

THE U.S. SUPREME COURT AND THE “INFERIOR” COURTS: SIBLINGS OR DISTANT COUSINS?

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Any respectable textbook account of the relationship between the U.S. Supreme Court and the lower federal courts would leave one with the impression that all three levels of the federal judiciary are fundamentally in the same line of business: judging. The constituent institutions, the account would continue, operate as a finely tuned machine, each part of which contributes to the support of the rule of law in the United States. True, the day-to-day work done at each level of the judiciary varies enormously: The district courts organize both the facts and the law, wrestling them into some kind of recognizable legal pattern; the courts of appeals receive a neatly wrapped package from the district court and evaluate that record on appeal to ensure that the district court made no consequential errors; and the Supreme Court picks through thousands of cases originating in both the federal courts of appeals and the high courts of the states, with the goal of selecting the sixty or seventy most consequential petitions for writs of certiorari (as the requests for hearing are formally called) that call out for full disposition on the merits.

Nevertheless, there is one well-known and key difference between the so-called lower courts and the Supreme Court: Put simply, in the lower courts, the litigants select the cases that will be pursued, but, in the Supreme Court, the tables are turned, and it is the Court itself (with minor exceptions) that reaches out and constructs its own docket. This, I argue, is a difference in kind, not one of degree. It has been a dominating feature of the Supreme Court’s jurisdiction since the Judges’ Bill of 1925,¹ which expanded the Court’s earlier certiorari jurisdiction to cover nearly the whole of the Court’s work.² The Court badly wanted

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¹ Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

² See *id.* § 237(b). Many others have pointed out the impact of the Court’s power to control its docket on its operation as an institution of government. See, e.g., Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1730–37 (2000); Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 712 (2018); cf. Dinis Cheian, “Absolute and Arbitrary”: *How the Supreme Court’s Certiorari Power Violates the Nondelegation Doctrine*, 50 BYU L. REV. 963, 966 (2025) (arguing that the delegation of absolute discretion to the Supreme Court to regulate its appellate docket violates the nondelegation doctrine, as there is no intelligible principle constraining this delegation). For a perspective that sees greater similarities between the Supreme Court and the courts of appeals, see Stephen L. Wasby & Martha Humphries Ginn, *Triage in Appellate Courts: Cross-Level Comparison*, 88 JUDICATURE 216, 216 (2005).

this change, by all accounts.³ Its caseload had been ballooning out of control — or so it seemed by contemporary standards — and the Court was looking for a way to bring its workload into balance with its judicial capacity.⁴ No lawyer today has ever known any different system.⁵

In this Essay, I argue that the switch to discretionary jurisdiction did more than facilitate docket control. It fundamentally changed the nature of the Supreme Court as an institution and turned it into a quasi-legislative body. Unlike the courts of appeals, the Supreme Court does not sit to correct errors of fact, nor for that matter does it have any institutional interest in most disputes over questions of law. The Court's own Rule 10 says as much: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."⁶ My own experience as a law clerk at the Court confirms that the Justices would often comment that a lower court decision was "wrong, but not certworthy."⁷

This is not a resolution that would be possible in a federal court of appeals, such as the U.S. Court of Appeals for the Seventh Circuit, on which I served for nearly twenty-nine years. The courts of appeals do not have the authority to limit their attention to the most interesting or most consequential cases.⁸ Instead, they act as purely judicial institutions. Anyone who properly files an appeal and pays the required \$605⁹ is entitled to an answer, even if that answer is a disappointing summary ruling that the lower tribunal (usually a district court or federal agency) lacked subject matter jurisdiction, or that the statute of limitations had run on the case, or that the complaint failed to state a claim. Granted, the procedures that the courts of appeals use for cases that are less likely to break new ground are often more truncated. Some circuits offer oral

³ *E.g.*, Epps & Ortman, *supra* note 2, at 711–12.

⁴ *Id.*

⁵ I say that with some confidence: Even if a hypothetical lawyer had been admitted to the bar at age twenty in the year 1925 just before the Judges' Bill was enacted, via the old system of reading law, they would be 121 years old by now. Records indicate that only one person — Jeanne Calment of France — has lived past 120 years (specifically, to about 122.5 years). See *Oldest Person Ever*, GUINNESS WORLD RECS., <https://www.guinnessworldrecords.com/world-records/oldest-person> [<https://perma.cc/34DM-Z37H>]. There is no reason to think that an undiscovered supercentenarian is lurking among the American bar.

⁶ SUP. CT. R. 10.

⁷ I clerked for Associate Justice Harry A. Blackmun during O.T. 1976. The Blackmun papers are now in the Library of Congress. *Harry A. Blackmun Papers*, LIBR. OF CONG., <https://findingaids.loc.gov/repositories/19/resources/2491> [<https://perma.cc/7Q5G-YFUN>].

⁸ See 28 U.S.C. §§ 1291–1292 (detailing that, with few exceptions, the courts of appeals "shall have jurisdiction of appeals from *all* final decisions of the district courts," *id.* § 1291 (emphasis added)).

⁹ Currently, the docketing fee for filing an ordinary appeal in the federal courts of appeals is \$600. See *Court of Appeals Miscellaneous Fee Schedule*, U.S. CTS. (Dec. 1, 2023), <https://www.uscourts.gov/court-programs/fees/court-appeals-miscellaneous-fee-schedule> [<https://perma.cc/WSG8-CRKS>] [hereinafter *Appellate Fee Schedule*]. In addition, parties are required to pay a statutory fee of \$5. 28 U.S.C. § 1917. In all, therefore, \$605 is normally due. The amounts are different for certain specialized proceedings. See *Appellate Fee Schedule*, *supra*.

argument only in cases that raise questions of first impression, or whose facts are particularly complicated.¹⁰ Others, including the Seventh Circuit, give oral argument in every case where both sides have counsel.¹¹ The differences among circuits are notable, as Second Circuit Judge Jon O. Newman and Professor Marin K. Levy have observed.¹² Using statistics from the Administrative Office of the U.S. Courts, they note that, while the average percentage of cases routed to the oral argument calendar across the country is 20%, that masks a range with a low of 11% in the Fourth Circuit to a high of 35% in the Seventh and D.C. Circuits.¹³ But these are merely differences in methodology, albeit potentially important ones. At the end of the day, every appeal properly before the appellate court is resolved.

Although the difference between the methodology used by the Supreme Court and the courts of appeals for case selection and resolution may seem like a pedantic detail that only a procedure nerd could love, it is far more than that. The contrast sheds light on the institutional design choice reflected in the 1925 Judges' Bill — a choice that may have been made without a full appreciation of its consequences. The ability of the Supreme Court to control its own workload was, to be sure, the immediate goal and result of the Judges' Bill.¹⁴ But, while we weren't looking, much more came to pass. The Court realized that it needed to use its scarce resources and its docket-control power in a way that maximized its impact. It is no surprise that it immediately developed criteria to ensure that only the most important cases in the system received full attention, while the more routine cases were left to the courts of appeals, even if some of those cases appeared to be wrongly

¹⁰ The authority to do this is conferred by FED. R. APP. P. 34(a)(2)(C), which allows a court of appeals to skip oral argument in any case where “the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.” *Id.*

¹¹ This is an internal practice followed by the court. It does not appear, in so many words, in the court's local rules or operating procedures.

¹² See generally JON O. NEWMAN & MARIN K. LEVY, WRITTEN & UNWRITTEN: THE RULES, INTERNAL PROCEDURES, AND CUSTOMS OF THE UNITED STATES COURTS OF APPEALS (2024), reviewed by Diane P. Wood, *Thirteen Fiefdoms: Inside the United States Courts of Appeals*, 108 JUDICATURE, no. 2, 2024, at 68 (book review).

¹³ Wood, *supra* note 12, at 72–73.

¹⁴ WILLIAM BAUDE ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 32 n.3, 43 (8th ed. 2025) (citing FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 4, 187–98 (1928)) (noting that the Judges' Bill “was drafted by a committee of Supreme Court Justices,” BAUDE ET AL., *supra*, at 43). Congress lopped off one last vestige of the Supreme Court's appellate jurisdiction in 1988, when it abolished direct appeals to the Supreme Court from decisions invalidating acts of Congress. See Act of June 27, 1988, Pub. L. No. 100-352, §§ 1–3, 102 Stat. 662, 662 (codified at 28 U.S.C. §§ 1252, 1254, 1257). The Court also still has appellate jurisdiction (in contrast with its discretionary certiorari jurisdiction) in cases decided by a three-judge court. 28 U.S.C. § 1253 (referring to *id.* § 2284). The only cases that fall within this category at present are those “challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.” *Id.* § 2284(a).

decided. In other words, with the power conferred by the Judges' Bill in hand, the Court began to evaluate the pool of certiorari petitions with a close eye to policy. As it goes about the task of building its docket, it now weighs such fundamental questions as the importance of the rule of law at issue, the consequences of mistakes of various types, and the need to observe constitutional limits.¹⁵ And it does all this against the backdrop of Chief Justice John Marshall's famous assertion in *Marbury v. Madison*¹⁶ that "It is emphatically the province and duty of the judicial department to say what the law is."¹⁷ Equally importantly, the *Marbury* Court went on to say that "Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."¹⁸

It would be one thing if the Supreme Court were required to exercise this awesome power as part of the normal judicial role of resolving cases.¹⁹ The Justices would have an immediate sense of how often a particular problem arises, whether there is something peculiar about the facts of any given case, whether there is room for an equitable exemption from a harsh application of the rule, and so on. Granted, that would be possible in today's system only in the unlikely event that the Justices could delve into the record of every case that comes before them. That is a tall (and likely unattainable) order, given the fact that certiorari petitions now number a little less than 4,000 per year.²⁰ That is still too many for serious review,²¹ even if it is not the 7,000 or so of a decade ago.²²

One might wonder why this difference matters. Both intermediate appellate courts and apex courts must address significant policy issues when they arise, but the Supreme Court can avoid them when it thinks

¹⁵ See SUP. CT. R. 10; see, e.g., *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14–15 (2024) (Alito, J., joined by Thomas, J., dissenting from the denial of certiorari).

¹⁶ 5 U.S. (1 Cranch) 137 (1803).

¹⁷ *Id.* at 177.

¹⁸ *Id.*

¹⁹ That would be difficult, to be sure, given the number of certiorari petitions filed each year — currently approximately 4,000. See JOHN G. ROBERTS, JR., 2025 YEAR END REPORT ON THE FEDERAL JUDICIARY 8 (2025). But some apex state courts manage to do this, see Ct. Stat. Project, *Understanding State Court Jurisdictions*, NAT'L CTR. FOR STATE CTS. (May 2025), <https://www.ncsc.org/resources-courts/understanding-state-court-jurisdictions> [https://perma.cc/KN3J-Y3HC], as do some apex courts in other countries, see, e.g., *About the Court*, COUR DE CASSATION, <https://www.courdecassation.fr/en/about-court> [https://perma.cc/J979-Q2WS]. What seems most likely, however, is that if the Court did not have the discretion conferred by the Judges' Bill, significant institutional change would be necessary. That discussion lies beyond the scope of this Essay.

²⁰ See ROBERTS, *supra* note 19, at 8.

²¹ Each Justice would need to carve out time to look at more than seventy-five cases a week, or fifteen a day, week in and week out, while still leaving room for more thorough consideration of the difficult cases.

²² See JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2015).

that the question would benefit from further percolation in the lower courts. When policy issues arise, either type of court will call on rules of constitutional and statutory interpretation in an effort to stay within the judicial lane. But the Supreme Court is doing more than that when it exercises its prerogative to choose which policy questions, which constitutional provisions, and which issues of pressing national importance it will reach. The process of resolving a question as part of an otherwise appropriate matter is fundamentally different from deciding both which matters are worth reaching, and which policy choices will prevail. Although of less importance for present purposes, the Judges' Bill also gave the Court the authority to decide how many cases it would resolve each year.²³ That has not been a constant number. For several decades now, it has limited its plenary consideration to seventy cases or so each Term — a number significantly lower than it was in the 1980s, for instance, when it was issuing full merits opinions in some 160 cases a year.²⁴

This smaller number has several consequences. It sharply restricts the opportunities for communication between the Supreme Court and its subordinate colleagues, who are often left to flesh out broad Supreme Court pronouncements with little feedback. And, because the Justices are able to lavish more attention on each case, their opinions often give birth to a new generation of complexities for the lower courts to solve in the first instance. This is not for lack of an in-depth explanation of the result at hand: The Court's opinions often provide lengthy discussions of history, precedents, and secondary sources.²⁵ But that material is less helpful than one might think for the everyday business of dispute resolution. A busy court of appeals judge, writing 100 or more opinions a year and evaluating another 200 as part of a three-person panel, would benefit more from a larger set of pertinent rulings that shed light on the issue at hand. The Supreme Court, however, plainly thinks that the full background of a given legal rule is pertinent, perhaps because its primary interest is in the abstract question presented in a petition.²⁶ It regards a case as worth hearing if that case is a suitable vehicle for providing an answer that will resolve a conflict among the lower courts

²³ Act of Feb. 13, 1925, ch. 229, § 237, 43 Stat. 936, 937.

²⁴ Erwin Chemerinsky, *By the Numbers*, SCOTUSBLOG (July 1, 2025, at 13:38 ET), <https://scotusblog.com/2025/07/by-the-numbers> [<https://perma.cc/9S22-8HHA>].

²⁵ Cf. Adam Feldman, *One Opinion More Complex Than the Next*, EMPIRICAL SCOTUS (June 13, 2018), <https://empiricalscotus.com/2018/06/13/more-complex> [<https://perma.cc/E43U-JX6W>] (discussing data detailing the increasing length and complexity of the Court's opinions over time).

²⁶ See SUP. CT. R. 14(1)(a) (requiring the first item in any petition for a writ of certiorari to be “[t]he questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail”); cf. SUP. CT. R. 24(1)(a) (setting forth much the same requirement for the petitioner's opening brief on the merits).

(federal or state, as long as the issue is one of federal law²⁷), or if its disposition will give a final answer to a question of pressing national importance, or if it sees the need to correct an egregious error by a lower court.²⁸ In all instances, the Court is attempting to create national uniformity in the matters entrusted to it.²⁹

This system makes it almost inevitable that the Supreme Court will resolve many of the nation's most fraught policy debates.³⁰ The Presidential Commission on the Supreme Court of the United States established by President Joe Biden made this point as it emphasized the "central and often contested role in shaping American political and civic life" that the Court has played.³¹ It would be hard to improve on its list of issues:

In the modern era, [the Court's] decisions continue to have both immediate and long-term effects on the welfare of individuals and communities throughout the country, including by affecting the rights of people of the same sex to marry, the right to bear arms, religious liberty, property ownership, women's reproductive rights and freedoms, access to health care, participation in the political process and voting, the structure of government and the separation of powers, the operation of the criminal justice system, diversity in higher education, and the regulation of workplaces and the right to organize. The stakes of the nomination process are so high precisely because they implicate matters of great public concern.³²

No one today disputes the Court's pivotal role in resolving this array of vital issues for American society.³³ The current debate is instead over the question whether the time has come to trim the Court's sails.³⁴ The premise of those who advocate some kind of change is that the Court has strayed well beyond the boundaries that the drafters of the Constitution intended to impose.³⁵ Several reasons lie behind this development: First, Justices are living longer, and so the median length of service has nearly doubled, from fifteen years to thirty years;³⁶ second, through long adherence to *Marbury*, the Court has solidified its role as the final

²⁷ See 28 U.S.C. § 1254 (review of decisions by the federal courts of appeals); *id.* § 1257 (review of decisions "rendered by the highest court of a State in which a decision could be had," insofar as they raise a federal question).

²⁸ See SUP. CT. R. 10.

²⁹ See *id.*; *cf.* *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 486 (1975) (emphasizing the importance of the Supreme Court providing final interpretations of federal law).

³⁰ See SUP. CT. R. 10; Jeffrey Rosen, *The Court and Democracy*, THIRTEEN PBS, <https://www.thirteen.org/wnet/supremecourt/democracy/history.html> [<https://perma.cc/NPR2-27Q7>].

³¹ PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 6, 18 (2021) [hereinafter PRESIDENTIAL COMM'N REPORT].

³² *Id.* at 18 (footnote omitted).

³³ See, e.g., Geoffrey R. Stone, *The Supreme Court in the 21st Century*, DAEDALUS, Spring 2013, at 36, 36.

³⁴ *Reforming the Courts*, DEMAND JUST., <https://demandjustice.org/priorities/reforming-the-courts> [<https://perma.cc/NHJ5-ZRD6>].

³⁵ See *id.*

³⁶ Christopher Sundby & Suzanna Sherry, Essay, *Term Limits and Turmoil: Roe v. Wade's Whiplash*, 98 TEX. L. REV. 121, 128 (2019).

authority on constitutional issues;³⁷ third, as a practical matter the Justices control the content of their docket.³⁸ As written in 1787, the Constitution contemplated three branches of government, each with powers that would check and balance the other two.³⁹ That tripartite structure is implicit in the first three articles of the Constitution, which delineate both the responsibilities and the limits of the legislative, the executive, and the judicial branches, respectively.⁴⁰ Alexander Hamilton, writing as “Publius” in Federalist No. 78, went so far as to postulate that “the judiciary . . . will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.”⁴¹ That prediction, many would argue, turned out to be spectacularly wrong. The reasons lie beyond the scope of this Essay, but they include the Framers’ failure to anticipate the rise of robust political parties, their equal failure to anticipate congressional paralysis in the face of strong assertions of executive power by various Presidents, the ever-increasing amounts of money poured into elections and lobbying, and the lengthening of the Justices’ terms of service as longevity has improved.⁴²

Those developments have sharpened concern about the operation of the twenty-first-century Court and the role it plays. Is the Court staying in its lane (whatever that might be)? If not, then what is the problem? Is the Court failing to give due deference to acts of Congress; is it bending too readily to the President’s will; is it poking its nose into topics best left to the states or the political process; or are the Justices simply too insulated from the People who ordained and established the Constitution?⁴³ Is the Court “call[ing] balls and strikes,” as Chief Justice

³⁷ See, e.g., *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (same).

³⁸ It is rare, though not impossible, that an issue in which the Court is interested is not presented in at least one of the petitions for a writ of certiorari that are presented to it over, let’s say, a two-year period. Even though, therefore, the Court cannot initiate litigation (a limitation it shares with the other federal courts), that constraint is not very meaningful.

³⁹ See U.S. CONST. arts. I, II, III.

⁴⁰ *Id.*

⁴¹ THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

⁴² See Diane P. Wood, *Why Term Limits for Supreme Court Justices Make Sense*, BRENNAN CTR. FOR JUST. (Aug. 19, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/why-term-limits-supreme-court-justices-make-sense> [<https://perma.cc/U9QX-6LCH>].

⁴³ The nature of the debate one hears with respect to the last of these is well illustrated by the Court’s decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997), raising the question whether a state may, consistently with the Fourteenth Amendment, pass a law prohibiting assisted suicide. *Id.* at 705–06. Finding that the states were “currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues,” *id.* at 719, the Court concluded that there was no warrant at this time for federal intervention that would block these state developments, *see id.* at 735.

Roberts famously said during his confirmation hearing,⁴⁴ or is it legislating from the bench, particularly in sensitive constitutional cases whose outcomes lie beyond the possibility of congressional correction, such as the debates over reproductive freedom, gun policy, and religion in the public square?⁴⁵

A browse through the U.S. Reports up until the twentieth century confirms that, with few exceptions, these are not the kinds of cases that the Court of yesteryear confronted.⁴⁶ The problem is not just that the Constitution is silent when it comes to the Court's role as the final authority on the "true" meaning of this document, now nearly 240 years old. It is an enduring discomfort with the idea that unreviewable Supreme Court decisions fix the meaning of the document for an indefinite, presumptively long, time.⁴⁷ Change occurs only if the Court changes its mind and overrules an earlier constitutional ruling, as it did in *Brown v. Board of Education*⁴⁸ vis-à-vis *Plessy v. Ferguson*,⁴⁹ or if the amendment machinery of Article V is cranked up and manages to result in a change,⁵⁰ as happened with the Civil War Amendments.⁵¹ Accepting the statement in *Marbury* that the only institution capable of resolving constitutional questions is the Court⁵² (a proposition that has been debated over time⁵³), we come to the key question: Has the Supreme Court

⁴⁴ *Chief Justice Roberts Statement - Nomination Process*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks/nomination-process/chief-justice-roberts-statement-nomination-process> [<https://perma.cc/5B3F-86CC>].

⁴⁵ See Edward Lempinen, *Abortion, Climate, Guns and Religion: Supreme Court Poised for a Sharp Right Turn*, UC BERKELEY RSCH. (May 12, 2022), <https://vcresearch.berkeley.edu/news/abortion-climate-guns-and-religion-supreme-court-poised-sharp-right-turn> [<https://perma.cc/A95H-6AEQ>].

⁴⁶ See generally DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888* (1985) (documenting the Court's development of constitutional law); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986* (1990) (same).

⁴⁷ Cf. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) ("We are not final because we are infallible, but we are infallible only because we are final.").

⁴⁸ 347 U.S. 483, 494–95 (1954).

⁴⁹ 163 U.S. 537, 551 (1896).

⁵⁰ U.S. CONST. art. V. Change via amendment has been extraordinarily difficult to achieve. See generally JILL LEPORE, *WE THE PEOPLE* (2025) (documenting this history at length). The threat of amendment is thus quite unlikely to influence Supreme Court decisionmaking.

⁵¹ I am referring in particular to the citizenship section of the Fourteenth Amendment, U.S. CONST. amend. XIV, which displaced the Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which held that people of African descent could never become citizens. *Id.* at 404–05; *Fourteenth Amendment*, NAT'L CIV. WAR MUSEUM, <https://www.nationalcivilwarmuseum.org/lectures/the-civil-war-amendments-the-14th-amendment-and-birthright-citizenship> [<https://perma.cc/YKQ3-H4JU>].

⁵² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 146–47 (1803).

⁵³ See Tabatha Abu El-Haj, *Linking the Questions: Judicial Supremacy as a Matter of Constitutional Interpretation*, 89 WASH. U. L. REV. 1309, 1316–25 (2012) (overviewing this debate).

become the final legislator (literally, law-proposer or giver⁵⁴) for the country, under the guise of being the last judicial tribunal to resolve a dispute between *A* and *B*? And where does that leave the lower courts, who resolve concrete cases and controversies every day with only limited guidance from the highest tribunal?⁵⁵

And the problem can be worse than that: In some cases, the Court dips in to resolve one issue without the benefit of the full picture, only later to take several steps back. That is one way of looking at what happened in the long-running litigation between the National Organization for Women (NOW) and various antiabortion groups, led by Joseph Scheidler.⁵⁶ The proceedings began in 1986, when NOW filed a suit asserting that Scheidler's group had violated the Racketeer Influenced and Corrupt Organizations Act⁵⁷ (RICO) by engaging in a conspiracy to shut down abortion clinics using activities, including extortion,⁵⁸ as defined by the Hobbs Act.⁵⁹ Both the district court (in 1991) and the Seventh Circuit (in 1992) dismissed the case on the theory that Scheidler's conduct needed to be economically motivated, and it was not.⁶⁰ The Supreme Court reversed, finding no requirement of economic purpose in RICO.⁶¹

On remand, after a lengthy trial, the jury found twenty-one violations of the Hobbs Act, among other things, and the court entered both a money judgment and an injunction in favor of plaintiffs.⁶² The Seventh Circuit affirmed.⁶³ Once again, the Supreme Court took the case, and once again, it reversed the Seventh Circuit.⁶⁴ This time it ruled that the acts of the antiabortion groups did not amount to "extortion" for Hobbs Act purposes, because those groups were not trying to take any property away from either the clinics or NOW.⁶⁵ The case then returned to the Seventh Circuit, which understood the Court's opinion to preclude any relief on the extortion grounds but to leave open the potential for relief on other Hobbs Act grounds that were untainted by the

⁵⁴ The word "legislator" comes from the Latin words for law (*lex, legis*) and proposer (*lator*). *Legislator*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/legislator> [<https://perma.cc/55V7-BMX7>].

⁵⁵ Cf. Erwin Chemerinsky, *Why the Shadow Docket Should Concern Us All*, SCOTUSBLOG (Aug. 4, 2025, at 09:53 ET), <https://www.scotusblog.com/2025/08/why-the-shadow-docket-should-concern-us-all> [<https://perma.cc/FX66-2Q44>] (arguing that the Court's expanding set of unexplained "shadow docket" rulings "should not be regarded as acceptable").

⁵⁶ See *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 14 (2006).

⁵⁷ 18 U.S.C. § 1962.

⁵⁸ *Scheidler*, 547 U.S. at 14.

⁵⁹ 18 U.S.C. § 1951.

⁶⁰ *Scheidler*, 547 U.S. at 14.

⁶¹ *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262 (1994).

⁶² *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 694–95 (7th Cir. 2001).

⁶³ *Id.* at 710.

⁶⁴ *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 397 (2003).

⁶⁵ *Id.* at 400, 402, 404–05.

Supreme Court holding.⁶⁶ But that, too, proved to be wrong, as the Supreme Court held during the next round.⁶⁷ Thus it was that the Seventh Circuit, in April 2006, ordered judgment to be entered in favor of the defendants — just as the district court had initially ruled before the Supreme Court’s initial intervention in the litigation.⁶⁸ Whatever else one might say about this saga, it seems to reflect a set of shifting goalposts. Worse, the need in the certiorari process to single out specific issues for Supreme Court treatment may have deprived the Court of the big-picture view that ultimately accounted for its decision.⁶⁹

In one respect, it is hard to resist the conclusion that when it comes to constitutional law, the Court is indeed the final legislator. This is not to say that Congress and the executive branch are exempt from the duty to follow the Constitution. To the contrary, all members of Congress and executive officers take an oath to uphold the Constitution.⁷⁰ But our system, unlike the one in the United Kingdom, does not follow the principle of parliamentary or legislative supremacy.⁷¹ When there is a conflict between Congress’s opinion about a law’s constitutionality and the opinion of the Supreme Court, the Court wins.⁷² And there’s more. The additional element takes us back to the Court’s certiorari jurisdiction. The act of selecting the topic on which it wants to opine is the exercise of a classic legislative power.⁷³ Just as Congress does every day, the Court can and does choose from among the myriad problems applicants bring to its attention the lucky few that will be addressed.⁷⁴

The problem is that the Court’s de facto legislative power over constitutional questions does not carry with it the type of resources that Congress has when it is considering legislation. Congress holds hearings, receives written submissions, consults with constituents around the country, and educates itself on the details of a given issue. The Court, in contrast, learns about a case and the constitutional issue it presents

⁶⁶ *Nat’l Org. for Women, Inc. v. Scheidler*, 396 F.3d 807, 811 (7th Cir. 2005).

⁶⁷ *Nat’l Org. for Women, Inc. v. Scheidler*, 547 U.S. 9, 16 (2006).

⁶⁸ Compare *Nat’l Org. for Women, Inc. v. Scheidler*, 178 F. App’x 557, 557 (7th Cir. 2006) (ordering district court to enter judgment in favor of defendants), with *Nat’l Org. for Women, Inc. v. Scheidler*, 765 F. Supp. 937, 945 (N.D. Ill. 1991) (granting defendants’ motion to dismiss).

⁶⁹ Cf. SCOTT L. NELSON, PUB. CITIZEN LITIG. GRP., GETTING YOUR FOOT IN THE DOOR: THE PETITION FOR CERTIORARI 8, <https://www.citizen.org/wp-content/uploads/getting-your-foot-in-the-door.pdf> [<https://perma.cc/qq7f-k27g>] (“[M]ost cases are granted to resolve what is essentially one issue . . .”).

⁷⁰ See 2 U.S.C. §§ 21, 25; 5 U.S.C. § 3331.

⁷¹ Sir Rabinder Singh, *Divided by a Common Language: American and British Perspectives on Constitutional Law*, Sir David Williams Lecture 5 (Feb. 24, 2017), <https://www.judiciary.uk/wp-content/uploads/2017/02/speech-by-j-singh-divided-by-a-common-language.pdf> [<https://perma.cc/CRZ2-6SV6>] (“[A] fundamental feature of [the United Kingdom’s] constitution remains the supremacy of the Westminster Parliament. The US Congress has no such supremacy even in theory.”).

⁷² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁷³ Cf. Cheian, *supra* note 2, at 1029 (arguing certiorari discretion is an exercise of legislative power that violates the nondelegation doctrine).

⁷⁴ *Id.*

primarily through the briefs filed by the parties.⁷⁵ It may supplement that information with the help of briefs *amicus curiae*, but it has to take care that it does not rely on facts that have not been tested through the adversarial process.⁷⁶ Moreover, the Court is not holding a popularity contest as it adjudicates constitutional cases, or for that matter any other cases.⁷⁷ It is exploring, through the tools it has legitimized, the meaning of our basic law.⁷⁸ Those tools include careful attention to the language of the document, the context in which that language appears, the history of the provision in question, and its own prior rulings.⁷⁹ The result it reaches may be, and sometimes is, opposed to the public's preference.⁸⁰

The disconnect with public opinion is troubling only insofar as the Court is playing a quasi-legislative role; judges sit to enforce the rule of law, not to win public approval.⁸¹ But that fact argues strongly for a jurisprudence that leaves ample room for a legislative voice once the core legal rule is established. It is not hard to find examples of issues where the public, at least, appears to wish that the Court was playing a more modest role. The following are just a few:

The Court's decisions in *Heller*,⁸² *McDonald*,⁸³ and *Bruen*⁸⁴ took an aggressive position in favor of a relatively untrammelled individual right to carry a firearm. The public, however, has a more nuanced view. When Gallup asked people whether they felt that "the laws covering the sale of firearms should be made more strict, less strict or kept as they are now," 60% of respondents said *more* strict, 12% said *less* strict, and

⁷⁵ See Carolyn Shapiro, *Behind the Scenes: How the U.S. Supreme Court Decides*, AM. BAR ASS'N (Apr. 23, 2025), https://www.americanbar.org/groups/public_education/resources/reproductive-rights-us-supreme-court/behind-the-scenes-how-the-u-s-supreme-court-decides/ [<https://perma.cc/M4DZ-UN3M>] (explaining how Supreme Court decisions are made).

⁷⁶ *Id.*; cf. FED. R. EVID. 201 (placing additional requirements on courts in order to take judicial notice of a fact "not subject to reasonable dispute").

⁷⁷ See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (describing the Court's adherence to the "party presentation principle" across different case types).

⁷⁸ Adam Feldman, *The Ways in Which Justices Reach Their Decisions*, SCOTUSBLOG (July 29, 2025, at 12:15 ET), <https://www.scotusblog.com/2025/07/how-supreme-court-justices-reach-their-decisions/> [<https://perma.cc/ZXX6-NSFN>].

⁷⁹ There is a literature too voluminous to cite on the proper approach to constitutional interpretation. It suffices here to say that some argue that the ultimate goal is to discern the original intent of those who wrote the document, others contend that the writers intended to create a "living" Constitution that would adapt to the times, and still others believe that the Constitution sits on top of a rich common law tradition that informs its provisions. And there is much more. The Court has adopted different approaches over history. What remains true, however, is that contemporary public opinion does not drive its decisions.

⁸⁰ See Andrew Napolitano, *Justice Scalia Liked the Court. He Loved the Constitution.*, REASON (Feb. 18, 2016, at 00:00 ET), <https://reason.com/2016/02/18/scalia-and-constitutional-fidelity> [<https://perma.cc/XGJ6-TN6S>].

⁸¹ That is why Article III of the Constitution assures their tenure during "good Behaviour" and stipulates that their salaries cannot be reduced. U.S. CONST. art. III, § 1.

⁸² *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁸³ *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

⁸⁴ *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

27% said they would opt to keep them as is.⁸⁵ Polling done by Pew Research Center returned similar results: 61% of respondents said that it is too easy legally to obtain a gun, 9% said that it is too hard, and 30% thought it was about right.⁸⁶

Likewise, the public's view on the role of religion in schools varies by state and appears to be closely divided.⁸⁷ Pew reports that support for Christian prayer in U.S. public schools varies widely by state. Overall, however, 27% of those polled strongly favor that practice, 26% favor it, 24% oppose it, and 22% strongly oppose it.⁸⁸ In response to questions from AP-NORC about particular religious practices, 58% of respondents said that they thought it was acceptable for religious chaplains to provide support services in public schools; 44% thought that teachers should be allowed to lead a class in prayer; 32% said that religion has too much influence; and 38% said that it has too little influence.⁸⁹

Finally, the public's view of abortion and reproductive autonomy more generally is not reflected in the Supreme Court's decision in *Dobbs*⁹⁰ to overrule *Roe v. Wade*.⁹¹ Pew reports that 63% of its respondents said that "abortion should be legal in all or most cases," while 36% took the opposite view.⁹² Gallup's results break down preferences in more detail, but also reveal that 60% of respondents opposed *Dobbs*.⁹³ More granularly, 30% said that abortion should be legal under any circumstances, and 55% said that legality should depend on the factors; the survey also found that 51% identified as pro-choice, and 43% as pro-life.⁹⁴

⁸⁵ See *Guns*, GALLUP, <https://news.gallup.com/poll/1645/guns.aspx> [<https://perma.cc/762M-YUD4>] (reporting polling data from October 1–16, 2025).

⁸⁶ See Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (July 24, 2024), <https://www.pewresearch.org/short-reads/2024/07/24/key-facts-about-americans-and-guns> [<https://perma.cc/RQ8J-WAFL>].

⁸⁷ For a recent example of this type of case, see *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022) (supporting a football coach's right to engage in personal prayer). The Supreme Court assumed that Kennedy was alone on the field, *id.* at 2430, but a concurring opinion at the Ninth Circuit level indicated that he might have acted with his team members, see *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 911–12 (9th Cir. 2021) (M. Smith, J., concurring in the denial of rehearing en banc).

⁸⁸ Chip Rotolo, *Support for Christian Prayer in U.S. Public Schools Varies Widely by State*, PEW RSCH. CTR. (June 23, 2025), <https://www.pewresearch.org/short-reads/2025/06/23/support-for-christian-prayer-in-us-public-schools-varies-widely-by-state> [<https://perma.cc/Q8V4-A6B9>].

⁸⁹ *The Public Holds Nuanced Views on the Role of Religion in Public Schools*, AP-NORC (June 26, 2025), <https://apnorc.org/projects/the-public-holds-nuanced-views-on-the-role-of-religion-in-public-schools> [<https://perma.cc/5PFE-7LSD>].

⁹⁰ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁹¹ 410 U.S. 113 (1973).

⁹² *Public Opinion on Abortion*, PEW RSCH. CTR. (June 12, 2025), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion> [<https://perma.cc/RZ79-NR3F>].

⁹³ *Where Do Americans Stand on Abortion?*, GALLUP (Oct. 7, 2025), <https://news.gallup.com/poll/321143/americans-stand-abortion.aspx> [<https://perma.cc/4YL8-QCTK>].

⁹⁴ *Id.*

Where does this leave us? A pessimist might say that we are left with a quasi-legislative institution that is free to disregard the will of the governed and whose decisions in the most important cases — those that construe the Constitution — are virtually unreviewable. Someone with a slightly more optimistic outlook, however, would find some reasons for hope.

First, the Court itself employs several doctrines to ensure that it does not stray too far into the legislative arena. These doctrines address various aspects of justiciability: ripeness (has the matter in question come to some kind of resolution or is it still a work in progress?); standing (is the person seeking judicial intervention one who has suffered injury-in-fact caused by the defendant and redressable by a court?); mootness (have later events essentially resolved the problem for now, such that a judicial decision would be advisory only?); and does the matter present a political question (that is, one that the Constitution assigns exclusively to one or both of the other two branches of government?).⁹⁵ When the Court refuses to decide a matter on grounds of lack of justiciability, it is sending a powerful message to Congress and the executive branch that any action must come from one or both of them. No matter how interesting, or even vital, to the nation the answer to such a question may be, or how many petitions for a writ of certiorari raise it, the Court will yield to others.

This state of affairs still leaves vital questions of constitutional policy that arise in vehicles that are suitable for judicial action. As for these, the options are limited, but it is possible to identify three broad proposals.

The first would be simply to stop complaining about judicial activism and recognize that the centrality of the Court's role in the shaping of the Constitution is the inevitable result of its discretionary jurisdiction and the continued vitality of *Marbury*. One could take this approach while at the same time recognizing that the problem today is more acute than it was in 1925, because the New Deal lay in the future then, and people had no idea what it was that they were going to ask the Court to do. The Court nonetheless certainly had contentious issues before it, as we know from discussions of the *Lochner* era.⁹⁶

Secondly, one could try to devise additional guardrails that would assure that the judiciary stays more closely connected to the public, while at the same time preserving the antimajoritarian role that assures the preservation of civil rights for the unpopular. This, too, is challenging, though not because people have not tried. It is beyond the scope of this Essay to delve into all of the proposals for Supreme Court reform

⁹⁵ See BAUDE ET AL., *supra* note 14, at 125–324 (chapters explaining standing, mootness, ripeness, and political questions).

⁹⁶ See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 147–93 (1993) (providing historical overview of the issues before the Court in the *Lochner* era).

that are circulating currently, let alone those mentioned in the past. It seems doubtful to me that the Court would accept congressional intervention into the internal management of its docket. The one tool that does lie within Congress's competence is the regulation of the Court's appellate jurisdiction.⁹⁷ If Congress were at the same time to restrict appellate jurisdiction for certain classes of cases, and to move other classes from the certiorari docket back to the appellate docket, it is possible that the Court might be able to play a more effective role, both for the public and for the lower courts that need its guidance.

The idea that the Court would somehow be required to leave alone cases where there is a consensus in the lower courts seems much less promising to me. It is already rare, though not unheard of, that the Court will take a case to upset an existing consensus among the courts of appeals and state high courts.⁹⁸ Since the original "rule of four," pursuant to which the Court will accept a case based on a vote of four, not five, Justices, was something that was volunteered by the Court, not imposed on it,⁹⁹ that is not a precedent for a congressional voice on this critical internal matter. Maybe a "rule of three" would help to ensure that the right cases are receiving Supreme Court attention, but I believe such a change would need to come from the Court itself.

More ambitiously (though possibly requiring a constitutional amendment), one could split the Court into two institutions, along the lines of the European judiciaries. In France, there is a *Cour de cassation*, which acts as the supreme court for all civil and commercial cases, and there is also a *Conseil constitutionnel*, which has the power (both ex ante and ex post) to review the constitutionality of legislation.¹⁰⁰ Germany is similar: Its *Bundesgerichtshof* is the highest in the country for civil and criminal cases, but constitutional matters go to the *Bundesverfassungsgericht* (that is, the Constitutional Court).¹⁰¹

The virtue of having a separate constitutional court, authorized by the country's basic law, is that it represents a democratic choice about where to lodge final decisionmaking authority. It also provides the national judiciary with a richer set of precedents on which to rely. The vice (apart from the apostasy of borrowing from the civil law systems) is that it may not be particularly efficient. Many cases before the U.S. Supreme Court include both a statutory argument and a constitutional

⁹⁷ U.S. CONST. art. III, § 2, cl. 2.

⁹⁸ *But cf.* *Bailey v. United States*, 516 U.S. 137, 142 (1995) (overstating the "conflict" and "perplexity" in the lower courts regarding the interpretation of "use" in 18 U.S.C. § 924(c)(1)).

⁹⁹ Robert L. Knauss, Recent Decision, *Integrity of the Rule of Four*, 56 MICH. L. REV. 118, 121 (1957); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 559 (1957) (Harlan, J., dissenting).

¹⁰⁰ *The Structure of the French Legal System*, GEO. L. LIBR. (May 16, 2025, at 14:24 ET), <https://guides.ll.georgetown.edu/francelegalresearch/legalsystem> [<https://perma.cc/EMU8-EHPD>].

¹⁰¹ *See* Fed. Jud. Ctr., *Germany*, JUDICIARIES WORLDWIDE, <https://judiciariesworldwide.fjc.gov/country-profile/germany> [<https://perma.cc/BUE6-453S>]; *Court System in Germany*, COUNCIL OF EUROPE (Apr. 12, 2006), <https://rm.coe.int/court-system-in-germany-constitutional-court-bundesverfassungsgericht-168078f809> [<https://perma.cc/4N73-BQ3L>].

argument.¹⁰² The Court follows the principle of constitutional avoidance,¹⁰³ under which it attempts first to resolve a case on nonconstitutional grounds (thus preserving Congress's power to take another look at the matter), before reaching the constitutional argument. With two apex courts, one would need to devise a system that routes hybrid cases to the proper tribunal. If all such cases were assigned to the constitutional court, it might wind up being a replica of what we have today. If all cases went presumptively to the general supreme court, which would then transfer either the case as a whole or the specific issue to the constitutional court, delay and procedural complexity are not hard to foresee.

Other solutions are also possible, if the door to constitutional amendment were opened. In Canada, section 33 of the Charter of Rights and Freedoms authorizes both the federal and provincial legislatures to override a constitutional decision of the Supreme Court.¹⁰⁴ Although this section has never been used at the federal level there,¹⁰⁵ it does function as a safety valve in case the courts overreach. Something along those lines might calm fears of an imperial judiciary while preserving the benefits of judicial independence that have been important to the U.S. Supreme Court's functioning.

Another approach would be to consider what, if anything, might help Congress perform its assigned constitutional role more effectively. Some have argued, for instance, that the Court's decision in *INS v. Chadha*¹⁰⁶ to override the one-house veto was mistaken.¹⁰⁷ Legislative oversight is difficult in the best of times. Now that the Supreme Court has enhanced Congress's role over that of agencies, through the *Loper Bright* decision,¹⁰⁸ it is more important than ever to give Congress the tools it needs to monitor the institutions it has set up.

None of these changes needs to be made to the lower courts. In their case, the normal corrective mechanisms are working fine. The primary safeguard is appellate review, first in the courts of appeals and then at

¹⁰² *E.g.*, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001) (Clean Water Act plus Commerce Clause).

¹⁰³ *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (formulating the constitutional avoidance doctrine).

¹⁰⁴ 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.). *See generally Developments in the Law — Chapter Five: The Constrained Override: Canadian Lessons for American Judicial Review*, 137 HARV. L. REV. 1725 (2024) (discussing lessons the United States can take from this Canadian “Notwithstanding Clause”).

¹⁰⁵ *Developments in the Law, supra* note 104, at 1726.

¹⁰⁶ 462 U.S. 919 (1983).

¹⁰⁷ *See, e.g.*, Aziz Huq, *How the Supreme Court Stripped Congress of the Power to End National Emergencies*, WASH. POST (Feb. 27, 2019), <https://www.washingtonpost.com/outlook/2019/02/27/congress-is-voting-end-trumps-emergency-vote-wont-stop-him> [<https://perma.cc/3A2D-G8ZY>] (“*Chadha* thus addressed a nonexistent problem of congressional overreach even as it created a new peril of executive abuse.”).

¹⁰⁸ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

least the possibility of review in the Supreme Court. Less common, but effective when needed, is the writ of mandamus.¹⁰⁹ And if there is a problem with non-case-related behavior, there is always the Judicial Conduct and Disability Act.¹¹⁰ The reason these devices have little to no impact at the Supreme Court level is because it is a more complex institution. As long as we have the system we do, perhaps the best we can do is to recognize the value of judicial restraint, to leave as much room for legislative action as is possible, and to accept the fact that the system created in the Constitution is not perfect. Nothing is, after all, and yet our judiciary at all levels has done quite well.

¹⁰⁹ See, e.g., *In re* United States, 572 F.3d 301, 312 (7th Cir. 2009) (writ of mandamus for disqualification of district judge was warranted); *In re* United States, 614 F.3d 661, 666 (7th Cir. 2010) (writ of mandamus issued; district judge was directed to admit certain evidence in a criminal case and to recuse).

¹¹⁰ See 28 U.S.C. §§ 351–364.