023).

<sup>92</sup> Robert Barnes, *Supreme Court Justices Tell Congress They Are Not Considering Televising Hearings*, WASH. POST (Mar. 7, 2019, 6:39 PM), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-justices-tell-congress-they-are-not-considering-televising-hearings/2019/03/07/5fb28684-4116-11e9-9361-301ffb5bd5e6\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-justices-tell-congress-they-are-not-considering-televising-hearings/2019/03/07/5fb28684-4116-11e9-9361-301ffb5bd5e6_story.html) [<https://perma.cc/XD4X-DHY3>].

Most troubling, however, was Chief Justice Roberts’s assertion that testifying before Congress would implicate judicial independence and the separation-of-powers doctrine.<sup>93</sup> He made a similar claim in his 2011 year-end report on the state of the federal judiciary, writing that Article III of the Constitution established “only one court” and left the rest of the judiciary to Congress.<sup>94</sup> And in 2012, Chief Justice Roberts rejected<sup>95</sup> calls from the judiciary committee<sup>96</sup> to adopt a binding ethics code after it was revealed that Justice Thomas failed to disclose years’ worth of his wife’s income from various political employers.<sup>97</sup>

In July 2023, Justice Alito echoed the Chief Justice. Responding to proposed legislation requiring the Court to adopt a binding code of ethics, Justice Alito remarked, “Congress did not create the Supreme Court’ — the Constitution did.”<sup>98</sup> “No provision in the Constitution gives [Congress] the authority to regulate the Supreme Court — period.”<sup>99</sup>

In other words, “[t]he court checks . . . but cannot be checked.”<sup>100</sup> As Senator Durbin wrote in response to Chief Justice Roberts’s refusal to testify, “[i]t is time for Congress to accept its responsibility to establish an *enforceable* code of ethics for the Supreme Court, the only agency of our government without it.”<sup>101</sup>

3. *The Court’s Code of Ethics.* — On November 13, 2023, the Court released its first code of ethics governing the behavior of its members.<sup>102</sup> In it, the Court could have acknowledged the gravity of its recent financial and political scandals and positioned the new Code of Conduct as part of a larger, ongoing internal reform effort. Instead, the

<sup>93</sup> Chief Justice Letter to Chair Durbin, *supra* note 89.

<sup>94</sup> ROBERTS, *supra* note 67, at 4.

<sup>95</sup> Letter from John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct., to Patrick J. Leahy, Chairman of the U.S. Senate Comm. on the Judiciary (Feb. 17, 2012) [hereinafter Chief Justice Letter to Chairman Leahy], [https://www.washingtonpost.com/t/2010-2019/WashingtonPost/2012/02/21/National-Politics/Graphics/Ltr\\_to\\_Chairman\\_Leahy.pdf?itid=lk\\_inline\\_manual\\_2](https://www.washingtonpost.com/t/2010-2019/WashingtonPost/2012/02/21/National-Politics/Graphics/Ltr_to_Chairman_Leahy.pdf?itid=lk_inline_manual_2) [<https://perma.cc/7G62-TCRY>].

<sup>96</sup> Letter from the U.S. Senate Comm. on the Judiciary to John Roberts, Chief J. of the U.S. Sup. Ct. (Feb. 13, 2012), [https://www.durbin.senate.gov/imo/media/doc/letter\\_from\\_chair\\_durbin\\_to\\_chief\\_justice\\_roberts\\_-\\_021312.pdf](https://www.durbin.senate.gov/imo/media/doc/letter_from_chair_durbin_to_chief_justice_roberts_-_021312.pdf) [<https://perma.cc/PDW3-GK4T>].

<sup>97</sup> *Justice Clarence Thomas Amends 20 Years of Disclosure Forms with Wife’s Employers*, ABC NEWS (Jan. 24, 2011, 4:28 PM), [https://abcnews.go.com/Politics/Supreme\\_Court/justice-clarence-thomas-amends-financial-disclosure-reports-virginia/story?id=12750650](https://abcnews.go.com/Politics/Supreme_Court/justice-clarence-thomas-amends-financial-disclosure-reports-virginia/story?id=12750650) [<https://perma.cc/SJ4Y-3K6W>].

<sup>98</sup> David B. Rivkin Jr. & James Taranto, *Samuel Alito, The Supreme Court’s Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, 1:57 PM) (quoting Justice Samuel Alito), <https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7#> [<https://perma.cc/K73U-HDRT>].

<sup>99</sup> *Id.* (quoting Justice Samuel Alito).

<sup>100</sup> Jamelle Bouie, *The Polite Disdain of John Roberts Finds a Target*, N.Y. TIMES (Apr. 28, 2023), <https://www.nytimes.com/2023/04/28/opinion/john-roberts-clarence-thomas-supreme-court.html> [<https://perma.cc/VN59-8RMV>].

<sup>101</sup> VanSickle, *supra* note 87 (emphasis added) (quoting Sen. Richard Durbin).

<sup>102</sup> SCOTUS CODE, *supra* note 63.

Justices wrote in a brief introduction that “[t]he absence of a Code . . . has led in recent years to the *misunderstanding* that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules.”<sup>103</sup> Further, despite recent reports of arguably unethical conduct, the Court’s statement assured the public that the rules and principles within the Code were “not new” and “largely represent[] a codification of principles that [it] ha[d] long regarded as governing [its] conduct.”<sup>104</sup>

The nine-page Code of Conduct echoes the code that applies to lower court judges, with some notable differences. For instance, lower court judges are told not to “lend the prestige of the judicial office to advance the[ir] private interests.”<sup>105</sup> The Justices are merely advised not to do so “knowingly,”<sup>106</sup> a loophole that may swallow the rule. The Code spells out some restrictions on the Justices’ participation in fundraising,<sup>107</sup> reiterates requirements to file disclosure reports and limit gift acceptance consistent with the relevant statutes and regulations,<sup>108</sup> and states that the “Justice[s] should not participate in extrajudicial activities that detract from the dignity of the Justice’s office, interfere with the performance of the Justice’s official duties, reflect adversely on the Justice’s impartiality, [or] lead to frequent disqualification.”<sup>109</sup>

The main difference between the Court’s Code and the one that applies to lower court judges is its treatment of recusal. The Commentary accompanying the Code explains that the Justices must be warier of recusing themselves because they cannot be replaced when they do.<sup>110</sup> Thus, the Commentary explains that the Code’s provision on recusal “should be construed narrowly.”<sup>111</sup>

One would think that an ethics code promulgated due to public pressure would advise against the unethical conduct that spurred the uproar, but not so with this Code of Conduct. For example, on the matter of outside influences on the Justices, the Code states that “[a] Justice should not allow family, social, political, financial, or other relationships to influence official conduct or judgment” and should “neither knowingly lend the prestige of the judicial office to advance the private interests of the Justice or others nor knowingly convey or permit others to convey the impression that they are in a special position to influence the Justice.”<sup>112</sup> Would this rule have stopped Justices Thomas and Alito

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<sup>103</sup> *Id.* (emphasis added).

<sup>104</sup> *Id.*

<sup>105</sup> CODE OF CONDUCT FOR U.S. JUDGES Canon 2B (JUD. CONF. OF THE U.S. 2019).

<sup>106</sup> SCOTUS CODE, *supra* note 63, at 1.

<sup>107</sup> *Id.* at 6.

<sup>108</sup> *Id.* at 7–8.

<sup>109</sup> *Id.* at 4.

<sup>110</sup> *Id.* at 10–11.

<sup>111</sup> *Id.* at 11.

<sup>112</sup> *Id.* at 1.

from maintaining relationships with billionaire donors? The rules suggest that, as long as Justices claim not to be “influenced” by their moneyed connections or “knowingly” give the impression they are, there is no ethical violation. Without an enforcement mechanism to determine when such relationships have gone too far, the scandals of last summer are free to repeat themselves under the new Code.

The Court’s Code of Conduct is still meaningful. It signals that the Justices recognize some obligation to communicate with and appease the American people. It signals that public pressure works, even on powerful institutions that are, by design, insulated from public pressure. It is an act of public accountability, symbolic though it may be. And, frankly, it’s better than nothing.

However, the Code’s lack of an enforcement mechanism leaves the bottom line where it has always been: Who will judge the Justices? Who will ensure that the Code’s rules are followed? As Professor Stephen Vladeck argues: “Even the most stringent and aggressive ethics rules don’t mean all that much if there’s no mechanism for enforcing them. And the [J]ustices’ unwillingness to even nod toward that difficulty kicks the ball squarely back into Congress’ court.”<sup>113</sup>

### C. Enforcement

Even if one concedes that ideally the Supreme Court Justices should follow an ethics code, such a code does not explain what happens when a Justice commits potential misconduct. The simplest measure would be the Supreme Court’s self-imposition of an ethics code that outlines sanctions for violations of its standards, essentially a self-enforcing code. As outlined above, the American Bar Association,<sup>114</sup> advocacy groups,<sup>115</sup> legal scholars,<sup>116</sup> and even former lower court judges<sup>117</sup> urged the Supreme Court to adopt its own code, resulting in the November 13, 2023 announcement.<sup>118</sup> However, the difficulty the nine had in finding

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<sup>113</sup> Joshua Kaplan et al., *The Supreme Court Has Adopted a Conduct Code, But Who Will Enforce It?*, PROPUBLICA (Nov. 13, 2023, 4:47 PM) (quoting Professor Stephen Vladeck), <https://www.propublica.org/article/supreme-court-adopts-ethics-code-scotus-thomas-alito-crow> [<https://perma.cc/2DVN-486Q>].

<sup>114</sup> *Supreme Court Justices Should Follow Binding Code of Ethics, ABA House Says*, AM. BAR ASS’N (Feb. 27, 2023), [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/publications/washingtonletter/feb-23-wl/scotus-ethics-0223wl](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/feb-23-wl/scotus-ethics-0223wl) [<https://perma.cc/7XAQ-WRUE>].

<sup>115</sup> See, e.g., Glenn Fine, Commentary, *Yet Another Ethics Allegation — When Will the Supreme Court Act?*, BROOKINGS INST. (Oct. 2, 2023), <https://www.brookings.edu/articles/yet-another-ethics-allegation-when-will-the-supreme-court-act> [<https://perma.cc/22DT-KV8M>].

<sup>116</sup> See, e.g., Joan Biskupic, *Supreme Court Under Fresh Pressure to Adopt Code of Ethics*, CNN (Feb. 9, 2023, 6:12 PM), <https://www.cnn.com/2023/02/09/politics/supreme-court-ethics-reform/index.html> [<https://perma.cc/XH3T-RFNG>].

<sup>117</sup> See, e.g., Ruth Marcus, Opinion, *A Former Judge Explains How to Fix the Supreme Court’s Ethics Problem*, WASH. POST (July 17, 2023, 7:30 AM), <https://www.washingtonpost.com/opinions/2023/07/17/supreme-court-legal-ethics-jeremy-fogel/> [<https://perma.cc/8YU6-S2M6>].

<sup>118</sup> See *supra* pp. 1687–89 (describing new Code).

consensus<sup>119</sup> seems clear in the promulgated Code, which does not actually condemn any of the conduct questioned by the public, Congress, and former judges.<sup>120</sup> The Justices' Code is also not binding, both because it leaves determinations of propriety entirely up to individual Justices and because it does not outline any mechanism for enforcing the code or sanctioning misconduct.<sup>121</sup> Since the Court has not bound itself to any ethical standards, protectors of the Court's legitimacy should look to enforcement by another branch.

Any enforcement plan must first ask: Who could pass judgment on the behavior of the nation's highest adjudicators? The very structure of the three branches of the federal government may pose a problem for enforcement. Life tenure and salary protections ensure the Justices' "independence to best interpret the law by shielding their judgments from outside political pressures."<sup>122</sup> This insulation is necessary to ensure that the Court can properly evaluate legislation and executive action without fear of retribution. However, it also means that Congress and the Executive must tread carefully in wading into ethics, lest regulation of nonjudicial behavior should infringe upon that judicial independence.

Despite these structural protections, Congress frequently regulates the Supreme Court. Few question Congress's authority to circumscribe the Court's appellate jurisdiction, set its budget and length of session, and even expand or contract (upon death or retirement) the number of Justices. This section argues that Congress is in the best position to impose some ethical standards on the Court.

Many, including a number of the Justices themselves, advocate for self-regulation by the Supreme Court and reject all potential enforcement mechanisms by another body as unconstitutional.<sup>123</sup> However,

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<sup>119</sup> See Melissa Quinn, *Kagan Says Congress Has Power to Regulate Supreme Court: "We're Not Imperial,"* CBS NEWS (Aug. 4, 2023, 2:08 PM), <https://www.cbsnews.com/news/elena-kagan-congress-regulate-supreme-court-ethics-code/> [<https://perma.cc/44EQ-SWSX>].

<sup>120</sup> See *supra* pp. 1687–88; see also Jeannie Suk Gersen, *The Supreme Court's Self-Excusing Ethics Code*, NEW YORKER (Nov. 21, 2023), <https://www.newyorker.com/news/daily-comment/the-supreme-courts-self-excusing-ethics-code> [<https://perma.cc/8QXE-SAGW>] (“[N]one of the alleged ethical breaches by Justices that have been reported in the past several years would likely be a violation of the new code of conduct.”).

<sup>121</sup> See Russell Wheeler, Commentary, *The Supreme Court's Code of Conduct: Enforcement Confusion, Extrajudicial Activism*, BROOKINGS INST. (Nov. 29, 2023), <https://www.brookings.edu/articles/the-supreme-courts-code-of-conduct-enforcement-confusion-extrajudicial-activism/> [<https://perma.cc/9HVV-49WD>].

<sup>122</sup> Charlie Savage, *Tightening Supreme Court Ethics Rules Faces Steep Hurdles*, N.Y. TIMES (May 5, 2023), <https://www.nytimes.com/2023/05/05/us/politics/supreme-court-ethics-rules-justice-thomas-crow.html> [<https://perma.cc/2749-TLQK>]; see Jonathan L. Entin, *Getting What You Pay For: Judicial Compensation and Judicial Independence*, 2011 UTAH L. REV. 25, 25.

<sup>123</sup> See ROBERTS, *supra* note 67, at 7 (noting that “the limits of Congress’s power to require recusal [of Supreme Court Justices] have never been tested”); Rivkin & Taranto, *supra* note 98; *Supreme Court Ethics Reform: Hearing on S.B. 325 and S.B. 359 Before the S. Comm. on the Judiciary*, 118th Cong. 2–3 (2023) (statement of Thomas H. Dupree, Jr., Partner and Co-Chair of the Appellate and Constitutional Law Practice Group, Gibson, Dunn & Crutcher); Chief Justice Letter to Chairman Leahy, *supra* note 95.



whether Congress can regulate the behavior of the Justices is an open constitutional question,<sup>124</sup> and history and current practice both imply that Congress has the constitutional authority to do so. This section first addresses Congress's general power to regulate the Supreme Court and why, despite statements by the Justices, this power is constitutionally valid. Enforcement mechanisms can be broadly divided into two categories. In the first, Congress acts as a direct enforcer of ethical standards. In the second, Congress deputizes some other body with oversight over the nonjudicial conduct of Justices. Looking to state court systems shows how lower court judges may also serve a role in policing the conduct of the Justices. This section argues that Congress has several constitutional paths to act on Supreme Court ethics reform.

*I. Congressional Power to Regulate Justices' Behavior.* — This section argues that the congressional power to regulate the extrajudicial behavior of Supreme Court Justices is at worst constitutionally unclear and at best textually supported. It first addresses the vague arguments raised by opponents of congressional regulation — including some of the Justices themselves — and concludes that those arguments lack clear constitutional reasoning and are ultimately unavailing. Instead, the Necessary and Proper Clause and historical practice provide a clear, textual constitutional argument that Congress may regulate the conduct of individual Justices.

*(a) Separation of Powers.* — Some argue that the separation of powers implied in the Constitution disables Congress from enforcing any kind of legislation regarding Supreme Court ethics.<sup>125</sup> However, given the above-mentioned constitutional structure, Congress has asserted some level of input in the day-to-day functions of the Court, from the very mundane details all the way to foundational, structural issues.<sup>126</sup> Ethics do not present some never-before-seen threat to the independence of the judiciary. In fact, the Court has mostly complied with ethics-related statutes, gesturing at its constitutional insulation from them but adhering nonetheless.<sup>127</sup>

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<sup>124</sup> See Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 484 (2014); Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 457 (2013).

<sup>125</sup> See, e.g., *Supreme Court Ethics Reform: Hearing on S.B. 325 and S.B. 359 Before the S. Comm. on the Judiciary*, *supra* note 123, at 2–3 (statement of Thomas H. Dupree, Jr.).

<sup>126</sup> See Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 846 (1995); Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 JUDICATURE 117, 122 (1996) (noting that “[f]or most of our history the federal courts had no central organization and were dependent on the political branches not only for budget allocations but for administrative support,” which, he argues, supports the constitutionality of legislation affecting the administration of the federal courts).

<sup>127</sup> See, e.g., ROBERTS, *supra* note 67, at 6 (“Congress has directed Justices . . . to comply with both financial reporting requirements and limitations on the receipt of gifts and outside earned income. The Court has never addressed whether Congress may impose those requirements on the Supreme Court. The Justices nevertheless comply with those provisions.”).

Admittedly, enforcing any kind of sanction for an ethical violation is a relatively new proposition for Congress. However, at core, the separation of powers principle protects judicial independence,<sup>128</sup> which is not necessarily implicated in ethics enforcement. Congress's focus on extrajudicial ethical violations and issues related to recusal is part and parcel of ensuring judicial legitimacy and the proper functioning of statutes meant to protect that legitimacy. Many separation of powers critiques may arise from this normative view of the congressional role based on the structure of the Constitution.<sup>129</sup> Chief Justice Roberts and Justice Alito, who have commented most directly on the subject, have not illuminated the constitutional reasoning for their conclusions.<sup>130</sup> While this kind of pronouncement has weight, Congress need not accept it as binding constitutional law. The separation of powers principle may even benefit from Congress pushing forward some kind of ethics regulation, encouraging the Court either to accept such regulation or to articulate firm separation of powers grounds for rejecting it.

(b) *Status of the Court.* — Justices and other opponents of congressional ethics enforcement cite the special status of the Supreme Court as a constitutionally created body, in contrast to lower federal courts, which are created by Congress.<sup>131</sup> However, as a constitutional matter, Justices as individuals are treated the same as other Article III judges. All Article III judges have tenure and salary protections guaranteed by the Constitution.<sup>132</sup> The fact of constitutional creation does not put Justices' extrajudicial behavior beyond the reach of legislative regulation, particularly with regard to actions taken as individuals, such as engaging in political activity or receiving gifts.

Recusal is the only category of ethics regulation that touches on judicial decisionmaking. The status question is more difficult to answer here, but again does not weigh against the congressional power to guard against a runaway Court. Although recusal violations require careful consideration and raise questions of constitutional legitimacy, no clear answer has emerged from the history and text of the Constitution.<sup>133</sup> This difficulty only speaks to the relative political expediency of

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<sup>128</sup> John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 965 (2002) ("Everyone agrees that we need 'decisional independence,' meaning judges' ability to adjudicate facts and interpret law in particular cases 'free from any outside pressure: personal, economic, or political, including any fear of reprisal.'" (quoting Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996))).

<sup>129</sup> See, e.g., THE FEDERALIST NO. 51, at 318 (James Madison) (Clinton Rossiter ed., 2003) ("Were the executive magistrate, or the judges, not independent of the legislature in [receiving a salary], their independence in every other would be merely nominal.").

<sup>130</sup> See Chief Justice Letter to Chair Durbin, *supra* note 89; Rivkin & Taranto, *supra* note 98.

<sup>131</sup> See ROBERTS, *supra* note 67, at 3–4; Rivkin & Taranto, *supra* note 98.

<sup>132</sup> U.S. CONST. art. III, § 1.

<sup>133</sup> See Louis J. Virelli III, *Congress, The Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1542 (2012).

increased enforcement of acts regulating extrajudicial activities of the Justices.

(c) *Legitimacy of the Court.* — Opponents of congressional intervention rightfully note that Congress and the Court are coequal branches of government.<sup>134</sup> While that is true, Congress is better situated to navigate the quagmire of ethics violations and plummeting public trust that the Court has created. Congressional action is first more legitimate in the eyes of the public, given the perception of the Court as failing to police itself,<sup>135</sup> and second “offer[s] greater possibilities for coordinated efforts between the two Branches.”<sup>136</sup> Congress needs to begin enforcing these ethics statutes to begin the process of shaping this constitutional gray area.<sup>137</sup> The legislature has the power to act upon its interpretations of the Constitution,<sup>138</sup> and while regulation of ethics is sensitive, that does not mean that Congress should abdicate its normal duties.

(d) *The Necessary and Proper Clause.* — Given the above general constitutional arguments, the Constitution provides a textual “hook” for this congressional power to regulate in the Necessary and Proper Clause. The Constitution establishes the Supreme Court in sparse language in Article III, leaving many of the details to be filled in (or not) by Congress.<sup>139</sup> These gaps in Article III, which include foundational questions such as the size of the Court, the processes by which it hears cases, and the scope of its appellate jurisdiction, all underscore the congressional role in establishing and regulating the Court.<sup>140</sup> Congress has exercised this Necessary and Proper authority by expanding and contracting the size of the Court, establishing and adjusting procedural rules, and even regulating the oath that Justices take when assuming office.<sup>141</sup> Scholars have noted that, in contrast to Article III, Article I of the Constitution establishes detailed procedural rules for the legislative branch,<sup>142</sup> implying that Congress was not only empowered but

<sup>134</sup> See, e.g., *Supreme Court Ethics Reform: Hearing on S.B. 325 and S.B. 359 Before the S. Comm. on the Judiciary*, *supra* note 123, at 2–3 (statement of Thomas H. Dupree, Jr.).

<sup>135</sup> See Gersen, *supra* note 120.

<sup>136</sup> Virelli, *supra* note 133, at 1542.

<sup>137</sup> Cf. Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 997 (2008) (explaining that constitutional showdowns create new constitutional precedents).

<sup>138</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136 (1893) (“[I]t is the legislature to whom this power is given, — this power, not merely of enacting laws, but of putting an interpretation on the [C]onstitution which shall deeply affect the whole country . . .”).

<sup>139</sup> See U.S. CONST. art. III; see also RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 20–21 (7th ed. 2015).

<sup>140</sup> See JOANNA R. LAMPE, CONG. RSCH. SERV., R47382, CONGRESSIONAL CONTROL OVER THE SUPREME COURT 5, 26–27 (2023).

<sup>141</sup> See Michael Waldman, *Alito vs. History, Again*, BRENNAN CTR. FOR JUST. (Aug. 1, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/alito-vs-history-again> [<https://perma.cc/K6BG-E22F>].

<sup>142</sup> E.g., Frost, *supra* note 124, at 457.

“perhaps even obligated” to establish governing rules for the Supreme Court.<sup>143</sup>

These noticeable gaps in Article III, when paired with the Necessary and Proper Clause of Article I, “confirm[] this perception of congressional primacy by empowering Congress to make[] laws necessary and proper for carrying into execution the powers vested in the judicial department.”<sup>144</sup> Using the Necessary and Proper Clause in combination with some of the below powers, Congress can act today to enforce existing ethical rules, rather than attempt to empower itself via new legislation. The constitutional structure explains why Congress could act and why its previous legislation, including acts requiring financial disclosures and barring outside income and gifts, validly applies to the Court.

2. *Enforcement Directly by Congress.* — “The non-judicial conduct and activities of the Supreme Court are subject to law, just like every other citizen’s conduct and activities are subject to the law. Much of the Justices’ non-judicial conduct and activities are of course subject to law today.”<sup>145</sup> The Code of Conduct for United States Judges, which applies to the lower federal courts, is not technically “binding” on them because it itself is merely advisory.<sup>146</sup> While a valuable resource, it cannot be the final answer to these ethical questions because, by definition, it has no teeth.<sup>147</sup> Additionally, the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980<sup>148</sup> (Judicial Conduct Act) offers an avenue for nearly anyone to file a complaint against a federal judge who “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.”<sup>149</sup> However, this statute also does not reach the Justices of the Supreme Court.<sup>150</sup> While expanding both the Code and the Judicial Conduct Act, as well as potentially establishing a new Inspector General for the Supreme Court<sup>151</sup>

<sup>143</sup> *Id.*

<sup>144</sup> JAMES E. PFANDER, ONE SUPREME COURT 2 (2009).

<sup>145</sup> *Supreme Court Ethics Reform: Hearing on S.B. 325 and S.B. 359 Before the S. Comm. on the Judiciary*, *supra* note 123, at 4 (statement of J. Michael Luttig, Former Judge of the United States Court of Appeals for the Fourth Circuit).

<sup>146</sup> See Wheeler, *supra* note 124, at 503; *id.* at 505 (“The Code of Conduct . . . help[s] in divining what ‘constitutes conduct prejudicial to the effective and expeditious administration of the business of the courts.’ But it is highly misleading to regard it as a cure for whatever ethical problems the Justices may exhibit.” (quoting 28 U.S.C. § 351(a))).

<sup>147</sup> See *id.*

<sup>148</sup> Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 331–332, 372, 604); see also Judicial Improvements Act of 2002, Pub. L. No. 107-273, 116 Stat. 1848 (codified as amended at 28 U.S.C. §§ 351–364).

<sup>149</sup> 28 U.S.C. § 351(a); see Wheeler, *supra* note 124, at 507.

<sup>150</sup> Wheeler, *supra* note 124, at 507; see 28 U.S.C. § 351(d)(1).

<sup>151</sup> See, e.g., Press Release, Senator Chuck Grassley & Representative James Sensenbrenner, Grassley, Sensenbrenner See Need for Inspector General for the Judiciary (Jan. 31, 2007) <https://www.grassley.senate.gov/news/news-releases/grassley-sensenbrenner-see-need-inspector-general-judiciary> [<https://perma.cc/E29P-2MWX>].

are promising steps, this section instead focuses on ways that Congress can require the ethical adherence of the Justices today.

In the most extreme case, Congress can impeach a Justice for misconduct. Equally extreme would be the withholding of appropriations, which could have some major repercussions for the continued functioning of the judicial branch. Finally, Congress could look to extant statutes for ways to enforce ethical standards.

(a) *Impeachment.* — Congress is authorized to impeach a Supreme Court Justice.<sup>152</sup> This power cuts both ways in evaluating what Congress can do in the face of an unethical Justice. On one hand, this constitutional backstop evinces the Framers' intent to ensure that the legislative branch retained some control in the face of tenure and salary guarantees. On the other hand, the authority to impeach may, by implication, exclude any other authority to discipline.<sup>153</sup> However, the impeachment power cannot be the only regulation of Justices, given that other limits still apply to their behavior, including criminal law.

In practice, “no Supreme Court [J]ustice has ever been [successfully] impeached and removed by Congress.”<sup>154</sup> While some may argue that the threat of impeachment changes Justices' behavior, impeachment practically cannot be the only mechanism for Congress to regulate Article III judges, given the incredibly high bar for starting and completing impeachment proceedings.<sup>155</sup>

Some argue that impeachment *is* the only mechanism by which Congress can regulate the Supreme Court, to the exclusion of other statutes, even criminal ones.<sup>156</sup> However, several federal appellate courts have concluded that a federal judge may be prosecuted without first being impeached.<sup>157</sup> In 1795, the House of Representatives declined to impeach Judge George Turner after the Attorney General decided to prosecute him, providing Founding-era evidence that the existence of

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<sup>152</sup> U.S. CONST. art. II, § 4; *id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

<sup>153</sup> Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 220 (1993) (“[I]t is suggested that all politically controlled disciplinary mechanisms short of impeachment are precluded by implication because any such mechanisms would undermine the value of judicial independence that the [Good Behavior and Compensation] Clauses are intended to protect.”).

<sup>154</sup> Ron Elving, *Congress Has Clashed with Supreme Court Justices over Ethics in the Past*, NPR (Apr. 22, 2023, 10:18 AM) <https://www.npr.org/2023/04/22/1171289725/congress-has-clashed-with-supreme-court-justices-over-ethics-in-the-past> [<https://perma.cc/GG4Z-THCM>]. The closest Congress has come to removing a sitting Justice was in 1804 when the House voted to impeach Justice Chase on charges of partisanship, but he was acquitted by the Senate. *See id.* More recently, Justices Douglas and Fortas were threatened with impeachment proceedings, which never materialized. *See id.*

<sup>155</sup> *See, e.g., id.*

<sup>156</sup> *See, e.g.,* Shane, *supra* note 153, at 220, 223.

<sup>157</sup> *See, e.g.,* United States v. Claiborne, 727 F.2d 842, 845 (9th Cir. 1984) (“[T]he Constitution does not immunize a sitting federal judge from the processes of criminal law.”); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir. 1974) (holding that life tenure does not immunize federal judges from criminal prosecution).

the impeachment procedure does not bar other laws, such as the criminal code, from reaching federal judges.<sup>158</sup>

Impeachment is a blunt tool for Congress in attempting to enforce ethical rules at the Court. Despite its bluntness, it has a strong basis in the Constitution, thus offering a legitimate toehold for Congress to enter the fray. However, given the polarization in the legislature, the difficulty of impeachment proceedings, and the post-hoc nature of the remedy, it does not offer the most practical avenue for ethics regulation.<sup>159</sup>

(b) *Appropriations*. — Using its power of the purse, Congress could sanction and deter violations of ethical rules by the Supreme Court Justices. The Senate Appropriations subcommittee that oversees the Court's budget has recently evaluated its options in approving the Court's budget for 2024.<sup>160</sup> Senator Chris Van Hollen has proposed that the Senate can leverage the appropriations process for the Court's budget to force the Court to bind itself to ethical standards.<sup>161</sup>

This issue is still politically live, but it does offer an avenue for immediate action to punish previous violations of the Ethics Reform Act of 1989 and the Ethics in Government Act of 1978, among others. However, the appropriations power is a similarly blunt instrument that does run the risk of compromising the Court's ability to function at all.

(c) *Enforcement of Extant Statutes*. —

(i) *Ethics in Government Act*. — The Ethics in Government Act applies to all three branches of the federal government, setting rules related to outside income and employment, gifts, and financial disclosure requirements.<sup>162</sup> Chief Justice Roberts is authorized, via the Judicial Conference, to issue regulations specifically for the Court.<sup>163</sup> While he does so, and while the Justices do submit financial disclosures yearly as required by statute, he has stated that the Justices follow the EGA “as a matter of internal practice” and cautioned that the Court has yet to rule on the regulations' legal applicability to itself.<sup>164</sup> It is worth examining what could result from Congress declaring the EGA applicable to the Court, as well as the specific enforcement mechanisms Congress might use to ensure compliance.

The Court does not need to have the first word on the applicability of the EGA to itself — Congress can today declare that the EGA does

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<sup>158</sup> See Frost, *supra* note 124, at 476 & n.157 (citing Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1217 n.43 (1991)).

<sup>159</sup> See Grimes, *supra* note 158, at 1220–23 (discussing the decline of judicial impeachment as a method of judicial discipline and its replacement by nonimpeachment disciplinary authorities).

<sup>160</sup> See Tobi Raji et al., *Democrats Weigh Trying to Force Supreme Court to Adopt Ethics Rules*, WASH. POST (Apr. 3, 2023, 6:08 AM) <https://www.washingtonpost.com/politics/2023/04/03/democrats-weigh-trying-force-supreme-court-adopt-ethics-rules> [<https://perma.cc/NX7K-4TKB>].

<sup>161</sup> *Id.*

<sup>162</sup> Wheeler, *supra* note 124, at 486.

<sup>163</sup> *Id.*

<sup>164</sup> See ROBERTS, *supra* note 67, at 6–7.

bind the Justices. The resulting constitutional showdown would arguably address the ethical crisis at the Court, no matter the outcome. Ideally, the Court would simply accept Congress's interpretation. A constitutional question would be answered, and the move might restore some faith in the Court. Alternatively, the Court could explicitly reject Congress's interpretation. However, this result seems unlikely as the Court would not reach the constitutionality of this interpretation unless an enforcement action or other case or controversy were brought before it. In the unlikely scenario that the Court rejects any application of the EGA to itself, the issue around ethics crystallizes. There is value to forcing the Court to firmly stake a position, rather than make statements to news outlets or vague allusions in the Year-End reports.<sup>165</sup>

In either of these two scenarios, Congress must act first. Under the EGA, judicial officers who “willfully fail to file or falsify their financial disclosure statements are subject to referral to the Attorney General and may face civil penalties.”<sup>166</sup> While many disagree as to whether individual Justices' behavior meets the “willful” standard for referral,<sup>167</sup> a public referral to the Attorney General is a powerful enforcement action and does not require an intense investigation by Congress on the merits. By viewing enforcement as merely a publicized referral, rather than the civil penalties themselves, applying the EGA to the Justices is likely more politically palatable.

As a general matter, violations of the EGA by any government official, which include “knowingly and willfully falsify[ing]” or “knowingly and willfully fail[ing] to file or report any information that such individual is required to report,” are enforceable by civil action brought by the Attorney General.<sup>168</sup> The Attorney General, upon referral, may bring this civil action in “any appropriate United States district court.”<sup>169</sup> The court in which the civil action is brought can assess a civil penalty, with the maximum possible penalty being \$50,000.<sup>170</sup> In the alternative or in addition to fines, the violator might even face incarceration for up to one year for “knowingly and willfully falsify[ing] . . . information.”<sup>171</sup>

In practice, bringing an enforcement action after a violation of the EGA by a Justice would be tricky, given not only the concerns raised above, but also the role of the Judicial Conference in enforcing the EGA. The EGA states that the Judicial Conference is the correct body to refer

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<sup>165</sup> See sources cited *supra* note 123.

<sup>166</sup> April Rivera, *Supreme Court Ethics Regulation: Amending the Ethics in Government Act of 1978 to Address Justices' Unethical Behavior*, 52 SW. L. REV. 308, 324 (2023).

<sup>167</sup> See Wheeler, *supra* note 124, at 487; Dahlia Lithwick & Mark Joseph Stern, *Clarence Thomas Broke the Law and It Isn't Even Close*, SLATE (Apr. 6, 2023, 4:26 PM), <https://slate.com/news-and-politics/2023/04/clarence-thomas-broke-the-law-harlan-crow.html> [<https://perma.cc/96TF-FSZH>] (excavating EGA provisions).

<sup>168</sup> 5 U.S.C. § 13106(a)(1).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* § 13106(a)(2)(A)(i).

potential violations to the Attorney General.<sup>172</sup> The Judicial Conference has established a Committee on Financial Disclosure, “consisting of [sixteen] judges from across the country,” which reports to the broader Conference.<sup>173</sup> The Conference has delegated authority to the Committee “with respect to the implementation of the financial disclosure provisions of the Ethics in Government Act, including reviewing financial disclosure reports and referring matters to the Attorney General. Allegations of financial disclosure errors or omissions submitted to the Conference are referred to the Committee for review and appropriate action.”<sup>174</sup> The Judicial Conference has rarely initiated proceedings against lower court federal judges<sup>175</sup> and has never referred a filer for “willingly falsifying” or withholding necessary disclosures.<sup>176</sup>

However, Congress does not have to wait idly. Senator Sheldon Whitehouse and Representative Henry C. Johnson have written publicly to the Conference requesting that the Committee refer Justice Thomas to the Attorney General for violating the EGA.<sup>177</sup> The Senate Judiciary Committee as a whole could make a statement and add more pressure to the Conference. Although it is unlikely that an actual referral would be made to the Attorney General and unlikelier still that the Attorney General would act against a sitting Supreme Court Justice, there is value in the Senate Judiciary Committee (or any congressional body, for that matter) making a public statement about the enforceability of the EGA. Given the utter lack of clarity on the constitutional reasons *against* congressional intervention, a statement from Congress could spur the Court (or particular members) to outline its reasoning and further the constitutional law in this area. Current congressional silence on the statute’s constitutionality begets further silence from the Court.

(ii) *Disqualification Statutes.* — There are several disqualification statutes currently on the books, which do apply to the Supreme Court

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<sup>172</sup> *Id.* § 13106(b).

<sup>173</sup> Letter from Roslynn R. Mauskopf, Sec’y, Jud. Conf. of the U.S., to Sheldon Whitehouse, Jr., Chairman of the Subcomm. on Fed. Cts., Oversight, Agency Action & Fed. Rts. of the Senate Comm. on the Judiciary 2 (May 15, 2023) [hereinafter Judicial Conference Letter] (on file with the Harvard Law School Library).

<sup>174</sup> *Id.*

<sup>175</sup> See Fogel & Bookbinder, *supra* note 11.

<sup>176</sup> Judicial Conference Letter, *supra* note 173, at 3.

<sup>177</sup> See Press Release, Sheldon Whitehouse, Chairman of the Subcomm. on Fed. Cts., Oversight, Agency Action & Fed. Rts. of the Senate Comm. on the Judiciary, Whitehouse and Johnson Urge Judicial Conference to Consider Breadth of Secret Billionaire-Funded Gifts to Justice Thomas as Support for Referral to Attorney General (Aug. 15, 2023), <https://www.whitehouse.senate.gov/news/release/whitehouse-and-johnson-urge-judicial-conference-to-consider-breadth-of-secret-billionaire-funded-gifts-to-justice-thomas-as-support-for-referral-to-attorney-general> [https://perma.cc/838U-HWJ7].



Justices.<sup>178</sup> 28 U.S.C. § 455, which has its roots in the late eighteenth century,<sup>179</sup> requires that any judge or Justice recuse herself in a variety of circumstances, including most notably in cases of personal bias toward a party or a financial interest in the matter.<sup>180</sup>

While there have been accusations that many Justices have already violated this statute, Congress likely lacks constitutional authority to regulate the Supreme Court's decisions in this area because the decisions are more inherently judicial than say, vacation plans or real estate transactions.<sup>181</sup> Instead, Professor Louis Virelli argues that Congress needs to exert pressure using other powers (including investigations, appropriations, and other clear areas of constitutional authority) and thus influence the Court to improve its recusal practices.<sup>182</sup> While issues of recusal gain public notoriety, Congress should not lose sight of where it has the strongest constitutional footing to act.

3. *Deputizing Lower-Level Federal Judges.* — The regulation of state supreme courts offers some insight into how the Supreme Court would function under some form of ethical oversight.<sup>183</sup> Many states have an independent agency that enforces its binding judicial ethics code on not only lower court judges, but also state supreme court justices.<sup>184</sup> These commissions have the power to impose a range of sanctions, including removal from office.<sup>185</sup>

While these agencies are not direct outgrowths of the states' respective legislatures, but rather sit within the judiciary,<sup>186</sup> they offer insight into how supreme courts can function under binding ethics regulation and enforcement. Justice Alito has stated “that it is inconsistent with the constitutional structure for lower court judges to be reviewing things

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<sup>178</sup> See generally CHARLES GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW (3d ed. 2020) (focusing primarily on the main statute for federal judicial disqualification, 28 U.S.C. § 455).

<sup>179</sup> Wheeler, *supra* note 124, at 488.

<sup>180</sup> *Id.* (citing 28 U.S.C. § 455(b)).

<sup>181</sup> See Virelli, *supra* note 133, at 1535.

<sup>182</sup> See generally *id.*

<sup>183</sup> See Wheeler, *supra* note 124, at 520 (“Most state supreme courts are integral parts of their state judicial system’s administration, and the judicial discipline mechanism can usually discipline a member of the state supreme court.”).

<sup>184</sup> In Alabama, the Court of the Judiciary can “remove from office, suspend without pay, or censure a judge” for an ethical violation. *Alabama Appellate Courts: Court of the Judiciary Overview*, ALA. JUD. SYS. (citing ALA. CONST. § 157(a)), <https://judicial.alabama.gov/appellate/judiciary> [<https://perma.cc/ELH2-GKVZ>]. In Arizona, the Commission on Judicial Conduct is “an independent state agency responsible for investigating complaints against” all members of the judiciary, including state supreme court justices. *Commission on Judicial Conduct: About Us*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/azcjc/AboutUs.aspx> [<https://perma.cc/75DL-STVX>]. “While the majority of California’s judges are committed to maintaining the high standards expected of the judiciary, an effective method of disciplining judges who engage in misconduct is essential to the functioning of our judicial system.” *State of California Commission on Judicial Performance*, CA.GOV., <https://cjp.ca.gov/> [<https://perma.cc/8CUC-ZT54>].

<sup>185</sup> See sources cited *supra* note 184.

<sup>186</sup> See sources cited *supra* note 184.

done by Supreme Court Justices for compliance with ethical rules.”<sup>187</sup> Justice Kennedy similarly implied that such a structure, where lower court judges would have a say in the ethical codes of the Justices, would violate the Constitution.<sup>188</sup> However, neither has offered any constitutional support for this position. There are no separation of powers concerns raised by lower court judges weighing in on ethical standards. While unorthodox at the federal level, trial and appellate judges weigh in on nonjudicial standards in many states, whose constitutional orders have not yet crumbled. Given the legitimacy crisis facing the Court, and if the Justices remain averse to direct congressional oversight, allowing the other Article III judges to weigh in on standards (and whether behavior violates those standards) offers a possible middle ground for ethics regulation.

### Conclusion

Today’s ethics problems are symptomatic of a Court that has ridden roughshod over any attempt to cabin its power.<sup>189</sup> Enforcement of ethical rules at the Supreme Court cannot wait on the Justices, nor should it wait on future legislation. The Court is not the only institution tasked with interpreting the Constitution. The Executive regularly makes constitutional determinations in exercising its power to take care that the laws are faithfully enforced. Congress is faced with a constitutional question every time it legislates. An impending constitutional question does not require inaction — if anything, it encourages action to spur its resolution.<sup>190</sup> While potential legislation is being debated,<sup>191</sup> Congress can act now based on its own interpretation of the Constitution and the multitude of avenues it has to check the extrajudicial behavior of the Justices. Starting the conversation between Congress and the Justices is the most viable way to restore the damaged legitimacy of this Court.

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<sup>187</sup> *Supreme Court of the United States: Hearing on Financial Services and General Government Appropriations for 2020 Before the Subcomm. on Fin. Servs. & Gen. Gov’t of the H. Comm. on Appropriations*, 116th Cong. 96 (2019) (statement of Justice Samuel Alito).

<sup>188</sup> Wheeler, *supra* note 124, at 502 (“[W]e would find it structurally unprecedented for district and circuit judges to make rules that [S]upreme [C]ourt judges have to follow.” (quoting *U.S. Supreme Court Budget: Hearing Before the Subcomm. of Fin. Servs. and Gen. Gov’t of the H. Comm. on Appropriations*, 112th Cong. 8 (2011) (statement of Justice Anthony Kennedy))).

<sup>189</sup> See, e.g., Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022).

<sup>190</sup> Scholars across the ideological spectrum have discussed the role of the executive and legislative branches in constitutional interpretation. See, e.g., Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 25–28 (1996) (arguing that nonexclusivity is the route to a socially desirable populist constitutional law); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1966 (2003) (“Both the Court and Congress interpret the Constitution from the perspective of a particular institution.”); Posner & Vermeule, *supra* note 137, at 997 (defining “constitutional showdown[s]” as interbranch disputes over constitutional authority that end in the development of new constitutional precedents).

<sup>191</sup> E.g., Judicial Ethics and Anti-Corruption Act of 2023, H.R. 2973, 118th Cong. (2023), <https://www.warren.senate.gov/imo/media/doc/SIL23572.pdf> [<https://perma.cc/7PRG-T7LE>].

## CHAPTER FOUR

### DISTRICT COURT REFORM: NATIONWIDE INJUNCTIONS

On November 18, 2022, months after the Supreme Court overturned *Roe v. Wade*,<sup>1</sup> a group of antiabortion doctors and organizations brought suit in the U.S. District Court for the Northern District of Texas.<sup>2</sup> The plaintiffs sought a preliminary and permanent injunction ordering the U.S. Food and Drug Administration (FDA) to withdraw its two-decade-old approval<sup>3</sup> of mifepristone, one drug used as part of a medication abortion regimen — the most common form of abortion in the United States.<sup>4</sup> The plaintiffs alleged that the FDA's approval process for mifepristone violated the Administrative Procedure Act<sup>5</sup> (APA).<sup>6</sup> On April 7, 2023, Judge Kacsmaryk<sup>7</sup> issued a nationwide stay that suspended the FDA's drug approval.<sup>8</sup> Hours later, Judge Rice of the U.S. District Court for the Eastern District of Washington granted a “dueling”<sup>9</sup> injunction that enjoined the FDA from changing its guidance and approvals in seventeen states and the District of Columbia.<sup>10</sup>

Outrage and confusion ensued. President Biden called Judge Kacsmaryk's order “the next big step toward the national ban on abortion that Republican elected officials have vowed to make law.”<sup>11</sup> Professor Nicholas Bagley asked: “[Judge Kacsmaryk is] just a single

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<sup>1</sup> 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>2</sup> *All. for Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507, 520 (N.D. Tex. 2023), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom.* *Danco Lab'ys, L.L.C. v. All. for Hippocratic Med.*, No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), and *cert. granted sub nom.* *FDA v. All. for Hippocratic Med.*, No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023).

<sup>3</sup> Mifepristone was first approved by the FDA in September 2000. *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. FOOD & DRUG ADMIN. (Sept. 1, 2023), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation> [<https://perma.cc/7BCZ-ZH3V>].

<sup>4</sup> KATHERINE KORTSMIT ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, *ABORTION SURVEILLANCE — UNITED STATES*, 2020, at 8 (2022), <https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm> [<https://perma.cc/CV26-79EC>].

<sup>5</sup> 5 U.S.C. §§ 551–559, 701–706.

<sup>6</sup> Complaint ¶ 357, *All. for Hippocratic Med.*, 668 F. Supp. 3d 507 (No. 22-CV-223).

<sup>7</sup> “A devout Christian, . . . [who] has been shaped by his deep antiabortion beliefs,” Judge Kacsmaryk was appointed to the bench by President Trump. Caroline Kitchener & Ann E. Marimow, *The Texas Judge Who Could Take Down the Abortion Pill*, WASH. POST (Feb. 25, 2023, 6:00 AM), <https://www.washingtonpost.com/politics/2023/02/25/texas-judge-abortion-pill-decision> [<https://perma.cc/CXM7-DTK2>].

<sup>8</sup> *All. for Hippocratic Med.*, 668 F. Supp. 3d at 560.

<sup>9</sup> *READ: Dueling Rulings from Federal Judges in Texas and Washington on Medication Abortion Pill*, CNN (Apr. 7, 2023, 10:50 PM), <https://www.cnn.com/2023/04/07/politics/read-texas-abortion-pill-mifepristone-ruling/index.html> [<https://perma.cc/NHM5-CT6W>].

<sup>10</sup> See *Washington v. FDA*, 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023).

<sup>11</sup> Press Release, The White House, Statement from President Joe Biden on Decision in *Alliance for Hippocratic Medicine v. FDA* (Apr. 7, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/07/statement-from-president-joe-biden-on-decision-in-alliance-for-hippocratic-medicine-v-fda> [<https://perma.cc/DX6Y-2TB8>].

judge in a small courthouse in Amarillo, Texas. Does he really have the power to dictate national policy about drug safety? If so, *should* he have that power?”<sup>12</sup> Dean Erwin Chemerinsky explained how “the case reveals underlying problems in the judicial system” and argued that “[l]itigants should not be able to handpick a judge who then can issue a nationwide injunction throwing the entire country into chaos.”<sup>13</sup>

A robust scholarly literature has grappled with these questions. Some scholars, jurists, and attorneys criticize the practice of district courts issuing nationwide injunctions as an inappropriate abuse of power.<sup>14</sup> Others defend nationwide injunctions as a powerful way to check federal agency overreach and ensure robust relief for plaintiffs.<sup>15</sup>

This Chapter explores these arguments, considering court reform at the district-court level. It also builds on a list of injunctions solicited from the Department of Justice (DOJ)<sup>16</sup> to provide the first empirical evidence documenting a trend that has not been, until now, fully quantified: nationwide injunctions have indeed grown much more common, dramatically spiking during the Trump Administration before decreasing during the Biden Administration. Section A of this Chapter quantitatively surveys this rise. Given this trend, section B identifies the troubling policy consequences of more frequent nationwide injunctions. Section C surveys proposals for reform, taking into consideration the ways in which judges have recently responded to this trend with apparent self-restraint and self-awareness.

Drawing from the list of injunctions, this Chapter notes the increasing risk of politicizing the nationwide injunction and delegitimizing the

<sup>12</sup> Nicholas Bagley, *A Single Judge Shouldn't Have This Kind of National Power*, THE ATLANTIC (Apr. 17, 2023, 2:30 PM), <https://www.theatlantic.com/ideas/archive/2023/04/mifepristone-case-problem-federal-judiciary/673724> [<https://perma.cc/A2BN-96UG>].

<sup>13</sup> Erwin Chemerinsky, Opinion, *Why One Judge in Amarillo Got to Decide Whether Any American Could Use the Abortion Pill*, L.A. TIMES (Apr. 25, 2023, 3:01 PM), <https://www.latimes.com/opinion/story/2023-04-25/supreme-court-mifepristone-ruling-abortion-judges> [<https://perma.cc/LZ4J-T8EK>].

<sup>14</sup> See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 30–31 (2019); Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 353 (2018).

<sup>15</sup> See, e.g., Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018); Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887, 889 (2020); Portia Pedro, *Toward Establishing a Pre-extinction Definition of “Nationwide Injunctions,”* 91 U. COLO. L. REV. 847, 855 (2020); see also Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 64 (2017); Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 51–53 (2017).

<sup>16</sup> *Harvard Law Review* editors submitted a Freedom of Information Act (FOIA) request to the DOJ for its list of nationwide injunctions mentioned in a speech by Deputy Attorney General Rosen. See Jeffrey A. Rosen, Deputy Att’y Gen., Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020), <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-opening-remarks-forum-nationwide> [<https://perma.cc/L9KH-4HHP>].

courts, as plaintiffs proceed to cherry-pick judges to increase the likelihood of political outcomes or policy goals. Ultimately, in light of this danger, this Chapter calls for reform to restructure the court system to disincentivize forum shopping. Though lower courts may be policing their use of the nationwide injunction, reforms centering on judicial restraint may miss the mark. If the goal is to disincentivize the political gamesmanship of nationwide injunctions, instead of their absolute use, reforms focused on curbing forum shopping may be most effective.

### A. *Quantifying the Rise of Nationwide Injunctions*

1. *Definitions.* — The injunction is an equitable remedy that enables the court to “control a party’s conduct”<sup>17</sup> — either by prohibiting or requiring action by a party. Either option is strong, coercive relief. Injunctions are thus a “drastic”<sup>18</sup> and “extraordinary”<sup>19</sup> remedy. Because of this concern, courts aim to issue injunctions that are “no more burdensome to the defendant than necessary to provide complete relief” to the parties before the court.<sup>20</sup> Courts generally retain broad discretion to craft the injunction’s scope. Depending on the stage of litigation, it can take the form of a temporary restraining order (TRO),<sup>21</sup> a preliminary injunction,<sup>22</sup> or a permanent injunction.<sup>23</sup>

No statute or Supreme Court case has defined what a “nationwide injunction” is. Indeed, scholars debate the proper terminology.<sup>24</sup> In general, however, the nationwide injunction is a universal remedy whereby a court enjoins a party with respect to *all* persons and entities,

<sup>17</sup> Frost, *supra* note 15, at 1070.

<sup>18</sup> Georgia v. President of the U.S., 46 F.4th 1283, 1303 (11th Cir. 2022).

<sup>19</sup> Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citing R.R. Comm’n v. Pullman Co., 312 U.S. 496, 500 (1941)).

<sup>20</sup> Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

<sup>21</sup> The TRO standard is the same as the preliminary injunction standard discussed *infra* note 22. See, e.g., Ass’n of Cmty. Cancer Ctrs. v. Azar, 509 F. Supp. 3d. 482, 493 (D. Md. 2020) (applying factors from Winter v. Nat. Res. Def. Council, 555 U.S. 7 (2008)); Hawai’i v. Trump, 241 F. Supp. 3d. 1119, 1134 (D. Haw. 2017) (same).

<sup>22</sup> Winter, 555 U.S. at 20 (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” (citing Munaf v. Geren, 553 U.S. 674, 689–90 (2008); Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987); Weinberger, 456 U.S. at 311–12)).

<sup>23</sup> eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (explaining the four-part test for a permanent injunction: “(1) that [the plaintiff] has suffered an irreparable injury; (2) that remedies available at law . . . 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” (citing Weinberger, 456 U.S. at 311–13; Gambell, 480 U.S. at 542)).

<sup>24</sup> See, e.g., Howard M. Wasserman, *Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent*, 91 U. COLO. L. REV. 999, 1002–03 (2020); Rendleman, *supra* note 15, at 892 (using the terms “national government injunction” and “nationwide national government injunction”).

not just parties to the litigation.<sup>25</sup> Though “no one denies that district courts have the power to enjoin a defendant’s conduct anywhere in the nation . . . as it relates to *the plaintiff*,”<sup>26</sup> sharp disagreement exists over courts’ ability to issue relief as applied to nonparties. This Chapter focuses on nationwide injunctions directed against the federal government that completely enjoin the government from implementing and enforcing a federal statute or executive policy.<sup>27</sup>

2. *Methodology.* — To capture and provide as complete a list as possible of nationwide injunctions as defined above,<sup>28</sup> this Chapter relies on two datasets<sup>29</sup>: First, in response to a Freedom of Information Act (FOIA) request to DOJ, editors of the *Law Review* received a dataset of the nationwide injunctions identified by the Department from 1963 into the beginning of 2020.<sup>30</sup> Second, editors compiled a list of nationwide injunctions issued from the beginning of 2020 through the end of 2023.<sup>31</sup>

Though our search was thorough, this data does not purport to be comprehensive. Most obviously, the documents provided by DOJ did not include the methodology by which the Department compiled its list. While editors of the *Law Review* reviewed each case identified by DOJ,<sup>32</sup> we did not verify whether DOJ’s list was comprehensive.

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<sup>25</sup> See, e.g., JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10664, NATIONWIDE INJUNCTIONS: RECENT LEGAL DEVELOPMENTS (2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10664/1> [<https://perma.cc/X9BZ-5QRC>]; *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–25 & n.1 (2018) (Thomas, J., concurring).

<sup>26</sup> Frost, *supra* note 15, at 1071.

<sup>27</sup> Our dataset does not include nationwide injunctions issued against nongovernmental actors, such as the one in *National Commission for Certification of Crane Operators, Inc. v. Nationwide Equipment Training, LLC*, No. 20-cv-483, 2020 WL 7389769, at \*1 (S.D. Ala. Nov. 24, 2020) (granting nationwide injunction against private company for copyright infringement). Thus, the total number of nationwide injunctions against all parties is larger than the number reported in this Chapter.

<sup>28</sup> We did not include TROs in our count. We only counted preliminary and permanent injunctions. We sought to avoid double counting an injunction that was granted on both a preliminary and permanent basis. Thus, where a court preliminarily enjoined a policy and subsequently enjoined the policy on a permanent basis, we counted this as one injunction. See, e.g., *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377 (M.D.N.C. 2019) (preliminary injunction); *Guilford Coll. v. Wolf*, No. 18CV891, 2020 WL 586672 (M.D.N.C. Feb. 6, 2020) (permanent injunction).

<sup>29</sup> See Appendix, <https://harvardlawreview.org/print/vol-137/district-court-reform-nationwide-injunctions-appendix/> [<https://perma.cc/QG6E-TRMR>].

<sup>30</sup> The latest nationwide injunction identified in the dataset occurred on February 6, 2020.

<sup>31</sup> Editors reviewed cases from a Westlaw search: (((nation!)/3 (injunction OR enjoin!)) OR “order applies nationally” OR ((universal!)/3 (injunction OR enjoin!)) OR “order applies universally”), which was cross-referenced by a LexisNexis search: (“outcome (injunct! OR enjoin!) and name (united states OR U.S. OR Secretary OR Department OR Administration OR Commission)”), and searches of state attorneys’ general websites and news media reports. As discussed in more detail, *infra* section B.3, pp. 1712–15, the dataset does not include cases in which the court issued vacatur, a distinct remedy affording nationwide relief, even where the plaintiffs initially sought an injunction. Nor does the dataset include cases where injunctive relief was issued as to a nationwide class.

<sup>32</sup> Our count differs from the count announced by DOJ in 2020. See note 16. DOJ may have double counted preliminary and permanent injunctions. Further, DOJ appears to have included cases where judges vacated a rule under the APA, rather than enjoined a policy nationally. See,

For purposes of our analysis, we focus on injunctions issued beginning in 2001 with the Bush Administration. Finally, we cannot guarantee our own search for nationwide injunctions from 2020 to 2023 picked up every single nationwide injunction issued. Westlaw and LexisNexis do not publish every case. Further, because judges use varying terminology, and do not always identify an injunction as “nationwide,” “national,” or “universal” despite issuing an injunction to that effect, our figures likely underestimate the total number of injunctions issued.<sup>33</sup> At the very least, we are confident this is the most comprehensive dataset of nationwide injunctions compiled and published to date.

3. *The Numbers.* — The dataset includes 127 injunctions. Just over half (64) of the injunctions issued since 1963 were issued against Trump Administration policies.<sup>34</sup>

Table 1: Nationwide Injunctions from 2001 to 2023

PRESIDENTIAL ADMINISTRATION THAT PROMULGATED THE ENJOINED POLICY	TOTAL INJUNCTIONS	INJUNCTIONS ISSUED BY JUDGE APPOINTED BY PRESIDENT OF OPPOSING PARTY	PERCENTAGE
Bush	6	3	50.0%
Obama	12	7	58.3%
Trump	64	59	92.2%
Biden	14	14	100.0%
TOTAL	96	83	86.5%

Of the 12 nationwide injunctions issued in response to Obama Administration policies, 7 were issued by judges appointed by a Republican President. The 12 injunctions were issued by 8 district courts. Just over half were issued by district courts in Texas: 3 by the Northern District of Texas, 3 by the Eastern District, and 1 by the Southern District.

Of the 64 nationwide injunctions issued against Trump policies, only 5 were issued by judges appointed by a Republican, leaving 92.2% of injunctions issued by a judge appointed by a Democrat. The 64 injunctions were issued by 18 district courts, with 15 (23.4%) issued by the Northern District of California, 10 (15.6%) by the District of the District

*e.g.*, *New York v. U.S. Dep’t of Health & Hum. Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019); *City & County of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019); *Washington v. Azar*, 426 F. Supp. 3d 704 (E.D. Wash. 2019).

<sup>33</sup> Our search terms in Westlaw, for example, did not pick up the case *New York v. Trump*, 490 F. Supp. 3d 225, 245 (D.D.C. 2020). However, we were able to find cases of this kind if they were cited as an example in a case that did populate through our Westlaw and LexisNexis searches.

<sup>34</sup> Given that President Trump held office for only one term — half the length of the two-term presidencies of the Bush and Obama Administrations — these numbers are particularly staggering.

of Columbia, and 8 (12.5%) by the District of Maryland.

Through the end of President Biden's third year in office, 14 nationwide injunctions were issued, halting vaccine mandates,<sup>35</sup> immigration policies,<sup>36</sup> climate-change cost estimates,<sup>37</sup> and stimulus programs for farmers of color,<sup>38</sup> among other presidential priorities. Every single injunction was issued by a judge appointed by a Republican President. As in the Obama Administration, these injunctions have clustered in Texas: 5 by the Southern District and 1 by the Northern District.

The number of nationwide injunctions issued during the first three years of the Biden Administration is lower than the number issued during President Trump's first three years.<sup>39</sup> But two points, which will be discussed in greater depth below, are worth noting. First, the extreme use of nationwide injunctions during the Trump Administration could reflect judicial responsiveness to the unprecedented degree to which President Trump tested the limits of presidential power.<sup>40</sup> Second, in the Biden years, judges appear to be ordering vacatur in cases where plaintiffs requested an injunction. Whether the falling rate of injunctions from the Trump to the Biden Administration reflects a decrease in abuses of executive power, judicial responsiveness to growing criticism of the nationwide injunction,<sup>41</sup> or the replacement of some injunctions

<sup>35</sup> *Georgia v. Biden*, 574 F. Supp. 3d 1337, 1343 (S.D. Ga. 2021) (vaccine mandate for federal contractors); *Louisiana v. Becerra*, 571 F. Supp. 3d 516, 526 (W.D. La. 2021) (Centers for Medicare & Medicaid Services' vaccine mandate).

<sup>36</sup> See, e.g., *Texas v. Biden*, 554 F. Supp. 3d 818, 828 (N.D. Tex. 2021), *rev'd*, 142 S. Ct. 2528 (2022); *Texas v. United States*, 555 F. Supp. 3d 351, 362–63 (S.D. Tex. 2021); *Texas v. United States*, 524 F. Supp. 3d 598, 607 (S.D. Tex. 2021); *Louisiana v. Ctrs. for Disease Control & Prevention*, 603 F. Supp. 3d 406, 412, 441 (W.D. La. 2022); *Arizona v. Biden*, 593 F. Supp. 3d 676, 692 (S.D. Ohio 2022), *rev'd*, 40 F.4th 375 (6th Cir. 2022).

<sup>37</sup> *Louisiana v. Biden*, 543 F. Supp. 3d 388, 396–97 (W.D. La. 2021).

<sup>38</sup> *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1295 (M.D. Fla. 2021); *Holman v. Vilsack*, No. 21-1085, 2021 WL 2877915, at \*1–2 (W.D. Tenn. July 8, 2021).

<sup>39</sup> We estimate that by December 31, 2019, 44 nationwide injunctions had been issued.

<sup>40</sup> President Trump is the only President to be impeached twice. Lisa Mascaro et al., *Donald Trump Becomes the First U.S. President to Be Impeached Twice*, PBS (Jan. 13, 2021, 4:33 PM), <https://www.pbs.org/newshour/politics/majority-of-house-members-vote-for-2nd-impeachment-of-trump> [<https://perma.cc/Y4DU-466E>]. He also maintained that Article II gave him “the right to do whatever [he] want[s].” Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him “The Right to Do Whatever I Want,”* WASH. POST (July 23, 2019, 9:46 PM), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want> [<https://perma.cc/2JRN-77FX>]. For more on President Trump's “unprecedented” efforts to “undermine and otherwise reshape domestic policy programs,” see FRANK J. THOMPSON ET AL., *TRUMP, THE ADMINISTRATIVE PRESIDENCY, AND FEDERALISM* (2020). For more on President Trump's disregard for presidential norms and checks on executive power, see generally BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* (2020).

<sup>41</sup> See *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1176 (M.D. Fla. 2022) (recognizing “the criticism about nationwide injunctive relief and admittedly shar[ing] some of the skepticism about it”); *Nat'l Urb. League v. Ross*, 489 F. Supp. 3d 939, 1002 (N.D. Cal. 2020) (“The Court is aware of the ongoing debate regarding nationwide injunctions and their scope.”); Gilliam



with the “lesser remedy”<sup>42</sup> of vacatur, the decrease should not mislead: district court judges appear to be striking down executive policies of opposing administrations with unprecedented frequency.

### B. *The Consequences*

Nationwide injunctions issued over the past twenty years collectively reveal three main takeaways: First, nationwide injunctions are becoming more common. Second, they are overwhelmingly issued by judges appointed by a President from the opposite political party as the President who promulgated the policy at issue. Third, some judges are increasingly turning to vacatur, rather than nationwide injunctions, to stop executive action.

1. *The Increase in Nationwide Injunctions.* — Nationwide injunctions are undeniably on the rise. As gridlock in Congress has forced Presidents to turn to executive action, so too have nationwide injunctions increased.<sup>43</sup> Scholars theorize that nationwide injunctions interrupt the ordinary development of law in three main ways: by interfering with percolation, creating conflicts in the law, and allowing an end-run around class actions. Two of these concerns have borne out in practice.

(a) *Percolation.* — Scholars contend that proper “percolation” — “the practice of awaiting multiple lower courts’ answers to a legal question that the [Supreme] Court is bound to decide”<sup>44</sup> — is foundational to legal development. Where legal challenges involve complex questions of law, development across many factual contexts may facilitate a more considered resolution, and granting a nationwide injunction could cut that short.<sup>45</sup> The Southern District of Georgia’s decision to enjoin the Biden Administration’s vaccine requirement for federal contractors and subcontractors presents a discrete example.<sup>46</sup> Around the time when the Georgia court enjoined the requirement, three other district courts had also considered and preliminarily enjoined the contractor mandate, but

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v. U.S. Dep’t of Agric., 486 F. Supp. 3d 856, 880–81 (E.D. Pa. 2020) (“The Court is also mindful of the skepticism regarding the increased issuance of nationwide injunctions.”); *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 981 F.3d 742, 763 (9th Cir. 2020) (“The appropriateness of nationwide injunctions in any case has come under serious question.”).

<sup>42</sup> *All. for Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507, 560 (N.D. Tex. 2023), *aff’d in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom. Danco Lab’ys, L.L.C. v. All. for Hippocratic Med.*, No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), and *cert. granted sub nom. FDA v. All. for Hippocratic Med.*, No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) (discussing vacatur as a “less drastic remedy,” *id.* at 165, than injunction); *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 52 (D.D.C. 2020) (considering vacatur as distinct from injunction and “substantially less intrusive”).

<sup>43</sup> *See* Charlton C. Copeland, *Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 U. COLO. L. REV. 789, 808 (2020).

<sup>44</sup> Michael Coenen & Seth Davis, *Percolation’s Value*, 73 STAN. L. REV. 363, 371 (2021).

<sup>45</sup> *See id.* at 381 & n.98 (quoting *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)).

<sup>46</sup> *See Georgia v. Biden*, 574 F. Supp. 3d 1337, 1357 (S.D. Ga. 2021).

these courts limited the injunctions to the parties in each case.<sup>47</sup> After the nationwide injunction was issued, at least seven district courts considered cases where plaintiffs challenged the vaccine mandate, but dismissed or stayed the claims instead of offering independent evaluations of the mandate's legality.<sup>48</sup> The courts claimed they lacked jurisdiction to decide the cases because plaintiffs could not demonstrate an imminent or traceable injury as a result of the preexisting nationwide injunction.<sup>49</sup> The nationwide injunction also led to more cursory review in circuit courts.<sup>50</sup> And, in other cases, courts struggled to answer questions tangential to the executive order because the injunction had prevented other courts from exploring them.<sup>51</sup>

Furthermore, the lack of percolation fast-tracks to the Supreme Court issues that have not “ha[d] the benefit of varying court of appeals decisions based upon multiple records.”<sup>52</sup> Instead, the Court may “review a single grant of preliminary relief and effectively decide a legal issue of nationwide importance without a well-developed sense of the consequences of its decision.”<sup>53</sup> Justice Gorsuch has lamented the loss of factual development in this manner, which “permits the airing of competing views that aids [the] Court’s own decisionmaking process.”<sup>54</sup>

(b) *Conflicting Law*. — With an increase in nationwide injunctions, some scholars warn that conflicting injunctions “could result in a

<sup>47</sup> See *Kentucky v. Biden*, 571 F. Supp. 3d 715, 735 (E.D. Ky. 2021) (enjoining mandate in Kentucky, Ohio, and Tennessee); *Missouri v. Biden*, 576 F. Supp. 3d 622, 635 (E.D. Mo. 2021) (enjoining mandate in Alaska, Arkansas, Iowa, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming); *Florida v. Nelson*, 576 F. Supp. 3d 1017, 1040 (M.D. Fla. 2021) (enjoining mandate in Florida).

<sup>48</sup> See *Conner v. Biden*, No. 21-CV-074, 2021 WL 6773174, at \*8 (N.D. Tex. Dec. 28, 2021); *SNL Workforce Freedom All. v. Nat’l Tech. & Eng’g Sols. of Sandia, LLC*, No. 22-cv-00001, 2022 WL 2065062, at \*5 (D.N.M. June 8, 2022); *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826, 836 (S.D. Tex. 2022); *Calderwood v. United States*, 623 F. Supp. 3d 1260, 1282 (N.D. Ala. 2022); *de Cristo Cano v. Biden*, 598 F. Supp. 3d 921, 923 (S.D. Cal. 2022); *Flores v. United States*, No. 22-cv-70, 2022 WL 204247, at \*1 (M.D. Fla. Jan. 24, 2022); *Texas v. Biden*, No. 21-CV-309, 2022 WL 18436750, at \*1 (S.D. Tex. Oct. 20, 2022).

<sup>49</sup> See sources cited *supra* note 48.

<sup>50</sup> See, e.g., *Kentucky v. Biden*, 23 F.4th 585, 611 (6th Cir. 2022) (noting “from a practical perspective that the contractor mandate is already subject to a nationwide injunction,” making the court’s decision “somewhat academic” because “even if [it] thought the district court’s injunction an abuse of discretion . . . dissolution of it could not revive the contractor mandate and prevent the government’s allegedly irreparable injuries”).

<sup>51</sup> See, e.g., *Donovan v. Biden*, 603 F. Supp. 3d 975, 982 (E.D. Wash. 2022) (“The issue as to whether the Executive Order 14042, which applies to federal contractors, complies with the Procurement Act is unsettled among district courts and courts of appeal. Currently, Executive Order 14042 is under a nationwide injunction, pending review by the 11th Circuit. However, the Ninth Circuit has not addressed the issue, and therefore, there is no binding authority directly on point.” (citations omitted)).

<sup>52</sup> Coenen & Davis, *supra* note 44, at 382; see also *Bray*, *supra* note 14, at 462 (“A world of national injunctions is one in which the Supreme Court will tend to decide important questions more quickly, with fewer facts, and without the benefit of contrary opinions by lower courts.”).

<sup>53</sup> Coenen & Davis, *supra* note 44, at 382.

<sup>54</sup> *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (mem.) (Gorsuch, J., concurring) (citing *Bray*, *supra* note 14, at 461–62).

defendant being held in contempt of court no matter which injunction the defendant tried to obey.”<sup>55</sup> But these fears of increased conflicts between jurisdictions may be overblown,<sup>56</sup> as Professor Amanda Frost has posited.<sup>57</sup> Judges tend to abide by the principle of comity — which “requires judges to avoid issuing [conflicting] injunctions when possible”<sup>58</sup> — and often narrow injunctions or otherwise issue injunctions so as not to overlap with preexisting ones.<sup>59</sup> Take the mifepristone case. Though the Eastern District of Washington limited the scope of its ruling to the Democratic plaintiff states, the Northern District of Texas ruling applied nationwide, leaving the judges’ orders at war with one another in nearly half the states. But only for a moment. The Fifth Circuit stayed the injunction, alleviating the tension.<sup>60</sup>

(c) *Relationship with Class Action.* — The availability of nationwide injunctions makes obtaining class-wide relief under Rule 23(b)(2) seemingly unnecessary. When “plaintiffs can get the same relief in an individual suit that they can in a class action,”<sup>61</sup> it raises the question: Why jump through the procedural hoops to obtain class certification when you can bypass them and still receive the same relief?<sup>62</sup>

2. *Nationwide Injunctions as Political Weapons.* — Notably, nationwide injunctions are not only increasing in frequency but also overwhelmingly issued by judges appointed by Presidents of the opposite party from the administration whose actions the judges are enjoining. Of the 78 nationwide injunctions issued during the Trump and Biden Administrations, 93.6% of injunctions were issued by judges appointed by a President of the opposing political party. Often, it is the policies that relate to politically hot-button issues or a President’s policy priorities that are enjoined: for President Obama, it was LGBTQ+ civil rights;<sup>63</sup>

<sup>55</sup> Frost, *supra* note 15, at 1106.

<sup>56</sup> See, e.g., Bert I. Huang, *Coordinating Injunctions*, 98 TEX. L. REV. 1331, 1332 & n.8 (2020) (contrasting expectations and reality).

<sup>57</sup> See Frost, *supra* note 15, at 1106.

<sup>58</sup> *Id.*

<sup>59</sup> See, e.g., *Louisiana v. Becerra*, 571 F. Supp. 3d 516, 543–44 (W.D. La. 2021).

<sup>60</sup> *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 256 (5th Cir. 2023).

<sup>61</sup> Bray, *supra* note 14, at 464–65.

<sup>62</sup> We found some instances where plaintiffs certified a nationwide class before obtaining relief. See, e.g., *U.S. Navy Seals 1–26 v. Austin*, 594 F. Supp. 3d 767, 776 (N.D. Tex. 2022) (enjoining the Navy’s COVID-19 vaccine mandate); *Doster v. Kendall*, 596 F. Supp. 3d 995, 1005 (S.D. Ohio 2022) (enjoining the Air Force’s COVID-19 vaccine mandate). However, most nationwide injunctions are issued against individual plaintiffs, and for purposes of our dataset, we only analyzed cases in which individual plaintiffs received nationwide relief.

<sup>63</sup> See, e.g., *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010) (Don’t Ask, Don’t Tell); *Texas v. United States*, 201 F. Supp. 3d 810, 816 (N.D. Tex. 2016) (transgender bathroom policies in schools); *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016) (abortion and gender-affirming surgery).

for President Trump, it was immigration;<sup>64</sup> and for President Biden, it was policies combatting the COVID-19 pandemic.<sup>65</sup>

Structural features of litigation exacerbate the politicization of the injunction. First, the ability of plaintiffs to target particular courts and forum shop for judges who are most likely to honor a request for injunctive relief results in a “race to the (‘right’) courthouse.”<sup>66</sup> Since securing a favorable ruling can enjoin enforcement of the challenged policy nationwide, strategic plaintiffs and state attorneys general are incentivized to bring cases in forums “with a particular perceived political valence” that aligns with plaintiffs’ own policy preferences.<sup>67</sup> Often, that means shopping litigation to states where the likelihood of drawing a judge appointed by a friendly political party is higher. Today, for example, two-thirds of all California federal district judges have been appointed by a Democrat.<sup>68</sup> The opposite is true in Texas.<sup>69</sup> It is also often the case in these states — where home-state senators tend to be solidly of one political party — that judges appointed by Presidents of the opposite party as the home-state senators are likely to be more moderate due to the Senate’s tradition of granting home-state senators veto power over a President’s judicial nominees.<sup>70</sup> It is no surprise that of the 6 injunctions issued against the Bush Administration, 4 (66.7%) were issued by judges in California. Of the 12 injunctions issued against the Obama Administration, Texas district courts issued 7 (58.3%). Like the trend observed during the Bush Administration, district courts in California issued more injunctions against the Trump Administration than any other state. Unsurprisingly, Texas federal courts have again become the hot zone for nationwide injunctions and vacatur after the election of President Biden.<sup>71</sup>

<sup>64</sup> See, e.g., *Hawai‘i v. Trump*, 245 F. Supp. 3d 1227, 1230 (D. Haw. 2017); *Hawai‘i v. Trump*, 265 F. Supp. 3d 1140, 1145 (D. Haw. 2017); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 544 (D. Md. 2017); *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 583 (D. Md. 2017); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 507 (N.D. Cal. 2017).

<sup>65</sup> See sources cited *infra* notes 73–76.

<sup>66</sup> Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2125 (2017).

<sup>67</sup> Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242, 243 (2017); Siddique, *supra* note 66, at 2125 (observing that, in just over one year, Texas district courts issued five nationwide injunctions “curtailing Obama-era regulations”).

<sup>68</sup> In the Northern and Eastern Districts of California, no judges have been appointed by a Republican President. See *Current Federal Judges by Appointing President and Circuit*, BALLOTPEdia (Feb. 17, 2024), [https://ballotpedia.org/Current\\_federal\\_judges\\_by\\_appointing\\_president\\_and\\_circuit](https://ballotpedia.org/Current_federal_judges_by_appointing_president_and_circuit) [https://perma.cc/7BCP-7U7R].

<sup>69</sup> Two-thirds of Texas federal district judges have been appointed by a Republican. See *id.*

<sup>70</sup> See generally Ryan C. Black et al., *Qualifications or Philosophy? The Use of Blue Slips in a Polarized Era*, 44 PRESIDENTIAL STUD. Q. 290 (2014).

<sup>71</sup> See, e.g., *Texas v. United States*, 524 F. Supp. 3d 598 (S.D. Tex. 2021); *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826 (S.D. Tex. 2022). Although vacaturs were not included in the dataset, plaintiffs often filed those cases — which sought injunctive relief, despite resulting in a stay or vacatur — in Texas district courts as well. See, e.g., *All. for Hippocratic Med. v. FDA*, 668 F. Supp.

Second, for each policy challenged, the asymmetrical effects of preclusion ensure that nationwide injunctions are a powerful tool for political opponents who can challenge the policy in multiple venues. Practically speaking, a successful defense against a nationwide injunction in one court is barely a win for the government at all: because that decision has no preclusive effect on new plaintiffs, other plaintiffs are free to bring the exact same lawsuit elsewhere and “[s]hop ‘til the statute drops.”<sup>72</sup> All it takes is one judge siding with the plaintiffs to enjoin the challenged law. These asymmetric consequences force the federal government to engage in a game of whack-a-mole. If enough plaintiffs sue — and if they can each target the forum most likely to be hostile to the government’s action — it seems almost inevitable that the action will be nationally enjoined. A prominent example is President Biden’s COVID-19 vaccine mandates: At least four judges declined to issue nationwide injunctions against Executive Order 14,042, but ultimately one did.<sup>73</sup> One judge declined to issue a nationwide injunction against Executive Order 14,043, but still the policy was enjoined nationally.<sup>74</sup> The same is true for the Centers for Medicare & Medicaid Services’ vaccine mandate.<sup>75</sup> And at least four different judges declined to issue nationwide injunctions against President Biden’s military vaccine mandate, but, ultimately, two enjoined the policy nationally.<sup>76</sup>

Though these structural factors contribute to the increase in nationwide injunctions, the exact causation is hard to pinpoint. As Judge

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3d 507 (N.D. Tex. 2023). The trend of filing in Texas is likely not a coincidence, but instead reflects a strategic decision to forum shop the case to a more favorable forum. As Professor Stephen Vladeck has documented, the structural quirks of the Texas federal district court system mean that filing a case in certain Texas divisions yields near certainty of drawing a particular judge. For example, by filing in the Amarillo Division, prospective plaintiffs have a 100% chance of having their case heard before Judge Kacsmayk. Steve Vladeck, *18 The Growing Abuse of Single-Judge Divisions*, SUBSTACK: ONE FIRST (Mar. 13, 2023), <https://stevevladeck.substack.com/p/18-shopping-for-judges> [<https://perma.cc/D4RB-SYHJ>].

<sup>72</sup> Bray, *supra* note 14, at 460.

<sup>73</sup> Compare *Brnovich v. Biden*, 562 F. Supp. 3d 123, 167 (D. Ariz. 2022) (limiting injunction to Arizona), *Florida v. Nelson*, 576 F. Supp. 3d 1017, 1040 (M.D. Fla. 2021) (limiting injunction to Florida contracts), *Kentucky v. Biden*, 571 F. Supp. 3d 715, 735 (E.D. Ky. 2021) (limiting injunctions to parties), and *Louisiana v. Biden*, 575 F. Supp. 3d 680, 695 (W.D. La. 2021) (same), with *Georgia v. Biden*, 574 F. Supp. 3d 1337, 1357 (S.D. Ga. 2021) (granting nationwide injunction to reduce confusion in implementation), *aff’d in part, vacated in part sub nom. Georgia v. President of the U.S.*, 46 F.4th 1283, 1303–08 (11th Cir. 2022) (overturning injunction as to nonparties).

<sup>74</sup> Compare *Rydie v. Biden*, 572 F. Supp. 3d 153, 162 (D. Md. 2021) (denying injunction), with *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826, 836 (S.D. Tex. 2022) (granting injunction).

<sup>75</sup> Compare *Missouri v. Biden*, 576 F. Supp. 3d 622, 635 (E.D. Mo. 2021) (limiting injunction to party states), with *Louisiana v. Becerra*, 571 F. Supp. 3d 516, 544 (W.D. La. 2021) (expanding reach of existing injunction nationwide).

<sup>76</sup> Compare *Poffenbarger v. Kendall*, 588 F. Supp. 3d 770, 798 (S.D. Ohio 2022) (limiting injunction to the parties), *Air Force Officer v. Austin*, 588 F. Supp. 3d 1338, 1347 (M.D. Ga. 2022) (same), *Roth v. Austin*, 603 F. Supp. 3d 741, 783 (D. Neb. 2022) (denying injunction), and *Doe #1-#14 v. Austin*, 572 F. Supp. 3d 1224, 1241 (N.D. Fla. 2021) (same), with *Doster v. Kendall*, 596 F. Supp. 3d 995, 1022–23 (S.D. Ohio 2022) (granting classwide injunction), and *U.S. Navy Seals 1–26 v. Austin*, 594 F. Supp. 3d 767, 789 (N.D. Tex. 2022) (same).

Rovner notes, it is difficult to disentangle “whether any such increase signals an expanding judicial overreach or an increasing executive autocracy.”<sup>77</sup> But, regardless of the exact causation, the numbers nonetheless demonstrate that nationwide injunctions — continually issued out of a select few districts, which change depending on the President’s party — are playing an increasing role in political battles. As a consequence of increased forum shopping and political gamesmanship, the increase in nationwide injunctions on highly politicized issues fuels the public’s perception that the courts themselves are politicized and that federal judges are political actors.<sup>78</sup> When “judges in the ‘red state’ of Texas halt Obama’s policies, and judges in the ‘blue state’ of Hawaii enjoin Trump’s,” it tests the limits of the public’s imagination to argue that the federal judiciary is impartial, nonpartisan, and legitimate.<sup>79</sup> The medication abortion cases are a prominent example, garnering public attention<sup>80</sup> and reigniting concerns that plaintiffs selectively “shopped” for judges they believed would likely rule in their favor.<sup>81</sup>

Perception of the judiciary as political is a natural conclusion in light of the fact that injunctions are disproportionately issued by more extreme judges: judges who were selected precisely because plaintiffs saw them as especially ideological and unafraid to reach beyond principles of judicial restraint.<sup>82</sup> In turn, these judges, who are least representative of the federal judiciary (not to mention unelected and unaccountable), determine policy for the rest of the country.

3. *Relationship with Vacatur.* — Finally, the Chapter’s analysis does not capture many high-profile cases deemed “nationwide injunctions”

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<sup>77</sup> *City of Chicago v. Barr*, 957 F.3d 772, 803 (7th Cir. 2020).

<sup>78</sup> See Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://harvardlawreview.org/blog/2018/01/an-old-solution-to-the-nationwide-injunction-problem> [<https://perma.cc/P6WX-D4VY>].

<sup>79</sup> See Frost, *supra* note 15, at 1104.

<sup>80</sup> See, e.g., Sarah McCammon, *Judges’ Dueling Decisions Put Access to a Key Abortion Drug in Jeopardy Nationwide*, NPR (Apr. 8, 2023, 5:45 AM), <https://www.npr.org/2023/04/07/1159220452/abortion-pill-drug-mifepristone-judge-texas-amarillo> [<https://perma.cc/LQN2-NR4N>]; Sandhya Raman, *Dual Court Rulings Throw Confusion into Abortion Drug Debate*, ROLL CALL (Apr. 7, 2023, 8:45 PM), <https://rollcall.com/2023/04/07/federal-judge-in-texas-blocks-use-of-abortion-drug> [<https://perma.cc/PZ5E-J8AK>].

<sup>81</sup> See, e.g., Kevin Breuninger, *Abortion Pill Ruling Puts “Judge Shopping” Concerns Back in Spotlight*, CNBC (Apr. 12, 2023, 5:37 PM), <https://www.cnbc.com/2023/04/12/abortion-pill-ruling-puts-judge-shopping-concerns-back-in-spotlight.html> [<https://perma.cc/AD8T-R2U2>]; Elie Mystal, *Conservatives Have a Sketchy New Legal Plot to Ban the Abortion Pill*, THE NATION, (Jan. 26, 2023), <https://www.thenation.com/article/politics/texas-judge-abortion-pill-case> [<https://perma.cc/9TSV-JNH9>]; Anna Bernstein, *Five Key Takeaways on Mifepristone, After Two Competing Rulings*, CENTURY FOUND. (Apr. 10, 2023), <https://tcf.org/content/commentary/five-key-takeaways-on-mifepristone-after-two-competing-rulings> [<https://perma.cc/JD2M-EE5W>]; Jordan Smith, *The Shadow Medical Community Behind the Attempt to Ban Medication Abortion*, THE INTERCEPT (Feb. 28, 2023, 12:44 PM), <https://theintercept.com/2023/02/28/medication-abortion-lawsuit> [<https://perma.cc/UL3Y-88EE>].

<sup>82</sup> See, e.g., Mystal, *supra* note 81 (describing Judge Kacsmaryk as a “zealot” who “[r]ight-wingers have actively sought out . . . for their most dubious legal claims”).

because the analysis did not include APA stays or grants of vacatur, which Bagley calls nationwide injunctions' "evil twin."<sup>83</sup>

Vacatur and injunctions are considered distinct.<sup>84</sup> First, a vacatur is authorized by the APA, which scholars argue is separate from remedies in equity.<sup>85</sup> In section 706 of the APA, Congress gave reviewing courts the power to "set aside agency action, findings, and conclusions" that the court found to be unlawful.<sup>86</sup> Section 705 authorizes stays, which effectively halt enforcement under the statute or regulation, pending judicial review.<sup>87</sup> Courts have interpreted this language to mean that they have the authority to vacate the entire rule, not simply the application of the rule as to the individual petitioners.<sup>88</sup> This tees up another distinction: their remedial nature (or lack thereof). While "[v]acatur operates on the legal status of a rule, causing the rule to lose binding force," injunctions operate on the parties to the litigation.<sup>89</sup> Put differently, "an injunction . . . merely blocks enforcement" while "vacatur unwinds the challenged agency action."<sup>90</sup> Thus, whether vacatur is considered a remedy is an open question.

Despite their technical differences, vacatur and injunctions function in the same manner when the challenged executive action is an agency rule.<sup>91</sup> Practically, both bar enforcement of the rule against all individuals across all jurisdictions<sup>92</sup> and "prevent[] some action before the

<sup>83</sup> Nicholas Bagley, *A Single Judge Shouldn't Have This Kind of National Power*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 14, 2023), <https://www.yalejreg.com/nc/a-single-judge-shouldnt-have-this-kind-of-national-power> [<https://perma.cc/Y7QE-EHW2>].

<sup>84</sup> See *Alabama v. Ctrs. for Medicare & Medicaid Servs.*, 674 F.3d 1241, 1244–45 (11th Cir. 2012) (per curiam) (differentiating vacatur from injunctions); *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 57–60 (D.D.C. 2020) (same).

<sup>85</sup> See William Baude & Samuel L. Bray, *The Supreme Court, 2022 Term — Comment: Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 181 (2023) ("[T]here is no traditional legal or equitable remedy of 'vacatur' . . ."). But see Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037, 2040–41 (2023) (tracking the history of the "set aside" remedy from earlier statutes and into the APA).

<sup>86</sup> 5 U.S.C. § 706(2).

<sup>87</sup> See *id.* § 705.

<sup>88</sup> See, e.g., *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)).

<sup>89</sup> John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. 119, 119–20 (2023).

<sup>90</sup> *Brown v. U.S. Dep't of Educ.*, 640 F. Supp. 3d 644, 667 (N.D. Tex. 2022) (quoting *Data Mktg. P'ship v. U.S. Dep't of Lab.*, 45 F.4th 846, 859 (5th Cir. 2022)).

<sup>91</sup> See Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1126 (2020); Ronald M. Levin, Opinion, *The National Injunction and the Administrative Procedure Act*, REGUL. REV. (Sept. 18, 2018), <https://www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act> [<https://perma.cc/Q936-35DZ>] ("[W]hen the challenged agency action is a rule, a judicial order that 'sets it aside' looks equivalent, in practical effect, to an injunction that prevents the rule from applying to anyone.")

<sup>92</sup> A small but growing literature has emerged that analyzes whether the Administrative Procedure Act's text actually does authorize this broad remedy. The literature dovetails with the debate on nationwide injunctions. See, e.g., Sohoni, *supra* note 91, at 1123 ("This effort to revisit

legality of that action has been conclusively determined.”<sup>93</sup> Indeed, vacatur is often colloquially referred to as nationwide injunctions,<sup>94</sup> and sometimes, courts consider them interchangeable.<sup>95</sup>

Because many of the most high-profile cases where courts issue nationwide prohibitions arise in the context of executive action, courts are free to choose between issuing a nationwide injunction or ordering vacatur. In considering President Trump’s decision to rescind the DACA program, two judges enjoined the rescission,<sup>96</sup> while one judge decided that vacatur, instead, was the appropriate remedy.<sup>97</sup> In the mifepristone case discussed above, plaintiffs sought a nationwide injunction in the Texas federal court, but Judge Kacsmaryk ultimately opted to issue a stay, or preliminary vacatur, instead.<sup>98</sup> He stated: “Because the Court finds injunctive relief is generally appropriate, Section 705 plainly authorizes the lesser remedy of issuing ‘all necessary and appropriate process’ to postpone the effective date of the challenged actions.”<sup>99</sup>

Given the perceived interchangeability between the two remedies, in recent rulings, what was once achieved through the nationwide injunction is increasingly being achieved through vacatur — especially because vacatur is considered a “less drastic remedy” that requires a lower standard.<sup>100</sup> Judge Mizelle’s order blocking President Biden’s

the APA’s remedial scheme has not arisen in a vacuum. Rather, it is largely (though not entirely) an outgrowth of the current maelstrom over the propriety of the ‘universal’ or ‘nationwide’ injunction.” (footnote omitted). It is outside the scope of this Chapter to rehash those arguments.

<sup>93</sup> *Nken v. Holder*, 556 U.S. 418, 428 (2009).

<sup>94</sup> See, e.g., Mark Joseph Stern, *Why Roberts and Kavanaugh Got So Furious at Biden’s Solicitor General*, SLATE (Dec. 2, 2022, 4:27 PM), <https://slate.com/news-and-politics/2022/12/supreme-court-biden-immigration-masks-debt-relief-elizabeth-prelogar.html> [<https://perma.cc/6WYN-VMDM>] (“More recently, however, district courts have used vacatur to function as nationwide injunctions against the executive branch. (To be clear, their decisions largely treat vacatur as a form of nationwide injunction — halting the enforcement of a regulation anywhere, by anyone, against any party — so it’s fair to use the two terms interchangeably, though they’re technically distinct.)”).

<sup>95</sup> See, e.g., *Guilford Coll. v. Wolf*, No. 18CV891, 2020 WL 586672, at \*11 (M.D.N.C. Feb. 6, 2020) (finding that nationwide injunctions were “especially appropriate in the immigration context” as justification to issue vacatur). But see *Cap. Area Immigrants’ Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 59 (D.D.C. 2020) (concluding that concerns about the “propriety” of issuing a nationwide injunction were “not the issue” when considering whether to order vacatur).

<sup>96</sup> *Regents of Univ. of Cal. v. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437 (E.D.N.Y. 2018).

<sup>97</sup> *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018).

<sup>98</sup> *All. for Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507, 560 (N.D. Tex. 2023), *aff’d in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom. Danco Lab’ys, L.L.C. v. All. for Hippocratic Med.*, No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), and *cert. granted sub nom. FDA v. All. for Hippocratic Med.*, No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023).

<sup>99</sup> *Id.*

<sup>100</sup> See *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) (“If a less drastic remedy (such as partial or complete vacatur of agency’s deregulation decision) was sufficient to redress respondents’ injury, no recourse to the additional and extraordinary relief of an injunction was warranted.”); see also *Brown v. U.S. Dep’t of Educ.*, 640 F. Supp. 3d 644, 667 (N.D. Tex. 2022) (“While ‘[i]t is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction,’ these circumstances do not justify such a remedy.” (quoting *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015))).



mask mandate on federal transit was deemed “a national injunction” by the media<sup>101</sup> but was actually vacatur.<sup>102</sup> So too was Judge Pittman’s order vacating President Biden’s student loan forgiveness program<sup>103</sup> and Judge Tipton’s decision invalidating immigration enforcement guidelines.<sup>104</sup> In practice, vacatur’s lower standard, combined with the enhanced opportunity for pre-enforcement challenges under the APA,<sup>105</sup> suggests litigants can use vacatur to achieve the same universal remedy as they might seek when pursuing injunctive relief.<sup>106</sup>

Many of the policy concerns regarding nationwide injunctions apply with similar force to vacatur.<sup>107</sup> Most obviously, plaintiffs are similarly incentivized to shop their litigation to friendly forums. And, indeed, this trend has been documented.<sup>108</sup> Further, when judges stay or vacate executive action, the order is still likely to halt the proper development of law, including by making it more likely that the case must be fast-tracked to the Supreme Court without proper factual development.

### C. Proposals for Reform

The rise in nationwide injunctions, coupled with the consequences identified in section B, suggest that reform is needed to curb the abuse of extreme nationwide injunctions that risk politicizing the judiciary. This section considers court reform proposals.<sup>109</sup> While many proposals may address one or a few particular symptoms of nationwide injunctions, when taking into account that judges are increasingly using

<sup>101</sup> See, e.g., Brad Kutner, *Judge Issues National Injunction Blocking Biden’s Airplane Mask Mandate*, NAT’L L.J. (Apr. 18, 2022, 4:55 PM), <https://www.law.com/nationallawjournal/2022/04/18/judge-issues-national-injunction-blocking-bidens-airplane-mask-mandate> [<https://perma.cc/USV5-LACT>].

<sup>102</sup> *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1177–78 (M.D. Fla. 2022).

<sup>103</sup> Compare Danielle Douglas-Gabriel, *Appeals Court Grants Injunction Against Biden’s Student Loan Forgiveness*, WASH. POST (Nov. 14, 2022, 5:14 PM), <https://www.washingtonpost.com/education/2022/11/14/appeals-halts-student-loan-forgiveness> [<https://perma.cc/PH3A-5CMY>], with *Brown*, 640 F. Supp. 3d at 667.

<sup>104</sup> Compare Maria Sacchetti, *Federal Judge in Texas Blocks Biden’s Efforts to Limit Immigration Arrests*, WASH. POST (Aug. 19, 2021, 6:45 PM), [https://www.washingtonpost.com/immigration/federal-judge-in-texas-blocks-bidens-efforts-to-limit-immigration-arrests/2021/08/19/673e43f4-011f-11ec-ba7e-2cf966e88e93\\_story.html](https://www.washingtonpost.com/immigration/federal-judge-in-texas-blocks-bidens-efforts-to-limit-immigration-arrests/2021/08/19/673e43f4-011f-11ec-ba7e-2cf966e88e93_story.html) [<https://perma.cc/VB4Z-KES9>], with *Texas v. United States*, 606 F. Supp. 3d 437, 499 (S.D. Tex. 2022), *rev’d*, 143 S. Ct. 1964 (2023).

<sup>105</sup> See *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 139–41 (1967); *Sackett v. EPA*, 566 U.S. 120, 130–31 (2012).

<sup>106</sup> See Kathryn Kimball Mizelle, *To Vacate or Not to Vacate: Some (Still) Unanswered Questions in the APA Vacatur Debate*, HARV. J.L. & PUB. POL’Y PER CURIAM, Fall 2023, at 1, 12–13.

<sup>107</sup> Frank Chang, Essay, *The Administrative Procedure Act’s Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions*, 85 GEO. WASH. L. REV. 1529, 1551 (2017).

<sup>108</sup> Vladeck, *supra* note 71. As of March 13, 2023, of the twenty-nine suits Texas had filed against the Biden Administration, zero were filed in Austin — where there is only a fifty percent chance of drawing a Republican-appointed judge. *Id.* By contrast, eight cases were filed in Victoria and seven in Amarillo, where plaintiffs are “guaranteed” to draw a specific Republican-appointed judge. *Id.*

<sup>109</sup> For reforms to nationwide injunctions that focus on curbing this type of remedy-seeking by litigants and litigators, see Elysa M. Dishman, *Generals of the Resistance: Multistate Actions and Nationwide Injunctions*, 54 ARIZ. ST. L.J. 359, 412–18 (2022).

vacatur to do what was once achieved through nationwide injunctions, structural reforms focused on limiting forum shopping are best suited to address the problem. These proposals preserve the ability of courts to use these remedies as a tool to curb executive abuses of power, while simultaneously limiting the most extreme uses.

Hanging over the debate on whether and how to reform nationwide injunctions is one large question: Are they constitutional? Scholars<sup>110</sup> and jurists<sup>111</sup> disagree — arguing about when the remedy first emerged and whether the remedy is consistent with traditional equitable principles.<sup>112</sup> Given the existing robust scholarly debate on the subject, the rest of this Chapter sets the question of constitutionality to the side. The increase in both executive policymaking and the issuance of nationwide injunctions supports the notion that nationwide injunctions are a critical tool in maintaining the constitutional separation of powers and protecting against executive abuse. For the purposes of this Chapter, we assume nationwide injunctions are not unconstitutional as a matter of law.

*I. Prohibiting Nonparty Relief.* — Some scholars and commentators argue for blanket prohibitions on nationwide relief. For example, Professor Michael Morley recommends adding to the Federal Rules of Civil Procedure a rule that would eliminate nationwide injunctions

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<sup>110</sup> With regard to the history, compare Bray, *supra* note 14, at 43, which cites *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963); *Flast v. Cohen*, 392 U.S. 83 (1968); and *Harlem Valley Transportation Ass'n v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), as early cases in which a national injunction was issued, with Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 943 (2020), which identifies *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913), as an earlier instance in which a court issued a nationwide injunction. Professor Mila Sohoni does not argue that *Lewis Publishing* is the first nationwide injunction issued against a federal law, only that it is at least one example that predates the previously recognized “first.” Sohoni, *supra*, at 943. With regard to constitutionality, compare Bray, *supra* note 14, at 420–21, who argues nationwide injunctions are beyond the scope of Article III, with Frost, *supra* note 15, at 1069, who argues nationwide injunctive relief is constitutional, and Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 981 (2020), who argues nationwide relief is an issue of scope of relief, not standing, so is properly within Article III.

<sup>111</sup> Justices Thomas and Gorsuch are skeptical of nationwide injunctions’ historical and constitutional basis. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2426, 2429 (2018) (Thomas, J., concurring) (arguing courts may lack not only constitutional and statutory authority to issue such injunctions but also historical precedent in equity); *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay) (arguing nationwide injunctions have “little basis in traditional equitable practice” because they “direct how the defendant must act toward persons who are not parties to the case” and may be “a sign of our impatient times”). Meanwhile, Justices Sotomayor and Jackson have indicated their support of nationwide injunctions where warranted to provide “complete relief.” See *Hawaii*, 138 S. Ct. at 2246 n.13 (Sotomayor, J., dissenting); *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 66 (D.D.C. 2019) (saying of the government’s arguments against a nationwide injunction: “[I]t reeks of bad faith, demonstrates contempt for the authority that the Constitution’s Framers have vested in the judicial branch, and, ultimately, deprives successful plaintiffs of the full measure of the remedy to which they are entitled.”).

<sup>112</sup> If the Court takes up this question, a major issue is likely to be whether nationwide injunctions are within the equitable jurisdiction of the federal courts. See *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308 (1999).

altogether and limit relief to the parties in the case.<sup>113</sup> Another commentator proposes a rule that would allow only circuit courts to issue nonparty relief.<sup>114</sup> Others suggest limiting injunctions by issue area, providing clear-cut cases where nationwide relief should be circumscribed.<sup>115</sup> And others look to limit by geographic scope, such as by a “circuit-border rule”<sup>116</sup> or a state-line boundary.<sup>117</sup> These reforms look to balance “the need for uniformity with the benefits of regional percolation.”<sup>118</sup> They also even the asymmetrical effects of an injunction: to enjoin a policy nationwide, plaintiffs must win multiple times.

However, outlawing nonparty injunctions altogether would be overly broad. Based on our survey of nationwide injunctions, many courts weigh heavily the need for restraint — suggesting the excessive use of nationwide injunctions is limited to certain judges and certain court-houses. Moreover, in some instances, nationwide injunctions may be the only remedy that could meaningfully check the executive branch’s power.<sup>119</sup> Indeed, outlawing nationwide injunctions in response to their increase could confuse cause and effect: nationwide injunctions might be increasingly common in part because they are increasingly

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<sup>113</sup> Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 28, 49 (2019). In Congress, Senator Cotton and Representative Meadows introduced the Nationwide Injunction Abuse Prevention Act of 2019, which sought to outlaw nationwide injunctions altogether by limiting federal injunctions to the parties to the suit and the geographic limits of the district, but they have yet to reintroduce the bill during the Biden Administration. S. 2464, 116th Cong. (2019); H.R. 4292, 116th Cong. (2019). Representative Biggs’s Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019), sought to limit injunctive orders that reach beyond the parties to the suit “unless the non-party is represented by a party” in a class action lawsuit.

<sup>114</sup> Sam Heavenrich, *An Appellate Solution to Nationwide Injunctions*, 96 IND. L.J. SUPP. 1, 3 (2020).

<sup>115</sup> See, e.g., Madison J. Scaggs, Note, *How Nationwide Injunctions Have Thwarted Recent Immigration Policy*, 105 IOWA L. REV. 1447, 1469–73 (2020) (proposing prohibiting nationwide injunctions as a remedy in the immigration context).

<sup>116</sup> Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1100 (2017).

<sup>117</sup> Joseph D. Kmak, Comment, *Abusing the Judicial Power: A Geographic Approach to Address Nationwide Injunctions and State Standing*, 70 EMORY L.J. 1325, 1363 (2021). Often, courts have taken this approach when defining an injunction’s scope, sometimes limiting the injunction to a single state. See, e.g., *Mayor & City Council of Balt. v. Azar*, 439 F. Supp. 3d 591, 616 (D. Md. 2020) (enjoining the Department of Health and Human Services from implementing or enforcing a final rule only in the state of Maryland); *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1031 (N.D. Ill. 2019) (enjoining enforcement of a final rule in Illinois); *Colorado v. EPA*, 445 F. Supp. 3d 1295, 1313 (D. Colo. 2020) (enjoining agencies to continue administering statute in Colorado).

<sup>118</sup> Berger, *supra* note 116, at 1101. Advocates for limiting the boundary of an injunction argue the injunction will still cover the entire territory where the decision has precedential value without choking off development of the same legal questions in other jurisdictions across the nation. *Id.*

<sup>119</sup> See Frost, *supra* note 15, at 1116; Malveaux, *supra* note 15, at 62 (noting the importance of nationwide relief as a judicial check in light of congressional gridlock); Ezra Ishmael Young, *The Chancellors Are Alright: Nationwide Injunctions and an Abstention Doctrine to Salve What Ails Us*, 69 CLEV. ST. L. REV. 859, 902 (2021) (“The judiciary cannot serve its constitutional function if it allows the executive to neuter it.”). *But see generally* Wasserman, *supra* note 14 (arguing that without national injunctions, complete relief for plaintiffs can still be achieved by expanding the scope of litigation through class actions, associational standing, and third-party standing).

warranted. From the plaintiff's perspective, nationwide injunctions are also a powerful tool in stopping or pausing irreparable harm.<sup>120</sup> Finally, from the government's perspective, nonparty relief is a "practical necessity" that ensures the government does not have to track its enforcement on an individual-by-individual basis.<sup>121</sup> As a matter of policy, this Chapter recognizes the nationwide injunction as a critical tool in protecting plaintiffs and ensuring governmental efficiency and thus does not recommend a blanket prohibition.

2. *Judicial Standards and Procedures.* — Some scholars believe courts can be trusted to self-regulate their use of nationwide injunctions and note that courts are well suited to "impos[e] self-disciplining rules and standards to calibrate the effect that the nationwide injunction has."<sup>122</sup> But this Chapter's empirical analysis suggests reforms that rely on judicial restraint may not effectively address the problem — that plaintiffs strategically shop their cases to the forums and judges most likely to issue drastic remedies. So even if the vast majority of federal judges exercised self-restraint, those judges may not be the ones driving the rise in nationwide injunctions. Instead, the small pocket of judges who issue most nationwide orders — and who seem least likely to display restraint — would remain. And so would nationwide injunctions.

Scholars have detailed several proposals counseling self-restraint. Self-regulation could take the form of adopting a multifactor balancing test<sup>123</sup> or a strengthened presumption against issuing nationwide injunctions.<sup>124</sup> For example, Professor Alan Trammell draws on principles of preclusion and acquiescence to propose a "preclusion-based theory" where a presumption against issuing nationwide injunctions can be overcome only if a government official is acting in bad faith by ignoring settled law.<sup>125</sup> Zayn Siddique suggests amending Federal Rule of Civil Procedure 65 to codify a standard that nationwide injunctions can be issued only when necessary to provide complete relief to the parties.<sup>126</sup>

<sup>120</sup> Amdur & Hausman, *supra* note 15, at 51.

<sup>121</sup> See Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2005 (2023).

<sup>122</sup> Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 996–97 (2022).

<sup>123</sup> See Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-class Collective Relief*, 90 CORNELL L. REV. 1119, 1145 (2005); Matthew Erickson, Note, *Who, What, and Where: A Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331, 335 (2018).

<sup>124</sup> See, e.g., Katherine B. Wheeler, Comment, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200, 203 (2017).

<sup>125</sup> Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 103–04, 108 (2019). Trammell notes that nationwide injunctions can be appropriate where an official is not technically acting in bad faith but where the law is nevertheless "settled enough." *Id.* at 108.

<sup>126</sup> Siddique, *supra* note 66, at 2139–47. Any judicially created rule that constrains injunctive relief must be "expressly cast in procedural terms" because the Rules Enabling Act grants the

But appellate courts have already attempted to institute standards and presumptions against issuing nonparty injunctions.<sup>127</sup> The Ninth Circuit instituted a presumption against issuing nonparty injunctions that reach beyond the circuit, absent “a showing of nationwide impact or sufficient similarity.”<sup>128</sup> The Fifth Circuit deemed nationwide injunctions appropriate if there is “(1) concern that a geographically limited injunction would fail to prevent a plaintiff’s harm or (2) a constitutional command for a consistent national policy,” such as immigration.<sup>129</sup> The Eleventh Circuit expressed skepticism of district courts’ ability to issue nationwide relief, explaining that courts should be “weary and wary” of such a “drastic form of relief” that “push[es] against the boundaries of judicial power” by allowing “a single district court an outsized role in the federal system.”<sup>130</sup> To cabin discretion, the Eleventh Circuit noted “a range of factors that may counsel in favor of a nationwide injunction.”<sup>131</sup> The Second and Sixth Circuits have also urged caution.<sup>132</sup>

District courts are catching on, taking steps to constrain or restrict broad nationwide injunctions.<sup>133</sup> In particular, courts have shown interest in respecting judicial comity<sup>134</sup> and avoiding “chaos and confusion”<sup>135</sup> when considering an order that may cause conflicts.<sup>136</sup> Lower

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judiciary rulemaking power over “procedural,” as opposed to substantive, rules. *See* Morley, *supra* note 113, at 49 & n.277. *But see* Rendleman, *supra* note 15, at 969 (calling an amendment to limit federal court orders “inadvisable and wrongheaded” because “[i]t would limit the courts’ remedial power based on [a] dubious analysis of legal history”).

<sup>127</sup> *See* Georgia v. President of the U.S., 46 F.4th 1283, 1305–06 (11th Cir. 2022) (“We are not the first to catalog these problems — many have already done so in response to the growing trend of nationwide injunctions against federal action.” (citing, *inter alia*, Arizona v. Biden, 40 F.4th 375, 395–98 (6th Cir. 2022) (Sutton, C.J., concurring); City of Chicago v. Barr, 961 F.3d 882, 936–38 (7th Cir. 2020) (Manion, J., concurring in the judgment); CASA de Md., Inc. v. Trump, 971 F.3d 220, 256–62 (4th Cir. 2020) (Wilkinson, J.), *vacated for reh’g en banc*, 981 F.3d 311 (4th Cir. 2020); California v. Azar, 911 F.3d 558, 583–84 (9th Cir. 2018))).

<sup>128</sup> *Azar*, 911 F.3d at 584.

<sup>129</sup> *Nuziard v. Minority Bus. Dev. Agency*, No. 23-CV-0278, 2023 WL 3869323, at \*7–8 (N.D. Tex. June 5, 2023) (citing *O’Donnell v. Harris County*, 892 F.3d 147, 155 (5th Cir. 2018); *Louisiana v. Becerra*, 20 F.4th 260, 263–64 (5th Cir. 2021)).

<sup>130</sup> *Georgia v. President of the U.S.*, 46 F.4th at 1303–04.

<sup>131</sup> *Id.* at 1306 (citing *Florida v. Dep’t of Health & Hum. Servs.*, 19 F.4th 1271, 1281–83 (11th Cir. 2021)).

<sup>132</sup> *See* *New York v. U.S. Dep’t of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020); *Kentucky v. Biden*, 57 F.4th 545, 556–57 (6th Cir. 2023).

<sup>133</sup> *See, e.g.*, *Texas v. Becerra*, 623 F. Supp. 3d 696, 704 (N.D. Tex. 2022) (limiting injunction to the state of Texas and the class of plaintiffs); *Washington v. FDA*, 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023) (declining to issue a nationwide injunction as abortion restrictions vary state by state and plaintiffs’ alleged harm was not shared nationwide).

<sup>134</sup> *See* *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1144 (D.N.D. 2021) (citing, *inter alia*, *California ex rel. Lockyer v. USDA*, 710 F. Supp. 2d 916, 921–23 (N.D. Cal. 2008); *Fund for Animals v. Norton*, 323 F. Supp. 2d 7, 10–11 (D.D.C. 2004)).

<sup>135</sup> *Colon v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 23-cv-223, 2024 WL 309975, at \*6 (M.D. Fla. Jan. 26, 2024).

<sup>136</sup> *See, e.g.*, *Texas v. Biden*, No. 22-CV-00004, 2023 WL 6281319, at \*16 (S.D. Tex. Sept. 26, 2023) (declining to issue nationwide injunctive relief because “extending relief nationwide would result in this Court encroaching upon the jurisdiction of other courts who have ruled on this issue”).

courts weigh this factor against whether a policy demands uniformity, often declining to issue nationwide relief when it does not.<sup>137</sup>

Yet, despite these standards and warnings, nationwide injunctions are still on the rise,<sup>138</sup> illustrating how difficult standardizing complete relief is. The proliferation of nationwide injunctions also indicates that reforms of this nature will be less likely to be effective. Any reform to the injunction that relies on the exercise of judicial restraint, even if adopted by the majority of judges, might be ignored by the particular judges who are *most likely* to issue nationwide injunctions — those whom plaintiffs seek out precisely because they may be unrestrained.

Alternatively, some recommend procedural reforms to cabin judicial discretion. For example, Judge Milan Smith of the Ninth Circuit supports requiring special hearings to determine the appropriate scope of a potential injunction and requiring district courts to fully explain their reasoning in writing with regard to the costs and benefits of enjoining the federal government.<sup>139</sup> In the context of permanent injunctions, parties might also be required to “brief the appropriate scope of the injunction after the court has issued its substantive decision,” which would allow the government to present arguments specifically related to the scope of the injunction in light of the judge’s findings and conclusions.<sup>140</sup> Others propose allowing more outsiders to intervene in cases seeking nationwide injunctions, which would provide more information to courts looking to understand the impact of an injunction and prompt either a better analysis or record for appellate review.<sup>141</sup>

But here too, procedural reforms may be an inadequate solution. More transparency does not stop judges from overissuing nationwide injunctions or necessarily make them think twice. Many opinions issuing nationwide injunctions thoroughly explain the court’s reasoning.

Regardless of their efficacy, such proposals may be missing the point: the consequences and problems purportedly resolved in the context of injunctions would still rear their head in the context of vacatur. As executive rulemaking under the APA increases, plaintiffs — and judges — could evade limits on nationwide injunctions by

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<sup>137</sup> *Texas v. EPA*, No. 23-cv-17, 2023 WL 2574591, at \*12 (S.D. Tex. Mar. 19, 2023) (noting nationwide relief was inappropriate because some states had not challenged the regulation and there was “no compelling need for uniform relief”); *Texas v. Becerra*, 577 F. Supp. 3d 527, 562 (N.D. Tex. 2021) (limiting injunction in the absence of a “constitutional command for nationwide uniformity”).

<sup>138</sup> Though there have been fewer injunctions against Biden policies than Trump policies, the number issued against the Biden Administration has exceeded those issued against Presidents Bush and Obama, both of whom served two terms. See *supra* Table 1.

<sup>139</sup> Milan D. Smith, Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 NOTRE DAME L. REV. 2013, 2036 (2020).

<sup>140</sup> *Id.* at 2036 & n.111 (emphasis omitted).

<sup>141</sup> Monica Haymond, *Intervention and Universal Remedies*, 91 U. CHI. L. REV. (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4703842](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4703842) [<https://perma.cc/SL6F-5E43>].

seeking — and granting — vacatur instead.<sup>142</sup> The same concerns about politicization and forum shopping would arise. Reforms aimed at addressing the increase in nationwide relief broadly — but that focus on injunctive relief narrowly — would prove ineffective in curbing partisan actors who see universal relief, in any form, as a tool for political ends.

Even if courts were able to resolve questions pertaining to nationwide relief more broadly, uniform and systematic judicial reforms seem practically unlikely in the short term. The Supreme Court has considered nationwide injunctions on a number of occasions<sup>143</sup> but has continually sidestepped the question.<sup>144</sup> In turn, lower courts have generally construed the Court's silence as an implicit endorsement.<sup>145</sup> The judiciary seems likely to continue to do so absent greater pressure.

3. *Reforms to Curb Judge Shopping.* — Perhaps, then, reform may be better focused on curbing judge shopping, which would target the underlying concern raised by universal remedies: namely, that the polarization of the judiciary, combined with the ability of plaintiffs to stack the deck by picking certain forums, undermines the legitimacy of the decision. Such proposals would preserve the judiciary's check on the Executive, but would undercut the ability of plaintiffs to forum shop by eliminating the ability to seek out a single extreme judge.

Indeed, support for limiting forum shopping is mounting. Justice Kagan and Chief Justice Roberts have expressed concerns with forum shopping. Speaking on the Court's legitimacy, Justice Kagan observed: "It just can't be right that one district judge can stop a nationwide policy in its tracks and leave it stopped for the years that it takes to go through the normal process."<sup>146</sup> Chief Justice Roberts has endorsed the random assignment of judges for patent cases as a cornerstone of the court system's legitimacy.<sup>147</sup> Last summer, nineteen Democratic senators asked the Judicial Conference to recommend rules to district courts regarding

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<sup>142</sup> Notably, courts have recognized that in APA cases, there is often an "unstated" presumption "that the offending agency action should be set aside in its entirety rather than only in limited geographical areas." *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1094 (9th Cir. 2020).

<sup>143</sup> *Young*, *supra* note 119, at 864 & n.19 (2021) (collecting ten Supreme Court cases).

<sup>144</sup> *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 n.7 (2020) ("Our affirmance of the . . . order vacating the rescission makes it unnecessary to examine the propriety of the nationwide scope of the injunctions . . .").

<sup>145</sup> *See Young*, *supra* note 119, at 873 & n.64 (citing *Roe v. Dep't of Def.*, 947 F.3d 207, 232 (4th Cir. 2020)); *City of Chicago v. Barr*, 961 F.3d 882, 916 (7th Cir. 2020) ("If the lower court was without the power to impose an injunction that provided relief to non-parties, and thus relief greater than that necessary for the parties before the court, then the Supreme Court's decision to allow the injunction to remain in place as to those non-parties would be inexplicable.")

<sup>146</sup> Josh Gerstein, *Kagan Repeats Warning that Supreme Court Is Damaging Its Legitimacy*, POLITICO (Sept. 14, 2022, 5:56 PM), <https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766> [<https://perma.cc/LBA4-4TR7>].

<sup>147</sup> *See* JOHN G. ROBERTS, JR., U.S. SUP. CT., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2021).

the random assignment of judges.<sup>148</sup> Just prior to print, the Judicial Conference of the United States announced a policy for random case assignment in nationwide injunction cases.<sup>149</sup>

This Chapter identifies three buckets of forum-shopping reforms:

(a) *Ensure the Random Assignment of Judges.* — At its annual meeting last year, the American Bar Association adopted a resolution urging federal courts to eliminate case-assignment procedures that “predictably assign cases to a single United States District Judge without random assignment” when an injunction is contemplated in a case of nationwide impact and one of the parties raises concerns about case assignment.<sup>150</sup> Representative Sherrill’s End Judge Shopping Act would require plaintiffs seeking nationwide injunctions to file in a forum where at least two judges are available to hear a case, eliminating the possibility that plaintiffs can select a single-judge forum.<sup>151</sup>

Professor Adam White recommends instituting a national lottery for nationwide injunctions, modeled off of the procedures for multi-court challenges to agency action under 28 U.S.C. § 2112.<sup>152</sup> White’s reform would involve establishing a timeframe in which plaintiffs seeking nationwide injunctions against government action must file, and then running a lottery among all federal district courts to determine which court would collectively decide the cases.<sup>153</sup> White also proposes this reform be accompanied by fast-tracking provisions directing reviewing courts to expedite any appeals of a district court’s injunction.<sup>154</sup>

(b) *Transfer to the District of the District of Columbia.* — Some propose requiring all lawsuits requesting national injunctive relief to be filed in the District Court for the District of Columbia, or another specific district, to curtail forum shopping.<sup>155</sup> The D.C. District Court could then consolidate similar cases and randomly select a judge to hear the case. After the mifepristone case, Democrats introduced legislation to this effect. Senator Hirono, for example, proposed the Stop Judge Shopping Act, which would give exclusive jurisdiction over cases

<sup>148</sup> Letter from Senator Chuck Schumer et al., to Robin L. Rosenberg, Chair, Advisory Comm. on Civ. Rules (July 10, 2023), <https://www.democracydocket.com/wp-content/uploads/2023/07/Letter-on-judge-shopping.pdf> [<https://perma.cc/VQ9R-GQ2X>].

<sup>149</sup> See Memorandum from Judge Gregory Van Tatenhove, Chair, Comm. On Ct. Admin. & Case Mgmt., to U.S. District Court Judges et al. (Mar. 15, 2024), <https://s3.documentcloud.org/documents/24483622/judicial-conference-policy.pdf> [<https://perma.cc/K8QW-MTG7>].

<sup>150</sup> Resolution Adopted by the House of Delegates, 521 A.B.A. REP. (2023), at 1, <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/521-annual-2023.pdf> [<https://perma.cc/9W3H-V2JH>].

<sup>151</sup> End Judge Shopping Act of 2023, H.R. 3163, 118th Cong. (2023).

<sup>152</sup> Adam J. White, *Congress Should Fix the Nationwide Injunction Problem with a Lottery*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 11, 2020), <https://www.yalejreg.com/nc/congress-should-fix-the-nationwide-injunction-problem-with-a-lottery> [<https://perma.cc/2W96-WCD7>].

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*; see also Court Shopping Deterrence Act, H.R. 893, 117th Cong. (2021).

<sup>155</sup> See Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1978 & n.139 (2019).



seeking national remedies to the D.C. District Court.<sup>156</sup> (Notably, this proposal echoes legislation that was introduced by Republican Representative Palmer at the start of the Trump Administration.<sup>157</sup>)

Professors Bradford Mank and Michael Solimine argue that the D.C. District would be particularly well suited to hear these cases because Congress has granted it exclusive jurisdiction over other federal administrative agency actions and it has built up relevant expertise.<sup>158</sup> They also note that these federal judges are often regarded as less partisan, which might add to the legitimacy of the court's decisions.<sup>159</sup>

(c) *Panel Systems.* — The last set of proposals recommends multi-judge panels review cases where nationwide relief is requested — requiring multiple judges to agree on the remedy. This agreement could lend credibility that the complete relief principle is operating as it should. Representative Casten proposes deterring forum shopping by creating a randomized multi-circuit panel of thirteen judges to hear cases against the Executive concerning challenges to statutory or executive actions.<sup>160</sup> A supermajority of at least nine judges would be required to invalidate the action.<sup>161</sup> Senator Wyden and Representative Ross's Fair Courts Act of 2023<sup>162</sup> would codify former Fifth Circuit Judge Gregg Costa's proposal to require plaintiffs seeking nationwide relief to be heard by a three-judge panel of randomly assigned judges.<sup>163</sup>

Panel-system proposals are reminiscent of reforms undertaken in response to the Supreme Court's hostility to Progressive Era policies<sup>164</sup>: Between 1937 and 1976, Congress required constitutional challenges to be heard by three-judge district courts.<sup>165</sup> This reform aimed to improve legitimacy and instill more confidence in judicial action: “[I]f three judges declare that a state statute is unconstitutional the people would rest easy under it.”<sup>166</sup> It also decreased the risk of conflicting injunctions.<sup>167</sup> Eventually, motivated by concern over wasted judicial resources,<sup>168</sup> and the American Law Institute's belief that that “[m]odern rules of procedure safeguarded against district judges granting

<sup>156</sup> Stop Judge Shopping Act, S. 1265, 118th Cong. (2023).

<sup>157</sup> Assigning Proper Placement of Executive Action Lawsuits Act (“APPEAL Act”), H.R. 2660, 115th Cong. (2017).

<sup>158</sup> Mank & Solimine, *supra* note 155, at 1978–79.

<sup>159</sup> *Id.* at 1979.

<sup>160</sup> Restoring Judicial Separation of Powers Act, H.R. 642, 118th Cong. (2023).

<sup>161</sup> *Id.*

<sup>162</sup> S. 1758, 118th Cong. (2023); H.R. 3652, 118th Cong. (2023).

<sup>163</sup> Costa, *supra* note 78.

<sup>164</sup> Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954–76*, 72 CASE W. RESV. L. REV. 909, 914–15 (2022).

<sup>165</sup> Michael E. Solimine, *Three-Judge District Courts, Direct Appeals, and Reforming the Supreme Court's Shadow Docket*, 98 IND. L.J. SUPP. 37, 37 (2023).

<sup>166</sup> *Swift & Co. v. Wickham*, 382 U.S. 111, 118 (1965) (quoting 45 CONG. REC. 7256 (1910) (statement of Sen. Lee Overman)).

<sup>167</sup> See Morley, *supra* note 113, at 30.

<sup>168</sup> *Id.* at 31.

precipitous *ex parte* injunctions,”<sup>169</sup> Congress reverted to default procedures for appellate review.<sup>170</sup> Notably, Congress *has* retained the three-judge system for redistricting and some voting rights cases,<sup>171</sup> in recognition of the fact that “such cases were ones of ‘great public concern’ that require an unusual degree of ‘public acceptance.’”<sup>172</sup>

### Conclusion

As nationwide injunctions — and vacatur — against high-profile executive policy initiatives continue to increase, inaction risks politicizing the nationwide injunction further. Proposals to curb forum shopping directly address the main problems revealed by our empirical analysis. Even if the exact causes of the increase in nationwide injunctions cannot be neatly disentangled from the increasing role of executive policymaking, the fact remains that plaintiffs can strategically shop litigation to judges they perceive as the most political or otherwise most predisposed to issue the requested relief.

If the goal is to disincentivize the political gamesmanship of nationwide injunctions, instead of their absolute use, random judge selection, multi-judge panels, or funneling through designated forums can constrain the most extreme uses without eliminating the remedy entirely. And most importantly, these reforms could also help restore perceptions of the judiciary as nonpartisan, while preserving judges’ ability to issue nationwide relief in cases where it is necessary to curb executive abuse.

Though these reforms may appear radical, they are not novel. Many of the proposals’ mechanisms have historical analogues, providing a powerful reminder that Congress not only possesses the power to retool the scheme for judicial review, but has historically experimented with and enacted reforms in response to concerns of judicial overreach.

Importantly, and unlike judicial reforms that solely focus on injunctive relief as a remedy, these proposals can also address the ways in which judges are increasingly turning to vacatur to issue universal relief. Structural reforms, if limited to the injunctive context, leave plaintiffs able to plead in a manner that avoids triggering any proposed guardrails for injunctions specifically. Thus, structural reforms dealing solely with nationwide injunctive relief may ultimately fall short if they do not also take account of vacatur. A robust set of reforms that work in tandem with one another would be the most effective approach.

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<sup>169</sup> Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 85–86 (1996) (citing AM. L. INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 318–19 (1969)).

<sup>170</sup> Morley, *supra* note 113, at 31.

<sup>171</sup> Solimine, *supra* note 169, at 87; *see also* Costa, *supra* note 78.

<sup>172</sup> *See* Solimine, *supra* note 169, at 86 (quoting *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 92d Cong. 791 (1971–72) (statement of Hon. J. Skelly Wright)).

## CHAPTER FIVE

### THE CONSTRAINED OVERRIDE: CANADIAN LESSONS FOR AMERICAN JUDICIAL REVIEW

Who gets to decide what the U.S. Constitution means? At least since the turn of the century, the Justices on the Supreme Court have made their answer clear: the courts.<sup>1</sup> But a growing wave of scholars offers a different answer: Congress.<sup>2</sup> These scholars point out the tension between democratic values and judicial supremacy.<sup>3</sup> They observe that federal courts have been worse than Congress at protecting minority rights and strengthening democracy.<sup>4</sup> They remind that “courts are a potential source of tyranny,” not just “imperfect guardians against it.”<sup>5</sup> And they admire the patches of American jurisprudence that have invited Congress to take part in constitutional interpretation.<sup>6</sup>

In response, defenders of judicial supremacy warn against leaving the Constitution in the hands of politicians. As compared to independent federal judges, elected officials have much stronger incentives to entrench their own power while neglecting the most vulnerable in society.<sup>7</sup> Some Canadians have echoed these concerns.<sup>8</sup> Canada’s constitutional bill of rights, the 1982 Charter of Rights and Freedoms,<sup>9</sup> contains a clause allowing both the federal and provincial legislatures to enact

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<sup>1</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 524, 529 (1997); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003).

<sup>2</sup> See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181–82 (1999); LARRY D. KRAMER, THE PEOPLE THEMSELVES 8 (2004); MARK TUSHNET, TAKING BACK THE CONSTITUTION 244 (2020); Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985, 1074–75 (2024).

<sup>3</sup> See, e.g., Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., Written Statement to the Presidential Commission on the Supreme Court of the United States 12–24 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> [<https://perma.cc/7WDY-FJE5>].

<sup>4</sup> See, e.g., *id.* at 5–12.

<sup>5</sup> Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 779 (2022); see also Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1404–05 (2006) (noting that the argument for judicial review as a countermajoritarian guardian assumes that sympathy for minority rights is stronger among political elites than among ordinary people).

<sup>6</sup> See Post & Siegel, *supra* note 1, at 38; Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2020 (2022); Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2301 (2023).

<sup>7</sup> See Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1463 (2017).

<sup>8</sup> See, e.g., Ira Wells, *The Notwithstanding Clause: Is It Time for Canada to Repeal It?*, THE WALRUS (Dec. 12, 2022, 3:52 PM), <https://thewalrus.ca/the-notwithstanding-clause-is-it-time-for-canada-to-repeal-it> [<https://perma.cc/WZQ3-TSVY>]; Jeffrey B. Meyers, *It’s Time to Banish the Notwithstanding Clause, The Slow Killer of Canada’s Rule of Law*, THE CONVERSATION (Oct. 11, 2023, 5:27 PM), <https://theconversation.com/its-time-to-banish-the-notwithstanding-clause-the-slow-killer-of-canadas-rule-of-law-215106> [<https://perma.cc/R49P-83L4>].

<sup>9</sup> Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

laws “notwithstanding” courts’ interpretations of certain sections of the Charter<sup>10</sup> — or notwithstanding those provisions of the Charter themselves, depending on who you ask<sup>11</sup> — for renewable five-year periods.<sup>12</sup> This “Notwithstanding Clause” (NWC) has never been invoked by the federal government, thus failing to facilitate the horizontal constitutional dialogue that some hoped it would.<sup>13</sup> Instead, it has been used by *provincial* governments to discriminate against same-sex couples<sup>14</sup> and prevent Muslim public servants from wearing religious attire.<sup>15</sup> These examples highlight the dangers of popular constitutionalism.<sup>16</sup>

So, which view of judicial review is right? Both are. This Chapter asks what the experience of the NWC can teach us about how to optimize for an enduring, rights-protecting constitutional democracy.<sup>17</sup> Based on those lessons, it proposes that the United States should adopt a model “constrained override” power that leverages the benefits of the NWC but avoids its drawbacks.

Unlike the NWC, this constrained override would only empower Congress, not state legislatures. It would thus capture the benefits of giving federal legislatures the power to engage in constitutional interpretation, as many American critics of judicial supremacy would be eager to see, while avoiding the dangers of a vertical override power that Canadian critics of the NWC have lamented. Use of the override would

<sup>10</sup> These are sections 2 (fundamental freedoms), 7 to 14 (legal rights), and 15 (equality rights). *Id.* § 33(1).

<sup>11</sup> Compare, e.g., Geoffrey Sigalet, *Legislated Rights as Trumps: Why the Notwithstanding Clause Overrides Judicial Review*, 61 OSGOODE HALL L.J. (forthcoming 2024) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4254342](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4254342) [<https://perma.cc/SZF6-KR75>] (reading section 33 as notwithstanding “judicial review”), and Grégoire Webber, *Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation*, 71 U. TORONTO L.J. 510, 513 (2021) (notwithstanding “remedy”), with Maxime St-Hilaire & Xavier Focroulle Ménard, *Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause*, 29 CONST. F. CONSTITUTIONNEL 38, 40–41 (2020).

<sup>12</sup> See Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.). Section 33 gives the Canadian Parliament and provincial legislatures the power to “expressly declare in an Act . . . that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.” *Id.* § 33(1). Following such a declaration, the Act “shall have such operation as it would have but for the provision of this Charter referred to in the declaration.” *Id.* § 33(2). Any such declaration “shall cease to have effect five years after it comes into force,” *id.* § 33(3), but the legislature can reenact them, with each subsequent reenactment again subject to the five-year sunset, *id.* § 33(4)–(5).

<sup>13</sup> See Mark Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 268 (2004).

<sup>14</sup> See Marriage Amendment Act, R.S.A. 2000, c M-5, § 5 (Can. Alta.).

<sup>15</sup> See An Act Respecting the Laicity of the State, S.Q. 2019, c 12, § 34 (Can. Que.).

<sup>16</sup> See Wells, *supra* note 8.

<sup>17</sup> This Chapter focuses on approximating the expected normative consequences of different forms of judicial review rather than on evaluating theoretical debates that might ground perspectives on judicial review regardless of consequences, such as the view that judicial review is inherently antidemocratic. For an example of the latter perspective, see Bowie, *supra* note 3, at 12–24.

also be subject to further conditions that would promote democratic accountability and dialogue. For example, the constrained override could only be used to immunize legislation that the Court has already declared unconstitutional. And, as a final bulwark against abusive constitutionalism,<sup>18</sup> use of the override would be subject to a “double override” by a Court acting in consensus.

The Chapter proceeds as follows. Section A first offers a pessimistic view of the NWC. Section B then turns to a more optimistic interpretation: several checks on the NWC reduce its likelihood of being abused (the negative defense); the NWC prevents a dangerous concentration of power in one branch of government (the first affirmative defense); and the NWC has led to a greater respect for constitutional rights among legislators and the public (the second affirmative defense). Section C identifies remaining problems with the Canadian NWC: it has only been used by provinces, has been used in ways that fail to promote constitutional dialogue or accountability, and lacks sufficient safeguards to prevent the federal government from abusing it. Section D compares the appeal of an override clause in the United States and Canada based on institutional differences; it concludes that even if judicial review is desirable to compensate for weak frictions between the legislative and executive branches in parliamentary countries, that justification has less purchase in the United States, where executive checks on Congress are much stronger.

Section E sketches the contours of the constrained override. Section F addresses three remaining counterarguments: Congress lacks the power to implement the constrained override without a constitutional amendment; the override will be ineffective in the United States because the country lacks a sufficiently robust constitutional culture; and the override could be a slippery slope toward further erosions of judicial power. Notwithstanding these concerns, this Chapter concludes that Congress should implement the constrained override. Doing so will minimize the dangers of giving one branch of government exclusive power to interpret this country’s most consequential document. And it will more deeply entrench constitutional norms in their ultimate enforcer: the people. The Court may be the least dangerous branch,<sup>19</sup> but the constrained override would yield the least dangerous system.<sup>20</sup>

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<sup>18</sup> See generally David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

<sup>19</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 1 (2d ed. 1986). But see Christopher Jon Sprigman, *Three Plans for Saving Voters from a Right-Wing Activist Supreme Court*, SLATE (Oct. 11, 2018, 2:35 PM), <https://slate.com/news-and-politics/2018/10/supreme-court-court-packing-good.html> [<https://perma.cc/G4XS-HJGQ>] (“The court is in fact very dangerous.”).

<sup>20</sup> Cf. Tascha Shahriari-Parsa, *Notwithstanding the Right to Strike: A Canadian Province Defies the Constitution — And Workers Strike Back*, HARV. L. REV. BLOG (Nov. 28, 2022), <https://harvardlawreview.org/blog/2022/11/notwithstanding-the-right-to-strike-a-canadian-province-defies-the-constitution-and-workers-strike-back> [<https://perma.cc/MN9C-YDKL>] (making this argument with respect to the Canadian NWC).

### A. Critique of the Notwithstanding Clause

This section recounts a pessimistic view of the NWC: that it undermines the constitutional revolution that the Charter otherwise engendered. In the early 1980s, Prime Minister Pierre Trudeau's draft Charter was transformed through significant public participation.<sup>21</sup> But just before it was finalized, the provinces demanded the ability to override most of the Charter's provisions as a condition of consenting to it.<sup>22</sup>

The one province absent from these negotiations was Quebec.<sup>23</sup> As Canada's only francophone-majority province,<sup>24</sup> Quebec had just two years earlier held a referendum on whether the province should pursue a path toward independent sovereignty, with forty percent of voters in favor.<sup>25</sup> Though the referendum was not successful, it reflected the tensions between Quebec and anglophone Canada, which, at the time, made it nearly impossible for national agreement on a new constitution.<sup>26</sup>

Soon after the Charter's adoption, the government of Quebec was emboldened to defy the constitutional revolution from which it had been excluded.<sup>27</sup> Quebec's unicameral legislature repealed and reenacted the entirety of its civil law code, adding in a "standard override clause" into every statute.<sup>28</sup> In each case, that clause affirmed the law's operation notwithstanding sections 2 and 7 to 15 of the Charter — that is, *every* overridable Charter right.<sup>29</sup> Quebec continued including NWCs in all of its legislation until 1985.<sup>30</sup> The Supreme Court upheld Quebec's omnibus use, holding that the NWC was a requirement in form only.<sup>31</sup>

Since 1985, Quebec has used the NWC in sixteen bills,<sup>32</sup> with two

<sup>21</sup> See Lorraine Eisenstat Weinrib, *Trudeau and the Canadian Charter of Rights and Freedoms: A Question of Constitutional Maturation*, in TRUDEAU'S SHADOW 257, 270–72, 274 (Andrew Cohen & J.L. Granatstein eds., 1998).

<sup>22</sup> *Id.* at 274. In an advisory opinion, the Supreme Court of Canada held that, by convention, a "substantial degree of provincial consent is required" to amend the Canadian Constitution. *In re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, 904–05 (Can.).

<sup>23</sup> Weinrib, *supra* note 21, at 274; LAURENCE BROSSEAU & MARC-ANDRÉ ROY, LIBR. OF PARLIAMENT, THE NOTWITHSTANDING CLAUSE OF THE CHARTER 3 (2018).

<sup>24</sup> François Rocher, *Self-Determination and the Use of Referendums: The Case of Quebec*, 27 INT'L J. POL. CULTURE & SOC'Y 25, 27 (2014).

<sup>25</sup> *Id.* at 32.

<sup>26</sup> See generally R. Roy McMurtry, *The Search for a Constitutional Accord — A Personal Memoir*, 8 QUEEN'S L.J. 28 (1983).

<sup>27</sup> Lorraine Eisenstat Weinrib, *Learning to Live with the Override*, 35 MCGILL L.J. 541, 544 (1990).

<sup>28</sup> *Id.*

<sup>29</sup> *Ford v. Quebec (Att'y Gen.)*, [1988] 2 S.C.R. 712, 727–28 (Can.) (quoting An Act Respecting the Constitution Act, S.Q. 1982, c 21 (Can. Que.)).

<sup>30</sup> Tsvi Kahana, *The Notwithstanding Clause in Canada: The First Forty Years*, 60 OSGOODE HALL L.J. 1, 22–23 (2023).

<sup>31</sup> *Ford*, 2 S.C.R. at 740–41.

<sup>32</sup> See Kahana, *supra* note 30, at 8.

recent ones drawing the most attention. In 2019, Quebec used the NWC in An Act Respecting the Laicity of the State<sup>33</sup> to limit the rights of Muslim women and other religious minorities by banning certain public employees from covering their faces<sup>34</sup> or wearing religious garments “in the exercise of their functions.”<sup>35</sup> Quebec’s national assembly had originally passed a version of the bill that did not contain the NWC.<sup>36</sup> Quebec’s premier affirmed that his government had not used the NWC because the ban was constitutionally justified.<sup>37</sup> But after Quebec courts temporarily enjoined the bill pending a final judgment on the merits,<sup>38</sup> the National Assembly enacted a new version of the bill invoking the override.<sup>39</sup> Despite causing public outcry, the party responsible for the ban was reelected with *even more* seats in the next election.<sup>40</sup>

In 2022, Quebec invoked the NWC in Bill 96,<sup>41</sup> a language reform law that limited the number of people who could access government services in English,<sup>42</sup> required most civil servants to “speak and write exclusively in French” and required adhesion contracts to be drafted in French.<sup>43</sup> The law was met with waves of protest<sup>44</sup> and lawsuits,<sup>45</sup>

<sup>33</sup> S.Q. 2019, c 12.

<sup>34</sup> *Id.* § 8.

<sup>35</sup> *See id.* § 6; Steve Rukavina, *New Research Shows Bill 21 Having “Devastating” Impact on Religious Minorities in Quebec*, CBC (Aug. 10, 2022), <https://www.cbc.ca/news/canada/montreal/bill-21-impact-religious-minorities-survey-1.6541241> [<https://perma.cc/7WZ7-B38F>]; *Bill 21*, CANADIAN C.L. ASS’N, <https://ccla.org/major-cases-and-reports/bill-21> [<https://perma.cc/NTB7-S9FC>].

<sup>36</sup> Kahana, *supra* note 30, at 45.

<sup>37</sup> *Id.*

<sup>38</sup> Anthony Breton, *Canada: Quebec Court Ruling Prolongs Stay of Uncovered-Face Provision*, LIBR. OF CONG. (July 27, 2018), <https://www.loc.gov/item/global-legal-monitor/2018-07-27/canada-quebec-court-ruling-prolongs-stay-of-uncovered-face-provision> [<https://perma.cc/5VDZ-QHYB>].

<sup>39</sup> Kahana, *supra* note 30, at 45.

<sup>40</sup> Antoni Nerestant, *CAQ Sails to Victory in Quebec with Largest Majority in Decades*, CBC (Oct. 4, 2022), <https://www.cbc.ca/news/canada/montreal/quebec-election-2022-results-1.6603562> [<https://perma.cc/WBK5-FNEU>].

<sup>41</sup> An Act Respecting French, the Official and Common Language of Québec, S.Q. 2022, c 14, § 118.

<sup>42</sup> Philip Authier, *Bill 96 Honour System in Place: Click If You Have the Right to English Services*, MONTREAL GAZETTE (June 2, 2023), <https://montrealgazette.com/business/local-business/bill-96-honour-system-in-place-click-if-you-have-the-right-to-english-services> [<https://perma.cc/LG7F-2JL8>].

<sup>43</sup> Jacob Serebrin, *Bill 96: Here’s What to Expect When Trying to Access English Services in Quebec*, GLOB. NEWS (June 2, 2023, 9:16 PM), <https://globalnews.ca/news/9739267/quebec-french-bill-96-changes> [<https://perma.cc/4YZT-EBX8>].

<sup>44</sup> *See, e.g.*, Jason Magder, *Thousands of Montrealers March in Opposition to Bill 96*, MONTREAL GAZETTE (May 15, 2022), <https://montrealgazette.com/news/local-news/heres-what-you-need-to-know-about-saturdays-bill-96-protest> [<https://perma.cc/DY6J-M4E7>].

<sup>45</sup> *See, e.g.*, Dominic Dupoy & Katherine Prusinkiewicz, *Court Temporarily Suspends Two Provisions of Quebec’s Bill 96 French Language Reform*, NORTON ROSE FULBRIGHT (Aug. 15, 2022), <https://www.nortonrosefulbright.com/en/knowledge/publications/beaa88ca/court-temporarily-suspends-two-provisions-of-quebecs-bill-96-french-language-reform> [<https://perma.cc/S9TW-NXZE>]; Felisha Adam, *First Hearing for Lawsuit Against Quebec’s Language Law*, CITYNEWS MONTREAL (Aug. 29, 2023, 6:54 PM), <https://montreal.citynews.ca/2023/08/29/first-hearing-for-lawsuit-against-quebecs-language-law-bill-96> [<https://perma.cc/9ZVJ-V8NV>].

especially from Indigenous groups<sup>46</sup> who successfully pressured the Quebec government to exempt Indigenous students from one part of the law.<sup>47</sup> But, as of November 2023, that exemption has not been extended to the rest of the bill.<sup>48</sup>

Outside of Quebec, the NWC was used only a few times before 2018. In a 1986 back-to-work law, Saskatchewan invoked the clause proactively (before a judicial decision had been rendered on whether the law violated the Charter).<sup>49</sup> And in 2000, Alberta used it to exclude same-sex couples from the provincial definition of marriage after the Supreme Court issued two decisions in support of LGBTQ rights.<sup>50</sup> But in 2018, use of the NWC began to ramp up. First, in May 2018, Saskatchewan used the NWC semi-proactively to guarantee non-Christian students the ability to attend publicly funded Christian schools, while appealing a lower court decision that held Saskatchewan's educational funding law unconstitutional.<sup>51</sup> Then, in an analogous posture in September of that year, the Ontario government threatened to use the NWC for the first time.<sup>52</sup> Bill 31,<sup>53</sup> which would have cut the number of local election

<sup>46</sup> See, e.g., Phil Carpenter, *Kahnawà:ke Youth Protest Against Bill 96*, GLOB. NEWS (May 22, 2022, 9:39 AM), <https://globalnews.ca/news/8854934/kahnawake-youth-protest-against-bill-96> [<https://perma.cc/B5ET-24SY>]; Susan Bell, *Indigenous Calls for Exemptions to Quebec's Bill 96 Get Louder*, CBC (May 26, 2022), <https://www.cbc.ca/news/canada/north/cree-inuit-education-bill-96-indigenous-languages-1.6465703> [<https://perma.cc/K3DE-XMQF>]; Pierre Saint-Arnaud, *First Nations Organizations Going to Court over Quebec's French Language Reforms*, CBC (Apr. 21, 2023), <https://www.cbc.ca/news/canada/montreal/bill-96-indigenous-court-case-1.6817437> [<https://perma.cc/D2W8-Z9WX>].

<sup>47</sup> Philip Authier, *CAQ Government Will Exempt Indigenous CEGEP Students from Bill 96*, MONTREAL GAZETTE (May 26, 2023), <https://montrealgazette.com/news/quebec/caq-indigenous-cegep-students-bill-96> [<https://perma.cc/4AV3-YY6E>].

<sup>48</sup> See Michelle Lalonde, *Indigenous Students in Limbo over Bill 96 as Quebec Mulls More Exemptions*, MONTREAL GAZETTE (Nov. 18, 2023), <https://montrealgazette.com/news/quebec/indigenous-students-in-limbo-over-bill-96-as-quebec-mulls-more-exemptions> [<https://perma.cc/5W38-XFMD>]; Kim Tekakwitha Martin, Opinion, "Complete Exemption from Bill 96" a Must, MONTREAL GAZETTE (June 22, 2023), <https://montrealgazette.com/opinion/opinion-complete-exemption-from-bill-96-a-must> [<https://perma.cc/ZRZ5-5YS8>].

<sup>49</sup> Kahana, *supra* note 30, at 51–52.

<sup>50</sup> *Id.* at 56–57.

<sup>51</sup> *Id.* at 53–54; The School Choice Protection Act, S.S. 2018, c 39, § 2.2(1) (Can. Sask.). The Saskatchewan law, which provided that educational funding could be allocated without regard to students' religious affiliations, was enacted in response to a decision by the Court of Queen's Bench. Kahana, *supra* note 30, at 53–54. That decision prohibited the government from funding non-Catholic students to attend Catholic, publicly funded "separate schools" when the government did not also fund other faith-based schools for the attendance of their respective nonadherent students. *Id.* at 53; see James P Barry, *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212*, 7 OXFORD J.L. & RELIGION 166, 167 (2017).

The use of the override in The School Choice Protection Act might be described as "semi-proactive" because the province was in the process of appealing the lower court decision, and in fact, successfully persuaded the Court of Appeal for Saskatchewan to overrule the lower court's decision that Saskatchewan had violated the Charter. Kahana, *supra* note 30, at 54.

<sup>52</sup> See Omar Ha-Redeye, *Unprecedented Use of S. 33 in Ontario*, CANLII CONNECTS (Sept. 20, 2018), <https://canliiconnects.org/en/commentaries/63900> [<https://perma.cc/X7UZ-NKLM>].

<sup>53</sup> Efficient Local Government Act, S.O. 2018, c 11 (Can. Ont.).



wards nearly in half right before a municipal election,<sup>54</sup> was introduced in response to a superior court decision striking down a previous version of the Act<sup>55</sup> that had not invoked the NWC.<sup>56</sup>

Then came Bill 307.<sup>57</sup> Back in 2017, Ontario had passed a law banning campaign spending by unions and corporations and limiting other third-party campaign spending in the six months before an election.<sup>58</sup> In 2021, Ontario extended the latter limitation to a twelve-month period through Bill 254.<sup>59</sup> The Ontario Superior Court of Justice found that this doubling of the time restriction was unconstitutional as it “did not minimally impair the free expression rights of third party advertisers.”<sup>60</sup> Within a week, Ontario enacted Bill 307, which was identical to Bill 254 except for the addition of the NWC.<sup>61</sup>

Ontario used the NWC again in Bill 28.<sup>62</sup> The law prohibited school board employees represented by the Canadian Union of Public Employees (CUPE) from withholding their labor from the Ontario government, subject to fines against individual workers for noncompliance.<sup>63</sup> Unlike Saskatchewan’s earlier back-to-work legislation, which used the NWC proactively, Bill 28 had to invoke the clause to survive judicial review because of intervening decisions by the Supreme Court that affirmed the right to strike as an “indispensable component” of the right to bargain collectively (where an alternative dispute resolution mechanism does not exist), and thus, of freedom of association.<sup>64</sup>

Most recently, the government of Saskatchewan used the NWC in the fall of 2023 in a “Parents’ Bill of Rights.”<sup>65</sup> The bill mandates parental consent before teachers and other school employees can refer to a student under the age of sixteen by their “new gender-related preferred name or gender identity at school.”<sup>66</sup> After a judge paused the bill’s enactment to allow a constitutional challenge, the Saskatchewan

<sup>54</sup> Nick Westoll, *Toronto Council Votes to Challenge Law that Would Slash Wards Amid Election Day Uncertainty*, GLOB. NEWS (Sept. 13, 2018, 5:03 PM), <https://globalnews.ca/news/4445053/toronto-city-council-bill-31-efficient-local-government-act> [https://perma.cc/58HC-EDUW].

<sup>55</sup> Better Local Government Act, 2018, S.O. 2018, c 11—Bill 5 (Can. Ont.).

<sup>56</sup> See Ha-Redeye, *supra* note 52. After the Ontario Court of Appeals stayed the lower court order pending appeal — which allowed the original Bill to go back into effect — Bill 31 was no longer needed. *Toronto (City) v. Ontario (Att’y Gen.)*, 2021 SCC 34, para. 10 (Can.). The Supreme Court held 5–4 that the original bill did not violate the Charter. *Id.* at para. 4.

<sup>57</sup> Protecting Elections and Defending Democracy Act, 2021, S.O. 2021, c 31 (Can. Ont.).

<sup>58</sup> *Working Fams. Coal. (Can.) Inc. v. Ontario (Att’y Gen.)*, 2023 ONCA 139, paras. 22, 33 (Can. Ont. C.A.).

<sup>59</sup> *Id.* at para. 23.

<sup>60</sup> *Id.* at paras. 7–8.

<sup>61</sup> *Id.* at para. 9; Kahana, *supra* note 30, at 59–60.

<sup>62</sup> Keeping Students in Class Act, S.O. 2022, c 20 (Can. Ont.), *repealed by* Keeping Students in Class Repeal Act, 2022, S.O. 2022, c 20 (Can. Ont.).

<sup>63</sup> Shahriari-Parsa, *supra* note 20.

<sup>64</sup> *Sask. Fed’n of Lab. v. Saskatchewan*, 2015 SCC 4, paras. 3, 25 (Can.).

<sup>65</sup> The Education (Parents’ Bill of Rights) Amendment Act, S.S. 2023, c 46, art. 197.4(3) (Can. Sask.).

<sup>66</sup> *Id.* art. 197.4(1).

government invoked the NWC in a special, expedited legislative session.<sup>67</sup>

These examples support the conventional understanding of the NWC as “repugnant to the rights-protecting project” of the Charter,<sup>68</sup> even a “trap door out of rights protection.”<sup>69</sup> And this view is not limited to Canada: recent calls for a legislative override in Israel were described by former President of the Supreme Court of Israel Aharon Barak as threatening “the beginning of the end” of Israel — the “constitutional equivalent ‘of a coup with tanks.’”<sup>70</sup> But this is only half the story.

### B. A Defense of the Notwithstanding Clause

This section offers three normative arguments in support of the NWC: The *negative argument* is that political checks, the NWC’s time limitation, and judicial review of nonoverridable rights reduce the risk that legislators will successfully abuse the NWC.<sup>71</sup> The *first affirmative argument* is that the NWC guards against judicial abuse of power. The *second affirmative argument* is that the NWC facilitates constitutional dialogue among the courts, the legislature, and the public. If we accept these arguments, we can view the NWC as a tool to preserve constitutional democracy and rights protection in the long run — by both cabin-ing the power of either branch and promoting a public attentiveness to constitutional retrogression.<sup>72</sup>

1. *The Negative Defense: Checks on the Override Power.* — At the time of the Charter’s passage, Prime Minister Pierre Trudeau claimed he did not “fear the notwithstanding clause very much.”<sup>73</sup> Others pointed out that the Canadian Bill of Rights, the statutory precursor to the Charter, also had an override clause, but it “was only employed once in two decades.”<sup>74</sup> Many provinces also had bills of rights with override provisions, and they “show[ed] a similar disinclination” to use them.<sup>75</sup> Members of Parliament, scholars, and other commentators at the time

<sup>67</sup> Adam Hunter, *Sask. Government Use of Notwithstanding Clause, School Policy Could Overshadow Fall Legislative Sitting*, CBC (Oct. 14, 2023), <https://www.cbc.ca/news/canada/saskatchewan/sask-notwithstanding-clause-1.6995293> [<https://perma.cc/7BG6-TPDR>].

<sup>68</sup> Weinrib, *supra* note 27, at 563.

<sup>69</sup> *Id.* at 564 (describing and challenging this “conventional understanding”); see also Wells, *supra* note 8 (“Why go to the trouble of codifying a Charter of Rights if that very Charter contains a kill switch for the rights themselves?”).

<sup>70</sup> *Ex-top Judge Barak: “Put Me Before a Firing Squad” If It’ll Stop Move to Tyranny*, TIMES OF ISR. (Jan. 8, 2023, 1:59 AM) (quoting Chief Justice Aharon Barak), <https://www.timesofisrael.com/ex-top-judge-barak-put-me-before-a-firing-squad-if-itll-stop-move-to-tyranny> [<https://perma.cc/2GSB-T7P5>] [hereinafter *Interview with Aharon Barak*].

<sup>71</sup> This defense is labeled “negative” because it does not itself justify the NWC; it simply rebuts an argument against it.

<sup>72</sup> See generally Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 94–99 (2018).

<sup>73</sup> BROSSEAU & ROY, *supra* note 23, at 4.

<sup>74</sup> *Id.* at 5.

<sup>75</sup> *Id.*

of the Charter's adoption widely shared the prediction that the NWC would be used only in exceptional circumstances.<sup>76</sup>

Were they right? Until recently, it seemed so. Outside of Quebec, the clause was invoked only three times before 2018. One of those uses was an anomalous rights-*enhancing* invocation by Yukon in 1982 that never went into effect.<sup>77</sup> Quebec used the clause more frequently, but almost always to shield legislation that was likely already compatible with existing Charter-rights jurisprudence.<sup>78</sup> And, to this day, the federal government has not invoked the clause a single time.<sup>79</sup>

Where provincial legislatures have invoked the clause abusively, three other checks have usually guarded against maximally abusive use: immediate public pressure, the sunset clause, and judicial intervention. The first check is best exemplified by Bill 28, Ontario's 2022 anti-strike legislation discussed in section A. The public response to the bill was unprecedented. What could have been an economic work stoppage became a political strike over Bill 28 itself that forced the closure of schools throughout the province, which most Ontarians blamed on the Ford government.<sup>80</sup> Other unions pledged their solidarity, leading to increasingly credible calls for a general strike.<sup>81</sup> Premier Doug Ford's government took twenty minutes to unanimously repeal the legislation, which

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<sup>76</sup> See, for example, statements of then–Minister of Justice Jean Chrétien, *id.* at 5 (“What the Premiers and Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances . . .”), Professor Peter Hogg, *id.* (“Presumably, the exercise of the power would normally attract such political opposition that it would rarely be invoked.”), and future Supreme Court of Canada Justice Gérard V. La Forest, *id.* (“My guess is that this provision will rarely be used.”). One premier at the First Ministers’ Conference even personally affirmed that he would “do everything possible to urge the Legislature of New Brunswick not to use” the override. *Id.* at 4 (quoting Premier Richard Hatfield). *But see* Geoffrey Sigalet, *Notwithstanding Judicial Benediction: Why We Need to Dispel the Myths Around Section 33 of the Charter*, MACDONALD-LAURIER INST. (Dec. 5, 2022), <https://macdonaldlaurier.ca/notwithstanding-judicial-benediction-why-we-need-to-dispel-the-myths-around-section-33-of-the-charter> [<https://perma.cc/HPM2-ZYRF>] (“There is no dispositive historical evidence that the framers of the Charter agreed that the clause should only be used in emergencies or treated as a ‘nuclear option.’”).

<sup>77</sup> Kahana, *supra* note 30, at 50–51.

<sup>78</sup> See *id.* at 24–40. Out of Quebec’s fifteen bills invoking the clause before 2018, only two involved a strong argument that the legislation violated the Charter: the omnibus use of the clause, see *supra* p. 1728, and the French signage legislation, see *infra* p. 1734.

<sup>79</sup> Kahana, *supra* note 30, at 8.

<sup>80</sup> See Shahriari-Parsa, *supra* note 20; Jeremy Appel, *Ontario Premier Doug Ford Is Using the Needs of Students to Justify Attacking Labor Rights*, JACOBIN (Nov. 3, 2022), <https://jacobin.com/2022/11/ontario-doug-ford-cupe-keeping-students-in-class-act> [<https://perma.cc/8XKJ-RVY4>]; Bryann Aguilar, *Poll Finds 6 in 10 Ontarians Blame Ford Government for Education Workers’ Job Action*, CP24 (Nov. 6, 2022, 11:49 AM), <https://www.cp24.com/news/poll-finds-6-in-10-ontarians-blame-ford-government-for-education-workers-job-action-1.6141215> [<https://perma.cc/5EU8-XG64>].

<sup>81</sup> Nick Seebruch, *Ford Blinks in Face of Union Solidarity; Will Repeal Bill 28*, RABBLE (Nov. 7, 2022), <https://rabble.ca/labour/union-solidarity-ford-to-repeal-bill-28> [<https://perma.cc/9EFM-WZ5F>]. CUPE national president Mike Hancock described Canada’s labor movement as “united . . . like never before.” *Id.*

it “deemed for all purposes never to have been in force.”<sup>82</sup>

The second check is the NWC’s five-year sunset. The automatic sunset puts the burden on legislatures to justify overrides every five years if they wish to maintain them and gives the public continuing opportunities to assess their representatives’ use of the NWC. That shift in defaults might be enough to discourage most legislatures from persistent override use. Indeed, none of the uses of the NWC outside of Quebec before 2018 were renewed.<sup>83</sup>

Third, judicial review offers a check on abusive use of the NWC directly and indirectly. Indirectly, an intervening judicial decision explaining how a law infringes on peoples’ constitutional rights can make it more politically costly for the legislature to maintain the law, especially in its most expansive form. For example, early in the Charter’s history, the Canadian Supreme Court struck down a Quebec law requiring all “signs and posters and commercial advertising” to be exclusively in the French language<sup>84</sup> for violating the Charter’s guarantee of freedom of expression.<sup>85</sup> In response, Quebec’s National Assembly invoked the override clause to enact not the same legislation, but a tempered version that limited the French-only requirement to exterior signs.<sup>86</sup> Directly, judicial review checks NWC abuse through nonoverridable constitutional rights. When Ontario changed its campaign finance laws right before an election in Bill 307, the Court of Appeals upheld Ontario’s invocation of the NWC.<sup>87</sup> But in the same opinion, it held that Bill 307 violated Canadians’ democratic rights under section 3 of

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<sup>82</sup> Keeping Students in Class Repeal Act, 2022, S.O. 2022, c 20 (Can. Ont.); Liam Casey, *Ontario Government Repeals Anti-strike Law for CUPE Education Workers*, CBC (Nov. 14, 2022), <https://www.cbc.ca/news/canada/toronto/ont-government-repeals-education-bill-1.6650584> [<https://perma.cc/RK4D-PQZ4>]; see also Kim Lane Scheppele, Laurance S. Rockefeller Professor of Socio. & Int’l Affs., Princeton Univ. & Fac. Fellow, Univ. of Pa. Carey L. Sch., Testimony for the Presidential Commission on the Supreme Court 8 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppele-Written-Testimony.pdf> [<https://perma.cc/5GV3-TU98>] (“Public esteem for courts is generally so much higher than it is for legislatures that it is often a big political mistake for a legislature to refuse to follow court decisions.”); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMPAR. L. 707, 724 (2001) (“[I]t was to be expected that use of Section 33 by a legislature would be politically costly rather than routine, forcing principled discussion and justification on the merits before alerted voters would likely accept limitations on their rights.”). For a deeper treatment of Ontario’s experience with the Notwithstanding Clause in Bill 28, see Shahriari-Parsa, *supra* note 20.

<sup>83</sup> See Kahana, *supra* note 30, at 66–67.

<sup>84</sup> *Ford v. Quebec (Att’y Gen.)*, [1988] 2 S.C.R. 712, 746 (Can.).

<sup>85</sup> *Id.* at 748 (“Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one’s choice.”).

<sup>86</sup> Kahana, *supra* note 30, at 40–41.

<sup>87</sup> *Working Fams. Coal. (Can.) Inc. v. Ontario (Att’y Gen.)*, 2023 ONCA 139, paras. 56–57 (Can. Ont. C.A.).

the Charter,<sup>88</sup> which is *not* one of the provisions subject to the NWC.<sup>89</sup>

2. *The First Affirmative Defense: Limiting the Risk of Judicial Abuse.* — We are used to seeing constitutional law from the eyes of judges: imagining ourselves in judges' shoes, wondering how judges can prevent *other* branches of government from stepping out of line. But like other branches, the judiciary is made of people. Those people can, and do, make mistakes — including grave ones.<sup>90</sup> Once we accept this, we can understand the NWC as a way to avoid granting to a single body a power that has “no beginning [and] no end.”<sup>91</sup> This view is perhaps best encapsulated by the late Professor Paul Weiler:

Canadian judges are given the initial authority to determine whether a particular law is a “reasonable limit [of a right] . . . demonstrably justified in a free and democratic society.” Almost all of the time, the judicial view will prevail. However, Canadian legislatures were given the final say on those rare occasions where they disagree with the courts with sufficient conviction to take the political risk of challenging the symbolic force of the very popular Charter. That arrangement is justified if one believes, as I do, that on those exceptional occasions when the court has struck down a law as contravening the Charter[] and Parliament re-enacts it, confident of general public support for this action, it is more likely that the legislators are right on the merits than were the judges.<sup>92</sup>

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<sup>88</sup> *Id.* at para. 136. Section 3 of the Charter reads: “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” Canadian Charter of Rights and Freedoms § 3, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

The court found that the expanded restrictions “overly restrict[ed] the informational component of the right to vote” guaranteed by section 3. *Working Families Coalition*, ONCA 139 at para. 136. The court first noted that section 3 guarantees each “citizen’s right to meaningfully participate in the electoral process,” which “includes a citizen’s right to exercise [their] vote in an informed manner.” *Id.* at para. 64 (emphasis omitted) (quoting *Harper v. Canada (Att’y Gen.)*, [2004] 1 S.C.R. 827, 871 (Can.)). But, unlike the United States Supreme Court, the Canadian Supreme Court has recognized that “spending limits are essential to ensure the primacy of the principle of fairness in democratic elections,” a principle that “flows directly from a principle entrenched in the Constitution: that of the political equality of citizens.” *Id.* at para. 77 (quoting *Libman v. Quebec (Att’y Gen.)*, [1997] 3 S.C.R. 569, 598 (Can.)). Thus, to balance these principles that are often in tension, the court must determine whether spending restrictions are (1) carefully tailored and (2) would permit a modest informational campaign. *See id.* at para. 136. The court found that Bill 307 did not meet these conditions, and therefore infringed on section 3 of the Charter. *Id.* The court ordered for its declaration to be suspended for one year “to allow Ontario to fashion new legislation that is compliant.” *Id.* at para. 143.

<sup>89</sup> *See supra* note 10 and accompanying text.

<sup>90</sup> *See* Doerfler & Moyn, *supra* note 5, at 779. After all, the German Reichsgericht “provided the highest level of legal justification for the atrocities of the Nazi era.” *Federal Court of Justice Celebrates 50th Anniversary*, 1 GERMAN L.J. No. 4, ¶ 2 (2000), [https://germanlawjournal.com/wp-content/uploads/GLJ\\_Vol\\_01\\_No\\_01\\_04.pdf](https://germanlawjournal.com/wp-content/uploads/GLJ_Vol_01_No_01_04.pdf) [<https://perma.cc/4PYB-FX85>].

<sup>91</sup> *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

<sup>92</sup> Paul C. Weiler, *The Evolution of the Charter: A View from the Outside*, in *LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 49, 57 (Joseph M. Weiler & Robin M. Elliot eds., 1986) (alterations in original) (footnote omitted) (quoting

Given that the Charter has been around for just over four decades, it is difficult to evaluate whether the NWC has guarded against judicial overreach. It is possible that the Canadian Supreme Court simply has not rendered many objectionable decisions during this time.<sup>93</sup> Perhaps the NWC has even *prevented* the Court from issuing decisions that would be abusive, knowing that the override would likely be invoked in response to trump them. In the United States, however, judicial review of federal legislation has arguably been used to erode the basic norms of constitutional democracy.<sup>94</sup> And as we imagine future possible worlds — worlds where both Congress and the Supreme Court err in existentially dangerous ways — we might be more inclined to give both branches a role in expounding the Constitution’s meaning.

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Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); *see also* Rosalind Dixon, Professor of L., Univ. of N.S.W., Testimony for the Presidential Commission on the Supreme Court of the United States (June 25, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf> [<https://perma.cc/HVS6-WTJM>] (noting that Canada’s NWC “provides a cabined mechanism for legislative override that respects rule of law constraints and offers a meaningful source of pressure for courts to accommodate expressions of reasonable democratic disagreement”).

<sup>93</sup> *See* Tushnet, *supra* note 13, at 268 (noting one possible explanation for relative nonuse of the NWC is “that governments generally have agreed with the Supreme Court”).

<sup>94</sup> First, in what might be considered *false positive* cases, the U.S. Supreme Court has prevented Congress from protecting minority rights and reinforcing democracy. *See* Bowie, *supra* note 3, at 11. A prototypical example is the Court’s pronouncement that people “of the African race” could not be “citizens” under the U.S. Constitution in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Other key decisions include *Citizens United v. FEC*, 558 U.S. 310 (2010), which precluded Congress from meaningfully regulating campaign finance “to prevent the wealthy from dominating national elections,” Bowie, *supra* note 3, at 9, and *Shelby County v. Holder*, 570 U.S. 529 (2013), which struck down a key part of the 1965 Voting Rights Act, *id.* at 556–57.

Second, the *false negatives*: the judiciary has failed to actually use judicial review to advance these values in the United States when its countermajoritarian role was most needed. For example, in *Korematsu v. United States*, 323 U.S. 214 (1944), the Court infamously upheld Congress’s power to authorize indefinite military detention of U.S. citizens of Japanese descent on no basis other than their ancestry. *Id.* at 217–18. More generally, the Court has and continues to give Congress near plenary power in its regulation of immigrants, Native Americans, and the United States’s colonial subjects in Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands, suggesting an “external” constitutional law where the tenets of liberal constitutionalism do not apply. *See* Maggie Blackhawk, *The Supreme Court, 2022 Term — Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 53–66, 151 (2023). Indeed, the Court’s lack of countermajoritarian intervention has included cases where “Congress and the president have violently dispossessed Native tribes, excluded Chinese immigrants, persecuted political dissidents, withheld civil rights from U.S. citizens in territories, and banned Muslim refugees.” Bowie, *supra* note 3, at 10–11 (footnotes omitted) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Chinese Exclusion Case*, 130 U.S. 581 (1889); *Dennis v. United States*, 341 U.S. 494 (1951); *Schenck v. United States*, 249 U.S. 47 (1919); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)). These false negatives matter: each time judges uphold legislative acts that infringe on the rights of unrepresented or underrepresented groups, their seal of approval implies to the public that those infringements are legitimate and dampens constitutional arguments against them. *Cf.* BICKEL, *supra* note 19, at 30; Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 1993–95 (1993) (book review). And both false negatives and false positives counter one of the most important empirical premises behind theories of judicial supremacy: “[T]hat courts are a better bulwark than are elected officials.” Doerfler & Moyn, *supra* note 5, at 779.

3. *The Second Affirmative Defense: Promoting Institutional Dialogue.* — The NWC has encouraged richer conversations about Charter rights in three ways. First, it has promoted constitutional dialogue within legislatures. As Professor Lorraine Weinrib writes: “The availability of the override has transformed the ways in which Canadians analyse public policy and action. Parliament and the provincial legislatures deliberate in their chambers and committee rooms on the scope of these rights, their justifiable limitation and the possibility of override.”<sup>95</sup> Thus, constitutional “values have become an important element of political platforms and election debates.”<sup>96</sup> And the Charter has encouraged a constitutional culture where the “institutional arrangements” of democracy are “locations for cooperation and for the production of freedom-enhancing government policies,” rather than merely “locations for conflict and struggle, with the end of protecting liberty by limiting government power.”<sup>97</sup>

Second, at least outside of Quebec, this cultural shift has translated into greater entrenchment of constitutional norms among the public, as exemplified by the public reaction to Ontario’s anti-strike law. In response to calls for the federal government to stop Ontario from using the clause, Prime Minister Justin Trudeau said that instead of the federal legislature taking action, “it should be Canadians saying, ‘Hold on a minute. You’re suspending my right to collective bargaining? You’re suspending fundamental rights and freedoms that are afforded to us in the Charter?’”<sup>98</sup> And “[t]hat’s exactly what happened.”<sup>99</sup>

Third, the override has allowed for legal dialogue, compromise, and evolution between the legislatures and courts.<sup>100</sup> Consider Quebec’s signage law. As discussed earlier, Quebec responded to the Supreme Court’s decision by limiting the French-only requirement to exterior

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<sup>95</sup> Lorraine E. Weinrib, *The Canadian Charter’s Override Clause: Lessons for Israel*, 49 *ISR. L. REV.* 67, 82 (2016); see also Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 *MICH. L. REV.* 245, 284 (1995) (noting that the NWC “might actually invigorate majoritarian politics by providing the people and their representatives with a way of engaging in direct discussion of constitutional values in the ordinary course of legislation”).

<sup>96</sup> Weinrib, *supra* note 95, at 101.

<sup>97</sup> Mark Tushnet, *The Charter’s Influence Around the World*, 50 *OSGOODE HALL L.J.* 527, 541 (2013).

<sup>98</sup> Shahriari-Parsa, *supra* note 20.

<sup>99</sup> *Id.* Professor Michael J. Perry argues that “[a]dopting the Canadian innovation” in the United States “would certainly encourage greater citizen participation ‘in the conversation about constitutional meaning.’” MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS* 201 (1994) (quoting Sanford Levinson, *The Audience for Constitutional Meta-Theory (or, Why, and to Whom, Do I Write the Things I Do?)*, 63 *U. COLO. L. REV.* 389, 407 (1992)).

<sup>100</sup> See generally KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 198 (2d ed. 2016); Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 *OSGOODE HALL L.J.* 75 (1997).

signs.<sup>101</sup> That amended version of the law remained on the books until 1993, when the United Nations Human Rights Committee (UNHRC) concluded that the Quebec law contravened the International Covenant on Civil and Political Rights.<sup>102</sup> Although the UNHRC decision was nonbinding, Quebec amended the law again, this time to allow bilingual exterior signs as long as the French part of the sign predominates.<sup>103</sup>

Though the U.S. Constitution does not contain an override clause, there have been patches of constitutional dialogue between Congress and the Court. For example, between 1966 and 1997,<sup>104</sup> the Supreme Court “invited Congress to engage in processes of constitutional interpretation” when exercising its powers under Section 5 of the Fourteenth Amendment.<sup>105</sup> Professors Robert Post and Reva Siegel note that this judicial deference capitalized on Congress’s “distinct institutional competencies, resources, and forms of democratic responsiveness”<sup>106</sup> and generated an evolving constitutional culture.<sup>107</sup> Professors Nikolas Bowie and Daphna Renan also argue that the pre-1926 “republican” conception of separation of powers, which “accepts as authoritative the decision of the political branches” on separation of powers questions, sustained a desirable constitutional order “grounded in deliberation, political compromise, and statecraft.”<sup>108</sup> And Professor Maggie Blackhawk has explained that legislative constitutionalism in federal Indian Law has produced more varied constitutional discourse and reforms.<sup>109</sup>

### C. *Improving the Override*

Although the NWC exhibits many desirable features, the Canadian experience suggests that the override power could be improved in several meaningful ways.

1. *Federal Exclusivity.* — Critics of the NWC in Canada have, above all, regretted the absence of judicial supremacy in *vertical* review (the Supreme Court’s review of state legislation).<sup>110</sup> Meanwhile, critics of judicial supremacy in the United States have primarily questioned the absence of constitutional dialogue in *horizontal* review (the Court’s

<sup>101</sup> See *supra* note 86 and accompanying text.

<sup>102</sup> Kahana, *supra* note 30, at 42.

<sup>103</sup> *Id.* The new version of the clause did not contain an override. *Id.*

<sup>104</sup> That is, the years between the Supreme Court’s decisions in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>105</sup> Post & Siegel, *supra* note 1, at 34.

<sup>106</sup> *Id.* at 38.

<sup>107</sup> *Id.* at 38–39. Perhaps most notably, in section 10 of the Voting Rights Act of 1965, Congress “announce[d] its revisionist constitutional view and ‘direct[ed]’ the attorney general to use these judgments to make an effort to persuade the Court to reject its old jurisprudence.” BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 107 (2014).

<sup>108</sup> Bowie & Renan, *supra* note 6, at 2020.

<sup>109</sup> Blackhawk, *supra* note 6, at 2301.

<sup>110</sup> See, e.g., Wells, *supra* note 8 (lambasting provincial use of the NWC).



review of federal legislation), while sometimes justifying federal judicial review of state legislation as consistent with principles of democracy at the federal level.<sup>111</sup> As Bowie and Renan have noted, seminal cases like *Brown v. Board of Education*,<sup>112</sup> *Roe v. Wade*,<sup>113</sup> and *Obergefell v. Hodges*<sup>114</sup> — the supposed paragons of American judicial supremacy — were brought as suits against state officials under 42 U.S.C. § 1983.<sup>115</sup> That is, they involved judicial enforcement of a federal statute that Congress can revise.<sup>116</sup> Thus, the critical perspectives from both countries can be straightforwardly reconciled by favoring an override power *only* at the federal level.

Federal exclusivity of the override power would be appealing for an additional reason: to encourage the federal legislature to actually use it. The Canadian Parliament has likely been deterred from invoking the NWC to avoid backlash from a public that sees the government as taking its rights away.<sup>117</sup> But Parliament has an even stronger reason to avoid the override: even a single federal invocation could normalize its use, emboldening *provincial* governments to use the clause too. Such a result would be plainly against the federal government's long-term interest in federal supremacy and national cohesion.

To the extent that this consideration deters federal use of the NWC,<sup>118</sup> it counsels against giving the override power to subnational governments. Doing so effectively produces strong-form judicial review of federal legislation and weak-form review of state legislation — an asymmetrical regime in which state legislatures enjoy extraordinary and exclusive power to wrestle over the federal constitution with the federal

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<sup>111</sup> E.g., Nikolas Bowie, *The Supreme Court, 2020 Term — Comment: Antidemocracy*, 135 HARV. L. REV. 160, 202–03 (2021).

<sup>112</sup> 347 U.S. 483 (1954).

<sup>113</sup> 410 U.S. 113 (1973).

<sup>114</sup> 576 U.S. 644 (2015).

<sup>115</sup> Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, THE ATLANTIC (June 8, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212> [<https://perma.cc/DB9B-Y3ZL>]; Bowie, *supra* note 3, at 23–24. These cases therefore represent more than the powers of judicial review: they at least partially also represent the consequences of majority will at the federal level.

<sup>116</sup> Bowie, *supra* note 3, at 23–24.

<sup>117</sup> See, e.g., Tushnet, *supra* note 13, at 268. Another reason for federal non-use might be that, since the Charter's enactment, Parliament has usually agreed with the Supreme Court. *Id.*

<sup>118</sup> On the one hand, this effect is likely more pronounced in Canada, where the sphere of exclusive provincial authority is greater (and thus, where the federal government may have to rely more on the courts to discipline the provinces), than it would be in the United States, where the federal government may have more opportunities to preempt state legislation. On the other hand — at least on subjects where either federal legislature can preempt subnational laws — this deterrence effect may be stronger in the United States, where gridlock makes it extremely difficult to pass legislation, than in Canada. In any event, even where the federal legislature *can* preempt subnational legislation that invokes the override, doing so comes at a meaningful political and opportunity cost that the legislature can reduce in the aggregate by abstaining from federal override use.

courts.<sup>119</sup> And insofar as the federal legislature is dissuaded from using the override, that will “weaken the case that the clause fosters a valuable dialogue on what the *Charter* means,” at least on the federal level.<sup>120</sup>

2. *Promoting Democratic Accountability and Dialogue.* — The NWC could have better achieved its purposes of promoting dialogue and democratic accountability if not for four defects, owed at least partially to the Supreme Court of Canada’s formalist interpretation of the clause.<sup>121</sup> Though these shortcomings of the NWC have manifested in its use by the provinces, they would likely persist even in a world where the clause could be invoked only by the federal legislature.

The first defect is the risk of *overbroad* override use that dodges political accountability. After Quebec applied the NWC to all of its legislation right after the Charter’s enactment, the Quebec Court of Appeals held that the NWC was meant to “bring into sharp focus the effect of the overriding provisions and the rights deprived,”<sup>122</sup> and thus to “set[] in motion political repercussions” specific to the rights being overridden.<sup>123</sup> The Supreme Court overturned that decision; but it could have agreed with the lower court and held that legislatures (1) need to invoke the specific Charter right(s) that they are overriding (rather than listing all of them), (2) must do so in every individual law (rather than through one omnibus bill), and (3) need to be clear about which specific provisions the NWC is shielding.<sup>124</sup> These requirements would have increased the likelihood that citizens are informed about which of their judicially recognized rights are being abrogated and by which statute — necessary information to assess the costs of the override’s invocation and, in turn, decide whether to hold governments accountable.

A related defect is that legislatures do not have to provide a *justification* for using the override. Neither the public nor the courts can

<sup>119</sup> For the woes of horizontal legislative constitutionalism, see OLIVER WENDELL HOLMES, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in COLLECTED LEGAL PAPERS 291, 295–96 (1952) (“I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”); and Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REFORM 51, 84–85 (1984).

<sup>120</sup> See Tushnet, *supra* note 13, at 268 (emphasis added); PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., FINAL REPORT 187 (2021) [hereinafter PRESIDENTIAL COMM’N REPORT], <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/6HXT-S3YK>] (“In both Canada and Israel . . . the federal legislatures have used the [override] power rarely. One might predict a similar outcome in the United States . . .” (footnote omitted)). In other words, the negative and positive defenses of the override clause are in tension with each other. The only resolution to that tension is to maintain enough cost on override use (to reduce the risk of abuse) without that cost being so great (that the clause is not used at all). It seems only federal exclusivity might achieve that.

<sup>121</sup> See *Ford v. Quebec (Att’y Gen.)*, [1988] 2 S.C.R. 712, 740–41, 743 (Can.).

<sup>122</sup> *Alliance des Professeurs de Montréal v. A.G. Quebec*, [1985] C.A. 376, para. 34 (Can. Que. C.A.) (translation).

<sup>123</sup> Weinrib, *supra* note 21, at 277.

<sup>124</sup> See Tushnet, *supra* note 95, at 280; Weiler, *supra* note 119, at 90 n.114.

appropriately evaluate legislators' reasons for invoking the clause when those reasons are not provided.

The third defect is permitting *proactive* use of the clause: where legislatures use the NWC not as a sword against an existing court decision, but as a shield against a potential future judicial nullification. Given that litigating up to the Supreme Court can easily take five years<sup>125</sup> — the length of the NWC's sunset — proactive use severely inhibits the Court's ability to meaningfully engage in Charter dialogue with the legislature. Moreover, to promote constitutional rights, legislatures should make a good faith effort to pass legislation that they think is constitutional. Only after the Court disagrees with them, when the two branches' divergent constitutional opinions can be put on the table for individual legislators and the public to examine, should legislatures be allowed to invoke the override. After all, the NWC should promote "a further stage in the dialogue between courts and legislatures as to the meaning of Charter rights, not . . . prevent such dialogue altogether."<sup>126</sup>

Finally, the NWC would have been better if it clarified that legislators are overriding judicial interpretations of Charter rights, not the rights themselves. This would ensure proposed uses of the NWC trigger public debate on different interpretations of the Charter, not different interpretations of whether the Charter should be followed. However, it might also make it more acceptable for legislators to invoke the clause, with the upside of increasing constitutional dialogue and the downside of empowering legislators to subtly erode constitutional norms.

3. *Guarding Against Constitutional Retrogression.* — Given the rise of autocratic figures in many constitutional democracies, including at the federal level, it would be naive to assume that these checks would fully preclude such would-be autocrats from making use of the override power to entrench their own power.<sup>127</sup> As a last resort, a Supreme Court acting in consensus (or by supermajority vote) should have the power to "double override" legislation invoking the override clause.<sup>128</sup>

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<sup>125</sup> See Tushnet, *supra* note 95, at 289.

<sup>126</sup> See Brian Slattery, *A Theory of the Charter*, 25 OSGOODE HALL L.J. 701, 742 (1987).

<sup>127</sup> Cf., e.g., Landau, *supra* note 18, at 208–11.

<sup>128</sup> Passing a supermajority vote requirement would plausibly fall within Congress's powers to regulate the Supreme Court's appellate jurisdiction. See PRESIDENTIAL COMM'N REPORT, *supra* note 120, at 17; see also *id.* at 170 ("Neither Article III of the Constitution nor Congress in the 1789 Judiciary Act directly specified how the Supreme Court's cases should be decided."). Three state constitutions and at least ten countries require (or, in the case of Ohio, formerly required) a supermajority threshold before their high courts strike down legislation. *Id.* at 171.

It would functionally achieve a similar end as Thayerian deference (the idea that Courts should strike down only legislation whose unconstitutionality is "so clear that it is not open to rational question." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893); see PRESIDENTIAL COMM'N REPORT, *supra* note 120, at 177–78. But it would avoid many of the inherent problems of individual Justices having to decide (and often, disagreeing on) whether certain legislation is "clearly" constitutional.

*D. Judicial Review as One of Many Checks and Balances:  
Differences in the Structure of Government*

Reasonable minds may continue to disagree about the utility of the NWC in Canada's constitutional order. But whichever conclusions one draws about the NWC, the applicability of those conclusions for judicial review in the United States must be mediated by considering a crucial way in which Canada and the United States differ.

In a contemporary parliamentary system like Canada's, checks and balances between the legislature and executive are weak. This wasn't always the case.<sup>129</sup> But, as Professor Stephen Gardbaum posits, political parties have become better at "organiz[ing] mass democracy outside [of] parliament, resulting in the ever-greater disciplining of members inside through the whip system."<sup>130</sup> Accordingly, "the major task of (the majority in) parliament became to support the government . . . rather than to hold it to account."<sup>131</sup> Parliamentary democracies, especially Canada's, have also witnessed a greater "centralization of power in the office of the prime minister and away from the cabinet as a whole."<sup>132</sup> Both developments have led to "a concentration of power both *in and within* the contemporary parliamentary executive."<sup>133</sup> Stronger forms of judicial review thus might be seen as "compensation" for the weakening of political checks and balances in parliamentary democracies.<sup>134</sup>

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*See* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 161–63 (1998); Mark Tushnet, William Nelson Cromwell Professor of L. Emeritus, Harv. L. Sch., Written Statement to the Presidential Commission on the Supreme Court of the United States 6 (Aug. 17, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Mark-Tushnet.pdf> [<https://perma.cc/T9D6-6SR9>] (advocating for Thayerian deference but acknowledging "doubt that there are any institutional mechanisms that can induce Justices to have a Thayerian cast of mind, or that can select only Justices who would have and sustain that cast of mind"). Unlike Thayerian deference, a supermajority vote requirement would also "preserve[] an active, vigorous judicial role . . . in the discourse about constitutional meaning." PERRY, *supra* note 99, at 200.

And, in the United States, a supermajority double-override might be preferable to designating certain rights as nonoverridable. Consider for example that, under the Charter, equality rights are overridable while voting rights are not. *See* Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); *supra* note 10 and accompanying text. But in the United States, both fall under the purview of the Fourteenth and Fifteenth Amendments. *See* U.S. CONST. amends. XIV, XV. Attempting to draw a line between them "would leave great discretion with the Supreme Court." PRESIDENTIAL COMM'N REPORT, *supra* note 120, at 189. Worries of overrides being used to erode the basic democratic process might thus be better assuaged by a double override.

<sup>129</sup> *See* Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMPAR. L. 613, 618 (2014).

<sup>130</sup> *Id.* at 631.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 633.

<sup>133</sup> *Id.*

<sup>134</sup> *See id.* at 617; *cf.* Susan Rose-Ackerman & Oren Tamir, *Comparative Administrative Law: Is the U.S. an Outlier? A Concluding Essay*, BALKINIZATION (Oct. 17, 2023),

Meanwhile, checks and balances between the American legislature and executive are much stronger. The President is elected by the people, can veto legislation (subject to congressional override), and can arguably refuse to execute statutory provisions that she believes are unconstitutional.<sup>135</sup> Severe party polarization in the United States has made these checks and balances even stronger: these days, unless one party maintains control of both houses and the presidency, Congress is all but paralyzed.<sup>136</sup> Reducing the power of judicial review could thus provide breathing room for effective government.<sup>137</sup>

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<https://balkin.blogspot.com/2023/10/comparative-administrative-law-is-us.html> [https://perma.cc/F4CL-TKU3] (“[J]udicial review of administration is potentially more important in parliamentary systems than it is in presidential ones in another key way. It ‘compensates’ for the relative lack of institutional contestation in the legislative process . . . .”).

<sup>135</sup> See *Myers v. United States*, 272 U.S. 52, 176 (1926) (sustaining the President’s view of unconstitutionality of statute without any suggestion that the President should not have refused to execute it); *Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part and concurring in the judgment) (noting the President’s power “to disregard [laws] when they are unconstitutional” in an opinion joined by three other Justices); Dariusz M. Stolicki, *Is the President of the United States Permitted to Disregard Unconstitutional Statutes?*, 12 AD AMERICAM 105, 110 (2011); Bowie & Renan, *supra* note 6, at 2053, 2081. See generally Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

<sup>136</sup> See, e.g., *Paralysis in Congress Makes America a Dysfunctional Superpower*, THE ECONOMIST (Oct. 12, 2023), <https://www.economist.com/united-states/2023/10/12/paralysis-in-congress-makes-america-a-dysfunctional-superpower> [https://perma.cc/LRD6-ZEX6].

<sup>137</sup> See generally CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? (Vicki C. Jackson & Yasmin Dawood eds., 2022).

Two other institutional considerations may support the relative desirability of the override clause in both Canada and the United States over some other countries. First is the threshold for constitutional amendment. Both the Canadian and American Constitutions might be among “the world’s most difficult to amend.” See Richard Albert, *The World’s Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2007 (2022); AREND LIJPHART, PATTERNS OF DEMOCRACY 208 (2d ed. 2012) (grouping the United States’s, Canada’s, and six other countries’ constitutions as among the most difficult to amend). A legislative override can compensate for the relative lack of democratic legitimacy and checks on judicial power that these constitutions carry because of their herculean amendment processes. See Jedediah Britton-Purdy, *The Constitutional Flaw That’s Killing American Democracy*, THE ATLANTIC (Aug. 28, 2022), <https://www.theatlantic.com/ideas/archive/2022/08/framers-constitution-democracy/671155> [https://perma.cc/7VKD-ZR84].

Second, whereas all Canadian provinces and some countries including Israel, New Zealand, Finland, and Luxembourg have unicameral legislatures, the Canadian Parliament, the U.S. states (except Nebraska), and the U.S. Congress all have bicameral legislatures. MINN. HOUSE OF REPRESENTATIVES RSCH. DEP’T., UNICAMERAL OR BICAMERAL STATE LEGISLATURES: THE POLICY DEBATE 1, 8 (1999). Under unicameral systems, the judiciary serves as a more crucial “check on government power,” given that the check of an upper house does not exist. See *Former AG Slams Netanyahu’s Gov’t for Turning Israel into a “Borderline Dictatorial State,”* HAARETZ (July 12, 2023), <https://www.haaretz.com/israel-news/2023-07-12/ty-article/premium/former-ag-slams-netanyahus-govt-for-turning-israel-into-a-borderline-dictatorial-state/00000189-4a4c-d11a-ade9-4ecfa5ef0000> [https://perma.cc/LKF9-AMCF] (reporting that Israel’s former Attorney General noted that “Israel lacks a bicameral legislature, a constitution and a bill of rights and ‘there is only independence of the courts’ to serve as a check on government power”). Countries like the United Kingdom, with a second chamber that lacks the power to veto legislation, might fit somewhere in between. See *Parliament Acts*, UK PARLIAMENT, <https://www.parliament.uk/site-information/glossary/parliament-acts> [https://perma.cc/B2F4-BBN8].

*E. The Constrained Override: A Proposal for Congress*

Following the lessons for judicial review from Canada and the United States, this section proposes the *constrained override*. The constrained override is a rough model for weak-form review that the United States should adopt. It can do so by constitutional amendment.<sup>138</sup> Or it can do so through an ordinary bill passed through bicameralism and presentment<sup>139</sup> pursuant to Congress's power to regulate the Supreme Court under the Exceptions Clause of Article III.<sup>140</sup> The constrained override would have the following features:

*Time-Bound.* The invocation of the override power is time-bound, like the five-year sunset on uses of the NWC in Canada.

*Retrospectivity.* Congress can invoke the power only to shield laws that are clearly unconstitutional under existing judicial precedents.<sup>141</sup>

*Discreteness.* The override cannot be used as an omnibus clause. The legislature must make a good-faith effort to explain, in plain English, which constitutional rights and statutory provision(s) are at issue.

*Justification.* Congress has to give reasons for using the override power. Those reasons have to be included in the same provision that

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Thus, it makes sense that in Israel — a parliamentary democracy that lacks an upper house and passes its semiconstitutional “Basic Laws” through simple majorities — former Chief Justice Barak perceived proposals for an override clause as an existential threat to constitutional democracy. See *Interview with Aharon Barak*, *supra* note 70 (“If Levin’s proposals are fully implemented, ‘nobody will protect them’ from the political majority of the day, since the Knesset is powerless to resist a majority coalition, and Israel has no constitution, no Bill of Rights, and no second House.”). After considering the utility of strong or weak forms of judicial review within broader packages of checks and balances, an override clause is least appealing in Israel, moderately appealing in Canada, and more appealing in the United States.

<sup>138</sup> While constitutional amendment would be ideal to entrench the constrained override from future modification, it might not be feasible given the extraordinarily high threshold for constitutional amendment in the United States.

<sup>139</sup> The legislation would grant Congress the power to override the Supreme Court’s interpretation of the Constitution under the conditions noted below. It would also provide that Congress would agree to be bound by unanimous (or supermajority) decisions of the Supreme Court overriding its use of the override power. But Congress’s commitment to comply with the override constraints in the future would primarily be enforced politically, rather than legally. See *infra* p. 1746.

Both the bill adopting the constrained override power and any subsequent bills invoking it would be subject to the Senate filibuster, which all but guarantees bipartisan support for the legislation. Congress should consider formalizing the Senate supermajority requirement for invocations of the override in case a future Congress decides to do away with the filibuster.

<sup>140</sup> U.S. CONST. art. III, § 2, cl. 2 (“[T]he supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.”); Sprigman, *supra* note 19.

<sup>141</sup> The debate in Canada continues over whether the clause can be invoked proactively or only retrospectively. See, e.g., Jacob Serebrin, *Quebec’s Use of Notwithstanding Clause in Language Law Opens Constitutional Debate*, CBC (May 29, 2022, 11:54 AM), <https://www.cbc.ca/news/canada/montreal/quebec-notwithstanding-clause-constitutional-debate-1.6470091> [<https://perma.cc/VK5V-J49A>]. Retrospectivity as a limitation to the invocation of the override clause was suggested as a reform by some members of Ontario’s Legislative Assembly. See Bill 37, Notwithstanding Clause Limitation Act (Ont. 2022).

invokes the override.<sup>142</sup>

*Overriding the Court, Not the Constitution.* Each time it uses the power, Congress must make clear that it is overriding the Court's *interpretation* of the Constitution, not the Constitution itself.

*Federal Exclusivity.* The override power can be used only by the U.S. Congress, not by the states.<sup>143</sup>

*Double-Override.* After Congress employs an override, a Supreme Court acting in consensus (or, alternatively, as a supermajority) can double-override Congress.

*Judicial Review.* When the constrained override power is invoked, courts can review both the underlying claim and the validity of the override. On the merits, the Court can still declare the statute unconstitutional and explain its disagreement with the legislature<sup>144</sup> — just without providing a remedy. If the Court finds that procedural conditions for invoking the override have not been met, it may rule the legislation *ultra vires*, this time with a remedy.

*Purposivist Interpretation of the Override Power.* If other unforeseen questions come up, the scope and bounds of the override power should be interpreted functionally to promote democratic deliberation.

## F. Counterarguments

*1. Does Congress Have the Power to Enact the Constrained Override by Statute?* — A comprehensive legal defense of Congress's power to enact the constrained override by statute is beyond the scope of this Chapter. But according to the Presidential Commission on the Supreme Court of the United States, there is a legitimate constitutional argument that “Congress could enact a statute that affirms congressional

<sup>142</sup> A proposed Ontario bill would have required the Attorney General to issue a report to the Legislative Assembly, accompanying any invocation of the NWC, that details how the law “can be demonstrably justified in a free and democratic society” and “what alternatives were considered before the government introduced a bill with this declaration and why they were deemed to be inadequate.” Bill 37, Notwithstanding Clause Limitation Act (Ont. 2022).

<sup>143</sup> The federal government should be able to invoke the override power to enact legislation authorizing states to regulate “notwithstanding” a Supreme Court opinion holding such regulation unconstitutional (mirroring antitrust law, which allows state governments to authorize local governments to displace competition and thereby avoid antitrust liability, *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985)). Such a scheme would bring the benefits of federal supremacy associated with cases like *Brown*, see *supra* note 115 and accompanying text, while avoiding complete insulation of judicial review of state action (with the assumption that Congress would consider states' interests and act on their behalf in exceptional circumstances, cf. *JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 176–84 (1980) (describing “structural aspects of the national political system” that “assure that states' rights will not be trampled,” *id.* at 176)).

<sup>144</sup> See Grégoire Webber, Eric Mendelsohn & Robert Leckey, *The Faulty Received Wisdom Around the Notwithstanding Clause*, POL'Y OPTIONS (May 10, 2019), <https://policyoptions.irpp.org/magazines/may-2019/faulty-wisdom-notwithstanding-clause> [<https://perma.cc/Y66F-WKDC>] (“Citizens will be better able to judge a government for invoking [the NWC] if a court, after full and fair argument, has ruled on whether the law violates rights.”).

authority to reenact a statute after a negative Court ruling; Congress could also establish procedures for such reenactment, consistent with bicameralism and presentment requirements.”<sup>145</sup> This follows textually: Article III “never expressly states that the Supreme Court is the final or sole arbiter of statutes’ constitutionality.”<sup>146</sup> And it is consistent with a long history of the political branches independently interpreting the Constitution.<sup>147</sup>

The Supreme Court might rule otherwise.<sup>148</sup> But deference to the Supreme Court’s view on judicial supremacy “begs the very question at issue” and “makes the Supreme Court judge in its own cause.”<sup>149</sup> Ultimately, Congress will have to convince the public that the constrained override power is legitimate and desirable. Whether it is successful in so doing, even over the Court’s objections, will dictate whether Congress has “the power” to enact the constrained override.<sup>150</sup>

2. *Does the United States Have the Constitutional Culture to Make the Override Work?* — Another counterargument to implementing the constrained override power might be that the people of the United States lack the kind of constitutional culture necessary to check legislators for their use of the clause. Scholarship on Congress’s role in various areas of constitutional lawmaking already counters this premise.<sup>151</sup> But even accepting it as true, it commits a chicken-and-egg fallacy. Did Canadians have such a culture prior to the Charter? Or was it the Charter that helped create such a culture? Within Canada, the Charter has been voted by Canadians as the country’s most important national symbol — even more popular than hockey.<sup>152</sup> It seems likely that the

<sup>145</sup> PRESIDENTIAL COMM’N REPORT, *supra* note 120, at 190. Note, however, that the override would apply only to subsequent parties, and would not overturn the specific holding made by a court in a given case. *Id.*

<sup>146</sup> *Id.* (describing a view “long contended” by “numerous scholars”).

<sup>147</sup> See, e.g., Ilan Wurman, Assoc. Professor of L., Sandra Day O’Connor Coll. of L., Testimony Before the Presidential Commission on the Supreme Court of the United States 5–9 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Wurman-Testimony-Supreme-Court-Commission.pdf> [<https://perma.cc/63V7-YQ79>]; Bowie & Renan, *supra* note 6, at 2041–47.

<sup>148</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

<sup>149</sup> Samuel Moyn, Henry R. Luce Professor of Juris. & Professor of Hist., Yale Univ., Written Statement to the Presidential Commission on the Supreme Court of the United States 20 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf> [<https://perma.cc/V96W-GE8W>].

<sup>150</sup> Congress could also call for a referendum and ask the executive branch to respect its results in order to ground its position in public legitimacy. Cf. ACKERMAN, *supra* note 107, at 17 (suggesting popular consent plays an important role in American constitutionalism). Though there is no guarantee such a referendum would be successful or, even if it is, that the government would respect it in the face of a decision by the Supreme Court rendering it null.

<sup>151</sup> See *supra* p. 1738.

<sup>152</sup> See, e.g., Greg Quinn, *Survey Finds We Like the Charter of Rights More Than Hockey*, CALGARY HERALD (Oct. 1, 2015), <https://calgaryherald.com/news/national/canadians-like-hockey-they-love-the-constitutional-bill-of-rights> [<https://perma.cc/B4QC-PDDA>]; Benjamin Shingler, *Charter of Rights, Universal Health Care Top Canadian Unity Poll*, GLOB. NEWS (June 30, 2014, 1:24 PM), <https://globalnews.ca/news/1424367/charter-universal-health-care-top-canadian-unity-poll/> [<https://perma.cc/H27R-EB6U>].



NWC has promoted popular engagement with the Charter.<sup>153</sup> The constrained override could play the same role in the United States.

3. *Will the Constrained Override Precipitate Further Erosions of Judicial Power?* — In the absence of a constitutional amendment, a current Congress likely cannot bind the Congress of tomorrow.<sup>154</sup> Thus, the constrained override might be a slippery slope towards an “unconstrained” override and other erosions of judicial power, including through increased executive assertions of constitutional authority.<sup>155</sup>

These are legitimate worries. Congress can mitigate them by being clear that the constrained override is not an erosion of constitutionalism, but a deepening of its principles<sup>156</sup>: by providing additional checks and dialogue between the different branches to ensure that neither are capable of capturing enough power to descend the polity into autocracy. Congress should plan extensive public outreach and civic education around the constrained override and its function within constitutional democracy, with an emphasis on the importance of the constraint. Congress must also affirmatively distinguish between congressional authority to enact the override clause through legislation from any alleged *executive* authority to challenge the Supreme Court’s understanding of the Constitution, which could carry much graver consequences.<sup>157</sup>

Ultimately, these risks must be weighed against the risks under the status quo: not only the everyday harms of uncheckable judicial decision making, but also the democratic debilitation that it carries with it.<sup>158</sup> Consider these words from Chief Justice Barak:

<sup>153</sup> That said, the NWC is one among several features of the Charter that facilitate constitutional dialogue. See Hogg & Bushell, *supra* note 100, at 82–91.

<sup>154</sup> See *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality opinion) (“[O]ne legislature may not bind the legislative authority of its successors . . .” (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*90)).

<sup>155</sup> Cf. Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2011 (2011) (suggesting judicial supremacy fosters constitutional compliance and reduces violence).

<sup>156</sup> See Tushnet, *supra* note 13, at 263.

<sup>157</sup> For a recent example demonstrating such dangers, see Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), <https://www.documentcloud.org/documents/23939549-december-6-memo-from-kenneth-chesebro-to-james-troupis> [<https://perma.cc/X7GV-Q59H>] (arguing that the Vice President has plenary constitutional authority to “both open *and* count the votes” in a presidential election and thereby allow for its results to be determined by the votes of fake electors, *id.* at 1). See also Scheppele, *supra* note 18, at 547 (“Some constitutional democracies are being deliberately hijacked by a set of legally clever autocrats, who use constitutionalism and democracy to destroy both.”).

<sup>158</sup> See Tushnet, *supra* note 95, at 247 (“[J]udicial review might debilitate decision-making by leading legislatures to enact laws without regard to constitutional considerations, counting on the courts to strike from the statute books those laws that violate the Constitution . . .”); Levinson, *supra* note 99, at 406–07 (“[T]he United States Constitution can meaningfully structure our polity if and only if every public official — and ultimately every citizen — becomes a participant in the conversation about constitutional meaning, as opposed to the pernicious practice of identifying the Constitution with the decisions of the United States Supreme Court or even of courts and judges more generally.”).

A nation that does not want a constitution, a nation that does not want rights, will get its wish. . . . I hope that the people will demand their rights, will want their rights, will support the court so that it will be able to protect their rights. . . . [I]f there is no spirit of freedom, if there is no aspiration to have rights, then no court would do any good.<sup>159</sup>

The status quo of American judicial review treats courts as the exclusive guardians of rights, freedoms, democracy, equality — everything we hold dear — instead of recognizing that the people are the ultimate protectors of these values.

Further, expounding and defending a Constitution is something that must be learned, tried, and developed in practice. Just as judges undergo years of legal training before they make binding interpretations of the Constitution, the people need to develop their constitutional reflexes too. The current system does not give the people that opportunity. It therefore leaves us with the grave danger that Chief Justice Barak warned of: that an autocrat ushers us into despotism with the public behind him and no judge able to stop it. An override power might be the only way to ensure that a Constitution that is “of the people, by the people, and for the people” does “not perish from the earth.”<sup>160</sup>

### *Conclusion*

As President Abraham Lincoln remarked in his First Inaugural Address, “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.”<sup>161</sup> To “protect the Constitution for the people,”<sup>162</sup> Congress should pass legislation reclaiming its role in interpreting the Constitution. Canada’s experience with the Notwithstanding Clause suggests that such power should be accompanied by meaningful constraints that stimulate public constitutionalism, political accountability, and constitutional dialogue between the branches. If implemented, the constrained override power will also help protect freedom, equality, and democracy from erosion by any branch of government. And it will reaffirm that the Constitution belongs neither to the Court, nor to Congress, but to the people themselves.

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<sup>159</sup> Kan 11 Network, *Special Interview with Aaron Barak, Former Chief Justice of the Supreme Court of Israel*, YOUTUBE (Feb. 11, 2023), <https://www.youtube.com/watch?v=XkyqODdZgAU> [<https://perma.cc/2EPG-8LU5>] (English translation).

<sup>160</sup> Abraham Lincoln, Address at the Dedication of the Gettysburg National Cemetery (Nov. 19, 1863), in 9 COMPLETE WORKS OF ABRAHAM LINCOLN 209, 210 (John G. Nicolay & John Hay eds., Francis D. Tandy Co. 1905) (1894).

<sup>161</sup> Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 5, 9 (James D. Richardson ed., Washington 1898).

<sup>162</sup> Post & Siegel, *supra* note 1, at 45.