

The Supreme Court and Public Opinion

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ABSTRACT: Alexander Hamilton famously called the Supreme Court the “least dangerous branch” because it was reliant on Congress for funding and the President for enforcement. To manage its relationship with the political branches in a way that affords the Court both independence from them and the necessary assistance from them, the Court must cultivate the affection of the electorate. Several doctrinal tools facilitate that cultivation, and, historically, the Court has used those tools effectively to maintain relatively high public-approval rates. But over the last decade, those rates have fallen significantly to historic lows. This Article interrogates why that is. Tracing the Court’s management of its relationship to the political branches and the public over the course of key moments in history—Marbury v. Madison, the Cherokee crisis, the “switch in time,” Brown v. Board, Bush v. Gore, and Lawrence v. Texas—I show a Court acutely attuned to its precarious position in the governmental structure. I then contrast those moments with the current Court, showing that the Court’s management today is being eroded by a steady barrage of jabs, some of which are the Court’s own making. The result is that, today, the Court’s flagging public support risks leaving it too vulnerable to stand up to the political branches in the country’s greatest moment of need.

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INTRODUCTION

The Justices of the U.S. Supreme Court are independent of both the political branches and the electorate. That is by design: The Court must appear neutral when deciding cases involving officials, when reviewing the constitutionality of statutes and governmental actions, and when vindicating minority rights protected by the Constitution in face of majoritarian transgressions.¹

But because an unelected judiciary that wields the supreme authority to interpret the laws sits uncomfortably in a democratic republic, the Constitution forces the judiciary to rely on the executive to enforce its decisions and on Congress to supply it with operational resources and jurisdictional power. This reliance is in tension with the need for structural independence from the political branches. The efficacy of the Court thus sits in a delicate balance.²

The Court maintains that balance by cultivating the people's affection. The political branches are, after all, beholden to the electorate, who can rise to the Court's defense when the political branches encroach upon the Court's independence. Accordingly, the Court must strategically manage its role to curry favor with both the political branches and the people.³

To do so, the Court employs various tools. The Court often defers to the interests of the political branches, thus playing a supportive role in democratic governance. When the Court is called upon to act against those interests in a countermajoritarian manner, the Court can employ various avoidance tools, such as strategic use of its certiorari discretion, to await a more hospitable political moment. In moments of countermajoritarian necessity without clear popular acceptance, the Court can draw upon the reserves of political capital it has accumulated to weather any popular or political backlash. Neutral

1. See *infra* Section I.A.

2. See *infra* Section I.B.

3. See *infra* Section I.C.

doctrines like stare decisis can help mollify a public that otherwise might fault the Court for appearing out of touch with popular sentiment.⁴

For much of the nation's history, the Court has managed its role effectively, maintaining relatively high approval ratings while weathering the necessary countermajoritarian decision.⁵ But, since 2010, the Court's popular support has fallen to historic lows. This trend has continued despite the leadership of a Chief Justice who, by all accounts, cares deeply about the reputation of the Court. Why?

The answer, I submit, lies in a series of small but consistent hits to the Court's reputation. Some of those hits are of the Court's own doing, such as ethics scandals and the aggressive use of judicial power to overturn precedent supported by popular majorities. Other hits reflect the politicization of the Court by the media and political branches through intense scrutiny during confirmation hearings. Many have come to view the Justices as partisan decision-makers wielding countermajoritarian power at the expense of the people, rather than in protection of the people. And the people are watching.⁶

This Article explains why in four main parts. Part I lays the foundation of the Court's relationship to the political branches and the people by situating the Court, and its great tension between independence and accountability, within the governmental structure. Part II details tools the Court deploys to manage its relationship with the political branches and to cultivate favor with the public. Part III offers a sweeping historical survey of the Court's efforts to manage its reputation by examining key moments—including *Marbury v. Madison*, the *Cherokee Cases*, the “switch in time,” *Brown v. Board*, *Bush v. Gore*, and *Lawrence v. Texas*. These moments offer teachings for how the Court can effectively manage its relationships while still exercising its essential functions. Part IV then turns to the ailments of the current Court, documenting the many small hits and noting the lack of heroic moments. A brief conclusion expresses some pessimism for the future of the Court as a bulwark of the people against governmental overreach.

I. THE COURT, THE POLITICAL BRANCHES, AND THE PEOPLE

This Part situates the Court in the federal governmental structure and documents its protections, vulnerabilities, and defense mechanisms.

A. COURT SUPREMACY AND INDEPENDENCE

The Framers recognized that “a government of laws and not of men”⁷ requires checks upon elected officials. The Constitution enables the judicial branch to check the other branches by giving the judicial branch the judicial power (and implicitly denying that power to the other branches)⁸ and by extending the judicial power to cases in which the United States or a state is a

4. See *infra* Part II.

5. See *infra* Part III.

6. See *infra* Part IV.

7. MASS. CONST. pt. 1, art. XXX (1780).

8. U.S. CONST. art. III, § 1.

party.⁹ In effect, the Constitution gives the federal courts the ability to decide disputes involving, and to issue orders restraining, officials who abuse their power at the expense of the people.¹⁰

Exercising such solemn duties and upholding the rule of law with neutrality and integrity, especially amidst politically charged cases, require judicial independence from both the other branches and the passions of the people.¹¹ Accordingly, the Constitution insulates the U.S. Supreme Court from such pressures. Unlike all other federal courts, whose existence is at the whim of Congress,¹² the Constitution itself creates the Supreme Court.¹³ Justices of the Supreme Court are appointed by the President and confirmed by the Senate;¹⁴ they hold their office “during good Behaviour,”¹⁵ subject only to removal by impeachment,¹⁶ and their salaries “shall not be diminished during their Continuance in Office.”¹⁷ These protections enable the U.S. Supreme Court to conduct its business—including wielding the awesome power of judicial review¹⁸—without undue interference.

B. CHECKS ON THE COURT

Yet an unelected Court with the authoritative power to both “say what the law is” and order compliance¹⁹ sits uncomfortably with principles of democracy.²⁰ Alexander Hamilton, responding to such concerns, called the judiciary “the least dangerous branch” and “the weakest of the three departments.”²¹ On paper, that sentiment is not wrong.

The Constitution itself sets limits on the judicial branch. It grants judges only the “judicial” power, implicitly denying them a legislative or executive power.²² As a result, the courts must rely on the President to execute and enforce judgments. The Constitution also confines court jurisdiction to the enumerated cases and controversies spelled out in the Constitution.²³ And it

9. *Id.* § 2.

10. THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

11. *Id.* at 469–70.

12. U.S. CONST. art. III, § 1 (vesting the judicial power “in such inferior Courts as the Congress may from time to time ordain and establish”).

13. *Id.* (vesting the judicial power “in one supreme Court”).

14. *Id.* art. II, § 2, cl. 2.

15. *Id.* art. III, § 1.

16. *Id.* art. II, § 4.

17. *Id.* art. III, § 1.

18. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

19. *Id.* at 177.

20. This “countermajoritarian difficulty,” a term first coined by Alexander Bickel in 1962 to capture the conduct of an unelected Court thwarting the will of the people by striking down laws embodying majoritarian preferences, has spawned generations of scholarly debate. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 17–18 (1962); see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 201–02 (2002).

21. THE FEDERALIST No. 78, *supra* note 10, at 465–66.

22. U.S. CONST. art. III, § 1.

23. *Id.* § 2.

preserves the right to trial by jury,²⁴ thereby giving back to the people some of the judicial power to resolve disputes of fact.

The Constitution also gives the other branches checks on judicial power. A person cannot become a federal judge without being appointed by the President and confirmed by the Senate.²⁵ The Constitution gives to Congress the power to regulate the lower federal courts' structure and jurisdiction—or even abolish them entirely.²⁶ Congress can restrict the appellate jurisdiction of the Supreme Court,²⁷ and has done so in myriad ways.²⁸

Congress can regulate rules of court procedure, the number of judges, and much of the courts' business.²⁹ Congress can remove individual federal judges through impeachment.³⁰ And even though it cannot diminish their salaries, Congress controls all other aspects of funding for the judicial branch.³¹ The Constitution may set some outer bounds on the intrusiveness of congressional regulation into the working functionality of the judicial branch, but, outside the courts' power to issue authoritative legal decrees, the business and workings of the judiciary are Congress's to regulate.

These checks mean that the federal judiciary, and the Supreme Court in particular, must tread carefully to fulfill its essential function.³² Presiding over crucial or fundamental cases, especially when political interests are at stake, demands delicacy.³³ In recent years, the Supreme Court has decided whether Congress, in investigating the President for potential impeachment, could appoint an independent counsel to lead the investigation³⁴ and issue subpoenas to order the President to disclose politically damning information.³⁵ A vengeful President could refuse to enforce an adverse court judgment or refuse to appoint sufficient members for a court to have a quorum. The Court regularly strikes down as unconstitutional laws that Congress has passed. A retaliatory Congress could strip the federal courts of much of their jurisdiction to hear

24. *Id.* § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”); *id.* amend. VI (right to criminal jury); *id.* amend. VII (right to civil jury). *But see generally* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005) (marking the decline in trials).

25. U.S. CONST. art. II, § 2, cl. 2.

26. *Id.* art. I, § 8, cl. 16 (Necessary and Proper Clause); *id.* art. III, § 1 (Ordain and Establish Clause).

27. *Id.* art. III, § 2, cl. 2 (“[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

28. 28 U.S.C. §§ 1253–1260 (2018).

29. *Id.* §§ 1–6.

30. U.S. CONST. art. II, § 4. Some have argued that removal can be by procedures other than impeachment. *See* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 80–82 (2006).

31. U.S. CONST. art. I, § 8, cl. 1 (giving Congress the power to raise and spend money).

32. MATTHEW E.K. HALL, *THE NATURE OF SUPREME COURT POWER* 19–21 (2011).

33. *See* 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 125–26 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966).

34. *See generally* *Morrison v. Olson*, 487 U.S. 654 (1988).

35. *See generally* *United States v. Nixon*, 418 U.S. 683 (1974).

cases and impoverish the courts' budgets.³⁶ In all events, the courts would have neither purse nor army in defense.³⁷

C. DEFENSE MECHANISMS

What the Court does have in defense is the people. The people can rise to the Court's defense by exerting political pressure on those officials who are democratically accountable.³⁸ To marshal such a defense, the Court must cultivate the public's affection. Some aspects of court structure and function naturally induce affection. Judges are selected from among the best and brightest, and they are vetted, often publicly so, through the confirmation process. All judges take an oath to uphold the laws and the duties of their office.³⁹ All federal judges other than the Supreme Court Justices must abide by a stringent code of ethics⁴⁰ and recusal laws designed to assure the appearance of impartiality.⁴¹ Judges other than Supreme Court Justices can be disciplined for failure to uphold duties and obligations as a judge.⁴²

Courts issue opinions supported by legal authorities and facts in the record, rather than political decisions.⁴³ Those decisions are published for public inspection, and judges individually sign on to their opinions, providing individualized transparency and accountability.⁴⁴ Courtroom decorum—with official seals, black robes, imposing benches, and “your honor” titles—reinforces a regal nature of an office worthy of the people's respect and deference.

Decisions that generally align with—or at least are not too far afield of—mainstream views help cement the Court's popular legitimacy. Chief Justice William Rehnquist once wrote that “judges go home at night and read the newspapers or watch the evening news on television; they talk to their family

36. See Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1044–46 (2010).

37. THE FEDERALIST No. 78, *supra* note 10, at 465 (“The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.”).

38. Things are not always so simple; the public can also rise up to attack the Court. See generally BRANDON L. BARTELS & CHRISTOPHER D. JOHNSTON, *CURBING THE COURT: WHY THE PUBLIC CONSTRAINS JUDICIAL INDEPENDENCE* (2020) (discussing public support for the political branches imposing “Court-curbing” limitations on judicial power).

39. 5 U.S.C. § 3331; 28 U.S.C. § 453.

40. CODE OF CONDUCT FOR U.S. JUDGES (JUD. CONF. OF THE U.S. 2019). For a study of the efficacy of legislative conduct controls, see Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 29 (1993). It is worth noting that these conduct controls are somewhat analogous to those in the UK. See John Thomas, L.C.J. of Eng. & Wales, Keynote Lecture at the Conference on the Paradox of Judicial Independence: Judicial Leadership 15–18 (June 22, 2015), <https://www.judiciary.uk/wp-content/uploads/2015/06/ucl-judicial-independence-speech-june-2015.pdf> [<https://perma.cc/5T6W-BH7H>].

41. 28 U.S.C. § 455.

42. *Id.* §§ 351–364.

43. See FED. R. CIV. P. 52(a).

44. Some opinions are signed by the court “per curiam,” which can disguise the author of the opinion. For a notable example, see *Bush v. Gore*, 531 U.S. 98, 100 (2000).

and friends about current events.”⁴⁵ In other words, the Court has a feel for the pulse of the nation. And despite its design, the Court “tends to follow public opinion” and “rarely behaves in a countermajoritarian manner.”⁴⁶ Some research concludes that around seventy percent of the Court’s decisions align with public sentiment.⁴⁷ Abiding by public sentiment helps curry favor with the people.

Occasionally, however, the Court must decide a case starkly counter to popular majoritarian preferences. The Constitution, after all, is fundamentally countermajoritarian, in that its whole purpose is to limit the powers of democratically elected officials, and curtailing majoritarian overreach in the name of the Constitution is both an essential and a profoundly antidemocratic function of the Court. Yet effective cultivation of the people’s affection can give the Court cover to issue opinions opposed by a popular majority. That is, to fulfill its essential functions, the Court must effectively manage its political capital through both general accumulation and strategic spending. For most of the Court’s history, it has done so skillfully, maintaining high ratings of public opinion. The next Part focuses on how the Court has managed its political capital.

II. THE COURT’S CULTIVATION OF PUBLIC FAVOR

The Court uses a variety of methods of judicial restraint to avoid alienating the coordinate branches and the people by appearing partisan or overly assertive.⁴⁸ This Part explores those methods.

45. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986); see also Alex Badas & Billy Justus, *Media Attention and Deliberation on the Supreme Court*, 76 POL. RES. Q. 757, 765 (2023) (finding evidence that the Court is responsive to negative media attention).

46. Eugenia Artabe & Alex Badas, *Measuring the Countermajoritarian Nature of Supreme Court Decisions*, 52 J. LEGAL STUD. 345, 353 (2023); see Joseph Landau, *New Majoritarian Constitutionalism*, 103 IOWA L. REV. 1033, 1045–60 (2018); Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1212 (2010); Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

47. E.g., THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 80–81 (1989). For other studies documenting the Court’s adherence to popular opinion, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 367–85 (2009); Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 86 (2011); and Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 492–93 (1997).

48. For other recent scholarship on this point, see generally Curtis A. Bradley & Neil S. Siegel, *The Supreme Court Under Threat: Early Lessons in Judicial Self-Protection* (July 7, 2025) (unpublished manuscript) (on file with the *Iowa Law Review*); and Scott Dodson, *The Modes and Forms of Judicial Restraint* (July 15, 2025) (unpublished manuscript) (on file with the *Iowa Law Review*).

A. AVOIDANCE

The Court can also exercise restraint by sidestepping a decision on the merits of a case entirely.⁴⁹ The agenda-control techniques for doing so, famously coined the “passive virtues” by Alexander Bickel,⁵⁰ are legal escape valves. Bickel included doctrines like standing, the political-question doctrine, and *Ashwander* avoidance, as well as the practice of discretionary certiorari review, among his litany of the passive virtues,⁵¹ but numerous other avoidance doctrines and practices exist, including abstention,⁵² remanding for more development of the record,⁵³ reliance on party-forfeiture rules,⁵⁴ and the sequencing of possible grounds for decision.⁵⁵ Such abdication of judicial decision-making leaves space for answers to be worked out in other fora, namely, lower federal courts, state courts, the political process, or popular discourse.⁵⁶ Thus, avoidance enables the Court to pick the right time to speak with principle.⁵⁷

Evidence suggests that the Court does use avoidance strategies to manage its institutional legitimacy.⁵⁸ Standing is a particularly manipulatable device.⁵⁹ One illustration is *Elk Grove Unified School District v. Newdow*.⁶⁰ There, a father brought suit on behalf of his minor daughter, a student in the Elk Grove Unified School District public schools, asserting that his daughter was an atheist, and the school’s daily recitation of the Pledge of Allegiance, which includes the phrase “under God,” violated his First Amendment right to

49. See Mark Tushnet, *The Jurisprudence of Constitutional Regimes: Alexander Bickel and Cass Sunstein*, in *THE JUDICIARY AND AMERICAN DEMOCRACY* 23, 30–32 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005).

50. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1961).

51. BICKEL, *supra* note 20, at 115–27.

52. *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (defending a doctrine of abstention in which federal courts should exercise their discretion to abstain from ruling on the constitutionality of state law before state courts have had a chance to rule); *Younger v. Harris*, 401 U.S. 37, 41 (1971) (defending a doctrine of abstention in which federal courts should not “stay or enjoin pending state court proceedings except under special circumstances”).

53. *E.g.*, *Willing v. Binstock*, 302 U.S. 272, 277 (1937).

54. See Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 694 (2012).

55. *Id.* at 705–06.

56. See Michael L. Wells, *The “Order-of-Battle” in Constitutional Litigation*, 60 SMU L. REV. 1539, 1548 (2007).

57. Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567, 1569–70 (1985).

58. See generally Amanda C. Bryan, *Public Opinion and Setting the Agenda on the U.S. Supreme Court*, 48 AM. POL. RSCH. 377 (2020) (arguing the Supreme Court exercises its certiorari discretion by accepting cases in which it agrees with public opinion); Kenneth W. Moffett, Forrest Maltzman, Karen Miranda & Charles R. Shipan, *Strategic Behavior and Variation in the Supreme Court’s Caseload Over Time*, 37 JUST. SYS. J. 20, 20 (2016) (arguing uncertainty and institutional constraints restrict the court’s docket choices).

59. See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1095–98 (2015); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1786 (1999).

60. See generally *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (holding father lacked standing to challenge school district policy requiring teacher-led pledge of allegiance).

instruct his child in religious beliefs free from state interference.⁶¹ The Ninth Circuit held that it did, the first federal appellate court to find public-school recitation of the pledge to be unconstitutional.⁶² The media erupted, and the Court took up the case.⁶³ The Court resolved the case using one of Bickel's passive virtues—it held that Newdow lacked standing to litigate the case because his divorce from his daughter's mother and ensuing custody agreement put into doubt his standing to pursue his daughter's religious freedom.⁶⁴ The Court thus ducked the substantive question of Pledge's constitutionality. In addition, because Newdow lacked standing, the Ninth Circuit could not hear the case, either, and so the Court reversed the Ninth Circuit's decision.⁶⁵ In one fell swoop, the Court both nullified the Ninth Circuit's decision and avoided deciding the question itself.

As Bickel put it, resort to such escape valves allow the Court to give "leeway to expediency without abandoning principle" by giving it more control of its docket and thus "mak[ing] possible performance of the Court's grand function," including wielding the countermajoritarian power of judicial review.⁶⁶

B. MINIMALISM

A related form of restraint, exercised when staking new ground, is decisional incrementalism or minimalism.⁶⁷ Justice Brandeis stated the idea as "not 'formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"⁶⁸ Minimalist decisions leave more room for public debate on contested issues, including room for debate among the political branches.⁶⁹ It allows disagreements to be worked out outside the courts.⁷⁰ And it expresses a sense of judicial humility, in that a minimalist court

61. *Id.* at 4–5.

62. *See generally* Newdow v. U.S. Cong., 328 F.3d 466 (9th Cir. 2003). *See* RONALD BISHOP, TAKING ON THE PLEDGE OF ALLEGIANCE 2 (2007).

63. BISHOP, *supra* note 62, at 122–32.

64. *Elk Grove*, 542 U.S. at 17–18.

65. *Id.* at 18.

66. BICKEL, *supra* note 20, at 71; *see also* Bickel, *supra* note 50, at 47, 75; Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 531–32 (2012) (discussing Bickel's conception of restraint).

67. *See, e.g.*, ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 372–75 (1992); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1301–17 (2005); Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1833–47 (2004); Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1957–66 (2005); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–75 (1999).

68. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885)).

69. *See* SUNSTEIN, *supra* note 67, at 26–27.

70. *See generally* John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987) (defending a political conception of justice under constitutional democracy that is achieved by overlapping consensus from various opposing religious, philosophical, and moral doctrines).

recognizes its own fallibility.⁷¹ Generally, the Court's law development follows the mantra of "slow and steady."

C. DEFERENCE

When the Court cannot avoid a controversial issue, it often defers to the actions of coordinate branches, both to pacify the political branches and to avoid appearing to overstep the judicial role. For example, federal courts have sometimes deferred to agency rules implementing legislation by upholding reasonable agency interpretations of ambiguous statutory provisions.⁷² In matters pertaining to national security and foreign relations, the federal courts give strong deference to presidential decisions supported by Congress.⁷³ Informally, the Court also tends to be deferential to the interests of the political branches.⁷⁴ And some Justices have subscribed to the Thayerian view⁷⁵ that, when interpreting imprecise provisions of the Constitution, such as due process and equal protection, the Court should uphold legislation and executive action that arguably falls within the constitutional ambit—rational-basis review is one arguable manifestation of this view.⁷⁶

D. DECISIONAL NEUTRALITY

Where avoidance and deference are either indefensible or unwarranted, the Court strives to independently decide issues based on neutral principles that justify the result and deflect criticism.⁷⁷ One prominent neutral principle is adherence to stare decisis. Stare decisis has moral weight, in that it forces

71. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1292–93 (1997).

72. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984). But see *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024) (overruling *Chevron* and holding that agency interpretations of statutes are not entitled to deference from federal courts).

73. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

74. Artabe & Badas, *supra* note 46, at 350 (“[R]esearch demonstrates that the Court actively considers the preferences of Congress.”); RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS* 8–9 (2012) (finding Court deference to the positions advocated by the Solicitor General). See generally Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829 (2018) (examining Court deference to the executive branch, especially in the face of assertions of executive power).

75. James B. Thayer, Letter to the Editor, *Constitutionality of Legislation: The Precise Question for a Court*, NATION, Apr. 10, 1884, at 314–15; JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* 10 (1893). Thayerian devotees were legion in the Progressive Era. See generally LEARNED HAND, *THE BILL OF RIGHTS* (1958); Henry M. Hart Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946). Thayerian minimalism continues today to have advocates. See generally ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

76. See, e.g., *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

77. See Wechsler, *supra* note 75, at 10–20.

the Court to treat like issues consistently.⁷⁸ Stare decisis also acts as a constraining force by dissuading the Court from advancing contemporary views at the expense of continuity.⁷⁹ And stare decisis offers the Court the opportunity to scapegoat that continuity when the Court's contemporary but conservative views might be unpopular. Resort to stare decisis often augments the Court's legitimacy.⁸⁰

III. SPENDING POLITICAL CAPITAL

From time to time, the Court opts against using these methods of judicial restraint and instead chooses to wield the countermajoritarian power of judicial review to render a decision that might damage the reputation of the Court. This Part describes how.

A. DEVISING PYRRHIC WINS

Just four years after the creation of the Supreme Court, the Court stepped into the mud with *Chisholm v. Georgia*,⁸¹ which held that the states are subject to suit in federal court in cases brought by private individuals. Large national majorities disagreed with the Court's decision,⁸² and Congress overwhelmingly passed, and the states quickly ratified, the Eleventh Amendment, rebukingly abrogating the decision.⁸³ Chief Justice John Jay felt the episode had so diminished the Court's stature that he resigned shortly after to become Governor of New York.⁸⁴

Shortly after, in the elections of 1800, Thomas Jefferson's Republicans won both the presidency (over Federalist incumbent John Adams) and Congress.⁸⁵ Meanwhile, Supreme Court Chief Justice Oliver Ellsworth resigned, and President John Adams appointed John Marshall to replace him. Marshall was confirmed in January 1801, but, at Adams's request, he continued to serve as Acting Secretary of State during the last month of the Adams Administration.⁸⁶

78. Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 5 (1989).

79. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1722 (2013) ("[W]here differences in constitutional philosophy are in the foreground, the preference for continuity disciplines jurisprudential disagreement.").

80. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."); cf. Payne v. Tennessee, 501 U.S. 808, 853–54 (1991) (Marshall, J., dissenting) ("If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind."). But see Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 223–32 (2022) (overruling *Casey* and *Roe v. Wade* on grounds that stare decisis would erode the Court's legitimacy).

81. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 429 (1793).

82. Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1750 (2001).

83. U.S. CONST. amend. XI.

84. Klarman, *supra* note 82, at 1751.

85. James A. Noe, *The Legacy and Future of Marbury v. Madison: A Bicentennial Reflection*, 42 JUDGES' J. 31, 31 (2003).

86. *John Marshall (1800–1801)*, MILLER CTR., <https://millercenter.org/president/adams/marshall-1800-secretary-of-state> [https://perma.cc/CD76-WC34].

During that last month, the lame-duck Federalist Congress passed laws expanding the federal judiciary,⁸⁷ and the lame-duck President Adams appointed the so-called “Midnight Judges”: sixteen new circuit judges, three D.C. judges, and forty-two justices of the peace, all party loyalists.⁸⁸ The Senate confirmed them, and Adams signed their commissions, on March 3, the day before the new administration and Congress took office.⁸⁹ The job of delivering the commissions fell to Acting Secretary of State John Marshall, who directed the commissions to be delivered that day, but at least four were not delivered in time.⁹⁰ Upon taking office, President Jefferson ordered his new Secretary of State, James Madison, not to deliver the commissions. Meanwhile, Marshall resumed his role as Chief Justice.

In December, one of the new justices of the peace who did not receive his commission, Federalist William Marbury, sued James Madison, in an original action in the U.S. Supreme Court. Marbury sought a writ of mandamus—an order compelling Madison to deliver the commission in accordance with the law.⁹¹ However, the new Republican Congress, in a show of strength against the judiciary, repealed one of the judiciary-expanding statutes and canceled the Supreme Court’s term for 1802.⁹² Marbury’s suit thus lay pending without action throughout the entirety of 1802.

The Court, composed entirely of Federalists, was widely expected to rule in favor of Marbury during the February 1803 Term, and Jefferson was widely predicted to defy the Court’s ruling,⁹³ as well as pursue retaliatory measures, possibly including impeachment.⁹⁴ Indeed, just before the Court’s Term began, in another show of political strength, the House brought impeachment proceedings against New Hampshire federal judge John Pickering and was making noise about impeaching Supreme Court Justices.⁹⁵ The Republicans’ threat to the Court and its Justices was not lost on new Chief Justice John Marshall.⁹⁶

In this context, the Court finally turned to Marbury’s case in February 1803 and ordered Madison to appear at a hearing to show cause why the writ

87. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103, 105–08.

88. Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607, 607–09 (2001).

89. *Id.* at 608.

90. *Id.*

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

92. Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in CONSTITUTIONAL LAW STORIES 13, 21 (Michael C. Dorf ed., 2d ed. 2009).

93. See Theodore B. Olson, *Remembering Marbury v. Madison*, 7 GREEN BAG 35, 41 (2003).

94. Mark A. Graber, *Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609, 639 (2003).

95. WILLIAM H. REHNQUIST, GRANT INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 127–28 (1992); see also John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 979 (2002) (stating that during Jefferson’s first term “[i]mpeachment-mania peaked”).

96. See Klarman, *supra* note 82, at 1762 n.237.

should not issue. On instructions from Jefferson, Madison refused to appear.⁹⁷ The Court proceeded without him, and, on February 24, issued its opinion in *Marbury v. Madison*.⁹⁸ The political genius of the opinion surprised just about everyone. The Court avoided a constitutional confrontation by giving the Republicans a win that they could not complain of while simultaneously both validating Marbury's claim and empowering the Court to strike down laws in future cases.

The Court first held that Madison was bound by law to deliver the commission, that mandamus was the proper remedy to order Madison to comply, and that section 13 of the Judiciary Act of 1789 did statutorily give federal courts the power to issue a writ of mandamus in these circumstances.⁹⁹ But, the Court refused to issue the writ on the ground that the Judiciary Act's authorization of the Supreme Court to order mandamus violated the Constitution. Marbury, by filing his action in the Supreme Court, invoked the Supreme Court's original jurisdiction. But the Constitution gives the Supreme Court original jurisdiction only over "[c]ases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party," and appellate jurisdiction over all other cases.¹⁰⁰ Marbury's action was based on original jurisdiction but fit within none of the constitutional categories for original jurisdiction.

Confronting this conflict between statutory authorization and constitutional restriction, the Court stated: "It is emphatically the province and duty of the judicial department to say what the law is" because "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule."¹⁰¹ The Court thus assumed the authority to resolve such conflicts itself, without deferring to Congress's views. The Court then resolved the conflict: "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."¹⁰² The Court thus declared the Judiciary Act's attempt to confer original jurisdiction on the Supreme Court in this case to be unconstitutional, and so the Court dismissed Marbury's case.

The decision left the Jefferson Administration in a quandary. Marshall had given them the win, sort of, by denying Marbury his mandamus, so Jefferson had no cause to complain about the result. And Marshall had done so in a way

97. See Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 365.

98. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 153 (1803). For essential reading, see generally JOEL RICHARD PAUL, *WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES* (2018) (providing a biography of Justice Marshall and the political context of *Marbury*); WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* (2000) (analyzing *Marbury*'s doctrinal roots and influence); PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997) (exploring the symbolic and cultural significance of *Marbury*); and ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989) (offering a revisionist account of *Marbury* and its resulting influence).

99. *Marbury*, 5 U.S. at 162–73.

100. U.S. CONST. art. III, § 2, cl. 2.

101. *Marbury*, 5 U.S. at 177.

102. *Id.* at 178.

that diminished the Court's own jurisdiction by rejecting a congressional expansion of the Court's original jurisdiction, so Jefferson would have a difficult time complaining that the Court exceeded its authority. And the act that the Court declared unconstitutional was one passed by Federalists, so Jefferson could not complain about partisan decision-making.¹⁰³

But in the process, Marshall managed to announce that *Marbury* was indeed entitled to his commission (he just had sued in the wrong court) and that the Jefferson Administration had acted unlawfully in withholding it, something Jefferson did complain bitterly about in private.¹⁰⁴ More enduringly, the Court claimed the primary power, within the confines of litigation, to declare laws to be unconstitutional, thus elevating the Court over Congress, and, implicitly, the President. The Pyrrhic victory the Court gave to Jefferson helped maintain the Court's stature—even enhancing its power in the process—from a position of extreme vulnerability. Mark Graber has called *Marbury* an exercise in the “passive-aggressive” virtues.¹⁰⁵

Though a strategic masterpiece, the opinion remained open to criticism,¹⁰⁶ and the Court still faced a hostile President and Congress.¹⁰⁷ To mollify tensions with Jefferson and subsequent Republican administrations (including Madison's), Marshall never again exercised the power of judicial review to declare an act of Congress or the executive to be unconstitutional.¹⁰⁸ Instead, he entrenched the power of judicial review by invalidating state laws on crucial issues of the day, including some in which the national government might welcome the Court's result.¹⁰⁹ Marshall died near the age of eighty in 1835, having served more than thirty-four years as Chief Justice. He is revered as one of the Court's greatest Justices, and he is credited with solidifying the Court's power and reputation as a coequal branch of the federal government.

103. The Court had buttressed this defense by upholding the new Congress's repeal of one of the Midnight Judges statutes. See generally *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

104. G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1485 (2003).

105. Mark A. Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT. 67, 68 (1995).

106. It is not clear that a direct conflict was at hand; Marshall perhaps could have construed the statute to not bestow original jurisdiction and thus dismiss the case on statutory grounds without reaching the question of constitutional review. See 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 243–47 (1922). Further, Marshall need only have decided the jurisdictional question and not whether mandamus was a valid remedy for courts to order Madison to deliver the commissions. See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 18 DUKE L.J. 1, 8 (1969).

107. The House successfully impeached Justice Samuel Chase in 1805, but the Senate failed to convict him. See REHNQUIST, *supra* note 95, at 10.

108. KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* 66 (2019).

109. E.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 220–22 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436–37 (1819); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 141–43 (1810). Notably, Marshall used a similar *Marbury*-style technique in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 444–48 (1821), by asserting the Supreme Court's jurisdiction over a state criminal conviction, deeming states powerless to interfere with the federal government's authority over the District of Columbia, but upholding the state statute on the facts at hand.

B. ASTUTE POLITICAL CALCULUS

In contrast to *Marbury*, the Court has occasionally stepped into the limelight with more vulnerability, often in full-throated fashion. In some cases, the Court has done so at politically astute times, often reaping an increase in public favor in hindsight.

1. Desegregation

After the Court's ruling in *Plessy v. Ferguson* in 1896 that racial segregation did not necessarily violate the Equal Protection Clause,¹¹⁰ states passed a multitude of laws enforcing racial segregation in all walks of life: public facilities, sports, residential communities, transportation systems, businesses, and the like. This regime, known as Jim Crow, had pervasive, intense, and systemic negative effects on Black individuals and communities.¹¹¹ School segregation instilled those negative effects in Black children at an early age. In one famous study, Black school children were given two dolls, identical except one had white skin and yellow hair, while the other had black skin and brown hair.¹¹² The children were asked which doll they preferred, which was the "nice" or "bad" doll, and other questions.¹¹³ The researchers found overwhelming racial preferences for the white doll and against the black doll.¹¹⁴

In 1951, Oliver Brown sued the Topeka Board of Education after his daughter, Linda, was denied admission to an all-white school.¹¹⁵ Brown contended that public-school segregation was inherently unequal. Brown lost before the lower courts and, aided by the NAACP, appealed to the U.S. Supreme Court, contending that *Plessy* should be overruled.¹¹⁶

Brown v. Board of Education, consolidated with similar cases challenging public-school segregation laws in South Carolina, Virginia, and Delaware,¹¹⁷ came to the Court in 1952. At first, the Justices were divided. But newly appointed Chief Justice Earl Warren managed to corral his colleagues into a unanimous opinion overruling *Plessy* and declaring that "in the field of public education the doctrine of 'separate but equal' has no place" because segregated

110. *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896).

111. See generally JIM CROW: VOICES FROM A CENTURY OF STRUGGLE, PART TWO: 1919–1976 (Tyina L. Steptoe ed., 2025) (compiling firsthand accounts of the experiences of Black Americans during Jim Crow); JIM CROW: VOICES FROM A CENTURY OF STRUGGLE, PART ONE: 1876–1919 (Tyina L. Steptoe ed., 2024).

112. See Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 169, 169 (Theodore M. Newcomb & Eugene L. Hartley eds., 1947).

113. *Id.*

114. *Id.* at 175–77.

115. Vanessa Romo, *Linda Brown, Who Was at Center of Brown v. Board of Education, Dies*, NPR (Mar. 26, 2018, 7:42 PM), <https://www.npr.org/sections/thetwo-way/2018/03/26/597154953/linda-brown-who-was-at-center-of-brown-v-board-of-education-dies> [<https://perma.cc/7V47-EVJ4>].

116. *Brown v. Bd. of Educ.*, 98 F. Supp. 797, 800 (D. Kan. 1951); see Romo, *supra* note 115.

117. *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 (1954).

schools are “inherently unequal.”¹¹⁸ The Court relied on social-science evidence, including the doll study, in reaching that conclusion.

The Court’s relatively spartan reasoning in *Brown* was criticized by some leading jurists of the time.¹¹⁹ And national opinion on desegregation at the time was split.¹²⁰ The Court itself was aware of the tenuous position it was in, ducking other controversial race-based cases to avoid feeding resistance to *Brown*.¹²¹ But the Court believed it had, in the long run, time on its side.¹²² More importantly, in the short run, it had President Dwight Eisenhower on its side. Eisenhower had personal reservations about *Brown*,¹²³ but he vocally supported adherence to its ruling.¹²⁴

The Court issued a second opinion the following year on the remedy for the constitutional violation of segregated schools.¹²⁵ The Court confirmed that “[a]ll provisions of federal, state, or local law requiring or permitting such discrimination must yield to [the] principle” that “racial discrimination in public education is unconstitutional.”¹²⁶ Yet it recognized that “[f]ull implementation of these constitutional principles may require solution of varied local school problems.”¹²⁷ Thus, the Court remanded to the original district courts to fashion appropriate relief “with all deliberate speed.”¹²⁸

Southern resistance to *Brown* was pervasive. In 1956, nineteen Senators and seventy-seven Representatives signed a “Southern Manifesto” attacking *Brown*’s legitimacy and urging state resistance.¹²⁹ Meanwhile, southern

118. *Id.* at 495.

119. *E.g.*, HAND, *supra* note 75, at 55 (“I have never been able to understand on what basis [*Brown*] does or can rest except as a *coup de main*.”); Wechsler, *supra* note 75, at 32–34 (1959) (criticizing the reasoning of *Brown*); see Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1931 (1995) (noting contemporaneous criticisms).

120. Klarman, *supra* note 82, at 1749–50.

121. See Robert B. McKay, “*With All Deliberate Speed*”: A Study of School Desegregation, 31 N.Y.U. L. REV. 991, 999–1000 (1956) (recounting the Court’s calculating strategy regarding *Brown*). One example of a ducked case is the Virginia Supreme Court’s opinion in *Naim v. Naim*, 197 Va. 80, 88 (1955), invalidating an interracial marriage, a case the U.S. Supreme Court refused to hear. As Justice Tom Clark reportedly put it at the time, “One bombshell at a time is enough.” Richard Delgado, *Naim v. Naim*, 12 NEV. L.J. 525, 526 (2012). The Court ultimately struck down prohibitions on interracial marriage in 1967 in *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

122. Susan D. Carle, *The Failed Idea of Judicial Restraint: A Brief Intellectual History*, 49 LAW & SOC. INQUIRY 569, 586 (2024).

123. Michael S. Mayer, *With Much Deliberation and Some Speed: Eisenhower and the Brown Decision*, 52 J. S. HIST. 43, 60 (1986).

124. Dwight D. Eisenhower, President of the United States of America, The President’s News Conference (May 19, 1954), <https://www.presidency.ucs.edu/documents/the-presidents-news-conference-454> [<https://perma.cc/LF5N-8SF3>]; Dwight D. Eisenhower, President of the United States of America, The President’s News Conference (Sept. 5, 1954), <https://www.presidency.ucs.edu/documents/the-presidents-news-conference-319> [<https://perma.cc/7WFFV-UJWZ>].

125. See generally *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954).

126. *Id.* at 298.

127. *Id.* at 299.

128. *Id.* at 301.

129. Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1054 (2014).

states vigorously opposed the ruling and even succeeded in slow-rolling its implementation for years.¹³⁰

In Arkansas, the Little Rock Independent School District approved an integration plan for Arkansas public schools, beginning with high school in the fall of 1957.¹³¹ But Arkansas voters approved an amendment to the state constitution that rejected *Brown* and desegregation.¹³² An Arkansas state court, citing the new amendment, enjoined desegregation efforts in the state's public schools,¹³³ but a federal district court in Arkansas enjoined the state injunction and ordered desegregation.¹³⁴

On September 2, 1957, Arkansas Governor Orval Faubus, a critic of *Brown*, ordered the Arkansas National Guard to prevent Black students from entering white schools.¹³⁵ For three weeks, Guard members stood shoulder to shoulder, physically blocking access.¹³⁶ The federal court then enjoined the Governor and Guard members from preventing school access.¹³⁷ The Guard members complied, and the Black students entered school the next day, but a protest formed, and the Little Rock Police Department was forced to remove the Black students for security reasons.¹³⁸ Two days later, President Eisenhower ordered federal military troops to escort the Black students into school, dramatically putting an end to the stalemate.¹³⁹ The Black students continued to attend classes, protected by federal officers, for the remainder of the school year,¹⁴⁰ while Governor Faubus lamented the state of his "occupied territory."¹⁴¹

Opposition continued. Protesters vandalized the school.¹⁴² The Black students were constantly harassed. Recurring bomb threats were made.¹⁴³ The school board asked the district court for an extension of the desegregation plan, arguing that the "extreme public hostility" made safe integration impossible.¹⁴⁴ Over the summer, the district court granted a thirty-month extension, citing "chaos, bedlam and turmoil" caused by the "deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred

130. NEIL R. McMILLEN, *THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-64*, at 267 (1971).

131. *Aaron v. Cooper*, 257 F.2d 33, 35 (8th Cir. 1958).

132. ARK. CONST. amend. 44.

133. *Aaron*, 257 F.2d at 35.

134. *Id.*

135. *Id.* at 36.

136. *Cooper v. Aaron*, 358 U.S. 1, 11-12 (1958).

137. *Id.* For more, see ELIZABETH JACOWAY, *TURN AWAY THY SON: LITTLE ROCK, THE CRISIS THAT SHOCKED THE NATION 170-74* (2007).

138. *Cooper*, 358 U.S. at 11-12.

139. *Id.* at 12.

140. *Id.*

141. Orval E. Faubus, *Text of Faubus Address on Little Rock Controversy*, N.Y. TIMES, Sept. 27, 1957, at 10 (on file with the *Iowa Law Review*).

142. *Aaron v. Cooper*, 257 F.2d 33, 36 (8th Cir. 1958).

143. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 327 (2004).

144. *Cooper*, 358 U.S. at 11-12.

years.”¹⁴⁵ The plaintiffs appealed the extension, and the Eighth Circuit reversed, vacating the extension and ordering desegregation to proceed, though it stayed its decision pending a decision from the U.S. Supreme Court in the case *Cooper v. Aaron*.¹⁴⁶ On September 12, the Supreme Court affirmed, without opinion, ordering its judgment to “be effective immediately” so that Black students could attend the school.¹⁴⁷

Two weeks later, the Supreme Court issued an opinion explaining its reasoning, signed individually by all nine Justices.¹⁴⁸ The unprecedented show of unanimity underscored the emphatic nature of the Court’s opinion.¹⁴⁹ Acknowledging “questions of the highest importance to the maintenance of our federal system of government,”¹⁵⁰ the Court affirmed that the constitutional rights declared in *Brown* were “the supreme Law of the Land” and “c[ould] neither be nullified openly and directly by state [officials], nor nullified indirectly by them through evasive schemes.”¹⁵¹ *Cooper* emphatically ended the Little Rock crisis. Ernest Green, one of the Little Rock Nine Black children finally allowed to attend the public high school, ultimately became the first Black student to graduate.¹⁵² Another, Minnie Jean Brown, was later asked why she kept attending during that first year despite all the harassment. She said that she “knew there was something precious inside that school,” and all the exclusionary efforts made her even more determined to access it.¹⁵³

The Court proved prescient about public opinion and desegregation. Even in the South, popular support for integration had dramatically reversed by the early 1960s.¹⁵⁴ *Brown* quickly become an iconic opinion revered by the American public as one of the Court’s greatest successes¹⁵⁵ and even credited as a significant part of the transformation of race relations in American

145. *Aaron v. Cooper*, 163 F. Supp. 13, 14, 20–26, 32 (E.D. Ark. 1958).

146. *Aaron*, 257 F.2d at 39–40.

147. *Aaron v. Cooper*, 78 S. Ct. 1399, 1400 (1958) (per curiam).

148. *Cooper*, 358 U.S. at 4–5.

149. Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 82 (1979).

150. *Cooper*, 358 U.S. at 4.

151. *Id.* at 17–18.

152. Claude Sitton, *Court Bars Little Rock Delay; President Calls for Support; Faubus Orders 4 Schools Shut*, N.Y. TIMES, Sept. 13, 1958, at 1 (on file with the *Iowa Law Review*).

153. Julian Bond, *With All Deliberate Speed: Brown v. Board of Education*, 90 IND. L.J. 1671, 1681 (2015).

154. *Poll Finds Gains for Integration*, N.Y. TIMES, May 3, 1970, at 53 (on file with the *Iowa Law Review*) (reporting support in the South for integration rising from sixteen percent in 1954 to sixty-one percent in 1963).

155. See Gregory Briker & Justin Driver, *Brown and Red: Defending Jim Crow in Cold War America*, 74 STAN. L. REV. 447, 450 (2022) (calling *Brown* “the most . . . celebrated Supreme Court opinion in modern American history”); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 330 (1994) (asserting that *Brown* “is universally approved as both right and necessary”); Klarman, *supra* note 82, at 1722–23 (“[O]ver the course of ensuing decades, *Brown* became a cultural icon . . . [that] enormously enhanced [the Supreme Court’s] prestige among the American people.”).

society.¹⁵⁶ In the process, the Court stood up for itself in its own show of strength in *Cooper*, and it emerged heroic.

2. Same-Sex Marriage

The story of marriage equality is a story of a Court marching alongside the public, seemingly hand in hand. Until the 1970s, “being gay put you beyond the social pale. You could be savagely beaten, kicked out of public spaces and private clubs, arrested, fired, expelled from your family, and scorned as a pariah.”¹⁵⁷ Even in 1985, only forty-four percent of Americans thought same-sex intimacy should be legal.¹⁵⁸ The Court’s stance was not different. In *Bowers v. Hardwick*, the Court upheld a Georgia law that criminalized sodomy.¹⁵⁹ Justice Lewis Powell provided a crucial fifth vote to support the majority opinion. It was reported that Powell told his colleagues in conference that he had “never met a homosexual,”¹⁶⁰ even though one of his clerks at the time was gay.¹⁶¹

In 1993, the Hawaii Supreme Court shocked the nation by holding the state’s prohibition on same-sex marriage to likely violate the state constitution.¹⁶² The case was emblematic of the rising public opinion of gay America, but acceptance of gay marriage was still premature. The state’s voters passed a state constitutional amendment mooting the case,¹⁶³ and other states did the same.¹⁶⁴ In 1996, the U.S. Congress passed, and President Bill Clinton signed, the Defense of Marriage Act.¹⁶⁵ The Act restricted marriage, for purposes of federal law, to a man and a woman, notwithstanding any different interpretation accepted by the states.¹⁶⁶

But this backlash to gay rights can be seen as a gasping, politicized reaction out of step with the direction of public sentiment.¹⁶⁷ Social views on homosexuality were changing, moving from a “politics of disgust” to a “politics

156. Neal Allen, *Judicialization of Political Conflict: Evidence of Brown v. Board of Education’s Effect in Newspaper Opinion*, 34 ST. LOUIS U. PUB. L. REV. 385, 385–88 (2015); Klarman, *supra* note 82, at 1756.

157. E.J. Graff, *How the Gay-Rights Movement Won*, AM. PROSPECT (June 7, 2012), <https://prospect.org/culture/books/gay-rights-movement-won> [<https://perma.cc/2KC8-HHJP>].

158. *LGBTQ+ Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<https://perma.cc/73ZP-RQDW>].

159. See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986).

160. EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* 386 (1998).

161. Dahlia Lithwick, *Extreme Makeover*, NEW YORKER (Mar. 4, 2012) (on file with the *Iowa Law Review*).

162. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

163. HAW. CONST. art. I, § 23 (repealed 2024).

164. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1154 (2009).

165. See generally *Defense of Marriage Act*, Pub. L. 104-199, 110 Stat. 2419 (Sept. 21, 1996) (repealed 2022).

166. *Id.* § 7.

167. MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 165–69 (2013).

of humanity.”¹⁶⁸ Indeed, they were changing dramatically and with unusual speed.¹⁶⁹ By 2003, polls showed that sixty percent of Americans thought gay sex should be legal, and fifty-four percent agreed that “homosexuality should be considered an acceptable alternative lifestyle.”¹⁷⁰

In this milieu, the Court, in 2003, confronted *Lawrence v. Texas*,¹⁷¹ an appeal by two Texas men convicted of private, consensual sex under Texas’s anti-sodomy law. They asked the Court to overrule *Bowers* and invalidate state anti-sodomy criminal laws nationwide. Gay Americans and their supporters across the country waited for the decision with bated breath, hoping for the “decriminaliz[ation] of gay Americans.”¹⁷²

Many were in the courtroom when the decision was issued. When Justice Kennedy announced the opinion for the Court, calling *Bowers* wrong then and wrong now, they “openly sobb[ed]” at the announcement.¹⁷³ Effusion quickly spread “in a series of where-were-you-when moments.”¹⁷⁴ Celebrations arose even in states, like Missouri, that previously had enforced sodomy laws.¹⁷⁵ In San Francisco, a towering rainbow flag that had flowed since 1978 was replaced, for a single day, with the American flag, as the crowd sang the national anthem.¹⁷⁶ Meanwhile, the opposite reaction, that *Lawrence* sounded “the death knell of American civilization” and “an agreement with Hell,” struck most as seriously out of touch with majoritarian American culture.¹⁷⁷

Lawrence’s emphasis on inclusivity—the integration of gay Americans into equal citizenship¹⁷⁸—cleared the path for the acceptance of same-sex marriage.¹⁷⁹ Massachusetts was the first state to extend marriage equality statewide, based on state-constitutional rights.¹⁸⁰ Some backlash followed, with calls for a Federal Marriage Amendment to prevent such decisions,¹⁸¹ and forty states using state law to ban same-sex marriage by 2012.¹⁸² But the tide had

168. MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW, at xix (2010).

169. BRIAN F. HARRISON & MELISSA R. MICHELSON, LISTEN, WE NEED TO TALK: HOW TO CHANGE ATTITUDES ABOUT LGBT RIGHTS 1 (2017) (characterizing the shift as “simply stunning and def[y]ing typical patterns of public opinion”); Kenneth Sherrill & Alan Yang, *From Outlaws to In-Laws: Anti-Gay Attitudes Thaw*, 11 PUB. PERSP. 20, 20–23 (2000) (documenting the shift).

170. *LGBTQ+ Rights*, *supra* note 158.

171. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

172. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS*: HOW A BEDROOM ARREST DECRIMINALIZED GAY AMERICANS (2012).

173. *Id.* at 259.

174. Marc Spindelman, *Tyrone Garner’s Lawrence v. Texas*, 111 MICH. L. REV. 1111, 1116 (2013).

175. CARPENTER, *supra* note 172, at 270.

176. *Id.* at 271–72.

177. *Id.* at 268.

178. Spindelman, *supra* note 174, at 1120.

179. Melissa Murray, *One Is the Loneliest Number: The Complicated Legacy of Obergefell v. Hodges*, 70 HASTINGS L.J. 1263, 1268–69 (2019) (“Almost immediately, . . . the decision came to be seen as a waystation on the road to same-sex marriage.”).

180. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003).

181. Scott Dodson, *The Peculiar Federal Marriage Amendment*, 36 ARIZ. ST. L.J. 783, 790–92 (2004).

182. Steve Sanders, *Dignity and Social Meaning: Obergefell, Windsor, and Lawrence as Constitutional Dialogue*, 87 FORDHAM L. REV. 2069, 2086 (2019).

clearly turned.¹⁸³ In 2012, President Obama endorsed same-sex marriage,¹⁸⁴ and by 2013, eight other states had joined Massachusetts in legalizing same-sex marriage under state law.¹⁸⁵ These views were national. In 2013, a Gallup poll found fifty-three percent of Americans supported recognizing same-sex marriage,¹⁸⁶ and a Pew Research poll found sixty-six percent of Americans thought same-sex couples should have the same legal rights as heterosexual couples.¹⁸⁷ Nearly sixty percent of Americans thought the federal government should not deny same-sex couples the benefits and protections afforded heterosexual couples.¹⁸⁸

In 2013, the Court invalidated the federal Defense of Marriage Act in *United States v. Windsor*,¹⁸⁹ and by 2015, the nation was ready. More than sixty percent of Americans supported same-sex marriage rights nationwide.¹⁹⁰ That year, the Court decided *Obergefell v. Hodges*, invalidating the remaining states' prohibitions on same-sex marriage and enshrining marriage equality in the U.S. Constitution.¹⁹¹

The trilogy of *Lawrence*, *Windsor*, and *Obergefell* show a Court aligned with, and perhaps advancing, a stepwise progression in "mainstream American social attitudes and policy preferences."¹⁹² One commentator has called it a "cultural dialogue in which the Supreme Court actively participates."¹⁹³ The decisions built upon each other, taking the same steps as the public in advancing equality and dignity for gay Americans; by the time of *Obergefell*, the Court "was essentially ratifying a consensus in favor of the legalization of same-sex

183. CARPENTER, *supra* note 172, at 283.

184. Peter Wallsten & Scott Wilson, *Obama Endorses Gay Marriage, Says Same-Sex Couples Should Have Right to Wed*, WASH. POST (May 9, 2012), https://www.washingtonpost.com/politics/2012/05/09/gIQAivsWDU_story.html (on file with the *Iowa Law Review*).

185. L.A. Times Staff, *Timeline: Gay Marriage Chronology*, L.A. TIMES (June 26, 2015), <https://graphics.latimes.com/usmap-gay-marriage-chronology> [<https://perma.cc/8G2G-CJG5>].

186. *LGBTQ+ Rights*, *supra* note 158.

187. PEW RSCH. CTR., *GROWING SUPPORT FOR GAY MARRIAGE: CHANGED MINDS AND CHANGING DEMOGRAPHICS* 3–4 (2013), <https://www.pewresearch.org/politics/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics> [<https://perma.cc/Y7N4-VK2T>].

188. Joseph McCormick, *Poll: 59 % of Americans Oppose the Defense of Marriage Act*, PINKNEWS (Feb. 20, 2013), <https://www.thepinknews.com/2013/02/20/poll-59-of-americans-oppose-the-defense-of-marriage-act> [<https://perma.cc/B753-G2M6>].

189. *United States v. Windsor*, 570 U.S. 744, 774 (2013).

190. Scott Clement & Robert Barnes, *Poll: Gay-Marriage Support at Record High*, WASH. POST (Apr. 23, 2015), https://www.washingtonpost.com/politics/courts_law/poll-gay-marriage-support-at-record-high/2015/04/22/f6548332-e92a-11e4-aae1-d642717d8afa_story.html (on file with the *Iowa Law Review*).

191. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

192. Sanders, *supra* note 182, at 2072.

193. *Id.* Other commentators have recognized the Court's dialogic participation in constitutional cultural conversations. See, e.g., Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1248–49 (2010); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1326 (2005).

marriage.”¹⁹⁴ Though it overturned a host of both federal and state laws in getting there, the Court’s legalization of same-sex marriage in 2015 provoked barely a whisper in backlash or opposition.

C. HIGH-PRICED GAMBITS

In a few instances, the Court has exposed its own vulnerabilities by wading into dangerous waters, whether by political miscalculation or genuine necessity. These gambles largely have not paid off, in that they have resulted in a net decrease in the Court’s reputation, though they also seem not to have irrevocably damaged the Court, perhaps due to the Court’s own subsequent corrective measures.

1. *Cherokee Cases*

In a combination of westward expansion, state assertions of regulatory authority over tribal territories within state borders, the discovery of gold on tribal lands, and straight-faced racism, the early 1800s brought persistent conflict with Native peoples.¹⁹⁵ Popular calls for removal of Native people and extinguishment of their land-title claims led to the landslide victory of President Andrew Jackson in 1828, who promised to remove Native people or subject them to state jurisdiction.¹⁹⁶ State regulation, however, confronted the Constitution, which gave the federal government primary authority over Indian affairs.¹⁹⁷ The Court recognized the problem it was in: The Constitution likely prevented states from doing what they wished with Native peoples and lands, but the President, powerful state officials, and most Americans strongly favored removal. Seeing the writing on the wall, Justice Joseph Story privately wrote, in 1831, that “it would have been desirable to have escaped [deciding Indian cases]; but you know it is not for Judges to choose times and occasions. We must do our duty as we may.”¹⁹⁸ That year, in a move reminiscent of *Marbury*, the Court managed to avoid the issue directly by signaling support for the legal claims of Native peoples but rejecting their appeal on jurisdictional grounds.¹⁹⁹

194. Murray, *supra* note 179, at 1264; see also John King, *How Did the Same-Sex Marriage Revolution Sweep the Nation So Quickly?*, CNN POL. (June 30, 2015, 3:05 PM), <https://www.cnn.com/2015/06/28/politics/inside-politics-same-sex-marriage-revolution> [<https://perma.cc/KCU3-JEWL>] (“The country got out ahead of the Supreme Court so that the Supreme Court only seemed to be ratifying public opinion that was already there.”).

195. LISA FORD, *SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICAN AND AUSTRALIA*, 1788–1836, at 130 (2010).

196. Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2229 (2023).

197. *E.g.*, U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To regulate Commerce . . . with the Indian tribes.”); see also Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1040–45 (2015).

198. 2 THE LIFE AND LETTERS OF JOSEPH STORY 49 (William W. Story ed., 1851) (quoting Letter from Joseph Story to George Ticknor (Jan. 22, 1831)).

199. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831). For discussions of the case, see, e.g., Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 510–18 (1969); and JILL NORGREN, *THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS* 100–01 (1996).

But direct confrontation could not be avoided for long. The following year, under “[a]n air of doom . . . as though caught in the clutches of fate and irresistible events,”²⁰⁰ the U.S. Supreme Court heard an appeal from the Supreme Court of Georgia by two white missionaries who had been convicted under Georgia state law for living in Cherokee territory without a license from the state.²⁰¹ In the face of a hostile President, a determined state, and widespread popular sentiment against Indians,²⁰² the Court (Marshall writing) reversed and held that the exclusive federal power over Indian affairs precluded states from regulating within tribal lands.²⁰³ Deploying apologetic rhetorical devices somewhat feebly, Marshall wrote that the Court had a duty to decide the case, “however unpleasant,” and that judges “have no discretion in selecting the subjects to be brought before them.”²⁰⁴ But his opinion was an unabashed, full-throated missive vindicating Indian sovereignty and rights.²⁰⁵

President Jackson has been ascribed as proclaiming, “John Marshall has made his decision, now let him enforce it.”²⁰⁶ Whether correctly attributed or not, the President pointedly refused to recognize the legitimacy of the Court’s decision.²⁰⁷ True to form, he rejected numerous petitions to enforce *Worcester*,²⁰⁸ and he declined to intervene when Georgia enforced the very laws *Worcester* invalidated, abolishing the government of the Cherokee Nation, seizing its lands,²⁰⁹ and prompting “one of the definitive constitutional crises from the Founding until the Civil War.”²¹⁰ The Court was powerless to intervene, and the Cherokee Nation was deported from Georgia to territories west of the Mississippi River in what became known as the Trail of Tears.²¹¹

Though Jackson proved the Court powerless, Jackson himself did not emerge unscathed. Marshall’s decades of building up the Court’s reputation as a coequal branch of government entitled to respect and deference on constitutional interpretation could not now be easily disregarded. Jackson’s political opponents pilloried him for violating his duty to uphold the Constitution and faithfully execute federal law.²¹² Jackson won reelection in 1832 but had had

200. Burke, *supra* note 199, at 500.

201. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 528–29 (1832).

202. E.g., Message of Governor Wilson Lumpkin to Georgia Legislature (Nov. 25, 1831), NILES’ REG., Dec. 24, 1831, at 313; Ritchie & Cook, *Richmond, Va., Tuesday, December 13*, RICHMOND ENQUIRER, Dec. 13, 1831, at 3; Ritchie & Cook, *Richmond, Va., Saturday, December 10*, RICHMOND ENQUIRER, Dec. 10, 1831, at 1–2.

203. *Worcester*, 31 U.S. at 559–63.

204. *Id.* at 541.

205. Burke, *supra* note 199, at 523.

206. JON MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 204 (2008).

207. Burke, *supra* note 199, at 528–29.

208. Blackhawk, *supra* note 196, at 2232.

209. MEACHAM, *supra* note 206, at 203–05.

210. Blackhawk, *supra* note 196, at 2230.

211. See generally JOAN GILBERT, *THE TRAIL OF TEARS ACROSS MISSOURI* (1996) (history of the forced removal of the Cherokee and other tribes from the American Southeast).

212. E.g., *The Indians and the Missionaries*, PITTSBURGH GAZETTE, Oct. 26, 1832, at 2 (reprinting article from the *Boston Daily Advertiser*); *The Cherokees*, NILES’ REGISTER, Sept. 15, 1832, at 47–48 (reprinting article from the *Columbus Enquirer*).

enough of the criticism. In December 1832, he adopted a more conciliatory tone regarding both Indians and the supremacy of the Supreme Court.²¹³ By 1833, the heat of the moment had passed, the nation had moved on, and never again has the Supreme Court experienced such brazen defiance of its decisions.²¹⁴

2. Switch in Time

The Court experienced a different crisis in the 1930s. During Reconstruction, the Court aggressively struck down federal legislation.²¹⁵ As Reconstruction gave way to industrialism, the Court entered a period of antiregulatory, laissez-faire conservatism known as the *Lochner* Era, after its namesake case in 1905,²¹⁶ in which it repeatedly struck down laws aimed at labor and commercial regulation. Progressives urged a counternarrative of judicial restraint.²¹⁷ In 1918, when the Court struck down a law that regulated child labor,²¹⁸ leading progressives struck back by calling for term limits, and Idaho Senator William Borah called for a law that would require a supermajority vote of the Justices to strike down a congressional statute.²¹⁹ Those calls went nowhere, however, and the Court—with conservative voters outnumbering progressive voters—continued charting a libertarian path through the 1920s.²²⁰

Public sensibilities changed with the onset of the Great Depression. In 1932, Franklin Delano Roosevelt was elected President. His aggressive mobilization of government to provide benefits to the people—styled the New Deal—was enormously popular with the public but failed to win over the Court, which continued to strike down its legislation.²²¹ On May 27, 1935, the Court unanimously struck down three key pieces of New Deal legislation.²²²

213. *E.g.*, Andrew Jackson, President of the United States, Fourth Annual Message to Congress (Dec. 4, 1832); Andrew Jackson, President of the United States, Nullification Proclamation (Dec. 10, 1832).

214. Wartime tends to embolden Presidents; Lincoln defied an order by Chief Justice Roger Taney during the Civil War that held unconstitutional Lincoln's unilateral suspension of habeas corpus, but Lincoln immediately sought and ultimately received retroactive approval from Congress. *See* CARL BRENT SWISHER, ROGER B. TANEY 550–56 (1935) (recounting Lincoln's response to *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487)). Those were unique times. Even President Harry Truman, shocked by the Supreme Court's invalidation of his attempt to seize U.S. steel mills during World War II, immediately complied. *See* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 197 (Duke Univ. Press 1994) (1971) (recounting Truman's response to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

215. Susan D. Carle, *Reconstruction's Lessons*, 13 COLUM. J. RACE & L. 734, 770–85 (2023).

216. *See generally* *Lochner v. New York*, 198 U.S. 45 (1905).

217. *Id.* at 75–76 (Holmes, J., dissenting).

218. *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918).

219. Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 75 (2003).

220. ROBERT C. POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930, at 1505–06 (2024) (“The result was an ever-growing if unexpressed anger at the Court’s increasingly conservative agenda. There would eventually be the devil to pay for [such] overreaching decisions.”).

221. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 79–91 (1995).

222. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601–02 (1935); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 632 (1935).

Those decisions, widely seen as a rebuke to the New Deal, provoked Roosevelt to propose several court-focused reform measures, including the possibility of adding Supreme Court seats.²²³ The public response to those plans was largely negative, and the Court did not back down, striking down more important New Deal legislation in 1936, including a case called *Morehead v. New York ex rel. Tipaldo*, which struck down minimum-wage legislation.²²⁴ The conservative bloc of four Justices—Van Devanter, McReynolds, Sutherland, and Butler—were often joined with Owen Roberts to consistently outvote the progressive bloc of Stone, Brandeis, and Cardozo, with Charles Evan Hughes in the middle.²²⁵

Tipaldo, however, was very unpopular with the American people and evoked wide criticism.²²⁶ Later that year, Roosevelt won the presidential election in a landslide, with more than sixty percent of the popular vote and 523 electoral delegates, sweeping many Democrats into Congress in the process.²²⁷ The Court thus confronted a vengeful President with an electoral mandate of support for his policies, a supportive Congress, and the political will to go toe-to-toe with the Court. Indeed, Roosevelt immediately took steps to develop a Court-packing plan and sell it to the public.²²⁸ Although the plan proved unpopular, Roosevelt was widely believed to have the votes in Congress to pass it.²²⁹ It was clear to everyone, including the Court, that Roosevelt's plan was a real threat to the power and standing of the Supreme Court.²³⁰

In 1937, Owen Roberts dramatically switched his position from New Deal skeptic to New Deal supporter²³¹ in a move the press called “the switch in time that saved nine.”²³² The key case was *West Coast Hotel*, which overturned *Tipaldo*, decided just ten months prior and a decision that Owen had joined.²³³ Two weeks later, the Court upheld another crucial piece of New Deal legislation and never looked back.²³⁴ Although the Court's post-switch decisions have largely been viewed positively in historical reckonings, the Court was ridiculed at the time for caving to Roosevelt's pressure.²³⁵ Still, the switch staved off a

223. LEUCHTENBURG, *supra* note 221, at 95.

224. *United States v. Butler*, 297 U.S. 1, 77–78 (1936); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936).

225. See, e.g., *Butler*, 297 U.S. at 53 (Roberts, J.); *Tipaldo*, 298 U.S. at 602 (Butler, J.).

226. See Klarman, *supra* note 82, at 1750–51; William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's “Court-Packing” Plan*, 1966 SUP. CT. REV. 347, 376–77.

227. *Election of 1936*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/economics/encyclopedias-almanacs-transcripts-and-maps/election-1936> [<https://perma.cc/VV4V-36SP>].

228. See LEUCHTENBURG, *supra* note 221, at 114–33.

229. *Id.* at 142.

230. Klarman, *supra* note 82, at 1751; *id.* at 1755 (“Roosevelt's Court-packing plan had the potential to destroy the Court as we know it.”).

231. Whether he did so because he genuinely changed his views, was badgered into the change by some of his dissenting colleagues, or sensed the political winds is unclear. LEUCHTENBURG, *supra* note 221, at 142–43.

232. Russell Fowler, *Black Monday and the Court-Packing Plan*, 57 TENN. BAR J. 48, 50 (2021); see also LEUCHTENBURG, *supra* note 221, at 216 (calling it “an astonishing about-face”).

233. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 388 (1937).

234. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 77–78 (1937).

235. See LEUCHTENBURG, *supra* note 221, at 143.

direct confrontation. With the political basis for it diminished, Roosevelt's Court-packing plan died in Congress.²³⁶

3. *Bush v. Gore*

The "most famous election law case ever decided" unfolded in 2000.²³⁷ The presidential election came down to the winner of Florida, and the Florida vote tally, after an automatic machine recount, put the margin at just 327 votes.²³⁸ Democratic candidate Al Gore requested a hand recount of four Democratic-leaning counties, but no county could complete the hand recount by the state-law-mandated certification deadline.²³⁹ Florida Secretary of State Katherine Harris, a Republican and co-chair of Republican candidate George Bush's campaign, refused to extend the deadline, refused to accept the counties' partial recount numbers, and certified Bush as the winner.²⁴⁰

One of the counties sued Harris in state court, seeking an injunction voiding the certification and extending the hand-recount deadline. Gore intervened in the case, lost in the trial court, and appealed to the Florida Supreme Court, which reversed and ordered Harris to accept hand-count results completed by November 26.²⁴¹ Two counties finished by the deadline, but two others did not, and, on November 27, Harris again certified Bush as the winner, by a margin of 537 votes.²⁴²

Gore then sued Harris in a second lawsuit to contest the election because the recount tallies from two counties had not been included.²⁴³ Gore lost before the trial court and appealed to the Florida Supreme Court, which reversed, held that Gore had shown that the number of uncounted legal votes placed the election results in doubt, ordered the inclusion of the hand recounts from the two remaining counties, and ordered a statewide hand recount of all "undervotes" excluded from the statewide tallies.²⁴⁴ The Florida decision was based entirely on state law, but Bush, who had intervened in the case, sought a stay from the U.S. Supreme Court.

Less than twenty-four hours later, the U.S. Supreme Court issued a stay and ordered oral argument on the merits the next business day.²⁴⁵ The following evening, the Court issued its decision in *Bush v. Gore*, reversing the

236. *Id.* at 142–54.

237. Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1419 (2016). For an insider story, see David Margolick, Evgenia Peretz & Michael Shnayerson, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310.

238. WASHINGTON POST, DEADLOCK: THE INSIDE STORY OF AMERICA'S CLOSEST ELECTION, at viii (2001).

239. Kang & Shepherd, *supra* note 237, at 1419.

240. *Id.* at 1419.

241. See Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So.2d 1220, 1240 (Fla.) (per curiam), *rev'd sub nom.* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000) (per curiam).

242. Kang & Shepherd, *supra* note 237, at 1420.

243. See generally Gore v. Harris, No. 00-2808, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4, 2000).

244. Gore v. Harris, 772 So.2d 1243, 1256 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

245. See generally Bush v. Gore, 531 U.S. 1046 (2000) (mem.).

Florida Supreme Court's judgment as creating a violation of the U.S. Constitution's Equal Protection Clause and effectively ending the election contest in favor of Bush.²⁴⁶ On the ultimate remedy, the Justices split 5-4, with all the conservative Justices joining the majority and all the liberal Justices dissenting.²⁴⁷ The opinion professed to be "limited to the present circumstances."²⁴⁸ Gore conceded the next day.

There is no indication that the Supreme Court involved itself, or decided the case, based on popular sentiment.²⁴⁹ Indeed, because the Florida justices stood for statewide election every six years,²⁵⁰ one might have expected an unelected and unaccountable Court concerned with democratic legitimacy to defer to their decisions on Florida law as validated by the process of state judicial elections.²⁵¹ Instead, the Court took intense heat from its decision. The salience of the issue put the Court in the national spotlight.²⁵² Critics assailed the Court's reasoning on its merits, chastised the Court for intervening in what was primarily a question of state law, and faulted the Court for overstepping many of the "passive virtues" that the Court could have deployed to avoid the case.²⁵³ Virtually no one defended the Court's legal reasoning; the most prominent defenders took the approach of suggesting that the Court's decision was a necessary intervention to stop a renegade state supreme court from contorting the election.²⁵⁴

246. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

247. *Id.* at 129 (Souter, J., dissenting).

248. *Id.* at 109 (per curiam). For discussion, see Richard M. Re, *On "A Ticket Good for One Day Only,"* 16 GREEN BAG 155, 163 (2013).

249. Gore received more than 500,000 more votes nationally than Bush. FED. ELECTION COMM'N, *FEDERAL ELECTIONS 2000: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES* 11 (2001), <https://www.fec.gov/resources/cms-content/documents/federalectionsoo.pdf> [<https://perma.cc/294V-8DEF>].

250. See Claire Cooper, *Florida Court in the Crosshairs in Wake of 'Gore v. Bush,'* LAW.COM (Mar. 30, 2001), <https://www.law.com/article/almID/900005522785> [<https://perma.cc/4MME-MLHD>].

251. Pamela S. Karlan, *When Freedom Isn't Free: The Costs of Judicial Independence in Bush v. Gore*, 64 OHIO ST. L.J. 265, 275 (2003).

252. Nathaniel Persily, *Foreword: The Legacy of Bush v. Gore in Public Opinion and American Law*, 23 ST. THOMAS L. REV. 325, 325 (2011).

253. See generally Howard Gillman, *Judicial Independence Through the Lens of Bush v. Gore: Four Lessons from Political Science*, 64 OHIO ST. L.J. 249, 249 (2003) (contextualizing *Bush v. Gore* within discussions about institutional structure and the "political considerations" and consequences of insulating decision-makers from political pressure); Klarman, *supra* note 82 (identifying factors underlying important Supreme Court decisions that bear on the Court's reputation and predicting that it is unlikely *Bush v. Gore* will have a long-term impact on the Court's reputation); Jed Rubenfeld, *Not as Bad as Plessy. Worse., in BUSH V. GORE: THE QUESTION OF LEGITIMACY* 20, 35 (Bruce Ackerman ed., 2002) ("*Bush v. Gore* . . . is not about constitutional principle. . . . It had to do with one thing: who won the election.").

254. E.g., Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 165, 183 (Cass R. Sunstein & Richard A. Epstein eds., 2001); David A. Strauss, *Bush v. Gore: What Were They Thinking?, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT, supra*, at 184, 204; John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 789 (2001). One rare exception is Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 659-61 (2001) (defending the decision on the merits and reasoning).

Both the U.S. Supreme Court decision and the Florida Supreme Court decision came to be seen as emblematic of “outcome-driven, partisan judicial decision-making” in the worst of circumstances: to resolve the election for the U.S. presidency.²⁵⁵ A full-page advertisement in the *New York Times* signed by 554 law professors accused the Court of “us[ing] its power to act as political partisans, not judges of a court of law.”²⁵⁶ Perhaps Bruce Ackerman put the sentiment most plainly: “[T]his time, the president has not been independently elected. He is in the White House as a result of an unprincipled judicial decision that brought the electoral contest to a premature end.”²⁵⁷

But perhaps there is honor in this story. It is likely that who really won the election will never be known.²⁵⁸ Even were one to settle on the one best standard for counting votes (itself a highly contestable proposition), the margin of error in applying that standard might exceed the vote margin. And, in the meantime, the uncertainty caused by a prolonged legal battle could only foment partisan passions. One need only look to the horrors of January 6, 2020, to realize that, by spending its popular goodwill to put an end to the contest,²⁵⁹ the Supreme Court may have staved off something far worse.

In the immediate aftermath of *Bush v. Gore*, that perspective was difficult for most to see,²⁶⁰ and, to be fair, circumstances in 2000 were quite different from those of 2020. But what can be said is that the immediate result of the Court’s decision was a Gore concession, a smooth transition of power, and a country that moved on quickly,²⁶¹ even uniting for a time under President Bush in the wake of the attacks of September 11, 2001. Some argued that the Court aided itself by leaning left in the immediate years that followed.²⁶² Whatever the cause, by 2004, more Democrats than Republicans approved of

255. Kang & Shepherd, *supra* note 237, at 1413.

256. Law Professors for the Rule of Law, 554 *Law Professors Say: By Stopping the Vote Count in Florida, the U.S. Supreme Court Used Its Power to Act as Political Partisans, Not Judges of a Court of Law*, N.Y. TIMES, Jan. 13, 2001, at A7 (on file with the *Iowa Law Review*).

257. Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT (Dec. 4, 2001), <https://prospect.org/features/court-packs> [<https://perma.cc/43WX-RC9Y>].

258. See Ford Fessenden & John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001, at A1 (on file with the *Iowa Law Review*) (concluding that the recount ordered by the Florida Supreme Court would not have changed the outcome but that a full statewide recount probably would have); Richard L. Berke, *Who Won Florida? The Answer Emerges, but Surely Not the Final Word*, N.Y. TIMES, Nov. 12, 2001, at A16 (on file with the *Iowa Law Review*) (“The reality, therefore, is that Mr. Bush’s victory in the most fouled-up, disputed and wrenching presidential election in American history was so breathtakingly narrow that there is no way of knowing with absolute precision who got the most votes.”).

259. Klarman, *supra* note 82, at 1762 n.237 (“One can only marvel at the enormous prestige of an institution that could command such total obedience to such a lawless decision.”).

260. But cf. *Gore v. Harris*, 772 So.2d 1243, 1263 (Fla. 2000) (Wells, C.J., dissenting) (“I have a deep and abiding concern that the prolonging of judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis. I have to conclude that there is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this Court as an institution.”).

261. See generally James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354 (2003) (indicating that polarized opinions of the Court moderated significantly within a year of the decision).

262. David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1430–32 (2006).

the Court.²⁶³ The Court took a hit that day in the eyes of the public, and perhaps it was a hit that has had enduring legacy,²⁶⁴ but, in the main, it weathered the storm.²⁶⁵

IV. THE COURT AND PUBLIC OPINION TODAY

Throughout history, the Supreme Court has maintained a high public-approval rating despite the occasional unpopular, even severely unpopular, decision. The Court has perennially had the highest reputational ratings of any branch of government.²⁶⁶ Its approval rating was typically above sixty percent until 2010, and its public trust was invariably above sixty percent between 1973 and 2014.²⁶⁷ The Court's public-trust rating even hit eighty percent in 1999, the year before *Bush v. Gore*.²⁶⁸ But since 2010, the Court's approval rating has been below sixty percent, and, since 2014, its trust rating has fallen below sixty percent four times.²⁶⁹ In 2021, the Court's approval rating sunk to a record low of forty percent.²⁷⁰ As of fall 2023, the Court's approval rating of forty-one percent and trust rating of forty-nine percent have languished near historic lows.²⁷¹

These low approval ratings seem strange for a Court helmed by a Chief Justice who has publicly pressed a judicial philosophy of humility and minimalism—calling balls and strikes, respecting precedent, avoiding controversy, offering political compromises, and striving for narrow opinions that can garner unanimity.²⁷² Indeed, Joan Biskupic has surmised that “Roberts

263. Manoj Mate & Matthew Wright, *The 2000 Presidential Election Controversy*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 333, 346–47 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008). By the time Barack Obama took office in 2009, seventy percent of Democrats and forty-nine percent of Republicans approved of the Court. See Jeffrey M. Jones, *Rating of Supreme Court Improves as Partisans Switch Sides*, GALLUP (June 22, 2009), <https://news.gallup.com/poll/121196/rating-supreme-court-improves-partisans-switch-sides.aspx> [<https://perma.cc/C35J-NNJN>].

264. See Mark S. Brodin, *Bush v. Gore: The Worst (or at Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563, 563 (2012).

265. See Linda Greenhouse, *My Florida Recount Memory*, N.Y. TIMES (Nov. 20, 2010), <https://www.nytimes.com/2010/11/21/opinion/21florida.html> (on file with the *Iowa Law Review*) (describing the decision “not as a travesty or tragedy, but as a bad hair day[.] . . . a weird gust of wind that blew through the court”).

266. 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/SLZ9-V2X8>].

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. See JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 10 (2019); David G. Savage, *Roberts Sees Role as Judicial ‘Umpire,’* L.A. TIMES (Sept. 13, 2005, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2005-sep-13-na-roberts13-story.html> [<https://perma.cc/24J9-2CXD>]; e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 348–49, 359 (2022) (Roberts, C.J., concurring); *Fulton v. City of Philadelphia*, 593 U.S. 522, 541–42 (2021); *June Med. Servs., L.L.C. v. Russo*, 591 U.S. 299, 345–46 (2020) (Roberts, C.J., concurring); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 531–32 (2012).

has at times set aside his ideological and political interests on behalf of his commitments to the Court's institutional reputation and his own public image.²⁷³ But his efforts haven't done the trick. This Part explores why.

The reason, I submit, lies not in a single, explosive exercise of antidemocratic power by the Court. As even the *Cherokee Cases* suggest, those shocks fade quickly, often hastened by calculated judicial retreat. Instead, this Court has experienced a confluence of circumstances that have accumulated over time, including: (1) two decades of perceived persistent conservative activism; (2) the Court's dismissive attitude toward a raft of ethics scandals; (3) partisanship surrounding the appointment of new Justices; (4) a handful of unpopular opinions; and (5) a rise in partisan polarization among the populace. Meanwhile, the Court has not issued a heroic opinion like *Brown* or *Lawrence* to pick up the flagging public support. The Court has avoided knockout punches, but it has exposed itself to, perhaps even invited, a steady barrage of jabs, and the public has noticed.

A. PERSISTENT CONSERVATIVE ACTIVISM

Some of the hits have been of the Court's own making. Stare decisis—adherence to prior precedent—is a foundational principle that increases stability and reduces ideological variance.²⁷⁴ Although measuring the Court's relative commitment to stare decisis over time is difficult,²⁷⁵ the public perception is that the Roberts Court regularly revisits important decisions, even delighting in overturning them.²⁷⁶ Key examples include *Citizens United* (overruling precedent allowing campaign-finance limits),²⁷⁷ *Dobbs* (overruling *Roe v. Wade*'s and *Casey*'s constitutionalization of abortion),²⁷⁸ *Students for Fair Admissions* (effectively overruling precedent allowing affirmative action in higher-education admissions),²⁷⁹ and *Loper Bright* (overruling *Chevron*'s directive that courts defer to reasonable agency interpretations of implementing statutes).²⁸⁰ That these important decisions have all been outcomes that align

273. BISKUPIC, *supra* note 272, at 10, 221.

274. RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 18 (2017); MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 18–20 (2008).

275. Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 401 (2007). One commentator charges the Roberts Court as “obstructing” precedent even when it does not overrule it expressly. See Bill Watson, *Obstructing Precedent*, 119 NW. U. L. REV. 259, 314–15 (2024).

276. Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 TEX. L. REV. 1, 5, 41 (2022) (asserting that the Court's commitment to stare decisis is breaking down); Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 53 (2022) (“[T]he Roberts Court does not appear to consider itself particularly bound by stare decisis.”); Carle, *supra* note 122, at 569 (characterizing the Roberts Court as pursuing “exceedingly aggressive activism”); Note, *The Thrust and Parry of Stare Decisis in the Roberts Court*, 137 HARV. L. REV. 684, 684 (2023) (“[T]his Court is undeniably marked by many moments of overturning precedent.”).

277. See generally *Citizens United v. FEC*, 558 U.S. 310 (2010).

278. See generally *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

279. See generally *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, 600 U.S. 181 (2023); Bill Watson, *Did the Court in SFFA Overrule Grutter?*, 99 NOTRE DAME L. REV. REFLECTION 113 (2023).

280. See generally *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

with conservative politics, decided along the Court's own ideological split, undermines the role that stare decisis plays in "protect[ing] the Court's legitimacy by reinforcing the public's opinion of an apolitical judiciary."²⁸¹

Worse, the Court appears to be using its discretionary agenda-setting powers not as Bickel proposed—to avoid controversy until the right moment—but to actively seek out controversial cases to decide. Scholars have noted "a trend, particular to the Roberts Court, of exercising its certiorari discretion to grant review in cases that present an opportunity to overrule precedent,"²⁸² a trend that appears to be accelerating.²⁸³ Indeed, *Dobbs* presented three questions in the petition for certiorari: (1) whether to overrule *Roe*; (2) whether a different constitutional standard should apply; or (3) whether standing existed.²⁸⁴ The Court could have taken the case on the second or third grounds and avoided the question of whether to overrule *Roe*. But it chose to take the case only on the first question.²⁸⁵ In other words, the Court overruled *Roe* "because it *wanted* to, not because it *had* to."²⁸⁶ This Court has turned the passive virtues—discretionary docket control—into the "active vices" by reaching out to take cases on certiorari and reframe issues for decision.²⁸⁷

In addition to active use of certiorari discretion, the Court has dramatically scaled up its use of other aspects of its "shadow docket"²⁸⁸—its nonmerits docket—often under the guise of the need to issue emergency relief, but resolving, in the process, particularly high-profile, partisan issues,²⁸⁹ including

281. Derigan Silver & Dan V. Kozlowski, *Preserving the Law's Coherence: Citizens United v. FEC and Stare Decisis*, 21 COMM'N L. & POL'Y 39, 48 (2016). Justice Sotomayor has worried that the Court's overruling of precedent has contributed to its sliding public-approval rating. See Bruce Schreiner, *Sotomayor Is Asked About Lower Trust in Supreme Court. She Points to Pace of Overturned Precedents*, ASSOCIATED PRESS (Feb. 5, 2025, 9:53 PM), <https://apnews.com/article/supreme-court-justice-sonia-sotomayor-5c9a6a140486a292c136a1d3a74bfff1> [<https://perma.cc/RL8F53TV>].

282. Tejas N. Narechania, *Certiorari in the Roberts Court*, 67 ST. LOUIS U. L.J. 587, 590 (2023); see also Benjamin B. Johnson, *The Active Vices*, 74 ALA. L. REV. 917, 919 (2023) ("[I]t consistently uses its agenda-setting powers to engage, rather than avoid, politically divisive issues.").

283. Narechania, *supra* note 282, at 592.

284. See generally *Petition for Writ of Certiorari, Dobbs v. Jackson Women's Health Org.*, 945 F.3d 265 (5th Cir. 2019) (No. 19-1392), 2020 WL 3317135.

285. Johnson, *supra* note 282, at 935–36.

286. Narechania, *supra* note 282, at 589–90; cf. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1717 (2000) (observing that, under certiorari discretion, when asked why the Court "exercise[d] the awesome power to declare an Act of Congress unconstitutional," the Justices "can no longer say, 'Because we had to.' Instead, they must say, 'Because we chose to'").

287. Johnson, *supra* note 282, at 943.

288. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1–2 (2015). For evidence of a scaling up, see STEPHEN I. VLADECK, CASE SELECTION AND REVIEW AT THE SUPREME COURT: HEARING BEFORE THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES 6–7 (June 30, 2021), <https://www.justsecurity.org/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf> [<https://perma.cc/3J2F-M2XE>] (comparing the forty-one stay applications filed by the Solicitor General in the October 2018 Term alone to the eight applications filed by the Solicitor General in all sixteen years of the Bush/Obama years).

289. Ben Johnson & Logan Strother, *Shedding Light on the Roberts Court Shadow Docket* 11 (Aug. 27, 2022) (unpublished manuscript) (on file with the *Iowa Law Review*).

immigration, COVID-19 regulations, and other matters.²⁹⁰ The merits docket operates with formalism and transparency—including regular procedures, public oral argument, and public written opinions—all designed to enhance public respect for the Court. By contrast, the shadow docket exhibits none of these features.²⁹¹ The Court can use the shadow docket to issue an unsigned, summary order staying the effect of a law or lower-court opinion. On May 22, 2025, for example, the Court, in an unsigned order, granted President Donald Trump’s emergency application for a stay of a lower-court ruling blocking the President’s ability to remove certain agency heads, despite some precedent to the contrary, and over the dissent of Justices Kagan, Sotomayor, and Jackson.²⁹² The last ten years have seen “an explosion in the use of [the shadow docket] powers and the controversy they create,”²⁹³ and the public has noticed.²⁹⁴

And the Court’s merits decisions reveal a conservative majority flexing its judicial muscles.²⁹⁵ Some ideologies threaten to destabilize the structure of government. The Roberts Court is strongly skeptical of the power and role of administrative agencies,²⁹⁶ “has consistently issued holdings that restrict the scope of administrative deference,”²⁹⁷ and doesn’t think particularly much of Congress.²⁹⁸ Other ideologies reflect views of the Constitution that disable elected officials from addressing the needs of the day, like reasonable gun regulation.²⁹⁹ Some see this agenda as an exercise in judicial aggrandizement, achieved by disparaging other branches and imposing vague standards that help the Court maintain control.³⁰⁰ These observations have led commentators

290. Alexis Denny, Note, *Clarity in Light: Rejecting the Opacity of the Supreme Court’s Shadow Docket*, 90 UMKC L. REV. 675, 676–77 (2022).

291. See Baude, *supra* note 288, at 11–12; see also Taraleigh Davis & Sara C. Benesh, *Procedural Justice and the Shadow Docket*, 73 EMORY L.J. 443, 448 (2023).

292. *Trump v. Wilcox*, 145 S. Ct. 1415, 1415–16 (2025); see also *id.* at 1418 (Kagan, J., dissenting) (criticizing the Court for “skip[ping] the usual appellate process when issuing an order that itself changes the law”).

293. Benjamin H. Barton, *Why Are These Justices Using the Shadow Docket More than Past Justices?*, 23 NEV. L.J. 845, 845 (2023).

294. STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* 8 (2023).

295. See Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 548–49 (2018).

296. See, e.g., *Collins v. Yellen*, 594 U.S. 220, 250–51 (2021); *Seila Law, LLC v. CFPB*, 591 U.S. 197, 213–14 (2020).

297. Eric C. Chaffee, *Securities Regulation and Administrative Deference in the Roberts Court*, 47 SEATTLE U. L. REV. 965, 968 (2024); see *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024).

298. See Fallon, *supra* note 295, at 548.

299. See, e.g., *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635–36 (2008).

300. See Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 38 (2024); e.g., *Loper Bright*, 603 U.S. 369, 412–13 (asserting that it is the Court’s responsibility to determine, without deference to the executive branch, whether agencies have exceeded their statutory authority).

to charge the Supreme Court with imperialism.³⁰¹ The Court, as one commentator put it, “today is not only the most activist of any Court in the past century, but increasingly the locus of all legal power.”³⁰² The Court is exercising that power not through sporadic and heroic decisions but through a series of decisions seen by large swaths of the nation as ideologically driven.

A prime example of all these factors is *Citizens United*, in which the Court overruled prior precedent and struck down, on free-speech grounds, a popular, bipartisan federal law limiting campaign contributions.³⁰³ The opinion generated a largely critical response.³⁰⁴ In fact, the five Justices in the majority had very little on their side, other than the Chamber of Commerce. Opposed were four Justices in dissent, the executive branch, Congress, and many states, all of which supported campaign limits.³⁰⁵ The Court could have avoided controversy by deciding the case as the parties presented it: without preserving the First Amendment question.³⁰⁶ Yet the Court itself put the constitutional challenge back on the table—as well as reconsidering two past precedents upholding campaign limits.³⁰⁷ All on its own, the Court chose to engage the constitutional questions, strike down a democratically popular law, and overrule two prior decisions.

In the aftermath, President Obama took the rare step of criticizing the opinion publicly in his State of the Union Address, with several Justices in attendance; Alito was broadcast visibly shaking his head and mouthing “not true.”³⁰⁸ To be sure, Obama’s reproach paled in comparison to Jefferson’s, Jackson’s, and Roosevelt’s, but the public noted the condemnation of the Court by a popular President. *Citizens United*, emblematic of this Court’s propensity toward activism rather than restraint, is a part of a gradual accumulation of negative public reactions to the Court.

B. ETHICS SCANDALS

Aside from decisions, certain Justices have been caught in the limelight for conduct implicating judicial ethics. Justice Thomas has repeatedly been

301. See Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022); see also Adam Liptak, *An ‘Imperial Supreme Court’ Asserts Its Power, Alarming Scholars*, N.Y. TIMES (Dec. 19, 2022), <https://www.nytimes.com/2022/12/19/us/politics/supreme-court-power.html> (on file with the *Iowa Law Review*).

302. Lemley, *supra* note 301, at 113; see also Blackhawk, *supra* note 196, at 2208 (“The United States has reached a moment in its constitutional history when the Supreme Court has asserted itself as not only one of, but the exclusive, audience to ask and answer questions of constitutional meaning and constitutional law.”).

303. See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

304. See, e.g., Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 603–05 (2011); Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 726 (2011).

305. Warren S. Grimes, *Judicial Activism in the First Decade of the Roberts Court: Six Activism Measures Applied*, 48 SW. L. REV. 37, 60 (2019).

306. Monaghan, *supra* note 54, at 690.

307. Johnson, *supra* note 282, at 920.

308. Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), <https://www.nytimes.com/2010/01/29/us/politics/29scotus.html> (on file with the *Iowa Law Review*).

under fire for failing to disclose numerous gifts of destination vacations, private jet flights, sports events, tuition payments, and vehicle financing paid by prominent conservative businessmen.³⁰⁹ Justice Alito reportedly was gifted an expenses-paid luxury fishing trip by a conservative donor, whose hedge fund subsequently appeared as a litigant before the Court; Alito neither disclosed the trip nor recused himself from the case.³¹⁰ In the weeks leading up to the January 6 insurrection of the Capitol by Trump supporters, Thomas's wife, Ginni, a longtime conservative activist, sent more than two dozen text messages to White House Chief of Staff Mark Meadows urging support for claims that the election was stolen from Trump.³¹¹ When flags flown during the January 6 insurrection were flown at Alito's house, he refused to recuse himself from pending cases pertaining to the insurrection.³¹² Both Alito and Thomas voted, in subsequent cases, to vacate the criminal conviction of a January 6 insurrectionist and to provide broad presidential immunity to Trump for his official acts in contesting the 2020 election.³¹³ These matters received widespread media coverage.³¹⁴

The Court's response to these events has not mollified the public. It has remained, as a whole, silent on media reports involving specific Justices.³¹⁵ When Congress held hearings about ethics at the Supreme Court and invited

309. See Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), <https://www.propublica.org/article/clarence-thomas-scot-us-undisclosed-luxury-travel-gifts-crow> [<https://perma.cc/ZVV4-YV8P>]; Chas Danner, *A Quick Guide to Justice Clarence Thomas's Ethics Scandals*, N.Y. MAG INTELLIGENCER (Aug. 10, 2023), <https://nymag.com/intelligencer/article/quick-guide-supreme-court-justice-clarence-thomas-ethics-scandals.html> (on file with the *Iowa Law Review*).

310. See Justin Elliott, Joshua Kaplan & Alex Mierjeski, *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-scot-us-supreme-court> [<https://perma.cc/VGT6-FDEY>].

311. Ryan Nobles, Annie Grayer, Zachary Cohen & Jaime Gangel, *First on CNN: January 6 Committee Has Text Messages Between Ginni Thomas and Mark Meadows*, CNN POL. (Mar. 25, 2022, 7:53 PM), <https://www.kcra.com/article/texts-between-ginni-thomas-and-mark-meadows/39531243> [<https://perma.cc/4MMW-5KMG>].

312. Adam Liptak, *Alito Refuses Calls for Recusal Over Display of Provocative Flags*, N.Y. TIMES (May 29, 2024), <https://www.nytimes.com/2024/05/29/us/alito-supreme-court-recusal-flag.html> (on file with the *Iowa Law Review*).

313. *Trump v. United States*, 603 U.S. 593, 593 (2024); *Fischer v. United States*, 603 U.S. 480, 480 (2024).

314. Absent from most media outrage was the historical fact that the author of *Marbury v. Madison*, Chief Justice John Marshall, was the Acting Secretary of State who signed *Marbury's* commission and whose failed duty to have the commissions delivered timely served as the very basis for the case. PAUL, *supra* note 98, at 226.

315. Kierra Frazier, *Justices' Quiet Response to Ethics Crisis Reveals a Lesson in PR Management*, POLITICO (May 5, 2023, 4:30 AM), <https://www.politico.com/news/2023/05/05/supreme-court-ethics-crisis-00095473> [<https://perma.cc/HZ8L-VQC4>]. One report suggests that Chief Justice Roberts took the opinion-writing assignment in the January 6 cases from Justice Alito after the flag story broke. See Jodi Kantor & Adam Liptak, *How Roberts Shaped Trump's Supreme Court Winning Streak*, N.Y. TIMES (Nov. 6, 2024), <https://www.nytimes.com/2024/09/15/us/justice-roberts-trump-supreme-court.html> (on file with the *Iowa Law Review*).

Chief Justice Roberts to testify, he declined.³¹⁶ And the Court has consistently resisted efforts to impose binding ethics standards on its members.³¹⁷ The Court finally issued a formal Code of Conduct in November 2023,³¹⁸ but that Code confirms that individual recusal matters are decided solely by the Justice implicated.³¹⁹ The reaction of the Court to the scandals has generated its own negative media attention and contributed to its declining popularity.³²⁰

C. POLITICIZED APPOINTMENTS

New Justices are appointed by the President and confirmed by the Senate. That process, as John Adams's Midnight Judges shows, has always been political and has occasionally been controversial. Abe Fortas, Robert Bork, and Clarence Thomas are prominent examples. But until recently, such polarized partisanship has been the exception rather than the rule. Antonin Scalia and Anthony Kennedy, for example, were unanimously confirmed, and Bill Clinton's appointees Ruth Bader Ginsburg and Stephen Breyer were confirmed by margins of ninety-six percent and eighty-seven percent, respectively. Since 2006, however, only one of the eight Justices confirmed has been so by more than a two-thirds vote, and the votes are invariably divided along partisan lines.

The partisan voting pattern reflects the partisan popular view of the Court. From 1993 to 2016, the Court's political balance remained relatively constant. Conservative Justices held a 5-4 majority, with some conservative moderates—namely, Justices Kennedy and O'Connor—voting with liberal Justices to uphold key precedents, like *Roe v. Wade*.³²¹ Republican Presidents would replace conservative retirements, and Democratic Presidents would replace liberal retirements, without dramatically altering the political valence of the Court.

But the political climate surrounding the Supreme Court began to change dramatically in 2015, in the waning years of an outgoing Democratic President and several aging liberal Justices who seemed unlikely to retire in time for Obama to appoint a younger successor. Then, Justice Scalia, a conservative

316. Letter from Chief Justice John Roberts to Richard J. Durbin, Chair, Senate Comm. on the Judiciary (April 25, 2023), <https://www.govinfo.gov/content/pkg/GOVPUB-JU6-PURL-gpo212369/pdf/GOVPUB-JU6-PURL-gpo212369.pdf> [<https://perma.cc/URA9-g8KA>].

317. Frazier, *supra* note 315. Some good reasons exist: Because the Supreme Court is the only court of last resort, with only nine members, excessive recusals could, as a practical matter, impair its essential role in the constitutional structure and create problems of enforcement. See Chief Justice John Roberts et al., Statement on Ethics Principles and Practices (Apr. 25, 2023), <https://www.govinfo.gov/content/pkg/GOVPUB-JU6-PURL-gpo212369/pdf/GOVPUB-JU6-PURL-gpo212369.pdf> [<https://perma.cc/URA9-g8KA>].

318. See generally CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [<https://perma.cc/gKRL-UYTD>].

319. *Id.* at 11.

320. Tonja Jacobi, *Justices Sign on to Loosened Ethics in and out of the Courtroom*, BLOOMBERG L. (May 17, 2023, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/justices-sign-on-to-loosened-ethics-in-and-out-of-the-courtroom> (on file with the *Iowa Law Review*).

321. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1993).

standard-bearer, suddenly died, resulting in a vacancy that President Obama attempted to fill by appointing Merrick Garland, a highly respected judge on the D.C. Circuit at the time. The Republican-controlled Senate, however, refused to act on the appointment, arguing that a Supreme Court confirmation should not occur in an election year when an outgoing President was of a different party than the controlling Senate majority.³²² It was not lost on the public that Garland's confirmation would have given liberal-leaning Justices a majority on the Court for the first time since 1970.³²³

The gambit paid off. Donald Trump prevailed in 2016 and appointed Neil Gorsuch to fill Scalia's seat, securing a conservative majority on the Court. Soon after, Justice Kennedy retired, and Trump appointed the reliably conservative Brett Kavanaugh to the Court, who was confirmed by a 50-48-1 vote only after a controversial and widely televised hearing involving allegations of sexual assault.³²⁴ And, soon after, liberal icon Justice Ruth Bader Ginsburg died, giving Trump the opportunity to flip a liberal seat to a reliably conservative vote, which he took by appointing Amy Coney Barrett in a move widely viewed as portending the end of *Roe v. Wade's* constitutional protection of abortion.³²⁵ That view proved true in the 2022 overruling of *Roe* in *Dobbs v. Jackson Women's Health*.³²⁶ The dissenters in that case wrote: "Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court."³²⁷ The culmination of a string of high-profile appointments whose ideologies have shifted the political valence of the Supreme Court has firmly tied the appointments process to popular politics.³²⁸

D. POLITICAL POLARIZATION

These events have, since 2010, coincided with "a rapid rise in party polarization," with Republican voters and candidates becoming more

322. Karoun Demirjian, *Republicans Refuse to Budge Following Garland Nomination to Supreme Court*, WASH. POST (Mar. 16, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/03/16/republicans-refuse-to-budge-following-garland-nomination-to-supreme-court> (on file with the *Iowa Law Review*).

323. See Brandon Bartels, *It Took Conservatives 50 Years to Get a Reliable Majority on the Supreme Court. Here Are 3 Reasons Why*, WASH. POST (June 29, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/29/it-took-conservatives-50-years-to-get-a-reliable-majority-on-the-supreme-court-here-are-3-reasons-why> (on file with the *Iowa Law Review*).

324. Catherine Trautwein, *Inside the Kavanaugh Hearings: An Oral History*, PBS (May 21, 2019), <https://www.pbs.org/wgbh/frontline/article/supreme-court-kavanaugh-collins-flake-heikamp-blasey-ford> [<https://perma.cc/8VNK-FJ7N>].

325. Anna North, *What Amy Coney Barrett on the Supreme Court Means for Abortion Rights*, VOX (Oct. 26, 2020, 7:17 PM), <https://www.vox.com/21456044/amy-coney-barrett-supreme-court-roe-abortion> [<https://perma.cc/5PKS-GRMY>].

326. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022).

327. *Id.* at 414 (Breyer, Sotomayor & Kagan, JJ., dissenting).

328. Dahlia Lithwick, *Most Americans Think the Supreme Court Is Politically Motivated*, SLATE (Nov. 22, 2021, 5:41 PM), <https://slate.com/news-and-politics/2021/11/scotus-approval-rating-s-what-now.html> [<https://perma.cc/45KH-LXLC>].

conservative and Democratic voters and candidates becoming more liberal.³²⁹ As a result, the public is more likely to view the Court in partisan terms, and elected officials are more likely to characterize the Court in partisan terms. With a shrunken political center, the Court, whatever it decides, is likely to dismay around half the populace.

That dismay is increasingly felt by the left. President Trump and his appointees “supercharged liberal discontent with the Supreme Court”³³⁰ by dismantling cherished precedent like *Roe*,³³¹ undermining core progressive values,³³² elevating the primacy of religious rights and gun rights,³³³ expressing a “deep distrust of bureaucracy,”³³⁴ and handing Trump a win on presidential immunity from criminal prosecution.³³⁵ With now more than fifty-five years of conservative dominance on the Supreme Court, the shine of the Court has worn off for progressives.³³⁶ Waning liberal support for the Court, in an age of Court politization and party polarization, is contributing to the view of the Court as just another form of dirty politics.³³⁷

CONCLUSION

Throughout history, the Court has ably managed its relationship with the coordinate branches and the people, despite punctuated events of extraordinary controversy. Today’s Court sits in a somewhat different position, beset by low-grade but persistent political and public skepticism, fueled by charged partisanship and the Court’s own conduct.

It is unclear what the Court can do, or is willing to do, to restore its reputation. The Court has committed itself to assuming the apex position not only of the judiciary but also in law itself, such that the other branches and the people routinely look to the Court to decide the major political and social questions of the day, cast in legal terms.³³⁸ As Susan Carle has argued, when “[c]onfronted with matters they see as profoundly important, [the Justices’] sense of responsibility, if nothing else, impels them to use the power they have to set matters straight in the way they see appropriate.”³³⁹ This Court, in

329. See Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 969 (2016).

330. Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 263 (2019).

331. *Dobbs*, 597 U.S. at 302.

332. See, e.g., *Students for Fair Admissions v. Presidents & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023); *Trump v. Hawaii*, 585 U.S. 667, 697 (2018).

333. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 71 (2022); 303 *Creative LLC v. Elenis*, 600 U.S. 570, 602–03 (2023).

334. Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3.

335. *Trump v. United States*, 603 U.S. 593, 642 (2024).

336. Balkin, *supra* note 330, at 217–18.

337. See Matthew Levendusky et al., *Has the Supreme Court Become Just Another Political Branch? Public Perceptions of Court Approval and Legitimacy in a Post-Dobbs World*, SCI. ADVANCES 1 (Mar. 8, 2024); Bressman, *supra* note 276, at 9 (“[T]he Court is facing a serious test of its continued legitimacy.”).

338. See Balkin, *supra* note 330, at 218–20.

339. Carle, *supra* note 122, at 580.

particular, seems inclined to do so, without regard to the reactions of the political branches or the people.³⁴⁰ Blunt force has overcome master strategy.

But even so, it's not clear the Court feels much threat. Although liberal anger at the Court in the wake of President Joe Biden's election generated calls for term limits and court-packing,³⁴¹ Biden neutralized the fervor by forming a Presidential Commission on the Supreme Court to study reform proposals;³⁴² the Commission did not recommend major reform, and no congressional reform measures resulted from its efforts.³⁴³ So perhaps the Court has calculated that it can continue along its path without paying a price.

But some costs are hidden. This Court, though weathering this stretch of low public opinion, has saved little political capital to cash in when needed. The real fear is whether the Court has exhausted the security and support to stand up when it really matters, perhaps in the face of serious threats to the constitutional order. Today, the Court is vulnerable. And thus so are we.

340. See Steve Vladeck, 99. *Optics Over Politics: Chief Justice Roberts and the Trump/January 6 Cases*, ONE FIRST (Sept. 16, 2024), <https://www.stevevladeck.com/p/99-optics-over-politics-chief-justice> [<https://perma.cc/9DZQ-5UG5>] ("This is a Court that is well aware of the political storms surrounding it (and, in some cases, for which it is responsible), and is *not* simply pulling in its oars.").

341. See Tonja Jacobi & Matthew Sag, *The Supreme Court Needs 15 Justices*, BLOOMBERG L. (May 4, 2021, 3:01 AM), <https://news.bloomberglaw.com/us-law-week/the-supreme-court-needs-15-justices> (on file with the *Iowa Law Review*); Stephen M. Feldman, *Court-Packing Time? Supreme Court Legitimacy and Positivity Theory*, 68 BUFF. L. REV. 1519, 1559 (2020); Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. FOR AM. PROGRESS (Aug. 3, 2020), <https://www.americanprogress.org/article/need-supreme-court-term-limits> [<https://perma.cc/9MKJ-HVSD>].

342. Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021).

343. Eugene Daniels, *Biden's Court Commission Appointees: We Told You So on Expanding the Court*, POLITICO (July 7, 2022, 4:30 AM), <https://www.politico.com/news/2022/07/07/joe-biden-supreme-court-commission-00044401> [<https://perma.cc/TFT7-VJEU>]. President Biden did publish an op-ed urging term limits and a binding ethics code, but no details of that plan ever emerged. See Joe Biden, *My Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WASH. POST (July 29, 2024), <https://www.washingtonpost.com/opinions/2024/07/29/joe-biden-reform-supreme-court-presidential-immunity-plan-announcement> (on file with the *Iowa Law Review*).