

JUDICIAL REVIEW AND THE COMMON LAW CONUNDRUM:  
A GOVERNMENT CAPTURED BY COUNTERMAJORITARIAN  
INSTITUTIONS

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Abstract

*When the U.S. Supreme Court gave itself the power of judicial review over the Constitution, it began moving the country toward the silent constitutional crisis that American democracy now faces. The Supreme Court, over time, has adopted a common law system of interpretation for the Constitution involving an elaborate and expansive web of constitutional doctrine that has become increasingly distinct from the text of the document itself. This interpretive power serves, in effect, as the power to amend the Constitution. And because formal Article V amendments have become a practical impossibility, the Court is left as the sole vehicle for constitutional amendment. This means the least democratic branch of government now maintains sole control over the foundational charter of this country—the one which governs all other law-making limits and procedures. Thus, the United States is faced with a constitutional crisis that has left the more democratic branches of government crippled and subject to the whims of an unelected judiciary. American democracy is wasting away at the hands of the countermajoritarian institutions designed to protect us from ourselves.*

*The problems this creates are vast. Because the U.S. Supreme Court continues to deny the existence of the expansive role it plays in setting policy, a system incentivizing disingenuity in the alteration of the United States' foundational text has developed—one where the sole institution with the power to amend the Constitution asserts that it neither can nor does. The common law alone creates many problems. By tying lawmaking to the resolution of discrete disputes, the Supreme Court is forced to serve two masters; it must determine*

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*both the correct resolution of the dispute while also creating rules that will be applied in the future. Burying much of the law in verbose and arcane decisions creates immense barriers to accessibility of the law. However, when the problems posed by traditional common law methods of interpretation are left without the traditional avenues for legislative correction available to common law statutory interpretation, the United States faces a constitutional crisis. This Note asks how America got here, why the current constitutional order is at odds with democracy, and what, if anything, can a nation do when it has been captured by countermajoritarian institutions?*

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## INTRODUCTION

Just how much should a democracy implement countermajoritarian checks? It is an exceptionally challenging question. Too few, and the democracy risks allowing the majority to subjugate minority populations—tyranny of the majority, as it is commonly termed.<sup>1</sup> But what if there are too many? What happens when democracy itself becomes subjugated to the will of the minority, something contrary to the very essence of democracy?

This is the question the United States (U.S.) now grapples with. This country was founded on the idea that the United States wants democracy, but not *too much* democracy.<sup>2</sup> Thus, checks against the democratic exercise of power were implemented at nearly every level of federal government. Examples include the electoral college, equal state representation in the senate, and the election of senators by state legislatures<sup>3</sup>—the first two continue to play a significant role in the countermajoritarian system of rule that has entrenched itself in the United States over the last century. The undemocratic nature of the electoral college and senate representation receive deserving critical attention.<sup>4</sup> However, there are two other countermajoritarian institutions that receive less attention while being

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1. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252 (1858) (“[I]n the United States the majority which so frequently displays the tastes and the propensities of a despot, is still destitute of the more perfect instruments of tyranny.”); see also THE FEDERALIST NO. 10 (James Madison) (“Complaints are everywhere heard . . . that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true.”).

2. See JOHN F. KOWAL & WILFRED U. CODRINGTON, *THE PEOPLE’S CONSTITUTION: 200 YEARS, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION 2* (2021).

3. See U.S. CONST. art. II, § 1; U.S. CONST. art. I, § 3 (superseded by U.S. CONST. amend. XVII).

4. See, e.g., David Leonhardt, ‘A Crisis Coming’: The Twin Threats to American Democracy, N.Y. TIMES, <https://www.nytimes.com/2022/09/17/us/american-democracy-threats.html> (last updated June 21, 2023) (“The chronic threats to democracy generally spring from enduring features of American government, some written into the Constitution. But they did not conflict with majority opinion to the same degree in past decades. One reason is that more populous states, whose residents receive less power because of the Senate and the Electoral College, have grown so much larger than small states.”); Jocelyn Kiley, *Majority of Americans Continue to Favor Moving Away from Electoral College*, PEW RSCH. CTR. (Sept. 25, 2023), <https://www.pewresearch.org/short-reads/2023/09/25/majority-of-americans-continue-to-favor-moving-away-from-electoral-college/> (“Nearly two-thirds of U.S. adults (65%) say the way the president is elected should be changed so that the winner of the popular vote nationwide wins the presidency.”).

just as democratically problematic. And when taken together, they have pushed the United States into a crisis that has disrupted its democracy.

The first is the unrealistically difficult process for amending the Constitution through Article V.<sup>5</sup> It is so rigorous as to have made traditional constitutional amendment effectively impossible.<sup>6</sup> The second is judicial review, specifically, the way common law principles have been grafted onto constitutional interpretation to create an ever-expanding web of constitutional doctrine that is legally, for all intents and purposes, part of the document's text.<sup>7</sup> The interplay of these two checks has led to a steady concentration of power in the U.S. Supreme Court—the single entity that retains the capacity to alter the United States' founding charter.<sup>8</sup>

This Note does not endeavor to answer the question of precisely how many countermajoritarian protections are too many. But it does propose that wherever that line may be, it has been far surpassed in the United States' constitutional order. The interplay between these checks has left American democracy in a state of crisis, with its highest body of law captured by a judiciary that refuses to acknowledge that it now maintains sole control over the contents of the Constitution. Part I explains the history of the common law and the way its modern application has abandoned its historic roots. Part II discusses the problems with the constitutional amendment process and the way it makes amendments a practical impossibility. Part III shows that by applying the common law to constitutional doctrine, the Supreme Court has established what is now the only viable path to constitutional change. Part IV explores the way this status quo poses a threat to American democracy and Part V offers potential solutions and alternatives.

## I. ORIGINS AND OPERATION OF THE COMMON LAW

### A. *Common Law Systems*

In 1066, William the Conqueror and his host of Normans landed in Southern England and unwittingly created modern America's legal order.<sup>9</sup> The Norman Conquest brought profound change to medieval England, including legal revolution as the Norman legal system was adapted to fit on top of the English

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5. See U.S. CONST. art. V.

6. See *infra* Section II.B.

7. See *infra* Section I.B.2, III.B–C.

8. See *infra* Part IV.

9. See HARRY POTTER, LAW, LIBERTY AND THE CONSTITUTION: A BRIEF HISTORY OF THE COMMON LAW 42 (2015).

system.<sup>10</sup> In 1166, King Henry II began asserting royal authority over England's various jurisdictions and reigning in the local sheriffs in the hope of imposing more uniformity and structure on an English legal system that had come to be defined by inconsistency and chaos in the wake of the Norman Conquest.<sup>11</sup> He succeeded<sup>12</sup> and created the foundation for the modern U.S. legal system.

King Henry appointed royal justices that traveled circuits in England, overseeing twelve-person juries where the accusatory and adjudicative functions were separated—juries that would soon require unanimity to reach a verdict.<sup>13</sup> Because these legal standards were shared in common by all of England, it was called the “common law.”<sup>14</sup> Over time, English judges began documenting their decisions and the reasoning behind them.<sup>15</sup> A preference for consistency with the past developed and, as a body of precedent was recorded, courts finally had the tool necessary to implement a system that could build upon itself.<sup>16</sup>

Justice Harlan Stone summed up the theory of common law well:

With the common law, unlike the civil law and its Roman law precursor, the formulation of general principles has not preceded decision. . . . Decision has drawn its inspiration and its strength from the very facts which frame the issues for decision. Once made, the decision controls the future judgments of courts in like or analogous cases. General rules, underlying principles, and finally legal doctrine, have successively emerged only as the precedents, accumulated through the centuries, have been seen to follow a pattern, characteristically not without distortion and occasional broken threads, and seldom conforming consistently to principle.<sup>17</sup>

The broad premise of common law systems is that a tremendous amount of law is uncodified.<sup>18</sup> It is, instead, set forth in judicial opinions. At the heart of a common law system are judges that act not just as rule-interpreters, but as rule-makers as well.<sup>19</sup> This is the critical aspect—creation of and reliance upon

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10. *See id.*

11. *See id.* at 46–47.

12. *See id.*

13. *See id.* at 50; JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 71–74 (2009).

14. *See POTTER, supra* note 9, at 65.

15. *See id.* at 91–92.

16. *See id.*

17. Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 6 (1936).

18. *See id.* at 5.

19. *See id.* at 6.

precedent. For most of its history, development of the common law was a “gradual” process.<sup>20</sup> Only after the same decision had been made again and again did the principles underlying it become doctrine.<sup>21</sup> So, when did the common law become strictly binding?

*B. Adoption of the Common Law and Judicial Review in the United States*

1. American Common Law and Stare Decisis

In the history of common law, stare decisis—the idea that previous decisions of a higher court are to some extent binding—is a relatively young doctrine.<sup>22</sup> For much of this history, the system was viewed as, over time, revealing natural principles through judicial decisions—judges were not making the law, they were discovering it.<sup>23</sup> This does not lend itself to the binding approach to precedent that the United States has today.<sup>24</sup> Under this approach, if a judge encountered precedent that did not, in their eyes, align with the natural law, it could be ignored—precedent was merely “evidence” of the law.<sup>25</sup>

This began to change around the time the U.S. Constitution was framed.<sup>26</sup> And when it was time to determine the role of the judiciary, it is clear that the founders did believe in precedent that was, to some extent, binding.<sup>27</sup> Alexander Hamilton, who referred to the judiciary as the “least dangerous” branch, set out in the oft-quoted Federalist No. 78 that “[t]o avoid an arbitrary discretion in the courts it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.”<sup>28</sup> James Madison held similar views to Hamilton, and

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20. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 645, 659–60 (1999) (“Legal historians generally agree that the doctrine of stare decisis is of relatively recent origin. At least as late as the early eighteenth century, common law judges and commentators acknowledged that . . . judicial decisions were viewed as evidence of the law.” (citing MATTHEW HALE, *THE HISTORY OF THE COMMON LAW* 45 (Charles M. Gray ed., Univ. of Chi. Press 1971) (1713))).

21. See Stone, *supra* note 17, at 6 (“General rules, underlying principles, and finally legal doctrine, have successively emerged only as the precedents, accumulated through the centuries, have been seen to follow a pattern, characteristically not without distortion and occasional broken threads, and seldom conforming consistently to principle.”).

22. Lee, *supra* note 20, at 659.

23. See *id.* at 660.

24. See *id.*

25. *Id.*

26. See *id.* at 662–66.

27. See THE FEDERALIST NO. 78 (Alexander Hamilton).

28. *Id.*

both touted consistency within the judiciary as a primary justification.<sup>29</sup> Hamilton also correctly predicted the complexity of the resulting system and significant amount of training needed to operate in it—he saw this as a justification for the lifetime tenure judges would receive in the soon-to-be-ratified Constitution.<sup>30</sup>

So, the common law and *stare decisis* became the foundation of the American judicial system. And judicial review of the Constitution was not exempted from the application of these principles.

## 2. Judicial Review

Many see the judiciary's right to overrule a legislature as dating back to well before the United States was founded.<sup>31</sup> And the framers were not blind to the fact that *someone* would have to interpret ambiguities in the Constitution. Hamilton set forth an explanation of what would become known as judicial review, stating, “[W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.”<sup>32</sup> But he dismissed concerns about the judiciary subverting the legislature: “[i]t can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.”<sup>33</sup>

Hamilton's views on the form judicial review would take were prescient—there is a reason why Federalist No. 78, of all the papers, was the most frequently cited by the U.S. Supreme Court in the twentieth century.<sup>34</sup> But his hand-waving of the astonishing authority granted to the courts has aged poorly. Some of it can

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29. See Lee, *supra* note 20, at 662–70 (“Such ‘precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions,’ were in Madison’s view ‘regarded as of binding influence, or, rather, of authoritative force in settling the meaning of a law.’” (quoting Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 391 (Marvin Meyers ed., revised ed. 1981))).

30. See *THE FEDERALIST* NO. 78 (Alexander Hamilton) (“There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government.”).

31. See generally R.H. Helmholz, *Bonham’s Case, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325 (2009) (rejecting the claim that *Bonham’s Case*, a British case from 1610, was an early instance of judicial review).

32. *THE FEDERALIST* NO. 78 (Alexander Hamilton).

33. *Id.*

34. Ira C. Lupu, *The Most-Cited Federalist Papers*, 15 CONST. COMMENT. 403, 408 (1998).



be explained by the fact that, at the time, rules of constitutional interpretation were generally agreed upon.<sup>35</sup> But much of it can be attributed to the fact that neither the Constitution nor the Federalist papers elucidate the critical interpretive process.<sup>36</sup> Despite Hamilton's lack of concern, it is through this vehicle that the Supreme Court has seized the United States' highest body of law and turned judicial review into something the framers would not recognize.

For the Marshall Court did, of course, formally adopt judicial review in *Marbury v. Madison*.<sup>37</sup> It should first be noted the ways in which even the most benign application is problematic before addressing the malignant system that judicial review has become.

The root difficulty is that judicial review is a countermajoritarian force in our system . . . when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing authority, but against it. That, without mystic overtones, is what actually happens.<sup>38</sup>

This is a point that cannot be stressed enough. When the Supreme Court strikes a law, it frustrates the successful consummation of the democratic process. This was true even of the initial, moderated version of judicial review.<sup>39</sup> It is a fundamentally anti-majoritarian approach to application of a constitution. This Note does not claim to know or even argue what the best method of balancing protections for minorities with adherence to the democratic process is—American history is replete with examples of the very real dangers of tyranny

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35. See CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 17 (rev. ed., 1994) (“[A]t the time of the Constitution’s framing, the rules for interpreting a constitution were so generally agreed upon that they were more or less noncontroversial or taken for granted.”).

36. See *id.* at 20 (“Although the *Federalist*’s interpretation has great authority, it does not directly address the question ‘in what manner should the Constitution be interpreted?’”).

37. 5 U.S. (1 Cranch) 137 (1803).

38. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH*, 16–17 (1962); see also ROBERT J. MCKEEVER, *RAW JUDICIAL POWER?* 29 (2d ed. 1995) (“The power of judicial review is counter-majoritarian and, therefore, to the extent that it determines public policy, is undemocratic.”).

39. See, e.g., THE FEDERALIST NO. 51 (James Madison) (“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.”).

of the majority.<sup>40</sup> But this Note does assert that, wherever that line might be, it has been so far surpassed by the modern system of judicial review as to have neutered the proper function of democracy.

For this reason, it is worth knowing that a common law approach to judicial review has not always been taken for granted. President Abraham Lincoln expressed disdain for the concept during his first inaugural address:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the 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.<sup>41</sup>

President Lincoln soon made good on this threat. Only a month after his inaugural address, he authorized suspension of the writ of habeas corpus.<sup>42</sup> When an ignored writ was subsequently challenged, then U.S. Supreme Court Chief Justice Roger Taney issued an opinion stating that the Constitution exclusively granted to Congress the power to suspend habeas corpus.<sup>43</sup> Lincoln ignored the Court and continued to suspend habeas corpus intermittently until 1863 when

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40. See, e.g., Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864) (obliging free states, and their citizens, to assist in the return of escaped slaves to bondage); Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (resettling indigenous populations west of the Mississippi River). The states continue to provide many examples. For instance, thirty states still have same sex marriage bans either statutorily enacted or enshrined in their state constitution should *Obergefell v. Hodges* ever be overturned. See Julia Mueller, *Is Same Sex Marriage Legal in all Fifty States?*, THE HILL (Dec. 1, 2022), <https://thehill.com/changing-america/respect/equality/3758722-is-same-sex-marriage-legal-in-all-50-states/>.

41. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

42. See generally James A. Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. ABRAHAM LINCOLN ASS'N 47 (2008) (assessing the history of former President Lincoln's suspension of habeas corpus and the constitutional issues it raised).

43. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C. Md. 1861).

Congress passed the Habeas Corpus Suspension Act,<sup>44</sup> explicitly giving the president the authority to do so.<sup>45</sup>

Regardless of whether judicial review properly balanced countermajoritarian protections with democratic concerns when it was instituted, it certainly does not now. For judicial review has changed. Not until *Dred Scott v. Sandford*<sup>46</sup> in 1857, more than fifty years after *Marbury*, did the U.S. Supreme Court strike a federal statute for the second time.<sup>47</sup> But in the wake of the Civil War, the Court's use of judicial review exploded.<sup>48</sup> By the time a study was conducted in 2008, the Court had overturned or partially overturned more than 1,500 laws and ordinances passed by elected bodies, with more than 160 being federal statutes.<sup>49</sup> And because of the difficulty amending the Constitution,<sup>50</sup> only four times has an amendment served to overturn the Court's interpretation of the document.<sup>51</sup> After the Civil War, the Court more and more frequently found itself making decisions on politically significant topics.<sup>52</sup> In his 1952 book, political science professor Fred V. Cahill stated:

[A] survey of the cases indicates that a new set of legal and constitutional relationships was coming into being—a set of relationships more easily explained in terms of social and economic policy than in the traditional terms of *stare decisis* and the nonlegislative theory of the judicial function . . . . Although the whole development

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44. Habeas Corpus Suspension Act, ch. 81, 12 Stat. 755 (1863).

45. See Dueholm, *supra* note 42, at 51.

46. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

47. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 887 n.2 (2003).

48. See LINDA CAMP KEITH, *THE U.S. SUPREME COURT AND THE JUDICIAL REVIEW OF CONGRESS I* (2008).

49. *Id.*

50. See *infra* Section II.B.

51. See KEITH, *supra* note 48, at 1 n.1 (“The Eleventh Amendment undid *Chisolm v. Georgia*, which had ruled that citizens could sue a state other than their own state; the Fourteenth Amendment undid *Dred Scott v. Sandford*; the Sixteenth Amendment undid *Pollock v. Farmers’ Loan and Trust Company*, which had declared a federal income tax unconstitutional; and the Twenty-Sixth Amendment, which gave 18 year-olds the right to vote, undid *Oregon v. Mitchell*.” (citations omitted)).

52. FRED V. CAHILL, JR., *JUDICIAL LEGISLATION* 48 (1952); see, e.g., *Bush v. Gore*, 531 U.S. 98, 109, 111 (2000) (staying the Florida Supreme Court’s order to recount votes during the closely contested 2000 presidential election); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (creating a constitutionally protected right to abortion); *Biden v. Nebraska*, 143 S. Ct. 2355, 2362, 2375–76 (2023) (striking President Joseph R. Biden’s income-based student debt forgiveness plan); *Buckley v. Valeo*, 424 U.S. 1, 143–44 (1976) (striking a statute imposing limits to electoral campaign contributions under the First Amendment).

took place without any change in the formal theory of the judicial function, it actually involved both an elevation of the judicial power into a predominating position and the use of that power to establish protections for certain parts of the emerging industrial system.<sup>53</sup>

Soon afterward, the Court had become comfortable basing invalidation of statutes on “broad constitutional phrases rather than the comparatively definite provisions that had been used in the Marshall and Taney periods.”<sup>54</sup>

Modern judicial review is simply not what the framers contemplated. And that is important because this more aggressive modern model of judicial review has become the only method of altering the Constitution.

## II. THE NEED FOR AN ADAPTABLE CHARTER AND THE AMENDMENT PROBLEM

### A. *The Need for an Adaptable Charter*

The U.S. Constitution was drafted at a time when it could be fairly assessed as a historic step toward a more egalitarian society.<sup>55</sup> It is also, in some ways, morally heinous.<sup>56</sup> Social morals and norms have advanced dramatically in the last two centuries—more rapidly, perhaps, than in any period of comparable length in human history.<sup>57</sup> And for a fundamental charter of rights to remain relevant, it must keep up.

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53. CAHILL, *supra* note 52, at 48.

54. *Id.* at 49.

55. See KOWAL & CODRINGTON, *supra* note 2, at 2.

56. See *id.* at 23–26; U.S. CONST. art. I, § 2, cl. 3 (superseded by U.S. CONST. amend. XIV); U.S. CONST. art. I, § 9, cl. 1.

57. At the nation’s founding, decisions on the right to vote were left to the states. U.S. CONST. art. 1 § 4. Most states limited enfranchisement to White male property owners. See *The Founders and the Vote*, LIBRARY OF CONG., <https://www.loc.gov/classroom-materials/elections/right-to-vote/the-founders-and-the-vote/> (last visited Mar. 23, 2024). The population granted the right to vote at the founding is not dissimilar to that of ancient Athens which, more than two millennia prior, limited voting rights to men over the age of twenty. See George Tridimas, *Constitutional Choice in Ancient Athens: The Evolution of the Frequency of Decision Making*, 28 CONST. POL. ECON. 209, 210 (2017). In the last 150 years, the right to vote has been expanded to all American citizens, regardless of race, gender, or social class over the age of eighteen. See U.S. CONST. amends. XV, XIX, XXIV, XXVI. And the United States is not an aberration in that regard—limitations on the right to vote based on sex are today a global rarity. See Katherine Schaeffer, *Key Facts About Women’s Suffrage Around the Century After U.S. Ratified 19th Amendment*, PEW RSCH. CTR. (Oct. 5, 2020), <https://www.pewresearch.org/short-reads/2020/10/05/key-facts-about-womens-suffrage-around-the-world-a-century-after-u-s-ratified-19th-amendment/>. The social advancement of the last two centuries likely has no precedent in human history.

Of course, the framers understood the document was imperfect and would need to be adaptable, thus the inclusion of Article V.<sup>58</sup> In fact, its inclusion was among the democratic breakthroughs of the Constitution.<sup>59</sup> It makes sense that the founders would recognize the imperfections of the document. After all, they had just scrapped their first attempt at a federal government, the Articles of Confederation, after less than decade.<sup>60</sup> The framers wanted to create a document that could stand the test of time and they knew some flexibility would be required to allow for this longevity.<sup>61</sup>

The idea that those applying the Constitution should be given the ability to account for changing norms seemed to be reaffirmed only a few years later with the inclusion of the Ninth Amendment<sup>62</sup> in the Bill of Rights.<sup>63</sup> The Ninth Amendment states, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>64</sup> It serves as an acknowledgement that the rights set out in the Constitution and the Bill of Rights are not exhaustive, leaving future generations room to maneuver.

As a constitution becomes outdated, lack of democratic means to update it risks the population turning to extra-constitutional means of progress as the democratic process becomes thwarted by an archaic document.<sup>65</sup> For the U.S.

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58. See Sanford Levinson, *Introduction: Imperfection and Amendability*, in *RESPONDING TO IMPERFECTION 1* (Sanford Levinson ed., 1995) (quoting Founding Father and first U.S. President George Washington saying “[t]he warmest friends and the best supporters the Constitution has . . . do not contend that it is free from imperfections; but they found them unavoidable and are sensible if evil is likely to arise there from, the remedy must come hereafter.”).

59. See *id.* at 1–2 (“It was a fundamental breakthrough in American constitutional theory, manifested originally in the drafting of state constitutions, that the ‘rules of government’ would be decidedly ‘alterable’ through a stipulated legal process.”).

60. See KOWAL & CODRINGTON, *supra* note 2, at 10–12.

61. See U.S. CONST. art. V; THE FEDERALIST NO. 22 (Alexander Hamilton) (“When the concurrence of a large number is required by the Constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely *to be done*, but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods.”).

62. U.S. CONST. amend. IX.

63. See *Griswold v. Connecticut*, 381 U.S. 479, 486–89 (1965) (Goldberg, J., concurring) (“[The Ninth Amendment] was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.”).

64. U.S. CONST. amend. IX.

65. See KOWAL & CODRINGTON, *supra* note 2, at 3 (“The framers never imagined their new plan of government would be perfect. Just two weeks into the proceedings in Philadelphia, George Mason, one of the project’s leading skeptics, predicted that the new plan of

Constitution, the three-fifths compromise and slave trade protections remain part of the document and serve as an ugly reminder of the importance of being able to correct for mistakes.<sup>66</sup> Until humans do perfect governance, constitutions must be able to evolve.

Thus, the U.S. Constitution provides for an amendment process and can, in theory be changed.<sup>67</sup> Unfortunately, in practice formal amendment has become a virtual impossibility.<sup>68</sup>

### B. *The Amendment Problem*

The bar for even proposing an amendment is higher than it is for passing federal legislation—it requires approval from two-thirds of the House and Senate, or two-thirds of the states via constitutional conventions.<sup>69</sup> Ratification requires approval from three-quarters of the states through their legislature or a convention.<sup>70</sup> This means only thirteen states need object to a proposed amendment to kill it.<sup>71</sup>

This is a big reason why the U.S. Constitution has been amended only seventeen times since passage of the Bill of Rights in 1791.<sup>72</sup> But even that low number is deceptive regarding the ease of amendment. The Thirteenth, Fourteenth, and Fifteenth Amendments were forced upon the south as a condition of readmission to the union following the civil war and would not have passed under typical Article V procedures.<sup>73</sup> Additionally, the amendments of the last century trend far more toward updating procedural aspects of American democracy rather than granting substantive rights like those in the Bill of Rights and post-Civil War Amendments. The Twentieth Amendment moved the

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government ‘will certainly be defective,’ just as the Articles of Confederation had proved to be. ‘Amendments therefore will be necessary,’ he posited, ‘and it will be better to provide for them in an easy, regular and Constitutional way than to trust to chance and violence.’ Mason’s point was well taken: to avoid the dysfunction and gridlock that hobbled governance under the Articles, the new governing charter would need a viable method of revision.”).

66. See *id.* at 23–26, 28–29; U.S. CONST. art I, § 2, cl. 3, *superseded by* U.S. CONST. amend. XIV, § 2; U.S. CONST. art. I, § 9, cl. 1 (inoperative since 1808).

67. See U.S. CONST. art. V.

68. See generally Richard Albert, *The Constructive Unamendability of the U.S. Constitution*, N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM (2023) (discussing the constructive inability to amend the U.S. Constitution).

69. U.S. CONST. art. V.

70. *Id.*

71. See *id.*

72. U.S. CONST. amends. XI–XXVII.

73. See Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in RESPONDING TO IMPERFECTION 48 (Sanford Levinson ed., 1995).

inaugurations from March to January and set procedures for a situation wherein the president-elect dies before taking office.<sup>74</sup> The Twenty-Second Amendment limits a presidency to two terms.<sup>75</sup> The Twenty-Third Amendment belatedly granted Washington D.C. residents the right to participate in presidential elections.<sup>76</sup> The Twenty-Seventh Amendment, the only amendment passed in the last fifty years, simply mandates that laws changing compensation for members of Congress not go into effect until after an intervening congressional election.<sup>77</sup> Compared to the Bill of Rights and post-Civil War Amendments, these Amendments are little more than procedural tweaks.

The bar for constitutional amendment has always been unrealistically high. But in recent decades it has become a virtual impossibility. As of the 2020 census, the U.S. population was roughly 331 million.<sup>78</sup> The thirteen smallest states add up to a total population of 14.6 million—4.4% of the population.<sup>79</sup> While the obvious retort is that it is highly unlikely that these specific thirteen states would all be on board with rejecting an amendment, it is not as far off the mark as one might think. The Republican Party controls the governor's seat in nine of those thirteen states and the math does not change tremendously when looking at the thirteen least-populous states that currently have a Republican governor.<sup>80</sup> These states have a total population of 20.7 million, or 6.3% of the population.<sup>81</sup> If one alters the math to only account for the thirteen least-populous states where the governor *and* both U.S. senators are Republicans,<sup>82</sup> it results in a population of roughly 33 million, or 10.1% of the population.<sup>83</sup> A Republican-supported amendment is more feasible, but even then, the thirteen least populous

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74. U.S. CONST. amend. XX.

75. U.S. CONST. amend. XXII.

76. U.S. CONST. amend. XXIII. (ratified in 1961).

77. U.S. CONST. amend. XXVII. (ratified in 1992).

78. *2020 Population and Housing State Data*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html>. [hereinafter U.S. CENSUS BUREAU, 2020].

79. These states are Alaska, Delaware, Hawaii, Idaho, Maine, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. *See id.*

80. *See id.*

81. This includes Alaska, Arkansas, Idaho, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming. *See id.*

82. Because one of these three figures is a democrat in the Republican bastions of Kentucky, Louisiana, Montana, and West Virginia, these states are excluded from this calculation. *See id.*

83. These states are Alabama, Alaska, Arkansas, Idaho, Iowa, Mississippi, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, and Wyoming. *See id.*

states with a Democratic governor amount to 13.4% of the population.<sup>84</sup> And when including only states with Democratic U.S. senators and governors, one finds 18.8% of the population.<sup>85</sup>

The portion of the population that can reject a potential amendment is so small that the partisan breakdown is not terribly meaningful. Even in the largest formulation listed above—the thirteen least-populous states where the governor and both U.S. senators are Democrats—less than 20% of the population can reject a proposed amendment. An amendment must be supported by such an overwhelming majority of the population that it would require significant support from both parties to ratify it. It seems likely that this is tied not only to the general lack of constitutional amendments, but also to the relatively uncontroversial nature of the more recent amendments. And all of this takes for granted that an amendment has been successfully *proposed*, an exceptionally difficult task in its own right. All of the Article V processes could be changed but, of course, that would require a constitutional amendment.<sup>86</sup>

It is worth addressing here a common retort: that the U.S. system was designed this way to avoid tyranny of the majority. This was, undeniably, a concern for the framers.<sup>87</sup> But it should be explained both why the circumstances in which that concern was voiced have changed dramatically and why the concerns were unfounded in the first place.

The demographic picture of the United States at the time of founding was dramatically different.<sup>88</sup> It is worth going through the math for the population of free white men over the age of sixteen (the closest stand-in available for the voting population), as well as the entire population to account for the extremely limited population actually enfranchised. Delaware, the smallest state in both

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84. These states are Colorado, Connecticut, Delaware, Hawaii, Kansas, Kentucky, Louisiana, Maine, Minnesota, New Mexico, Oregon, Rhode Island, and Wisconsin. *See id.*

85. These states are Arizona, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, and Washington. *See id.*

86. *See* U.S. CONST. art. V.

87. *See* THE FEDERALIST NO. 51 (James Madison) (“[I]n the federal republic of the United States... all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”).

88. For purposes of this information, Maine is treated as a separate state despite not achieving statehood until 1820. The census data for Maine was tabulated separately. Additionally, Vermont and Kentucky, both of which would achieve statehood in the two years following the 1790 census, are also included.



categories had 11,783 free white men over the age of sixteen.<sup>89</sup> Virginia, the largest in both categories had 110,936 free white men over the age of sixteen.<sup>90</sup> The two states' entire populations were 59,094 and 747,610 respectively.<sup>91</sup> So, Virginia had 9.4 times as many free white men and 12.7 times as many people living there overall. This is a far cry from the disparity today, where California, the most populous state, has 68 times as many people as Wyoming, the least populous.<sup>92</sup> Half of today's population lives in just nine states.<sup>93</sup> For reference, the least-populous nine states comprise 2.5% of the population.<sup>94</sup> Even if one assumes that the disparity in 1790 is democratically defensible, the state-to-state variance in population is now much greater. And this Note does not assume that the amendment process in the context of 1790 is democratically defensible.

It is worth reiterating that every minority protection comes at the cost of majoritarian democracy. One cannot empower the minority without taking some power from the democratic majority. It cannot be stressed enough what an unrealistically difficult amendment process this is comparatively—a look at the amendment procedures of state and foreign constitutions makes this clear. As of 1991, states amended their constitutions at nearly ten times the rate of the U.S. Constitution.<sup>95</sup> While the bar for proposal can often still be quite high,<sup>96</sup> the bar for approval is much lower—all but one state use popular referendum.<sup>97</sup> Notably, this is before considering that states from time to time will draft an entirely new constitution.<sup>98</sup> States have had, on average, 2.9 constitutions each.<sup>99</sup>

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89. *1790 Census: Return of the Whole Number of Persons Within the Several Districts of the United States*, U.S. CENSUS BUREAU, <https://www.census.gov/library/publications/1793/dec/number-of-persons.html> (last updated Jan. 13, 2024).

90. *Id.*

91. *Id.*

92. See U.S. CENSUS BUREAU, 2020, *supra* note 78.

93. These nine states are California, Texas, Florida, New York, Pennsylvania, Illinois, Ohio, Georgia, and North Carolina. See *id.*

94. *Id.*

95. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 223 (Sanford Levinson ed., 1995).

96. Proposal by the state legislature remains by far the most common method of proposal, although states vary in needed approval rate from a simple majority to 75% of legislators. Some states require the proposed amendment be voted on twice. Voter initiatives and constitutional conventions may also be used, but legislative referral remains by far the most common method. *Id.* at 230–31.

97. See *id.* at 229 (Delaware is the exception).

98. See *id.* at 227.

99. See *id.* at 224–25 (Louisiana alone has had eleven).

These comparisons persist at an international level. A 1992 study comparing the difficulty of constitutional amendment in thirty different countries found that of those assessed, the U.S. Constitution was the second hardest to amend.<sup>100</sup> And first was the now-defunct Yugoslavia.<sup>101</sup> Additionally, the same study found rates of constitutional amendment to be directly tied to the difficulty of the process.<sup>102</sup> The American process is exceptionally burdensome and stands in the way of not just needed constitutional flexibility, but needed constitutional flexibility grounded in the democratic process.

The United States prioritizes minority power at almost every level of federal government. The countermajoritarian nature of the amendment process is problematic in its own right. But when it begins to interact with other undemocratic institutions, it creates the constitutional crisis this country now faces.

### III. THE CONSTITUTIONAL COMMON LAW DOCTRINE

#### A. *How, then, can the Constitution be changed?*

All of this leaves one institution that can alter the Constitution: the Supreme Court of the United States.<sup>103</sup> In many ways, the Supreme Court does not have a choice. The judiciary, with the exclusive right to interpret the meaning of this antiquated document, is faced with a choice: chain the nation to centuries-old ideologies or warp the obvious text of the document in ways that sometimes go so far as to render the words on the page nearly meaningless.<sup>104</sup> If it is taken for granted that judicial review is the exclusive purview of the Court, short of an idea achieving the absurdly high level of consensus needed for a constitutional amendment, the judiciary is forced into some form of undemocratic action. Either the country is stuck with institutions that remain static, grounded in outdated and undemocratic ideals, or the unelected judiciary takes an outsized hand in policymaking by shaping the meaning of the founding document to better suit a nation that looks nothing like the one that came into existence in the late 1700s.

An example of this is the way the nearly identical Due Process Clauses of the Fourteenth and Fifth Amendments have been used to create protections for various rights that obviously were not contemplated by those that framed the U.S.

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100. *Id.* at 236.

101. *Id.* at 236.

102. *Id.* at 240.

103. *See supra* Part II.

104. *See infra* Section III.C.

Constitution.<sup>105</sup> The Fourteenth Amendment's Due Process Clause states, "No state shall . . . deprive any person of life, liberty, or property without due process of the law."<sup>106</sup> First, the Court had to determine that not all due process rights are procedural in nature; some are referred to (oxymoronically) as substantive due process rights.<sup>107</sup> These relatively brief constitutional provisions now mean not only that the government cannot deprive someone of "life, liberty, or property" without engaging in the proper procedures, but also that the government cannot constitutionally pass a law that denies those rights in the first place unless it survives the rigorous strict scrutiny standard.<sup>108</sup> The next obvious question is, What deprivations equate to a loss of "life, liberty, or property"? The Court has held that denial of most of the guarantees of the Bill of Rights qualify as a loss of "life, liberty, or property" and it is only through these interpretations that most of the Bill of Rights apply to state legislatures.<sup>109</sup> But the Court has gone much

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105. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015) (establishing a constitutional right to gay marriage as a part of the broader constitutional right to marriage which has been held to be an aspect of the "liberty" mentioned in the Due Process Clause).

106. U.S. CONST. amend. XIV.

107. The origin of substantive due process is complicated and controversial, though it appears to have originated in the invalidation by courts of certain statutes seen as exceeding a legislature's ability to pass laws based what were eventually termed police powers. See Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 819 (2020). The concept began to solidify as being a part of the Due Process Clause (though it was not yet termed "substantive due process") during the *Lochner* era with the advent of the economic due process right to freedom of contract. See *Lochner v. New York*, 198 U.S. 45, 63–64 (1905) (explaining that similar laws to the one challenged had been previously struck down as violations of the Due Process Clause).

108. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (citations omitted)).

109. It should be observed that rather than hold that the entirety of the Bill of Rights is protected by the Due Process Clause, the Court has done so piecemeal. See, e.g., *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (incorporating the excessive fines clause of the Eighth Amendment as one of the fundamental rights guaranteed by the Bill of Rights); *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) ("[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendment, but because they are of such a nature that they are included in the conception of due process of law." (citation omitted)). Only three of the protections granted in the Bill of Rights are at this point not considered part of the protections of the Due Process Clause: the Third Amendment's grant of freedom from quartering of soldiers, the Fifth Amendment's guarantee of a grand jury indictment, and the Seventh Amendment's guarantee of a jury in civil cases. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1263–64 (1992) (While the author also lists the Second Amendment's right to bear arms as being

further than limiting the definition of “life, liberty, or property” to the Bill of Rights guarantees. The rights to privacy,<sup>110</sup> contraception,<sup>111</sup> procreation,<sup>112</sup> freedom from restrictions on the ability to marry,<sup>113</sup> and control over the upbringing of one’s children<sup>114</sup> (and formerly the right to abortion<sup>115</sup> and freedom of contract<sup>116</sup>) are all guaranteed by the Constitution through a clause the Court saw as being pliant enough to support them.

Through this lens, and despite the claims of originalists,<sup>117</sup> the reality is that keeping the meaning of the Constitution stagnant is not a choice at all and has

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unincorporated, the Supreme Court did incorporate it in 2010. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010)).

110. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (holding that the various protections tied to privacy granted by the First, Third, Fourth, and Fifth Amendments show that there is a fundamental right to privacy guaranteed by the Due Process Clauses); *cf.* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 332 (Thomas, J., concurring) (suggesting that the Supreme Court should “reconsider all [its] substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*”); Erin Chemerinsky, *The Future of Substantive Due Process: What Are the Stakes?*, 76 SMU L. REV. 427 (2023).

111. *See Griswold*, 381 U.S. at 484–86 (holding that the protection of the right to privacy included a protection of the right to contraceptives). *Compare* *Roe v. Wade*, 410 U.S. 113, 1153 (1973) (holding that the right to privacy, as a substantive due process right, includes a woman’s decision whether or not to receive an abortion), *and* *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (same), *with Dobbs*, 597 U.S. at 292–32 (overruling *Roe* and *Casey*).

112. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (holding that a statute mandating sterilization for those convicted of certain crimes denied a fundamental liberty guaranteed by the Constitution).

113. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.” (citations omitted)).

114. *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).

115. *Roe*, 410 U.S. at 113 (holding that the right to an abortion was protected as a part of the privacy right established in *Griswold v. Connecticut*), *overruled by Dobbs*, 597 U.S. 215.

116. *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

117. *See* Len Niehoff, *Unprecedented Precedent and Original Originalism: How the Supreme Court’s Decision in Dobbs Threatens Privacy and Free Speech Rights*, AM. BAR ASS’N (June 9, 2023), [https://www.americanbar.org/groups/communications\\_law/publication/s/communications\\_lawyer/2023-summer/unprecedented-precedent-and-original-originalism/](https://www.americanbar.org/groups/communications_law/publication/s/communications_lawyer/2023-summer/unprecedented-precedent-and-original-originalism/) (explaining the untenability of an embrace of originalist constitutional interpretations). *See also* ERIN CHERMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 82 (2022) (“there is no evidence that the original meaning of Article III of the Constitution

not been for a long time. To bind us to the original meaning of the document would mean leaving the astonishing ambiguity found within unresolved. Either the Constitution remains stagnant, or the Supreme Court takes a proactive role in shaping it. Thus, the U.S. Constitution and American constitutional law diverged.<sup>118</sup>

B. *Amendment via Interpretation: The Doctrine*

Constitutional law in the United States has, over time, become more untethered from the document itself. An expansive network of precedent has developed that has not just shaped the contours of the document, but created constitutional text out of thin air; a document with far fewer words<sup>119</sup> than this Note, has become a broad and opaque web of doctrine.<sup>120</sup>

The idea that the U.S. Constitution has come to exist within a common law framework is not a new one; it is well established that a tremendous amount of constitutional law is not present in the Constitution.<sup>121</sup> But it must be stressed that when the Supreme Court of the United States extrapolates rules from the text—no matter how far-flung—those rules, for all intents and purposes, become part of the Constitution.<sup>122</sup> Lower courts and other branches are concerned with—and bound by—not the text of the Constitution itself, but the body of law

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included the understanding that courts should interpret the Constitution based on its original meanings”).

118. See Henry Paul Monaghan, *The Constitution of the United States and American Constitutional Law*, in CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 181–82 (Eivind Smith ed., 1995).

119. Including amendments, the U.S. Constitution is a mere 7,591 words long. See Joshua Geltzer, *The Lost 110 Words of Our Constitution*, POLITICO (Feb. 23, 2020, 7:00 AM), <https://www.politico.com/news/magazine/2020/02/23/the-lost-constitutional-tool-to-protect-voting-rights-116612>.

120. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883–84 (1996) (“Although everyone agrees that the text is in some sense controlling, in practice constitutional law generally has little to do with the text. Most of the time, in deciding a constitutional issue, the text plays only a nominal role. The issue is decided by reference to ‘doctrine’—an elaborate structure of precedents built up over time by the courts—and to considerations of morality and public policy. This point is, I think, obvious for judicial decisions. It is the rare constitutional case in which the text plays any significant role. Mostly the courts decide cases by looking to what the precedents say.”).

121. See generally *id.* (arguing that the implementation of common law principles in constitutional interpretation explains modern constitutional law); see also Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 1–3 (1975) (“[T]he Court’s great prestige has fostered the impression that every detailed rule laid down has the same dignity as the constitutional text itself. This impression should be understood as the illusion it is.”).

122. See Strauss, *supra* note 120, at 883–84.

created by Supreme Court interpretations of the Constitution.<sup>123</sup> Through this lens, it's explicit that the Court is making policy decisions.

While the Supreme Court is deferential to its own precedent,<sup>124</sup> it can and does overturn its previous decisions, both implicitly<sup>125</sup> and explicitly.<sup>126</sup> However, because of the way American common law has developed strict adherence to *stare decisis*, all other courts and American institutions are bound by the ways the Court amends the document and the policy implications of that functional amendment.<sup>127</sup>

Some of the Supreme Court's movement away from constitutional text has been for the better. In decisions like *Loving v. Virginia*,<sup>128</sup> *Brown v. Board of Education*,<sup>129</sup> and *Obergefell v. Hodges*,<sup>130</sup> the Court greatly expanded the rights of and protections for marginalized populations.<sup>131</sup> It is not this Note's position that minority protections are without redeeming value. But the Court has,

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123. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 771 (1988) [hereinafter Monaghan, *Stare Decisis*] ("The Supreme Court is concerned not with the Constitution, but with constitutional law, which consists largely (albeit not entirely) of case law. As John Chipman Gray insisted long ago, 'in truth, all the [l]aw is judge-made law,' and accordingly, texts are not themselves law, but only sources of the law. This view of constitutional adjudication comports with reality. Judges and lawyers (and even law professors) are centrally concerned with judicial decisions, not with the text.").

124. See Lee, *supra* note 20, at 730–35.

125. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–400 (1937) (implicitly overturning *Lochner v. New York*'s due process right to freedom of contract).

126. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (explicitly overturning *Roe v. Wade*).

127. See generally Monaghan, *Stare Decisis*, *supra* note 123 (exploring the divergence in constitutional text and constitutional law, as well as the difficulty reconciling this divergence with originalism).

128. 388 U.S. 1, 12 (1967) (holding a statutory ban on interracial marriage an unconstitutional violation of both the Fourteenth Amendment's Equal Protection Clause and Due Process Clause).

129. 347 U.S. 483, 495 (1954) (holding racial segregation in public schools to be a violation of the Equal Protection Clause of the Fourteenth Amendment).

130. 576 U.S. 644, 675 (2015) (holding a statutory ban on same sex marriage was an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment).

131. The broad Equal Protection and Due Process guarantees of the Fourteenth Amendment are frequently at the forefront of debates over constitutional interpretation. However, it emphasizes the importance of interpretive doctrine over the text when observed that the equally broad Privileges or Immunities Clause of the Fourteenth Amendment was effectively written out of the Constitution during the *Slaughter-House Cases* less than a decade after the Amendment's passage and have rarely been invoked since. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

historically, been a regressive force unresponsive to public opinion.<sup>132</sup> The great irony of the nation's countermajoritarian protections is that they have, historically, protected the majority at the expense of this country's minority populations.<sup>133</sup> And, to be clear, regardless of what one thinks of the Court's decision-making quality or the United States' overall success in protecting minority populations, it is fundamentally undemocratic for the sole body responsible for amending the Constitution to be nine unelected jurists. The Court itself always seems eager to acknowledge this just before it sets policy.<sup>134</sup>

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132. See generally Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010) (arguing that the U.S. Supreme Court is broadly unresponsive to public opinion in its decision-making).

133. Congress and the Electoral College overweight the electoral voice of residents of smaller states. This serves to dramatically overweight the representation White voters in the aggregate. Of the thirteen least-populous states, i.e., the smallest possible proportion of the population that could reject a constitutional amendment and those most overrepresented in the Senate, eight are among top ten states with the highest portion of the population made up of non-Hispanic whites. See *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/geo/chart/US> (last visited Feb. 2, 2024). The five Whitest states are all among the thirteen least-populous. *Id.* And the eleven Whitest states all have total populations lower than the median state population. *Id.* California and Texas—by far the two largest by population—are both bottom five states for percentage of the population made up of non-Hispanic whites. *Id.* California, by far the most populous state, with ten million more people than Texas, is second only to Hawaii in the percent of the population made up of non-Hispanic whites: 34.7%. *Id.*; see also discussion *infra* Section IV.A.3 (discussing the ways Supreme Court justices have, historically, failed to reflect the demographics of the U.S. population).

134. See, e.g., *Lochner v. New York*, 198 U.S. 45, 57 (1905) (“This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law.”); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. (“It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.”); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 239 (2022) (“In interpreting what is meant by the Fourteenth Amendment’s reference to ‘liberty,’ we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been ‘reluctant’ to recognize rights that are not mentioned in the Constitution.”); *Bush v. Gore*, 531 U.S. 98, 111 (2000) (“None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere.”).

It is difficult to contend that the Supreme Court's role in setting policy has remained stagnant through American history.<sup>135</sup> Prior to 1865 the Court, on average, only took one case reviewing congressional action every five years.<sup>136</sup> And it's noteworthy that, while *Dred Scott* served as only the second instance of a federal statute being struck down via judicial review, the Court had eleven opportunities between *Dred Scott* and *Marbury* to do so, but always opted for deference.<sup>137</sup> Since 1865, the Court has heard, on average, 6.58 cases per year reviewing the constitutionality of congressional action—and that does not include the vast majority of judicial review cases, which involve state or local legislative action.<sup>138</sup> Today, the Court has concentrated incredible policy-setting power within itself at the expense of the more democratic branches of government.<sup>139</sup> Empirical analysis has shown the ways that justices select cases for review as a method for furthering their policy agenda.<sup>140</sup> No matter what justices might insist, they do much more than call balls and strikes.<sup>141</sup>

When an aggressive brand of judicial review is infused with common law principles and interacts with a near-impossible amendment process, the result is where the United States is today—with a Court that has the exclusive power to amend this country's highest body of law and is more than happy to do so. A review of the way several rules have shifted or been implicitly rewritten makes

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135. See MCKEEVER, *supra* note 38, at 28 (“[I]t is generally recognised that the Supreme Court today plays a role in American politics [that is] quite different from that which it has played throughout most of its history. One of the main reasons for this is that the concept of constitutional interpretation has undergone a fundamental change in recent years.”).

136. See KEITH, *supra* note 48, at 27.

137. *Id.* at 28.

138. See *id.* at 27.

139. See Mark A Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 133 (2022) (“There is one consistent theme in the cases . . . [t]hey centralize power in the Supreme Court, which today is not only the most activist of any Court in the past century, but increasingly the locus of all legal power. This is not a Court that ‘calls balls and strikes,’ as the ludicrous metaphor suggests. It is not even a Court that is using the tools of common law and equity to adapt the law in ways that it prefers. It is a Court that is consolidating its power, systematically undercutting any branch of government, federal or state, that might threaten that power, while at the same time undercutting individual rights.”).

140. See Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. OF POLS. 1062, 1072 (2009) (“Justices grant review when they believe that the policy outcome of the merits decision will be better ideologically for them than is the status quo. Conversely, they deny review when they prefer the status quo policy. Policy maximization—the outcome mode—is a strong predictor of Supreme Court agenda setting.”).

141. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing on S. H.R. 109–158 Before the Comm. on the Judiciary United States Senate*, 109th Cong. 55–56 (2005).



obvious the profound ways the Court shapes the U.S. Constitution and, through it, policy. It is likely the case that, setting aside the post-Civil War Amendments (which, again, were not ratified under the typical constraints of Article V), vastly more change has come in the meaning of the document through precedent than amendments under Article V.<sup>142</sup> This Part continues with a discussion of three examples: the First Amendment, administrative law, and the Second Amendment, while specifically noting the ways that various constitutional rules have warped and shifted over time as well as the ways such rules have become distinct from the text.

### C. Examples

#### 1. The First Amendment Freedom of Speech Protections

The First Amendment is a quintessential example of the way the constitutional text and doctrine diverge. The plain text is among the least ambiguous in the entire document; it prescribes an outright ban on certain types of laws.<sup>143</sup> The relevant part of the Amendment states, “Congress shall make no law . . . abridging the freedom of speech.”<sup>144</sup> Despite the absolute terms in which the Amendment speaks, First Amendment law has become exceptionally nuanced and complex.<sup>145</sup> Thus, to circumvent the Amendment’s absolute proscription, “no law” has been interpreted as meaning mostly no laws.<sup>146</sup>

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142. See Strauss, *supra* note 120, at 884 (“Most of the great revolutions in American constitutionalism have taken place without any authorizing or triggering constitutional amendment. This is true, for example, of the Marshall Court’s consolidation of the role of the federal government; the decline of property qualifications for voting and the Jacksonian ascendance of popular democracy and political parties; the Taney Court’s partial restoration of state sovereignty; the unparalleled changes wrought by the Civil War (the war and its aftermath, not the resulting constitutional amendments, were the most important agents of change); the rise and fall of a constitutional freedom of contract; the great twentieth-century growth in the power of the executive (especially in foreign affairs) and the federal government generally; the civil rights era that began in the mid-twentieth century; the reformation of the criminal justice system during the same decades; and the movement toward gender equality in the last few decades. In some of these instances—notably the expansion of the congressional commerce power and the enforcement of gender equality—amendments bringing about the changes were actually rejected, but the changes occurred anyway.”).

143. See U.S. CONST. amend. I.

144. *Id.*

145. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 52–53 (2010).

146. The First Amendment also specifically singles out Congress, but has been applied to all levels of government. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925). As with the majority of the Bill of Rights, the First Amendment is applied to the states by being incorporated into the Fourteenth Amendment’s Due Process Clause. See *id.*; see also *supra*

In 1919 Justice Oliver Wendell Holmes famously wrote, “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.”<sup>147</sup> Under a literal reading of the First Amendment, this could not possibly be correct. A law criminalizing someone for “falsely shouting fire in a theatre” is plainly a law abridging the freedom to speak. It also isn’t workable for the government to be entirely unable to restrict even the most harmful forms of communication. The Court gets around the absolute language by distinguishing between various categories of speech that are more or less protected.<sup>148</sup> That is, some speech is constitutionally-shielded “speech,” some is not, and some is somewhere in between.

Some nonverbal conduct is protected speech.<sup>149</sup> But only if it is intended as communication and substantially likely to be understood as “speech.”<sup>150</sup> Not speaking is also protected speech.<sup>151</sup> Of course, that means that *not* engaging in nonverbal communicative conduct is protected speech.<sup>152</sup> Some communication

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note 109. While it is notable that, unlike in other amendments, Congress is singled out specifically here, it ultimately is not a barrier to application to the states and requires much less mental cartwheeling than getting around “no law” (beyond the mental cartwheeling involved in arriving at the modern interpretation of the Due Process Clause to include substantive due process rights). *See supra* text accompanying notes 105–116. The Fourteenth Amendment protects rights that are akin to “life, liberty, or property.” *See id.* The key is that abridgments of speech are akin to an abridgement of “liberty,” thus protected by the Due Process Clause. *Gitlow*, 268 U.S. at 666 (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

147. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

148. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 163–66 (2015) (clarifying the distinctions between speech restrictions that are and are not “content based” and, thus, subject to varying degrees of constitutional scrutiny).

149. *Spence v. Washington*, 418 U.S. 405, 409–10 (1974).

150. *Id.* at 410–11 (“An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”).

151. *See 303 Creative, LLC v. Elenis*, 600 U.S. 570, 586 (2023) (“[T]he government may not compel a person to speak its own preferred messages. Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include.” (citations omitted)).

152. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34, 642 (1943) (Where students who defied mandatory participation in the pledge of allegiance for religious reasons were expelled, it was held that compelling speech violates the First Amendment. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

is protected more depending on where it takes place.<sup>153</sup> Some public places are associated with “speech” and protected more heavily.<sup>154</sup> Some public property is not associated with “speech” but is voluntarily opened up to speech, so protections are heightened there too.<sup>155</sup> But some public property has no historic association with being open to speech, so speech is less protected there.<sup>156</sup> And the purpose of some publicly owned property—such as public schools—is so antithetical to free speech that even significant speech restrictions there do not

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prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”)

153. *See, e.g., Perry Educ. Ass’n v. Perry Loc. Educ.’ Ass’n*, 460 U.S. 37, 44 (1983) (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. . . . A second category consists of public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. . . . Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the ‘First Amendment does not guarantee access to property simply because it is owned or controlled by the government.’” (quoting *U. S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981))).

154. *See Minn. Voters All. v. Mansky*, 585 U.S. 1, 11–12 (2018) (“In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.”).

155. *See id.* (“The same standards apply in designated public forums—spaces that have ‘not traditionally been regarded as a public forum’ but which the government has ‘intentionally opened up for that purpose.’” (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009))).

156. *See Adderley v. Florida*, 385 U.S. 39, 47–48 (1966) (“The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners’ argument that they had a constitutional right to stay on the property, over the jail custodian’s objections, because this ‘area chosen for the peaceful civil rights demonstration was not only “reasonable” but also particularly appropriate.’ Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected . . .”).

rise to the level of abridging constitutionally protected speech.<sup>157</sup> Unless the speaker is making a non-disruptive political statement, then it is still protected.<sup>158</sup>

Restrictions of “speech” based on its content are offered greater protection than restrictions not based on content: generally, restrictions on the time, place, and manner of the speech.<sup>159</sup> But some categories of content based-restrictions have been exempted and are not offered greater protections than non-content-based restrictions.<sup>160</sup> Speech advocating for unlawful action by others is still protected.<sup>161</sup> But where the speaker sincerely means it and the listener is like to act on it imminently—then the First Amendment’s protections don’t apply.<sup>162</sup> Similarly, fighting words intended to provoke a violent response toward the speaker are not protected.<sup>163</sup> But a restriction is not protected where it

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157. *See* *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683–84 (1986) (“The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. In *New Jersey v. T.L.O.*, we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” (referring to *New Jersey v. T.L.O.*, 469 U.S. 325, 340–342 (1985)) (citations omitted)).

158. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

159. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (“Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue. Deciding whether a particular regulation is content based or content neutral is not always a simple task.” (citations omitted)); *see also* *Reed v. Town of Gilbert*, 576 U.S. 155, 172 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

160. *See* *Cohen v. California*, 403 U.S. 15, 24 (1971) (“we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions . . . to the usual rule that governmental bodies may not prescribe the form or content of individual expression.”).

161. *See* *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (overturning the conviction of a man for yelling to antiwar protesters “we’ll take the fucking street later” because “[a]t best . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time”).

162. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

163. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (explaining that fighting words are “those which by their very utterance inflict injury or tend to incite an

distinguishes between different types of fighting words based on their content.<sup>164</sup> Then the fighting words are still protected because a content-based distinction is being made within a broader constitutionally proscribable category of speech content.<sup>165</sup> Threats are not protected.<sup>166</sup> But only where the speaker “consciously disregarded a substantial risk” or intended that the speech would be viewed as threatening violence.<sup>167</sup> So, a blanket ban on burning crosses violates First Amendment protections because the question of intent is not considered by the law.<sup>168</sup> But a ban on burning crosses with the intent of threatening complies with the First Amendment.<sup>169</sup> However, a ban on burning crosses with the goal of threatening only specifically identified groups does not.<sup>170</sup> Additionally,

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immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”).

164. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–85 (1992) (“What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.”).

165. *Id.*

166. *See, e.g., Counterman v. Colorado*, 600 U.S. 66, 69 (2023) (“True threats of violence are outside the bounds of First Amendment protection and punishable as crimes.”).

167. *Id.* (“The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.”).

168. *Virginia v. Black*, 538 U.S. 343, 367 (2003) (striking a Virginia law that created a blanket ban on cross burning by instituting a policy that cross burning was *prima facie* evidence of intent to threaten because it negated the proof of intent requirement for showing a true threat, saying “[a]s the history of cross burning indicates, a burning cross is not always intended to intimidate”)

169. *See id.* (“The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.”).

170. *R.A.V.*, 505 U.S. at 391 (“[T]he . . . unmodified terms make clear that the ordinance applies only to ‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender.’ Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use ‘fighting words’ in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”).

obscenity is not protected speech.<sup>171</sup> But to qualify as obscenity it does have to appeal to a “prurient interest”<sup>172</sup> and depict sexual conduct in a patently offensive way—nudity alone is not enough.<sup>173</sup> But even if it does check those boxes, if it has literary, artistic, political, or scientific value it still falls within First Amendment protections.<sup>174</sup>

Everything above is spun from the ten words, “Congress shall make no law . . . abridging the freedom of speech.”<sup>175</sup> It is, plainly, nonsense. Where the Court has been handed the authority to amend the Constitution as they have here, rules become fluid and tangled as the Court adds caveats to its caveats<sup>176</sup> while earnestly insisting it is merely divining the actual meaning of these ten words with intellectual consistency. The point is not that any of these cases were or were not correctly decided. The regulation of speech is obviously fraught, and nuance is clearly needed. The point is that judges make bad legislators.

The First Amendment strips Congress (and, through the Fourteenth Amendment, state and local legislative bodies) of the ability to legislate in areas where it obviously must. So, the legislatures pass laws restricting speech anyway, the Court finds reasons why the laws are constitutional despite plainly going against the text of the First Amendment, and the words of our highest body of law stop meaning what they plainly do. In a functional system (and setting aside

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171. See *Roth v. United States*, 354 U.S. 476, 484–85 (1957) (“All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”).

172. *Miller v. California*, 413 U.S. 15, 24 (1973) (“State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. . . . A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex . . .” (citation omitted)).

173. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (“[N]udity alone is not enough to make material legally obscene under the *Miller* standards. Appellant’s showing of the film ‘Carnal Knowledge’ is simply not the ‘public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain’ which we said was punishable in *Miller*.” (referring to *Miller v. California*, 413 U.S. 15 (1973))).

174. See *Miller*, 413 U.S. at 24–26 (1973) (“At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.”).

175. U.S. CONST. amend. I.

176. The Court created a caveat to the rule of greater protection for content-based restrictions by setting out exceptions where certain content-based restrictions (e.g., true threats) receive less protection. A caveat to this caveat was created by *R.A.V.*, where the Court established that content-based restrictions entirely within broader categories of less protected classes of content still receive greater protection. See *supra* note 164.

the unique cultural relevance or the First Amendment and the strong opinions it seems to generate among laypeople), the Constitution would actually be amended to reflect modern necessities. Society is instead left with a perpetually evolving and uncertain maze of judicial rules created on the disingenuous premise that the constitutional jurisprudence is consistent with the constitutional text.

## 2. Administrative Law

Administrative law is an area where the U.S. Supreme Court's need to legislate is obvious. The administrative state was in many ways unforeseen by the framers despite becoming a functional necessity for any modern state.<sup>177</sup> The Constitution has remarkably little to say on the topic.

Article I, Section 1 states, "All legislative powers herein granted shall be vested in a Congress of the United States."<sup>178</sup> Articles II and III establishing the executive and judicial branches also start with vesting clauses. None of the three Articles use the word "exclusive"<sup>179</sup> and scholars have long debated what, specifically, these clauses mean and the constitutionality of one branch handing over its vested power to another.<sup>180</sup> The only thing the language appears to forbid the legislature from doing is delegating its authority while *also* divesting itself of that authority. There is no explicit ban on handing over the entirety of the

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177. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); Mekela Panditharatne, *Rebuilding Federal Agencies Hollowed Out by Trump and Congress*, BRENNAN CTR. FOR JUST. (Apr. 5, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/rebuilding-federal-agencies-hollowed-out-trump-and-congress>.

178. U.S. CONST. art. I, § 1.

179. It is worth noting that word "exclusive" appears twice in the Constitution prior to the amendments—both are in the Article I, Section 8 congressional grants of power. The first simply regards the ability to grant exclusive ownership of intellectual property. U.S. CONST. art. I, § 8, cl. 8. However, the second grants the right "[t]o exercise exclusive legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. CONST. art. I, § 8, cl. 18. While this is entirely speculative, it seems likely the inclusion here was to make clear that the states no longer had jurisdiction over their former lands. Still, within the context of questions about the exclusivity of the vesting clauses, it does seem noteworthy that there is a single instance in the Constitution where the grant of legislative authority is deemed "exclusive" even if little has ever been made of it.

180. See Joseph P. Verdon, *The Vesting Clauses, the Nixon Test, and the Pharaoh's Dream*, 78 VA. L. REV. 1253, 1254–55 (1992).

legislative powers to some body in the executive provided the legislature retained the right to overrule that body's decisions and revoke the legislative powers whenever it saw fit. This is, obviously, not what the framers had in mind—this literal reading of the Article I vesting clause would be directly contrary to the checks and balances idea so key to the constitutional framework.<sup>181</sup> It seems safe to assume that there is at least some degree of exclusivity to the vesting clauses.<sup>182</sup> But how much?

The Court started wrestling with the degree to which Congress may constitutionally delegate rulemaking authority early in the country's history. In 1813, the Court held that Congress was able to vest policymaking in the president contingent upon the outcome of a future event.<sup>183</sup> In *Wayman v. Southard*,<sup>184</sup> it was contended that Congress's decision to vest in the Court the power to create its own procedural rules was an unconstitutional delegation of legislative authority.<sup>185</sup> Chief Justice John Marshall explained, "It will not be contended that Congress can delegate to the Courts . . . powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."<sup>186</sup> The Court elaborated:

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.<sup>187</sup>

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181. See THE FEDERALIST NO. 51 (James Madison) ("It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.").

182. See *id.*

183. *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 387 (1813) ("The legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect. . . . The Legislature may make the revival of an act depend upon a future event, and direct that event to be made known by proclamation.").

184. 23 U.S. (10 Wheat) 1 (1825).

185. See *id.* at 47–50.

186. *Id.* at 42–43.

187. *Id.* at 43.



Still, even with the acknowledgement of a certain degree of delegation power from no less an authority than the progenitor of judicial review, over the course of the following century the nondelegation doctrine—the idea that the grant to Congress of “[a]ll legislative authority” is exclusive and may not be delegated to another branch<sup>188</sup>—became the de jure interpretation of the Constitution.<sup>189</sup> Or at least this is how it was described. In practice, the Court generally allowed at least some delegation,<sup>190</sup> although just how much is debated.<sup>191</sup>

In 1928, the Supreme Court devised a vague rule for determining the constitutionality of a delegation: delegations of power would be upheld provided the delegating statute offered an “intelligible principle” to guide the exercise of that power.<sup>192</sup> But as New Deal legislation was passed in the wake of the Great Depression—legislation that remains the foundation for much of the modern, expansive administrative state<sup>193</sup>—the nondelegation doctrine came under renewed scrutiny through challenges to the constitutionality of New Deal delegations.<sup>194</sup> The Court initially limited Congress’s ability to hand rulemaking to the Executive, striking New Deal delegations in a pair of 1935 cases.<sup>195</sup> As a result, President Franklin D. Roosevelt began pursuing judicial reform legislation including a bill that would add as many as six new justices to the

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188. See Ilaria Di Gioia, *A Tale of Transformation: The Non-Delegation Doctrine Judicial Deference*, 51 U. BALT. L. REV. 155, 159 (2022).

189. See, e.g., *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”).

190. See, e.g., *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (“From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations . . . . None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions ‘power to fill up the details’ by the establishment of administrative rules and regulations.”).

191. See Di Gioia, *supra* note 188, at 156 (arguing that the nondelegation doctrine “has transformed radically over time”); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 65 U. PA. L. REV. 379 (2017) (arguing that the nondelegation doctrine has never stood as a barrier to significant delegations of rulemaking authority).

192. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

193. See Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1733–34 (2019).

194. See, e.g., *Panama Refining Co. v. Ryan*, 293 U.S. 388, 410–11 (1935) (striking a statute giving the president power to limit the transportation of petroleum); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 519 (1935) (striking a statute giving the president authority to regulate unfair competition where the statute failed to define “fair competition”).

195. See *Panama Refining Co.*, 293 U.S. at 433; *A.L.A.*, 295 U.S. at 551.

Court.<sup>196</sup> The Court soon began issuing decisions recognizing the constitutionality of Congress's New Deal delegations. President Roosevelt's court-packing scheme never came close to materializing and the extent to which it may have influenced the Court, if at all, is debated.<sup>197</sup> But since 1935, no congressional grant of power has been overturned as a violation of the nondelegation doctrine.<sup>198</sup> The Court then entered an era where deference to delegations was the norm. While delegation power was not absolute, broad deference was granted to both Congress in its ability to delegate and agencies to interpret and implement those delegations.<sup>199</sup> Today, massive amounts of rulemaking and policy-setting is done outside the confines of the legislative branch. Nevertheless, in recent decades, the Court has moved back toward a narrower interpretation of Congress's power to delegate<sup>200</sup> and there are indications of a willingness to revive the long-dormant nondelegation doctrine.<sup>201</sup>

Constitutional doctrine ebbs and flows as the document remains stagnant. It is worth emphasizing the high degree of ambiguity in this area of law. Delegations of rulemaking are neither expressly allowed nor forbidden by the text of the Constitution. Of course, rigorous adherence to nondelegation doctrine would also seem to comport with Article I, dysfunctional as it might be to create a reality where every single minute rule and regulation was valid only when part

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196. MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR* 280–87 (2002).

197. *See generally id.* (exploring the relationship between the New Deal and federal judiciary with a particular focus on the role of President Roosevelt's court-packing plan).

198. *See* Whittington & Iuliano, *supra* note 191, at 385–86.

199. *See* *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.”); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).

200. *See* *West Virginia v. EPA*, 597 U.S. 697 (2022) (formally adopting the major questions doctrine, which mandates that where the administrative interpretation involves a question of “economic and political significance,” no deference is owed to agency interpretations of ambiguous statutes and, rather, explicit congressional authorization is required); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

201. *See* *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (“Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General. But Justice Alito supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters.”).

of a federal statute.<sup>202</sup> Ultimately, the Court has a free hand to determine the limits, or lack thereof, on the administrative state.

### 3. The Second Amendment

The Second Amendment states, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>203</sup> Controversy surrounding the writing out of the first clause of the sentence—which appears to explain the context in which an unfringeable right to bear arms exists—is well documented.<sup>204</sup>

In *District of Columbia v. Heller*,<sup>205</sup> Justice Antonin Scalia, writing for the majority, dissected the relationship between the first and second portions of the Amendment and found, based on textual reasoning, that the first clause of the Second Amendment did not serve to inform the second.<sup>206</sup> There is a certain perversity to an ardent textualist like Justice Scalia<sup>207</sup> making a textual argument

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202. The subject matter/agency index for regulations created in 2022 is nearly 1,000 pages on its own. See CODE OF FEDERAL REGULATIONS INDEX AND FINDING AIDS, OFFICE OF THE FEDERAL REGISTER (2022).

203. U.S. CONST. amend. II.

204. See, e.g., Paul Finkelman, “A Well Regulated Militia”: *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 226–27 (2000) (“The [framers debating the Second Amendment] never sought to clarify the meaning of the words ‘to keep and bear arms shall not be infringed.’ But, the overwhelming tenor of the debate is that the Congressmen perceived this discussion as concerning only the militia. The [debated but ultimately rejected] last clause, providing an exemption for pacifists, fits with this understanding. Nowhere in the debate is there the slightest hint about a private or individual right to own a weapon.”); Paul Finkelman, *It Really Was About A Well Regulated Militia*, 59 SYRACUSE L. REV. 267, 269 (2008) ([I]f we accept Justice Scalia’s interpretation of the clause, we have to assume that the First Congress put the well regulated militia provision in the Amendment for no good purpose at all. The clause is absolutely unnecessary for Justice Scalia’s individual rights analysis.”); Nicholas A. Serrano, *The Perfect Word: Duty Fulfillment, Service Provision, and the Meaning of ‘Keep’ in the Second Amendment*, 59 GONZ. L. REV. 147, 152 (2024) (“At the time of ratification, everyday men were legally obligated to fulfill a civic duty to participate in the militia and often to equip themselves with the arms necessary to do so. The Second Amendment protected their right to maintain arms in order to fulfill this duty to provide militia service. While it is difficult to imagine a system like this today, the civic duty to serve in the militia was an accepted aspect of American life and, as discussed below, provided a critical backdrop to the Second Amendment’s conceptualization, adoption, and ratification.” (footnotes omitted)).

205. 554 U.S. 570 (2008).

206. See *id.* at 584.

207. See Chase Wathen, *Textualism Today: Scalia’s Legacy and His Lasting Philosophy*, 76 U. MIA. L. REV. 864, 866–67 (2022) (generally discussing the impact of Scalia’s textual philosophy on the Court).

to entirely ignore part of the Constitution's text. There is ample evidence that the drafters of the Bill of Rights were, indeed, chiefly concerned with regulating militias, rather than some unfettered individual right to bear arms.<sup>208</sup>

A perfectly reasonable reading of the Second Amendment would be that a right to bear arms is protected for those who serve in the National Guard or military.<sup>209</sup> Of course, a truly textualist reading would demand limiting the right to bear arms to only those serving in the official well-regulated state militias and working toward the security of a free state. In other words, nobody.<sup>210</sup> It is not unprecedented to essentially render a constitutional amendment a nullity: the Third Amendment's restrictions on quartering soldiers have become a legal relic—something far more relevant at the time the Bill of Rights was drafted.<sup>211</sup> A strictly textualist reading of the Second Amendment would seem, if anything, less forced than one that simply negates the first half of its text.

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208. The dissent in *Heller* offers an analysis of the history of the motivations underlying the Second Amendment and the importance of the militia in the United States during the founding era. Justice John Paul Stevens wrote:

The parallels between the Second Amendment and these state declarations, and the Second Amendment's omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time. Article XIII of Pennsylvania's 1776 Declaration of Rights announced that "the people have a right to bear arms for the defence *of themselves* and the state" . . . § 43 of the Declaration ensured that "[t]he inhabitants of this state shall have the liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed," . . . . And Article XV of the 1777 Vermont Declaration of Rights guaranteed "[t]hat the people have a right to bear arms for the defence *of themselves* and the State." . . . The contrast between those two declarations and the Second Amendment reinforces the clear statement of purpose announced in the Amendment's preamble. It confirms that the Framers' single-minded focus in crafting the constitutional guarantee "to keep and bear Arms" was on military uses of firearms, which they viewed in the context of service in state militias.

*Heller*, 554 U.S. at 636–43 (Stevens, J., dissenting) (internal citations omitted); *see also* THE FEDERALIST NO. 29 (Alexander Hamilton) (arguing for the maintenance of a militia as an alternative to a standing army).

209. *See* Serrano, *supra* note 204, at 152.

210. *See* Jeffrey P. Kaplan, *Unfaithful to Textualism*, 10 GEO. J.L. & PUB. POL'Y 385, 427–28 (2012) ("What *would* a faithfully textualist Court have done in *Heller*? By taking the language of the Amendment seriously, it would have held that the Amendment, by its words, guaranteed the right of the people to keep and bear arms exactly to the extent that a secure free state depends for its security on a well-regulated militia—that is, not at all. Consequently, it would have held that the Amendment posed no bar against governmental regulation of weapons ownership.").

211. *See* U.S. CONST. amend. III.

IV. THE DEMOCRATIC THREAT OF THE CONSTITUTIONAL COMMON LAW: A  
SYSTEM BUILT ON DISINGENUITY

A. *Common Law Problems*

Some of the problems created by the current constitutional order are inextricable from the way common law principles are applied. The following problems—tying rulemaking to resolution of discrete disputes, burying the law in judicial decisions, and the influence of jurist demographics—would, to some extent, persist even with a more functional amendment process.

1. Tying Rulemaking to Discrete Disputes

Tying together rulemaking and adjudication is, of course, *the* hallmark of the common law system—these functions are kept separate in civil law systems.<sup>212</sup> Judges are creating rules within the context of disputes that will be resolved on the basis of the rules created.

It has been more than a century since Justice Benjamin N. Cardozo offered his thoughts on Chief Justice Marshall’s assertion in *Osborne v. Bank of the United States*<sup>213</sup> that judges have “no will in any case. . . . Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law.”<sup>214</sup> Justice Cardozo responded by stating:

It has a lofty sound; it is well and finely said; but it can never be more than partly true. Marshall’s own career is a conspicuous illustration of the fact that the ideal is beyond the reach of human faculties to attain. He gave the Constitution of the United States the impress of his own mind; and the form of our Constitutional law is what it is because he moulded it while it was still plastic and malleable in the fire of his own intense conviction.<sup>215</sup>

Justice Cardozo went on to approvingly quote scholar James Harvey Robinson, stating:

We are constantly misled by our extraordinary faculty of ‘rationalizing’—that is, of devising plausible arguments for accepting

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212. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 23–24 (3d ed., 2007).

213. 22 U.S. 738 (1824).

214. *Id.* at 866.

215. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 169–70 (1921).

what is imposed upon us by the traditions of the group to which we belong. . . . We are abjectly credulous by nature, and instinctively accept the verdicts of the group. We are suggestible not merely when under the spell of an excited mob or a fervent revival, but we are ever and always listening to the still small voice of the herd, and are ever ready to defend and justify its instructions and warnings, and accept them as the mature results of our own reasoning.<sup>216</sup>

The role of the subconscious in human cognition has been long known.<sup>217</sup> The role of implicit bias in decision-making is well-established and there is some evidence that judges may be even more susceptible to it than the average person.<sup>218</sup> Judges will never be anything more than human. Nevertheless, this understanding does not stop justices from confidently asserting that they play only the role of unbiased umpire—calling balls and strikes.<sup>219</sup>

Fourth Amendment<sup>220</sup> cases provide a good example of the problematic nature of tying these functions together. The way courts enforce the Fourth Amendment is by excluding evidence gathered in violation of it from a criminal trial—the American legal system tries to pretend the evidence was never gathered at all.<sup>221</sup> Of course, this means that the issue at the heart of nearly all Fourth Amendment cases is not just whether a certain piece of evidence is admissible, but whether the *key* piece of evidence is admissible. In the vast majority of Fourth Amendment cases, it is understood that the defendant either

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216. *Id.* at 175–76.

217. See Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128–32 (2012).

218. See *id.* at 1173 (discussing the way belief in one’s own objectivity increases susceptibility to implicit bias and influences decision-making, particularly within the context of judges).

219. See *Obergefell v. Hodges*, 576 U.S. 644, 686 (Roberts, C.J., dissenting) (“Petitioners make strong arguments rooted in social policy and considerations of fairness. . . . But this Court is not a legislature. . . . Under the Constitution, judges have power to say what the law is, not what it should be.”). See generally Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. 113 (2010) (assessing the history of the judge-umpire analogy and rejecting its validity).

220. U.S. CONST. amend. IV.

221. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 649 (1961) (“The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction if obtained by government officers through a violation of the Amendment.” (quoting *Olmstead v. United States*, 277 U.S. 438, 462 (1928))).

is, or almost certainly is, guilty.<sup>222</sup> Sometimes, of a truly heinous crime.<sup>223</sup> The question in these cases is whether the piece of evidence that makes this guilt obvious is admissible.<sup>224</sup>

This means the Supreme Court faces the question of whether to let an obviously guilty person walk free. The idea that anyone, even if you believe a good faith effort is being made, could set aside the obvious consequence of the decision is absurd. Depending on the rule the Court sets, a murderer may walk free. The idea that this would not play a role in the decision-making of the individuals that sit on the Court is ludicrous. Over the Court's history, some justices have been worse about this than others. Former Chief Justice William Rehnquist always seemed eager to make any carve out necessary to ensure a purported criminal saw punishment.<sup>225</sup>

And this effect is not limited to cases surrounding criminal procedure. Today it is taken for granted that part of successfully petitioning the Court for a change in the law is finding the right dispute to serve as a vessel.<sup>226</sup> Lawyers have long known the importance of picking the right plaintiff.<sup>227</sup> When the National Association for the Advancement of Colored People (NAACP) was looking to

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222. *See id.* at 654.

223. *See* Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment Search and Seizure Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 991 n.293 (offering examples of the severe nature of the crimes at issue in some Fourth Amendment cases).

224. *See Mapp*, 367 U.S. at 644-65.

225. *See* Craig M. Bradley, *Rehnquist's Fourth Amendment: Be Reasonable*, 82 MISS. L.J. 259, 293 (2013) ("When it came to the Fourth Amendment, the police had no greater friend on the Supreme Court than William Rehnquist. . . . To the extent that personal feelings and experiences underlie a Justice's attitudes about the law, the prospect of being stopped or searched by police would not seem to be a personal concern of Rehnquist's. Nor does he empathize with those people for whom it is a more realistic possibility.").

226. *See* Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136 (2015) ("A well-selected plaintiff can provide a concrete context for abstract legal concepts and personalize the stakes. . . . As a former litigator for juvenile justice and education reform, I know well that the selection of plaintiffs is one of the most significant decisions a cause lawyer can make. The plaintiffs must be amenable to the spotlight and both sympathetic and relatable to the average person.").

227. *See generally id.* ("As a former litigator for juvenile justice and education reform, I know well that the selection of plaintiffs is one of the most significant decisions a cause lawyer can make. The plaintiffs must be amenable to the spotlight and both sympathetic and relatable to the average person. Lawyers have historically denied that they cherry-pick appealing plaintiffs, perpetuating the myth that cases arrive at the Supreme Court by chance. Although some of the *Obergefell* attorneys framed the case as 'happening totally by accident,' other accounts confirm that they selected and groomed their plaintiffs with great care." (footnotes omitted)).

strike the separate-but-equal doctrine of *Plessy v. Ferguson*,<sup>228</sup> it wisely targeted the inherent unfairness of education, a strategic choice that led to a focus on the harm to particularly sympathetic plaintiffs: children.<sup>229</sup> The Court took notice when it acknowledged the spiral of harm that segregation can have on children of color: “To separate [children] . . . from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>230</sup>

While this Note certainly argues it is disingenuous to assert that these factors play no role in decision-making, the problem, ultimately, is a system that insists judges be more than human. It asks judges to set aside their humanity in order to both create constitutional rules while also deciding the outcome of these disputes. It cannot be done. It appears that no branch of government is so self-obsessed as the judiciary and perhaps this is why—the awareness of the impossible nature of its task. It is asked to serve two masters who cannot both be satisfied. To focus on the correct resolution of the dispute at hand naturally leads to putting rulemaking in the backseat. And a focus on the creation of a generally applicable rule can come at the cost of seeing the nuances of the dispute at hand. In an interview conducted not long after his retirement from the Seventh Circuit, Judge Richard A. Posner acknowledged the difficulty in satisfying both duties, saying, “I pay very little attention to legal rules, statutes, constitutional provisions, [a] case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?”<sup>231</sup>

The next problem emerges as a result of the form that the rules take.

## 2. Burying the Law in Judicial Decisions

Imagine if each individual statute passed by a legislature were fifty pages long with the sentence-or-two-long rule buried somewhere toward end, mixed up in not just justifications for the statute, but discussion of past statutes and tangents on the role of the legislature. Now imagine that the legislature often did not actually explicitly say which part of the statute was the actual rule and which parts, though resembling a rule, were not legally binding. Now imagine that every member of the legislature that disagreed with or did not entirely support

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228. 163 U.S. 537 (1896).

229. See *Brown v. Board of Education: The Case that Changed America*, LEGAL DEF. FUND, <https://www.naacpldf.org/brown-vs-board/> (last visited Mar. 19, 2024).

230. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

231. Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html>.



the lengthy statute got to include in that statute the reason they disagreed and what they thought the statute should actually be. And future legislators would then view that as, to at least some extent, a valid basis for passing a statute in the future.

The analogy is obvious, but it is often overlooked what a dysfunctional system for rulemaking the common law—and especially American common law—presents. Hiding many of the rules of society deep within judicial opinions has a few implications.

It can be taken for granted that it is normal to learn how to practice law by reading judicial opinions, but putting so many rules in a dense opinion means the law is deeply inaccessible to a lay person.<sup>232</sup> It is noteworthy just how much of the U.S. legal education process revolves around not just learning to interpret the law, but learning to figure out what it even is. This is a huge democratic problem. And as the law becomes more inaccessible, lawyers become more needed and their work, more opaque.<sup>233</sup> In the American system, lawyers maintain a monopoly on understanding of the law, benefitting from the confusion.<sup>234</sup> After all, the product lawyers sell is their technical expertise.<sup>235</sup>

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232. See James R. Maxeiner, *A Government of Laws Not of Precedents 1776-1876: The Google Challenge to Common Law Myth*, 4 BRIT. J. AM. LEGAL STUD. 137 (2015); see also *id.* at 140 (“Only naïve laypersons believe that law is a system of rules in a rulebook, or so advocates of contemporary common law profess.”); *Id.* at 195 (“For statutes to govern, Professor Charles Warren rightly wrote, they must be accessible ‘for the benefit of laymen as well as lawyers.’ There he saw one of the great benefits of codes and revisions: laymen can read and apply the law themselves without lawyers.”); *Id.* at 248 (“Systematized written laws are the norm worldwide. They are the world’s best practices. Systematizing is not unusual: it is ordinary, albeit difficult. Professors of contemporary common law myth avert their eyes from that inconvenient truth. They would have Americans believe that whatever may be the role of written laws abroad, in the United States unwritten judge-made law is and always has been the American way. Whatever advantage codes may bring to other countries’ legal systems, somehow those advantages don’t apply in the United States.”); Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 664 (2022) (“When courts construe statutes based on inaccessible, background legal doctrines that only lawyers and judges are familiar with, they engage in the functional equivalent of posting statutes high up on pillars, beyond the reach (or understanding) of ordinary citizens.”).

233. See BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 260–61 (2011) (“Robert Kagan has collected and digested various empirical studies that show American law to be unusually expensive, expansive, complex, and uncertain. . . . In short, American law is especially prone to complexity, more pervasive in more areas of our lives, and more suffused with uncertainty.”).

234. *Id.* at 260 (“[O]ne major reason for [American law being unnecessarily complex] is that complexity behooves two of the main players in the system – judges and lawyers.”).

235. *Id.* at 269.

And, of course, before American judges are judges, they are almost always lawyers.<sup>236</sup> It is taken for granted that this should be the case. As mentioned, even the framers believed the complexity of adjudication would require significant specialized training.<sup>237</sup> But many countries involve lay judges in their legal process.<sup>238</sup> Civil law countries train lawyers and judges separately,<sup>239</sup> an acknowledgment of the extraordinarily different roles they play in the legal system.

This complexity is one of the primary sources of dissatisfaction with the U.S. legal system.<sup>240</sup> It is designed to be inaccessible. And while this does not all come from the common law, the complexity and opaqueness inherent to it are the foundation of this problem and entrench the power of those who benefit from the current arrangement.

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236. Notably, the Constitution does not require Supreme Court justices to have attended a law degree or practice as a lawyer, they just must be trained in the law. *FAQs - General Information*, SUP. CT. OF THE U.S., [https://www.supremecourt.gov/about/faq\\_general.aspx](https://www.supremecourt.gov/about/faq_general.aspx) (last visited April 22, 2024). Likewise, “members of Congress, who typically recommend potential nominees, and the Department of Justice, which reviews nominees’ qualifications, have developed their own informal criteria,” to assess federal judge nominees. *FAQs: Federal Judges*, U.S. CTS., <https://www.uscourts.gov/faqs-federal-judges#faq-What-are-the-qualifications-for-becoming-a-federal-judge?> (last visited April 22, 2024). Outside of federal court, only twenty-eight states require all judges presiding over misdemeanor cases to have been lawyers. Matt Ford, *When Your Judges Isn’t a Lawyer*, THE ATLANTIC (Feb. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/02/when-your-judge-isnt-a-lawyer/515568/>.

237. See THE FEDERALIST NO. 78 (Alexander Hamilton) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges.”).

238. BARTON, *supra* note 233, at 294 (noting several countries that utilize lay judges including countries like Austria, France, Italy, Sweden, Cuba, and Japan).

239. See *id.* at 295 (“The training and selection of judges is a key distinction between civil law and common law systems. Civil law judges are educated and apprenticed as judges, not lawyers, and usually serve that role throughout their career. . . . The fact that so many countries select and train judges differently and still have functioning rules of law suggests that the common law lawyer-judge model is not the only route to success.”).

240. *Id.* at 261 (“The opacity of the legal system, much of which is a result of the natural indeterminacy that comes from complexity, is a main source of public distrust and unhappiness with the legal system.”).

### 3. Justice Demographics and Backgrounds

Even as he expressed approval for the idea that judges should attempt to act with an eye toward modern sensibilities, Judge Cardozo stated:

The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.<sup>241</sup>

Throughout its history, the U.S. Supreme Court has been overwhelmingly old, White, male, Christian, and wealthy.<sup>242</sup> While today's Court reflects a diversity that is closer to an accurate reflection of modern America,<sup>243</sup> because of the high degree of deference given to precedent in a common law system, the opinions of all justices who have sat on the bench remain relevant. And of the 116 justices throughout U.S. history, only six have been women, four non-White, and none are known to have been LGBTQ+.<sup>244</sup> The vast majority obtained their education from elite universities and have been financially well-off.<sup>245</sup> When judges turn to precedent, they are not turning to a body of law that was created by a population that is representative of modern America. Consequently, privilege-cloaked interpretations tether the United States to the power disparities present throughout the country's history.<sup>246</sup>

#### *B. The Interplay of Common Law Principles and American Institutions: A Crisis for Democracy*

The problems specific to the common law are significant even without accounting for the unique way they interact with U.S. institutions. But once this is accounted for, it creates the crisis for democracy the nation now faces: a system defined by countermajoritarian institutions and infused with disingenuity.

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241. CARDOZO, *supra* note 215, at 174–75.

242. See Rachel Wilson & Brandon Griggs, *Of the 116 Supreme Court Justices in US History, All But 8 Have Been White Men*, CNN (Feb. 4, 2024, 9:00 AM), <https://www.cnn.com/politics/supreme-court-justices-dg/index.html#:~:text=Since%20the%20Supreme%20Court%20first,have%20been%20women%20or%20minoritie>.

243. *Id.*

244. *Id.*

245. See SUSAN NAVARRO SMELCER, CONG. RSCH. SERV., R40802, SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789-2010, at 30–32 (2010).

246. See Baum & Devins, *supra* note 132, at 1516.

### 1. The Undemocratic Nature of Judicial Law

Everything set out thus far demonstrates the way sole control of the nation's foundational charter lies in the hands of the least democratic branch of government. The obvious retort to this idea is that federal judges are still subject to democracy through appointment by the president and confirmation by the Senate.<sup>247</sup> This is true, and it might be a fair retort if the presidency and Senate were true vehicles for representative democracy. But they are not. While this Note does not specifically cover the democratic flaws of the other branches, it is necessary to discuss the way those flaws become exacerbated in the judiciary—one additional step removed from voters.

Of the twenty-one justices who have been confirmed since Richard Nixon was elected to his first term as U.S. president in 1968, only five were appointed by Democrats.<sup>248</sup> At first glance, this lines up reasonably well with presidential election results. Democrats have won the White House in only six of the fourteen elections that took place during that time.<sup>249</sup> But it is important to recognize that Democratic candidates have won the popular vote eight times.<sup>250</sup> And while former President George W. Bush made no appointments in his first term when he lost the popular vote to Al Gore, former President Donald Trump had three justices confirmed in his single term after losing the popular vote to Hillary Clinton.<sup>251</sup> If the presidential election was determined based on popular vote, Hillary Clinton likely would have been able to fill the seats of at least Justices Scalia and Ruth Bader Ginsburg, and possibly that of Justice Anthony Kennedy depending on whether he still retired.<sup>252</sup> Which leads to the less democratic of the two institutions involved in the appointment process: the Senate.

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

248. See *Justices 1789 to Present*, SUP. CT. THE OF U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) (last visited Mar. 21, 2024) [hereinafter *Justices 1789 to Present*]; see also *United States Presidential Election Results*, BRITANNICA, <https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863> (last updated Aug. 27, 2023) [hereinafter *U.S. Presidential Election Results*].

249. See *U.S. Presidential Election Results*, *supra* note 248.

250. See Alvin Chang, *Trump Will Be the 4th President to Win the Electoral College After Getting Fewer Votes than His Opponent*, VOX (Dec. 19, 2016, 1:37 PM), <https://www.vox.com/policy-and-politics/2016/11/9/13572112/trump-popular-vote-loss>.

251. See *Justices 1789 to Present*, *supra* note 248.

252. See Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>; Linda Greenhouse, *Ruth Bader Ginsberg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html>; Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-re>

The Senate, of course, confirms presidential appointments with a straight up-or-down vote.<sup>253</sup> Allocating two senators to each state, it dramatically overweights the voice of those from small states. If one assumes each senator represents half a state's population, senators from the most populous state, California, each represent just shy of 20 million people while the senators from the least populous state, Wyoming, represent less than 300,000 individuals.<sup>254</sup> This means that for judicial confirmations, the opinion of one Wyomingite is equivalent to roughly sixty-eight Californians. To put this in context, if each of the hundred senators represented an equal 1% of the population (including the currently unrepresented District of Columbia, but no territories), they would each represent roughly 3.3 million people. Right now, in theory, a senate majority could represent as little as 16.8% of the U.S. population.<sup>255</sup> California alone is bigger than the combined populations of the twenty-one least-populous states, which combine for forty-two senators to California's two.<sup>256</sup> In today's evenly split Senate, Republican senators represent 43.5% of the population while Democrats represent 56.5%.<sup>257</sup>

The democratic failings of these branches are troubling in their own right, but they become exacerbated on the Court because of lifetime appointment for justices.<sup>258</sup> And this problem has become more significant as appointed justices get younger and the average age of retirement grows older.<sup>259</sup> Over the course of American history, the average justice's tenure has been roughly fifteen years, a

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tire-supreme-court.html#:~:text=The%20Times's%20Supreme%20Court%20correspondent,his%20championship%20of%20gay%20rights.

253. See U.S. CONST. art. II, § 2, cl. 2. As of 2017, Supreme Court appointments may no longer be filibustered, a tactic that effectively required a sixty-vote majority for Senate confirmation. See Lawrence Hurley & Andrew Chung, *With 'Nuclear Option,' Senate Ends Democratic Blockade of Trump Court Pick*, REUTERS (April 6, 2017, 1:50 PM), <https://www.reuters.com/article/us-usa-court-gorsuch-idUSKBN17814Y/>.

254. See U.S. CENSUS BUREAU, 2020, *supra* note 78.

255. Based on the populations of the twenty-sixth through fiftieth most populous states, plus half the population of the twenty-fifth most populous state for the fifty-first seat. See *id.*

256. Al From, *The Challenge to Democracy—Overcoming the Small State Bias*, BROOKINGS (July 6, 2022), <https://www.brookings.edu/articles/the-challenge-to-democracy-overcoming-the-small-state-bias/>.

257. *Id.*

258. See LARRY J. SABATO, A MORE PERFECT CONSTITUTION 113 (2007) (“The insularity produced by lifetime tenure, combined with the youthful appointment and long service, often means that senior judges represent the views and outlooks of past generations better than the current day.”).

259. Kristen Bialik & John Gramlich, *Younger Supreme Court Appointees Stay on the Bench Longer, But There are Plenty of Exceptions*, PEW RSCH. CTR. (Feb. 8, 2017), <https://www.pewresearch.org/short-reads/2017/02/08/younger-supreme-court-appointees-stay-on-the-bench-longer-but-there-are-plenty-of-exceptions/>.

number that remained relatively steady until the mid-twentieth century; today it is closer to twenty-six.<sup>260</sup> This ballooning of the average tenure of justices has moved them even further away from electoral accountability by increasing the amount of time that passes since they were appointed and confirmed by an elected body.<sup>261</sup>

The U.S. system's flouting of proportionate representation does not simply lead to compromise candidates.<sup>262</sup> It is well settled that federal jurors are becoming more polarized.<sup>263</sup> And as the country trends toward polarization in its explicitly political arenas, the Supreme Court has increasingly been seen as a viable vehicle for implementing policy.<sup>264</sup> There was a period in the mid-twentieth century where justices were being confirmed by the Senate with bipartisan support.<sup>265</sup> But those days are gone. The increasingly partisan nature of the federal judiciary is well-documented,<sup>266</sup> as is the increased role of partisan organizations in shaping the ideological makeup of the Court.<sup>267</sup>

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260. David Ingold, Cedric Sam & Mira Rojanasakul, *Biden Nominee Jackson Could Serve for Decades with a Conservative Supreme Court Majority*, BLOOMBERG, <https://www.bloomberg.com/graphics/2022-supreme-court-justice-stephen-breyer-retirement/#xj4y7vzkg> (last updated Feb. 5, 2022); Alicia Bannon & Michael Milov-Cordoba, *Supreme Court Term Limits*, BRENNAN CTR. FOR JUST. (June 20, 2023), <https://www.brennancenter.org/our-work/policy-solutions/supreme-court-term-limits>.

261. See Bannon & Milov-Cordoba, *supra* note 260.

262. See generally Drew DeSilver, *The Polarization in Today's Congress Has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/> (“It’s become commonplace among observers of U.S. politics to decry partisan polarization in Congress. Indeed, a Pew Research Center analysis finds that, on average, Democrats and Republicans are farther apart ideologically today than at any time in the past 50 years. But the dynamics behind today’s congressional polarization have been long in the making.”).

263. See ADAM BONICA & MAYA SEN, *THE JUDICIAL TUG OF WAR* 258 (2021) (offering empirical evidence of an increasing ideological divide in federal judges based on the party of the president that appointed them).

264. See MCKEEVER, *supra* note 38, at 20–22 (explaining that due to increasing attempts to legislate through the court, “the legal bureaucracy of both Congress and the presidency has become highly politicized,” leading to “regularized confrontations between Congress and the President,” legislation “deliberately left vague,” and Congress refraining from “pronouncing on certain issues at all”).

265. See *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited Mar. 21, 2023).

266. See BONICA & SEN, *supra* note 263, at 258.

267. See generally AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* 4 (2015) (“[N]ot only did it take advantage of these critical junctures in constitutional jurisprudence by providing intellectual capital to decision-makers when they were ready to revise or reconstruct

Both parties have increasingly come to rely on the Court to do the work of legislating for them.<sup>268</sup> As frequent bifurcated control of the executive and legislative branches has, in recent decades, thwarted attempts to legislate, both branches have turned to the Court to implement their will and litigation has become a tool frequently used to advance policy.<sup>269</sup> Additionally, legislation is left increasingly vague out of necessity, inviting others to fill in the gaps,<sup>270</sup> while the modern Court has concentrated this gap-filling power exclusively within itself.<sup>271</sup> The fact that the legislature is actively choosing to abdicate its traditional function does nothing to make its decision more democratic and it seems conceivable that Congress would better fulfill its obligations without the availability of judicial recourse.<sup>272</sup>

As the Court is increasingly treated as an alternative avenue for setting policy, the entire process has moved even further from current voters as legal gamesmanship becomes increasingly important. In 2015, senators at odds with the political designs of then President Barack Obama engaged in chicanery by holding a seat open for a year to see if their party would win the next presidential election.<sup>273</sup> It was all constitutional—the document only states that the Senate must approve of the presidential appointment, not *when* it must do so.<sup>274</sup> The framers did not intend the Court to be so thoroughly detached from democratic

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constitutional frameworks, this network also actively worked to bring about those critical junctures in the first place.”).

268. See MCKEEVER, *supra* note 38, at 21 (“[T]he new ‘dealignment’ or ‘bifurcated’ politics, in which Congress and presidency are controlled by different parties, has made legislative action more difficult. The result has been that both Congress and presidency have sought to draw the federal judiciary into their own political struggle: ‘An activist judiciary and a dealigned electoral system heighten the value of litigation and law enforcement as policy instruments.’”).

269. *Id.*

270. *Id.* at 21–22.

271. *West Virginia v. EPA*, 597 U.S. 697, 784 (2022) (Kagan, J., dissenting) (“The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening.”); see MCKEEVER, *supra* note 38, at 22–23 (“Because of changes in the political system and political environment in which it operates, the Court has acquired a greater autonomy than it has ever had before; and it has responded to those changes by instituting modifications in judicial procedures that help reinforce its increased independence in policy making. Many Court observers believe that these developments have become institutionalized and, therefore, are unlikely to be reversed in the foreseeable future.”).

272. See MCKEEVER, *supra* note 38, at 21–22.

273. See BONICA & SEN, *supra* note 263, at 1–4.

274. See U.S. CONST. art. II, § 2, cl. 2.

outcomes—they recognized the dangers of fully untethering one branch of government from the electoral process.<sup>275</sup>

And an untethering of the Court from public opinion is precisely what has happened:

One study found a substantial time lag between shifts in the public mood and shifts in the Court’s mix of decisions, a lag that raises questions about the direct impact of the public . . . . The estimated effects of public opinion on the Court, although statistically significant, are not necessarily very large.<sup>276</sup>

This is particularly dangerous because as the Court has become increasingly distant from electoral checks, it has, through its actions, leaned further into its status as a political actor, all the while, denying it plays any political role whatsoever.

## 2. A System Built on Disingenuity

In 1986, political science professor Christopher Wolfe wrote:

The first decisive steps in the rise of judge-made law were made by justices who staunchly denied that they were doing anything different from what courts had done in America all along, or that they were doing anything other than enforcing and protecting the Constitution. While they had departed from the practice of the traditional era, the justices of this transitional era clung firmly to its theory, its understanding of the nature of judicial review.<sup>277</sup>

It may be argued that this changed briefly during the U.S. Supreme Court’s Warren era.<sup>278</sup> But if it did, the trend has thoroughly reversed itself. The modern Court is in many ways defined by its refusal to acknowledge the astonishing power it wields. It insists desperately that it merely calls balls and strikes. This is a particular hobbyhorse of Chief Justice John Roberts, who said in his Senate

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275. See THE FEDERALIST NO. 51 (James Madison) (“The first method [of protecting against tyranny of the majority] prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties.”).

276. Baum & Devins, *supra* note 132, at 1561.

277. WOLFE, *supra* note 35, at 5–6.

278. See generally GEOFFREY R. STONE & DAVID A. STRAUSS, DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT (2020) (exploring the radical changes to constitutional law that occurred under the Warren Court).



confirmation hearing, “[I]t’s my job to call balls and strikes, and not to pitch or bat.”<sup>279</sup> Roberts in particular is worth focusing on because, as Chief Justice, he gets to decide who writes the opinion of the side he votes with.<sup>280</sup> And Chief Justice Roberts nearly always votes with the majority. The rates at which he voted with the majority in recent terms were 97% in 2019,<sup>281</sup> 94% in 2020, 95% in 2021, and 95% in 2022.<sup>282</sup> And this is not just a recent trend. In his first fourteen years on the Court, he voted with the majority 88% of the time.<sup>283</sup> Even before considering the Court’s recent textualist drift in the ideology of sitting justices,<sup>284</sup> it should not be surprising that decisions made on the basis of a theoretical return to textual traditionalism have become the norm when the man who embodies the Court insists that he has no moral agency in the system where he wields such incredible power.

The reality is that even when sticking to the strict text, there is massive flexibility in constitutional interpretation. For example, many of the substantive due process rights simply come down to framing. Whether or not a right is “fundamental,” i.e., one that is a part of the “liberty” guaranteed by the Due Process Clause,<sup>285</sup> is generally determined based on the “history and tradition” of acknowledging the purported right in the United States.<sup>286</sup> In *Loving*,<sup>287</sup> the Court struck down an interracial marriage ban, holding that the right to marry was fundamental and guaranteed by the Due Process Clause.<sup>288</sup> The reason the framing is critical is that it would have been much harder to argue in 1967 that there was a “history and tradition” in the United States indicating a right to *interracial* marriage so fundamental as to be guaranteed by the Constitution. This issue came up again in *Obergefell*.<sup>289</sup> There, the majority struck a statute banning gay marriage under the same logic—the Constitution guarantees a right to

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279. Meghan Dalton, *Calling Balls and Strikes? Chief Justice Roberts in October Term 2019*, 97 NOTRE DAME L. REV. 1327, 1328 (2022).

280. *Id.* at 1329–30.

281. *Id.* at 1329.

282. Adam Feldman, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2023), <https://empiricalscotus.com/2023/06/30/another-one-bites-2022/>.

283. Dalton, *supra* note 279, at 1329.

284. See Wathen, *supra* note 207, at 866–67.

285. See U.S. CONST. amends. V, XIV.

286. *E.g.*, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 237 (2022) (“In deciding whether a right falls into either of these categories, the Court has long asked whether the right is ‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’” (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019))).

287. *Loving v. Virginia*, 388 U.S. 1 (1967).

288. *Id.* at 12.

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

marriage.<sup>290</sup> Predictably, the dissents focused on the idea that marriage was not the right at issue.<sup>291</sup> Rather, it was gay marriage specifically, of which there was no history or tradition indicating a fundamental right.<sup>292</sup> The dissenters were, of course, insistent that this was not a moral judgment—it simply was not their call to make.<sup>293</sup>

Ultimately, the U.S. Constitution is vague enough that it can mean whatever the justices want it to mean.<sup>294</sup> It is challenging to stomach the idea that these individuals who have been educated in the world’s most elite law schools<sup>295</sup>—schools that prepare students for a career not of judging legal arguments, but *making* them—don’t see that they are passing moral judgment and disguising it as legal judgment. So why is there a baked-in assumption in the U.S. legal system

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290. *Id.* at 664–65 (“This Court’s cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond.”).

291. See Veronica C. Abreu, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the “Deeply Rooted” Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment’s Due Process Clause*, 44 B.C. L. REV. 177, 201–04 (2002) (“The U.S. Supreme Court’s substantive due process jurisprudence demonstrates that the ‘deeply rooted’ test is often flexibly implemented depending on the specific rights at stake. The Court often finds a right’s deep roots by focusing on selective parts of an inconsistent historical record, or by drawing upon our societal evolving conscience.”).

292. See *Obergefell*, 576 U.S. at 700 (Roberts, C.J., dissenting) (“[T]he ‘right to marry’ cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process.”); *id.* at 718 (Scalia, J., dissenting) (“[Members of the majority] have discovered in the Fourteenth Amendment a ‘fundamental right’ overlooked by every person alive at the time of ratification, and almost everyone else in the time since.”); *id.* at 738 (Alito, J., dissenting) (“For today’s majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition.”).

293. See *id.* at 686 (Roberts, C.J., dissenting) (“Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal. . . . But this Court is not a legislature.”); *id.* at 713 (Scalia, J., dissenting) (“[I]t is not of special importance to me what the law says about marriage.”).

294. See *supra* Section III.C.2.

295. Ilana Kowarski, *Where Supreme Court Justices Earned Law Degrees*, U.S. NEWS & WORLD RPT. (Apr. 7, 2022, 4:00 PM), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/where-supreme-court-justices-earned-law-degrees>; *2023-2024 Best Law Schools*, U.S. NEWS & WORLD RPT., [https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?\\_sort=my\\_rankings-asc](https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?_sort=my_rankings-asc) (last visited Feb. 10, 2024).

that the Court is populated by good faith actors? It is not something assumed for most political operatives.<sup>296</sup>

In fact, many of the cases that have aged well have mostly eschewed traditional constitutional analysis and focused on the policy implications of the decision—*Obergefell*,<sup>297</sup> *Brown*,<sup>298</sup> and *Plyler v. Doe*<sup>299</sup> are all conscientious decisions where the Court appeared to embrace that it was, ultimately, making a moral judgment and setting a policy that would have staggering effects on the lives of individuals. Part of the reason this is important is that without embracing

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296. There is significant debate about whether the Court should be politicized. Implicit in this debate is the idea that justices are seen differently than any other figure with significant control over policy, i.e., politicians, in our government. See, e.g., Robert Alleman & Jason Mazzone, *The Case for Returning Politicians to the Supreme Court*, 61 HASTINGS L.J. 1353 (2010) (explaining that through most of American history politicians were frequently members of the Supreme Court, arguing in favor of a return to that norm, and arguing against the modern, bureaucratic version of the Court); see also Rachel Reed, *Politics, the Court, and 'the Dangerous Place We Find Ourselves in Right Now'*, HARV. L. TODAY (Sept. 21, 2022), <https://hls.harvard.edu/today/politics-the-court-and-the-dangerous-place-we-find-ourselves-in-right-now/> (featuring highlights from a panel of scholars debating the relationship between politics and the Supreme Court).

297. See *Obergefell*, 576 U.S. at 672 (“But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.”).

298. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.” (alterations in original)).

299. See *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (“Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.”). *But see id.* at 242 (Burger, C.J., dissenting) (“Were it our business to set the Nation’s social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language. However, the Constitution does not constitute us as ‘Platonic Guardians’ nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, ‘wisdom,’ or ‘common sense.’” (footnote omitted) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978))).

the moral aspect of their role, justices—conservative ones in particular—can assert that they are bound by the inherently conservative principles of a common law system.<sup>300</sup> American common law, ultimately, is a system deeply resistant to progress. It is inherently backward looking; even those who see it as a system that evolves acknowledge that this evolution is gradual.<sup>301</sup> And the modern tyranny of stare decisis stands in defiance of those that acknowledge principles of progress inherent to the common law. Any decision where an interpretive change is made can be argued against as a violation of precedent.<sup>302</sup> Any decision where the status quo is maintained can be justified on the same grounds. The modern Court is simply leaning into a conservative bias that is already present.

But it is important to note that this trend toward conservatism is not a movement to traditional conservatism. It is a move toward modern conservatism under the guise of textualism and originalism. Textualism is, of course, merely disguised originalism.<sup>303</sup> Textualism without originalism is nothing, for it demands acknowledgment that nowhere in the Constitution is the Court granted the power of judicial review. But, as this Note has now set out, the originalist principles upon which courts rely are merely disguised moral judgments. The

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300. Erin P. Hennes & Layla Dang, *The Devil We Know: Legal Precedent and the Preservation of Injustice*, 8 POL’Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 76, 79 (2021) (“Perhaps nowhere is the ‘system’ more salient, and status quo biases higher, than in the courtroom. Flags and seals of the jurisdiction hang from the walls, the hierarchy of judge, jury, and defendant are clear, rules are strictly adhered to, and historical references are commonly invoked. It follows that individuals would be motivated to defend existing legal arrangements and adhere to norms and rules. While such deference generally protects judicial legitimacy, psychological biases may lead precedential rhetoric to facilitate the perpetuation of injustice.”).

301. See CARDOZO, *supra* note 215, at 150–52.

302. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 387 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (“As a matter of constitutional substance, the majority’s opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command.”).

303. See Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825, 827–28 (2022) (“[O]riginal public meaning originalism is concerned not with what the authors, drafters, framers, or ratifiers intended, but with the meanings at the time of what they *said*. Both original meaning originalists and original intent originalists purport to be, and are typically labeled as, textualists. Because living constitutionalism is understood as taking the actual text of the document less seriously, one or another variety of originalism is considered to be, at least by its adherents, the approach most faithful to the idea of having a canonical written constitution. Commitment to the text is consequently assumed to entail a commitment to some form of originalism.”).

reality is that the founders held myriad views. This is one of the reasons so much of the Constitution is vague—it was all the framers could agree to.<sup>304</sup> It would not even be hard to find an originalist justification for abandoning originalism: Hamilton explicitly expressed a preference for a flexible method of interpretation.<sup>305</sup> One might imagine Hamilton’s position would carry more weight given the biblical role the Federalist Papers have come to occupy in constitutional interpretation—he wrote nearly two-thirds of them.<sup>306</sup>

Even if one is not convinced that they pick and choose the history they rely on, judges are poor historians.<sup>307</sup> This point is key: the Court is not moving back to the more traditional role it used to occupy—it is dramatically concentrating

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304. See KOWAL & CODRINGTON, *supra* note 2, at 15 (“[T]he Constitution they constructed was the product of compromises that left none of the delegates completely satisfied.”); THE FEDERALIST NO. 85 (Alexander Hamilton) (“I never expect to see a perfect work from imperfect man. The result of the deliberations of all collective bodies must necessarily be a compound, as well of the errors and prejudices, as of the good sense and wisdom, of the individuals of whom they are composed. The compacts which are to embrace thirteen distinct States in a common bond of amity and union, must as necessarily be a compromise of as many dissimilar interests and inclinations. How can perfection spring from such materials?”).

305. Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States*, in 3 THE WORKS OF ALEXANDER HAMILTON 445, 456–57 (Henry Cabot Lodge ed., 1904) (“The moment the literal meaning is departed from, there is a chance of error and abuse. And yet an adherence to the letter of its powers would at once arrest the motions of government. It is not only agreed, on all hands, that the exercise of constructive powers is indispensable, but every act which has been passed is more or less an exemplification of it.”); Charles Grove Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, in JUDICIAL REVIEW IN AMERICAN HISTORY 316, 316 (Kermit L. Hall, ed., 1987) (“Once drafted and formally enacted, . . . it was Jefferson’s view that the constitution’s terms and conditions should be strictly and literally followed until necessary and desirable changes could be secured through amendments. Hamilton, on the other hand, who would have preferred to have government operate without written restrictions, when called upon to interpret such restrictions favored a loose or latitudinarian interpretation of national authority to be attained in large part through a doctrine of implied or resulting powers.”).

306. See FREDERICK MOSTELLER & DAVID L. WALLACE, APPLIED BAYESIAN AND CLASSICAL INFERENCE: THE CASE OF THE FEDERALIST PAPERS 2–3 (2d ed., 1984). It is known with certainty that Hamilton wrote fifty-one of the eighty-five Federalist Papers. *Id.* There are also three papers credited to “Hamilton and Madison” and twelve where authorship is disputed between the two. *Id.* at 3. A statistical analysis of word usage revealed that it is not only highly likely that Madison wrote all twelve papers of disputed authorship, *id.* at 263, but also that he was the primary author for at least two of the three coauthored papers. *Id.* at 263–64. But even without crediting Hamilton with authorship for any of these fifteen, it is still known he still wrote 60% of them. See *id.* at 2–3.

307. See generally Armand Derfner, *Why Do We Let Judges Say Anything About History When We Know They’ll Get It Wrong?*, 27 PUB. HISTORIAN 9 (2005) (arguing that judges do a poor job of assessing historic evidence and the need for greater involvement of professional historians where historic questions are legally relevant).

power while it fervently asserts it is doing the opposite. The irony of originalism is the incredible freedom it grants its acolytes as it disguises their moral decision-making as adherence to neutral principles. As legal scholar David Strauss stated, “A judge who conscientiously tries to follow precedent is significantly limited in what she can do. But a judge who acknowledges only the text of the Constitution as a limit can, so to speak, go to town.”<sup>308</sup> Again, why does society treat the Court as though it is populated by good faith actors? Why does society shield them from the incredible moral responsibility they bear? Charles Haines, a scholar of American constitutional history, summed up well what is happening:

In reality, the rigid limitations which the Court interprets and applies in order to rebuke sternly the legislative and executive departments, are largely judge-made limitations read into the Constitution by justices who looked with disfavor upon the tendencies toward governmental paternalism and had little respect for popular government as carried out through representatives and executives elected by the people.<sup>309</sup>

And it can border on absurdity. In his concurrence in *Dobbs v. Jackson Women’s Health Organization*,<sup>310</sup> Justice Brett Kavanaugh spent several paragraphs setting out the extraordinary moral implications of the Court’s decision before stating, “The issue before this Court, however, is not the policy or morality of abortion.”<sup>311</sup> Of course it was! One would think he would see that when he had just taken the time to make clear the ways this was the case.<sup>312</sup>

It can be hard not to be nonplussed. Regardless of the obvious social and economic advantages many sitting on the Court have enjoyed throughout their lives, these are exceptionally intelligent people. The bar for attending the Ivy League law schools that nearly all of them have is incredibly high.<sup>313</sup> Which is

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308. Strauss, *supra* note 120, at 926.

309. See Haines, *supra* note 305, at 333.

310. 597 U.S. 215 (2022).

311. See *id.* at 336 (Kavanaugh, J., concurring).

312. See *id.* at 337 (“Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.”).

313. See *2023-2024 Best Law Schools*, U.S. NEWS & WORLD RPT., [https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?sort=my\\_rankings-asc](https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?sort=my_rankings-asc) (last visited Mar. 21, 2024); *Top Law Schools – Rankings, Acceptance Rates, LSAT & GPA*, 7SAGE, <https://7sage.com/top-law-school-admissions/> (last visited Mar. 21, 2024). Justice Amy Coney Barrett is the lone Justice who did not attend either Harvard or Yale law schools, having obtained her J.D. from Notre Dame. See Kowarski, *supra* note 295. It should be observed that while the bar for admissions is undeniably high, there are deeply unmeritocratic aspects that also factor in based on the perpetuation of systemic privilege. See Aatish Bhatia, Claire Cain

why it is challenging to take them at their word when they say they are merely returning to a more traditional view of the Constitution. There is a certain twisted irony to the fact that, while espousing that the meaning of the Constitution should not change, justices are changing the meaning of the Constitution to something that is neither what it was originally nor what it had become.<sup>314</sup> It is incredibly hard to believe that the justices are not aware that they are taking moral positions that radically alter the policy of this nation.

For U.S. institutions to persist, at a minimum, the Court must face what it has become: a countermajoritarian institution that maintains sole control of this democracy's highest body of law while shirking the responsibilities that come with that awesome power. Therein lies the crisis at the heart of the issue. How long can a democracy remain a democracy when it brazenly forsakes majority rule, but cannot admit it?

#### V. A CONSTITUTIONAL CRISIS: ALTERNATIVES TO THE CURRENT SYSTEM AND THEIR PROSPECTS

It could be argued it is improper to term this a constitutional crisis. Professor Jack Balkin offered this definition: "A constitutional crisis occurs when there is a serious danger that the Constitution is about to fail at its central task. The central task of constitutions is to keep disagreement within the boundaries of ordinary politics rather than breaking down into anarchy, violence, or civil war."<sup>315</sup> He and fellow constitutional law scholar Sanford Levinson lay out the three limited situations where this occurs: a) government or military officials intentionally ignore the constitution, b) adherence to the constitution directly leads to disaster,

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Miller & Josh Katz, *Study of Elite College Admissions Data Suggests Being Rich Is Its Own Qualification*, N.Y. TIMES: THE UPSHOT (July 24, 2023), <https://www.nytimes.com/interactive/2023/07/24/upshot/ivy-league-elite-college-admissions.html>; Stephanie Saul, *Elite Colleges' Quiet Fight to Favor Alumni Children*, N.Y. TIMES, <https://www.nytimes.com/2022/07/13/us/legacy-admissions-colleges-universities.html> (last updated Oct. 31, 2022).

314. See Monaghan, *Stare Decisis*, *supra* note 123, at 771–72 ("Recognition that in actual process of constitutional adjudication the constitutional text plays only a role, and an increasingly subordinate one at that, has important consequences for originalism. Originalism must confront a constitutional adjudicatory process in which, after two centuries, the original understanding of the text is simply a factor in the process of decisionmaking, a factor to be considered and balanced against other factors. Indeed, frequently the text operates as little more than a boundary marker restraining judicial lawmaking. In each instance, the case law overwhelms the text and historical understanding. The latter play no directive role in determining most issues. Thus, in the arena of constitutional adjudication it is quite possible to see the case law and not the text as of central importance.").

315. Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 147–48 (2017).

or c) the people refuse to obey the constitution.<sup>316</sup> Balkin proposed an alternative term for less explosive degradation of constitutional systems: constitutional rot.<sup>317</sup> He said it “is a process of decay in the features of our system of government that maintain it as a healthy democratic republic” and asserts that this is the proper way to denote the problems that currently afflict the United States.<sup>318</sup>

But under his own definition, the current state of the judiciary and the countermajoritarian institutions running amok are best termed a constitutional crisis. He defines the second type of crisis as one where “all relevant actors comply with their widely accepted constitutional duties and roles, but following the accepted understandings of the Constitution fails to resolve an existing political crisis or leads to disaster.”<sup>319</sup> They are “failures of constitutional structures that the relevant actors do not dispute or attempt to escape.”<sup>320</sup>

This is the situation Americans now find ourselves in. Whatever the judiciary’s sins, they have not violated the Constitution. The judiciary has no more acted contrary to our nation’s charter by accumulating the power it now holds than Congress or the Executive have in acquiescing. The problem society now faces is that this is the culmination of our countermajoritarian systems functioning as designed. And it means that there are no easy solutions. The systemic inertia that has brought the United States to this point is dragging it down a dangerous constitutional path and will likely be reversed only with great difficulty. Unfortunately, it also means that the more realistic a solution, the less it does to correct the problem. This Part offers ideas that go from least to most severe.

#### *A. Embracing the Common Law*

The idea of embracing the common law is relatively straightforward. If the U.S. Supreme Court willingly acknowledged the common law principles that already exist and embraced the interpretive flexibility they granted, it would address the disingenuity of the modern Court, allow for more significant

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316. See Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 714 (2009).

317. See Balkin, *supra* note 315, at 150–52 (“Constitutional crisis could, in theory, happen to any constitution; constitutional rot is a specific malady of constitutions of representative democracies—that is, republics. Constitutional crisis occurs during relatively brief periods of time; constitutional rot is a degradation of constitutional norms that may operate over long periods of time.”).

318. *Id.* at 151.

319. Levinson & Balkin, *supra* note 316, at 729.

320. *Id.*



constitutional changes without formal amendment, and allow more room for breaking with the past.<sup>321</sup> Professor Strauss proposed exactly this.<sup>322</sup> He argued, “Disputes that in fact concern matters of morality or policy masquerade as hermeneutic disputes about the ‘meaning’ of the text, or historians’ disputes about what the Framers did. By contrast, in common law constitutional interpretation, the difficult questions are on the surface and must be confronted forthrightly.”<sup>323</sup> He summed up the idea by stating, “Gradual innovation, in the hope of improvement, has always been a part of the common law tradition, as it has been a part of American constitutionalism.”<sup>324</sup>

It is obviously unlikely the modern Court would have much interest in this idea,<sup>325</sup> and it would not solve any of the problems set out that are inherent to the common law. But it would, if nothing else, force the Court to be more honest with itself about the role it plays in lawmaking and force it to accept the grave responsibilities with which it remains entrusted. And that would be an improvement. Perhaps it is time to embrace the vision of the common law Justice Cardozo set forth:

I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . ‘[G]reat writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary. Change of this character should not be left to the legislature.’ If judges have wo[e]fully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.<sup>326</sup>

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321. *See generally* Strauss, *supra* note 120 (arguing that the flexibility of common law constitutional interpretation should be embraced).

322. *See id.*

323. *Id.* at 928.

324. *Id.* at 935.

325. As this Note has spelled out numerous times, conservative justices are inclined toward textual interpretations. *See* Wathen, *supra* note 207. Because conservatives on the current Supreme Court bench hold six of the nine seats, an embrace of a flexible interpretive method is unlikely to occur any time soon. *See* Nina Totenberg, *The Supreme Court is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative>.

326. CARDOZO, *supra* note 215, at 150–52 (emphasis omitted) (quoting *Dwy v. Conn. Co.*, 92 A. 883 (Conn. 1915)).

*B. Legislative Solutions: Bring the Court Closer to Democracy*

The nature of the Supreme Court's exclusive right to interpret the foundational document for the U.S. legal system means legislative solutions are limited even before considering the difficulty in getting legislation passed in a gridlocked Congress.

The broad court reform ideas that are bandied about from time to time—adding justices or instituting a binding ethical code being among the most common—would appear to be steps in the right direction.<sup>327</sup> Creating fixed terms, in particular, would help tie the Court to the political process and is worth mentioning along with other Court reform ideas for that reason.<sup>328</sup> It is, however, the one widely discussed reform idea that could require a constitutional amendment, with lifetime tenure for federal judges being implicitly written into the Constitution.<sup>329</sup> There is debate around the question of whether it would be constitutional, after a set term of years, to relegate a Supreme Court Justice back to a circuit court for the rest of their career, thus complying with the constitutional mandate that federal judges “hold their Offices during good behavior.”<sup>330</sup> It's impossible to predict what the Court would do if forced to rule

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327. See, e.g., Bannon & Milov-Cordoba, *supra* note 260 (arguing for eighteen-year term limits for justices).

328. Eighteen-year terms tend to be the most common suggestion. See *id.* It would guarantee that each presidential term is responsible for two justices and eliminate the randomness by removing the role of death and negating the ability to make strategic retirements for partisan reasons. For example, Trump and Jimmy Carter each served a single term as president. The former had three justices confirmed and the latter none—the idea is to limit the arbitrary nature of our current system. See *id.*

329. See U.S. CONST. art. III, § 1. Article III only says that “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior” but implicit in this is the idea of lifetime tenure and that certainly appears to be what was intended by the framers. See THE FEDERALIST NO. 78 (Alexander Hamilton) (“If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.”); Erwin Chemerinsky, Dean, UC Berkeley Sch. of L., Address at Quackenbush Lecture at Gonzaga University School of Law (Mar. 7, 2024) (discussing reforming the Supreme Court); Erwin Chemerinsky, Dean, UC Berkeley Sch. of L., Remarks at UC Berkeley School of Law Symposium: *Supreme Court Reform? Three Proposals* (Feb. 22, 2021) (transcript available at: <https://www.law.berkeley.edu/research/public-law-and-policy-program/events/past-events/scotus-reform/>).

330. Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1, 25 (2021) (“The majority of proposals rest on the assumption that term limits are inconsistent with Article III’s guarantee of tenure during “good Behaviour,” making a constitutional amendment necessary. But some scholars argue that there are ways to effectively create term limits through a statute alone.”).

on the constitutionality of a statute implementing term limits for them, but the idea does appear to have bipartisan support<sup>331</sup> and a bill was introduced in the house in 2021, though it failed to go anywhere.<sup>332</sup>

Expanding the Supreme Court is squarely within Congress's power; the number of justices fluctuated based on congressional action prior to settling at nine in 1869.<sup>333</sup> Originally, the Court was expanded in size as federal appeals circuits were created to keep the number of each the same.<sup>334</sup> This continued until the number of justices was reduced from ten to nine with the Judiciary Act of 1869.<sup>335</sup> Thus, the typical suggested expansion is to add four justices to match the thirteen federal circuit courts, and a bill doing just this was introduced in 2023, though it too failed.<sup>336</sup> Additionally, while this Note has not contemplated any of the historic or recent ethical quandaries members of the Court have found themselves in,<sup>337</sup> a binding ethical code instituted by Congress (rather than the Court itself) certainly seems like something that should have already happened.<sup>338</sup>

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331. Kelsey Reichmann, *There's a Supreme Court Reform Idea People Like, if They Know About It*, COURTHOUSE NEWS SERV. (July 26, 2022), <https://www.courthousenews.com/theres-a-supreme-court-reform-idea-people-like-if-they-know-about-it/>.

332. See Supreme Court Term Limits and Regular Appointments Act of 2021, H.R. 5140, 117th Con. (2021).

333. *Why Does the Supreme Court Have Nine Justices?*, NAT'L CONST. CTR. (July 6, 2018), <https://constitutioncenter.org/blog/why-does-the-supreme-court-have-nine-justices>.

334. *Id.*

335. *Id.*

336. See Judiciary Act of 2023, H.R. 3422, 118th Cong. (2023).

337. See Joshua Kaplan, Justin Elliot & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA, <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow> (last updated Apr. 7, 2023); Justin Elliot, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court>; Heidi Przybyla, *Law Firm Head Bought Gorsuch-Owned Property*, POLITICO (Apr. 25, 2023, 4:30 AM), <https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579>; John M. Scheb II, *McReynolds, James Clark*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 630 (Kermit L. Hall ed., 2005). (“[Justice James McReynolds’] attitudes toward women, especially female attorneys, were likewise intolerant. Perhaps one of his least endearing characteristics was his thoroughgoing anti-Semitism, which prevented him from being civil to his Jewish brethren Brandeis and Cardozo.”); Ron Elving, *Congress has Clashed with Supreme Court Justices over Ethics in the Past*, NPR (Apr. 22, 2023, 10:18 AM), <https://www.npr.org/2023/04/22/1171289725/congress-has-clashed-with-supreme-court-justices-over-ethics-in-the-past>.

338. See Michael Waldman, *New Supreme Court Ethics Code is Designed to Fail*, BRENNAN CTR. FOR JUST. (Nov. 14, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail> (“The Supreme Court announced

This corrects neither the amendment problem, nor the problems inherent to judicial review, but democratizing the courts and making them more accountable to the electorate would likely go great lengths in moving the judiciary back to its proper role. The theory behind insulating the judiciary from voters is sound—it makes some sense that a democracy would not want those applying the law to be subject to majoritarian whims in the same way as those making the laws.<sup>339</sup> But the evidence says this is not the problem many envision it to be, there is plenty of evidence that the courts can function adequately when tied more closely to democracy. Most states select or retain state supreme court justices through direct elections<sup>340</sup> and international procedures for high court appointments vary greatly.<sup>341</sup>

This is likely the best democratically achievable solution currently available.<sup>342</sup> The entire reason this is a constitutional crisis is that, with an amendment out of the question, the solutions available under the current constitutional system are limited and incapable of addressing the underlying problems. Ultimately, under the current system, Congress has no power to correct any of the fundamental problems caused by a precedent-setting Court that has exclusive power to interpret the nation's charter.

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Monday that the justices will subject themselves to a code of ethics. It is, in some ways, welcome news. But the code comes with a whiff of condescension. The justices only took this step, they explain, because of some 'misunderstanding' by the public about their probity. It's not accountability—it's the appearance of accountability. The Supreme Court has been the only court in the country without a binding ethics code. Now it has one of the country's weakest. These new rules are more loophole than law.”)

339. The theory is that if judges are subject to majoritarian whims, they are less likely to do what is correct under the law and more likely to do what is politically popular. *See Judicial Independence*, JUD. LEARNING CTR., <https://judiciallearningcenter.org/judicial-independence/> (last visited Mar. 21, 2024).

340. *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/judicial-selection-map> (last updated Oct. 11, 2022).

341. Amichai Cohen & Guy Lurie, *Appointment of Judges to High Courts in Democratic Countries: A Comparative Study*, ISR. DEMOCRACY INST. (April 4, 2023), <https://en.idi.org.il/articles/48993>.

342. The infeasibility of Article V solutions has been well established. *See supra* Section II.B. Ignoring the Supreme Court is a solution that flouts democratic norms—it is an usurpation of power by the Executive, though it is debatably democratic in that it is an elected figure ignoring an unelected one. *See infra* Section V.C. An embrace of the common law by the judiciary is not a solution involving popular sentiment, merely an internal change in approach within the judiciary. *See supra* Section V.A. Additionally, the conservative death-grip on the Court makes it exceedingly unlikely. *See supra* Section V.A. Legislative solutions are the only solution ones that are conceivable under our current system. All others ignore either the democratic process or the intended functioning of our institutions.

Without upsetting the U.S. Constitution, the solutions are limited to the Supreme Court changing internally or Congress acting on its power to regulate the courts. Neither appear terribly realistic.

*C. Embrace Constitutional Crisis: Ignore the Court*

It is well understood that the judicial branch has no enforcement mechanism, instead relying on the other branches to carry out its decisions.<sup>343</sup> And while it certainly would not be legal, the executive branch could simply stop enforcing the Supreme Court's interpretations of the Constitution, allowing Congress to legislate as it pleases. President Andrew Jackson allegedly summed up the idea by saying, "[Chief Justice] Marshall has made his decision; now let him enforce it."<sup>344</sup>

As radical as this sounds, it has been done before. As previously discussed, President Lincoln ignored Chief Justice Taney's opinion that the right to suspend habeas corpus belonged exclusively to Congress.<sup>345</sup> President Jackson expressed a similar opinion: "In 1791 the Supreme Court held that the constitution gave Congress the power to create a national bank ... He told Congress that the 'opinion of the judges has no more authority over Congress than the opinions of Congress has over the judges, and on that point the President is independent of both.'"<sup>346</sup> He vetoed the Congressional action, nullifying the constitutional issue.<sup>347</sup>

There is certainly something to be said for forcing a bit of the modesty that it appears to believe it already has upon the judiciary. Lincoln's action failed to cause a slippery slope effect resulting in the executive and legislative branches frequently disregarding the text of the Constitution. Still, the implication of simply ignoring Court interpretations of the Constitution would be, in effect, rejecting the entire premise of judicial review and the enormous body of law that it has developed. In many ways it would make the Constitution a blank slate. The risks are high, but the reward of making the Court directly accountable in this way to the elected branches is intriguing and, given the poor reputation the Court

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343. See, e.g., Gramal Ralph, *The Supreme Court's Ability to Enforce Rulings*, JURIS (Nov. 1, 2018), <https://dukeundergradlawmagazine.org/2018/11/01/the-supreme-courts-ability-to-enforce-rulings/> ("Americans have long looked at the Supreme Court as an authority to protect the people from unconstitutional executive actions, laws, and statutes. It is often seen as the last line of defense to protect civil liberties. However, the Constitution does not establish a basis for the court to enforce its decisions.").

344. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 14 (1999).

345. See Dueholm, *supra* note 42, at 49; see also discussion *supra* Section I.B.2.

346. TUSHNET, *supra* note 344, at 15.

347. *Id.*

currently enjoys,<sup>348</sup> it might not be out of the cards. The next time the Supreme Court rejects some form of executive agency action or strikes an act of Congress, the president could simply remind the Court that its authority is limited to words on a piece of paper.

#### D. *Constitutional Revolution: A New Constitution*

The most dramatic of the options would be to, through legitimate or illegitimate means, draft a new constitution. This embraces the bittersweet nature of the United States' distinction as the world's oldest continuous democracy.<sup>349</sup> U.S. institutions have persisted, but they have been surpassed. The waning influence of the American Constitution internationally<sup>350</sup> and its obviously problematic implementation at home are what grant this idea its appeal.

Theoretically, a constitutional convention could be called under Article V and a new constitution built on top of the old one.<sup>351</sup> This is the legitimate means of change. There has been no second constitutional convention in U.S. history—all constitutional amendments have been proposed by Congress.<sup>352</sup> Still, two-thirds of state legislatures could agree to call one.<sup>353</sup> However, one of the barriers to change here is a 1920 case: *Hawke v. Smith*.<sup>354</sup> Ohio's constitution contained

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348. See Jeffrey M. Jones, *Supreme Court Approval Holds at Record Low*, GALLUP (Aug. 2, 2023), <https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx#:~:text=Americans%20approval%20of%20the%20job,a%2042%25%20reading%20in%202005>.

349. See Jeff Desjardins, *Mapped: The World's Oldest Democracies*, WORLD ECON. F. (Aug. 8, 2019), <https://www.weforum.org/agenda/2019/08/countries-are-the-worlds-oldest-democracies/>; see also David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 807 (2012) (“[T]he fact that the U.S. Constitution is both old—older, indeed, than any other constitution currently in force—and extremely difficult to amend raises the possibility that it is simply becoming obsolete.” (footnotes omitted)).

350. See Law & Versteeg, *supra* note 349, at 850 (“The appeal of American constitutionalism as a model for other countries appears to be waning in more ways than one. Scholarly attention has thus far focused on global judicial practice: There is a growing sense, backed by more than purely anecdotal observation, that foreign courts cite the constitutional jurisprudence of the U.S. Supreme Court less frequently than before. But the behavior of those who draft and revise actual constitutions exhibits a similar pattern. Our empirical analysis shows that the content of the U.S. Constitution is becoming increasingly atypical by global standards.”).

351. See U.S. CONST. art. V.

352. See Ethan Herenstein, *How to Improve the Federal Amendment Process Without Formally Amending the Constitution*, N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM (Apr. 24, 2023), <https://nyujlpp.org/quorum/herenstein-improve-federal-amendment-process/>.

353. U.S. CONST. art. V.

354. 253 U.S. 221 (1920).

a provision mandating that once its legislature had approved a proposed amendment, it would be put to popular referendum—only then would the state approve of it.<sup>355</sup> The Supreme Court of Ohio upheld the provision, ruling “that the term ‘legislature,’ as used in the Ratification Clause, refers to the legislative power in a state, rather than just the formal state legislature.”<sup>356</sup> The U.S. Supreme Court rejected this interpretation of Article V and reversed, removing any potential for the involvement of popular referendums in any Article V procedures, including the calling of a constitutional convention.<sup>357</sup> And regardless, the entire problem is that legitimately replacing the Constitution requires meeting the impossible bar set by Article V for amendments, one of the primary problems that has led to this predicament.

The illegitimate means of change are self-explanatory. The risks of revolution should be obvious, but when considered through the framing of Professor Haines, the case for wholesale abandonment of the Constitution is not unconvincing:

The statesmen of 1787 to 1789 faced the issue and did not hesitate when necessary, to resort to revolutionary methods to change the fundamental law to meet the conditions of the time. Similarly, the statesmen of 1861 to 1865 refused to permit the Constitution to stand as a barrier in the way of carrying out the well matured sentiment and policies of the nation. Will the statesmen of the twentieth century fail to take the necessary steps to adjust their government to the prevailing conditions of economic and political life? Will national policies and progress be confined permanently within the express restrictions and the judge-made limits of a written Constitution prepared essentially to suit eighteenth century conditions, or will the Constitution and its judicial gloss be changed . . . to accord with the progress of the life of the people?<sup>358</sup>

The path to reform is exceptionally steep. Still, ideas of American exceptionalism are being abandoned by younger generations<sup>359</sup> and trust in U.S.

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355. *See id.* at 225; Herenstein, *supra* note 352.

356. Herenstein, *supra* note 352 (summarizing the holding in *Hawke v. Smith*, 126 N.E. 400 (Ohio 1919), overruled by *Hawke*, 253 U.S. 221).

357. *Id.* (summarizing *Hawke*, 253 U.S. 221).

358. *See* Haines, *supra* note 305, at 356.

359. *See* Hannah Hartig, *Majority of Americans Say U.S. is One of the Greatest Countries in the World*, PEW RSCH. CTR. (Aug. 29, 2023), <https://www.pewresearch.org/short-reads/2023/08/29/majority-of-americans-say-us-is-one-of-the-greatest-countries-in-the-world/>.

institutions has hit record lows.<sup>360</sup> A majority of Americans believe we are in need of major systemic reforms.<sup>361</sup> While there is a stark partisan divide in beliefs about what type of change needed, the appetite for systemic change does appear to exist.<sup>362</sup> The question then is not whether reform is needed or desired, but whether our system has become so paralyzed and undemocratic as to effectively eliminate any viable path to change.

#### CONCLUSION

The American Constitution is old—the oldest in the world still in force.<sup>363</sup> Because democracy was a new and radical idea, there was little in the way of comparative experience for those that framed it.<sup>364</sup> They were not convinced that the people could be trusted with it. So, they built in safeguard after safeguard. The intervening centuries have proved their fears unfounded—for democracy has thrived.<sup>365</sup> But it has also changed.<sup>366</sup> Parliamentary systems have come to be favored over presidential ones.<sup>367</sup> Judicial review has become centered in constitutional courts distinct from the rest of the judiciary rather than courts of general jurisdiction.<sup>368</sup> And those who would found a fledgling democracy now know what the framers did not—that the people are more trustworthy than the framers believed.

We are now being smothered by the very institutions designed to protect us from ourselves. As Winston Churchill is often quoted, “[I]t has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.”<sup>369</sup> The founders appear to have agreed with this sentiment given the way our democracy was designed. But reciters often fail to include the second half of Churchill’s sentence: “but there is the broad feeling

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360. See *Public Trust in Government: 1958-2023*, PEW RSCH. CTR. (Sept. 19, 2023), <https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/>.

361. Reid J. Epstein, *As Faith Flags in U.S. Government, Many Voters Want to Upend the System*, N.Y. TIMES (July 17, 2023), <https://www.nytimes.com/2022/07/13/us/politics/government-trust-voting-poll.html>.

362. *Id.*

363. Law & Versteeg, *supra* note 349, at 807.

364. See KOWAL & CODRINGTON, *supra* note 2, at 2.

365. See Richard Wike, Katie Simmons, Bruce Stokes & Janell Fetterolf, *Globally, Broad Support for Representative and Direct Democracy*, PEW RSCH. CTR. (Oct. 16, 2017), <https://www.pewresearch.org/global/2017/10/16/globally-broad-support-for-representative-and-direct-democracy/>.

366. See Law & Versteeg, *supra* note 349, at 779–801.

367. See *id.* at 791–93.

368. See *id.* at 793–96.

369. Winston Churchill, Speech to the House of Commons (Nov. 11, 1947).



in our country that the people should rule, continuously rule, and that public opinion, expressed by all constitutional means, should shape, guide, and control the actions of Ministers who are their servants and not their masters.”<sup>370</sup>

The conceit that this nation is a confederation of states was abandoned after less than a decade. And it has been more than a century-and-a-half since the federal government’s ultimate supremacy was settled by the Civil War. It is time to embrace true majoritarian democracy, not just state-to-state, but as the singular nation that we undeniably are. Justice Scalia said it well: “A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.”<sup>371</sup> It is time to stop protecting the people from themselves.

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370. *Id.*

371. *Obergefell v. Hodges*, 576 U.S. 644, 717 (2015) (Scalia, J., dissenting).