

IMPORTANT NOTE ON THESE DISCUSSION MATERIALS

The following are discussion materials on SETTING THE STAGE: THE GENESIS OF THE REFORM DEBATE AND THE COMMISSION'S MISSION assembled solely for deliberation by the President's Commission on the Supreme Court of the United States. Each set of discussion materials was prepared by a working group for the Commission's use in studying and deliberating on the issues identified in Executive Order 14023.

These materials attempt to set forth the broad range of arguments that have been made in the course of the public debate over reform of the Supreme Court. They were designed to be inclusive in their discussion of these arguments to assist the Commission in robust, wide-ranging deliberations.

The inclusion of particular arguments in these draft materials does not constitute a Commission endorsement or rejection of any of them, and specific points of analysis or particular perspectives appearing in the drafts should not be understood to reflect the Commission's views or those of any particular Commissioner. Consistent with Executive Order 14023, the Commission includes members with diverse perspectives on these issues. Commissioners therefore can be expected to hold various and even strongly opposing views, which will be the subject of deliberation at the public meeting scheduled for October 15.

The Commission will post a draft Report for deliberation, in advance of its next public meeting.

SETTING THE STAGE: THE GENESIS OF THE REFORM DEBATE AND THE COMMISSION'S MISSION

Introduction

On April 9, 2021, President Joseph R. Biden issued an executive order establishing this Commission. The Order charged the Commission with producing a report for the President that addresses three sets of questions. First, the Report should include “[a]n account of the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and about the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court.”¹ Second, the Report should consider the “historical background of other periods in the nation’s history when the Supreme Court’s role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform.”² Third, the Report should provide an analysis of the principal arguments for and against particular proposals to reform the Supreme Court, “including an appraisal of [their] merits and legality.”³

This Commission is the most recent of various committees and commissions established over the last 50 years to explore judicial reform. These have addressed a wide range of issues, such as caseload management and capacity, judicial disciplinary codes and administration, and the organization of the lower federal courts. Consistent with this history, President Biden’s Order charged this Commission to enlist experts, as well as the public, to “ensure that its work is informed by a broad spectrum of ideas” on the question of Supreme Court reform.⁴

I. The Genesis of Today’s Reform Debate

In October of 2020, then-presidential candidate Biden stated his intention, if elected, to create a bipartisan commission to examine Supreme Court reform. In response to a question about whether he supported proposals to expand the number of Justices on the Court, Biden responded that “it’s not about court packing” and observed that constitutional scholars have debated a range of Court reform proposals.⁵

The President’s comments and the Commission’s subsequent creation underscore that the nation has been engaged for some time in an intense and ongoing debate about the Court’s composition, the direction of its jurisprudence, and whether one political party or the other has breached norms that guide the process of confirming new Justices. Political actors, lawmakers, and commentators have articulated sharply divergent accounts of why conflict over the Court has escalated in recent years. And they disagree about whether these political struggles have undermined the Court’s legitimacy.⁶

The Commission does not purport to offer a consensus history of the last decades of conflict over the Supreme Court, nor does it come to a conclusion about whether the Court has suffered a loss or crisis of legitimacy. Commissioners hold very different views on these matters. Without purporting to resolve any of those differences, this Chapter offers a set of observations

that provide context for President Biden’s decision to issue the April 2021 Executive Order, discusses a set of criteria by which the broader debate might be appraised, and presents an account of the history of conflict over the Court that dates back to the nation’s earliest days.

A. Partisan Conflict Over the Court

The role the Court plays in major political and social conflicts has long made its composition and jurisprudence subjects of debate in the nation’s civic life. Throughout American history, including in recent decades, partisan conflict over the Court has played out with varying degrees of intensity in the processes by which the President nominates and the Senate confirms new Justices. Both Democrats and Republicans have lamented that nominees, prepared by the White House staff, have systematically sidestepped candid answers to questions about their records and judicial philosophies. Bitter battles also have erupted over the treatment of particular nominees. President Woodrow Wilson’s nomination of Louis Brandeis generated aggressive opposition fueled by antisemitism.⁷ When President Lyndon Johnson nominated Judge Thurgood Marshall—a famous civil rights lawyer and former Solicitor General—to be the first Black member of the Court, Marshall was confronted with hostile and demeaning questions from segregationist Senators.⁸ Other nominations were fiercely contested because of opposition to the nominee’s judicial philosophy.⁹ When the Senate rejected President Ronald Reagan’s nomination of Judge Bork to the Court in 1987, Judge Bork’s supporters contended that he was a highly qualified nominee who was subjected to deceptive and inflammatory partisan criticism, and whose record and views were mischaracterized by his opponents. They coined the term “borked,” which is now recognized in the dictionary as meaning that a nominee had been subject to unfair treatment through “an organized campaign of harsh public criticism or vilification.”¹⁰ Defenders of the Senate’s treatment of Judge Bork, by contrast, asserted that he received an extensive hearing at which he had an opportunity to present and defend his views at length, and that his nomination failed by a bipartisan majority vote after a floor debate.

Three recent nominations have generated fierce partisan conflict. We explore those nomination battles in greater detail in Chapter 2 of this Report but note them here because of their role in the debates leading to the formation of this bipartisan Commission. First, after Justice Scalia died in February 2016, the Republican majority in the Senate declined to consider President Barack Obama’s March 2016 nomination of Chief Judge Garland to fill that seat. They argued that the nation was poised in a matter of months to elect a new President, who should be able to appoint Justice Scalia’s successor. Thus, they declined to take any formal action, such as a hearing or votes, on the Garland nomination. President Donald Trump later appointed Judge Gorsuch to fill the vacant seat. Next, in the summer of 2018, Justice Kennedy—widely viewed as occupying the Court’s ideological center—announced he would retire. President Trump nominated Judge Kavanaugh, whom the Senate confirmed after contentious hearings and floor debate. Finally, Justice Ginsburg died in September 2020, creating another election-year vacancy. Although the Senate’s Republican majority had opposed the election-year confirmation of Judge Garland for nearly eight months before the 2016 election, this time it took up President Trump’s nomination of Judge Barrett and confirmed her in less than one month, on October 26, after voting in the 2020 presidential election had already commenced. Senate Democrats participated in the Judiciary Committee hearings and final vote on Barrett’s nomination, but most

declined individual meetings with her, and the Democrats on the Judiciary Committee boycotted the final committee vote to express their objection to the timing of the nomination.

These events directly motivate some of the current calls for Supreme Court reform by those who allege that the seats previously occupied by Justices Scalia and Ginsburg were “stolen” by Republicans from Democrats. According to these critics, Republicans achieved the current conservative dominance of the Court by disregarding the norms that should govern and have governed the appointments process in the past.¹¹ In response, others reject the charge that the Senate Republicans violated any well-established norms or disrupted any consistent historical practice. Over the course of American history, they argue, Senate majorities periodically have declined to take up nominations in election years or have used the filibuster to deny a sitting president a confirmation, in order to reserve the choice for his successor.¹²

Several witnesses who testified or provided written submissions to the Commission observed that partisan conflict over nominations has occurred throughout the nation’s history, particularly in election years.¹³ According to one witness, historically the Senate has confirmed nearly 90 percent of Supreme Court nominees when the president’s party is in power but “fewer than 60 percent of nominees under divided government.”¹⁴ Similarly, the same witness observed that over 80 percent of nominees are confirmed when nominated “in the first three years of a presidential term,” but “barely more than half” when nominated “in the fourth (election) year.”¹⁵ Nonetheless, most witnesses agreed that conflict has escalated in recent years. One witness cited the history of confirmations since the Reagan Administration as one of a “continuous cycle of escalation” of partisan conflict over nominations to both lower courts and the Supreme Court.¹⁶ This escalation originates in the belief, held by both parties, that “the other side plays dirty and will manipulate the rules to its own advantage,” conferring on the party in power “a significant incentive to violate the current norms when it has the chance.”¹⁷ He summarized the current state of affairs: “[E]ach side . . . believ[es], probably rightly, that the other side would do the same as soon as it had the chance. It’s a classic prisoner’s dilemma, and it operates according to its own logic.”¹⁸ Another witness characterized this recent history as “decades of political circus.”¹⁹

The Commission also received a survey of a bipartisan group of former Senate staffers, including those who have served the current and former leadership of the Senate Judiciary Committee, documenting their views of the state of the confirmation process. The results reflected broad bipartisan agreement that the confirmation process has come under severe strain from partisan conflict, though Republican and Democratic staffers disagreed about the causes of the strain. Democrats cited the controversies surrounding the nominations of Judges Garland and Barrett as evidence of Republican bad faith and disregard of longstanding norms. Republicans cited the hearings on the nominations of Judges Bork, Thomas, and Kavanaugh, and blamed Democrats for personal attacks on nominees designed to derail nominations for partisan or ideological reasons.²⁰

The recent history of Senate confirmation votes supports witnesses’ accounts of escalating partisanship. For 70 years until 1968, most Justices were confirmed by voice vote. Since then, roll call voting has become the norm, and votes have divided increasingly along party lines.²¹ Justice Sotomayor received 68 votes (all Democrats and nine Republicans voting to confirm); Justice Kagan, 63 (all but one Democrat and only five Republicans voting to confirm);

Justice Gorsuch, 54 (all Republicans and only three Democrats voting to confirm); Justice Kavanaugh, 50 (all Republicans and just one Democrat voting to confirm); and Justice Barrett, 52 (all but one Republican and no Democrats voting to confirm).

To be sure, over the last 50 years, some nominees have received significant bipartisan support. Some of those nominations—including Justice Scalia (confirmed in 1986 with 98 votes), Justice Ginsburg (confirmed in 1993 with 96 votes), and Justice Breyer (confirmed in 1994 with 87 votes)—occurred when the Senate was controlled by the President’s party. Others—including Justice Kennedy (confirmed unanimously in 1988, an election year, after Judge Bork’s nomination was rejected) and Justice Souter (confirmed in 1990 with 90 votes)—occurred when the Senate majority was not aligned with the President. But unmistakably, the overall trend over the last three decades has been toward more partisan conflict, which has affected nominations to the lower courts, as well as the Supreme Court.

The confirmation battles of recent years have given rise to multi-million dollar lobbying campaigns seeking to mobilize public pressure for or against particular nominations. Millions of dollars were spent for and against the nominations of Brett Kavanaugh and Amy Coney Barrett.²² There is little reason to doubt that nominations will continue to trigger expensive campaigns to shape public opinion and pressure undecided Senators. Indeed, when vacancies arise, political and interest group allies now expect the President to thoroughly vet nominees for their substantive views, to ensure to the maximum extent possible that they will advance the desired ideological outlook. Presidents are also expected to nominate individuals who, if confirmed, will be young enough to serve for many decades. In short, political actors now perceive the stakes of each nomination to be exceedingly high, especially if confirmation is seen as likely to lead to an immediate shift in the balance of power between Court “liberals” and “conservatives.”

As witness testimony before the Commission suggested, the struggles over the confirmation process appear likely to persist, if not intensify. One witness testified that the partisan escalation of recent years may lead future Senate majorities to decline to take up any nomination from a President of the opposing party, at any time at all, not just in the last year of the President’s term.²³ At various times and to different degrees, party leaders have expressed a readiness to resort to these kinds of tactics as a matter of course. In 2021, the Republican Leader Mitch McConnell stated that, if his party won a majority in the Senate in the 2022 midterm elections, he would not commit to acting on any Supreme Court nomination by President Biden in 2023 and indicated it was “highly unlikely” that he would agree to any such consideration in the 2024 presidential election year.²⁴ In 2007, Senator Chuck Schumer, then a member of the Senate Democratic leadership and now the Senate Majority Leader, observed in a speech that, for the 18 months remaining in George W. Bush’s presidency, “[w]e should reverse the presumption of confirmation.”²⁵ He set the nomination of a “moderate” as a condition of confirmation, asserting that “the Supreme Court is dangerously out of balance” and that a Bush nomination should not be confirmed “except in extraordinary circumstances.”²⁶ Defenders of recent Republican actions point to these statements as evidence that both sides have engaged, or have been prepared to engage, in similar practices. They therefore contend that Republicans cannot fairly be charged with breaching any established norms. Critics of the Republicans’ approach see a distinction between Senator McConnell’s and Senator Schumer’s respective statements. They

view it as improper for the Senate simply to refuse to consider a President's nominees, but claim it is different, and appropriate, for a Senate majority that is not aligned with the President to insist that the President's nominee be relatively moderate. Of course, what it means for a nominee to be "moderate," and whether any given nominee is accurately described as such, are often matters of significant disagreement.

B. The Stakes of the Reform Debate

The Court reform debate is not merely a byproduct of recent partisan conflict. Rather, it is a high-stakes debate because of the unique role and structure of the Supreme Court. The Court's decisions have extraordinary impact on the lives of Americans generally. It also exercises enormous power within the U.S. system of government, as do the individual Justices themselves, who serve for life. The sharp polarization in contemporary American politics only exacerbates the conflict over the Court.

The Court has long occupied a central and often contested role in shaping American political and civic life—from its rejection of economic and labor regulation during the first Gilded Age, through its blocking of New Deal legislation designed to rescue the nation from the Great Depression, to its lionized role in repudiating segregation in *Brown v. Board of Education*, and its protection of civil liberties, including the right to privacy and to choose whether to bear a child.²⁷ In some ways, then, the current debate over Court reform is unsurprising.

The Court's decisions in our modern era continue to have both immediate and long-term effects on the welfare of individuals and communities throughout the country across a broad range of issues, including the rights of people of the same sex to marry, the right to bear arms, religious liberty, property ownership, women's reproductive rights and freedom, access to health care, participation in the political process and voting, the operation of the criminal justice system, diversity in higher education, and the regulation of workplaces and the right to organize, among many others.²⁸ The stakes of the nomination process are so high precisely because they implicate matters of great public concern. Indeed, at various moments throughout history, conservatives and progressives alike have turned to the Court to protect the rights they most value and to define the authority of the elected branches of the federal government and of the states in accord with their understandings of the Constitution.

The controversies surrounding the Court are heightened by the power it occupies within our constitutional structure. As discussed in Chapter 4 of this Report, the Court exercises the power not only of judicial review but also of judicial supremacy—the right to define the scope of constitutional rights, to strike down legislation as inconsistent with the Constitution, and ultimately to have the last word on questions of constitutional interpretation. As one witness emphasized, it is a "very powerful Supreme Court . . . combined with a nearly-impossible-to-amend constitution."²⁹ Consequently, when the Court generates "a firestorm of controversy, the only practical avenue for overturning decisions of the Court has been through changing the judges who sit on that Court."³⁰ The fact that Justices have life tenure—and therefore often serve for upwards of 30 years in the modern era—only heightens the stakes of who joins the Court. Up until the late 1960s, the average term of service was 15 years. It has now risen to roughly 26 years, and a number of Justices have served three or more decades spanning

numerous election cycles and presidential administrations. It is hardly a surprise, then, that key segments of the American public are so heavily invested in making sure that the “right” nominee is confirmed.

The highly polarized politics of the current era threatens to transform this already high-stakes process into one that is badly broken.³¹ Political scientists generally agree that “the period since the 1980s has largely featured deepening dispute and standoff between the parties, accompanied by intensifying political and social polarization.”³² Contemporary politics generally has developed the “distinctive character of high-stakes warfare,” associated with the “breakdown of norms of cooperation and civility across the aisle.”³³ According to Chief Justice Roberts, this extreme polarization has affected public perceptions of the Court: “When you live in a polarized political environment, people tend to see everything in those terms.”³⁴

The Commission did not attempt to identify the sources of polarization or come to conclusions about any role the Court may have played in it. These, too, are matters about which individual Commission members disagree. The Commission did hear testimony, however, that acute polarization is likely to continue to affect the debate over the Court’s role in the constitutional system, and to perpetuate partisan conflict over nominees to the Court.³⁵ On this point, there is consensus among Commissioners. Any account of the origins of the present debate about the role and operations of the Court, therefore, would be incomplete without taking note of how our deeply divided polity affects debates over the Court.

* * *

Before we turn to discussing proposals for Court reform and how best to evaluate them, two caveats to the above picture of partisan breakdown are in order. *First*, even as the Court is at the center of escalating partisan conflict, its rulings have not fallen consistently along “party lines,” where Justices appointed by Republicans always vote in a predictably conservative fashion and Justices appointed by Democrats vote in a consistently liberal one. A significant portion of the Court’s work is not highly ideological, and in these cases the Justices are often unanimous or aligned in ways that cannot be predicted by partisan identity.³⁶ However, this appears to be less true of late with respect to emergency orders (often referred to as the “shadow docket”), as discussed in Chapter 5 of this Report.³⁷

Second, the extent to which extreme political polarization affects the public standing of the Court is not clear. Historically, the Court has maintained levels of public confidence higher than those accorded the other branches.³⁸ While public opinion may shift in the wake of particularly controversial decisions and nominations, many have argued that basic trust in the Court as an institution has exhibited significant resilience.³⁹ At the same time, there is some evidence that partisan differences shape judgments about the Court’s performance. Court “approval” among Democrats dropped to 40% after President Trump assumed office and made his first appointment to the Court, while among Republicans it rose to nearly 65%.⁴⁰ And whether public trust in the Court will continue to be durable remains to be seen. One recent poll suggests the Court’s approval is waning, with 49% of Americans disapproving of its performance and only 37% approving—an all-time low.⁴¹

II. Proposals for Reform

A. *The Commission's Process and Scope of Analysis*

In considering the current reform debate, the Commission received oral testimony from 44 witnesses; written statements from 23 additional experts and organizations; and more than 6,500 submissions in the form of public comment. The views expressed regarding whether Court reform is needed and the proposals for such reform were wide ranging and diverse.

Informed by that material and the broader public debate, the Commission divided the reform proposals into four main categories for analysis.

- *The size and composition of the Court.* One prominent proposal would increase the number of Justices who sit on the Court. Other proposals suggest reorganizing the membership of the Court – for example, by having cases decided by panels instead of the entire Court, or by rotating other Article III judges on to the Supreme Court periodically. We address these proposals in Chapter 2.
- *The Justices' tenure.* Justices currently serve “during good Behavior,” meaning for life, unless they voluntarily leave the Court or are impeached and removed from office. Another prominent proposal would limit the length of time that Justices serve on the Court and, relatedly, would define the intervals at which Justices are appointed. We consider these term limits proposals in Chapter 3.
- *The powers of the Court and its role in the constitutional system.* Another set of proposals seeks to disempower the Court in relation to the political branches, particularly to limit the Court's power to declare legislative acts unconstitutional. This category includes modifying the Court's jurisdiction, as well as changing the Court's voting rules and the standards of review it uses when considering whether to invalidate the actions of elected officials. Finally, it includes proposals to allow Congress to override constitutional decisions of the Supreme Court and other courts. We analyze this category of proposals in Chapter 4.
- *Transparency and the Court's internal processes.* A final category of potential reforms includes proposals that would address internal operations of the Court. These proposals include how to address: the procedures and substantive standards the Court applies to emergency applications and other summary dispositions; how the Court selects the cases it hears and from whom it receives briefing and hears argument; judicial ethics and transparency with respect to recusals and conflicts; and making the Court's arguments more transparent through real-time audio or video transmission of oral argument. We take up this set of reforms in Chapter 5.

With regard to each of four categories of Court reform, we consider relevant historical background; we evaluate the case for and against the reform as framed by proponents and critics; we explore whether the proposed reforms promote the goals of their proponents and what the

potential consequences of the reforms might be; and we consider the legal requirements and obstacles that must be met or overcome to implement the reforms.

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

B. Criteria for Evaluation

Before proceeding to analyze particular reform proposals in subsequent chapters, we consider the values and principles that might be brought to bear in evaluating whether reform generally is needed and whether a particular reform might be worth pursuing or could be counterproductive. Three common and inter-related themes animate calls for reform: the perceived need to enhance the Court's "legitimacy," concerns about preserving the independence of the federal judiciary (and the Court in particular), and the importance of grappling with the Court's relationship to democracy. As we have noted, the Commission did not attempt to discern whether the Court is beset by a crisis of legitimacy today, nor do we take a position on whether the Court's independence is at risk or whether it has become too anti-democratic. But it is important to clarify these concepts in order to understand the debate.

1. Legitimacy

Nearly all of the matters now being debated—the size and composition of the Court, the Justices' tenure, the Court's role in the constitutional system, the propriety and transparency of the Court's internal processes, and the way in which Justices are appointed and confirmed—are said to implicate questions of legitimacy. The Supreme Court's legitimacy and standing with the public and government officials long have been regarded as crucial to the institution. The Court cannot enforce its own decisions; the federal judiciary has no military or other compliance mechanism.⁴³ The judiciary must rely on others to adhere to its decisions.⁴⁴ As Alexander Hamilton stated in *The Federalist*, "[t]he judiciary ... has no influence over either the sword or the purse ... and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."⁴⁵ Government officials and the general public are more likely to comply with Supreme Court decisions if they view the Court as legitimate—that is, as an institution that does and should have the authority to determine legal rights and obligations.⁴⁶ It is particularly important to the Court that those who *disagree* with a Supreme Court decision view the institution as legitimate. Such observers are far more likely to accept a (disappointing) ruling if they generally treat the institution as authoritative.⁴⁷ The Supreme Court's capacity to function, at least in the long term, arguably depends on the Court retaining its legitimacy with the public.⁴⁸

There are different ways to understand this idea of “legitimacy” as it is employed in reform debates. An argument grounded in a concern with “legitimacy” might refer to the general level of support that the Court has among the people of the United States, as reflected in public opinion polls, including as compared to the level of support for other government institutions. It might refer to how the people regard the Court: whether they see it as a judicial or legal institution, as opposed to simply a “political” or even partisan body. And claims about “legitimacy” sometimes reflect an evaluative judgment about the Court’s actions—whether it is making good or right decisions—rather than an assessment of the support the Court has among Americans generally.

2. Judicial Independence

Judicial independence is commonly, and correctly, thought to be a core requirement of the rule of law. Some aspects of judicial independence are straightforward to specify. Judges must be free to decide cases without fear that they will be punished by the government or will suffer physical or financial harm at the hands of private individuals. They must not be corrupted by bribes. Their rulings must not be influenced by personal favoritism or family relationships.

In those ways, judicial independence is not different from what we expect of other government officials: that they are able to, and do, carry out the responsibilities of their office without fear or favor. But other aspects of judicial independence are distinctive and indispensable components of the work of judges in particular. Judges should be not be partisans. Other government officials, depending on their positions, might legitimately set out to promote the interests of the political party with which they are associated; one requirement of judicial independence is that judges not do that. And, importantly—because federal judges are appointed and confirmed by political actors—the belief that the judiciary is independent can be undermined if judges are perceived to be “playing on the team” of one party or another.

Beyond that, it is sometimes said that judicial independence requires that judges must decide cases solely according to the law. So stated, that is incontrovertible. But there are difficult questions—they have been debated, literally, for centuries—about what decision according to the law means. In particular, legal decisions, especially those of a court like the Supreme Court that has the responsibility to resolve the most difficult issues facing our system, will sometimes require the exercise of judgment on legal issues about which there can be reasonable disagreement and that may implicate—to quote Judge (later Justice) Benjamin Cardozo — “[h]istory or custom or social utility or some compelling sentiment of justice.”⁴⁹ Difficult decisions of those kinds, especially when they involve controversial social issues, can leave judges and Justices open to the accusation that they have compromised judicial independence by advancing a partisan or otherwise improper agenda. That makes some of the duties associated with the judicial role and judicial independence—candor, consistency, reasoned elaboration, attention to both the appearance and reality of impartiality—all the more important.

3. Democracy

One far-reaching critique of the Court, sometimes cast in terms of “legitimacy,” emphasizes that the Court is too willing to intrude into matters that should be left to democratic

political processes. According to this line of criticism, many concerns about the Court are derivative of its outsized role in the system of government. When the Court's decisions are so important, the confirmation process becomes more contentious and partisan; the incentives to use the Court for partisan purposes become greater; the Court is more likely to be perceived as a political rather than a judicial institution; and the risk that the Court will entrench views that the people have rejected becomes greater and more unacceptable.

On this view, the debate over the Court and its legitimacy should be reframed as one about democracy. For some readers, it may seem odd to discuss the “democratizing” force of Supreme Court reform. After all, many view an independent Court as a valuable *check* on the political process. Indeed, some elected officials have taken to reminding the public that the U.S. system is a republic, not a pure democracy.⁵⁰ Yet to proponents of democracy-based critiques of the Court, this framing misses the point that a scheme of checks and balances in a constitutional democracy must provide a way to check the judiciary as well.

In debates about the Court, the term “democracy” has multiple meanings.

a. Deference to the Political Branches. If the fundamental democratic goal is ensuring that decisions are made by relatively democratic institutions, such as the legislature, a goal of reform might be to ensure that the Supreme Court not interfere with the outcomes of the democratic process—by, for example, holding unconstitutional federal or state legislation. Some advocates for reform thus contend that the Court should be more reluctant to override the decisions of elected officials by declaring their acts unconstitutional, or that the Court should be restrained by other actors from doing so. This understanding, in various forms, has been advocated by commentators, judges, and Justices, at various points in history, and some of the witnesses before the Commission forcefully advanced this view.⁵¹ In fact, it is difficult to think of any issue related to the Court that has been discussed more extensively.

This conception gives rise to various questions. What is the category of decisions to which the Court should be more deferential? Is the concern that the Court exercises too much power just about the invalidation of Acts of Congress, or does it extend to the much more common instances in which the Court declares unconstitutional the actions of states or local governments? Those two forms of judicial review raise significantly different issues, but both implicate the power of the Court to overturn enactments by democratically elected bodies. In addition, the Court exercises power over the other branches of the federal government in ways besides its constitutional holdings. The Court interprets federal statutes and can declare unlawful the actions of executive branch agencies. While these decisions, unlike constitutional holdings, can in principle be overturned by legislation, in practice the difficulty of enacting legislation routinely means that what the Court says is the last word.

Perhaps the more fundamental question—the one that has attracted so much discussion for so long—is when deference is justified and when it is not. In prominent cases, the Court has intervened to try to protect racial or religious minorities or political dissidents from the abusive actions of majorities.⁵² If the Court were to adopt a posture of across-the-board deference, it would no longer play that role. But some critics of the Court assert that it would be worth it: that the gains from those celebrated decisions are outweighed by the instances in which the Court has

prevented democratically elected branches of government from serving the nation's interests, including by recognizing and protecting individual rights and the rights of minority groups and the disadvantaged.⁵³

b. A More Representative Court—and Avoiding Partisan Entrenchment. A second democracy-related argument aims for a Court that reflects, in broad terms, the political makeup of the country. The assumption appears to be that such a Court will not issue decisions that diverge too greatly from the preferences of the broader public. The argument is that while the Court need not and should not be responsive to short-term swings in public opinion, it is good neither for the country, nor the Court, for the Court to be substantially out of line with public opinion for an extended period.

Some critics of the current system contend that it produces a persistent gap between the composition of the Court and long-term movements in popular opinion. This misalignment might occur by happenstance, because of the fortuity of when vacancies on the Court occur,⁵⁴ enabling some Presidents to make many more appointments to the Court than others—and therefore to have a much greater influence on the direction of the Court. Or it may happen by design, if a transient governing majority, or one that is about to be superseded, succeeds in appointing to the judiciary a significant number of candidates whose legal philosophy matches that majority's preferences—a phenomenon sometimes referred to as partisan entrenchment. During such periods of misalignment, there may be a heightened risk that the Court's direction on political or social issues will be perceived to be significantly or increasingly distant from the strongly held preferences of a large majority of the public.

Some commentators assert that such a misalignment exists today. They point to the fact that Republican presidents have appointed 15 of the last 19 Justices and six of the current nine Justices, “even though Democrats have held the presidency for 16 of the last 28 years and have received more votes in six of the last seven presidential elections.”⁵⁵ President Trump, for example, appointed three Justices in his single four-year term; his immediate Democratic predecessors, Presidents Obama, Clinton, and Carter, made only four appointments total in a combined 20 years in office.⁵⁶ This argument dovetails with some of the concerns about Supreme Court legitimacy. Observers worry that, absent a change in membership, the Court will reverse longstanding precedents that may be favored by a large segment of the public, such as on reproductive rights.⁵⁷

The prospect of misalignment arguably deepens as we take account of certain structural features of the Constitution and their relationship to the country's demographic development. As larger states grow relative to smaller ones, the power imbalance in the Senate increases; Senators from smaller states, who many come to represent smaller portions of the electorate nonetheless retain the same power to move or block nominations. In addition, the vagaries of the Electoral College will increasingly magnify the risk that candidates who do not secure the popular vote will nonetheless win the presidency and with it the opportunity to appoint Justices to the Court.

What some critics cite as misalignment or questionable partisan entrenchment, others view as serving important values or purposes of the constitutional system. Justices' life tenure inevitably results in the Court reflecting the views of an earlier generation; as long as the

members of the Court have some tenure protections, as opposed to rotating out of office frequently in response to elections, the Court will inevitably reflect views that are not currently endorsed by the electorate. But these protections may also maintain judicial independence by providing a degree of insulation from the partisan politics of the moment. This insulation also helps the Court to serve as a check on majority opinions in order to protect constitutional rights and principles that majorities may choose to ignore. As noted above, some of the Court's prominent decisions on subjects ranging from school prayer to criminal justice were quite unpopular.⁵⁸ The "popular will" is also subject to change over time. *Brown v. Board of Education* ignited a flurry of resistance when it was issued but is now one of the most well-respected Supreme Court decisions in history.⁵⁹

Further, whether this misalignment is especially severe is debatable. Some legal scholars argue that the Supreme Court has, for much of its history, issued decisions that, in practice, reflect the wishes of the public.⁶⁰ Moreover, there is no obvious way of determining when Justices have reflected the views of an earlier generation and when they have provided a valuable counterweight to majoritarian excesses. And there are examples, in history, of dominant political coalitions that tried to entrench themselves in the judiciary by systematically appointing Justices with certain views, only to have those very appointees decide cases in ways that diverged from the preferences or platforms of the appointing party.⁶¹

Ultimately, Commissioners hold different views on the extent to which misalignment is a problem and whether the Court is sufficiently deferential to the political branches. But throughout this Report, we address and take seriously these democracy-related concerns as we evaluate the various proposals that seek to advance different conceptions of democracy.

4. Efficacy and Transparency

Commentators on the Court have raised a distinct set of concerns about the Court's efficacy and transparency. Some critics contend that the Court decides too few cases. Another persistent critique is that the Court should make its proceedings and practices more visible to the public, such as by video or real-time audio transmissions. Another is that the Justices should articulate more completely their reasons for their decisions, for example related to the denial (or perhaps the granting) of certiorari. Critics also contend that the Court should be more transparent about the criteria governing justices' recusals from deciding particular cases. There are also recurrent calls for the Court to be subject to more explicit rules about conflicts of interest and other matters concerning the reality and appearance of impartiality. Finally, numerous critics have raised concerns about how the Court handles cases that do not receive plenary consideration – what is sometimes called the "shadow docket."

III. The History of Reforms and Reform Debates

Any account of what has precipitated today's debate about the role and operation of the Supreme Court would be incomplete without an understanding of the long history of political debate and institutional reform surrounding the Court. This history, which dates back to the Founding and encompasses formative periods of the nation's history, highlights how lawmakers and the public frequently have been keenly attentive to and

engaged in debate about the role the Court plays within the constitutional system. Reform debates have reflected the institutional needs of an expanding nation, and they have involved partisan conflict and philosophical struggle over substantive constitutional values and the power of government to serve the needs of the people. We offer this history not to explain away or attempt to resolve today's debate according to a particular historical standard, but rather to underscore that it is part and parcel of U.S. constitutional history and the development of the American political order.

A. *The Origins of Federal Judicial Power*

In the spring of 1788, Alexander Hamilton published an essay titled *The Federalist No. 78*, under the pseudonym "Publius." The piece was one of a "Collection of Essays, written in favour of the New Constitution" and addressed to "the People of the State of New York." In it, Hamilton offered "an examination of the judiciary department of the proposed government." The courts, he argued,

were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. . . . A constitution is in fact, and must be, regarded by the judges as a fundamental law. . . . Nor does this conclusion by any means support a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.⁶²

Federalist 78 was printed in newspapers and sold as a freestanding pamphlet. It circulated through the markets, coffeehouses, shops, and parlors of New York City and beyond. Not everyone who read *Federalist 78* agreed with it. But by the time the Constitution was ratified on June 21, 1788, *Federalist 78* was part of a broad public debate about the role that courts would play in the new republic.

Since that moment, Hamilton's conception of the judiciary has provided both a framework and a set of questions about the role of the Supreme Court in the American constitutional system. The Constitution is the "fundamental law" of the nation. But as a written document, it depends on some actual governmental institution for its articulation and enforcement. According to *Federalist 78*, that institution is the Supreme Court. The will of "We the People" is channeled through the Constitution, and the Court's job is to ensure that that will is honored and carried out in the day-to-day workings of government. When it does this, the Court acts as "an intermediate body between the people and the legislature"—a check that keeps the other branches of government "within the limits assigned to their authority."

Of course, the legislature also acts on behalf of the people. Congress possesses lawmaking power because it represents the people of the United States. The drafters of the Constitution believed deeply in representative government, but they also believed that the

people's elected representatives might make mistakes. In such a situation, rather than waiting for the representatives to realize their errors, the will of the people would act through the Court.

The novelty of the Constitution was thus twofold. First, it announced what the fundamental law was. Second, it created an agent whose job it was to carry out that fundamental law. That agent was, in the words of Article III of the Constitution, the "judicial power of the United States," which was to be vested in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."⁶³

Federalist 78 is relevant today not because Hamilton's was the authoritative view on what the Constitution meant when it was drafted, nor because Americans living in the twenty-first century are necessarily obliged to carry out the will of the nation's long-dead founders. Hamilton's voice was one among many in a years-long argument, and we now rightly reject many beliefs and structures that afflicted late-eighteenth-century American society.

Rather, *Federalist 78* is important because it illustrates several key themes that have grown even more urgent over the past 233 years. Beginning in the founding era and continuing to the present day, the role of the Court has been contested. Over the intervening centuries, the place of the Court in the American system has changed. Four themes are especially vital to understanding modern debates concerning the current role of, and potential reforms to, the Supreme Court:

- the persistence of reform debates;
- the tension in the Court's role, as both a branch of the federal government and also the arbiter of the constitutional system;
- the connection between the mechanics of the Court's day-to-day operation and deeper structural concerns; and
- the relationship between the Court and politics, distinguishing between the political branches (Congress and the president), and partisan politics.

Here, we trace the history of debates over potential reforms to the Supreme Court from the early national period through the twentieth century. The discussion proceeds chronologically in order to explicate the ways in which the themes just mentioned shaped, and were shaped by, changing conceptions of the Court's role in the American constitutional system.

B. The Origins of the Supreme Court: The Constitution and the Judiciary Act of 1789

The Court's origins are inextricably bound up with existential questions concerning the structure of the judicial power of the United States. On March 4, 1789, the new government created by the Constitution began operating. Many elements of the system remained uncertain and disputed, despite the preceding twenty-two months of discussion and drafting, first in the Constitutional Convention and then in the state ratifying conventions.⁶⁴ The Constitution's beginning raised a host of new questions, the stakes of which were understood to be tremendously high.⁶⁵

Chief among the issues still to be settled were the scope of the federal judicial power and the practical details of how that power would function. Article III of the Constitution established the Supreme Court. But the drafters of the Constitution had been unable to agree on key points – most importantly, whether to create inferior federal courts, what types of cases the federal courts would be able to hear, and what sort of relationship the Supreme Court would have with the state courts.⁶⁶ The Constitution was also silent on the number of Justices who would sit on the Court. The drafters therefore left to Congress the task of addressing many of these questions as it saw fit, subject to the boundaries set forth in Article III.⁶⁷ The drafters' decision to postpone the question of the inferior federal courts has been termed by modern commentators the "Madisonian Compromise."⁶⁸

When the First Congress convened in New York's Federal Hall in April 1789, its members immediately began debating a bill to establish the federal courts. "The importance of the judiciary bill was obvious to contemporary observers both inside and outside Congress," according to several historians.

In March 1789, weeks before a Senate committee had even been formed to draft a bill, an anxious James Sullivan—soon to become the attorney general of Massachusetts—wrote to his friend Representative Elbridge Gerry pleading for more news about the formation of the judiciary. "[T]he freedom of the people depends so much upon the proper arrangement of this part of the government," he explained. James Monroe, not yet in Congress, told Virginia representative James Madison that the judiciary bill "will occasion more difficulty, I apprehend, than any other, as it will form an exposition of the powers of the gov[ernment] itself, and sh[o]w in the opinion of those who organize it, how far it can discharge its own functions." Senator Richard Bassett, a member of the committee drafting the bill, ventured to say that "our happiness as a people very much depends on this System."⁶⁹

A Senate committee comprising ten members (one from each state that had both ratified the Constitution and sent senators by that point) produced a first version of the act. The committee then sent its draft to leading lawyers, jurists, and officials around the nation, requesting their comments. What resulted was a compromise bill that attempted to balance competing interests, most notably the Federalists' focus on establishing a strong federal judiciary with the Anti-Federalists' desire to preserve state autonomy.⁷⁰ Following several rounds of revisions and amendments, the bill won approval from the Senate and the House. On September 24, the Judiciary Act of 1789 was signed into law by President George Washington.⁷¹

The Judiciary Act was far more than a restatement of Article III of the Constitution.⁷² As the intense debates surrounding the bill suggest, the provisions of the act were hard fought, and the final version represented a set of choices about how the judicial power of the nation would be shaped.⁷³ Even its supporters expressed reservations about the bill. James Madison wrote that the act was "pregnant with difficulties."⁷⁴ On the floor of Congress a few weeks later, however, he praised the bill as "as good as we can at present make it," while noting that it "may not exactly suit any one member of the House, in all its parts."⁷⁵

The Act provided for a six-justice Supreme Court: one chief justice and five associate justices. It established the Court's jurisdiction, both original and appellate. It also placed the Court at the top of the hierarchy of courts in the nation, state as well as federal. Section 25 of the Act granted the Court the power to review certain decisions of the highest courts of the states. This provision was viewed by some as particularly delicate, insofar as it placed the Supreme Court in the position of overseeing – and potentially overruling – the decisions of state-court judges.

Proponents of the Act, including Connecticut U.S. Senator Oliver Ellsworth, its primary drafter (and a future Chief Justice of the United States), maintained that a robust system of inferior federal courts with jurisdiction to hear cases arising under federal law would be a more effective method of vindicating constitutionally secured rights and guarantees than relying on state courts alone.⁷⁶ The Act thus established a system of inferior federal courts, which it broke down into two categories: district courts and circuit courts. The thirteen district courts, each with a single district judge, were apportioned along state lines, including two for Maine and Kentucky, which had not yet become independent states. The jurisdiction of the district courts extended primarily to admiralty cases and cases involving minor federal crimes. The three circuits – eastern, middle, and southern – were each staffed by the district judge and two Justices of the Supreme Court, whom the act charged with “riding circuit” to hold sessions in each district of the circuit twice each year.⁷⁷ Both the district courts and the circuit courts were primarily trial courts, with jurisdiction depending on the nature of the suit, the citizenship of the parties, and the amount in controversy. The circuit courts also possessed limited appellate jurisdiction.

The Act's assignment of circuit-riding duties to the Justices of the Supreme Court proved one of the most significant, and controversial, features of the U.S. judicial system for its first century of existence. The circuit-riding system tied the Court to the circuits, in both numerical and geographic terms. The original number of seats on the Court was set at six, allowing an even division among the three circuits. Although it required substantial and difficult travel, drawing complaints from the justices,⁷⁸ the practice of circuit riding compelled the justices to leave the capital and travel to the nation's periphery, where they mixed with a broad array of lawyers and litigants. When hearing cases on circuit, the justices acted as trial-court judges, requiring them to deal with issues of fact, instruct juries, and issue rulings on procedure and evidence.

Not until four months after Congress passed the Judiciary Act did the Supreme Court begin operations. On February 2, 1790, Chief Justice John Jay convened the initial session at New York's Royal Exchange, at which only three associate Justices were present.

The Court started its work in the midst of intense arguments about the Judiciary Act. Within a year of the Court's first session, reform of the federal judiciary returned to the center of public debate because of dissatisfaction with the allocations of authority between the district and circuit courts, and between the federal and the state courts.⁷⁹ In 1790, President Washington's attorney general, Edmund Randolph, submitted a report to Congress that recommended restructuring the federal courts. Randolph's report was soon followed by a set of proposed amendments to Article III drawn up by New York congressman Egbert Benson. Among the proposed reforms in Randolph's and Benson's plans were ending circuit riding, creating circuit

judgeships, and vesting the inferior federal courts with jurisdiction to hear all cases arising under federal law.⁸⁰ Neither plan gained sufficient support to bring about change. Yet reform of the federal courts was a constant topic of political debate in the early years of the Republic.

C. The Court and Politics in the Early National Period

Throughout the 1790s, Congress continued to debate reform of the federal judiciary, with much criticism focusing on the Justices' circuit-riding duties. In his annual message to Congress in 1799, President John Adams urged members to begin "a revision and amendment of the judiciary system," which he argued was "indispensably necessary" to "give due effect to the civil administration of Government and to insure a just execution of the laws."⁸¹

In February 1800, a House committee met with Justices William Paterson and Bushrod Washington to solicit their recommendations for reform. The following month, Congressman Robert Goodloe Harper of South Carolina introduced a draft bill recommending substantial reforms to the federal judiciary. The bill expanded the jurisdiction of the inferior federal courts to include all cases arising under federal law, increased the number of districts and circuits, and created sixteen new circuit judgeships, thereby ending the Justices' circuit-riding duties.⁸² The Act reduced the number of Supreme Court Justices from six to five upon the next vacancy, likely to limit the ability of a future president who was not Adams to shape the Court.⁸³ It also added a new, sixth circuit, comprising Tennessee, Kentucky, and the Indiana and Ohio territories. Following debate and minor modifications, the bill passed the House on January 20 and the Senate on February 7, 1801, and was signed into law by Adams on February 13, 1801. Officially titled "An Act to Provide for the More Convenient Organization of the Courts of the United States," the act became known as the Judiciary Act of 1801.⁸⁴

The Judiciary Act of 1801 is sometimes assumed to have been entirely motivated by the victory of Thomas Jefferson in the presidential election of 1800. Four days after the 1801 Act was passed, on February 17, 1801, the House settled the disputed contest by electing Jefferson on the thirty-sixth ballot. Jefferson's Republican Party swept into power in Congress as well. But reforms to the federal judiciary, including ending circuit riding and expanding the courts' jurisdiction, had been debated since the 1790s, and the movement that led to the 1801 Act predated the election by several months.⁸⁵

Nevertheless, the election of 1800 clearly heightened political polarization, and with it the politicization of the judiciary. When Jefferson and the Republicans took control of the presidency and Congress in March 1801, they quickly moved to undo the Federalists' judicial reforms. On March 8, 1802, the Judiciary Act of 1801 was repealed. The new act, known as the Judiciary Act of 1802, revoked the grant of general federal question jurisdiction, abolished the new circuit judgeships, and reinstated the Supreme Court Justices' circuit-riding duties.⁸⁶ The 1802 Act also retained the enlarged number of circuits (six) but reversed the planned reduction of the number of seats on the Court, bringing it back to six. For the third time in a dozen years, the Founders adjusted the number of Justices on the Supreme Court. Consequently, after 1802, the number of circuits matched the number of Justices, and the Justices continued to ride circuit.

The 1802 repeal of the 1801 Judiciary Act further inflamed debate surrounding the federal courts. All sides accused the others of using the judiciary for political gain. Jefferson charged the Federalists with having “retired into the Judiciary as a strong hold” in order to entrench themselves in the face of electoral losses.⁸⁷ Alexander Hamilton, influential among Federalists even though out of office, warned that “if the bill for the repeal passed, and the independence of the Judiciary was destroyed,” the nation would before long “be divided into separate confederacies, turning our arms against each other.”⁸⁸

The substance as well as the structure of federal judicial power was deeply contested during the early national period. One of Adams’s most lasting achievements as president was his appointment of John Marshall as Chief Justice in January 1801. During Marshall’s 34-year tenure as Chief Justice, the Court became stronger as an institution, claimed the power to interpret the Constitution, and asserted with increasing force a particular vision of the United States as a union rather than a confederation. Under Marshall’s leadership, the Court positioned itself as an arbiter of the constitutional order as well as a branch of the federal government.

In the early months of 1803, the Marshall Court issued two important rulings on key constitutional issues. In both cases, *Marbury v. Madison* and *Stuart v. Laird*, the Court demonstrated a notable ability to claim power while also appearing to limit that power. Both cases were also deeply political, having arisen out of the election of 1800, and both had been delayed when the Jeffersonian Congress postponed the Court’s 1802 term.

In *Marbury v. Madison*, the Court held that it lacked the authority to order Secretary of State James Madison to issue a commission to William Marbury for a position as justice of the peace, even though Marbury clearly had a right to the commission, and the remedy he sought—a writ of mandamus—was the proper remedy.⁸⁹ The problem, Marshall held, was that the statutory provision on which Marbury relied to establish the Court’s jurisdiction to grant the remedy was invalid because it exceeded Congress’s authority. The Court therefore lacked the ability to grant Marbury his remedy, Marshall determined.

The reason for this seeming weakness, however, was that the Court possessed a far stronger weapon: the ability to declare acts of Congress unconstitutional. This was the power of judicial review. The authority that Congress sought to give the Court in Section 13 of the Judiciary Act of 1789 “appears not to be warranted by the constitution,” Marshall stated.⁹⁰ Then followed what became one of the most-quoted passages in American constitutional law:

It is emphatically the province and duty of the judicial department to say what the law is. . . . So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.⁹¹

As many scholars have noted, judicial review was not new to American law in 1803.⁹² Courts had long claimed the authority to invalidate legislation, including the Supreme Court, state courts, and, even earlier, colonial courts. The Constitution did not refer explicitly to judicial

review. But the combined force of Article III, the Supremacy Clause of Article VI, longstanding Anglo-American practice, and the nature of the written Constitution suggested to Marshall and others that judicial review was within the Court's power.⁹³ In *Marbury*, Marshall established judicial review as a principle of American law, claiming for the Court—in the name of the Constitution and the people—the power “to say what the law is.”⁹⁴ Yet Marshall's opinion in *Marbury* was ambivalent, insofar as it paired this claim of interpretive power with a disavowal of the power to order Madison to deliver Marbury's commission.

In addition, the power of judicial *review* that Marshall asserted did not necessarily amount to judicial *supremacy*. As one leading constitutional law casebook puts it, judicial review “means that a federal court can review statutes (or executive actions) for constitutionality and refuse to enforce them in court proceedings if it finds them unconstitutional.” Judicial supremacy, in contrast, “means that the federal courts' interpretation of the Constitution is supreme over the other branches.”⁹⁵ The boundaries between the two concepts, and the Court's ability to lay claim to each, remained disputed in the nineteenth and early twentieth centuries.

One week after the Court handed down its ruling in *Marbury*, it decided another case that also carried important consequences for the role of the judiciary in the constitutional system. That case, *Stuart v. Laird*, required the Court to rule on the constitutionality of the Jeffersonian Congress's 1802 repeal of the Judiciary Act of 1801. The questions presented asked, first, whether Congress could validly abolish the circuit courts created under the 1801 Act without violating Article III of the Constitution, which stated that federal judges were to hold their offices “during good Behaviour”; and second, whether the Justices could be required to sit as circuit judges.⁹⁶ The Court upheld the constitutionality of the 1802 repeal act, found that the reorganization of the inferior federal courts was within Congress's power, and held that the validity of circuit riding had been settled by “practice and acquiescence.”⁹⁷

Some commentators have characterized *Stuart* as a more overtly political—and perhaps more consequential—decision than *Marbury*. *Stuart* forced the Court to confront existential questions about the balance between judicial independence and congressional control of the courts. One scholar has argued that “Marshall and his brethren apparently calculated that to invalidate this statute was to guarantee Jeffersonian political retaliation against the Court,”⁹⁸ while another called the *Stuart* decision “an exercise in self-preservation.”⁹⁹ Chief Justice Marshall himself seems to have remained skeptical about the basis of the decision, referring in an 1823 letter, in ironic tones, to “the memorable distinction as to tenure of office, between removing the Judge from the office, and removing the office from the Judge.”¹⁰⁰

As the *Marbury* and *Stuart* decisions demonstrate, the Court was at the center of negotiations about both law and politics during the early nineteenth century. Through its substantive decisions, the Court established its power even as it showed itself attentive to political context. As the Court gained stature under Chief Justice Marshall's leadership, structural reforms to the judiciary continued to be a perpetual topic of discussion. In 1807, Congress both increased the size of the Court to seven Justices and added a seventh circuit, comprising of Ohio, Kentucky, and Tennessee.¹⁰¹ The size of the Court and the number of circuits were still understood as necessarily linked. Other changes to the Court's jurisdiction were periodically proposed. These included stripping the Court of its power under Section 25 of

the 1789 Judiciary Act to hear appeals from state courts, an effort that was linked to specific policy issues, including treaty enforcement, land sales, bank regulation, and internal improvements.¹⁰²

D. The Jacksonian Era: National Expansion, Court Expansion, and Partisan Strife

The antebellum decades saw continuing disputes over the federal judiciary's structure; the balance between political control of the Court and judicial independence; and the orientation of the Court toward pressing political issues, including commerce, migration, and slavery.

The election of Andrew Jackson as president in 1828, and the related rise of the Democratic Party to national political dominance, was viewed by many contemporaries as “a kind of revolution” akin to that which had swept Jefferson into office in 1800.¹⁰³ Jackson's two terms as President, from 1829 to 1837, brought a bold executive who claimed broad powers, the rise of modern party politics, and the entrenchment of sectionalism. Jacksonian nationalism aimed, in the words of one historian, to “maintain white supremacy and expand the white empire, to evict the Indian tribes, [and] to support and extend slavery.”¹⁰⁴

These imperatives had important consequences for the federal judiciary in three distinct areas: the role of the Supreme Court and its relationship to contemporary politics; the structure of the federal courts, in particular the ongoing debate over the Justices' circuit riding; and the related issue of the size of the Court. Throughout this period, the Court was embroiled in important issues relating to the separation of powers (the Court's relationship to the President and Congress) and federalism (the relationship between the Court and the states, including both state courts and legislatures).

First, the Supreme Court continued to be viewed by contemporaries as an institution that was necessarily involved in politics. Prior to Chief Justice Marshall's death in 1835, the Court took stances in a few high-profile cases that appeared to be carefully calculated acts of resistance to Jeffersonian-Republican policies. In *McCulloch v. Maryland* (1819) and *Osborn v. Bank of the United States* (1824), the Court upheld the constitutionality of the Second Bank of the United States, against attacks on it by several states and by then-candidate Jackson.¹⁰⁵ Chief Justice Marshall published a series of newspaper essays under a pseudonym in which he defended the *McCulloch* decision against arguments that the Bank represented an overreach by Congress and an invasion of state sovereignty.¹⁰⁶ During Jackson's presidency, the Marshall Court heard a pair of cases brought by the Cherokee Nation in which the tribe sought to vindicate its jurisdiction and ownership of lands against the state of Georgia. Jackson had campaigned for the presidency on a promise of “Indian removal,” and, in 1830, a closely divided Congress had passed the Indian Removal Act.¹⁰⁷ In the 1831 case of *Cherokee Nation v. Georgia*, the Court held that it lacked jurisdiction to hear the tribe's case.¹⁰⁸ In 1832, however, the Court ruled in *Worcester v. Georgia* that Georgia did not have authority to extend its criminal laws over the Cherokee Nation.¹⁰⁹ The Court's ability to compel the state to carry out its decision was limited, however, by the procedures set forth in the Judiciary Act of 1789. Contemporaries also speculated that the Court was leery of provoking Georgia at the same moment that South Carolina was claiming the power to nullify federal law.¹¹⁰

Following Chief Justice Marshall's death in July 1835, Jackson nominated as his successor Roger Brooke Taney, who had previously served as Jackson's Attorney General and Treasury Secretary (the latter via a recess appointment which was subsequently rejected by the Whig-dominated Senate). Earlier in 1835, Jackson had nominated Taney to an associate justiceship on the Court. At that time, the Senate had refused to confirm Taney based on his removal of deposits from the Bank of the United States at Jackson's direction.¹¹¹ Taney had removed the deposits following Jackson's 1832 veto of the Bank's recharter, in which Jackson had rejected the Court's power to decide with finality the issue of the Bank's constitutionality.¹¹² By 1836, Democrats had regained sufficient control of the Senate to confirm him.¹¹³

Contemporaries noted the interaction of politics with the structure of the federal courts and the size of the Supreme Court. Territorial expansion and regional affiliations were important factors with respect to these issues. By 1837, the Union comprised twenty-six states, nine of which had been admitted since the addition of the most recent circuit in 1807. Since then, the number of circuits and Justices had remained at seven. But residents of the six most recently added states increasingly demanded that their states be incorporated into circuits, rather than having district courts exercise both district- and circuit-court jurisdiction (and without ever being visited by a circuit-riding Justice).¹¹⁴ Jackson was the first western president, and the West was an important piece of the Democratic political coalition. An increasingly widespread belief held that the Court should represent the regions of the nation. Relatedly, some observers felt that, for all its problems, circuit riding was valuable because it ensured that the Justices were exposed to the issues and debates on the periphery, and that Americans on the nation's periphery felt connected to the center. Another view, however, held that the Court was already too large, and that the quest for regional balance was either not worth pursuing or doomed to failure.¹¹⁵

While these arguments over the structure of the federal judiciary were churning, the Court's personnel was shifting. During his first term in office, Jackson appointed two Justices to the Court. During his second term, Jackson nominated five additional Justices, including Taney as Chief Justice, bringing to seven his total number of nominees to the Court.¹¹⁶ Jackson thus "made more Supreme Court appointments than any other president between Washington and Taft."¹¹⁷

Jackson was able to appoint more Justices to the Court because on March 3, 1837—his last day in office—Congress passed a new Judiciary Act.¹¹⁸ The act created two new circuits and added two new seats to the Court, bringing the total for both to nine for the first time in the nation's history. Four of the nine Justices hailed from the Mississippi Valley; the last five of Jackson's appointments came from slaveholding states.¹¹⁹ Describing Jackson's impact on the Court, one contemporary magazine characterized the "late *renovation* of the constitution of this august body, by the creation of seven of the nine members under the auspices of the present democratic ascendancy" as "the closing of an old, and the opening of a new, era in its history."¹²⁰

E. The Upheavals of the Civil War and Reconstruction: Transforming the Constitution

The constitutional transformations brought about by the Civil War and Reconstruction were accompanied by a series of fundamental changes in the operation of the federal judiciary.

The overall trend was toward stronger federal courts with more robust jurisdiction. Beginning in the 1870s, however, a series of narrow decisions from the Court severely limited Reconstruction's revolutionary potential.

In 1857, the Supreme Court had drawn attack from growing numbers of Americans for its infamous decision in *Dred Scott v. Sandford*, in which Chief Justice Taney wrote for a seven-Justice majority that persons of African descent “are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”¹²¹ As part of his campaign for the U.S. Senate in 1858, Abraham Lincoln decried the decision, calling it “erroneous” as a matter of law and warning that it would lead to “the spread of the black man’s bondage.”¹²² In his first inaugural address in March 1861, Lincoln continued his criticism of the Court, suggesting that such judicial overreach as the *Dred Scott* decision—which he did not mention by name—threatened democracy:

[T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.¹²³

Following the secession of the eleven states that formed the Confederacy in spring 1861, the Republican-controlled Congress set about reshaping the federal judiciary as “a partner against the South.”¹²⁴ Many contemporaries also hoped that these efforts would redeem the Court from the stain of the *Dred Scott* decision.

The start of the Civil War witnessed a series of reforms to the circuit courts. In his first message to Congress in 1861, President Lincoln observed that “the country has outgrown our present judicial system” and called for the circuit system to be overhauled.¹²⁵ Eight states that had been admitted over the past two decades had never had circuit courts visited by a Supreme Court Justice. Yet Lincoln did not advocate expanding the size of the Court. Instead, he urged that Congress sever the connection between the Court and the circuits, setting the size of the Court at a “convenient number” and then establish circuits of “convenient size,” with circuit-judging duties to be handled by some combination of Justices and circuit judges.¹²⁶

Congress enacted some of Lincoln’s recommended reforms. In 1862 and 1863, enabled by the exodus of southern Democrats from the federal government, Congress reorganized the circuits in order to limit Southern influence. Instead of five circuits composed entirely of slaveholding states, there were now only three such circuits. The total number of circuits was increased to ten, and a tenth seat was added to the Court. As in the eighteenth century, when the Court had comprised six members, reformers appeared unbothered by the prospect of an even number of Justices. The Justices responsible for the Eighth, Ninth, and Tenth Circuits now all hailed from Northern states.¹²⁷

In 1866, after the war had ended, Congress once more reorganized the circuits and the Court, again with the objective of limiting the influence of the former Confederate and other slaveholding states. The statute reduced the number of circuits to nine and mandated a gradual reduction of the number of seats on the Court from ten to seven, via attrition.¹²⁸ Congressional Republicans sought to reduce the size of the Court in order to prevent President Andrew Johnson, a foe of Radical Reconstruction, from nominating Justices to fill any vacancies.¹²⁹

The judicial power of the United States was even more profoundly transformed in this period by a series of statutes enlarging the federal courts' jurisdiction. As one historian writes, "In no comparable period of our nation's history have the federal courts, lower and Supreme, enjoyed as great an expansion of their jurisdiction as they did in the years of Reconstruction, 1863 to 1876."¹³⁰ Although Congress did on a few notable occasions strip the Supreme Court of jurisdiction in specific sets of cases,¹³¹ the broader movement was toward expanding the judicial power of the United States.¹³² The most important reforms were in three areas: First, removal jurisdiction, which allowed certain cases that began in state court to be taken to federal court;¹³³ second, the habeas corpus power, permitting federal courts to issue writs on behalf of prisoners held by state authorities in violation of federal law;¹³⁴ and third, federal question or "arising under" jurisdiction.¹³⁵

This growth in jurisdiction was accompanied by substantive legislation from Congress that created new federal rights and causes of action, many of which were aimed at protecting the rights of African Americans.¹³⁶ As a result of these reforms, the inferior federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."¹³⁷

Despite Congress's expansion of federal jurisdiction during the post-Civil War era, however, the Court issued a series of decisions that significantly limited the reach of both congressional civil rights legislation and the Reconstruction amendments. In the *Slaughter-House Cases*, the Court interpreted the Privileges and Immunities Clause of the Fourteenth Amendment narrowly, holding that the Clause covered only certain rights of national citizenship that did not include the economic protections claimed by the plaintiffs, a group of white butchers in New Orleans.¹³⁸ Three years later, the Court reaffirmed this constrained view of the Fourteenth Amendment in *United States v. Cruikshank*, a case arising out of the infamous Colfax Massacre in Louisiana, in which a mob of white vigilantes killed between 60 and 150 African Americans, as well as three white men.¹³⁹ In the case, the Court overturned the federal convictions of the vigilantes, holding that the Bill of Rights did not protect citizens against deprivations of rights by states or private parties, but only by the federal government.¹⁴⁰

The next several years saw frequent litigation of the Reconstruction legislation and amendments. In the words of one historian, "The opening of each term of the Court, beginning in 1876, caused a buildup of anxiety regarding possible decisions in the civil rights cases."¹⁴¹ The Civil Rights Act of 1875 was regarded by many contemporaries as the most far-reaching piece of Reconstruction legislation.¹⁴² The Act's stated aim was "to protect all citizens in their civil and legal rights," and it guaranteed to all citizens, regardless of color, access to public accommodations, including public schools, churches, theatres, and transportation, as well as jury service.¹⁴³ In 1883, in the *Civil Rights Cases*, the Court invalidated key provisions of the Act.¹⁴⁴

The Court ruled that neither the Thirteenth nor the Fourteenth Amendment permitted the federal government to proscribe discriminatory behavior by private actors. Many scholars regard the *Civil Rights Cases* as the culmination of a decade-long shift by the Court toward a narrow interpretation of the Reconstruction statutes and amendments. As one historian observes, “The rights of the individual took precedence over obvious social inequalities that federal officials sought to address.”¹⁴⁵ With the erosion of Northern support for robust Reconstruction policies, “[t]hat same narrow, highly individualized interpretation of rights also allowed legal segregation to flourish.”¹⁴⁶

F. The Progressive Era: Structural Reforms and Democracy-Based Critiques of the Courts

As a result of the structural reforms of the Reconstruction era, the dockets of the federal courts—and in particular the Supreme Court—became crowded “beyond all control.”¹⁴⁷ A small reprieve came from Congress in an 1869 statute that created circuit judgeships, one for each of the nine circuits.¹⁴⁸ The circuit-riding obligations of the Justices were also reduced. But it was not enough to stem the tide of litigation in federal court. The number of cases pending in the federal district and circuit courts rose from 29,013 in 1873 to 54,194 in 1890—an increase of eighty-six percent.¹⁴⁹ Yet over the same period, the number of inferior federal court judges rose only slightly, from sixty-two in 1873 to sixty-nine in 1890.¹⁵⁰

Moreover, the booming dockets in the district and circuit courts meant a concomitant surge in the Court’s caseload. “[W]ith no other exclusively appellate court and an automatic right of appeal to the Court in many instances, the losing parties in such cases inevitably brought their claims to the justices.”¹⁵¹ The Court’s docket in 1860 numbered 310 cases. In 1890, the number was 1,816 cases—623 of which had been filed in 1890 alone.¹⁵²

Dissatisfaction with the federal courts’ organization and functioning spawned numerous reform proposals. These included calls for an intermediate level of appeals courts, an innovation that had been discussed for decades but had never gained sufficient support to be attempted. Other proposals included expanding the Court to eighteen Justices, half of whom would operate as a “National Court of Appeals.” Another proposal would have segmented the Court into three “divisional” panels, each responsible for common-law, equity, and admiralty and revenue cases, and with the entire Court hearing constitutional cases.¹⁵³

Finally, in 1891, Congress passed the Circuit Court of Appeals Act, known as the Evarts Act in honor of its chief architect, Senate Judiciary Committee Chairman William Evarts of New York.¹⁵⁴ The Evarts Act “fundamentally reshaped the federal judicial system” and “substantially established the framework of the contemporary system.”¹⁵⁵ For the first time since 1802, the Justices were no longer obliged to ride circuit. The act also created intermediate courts of appeals, which “shifted the appellate caseload burden from the Supreme Court to new courts of appeals, and, in so doing, made the federal district courts the system’s primary trial courts.”¹⁵⁶ The reforms also drastically decreased the Court’s caseload by limiting the right of automatic appeal, and by making the decisions of the courts of appeals final in several categories of cases, including diversity suits and criminal prosecutions. The courts of appeals could certify questions to the Supreme Court, or the Supreme Court could grant review by certiorari; for state-court

cases, the mechanism remained the writ of error.¹⁵⁷ Whereas the number of new cases filed before the Court in 1890 was 623, that number dropped to 379 in 1891 and then to 275 in 1892.¹⁵⁸ Three decades later, Harvard Law professor and future Supreme Court Justice Felix Frankfurter, along with his former student James M. Landis, offered the following characterization of the Evarts Act: “The remedy was decisive. The Supreme Court at once felt its benefits. A flood of litigation had indeed been shut off.”¹⁵⁹

The end of federally enforced Reconstruction by 1877 also redirected Republican energies from civil rights for African Americans toward new forms of nationalism that prioritized economic development, property rights, and the interests of large-scale enterprise.¹⁶⁰ Critics of the Court, especially those associated with the Progressive movement, charged the federal courts with favoring business interests, in part due to the expansion of the courts’ diversity jurisdiction, the frequency of removal from state to federal court by corporate defendants, and the application of a substantive body of law known as “general federal common law.”¹⁶¹ These critics charged the Court with deploying its power of judicial review more often and in accordance with conservative policy preferences. Chief among these preferences was the curtailing of legislation and regulations, especially those that protected workers and consumers. Between 1864 and 1895, the Court invalidated an average of three state laws each year, a sharp contrast with the pre-Civil War rate of less than one law per year.¹⁶²

By the 1890s, what one scholar has described as a “muted fury” toward the federal courts had developed among some reformers, many of whom mobilized as the Populist and later the Progressive parties.¹⁶³ Three decisions that the Court handed down in 1895 drew particular criticism: *United States v. E.C. Knight Co.* (holding that the federal commerce power did not reach manufacturing);¹⁶⁴ *Pollock v. Farmers’ Loan & Trust Co.* (invalidating the federal income tax);¹⁶⁵ and *In re Debs* (upholding a labor injunction against striking railroad workers).¹⁶⁶

Progressive anger at the courts became a defining issue in the 1912 presidential election. After having left office and embarked on a worldwide tour, former president Theodore Roosevelt reentered the political fray with a blistering attack on the courts, focusing his ire on the Supreme Court’s recent decision in *Lochner v. New York*.¹⁶⁷ Addressing a joint session of the Colorado legislature, as well as an audience of thousands who had gathered outside, Roosevelt decried the Court’s decisions in *Lochner* and *E.C. Knight*.¹⁶⁸ In print, Roosevelt argued that the Justices had “strained to the utmost (and, indeed, in my judgement, violated) the Constitution in order to sustain a do-nothing philosophy which has everywhere completely broken down when applied to the actual conditions of modern life.”¹⁶⁹

Upon launching his presidential campaign in February 1912, Roosevelt proposed that state judicial decisions invalidating a statute as unconstitutional (either under the Federal Constitution or the state constitution) should be “recalled” by a vote of the citizens.¹⁷⁰ “[W]hen a judge decides a constitutional question, when he decides what the people as a whole can or cannot do, the people should have the right to recall that decision if they think it wrong,” Roosevelt argued.¹⁷¹ The former president’s proposal focused on rulings by state courts, and he disavowed the notion that it would apply to federal courts. But one commentator notes that despite his public statements, Roosevelt “confided to [Progressive journalist Herbert] Croly that

he believed the people would ultimately obtain the power to interpret even the federal Constitution.”¹⁷²

Roosevelt’s recall initiative became a dominant issue during the 1912 presidential election, a four-way contest that pitted Roosevelt, running as a Progressive, against Republican incumbent William Howard Taft, Democrat Woodrow Wilson, and Socialist Eugene V. Debs.¹⁷³ Ultimately, Roosevelt’s attacks on the judiciary failed to win him the Republican nomination, repelling party conservatives and energizing Taft’s reelection campaign, which focused on protecting judicial independence.¹⁷⁴ President Wilson, who prevailed in the contest, did not support recall of court decisions, and the frontal attack on the judiciary faded after Roosevelt’s defeat. It would not reemerge so forcefully as an issue until the presidency of his cousin Franklin.

G. 1937, FDR, and the Court: Existential Challenges

Populist and Progressive critiques of the Court continued to circulate through the early decades of the twentieth century. By 1936, when the nation was in the grip of the Great Depression, these criticisms gained new salience. After President Franklin D. Roosevelt won reelection to a second term by an overwhelming margin, he turned his attention to the Court. In a series of decisions in 1935 and 1936, the Court had invalidated key New Deal legislation introduced by the Roosevelt administration and supported by Democrats in Congress.¹⁷⁵ “A majority of the Court seemed to have turned decisively against the Administration’s programs,” notes one prominent casebook, adding that “constitutional challenges to a new spate of laws—the Fair Labor Standards Act, the National Labor Relations Act, and the Social Security Act—loomed in the coming months.”¹⁷⁶

In February 1937, Roosevelt presented a package of reforms to Congress that he described as a remedy for overcrowded federal-court dockets. The proposal authorized the President to appoint one additional judge to the federal courts, including the Supreme Court, to supplement any federal judge who reached the age of seventy and did not retire. The size of the Court would be limited to fifteen justices. “The significant fact was that the plan would permit the president to appoint six new Supreme Court justices, and thus to insure approval of the New Deal programs. It was, as it was called, a ‘court-packing plan.’”¹⁷⁷ On March 9, 1937, Roosevelt took to the national airwaves to present the reforms to the American people in a “Fireside Chat.”

On March 29, 1937, the Supreme Court handed down its decision in *West Coast Hotel Co. v. Parrish*, upholding a state minimum-wage statute for women that was nearly identical to one that it had struck down a year earlier.¹⁷⁸ On April 12, the Court decided *NLRB v. Jones & Laughlin Steel Corp.*, in which it held the National Labor Relations Act to be a valid exercise of Congress’s power to regulate interstate commerce, appearing to diverge from the Court’s position in a similar case from 1936.¹⁷⁹ And on May 24, in *Steward Machine Co. v. Davis*, the Court upheld the unemployment compensation provisions of the Social Security Act of 1935—again seemingly taking a broader view of congressional power than in previous cases.¹⁸⁰ All three were 5-4 decisions. This seeming about-face was dubbed the “switch in time that saved nine” by some observers,¹⁸¹ and “the constitutional revolution of 1937” by others.¹⁸² Also in May

1937, Justice Willis Van Devanter—one of the so-called “Four Horsemen” who had steadfastly opposed most New Deal legislation—announced his retirement from the Court.¹⁸³

Roosevelt’s Court-packing plan was ultimately not enacted by Congress. Many observers—at the time and since—have charged Roosevelt with overreaching.¹⁸⁴ They argue that had the plan succeeded, its passage would have “set a precedent from which the institution of judicial review might never recover.”¹⁸⁵

Clearly, however, something did change in 1937. In the spring, the Court began upholding major pieces of New Deal legislation, despite challenges that the statutes exceeded Congress’s Article I powers—in particular, the commerce power and the taxing and spending power. Roosevelt did not succeed in packing the Court, but neither did he have to abandon his New Deal agenda. Nor did he have to launch an effort for a constitutional amendment to limit the Court’s power, as some in his administration had urged.¹⁸⁶ The Justices might well have viewed the Court-packing plan as a threat and altered their views accordingly, engaging in “self-salvation by self-reversal.”¹⁸⁷ On this view, “[w]hile the president lost the skirmish with the Court, he won the battle.”¹⁸⁸

But another view of the events of 1937 suggests the opposite conclusion: that “although the battle was won, the war was lost.”¹⁸⁹ Court-packing

divided Democrats and undermined middle-class and bipartisan support for the New Deal. It shattered FDR’s aura of invincibility, helped ‘blunt the most important drive for social reform in American history,’ and ‘squandered’ the president’s 1936 triumph by welding together a coalition of conservative Southern Democrats and Republicans that blocked reform in Congress until 1964.¹⁹⁰

As scholars have noted, these accounts might be reconcilable. Gradual shifts in specific Justices’ doctrinal approaches might explain the Court’s shift in 1937.¹⁹¹ The New Deal “did not reconstruct constitutional law out of thin air.”¹⁹² But “the doctrinal revolution would not have happened without sustained Presidential leadership.”¹⁹³

The public debate surrounding the Court-packing plan placed undeniable pressure on the Court in the late winter and spring of 1937. More than twenty-five bills regulating the Court were introduced in Congress between January 8 and May 20, 1937.¹⁹⁴ Justice Owen Roberts, the Justice whom many conventional accounts of the crisis identify as switching his views in 1937, recalled years later, in testimony before the Senate, “the tremendous strain and the threat to the existing Court, of which I was fully conscious.”¹⁹⁵

H. The Postwar, Post-Brown Era: Judicial Supremacy Articulated and Challenged

In the wake of *Brown v. Board of Education*,¹⁹⁶ some Southern officials challenged the authority of the Court’s decisions on issues concerning African Americans’ civil rights under the Fourteenth Amendment, and school desegregation in particular. Some Southern state legislatures passed “interposition” resolutions asserting that a given issue—typically, public education—was within the exclusive control of the state.¹⁹⁷ In 1956, nineteen senators and seventy-seven

congressmen, all from former Confederate states, signed onto a document titled “The Declaration of Constitutional Principles,” but which became known as the “Southern Manifesto.”¹⁹⁸ Such efforts at blocking the implementation of the Court’s decisions explicitly borrowed from eighteenth- and nineteenth-century theories of state sovereignty associated with James Madison and John C. Calhoun, among others.¹⁹⁹

The reaction against the *Brown* decision sparked a number of proposals for constitutional amendments. Among the amendments presented to Congress by various state legislatures were the following:

- an amendment making the Senate the final appellate court with power to review decisions of the Supreme Court in cases “where questions of the powers reserved to the States, or the people, are either directly or indirectly involved and decided, and a State is a party or anywise interested in such question”;²⁰⁰
- an amendment setting term limits for federal judges and revising the method of selecting them;²⁰¹
- a procedure according to which if one-fourth of the states disapproved of a decision by the Court that weakens states’ rights, the decision would be rendered null unless three-fourths of the states approved it;²⁰²
- a proposed “Court of the Union” drawn from judges of state supreme courts, with the power to review decisions of the Supreme Court with respect to “the rights reserved to the States or to the people” by the Constitution;²⁰³
- reserving to the states “the right to sole, and exclusive jurisdiction of public school systems in the separate States.”²⁰⁴

None of these proposed amendments came to pass. But they demonstrate the broad range of Supreme Court reforms that have been proposed from across the political spectrum by critics of its decisions, its procedures, and, in some cases, its authority.

¹ Exec. Order No. 14023, 86 Fed. Reg. 19,569 (Apr. 14, 2021) [hereinafter Exec. Order].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Joe Biden 60 Minutes Interview Transcript*, REV (Oct. 25, 2020), <https://www.rev.com/blog/transcripts/joe-biden-60-minutes-interview-transcript>.

⁶ See, e.g., Bruce Ackerman, Opinion, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html> (noting that partisan politics threatens to “destroy the court’s legitimacy in the coming decade”); Erwin Chemerinsky, *With Kavanaugh Confirmation Battle, the Supreme Court’s Legitimacy Is in Question*, SACRAMENTO BEE (Oct. 5, 2018), <https://www.sacbee.com/opinion/california-forum/article219317565.html> (noting a “cloud over the court’s legitimacy”); Press Release, Office of Sen. Mitch McConnell, McConnell on Court Packing-Commission: Disdain for Judicial Independence (Apr. 9, 2021), <https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-on-court-packing-commission-disdain-for-judicial-independence-> (describing the Commission as “squarely within liberals’ years-long campaign to politicize the Court, intimidate its members, and subvert its independence”).

⁷ Roll Call Vote on the Confirmation of Louis Brandeis, 1916, U.S. CAPITOL VISITOR CTR., <https://www.visitthecapitol.gov/exhibitions/timeline/image/roll-call-vote-confirmation-louis-brandeis-1916#top>.

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- ⁸ Matt Ford, *Thurgood Marshall's Patient but Relentless War*, ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/membership/archive/2017/09/thurgood-marshalls-patient-but-relentless-war/538854/> (describing Justice Marshall's confirmation process as a "national embarrassment").
- ⁹ See, e.g., Alfonso A. Narvaez, *Clement Haynsworth Dies at 77; Lost Struggle for High Court Seat*, N.Y. TIMES (Nov. 23, 1989), <https://www.nytimes.com/1989/11/23/obituaries/clement-haynsworth-dies-at-77-lost-struggle-for-high-court-seat.html> (describing "a tense battle between the Nixon Administration and a coalition of labor and civil rights groups" that led to the failed confirmation of Judge Clement Haynsworth to the Supreme Court).
- ¹⁰ *Borked*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/bork> (last visited Sept. 17, 2021).
- ¹¹ See, e.g., Jackie Calmes, *How Republicans Have Packed the Court for Years*, TIME (June 22, 2021), <https://time.com/6074707/republicans-courts-congress-mcconnell/> (describing "bare-knuckle tactics in the Senate" by Republicans to "stock...the federal bench at all levels with conservatives").
- ¹² See, e.g., Opinion, *The Myth of the Stolen Supreme Court Seat*, WALL ST. J. (Feb. 1, 2017), <https://www.wsj.com/articles/the-myth-of-the-stolen-supreme-court-seat-1485995357> (arguing that "the standard of not confirming a Supreme Court nominee in the final year of a Presidency was set by...Democrats").
- ¹³ *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Ilya Shapiro, Vice President & Director, Robert A. Levy Ctr. for Const. Stud.), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Shapiro-Testimony.pdf>.
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Benjamin Wittes, Senior Fellow in Governance Studies, Brookings Institutions), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Wittes-Testimony.pdf>.
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Curt Levey, President, Committee for Justice), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Levey-testimony.pdf>.
- ²⁰ *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Jeffrey J. Peck), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Peck-Testimony.pdf>.
- ²¹ The Democratic vote count includes independents who caucus with the Senate Democrats.
- ²² Peter Overby, *Kavanaugh Nomination Battle Is Fought With Millions In Secret Cash*, NPR (Oct. 4, 2018, 5:00 AM), <https://www.npr.org/2018/10/04/654187465/kavanaugh-nomination-battle-is-fought-with-millions-in-secret-cash>; Jordan Fabian, *Trump-Aligned Groups Pour \$30 Million Into Barrett Confirmation*, BLOOMBERG (Oct. 22, 2020, 4:00 AM), <https://www.bloomberg.com/news/articles/2020-10-22/trump-allied-groups-pour-30-million-into-barrett-confirmation>.
- ²³ *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Noah Feldman, Felix Frankfurter Professor of Law, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf>.
- ²⁴ Carl Hulse, *McConnell Suggests He Would Block a Biden Nominee for the Supreme Court in 2024*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/us/politics/mcconnell-biden-supreme-court.html>.
- ²⁵ Senator Charles Schumer, Remarks at the American Constitution Society (July 27, 2007), <https://www.acslaw.org/expertforum/text-of-senator-schumers-speech/>.
- ²⁶ *Id.*
- ²⁷ See *Lochner v. New York*, 198 U.S. 45 (1905) (striking down state labor regulations as unconstitutionally burdensome); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down New Deal legislation as beyond the reach of Congress's Commerce Clause power); *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954) (finding public school segregation unconstitutional under the Equal Protection Clause); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (striking down a Pennsylvania abortion restriction as creating an undue burden on women seeking abortions); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (finding that the Second Amendment creates an individual right to possess a firearm for lawful purposes); *Obergefell v. Hodges*, 576 U.S. 664 (2015) (finding that the Fourteenth Amendment requires states to license and recognize same-sex marriages).
- ²⁸ See, e.g., *Presidential Commission on the Supreme Court of the United States* (Aug. 26, 2021) (written testimony of David D. Cole, National Legal Director, ACLU), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Cole-Testimony.pdf>.

content/uploads/2021/08/ACLU.pdf (describing the federal judiciary as “the primary guarantor of the Bill of Rights”); *Presidential Commission on the Supreme Court of the United States* (July 26, 2021) (written testimony of Federal Capital Habeas Project), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Federal-Capital-Habeas-Project.pdf> (describing the Court’s crucial role in death penalty cases).

²⁹ *Presidential Commission on the Supreme Court of the United States 2* (June 30, 2021) (written testimony of Kim Lane Scheppelle, Laurance S. Rockefeller Professor of Sociology and International Affairs, Princeton University), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppelle-Written-Testimony.pdf>.

³⁰ *Presidential Commission on the Supreme Court of the United States 2* (July 5, 2021) (appendix to written testimony of Kim Lane Scheppelle, Laurance S. Rockefeller Professor of Sociology and International Affairs, Princeton University), <https://www.whitehouse.gov/wp-content/uploads/2021/09/Scheppelle-Followup-response.pdf>.

³¹ NEAL DEVINS AND LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 149 (2019).

³² Donald Alexander Downs, *Supreme Court Nominations at the Bar of Political Conflict: The Strange and Uncertain Career of the Liberal Consensus in Law*, 46 LAW & SOC. INQUIRY 540, 542 (May 2021) (discussing LAURA KALMAN, *THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT* (2017)).

³³ SAM ROSENFELD, *THE POLARIZERS: POSTWAR ARCHITECTS OF OUR PARTISAN ERA* 3 (2018).

³⁴ Andrew Chung, *U.S. Supreme Court Not Politicized, Says Chief Justice Roberts*, REUTERS (Sept. 24, 2019), <https://www.reuters.com/article/us-usa-court-chiefjustice/u-s-supreme-court-not-politicized-says-chief-justice-roberts-idUSKBN1WA08F>.

³⁵ Wittes testimony, *supra* note 16, at 5.

³⁶ *Stat Pack for the Supreme Court’s 2020-21 Term*, SCOTUSBLOG (July 2, 2021), <https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-07.02.2021.pdf> (showing that 43% of the October Term 2020 cases were decided unanimously, with only 15% of cases neatly polarized along ideological lines).

³⁷ Not infrequently in recent years, the Court has divided along party lines when resolving issues of considerable importance by emergency orders. The Commission received testimony that emergency order decisions are “even more homogenously ideological” than “merits docket” decisions, and are occurring with greater frequency now than in the past. *Presidential Commission on the Supreme Court of the United States 2* (June 30, 2021) (written testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf>.

³⁸ See Ephrat Livni, *Americans Trust the Supreme Court More Than Other Government Branches*, QUARTZ (Oct. 26, 2019), <https://qz.com/1735709/americans-trust-supreme-court-more-than-other-government-branches/>; Frank Newport, *Americans Trust Judicial Branch Most, Legislative Least*, GALLUP (Sept. 26, 2012), <https://news.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx>.

³⁹ Justin McCarthy, *Approval of the Supreme Court Is Highest Since 2009*, GALLUP (Aug. 5, 2020), <https://news.gallup.com/poll/316817/approval-supreme-court-highest-2009.aspx>.

⁴⁰ *Id.* (showing a table where the trend lines cross for Democrats and Republicans in early 2017).

⁴¹ *Nearly 7 in 10 Say Recent Rise in COVID-19 Deaths Was Preventable, Quinnipiac University National Poll Finds; Job Approval For Supreme Court Drops to All-Time Low*, QUINNIPAC POLL (Sept. 15, 2021), <https://poll.qu.edu/poll-release?releaseid=3820>.

⁴² Peck testimony, *supra* note 20.

⁴³ See Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 POL. PSYCH. 675, 675 (2008) (“the Supreme Court does not possess the budgetary power of Congress or the enforcement power of the President”).

⁴⁴ See, e.g., Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013) (“For an institution like the U.S. Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy . . .”).

⁴⁵ THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

⁴⁶ See JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGEMENTS OF THE AMERICAN PEOPLE* 38-39 (2009).

⁴⁷ See *id.* (“Legitimate institutions are those recognized as appropriate decision-making bodies even when one disagrees with the outputs of the institution.” (emphasis omitted)).

⁴⁸ See *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) (“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.”).

⁴⁹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 43 (1921).

⁵⁰ See, e.g., Sen. Mike Lee, *Of Course We’re Not a Democracy*, MIKE LEE: U.S. SENATOR FOR UTAH (Oct. 20, 2020), <https://www.lee.senate.gov/2020/10/of-course-we-re-not-a-democracy> (“During the recent vice presidential debate, I pointed out on Twitter that our form of government in the United States is not a democracy, but a republic.”).

⁵¹ See, e.g., Dylan Matthews, *The Supreme Court is Too Powerful and Anti-democratic. Here’s How We Can Scale Back Its Influence*, VOX (Sept. 29, 2020), <https://www.vox.com/policy-and-politics/21451471/supreme-court-justice-constitution-ryan-doerfler>; *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Samuel Moyn, Henry R. Luce Professor of Jurisprudence and Professor of History, Yale University), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf>.

⁵² See, e.g., *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943) (finding that the First Amendment protected Jehovah’s Witness students from compulsorily saluting the American flag in public schools); *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954) (finding public school segregation unconstitutional under the Equal Protection Clause); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503 (1969) (finding that the First Amendment prevented a public school from punishing students for peacefully protesting the Vietnam War through the wearing of black armbands); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (striking down a Pennsylvania abortion restriction as creating an undue burden on women seeking abortions); *Obergefell v. Hodges*, 576 U.S. 664 (2015) (finding that the Fourteenth Amendment requires states to license and recognize same-sex marriages).

⁵³ See, e.g., *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Nikolas Bowie, Assistant Professor of Law, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> at 12 (“[A]s Tocqueville observed even before this history began, judicial review is also antidemocratic as a matter of theory.”); Adrienne Stone, *Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law*, 60 U. TORONTO L. REV. 109 (2010).

⁵⁴ See, e.g., *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Vicki C. Jackson, Laurence H. Tribe Professor of Constitutional Law, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf> at 16 (“[T]he current system makes vacancies depend on contingent, random events.”).

⁵⁵ *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Jamal Greene, Dwight Professor of Law, Columbia Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf> at 1 n.2.

⁵⁶ *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm>.

⁵⁷ See, e.g., *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Nan Aron, President, Alliance for Justice.), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Aron-Testimony.pdf> at 15 (“If the Court proceeds to wipe away reproductive rights, in spite of decades of precedent and overwhelming public support for those rights, then the only possible conclusion is that reform is imperative.”).

⁵⁸ See Alison Gash & Angelo Gonzales, *School Prayer*, in *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 62, 68-70, 77 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (showing that, in the 1970s, over seventy percent of the public disapproved of the Court’s school prayer decisions); Amy E. Lerman, *The Rights of the Accused*, in *PUBLIC OPINION*, *supra*, at 42-43 (“In many ways,” the Warren Court’s criminal procedure decisions “were out of step with public opinion and may even have shifted public opinion against the Court’s pro-rights position.”).

⁵⁹ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“Separate educational facilities are inherently unequal.”); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1016 (1998) (describing *Brown* as “[t]he classic example” of a canonical case); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (“[T]he constitutional canon” is “the set of decisions whose correctness participants in constitutional argument must always assume. *Brown* ... is the classic example.”). For discussions of the resistance to school desegregation, see JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 242-314 (2018); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT*

AND THE STRUGGLE FOR RACIAL EQUALITY 290-442 (2004); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 124-34 (2004).

⁶⁰ See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 16 (2009) (arguing that the Supreme Court “ratif[ies] the American people’s considered views about the . . . Constitution”); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SAVE AMERICA* 3 (2006) (arguing that Supreme Court decisions often reflect public opinion better than Congress). *But see* DEVINS & BAUM, *supra* note 31, at xi (2019) (arguing that the Justices are “elites who seek to win favor with other elites,” rather than with the general public); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 757-58 (2011) (doubting that Supreme Court decisions “reflect[] the ‘consensus’ views of the American public,” because the public rarely has a united position on controversial constitutional issues); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103 (2010).

⁶¹ See, e.g., Jeff Greenfield, *The Justice Who Built the Trump Court*, POLITICO MAG. (July 9, 2018), <https://www.politico.com/magazine/story/2018/07/09/david-souter-the-supreme-court-justice-who-built-the-trump-court-218953/> (noting how Justice Souter, a Republican appointee, “began to drift left” soon after his Court tenure began, ultimately becoming a “more reliable champion of liberal causes than Clinton appointees Ruth Bader Ginsburg and Stephen Breyer”); Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, & Sara C. Benesh, *2020 Supreme Court Database, Version 2021 Release 01*, <http://supremecourtdatabase.org> (tracking the leftward drift of numerous Republican-appointed Justices).

⁶² THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Ian Shapiro ed., 2009).

⁶³ U.S. CONST. art. III, § 1 (“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”).

⁶⁴ See generally JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996); PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788* (2010); *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* (Richard Beeman, Stephen Botein & Edward C. Carter II, eds., 1987).

⁶⁵ See JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 4 (2018) (“The Constitution was born without many of its defining attributes; these had to be provided through acts of imagination.”).

⁶⁶ See generally 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911); see also Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345, 393 (2007) [hereinafter *The New Wheel in the Federal Machine*] (“The language of Article III, combined with the Madisonian compromise, had deliberately left a lacuna in the constitutional structure.”).

⁶⁷ U.S. CONST. art. III, § 2, cl. 2 (“In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

⁶⁸ See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 8 (7th ed. 2015).

⁶⁹ Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789* 13, 14 (Maeva Marcus ed., 1992) (alteration added) (footnotes omitted).

⁷⁰ See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 182-85 (2010) [hereinafter *IDEOLOGICAL ORIGINS*].

⁷¹ An Act to Establish the Judicial Courts of the United States, Ch. 20, 1 Stat. 73 (1789).

⁷² See Marcus & Wexler, *supra* note 69, at 27 (noting that “politics had a greater influence than the language of the Constitution on the decisions Congress made with regard to a new judicial system”).

⁷³ See *IDEOLOGICAL ORIGINS*, *supra* note 70, at 201 (noting that “beginning in 1789, judicial power emerged as the focus of both practical and theoretical disputes about the nature of multilayered authority” in the American federal republic).

⁷⁴ Letter from James Madison to Samuel Johnston (July 31, 1789), in 4 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, 491 (Maeva Marcus, ed., 1992) [hereinafter *DHSC*].

⁷⁵ See *IDEOLOGICAL ORIGINS*, *supra* note 70, at 186.

⁷⁶ Similar arguments for expansive federal jurisdiction continued to be made well into the nineteenth century, even as Congress declined to grant the full scope of decisional authority permitted by the Constitution. *See generally* Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205 (2012).

⁷⁷ *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUD. CTR., CREATING THE FEDERAL JUDICIAL SYSTEM 5-8 (3d ed. 2005). In 1793, the Act was amended to require only one justice, along with the district judge, to hold circuit court.

⁷⁸ In 1791, while riding circuit in Virginia, Justice Iredell wrote to his wife Hannah of “a very rascally house where I had the misfortune to be obliged to put up on Saturday night” at which “a parcel of worthless young Fellows” were “sitting up drinking gaming & cursing & swearing all night.” Letter from James Iredell to Hannah Iredell (Sept. 19, 1791), in 2 DHSC, *supra* note 74, at 210.

⁷⁹ *See* Kathryn Turner [Preyer], *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3 (1965).

⁸⁰ *See* IDEOLOGICAL ORIGINS, *supra* note 70, at 194-97.

⁸¹ John Adams, Third Annual Message, Dec. 3, 1799, MILLER CTR., <https://millercenter.org/the-presidency/presidential-speeches/december-3-1799-third-annual-message>.

⁸² Harper Judiciary Bill of 1800, *reprinted in* 4 DHSC, *supra* note 74, at 310, 317.

⁸³ On March 28, 1800, arguing against congressional Republicans’ motion to postpone the bill’s consideration, one Federalist congressman contended “that the close of the present Executive’s authority was at hand, and from his experience, he was more capable to choose suitable persons to fill the offices than another.” Turner, *supra* note 79, at 13.

⁸⁴ An Act to Provide for the More Convenient Organization of the Courts of the United States, Ch. 4, 2 Stat. 89 (1801).

⁸⁵ *See* IDEOLOGICAL ORIGINS, *supra* note 70, at 202-03 (“[T]he source of the conflict was political gain and power as well as ongoing and fundamental disagreement about just what the ‘federal’ in ‘federal republic’ was to mean, and what role the judiciary would play in that federal republic.”); LINDA K. KERBER, FEDERALISTS IN DISSENT: IMAGERY AND IDEOLOGY IN JEFFERSONIAN AMERICA 136 (1970) (“Contrary to its subsequent reputation, the Judiciary Act of 1801 had been the subject of a full and responsible debate during the preceding session of Congress, and its terms represented an attempt to correct the inadequacies of the first Judiciary Act of twelve years before.”).

⁸⁶ An Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States; and For Other Purposes, Ch. 8, 2 Stat. 132 (1802).

⁸⁷ Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), in 36 THE PAPERS OF THOMAS JEFFERSON 165-66 (Barbara B. Oberg ed., 2009).

⁸⁸ Alexander Hamilton, *Remarks on the Repeal of the Judiciary Act*, NEW-YORK GAZETTE & GEN. ADVERTISER (Feb. 13, 1802), *reprinted in* 25 THE PAPERS OF ALEXANDER HAMILTON 523 (Harold C. Syrett ed., 1976).

⁸⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁹⁰ *Id.* at 176.

⁹¹ *Id.* at 177-78.

⁹² *See* Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. OF POL’Y HIST. 6, 6 (2008); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004).

⁹³ The Supremacy Clause states, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

⁹⁴ *Marbury*, 5 U.S. (1 Cranch) at 177.

⁹⁵ PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 134-35 (Paul Brest et al. eds., 7th ed. 2018).

⁹⁶ *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). Justice William Paterson wrote the opinion for the Court; Marshall had recused himself from hearing the case when it came before the Court, perhaps because he had heard the case when it was before his circuit court. *See* JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 76 (2012).

⁹⁷ *Stuart*, 5 U.S. (1 Cranch) at 309.

- ⁹⁸ Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1124-25 (2001).
- ⁹⁹ DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 78 n.102 (1985).
- ¹⁰⁰ Letter from Chief Justice Marshall to Henry Clay (Dec. 22, 1823), reprinted in Ruth Wedgwood, *Cousin Humphrey*, 14 CONST. COMMENT. 247, 267-69 (1997).
- ¹⁰¹ Act of Feb. 24, 1807, ch. 16, 2 Stat. 420.
- ¹⁰² See William M. Wiecek, *Murdock v. Memphis: Section 25 of the 1789 Judiciary Act and Judicial Federalism*, in *ORIGINS OF THE FEDERAL JUDICIARY*, *supra* note 69, at 225-29.
- ¹⁰³ CARL B. SWISHER, *THE TANEY PERIOD, 1836-1864*, 5 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 4 (2010).
- ¹⁰⁴ DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 280 (2007).
- ¹⁰⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).
- ¹⁰⁶ See JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969).
- ¹⁰⁷ Ch. 148, 4 Stat. 411 (1830).
- ¹⁰⁸ 30 U.S. (5 Pet.) 1 (1831).
- ¹⁰⁹ 31 U.S. (6 Pet.) 515 (1832).
- ¹¹⁰ See RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS* 116 (1987) (quoting the observations of William Wirt, attorney for the Cherokee Nation, regarding "public considerations connected with the state of the country (particularly the open resistance of South Carolina), and the extremely ticklish predicament of Georgia").
- ¹¹¹ See HOWE, *supra* note 104, at 441.
- ¹¹² Andrew Jackson, Veto Message (July 10, 1832), reprinted in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576, 582 (James D. Richardson ed., 1898) ("The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.").
- ¹¹³ See HOWE, *supra* note 104, at 441.
- ¹¹⁴ See Curtis Nettels, *The Mississippi Valley and the Federal Judiciary, 1807-1837*, 12 MISS. VALLEY HIST. REV. 202 (1925).
- ¹¹⁵ *Id.* at 210 ("Extension of the circuit courts was delayed until 1837 because it entailed a decision as to the permanent structure of the whole judiciary upon which all parts of the country could not agree.").
- ¹¹⁶ Jackson's sixth nominee, John Catron, was nominated so late on Jackson's final day in office that he was re-nominated by Jackson's successor and protégé, Martin Van Buren. Jackson's seventh nominee, William Smith, declined the appointment following Senate confirmation. See SWISHER, *supra* note 103, at 63-65.
- ¹¹⁷ HOWE, *supra* note 104, at 441.
- ¹¹⁸ Act of Mar. 3, 1837, ch. 34, 5 Stat. 176.
- ¹¹⁹ Nettels, *supra* note 114, at 226; HOWE, *supra* note 104, at 441.
- ¹²⁰ *The Supreme Court of the United States*, 1 U.S. MAG. & DEMOCRATIC REV. 143, 143 (Jan. 1838).
- ¹²¹ 60 U.S. (19 How.) 393, 404 (1856).
- ¹²² Speech at Springfield, Ill. (June 26, 1857), in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 398, 401, 404 (Roy P. Basler ed., 1953).
- ¹²³ First Inaugural Address (Mar. 4, 1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).
- ¹²⁴ CROWE, *supra* note 96, at 133.
- ¹²⁵ See WHEELER & HARRISON, *supra* note 77, at 12.
- ¹²⁶ *Id.*
- ¹²⁷ Act of July 15, 1862, ch. 178, 12 Stat. 576 (Eighth and Ninth Circuits); Act of Mar. 3, 1863, ch. 100, 12 Stat. 794 (Tenth Circuit). The Justices were David Davis of Illinois (Eighth Circuit), Samuel Miller of Iowa (Ninth), and Stephen Field of California (Tenth).
- ¹²⁸ Act of July 23, 1866, ch. 210, 14 Stat. 209.
- ¹²⁹ See FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 68, at 27 n.44.

- ¹³⁰ William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333, 333 (1969).
- ¹³¹ See, e.g., *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (upholding jurisdiction-stripping legislation). But see *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) (invalidating jurisdiction-stripping legislation).
- ¹³² See CROWE, *supra* note 96, at 132 (“Contrary to the view that the election of Abraham Lincoln and the ascendance of the Radical Republicans effectively resulted in a circumscribed and cowering Supreme Court, the events of the Civil War and Reconstruction empowered rather than dismantled the federal courts.” (citations omitted)).
- ¹³³ See Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.
- ¹³⁴ See Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.
- ¹³⁵ See Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.
- ¹³⁶ See Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875, ch. 114, 18 Stat. 335.
- ¹³⁷ *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (emphasis omitted) (quoting FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1928)).
- ¹³⁸ 83 U.S. (16 Wall.) 36 (1873).
- ¹³⁹ 92 U.S. 542 (1876). See generally LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* (2008).
- ¹⁴⁰ 92 U.S. 542.
- ¹⁴¹ John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, 6 PROLOGUE 225, 234 (1974).
- ¹⁴² See WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION, 1869-1879*, at 273-74 (1982).
- ¹⁴³ Ch. 114, 18 Stat. 335.
- ¹⁴⁴ 109 U.S. 3 (1883).
- ¹⁴⁵ LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION* 164 (2015).
- ¹⁴⁶ *Id.*
- ¹⁴⁷ FRANKFURTER & LANDIS, *supra* note 137, at 86.
- ¹⁴⁸ Act of April 10, 1869, ch. 22, 16 Stat. 44.
- ¹⁴⁹ FRANKFURTER & LANDIS, *supra* note 137, at 60.
- ¹⁵⁰ WHEELER & HARRISON, *supra* note 77, at 16.
- ¹⁵¹ CROWE, *supra* note 96, at 174.
- ¹⁵² FRANKFURTER & LANDIS, *supra* note 137, at 60, 102.
- ¹⁵³ See FRANKFURTER & LANDIS, *supra* note 137, at 82-83; WHEELER & HARRISON, *supra* note 77, at 16.
- ¹⁵⁴ Act of March 3, 1891, Ch. 517, 26 Stat. 826.
- ¹⁵⁵ FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 68, at 29.
- ¹⁵⁶ WHEELER & HARRISON, *supra* note 77, at 18.
- ¹⁵⁷ See *id.*; FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 68, at 30 & n.67.
- ¹⁵⁸ FRANKFURTER & LANDIS, *supra* note 137, at 102.
- ¹⁵⁹ *Id.* at 101.
- ¹⁶⁰ See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 517, 522 (1988); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 512 (2002).
- ¹⁶¹ See generally EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958* (1992).
- ¹⁶² Gillman, *supra* note 160, at 512.
- ¹⁶³ See generally WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994).
- ¹⁶⁴ 156 U.S. 1 (1895). The case was also known as the “Sugar Trust Case.”
- ¹⁶⁵ 157 U.S. 429 (1895).
- ¹⁶⁶ 158 U.S. 564 (1895).
- ¹⁶⁷ 198 U.S. 45 (1905) (invalidating a New York statute regulating bakers’ working hours on the ground that the statute violated the Due Process Clause of the Fourteenth Amendment).
- ¹⁶⁸ See *Roosevelt in 1912 The Cry in Denver*, N.Y. TIMES, Aug. 30, 1910, at 1.
- ¹⁶⁹ Theodore Roosevelt, *Judges and Progress*, OUTLOOK, Jan. 6, 1912, at 40, 44.

¹⁷⁰ See ROSS, *supra* note 163, at 130-54.

¹⁷¹ Theodore Roosevelt, A Charter of Democracy: Address Before the Ohio Constitutional Convention (Feb. 21, 1912).

¹⁷² ROSS, *supra* note 163, at 144.

¹⁷³ JAMES CHASE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY 105 (2004).

¹⁷⁴ SIDNEY M. MILKIS, THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 56 (2009).

¹⁷⁵ See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (voiding the National Industrial Recovery Act of 1933); United States v. Butler, 297 U.S. 1 (1936) (voiding the Agricultural Adjustment Act of 1933).

¹⁷⁶ PROCESSES OF CONSTITUTIONAL DECISIONMAKING, *supra* note 95, at 602. See also William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 (1966); Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005).

¹⁷⁷ ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 113 (Sanford Levinson ed., 6th ed. 2005).

¹⁷⁸ 300 U.S. 379 (1937).

¹⁷⁹ 301 U.S. 1 (1937).

¹⁸⁰ 301 U.S. 548 (1937).

¹⁸¹ See WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 177 (1995).

¹⁸² See Kalman, *supra* note 176, at 1055.

¹⁸³ Justice Van Devanter Retires, LIBRARY OF CONGRESS (May 19, 1937), <https://www.loc.gov/item/2016871705/>.

¹⁸⁴ See Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 293 (1988).

¹⁸⁵ MCCLOSKEY, *supra* note 177, at 113.

¹⁸⁶ See Jane Perry Clark, *Some Recent Proposals for Constitutional Amendment*, 12 WIS. L. REV. 313, 316 (1937) (discussing, among others, proposals from the National Committee for Clarifying the Constitution by Amendment aimed at ensuring that “the right will be clear for the federal and the state governments to enact labor and social legislation in accordance with the needs of the complicated industrial and economic system today”).

¹⁸⁷ JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS, at 147 (1938).

¹⁸⁸ Kalman, *supra* note 176, at 1056.

¹⁸⁹ *Id.* at 1057.

¹⁹⁰ *Id.* at 1057 (quoting LEUCHTENBURG, *supra* note 181, at 157).

¹⁹¹ See, e.g., BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

¹⁹² BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 291 (1998).

¹⁹³ *Id.*

¹⁹⁴ See Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 INT'L REV. L. & ECON. 45, 58-59 (1992).

¹⁹⁵ Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277, 279 (1994) (quoting *Composition and Jurisdiction of the Supreme Court: Hearings on S.J. Res. 44 Before the Subcomm. on Const. Amendments of the S. Comm. on the Judiciary*, 83d Cong. 9 (statement of J. Owen J. Roberts)).

¹⁹⁶ 347 U.S. 483 (1954).

¹⁹⁷ See, e.g., *Bush v. Orleans Parish Sch. Bd.*, 364 U.S. 500, 501 (1960) (rejecting the state of Louisiana's assertion that certain state statutes were valid because the state “has interposed itself in the field of public education over which it has exclusive control” (quotations omitted)).

¹⁹⁸ See generally Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053 (2014) (noting that although the debates over the Southern Manifesto challenged the Court's authority, they also suggest widespread popular belief in judicial supremacy by 1956, two years before the Court's decision in *Cooper v. Aaron*, 358 U.S. 1 (1958), which scholars often identify as establishing judicial supremacy).

¹⁹⁹ See James Madison, Virginia Resolutions, Dec. 21, 1798, in 17 THE PAPERS OF JAMES MADISON 189 (David B. Mattern, J. C. A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991) (describing “the powers of the federal government” as “resulting from the compact, to which the states are parties” and stating that “in case of a

deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the states who are parties there-to, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them”).

²⁰⁰ 103 CONG. REC. S12787 (daily ed. July 26, 1957) (Res. of the Leg. of Fla. to the S. Comm. on the Judiciary).

²⁰¹ 103 CONG. REC. S10863 (daily ed. July 3, 1957) (Res. of the Leg. of Ala. to the S. Comm. on the Judiciary).

²⁰² 107 CONG. REC. S2154 (daily ed. Feb. 16, 1961) (Res. of the Leg. of Ark. to the S. Comm. on the Judiciary).

²⁰³ 109 CONG. REC. S2071-72 (daily ed. Feb. 11, 1963) (Res. of the Leg. of Fla. to the S. Comm. on the Judiciary).

²⁰⁴ 111 CONG. REC. S15769-70 (daily ed. July 7, 1965) (Res. of the Leg. of Miss. to the S. Comm. on the Judiciary).

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