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“Lawyers’ Work”: Does the Court Have a Legitimacy Crisis?

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ARTICLE

"LAWYERS' WORK": DOES THE COURT HAVE A LEGITIMACY CRISIS?

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> As long as this Court thought (and the people thought) that we were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our processes of constitutional adjudication consists primarily of making value judgments . . . then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better . . . confirmation hearings for new [J]ustices should deteriorate into question-and-answer sessions in which senators go through a list of their constituents' most favored and disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them.
>
> —Justice Scalia

I. INTRODUCTION

Talk of the Supreme Court's legitimacy is in the air. Indeed, it is almost unavoidable. Critics argue the Court is in danger of being perceived by the public as illegitimate. Is that true? If so, what consequences would likely follow? This Article will address the question of the Court's legitimacy in the present political context. After a brief introduction, it will discuss the concept of institutional judicial legitimacy as it has come to be understood by political scientists. Then, building on Justice Scalia's dissent in *Planned Parenthood v. Casey,*[1] it will briefly discuss those methodologies that Justice Scalia referred to as "lawyers' work"—the analytical techniques that the Justices have traditionally relied on to interpret the Constitution. Further, the Article will engage in an extended review of several historical periods in history in which the public questioned the Court's legitimacy. It will be argued that often, though not always, the Court was able to preserve its legitimacy through the engagement of what Justice Scalia characterized

1. Planned Parenthood v. Casey, 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting).

as "lawyer's work." Finally, it will be argued that when the public seriously questions the Court's legitimacy, the constitutional check provided through the appointment and confirmation authority has slowly but surely resolved the crisis. The Article will maintain that recent changes to the Court's composition are simply one more example of the political system employing the constitutionally based appointment and confirmation process to address public dissatisfaction with the Court. The cries of illegitimacy are little more than an anguished response to this change.

It is no secret that we live in politically polarized times. The political polarization has enveloped every governmental institution, including the Supreme Court. The bitter political struggle over the confirmation of Justice Brett Kavanaugh brought the political dispute over the Court into public focus.[2] Many who bitterly opposed the replacement of Justice Kennedy with Justice Kavanaugh assumed the appointment would lead to a solid conservative majority on the Court that would overrule or significantly narrow decisions they prefer, or at the very least would render it far more difficult to persuade the Court to use constitutional interpretation to deliver desired political results. Many of Justice Kavanaugh's supporters hoped that was exactly what might well happen and had voted for President Trump in anticipation of that possibility. It was a heated and bitter political battle but well within the boundaries set by the Constitution.

Following the appointments of Justices Gorsuch and Kavanaugh, both nominated by President Trump, editorials, op-eds, and blogs argued that conservative oriented decisions—especially those favoring President Trump and his policies—will raise serious questions as to the legitimacy of the Court as an institution.[3] Five senators filed an amicus brief

2. *See generally* CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT, FROM SCALIA'S DEATH TO JUSTICE KAVANAUGH (2020) (explaining the political fight involved in the appointment of Justice Kavanaugh); MOLLIE HEMINGWAY & CARRIE SEVERINO, JUSTICE ON TRIAL: THE KAVANAUGH CONFIRMATION AND THE FUTURE OF THE SUPREME COURT (2019) (showing a detailed account of the political battles surrounding Judicial confirmations from Robert Bork in 1987 to Brett Kavanaugh in 2018).

3. Joshua A. Geltzer, *Will the Legitimacy of the Supreme Court Survive the Census Case?*, N.Y. TIMES (May 31, 2019), https://www.nytimes.com/2019/05/31/opinion/census-citizenship-question-supreme-court-travel-ban.html [https://perma.cc/2RSR-FZEV]; Ronald Brownstein, *Brett Kavanaugh is Patient Zero*, THE ATLANTIC (Oct. 1, 2018), https://www.theatlantic.com/politics/archive/2018/10/kavanaughs-partisanship-threatens-supreme-court/571702/ [https://perma.cc/F7V3-M95P] ("President Trump's nominee would bring a virus of illegitimacy and partisanship to the Supreme Court."); Paul Waldman, *Yes the Supreme Court Is Facing a Legitimacy Crisis and We Know Exactly Whose Fault It Is*, WASH POST. (Sept. 24, 2018, 2:06 PM CDT), https://www.washington

with the Court in a New York gun regulation case threatening the Court with "restructuring" if it did not dismiss the case.[4] These warnings of potential illegitimacy may be attributable to at least four factors. At least some of this onslaught is aimed at Chief Justice Roberts and is certainly intended to intimidate him into rejecting the conservative majority in key areas.[5] It is widely believed that Chief Justice Roberts may have taken such institutional arguments seriously in his decisions to vote to reject the challenge to the Affordable Care Act,[6] to find that the provision of Title VII of the Civil Rights Act of 1964 prohibiting discrimination "because of sex" applied to homosexuals and transgenders,[7] to temporarily halt President

post.com/blogs/plum-line/wp/2018/09/24/yes-the-supreme-court-is-facing-a-legitimacy-crisis-and-we-know-exactly-whose-fault-it-is/ [https://perma.cc/2JVP-5HSZ]; Ian Millhiser, *Brett Kavanaugh is an Existential Threat to the Supreme Court*, THINK PROGRESS (Sept. 27, 2018), https://archive.thinkprogress.org/brett-kavanaugh-risks-destroying-the-supreme-courts-legitimacy-684e7627961e/ [https://perma.cc/9A2V-6MA9]; Amelia Thompson-DeVeaux & Oliver Roeder, *Is The Supreme Court Facing a Legitimacy Crisis?*, FIVE THIRTY EIGHT (Oct. 1, 2018, 6:00 AM), https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/ [https://perma.cc/7UPB-65PZ]; Richard L. Hasen, *The Census Case Is Shaping Up to be the Biggest Travesty Since* Bush v. Gore, SLATE (June 25, 2019, 6:29 PM), https://slate.com/news-and-politics/2019/06/census-case-john-roberts-bush-v-gore-tragedy.html [https://perma.cc/4Z4X-H6WT]; *see* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 n.1 (2019) (citing a collection of further articles alleging that the Court is illegitimate).

4. Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kirsten Gillibrand as Amici Curiae in Support of Respondents, New York State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280); *see Senators File an Enemy-of-the-Court Brief*, WALL ST. J. (Aug. 15, 2019, 11:48 AM ET) [https://perma.cc/D6V7-BMK6] ("'The Supreme Court is not well,' they tell the Justices in what is really an enemy-of-the-Court brief. 'Perhaps the Court can heal itself before the public demands it be restructured in order to reduce the influence of politics.'"). The case was dismissed as moot on April 27, 2020.

5. The Editorial Board, *The Assault on the Supreme Court*, WALL ST. J. (Sept. 16, 2019, 6:55 PM ET) [https://perma.cc/PDU9-DXFJ] (noting the Democratic strategy "includes regular campaigns lecturing Chief Justice Roberts about 'legitimacy' whenever a case with political implications is heard"); Kevin D. Williamson, *John Roberts, Eternal Hostage*, NAT'L REV. (Jan. 16, 2020, 6:30 AM) [https://perma.cc/PRZ6-ZT2L].

6. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2597–98 (2012) (showing Chief Justice Roberts accepted the challenger's argument that the individual mandate of the Act could not be sustained under the commerce power but then concluded that it could be sustained as a potential exercise of the congressional taxing power). The Roberts decision to uphold the Affordable Care Act has been widely interpreted as an attempt to protect the Court's institutional credibility during an election year. JEFFREY TOOBIN, THE OATH 283 (2012).

7. *See* Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1743 (2020) ("[T]hese cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always

Trump's repeal of DACA,[8] and in deciding the *Census Case*[9] as well. It is understandable that those opposed to more conservative results would assume that in any major politically controversial case that Chief Justice Roberts could be swayed.[10] The critics charge that if the Court decides cases, especially those involving the President or his policies, in a politically conservative manner, it will lose its legitimacy as an institution. As such, the charges of potential illegitimacy are designed to influence the Chief Justice.

The second reason for the illegitimacy claims is to influence the public against the Court.[11] The critics may believe that if they can succeed in convincing a significant portion of the public that the Court is behaving in a partisan and non-judicial manner, the public may rally against the Court politically by pressuring Senators to vote against future conservative

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been prohibited by Title VII's plain terms—and that 'should be the end of the analysis.'") (citation omitted).

8. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020) ("[W]hen an agency rescinds a prior policy its reasoned analysis must consider the 'alternatives' that are 'within the ambit of the existing policy' . . . . But the rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. [The memorandum] 'entirely failed to consider [that] important aspect of the problem.'") (citations omitted).

9. *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575–76 (2019) ("[W]e cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but . . . not required . . . . The reasoned explanation requirement . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.") (citations omitted) (quotation omitted).

10. Ilya Shapiro, *How the Supreme Court Undermines Its Own Legitimacy*, WASH. EXAMINER (July 18, 2019, 11:00 PM) [https://perma.cc/7C9J-MQQN] (stating the threat to legitimacy claims will continue as "a cynical tactic that will continue so long as it appears to be an effective guilt trip against 'institutionalist' judges such as Chief Justice John Roberts"). By accepting the threat to legitimacy arguments and issuing compromise decisions to appease the critics, Shapiro argues the Court actually undermines its legitimacy. *Id.* *See* Luis Fuentes-Rohwer, *Taking Judicial Legitimacy Seriously*, 93 CHI. KENT L. REV 505 (2018) (using a similar argument); *see also* Randy E. Barnett, The Disdain Campaign, 12 HARV. L. REV., 1, 8 (2012) (explaining legal "intelligentsia" used threats of illegitimacy to bully Chief Justice Roberts to vote to uphold the Affordable Care Act); The Editorial Board, *Senators File an Enemy-of-the-Court Brief*, WALL ST. J. (Aug. 16, 2019, 11:48 PM ET) [https://perma.cc/D6V7-BMK6] ("When liberals worry about losing a major Supreme Court case, they usually make appeals to the Court's legitimacy.").

11. *See* Cass R. Sunstein, *If People Would be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 189 (2007) (noting that "meaning entrepreneurs" might use the media to rally the public against particular interpretations by the Court). Sunstein notes that on difficult questions of constitutional interpretation, public outrage could provide the Court with useful information. *Id.* at 176; *see also* MOLLIE HEMMINGWAY & CARRIE SEVERINO, JUSTICE ON TRIAL 304 ("Make no mistake, the smear campaigns against judicial nominees are themselves an attack on the Court's legitimacy.").

nominees. Alternatively, the critics may hope to encourage readers to vote against Presidential candidates inclined to nominate conservatives to future vacancies or senators inclined to confirm such nominees. Additionally, the critics may hope to drive down respect for the Court as an institution in public opinion polls causing the Justices to moderate their opinions in response.

The third reason for the warnings of illegitimacy is that many of the critics of the Court are true believers in a "living constitution" approach to constitutional interpretation, under which the Court employs open ended phrases in the document—including equal protection and due process—to achieve progressive results. These critics believe that this is the correct approach to constitutional interpretation and that a Supreme Court majority that would reject an interpretive approach, substituting instead a far more constraining methodology such as textualism or originalism, would indeed render the Court illegitimate. Indeed, some of the claims of illegitimacy are based on a deep and heart-felt disagreement about the role of the Court and appropriate interpretive methodology.

Finally, the critics arguing that the Court is behaving illegitimately may simply be venting their anger after concluding that the confirmation of Justices Gorsuch and Kavanaugh significantly decreases the possibility that the Court can be convinced to issue decisions confirming their political positions. Over the past sixty years, the Court has been amenable to progressive social and legal change through constitutional adjudication. Liberals and progressives have come to rely on the Court as a means of effecting political change that could not be achieved readily through the political process. Those who have come to rely on the Court as an instrument of liberal and progressive political change have tended to view this type of adjudication as normal and neutral. Hence, the potential diminishment of this avenue of political relief seems disconcerting causing some to lash out in rage.

The question of judicial legitimacy is not new. It is well accepted that an unelected, politically unaccountable court, with no direct enforcement power depends on public support and approval, often characterized as moral capital or legitimacy, to obtain compliance with its decisions, which very frequently dissatisfy significant segments of the public. The issue of institutional legitimacy, especially judicial legitimacy, has long been of interest to political scientists, legal academics, philosophers, and

sociologists.[12] In these disciplines, the discussion is generally arcane, academic, and of little interest or understanding to the general public. Academics have identified at least two types of legitimacy: moral and sociological.[13] Moral legitimacy, largely of concern to philosophers, tends to concentrate on whether particular decisions or doctrines are morally proper, hence legitimate, in a jurisprudential sense.[14] That sense of legitimacy is of slight interest to the present controversy. Rather, the focus here is on sociological legitimacy, which focuses on public approval or disapproval of particular decisions or of the Court as an institution.[15] Sociological legitimacy is the domain of political scientists rather than moral philosophers and is closer to the type of legitimacy at the center of recent discourse. The argument is that decisions favoring the President and his policies by a Supreme Court majority that he helped to create will endanger the Court's legitimacy. Is that true? And if so, what will be the institutional and societal consequences?

Justice Scalia was correct in arguing that as long as the Court engages in "lawyers' work" the public will generally leave it alone. Research confirms

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12. *See* James L. Gibson & Michael Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto*, 10 ANN. REV. OF L. & SOC. SCI. 1, 1 (2014) ("Perhaps no concept in social science has received as much attention as the age-old concept of 'legitimacy.'") [hereinafter Gibson & Nelson, *Conventional Wisdoms*]; RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 2 (2018) (examining the role legal and moral legitimacy play in legal correctness and incorrectness from the Court's decisions); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 791 (2001) (arguing that contrary to the assertion of many legal academics, the decision in *Bush v. Gore* did not threaten the Court's legitimacy); Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy and the American Public*, 57 AM. J. POL. SCI. 184, 185 (2013) (seeking to understand the basis for why "Americans ascribe legitimacy to the Court"); Dino P. Christenson & David M. Glick, *Chief Justice Roberts Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 403 (2015) (delving into the things that change the public's perception of the Court's legitimacy); James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the U.S. Supreme Court: Is the Court's Legitimacy Imperiled by the Decision's It Makes?*, 80 PUB. OP. Q. 622, 623–24 (2016) [hereinafter Gibson & Nelson, *Change in Institutional Support*] (attempting to explore competing theories that only blockbuster-type cases may withdraw public diffuse from a theory that every "run-of-the-mill decision . . . is potentially dangerous to the institution's health"); James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 198 (2011) (providing insight into why those who know and acknowledge Justices' application of personal values also extend the most support to the institution).

13. FALLON, *supra* note 12, at 21.

14. Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 116 (2003) (focusing on the moral duty to obey as opposed to sociological or descriptive legitimacy).

15. Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U.L. REV. 985, 989 (1990).

that the public understands that the Court is different from the Executive and Legislative branches of the government and expects the Court to resolve difficult legal questions through the application of legal tools, analytical tools, or both. As long as the public believes that the Court is proceeding in such a manner, it respects the Court and is willing to accept decisions with which large segments of the public, often a majority, disagree. In such instances, the Court's legitimacy is not endangered. However, that is not always the case. There are certain questions that are simply too big and too controversial for the Court to resolve even through the application of "lawyer's work." That may have been the case with the appropriate balance of federal and state authority in the early half of the nineteenth century: the legal ability of Congress to regulate slavery in the territories and whether a woman has a constitutional right to obtain an abortion. Thus, Justice Scalia was essentially, though not entirely, correct.

Suppose the Court does lose public approval and hence a degree of legitimacy—what then? Does a decline or loss of legitimacy mean the rule of law collapses followed by massive defiance of judicial decisions? History suggests otherwise. Rather, on several occasions, the Court has gotten out of step with the public, arguably suffering a crisis of legitimacy. On each such occasion, the disjunction between the public and the Court has been corrected through the replacement of dying or retiring Justices, pursuant to the constitutional check of nomination and confirmation of replacements, and to a lesser extent by Justices themselves changing their approaches to interpretation and adjudication.[16] In other words, maintaining public respect and legitimacy has been a concern for the Court throughout its two hundred-year-plus history. To the extent a judicial legitimacy crisis arises, the political system provided by the Constitution has provided a remedy; although, it often takes an extended period of time and gives rise to significant partisan political fury. This is especially true today with longer life expectancies, longer tenures of service on the Court, as well as a reluctance of Justices to permit a President of a different political ideology to appoint a successor. If the Court is presently in the midst of a legitimacy crisis—and it is difficult to determine whether that is the case—there is every reason to believe, both on the basis of history as well he empirical

16. FALLON, *supra* note 12, at 118 ("If large political majorities dislike the course that the Supreme Court has charted, electorally accountable presidents will use their powers of appointment to install Justices who will chart a new course, much as Roosevelt and Nixon did.").

research of political scientists, that it will be resolved over time as it has been in the past.

Crises of legitimacy for the Court are nothing new. Throughout much of its history, the Court has been at the center of political controversy and yet it has managed to survive. If anything, the respect for the Court has increased over time. As Professor Alexander Bickel wrote in the very first sentence of his classic book *The Least Dangerous Branch*: "The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known."[17] As Bickel explained, it hasn't always been that way. Rather, the Court has acquired its prestige and public support over a lengthy period of time. Throughout much of American history, the Court's legitimacy has not been in question; however, on occasion it has. When that has occurred, the Court has been saved as an institution by the political check of the appointment and confirmation process. That is, when the Court has gotten sufficiently out of step with the public, retirements have led to the appointment of new Justices who have either reversed course or have at least engaged in sufficient retrenchment to defuse any threat to the Court's legitimacy.

Throughout much of its history, the Supreme Court has been a subject of controversy and public and political backlash. Within the very first decade of the republic, the Constitution was amended to overrule the Supreme Court's decision in *Chisholm v. Georgia*,[18] permitting a private citizen to sue a state for money damages absent the consent of the state.[19] The Marshall Court's decision in *M'Culloch v. Maryland*,[20] holding Congress possessed the authority to charter the Bank of the United States and that a state could not impose a targeted tax on the Bank's assets, led to perhaps the most vigorous political backlash against the Court in the nation's history.[21] In 1857, the *Dred Scott*[22] decision, holding that a slave or descendant of a slave could never be a citizen of the United States or of a

17. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962).

18. Chisholm v. Georgia, 2 U.S. 419 (1793).

19. *See generally id.* at 424 ("[I]f it be allowed, that a State may be sued by a foreigner, why, in the scale of reason, may not the measure be the same, when the citizen of another State is the complainant?").

20. M'Culloch v. Maryland, 17 U.S. 316 (1819).

21. *See generally id.* at 408 ("[A] government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution.").

22. Scott v. Sandford, 60 U.S. 393 (1857).

state, and that Congress lacked power to prohibit slavery in the territories, inflamed a national controversy that culminated in secession and the Civil War.[23]

The approximately forty-year period from the 1890s to 1937, often characterized as the Lochner era, ended in a political revolt against the Court, the introduction of President Roosevelt's Court packing plan, and an abrupt change in the Court's interpretive approach. This is often cited as a stunning example of the Court eventually bowing to political backlash.

The Warren Court engaged in aggressive judicial review attacking school desegregation, mandating reapportionment of state legislatures, expanding the rights of the accused, prohibiting prayer in schools, and so much more. Eventually, the unpopularity of many of these decisions led to a political backlash which helped propel Richard Nixon to the presidency resulting in a fairly abrupt change in the composition of the Court.

No decision in history has led to a longer and more sustained challenge to the Court than the Burger Court's decision in *Roe v. Wade*.[24] Due to the very nature of the issue of abortion, as well as the Court's inability to justify the decision in a legally acceptable manner, five decades after the case was decided, *Roe* still remains a flashpoint of controversy looming over the Court. In deciding *Roe*, the Court seemed to descend into a maelstrom from which escape is difficult if not impossible. Arguably, the continuing controversy surrounding *Roe* contributed in a significant way to recent changes in the composition of the Court.

A series of decisions by the Rehnquist and Roberts Courts, including *Bush v. Gore*,[25] *District of Columbia v. Heller*,[26] and *Citizens United v. FEC*,[27] have led to extended grumbling by critics, but have not resulted in sustained political backlash against the Court. Empirical research suggests that as of 2013, self-identified conservatives held the Court in lower esteem than liberals despite the fact Republican presidents have appointed a majority of the Justices.[28] This may be attributable to the disappointment of

23. *See generally id.* at 427 ("The principle of law is too well settled . . . that a court can give no judgment . . . where it has no jurisdiction; and if . . . it appeared that he was still a slave, the case ought to have been dismissed.").

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

25. Bush v. Gore, 531 U.S. 98 (2000).

26. Dist. of Columbia v. Heller, 554 U.S. 570 (2008).

27. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

28. Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 194 (2013).

conservatives in the apparent inability of Republican presidents to alter the ideological direction of the Court,[29] or perhaps to the perception that the Court is an elite institution aligned against more traditional values held by the public at large.

Arguably, recent changes in the Court's composition, and potentially its interpretive direction, are yet the most recent example of the exercise of a constitutionally based political check on the Court. This is especially true given that, as a candidate, Donald Trump made Supreme Court appointments a crucial issue in his campaign and voters responded favorably. Consequently, any crisis of legitimacy, if there was one, occurred prior to the election, not afterwards. In the long run, nothing disturbing has occurred. History and political science indicate that the Court has a deep reservoir of public support that it can draw on when it is challenged by those disappointed with its decisions. Rarely, if ever, do claims of illegitimacy lead to defiance of or a restructuring of the Court. The general public almost always continues to respect and support the Court even when it disagrees with its approach and decisions. Even so, the Court stretches its goodwill with the public past the breaking point, the constitutionally based political process exercised through the appointment and confirmation process will succeed in redirecting the Court.

II. THE CONCEPT OF JUDICIAL LEGITIMACY

To begin, it is worthwhile to ask why the Supreme Court and its decisions matter. Over time, the Court has utilized judicial review, especially through constitutional interpretation, to resolve many difficult legal, political, and social issues. Arguably, judicial review, at least as contemplated by the Marshall Court, was never intended to extend as widely and deeply as it has in the twentieth and twenty-first century America.[30] However, that is water under the bridge. The Court has employed judicial review broadly and the public, by and large, has accepted it. For most people, it seems sensible to have a body that can settle difficult and troubling legal questions. But why does the public acquiesce to the decision of five Justices even when a large segment of that public, very often a majority, disagrees with the result?

29. *Id.*

30. WILLIAM NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 8, 63 (2000); *see* Michael Klarman, *How Great Were the "Great" Marshall Court Decisions*, 87 VA. L. REV. 1111, 1121 (2003) ("Marshall simply was evincing his commitment to the prevalent understanding that judicial review authorized invalidation of only obviously unconstitutional laws.").

Discussions of judicial legitimacy usually start by quoting Alexander Hamilton's famous remark in *Federalist* No. 78 that, "[t]he judiciary . . . has no influence over the purse or the sword . . . [i]t may truly be said to have neither FORCE nor WILL, but merely judgment."[31] Why then does the public accept and obey judicial decisions with which it disagrees? The answer supplied by generations of political scientists and legal scholars is that the Court relies on its accumulated "moral capital" to ensure obedience.[32] This constitutes the Court's legitimacy. In other words, to be effective, at least in a democracy, a governmental institution, including the Supreme Court, must be perceived by the public as legitimate.[33] Otherwise, it would be ignored. This is especially true with respect to the courts which, as Hamilton noted, have no direct enforcement power.[34] As political scientists have declared: "*Legitimacy is for losers*, since winners ordinarily accept decisions with which they agree . . . ."[35] Interviews with Supreme Court Justices indicate that many are concerned with maintaining public support and, hence, legitimacy.[36] Arguably, at least some Justices are more influenced by elite opinion than the opinion of the public at large.[37]

Political scientists who study judicial legitimacy tend to divide the concept

31. THE FEDERALIST NO. 78, at 291 (Alexander Hamilton) (J. & A. M'Lean 1788).

32. James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POLITICAL SCIENCE 162, 173 (2014) ("[B]ecause the Court currently attracts legitimacy from the majority, its ability to rule against the people's preferences, even up to one-half or so of the time, is secure."); Walter F. Murphy & Joseph Tanenhaus, *supra* note 15, at 992 (1990) ("In a political system ostensibly based on consent, the Court's legitimacy—indeed the Constitution's—must ultimately spring from public acceptance, even approval, of its various roles."); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 127–28 (1980).

33. Murphy & Tanenhaus, *supra* note 15, at 992 (1990) ("In a political system ostensibly based on consent, the Court's legitimacy—indeed the Constitution's—must ultimately spring from public acceptance, even approval, of its various roles."). The perception of the legitimacy of the Court as an institution by the public also helps to legitimize the policies which the Court approves. Jeffery J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RES. Q. 675, 677 (1994).

34. THE FEDERALIST NO. 78, at 291 (Alexander Hamilton) (J. & A. M'Lean 1788) ("The judiciary . . . has no influence over either sword or the purse.").

35. James L. Gibson et al., *Losing but Accepting: Legitimacy, Positivity Theory and the Symbols of Judicial Authority*, 48 LAW & SOC'Y REV. 837, 839 (2014).

36. Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 973 (2009) (quoting interviews with several unnamed Justices).

37. Lawrence Baum & Neal Devins, *Why the Supreme Court Cares More About Elites, Not the American People*, 98 GEO. L. REV. 1515, 1528 (2010).

into diffuse support and specific support.[38] Diffuse support focuses on public approval of the Court as an institution.[39] Specific support tends to focus on whether the public approves or disapproves of a particular decision or doctrine of the Court, i.e., judicial performance.[40] Of the two, diffuse support is more important since the Court needs to rely on it when specific support declines. If the Court has sufficient diffuse support it can render decisions unpopular with a majority of the public without threatening its legitimacy as an institution.[41] Indeed, a study conducted in 2005, by arguably the preeminent expert on public opinion and the Court, concluded that the extremely partisan political climate that exists in the country has no discernable impact on public support for the Court and hence its legitimacy.[42] Research tends to show that the impact of disapproval on specific decisions may have a short term negative impact on diffuse support for the Court; however, that effect will dissipate rapidly.[43] Yet, a recent

38. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992) ("The distinction between diffuse and specific support strikes us as conceptually sound and intuitively pleasing.").

39. *Id.*

40. *Id.*

41. *See* Gibson & Nelson, *supra* note 32, at 171 ("[T]he Court enjoys a wide and deep 'reservoir of goodwill,' and its supply of institutional support is not overly dependent upon pleasing people on a day-to-day basis with its decisions."); Caldeira & Gibson, *supra* note 38, at 636 (showing the general public support for the Court is unaffected by the results of particular decisions, however the opinion of elites is); *id.*, at 643 ("[W]e find no evidence to buttress the argument for a connection between partisanship and institutional support for the Court."). *But see* Bartels & Johnston, *supra* note 12, at 192 (explaining the conclusion that although there is substantial diffuse support for the Court, persons on the ideological extremes tend to base their support for the Court on whether they approve of the Court's decisions). *See* Walter F. Murphy & Joseph Tanenhaus, *Explaining Diffuse Support for the United States Supreme Court: An Assessment of Four Models*, 49 NOTRE DAME L. REV., 1037, 1042 (1974) (showing the argument that learning to respect institutions in childhood offers the best explanation for diffuse support for the Court).

42. *See* James L. Gibson & Michael Nelson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL. STUD. 507, 533 (2007) (concluding the legitimacy of the Court survives even with vast differences in public opinion over decisions); Gibson & Calderia, *supra* note 12, at 211 (explaining the public appreciates that the Court exercises discretion in a principled manner); Baum & Devins, *supra* note 37, at 1548 ("That evidence shows that the Justices have little to fear from a public that disagrees with its decisions, because its legitimacy is largely impervious to such disagreement."). *But see* David Fontana, *How Do People Think About the Supreme Court When They Care*, 93 N.Y.U. L. REV. ONLINE 50, 51 (2018) (explaining the argument that much of the diffuse support for the Court accumulates when the public is unconcerned about the Court and its decisions).

43. *See* Gibson & Nelson, *Conventional Wisdoms*, *supra* note 12, at 8–9 (noting one decision will not have a lasting impact on the public perception of the Court). In a polarized nation, specific disapproval of decisions tends to be cancelled out by approval by others. Christenson & Glick, *supra* note 12, at 416. This suggests that the Court's legitimacy can best be protected by the practice of

empirical study found the Court's "overly liberal" decisions has had a negative effect on the its overall approval rating.[44] The recent dispute over the Court's legitimacy discussed herein will focus largely on diffuse support since that is what the Court must rely on when it renders unpopular decisions.

Presumably, the Court has accumulated a high level of diffuse support over its two hundred-year-plus history. The Court is not the untested and possibly feared institution that it was when Hamilton wrote *Federalist* No. 78. Political scientists have argued that an important source of the Court's diffuse support is the public's perception that the Court is different from other institutions of government such as Congress and the President.[45] The Court purports to decide cases, and generally does, through the application of law as opposed to reaching decisions solely on the basis of policy or value preference.[46] Political scientists refer to this as the "myth of legality," and whether they believe the Court is actually making decisions on the basis of law or whether the Justices are simply using law as a smokescreen to conceal their policy based decisions, they concede that the public perception of "legality" provides powerful diffuse support for the Court as an institution.[47] On the other hand, approval or disapproval of the Court tends to coincide with approval or disapproval of Congress and the President. This suggests that public opinion of the Court tracks public opinion of the government in general.[48] Even so, the public, while supporting the Court, recognizes the Justices must inevitably exercise discretion in deciding cases.[49] More educated and informed members of the public are most likely to believe judicial decisions are based on legal

deciding some cases in favor of each side in an opalized polity. *See* Grove, *supra* note 3, at 2262 (discussing this approach).

44. Kathryn Haglin et al., *Ideology and Public Support for the Supreme Court*, SOCARXIV 1, 28 (Oct. 21, 2018), https://osf.io/preprints/socarxiv/unbmh/ [https://perma.cc/6G2G-895H].

45. Gibson & Caldeira, *supra* note 12, at 214 (asserting judges make decisions within the rule of law and not upon their own ideological opinions).

46. *Id.*

47. John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 929 (2000) ("The myth of legality is the belief that judicial decisions are based on autonomous legal principles . . . [and] is deeply ingrained in American political culture.").

48. Sofi Sinozich, *Public Opinion on the US Supreme Court, 1973–2015*, 81 PUB. OP. Q. 175, 179, 185 (2017).

49. *See* Gibson & Nelson, *Conventional Wisdoms*, *supra* note 12, at 20–21 ("[W]hat distinguishes the judges in the minds of the American people is that the judges exercise discretion in a principled fashion.").

principles.[50] Diffuse support for the Court declines if the public concludes that the Justices are simply making policy or political decisions.[51] Justice Scalia recognized this in his dissent in *Planned Parenthood v. Casey*, which emphasized the essential need for the Justices to decide cases by "lawyers' work."[52]

That leads to the question of how the Court should respond to concerns of public dissatisfaction with its work. One approach, perhaps best identified by the late Alexander Bickel, is that the Court always has, always will, and always should respond strategically.[53] That is, the Court is aware of its need for general public approval and should and will avoid deciding cases that will lower its public esteem and hence its moral capital, the key to its legitimacy. Such a philosophy entails taking a minimalist approach to constitutional decision-making and avoidance of controversy whenever possible. Under this approach the Court will make liberal use of the various avoidance devices, which Bickel characterized as the "passive virtues."[54] The theory is the Court should and will maintain its legitimacy by avoiding controversy to the extent possible.[55] The theory, to a large extent, rests on the belief that the Court will inevitably behave in a self-protective manner as virtually any institution would.[56] Were the theory accurate in every respect, the Court would never have decided cases that have resulted in

50. Scheb & Lyons, *supra* note 47, at 930.

51. *See* Michael J. Nelson & James L. Gibson, *Has Trump Trumped the Courts?*, 93 N.Y.U. L. REV. 32, 35 (2018) ("But, when citizens believe that judicial behavior crosses the line from principled to politicized, they no longer extend high levels of support to the courts.").

52. *See* Planned Parenthood v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., dissenting) ("As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone.").

53. *See generally* BICKEL, *supra* note 17 (discussing the relationship between the Court, the law, and politics); *see also* Sunstein, *supra* note 11, at 172 ("If the Court is concerned about its own place in the constitutional order, and wants to maintain its legitimacy and power, it might take account of outrage as a method of self-preservation."); Clark, *supra* note 36, at 973 (highlighting interviews with some Justices that suggest they do take potential public disapproval into account in rendering decisions).

54. *See generally* BICKEL, *supra* note 17 (discussing a study of the formal techniques for avoidance of decision, termed "passive virtues").

55. *See* Micheal W. Giles et al., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 293, 303 (2008) ("[T]he strategic behavior explanation which posits that justices respond strategically to public opinion to protect the Supreme Court's legitimacy . . . .").

56. *See generally id.* at 303 (2008) (concluding empirical research provides no support for the theory that Justices engage in strategic decision-making).

intense political reaction. At the very least, these decisions would be said to be a result of the Court's gross underestimation of the strength of disapproval that these decisions provoked. If the Court always behaved strategically, there would have been no *Dred Scott*, no *Roe v. Wade*, no *Lochner v. New York*, no *Miranda v. Arizona,* and no school prayer cases. If the Court always behaved strategically, *M'Culloch v. Maryland* would not have been so strident and dogmatic. The Court has not always attempted to avoid political controversy.

There is a different theory of the judicial role perhaps best articulated by Gerald Gunther in open debate with Alexander Bickel.[57] Gunther argued it is the Court's duty to decide cases properly brought before it according to the law with no consideration of the political consequences, even to the Court itself. In other words, the Court should never employ the avoidance devices in a manipulative manner for self-protection. Rather, the Court must decide the cases as the law dictates and let the chips fall where they may. According to this view, enforcement responsibility rests with the Executive branch and as such, should not be the Court's concern even if lack of enforcement undermines respect for the Court. Both Bickel and Gunther are partially correct in terms of the Court's past behavior. Sometimes the Court has behaved strategically and at other times it has not.

Empirical research suggests that the public respects the Court to a large extent because it believes the Court behaves more like the model presented by Gunther than by Bickel.[58] Diffuse support for the Court tends to be based on the view that the Justices decide cases impartially as the law requires, rather than in a strategic, self-protective manner.[59] If the public

57. *See generally* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (promulgating a new thesis of the "passive virtues" in preview and opposition of Bickel's).

58. *See* Scheb & Lyons, *supra* note 47, at 935 ("Americans are more comfortable with a Court that they perceive to base its decisions on original intent and precedent, rather than on ideology, partisanship, or pressures from other institutions.").

59. *See id.* (positing that though only a quarter of the public believes that the Justices rely primarily on legal principles in decision-making, this support for the Court would further decline if the public believed that the Court was making primarily political decisions); Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCHOL. 597, 603 (2006) ("[R]eceiving information that justices bargain and compromise produces more negative evaluations of Court procedures relative to when the process is portrayed as guided largely by legal factors."); Christenson & Glick, *supra* note 12, at 415 (highlighting the perceptions of legitimacy decrease most significantly among those who learned that the Court was influenced by non-legal factors and did not align with their personal ideologies).

believed the Court was behaving in a manipulative manner, diffuse support would decline.

Those who favor a strategic self-protective role for the Court can argue their authority depends on acceptance by the public and as such, the Court needs to conserve its moral capital for those unusual occasions when they need to spend it in the face of severe public opposition. If the Court decides too many cases that are inconsistent with public opinion and values, it will eventually discover that voluntary compliance with its mandates will diminish. This position assumes the diffuse support that the Court presently maintains can be undermined in a significant way. The counterargument is the Court's constitutional obligation is to apply the law faithfully, without concern for the consequences. Alternatively, proponents of this approach could contend that the Court's moral capital is great and difficult to exhaust, and the Justices themselves are ill equipped to estimate whether particular decisions, or lines of decisions, are likely to diminish the Court's public support.

There has been speculation that Chief Justice Roberts's decisive vote to uphold the Affordable Care Act was a strategic decision motivated by a desire to protect the Court from being thrust into the 2012 presidential campaign.[60] Research tends to show that members of the public, upon being informed that such considerations may have guided the decision, lowered their opinion of the Court.[61] This would seem to present a paradox. Action taken to preserve the Court's legitimacy, if so understood by the public, could actually undermine the very support it is attempting to preserve.[62] This suggests that the Court can appear to decide cases in a strategic, as opposed to a legalistic manner, only infrequently without endangering its diffuse support. Moreover, an individual justice's decision to behave strategically may turn on an assessment of the likelihood that such behavior will be recognized by a significant segment of the public. An evaluation of the breadth and depth of diffuse support, and a calculous of whether more damage will be done to the Court's reputation by deciding

60. *See* MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 350–51 (2013) (referencing a report by CBS correspondent Jan Crawford discussing the political influence of Chief Justice Roberts's vote to uphold the ACA).

61. Christenson & Glick, *supra* note 12, at 415 ("People who got bad news on both fronts—that is, read about the non-legal influences on the Court and came to see the Court as less congruent with their views than they previously believed—exhibited especially large legitimacy losses.").

62. *See* Grove, *supra* note 3, at 2269 (discussing the possibility that actions taken to preserve legitimacy may in fact lead to its diminishment).

the case strictly according to law or by deciding it through recognizable strategic manipulation.

The Court has much more room to behave strategically with respect to its selection of cases to review than in deciding cases on the merits. This will certainly be the case given that the Court can only decide a minimal percentage of the cases filed on the merits, along with the fact the public will be less aware and less concerned with the cases the Court declines to hear. Indeed, Professor Alexander Bickel who addressed the strategic nature of the Court's decision-making process argued that such strategic considerations should predominate primarily in docket management.[63]

Other factors seem to increase the Court's diffuse support. Some scholars have argued there is a positivity theory that works in the Court's favor.[64] Arguably, some of the Court's diffuse support is attributable to the public's belief in and support of American institutions, democracy, the rule of law, and the need to have an institution that can resolve hard legal questions.[65] In addition, the Court's symbols—the robes, the majestic building, the honorary titles by which the Justices are addressed, and the secrecy—all contribute to the public's diffuse support.[66] All of this leads to the Court's legitimacy which seems to have increased over time.

There also appears to be a negativity bias at work because decisions which a large segment of the public disapprove of seem to reduce support for the Court to a greater extent than decisions that are met with public approval which seem to increase public support.[67] This is in line with social science

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63. BICKEL, *supra* note 17, at 127–33.

64. Gibson & Nelson, *Change in Institutional Support*, *supra* note 12, at 626 ("The magnitude of the effects of democratic values typically dwarfs the predictive power of all other explanatory factors . . . .").

65. *See* Gibson, *supra* note 42, at 532–33 ("[L]oyalty toward the institution is grounded in broader commitments to democratic institutions and processes, and more generally in knowledge of the role of the judiciary in the American democratic system."). Even during the war on terror, the American public remained strongly committed to the rule of law. *See* James L. Gibson, *Changes in American Veneration for the Rule of Law*, 56 DEPAUL L. REV. 593, 604 (2007) (noting the reluctance of the American public to allow the government to venture from the rule of law).

66. *See* Gibson et al., *supra* note 35, at 838, 859 (positing judicial symbols do not change or produce attitudes toward the Court but rather activate pre-existing attitudes); Gibson & Nelson, *Change in Institutional Support*, *supra* note 12, at 633 (supporting the conclusion that exposure to judicial symbols increases acceptance of Court decisions).

67. *See* Anke Grosskopf & Jeffrey J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of* Webster *and* Texas v. Johnson *on Public Confidence in the Supreme Court*, 51 POL. RSCH. Q. 633, 636 (1998), https://www.jstor.org/stable/3088042?seq=1 [https://perma.cc/84L4-VLEP] ("[R]espondents offered approximately three times more disliked than liked cases when

research which indicates that negative information has a greater impact on the recipient than positive information.[68] This suggests that the Court could diminish its standing with the public by issuing a serious of well publicized unpopular decisions.[69] Research suggests that decisions perceived as liberal have a greater negative impact on the Court than decisions perceived as conservative.[70] Arguably, the Court attempts to deflect negative bias from itself to the law on which it bases its decisions.[71] In other words, the Court seems to say "Don't blame us. The law made us do it."

It should be clear that the general public is not well informed as to the Court's interpretive process.[72] Many people judge the Court largely, if not exclusively, on the basis of whether they like the results of the decisions.[73] This is hardly surprising. There is no reason to think that the lay public would be legally sophisticated. Moreover, some empirical research indicates that legally trained media commentators have little influence whatsoever on public acceptance of judicial decisions.[74] However, there comes a point at

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answering open-ended questions about the Court's actions."); Gibson, et al., *supra* note 35, at 840 n.4 (arguing positivity theory and negativity bias are not necessarily in conflict).

68. Grosskopf & Mondak, *supra* note 67, at 636 (noting that negative information is weighted heavier by people and that this might also apply to opinions issued by the Court); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 134 (1980) ("[N]egative opinions exercise disproportionate influence in political behavior.").

69. Grosskopf & Mondak, *supra* note 67, at 648.

70. Haglin et al., *supra* note 44, at 28.

71. James L. Gibson, et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 354 (1998).

72. *Cf.* Murphy & Tanenhaus, *supra* note 15, at 1019 (showing public acceptance of the Court's legitimacy is not dependent on an understanding of the Court's application of legal principles); David Adamany, *Legitimacy, Realigning Elections and the Supreme Court*, 1973 WIS. L. REV. 790, 808 (1973) ("[T]he Supreme Court and its decisions have such low salience as to render improbable popular acceptance of governmental action because of public knowledge that the policies have been approved by the justices."). *But see* Caldeira & Gibson, *supra* note 38, at 649 ("Those who are more knowledgeable, more 'elite,' and more active in politics generally show more support for the Supreme Court . . . ."); James L Gibson & Gregory Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429, 439 (2009) (arguing much of the evidence for the thesis that the public is ignorant of the Court is based on improper survey techniques). Instead, they concluded that participants in their survey "demonstrate[d] relatively high levels of information about the Supreme Court." *Id.*

73. *See* Bartels & Johnston, *supra* note 12, at 197 ("When individuals perceive that they are in ideological disagreement with the Court's policymaking, they ascribe lower legitimacy to the Court compared to individuals who perceive that they are in agreement with the Court . . . .").

74. *See* Dan Simon & Nicholas Scurich, *The Effect of Legal Expert Commentary on Lay Judgments of Judicial Decision Making*, 10 J. LEGAL EMPIRICAL STUD. 797, 804 (2013) (concluding the public is influenced by whether respondents personally approve of the result as opposed to whether legal experts

which even the legally untrained will understand that the Justices have exceeded the boundaries of accepted legal interpretation. When that happens, questions as to the legitimacy of the Court may arise.

Apparently, the legal elite hold the Supreme Court in higher esteem than the public at large, almost unanimously accepting its legitimacy.[75] This may reflect the greater familiarity of the legal elite with the Court, extended socialization through legal training and practice, and perhaps an aspect of self-protective behavior in that the legal elite, to a large extent, justifies its existence and status through the legitimacy of the Court.[76] To the extent that the legal elite disagree with specific decisions of the Court, it tends to attribute its dissatisfaction to bad decision-making by the particular Court rather than disapproval of the Court as an institution.[77]

Recently, as noted above, the concept of legitimacy as applied to the Supreme Court or to specific decisions of the Court has crept into general public and media discourse. Partisan political opponents often charge that the Court as an institution has become "illegitimate" either based on a specific decision or a group of decisions. To a large extent, the term illegitimate has become an epithet hurled at political opponents in the hope of influencing the public. As such, these charges of illegitimacy should be understood for what they are, simply examples of overheated partisan political rhetoric which ought not be taken too seriously. This is not the type of legitimacy generally studied by political scientists unless, of course, the rhetoric has the desired effect of actually influencing public opinion.

Empirical research confirms that Justice Scalia was correct in recognizing that public acceptance of the Court and its decisions is grounded in the public's understanding that the Court is attempting, in good faith, to decide difficult legal questions through the employment of accepted methods of legal interpretation,[78] in the words of Justice Scalia, by doing "lawyers'

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view the decision as correct). *But see* Nelson & Gibson, *supra* note 51, at 39–40 (stating charges of politicization of judicial decisions by law professors can have a greater impact in lowering respect for the Court than similar charges by politicians).

75. *See* Brandon L. Bartels et al., *Lawyer's Perceptions of the U.S. Supreme Court: Is the Court a Political Institution?*, 49 LAW & SOC'Y REV. 761, 764 (2015) ("[P]erceived legitimacy among these legal elites is extremely high—and much higher than it is for the mass public at large.").

76. *See id.* at 765 (describing the characteristics that lead to near unanimous approval of the Court).

77. *See id.* at 769 ("For legal elites, the core of institutional legitimacy, which they possess at near unanimous levels, and perceptions of the Court's decision making may be separable constructs.").

78. *See* FALLON, *supra* note 12, at 11 (concluding that in order to adjudicate in a legitimate manner, the Justices must (1) "stay within the bounds of law," (2) exhibit "reasonable practical and

work."[79] If the public concluded that the Court was simply deciding cases on the basis of value judgments or partisan ideology, as opposed to good faith efforts to apply the law, the Court would lose respect.[80] The public assumes that the Court is not simply deciding cases on a political basis, or on the basis of the personal values, or on the ideology of the judges and then providing a legalistic veneer as cover. Rather, it is attempting to resolve hard legal questions by applying reasoning from pre-existing legal principles.[81] The joint opinion in *Planned Parenthood v. Casey* addressed this explicitly. The Court wrote:

> The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. The underlying source of this legitimacy is the warrant for the Court's decisions in the Constitution and lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms that the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under

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moral judgment" and (3) "support their judgments with arguments they advance in good faith"). All of these conditions would satisfy Justice Scalia's criteria of "lawyers' work." *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., dissenting) (noting the public does not negatively view Court decisions when they are perceived to be removed from political influence); *see also* Bartels & Johnston, *supra* note 12, at 194 ("Moderates who perceive the Court as taking a case-by-case approach to its rulings maintain the highest degree of legitimacy among the groups examined . . . .").

79. *See Casey*, 505 U.S. at 1000 (Scalia, J., dissenting) (noting the public does not negatively view Court decisions when they are perceived to be removed from political influence).

80. *See* Tom R. Tyler & Gregory Mitchell, *Legitimacy and Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 705, 783 (1994) ("The data presented extend this conclusion to the Supreme Court: how decisions are made tends to be more important to Court legitimacy than what decisions are made.").

81. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 12 (2d ed. 1994) ("The Court's claim on the American mind derives from the myth of an impartial, judicious tribunal whose duty it is to preserve our sense of continuity with the fundamental law.").

> circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[82]

The joint opinion stated the case for judicial legitimacy more explicitly than had ever been done before by the Supreme Court. The irony is that the very arguments that the joint opinion made for sustaining at least the core of *Roe v. Wade* are the exact arguments raised by its critics to argue it was in fact an unprincipled and hence illegitimate decision.[83]

However, if the concept is to have any meaning, it must be defined with greater precision. What if the Court is deemed to be illegitimate? What then? Does it really matter? To be a meaningful concept, illegitimacy must mean something more than general disapproval. The Court often decides difficult questions of great interest to the public, often by a 5–4 vote. Whether the subject is abortion rights, racial preferences in education, prohibition of school prayer or same sex marriage, a significant segment of society will be pleased with the result in these cases and a significant segment of society will be displeased. To some extent, the pleased and displeased will cancel each other out.[84] That is always the case and the very fact that many dislike a particular decision or doctrine hardly means that there is a legitimacy crisis. Rather, for the Court to be considered illegitimate, a substantial majority of the public must conclude that the Court is so thoroughly off base, it should be significantly restructured or even abolished. Otherwise, illegitimacy simply becomes an epithet of strong disapproval, often grounded in political disagreement. The mere desire to reshape it when possible through the appointment process, as has been done

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82. *Casey*, 505 U.S. at 865–66. Based on a detailed empirical study, Tyler and Mitchell concluded "the findings support the Court's argument that the willingness of the public to empower the Court to make controversial decisions such as *Casey* is related to public perceptions of how Court decisions are made." Tyler & Mitchell, *supra* note 80, at 772. As Robert McCloskey observed, "[t]he judges have usually known what students have sometimes not known—that their tribunal must be a court, as well as seem one, if it is to retain its power." MCCLOSKEY, *supra* note 81, at 13.

83. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE. L. REV. 920, 936, 943, 947 (1973) (discussing the unconstitutionality of the decision in *Roe v. Wade*); ROBERT H. BORK, THE TEMPTING OF AMERICA 112 (1990) ("Unfortunately, in the entire opinion there is not one line of explanation, not one sentence that qualifies as legal argument.").

84. *See* MICHAEL J. NELSON & PATRICK D. TUCKER, THE STABILITY AND DURABILITY OF THE U.S. SUPREME COURT'S LEGITIMACY 8 (2017) (on file with author) ("[B]ecause the number of individuals who are pleased with the decision and the number of individuals who are disappointed in the decision are approximately equal in number, thereby canceling each other out in the aggregate."); Herbert M. Kritzer, *Into Electoral Waters: The Impact of* Bush v. Gore *on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 36 (2001) (stating the effect of those who approved of the decision in *Bush v. Gore* and those who disapproved cancelled each other out).

throughout history does not necessarily mean that the Court is illegitimate. Rather, this suggests the Court has simply grown out of synch with the public and needs to be redirected. Research shows that despite some dissatisfaction from time to time with the Court, an overwhelming majority rejects restructuring, packing, or abolishing.[85] There is also the thought that if the Court were to lose substantial public support, defiance of its mandates might become routine. The risk that the public might ignore judicial decrees may have been a viable threat in the first third of the nineteenth century, before the Court had established its role in the constitutional system and won the respect of the public. The threat of widespread defiance is now minimal. The Court simply has too deep of a reservoir of diffuse support grounded in respect for the rule of law.

By definition, the type of hard questions that come before the Court do not have obvious legal answers. Justices operating in complete good faith may reach opposite conclusions through accepted legal analysis. That should not and generally does not undermine the respect for the law and for the Court. Nor should it undermine the Court's legitimacy that a particular Supreme Court is guided by a particular vision of its role in constitutional interpretation.[86] That has always been the case. The Marshall Court sought to strengthen the federal government with respect to state authority, to establish and secure its own role in the constitutional system, and to encourage business and investment.[87] The Taney Court attempted to consolidate judicial power and preserve the Union.[88] The Lochner-era Court sought to protect private property and business against undue governmental regulation.[89] The Warren Court was interested in expanding the protection of individual rights as well as the role of the Court. The Rehnquist Court was dedicated to restoring the concept of federalism. The Roberts Court may be concerned with minimizing the role of the Court in policy making. The fact that at any given time, the Court has had a discernable agenda or bias does not necessarily threaten its legitimacy as a

85. *See* David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 782 (2012) ("[M]any studies have shown that even in the face of unhappiness with the Court there is very little support for 'fundamental structural changes' to the Court.").

86. *See* Nelson & Gibson, *supra* note 51, at 35 (distinguishing between principled ideologically based decisions which the public accepts and political decisions which it does not).

87. Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 801 (1975).

88. *Id.* at 801–02.

89. *Id.*

judicial institution as long as it is able to achieve its results through the application of accepted legal reasoning.

At the outset, the joint opinion in *Casey* recognized that the public acceptance of the Court's decisions and thus its legitimacy is dependent on the belief that it interprets the nation's laws in a principled manner.[90] How does the Court do that? In his dissenting opinion in the very same case, Justice Scalia provided the answer arguing that to accept the Court's decisions, the public must believe that the Court is doing "lawyers' work."[91] But that begs the question of what is "lawyer's work?" Which methods of analysis are legitimate for judges to employ and which are not? That raises the question of why we ask judges to resolve legal questions. Presumably, the answer lies in the assumption that law has meaning which is discoverable through accepted methods of legal analysis.[92] Otherwise, why are judges any more capable of resolving legal questions than politicians, fortune tellers, or the public at large.

In *Marbury v. Madison*,[93] the case that gave rise to the principle of judicial review, at least with respect to acts of a coordinate branch of government, Chief Justice Marshall endorsed the principle that judges are only authorized to proceed through the application of legal principles.[94] Marshall justified the exercise of judicial review over acts of Congress as subsidiary to courts' obligation to decide cases between the parties to litigation through application of the law. As he noted: "It is emphatically the province and duty of the judicial department to say what the law is."[95] According to Marshall, resolving conflicts through interpretation and application of the law was "the very essence of judicial duty."[96] *Marbury*—and consequently the entire theory of American judicial review—was explicitly based on courts doing "lawyers' work," that is attempting to apply pre-existing legal

90. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 845–46 (1992) ("[C]onsidering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained.").

91. *Id.* at 1000 (Scalia, J., dissenting).

92. Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("Underlying this legal system is the key premise that words, including written laws, are capable of objective ascertainable meaning.").

93. Marbury v. Madison, 5 U.S. 137 (1803).

94. *See id.* at 177–78 (proclaiming the judicial department's duty is to state what the law is and as part of their duty to "apply the rule to particular cases").

95. *Id.* at 177.

96. *Id.* at 178.

principles to resolve legal disputes. It was clearly not based on a conception of the judge identifying and applying unenumerated values or an emerging consensus. Thus, the conclusion that judicial review in a democracy is justified at all is based on the assumption, from the very outset, that judges are resolving the cases before them through the application of legal principles derived through well-accepted methods of interpretation. Any other approach would threaten the legitimacy of the Court.

III. WHAT IS LAWYER'S WORK AND WHY SHOULD THE COURT ENGAGE IN IT?

If the accepted conception of judicial review, which in turn supports the Court's legitimacy as an institution, is based on the assumption that the Court will decide legal disputes through the application of the law, that is, by doing lawyers' work, the question then becomes what lawyers' work is and what are its proper boundaries.

So, what is lawyers' work? What are the accepted methods of legal analysis? What is it that lawyers have been trained to do and how have judges interpreted the Constitution over the past two centuries?[97]

A. *Textualism*

First among these methods is textual analysis. Much of the time, the Court is attempting to discern the meaning of a written text. Indeed, Marshall based his case for judicial review in *Marbury* on the premise that the framers established a written constitution in order to provide clear limitations on power and that the written constraints contained in the text were discoverable by judges through the adjudication of disputes.[98] As such, Marshall privileged textualism as a method of interpretation.[99] Indeed, the Marshall Court produced several of the finest examples of textual analysis including Chief Justice Marshall's exposition of the

97. *See generally* LACKLAND H. BLOOM, JR., METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION (2009) (providing an analysis of the interpretive techniques the Court has relied on throughout its history).

98. *Marbury*, 5 U.S. at 176 ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken or forgotten, the constitution is written.").

99. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) ("When a judge goes beyond the meaning of the words that were enacted—to the unexpressed intentions of the legislature, or to what the courts think would meet the needs and goals of society—the judge has no democratic warrant. The constitutional text is therefore, the first and foremost consideration in judging.").

Necessary and Proper Clause in *M'Culloch v. Maryland*,[100] his interpretation of the Interstate Commerce Clause in *Gibbons v. Ogden*,[101] as well as Justice Story's analysis of Article III in *Martin v. Hunter's Lessee*.[102] The assumption is that words have meaning and the text's legitimate authors intended to convey such meaning. However, texts can be ambiguous, and it is often unclear how the text should apply to uncontemplated circumstances. There will be room for disagreement among those legally trained operating in good faith. To aid in the interpretation of a legal text—be it a constitution, statute, contract, or deed—the courts over time have adopted various canons of construction to provide guidance.[103] The canons will not resolve every issue but at the least, they will often narrow the possibilities. When judges engage in good faith textual analysis, they are doing what lawyers are trained to do. Obviously, well trained judges acting in good faith can interpret a text and reach different conclusions. That has happened often in our constitutional history. That does not mean that the judges are not engaged in lawyers' work and hence are acting illegitimately. Rather, it suggests the types of hard cases that the Court often attempts to resolve do not have easy answers.

An excellent example of two superb Justices reaching different conclusions as to the meaning of constitutional text is found in *District of Columbia v. Heller*.[104] There, Justice Scalia, writing for the majority, interpreted the text of the Second Amendment as recognizing an individual right to possess firearms for purposes of self-defense.[105] Justice Stevens dissented, interpreting the text as recognizing only a collective right tied to service in the now defunct state militias.[106] Each justice marshaled extensive legal support for his respective position. The acceptance of either position would not have presented a challenge to the legitimacy of the Court as an institution. Rather, it was an example of the Court, at its finest, simply doing lawyers' work in a challenging case. While most cases the Court decides today do not involve close interpretation of constitutional text, there are many examples of careful textual analysis throughout the Court's

100. M'Culloch v. Maryland, 17 U.S. 316 (1819).

101. Gibbons v. Ogden, 22 U.S. 1 (1824).

102. Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

103. *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) (discussing the legal canons of interpretation in depth).

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

105. *Id.* at 627–29.

106. *Id.* at 636–38 (Stevens, J., dissenting).

history.[107] For instance, in *The Pocket Veto Case*,[108] the Court interpreted the word "days" in Article I Section 7 to mean legislative days and the word "adjournment" as not limited to final adjournments. In *Hawke v. Smith*,[109] the Court interpreted the word "legislature" in Article 5 to mean a representative body of the people authorized to make laws as opposed to a popular referendum. In *City of Boerne v. Flores*,[110] the Court read the word "enforc[ing]" in Section 5 of the Fourteenth Amendment to effectuate the substantive provisions of the Amendment rather than change its meaning.[111] In *Plyler v. Doe*,[112] the Court understood the phrase "persons within its jurisdiction" in the Fourteenth Amendment to mean, as it seemed, physically as opposed to legally present.[113] These are all examples of judges interpreting a legal text, the Constitution, as lawyers are trained to do. Texts often are subject to alternative interpretations. The majority may not always reach the correct result. But as long as it proceeds in a careful, lawyerly interpretive manner, erroneous conclusions do not threaten the Court's legitimacy. However, textual analysis can cross the line if the judge is acting disingenuously and construing the text to mean something it clearly couldn't mean. If carried on repeatedly, this might cast doubt on the Court's legitimacy. Or it might also suggest that certain judges were simply bad lawyers.

B. *Original Understanding*

One significant related aspect of textual interpretation is original understanding. Assuming that words have meaning, one method of resolving that meaning is to attempt to learn what the public understood the words to mean at the time of their adoption. Sometimes, it will not be possible to discover the original understanding of the text. Sometimes that understanding will not resolve contemporary legal issues. But sometimes it will be very helpful. And if the original understanding of text is clear, it provides a powerful interpretive argument. At the very least it may eliminate certain interpretations that are clearly inconsistent with the original

107. Cummings v. Missouri, 71 U.S. 277, 287 (1866) (reading the phrase "bill of attainder" in Article I broadly).

108. *The Pocket Veto Case*, 279 U.S. 655, 679–80 (1929).

109. Hawke v. Smith, 253 U.S. 221, 227 (1920).

110. City of Boerne v. Flores, 521 U.S. 507 (1997).

111. *Id.* at 519–20.

112. Plyer v. Doe, 457 U.S. 202 (1982).

113. *Id.* at 211–15.

understanding.[114] Just as *Heller* was an excellent example of textual analysis, it was also one of the finest examples of an attempt to discover the original understanding in the United States Reports by both Justice Scalia and Justice Stevens. Original understanding is a powerful legal argument. It makes sense.[115] No competent lawyer or judge would ignore it if it would aid their position. Likewise, to the extent it undermines their position, it would be a great mistake to simply ignore it. There has been a revival of interest in original understanding methodology since Judge Bork, and Justices Scalia and Thomas began to emphasize it over the past forty years.[116] More historical material shedding light on the original understanding of constitutional language is available to lawyers and judges than has ever before. More lawyers and judges have been trained in the competent understanding and usage of this material. There is every reason to believe that serious originalism-based arguments will increase in the future.

C. *Precedent and Doctrine*

Our legal system has developed along a common-law path, meaning precedent and doctrine play a major role.[117] Reliance on precedent furthers legal efficiency by keeping courts from continually needing to reinvent the wheel. Over time, precedent becomes almost as authoritative as statutory or constitutional text.[118] However, courts recognize that they sometimes decide incorrectly, so there is room for the overruling of precedent. But this is very much the exception. There is a strong presumption in favor of precedent. Precedent may be interpreted broadly or narrowly and there is room to argue it is inapplicable to the present controversy. Arguing about the applicability of precedent is quintessential lawyers' work.

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114. *See* H. Jefferson Powell, *Rules for Originalists*, 73 U. VA. L. REV. 659, 661 (1987) (noting the first step that is often ignored by originalists is to see the clear original understanding).

115. *See* FALLON, *supra* note 12, at 48 ("[E]veryone agrees that original meaning matters sometimes.").

116. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (emphasizing the role originalism has played in constitutional interpretation).

117. *See generally* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT (Brian Garner ed. 2016) (providing pertinent information on the role precedent plays in the United States' legal system); MICHAEL J. GERHARDT, THE POWER OF PRECEDENT (2008) (discussing how precedent is used as persuasion in arguing cases).

118. *See* Gamble v. United States, 139 S. Ct. 1960, 1980 (2019) (Thomas, J., concurring) (arguing precedent should never be equated with the status of the text and that the Court should be prepared to overrule clearly erroneous precedent).

Quite apart from precedent, there is doctrine. In areas in which cases arise with frequency, the Court creates legal doctrine to provide guidance both to itself and to lower courts and primary decision-makers. Some doctrine sets forth rules of analysis such as standards of review in particular areas. Other doctrine embodies substantive rules of law. Doctrine plays the important role of injecting a degree of consistency and predictability into the law. Doctrine helps to render legal decision-making law-like rather than wholly ad hoc. By providing a degree of clarity to the law, doctrine avoids the litigation of every case by informing parties and counsel in advance of the likely results if litigation proceeds. The creation of doctrine is necessary to the efficient operation of a precedent-based legal system; however, it always raises the concern that doctrine will assume a life of its own and stray from the primary sources of text, original understanding, and precedent from which it is derived. Engaging in doctrinal analysis is at the very heart of modern constitutional decision-making. It is what judges and lawyers do, what they are expected to do, and what they are trained to do. It is at the very core of "lawyers' work." As with the other methods of analysis, there is much room for plausible disagreement over how doctrine should be interpreted.

D. *Structure*

Yet another accepted method for gleaning constitutional meaning is structural analysis. That is, attempting to derive constitutional principles from the structure of the Constitution and the nature of the government it creates. Structural analysis played a very important role in early Marshall Court decisions, at a time when the Court was writing on a relatively blank slate. *M'Culloch v. Maryland* has been justly cited as the case that embodies structural analysis at its finest and which has since justified structural analysis as a legitimate method of constitutional interpretation.[119] In *M'Culloch*, Marshall relied on constitutional structure to establish broad powers of Congress to choose appropriate means to execute its great enumerated powers and to establish that a state could not constitutionally impose a targeted tax on a federal instrumentality.[120] However, structural analysis is

119. *See* CHARLES J. BLACK JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 4 (1969) (using *M'Culloch* as the paradigm example of the legitimacy and power of structural argument).

120. *See* M'Culloch v. Maryland, 17 U.S. 316, 406, 411–16 (1819) (concluding the word necessary in the phrase "laws which shall be necessary and proper, for carrying into execution the foregoing powers" as being intended to "insure, as far as human prudence could insure, [such powers] beneficial execution").

not simply a remnant of the Marshall Court. More recently, the Court has relied on constitutional structure in cases involving questions of federalism.[121] As with other accepted methods of interpretation, structure is subject to very different visions and hence results. Indeed, in *M'Culloch v. Maryland* itself, the challengers propounded a very different conception of constitutional structure than did Chief Justice Marshall writing for a unanimous court.[122] As with the other accepted methods of interpretation, the very fact of disagreement, especially in hard cases, does not undermine the legitimacy of the methodology. In hard cases by definition, the law is unclear and good lawyers, doing lawyers' work, will make divergent arguments, and the courts, hopefully in good faith, will draw conclusions and resolve the disputes. That is how the legal system proceeds.

E. *Tradition and History*

There are certain areas in which the Court has placed reliance on tradition and history as a method for discovering constitutional meaning. This is particularly true in the area of separation of powers, where alternative modes of analysis may provide little guidance. Perhaps the most noted example of this is Justice Frankfurter's concurrence in *Youngstown Sheet & Tube v. Sawyer*[123] where he wrote "a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making it as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power . . . .'"[124] Tradition and history has also played a role in the Establishment Clause area, where the longstanding recognition and support for a practice, such as legislative prayer, has been a factor—though generally not the exclusive or definitive factor—establishing its constitutionality.[125]

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121. *See generally, e.g.*, New York v. United States, 505 U.S. 144 (1992) (interpreting the Constitution by using its structure to determine the legal questions presented).

122. Maryland's conception of constitutional structure gave precedence to the states over the federal government contrary to Marshall's vision.

123. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).

124. *Id.* at 610–11 (Frankfurter, J., concurring).

125. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786 (1983) ("From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court.' The same invocation occurs at all sessions of this Court.").

Reliance on tradition and history is well accepted in constitutional interpretation; however, it is a slippery methodology easily subject to manipulation.[126] It may be difficult to establish a particular practice or tradition. There may be room for a choice between competing traditions. There will be questions as to whether a particular historical tradition is sufficiently analogous to the question at hand. There may be questions as to whether the tradition is sufficiently worthy of being sustained. There is also a question as to the level of abstraction at which a tradition should be defined, which in a particular case may be outcome determinative.[127] Still, a careful and discerning Justice may draw useful constitutional meaning from a longstanding tradition as Justice Scalia noted in his *Planned Parenthood* dissent, interpreting constitutional traditions is well recognized lawyers' work.

F. *The Tools of the Lawyer's Trade*

Text, original understanding, precedent, doctrine, constitutional structure, and tradition and history have been identified as legitimate means of constitutional interpretation. Why are these methodologies preferred? The answer is because they are the tools of the legal trade and because they have been accepted as legitimate throughout most of our constitutional history. The trust in the Supreme Court (and lower courts) to resolve constitutional disputes is based on the expectation that it will do so through the application of the law in good faith. In applying the law, it is assumed by the public, the legal community, and the Justices themselves that they are in fact resolving disputes according to law and they are deriving that law through accepted interpretive methodologies, as opposed to simply deciding cases based on their own ideologies, value preferences, or their conception of society's emerging consensus. As long as Justices employ these well-accepted methodologies, the Court as an institution will continue to retain respect even though large segments of the public disagree intensely with particular decisions derived through lawyerly analysis. Rather, it is when the Court clearly departs from accepted methods of analysis and decides significant issues based on no discernable form of legal analysis that the Court's institutional reputation is endangered.

126. *See generally* BLOOM, *supra* note 97, at 133–67.

127. *See generally* Michael H. v. Gerald D., 491 U.S. 110 (1989) (showcasing debate between Justices Scalia and Brennan).

A response to this argument is that perhaps over time, more ad hoc non-legalistic interpretation, sometimes characterized as "non-interpretivism," has gained favor with some of the Justices and the public and has come to be accepted.[128] Sometimes this is characterized as a "living Constitution" approach.[129] As such, if free form, result-oriented judging was not initially accepted, perhaps it has become accepted over time. To a large extent, legal academics, well aware of the inherent weakness of certain decisions that they revere, especially *Roe v. Wade*, have attempted to justify such non-legalistic, value-based, result-oriented judging.[130] In its simplest form, this is an ends justifies the means argument.

There are at least three answers to this claim. First, with only a few prominent counterexamples such as abortion rights and same-sex marriage, the Court tries very hard to justify its decisions with traditionally accepted interpretative methodologies. The cases in which the Court is unable to offer such justification are clearly the exceptions or outliers, though they are significant. Both through their decisions and through their statements pertaining to the nature of their work, the Justices themselves purport to believe that they are deciding cases by doing lawyers' work and should be doing just that.

Second, quite apart from judicial behavior, reliance on the well-accepted tools of the legal and judicial craft is the only approach that squares with the very justification for judicial review—the reason why legally trained judges are entrusted with interpreting the law and most particularly the Constitution. As Justice Scalia was known to believe, if the Court cannot resolve a case through the application of interpretive methods designed to clarify pre-existing legal principles, it has no business proceeding. Diffuse public support for the Court, hence its legitimacy, is largely based on the public's perception that the Court is different from the political branches

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128. *Cf.* FALLON, *supra* note 12, at 88 ("American constitutional law is a practice in this sense, constituted by the shared understandings, expectations, and intentions of those who accept the constitutional order and participate in constitutional argument and adjudicative practices."). In other words, the participants in the game make the rules as they proceed. *See also* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 39 (1991) ("[W]hat counts as a plausible legal argument does indeed change, and change profoundly, over time.").

129. *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (arguing against Justice Scalia's method of interpreting the Constitutions as the framers would have understood it).

130. *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975) (examining the controversial assertion that Justices might should apply "principles of liberty and justice when" reviewing laws for constitutionality); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1975) (noting the Court is deviating from an Originalist application when making its decision).

because it attempts to decide cases in good faith through application of law rather than values, ideology, or policy preferences.

Third, acceptance of unconstrained judging becomes a self-fulfilling prophecy. If it is appropriate for the Court to ignore accepted methods of legal interpretation in one case, both the Justices and the informed public will assume that it will be appropriate as well in the next case that presents a desired result with no accepted legal basis. This has the potential to lead the Court away from constrained decision-making in a vast array of cases, endangering the Court's legitimacy and its role in the constitutional system. Under such an approach, the Court would be especially subject to political manipulation. As Justice Scalia noted in his dissent in *Planned Parenthood v. Casey*, judicial confirmation hearings would degenerate into inquisitions focused on potential substantive results rather than the limits of interpretation.[131]

There is no question that the public at large is uninformed about judicial methodology and either approves or disapproves of decisions based primarily on the result.[132] Nevertheless, there are limits to public ignorance or apathy with regard to the Court's interpretive approach. At least a significant segment of the public will lose respect for the judiciary when the issue in question really matters (as abortion does), and the Court's decision is transparently devoid of adequate legal support. At that point, many will conclude that the Court has strayed well beyond its legitimate boundaries and entered the world of partisan politics. In that event, a segment of the public would support the decisions because they are deeply committed to the result and assume that it is the duty of the Court to deliver results that they consider fair and just, at least on matters that they really care about. However, another significant segment of the public will cling to the assumption that it is the proper role of the Court only to decide cases on the basis of law and if the law fails to support a decision, then it is not the Court's business to decide. Consequently, non-legalistic or non-interpretivist judging will all but inevitably lead to political controversy with respect to the Court.

Even when the Court applies these time-honored methodologies of interpretation, there will be room for much play in the joints and in

131. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1001 (1992) (Scalia, J., dissenting).

132. *See* Murphy & Tanenhaus, *supra* note 15, at 990 ("[W]e suspected—correctly, it turned out—that only a small portion of the general public would have a sophisticated understanding of the Court.").

politically controversial cases including *Citizens United v. Federal Election Commission*,[133] and *District of Columbia v. Heller*,[134] as well as cases involving hot-button issues such as racial preferences in college admissions[135] or public school graduation prayer.[136] Plausible arguments can be made in favor of one result or the opposite. The very fact that hard legal questions are difficult and fail to yield a unanimous conclusion should not undermine the Court's legitimacy as long as the Justices are attempting to decide the questions through a good faith attempt to apply the law using well-accepted interpretive techniques.

In addition to proceeding in a more lawyer-like manner, the Court should, and hopefully will, be more cautious in determining what type of cases it can resolve in a principled manner—perhaps reinvigorating the political question doctrine as a protective device. The Court must ensure that its interpretation and decision-making does no more than professionally trained lawyers are capable of doing. If the Court follows that approach, will everyone be happy and rally to the Court's defense? Of course not. There is a significant constituency that has urged the Court to do justice regardless of the law and applauded the Court when it has complied. As noted above, this can become a self-fulfilling prophecy. If there is a segment of the population that expects the Court to resolve controversial political issues in a manner which that segment favors with little if any legal support and the Court does so, an even greater segment of the public will come to accept such judicial over-reaching as the Court's proper role. It is only by pursuing a more restrained approach over a lengthy period of time (perhaps

133. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

134. Dist. of Columbia v. Heller, 554 U.S. 570, 577 (2008) ("The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." (internal citation omitted)).

135. *See* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2205 (2016) (upholding the University of Texas at Austin's admissions policy based in a limited manner on race for the purpose of increasing racial and ethnic diversity); Fisher v. Univ. of Tex., 570 U.S. 297, 310–11 (2013) (clarifying no deference is owed when determining whether the use of race is narrowly tailored to achieve a university's permissible goals); Grutter v. Bollinger, 539 U.S. 306, 311 (2003) (deciding a school's use of race as a factor among many other factors is constitutional); Gratz v. Bollinger, 539 U.S. 244, 249–51 (2003) (holding application of race in mechanical manner such as through an admissions equation is unconstitutional).

136. *See* Lee v. Weisman, 505 U.S. 577, 580 (1992) (deciding whether "clerical members who offer prayers" during a "graduation ceremony is consistent with the . . . First Amendment" and Fourteenth Amendment).

decades) that the Court can reestablish—both for the Justices themselves and hopefully a majority of the public—the appropriate role of the Court in the constitutional system. But there will be a segment of the public, especially among legal academics, who will never be convinced and who will continue to rail for a return to the days when the Court could be expected to come to the rescue and deliver otherwise unachievable political victories.[137] For these critics, the Court's return to a lawyers' work judicial system will evoke cries of illegitimacy.

IV. IS THE SUPREME COURT ALWAYS INVOLVED IN A CONTINUING CRISIS OF LEGITIMACY?

Arguments have been raised that the Supreme Court is facing a crisis of legitimacy capable of destroying the Court as a credible institution. These claims come from opposite directions. Some, including certain Justices on the Court,[138] have claimed over the past several decades that the substantive due-process-based decision in *Roe v. Wade*—together with the Court's vigorous defense of the decision—has threatened the Court's legitimacy because the decision has never been adequately defended or justified by accepted legal principles or interpretive methods. On the other hand, defenders of *Roe* and the ad hoc value-oriented approach that it represents, faced with the possibility of serious judicial retrenchment have argued that any movement away from *Roe* and its jurisprudential approach will threaten the Court's legitimacy with the public. Thus, the Court finds itself at the center of a fierce partisan political battle over its role in our constitutional system with each side predicting doom should the other side prevail. Is this unusual? Is there a basis for serious concern?

In fact, the Court has been at the center of political controversy from time to time throughout constitutional history. Even when the public and political backlash against the Court has been most severe, the Court as an institution has managed to survive and retrieve public support through the constitutionally based political checks on the Court. The President has appointed, and the Senate has confirmed, new Justices to replace those who have died or retired. The newly appointed Justices change the direction of

137. BORK, *supra* note 83, at 252 (noting "professors . . . state a preference for talented and benevolent autocrats [federal judges] over the self-government of ordinary folk.").

138. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1001 (1992) (Scalia, J., dissenting) ("I am appalled by[] the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—against overruling, no less—by the substantial and continuing public opposition the decision has generated.").

the Court by pulling back from decisions that led to the crisis. Over time, the Court recovers its "moral capital" with the public. Often, the crisis was prompted by the perception that the Court had decided or was deciding cases that were beyond its legitimate capacity to decide at least on a legally principled basis. In other instances, the crisis was prompted by severe disagreement with decisions that were justified by accepted methods of analysis. In either case, when the Court gets too far out of step with public perceptions giving rise to a crisis of legitimacy, it will retreat to save itself. That seems to be happening in the present instance as well. But in order to evaluate the current crisis, it is useful to look to the past.

A. Chisholm v. Georgia—*The Court's First Big Misstep*

The history of the Court is that it has frequently been at the center of a political storm. In the earliest days of the nation, the Court in *Chisholm v. Georgia*[139] created a political controversy by deciding that states were not immune from damage suits in federal courts by a citizen of another state. Traditional legal arguments were raised both in support of and in opposition to the decision.[140] The decision was met with "a gale of opposition from all sides"[141] leading to the prompt enactment of the Eleventh Amendment reversing the decision in record time. This occurred at a time when the federal court system, especially the Supreme Court, was viewed with great skepticism. It was prior to the time when Chief Justice Marshall succeeded in earning respect for the Court as an institution. There is no possibility that an unpopular constitutional decision could be reversed by constitutional amendment with this alacrity in the present time. No matter what the current Court might do, it would have its defenders who would fight for it in the political process. Still, it is a reminder that the Court found itself in a state of crisis from the very outset. However, at the time of *Chisholm*—only five years after the Constitution had been ratified—the Court was a fledgling institution still feeling its way.

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139. Chisholm v. Georgia, 2 U.S. 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

140. At the time, the Court delivered its decisions *seriatim* rather than with a single Justice writing for the majority. Justices Blair and Cushing supported the decision with textual arguments. Justices Jay and Wilson also joined the majority placing primary reliance on policy and history. Justice Irdell dissenting argued that Article III was not self-executing and Congress had not provided jurisdiction for a damage action against a state by a non-citizen. *See generally id.* (providing diverging opinions on the Constitution's restrictions).

141. MCCLOSKEY, *supra* note 81, at 22.

B. McCulloch v. Maryland—*The Great Backlash*

Chief Justice Marshall, generally considered the greatest of all Justices, began his lengthy term as Chief Justice with the important opinion in *Marbury v. Madison*.[142] *Marbury* is heralded today as the case which first recognized judicial review over acts of Congress. This aspect of the case was not particularly controversial even at the time. Instead, it was Marshall's assumption that the Court had the authority, at least in limited circumstances, to oversee decisions of the Executive branch that so disturbed President Jefferson.[143] This complaint may have bothered the political elites but did not resonate with the general public.

Rather, it was *M'Culloch v. Maryland*,[144] sometimes described as the Supreme Court's greatest decision,[145] that set off one of the most severe firestorms that the Court has ever weathered. In his classic opinion in *M'Culloch*, Marshall upheld the authority of Congress to create and re-authorize the Bank of the United States and to establish a constitutional principle prohibiting targeted taxation of a federal instrumentality. *M'Culloch* strengthened the authority of the federal government at the expense of the states. Along the way, Marshall endorsed the popular sovereignty theory of constitutional origin over the compact theory favored by advocates of state sovereignty.[146] *M'Culloch* led to perhaps the most ferocious political backlash that the Court has ever faced.[147] As one commentator has noted,

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142. Marbury v. Madison, 5 U.S. 137 (1803).

143. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 264–65 (rev. ed. 1922).

144. M'Culloch v. Maryland, 17 U.S. 316, 402–05 (1819).

145. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 122 (1996) (stating "*MCulloch* ranks among the greatest of Marshall's opinions"); MCCLOSKEY, *supra* note 81, at 53 (notating how *M'Culloch* was "the greatest decision John Marshall ever handed down"); JEAN EDWARD SMITH, JOHN MARSHALL DEFINER OF A NATION 441 (1996) (expressing "*MCulloch v. Maryland* may be the most important case in the history of the Supreme Court").

146. *M'Culloch*, 17 U.S. at 402–05.

147. *See* ARCHIBALD COX, THE COURT AND THE CONSTITUTION 78 (1st ed.1987) (stating "[i]n the South and old Northwest the Court's opinion evoked violent criticism"); RICHARD E. ELLIS, AGGRESSIVE NATIONALISM 10–11 (2007) (asserting *M'Culloch* led to a reaction against both the Bank and the Court which were considered "aggressive, intrusive and coercive"); BARRY FRIEDMAN, THE WILL OF THE PEOPLE 83 (2009) ("From the time of [*M'Culloch*] forward the Court was under almost constant fire."); HOBSON, *supra* note 145, at 117 (acknowledging the decision "provoked harsh public censure in the months following its announcement"); MARK R. KILLENBECK, M'CULLOCH V. MARYLAND SECURING A NATION 141–58 (2006) (detailing a discussion of the reaction against *M'Culloch* recognizing that the reaction was "indeed different" from the negative reaction against other nationalist-oriented Marshall Court decisions); R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 299 (2000) (noting how *M'Culloch* unleashed a "no holds

"[f]or perhaps most of the public, the Court's decision appeared revolutionary."[148] Part of the backlash against the Court is attributable to the result of the case that upheld the wildly unpopular Bank of the United States which was widely blamed for credit policies that contributed to the recession existing at the time.[149] Beyond that however, *M'Culloch* was quite correctly understood as the Court entering the continuing and often vitriolic argument over the proper relationship between the national government and the states with the Court clearly throwing its weight behind the national government.[150] Justice Story's opinion in *Martin v. Hunter's Lessee*[151] prior to *M'Culloch* and Marshall's opinion in *Cohens v. Virginia*[152] subsequent to *M'Culloch* both of which endorsed Supreme Court jurisdiction to review the highest court of a state (in both instances Virginia) also fueled the fire of backlash against the Court.[153]

Marshall's opponents in Virginia, especially Judge Spencer Roane of the Virginia Court of Appeals, launched an attack on *M'Culloch* through a series of essays published in newspapers.[154] This attack alarmed Marshall to the extent of causing him to respond in a series of pseudonymous essays published under the name "A Friend of the Constitution." The reaction to *M'Culloch* was not limited to a debate in the press, however. Over the next decade in response to *M'Culloch*, Congress seriously considered limiting the

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barred debate on the Court, the Constitution, and the Union"). *Id.* at 332 (stating "Marshall was caught off balance by the vehemence of the attack on his opinion and on him personally"); WARREN, *supra* note 143, at 504, 514 (explaining how the decision in *M'Culloch* was met with an outburst of indignation and even actual defiance though disapproval of the decision was largely in the South and West). *Id.* at 504–525 (identifying quotations from the press condemning and sometimes praising the decision); *see also* JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS; VINDICATED (1820) (arguing against Marshall's analysis in *M'Culloch*).

148. BRAY HAMMOND, QUARRELS THAT HAVE SHAPED THE CONSTITUTION 39 (John A. Garraty ed., 1st ed. 1987).

149. *Id.* at 518–19.

150. NEWMYER, *supra* note 147, at 335 (*M'Culloch* became the "cause celebre" of the defenders of state rights).

151. Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

152. Cohens v. Virginia, 19 U.S. 264 (1821).

153. *See Hunter's Lessee*, 14 U.S. at 380–81 (noting there is an "absolute necessity . . . for . . . a revising power over cases and parties in the state courts . . . ."); Cohens, 19 U.S. at 416–17 (emphasizing the framers' intent to "strengthen[] the confederation by enlarging the powers of the government, and by giving efficacy to those which it before possessed, but could not exercise").

154. *See* GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF *M'CULLOCH V. MARYLAND* 1–21 (1969) (collecting historic essays attacking *M'Culloch* and the Court as well as Marshall's replies); *see also* ELLIS, *supra* note 147, at 381 (documenting the discussion of the exchange). At least in private correspondence, Thomas Jefferson was also a severe critic of the Court in the wake of *M'Culloch*. SMITH, *supra* note 145, at 155–56.

Court's jurisdiction.[155] The Virginia legislature passed a resolution condemning the decision.[156] State officials blatantly defied the decision forcing the Court to reaffirm it in *Osborne v. United States*.[157] As one historian has noted, "*M'Culloch* set in motion the forces of state rights that charted the direction of antebellum history."[158] Andrew Jackson successfully ran for President in large part in opposition to the Bank and the Marshall Court.[159] He vetoed the re-authorization of the Bank, in part based on his constitutional disagreement with *M'Culloch*.[160] Eventually, he abolished the Bank by ordering his Secretary of the Treasury to remove all deposits by the United States from it.[161] A movement arose to bring a case before the Court in an attempt to persuade it to overrule *M'Culloch*; however it did not materialize.[162] Marshall's endorsement of the popular sovereignly theory of constitutional origin over the competing compact theory may have prevailed in the courts as of *M'Culloch*, but it took a civil war for that theory to become truly embodied in the public conception of constitutional origin.[163] Moreover, *M'Culloch*'s conclusions as to the expansive breadth of

155. NEWMYER, *supra* note 147, at 381 (indicating how *M'Culloch* and the ensuing debate in the press gave rise to an "outpouring of measures for curbing judicial power" and among the measures debated in Congress were proposals to give the Senate final authority over all constitutional cases involving the issue of federalism or to create a court of the Chief Justices of all of the states to resolve such issues). The attack on the Court culminated in John Calhoun's nullification proposal. *See id.* at 382–84 (providing an overview of the legislative backlash from *M'Culloch*). The Court's defenders in New England, especially through Joseph Storey's *Commentaries on the Constitution*, defended the Court against the assault. *Id.* at 384.

156. WARREN, *supra* note 143, at 518–19.

157. Osborn v. Bank of the U.S., 22 U.S. 738, 867–68 (1824), *superseded by statute*, 28 U.S.C. §§ 1331, 1332 ("[T]he Court adheres to its decision in the case of [*M'Culloch*] against The State of Maryland, and is of opinion, that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States, made in pursuance of the [C]onstitution, and, therefore, void.").

158. NEWMYER, *supra* note 147, at 375.

159. KILLENBECK, *supra* note 147, at 167–68.

160. ELLIS, *supra* note 147, at 214–15; KILLENBECK, *supra* note 147, at 177–79 ("[T]he heart of Jackson's veto was clearly his attempt to minimize the role and influence of the Court, and his position represented a stark challenge to its authority.").

161. ELLIS, *supra* note 147, at 214–15.

162. KILLENBECK, *supra* note 147, at 177–79.

163. The South seceded on the basis of the compact theory. Lincoln fought the war under the mantle of popular sovereignty, i.e., the Union was formed by the people, not the states, and thus the states could not secede. Following the war, the Supreme Court explicitly endorsed Marshall's popular sovereignty theory. *See* Texas v. White, 74 U.S. 700, 726–27 (1869), *overruled by* Morgan v. United States, 113 U.S. 476 (1855) (stating actions ratified by the Legislature and citizens of Texas, such as the ordinance of secession, "were absolutely null" as the war was fought "for the suppression of rebellion"

congressional power eventually prevailed as well, but only after both the Civil War and the New Deal Crisis of 1937.

M'Culloch, as well as some of the Marshall Court's other decisions favoring the national government over the states, created a political reaction against the courts. Five of the seven Justices who joined the unanimous opinion in *M'Culloch* had been appointed by either President Jefferson or President Madison—the political opponents of Chief Justice Marshall nationalist-oriented approach.[164] However, as has often been the case, when the Court got out of step with public opinion, the political process—gradually through the appointment and confirmation power, especially the six Supreme Court appointments by President Jackson which included the replacement of Marshall as Chief Justice with Roger Taney—ultimately altered the direction of the Court, especially with respect to questions of federalism.[165] The new majority on the Court was appointed for the purpose of changing the Court's direction and did just that.[166] One of Marshall's last major decisions, *Worcester v. Georgia*,[167] was effectively ignored by President Jackson, Congress, and the State of Georgia.[168] The popular tide had clearly turned against the Court.

The crisis provoked by *M'Culloch* is distinguishable from subsequent crises surrounding the Court. Justice Marshall's opinion for the Court in *M'Culloch* is an extraordinary example of traditional legal analysis at its finest.[169] Indeed, it provides one of the Court's most compelling models of a great justice doing "lawyers' work." Nevertheless, the Court provoked

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rather than that of conquest; that their obligation and allegiance to the Constitution remained whether faithful or unfaithful).

164. NEWMYER, *supra* note 147, at 385 (indicating the Court survived "the anti-Court movement of the 1820s and early 1830s" by trimming its sails and by the fact that its opponents eventually gained control through the appointment and confirmation process). *Id.* at 412 (reporting the Marshall Court began a political retrenchment of its more controversial decisions prior to the Taney Court).

165. R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 92–93 (2d ed. 2006) ("President Jackson brought the Supreme Court into harmony with Jacksonian Democracy by virtue of six appointments.").

166. NEWMYER, *supra* note 147, at 377.

167. Worcester v. Georgia, 31 U.S. 515 (1832).

168. *See* FRIEDMAN, *supra* note 147, at 83–95 (describing the conflicts related to some of the Court's decisions, and that during this period, state officials often defied the Court).

169. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 22 (2012) ("To read [*M'Culloch*] is to behold the art of constitutional interpretation at its acme."). However, critics of Marshall and *M'Culloch* have argued the decision was more political than legal. *See* HOBSON, *supra* note 145, at 115 (noting the criticism). *But see id.* at 116 (illustrating Hobson himself rejects the critics take on *M'Culluch*).

a crisis of legitimacy by attempting to authoritatively resolve by judicial edict the most volatile political issue of the day. No matter how persuasive Marshall's legal reasoning might have appeared either at the time or at present when his vision has largely prevailed, he was attempting to resolve a controversy that could ultimately only be resolved politically, not judicially. As such, Marshall's opinion in *M'Culloch* provoked extreme political backlash against the Court, not because Marshall lacked solid legal support for his decision but rather because the issue was simply too big and too controversial for the Court to resolve, no matter how skilled its Chief Justice.

Some have argued that *M'Culloch* established "the Court's legitimacy as a final arbiter of constitutional questions," though others have disagreed vigorously.[170] The controversy provoked by *M'Culloch* was created not by Marshall's interpretive methods but rather by the result he reached and to some extent by the unnecessarily provocative and dogmatic tone of the opinion. Not far from the surface was the fear of critics in the South that Marshall's deference to a sweeping view of congressional power would eventually be employed to challenge slavery or at least its expansion.[171] In the context existing at the time, virtually any judicial attempt to define the appropriate boundaries between federal and state power, a legitimate question for the Court to address both then and now was likely to result in public controversy and perhaps political challenge to the Court. Marshall simply went too far, too fast, and too stridently on an issue of which the nation was deeply divided, subjecting the Court to a severe but legitimate constitutional check.

C. *The Taney Court and the* Dred Scott *Debacle*

When Taney replaced Marshall as Chief Justice in 1835, the supporters of the nationalist-oriented Marshall Court concluded both the Court and the Constitution were doomed.[172] For two decades, however, the post-Marshall Taney Court maintained a low profile and avoided public controversy, but that changed with the overheated debate concerning congressional authority over slavery in the territories preceding the Civil

170. *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815–1835, at 749 (1991) (asserting *M'Culluch* helped the perception of the Court's importance).

171. LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 604 (1974); PETER CHARLES HOFFER ET AL., THE SUPREME COURT: AN ESSENTIAL HISTORY 70 (2007).

172. MCCLOSKEY, *supra* note 81, at 53.

War.[173] The understanding was if a territory was authorized to permit slavery, it would probably enter the Union as a slave state and vice versa. It was crucial to the South to maintain somewhat of a balance between slave and free states to avoid creating a supermajority of free states capable of amending the Constitution to prohibit slavery. By the 1850s, this issue was tearing the nation apart. In the *Dred Scott* case, widely considered the Court's gravest error, the Court attempted to provide a constitutionally based judicial resolution to the question.[174] In that case, Scott, a slave, sued for his freedom because he had lived with his master, an army physician, in the free state of Illinois and the free territory of Upper Louisiana before being returned to slavery in Missouri. The Court attempted the impossible. By throwing its weight and prestige behind the slave-holding South in a disingenuous and poorly reasoned opinion, the Court only made matters worse, damaging its own reputation in the process. The *Dred Scott* case did not cause the Civil War; it almost certainly would have occurred in any event.[175] However, it did make a very bad situation even worse.

There were two holdings in *Dred Scott*. First, a three Justice plurality held that a slave or a descendant of a slave could be neither a citizen of a state nor the United States.[176] As a result, Scott could not sue in federal court under diversity of citizenship, and the Court dismissed his lawsuit for lack of jurisdiction. Perhaps even more provocative, a six-Justice majority held that Congress could not prohibit slavery in the territories because it would violate the (substantive) due process rights of the slave owner by effectively depriving him of his property on venturing into congressionally declared free territory.[177] Essentially the Court declared the Missouri Compromise of 1820—which had been repealed by the Kansas Nebraska Act of 1854—unconstitutional.[178] This was the first instance in which the Supreme Court

173. As of 1850, the Court had achieved an extremely high degree of public support. *Id.* at 63.

174. Scott v. Sandford, 60 U.S. 393, 406–07 (1857).

175. The dispute over the LeCompton Constitution in Kansas and the election of Lincoln as President, pushed the nation closer to Civil War than the *Dred Scott* decision. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 561–67 (1978); EARL M. MALTZ, *DRED SCOTT* AND THE POLITICS OF SLAVERY 154 (2007) ("Modern historians generally do not view *Dred Scott* as a major cause of the Civil War . . . .").

176. *Sandford*, 60 U.S. at 427.

177. *Id.* at 450.

178. Although the Missouri Compromise has been repealed by the time of the *Dred Scott* decision, it had been the law at the time that Scott had been taken into the Upper Louisiana Territory. *Id.* at 519 (addressing Scott's argument that the Missouri Compromise granted his freedom at the time he entered free territory).

evoked the concept of substantive due process, although it did so without careful analysis. As with subsequent use of substantive due process in the *Lochner* era and again with the contemporary right to privacy, the theory as utilized in *Dred Scott* would only thinly cover a judicial value judgment.

The majority in *Dred Scott* decided the case on the broadest and most politically explosive grounds when there were several less controversial means for disposing of the case.[179] In *Dred Scott*, Chief Justice Taney attempted to dress his obvious political opinion in legalistic analysis; however, his arguments were highly selective and disingenuous and failed to persuade the persuadable.[180] Apparently, the Court did not realize how controversial its opinion would be.[181] *Dred Scott* is quite properly condemned for reaching morally and legally indefensible results on the issues that the Court addressed.[182] Beyond that, the most serious failing of *Dred Scott* is that the Court vainly attempted to resolve by judicial decree a political issue that was far beyond judicial resolution.[183] As Professor McCloskey noted, the Court should "leave alone" questions that "profoundly engage the emotions of the whole people."[184] In the Court's defense, the political branches had invited the Court to resolve the

179. The narrowest resolution would have been that proposed by Justice Nelson recognizing that Missouri had declared Scott a slave, in litigation in state court, and that decision was controlling as a matter of law. *See* LACKLAND H. BLOOM, JR., DO GREAT CASES MAKE BAD LAW? 88–89 (2014) (discussing potential alternative grounds for the decision).

180. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 122–23 (1993) (criticizing both the Taney opinion for the Court and the Curtis dissent as "result-oriented" opinions intended to foster their authors "social vision").

181. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 24 (1937); MCCLOSKEY, *supra* note 81, at 62 ("The tempest of malediction that burst over the judges seems to have stunned them . . . .").

182. *See* HOFFER, *supra* note 171, at 100 ("Taney's interpretation of the Constitution was certainly arguable."). *But see* MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 28–30 (2006) (arguing Taney's arguments though morally wrong were legally plausible).

183. WARREN, *supra* note 181, at 24 (attempting to settle the controversy over slavery in the territories by judicial decree "would only serve to enflame rather than to extinguish"). Many of the critics of the decision at the time made this very argument. FRIEDMAN, *supra* note 147, at 114.

184. MCCLOSKEY, *supra* note 81, at 60 ("They should have realized that their power was built on a lively sense of its own limitations . . . ."). *Id.* at 63 (stating the Court's greatest mistake was "to imagine that a flaming political issue could be quenched by calling it a 'legal' issue and deciding it judicially"); SCHWARTZ, *supra* note 180, at 124 ("[T]he Court was stretching judicial power to the breaking point."); MALTZ, *supra* note 175, at 156 ("[T]he story of *Dred Scott* is a story of judicial hubris."); NEWMYER, *supra* note 165, at 138 ("When the Court decided *Dred Scott*, it put itself on trial."); Maurice Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221, 243 (1925) ("A question which involved a Civil War can hardly be proper material for the wrangling of lawyers.").

troublesome issue of slavery in the territories.[185] Perhaps to a large extent, the *Dred Scott* Court was a victim of its own prior success. Under Taney, the Court had achieved great public support, arguably causing both the Justices and political actors to assume that it could resolve a wrenching and divisive political issue through constitutional adjudication.[186] From a moral and legal standpoint, the Court threw its weight behind the wrong result both then and now. The opponents of the decision responded with fury.[187] The defenders of the decision relied on "rule of law" arguments.[188] The critics dismissed the controversial holding, invalidating the Missouri Compromise as dicta, which it clearly was not.[189] The decision became a central issue in the famous Lincoln Douglas debates the following year.[190] Several northern state legislatures passed resolutions condemning the decision,[191] much like the Virginia legislature's resolution condemning McCulloch.

185. SCHWARTZ, *supra* note 180, at 110–11; LUCAS A. POWE, JR. & L.A. SCOT POWE, THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008, at 105–06 (2009). Even Lincoln urged the Court to resolve the issue of slavery in the territories. FRIEDMAN, *supra* note 147, at 111.

186. SCHWARTZ, *supra* note 180, at 106 ("The *Dred Scott* Court fell victim to its own success as a governmental institution.").

187. WARREN, *supra* note 181, at 24–25 (A "whirlwind of abuse . . . swept upon the Court . . . ."); *see id.* at 26–38 (quoting press critiques of the *Dred Scott* decision); FEHRENBACHER, *supra* note 175, at 417 (discussing how the decision was denounced in the press as "atrocious," "wicked," and "abominable").

188. Abraham Lincoln & Stephen A. Douglas, Political Speeches and Debates of Abraham Lincoln and Stephen A. Douglas in Chicago, Illinois (July 9, 1858) ("[T]he decision of the highest tribunal known to the Constitution of the country must be final till it has been reversed by an equally high authority."); Abraham Lincoln & Stephen A. Douglas, Political Speeches and Debates of Abraham Lincoln and Stephen A. Douglas in Jonesboro, Illinois (Sept. 15, 1858) ("[T]hat decision becomes the law of the land, binding on you, on me . . . .").

189. FRIEDMAN, *supra* note 147, at 114. The dicta argument was based on the assertion that it was inappropriate for the Court to reach the Missouri Compromise question after having concluded that Scott was not a citizen and hence there was no jurisdiction under the diversity of citizenship clause. The problem with this argument is that only three Justices joined the former holding while six joined that latter. *See* BLOOM, JR., *supra* note 179, at 88 ("And yet the latter can hardly be dismissed as dicta as it often has been, given that it had the support of six [J]ustices while the former position seemed to have only three.").

190. *See generally* Abraham Lincoln & Stephen A. Douglas, The Lincoln-Douglas Debates in Ottawa, Illinois (Aug. 21, 1858); Abraham Lincoln & Stephen A. Douglas, The Lincoln-Douglas Debates in Freeport, Illinois (Aug. 27, 1858); Abraham Lincoln & Stephen A. Douglas, Political Speeches and Debates of Abraham Lincoln and Stephen A. Douglas in Jonesboro, Illinois (Sept. 15, 1858); Abraham Lincoln & Stephen A. Douglas, Political Speeches and Debates of Abraham Lincoln and Stephen A. Douglas in Charleston, Illinois (Sept. 18, 1858); Abraham Lincoln & Stephen A. Douglas, The Lincoln-Douglas Debates in Galesburg, Illinois (Oct. 7, 1858); HARRY V. JAFFA & ROBERT W. JOHANNSEN, IN THE NAME OF THE PEOPLE 40 (1959).

191. FEHRENBACHER, *supra* note 175, at 432.

However, the decision would have been as divisive had the Court reached the opposite result. The question of the legality of congressional regulation of slavery in the territories had become so inflammatory that it was well beyond judicial resolution. Perhaps it was beyond political resolution as well. Certainly, Congress and the President had been unable to settle it up to that point. Maybe it could only be resolved through secession and the violence of the Civil War. In any event, the Court, and much of the political establishment, that pressed for a judicial solution were deluded. No case has attested to the limits of judicial power more than *Dred Scott*. Despite the controversial nature of the *Dred Scott* opinion, its critics, unlike the critics of *M'Culloch v. Maryland*, did not urge outright defiance but rather reversal through the legal process, especially through the appointment of Justices with a different point of view.[192]

Critics argue the Court's *Scott v. Sanford* decision wounded the Court's reputation for decades to come.[193] However, that probably is not so.[194] First, the Civil War diverted attention from the Court for the first part of the next decade, even though Chief Justice Taney continued to tussle with President Lincoln.[195] Second, Lincoln replaced many of the Justices who decided the *Dred Scott* case, molding the Court into a more nationalistic institution.[196] Third, the Court did not behave as if its prestige

192. FRIEDMAN, *supra* note 147, at 119; FEHRENBACHER, *supra* note 175, at 454 (noting how *Dred Scott* did not cause its critics to attempt to constrain the Court's authority but rather to win the next election and alter the Court's membership). That was the position that Lincoln took. POWE, JR. & POWE, *supra* note 185, at 105.

193. Edwin S. Corwin, *The* Dred Scott *Decision, in the Light of Contemporary Legal Doctrine*, 27 AM. HIST. REV. 69 (1911) (discussing the "shattered reputation" of the Court after the *Dred Scott* decision); MCCLOSKEY, *supra* note 81, at 63 (recounting how the Court's near unanimous support was destroyed by the *Dred Scott* decision). Charles Warren argued it was biased reporting of the decision in part, as much as the decision itself that wounded the Court's reputation. WARREN, *supra* note 181, at 39.

194. FEHRENBACHER, *supra* note 175, at 454 ("The extent to which the [*Dred Scott*] decision undermined the Court as an institution has in fact been greatly exaggerated."); FRIEDMAN, *supra* note 147, at 137 ("The Supreme Court experienced a remarkable rise in respect and importance during the generation following the Civil War.").

195. Sitting as a circuit judge, Taney ordered Lincoln to release John Merryman, who had been arrested in Maryland for secessionist activities, from custody. The commanding officer on whom Taney's order was delivered refused. Taney then issued an opinion criticizing Lincoln's suspension of habeas corpus as well as the arrest of Merryman. *Ex parte* Merryman, 17 F. Cas. 144, 148 (1861). Despite Taney's opinion, Lincoln did not comply. *But see* Seth Barrett Tillman, Ex Parte Merryman: *Myth, History and Scholarship*, 224 MIL. L. REV. 481, 501–06 (2016) (offering a different interpretation of the incident, arguing there was no defiance by anyone).

196. Lincoln appointed five Justices to the Court, including Samuel Chase as Chief Justice on Taney's death.

had suffered. Rather, it invalidated more federal laws in the decade and one-half following *Dred Scott* than it had in the preceding seventy years.[197] Except for the *Legal Tender* Cases[198] in which the Court initially invalidated paper money as legal tender, and then with the addition of two new Justices changed its mind, the Court managed to land on its feet following the debacle of *Dred Scott*. The initial decision invalidating paper currency as legal tender indicated that a majority of the Court did not feel at all intimidated by the negative reaction to the *Dred Scott* case twelve years earlier. Again, the Court as an institution was saved by the President and Senate's ability to change its composition to some extent because several southern Justices resigned with the advent of the Civil War. The *Dred Scott* debacle could have seriously threatened the Court's legitimacy as a constitutional interpreter had it not been for the war.

D. *The Rise and Fall of the* Lochner *Era*

For the most part, the Court, with the aid of highly capable Justices, managed to avoid public controversy for the next two and one-half decades until 1895, when it decided three cases that once again placed it very much in the public limelight. Within a short period of time, the Court invalidated the income tax,[199] struck down the government's attempt to apply the Sherman Antitrust Act to a massive monopoly in the sugar industry,[200] and sustained an injunction against a labor strike involving the Pullman company.[201] The following year, William Jennings Bryan ran for the presidency to some extent on an anti-Supreme Court platform but was defeated by William McKinley.[202] With the emergence of the progressive movement, these decisions cast the Court as the defender of wealth and

197. SCHWARTZ, *supra* note 180, at 154. Despite Lincoln's appointments, the Court continued to battle the radical Republican Congress. Adamany, *supra* note 72, at 834–35 (discussing the cases that the Supreme Court decided after Lincoln's appointment).

198. In *Hepburn v. Griswold*, 75 U.S. 603, 626 (1869), the Court ruled that paper money could not qualify as legal tender under the Constitution. The following year in the *Legal Tender Cases*, 79 U.S. 457, 586 (1870), with the addition of two new Justices to the Court, it reached the opposite result. *See* BLOOM, JR., *supra,* note 179, at 97–113 (discussing these decisions). This may or may not have been an example of the appointment power being employed to modify the direction of the Court depending on one's view of the underlying facts. *See id.* (discussing these decisions).

199. Pollock v. Farmers' Loan & Tr. Co.,157 U.S. 429, 625, 675 (1895); *see also* BLOOM, JR., *supra,* note 179, at 151–65 (discussing the three cases).

200. United States v. E.C. Knight Co., 156 U. S. 1, 12–13 (1895).

201. *In re* Debs, 158 U.S. 564, 599–600 (1895).

202. Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 384 (1992).

power against the emerging reform movement. These cases, though controversial, did not imperil the Court's legitimacy. At the same time, the Court began its four-decade-long venture against economic reform legislation prompted by the problems triggered by the industrial revolution. Concerning federal reform legislation, the Court applied the concept of dual sovereignty to sharply limit the federal government's power to address economic issues at the local level.[203] At the same time, the Court developed the economic substantive due process liberty-of-contract doctrine, characterized by its decision in *Lochner v. New York*,[204] to invalidate much state-level economic and social welfare legislation as well. The Court's employment of constitutional doctrines to flout the will of legislative majorities in the areas of economic and social legislation continued for the better part of four decades.

One might have thought that the doctrine of substantive due process, first articulated by the Court in *Dred Scott*, had perished with the rejection of most of that opinion following the Civil War. However, the Court had other plans. In the case of *Munn v. Illinois*[205] in 1877, the Court acknowledged that substantive due process liberty of contract was a valid legal theory but did not yet employ it to invalidate state legislation. Within two decades, however, the Court began relying on the doctrine to invalidate state economic regulation. Although the Court employed substantive due process to invalidate hundreds of state laws for over forty years, the period has become known as the *Lochner* era on account of the decision in the 1905 case of *Lochner v. New York*. In a five-to-four ruling, the Court invalidated a New York law that limited a baker's workweek to sixty hours. *Lochner* emerged as the case which characterized this era due in part to the Court's detailed explication of the doctrine along with the famous dissent by Justice Holmes. The Court rejected the state's health justification as unsupported by evidence and declared that regulating labor relations exceeded the boundaries of the police power.[206] As such, the regulation infringed a baker's substantive due process liberty of contract to agree to work as many hours as the parties desire.

Justice Holmes wrote a short but classic dissent, forever upstaging the majority opinion. He rejected the liberty-of-contract doctrine, arguing that

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203. *E.C. Knight Co.*, 156 U.S. at 12–13 (providing an excellent early example of the dual federalism approach).

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

205. Munn v. Illinois, 94 U.S. 113 (1876).

206. *Lochner*, 198 U.S. at 57.

no particular aspect of liberty is more highly protected than any other.[207] He maintained the state had the right to regulate any exercise of liberty if it had a legitimate police power rationale for doing so and that regulating labor relations was such a justification. Perhaps the most significant aspect of the Holmes dissent was his declaration that the Constitution did not "embody a particular economic theory."[208] By implication, he alleged that the majority was reading its favored laissez-faire theory into the Constitution—that is, substituting its own particular value preferences for constitutional law. This is the classic critique of substantive due process, whether employed in *Dred Scott*, *Lochner*, or *Roe v. Wade*. The doctrine allows the Court to prefer those aspects of liberty, whether slave ownership, freedom of contract, or the right to obtain an abortion over state regulation to the contrary. As contemporary commentators have argued, the *Lochner* Court may have had more legal support for its liberty-of-contract doctrine than Holmes assumed.[209] Nevertheless, Holmes's critique rang true. *Lochner* became a bad word in constitutional jurisprudence.[210] Certainly, after its rejection, the *Lochner* era came to represent a Court determined to impose its own preferred values through its decisions in constitutional cases.

During this period, the Court faced vigorous public and professional criticism, and pointed internal criticism through the dissents of Justice Holmes.[211] Amidst the Great Depression, matters came to a head when the Court struck down several measures passed at the behest of President Franklin D. Roosevelt as part of his New Deal and struck down the state regulations of economic matters.[212] The following year, perhaps influenced by the President's court packing threats or public

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207. *Id.* at 75.

208. *Id.* at 75–76.

209. David E. Bernstein, *The Story of* Lochner v. New York: *Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES 325, 327 (Michael C. Dorf ed., 2004) ("Virtually no serious scholar of the *Lochner* era believes any longer that the *Lochner* Court simply tried to impose laissez-faire or was influenced much by Social Darwinism."). The legal principles guiding the *Lochner* Court are grounded in a combination of Jacksonian anti-class bias along with the free labor ideology of the abolitionist movement.

210. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14–15 (1980).

211. FRIEDMAN, *supra* note 147, at 178 ("In the aftermath of *Lochner*, prominent lawyers began to attack not just judicial decisions but the institution of judicial review itself.").

212. *See* A.L.A. Schechter Poultry Corp. v United States, 295 U.S. 495, 550–51 (1935) (limiting the reach of the National Industrial Recovery Act through a narrow construction of the commerce clause); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 618 (1936) (invalidating a state minimum wage law on the ground that it violated the substantive due process liberty of contract).

dissatisfaction,[213] the Court radically changed directions rejecting dual federalism at the national level[214] and substantive due process at the state level.[215] In rejecting substantive due process methodology, the Court embraced the critique set forth by Holmes in *Lochner v. New York*.[216] As a result, the Court changed directions before the President had the opportunity to alter its composition through the appointment process.[217] To a large extent, the Court may have been responding to widespread public disagreement with the substance of its decisions—that is, with respect to the results rather than the interpretive methodology.[218] Amid the Depression, the public preferred government intervention in economic affairs. President Roosevelt, along with other critics of the Court, had effectively characterized the Court as an obstacle to such policies.[219] Times were hard, the Court was perceived as blocking the way to economic recovery, and as such, the Court had lost critical public support. Whether its legal doctrines and reasoning were correct or at least reasonably plausible was beside the point. The severity of the economic circumstances, the popular President's persuasiveness, and the accumulation of decades of questionable precedent combined to seriously undermine diffuse support for the Court. Under these circumstances, a majority of the Court self-corrected before external correction could occur. Nevertheless, the Court's withdrawal from the economic sphere was cemented by the eventual replacement of Justices who had stood as an obstacle to economic reform

213. *See generally* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010) (remaining disputed as to the extent to which the Justices may have been aware of the yet publicly announced court packing proposal).

214. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (expanding Congress's power under the Commerce Clause by upholding the constitutionality of the National Labor Relations Act of 1935).

215. *See* W. Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937) (rejecting substantive due process liberty of contract analysis and upholding state minimum wage legislation).

216. *See* Lochner v. New York, 198 U.S. 45, 65–76 (1905) (Holmes, J., dissenting) ("I think that the word 'liberty' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us.").

217. *See* SHESOL, *supra* note 213, at 2–3 (detailing the account of the battle between President Roosevelt and the Supreme Court).

218. *See* FRIEDMAN, *supra* note 147, at 4 ("In effect, a tacit deal was reached: the American people would grant the [J]ustices their power, so long as the Supreme Court's interpretation of the Constitution did not stray too far from what a majority of the people believed it should be.").

219. SHESOL, *supra* note 213, at 148–50.

legislation. The judicial revolution of 1937 is yet a further example of an overreaching Court eventually succumbing to a combination of public pressure and appointment power.

E. *The Warren Court—Many Bridges Too Far*

For the next two decades, the Court largely avoided public controversy by slowly shifting its focus from constitutional challenges of economic regulation to questions involving civil rights and liberties.[220] Under the Warren Court, the public perceptions of the Court changed significantly. During the 1950s and 1960s, the Court engaged in aggressive constitutional decision-making by challenging racial segregation in public schools, ordering reapportionment of state legislatures based on population equality, banning prayer in public schools, making it more difficult for states to provide financial aid to religious schools, protecting the rights of criminal defendants, and recognizing a constitutionally based right to privacy.[221] In achieving these substantive results, the Court often played fast and loose with existing judicial precedent. The public accepted many of these decisions in their own right. However, the aggregation of these decisions gave rise to the perception that a group of unelected Justices of the Supreme Court had embarked on an undemocratic attempt to alter the very basis of American society. *Brown v. Board of Education*[222] is the cornerstone of Warren Court jurisprudence. Arguably, it the most significant decision in Supreme Court history. *Brown* was pending before the Court when Earl Warren was nominated as Chief Justice.[223] *Brown*'s legal correctness is now beyond dispute. And yet, that has not always been the case. Respected members of the *Brown* Court, most particularly, Justices Frankfurter and Jackson, worried that a decision in favor of the plaintiffs was legally insupportable, and most of the two-year process of reaching a decision was necessary to convince them otherwise.[224] Moreover, Professor Wechsler,

220. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (noting the shift in emphasis that was telegraphed shortly after the judicial revolution of 1937 in the now famous footnote 4 of Justice Stone's opinion for the Court).

221. *See* Baum & Devins, *supra* note 37, at 1565 (explaining the Warren Court may have perceived support and encouragement from left-leaning academics and the media elite).

222. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

223. Warren joined the Court with a recess appointment. The Senate would not confirm Warren until he had begun writing the opinion in *Brown*.

224. *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976) (detailing the history and decision in *Brown v. Board of Education*); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD

perhaps the most prominent law professor of his era, delivered an address at Harvard Law School in 1959, arguing *Brown* failed the test of justification by neutral and general principles.[225] Despite these criticisms, *Brown* was clearly defensible. The defendants in *Brown* argued that a decision in favor of desegregation was inconsistent with the original understanding of the Fourteenth Amendment and the precedent of *Plessy v. Ferguson*.[226] However, the Court was able to honestly deflect each argument. First, based on the uncited memoranda of Justice Frankfurter's law clerk, Alexander Bickel,[227] the Court held that the original understanding was inconclusive.[228] Furthermore, based on precedent, the Court demonstrated that *Plessy* had in fact been undermined by the series of graduate school cases decided by the Court in the interim.[229]

Thus, neither the original understanding nor precedent provided an insurmountable obstacle to a decision in favor of the plaintiffs. The plaintiffs needed a legal rationale to decide in their favor, and Chief Justice Warren clearly had one. The problem, however, was that he could not explicitly rely on it. At the first conference over which Chief Justice Warren presided, following the second round of arguments in *Brown*, Justice Warren began by declaring that racial segregation in schools was based on the constitutionally illegitimate purpose of racism.[230] As such, segregation was constitutionally invalid. The problem was that

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MARSHALL AND THE SUPREME COURT, 1956–1961 (1994) ("The way the [J]ustices responded to each case the NAACP presented affected what Marshall and his colleagues could do in the next case.").

225. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32 (1959) ("The problem inheres strictly in the reasoning of the opinion, an opinion which is often read with less fidelity by those who praise it than by those by whom it is condemned.").

226. *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (holding separate but equal racial segregation on a train was constitutional, essentially endorsing Jim Crowe segregation laws throughout the South), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

227. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64–65 (1955) (expressing the essence of Alexander Bickel's memo when he was a law clerk for Justice Frankfurter).

228. *See* Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954) ("[T]he inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.").

229. *See id.* at 491–92 (1954) ("In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications.").

230. *See Brown v. Board of Education & Bolling v. Sharpe*, *in* THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 654–55 (Del Dickson ed., 2001) ("At present, my instincts and tentative feelings would lead me to say that in these cases we should abolish, in a tolerant way, the practice of segregation in public schools.").

Warren acknowledged that he could not use that as the rationale for his opinion because he wanted to avoid blaming and, hence, provoking the segregated South, given he understood that its cooperation was essential to the effective implementation of the decision.[231] Justice Warren was forced to rely on a more problematic explanation of the decision based on the stigmatic impact of segregation.[232] As a result, *Brown* was a great decision that was quite clearly legally justified but not necessarily by the Court's own explanation.

Nevertheless, *Brown* contributed to the present troubles of the Court. First, opponents of originalism have often attempted to use *Brown* as a means of discrediting originalism as a valid interpretive methodology. Opponents argue *Brown* is inconsistent with the original understanding, and *Brown* is a great decision; thus, originalism must be wrong.[233] As noted above, the argument that *Brown* is inconsistent with the original understanding is a gross overstatement often made disingenuously.[234] However, to the extent that people believe *Brown* was legally insupportable but correctly decided can lead to the belief that it is generally appropriate for courts to reach a morally just decision regardless of whether it is legally supported or not. This is clearly an incorrect understanding of *Brown*. Still, some believe that *Brown* established the dawn of the "living Constitution era" and from 1954 on anything goes.

Even assuming merely for the sake of argument that *Brown* was legally insupportable, the fact that the decision was correctly decided should not be taken to mean that traditional methods of constitutional analysis have been or should be rejected in all contexts. After all, the Fourteenth Amendment was concerned with the prohibition of racial discrimination, at least in certain contexts. It was not as if the *Brown* Court attempted to address an issue of no constitutional concern whatsoever. There was at least some textual, originalist grounding for the decision. Second, even if accepted legal methods did not lead to the decision in *Brown*, the moral evil of racial

231. *See* KLUGER, *supra* note 224, at 696 (stating Warren circulated his draft opinion in *Brown* with a cover memo indicating that the opinion needed to be "short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory").

232. *See Brown*, 347 U.S. at 494 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

233. *See* STRAUSS, *supra* note 129, at 12, 78, 85.

234. *See* BORK, *supra* note 83, at 82 (siding with the argument *Brow*n was consistent with the original understanding).

segregation was such that it demanded judicial action. As such, *Brown* was legitimately a one-off type decision. It was correct whether or not easily justified, but that in itself should not throw the door open to unjustifiable decisions in other areas as well. Hence, even if *Brown* was legally insupportable, which it was not, it should not be viewed as creating a battering ram to justify other insupportable decisions.

There is another way in which *Brown* may have created the perception that the Court should be aggressive in the pursuit of justice and fairness, regardless of the law. One valid criticism of *Brown* is that for a lengthy period of time, ten to fifteen years, the Court failed to provide support and guidance to lower court judges struggling with the difficult task of molding desegregation decrees in the midst of massive, often violent, resistance. Many lower court judges performed heroically under very challenging circumstances.[235] These judges are worthy of the praise they have received. However, an unfortunate byproduct of these efforts was to create, at least for some, a mythology of the judge as a hero. From this perspective, the federal district judge was perceived as a knight in armor authorized to do battle with corruption, unfairness, and injustice whenever identified in litigation. This is an improper conception of the role of the federal judge; however, it would seem to be the self-perception that at least some federal district judges have taken from the attempt of many courageous district judges struggling to apply *Brown*'s mandate in very difficult circumstances.

A related problem raised by the enforcement issues created by *Brown* was the growth of institutional reform litigation and structural injunction as an enforcement tool.[236] In fashioning desegregation orders, district judges turned to the continuing injunction by which a school district was placed under judicial control until it satisfied the district judge that it had fully complied with the desegregation decree.[237] The continuing injunction was not created in the context of school desegregation. Rather, it was borrowed from the antitrust field.[238] However, in law, arguments made by analogy

235. *See generally* JACK BASS, UNLIKELY HEROES 14 (1981) ("None acted with greater impact—on the region and ultimately on the nation—than the heroic band of [lower court] judges . . . .").

236. *See generally* Abram Chayes, *Foreword: Public Law Litigation and the Burger Court,* 96 HARV. L. REV. 4, 51 (1982) ("[A]s in the school cases, the precise level of remedial action and the components of a remedial prescription will reflect a range of factors—including, I believe, availability of resources—that are unrelated to liability.").

237. *See* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) ("During this period of transition, the courts will retain jurisdiction of these cases.").

238. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 137 (1948) (affirming the district court ruling of an injunction against Paramount Pictures).

often prevail, that is, one thing frequently leads to another. Accordingly, the continuing injunction came from litigation for institutional reform but placed in the context of desegregation. If federal district courts could employ the continuing injunction as a means of desegregating the schools, why not also employ it to right constitutional wrongs in prisons,[239] and state hospitals[240] and other state-run institutions? Granted, federal judges generally did not embark on these crusades uninvited. Rather, they were urged to employ the tools developed in the desegregation area to other state institutions by civil rights attorneys. The judges often complied. Over time, several district judges became deeply involved in the judicial reform of various state institutions generally based on the predicate of unremedied constitutional violations. The growth of institutional reform litigation also supported the assumption that it was the job of federal judges to right legal and constitutional wrongs wherever they appeared, even if that led to judicial control over an entire state institution and bureaucracy.

Brown v. Board of Education was one of the Supreme Court's greatest decisions. The case needed to be decided in favor of the plaintiffs. However, it did produce some unhealthy consequences for the judicial system, some of which could have been avoided and others which probably could not.

In the wake of *Brown*, in 1957, the Court decided several cases making it difficult, if not impossible, to successfully prosecute leaders of the American Communist Party or to investigate membership in the party. The simultaneous release of four of these decisions was characterized as "Red Monday."[241] Six years earlier, the Court upheld the convictions of the leaders of the American Communist Party under the Smith Act in *Dennis v.*

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239. *See* Ruiz v. Estelle, 503 F. Supp. 1265, 1391 (S.D. Tex. 1980) *aff'd in part and vacated in part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1982) (asserting judicial control over the Texas prison system).

240. *See* Sharp v. Weston, 233 F.3d 1166, 1173 (9th Cir. 2000) (upholding structural injunction against state institution for civilly committed sexually violent predators); *see also* Wyatt v. Aderholt, 503 F.2d 1305, 1305 (5th Cir. 1974) (upholding structural injunction against a state school designed to help the civilly committed mentally handicapped).

241. *See* Watkins v. United States, 354 U.S. 178, 215 (1957) ("It is only those investigations that are conducted by use of compulsory process that give rise to a need to protect the rights of individuals against illegal encroachment."); *see also* Sweezy v. New Hampshire, 354 U.S. 234, 266–67 (1957) (Frankfurter, J., concurring) (concluding the decision was based on "the right to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection"); *see also* Yates v. United States, 354 U.S. 298, 334 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978) (using the First Amendment to provide constitutional protection to the members of the Party).

United States.[242] The abrupt change of direction with respect to the investigation and prosecution of members of the American Communist Party led to a vigorous political reaction against the Court in Congress, the Bar, and the Academy.[243] In view of this reaction, the Court backed off in subsequent cases.[244]

Perhaps the most visible and criticized line of decisions from the Warren Court were the cases in which the Court attempted to reform the criminal process during the 1960s. This was a major project of the Warren Court and, with modifications by subsequent courts, was largely successful. The decisions are too numerous to consider individually. However, the highlights include *Gideon v. Wainwright*,[245] which extended appointed counsel to all indigent felony defendants, *Mapp v. Ohio*,[246] which required that illegally seized evidence be excluded in state criminal trials, *Miranda v. Arizona*,[247] which established that the police officers must administer the infamous *Miranda* warnings before obtaining a confession that could be admissible in evidence, and *United States v. Wade*,[248] which required the presence of an attorney for the accused must be present before the police could place the suspect in a lineup.

These cases were controversial, especially *Mapp* and *Miranda*, which were portrayed as leading to the release of dangerous criminals, including murderers and rapists. The public became familiar with these decisions through movies and television shows, where these cases were frequently portrayed in a bad light.[249] Reporter Fred Graham wrote a book on the

242. *See* Dennis v. United States, 341 U.S. 494, 516–17 (1951) (convicting members of the American Communist Party under the Smith Act to assist in stopping the spread of communism in the U.S.).

243. FRIEDMAN, *supra* note 147, at 253–58.

244. *See* Scales v. United States, 367 U.S. 203, 274 (1961) (Douglas, J., dissenting) ("When belief in an idea is punished as it is today, we sacrifice those ideals and substitute an alien, totalitarian philosophy in their stead."); *see also* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 169 (1961) (Black, J., dissenting) ("I would reverse this case and leave the Communists free to advocate their beliefs in proletarian dictatorship publicly . . . .").

245. Gideon v. Wainwright, 372 U.S. 335, 345 (1963). *Gideon* was better received in part because of Henry Fonda's sympathetic portrayal of *Gideon* in a made-for-TV movie, almost twenty years later and partially due to the fact that Florida, the state defendant in the case, was a rather extreme outlier, given that most states already provided indigent defendants with counsel in felony cases. GIDEON'S TRUMPET (Hallmark Hall of Fame 1980).

246. Mapp v. Ohio, 367 U.S. 643 (1961).

247. Miranda v. Arizona, 384 U.S. 436 (1966).

248. United States v. Wade, 388 U.S. 218 (1967).

249. *See, e.g.*, DIRTY HARRY (The Malpaso Company 1971) (providing a prominent example of negative results occurring from Supreme Court rulings).

political impact of the Court's criminal procedure cases, appropriately titled "The Self-Inflicted Wound."[250] President Nixon based his successful 1968 campaign on a law-and-order theme at least partially aimed at the Court's criminal procedure decisions. Despite the fact that this series of cases was publicly visible and politically controversial at the time, they are not responsible for the perception that the Court had abandoned its role of applying the law to decide cases based on traditionally accepted methods of interpretation and analysis.

First, every criminal procedure case started out with explicit textual provisions such as the Fourth Amendment protection against unreasonable search and seizures, the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment guarantee of the right to counsel. Interpreting these textually based rights is what the Court is expected to do. In that sense, the Court hardly wandered outside of its legitimate domain in adjudicating these cases. Even so, the Court can readily start out with an explicit provision of constitutional text and then reason its way to an incorrect decision, as the Court arguably did in *Miranda*. This is troublesome, but should not raise significant doubts as to the legitimacy of the Court as an institution as long as it is able to make plausible legal arguments in support of its decision. It is understood that the type of cutting-edge cases that the Supreme Court tends to decide are capable of producing plausible opposing arguments, each based on accepted interpretive methodology. That occurred in the Court's significant constitutional criminal procedure cases during the 1960s. The fact that the Court may have been agenda driven and that it may have misinterpreted the constitutional provisions in issue should not raise questions as to its legitimacy especially since these decisions, at least as qualified by subsequent precedent, have become embedded in the law and have been largely accepted by the public.

The Warren Court's Establishment Clause jurisprudence, especially its school prayer cases,[251] also led to significant backlash against the Court. Apparently, the extent and vigor of the public reaction against these

250. *See generally* FRED P. GRAHAM, THE SELF-INFLICTED WOUND (1970) (noting changes in criminal procedure that the Supreme Court was directly responsible for).

251. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962) (asserting the use of a daily morning prayer as inconsistent with the Establishment Clause); *see also* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963) (examining state action requiring the reading of Bible verses in school as unconstitutional under the First Amendment and Establishment Clause).

decisions surprised the Court.[252] These cases are frequently considered the most publicly defied decisions of the recent Court, especially in certain areas of the nation.[253] Because the Court ignored and disregarded lengthy public traditions, many viewed these decisions as illegitimate because they were aggressively hostile to fundamental public values. As with the criminal procedure cases, the Establishment Clause cases were at least defensible as plausible interpretations of text based on standard interpretive technique. Perhaps the reason why these decisions are not as harmful to the Court's credibility on a long-term basis as they once appeared, is that overtime, the Court recognized it had pushed its secular vision too far and has since moderated its former approach in the Establishment Clause context.[254] The Establishment Clause cases may be evidence of the realistic political check that constrains the Court. When the Court renders unpopular and arguably legally incorrect decisions, over time the Court is subject to correction through narrowing, if not outright rejection, pursuant to the judicial appointment process and the emergence of subsequent cases testing previous assumptions.

Some would trace the decline of the Court's standing with at least a segment of the voting public to the decision of *Roe v. Wade*[255] in 1973 or perhaps its progenitor, *Griswold v. Connecticut*[256] in 1965. *Roe* is certainly the flash point because of the nature of the issue itself, due in large part to the emotional passions evoked on both sides of the abortion debate. However, the pattern of decision-making leading to *Roe* is best traced to a pair of earlier

252. *See* FRIEDMAN, *supra* note 147, at 265.

253. *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 92 (1970) ("There has been very little in the way of general assent to . . . [the school prayer] decisions, not only in a single recalcitrant region, but throughout the country . . . .").

254. *See* Mueller v. Allen, 463 U.S. 388, 390–91 (1983) (upholding state tax credit for educational expenses including expenses at a religious school); *see also* Agostini v. Felton, 521 U.S. 203, 208–09 (1997) (validating a program sending public school teachers into parochial schools to teach remedial subjects and overruling a prior decision in the same case invalidating the program); Mitchell v. Helms, 530 U.S. 793, 801 (2000) (justifying a program of lending media supplies to private schools, including religious schools); Zelmon v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (approving a school voucher program although an overwhelming percentage of the vouchers were used at religious schools).

255. *See generally* Roe v. Wade, 410 U.S. 113, 169 (Stewart, J., concurring) (1973) (holding abortion was within the scope of the liberties guaranteed by the Due Process Clause).

256. *See generally* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding marriage and the right to use contraceptives lie "within the zones of privacy created . . . by constitutional guarantees").

decisions, *Baker v. Carr*[257] and *Reynolds v. Sims*,[258] involving the issue of the judicial role in curing gross malapportionment in state legislative bodies.[259] The decision in *Baker v. Carr*, endorsing a judicial role in curing political reapportionment, and the subsequent adoption of the one-person one-vote solution to the issue two years later in *Reynolds v. Sims* were popular decisions with the public to the extent the public was aware of them.[260] These opinions were much less popular with the political elites who believed that the Court had improperly intruded into their own domain.[261] Still, the cases are considered foundational pillars of democracy and constitutional law despite the fact the decisions, especially *Reynolds v. Sims*, flew in the face of text, original understanding, precedent, and constitutional structure. As the critics, including Justice Harlan dissenting in *Reynolds v. Sims*, recognized at the time, the methodology and potential consequences of the decisions were deeply flawed and had the potential of leading to more problems in the future.[262]

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257. *See generally* Baker v. Carr, 369 U.S. 186 (1962) (concluding apportionment cases pose "a justiciable constitutional cause of action" under the Fourteenth Amendment's Equal Protection Clause).

258. *See generally* Reynolds v. Sims, 377 U.S. 533, 586–87 (1964) (affirming the holding in *Baker* that apportionment cases pose a justiciable constitutional cause of action under the Fourteenth Amendment Equal Protection Clause).

259. *See Baker*, 369 U.S. at 187–88 (noting that this cause of action originated from deprivation of voting rights by citizens in Tennessee); *see also Reynolds*, 377 U.S. at 536–37 (indicating the case arose from the act of the Alabama Legislature in violation of the Equal Protection Clause).

260. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 133 (1980) (citing a poll finding 60% public approval). *Id.* at 151 (indicating only three percent of the population knew of the decisions); *see also* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 255 (2002) (noting an absence of public awareness of the decisions); Murphy & Tanenhaus, *supra* note 15, at 996 ("[T]he issue of reapportionment was almost invisible to the national public in 1964 and 1966 . . . .").

261. *See generally* POWE, JR., *supra* note 260, at 253–553 (discussing the passage of a bill by the United States House of Representatives stripping federal courts of the jurisdiction for reapportionment cases); *see also* COX, *supra* note 147, at 301 (highlighting thirty-two states called for a constitutional convention to reverse *Reynolds*, and the call fell two states short of the necessary supermajority).

262. *See Reynolds*, 377 U.S. at 598 (Harlan., J., dissenting) (discussing repercussions of the Court's decision in the case); COX, *supra* note 147, at 303 (discussing Solicitor General Archibald Cox, who argued the cases as an amicus on behalf of the United States, later admitted that "[t]he Court went extraordinarily far in breaking away from established practices, with little apparent support in conventional sources of law" but concluded the Court "was justified by identifying deeper shared values."); *see also* RICHARD C. CORTNER, THE APPORTIONMENT CASES 236 (1970) (discussing the recognition that *Reynolds* "was the farthest-reaching . . . [exercise of judicial review] 'since *Marbury v. Madison*' . . . ."); *see also* BICKEL, *supra* note 253, at 172–77 (sharing Bickel's—one of the leading constitutional law scholars of his time—criticism the *Reynolds* decision); *see also* MORTON J. HOROWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 85 (1998) (discussing the opinion of the author,

On several occasions, Chief Justice Warren declared that these were the most significant decisions of his tenure[263]—with the exception of *Brown v. Board of Education*. The reapportionment decisions are deeply embedded in constitutional jurisprudence. Contrary to predictions by leading and respected scholars,[264] the decisions were implemented without difficulty. The democratic majoritarian principles animating the decisions have become foundational constitutional concepts. The Court's one-person, one-vote principle strikes most of the public as eminently fair. Indeed, the reapportionment decisions are characterized as the success story of the Warren Court.[265]

In view of all of this, how could such well received decisions possibly have led to questions as to the Court's legitimacy? Don't the reapportionment decisions represent the Court at its finest? The answer is not because of the results of these decisions, which have largely stood the test of time and are deeply embedded in our constitutional system. Rather, the answer is the decision-making process that delivered the results. In first deciding to resolve the issue at all and then selecting a particular metric, the Court proceeded in a defiantly non-judicial manner. The reapportionment cases are among the most blatant examples of "the ends justify the means" methodology in the annals of the United States Reports.

Baker v. Carr was a great case.[266] Like many great cases, *Baker* was argued to the Court twice. The question was whether a challenge to the malapportionment of Tennessee legislative districts could be heard by a federal court or whether it should be dismissed as a non-justiciable political question. Fifteen years earlier in *Colegrove v. Green*,[267] the Court dismissed a

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Professor Martin Horowitz, who enthusiastically approves of the decision, conceded that it could only be justified on "a living Constitution" theory).

263. *See* BERNARD SCHWARTZ & STEPHAN LESHER, INSIDE THE WARREN COURT 184 (1983) (discussing declarations made by former Chief Justice Warren regarding the importance of the reapportionment decisions during an interview on June 25, 1969); *see also* EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 306 (1977) ("It seemed to me that accolade . . . [of] the most important case of my tenure on the Court . . . should go to the case of *Baker v. Carr* . . . .").

264. *See* BICKEL, *supra* note 253, at 173 (predicting that the reapportionment decisions were "head[ed] toward obsolescence, and . . . abandonment."); HERBERT WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS 25 (1968).

265. *See* ROBERT B. MCKAY, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223, 229 (1968) (opining the success story of the Court's reapportionment decisions was due to lack of opposition from the public).

266. *See generally* BLOOM, JR., *supra* note 179, at 235–52 (2014) (noting the weight Chief Justice Warren gave to *Baker v. Carr* in contrast to *Brown v. Board of Education*).

267. Colegrove v. Green, 328 U.S. 549 (1946), *abrogated by* Evenwel v. Abbott, 136 S. Ct. 1120

constitutional challenge to the Illinois Legislature based on the Guarantee Clause of Article IV.[268] There was no majority opinion in *Colegrove*, however, the dominant plurality opinion written by Justice Frankfurter argued for dismissal under the political question doctrine due to lack of judicially manageable standards.[269] Justice Frankfurter famously warned that the Court should not enter the "political thicket."[270]

In *Baker v. Carr*, Justice Brennan rejected the political question argument (the central issue in the case) acknowledging that there were no judicially manageable standards under the Guarantee Clause, the basis of the *Colegrove* challenge. However there were such standards under the Equal Protection Clause, the basis of the claim in *Baker*.[271] Justice Frankfurter wrote a lengthy, impassioned dissent arguing that reapportionment challenges should be dismissed under the political question doctrine, not due to the particular legal theory raised but rather due to the nature of the underlying issue.[272] He asserted that this "destructively novel judicial power . . . may well impair the Court's position as the ultimate organ of the '[S]upreme Law of the Land' . . . ."[273] Justice Frankfurter argued that the Constitution simply did not endorse a particular theory of representation and hence apportionment, and consequently the Court, would need to adopt its own theory independent of anything in the Constitution in order to decide the case.[274] Justice Frankfurter argued that

(2016).

268. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946), *abrogated by* Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (holding a violation of the Guarantee Clause falls outside of the scope of judicial action and therefore cannot be handled by a court).

269. *See generally id.* at 552–55 (highlighting the danger of the judiciary being involved in the political aspects of the government).

270. *See id.* at 556 (warning of the dangers of the judiciary entering into politics and "cutting" into legislative territory).

271. *See* Baker v. Carr, 369 U.S. 186, 226–27 (1962) (noting the principal question is not one that is relegated to a political branch and recognizing the Court's competency to handle questions under the Equal Protection Clause of the Fourteenth Amendment).

272. *See id.* at 297 (Frankfurter, J., dissenting) ("It is the nature of the controversies arising under it, nothing else, which has made it judicially unenforceable . . . . [W]here judicial competence is wanting, it cannot be created by invoking one clause of the Constitution rather than another.").

273. *Id.* at 267 (Frankfurter, J., dissenting).

274. *See id.* at 300 ("What is actually asked of the Court in this case is to choose among competing bases of representation . . . among competing theories of political philosophy—in order to establish an appropriate frame of government . . . ."). *See generally id.* at 302–23 (detailing that reapportionment based on population equality was not the accepted basis of legislative apportionment in England, the colonies, the early republic, the states as of the time of ratification of the Fourteenth Amendment or in contemporary America).

judicial intervention in legislative apportionment would threaten public confidence in the Court's "moral sanction" on which its legitimacy depended.[275] Justice Harlan's dissent reached the same result by a somewhat different route, arguing that given that the Constitution did not endorse any particular theory of legislative representation, no right of the plaintiffs had been violated and thus the case should have been dismissed for failure to state a claim on which relief could be granted.[276] Justice Harlan closed his opinion by noting that the decision would please those who see the Court "primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source . . . ."[277]

Justice Brennan for the majority and Justices Frankfurter and Harlan dissenting wrote lengthy and scholarly opinions defending their positions. None of the three appeared to operate outside of the accepted legal analytical framework. Yet, *Baker v. Carr* arguably represented one of the great turning points in constitutional analysis. Justice Frankfurter, in his last opinion prior to retiring due to a stroke, well understood that by agreeing that reapportionment challenges were justiciable, the Court was necessarily engaging in an unwarranted judicial restructuring of the American political process.

As Justice Frankfurter feared, the Court would need to select a benchmark among many alternatives and declare that benchmark the constitutionally requisite standard. The Court did just that in *Reynolds v. Sims*, adopting "one person one vote" as the standard with which both houses of bicameral legislative bodies must forthwith comply. Chief Justice Warren attempted to dress the opinion in equal protection garb but failed to persuade. The crucial question as a matter of equal protection analysis is whether similarly situated persons are being treated differently. If so, there will be a presumptive equal protection violation. However, the decisive issue in any equal protection case will be whether persons on each side of the legislative classification in issue are similarly situated. All persons are

275. *Id.* at 267 (Frankfurter, J., dissenting). *But see* Luis Fuentes-Rohwer, *Taking Judicial Legitimacy Seriously*, 93 CHI. KENT L. REV. 505, 522 (2018) (arguing that Frankfurter was wrong as to the impact of the reapportionment decisions on public perceptions of the Court and hence its legitimacy, despite the fact that his constitutional arguments were more solidly grounded than those of the majority).

276. *See id.* at 331, 333 (Harlan, J., dissenting) (arguing the case should have dismissed for failure to state a claim as the Court no longer "us[ed] the Fourteenth Amendment to strike down state laws [simply] because they may be unwise . . . .").

277. *Id.* at 339.

similarly situated to other persons in some respects and yet differently situated in others. From an equal protection standpoint, the question in a reapportionment case is whether geography matters. Are voters in different geographic regions of the state differently situated—in which case, the state may accord greater political power to voters in more thinly populated regions? Or are they similarly situated—in which case, according more political power to voters in thinly populated areas would violate equal protection? Chief Justice Warren opted for the latter, pronouncing that "all voters, as citizens of a State, stand in the same relation regardless of where they live."[278] This was the very crux of the case, and to use the language of logic, Warren simply assumed his conclusion. The crucial question raised by *Reynolds* was how the Court knew the Constitution requires voters in different geographic areas of the state be similarly situated. Warren had no answer to this question and did not even seem to realize that it was in fact the central issue in the case. Warren's former law clerk and sympathetic biographer, G. Edward White, declared that in *Reynolds*, "[Warren] had substituted homilies . . . for doctrinal analysis."[279]

Justice Harlan wrote a vigorous dissent arguing that the Court's selection of one-person one-vote was clearly inconsistent with the text of the Fourteenth Amendment (leaving control of the state electoral process to the states), constitutional history and tradition, as well as precedent.[280] Like Justice Frankfurter in *Baker*, Justice Harlan argued that the majority was simply choosing one of many alternative approaches to representative apportionment and then embedding it in the Constitution as if it was actually there. Justice Harlan concluded his opinion with the following diagnosis:

> [T]hese decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements . . . . [The] Court, limited in function . . . does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with

278. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

279. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 239 (1982).

280. *See generally* Reynolds, 377 U.S. at 589–614 (Harlan J., dissenting) (arguing the majority opinion's use of one-person one-vote is wholly inconsistent with history, tradition, and precedent).

> the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.[281]

"In a nutshell"—as Justice Harlan would say—he captured what was so fundamentally wrong with *Reynolds v. Sims* and the jurisprudence it encouraged. Indeed, Solicitor General Cox as amicus arguing for the challengers to malapportionment refused to argue that one-person one-vote was the standard embodied in the Constitution, instead argued that the gross malapportionment presented by the cases was unreasonable and arbitrary.[282]

Why beat up on *Reynolds* over fifty years after it was decided? After all, as noted above, it has incontrovertibly carried the day, at least in terms of its result. To a large extent because of *Reynolds*, majoritarian democracy as expressed through one-person one-vote has become a fundamental constitutional principle, though that was hardly the case either at the time of the founding, during the reconstruction era, or immediately prior to the decision in *Reynolds*. The real problem with *Reynolds*, as Justice Harlan recognized, was that it was a major step toward giving rise to an erroneous and dangerous conception of the Court's appropriate role in the constitutional system. It was especially dangerous because the Court succeeded in transforming the American political system down to its roots with very little resistance. The ease with which the Court was able to effect such a major change in the teeth of so much law to the contrary must have emboldened the Court to push even further. It also must have convinced a segment of the public that it was completely appropriate for the Court to use "constitutional interpretation" to address and hopefully resolve all sorts of troubling political issues.

The reapportionment decisions were especially damaging because they created the mindset in many Justices, often a majority, that the appropriate role of the Court was to resolve troubling and controversial political issues. All this to ensure fairness and justice when there was little if any supporting law or even when the existing law was very much to the contrary. In other words, the reapportionment cases taught at least some of the Justices that it

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281. *Id.* at 624–25 (emphasis added).

282. *See* COX, *supra* note 147, at 298 (describing the contents of the amicus curiae as focusing on an arbitrary and unreasonable departure in violation of the Equal Protection Act as opposed to support for one-person one-vote).

was their job to simply "do the right thing" as long as they could get away with it, and they seemed to be able to get away with a lot.[283] These decisions were equally damaging because they convinced a significant segment of the public, especially through those including law professors and media commentators whom the public relied on to explain the decisions, to assume it is the proper role of the Court to resolve controversial political issues in a manner that promoted justice and fairness regardless of the presence or absence of legal support.[284] As Earl Maltz noted, "[t]he experience of the Warren Court . . . conditioned the public to view the Court as a kind of ultimate *substantive* authority on substantive moral questions."[285] As such, the judicial and public mind set created by the reapportionment decisions created the legal environment that made *Roe v. Wade* possible.

Only a year after *Reynolds*, the Court decided *Griswold v. Connecticut*[286] beginning the inevitable march to *Roe v. Wade*.[287] In *Griswold*, the Court invalidated what Justice Stewart's dissent characterized as "an uncommonly silly law"[288] of Connecticut which made it a crime for married people to use contraceptives. The specific result of the case was not jarring. However, the rationale was quite troublesome. As discussed above, during the first third of the twentieth century, the Court had invalidated much state economic and social welfare legislation under the rubric of a substantive due process liberty right to contract. The theory was totally discredited and rejected by the Court in the mid-1930s. There was every reason to believe that substantive due process, under which the Court seemed to treat certain aspects of liberty as far more important than others, had been altogether discarded as a legitimate constitutional doctrine. Justice Douglas, who wrote the majority opinion in *Griswold*, went out of his way to avoid any reliance on substantive due process, which he had long opposed, by basing

283. BORK, *supra* note 83, at 77 ("The Court can do what it wishes, and there is almost no way to stop it, provided its result has a significant political constituency.").

284. *See generally* HOROWITZ, *supra* note 262 (noting the Court's decisions are justifiable as long as they further democracy); ELY, *supra* note 210, at 12–15 (discussing that the Court's decisions are justifiable as long as they further democracy); STRAUSS, *supra* note 129, at 1–2 (discussing the importance of Justices and judicial rulings in adapting the Constitution to create the common law, "the living Constitution").

285. Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11, 25 (1992).

286. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that marriage and the right to use contraceptives lie within the zones of privacy created by constitutional guarantees).

287. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (holding abortion was within the scope of the liberties guaranteed by the Due Process Clause).

288. *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting).

the opinion on a right to privacy derived from the penumbras and emanations of various explicit provisions of the Bill of Rights.[289] Justice Douglas's sleight of hand did not fool Justice Black, and in his dissenting opinion, he charged that the opinion indeed represented a return to the discredited *Lochner* era of substantive due process.[290]

Unfortunately, less than a year after decrying the emerging use of constitutional interpretation to advance a political agenda in his *Reynolds* dissent, Justice Harlan readopted his prior support for a substantive due process liberty-based approach.[291] Justice Harlan erroneously believed that the due process theory could be adequately constrained by careful consideration of the teachings of tradition and history.[292] *Griswold* is stunning proof that a potentially dangerous legal theory cannot be limited by assurances of counsel or by explicit limitations adopted by the Court in its opinion. During oral argument, counsel for the plaintiff assured the Court that a decision in their favor would have no application to laws prohibiting abortion.[293] Almost every Justice who wrote either a majority or concurring opinion in the case limited its scope to laws affecting married couples.[294] Most of the Justices declared it would have no impact on laws criminalizing homosexual conduct.[295] In subsequent cases, all of these limitations were discarded.

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289. *See id.* at 481–86 (analyzing many of the amendments of the Bill of Rights to determine the penumbras emanating from those rights).

290. *See id.* at 514–15 (Black, J., dissenting) (noting that other Justices did not blame *Lochner*, despite the reasoning in the case being similar).

291. In the previous case of *Poe v. Ullman*, 367 U.S. 497 (1961), in which the Court dismissed a challenge to the very same Connecticut statute invalidated in *Griswold*, Justice Harlan had written a dissent arguing that the statute should be invalidated under substantive due process liberty. Rather than restate his prior arguments in *Griswold*, Justice Harlan simply incorporated by reference his *Poe* dissent into his *Griswold* concurrence. *See Griswold*, 381 U.S. at 500 (Harlan, J., concurring) ("For reasons stated at length in my dissenting opinion in *Poe v. Ullman* . . . I believe that it does.").

292. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

293. Oral Argument at 1:04:11, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496), https://www.oyez.org/cases/1964/496 [https://perma.cc/K876-V8KK] (Justice Black: "Would your argument concerning these things you've been talking about relating to privacy, invalidate all laws that punish people for bringing about abortions?" Thomas Emerson: "No, I think it would not cover thee abortion laws or the sterilization laws, Your Honor.").

294. *Griswold*, 381 U.S. at 482 ("[T]his law, however, operates directly on an intimate relation of husband and wife[.]"). *Id.* at 499 (Goldberg, J., concurring) ("[T]he right of privacy in the marital relation is fundamental and basic[.]"). *Id.* at 502–03 (White, J., concurring) ("Surely the right invoked in this case is the right to be free of regulation of the intimacies of marriage relationship[.]").

295. *Id.* at 499 (Goldberg, J., concurring) (suggesting "[a]dultery, homosexuality and the like are sexual intimacies which the state forbids" and as such are not implicated by the right to privacy) (quoting *Poe*, 367 U.S. at 553) (Harlan, J., dissenting).

The specific result in *Griswold* was hardly controversial since the Court invalidated a law that had never been enforced against married couples and was clearly far out of step with contemporary mores. The harm was serious, however, in that the Court had unleashed a doctrine that most considered long dead and buried, which would allow the Court under the rubric of privacy to invalidate laws that it disapproved of regardless of how long they had existed or how widely they were supported. The rediscovery of substantive due process leads directly to *Roe v. Wade* and later to the *Obergefell v. Hodges*[296] decision.

The cumulative impact of the Warren Court precedents in a wide variety of areas. Especially, school prayer and the rights of criminal defendants created a widespread degree of public discontent with the Court. Richard Nixon capitalized on public hostility to the Warren Court by making the Court an issue in the 1968 presidential campaign.[297] The crime rate in the sixties increased, probably due to demographical reasons unconnected to the Court's criminal procedure decisions. Nevertheless, dissatisfaction with the Court resonated with a sufficient number of voters that Nixon targeted.[298] Public backlash against the Warren Court was one of many issues that led to Nixon's election.[299] Having campaigned against the Court, Nixon had the unusual political fortune of four Supreme Court vacancies to be filled during his first presidential term, including the Chief Justice position following the retirement of Earl Warren.[300] With

296. Obergefell v. Hodges, 574 U.S. 1118 (2015).

297. *See* Chris Hickman, *Courting the Right: Richard Nixon's 1968 Campaign Against the Warren Court*, 36 J. SUPREME COURT HISTORY 287, 291 (2012) (describing the evolution of candidate Nixon's attack on the Warren Court during the 1968 campaign and the encouragement of that strategy by Judge, later Chief Justice, Warren Burger); LIVA BAKER, MIRANDA: CRIME LAW AND POLITICS 211 (1983); *see also* Rosenberg, *supra* note 202, at 385–86 (evidencing Barry Goldwater had run against the Court in the 1964 presidential election but lost decisively to Lyndon Johnson).

298. *See* Gregory A. Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POLITICAL SCIENCE REV. 1209, 1216–17, 1223 (1986) (noting an increase in media coverage of crime tends to lead to a decline in support for the Court and concluding that an increase in the public perception of judicial activism also resulted in a decline in public support for the Court).

299. *See* BICKEL, *supra* note 253, at 93 ("[T]he election of 1968 may have been something of a vote of repudiation of the criminal decisions[.]").

300. Warren had announced his resignation prior to the 1968 election, but due to political difficulties, the vacancy had not been filled when President Nixon was inaugurated in January 1969. Justice Fortas had also resigned prior to the Nixon inauguration but once again, political problems prevented the nomination and confirmation of a replacement by the lame duck President Johnson. Following the end of the 1971 Supreme Court term, Justices Black and Harlan both retired for health reasons. That gave President Nixon two further vacancies on the Court to fill during his first term.

four appointments to the Court, Nixon effectively turned the Court away from the direction it had taken under Chief Justice Warren. Nixon's four appointments to the Court during his first term was yet another example of how the constitutionally based appointment power can respond to public dissatisfaction with the Court. Especially in the contentious area of rights of the accused, an issue that Nixon had campaigned on, the Burger Court placed constraints on many of the more expansive Warren Court precedents.[301] However, the reconstituted Court did not entirely change direction, but in some areas, engaged in even more aggressive action than its predecessor.[302]

F. The Burger Court and *Roe v. Wade*

Early on the Burger Court in *Furman v. Georgia*[303] (with all four Nixon appointees dissenting) invalidated the death penalty as it then stood in all jurisdictions. Justice Marshall asserted that the death penalty was out of step with modern sensibilities and that few if any states would reenact it.[304] He could not have been more wrong. Within a year of the decision, nearly half the states had reenacted the death penalty.[305] This is a stunning example of how at least one justice, if not a majority of the Court, was badly out of step with public opinion and sensibilities. It is also an excellent example of an adverse political response to an unpopular decision. In one particular area, the right to privacy, the Court ventured far beyond anything that that the Warren Court had done to the severe detriment of its reputation. In

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301. *See* United States v. Leon, 468 U.S. 897, 922 (1984) (noting the exclusionary rule does not apply where the police relied in good faith on a search warrant subsequently ruled invalid); *see also* United States v. Robinson, 414 U.S. 218, 235 (1973) (permitting warrantless full body search pursuant to a custodial arrest); United States v. Miller, 425 U.S. 435, 446 (1976) (establishing there is no reasonable expectation of privacy with respect to number on checks provided to bank); Harris v. New York, 401 U.S. 222, 226 (1971) (declaring statements obtained in violation of *Miranda v. Arizona* can be admitted for impeachment of a witness); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (holding a person invited to the police station and who was told he was suspected in a burglary was not in custody and thus was not entitled to *Miranda* warnings); Rhode Island v. Innis, 446 U.S. 291, 303 (1980) (ruling conversation between officers in a squad car with arrested subject did not constitute interrogation invoking *Miranda* warnings); Kirby v. Illinois, 406 U.S. 682, 691 (1972) (limiting the right to presence of counsel to post-indictment lineups); United States v. Ash, 413 U.S. 300, 317 (1973) (ruling that right to counsel does not apply to photographic identification).

302. *See generally*, THE BURGER COURT: THE COUNTERREVOLUTION THAT WASN'T vii (Vincent Blasi ed., 1983) ("[W]hat has happened to those controversial Warren Court Doctrines? They are more securely rooted now than they were in 1969 . . . .").

303. Furman v. Georgia, 408 U.S. 238, 278 (1972).

304. *Id.* at 369.

305. FRIEDMAN, *supra* note 147, at 287.

Griswold v. Connecticut in 1965, the Warren Court first recognized a constitutional right of privacy to invalidate an archaic Connecticut law prohibiting married couples from using contraceptives.[306] The Burger Court employed the right of privacy to challenge laws of far greater contemporary significance. In *Eisenstadt v. Baird*[307] decided in 1972, the Court uncoupled the right to privacy from the marital relationship and extended it to the individual.[308] In *Eisenstadt*, employing equal protection analysis, the Court invalidated a Massachusetts law prohibiting the distribution of a contraceptive device to an unmarried person.[309] *Eisenstadt* paved the way to *Roe v. Wade*[310] which was already on the Court's docket.

After two separate oral arguments, neither of which was particularly competent, the Court issued its opinion in *Roe v. Wade*, surely the most divisive and controversial decision of the Court since *Dred Scott*. *Roe*, along with the companion case of *Doe v. Bolton*,[311] effectively invalidated the abortion laws of almost all states. Unlike *Griswold*, in which Justice Douglas had struggled mightily to avoid resting the decision on the presumptively discredited doctrine of substantive due process, Justice Blackmun in *Roe* embraced substantive due process liberty as the constitutional source of the right to privacy.[312] Were it not for *Roe v. Wade*, there might be no present firestorm surrounding the Court, or at least it would be far more muted. *Roe* created a never-ending controversy in at least three respects.

First, by tackling the abortion issue at all, the Court entered an endless whirlpool of controversy from which there was no escape. Too much was at stake—life or no life. There was no room for compromise although the Court seemed to think it could find one. For many persons on both sides of the debate, this is an issue. For some, this is the issue that evokes extreme passion and a desire to fight to the bitter end.[313] As William Eskridge has observed, "*Roe* was a threat to our democracy because it raised the stakes of

306. Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) ("[Marriage] deal[s] with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.").

307. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

308. *Id.* at 453.

309. *Id.* ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into a matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (emphasis in original).

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

311. Doe v. Bolton, 410 U.S. 179 (1973).

312. *Roe*, 410 U.S. at 153.

313. *Id.* at 116 (acknowledging the emotion laden nature of the abortion question). However, it is doubtful that Justice Blackmun understood the depth of emotion that the decision would provoke.

an issue where primordial loyalties ran deep."[314] He continued by saying: "Pro-life Americans behaved as though they had been disowned by this country. And to a certain extent they had been."[315]

Second, the Court's substantive due process theory revealed that the Court had no solid basis in law for its decision and that it was simply relying on nothing more than its own conception of sound public policy.[316] As John Hart Ely wrote in his classic critique of the case, the opinion in *Roe* was "not constitutional law and gives almost no sense of an obligation to try to be."[317]

Third, the Court attempted to resolve a question that even it seemed to recognize was incapable of judicial resolution—at least on a principled constitutional basis—when a fetus becomes a human being deserving legal if not constitutional protection. Justice Blackmun seemed to recognize that this question was beyond legal competence but then purported to answer it by fiat, as he must, once the Court decided to address the abortion issue at all. Initially, he wrote:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[318]

Surely, Justice Blackmun meant the Court could not resolve the issue of when a fetus becomes a constitutional person since there can be no question that a fetus is a form of life from conception on. However, in this quotation, Justice Blackmun gave away his case, as lawyers would say, by admitting that the judiciary cannot resolve the central issue. Then Texas should win since it had resolved the issue. Nonetheless, Blackmun was not finished. After briefly discussing the divergence of views on the question of when a fetus becomes a person, Blackmun declared "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman

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314. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE. L.J. 1279, 1312 (2005).

315. *Id.*

316. *See* BORK, *supra* note 83, at 43 ("[A] judge who insists on giving the due process clause such content must make it up.").

317. Ely, *supra* note 83, at 947.

318. *Roe*, 410 U.S. at 159.

that are at stake."[319] However, he recognized that the state had a legitimate and important interest in protecting "potentiality of human life."[320] Blackmun chose the line of viability (the point at which the fetus can survive outside of the womb) as the point at which the state's interest in the protection of potential human life could override the woman's right to an abortion (at least as long as giving birth did not endanger the woman's life or health).[321] After declaring the judiciary was unable to draw the line, Justice Blackmun proceeded to draw the line by substituting potential life for life. No one was fooled by this clumsy maneuver. Justice Blackmun had admitted that the abortion controversy could not be resolved on a principled basis, much less on a principled basis grounded in constitutional law, and then proceeded to resolve it anyway. Quite transparently, it was simply not the Court's proper role to resolve troubling social, cultural, or political controversies through naked interest balancing devoid of any pre-existing legal or constitutional support.[322]

Justice Rehnquist, in a short dissent, compared the Court's decision, based as it was on substantive due process, to the infamous decision in *Lochner v. New York*.[323] Justice White, in a dissenting opinion, characterized the Court's opinion as "an exercise of raw judicial power" with "scarcely any reason or authority for its action . . . ."[324] Following Professor Ely's influential article savaging the opinion in *Roe*, other leading legal academics, including many who sympathized with the result in *Roe*, joined in criticism of the opinion. Professor Archibald Cox of the Harvard Law School wrote that the decision "lacked significant support in conventional sources of law."[325] Gerald Gunther of the Stanford Law School, and author of the most widely used Constitutional Law casebook, declared, "I have not yet found a satisfying rationale to justify *Roe v. Wade,* the abortion ruling, on the

319. *Id.* at 162.

320. *Id.*

321. *Id.*; *see also* CLARKE FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 127 (2013) (noting viability had not been mentioned in either the briefs, including the amicus briefs, or the oral arguments of *Roe v. Wade*).

322. *See* Tom Tyler & Gregory Mitchell, *Legitimacy and Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 781 (1994) (illustrating, according to a telephone survey conducted in the San Francisco Bay area, a "majority of respondents indicated that the Supreme Court should have less authority to determine public policy over the abortion issue").

323. *Roe*, 410 U.S. at 174.

324. *Id.* at 222 (White, J., dissenting).

325. COX, *supra* note 147, at 334.

basis of modes of constitutional interpretation I consider legitimate."[326] Judge Bork wrote that *Roe* did not contain "one sentence that qualifies as legal argument."[327] Dean Guido Calabresi of the Yale Law School characterized *Roe* as "offensive" and a "disaster."[328] Professor Mark Tushnet, who had served as Justice Marshall's law clerk when *Roe* was decided, characterized it as "a new art form," "the totally unreasoned judicial opinion."[329] Professor Richard Fallon of the Harvard Law School stated that the *Roe* opinion was "puzzling, disappointing and almost embarrassing to read" and that it was "bereft of reasoned argument."[330] Judge Henry Friendly observed that the Court had failed "to articulate a defensible principle."[331] And there was so much more.[332] The gist of the academic criticism made two points. First, the opinion in *Roe* applied no discernable principles of law to defend its result. Second, and relatedly, the Court went far beyond its proper role in attempting to resolve an issue that could only be resolved politically.

The public reaction to *Roe* was perhaps slow in developing, given that former President Johnson died on the day the opinion was announced, capturing the immediate news cycle. However, protests and counter protests soon materialized. As Archibald Cox noted, "no decision other than *Dred Scott* has aroused as intense emotion."[333]

By taking one side on the abortion issue, the Court stepped into quicksand from which it might be impossible to extricate itself. The Court's only path to salvation would have been to avoid deciding the case on the

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326. Gerald Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 WASH. U.L.Q. 817, 819 (1979).

327. BORK, *supra* note 83, at 112.

328. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 93–97 (1985).

329. MARK V. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 54 (1988).

330. RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION 62 (2001).

331. Henry Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 35 (1978).

332. *See* JOHN T. NOONAN, JR., A PRIVATE CHOICE, ABORTION IN AMERICA IN THE SEVENTIES 30 (1979) ("Political pragmatism, not constitutional principle, appeared to be the *raison d'être* of *The Abortion Cases*."); *see also* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 81 (1991) ("Roe gave legal reasoning a bad name."); ALEXANDER BICKEL, THE MORALITY OF CONSENT 28 (1975) (In Roe, the Court "simply asserted the result it reached."); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 82 (2006) (arguing *Roe* "was a political and constitutional mistake" because of judicial "unilateralism").

333. COX, *supra* note 147, at 322.

merits entirely. However, once the Court found a constitutional right to abortion, it created a constituency that would continue to demand protection of that right and would endorse the value oriented non-legalistic methodology that produced the decision. *Roe* convinced a significant segment of the public that the Supreme Court's proper role was to provide a trump card that could be played to invalidate any state or federal law that could not be repealed through the political process.[334] As of *Roe*, at least for many, the Supreme Court had become Santa Claus and any vision of the Court or methodology that threatened the Court's role as supreme political actor became threatening to "democracy."

Immediately after *Roe*, several states passed legislation testing the limits of the decision. In the decade following *Roe*, the Court defended the decision vigorously, invalidating most laws that had the effect of undermining it with the exception of state and federal laws prohibiting public funding of abortion.[335] Given the Court's continued support for *Roe*, Supreme Court confirmation hearings did not for the most part turn on the potential for overruling *Roe*. That changed near the end of the 1980s. *Roe* had been decided by a seven-to-two majority. As new Justices were appointed, apparent support on the Court for *Roe* declined from six to three, then five to four, until finally the *Webster* case in 1989 when it appeared there might be a majority to overrule *Roe*.[336]

The other event that crystalized the public controversy over the continued survival of *Roe* was the unsuccessful nomination of Judge Robert Bork to the Supreme Court in 1987. As a law professor, Bork had been highly critical of *Griswold v. Connecticut*, the less controversial precursor of *Roe*

334. FRIED, *supra* note 331, at 87 ("[A]bortion has distorted public attitudes and expectations about the Supreme Court.").

335. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 71–75 (1976) (invalidating requirements of parental and spousal consent); *see also* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 452 (1983) (invalidating requirement that post first trimester abortions be performed in a hospital), *overruled by* Planned Parenthood v. Casey, 505 U.S. 833 (1992). *But see* Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding prohibition of public funding for medically unnecessary abortions where childbirth costs for indigents were paid by the state); Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding a federal law prohibiting federal funding for some medically necessary abortions).

336. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 537–38 (1989) (Blackmun, J., dissenting) (discussing how close the opinion was to overturning *Roe*). *Webster* involved a Missouri law that was designed to present a direct challenge to *Roe*. Chief Justice Rehnquist writing for a four-justice plurality was prepared to overrule *Roe*. Justice O'Connor, the fifth vote, concluded that the statute could be upheld without reconsidering *Roe*. *Id.*

v. Wade.[337] The supporters of *Roe* recognized that Judge Bork would probably be the crucial fifth vote to overrule *Roe*. Judge Bork's explicit views on the illegitimacy of the right to privacy played a significant role in the defeat of his nomination.[338] After the highly publicized Bork hearings, Supreme Court confirmation hearings—at least for nominees who might be inclined to vote to overrule or at least substantially narrow *Roe*—would never again be the same. The year before the Bork hearings, Justice Antonin Scalia, who proved to be a vigorous opponent of *Roe*, had been confirmed by a unanimous vote of the Senate.

One of the puzzling considerations surrounding the recent debate over whether *Roe* should or will be overruled is that it was, in fact, partially overruled over twenty-five years earlier in *Planned Parenthood of Southern Pennsylvania v. Casey*.[339] For years, the Department of Justice urged the Court to reconsider and overrule *Roe*. Finally, in *Casey*, the Court agreed to consider and address that issue. In order to save *Roe* from being completely overruled, the Joint Opinion of Justices Kennedy, Souter, and O'Connor, replaced the strict scrutiny standard of review—which would ordinarily apply in a case involving a fundamental right—with the undue burden test. In other words, a law regulating abortion would only be unconstitutional if it intended or had the effect of imposing an undue burden on the woman's right to obtain an abortion.[340] In *Roe*, the Court took on an issue which it could not adjudicate in a principled manner and in *Casey*, it rendered it even more subjective. As Justice Scalia pointed out in dissent, what constituted an undue burden was very much in the eye of the beholder.[341] Thus a judge sympathetic to the abortion right can find that virtually all regulation creates an undue burden. A judge unsympathetic to the right will rarely find that good faith abortion regulation creates an undue burden. Consequently,

337. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J 1, 7–11 (1971) (opining how the substantive due process doctrine used in *Griswold* has always been improper).

338. *See* Lackland H. Bloom, Jr., *The Legacy of Griswold*, 16 OHIO N.U. L. REV. 511, 540–544 (1989) ("There is no way to tell exactly how much Judge Bork's persistent attacks on *Griswold* contributed to his rejection by the Senate; however, it is fair to say that it was a significant factor. *Griswold* was a useful case for Judge Bork's opponents because its general right to privacy . . . . The opposition portrayed Judge Bork as a threat to privacy . . . .").

339. Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992).

340. *See id.* at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of liberty protected by the Due Process Clause.").

341. *Id.* at 986 ("[T]he standard is inherently manipulable and will prove hopelessly unworkable in practice.").

Casey contained the seeds of the ultimate effective rejection of *Roe* by providing the Court with the tools to narrow and minimize *Roe* without explicitly overruling it. At least for public relations purposes, the defenders of *Roe* proceed as if it still existed unaltered, but that has not been the case for over two decades. By deciding *Roe*, the Court created large and active constituencies both favoring and opposing the continuing existence of the decision. The Court has painted itself into a corner from which it cannot easily escape. Whatever it does with respect to a constitutionally based abortion right will cause millions of Americans to rebel against the Court. That cannot be said of any other contemporary decision. This is a very precarious position for the Court to have placed itself in.

G. *The Rehnquist Court*

Like the Burger Court before it, the Rehnquist Court was not as conservative in ideology as it has often been portrayed.[342] Having rediscovered the substantive due process methodology, the Court made use of it in socially controversial areas, especially gay rights. In *Lawrence v. Texas*,[343] the Court employed substantive due process to invalidate a Texas criminal law which prohibited homosexual sodomy, even within the confines of the home.[344] The result was not particularly controversial because a few states maintained such laws and those that did rarely enforced them. *Lawrence* was troublesome in at least three respects, however. First, there was a serious question whether the validity of such laws was any of the Court's business, as would be the case whenever the Court relied on substantive due process to invalidate a law. Second, Justice Kennedy, writing for the majority, seemed to reject public morality as a legitimate police power interest by equating it with nothing more than prejudice.[345] For over a century, federal courts had characterized morality as one of the legitimate ends of the police power.[346] Finally, *Lawrence* was seen as a

342. *See* Bartels & Johnston, *supra* note 12, at 186 (reporting between 57% and 64% of the Rehnquist Court's decisions are characterized as liberal).

343. Lawrence v. Texas, 539 U.S. 558 (2003). For an excellent discussion of the history of the case, see DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (1st ed. 2012) (summarizing the specific details behind the *Lawrence* decision).

344. *Lawrence*, 539 U.S. at 578.

345. *Id.* at 571.

346. *See* Stone v. Mississippi, 101 U.S. 814, 818 (1879) ("[The police power] extends to all matters affecting the public health or the public morals."); Chi., B. & Q. Ry. Co. v. State of Illinois, 200 U.S. 561, 592 (1906) ("We hold that the police power of a state embraces . . . regulations designed to promote the public health, public morals, or the public safety.").

doctrinal step in the invalidation of laws prohibiting same-sex marriage. The majority denied that this was where the decision would lead.[347] Justice Scalia's dissent argued that that was exactly the intended result.[348] He proved to be correct.

There are two Rehnquist Court decisions that critics of the conservative majority on the Court have assailed, neither of which have led to a legitimacy crisis. The first is *Bush v. Gore*.[349] The 2000 presidential race resolution turned on a recount of Florida's votes, where George W. Bush held a slight lead.[350] Democrat candidate Al Gore sought the aid of the Florida courts to alter the rules governing the recount.[351] The Florida Supreme Court complied.[352] Ultimately, the Supreme Court of the United States intervened at the behest of Bush by first halting the manual recount[353] and then concluding that the lack of uniform standards rendered such a recount to violate equal protection of the laws. Given the safe harbor deadline's imminence, there simply was insufficient time to devise a standard and resume the recount.[354] Consequently, given that Bush still held a slim lead, he won the Florida electoral vote and the presidency.

The majority's legal basis for its equal protection result was thin. However, the decision was best explained by Justice Stevens's dissent, which contended that "[w]hat must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed."[355] Stevens was exactly correct. Chief Justice Wells of the Florida Supreme Court, dissenting from the majority's decision to change the vote count deadline, had charged that there was "no foundation in the law of Florida" for that decision.[356] As Justices O'Connor, Kennedy, and Breyer indicated after the fact, they had

347. *Lawrence*, 539 U.S. at 578 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

348. *Id.* at 604 (Scalia, J., dissenting).

349. Bush v. Gore, 531 U.S. 98 (2000).

350. *Id.* at 100.

351. *Id.*

352. Palm Beach Cnty. Canvassing Bd. v. Harris, No. SC00-2346, No. SC00-2347, No. SC00-2348, 2000 WL 1716480 (Fla. Nov. 17, 2000).

353. Bush v. Gore, 531 U.S. at 1046, 1047 (2000).

354. *Id.* at 122.

355. *Id.* at 128 (Stevens, J., dissenting).

356. Gore v. Harris, 772 So. 2d 1243, 1263 (Fla. 2000) (Wells, C.J., dissenting), *rev'd*, 531 U.S. 98 (2000).

concluded that the Florida Supreme Court could not be trusted to fairly and competently resolve a dispute involving the election of the next President of the United States.[357]

Democrats, especially law professors, were furious and charged that by intervening and effectively deciding a presidential election, the Court had tarnished its image with the public irreparably. Some portrayed *Bush v. Gore* as a fatal blow to the Court's legitimacy as an institution.[358] Law professors were as critical of the reasoning of *Bush v. Gore* as they had been of *Roe v. Wade*.[359] However, these dire predictions were not realized.[360] There were hard feelings for a short period, but these dissipated with time. The predicted blow to the Court's legitimacy as an institution failed to materialize.[361] The public was tired of the continued conflict over the election and accepted its resolution by the Court. The Court's opinion in *Bush v. Gore* could be criticized as light on legal principle and that the Court should have given Florida one final opportunity to complete the recount; however, while a 5–4 decision by a majority appointed by Republican presidents might appear politically partisan, the decision had little—if any—long-term impact on the Court's institutional credibility with the general public. Not only did the decision fail to erode public support for the Court, public support for the Court reached a higher level in the year following the decision than recorded in the recent

357. JAN CRAWFORD GREENBURG, SUPREME CONFLICT 31–32 (2007) (noting Justice O'Connor remarks that the Florida Supreme Court was "off on a trip of its own"); *see also id.* at 176 (stating Justice Kennedy "would later explain that the outcome had to do with bringing a renegade court to heal"); JEFFREY TOOBIN, THE NINE 165 (2007) (quoting how Justice Breyer "didn't like what the Florida Supreme Court had done. To him, the justices in Tallahassee looked like they were trying too hard to help Gore.").

358. *See* Yoo, *supra* note 12, at 775 (voicing claims by legal academics that the decision undermined the Court's legitimacy).

359. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1083–86 (2001) (critiquing the analysis of *Bush v. Gore* as political, not legal); James L. Gibson, Gregory A. Caldeira, & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRITISH J. OF POL. SCI. 535, 535–36 (2003) ("585 law professors placed an advertisement in the New York Times on 13 January 2001, condemning the Court's decision as illegitimate.").

360. *See* Yoo, *supra* note 12, at 776–78 (explaining why the decision in *Bush v. Gore* did not threaten the Court's legitimacy with the public).

361. FRIEDMAN, *supra* note 147, at 358 (asserting 61% of the public believed that the Court should have resolved the election dispute); JEFFREY TOOBIN, THE NINE 177 (2007); Gibson & Caldeira, *supra* note 12, at 199; Gibson, Caldeira & Spence, *supra* note 358, at 546 ("Most Americans (62.4 percent) believe that the Court based its decision on the legal merits of the case, not on the [J]ustices' desire to see Bush become president.").

past.[362] The election was a mess, so it needed to be resolved. The Court's intervention brought it to a quick conclusion, which is probably what the general public desired. Unlike *Roe*, the decision resolved a once in a lifetime dispute unlikely to occur again. *Bush v. Gore* well illustrates the strength of the diffuse support for the Court. Given the onslaught of academic and media criticism of the decision, as Professor Fuentes-Rohwer asked: "If *this* case did not harm the Court's legitimacy in any noticeable way, will any case ever will?"[363]

A second hot-button case decided by the Roberts Court was *District of Columbia v. Heller*,[364] where the Court comprehensively addressed the meaning of the Second Amendment. The underlying issue, whether the Second Amendment recognized a constitutional right to possess firearms for self-defense, was politically controversial since such a right would render gun control efforts more difficult.[365] However, the case was not controversial since its resolution was entirely dependent on lawyers' work. Indeed, Justice Scalia's majority with Justice Stevens dissenting contributed one of the finest examples of textual and originalist analysis. While individuals may continue to disagree with Justices Scalia or Stevens, there is no room to argue that they or any other Justice was acting beyond the scope of appropriate judicial conduct.[366] Rather, both were deciding a difficult constitutional case by applying tools that lawyers and judges had traditionally employed to decide such cases. The public seemed to understand that even though it paid little attention to the details. Despite severe political disagreement regarding gun control, there is no reason to believe that *Heller* undermined the legitimacy of the Court with the public.

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362. Gibson, *supra* note 42, at 520 (reporting, in 1995, 65% of the public believed the Court could be trusted, and, in 2001—the year after *Bush v. Gore*—public trust rose to 78%).

363. Fuentes-Rohwer, *supra* note 10, at 511; *see also* Gibson, Caldeira & Spence, *supra* note 358, at 553 ("[E]ven an enormously controversial decision like *Bush v. Gore* has little if any influence on institutional loyalty.").

364. District of Columbia v. Heller, 554 U.S. 570, 573 (2008).

365. *See* Linda Greenhouse, *Supreme Court Agrees to Hear Gun Control Case*, N.Y. TIMES (Nov. 20, 2007), https://www.nytimes.com/2007/11/20/washington/20cnd-scotus.html [https://perma.cc/DE3V-SWBZ] ("[L]awyers on both sides of the case agreed today that a victory for the plaintiff in this case would amount to the opening chapter in an examination of the constitutionality of gun control rather than anything close to the final word.").

366. *See* Linda Greenhouse, *Justices, Ruling 5–4, Endorse Personal Right to Own Gun*, N.Y. TIMES (June 27, 2008), https://www.nytimes.com/2008/06/27/washington/27scotus.html [https://perma.cc/X66Q-9S62] (examining the strained arguments in Justice Scalia's majority opinion and Justice Stevens' dissenting opinion in that neither relied on already expounded legal principles but rather only their personal reading of the Second Amendment).

Yet another controversial case decided by the Rehnquist Court was *Kelo v. City of New London*.[367] In a 5–4 decision, the Court held the city's taking of private property for a private party included in a redevelopment project intended to benefit the economy would constitute "public use" under the Takings Clause.[368] The decision was consistent with the precedent but arguably not with the text. The case gave rise to a massive counter-reaction by the *public*, resulting in laws in most states prohibiting condemnation authority to transfer property from one private owner to another.[369] This readily available political remedy for those dissatisfied with the decision is likely the reason the decision did not result in a loss of the Court's legitimacy. Still, *Kelo* is a stunning example of significant political backlash against a Supreme Court decision in action.

H. *The Roberts Court*

Several decisions of the Roberts Court have also raised concerns with at least some segments of the public as to the Court's legitimacy. *Citizens United v. FEC*, which pitted First Amendment freedom of speech against campaign finance legislation, became a rallying cry for the Court's opponents.[370] Like gun control in *Heller*, this implicated a controversial partisan issue. In *Citizens United*, the Court, by a 5–4 majority invalidated an Act of Congress prohibiting corporations or unions from purchasing with general funds campaign advertising to endorse a candidate on electronic media within 30 days of a primary election or 60 days of a general election.[371] The decision was politically controversial, resulting in a rebuke from President Obama during the State of the Union address.[372] Considering that the Court relied on constitutionally based principles of freedom of speech, the case did not raise questions about the Court's legitimacy other than with the ultra-

367. Kelo v. City of New London, 545 U.S. 469 (2005).

368. *Id.* at 479–480 ("[W]hen this Court began applying the Fifth Amendment to the States at the close of the 19th [C]entury, it embraced the broader and more natural interpretation of public use as 'public purpose.'").

369. *See* 50 *State Report Card*, CASTLE COALITION, http://castlecoalition.org/50-state-report-card [https://perma.cc/N5AV-FVFQ] ("In the two years since the U.S. Supreme Court's now-infamous decision in *Kelo v. City of New London*, 44 states have passed new laws aimed at curbing the abuse of eminent domain for private use.").

370. Citizens United v. FEC, 558 U.S. 310, 318–19 (2010).

371. *Id.* at 336–37 ("[A] statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated.").

372. TOOBIN, *supra* note 6, at 196–197.

partisan Democratic party elite who used opposition to *Citizens United* as a fundraising tool.[373]

Critics attacked the ruling on the ground that it allowed corporate money to influence elections.[374] This was a red herring. Apart from the decision, wealthy individuals had the right to spend vast sums of money to hopefully influence elections. Critics of *Citizens United* were motivated by its rejection of the theory that it was permissible for the government to level the playing field concerning political speech funding.[375] The *Citizens United* Court made it clear that such a theory was completely inconsistent with the First Amendment.[376] That, in a nutshell, is why *Citizens United* remains a thorn in the side of those who desire greater governmental regulation of electoral speech.

In *National Federation of Independent Business v. Sebelius*,[377] the Court by a 5–4 vote upheld the constitutionality of the mandate to purchase insurance as an aspect of the Affordable Care Act.[378] Five Justices—including Chief Justice Roberts—held that Congress lacked authority to enact the mandate pursuant to the Commerce Clause, the primary basis for the legislation.[379] This upset those who believed that Congress did have such power or that the scope of congressional authority under the Commerce Clause was beyond the purview of judicial authority. However, Chief Justice Roberts voted to uphold the mandate because Congress could have enacted it under the taxing power.[380] That distressed those who believed that the mandate was beyond congressional authority and that

373. Dave Levinthal, *How 'Citizens United' is helping Hillary Clinton win the White House*, CTR. FOR PUB. INTEGRITY [https://perma.cc/JJ5Q-CR7Z] (investigating several Democratic party leaders', including then presidential candidate Hillary Clinton, stance on an election reform-centric platform following the *Citizens United* decision).

374. Daniel J.H. Greenwood, *Money Is Speech: Why the* Citizens United v. FEC *Ruling Is Bad for Politics and the Market*, DISSENT (Mar. 3, 2010) [https://perma.cc/7C4A-VYK9] ("If economic incumbents—those who were successful in the past—are able to use their current wealth to influence elections and indirectly buy laws that will assure them future wealth, the market will fail just as surely as democracy would fail if political incumbents were permitted to use their offices to control elections.").

375. Jonathan E. Skrabacz, Note, *"Leveling the Playing Field": Reconsidering Campaign Finance Reform in the Wake of Arizona Free Enterprise*, 32 SAINT LOUIS U. PUB. L. REV. 487, 488 ("[C]ases [such as Citizens United] that have rejected the idea of leveling the playing field have been off the mark.").

376. *Id.* at 489 n.15.

377. Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

378. Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 575 (2012).

379. *Id.* at 552, 646–47 (Scalia, J., dissenting).

380. *Id.* at 563.

Chief Justice Roberts had simply yielded to political and media pressure. One explanation for Chief Justice Roberts's surprising decision to save the mandate is that he was attempting to preserve the Court's institutional integrity by preventing it from becoming an issue in the 2012 presidential campaign. If that was in fact Roberts's goal, he clearly succeeded. The Affordable Care Act's constitutionality was an important issue for some, but there is no evidence *Sebelius* endangered the Court's legitimacy with the public.

True to Justice Scalia's prediction in his *Lawrence* dissent, in *Obergefell v. Hodges*, the Court again relied primarily on substantive due process to invalidate state laws prohibiting same-sex marriage and their refusal to recognize the legality of same-sex marriages performed in other states.[381] As with prior gay rights cases, Justice Kennedy wrote the majority opinion, which was bereft of traditional legal analysis. Unlike *Lawrence*, *Obergefell* presented a much more deeply divisive cultural issue.[382] At the time of the decision, same-sex marriage had been legislatively authorized in several states, although it was clear that it would be resisted in many others. As with any substantive due process decision, the opponents of the result could ask on what basis the Court invalidated a longstanding law that had traditionally been deemed well within the states' domain. It seemed like a clear instance of the Court taking sides in an existing culture war as Justice Scalia had charged in an earlier gay rights case.[383]

Like *Roe*, *Obergefell* raised serious questions concerning the Court's legitimacy. Instead of doing "lawyers' work," the Court appeared to be entering a political/cultural fray to deliver a result that was deeply desired by some but simply could not be readily achieved through the political process. A successful appeal to the Court provided an argument ender. Prior to the decision, there was public debate. After the decision, the issue was definitively settled, and the only debate remaining was whether it was proper for the Court to intervene.[384] Although the recognition of same-

381. Obergefell v. Hodges, 576 U.S. 644, 675, 681 (2015).

382. Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015), https://news.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx [https://perma.cc/GF6P-QTUG] (noting support of same-sex marriage is much less among Republicans than Democrats).

383. Romer v. Evans, 517 U.S. 620, 636, 652 (1996) (Scalia, J., dissenting).

384. *See Obergefell*, 576 U.S. at 686 (Roberts, C. J., dissenting) ("Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.").

sex marriage, especially by judicial decree, was deeply troubling to a significant segment of the public, the decision did not in itself significantly threaten the Court's legitimacy, partially because many states had been moving in the direction of the result anyway.[385] Moreover, like *Bush v. Gore*, it may have been an issue that the public simply wanted to be resolved and removed from the political agenda. Although the decision may not have eroded public support for the Court, it was almost certainly one that played a role in a large portion of the voting public in 2016 that a change in the Court's analytical approach, as well as its results, was warranted.

Donald Trump made the Supreme Court an issue in the 2016 presidential campaign by publishing a list of names from which he would choose future nominees to fill the vacancy created by the death of Justice Scalia, as well as to fill future vacancies should they occur.[386] In February 2016, Justice Scalia had died unexpectedly. Senate leader Mitch McConnell took an extreme risk in holding a Supreme Court seat open to be filled by the winner of the presidential election, given that it was widely assumed that Hillary Clinton would win the election and hence be in a position to fill the vacant seat on the Court. President Obama nominated respected circuit Judge Merrick Garland; however, McConnell refused to hold a hearing on the nomination.

This qualifies as what Professor Mark Tushnet characterizes as "constitutional hardball."[387] Hillary Clinton had every opportunity to campaign on filling the seat as vigorously as Donald Trump. But the voters heard Donald Trump's proclamation to nominate conservative judges, and while the Supreme Court was hardly the only issue that affected the election, it was certainly a significant issue.[388] It appears for those who considered the Supreme Court a reason to vote, the nomination of a conservative justice, from a list provided to Trump by the Federalist Society, carried more influence in the voting booth than the prospective nomination of a

385. *See* McCarthy, *supra* note 380 (reporting sixty percent of Americans being in outright support of same-sex marriages).

386. HULSE, *supra* note 2, at 2–3.

387. *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 534–36 (2004) (describing "constitutional hardball" as practices which fall within the boundaries of existing constitutional doctrine but are in tension with existing pre-constitutional understandings).

388. *See* Tessa Berenson, *Donald Trump Offers Conservatives a Deal on Supreme Court*, TIME (Mar. 21, 2016), https://time.com/4266700/donald-trump-supreme-court-nominations [https://perma.cc/YHV3-HGDV] ("Trump . . . is offering conservatives a pretty sweet [deal]: He'll give up some of the independence that a president normally has on judicial nominations if they'll stay on his side.").

moderate, liberal, or progressive nominee by Hillary Clinton.[389]

That strategy succeeded in attracting voters.[390] There is a general agreement that Trump would not have won the election had he not taken the bold and controversial step of publishing the list.[391] For at least a quarter of Trump's voters, it was the primary reason they supported him.[392] When vacancies did occur, including the opportunity to fill the seat of Justice Scalia held open from the previous year, President Trump chose two nominees from the list as augmented, both of whom were confirmed and now sit on the Court. Now, President Trump has named another nominee from an approved list who has likewise been confirmed. The election of President Trump was the latest example of how the constitutional appointment process responds to a degree of public dissatisfaction with the Court and thereby tempering any question about the Court's legitimacy.

I. *The Reconstituted Roberts Court*

So far, at least three cases have been the focus of controversy by the President Trump's opponents. The first was *Trump v. Hawaii*[393] decided in 2018. The Court upheld President Trump's travel ban by a 5–4 majority with respect to entry from eight countries that the United States had concluded did not satisfy sufficient security-vetting processes. Several district courts had enjoined the Executive Order. The majority held that the Order fell within the authority delegated to the President by Congress.[394] The majority also rejected the claim that the Order was intended to discriminate against Muslims.[395] Although President Trump's opponents howled at the decision, there is no reason to believe the decision

389. Citizens exercised their rights to vote for the person they believed would best uphold and implement their ideals and values. *See* Balkin & Levinson, *supra* note 358, at 1102 ("[E]ach party has the political 'right' to entrench its vision of the Constitution in the judiciary if it wins a sufficient number of elections. If others don't like the constitutional vision that results, they have the equal right to go out and win some elections of their own."); *see also* Baum & Devins, *supra* note 37, at 1522 ("The appointments and confirmation process is the most direct way that elected officials put their imprimatur on Court decision making.").

390. *See* CHARLES HURT, STILL WINNING: WHY AMERICA WENT ALL IN ON DONALD TRUMP—AND WHY WE MUST DO IT AGAIN 163 (2019) (indicating the list "prove[d] to be one of the biggest issues that got Trump elected"); HULSE, *supra* note 2, at 289 ("Trump would almost certainly not have won the presidency without that open court seat.").

391. HULSE, *supra* note 2, at 1, 56, 147, 152–53.

392. HEMINGWAY & SEVERINO, *supra* note 2, at 59.

393. Trump v. Hawaii,138 S. Ct. 2392 (2018).

394. *Id.* at 2408.

395. *Id.* at 2421.

undermined the Court's credibility with the public. Trump had campaigned vigorously on the need for a travel ban. Indeed, many of his statements in the campaign became an issue in the case. Since the result in the case, upholding the travel ban was consistent with Trump's position during his successful presidential campaign, it is unlikely that the decision would undermine the Court's reputation with a significant swath of the public despite its unpopularity with Trump's partisan opponents.

In 2019, the Court decided two politically controversial cases on the final day of its term. In *Rucho v. Common Cause*,[396] the Court finally held that legal challenges to partisan gerrymandering of legislative districts constituted political questions beyond the scope of federal judicial authority due to the absence of judicially manageable standards. A four-vote plurality had endorsed that approach in *Vieth v. Jubelirer*.[397] Justice Kavanaugh, replacing Justice Kennedy, provided the crucial fifth vote. Democrats complained, but the public at large did not seem to care. Evaluating partisan gerrymandering legally presented a classic political question due to the absence of judicially manageable standards, even more so than reapportionment. There remains hope that *Rucho* will reinvigorate the political question doctrine after it was unduly diminished in *Baker v. Carr*.

In *Department of Commerce v. New York*,[398] the other case decided on the final day of the term, a 5–4 majority held that the Secretary of Commerce could not add a question for the recipient's citizenship to the short form of the census because the Secretary's explanation for the addition was pretextual. A media campaign followed the decision, arguing that a decision in favor of the Secretary (and hence President Trump) would threaten the legitimacy of the Court.[399] The Court prevented the Secretary from adding the question. Since the issue was quite technical, the public probably would not have cared much one way or the other. The "legitimacy" argument is beginning to lose its punch if it ever had any.

396. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

397. Vieth v. Jubelirer, 541 U.S. 267, 305 (2004).

398. Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

399. *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1743 (2020) ("[T]hese cases involve . . . straightforward application of legal terms . . . . For . . . discriminat[ion] against employees for being homosexual or transgender . . . discriminate[s] against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms . . . .").

V. DOES THE COURT CURRENTLY HAVE A LEGITIMACY CRISIS?

On several occasions, the Court has gotten out of step with the public. The Court's diffuse support permits it to decide cases against the grain of public opinion for some time. However, when the public becomes too dissatisfied with the Court and its decisions, the political check of nomination and confirmation of new Justices will change its direction. This occurred over dissatisfaction with the Marshall Court's federalism decisions, the Taney Court's *Dred Scott* decision, the *Lochner* era decisions of the first third of the twentieth century, and the Warren Court's aggressive decisions in civil rights. In each instance, the newly constituted Court changed directions trimming back the jurisprudence of the prior Court. Given life tenure for the Justices, the likelihood of strategic retirements, and the probability of sporadic vacancies on the Court, replacement of Justices will often occur unpredictably. Nevertheless, given human mortality, vacancies on the Court will occur. If the public is sufficiently dissatisfied with the Court over a lengthy period of time, a President and Senate will eventually be in place to appoint Justices who will alter the Court's direction. It may seem like happenstance, however, that the appointment of Justices has resolved potential legitimacy crises short of more powerful options including defiance, court packing, limitation of jurisdiction, impeachment, or partial elimination of the Court.

A lack of a political consensus in favor of altering the Court's direction should not matter. In most political choices, the majority rules. Just as there will be political forces favoring change, there almost certainly will be counterforces favoring the status quo. If the forces favoring a change in the Court's direction prevail politically, they have the constitutional right to nominate and confirm Justices likely to move the Court in a new or different direction.

Arguably, that is what has happened over the past few years. Nominating textualist/originalist judges from a published list was a crucial piece of Donald Trump's presidential campaign. That proposal appealed to a significant swath of the electorate. Hillary Clinton responded with her approach, proclaiming that she would appoint Justices who would preserve *Roe v. Wade* and reject *Citizens United*.[400] It seems that Court appointments resonates to a greater extent with Republican and conservative voters than

400. HULSE, *supra* note 2, at 148.

with Democratic and liberal voters.[401] Perhaps this is because conservative voters perceive some of the Court's decisions to be hostile to their basic values, particularly cultural and religious issues.[402] To some extent, abortion and *Roe v. Wade* serve as a proxy for broader cultural issues. Conservatives are more likely to disagree with the Court's resolution of these issues and are more likely to question whether deciding these cases is any of the Court's business. Conservative voters are also likely to be more receptive to arguments claiming the Constitution should be interpreted according to the original understanding of the text and not based on judicial assumptions of wise policy. This was the approach that candidate Trump took, and it seemed to resonate with enough voters to lead to his election.

As has often been the case, the public avoided a true legitimacy crisis with respect to the Court by electing a President and Senate committed to using the appointment and confirmation process to alter the Court's direction.[403] This entails altering interpretive approaches and specific results, as has happened on several occasions in the past. The appointment and confirmation process assumes that the President, with the Senate's concurrence, may alter the direction of the Court. If precedent restricted the Justices to interpret the law precisely as it had always been interpreted in the past, judicial confirmation hearings would be far simpler. Senators would simply need assurance from the nominee that the Justice would continue to decide cases exactly as the Court had done in the past. Under such an approach, *Plessy v. Ferguson*, *Lochner v. New York*, and *Betts v. Brady* would still be the law. Precedent matters. It constrains without controlling for all time. The Court can change directions, and it is entirely appropriate for the President and Senate to nudge it in the direction of change. Those

401. Haglin et al., *supra* note 44, at 30–31; *see* TOOBIN, *supra* note 360, at 338 (indicating conservatives "*cared* more about the Court than their liberal counterparts"). Ronald Reagan had also employed the prospect of conservative judicial appointments to increase political support. Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 381 (2007).

402. *See* NELSON & TUCKER, *supra* note 84, at 30 (showing a 2015 poll by Pew indicated that 68% of conservative Republicans considered the Roberts Court liberal); Fontana & Braman, *supra* note 85, at 765–76 (stating conservatives are more motivated to vote than liberals based on Court decisions that either support or conflict with their values); TOOBIN, *supra* note 360, at 86 (stating evangelical Christens were activated by Supreme Court decisions secularizing constitutional law); Eskridge Jr., *supra* note 313, at 1312 ("Not only did *Roe* energize the pro-life movement and accelerate the infusion of sectarian religion into American politics, but it also radicalized many traditionalists.").

403. *See* Balkin & Levinson, *supra* note 358, at 1083 ("It is perfectly normal for Presidents to entrench members of their party in the judiciary as a means of shaping constitutional interpretation. That is the way most constitutional change occurs.").

who resist such change will cry "illegitimacy," but this will be a political argument tested in the political process.

Does the Court presently have a legitimacy crisis? Probably not. Diffuse support for the Court remains strong despite anguished cries of illegitimacy from those disappointed with changes in the Court's membership and those anxious about the Court's future direction.[404] History indicates that controversial decisions that affect persons classified as elite do not negatively impact public respect for the Court. However, there cannot be multiple decisions over a relatively short period. The strength of that diffuse support is illustrated by the fact that most of the public rejects many significant constitutional doctrines and decisions of the Court over the past several decades. The rejected decisions of the Court include protection of abortion rights beyond the first trimester,[405] the use of racial preferences in college admissions to achieve diversity in the student body,[406] expanded protection for criminal defendants,[407] the prohibition of prayer in the public schools,[408] protection of flag burning under the First Amendment,[409] judicially imposed limitations on the death penalty,[410] and the ability of municipalities to take private property and convey it to a private developer.[411] Even more significantly, the fact *Bush v. Gore*, criticized by elites as one of the most illegitimate decisions of all time, had no long-term impact on diffuse support for the Court is testimony

404. A 2003 survey found that "[n]early all Americans believe the Court is doing at least a pretty good job, and most believe its policy positions are about right." James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. OF POL. SCI. 354, 359 (2003); *see also* NELSON & TUCKER, *supra* note 84, at 30 (noting that despite polls indicating a decline in support for the Court, empirical research shows that despite controversial decisions on the Affordable Care Act, same-sex marriage, and affirmative action, diffuse support for the Court remains strong).

405. SAMANTHA LUKS & MICHAEL SALAMONE, ABORTION, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 80 (Nathaniel Persily, Jack Citrin & Patrick J. Egan ed. 2008).

406. LOAN LEE & JACK CITRIN, AFFIRMATIVE ACTION, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 162, 181 (Nathaniel Persily et al. eds. 2008).

407. AMY E. LERMAN, THE RIGHTS OF THE ACCUSED, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 41, 56 (Nathaniel Persily et al. eds. 2008).

408. ALISON GASH & ANGELO GONZALEZ, SCHOOL PRAYER, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 77 (Nathaniel Persily et al. eds. 2008).

409. PETER HANSON, FLAG BURNING, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 184, 199 (Nathaniel Persily et al. eds. 2008).

410. JOHN HANLEY, THE DEATH PENALTY, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 108, 135 (Nathaniel Persily et al. eds. 2008).

411. JANICE NADLER ET AL., GOVERNMENT TAKING OF PRIVATE PROPERTY, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 286, 304 (Nathaniel Persily et al. eds. 2008).

to the depth of that support. Indeed, the Court seems to be all but bulletproof. All this suggests is current cries of illegitimacy are unlikely to shake public support for the Court. There is some research suggesting that, at least with respect to salient decisions inconsistent with public attitudes, backlash against the decisions will fade over time resulting in public acceptance.[412] The extent the public remains in disagreement with so many major decisions from the nineteen fifties, sixties, and seventies would seem to undermine this thesis. This will especially be true with respect to technical legal decisions of little interest to the general public.

The remedy for illegitimacy, defined as deep and widespread general dissatisfaction with the Court, is political and exercised through the appointment and confirmation power. No matter how intensely a particular minority of citizens may disapprove of the direction of the Court, the claims of illegitimacy will have no impact unless they can translate that disapproval into viable political action capable of affecting presidential or senatorial elections, or at least at the appointment and confirmation stage.

Was Justice Scalia correct? Would the Court's failure to decide cases by doing "lawyers' work" seriously undermine public respect for the Court? Considering the past instances in which the Court strayed too far from the public's views and values, he was partially correct. Most of the time, the public is unaware of the Court's decisions, much less its reasoning. As such, there is slight prospect of negative public reaction against the Court. However, every so often a judicial decision resonates with the public, as was the case with abortion in *Roe v. Wade*, slavery in the territories in *Dred Scott*, or regulation of economic affairs in the *Lochner* era. When that happens, and when the public is paying attention, the Court is at grave risk—as Justice Scalia argued—if it is deciding such crucial questions through the transparent application of judicial value judgments rather than through the traditional interpretive approaches that lawyers are trained to apply. In all three instances cited above, the Court relied on the dubious device of substantive due process. Even the uninitiated lay person can understand that there is little legal substance to this concept and in fact it is simply a facade for the imposition of value judgments rather than pre-existing legal principles. Justice Scalia is surely correct in concluding that decisions based

412. Joseph Daniel Ura, *Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions*, 58 AM. J. POL. SCI. 110, 119 (2013) ("[T]he data indicate this initial backlash response eventually decays and is ultimately replaced by public mood's movement toward the ideological direction of Supreme Court decisions.").

on substantive due process are likely to lead to trouble for the Court, as has often been the case.

However, history has suggested the Court can seriously undermine its public support even when it seems to be doing "lawyers' work" by attempting to resolve troubling questions that are simply incapable of judicial resolution, even by the best application the lawyer's craft has to offer. *M'Culloch v. Maryland* provides an example. Marshall's opinion in *M'Culloch* is a masterpiece of legal reasoning. However, it attempted to definitively resolve the proper relationship between the federal government and the states, which was simply too big and divisive to be resolved by judicial degree at that time. The political backlash against the *M'Culloch* opinion and the Marshall Court demonstrated Marshall attempted a task beyond the Court's competence. Perhaps it took the Civil War to ultimately resolve the question. Perhaps, a more nuanced approach than Marshall was willing to take would have brought less fury and outrage upon the Court. In any event, the reaction to *M'Culloch* indicates that sometimes lawyers' work, even brilliant lawyers' work, is not enough. The Court must understand some seemingly legal issues are sometimes incapable of final judicial resolution.

The *Dred Scott* opinion may be the premier example of that principle. Apparently, the Court believed that it could provide a definitive resolution to the question of slavery in the territories that was tearing the country apart. This was not simply a case of judicial arrogance. Political institutions invited the Court to intervene and resolve the issue. However, reflection should have indicated that an issue so fundamental and so intense could not be settled by judicial decree regardless of the outcome. There was nothing the Court could say to appease the losing side. Unlike Marshall in *M'Culloch*, Chief Justice Taney did not succeed in supporting his decision with plausible legal argument.[413] Further, for the first time in the Court's history, Justice Taney characterized the decision as politics rather than law. But whether the decision was legally justifiable—and some believe that it was—was not the only difficulty. The primary difficulty was the Court attempting to settle an issue that could not be judicially resolved. *Dred Scott* is perhaps the most glaring example of the real limits of judicial power. As it turned out, only a catastrophic civil war could provide an answer.

413. *See* Scott v. Sandford, 60 U.S. 393, 451 (1857) (attempting to project the Constitution as making no distinguishment between a slave as property and other property of a citizen).

The *Lochner* era is another instance in which the Court seems to have lost legitimacy with the public. It may have initially self-corrected, but the ultimate correction came through the appointment and confirmation process. The *Lochner* era is shorthand for a thirty-year period in which the Court sporadically rejected both federal and state efforts to regulate economic matters on constitutional grounds. With respect to the invalidation of state legislation, the reliance on substantive due process can be challenged as transparently value oriented as with *Dred Scott* and *Roe v. Wade*. However, both the narrow construction of the Commerce Clause in the federal regulatory cases and the expansive conception of the substantive due process liberty of contract can be defended as incorrect but at least plausible legal arguments. The primary problem with the *Lochner* era cases was not that the Court was failing to do "lawyers' work;" rather, it was attempting to resolve an issue beyond the scope of judicial competence, which is the role of the government in regulating the economy. Individually, the issues presented in the *Lochner* era cases—whether a particular piece of federal legislation was within the congressional commerce power, or whether state legislation was inconsistent with substantive due process—seemed justiciable. However, taken together these cases raised a larger question pertaining to the judicial role in supervising federal and state regulatory power over economic affairs. In his classic dissent in *Lochner*, Justice Holmes criticized the majority both for its doctrine and for deciding an issue which was inappropriate for judicial resolution.[414] Justice Harlan's dissent concentrated primarily on the latter ground.[415] The *Lochner* era cases can be criticized as doctrinally incorrect or overly value oriented. However, the best understanding as to why the public, through the appointments process, ultimately eliminated this line of cases is that for a period of almost forty years, the Court had attempted to address and resolve an issue beyond its legitimate authority. As with *McCulloch* and *Dred Scott*, the problem was not so much the Court was failing to do "lawyer's work," but rather it was attempting to answer questions beyond competence of lawyers' work to answer.

Yet another instance in which the Court grew out of synch with the public and was disciplined through the appointment process involved the Warren Court. There was no single decision that led to an effective political backlash, but rather an aggregation of decisions in several areas of law.

414. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

415. *Id.* at 68 (Harlan, J., dissenting).

However, one area that stands out as marshaling political forces against the Court is constitutional criminal procedure, as best exemplified by the decision in *Miranda v. Arizona*.[416] Perhaps the Warren Court's most enduringly unpopular decisions were the school prayer cases. The problem with the Warren Court decisions was not lack of plausible legal justification, although professional critics both in dissent and law reviews dispute the Court's inattention to legal craft. Rather, the political backlash against the Warren Court was more attributable to the sense that a majority of the Court was employing the legal process to radically alter settled expectations in every area of the law. As such, it was tagged with the epithets of "judicial activism" or "legislating from the bench."

The Court could be faulted for its interpretive doctrinal analysis, but the general public was almost certainly unaware of that and could not care less. Rather, the backlash against the Warren Court was motivated by the results of the decisions. Not of any particular decision, but rather the aggregation of opinions suggesting a large-scale pattern of change inconsistent with public opinion. The backlash against the Warren Court tends to confirm the theory of judicial legitimacy. That is, the Court has a relatively deep reservoir of diffuse support, permitting it to render decisions from time to time that go against the grain of public opinion.

However, that support is not unlimited. If the Court clashes with deeply held public values too frequently in a brief period of time, the Court's goodwill may be exhausted, and the Court may pay a political price. Arguably, that it is what happened at the end of the Warren Court. The President and the Senate used the appointment and confirmation process to alter the direction of the Court not because the Justices were not doing "lawyers' work" but rather because of the revolutionary nature of so many of the Court's decisions. In a sense, the reaction against the Warren Court bears similarities to the backlash against the Marshall Court and *McCulloch*. In each instance, the Court attempted to move the public too far and too fast in a direction it was not prepared to go.

That brings us to the Burger Court and *Roe v. Wade*. To the extent that recent changes in the Court's membership can be attributable to political backlash, *Roe* would seem to be at the center of the storm. *Roe* led to a

416. *See* Aaron J. Ley & Gordie Verhovek, *The Political Foundations of* Miranda v. Arizona *and the Quarles Public Safety Exception*, 19 BERKELEY J. CRIM. L. 206, 228 ("Congress's response to *Miranda v. Arizona* was forceful. Blaming *Miranda* and the Supreme Court for the increase of crime in the United States became a popular pastime among legislators.").

backlash against the Court for a variety of reasons. As Justice Scalia argued in his *Planned Parenthood* dissent, the decision seemed to be the product of a judicial value judgment as opposed to "lawyers' work."[417] That charge can be made to a greater extent against *Roe* than any prior case that has led to a political reaction against the Court, although some critiques of *Dred Scott* are similar. Second, the decision was at war with the deeply held beliefs and values of a significant segment of the public. It matters little, whether at any given time, a slight majority approves or disapproves of the decision.

Contrary to other historically controversial decisions such as *Brown v. Board of Education* or *Miranda v. Arizona*, time does not serve to dissipate disapproval of *Roe*. It is almost fifty-years since the Court decided *Roe* and the political backlash against the case seems to be stronger than ever. The primary problem with *Roe* however, as identified in Justice White's dissent and in Professor Ely's early critique, is that the political issue of whether a fetus is a human being constitutionally protected by law was none of the Court's business.[418] Rather it could only decide the matter by judicial fiat which it did.

However, by initially attempting to resolve the issue, the Court painted itself into a corner from which there is no easy escape. There will virtually always be a significant constituency that cares ever deeply about the right to life and will continue to seek to overturn *Roe*, especially through the appointment process. By recognizing a constitutional right to abortion in *Roe*, the Court created a significant constituency devoted to *Roe* and equally determined to employ all means, including the appointment process to preserve the abortion right. As such there is no way out for the Court. Whatever it does in future abortion cases, it will almost certainly make one side or the other very angry. It is unusual for the Court to find itself in such a no-win situation especially over an extended period of time. Normally, the public grows accustomed to Supreme Court decisions and would not be particularly upset by either their retention or rejection. Not so with *Roe*. It is expected by some and feared by others that the present Court will limit, if not totally reject the abortion right. A failure to do anything will certainly anger the significant segment of the public that supported President Trump and his three Supreme Court appointments in hope that *Roe* would be rejected. On the other hand, the overruling of *Roe* or a further significant

417. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 981–82 (1992) (Scalia, J., dissenting).

418. Roe v. Wade, 410 U.S. 179, 221 (1973) (White, J., dissenting). *See generally* Ely, *supra* note 83 (providing an overview of where the Court's majority opinion went askew).

narrowing will enrage the substantial segment of the public that highly treasure the decision and the right it created. Almost by definition, a decision that places the Court in such a continuing bind should never have been decided in the first place. As Justice Scalia and many others have observed, *Roe* has had an extraordinary deleterious impact on the judicial confirmation process, turning the confirmation of any justice who might vote to alter into all out political war.

There are many reasons that the Supreme Court appointments became a crucial issue in the 2016 presidential election, including decisions with respect to freedom of religion and same-sex marriage. But, at the very center of the controversy was *Roe v. Wade*. The prospect of a Supreme Court majority narrowing or overruling *Roe* almost certainly played a significant role in the election of Donald Trump. In that sense, this was one more example of the political process counter-attacking the Court's direction. As such, it is simply a further instance of constitutionally based checks on the Court in action.

If the Justices are concerned with public support, they may attempt to thread the needle by applying *Casey*'s undue burden standard to uphold some abortion regulation while invalidating others. On the other hand, some or all of the Justices may ignore public opinion and simply decide the matter by applicable legal principles. In that event, the Justices will need to focus on whether a decision that some believe to have been incorrectly decided from the outset should now be rejected.

The counterargument will be stare decisis. By definition, that doctrine assumes that incorrect decisions should generally be allowed to stand as precedent. That would be especially true with respect to a decision like *Roe*, which is close to fifty-years old and has been relied on by the Court on countless occasions. Moreover, the Court explicitly addressed overruling *Roe* in *Casey* twenty-five years ago, and while narrowing it, upheld its essence. Accordingly, as a matter of stare decisis, the case against overruling *Roe* is formidable. It is most likely that a majority of the Court will apply the *Casey* undue burden standard in a manner more sympathetic to abortion regulation. However, one cannot predict with any accuracy what the Court is likely to do given the Justices themselves are likely to be very divided in their approaches. Whatever the Court does in the abortion area, it can expect a deluge of public criticism.

Much of the criticism of the present Court alleges it behaves in a partisan manner by rubber stamping constitutionally dubious actions taken by President Trump. This critique presents several complicated questions.

First, this argument is usually made by partisan critics of President Trump who may be attempting to intimidate the Justices and to lower respect for the Court in view of its perceived conservative tilt. If so, it may be the critics who are attempting to politicize the Court instead of the Justices themselves. Moreover, if it appears certain district judges are employing their injunctive power to aid the resistance to the President and his policies, Supreme Court intervention might well constitute appropriate intervention against a politicized use of the judicial process.

Nevertheless, empirical research tends to indicate that the public has traditionally accorded the Court greater approval than other governmental institutions because it considers the Court different in that it has been perceived as principled, fair, and non-partisan. If the public does come to view the Court as simply doing the President's bidding in high profile cases involving presidential policy, its traditional high approval could suffer. Whether that happens depends on how many of such cases the Court decides, how they are decided, whether they are highly publicized, and ultimately whether the public cares about the results. So far, cases involving the President and his policies, though highly publicized, have constituted a minuscule portion of the Court's docket. However, there is a risk that if the Court decides too many important and controversial cases in favor of the President, the Court's image as neutral and non-partisan might suffer. However, in a highly polarized polity, it is likely that partisan disapproval may be cancelled out to a large extent by partisan approval. In addition, based on past experience, public disapproval of the Court based on disagreement with specific decisions tends to dissipate fairly quickly.

One way in which the Court could attempt to minimize threats to its public support is to decide fewer controversial cases of concern to the public, especially cases raising hotly contested cultural issues. This would require the Court to engage in strategic decisions with respect to docket management, which it almost certainly does in any event given the volume of certiorari petitions presented. As noted earlier, due largely to the public invisibility of this process, it would be unlikely to have an adverse impact on the Court's reputation. The overwhelming amount of the Court's docket is composed of technical legal questions of little interest to the public. The cases of public salience, to use the jargon of political science, tend to come in two varieties. There are those questions presented under specific constitutional provisions which the Court is expected and accustomed to interpret. Many of the Court's most controversial decisions fall in this category. Does First Amendment freedom of speech prohibit legislation

prohibiting burning of the American flag or criminalizing categorically defined hate speech? Does the Establishment Clause of the First Amendment prohibit legislation establishing vouchers that can be used to pay tuition at religious schools or does it prohibit school-sponsored prayers at public school graduations? Does the Commerce Clause authorize Congress to impose a mandate requiring private individuals to purchase health insurance? These cases raise publicly controversial issues, but they also clearly implicate specific constitutional provisions the Court is expected to interpret, at least when raised in otherwise justiciable cases presented for review.

Arguably, the question is qualitatively different when the Court is asked to rule that the concept of liberty in the Due Process Clause must be interpreted to recognize a right to obtain an abortion, or the right to assisted suicide or the right to same-sex marriage. In these cases, the Court is being asked to substitute a judicial value judgment for the conclusions of elected legislatures. It is these substantive due process cases in which the Court strays farthest from traditional lawyers' work, entering the political domain and, as Justice Scalia charged, inevitably taking sides in a culture war. It is the likelihood that the Court will disengage from deciding these types of cases that has fueled the battle over Supreme Court confirmations in recent years.

The Court cannot avoid all controversy, nor should it. Many of the most contentious issues in contemporary society end up in litigation, implicating specific constitutional provisions. Most legal issues, including many of the most controversial, are ultimately resolved by the lower federal courts. The Supreme Court does not have the time or resources to address every cutting-edge issue of constitutional law. Still, the Court sits atop the federal judicial system and plays a significant supervisory role. If the Court concludes the lower federal courts have made serious errors with respect to the interpretation of the constitution or federal law, or that the circuits are split on an important interpretive question, the Supreme Court may have to intervene regardless of the politically controversial nature of the issue. The Court has control of its docket, but within limits. The Court must decide certain cases it might otherwise choose to avoid if it is to perform its job as head of the federal judiciary.

Another strategy to protect the Court's moral capital is constitutional minimalism. Professor Bickel endorsed the approach to an extent in *The*

Least Dangerous Branch.[419] Professor Sunstein wrote a book describing and recommending that approach,[420] though, as a progressive confronting a conservative leaning Court, his arguments may be somewhat disingenuous.[421] Chief Justice Roberts seems to have adopted a minimalist approach to constitutional interpretation. Minimalism consists of deciding cases on the narrowest grounds reasonably presented. It is consistent with a restrained approach to the judicial role, emphasizing that courts are better equipped to appreciate factual particulars than abstract principles. Minimalism is derived from the traditional approach to common law adjudication. It assumes that courts are incapable of understanding the big picture and hence derive general principles only after working through several specific cases, which in the aggregate will help illuminate the larger themes of the law. Minimalism is a device designed to protect against judicial error. The narrower the decision, the less likely the Court will stumble into incorrect principle. In addition, narrow decisions are easier to correct or at least distinguish. Likewise, if there is a fear of public disapproval, the narrower the decision, the lower the risk, unless of course the relevant public was expecting a broad and definitive resolution. Judicial minimalism is a means through which, over time, the Court can recalibrate the public perception of the appropriate role of the Court from that of an all-purpose problem solver to that of a body obligated to adjudicate properly presented disputes between parties before the Court with respect for the decisions of more democratic institutions.

Minimalism is also a means by which Justices who agree on a particular result, but for very different reasons, can be persuaded to join a narrow factually particular decision. Sometimes, minimalism will be a deliberate strategy by the majority to decide a case in the narrowest possible manner. On other occasions, it will be a necessity thrust upon the Court in an attempt to construct a majority opinion when there is significant disagreement among the Justices joining that opinion. In either event, judicial minimalism

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419. *See generally* BICKEL, *supra* note 17 (discussing the idea of the Court deciding cases on narrower grounds when able as opposed deciding them on substantive grounds).

420. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix (1999) ("My goal in this book is to identify and defend a distinctive form of judicial decision-making, which I call 'minimalism.'"); *see also* Eskridge Jr., *supra* note 313, at 1283 (discussing similar suggestions).

421. *See* Balkin & Levinson, *supra* note 358, at 1087 (observing "liberal and left-wing scholars have embraced procedural arguments about the [C]ourt's proper role as a way of combating changes in constitutional doctrine" while also noting "Sunstein's embrace of constitutional minimalism").

has advantages. Returning the Court to a more restrained role should over time bolster its reputation with the public. However, in the short run there will be disappointment by those who have been conditioned to believe the appropriate role of the Court is to ultimately resolve societal conflicts that political institutions have been unable to settle.

Based on historical experience and long-term public polling, there is little reason to believe the Court faces a legitimacy crisis based on a decline in public support. The Court's public support appears to be sufficiently deep to protect against public disappointment with particular decisions. Indeed, many of the Court's signature precedents including the prohibition of school prayer, the approval of limited racial preferences in educational admissions, and expanding the protection of criminal defendants, have not even to this day evoked majoritarian support from the public and yet the Court as an institution remains well respected. This illustrates the Court has a relatively broad protected zone in which to operate. Perhaps the wild card is abortion, where the Court has worked itself into a position in which a decisive decision in either direction might well imperil its reputation with a significant segment of the public. As such, the Court appears to be on a tight rope. *Roe* should offer caution with respect to future constitutional adjudication. First, it illustrates—as should have been apparent from both *Dred Scott* and *Lochner*—that substantive due process is a very dangerous approach. It is dangerous in that it is transparently value oriented and appears political. Likewise, unlike other accepted methods of interpretation, there are no guard rails. Despite Justice Harlan's classic dissent in *Poe v. Ullman*, there is little that the Justices can rely on aside from their own preferences or their perceptions of the public's preferences. Sometimes, that may not lead to trouble but often it has and will. Most importantly, this is not the application of law but rather simply thinly disguised politics. As such, as Justice Scalia recognized in his *Casey* dissent, it is unworthy of public respect.

Perhaps, the most important lesson the Court should learn from *Roe* and from prior instances in which the Court got significantly off-track with public opinion is that there are some issues which may seem to involve a legal question (i.e., whether Jane Roe was constitutionally entitled to receive an abortion in Texas) but that may not be answered in a principled manner by the Supreme Court. The questions are either too big and divisive or law lacks the tools of resolution. When in such an instance and the Court nevertheless presses ahead and tries to impose a judicial resolution, the

attempt will fail, and constitutionally based appointment and confirmation processes will provide some correction for judicial overreaching.

There is another lesson *Roe* teaches. Before entering a conflict, the military attempts to ensure that there is an exit strategy. There must be a means to assure that the conflict is not interminable. The same strategy should apply to judicial ventures. The Court should not embark on a line of precedent that may become problematic and from which there is no easy escape. There is every reason to believe *Roe* was the product of gross miscalculation. At the time *Roe* was decided, the Court had been on a roll. It had ordered the desegregation of the public schools, imposed majoritarian democracy in the face of longstanding practice to the contrary, moved the country's position on the death penalty, prohibited prayer in public schools, reformed the criminal process, and had seemingly carried it all off with little threat to the Court's legitimacy. The fact Richard Nixon had been elected on an anti-Court platform in 1968 should have suggested that all was not well, but the Justices failed to notice. Indeed, two years after *Roe*, the Court effectively ushered Nixon out of office.

The Court indicated in *Roe* it understood it was deciding a deeply controversial issue, but there is no reason to believe it understood how deeply divisive its decision was, how long the conflict would rage, the degree to which it would envelop the appointment and confirmation process, and the difficulty the Court would face in extricating itself from the abortion conflict. As with *Dred Scott*, the Court seemed to walk into a buzz saw with little awareness of what lay ahead. Foresight is difficult—perhaps impossible. That is all the more reason for the Court to tread cautiously in new areas of adjudication. The Justices seemed to believe they were engaged in a careful balancing of interests. But the decision, when combined with the companion case of *Doe v. Bolton* and as subsequently and somewhat stridently interpreted by the Court, was extremely broad and one-sided. The wise decision would have been for the Court to abstain completely. However, if the Court was determined to wade into the question of the constitutionality of abortion regulation, it would have been a perfect instance for the exercise of minimalism, deciding no more than what was absolutely required, as some have suggested. The Court may be unable to predict accurately at the time of its decisions whether trouble is lurking ahead, but it should be able to decide cases in a manner that minimizes the risks.

Justice Scalia was correct in insisting the public will generally leave the Court alone as long as it believes the Court is deciding cases through

application of the tools of the lawyer's craft. The Court has built up a sufficient cushion of support to permit it to decide cases in opposition to public opinion without sacrificing its legitimacy. However, there are limits. If at some point the public concludes the Court is attempting to resolve conflicts beyond its competence, the appointment and confirmation process will be used, as it has been used in the past, to alter the Court's direction. It may be a slow-moving check, but it provides the ultimate and effective answer to charges of illegitimacy.