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**DEATH DROP: THE ROBERTS COURT, LEGITIMACY, AND THE  
FUTURE OF DEMOCRACY IN THE UNITED STATES**

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*Left critics of the Roberts Court have objected to the Court’s decisions, but also to its efforts to transform the Constitution and constitutional interpretation, upending longstanding organizations of political power and the structure and scope of rights. These critics have questioned the Court’s legitimacy, noting the unpopularity of some of these agendas. The criticisms, however, are hard to distinguish from the routine, if quite serious, objections that liberals have been raising for many years. This Article proposes a turn to queer theory, reading the Court’s work in its recent terms as performance of bad drag: a judicial appropriation of the doctrinal garb of the Fuller Court. The Roberts Court’s bad drag echoes advocacy for structures and principles that operate in a mean-spirited and defensive way, leaving little room for subversive play or the undermining of oppressive power structures. Understanding the Court’s work in these terms provides an alternative approach to critique and highlights why its current behavior poses a serious threat to the institution’s legitimacy.*

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## INTRODUCTION

It is no secret that political observers, activists, and actors on the left are highly critical of the Roberts Court. These criticisms have been persistent and consistent since John Roberts ascended to the role of Chief Justice in 2005, but the 2021 term put up a marquee for a new show, garnering pans among critics, who described it as “a blockbuster,” “polarizing,” “divisive,” and “controversial,” among other florid adjectives.<sup>1</sup> The objections target both the substance of the Court’s efforts to remake constitutional law and its approaches to doing so. For left-leaning constitutional theorists coming from a purely legal background, the tenor of the objections is shifting from claims that the Roberts Court’s rulings are wrongheaded to claims that they are pushing the boundaries of legitimacy. Political science, on the other hand, has looked at public reactions to the Court and questioned whether it is losing diffuse support to an extent that threatens it. While these concerns are serious, they may not fully capture why or how the Roberts Court is problematic and possibly in trouble.

Analyzing the legitimacy of the Court is thorny. It is not satisfactory to limit the question to whether the Court is properly applying appropriate interpretive methodologies. Nor is it enough to accept the purely political stance that the law is what the Court claims it to be as long as it is not checked by the other branches. And while the public’s perception of the Court is important, public perception cannot independently establish or destroy legitimacy. Rather, legitimacy rests in an analysis of the long project of

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1. Robert Barnes, *Chief Justice Ignores Controversial Supreme Court Term in Annual Report*, WASH. POST (Dec. 31, 2022, 6:00 PM), <https://www.washingtonpost.com/politics/2022/12/31/supreme-court-roberts-leak-report/>; Masood Farivar, *Polarizing US Supreme Court Decisions Headline Blockbuster Term*, VOA (July 2, 2022, 9:38 AM), <https://www.voanews.com/a/polarizing-us-supreme-court-decisions-headline-blockbuster-term/6642017.html>; John Fritze & Bart Jansen, *Abortion, Guns, Religion: Breaking Down a Blockbuster Supreme Court Term*, USA TODAY (June 30, 2022, 6:21 PM), <https://www.usatoday.com/story/news/politics/2022/06/30/breaking-down-supreme-court-on-roe-wade-second-amendment/7757961001/?gnt-cfr=1>; Tierney Sneed, *Takeaways from the Blockbuster Victories Conservatives Secured at the Supreme Court*, CNN (June 30, 2022, 7:02 PM), <https://www.cnn.com/2022/06/30/politics/takeaways-supreme-court-term-round-up-conservative-victories/index.html>.

constitutional development and a normative commitment to democracy. Attending to the past by integrating an analysis of cycles of constitutional development with queer theory<sup>2</sup> may provide a more productive route for critique.

Constitutional interpretation and analysis focus on doctrine, but scholars over the years have recognized that the Court's work is also performative. Feminist theorist Judith Butler popularized the idea that gender, rather than simply reflecting biological realities, is produced through performative acts. As she explains, "the body becomes its gender through a series of acts which are renewed, revised, and consolidated through time."<sup>3</sup> Yet she emphasizes that this is a community-based process, since acts depend upon pre-existing cultural meanings even as they reproduce these meanings.<sup>4</sup> In explaining gender as a performative act, she likens it to theater: "Just as a script may be enacted in various ways . . . so the gendered body acts its part in a culturally restricted corporeal space and enacts interpretations within the confines of already existing directives."<sup>5</sup> Performativity, however, makes gender more than a rigid and inescapable role. It opens up the possibility of what Butler describes as "a politics of performative gender acts, one which both re-describes existing gender identities and offers a prescriptive view about the kind of gender reality there ought to be."<sup>6</sup>

Performance in this sense can encompass more than gender. Construed broadly, it is an iterative process where behavior is repeated to invoke its previous episodes, but the "citation" of this previous behavior can produce a different meaning. Following Butler, law professor Frederick Mark Gedicks discusses legal interpretation as a performative act, arguing that "[c]itations are performatives that do not simply re-cite prior meanings but produce their own meanings and effects in reciting the original."<sup>7</sup> For Gedicks, performance involves reiterating or citing previous behaviors but in the course of doing so, re-presenting it. He reads this broad theory into the process of legal decision-making by understanding judicial speech itself as

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2. Queer theory destabilizes assumed and naturalized binaries in frameworks of sex, gender, and sexuality, often in playful or ironic ways. See SUSAN BURGESS, *THE FOUNDING FATHERS, POP CULTURE, AND CONSTITUTIONAL LAW: WHO'S YOUR DADDY?* 91–95 (2008).

3. Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 *THEATRE J.* 519, 523 (1988).

4. *Id.* at 525–26.

5. *Id.* at 526.

6. *Id.* at 530.

7. Frederick Mark Gedicks, *Working Without a Net: Supreme Court Decision-Making as Performance*, 2018 *BYU L. REV.* 57, 67 (2018).

performative, particularly in its explicit uses of previous cases through citation.<sup>8</sup> While citations invoke the past, they generate new contexts.<sup>9</sup>

As Gedicks has noted, thinking about the Court and Justices through a framework of performativity can “illustrate the bounded creativity of judicial decision-making.”<sup>10</sup> Gedicks identifies the modern Court’s work as fundamentally performative when the Justices “surreptitiously create constitutional law while denying they do so.”<sup>11</sup> This opens up an alternative framework for evaluating what the Court is doing, asking whether its reasoning from precedent is “faithful *and* creative” in performative terms.<sup>12</sup>

Gedicks also observes the need for the generative and transformational nature of performance to remain unacknowledged, even disavowed. If law is to be paramount and the Justices its servant, they “cannot admit their performative role because it cannot be reconciled with still-powerful higher-law and rule-of-law myths.”<sup>13</sup> And so Justice Roberts insists on his role of calling balls and strikes, and Justices speaking off the bench decry attempts to identify the Court as a political institution.<sup>14</sup> But the Supreme Court’s mode of performance goes beyond citation, either as a literary phenomenon or as argumentative strategy.

The Court and its members have long been aware of the performative aspect of their work and seem to be increasingly conscious of how it plays. While majority opinions have been announced throughout the Court’s history, until “roughly 1940,” the public reading of a dissent from the bench was highly unusual, and Chief Justice Burger discouraged it.<sup>15</sup> The practice occurs more frequently now, particularly in salient cases in which the distance between the dissenting Justice and the majority is great, and “Justices who announce dissents use tones that are . . . less pleasant and sadder than Justices who announce majority opinions from the bench.”<sup>16</sup>

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8. *Id.* at 62–67.

9. *Id.* at 60–61.

10. *Id.* at 60.

11. *Id.* at 62.

12. *Id.*

13. *Id.* at 58.

14. See, e.g., William Branigin, *Roberts Rejects ‘Judicial Activism’ in Opening Remarks*, WASH. POST (Sept. 12, 2005), <https://www.washingtonpost.com/archive/business/technology/2005/09/12/roberts-rejects-judicial-activism-in-opening-remarks/a7448d94-1cc3-4935-8a66-e4c4e4383a11/>; Ariane de Vogue, *Justice Samuel Alito Says Supreme Court Is Not a ‘Dangerous Cabal’*, CNN POLITICS, (Sept. 30, 2021, 4:09 PM), <https://www.cnn.com/2021/09/30/politics/samuel-alito-notre-dame/index.html>.

15. Timothy R. Johnson, Ryan C. Black & Eve M. Ringsmuth, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 1560, 1566 (2009).

16. *Id.* at 1580.

But when and how might we think about performance crossing fully into theatricality and high drama, perhaps even camp? The Rehnquist Court moved in this direction. The late Justice Ruth Bader Ginsburg (who declared that her fantasy job would be an opera diva) took performance to another level by wearing gold collars when she announced majority opinions and a black collar with grey beads to announce her dissents.<sup>17</sup> Ginsburg claims that her sartorial choice inspired Chief Justice Rehnquist to attend to his own dress, glamming up his robe with four gold stripes on the sleeves, a style borrowed from a Gilbert and Sullivan operetta.<sup>18</sup> Her close friend and legal adversary Antonin Scalia has been described as “an inveterate performance artist,” and the Justices’ relationship inspired a one-act opera, *Scalia/Ginsburg*, featuring the two opera buffs.<sup>19</sup> Scalia’s dissents were sometimes nothing short of flamboyant, describing majority opinions, and at times their authors, in near-histrionic terms.<sup>20</sup> Chief Justice Roberts “has never adorned his robe with any accoutrements” and generally portrays himself as an umpire rather than a player,<sup>21</sup> several other Justices in the current era seem quite willing to cast shade in their opinions and spill the tea for admiring Federalist Society audiences.<sup>22</sup>

This Article argues that the Court’s performance in 2021 at times took on the character of bad drag.<sup>23</sup> Bad drag is more than a histrionic or problematic performance. It inverts the purpose of drag as a generative and liberating performance, instead using performance to reinstate power structures. When the Court engages in bad drag, it clothes itself in abandoned doctrines with the purpose of performing a new constitutional order, but the order itself is nothing better than a retread, and a terrible one at that.

This Article will summarize the Roberts Court’s recent jurisprudential agendas that trouble liberal and left-wing constitutional scholars.<sup>24</sup> It will

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17. Ruth Bader Ginsburg & Nadine Strossen, *Transcending Ideological Divides to Advance All Rights for All People: A Conversation Between the Honorable Ruth Bader Ginsburg and Professor Nadine Strossen*, 66 N.Y.L. SCH. L. REV. 27, 44 (2021).

18. *Id.* at 43–44.

19. Steve Cohen, *Justice Antonin Scalia as Performance Artist*, BROAD ST. REV. (July 14, 2015), <https://www.broadstreetreview.com/essays/justice-antonin-scalia-as-performance-artist>.

20. *Id.*

21. Richard Wolf, *Chief Justice John Roberts’ Fashion Choice: No Stripes*, USA TODAY (Jan. 21, 2020, 2:57 PM), <https://www.usatoday.com/story/news/politics/2020/01/21/chief-justice-john-roberts-rehnquist-drops-stripes/4532521002/>.

22. Josh Gerstein, *Gorsuch Takes Victory Lap at Federalist Dinner*, POLITICO (Nov. 16, 2017, 11:54 PM), <https://www.politico.com/story/2017/11/16/neil-gorsuch-federalist-society-speech-scotus-246538>; Scott Lemieux, *Supreme Court Justice Alito’s Federalist Society Speech Shows How Political the Court Will Get*, NBC NEWS (Nov. 13, 2020, 4:40 PM), <https://www.nbcnews.com/think/opinion/supreme-court-justice-alito-s-federalist-society-speech-shows-how-ncna1247751>.

23. See *infra* Part III.

24. See *infra* Part I.

then explain how different political science approaches raise questions about legitimacy.<sup>25</sup> In discussing historical institutionalist approaches, it will note some significant analogies between the Roberts Court and its predecessors, particularly the Fuller Court (1888–1910).<sup>26</sup> It will then use queer theory to show that the Court is treating us to a bad drag performance in the garb of the Fuller Court, closing with a brief discussion of where developments might take us in the immediate future.<sup>27</sup>

### I. THE LEFT’S OBJECTIONS TO THE ROBERTS COURT

While the Roberts Court’s remaking of American constitutional law has been a long-term project, the pace and the intensity of this project have increased. Since 1993, the ideological split has generally been five conservative Justices and four liberals, but the division sharpened with the departure of Anthony Kennedy and the addition of Brett Kavanaugh. In Kavanaugh’s first term, “the gap between the four liberals and the five conservatives in their proportions of liberal and conservative votes was considerably greater than it typically had been since 2010.”<sup>28</sup> During the 2018 and 2019 terms, the conservative and liberal wings themselves were not entirely unified; Justices Thomas and Alito were “distinctly more conservative” than the Chief Justice, Gorsuch, and Kavanaugh, and Justices Sotomayor and Ginsburg carved out their own (and often dissenting) space on the left.<sup>29</sup> Nevertheless, the overall conservative tilt of the Court remained.

In the 2021 and 2022 terms, a conservative supermajority, bolstered by the replacement of Ruth Bader Ginsburg by Amy Coney Barrett, moved forward boldly, at times seeming to outpace Justice Roberts’s own preferences for a more incremental approach. Several agendas that had been advancing gradually shifted into an aggressive posture, and the Court’s decisions during the 2022 term suggest that this stance is more than just a one-time anomaly. This dramatic shift, described as “revolutionary” by Supreme Court scholar Morgan Marietta, reflected the ascendance of the Justices on the hard right.<sup>30</sup> In Marietta’s view, “[t]he major rulings this year announce nothing less than a replacement of one constitutional regime with another.”<sup>31</sup>

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25. *See infra* Part II.

26. *See infra* Part II.

27. *See infra* Part III.

28. Lawrence Baum, *Ideology and the Court’s Work*, in SCOTUS 2020, at 163, 164 (Morgan Marietta ed., 2021).

29. *Id.* at 165.

30. Morgan Marietta, *Introduction: The 2021–2022 Term at the Supreme Court*, in SCOTUS 2022, at 1, 1 (Morgan Marietta ed., 2023).

31. *Id.*

While the legacy of the 2021 term is not yet certain, it seems consequential. Although the Justices decided only sixty-three cases in 2021–22, a near-historic low, these rulings “made sweeping alterations to the legal landscape in the United States.”<sup>32</sup> It was the “single most conservative” term in at least eighty-five years in terms of the outcomes in fully briefed, argued, and decided cases, with sixty-three percent of these rulings leaning toward the right.<sup>33</sup> Ryan Black and Timothy Johnson note that two previous terms (2005 and 2008) had nearly as strong a conservative orientation.<sup>34</sup> The 2022 term, however, featured broad rulings that either sharply advanced long-held conservative agendas or attempted to cement these agendas institutionally.<sup>35</sup> As a result, the Court’s behavior has attracted vehement criticism from the left.

Observers have been particularly vocal about four issues. First is the radical restructuring of the Court’s rights jurisprudence, with long-held rights being curtailed and different rights elevated, often set up in competition with the more venerable rights.<sup>36</sup> Second is the strong tilt toward protection of capital and business interests.<sup>37</sup> Third is the dismantling of the New Deal/Civil Rights administrative state.<sup>38</sup> And finally, left observers have objected strenuously not only to the substance of the Court’s rulings, but also to their ways of doing things, including extensive use of the emergency docket and exercise of jurisdiction over cases in which litigants have questionable standing that might previously have been deferred.<sup>39</sup>

#### A. *Curtailling Established Rights*

The most controversial ruling of the 2021 term was the 5–4 ruling in *Dobbs v. Jackson Women’s Health Organization*,<sup>40</sup> which not only upheld Mississippi’s ban on almost all abortions after fifteen weeks of pregnancy but also overruled *Roe v. Wade*,<sup>41</sup> the 1973 case establishing abortion as a right, and *Planned Parenthood v. Casey*,<sup>42</sup> the 1992 ruling affirming this right.<sup>43</sup>

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32. Ryan Black & Timothy Johnson, *Noteworthy but Not Unprecedented: The 2021–2022 Term in Historical Context*, in SCOTUS 2022, *supra* note 30, at 191, 191.

33. *Id.* at 193. At least sixteen prior terms were at least as ideologically weighted toward the liberal side. *Id.* at 192.

34. *Id.* at 193–94

35. Marietta, *supra* note 30, at 17–18.

36. *See infra* Sections I.A–B, I.E.

37. *See infra* Section I.C.

38. *See infra* Section I.D.

39. *See infra* Section I.F.

40. 142 S. Ct. 2228 (2022).

41. 410 U.S. 113 (1973).

42. 505 U.S. 833 (1992).

43. *Dobbs*, 142 S. Ct. at 2242.

The majority opinion, written by Samuel Alito, characterized *Roe* as “egregiously wrong from the start” and pledged to “return the issue of abortion to the people’s elected representatives” as a return to “the rule of law.”<sup>44</sup> In a less visible but still consequential ruling, *Whole Woman’s Health v. Jackson*,<sup>45</sup> the Court provided only a very narrow path for litigants to challenge a Texas law that established a mechanism for private individuals to enforce an abortion ban at six weeks’ gestation—a path quickly eliminated in later litigation.<sup>46</sup>

These cases, taken together, mark both the end and the beginning of a developmental stage in American history. While *Dobbs* claimed to remove the Court from debates over abortion regulation, returning the issue to the states, the ruling opens up new legal questions and concerns that will undoubtedly find their way into federal court. Do pregnant people have any rights or liberties that may warrant limiting the state interest in protecting fetal life? How far can the federal government go to establish national policies regarding abortion, whether those policies have a liberalizing effect (as with efforts to expand the Health Insurance Portability and Accountability Act to protect individuals seeking, obtaining, or providing abortions)<sup>47</sup> or advance new national restrictions (as many Republicans have expressed an interest in doing)?<sup>48</sup>

The Court followed up with rulings in two affirmative action cases in June 2023 that transformed the jurisprudence of race. In *Students for Fair Admissions, Inc. v. Harvard*<sup>49</sup> and companion case *Students for Fair Admission, Inc. v. University of North Carolina*,<sup>50</sup> the six conservative Justices agreed that the admissions systems used by these institutions, which acknowledged race in the process, violated the Equal Protection Clause by employing race improperly.<sup>51</sup> In doing so, Chief Justice Roberts, writing for the majority, reread the history of the Court’s interpretation of the Fourteenth

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44. *Id.* at 2243.

45. 142 S. Ct. 522 (2021).

46. *See generally id.*

47. Alice Miranda Ollstein, *Biden’s HIPAA Expansion for Abortion Draw Criticism, Lawsuit Threats*, POLITICO (July 18, 2023, 12:22 PM), <https://www.politico.com/news/2023/07/18/biden-hipaa-expansion-abortion-00106694>.

48. Bess Levin, *One Year After the Fall of Roe, Republicans Are Full Steam Ahead with National Abortion Ban*, VANITY FAIR (June 23, 2023), <https://www.vanityfair.com/news/2023/06/one-year-after-the-fall-of-roe-republicans-are-full-steam-ahead-with-national-abortion-ban>.

49. 143 S. Ct. 2141 (2023).

50. *Id.*

51. *Id.* at 2176.



Amendment as culminating in the rejection of “all manner of race-based state action” in *Brown v. Board of Education*<sup>52</sup> and its progeny.<sup>53</sup>

In light of the Court’s shift to the right, observers were also concerned about the fate of the Indian Child Welfare Act, a 1978 law that strongly encourages Native children removed from their homes be placed either with extended relatives or other unrelated Native families. In oral arguments in November 2022, “[s]everal justices raised the question whether ICWA violates the Constitution’s guarantee of equal protection” by operating as a racial/ethnic preference.<sup>54</sup> The majority opinion written by Justice Barrett for seven of the nine Justices rejected the challenges to the statute, much to the relief of advocates for Native Americans.<sup>55</sup> In section IV of the majority opinion, however, the Court ducked the question of whether the placement preferences for Native Americans violated the Equal Protection Clause as a prohibited form of racial discrimination.<sup>56</sup> While Justice Gorsuch’s concurrence explained the need to respect Native sovereignty and Congress’s power to bolster tribal autonomy and survival,<sup>57</sup> Justice Kavanaugh wrote separately to highlight his view that “the equal protection issue is serious.”<sup>58</sup>

LGBTQ rights until recently seemed to be an outlier in the Court’s transformative identity rights jurisprudence. Neil Gorsuch joined the liberal wing of the Court in 2020 to extend protections against workplace discrimination to transgender individuals as part of the federal barrier against sex discrimination.<sup>59</sup> Employment discrimination, however, is statutory, not constitutional, and the Court has never accepted the invitation to mandate elevated scrutiny to address laws and policies that differentiate based on sexual orientation or gender identity.<sup>60</sup>

The string of constitutional victories on equal protection grounds for LGBTQ rights initiated in the mid-1990s may be no more stable than the

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52. 347 U.S. 483 (1954).

53. *Students for Fair Admissions*, 143 S. Ct. at 2159–60.

54. Amy Howe, *Closely Divided Court Scrutinizes Various Provisions of Indian Child Welfare Act*, SCOTUSBLOG (Nov. 9, 2022, 6:02 PM), <https://www.scotusblog.com/2022/11/closely-divided-court-scrutinizes-various-provisions-of-indian-child-welfare-act/>.

55. *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023); Elyse Wild, *Here’s What Indian Country and Government Leaders are Saying about the Haaland v. Brackeen Ruling*, NATIVE NEWS ONLINE (June 16, 2023), <https://nativenewsonline.net/sovereignty/here-s-what-indian-country-and-government-leaders-are-saying-about-haaland-v-brackeen-ruling>.

56. *See Brackeen*, 143 S. Ct. at 1638 (declining to reach the merits of the equal protection challenge after determining all parties lacked standing to raise the challenge).

57. *Id.* at 1641 (Gorsuch, J., concurring).

58. *Id.* at 1661 (Kavanaugh, J., concurring).

59. *See generally Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

60. *See, for example, the Court’s decision in Lawrence v. Texas* discussing *Romer v. Evans* and the stigmatic and demeaning nature of legislation targeting “homosexual conduct.” *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003).

right to abortion. This series of decisions began with *Romer v. Evans*<sup>61</sup> in 1996, which invalidated a state constitutional provision that prevented localities from protecting sexual minorities from discrimination, and culminated in *Obergefell v. Hodges*<sup>62</sup> in 2015, which established a constitutional right to marriage for same-sex couples.<sup>63</sup> Justice Alito, writing for the majority in *Dobbs*, explicitly distinguished *Roe* from other cases addressing sexuality and identity, including *Griswold v. Connecticut*,<sup>64</sup> *Eisenstadt v. Baird*,<sup>65</sup> *Lawrence v. Texas*,<sup>66</sup> and *Obergefell*, on the ground that only *Roe* prohibited states from recognizing and protecting “potential life.”<sup>67</sup> Justice Thomas’s concurrence, however, demanded the reconsideration of “all of this Court’s substantive due process precedents,” including *Griswold*, *Eisenstadt*, and *Obergefell*.<sup>68</sup>

### *B. The Roberts Court’s New Rights Jurisprudence*

The Roberts Court is not entirely hostile to rights. While the Court has aggressively restricted or dismantled some rights, it has moved equally aggressively to establish and expand others. It has transformed gun rights, revitalized workers’ individual liberty rights, and advanced freedom of religious expression while loosening the constitutional limits on state expenditures to support or promote religion.

The expansion of gun rights, initiated in *District of Columbia v. Heller*<sup>69</sup> in 2008, extended to the states in *McDonald v. City of Chicago*,<sup>70</sup> and strongly bolstered in *New York State Rifle & Pistol Ass’n v. Bruen*<sup>71</sup> in the 2021 term, has attracted significant attention. *Bruen* invalidated a New York regulation allowing individuals to carry concealed weapons only if licensed to do so.<sup>72</sup> The statute required applicants wishing to possess firearms at home or in their places of business to establish their suitability for possession, and for those wishing to carry firearms outside the home, to show “proper cause” for doing so.<sup>73</sup> The Court struck down the proper cause provision, finding that the

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61. 517 U.S. 620 (1996).

62. 576 U.S. 644 (2015).

63. See generally *id.*; *Romer v. Evans*, 517 U.S. 620 (1996).

64. 381 U.S. 479 (1965).

65. 405 U.S. 438 (1972).

66. 539 U.S. 558 (2003) (holding that anti-sodomy laws criminalizing consensual adult sexual intimacy violate the Equal Protection Clause of the Fourteenth Amendment).

67. *Dobbs*, 142 S. Ct. at 2236.

68. *Id.* at 2301 (Thomas, J., concurring).

69. 554 U.S. 570 (2008).

70. 561 U.S. 742 (2010).

71. 142 S. Ct. 2111 (2022).

72. *Id.* at 2122.

73. *Id.* at 2123.

Second Amendment “protects . . . carrying handguns publicly for self-defense” and requiring prospective carriers to establish a proper cause for doing so set too high and arbitrary a threshold for the highly protected right in question.<sup>74</sup> This outcome generated outrage, with one commentator, for example, accusing the Court of “endanger[ing] huge swaths of long-existing gun laws . . . in an opinion that simultaneously fetishizes the ‘Second Amendment’s plain text,’ while ignoring the first thirteen words of that amendment.”<sup>75</sup>

Beyond the outcome, however, scholars’ eyebrows arched at the Court’s approach. As Douglas Dow noted, the majority abandoned conventional approaches based in heightened scrutiny, opting instead “to resolve the controversy through the exclusive use of constitutional text and historical traditions.”<sup>76</sup> This shift will likely transform outcomes in the lower federal courts, bolstering gun rights. While *Heller* dealt the courts into the debate over gun regulation, “roughly 90% of Second Amendment challenges” launched under its framework failed.<sup>77</sup> *Bruen*’s approach invites more challenges on its originalist and expansive basis: Justifications for regulations “must seemingly be tied to constitutional text and history” rather than upon important state objectives or interests.<sup>78</sup> By September 2023, the ruling had already been cited more than 600 times by lower federal courts.<sup>79</sup> While a full analysis of post-*Bruen* developments is beyond the scope of this Article, courts have ruled in favor of plaintiffs by, for example, allowing a suit to proceed seeking the right to bear arms in houses of worship in New York,<sup>80</sup> allowing parents to continue a lawsuit seeking recovery of their son’s guns after his conviction,<sup>81</sup> maintaining a New Jersey lawsuit challenging New Jersey’s regulation of gun possession in sensitive places,<sup>82</sup> enjoining a Delaware law “criminaliz[ing] the possession, manufacture, and distribution of unserialized firearms,”<sup>83</sup> and validating a challenge to a federal statute

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74. *Id.* at 2119.

75. Ian Millhiser, *The Post-Legal Supreme Court*, VOX (July 9, 2022, 8:00 AM), <https://www.vox.com/23180634/supreme-court-rule-of-law-abortion-voting-rights-guns-epa> (quoting *Bruen*, 142 S. Ct. at 2126).

76. Douglas C. Dow, *New York Rifle & Pistol v. Bruen on the Second Amendment and Concealed Carry Laws*, in SCOTUS 2022, *supra* note 30, at 51, 51.

77. Joseph Blocher & Andrew Willinger, *Does the Second Amendment Make Gun Politics Obsolete?*, 55 POLITY 1, 2 (2023).

78. *Id.* at 4.

79. This count is based on a Lexis-Nexis search conducted by the author on August 24, 2023. This search also indicated 140 citations by state courts.

80. *Hardaway v. Nigrelli*, 636 F. Supp. 3d 329 (W.D.N.Y. 2022).

81. *Frein v. Pa. State Police*, 47 F.4th 247 (3d Cir. 2022).

82. *Koons v. Reynolds*, 649 F. Supp. 3d 14 (D.N.J. 2023).

83. *Rigby v. Jennings*, 630 F. Supp. 3d 602, 608 (D. Del. 2022).

criminalizing the possession of firearms by persons subject to court orders,<sup>84</sup> to name only a few.

If the Roberts Court's Second Amendment jurisprudence has been aggressive, that aggression is at least matched by its analysis of the First Amendment's Religion Clauses. As Morgan Marietta notes, the four rulings issued by the Court during the 2021 term—*Carson v. Makin*,<sup>85</sup> *Kennedy v. Bremerton School District*,<sup>86</sup> *Ramirez v. Collier*,<sup>87</sup> and *Shurtleff v. City of Boston*<sup>88</sup>—“add up to something new, a redefinition of the concepts of neutrality and coercion under the Religion Clauses of the First Amendment.”<sup>89</sup> The changes in both the Establishment and Free Exercise Clauses taken together “insist that we read the Religion Clauses as a unified whole rather than as competing concepts,” shifting away from the previous model that allowed limits on establishment to set boundaries for free religious practice and expression.<sup>90</sup> In two of these rulings (*Carson* and *Bremerton*), the Court divided along conservative-liberal lines to produce consequential shifts in jurisprudence concerning religion.

*Carson v. Makin* illustrates this shift well. The state of Maine provided tuition assistance for children living in rural school districts and opting to attend private schools “so long as [the schools] are ‘nonsectarian.’”<sup>91</sup> Employing strict scrutiny, the Court found that Maine’s program improperly disqualified the religious schools from receiving funding because of their religious orientation.<sup>92</sup> To Maine’s argument that extending this funding would improperly entangle the state in religion, the Court responded that “[a] State’s antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.”<sup>93</sup> By reading the free exercise guarantee to require the state to support religious education on an equivalent basis, the Court moved toward unifying the Religion Clauses to expand the latitude for public support and expression of religion.

A similar dynamic drove the Court’s reasoning in *Kennedy v. Bremerton School District*, which turned on what formerly would have been a tension

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84. *United States v. Perez-Gallan*, 640 F. Supp. 3d 697 (W.D. Tex. 2022).

85. 142 S. Ct. 1987 (2022).

86. 142 S. Ct. 2407 (2022).

87. 142 S. Ct. 1264 (2022).

88. 142 S. Ct. 1583 (2022).

89. Marietta, *supra* note 30, at 9.

90. *Id.* at 10.

91. *Carson v. Makin*, 142 S. Ct. 1987, 1993 (2022) (quoting ME. REV. STAT. ANN. tit. 20-A, § 2951(2) (1981)).

92. *Id.* at 1997.

93. *Id.* at 1998.

between free exercise and establishment.<sup>94</sup> Justice Gorsuch’s opinion for the Court vindicated a high school football coach who “lost his job . . . because he knelt at midfield after games to offer a quiet prayer of thanks,”<sup>95</sup> a questionable characterization of the facts that nonetheless grounded a ruling that “effectively dissolved the boundaries that have defined these categories of First Amendment jurisprudence for most of a century.”<sup>96</sup> The principles of preventing coercion and endorsement and exercising particular care when children were involved collapsed under Gorsuch’s emphasis on Coach Kennedy’s status as a private revenant. The case also announced the Court’s formal abandonment of another venerable precedent, 1971’s *Lemon v. Kurtzman*,<sup>97</sup> which had previously required state policies touching on religion to have secular purposes and predominantly secular effects and not to entangle the state with religion.<sup>98</sup>

While the 2022 term did not feature as many major rulings concerning religion, Justice Alito wrote the majority opinion for a unanimous Court in *Groff v. DeJoy*.<sup>99</sup> The Court determined how to read Title VII’s requirement that employers accommodate employees’ religious practices unless the accommodation would impose an undue hardship on the employer. Lower courts, including the Third Circuit from which the appeal came, had interpreted undue hardship “to mean any effort or cost that is ‘more than . . . *de minimus*.’”<sup>100</sup> While the majority’s analysis was statutory, it did require that employers establish with more precision that “the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.”<sup>101</sup> The ruling thus modestly strengthened free exercise rights in the employment context.

### C. Rebalancing Rights

These shifts in the Court’s rights jurisprudence do not operate independently. Some of the restrictive and expansive agendas intersect powerfully. I will sketch two of these agendas as an illustration. First, the Court is moving toward establishing protections for free religious exercise

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94. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2416 (2022).

95. *Id.* at 2415.

96. Howard Schweber, *Kennedy v. Bremerton School District on Religious Expression in Schools and the Boundaries of the First Amendment*, in *SCOTUS 2022, supra* note 30, at 71–72.

97. 403 U.S. 602 (1971).

98. Schweber, *supra* note 96, at 72–74.

99. 143 S. Ct. 2279 (2023).

100. *Id.* at 2286.

101. *Id.* at 2295. Justice Sotomayor concurred to emphasize that an undue hardship could include analysis of the impact of an employee’s exercise of religion on other employees. *Id.* at 2297–98 (Sotomayor, J., concurring).

and free speech in ways that constrain further advances or even roll back LGBTQ equality rights and reproductive rights. Second, the Court has revitalized property rights and freedom in ways that limit collective bargaining rights. Rulings in the 2022 term have advanced the first agenda and bolstered the second.

The Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.*<sup>102</sup> in 2014 raised the concern about the potential impact of strengthening religious rights. The ruling exempted the owners of a closely held corporation from the Patient Protection and Affordable Care Act's ("ACA") rule that required for-profit employers to cover FDA-approved contraceptive measures.<sup>103</sup> The exemption, originally written to apply only to non-profit religious organizations, was expanded to encompass closely held for-profit corporations and rested on a perceived statutory collision between ACA and the Religious Freedom Restoration Act ("RFRA").<sup>104</sup> The ruling, written by Justice Alito, was not itself a major doctrinal shift; Alito likely had to limit its scope to garner support from Chief Justice Roberts and Justice Kennedy, producing a 5-4 outcome.

While *Obergefell* was decided the next year to much jubilation on the left, the Court's 2018 ruling in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*<sup>105</sup> indicated that *Hobby Lobby* was no anomaly. In *Masterpiece Cakeshop*, the Court relied on free exercise to find that the Colorado Civil Rights Commission had violated a commercial baker's rights by finding that his refusal to bake a wedding cake for a same-sex couple was discriminatory.<sup>106</sup> The majority opinion, written by Justice Kennedy and joined by five other Justices, including Kagan and Breyer, was framed narrowly and turned on the Civil Rights Commission's exhibition of "a clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection."<sup>107</sup> The tension continued in *Bostock v. Clayton County*,<sup>108</sup> in which Justice Gorsuch wrote a somewhat surprising opinion siding with gay, lesbian, and transgender litigants seeking relief under Title VII for gender discrimination. While endorsing Title VII's protection against discrimination for LGBT individuals, Justice Gorsuch reminded everyone that "[w]e are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution."<sup>109</sup> He

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102. 573 U.S. 682 (2014).

103. *Id.* at 690–91.

104. *Id.* at 738–39 (Kennedy, J., concurring).

105. 138 S. Ct. 1719 (2018).

106. *Id.*

107. *Id.* at 1729.

108. 140 S. Ct. 1731 (2020).

109. *Id.* at 1754.

explicitly declared that the interaction of free exercise with Title VII's guarantees was a question for future cases.<sup>110</sup>

These tensions are now coming to a head. In 2021, the Court relied on free exercise in *Fulton v. City of Philadelphia*<sup>111</sup> to rule against the city government, which refused to contract with Catholic Social Services (“CSS”) to provide foster care because CSS declared that it would not certify same-sex couples as foster parents. And one of the most anticipated cases of the 2022 term, *303 Creative LLC v. Elenis*,<sup>112</sup> picked up where *Masterpiece Cakeshop* left off. The case involved a web designer who expressed concern that she would be compelled under the Colorado Anti-Discrimination Act—the same legislation addressed in *Masterpiece Cakeshop*—to create websites for same-sex marriages in contradiction of her sincere religious belief that marriage should only take place between a man and a woman. The 6-3 ruling, delivered in an opinion by Justice Gorsuch, found that the Act had the potential to “compel speech Ms. Smith does not wish to provide.”<sup>113</sup> While the Court acknowledged that all levels of government have a compelling interest in eliminating discrimination in public accommodations, the six conservatives countered that such laws and policies sweep too broadly if they purport to mandate speech.<sup>114</sup> While religion was a leitmotif in the ruling rather than the central principle, the majority liberally cited *West Virginia v. Barnette*,<sup>115</sup> the landmark ruling overturning the imposition of mandatory flag salute for Jehovah’s Witnesses, and framed the policy it invalidated as Colorado’s attempt “to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance.”<sup>116</sup> Justice Sotomayor’s dissent, joined by Justices Kagan and Jackson, framed the problem differently, seeing the website designer’s claim as a request for permission “to deny gay and lesbian customers the full and equal enjoyment of its services based on the owner’s religious belief.”<sup>117</sup>

Less publicly discussed has been the Court’s labor union jurisprudence. Unlike the incremental approach taken in rebalancing free exercise and other equality and due process rights, the Court has aggressively asserted individual free speech and property guarantees to undercut hard-won collective bargaining rights dating back more than 80 years. A series of mostly narrowly divided rulings leading up to *Harris v. Quinn*<sup>118</sup> in 2014

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110. *Id.*

111. 141 S. Ct. 1868 (2021).

112. 143 S. Ct. 2298 (2023).

113. *Id.* at 2313.

114. *Id.* at 2314–15.

115. 319 U.S. 624 (1943).

116. 143 S. Ct. at 2320–21.

117. *Id.* at 2322 (Sotomayor, J., dissenting).

118. 573 U.S. 616 (2014).

created cracks in organized labor's legal foundations that permitted shop closures, mandatory union dues payments, and union political expenditures and participation.<sup>119</sup>

The Court's attack on labor unions culminated in 2018 in *Janus v. AFSCME*,<sup>120</sup> with Justice Alito writing for a 5-4 majority to hold that public employees "forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes" experience a violation of their free speech rights.<sup>121</sup> The opinion, which overruled the 1977 ruling in *Abood v. Detroit Board of Education*,<sup>122</sup> framed the violation as a First Amendment violation and as a sort of theft, characterizing union dues as "unconstitutional exactions" that "have been taken from nonmembers and transferred to public-sector unions."<sup>123</sup> Former Labor Commissioner William Gould sees the ruling as "reviv[ing] the early New Deal judicial personal predilections regarding economic and regulatory policy."<sup>124</sup>

This agenda advanced in the 2021 term through *Cedar Point Nursery v. Hassid*,<sup>125</sup> in which the Court considered a California regulation allowing labor organizations to access agricultural employers' property to promote union membership. Two growers challenged the regulation as an uncompensated taking of property. Chief Justice Roberts, writing for himself and the five conservatives, found that the regulation indeed constituted a per se physical taking.<sup>126</sup> In one instance, the United Farm Workers allegedly entered the property without prior notice and disrupted a day's labor by using bullhorns to encourage protest and workers' departure.<sup>127</sup> In another, the organizers also attempted to enter the property but were blocked.<sup>128</sup> Both companies then filed suit seeking the invalidation of the regulation on constitutional grounds.<sup>129</sup>

The majority opinion framed the central question as "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use

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119. William B. Gould IV, *Organized Labor, the Supreme Court, and Harris v. Quinn: Deja Vu All Over Again?*, 2014 SUP. CT. REV. 133, 136–145.

120. 138 S. Ct. 2448 (2018).

121. *Id.* at 2459–60.

122. 431 U.S. 209 (1977).

123. *Janus*, 138 S. Ct. at 2486.

124. William B. Gould IV, *How Five Young Men Channeled Nine Old Men: Janus and the High Court's Anti-Labor Policymaking*, 53 U.S.F. L. REV. 209, 215 (2019).

125. 141 S. Ct. 2063 (2021).

126. *Id.* at 2072.

127. *Id.* at 2069–70.

128. *Id.* at 2070.

129. *Id.* at 2069–70.



his own property.”<sup>130</sup> Characterizing the access regulation as a measure that “appropriates a right to invade the growers’ property” and citing William Blackstone’s framing of exclusion as a central component of property rights, the majority accused California of engineering a *per se* taking in the form of an easement, despite the difficulty of calculating any meaningful economic loss tied to it.<sup>131</sup> The state regulation, while it served the interest of securing labor organizing rights, improperly interfered with employers’ property interests and thus could not stand. (This ruling contrasts with the Court’s 2023 decision in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters*,<sup>132</sup> in which eight Justices agreed that the National Labor Relations Act’s protection of the activities of striking workers did not preempt state tort law, which Glacier wished to use to recoup economic losses related to a work stoppage.<sup>133</sup>)

#### *D. Transforming the Administrative State*

The Roberts Court’s efforts to constrain the administrative state have garnered almost as much attention and alarm as its rights jurisprudence. Conservative justices have sniped for years about the practice of congressional delegation of authority to administrative agencies, a practice dating back to the New Deal and codified in the Administrative Procedure Act.<sup>134</sup> As in other areas, however, recent developments suggest that the appetite for drastic change has increased significantly.

The mechanism for reviving the long-dormant idea that Congress may not broadly authorize administrative agencies to engage in substantive rulemaking is known as the major questions doctrine. First introduced in 2000, the doctrine at that time indicated that, while the Court would ordinarily allow agency interpretations of statutes supporting rulemaking to prevail, in “extraordinary cases,” courts might question whether the authority had indeed been properly delegated.<sup>135</sup> Afterwards, the idea appeared quite sparingly in the Court’s rulings, but the Trump Administration eagerly pressed it in its challenges of administrative rules promulgated by the Obama Administration.<sup>136</sup>

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130. *Id.* at 2072.

131. *Id.* at 2072–73.

132. 143 S. Ct. 1404 (2023).

133. *Id.* at 1413–14.

134. See generally George I. Lovell, *That Sick Chicken Won’t Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine*, 17 CONST. COMMENT. 79 (2000); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217 (2022); Joseph Postell & Paul D. Moreno, *Not Dead Yet—Or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONST. STUD. 41 (2018).

135. Julie Novkov, *West Virginia v. EPA: Whither the New Deal Order?*, 55 POLITY 410 (2023).

136. Brunstein & Revesz, *supra* note 134, at 291.

In 2019, in *Gundy v. United States*,<sup>137</sup> Justice Alito called openly for a full revival of the nondelegation doctrine<sup>138</sup> in a concurring opinion, reinforcing conservative efforts to identify and press forward suitable cases.<sup>139</sup> Further encouragement for the right came with the Court's decision in early 2022 to invalidate the nationwide workplace vaccine mandate promulgated by the Occupational Safety and Health Administration ("OSHA") on the ground that the mandate exceeded OSHA's authority.<sup>140</sup> Justice Gorsuch, whom Justices Thomas and Alito joined, wrote separately alongside a brief per curiam opinion to endorse the major questions framework as a means of preventing such perceived governmental overreach.<sup>141</sup>

The Court's 2022 ruling in *West Virginia v. EPA*<sup>142</sup> relied on the major questions doctrine, raising its salience for considerations of the actions of administrative agencies. The conservatives appeared to be stretching to take up the case: The Obama-era administrative regulation in question, a rule that pressed energy producers to shift away from using coal to generate energy, was challenged before it went into effect, rescinded under Trump, and abandoned by Biden.<sup>143</sup> The Court indeed voted 6-3 that the EPA did not have the authority under the Clean Air Act to promulgate the (already defunct) rule. However, the majority opinion written by Chief Justice Roberts applied the doctrine in a technical, narrow fashion.<sup>144</sup> Some commentators characterized the ruling as a setback but not a critical blow to the cause of administrative advancement of environmental regulation.<sup>145</sup> Justice Gorsuch, however, wrote separately, endorsing an aggressive revision of administrative law that would demand closer scrutiny over any regulation not directly authorized in the controlling statute.<sup>146</sup>

The Court followed this ruling with a 2023 decision in *Sackett v. EPA*<sup>147</sup> that limited the scope of the Clean Water Act ("CWA"). All nine Justices agreed that the regulatory activity at issue, which prevented a couple from developing a plot of land they had purchased because they would have

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137. 139 S. Ct. 2116 (2019).

138. The nondelegation doctrine is the principle that Congress may not delegate its legislative authority to the executive branch.

139. Novkov, *supra* note 135, at 412.

140. Nat'l Fed. of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022).

141. *Id.* at 667–68 (Gorsuch, J., concurring).

142. 142 S. Ct. 2587 (2022).

143. *Id.* at 2604–06.

144. *Id.* at 2609–12.

145. *E.g.*, Dan Farber, *The Supreme Court Curbs Climate Action*, LEGALPLANET (June 30, 2022), <https://legal-planet.org/2022/06/30/the-supreme-court-curbs-climate-action/>.

146. *West Virginia*, 142 S. Ct. at 2618–19 (Gorsuch, J., concurring).

147. 143 S. Ct. 1322 (2023).

disturbed a wetland, went too far.<sup>148</sup> However, Justice Alito wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett. The five conservatives ruled for a more sweeping set of restrictions on the EPA's ability to regulate wetlands. Rather than relying on major questions, they claimed that the CWA only authorized regulating wetlands that are "as a practical matter indistinguishable from waters of the United States."<sup>149</sup> While the opinion suggested that a full and separate statutory authorization by Congress could allow the EPA to protect wetlands, Justices Thomas and Gorsuch endorsed constitutional limitations based on the Commerce Clause to prevent federal regulation of non-navigable waters entirely.<sup>150</sup> While concurring with the judgment, Justice Kagan observed that the majority's analysis in *Sackett* shared the same "vice" as its ruling in *West Virginia*: "the Court's appointment of itself as the national decision-maker on environmental policy."<sup>151</sup>

Leftist observers likely nonetheless have been encouraged by congressional efforts to tackle climate change more directly through new legislation, noting that the 2022 Inflation Reduction Act ("IRA") relies on several strategies to encourage shifts toward cleaner energy across several different economic sectors in the United States, including incentivizing the production of more clean energy, encouraging the reduction of methane emissions, promoting investment in clean-energy infrastructure and technology, and providing rebates for electric vehicle and household purchases that use less energy.<sup>152</sup> Nevertheless, new congressional legislation will likely invite legal challenge in implementation. The IRA itself has already earned the ire of the National Association of Manufacturers, and several pharmaceutical companies have already filed suits.<sup>153</sup>

If the Court is simply advising Congress to be more accountable for legislating directly to address problems, we must also attend to the Court's

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148. *See id.* at 1362 (Kavanaugh, J., concurring).

149. *Id.* at 1341 (majority opinion) (quoting *Rapanos v. United States*, 547 U.S. 715, 742, 755 (2006)).

150. *Id.* at 1345 (Thomas, J., concurring).

151. *Id.* at 1361–62 (Kagan, J., concurring).

152. Sarah Kuta, *What the Inflation Reduction Act Hopes to Do About Climate Change*, SMITHSONIAN MAG. (Aug. 18, 2022), <https://www.smithsonianmag.com/smart-news/us-to-invest-370-billion-to-tackle-climate-change-180980596/>.

153. Jay Timmons, *Manufacturers Remain Staunchly Opposed to the Inflation Reduction Act*, NAT'L ASS'N MFRS. (Aug. 6, 2022, 7:46 PM), <https://www.nam.org/manufacturers-remain-staunchly-opposed-to-the-inflation-reduction-act-18530/>; Fraiser Kansteiner, *The Fight Is On: As US Pricing Reform Advances Through Congress, Pharma Gears Up for a Brawl*, FIERCE PHARMA (Aug. 11, 2022, 10:55 AM), <https://www.fiercepharma.com/pharma/senate-passed-major-drug-pricing-reform-sunday-are-industry-lawsuits-next>; *Inflation Reduction Act*, O'NEILL INST.: HEALTH CARE LITIGATION TRACKER, <https://litigationtracker.law.georgetown.edu/issues/inflation-reduction-act/> (last visited Sept. 24, 2023).

jurisprudence concerning congressional authority to regulate more generally. Gillian Metzger, writing in 2019, characterized the current state of administrative law as “the legal equivalent of mortal combat, where foundational principles are fiercely disputed and basic doctrines are offered up for ‘execution.’”<sup>154</sup> Metzger notes that congressional gridlock has been a major contributing factor, leaving presidential administrations to push to achieve desired policy outcomes through administrative action. However, extreme polarization has raised the stakes and incentives for political challenges on both sides, and both red and blue states have litigated to thwart unwanted executive branch regulations.<sup>155</sup> While Metzger described the Court as “deeply divided” on administrative law” along ideological lines, the tension between incremental and radical reform she identified in the 2018 term seems to have resolved in favor of wholesale transformation, both restricting administrative government and placing the courts in a far stronger position of oversight.<sup>156</sup>

At the same time, the Roberts Court has continued down the Rehnquist Court’s path of revitalizing federalism; as Earl Maltz observes, under these two Chiefs, “the Court has developed a number of different doctrines that have been used both to protect the structural integrity of state governments and to preserve the ability of those governments to make important policy decisions without congressional interference.”<sup>157</sup> Recent rulings have revitalized the Eleventh Amendment, strengthening the concept of anti-commandeering, and restricting Congress’s authority to regulate under the Commerce Clause.<sup>158</sup> The Court’s trajectory suggests that Congress must tread cautiously in exercising legislative power, yet the Court has simultaneously insisted that Congress must employ this power more directly in its jurisprudence regarding the administrative state. *Sackett* provides further evidence that this path is on the minds of several of the conservative Justices.

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154. Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 1 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019)).

155. *Id.* at 2.

156. *Id.* at 5–7.

157. Earl M. Maltz, *Faint-Hearted Federalism: The Role of State Autonomy in Conservative Constitutional Jurisprudence*, 72 S.C. L. REV. 55, 55 (2020).

158. *Id.* at 59–60. As Maltz explains, the Court’s rulings in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), and *Alden v. Maine*, 527 U.S. 706 (1999), prevented Congress from legislating to allow states to be sued for damages for violating federal statutes. He notes that *New York v. United States*, 505 U.S. 144 (1992), among others, strengthened anti-commandeering by preventing the federal government from forcing states to take title to nuclear waste, a principle echoed in *Printz v. United States*, 521 U.S. 898 (1997), which barred the federal government from requiring the participation of local law enforcement in background checks. *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012), is best known for upholding the Affordable Care Act, but a majority of the Justices found that the Commerce Clause was not a sufficient ground. *Id.* at 60 & n.29.

*E. Transforming Voting Rights*

In contrast to some of the other issues discussed, the Court's transformative shift regarding voting in the United States did not take place in the last few years. Rather, it dates back to *Shelby County v. Holder*,<sup>159</sup> in 2013, which invalidated Section 4(b) of the Voting Rights Act of 1964 because the coverage formula was, in the Court's view, outdated and therefore an inappropriate trespass on federalism and state sovereignty.<sup>160</sup> The invalidation of Section 4(b) rendered Section 5 of the Voting Rights Act inoperable.<sup>161</sup> Section 5 had provided for preclearance, which required jurisdictions that had formerly engaged in discriminatory voting practices to subject new voting regulations to the Justice Department for review to ensure that they would not improperly burden voting rights.<sup>162</sup>

States responded quickly—indeed, the Texas legislature was out of the gate the day that the ruling in *Shelby County* was announced with a new voter ID law.<sup>163</sup> Some states covered by Section 4(b) passed measures that likely would have faced problems in the preclearance process, including removal of voters from registration rolls, new identification requirements, and other restrictive laws. The Leadership Conference on Civil and Human Rights reported that between 2012 and 2018, states closed 1,688 polling places, with 1,173 closures between 2014 and 2018 taking place in jurisdictions formerly subject to preclearance.<sup>164</sup> Purging voters through existing and new policies also became a critical tactic; one study found “consistent evidence that purge rates trended higher in formerly covered jurisdictions after the Supreme Court effectively ended preclearance . . . suggest[ing] that registrars in formerly covered jurisdictions might be more likely to erroneously remove voters from their rolls since *Shelby*.”<sup>165</sup>

The impact of the new regulatory environment is difficult to assess, at least for now, but watching it closely seems necessary in light of the Court's enthusiasm about returning some issues (like abortion, state support for religious free exercise, and election management itself) to state-level legislative processes. Scholars generally agree that the Voting Rights Act contributed to major increases in Black voting registration and Black

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159. 570 U.S. 529 (2013).

160. *Id.* at 556.

161. *Id.*

162. *Id.* at 537.

163. Catalina Feder & Michael G. Miller, *Voter Purges After Shelby*, 48 AM. POL. RSCH. 687, 687 (2020).

164. LEADERSHIP CONF. EDUC. FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE (2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

165. Feder & Miller, *supra* note 163, at 690.

participation in voting, thus enhancing democracy.<sup>166</sup> Overt racial discrimination is no longer a feature of American electoral law in most circumstances. The concern, especially after *Shelby County*, is with “second-generation discrimination,” or policies that, rather than disenfranchising demographic groups, “make the act of voting more difficult for those at the margins.”<sup>167</sup>

While legislation along these lines has certainly passed, the impact on turnout is not entirely clear. One study investigating restrictive measures in North Carolina found that, while overall turnout decreased, “Democratic vote share continued to remain higher in formerly precleared counties relative to noncovered counties,” suggesting that election outcomes, at least in the short term, were not disproportionately shifted in formerly covered precincts.<sup>168</sup> Another study confirmed that policymakers did “adopt policies that increase the cost of voting, perhaps differentially for prospective Black voters.”<sup>169</sup> Nevertheless, relative turnout for Black voters did not drop off, probably because of strong counter-mobilization.<sup>170</sup> Likewise, a study in South Carolina found that a fairly mild suppressive law did not have a definitive differential demobilizing impact for racial minorities.<sup>171</sup>

Several scholars of Latinx politics, however, criticize voter ID laws. They found that while these laws have a disparate and negative impact on nonwhite voters, even “[a]mong Whites, other factors are important predictors of lacking an ID, including being over the age of 65 years, a Democrat, and female.”<sup>172</sup> A more recent study presents stronger evidence that in recent elections, jurisdictions with the strictest versions of voter ID laws are experiencing a turnout gap disfavoring voters of color.<sup>173</sup>

Scholars’ inability to detect a clear impact from voter ID laws likely reflects what has become a cat-and-mouse game of restriction and mobilization on the ground. A 2019 study showed that the location of Democratic campaign field offices enabled party activists to mobilize

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166. E.g., Nadine Suzanne Gibson, *Moving Forward or Backsliding: A Causal Analysis of the Effects of the Shelby Decision in North Carolina*, 48 AM. POL. RSCH. 649, 649 (2020).

167. *Id.* at 651.

168. *Id.* at 656.

169. Kyle Raze, *Voting Rights and the Resilience of Black Turnout*, 60 ECON. INQUIRY 1127, 1128 (2022).

170. *Id.*

171. M.V. Hood, III & Scott E. Buchanan, *Palmetto Postmortem: Examining the Effects of the South Carolina Voter Identification Statute*, 73 POL. RSCH. Q. 492, 494, 501 (2020).

172. Matt A. Barreto et al., *The Racial Implications of Voter Identification Laws in America*, 47 AM. POL. RSCH. 238, 244–46 (2018).

173. John Kuk, Zoltan Hajnal & Nazita Lajevardi, *A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout*, 20 POL., GRPS., & IDENTITIES 126, 132 (2022).

sufficiently to overcome newly created legal barriers.<sup>174</sup> Some barriers, however, might prove easier to overcome than others. Poll closures, if strategically engineered, can drastically increase wait times for voting, and a recent study has shown that voters who experienced long waits to cast their ballots in one election were less likely to turn out for the next, and this effect was stronger for Black voters.<sup>175</sup> The full impact of *Shelby County* and other more recent rulings will also not be evident until the redistricting process from the delayed 2020 census has been fully completed, including still ongoing post-redistricting litigation.

*Shelby County* was an important factor in transforming voting access and voting rights, but other major recent rulings have shifted how federal oversight of elections works. In 2019, the Court ruled in *Rucho v. Common Cause*<sup>176</sup> that overt partisan gerrymanders incorporated in states' redistricting plans could not be challenged in federal court, as they constituted non-justiciable political questions. In 2021, the Court dealt another significant blow to the Voting Rights Act in *Brnovich v. Democratic National Committee*.<sup>177</sup> A divided Court, led by Justice Alito, ruled that Section 2 of the Voting Rights Act, which prohibits voting practices that deny or abridge the right to vote on the basis of race or color through voting qualifications or prerequisites, could not be employed to challenge state regulations regarding how ballots are collected and counted.<sup>178</sup>

The Court docketed two additional cases for the 2022 term that threatened to transform federal oversight over elections but resulted in more moderate rulings, at least in appearance. *Allen v. Milligan*<sup>179</sup> addressed a challenge to Alabama's 2021 redistricting plan under Section 2 of the Voting Rights Act, but Alabama claimed in defense that Section 2 itself as superannuated and asked the Court to narrow it drastically or eliminate it on constitutional grounds. The Court, in an opinion by Chief Justice Roberts, declined to do so, leaving it intact and sending Alabama back to the drawing board to establish its districts.<sup>180</sup> *Moore v. Harper*<sup>181</sup> considered whether the Constitution's Elections Clause prevents state high courts from reviewing legislatively drawn congressional districts, a claim based on the independent

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174. Jacob R. Neiheisel & Rich Horner, *Voter Identification Requirements and Aggregate Turnout in the U.S.: How Campaigns Offset the Costs of Turning Out When Voting Is Made More Difficult*, 18 ELECTION L.J. 227 (2019).

175. Stephen Pettigrew, *The Downstream Consequences of Long Waits: How Lines at the Precinct Depress Future Turnout*, 71 ELECTORAL STUD. 1, 9 (2021).

176. 139 S. Ct. 2484 (2019).

177. 141 S. Ct. 2321 (2021).

178. *Id.* at 2330.

179. 143 S. Ct. 1487 (2023).

180. *Id.* at 1517.

181. 143 S. Ct. 2065 (2023).

state legislature theory, which radically posits that the Elections Clause grants state legislators the final say over all voting laws and regulations in their states. In a decision authored by Chief Justice Roberts, the Court declined to entertain this theory and ruled that legislatures are indeed bound by judicial interpretations of state laws and constitutional guarantees.<sup>182</sup> The Chief Justice, however, underlined the authority of the U.S. Supreme Court to serve as a final arbiter of election matters if constitutional questions could be raised,<sup>183</sup> providing the Court with a means of addressing such disputes as happened in *Bush v. Gore*.<sup>184</sup>

The Court's stance on elections establishes some key themes. Law professor Travis Crum argues that it is "retreating from the 'political thicket' on every front but race *qua* race."<sup>185</sup> Elevating federalism and separation of powers over the Reconstruction Amendments' commitments to equality and defense of voting rights, the Court has empowered states to exert increasing control over access to the ballot.<sup>186</sup> These jurisprudential shifts have dovetailed with aggressive advances by the Republican Party to increase their electoral shares in the House and in state delegations through gerrymandering; as Robinson Woodward-Burns observes, Wisconsin Republicans managed to secure sixty-three percent of the state assembly seats with only forty-five percent of the votes cast in 2018.<sup>187</sup>

#### *F. Concerns About Judicial Overreaching*

Finally, the Court's activities have raised concerns not only about substantive rulings, but also about how the Justices are making them. The Court increasingly reaches major transformative outcomes through its emergency, or shadow, docket. The term "shadow docket," coined in 2015, distinguishes these cases from cases decided on the merits, for which attorneys present full oral arguments and the Justices render decisions in opinions signed by the Court or its members. Rulings on the shadow docket, in contrast, "typically come after no more than one round of briefing . . . ; are usually accompanied by no reasoning . . . ; invariably provide no identification of how (or how many of) the Justices voted; and can be handed

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182. *Id.* at 2081.

183. *Id.* at 2088–89.

184. 531 U.S. 98 (2000).

185. Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 365 (2022) (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946)).

186. *Id.* at 366–67.

187. Robinson Woodward-Burns, *Counter-Majoritarian Constitutional Hardball*, 81 MD. L. REV. 380, 390 (2022).



down at all times of day.”<sup>188</sup> While the shadow docket has always existed, until recently it has attracted little attention because its rulings have been perceived as largely “anodyne,” encompassing denials of certiorari, rejections of applications for emergency relief, refusal to intervene to bar executions, allowance of extensions for parties to file briefs, and the like.<sup>189</sup>

Law professor Stephen Vladeck has shown, however, that since 2017, the Court has not only increased the number of emergency relief requests it has granted; it has also issued more substantively important and potentially controversial rulings, including decisions that either enjoin policies statewide or stay rulings that had blocked state or federal policies, generating far more consequential results.<sup>190</sup> The issues raised, substantive as they are, have contributed to the shadow docket’s increasingly politically divisive nature, provoking significantly more public reaction and controversy as well as more written dissents within the Court.<sup>191</sup> Dissents have raised concern about the dynamics within the Court and the extent to which much of the shift is being driven by the conservative Justices.<sup>192</sup> As the number of shadow docket cases has climbed, so too has the innovative nature of relief granted for these petitions, including the issuing of summary rulings on the merits.<sup>193</sup> Finally, these rulings have created confusion in the lower federal courts, which are unsure whether and when they constitute binding precedent.<sup>194</sup>

This development is troubling. These rulings are often issued with little justificatory reasoning and without the usual full development of a controversy in the context of a case with lower court rulings on the merits. Yet they “have had dramatic real-world impacts” in important areas, including enabling restrictive immigration policy to go into effect, reviving the federal death penalty, prohibiting states from imposing COVID restrictions, barring lower court rulings that extended ballot access in a presidential election, and withholding intervention in post-election controversies, to name only a few.<sup>195</sup>

The Court has become far more willing to wade into disputes that previously it might have eschewed under Brandeis’s famous *Ashwander* formulation. His concurrence setting out seven rules for avoiding unnecessary constitutional decision-making, while not always fully

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188. *Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 2 (2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law).

189. *Id.* at 3.

190. *Id.* at 6.

191. *Id.* at 6–7.

192. *Id.* at 8.

193. *Id.* at 9.

194. *Id.* at 9–10.

195. *Id.* at 16.

observed, has guided the Court to be cautious both about accepting cases for review and issuing broad rulings on constitutional grounds if non-constitutional or narrower grounds are available.<sup>196</sup> As Vladeck notes, substantive rulings in shadow docket cases can violate several of these principles; in *Roman Catholic Diocese of Brooklyn v. Cuomo*,<sup>197</sup> the Court “enjoined New York COVID restrictions that were *no longer in effect* . . . and did so before the litigation had a chance to make its way through the courts on the merits.”<sup>198</sup> In *West Virginia v. EPA*, the Court evaluated the constitutionality of an administrative rule that had never been implemented, had been superseded by a subsequent administration’s revised framework, and had been publicly abandoned by yet another administration.<sup>199</sup> And while the Court denied standing to aggrieved student loan borrowers wishing to challenge the Biden administration’s student loan debt relief plan, a majority allowed the state of Missouri to assert standing based on its claim that a loan servicing corporation that had not itself objected to the program had been injured.<sup>200</sup>

These developments suggest that something significant is happening with the Supreme Court that goes beyond a few controversial rulings or even an effort to protect and defend conservative ideologies in a highly partisan political moment coming on the heels of a very lengthy stretch of mostly divided government in which few presidents have had the opportunity to work with two houses of Congress held by shared strong majorities. The changes the Court is promoting go further than just issuing some big wins on the conservative side of the ledger that the political branches have been unable to deliver. But if the Court is indeed doing something different that cannot be captured by identifying some objectionable cases or claiming that it is engaging in activism (a charge that political scientist Thomas Keck levelled at the Rehnquist Court<sup>201</sup>), what is it? And what does it have to do with the institution’s legitimacy?

## II. HOW DO WE EVALUATE LEGITIMACY?

Based on these concerns, as well as the overall balance of the Court’s personnel in light of Mitch McConnell’s refusal to consider Barack Obama’s nominee to replace Antonin Scalia upon his death, prominent liberal law professors have called the Court’s rulings and their legitimacy into question.

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196. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–49 (1935) (Brandeis, J., concurring).

197. 141 S. Ct. 63 (2020).

198. *Hearing Before the S. Comm. on the Judiciary*, *supra* note 188, at 19.

199. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

200. *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023).

201. *See generally* THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004).

Constitutional law luminary Laurence Tribe, in declaring the Supreme Court to be in crisis in 2022, stated his view that “the [C]ourt is at a point that is far more dangerous and damaging to the country than at any other point, probably, since *Dred Scott* . . . . [T]he [C]ourt is dragging the country back into a terrible, terrible time.”<sup>202</sup> While less hyperbolic in his assessment, Erwin Chemerinsky, the Dean of Berkeley’s Boalt Hall Law School, declared the October 2021 term to be “one of the most momentous in history.”<sup>203</sup> Reflecting on the 2022 term in summer 2023, law professor Aziz Huq acknowledged that the rulings released in 2022–23 were overall less shocking, giving the impression that “[a] more cautious, more legalistic tribunal seemed at work.”<sup>204</sup> He nonetheless warned that “[t]he basic vector of the Roberts Court remains unchanged” and noted that the majority continued to “flex[] enormous discretion interpreting statutes and constitutional text to reach profoundly counter-democratic outcomes.”<sup>205</sup>

Concerns about the Court also extend to the scope and approach of controversial decisions. Liberal legal academics have focused ire on conservatives’ uses of originalism. Eric Segall, for instance, provides a developmental account of originalism, arguing that its foundation in deference to the politically accountable branches has shifted over the years to a cynical search for argumentative techniques to support desired conservative outcomes.<sup>206</sup> His current viewpoint is even more critical, shifting from describing it as “mostly an after-the-fact rationalization for decisions made on other grounds” to “all dangerous nonsense.”<sup>207</sup> Supporters of the Court’s conservative turn in both jurisprudential approach and outcomes have defended originalism but also have advanced and legitimized other interpretive modes like Adrian Vermeule’s attempt to ground “common good constitutionalism” that will produce and defend a conservative moral vision of law and constitutionalism.<sup>208</sup>

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202. KK Otteson, *Current Supreme Court is Damaging to the Country, Law Scholar Warns*, WASH. POST MAG. (Aug. 16, 2022), <https://www.washingtonpost.com/magazine/2022/08/16/supreme-court-roe-vs-wade-clarence-thomas/>; see also Neiheisel & Horner, *supra* note 174.

203. Erwin Chemerinsky, *Chemerinsky: Supreme Court Poised to Sharply Advance the Law to the Right*, ABA J. (Sept. 29, 2022, 9:52 AM), <https://www.abajournal.com/columns/article/chemerinsky-supreme-court-poised-to-sharply-advance-the-law-to-the-right>.

204. Aziz Huq, *No, The Roberts Court Is Not Moderating*, TIME (July 6, 2023, 6:00 AM) <https://time.com/6292282/the-supreme-court-remains-profoundly-counter-democratic/>.

205. *Id.*

206. ERIC J. SEGALL, ORIGINALISM AS FAITH 88 (2018).

207. Eric Segall, *Originalism as Dangerous Nonsense*, CONST. ACCOUNTABILITY CTR. (Nov. 3, 2022), <https://www.theconstitution.org/news/originalism-as-dangerous-nonsense/>.

208. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

The debate proceeds in normative terms around both outcomes and interpretive approaches. Despite its intensity, legal scholars do seem to share some common ground. Generally, they believe that precedent ought to be respected unless there is a good and sufficient reason for turning aside from it.<sup>209</sup> While the interpretation of constitutional and statutory language is a subject of much debate, scholars generally agree (outside of the most dedicated critical legal studies approaches) that the language itself is consequential.<sup>210</sup> These normative points of agreement do not incorporate clear predictions about consequences for their violation, but we may generally understand that violating them invites negative consequences ranging from erosion of shared values to loss of public trust in the judiciary.

The political science approach is entirely different, focusing on institutional legitimacy. Rather than debating standards around reasoning, these scholars begin from the fundamental observation that judging is a political act. The following discussion will outline how political scientists understand and analyze judicial decision-making and explain what we can learn from these insights. As the Article will explain, scholars who focus on the quantitative analysis of judicial behavior and who study judges' strategic behavior have analyzed the ideological shifts on the Court prompted by changes in membership and have investigated the public's views about the Court and its activities. The Article will then explain how these scholars have related this work to public-opinion-oriented understandings of legitimacy. It will then turn to the alternative analysis of legitimacy provided by historical institutionalist approaches in political science, followed by a discussion of how the current era bears a striking resemblance to the Gilded Age.

#### *A. Political Science, Political Elements of Judging, and Public Appraisals*

To understand what political science has to contribute to conversations about legitimacy, it is first useful to understand how these scholars conceptualize judicial ideology and judicial behavior, and then to look to how these measurements relate to the public's views about the Court. As public law scholars Keith Whittington, R. Daniel Kelemen, and Gregory Caldeira explain, while scholars engaging "the professional craft of law" may bracket the politics of law, among scholars of law and politics, "the starting point . . . is that politics matters and that considerable analytical and empirical leverage over our understanding of law and legal institutions can

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209. Ronald Kahn, *Social Constructions, Supreme Court Reversals, and American Political Development: Lochner, Plessy, Bowers, but not Roe*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 67 (Ronald Kahn & Kenneth Kersch eds., 2006).

210. See generally Ronald Kahn, *Supreme Court Decision-Making and the Social Construction Process: Continuity in a Polarized Age*, 4 *CONST. STUD.* 155 (2019).

be gained by placing politics in the foreground.”<sup>211</sup> In political science, the empirical study of U.S. courts and judicial decision-making falls into three general categories: the study of judicial behavior, the analysis of strategic action by judges and other state actors, and historical institutional analysis of how judges’ roles and behavior have developed over time and in response to other institutions.<sup>212</sup> The former two approaches enable us to measure ideology and analyze how the Court is perceived publicly. The latter, discussed in the next subsection, provides a broader, structural explanation for legitimacy rooted in institutional history and development.

All three perspectives separate empirical evaluation from normative analysis. The literature on judicial behavior emphasizes judicial attitudes, holding that judges, and particularly Supreme Court Justices, regardless of whether they sit on the right or left wing of the Court, “decide cases in light of their sincere ideological values juxtaposed against the factual stimuli presented by the case.”<sup>213</sup> The strategic model acknowledges judicial preferences and the role of ideology, but posits that a judge will attend to “the preferences of other relevant actors [and institutions] and the actions she expects them to take, not just . . . her own preferences and actions.”<sup>214</sup> Scholars in these traditions developed measures of judicial ideology that incorporate multiple sources of data and update as Justices’ careers progress.<sup>215</sup> These measures enable measurement of polarization across a Court, and information about polarization can then be considered in the context of broader questions of political polarization and public opinion. While this approach presumes that all judges have ideological standpoints, its practitioners have used these measures to illustrate growing ideological division on the Court and the loss of a meaningful ideological center.<sup>216</sup> Adam Bonica and Maya Sen’s work also illustrates that presidential appointments at the district and circuit court levels have grown increasingly polarized over time.<sup>217</sup> These shifts potentially have implications for the Court’s legitimacy if we consider legitimacy to be in part a reflection of public perceptions of the Court and its work.

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211. Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira, *The Study of Law and Politics*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 3, 4 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008).

212. *Id.* at 12. Political science scholars of law and politics also incorporate law and society approaches and engage in comparative research, but these branches of study fall beyond the scope of this Article.

213. Robert M. Howard & Kirk A. Randazzo, *Understanding Judicial Behavior—A Work in Progress*, in ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR 1, 3 (Robert M. Howard & Kirk A. Randazzo eds., 2018).

214. *Id.* at 4.

215. Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97 (2021).

216. *Id.* at 99.

217. *Id.* at 113.

One way of considering the Court's legitimacy is simply to look at whether the public believes it to be legitimate. Regardless of how one understands the foundations of legitimacy, an institution's legitimacy in a democracy relates to how that democracy's denizens view it, and if the institution is consistently perceived as being illegitimate or taking illegitimate actions, its legitimacy is threatened. The changes identified by quantitative scholars of public law have generated a gap between public opinion and the Supreme Court's behavior. For decades, while political scientists studied both attitudes and strategy, they understood the Court as operating within the broad constraints articulated by Robert Dahl and his successors: The Court allied with stable political interests and often collaborated with its institutional partners and therefore was unlikely to stray very far or for very long away from the dominant views of lawmaking majorities.<sup>218</sup>

The Court enjoys an advantage here. Political science studies have consistently shown that "[t]he Court generally maintains high levels of legitimacy and diffuse support, which is thought to serve as the source of its influence."<sup>219</sup> While people may disagree with individual decisions, even highly controversial ones like *Bush v. Gore*<sup>220</sup> have not tended to have a lasting impact. Some scholars have posited that the stickiness of the Court's positive perception suggests that its legitimacy lies in "deeper democratic values," as the public sees the Court as a distinctive institution: "thoughtful, legalistic, and thus generally different from the other two branches."<sup>221</sup> While this public understanding might seem to benefit the Court by insulating it from the volatility, reactivity, and ideological sensitivity that the other branches experience, it incorporates an Achilles' heel: If perceptions of the Court begin to tip against its adherence to legalistic and apolitical behavior, trouble could arise. An experiment that tested reactions to framings of a Court ruling either as political or legalistic, illustrated that these framings do matter for the public. But the relationship is complex. While "[t]he Court has more ideological leeway when it is seen as being above politics," people do care about outcomes and their alignment with their policy preferences.<sup>222</sup> Overall, however, "most decisions do not affect legitimacy," even if these decisions are in high profile cases.<sup>223</sup>

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218. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 282 (1957).

219. Dino P. Christenson & David M. Glick, *Chief Justice Roberts' Health Care Decision Disobeyed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 404 (2015).

220. 531 U.S. 98 (2000).

221. Christenson & Glick, *supra* note 219, at 404.

222. *Id.* at 415.

223. *Id.* at 416.

A more recent study considers how the Court's behavior in high profile cases has aligned with public views about the controversial issues driving them from 2010 to 2020. Authors Stephen Jessee, Neil Malhotra, and Maya Sen analyzed data collected through surveys conducted periodically over the course of the decade to trace public opinion concerning major issues that the Court has addressed and compare these beliefs to the Court's positions. They find that "the [C]ourt's rulings were once similar to the preferences of the average American but are now more conservative than the preferences of the majority of Americans."<sup>224</sup> If the Court indeed "must draw its legitimacy as a governing institution from public support," questions arise about how large the gap has grown and how it is perceived.<sup>225</sup>

The Court's ideological shift seems tied to personnel shifts. In 2010, the first wave of the survey, the median Justice was Justice Kennedy, known to be somewhat conservative but an occasional collaborator with the liberal wing of the Court. With his departure, the center of gravity shifted to Chief Justice Roberts in 2018. The 2020 survey captured a term in which Roberts cast moderating votes in key cases, "siding with liberal majorities across several issues."<sup>226</sup> In light of this, "the [C]ourt's position was quite close to the average American" in 2020 as well as in 2010.<sup>227</sup> In 2021, however, Brett Kavanaugh became the median Justice and the ideological balance shifted from 5-4 to 6-3, producing dramatic change in outcomes across the board, as well as in highly salient cases.<sup>228</sup>

This shift put the Court significantly out of step with American public opinion. Jessee, Bonica, and Sen found that during the 2021 term, "the [C]ourt mov[ed] away from the general public to correspond almost exactly to the ideological position of the average Republican voter," which was some distance away from the overall average.<sup>229</sup> But how did these changes line up with public perceptions? In 2010, all groups "expected the Court to be more liberal than it actually was," perhaps reflecting either a general perception of the Court as an institution dedicated to liberal reform or Republican efforts to paint the Court as an activist institution.<sup>230</sup> The media covered the Court as being more conservative in the years leading up to the 2021 term and news outlets heavily discussed how Justice Ruth Bader Ginsburg's death would affect the Court, leading the survey's respondents to expect a rightward shift

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224. Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public*, 119 PROC. NAT'L ACAD. SCI. U.S. 1, 1 (2022).

225. *Id.*

226. *Id.* at 3.

227. *Id.*

228. Black & Johnson, *supra* note 32; Jessee et al., *supra* note 224, at 3.

229. Jessee et al., *supra* note 224, at 3.

230. *Id.*

in light of staffing changes. Yet in 2021, Democrats still expected the Court to be fairly centrist in its rulings on publicly controversial and salient issues.<sup>231</sup>

How then can we understand public assessment of the Court and the question of legitimacy? If legitimacy is linked to public perceptions of the Court and the outcomes in the cases it decides, perhaps the problem is simply one of slow updating. Scholars investigating the relationship between the Court's actions and perceptions of its legitimacy have traditionally presumed a sequenced process. The Court makes a decision, about which the public learns through mass media and the elites and interest groups with whom they engage. Individuals then compare their own policy preferences with their understanding of what the Court has done, and finally reach a conclusion about the Court's legitimacy based on this assessment.<sup>232</sup> In theory, this updating process would reveal major gaps between public preferences and the Court's decisions, raising public concern about the Court when they appear.

This understanding, however, incorporates challenging assumptions about the public's willingness to evaluate themselves on a conventional ideological scale, their knowledge about the Supreme Court's activity, and their proper mapping of Court decisions on a unidimensional scale.<sup>233</sup> Empirical testing of this model published in 2017 after the Court's surprising partial validation of the Affordable Care Act suggests that the baseline assumptions about ideology and outcomes of even highly salient cases may not hold water.<sup>234</sup> Beyond this, viewpoints about the Court seemed to be resistant to change (echoing Dino Christenson and David Glick's findings).<sup>235</sup> A simpler model might capture the process more accurately: "citizens evaluate Court opinions, when they learn of them, in terms of whether they like the opinion or dislike it," and while some reach these conclusions on ideological grounds, others turn to "simple group benefits," and still others "may do nothing more than take cues from respected opinion leaders."<sup>236</sup> Underneath these dynamics, however, remains the Court's reserve of institutional respect, which either may lead some observers to misperceive the Court's placement in ideological space (like the Democrats that Jessee, Malhotra, and Sen observed) or to give the Court more benefit of

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231. *Id.* at 3–4.

232. James Gibson, Miguel Pereira & Jeffrey Ziegler, *Updating Supreme Court Legitimacy: Testing the "Rule, Learn, Update" Model of Political Communication*, 45 AM. POL. RSCH. 980, 981 (2017).

233. *Id.* at 984–85.

234. *Id.*

235. *Id.* at 995; see Christenson & Glick, *supra* note 219.

236. Gibson et al., *supra* note 232, at 997.



the doubt that other branches might receive (as Christenson and Glick observed).

It is too early to tell whether the 2022 term will lead to updating, and if so, what impact that updating will have on perceptions of the Court's legitimacy. There are hints that at least in the short run, the 2021 term's decisions have impacted legitimacy. A recent experiment suggests that in the current political climate, even individuals who believe that institutional fairness is important may be willing to accept "unfair Court procedures that benefit one's group."<sup>237</sup> In this environment, "a modern audience—that now better connects all elements of politics with their existing predispositions and attitudes . . . —may be more receptive to attacks on the judiciary, which may come to bear on long-run support."<sup>238</sup>

Jessee, Malhotra, and Sen conducted the most recent survey in their study in April 2021, but rulings issued over the course of the 2021 term took both a harder and more publicly visible turn to the right, culminating in *Dobbs*.<sup>239</sup> In the immediate aftermath of *Dobbs*, the Court's standing in the public eye dropped precipitously. In both July and September, the Court's disapproval ratings in the Gallup Poll were at or above 55%, higher than any point since reporting on this item began in 2000.<sup>240</sup> More in depth polling conducted by the Pew Research Center in August 2022 reached similar conclusions. They found that "Americans' ratings of the Supreme Court are now as negative as . . . at any point in more than three decades of polling on the nation's highest court."<sup>241</sup> In 1987, Pew's respondents split 76-17% in rating the Court as favorable rather than unfavorable, but in 2022, the unfavorable rating was 49%, topping the favorable rating for the first time.<sup>242</sup> Notably, the percentage of respondents indicating that they held a very unfavorable opinion of the Court reached 21% in 2022, exceeding previous highs of 17% in 2015.<sup>243</sup> By the summer of 2023, the Court's favorability

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237. Miles T. Armaly, *Loyalty Over Fairness: Acceptance of Unfair Supreme Court Procedures*, 74 POL. RSCH. Q. 927, 935 (2021).

238. *Id.* at 937 (citations omitted).

239. Jessee, Malhotra & Sen, *supra* note 224, at 5; Black & Johnson, *supra* note 32.

240. *Do You Approve or Disapprove of the Way the Supreme Court Is Handling Its Job?*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> (last visited Aug. 14, 2023).

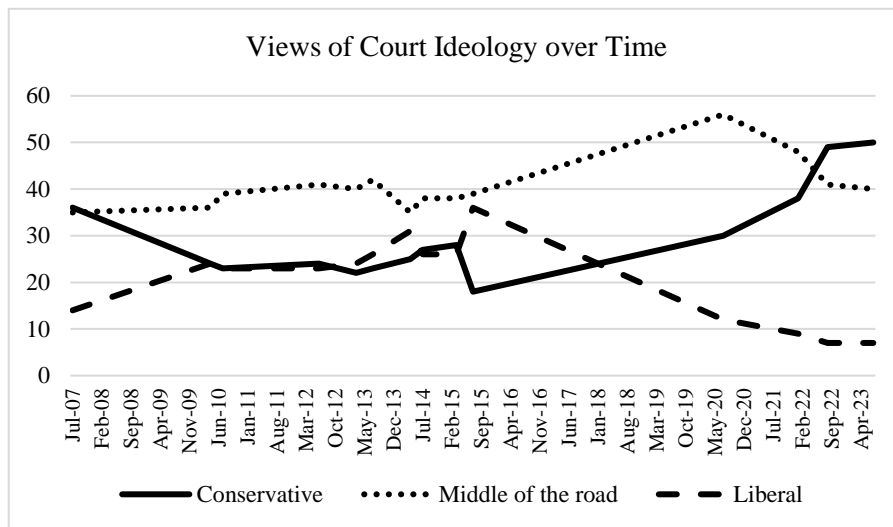
241. *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), <https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/> [hereinafter *Positive Views Decline*].

242. *Id.*

243. *Wave 113 August 2022 Final Topline*, PEW RSCH. CTR. (Sept. 1, 2022), [https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2022/08/PP\\_2022.09.01\\_SCOTUS-TOPLINE.pdf](https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2022/08/PP_2022.09.01_SCOTUS-TOPLINE.pdf).

rating had fallen to a historic low of 44% and its unfavorability rating remained high, at 54%.<sup>244</sup>

The Pew data suggests that updating may be occurring, even among Democrats who previously misperceived the Court's orientation. In January 2022, 38% of respondents saw the Court as conservative, with 48% describing it as middle of the road.<sup>245</sup> By August, the percentage perceiving it as conservative had grown to 49% (with 41% choosing middle of the road).<sup>246</sup> And in July 2023, half of respondents perceived the Court as conservative, with only 7% perceiving it as liberal.<sup>247</sup> As the graph below indicates, this marks a distinctive shift in perception, with the percentage viewing the Court as liberal in steady decline, while those seeing it as conservative experienced a sharp uptick that may be sticking.<sup>248</sup>



The view of the Court as ideally not political still prevails. In both August and January of 2022, more than 80% of respondents believed that Justices should not “bring their own political views into how they decide major cases.”<sup>249</sup> Among those respondents, 38% said in August that the Court was doing a poor job of keeping their political views out of their decisions,

244. Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (July 21, 2023), <https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/>.

245. *Wave 113 August 2022 Final Topline*, *supra* note 243.

246. *Id.*

247. Lin & Doherty, *supra* note 244.

248. *Id.*; *Positive Views Decline*, *supra* note 241.

249. *Positive Views Decline*, *supra* note 241.

compared to 24% in January 2022. Potentially signaling further trouble on the horizon, respondents indicating that the Court had “too much power” grew from 25% in 2020 to 30% in January 2022 to 45% in August 2022.<sup>250</sup> In January, 58% responded that the Court had the right amount of power, but by August, this number had fallen to 48%.<sup>251</sup>

Suggestive, to be sure, but important questions remain. Will the overall disapproval of the Court dissipate over time as outrage over *Dobbs* fades, with the Court managing to evade the deep partisan divides that affect other national institutions? A recent study finds that even when American judges engage in scandalous behavior, people tend to withdraw support for the judges themselves but not to see the judiciary as an institution more negatively.<sup>252</sup> Yet given the public opinion data discussed above, could outrage be stoked if the Court continues to remake American civil rights jurisprudence and thwart national coordinated administrative action to address big problems like climate change and pandemics? Will the Justices be able, through their reasoning and the ways it is publicly framed, to persuade the public that they are doing something more or different than engaging in raw politics? And ultimately, is measuring public confidence in the Court and acceptance of its decisions the best way to evaluate its legitimacy?

#### *B. Historical Institutionalism and the Courts' Political Role*

The historical institutional perspective on the Court pushes us to look deeper, holding that while public support and general acceptance of the Court's rulings may protect it against attack, it may not be enough to maintain legitimacy. Likewise, a loss of support and a public shift not only toward opposition of particular decisions but toward a sense that the Court itself is not performing its proper constitutional task would be suggestive but might not be enough to illustrate that the Court has crossed the line from making bad or even unwise decisions and into illegitimacy. Indeed, even liberal observers unhappy with the Court's current trajectory might pause when reminded that several of the Warren Court's decisions were controversial, the legitimacy of the Court itself came under frequent public attack, and opponents of the Court's reapportionment jurisprudence came far closer to

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250. *Id.*

251. *Id.*

252. See generally Joshua Boston et al., *Your Honor's Misdeeds: The Consequences of Judicial Scandal on Specific and Diffuse Support*, 56 PS: POL. SCI. & POL. 195 (2023).

forcing a constitutional convention than the fiercest critics of the Roberts Court have yet imagined.<sup>253</sup>

Historical institutionalism, attending as it does to political regimes, focuses on where the Court stands in its relationship to other branches. Keith Whittington's review of all rulings in which the Court has "explicitly considered a constitutional challenge to the scope of federal legislative authority and rendered a substantive judgment" outlines this relationship well.<sup>254</sup> He shows how the Court alternately contributes to constructing, maintaining, and breaking down political regimes, noting that it exercises judicial review more frequently over statutes that "have been in place for some time."<sup>255</sup> Whittington identifies three large-scale eras and largely confirms other scholars' claims that the Court occasionally goes through periods of invalidating congressional statutes more frequently, but his picture of the Court is neither that of a simple counter-majoritarian laggard or of a follower of public opinion. Instead, "it sometimes supports regimes, but often shapes the ways that these regimes legitimize their political actions," thus "act[ing] as a regime partner . . . on its own terms from its distinctive institutional place."<sup>256</sup>

As a regime partner, the Court can collaborate, as a conservative Court did with Republicans during the Rehnquist era, by trimming the sails of expansive congressional legislation passed in a prior, more left-leaning regime, thereby aligning national policy more closely with the prevailing regime. Yet, at the same time, even a conservative Court can hew to a prevailing constitutional order by siding with strongly established and apparently foundational constitutional principles, as Ronald Kahn has argued about the Rehnquist (and until recently, the Roberts) Court's willingness to advance lesbian and gay rights and to maintain at least superficial support for abortion.<sup>257</sup> This is not just a function of the Court's role in producing and defending doctrine, but also reflects how the Court constructs and incorporates social facts that then influence the world outside its doors.<sup>258</sup>

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253. J. DOUGLAS SMITH, ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT "ONE PERSON, ONE VOTE" TO THE UNITED STATES 7–8 (2014); see *Baker v. Carr*, 369 U.S. 196 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1962).

254. KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* 317 (2019).

255. *Id.* at 33.

256. Julie Novkov, *How the Umpires Remake the Game*, 35 CONST. COMMENT. 31, 34 (2020).

257. Kahn, *supra* note 209; Ronald Kahn, *The Right to Same-Sex Marriage: Formalism, Realism, and Social Change in Lawrence (2003), Windsor (2013), & Obergefell (2015)*, 75 MD. L. REV. 271 (2015).

258. Ronald Kahn, *Institutional Norms and the Historical Development of Supreme Court Politics: Changing "Social Facts" and Doctrinal Development*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* 43, 43–59 (Howard Gillman & Cornell Clayton eds., 1999).

The political branches, when aligned and united behind a large-scale political project, can facilitate partnerships with the courts, ranging from encouraging collaboration to reshaping them to enforce their regime. The most notable example is Congress's work during and immediately after the Civil War to transform the federal courts, redraw districts, and add judges who would collaborate actively with the Republican Party.<sup>259</sup>

The previously discussed research on public opinion and the Court's legitimacy highlights the stability of American trust in the federal courts generally and the Supreme Court specifically, and this favorable view can be traced back at least to the early 1970s.<sup>260</sup> However, the Court has not always held this favor securely. Congress's remaking of the federal courts followed the Court's failed effort to resolve the struggle over slavery in *Dred Scott v. Sandford*,<sup>261</sup> a failure that contributed to the popular rise of the Republican Party.<sup>262</sup> While the conservative Court's retreat in 1937 is often attributed to action by a unified Congress and President who wanted to move forward against the will of recalcitrant Justices, brought to heel only by the threat of institutional reform, political mobilization played an important role in the struggle.<sup>263</sup> The Court's behavior was controversial enough that the Gallup Poll "asked the public several times in this period [in 1935 and 1936] about restrictions on the Supreme Court's power to invalidate legislation."<sup>264</sup> Sentiment against the Court remained high and initially Roosevelt's plan to alter the Court's structure garnered interest and support, signaling a lack of trust in its institutional legitimacy.<sup>265</sup> Progressive-era advocates for labor regulation routinely attacked the Court as not only out of touch, but as illegitimately empowering capital to the detriment of unions and vulnerable workers in the late nineteenth and early twentieth centuries.<sup>266</sup>

This modern stability and positive public perception that the Court has enjoyed more recently have prevailed against a backdrop of independent scholarly discussions. First was a debate within the legal academy over the circumstances under which the Court could legitimately override the will of

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259. See generally JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* (2012).

260. Carol Nackenoff, *Is There a Political Tilt to "Juristocracy"?*, 65 MD. L. REV. 139, 143 (2006).

261. 60 U.S. (19 How.) 393 (1857).

262. See generally MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

263. See generally LAURA KALMAN, *FDR'S GAMBIT: THE COURT-PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM* (2022).

264. Gregory A. Caldeira, *Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1141 (1987).

265. *Id.* at 1149–50.

266. See generally JULIE NOVKOV, *CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS* (2001).

the people, keying off the Warren Court's remaking of American constitutional law.<sup>267</sup> Second, in political science, researchers sought to link court decisions to attitudes and to evaluate strategic behavior.<sup>268</sup> And social scientists debated the extent to which the courts, if not acting with the support and collaboration of the other two branches, could effect any policy change at all.<sup>269</sup> In the 1990s and early 2000s, historical institutionalists integrated these conversations by asking questions about how the institutionally distinct nature of the courts shaped their capacity to make policy and defined the avenues through which they could do so.<sup>270</sup>

These discussions, though often separate, tied in with the growing observation in the study of comparative constitutional law that judicial power and authority were growing worldwide. Ran Hirschl identifies the rise of juristocracy, or judicial empowerment through constitutionalization (shifting issues previously addressed through political processes into constitutional courts) and the corresponding transformation of political struggles and discourse into constitutional terms, in several comparative cases. Juristocracy deals courts into the political realm in a vaunted status that became—as we have seen—difficult to challenge effectively in public opinion or in the political sphere.<sup>271</sup>

This dynamic makes consideration of the Court's legitimacy important while also making a simple metric difficult to construct. Juristocracy in the United States is intertwined with judicial supremacy, or the view that “the Court defines effective constitutional meaning such that other government officials are bound to adhere not only to the Court's disposition of a specific case but also to the Court's constitutional reasoning.”<sup>272</sup> As Whittington shows, judicial supremacy in the United States is grounded in political development. He argues that over time, “political actors defer to the authority claims of the courts because the judiciary can be useful to their own political and constitutional goals.”<sup>273</sup> Presidents, for instance, have strong incentives to collaborate with agendas of judicial empowerment if they can turn to the

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267. Mark Graber, *From the Counter-majoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 MD. L. REV. 1, 1–2 (2006).

268. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

269. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

270. Graber, *supra* note 267, at 3–4.

271. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2007).

272. KEITH E. WHITTINGTON, *THE POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 7 (2006).

273. *Id.* at 18.

courts as authoritative explainers and legitimators of these Presidents' constitutional agendas.

Historical institutional analysis recognizes that developmental trajectories of institutions may evolve differently. In constitutional development, identification of periods of political time and political regimes do not always align with judicial time or the conditions that may contribute to successful legal mobilization. Uneven institutional development may give rise to intercurrency, or a situation in which lack of alignment in institutional orders and development leads to conflicts that may diminish the operation of state capacity, enables political entrepreneurs to initiate new forms of power and authority to accomplish needful tasks, or both.<sup>274</sup>

To consider how judicial empowerment and institutional development have worked together across American constitutional history, we may consult recent work by law professor Jack Balkin. Balkin's analysis illuminates how the alignment of different cyclical phenomena can produce environments that are more or less amenable to constitutional change. He argues that American politics reflects three cycles: "the rise and fall of political regimes in American history," "the cycle of polarization and depolarization," and "the decay and renewal of republican government."<sup>275</sup> Each cycle turns individually, but as they intersect with each other, they produce what he terms "constitutional time."<sup>276</sup> When all three cycles approach nadir at the same time, he argues that the conjunction may drive a bottom-up movement seeking democratic renewal.<sup>277</sup>

Discussions of polarization and depolarization over time are common in political science.<sup>278</sup> Historical institutionalists studying constitutional developments have long understood American politics as composed of sequential regimes and have debated about the extent to which courts follow, collaborate with, or act independently from them.<sup>279</sup> Balkin builds his theory from both sets of insights to illustrate why some moments in constitutional history present more open opportunities for democratic advancement than others.

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274. *See generally* KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004).

275. JACK BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* 6 (2020).

276. *Id.* (emphasis omitted).

277. *Id.* at 6–7.

278. *See generally* NOLAN MCCARTY, *POLARIZATION: WHAT EVERYONE NEEDS TO KNOW* (2019); POLITICAL POLARIZATION IN AMERICAN POLITICS (Daniel J. Hopkins & John Sides eds., 2015).

279. *See generally* Matthew K. Hall, *Rethinking Regime Politics*, 37 *L. & SOC. INQUIRY* 878 (2012); KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* (2019).

While regimes, or the dominance of a political coalition organized through a party, and polarization are straightforward concepts in literatures on constitutional and political development, Balkin advances the analysis by identifying constitutional rot and its successor, constitutional renewal, as factors in political development. He defines rot as “the process through which a constitutional system becomes less democratic and less republican over time.”<sup>280</sup> Government agents become less responsive to popular imperatives and less invested in employing government to serve the public good.<sup>281</sup> The end point of this developmental trajectory—the capture of government by a small cadre of powerful and wealthy individuals—is neither democratic nor republican. It has reached oligarchy.<sup>282</sup>

The three instances of rot that he identifies are the 1850s dominance of slavery interests, the nineteenth century’s Gilded Age, and the current moment.<sup>283</sup> Rot encourages the collapse of political norms, particularly those that facilitate functional political compromise and advance. The robust balancing of interests and ambitions through institutions laid out in the Federalist Papers breaks down, as raw and boundaryless power struggles prevail. This no-holds-barred environment undermines both faith in rule of law and the rule of law itself. Ultimately trust collapses: trust between different representatives of government and their coalitions, and between the people and their public officials. Conditions become ripe for unscrupulous demagogues to flourish.<sup>284</sup>

Balkin identifies six distinctive regimes in American history, with three falling in the antebellum era and three after: a Republican regime from 1860 through 1932, a Democratic regime spanning the New Deal and Civil Rights eras from 1932 through 1980, and the current Republican regime that began with the election of Ronald Reagan in 1980.<sup>285</sup> The current regime, a “regime of neoliberalism, deregulation, declining labor unions, and lower taxes—especially for the wealthy,” is “cracking up before our eyes.”<sup>286</sup> While the Republicans have often won national and state elections, the actions the party has taken to consolidate these gains have empowered its extremist wing and strengthened wealthy individual donors’ ability to dictate directions. The current moment features an alignment of three low points in the cycles Balkin identifies: a regime’s decline, extreme polarization, and extensive constitutional rot. Trump’s efforts to energize the party depended on

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280. BALKIN, *supra* note 275, at 45.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 14–15.

286. *Id.* at 16.



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whiteness, populism/nativism, and Christian nationalism, and he sought popular buy-in around this coalition while signaling his willingness to govern to favor business elites and corporations and wealthy individuals.<sup>287</sup>

In times of rot, Balkin argues, federal courts become part of the problem. As the dominant party is the “primary enabler and driver of constitutional rot,” its political actors do not hesitate to bring the courts into the struggle to maintain power as principle ebbs away.<sup>288</sup> Polarization leaves judges beholden to decaying regime politics and they find themselves employing language of constitutional principle to achieve partisan gain. Their audience increasingly becomes political and legal elites, and as economic inequality increases, they may tend to acquiesce to or even accelerate the process by virtue of their reflection of “the values and worldview of polarized elites.”<sup>289</sup>

For Balkin, in the current conjunction of regime cycling, extreme polarization, and rot, as functional governance becomes more difficult to accomplish, incentives grow to pass governance questions to the courts for resolution. He observes that entrusting courts with these decisions cannot produce a robust defense of democracy because the judges and Justices themselves do not have enough shared ground between them to articulate a vision of democracy. The dominant party—if in control of the judiciary—will turn to political entrenchment and will use the language of law to defend entrenchment as the advancement of constitutionalism. To partisans on the other side, this process crosses the line from deeply objectionable ideological behavior and into constitutional illegitimacy.

These insights help to explain how political developments and judicial behavior have contributed to a growing sense that representative government in the United States is in a bad way. Balkin’s theory helps by linking broader political developments to constitutional change, and the reinforcement of judicial power through juristocracy in this context both explains the increasingly important role of the Court and its investment in advancing particular political projects. But to engage a full diagnosis for why these developments threaten the Court’s legitimacy, it is useful to develop Balkin’s insight that the current era bears more than a passing resemblance to the Gilded Age. Indeed, upon examination, the analogy is stronger than Balkin himself acknowledges.

### *C. The Court’s Agenda*

Political science thus provides thoughtful consideration of public support for the Court, guidance about what we might conclude from a

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287. *Id.* at 16–26.

288. *Id.* at 137.

289. *Id.* at 138.

demonstrable shift in that support, and an analysis of the foundations of the Court's legitimacy in political and constitutional development. These perspectives facilitate consideration of the Roberts Court and where it might be headed.

The judiciary's choice to collaborate with the Reaganesque political regime that is moving toward collapse is to be expected. The judiciary operates on a different time frame than the political branches and most regimes have sought to consolidate and insure their ideologies through the courts, those most conservative of institutions. For most regimes, courts serve as a reservoir of ideology as transformation is taking place and for at least some time afterward. This laggardly behavior, a product of regime insurance, is visible in several episodes of U.S. history. Indeed, one might read some of the surprisingly progressive rulings by the Burger Court as reflecting this phenomenon.<sup>290</sup>

The Roberts Court, however, is doing something qualitatively different from seeking to insure a Reaganesque cast in its decisions. Reinforcing Reaganism is impractical if the regime is indeed exhausted. The Court is likely to damage its own public standing by reinforcing these ideas if they have reached the end of their influence and usefulness. The routine remedy to an overly stubborn Court is to wait for turnover among the Justices and in the interim to rely on the Justices themselves to recognize the political limits on how staunchly a dying regime can be enforced without provoking a hostile and unified institutional response against the Court. This is a simple matter of constitutional politics, albeit constitutional politics in a challenging moment. We see some signals that Chief Justice Roberts would prefer to follow this path in his efforts to build majorities around incremental rulings (*West Virginia v. EPA's* reliance on statutory analysis provides a good example) and his increasingly vocal defenses of the Court as an institution.<sup>291</sup>

The Chief Justice, however, has been either unable or unwilling to hold the Court in check. Rather than reinforcing Reaganism's fading star, the Roberts Court has embraced an agenda of reviving, in unsystematic and piecemeal ways, older regime projects long since abandoned, even as it exploits its position as a much more powerful institution than its distant historical predecessors.<sup>292</sup> It is blending superseded and abandoned ideas with its new myth of rights to establish and defend a Republican hegemony

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290. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 400 U.S. 956 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *abrogated by Groff v. DeJoy*, 600 U.S. 447 (2023); *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

291. Colleen Slevin, *Chief Justice John Roberts Defends Legitimacy of Court*, AP NEWS (Sept. 10, 2022), <https://apnews.com/article/abortion-us-supreme-court-colorado-springs-john-roberts-government-and-politics-cdff7d291a37c3b8459e787421c633d2>.

292. See *supra* Part I.

that trades on a starkly limited form of democracy that at the edges shades into Christian nationalism.<sup>293</sup>

The Roberts Court's destructive agenda attracts substantial attention, but as it destroys, it is also creating. This phenomenon, accelerated recently, is not new. Scholars who study the rise of the conservative legal movement have observed the importance of the turn to ideological production and a new hierarchy of rights.<sup>294</sup> The Federalist Society has been a key player in this process, both fostering professional networks and providing structured community for like-minded ideological entrepreneurs.<sup>295</sup> This project is also advancing in part through the Christian right's legal mobilization, a movement that has learned well from prior social movements' successes. The movement has an engaged and wealthy base to support its efforts to infiltrate existing legal institutions (especially law schools), develop supplemental institutions, and build new institutions to advance itself. The aim is to produce lawyers, ideas, and the social capital needed to transform American law.<sup>296</sup> Several Justices on the Court have indicated their enthusiasm for collaboration with both conservative and Christian mobilization in a variety of ways. Most notably, they have publicly signaled their engagement by attending and speaking at Federalist Society events. Justices Alito, Barrett, Kavanaugh, and Gorsuch all attended the Society's annual convention in November, garnering adulation and applause.<sup>297</sup>

Constitutional scholar Earl Maltz traces the ideological project through the Court's recent jurisprudence on federalism. While the conservative Justices have recently used federalism aggressively to challenge and limit congressional agendas with which they disagree, they have simultaneously

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293. As the Court has undermined the democratic process through its voting rights jurisprudence, it has increasingly framed sincere religious believers as persecuted minorities in need of judicial protection. The cases themselves establishing this perspective have involved Christians arguing that state policies are targeting their expressions and beliefs. See Stephen M. Feldman, *White Christian Nationalism Enters the Political Mainstream: Implications for the Roberts Court and Religious Freedom*, 53 SETON HALL L. REV. 667, 722–740 (2023); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *303 Creative, LLC v. Elenis*, 143 S. Ct. 2298 (2023).

294. JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* (2016); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

295. AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2019).

296. AMANDA HOLLIS-BRUSKY & JOSHUA C. WILSON, *SEPARATE BUT FAITHFUL: THE CHRISTIAN RIGHT'S RADICAL STRUGGLE TO TRANSFORM LAW AND LEGAL CULTURE* (2020). Amanda Hollis-Brusky, Jefferson Decker, Kenneth Kersch, Stephen Teles, and others have analyzed the movement and its intellectual and structural development, as well as its techniques of mobilizing resources. See *supra* notes 294–295.

297. Jacqueline Thomsen, *Standing Ovarions for Conservative U.S. Justices at Federalist Society Event*, REUTERS (Nov. 11, 2022, 10:16 AM), <https://www.reuters.com/world/us/standing-ovations-conservative-us-justices-federalist-society-event-2022-11-11/>.

“impose[d] significant constraints on state governments with little or no concern for the impact those decisions may have on state autonomy.”<sup>298</sup> As discussed previously, this tension has sharpened when the Court’s jurisprudence concerning race and voting rights is compared to its rulings concerning gun rights, freedom of religion, and some elements of freedom of speech.<sup>299</sup>

But Maltz’s analysis, published in 2020, does not capture the current state of play as discussed above. Beyond the individual cases addressed in Part I, we can consider the Court’s overall orientation toward acts of Congress. Since Neil Gorsuch was elevated to Associate Justice, the Court has ruled in twenty-two cases involving a direct challenge to a congressional statute. According to Keith Whittington’s research, twelve of these challenges have resulted in at least a partial invalidation of the statute.<sup>300</sup> Affected statutes have ranged from striking of a portion of the 1946 Lanham Act that prohibited the federal trademark registration of “immoral” or “scandalous” marks to the partial invalidation of a federal robocall ban enacted in 2015.<sup>301</sup> Of the cases that invalidated congressional provisions, four cited due process grounds, three cited a substantive right or separation of powers, and two cited federalism. In the three 2022 cases involving federalism in which the Court upheld a congressional statute, Justices Alito, Gorsuch, and Thomas dissented, with Barrett joining them in *Torres v. Texas Department of Public Safety*.<sup>302</sup> This trend illustrates the Court’s use of multiple tools to constrain Congress and raises the prospect of further limits.<sup>303</sup>

At the same time, while the Court continued to restrict independent state policymaking and subject it to federal judicial oversight, when state policies align with the Court’s preferences, they tend to prevail. On religious establishment, the states retained relatively free rein to engage in activities

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298. Maltz, *supra* note 157, at 56.

299. *See supra* Part I.

300. Keith E. Whittington, *The Judicial Review of Congress Database*, PRINCETON UNIV. (2022), <https://kewhitt.scholar.princeton.edu/judicial-review-congress-database>.

301. *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Barr v. Am. Ass’n of Pol. Consultants Inc.*, 140 S. Ct. 2335 (2020); Whittington, *supra* note 300.

302. *Torres v. Tex. Dep’t of Pub. Safety*, 142 S. Ct. 2455 (2022); *Artis v. District of Columbia*, 583 U.S. 71 (2018); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021).

303. *See supra* notes 154–158 and accompanying text. The 2022 term was not as eventful, but the Court contributed further to this agenda by limiting the scope of the Clean Water Act under the Commerce Clause in *Sackett v. EPA*, 143 S. Ct. 1322 (2023), denying federal preemption in a labor dispute in *Glacier v. International Brotherhood of Teamsters*, 143 S. Ct. 1404 (2023), and denying the extraterritorial application of two provisions of the Lanham Act in *Abitron Austria GmbH v. Hetronic International*, 143 S. Ct. 2522 (2023). While upholding the Indian Child Welfare Act in *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023), as discussed *supra* notes 54–58, the Court left room for future restriction based on the Equal Protection Clause.

that could be perceived as supporting religion, despite the objections of the liberal wing of the Court.<sup>304</sup> Likewise, the Court found in *Rucho v. Common Cause*<sup>305</sup> that challenges to partisan gerrymandering constituted political questions that could not be directly reached by the federal courts.<sup>306</sup> It also rejected a challenge to Arizona's voting procedures under the Voting Rights Act, leaving less latitude for federal intervention to address states' alleged discriminatory practices under Section 2 of the Act.<sup>307</sup> And despite the Court's willingness to sustain *Roe* during Justice Ginsburg's last term, the 2021 term not only saw the demise of *Roe* in *Dobbs*, but saw the Court (rather astonishingly) defer to Texas's open defiance of *Roe* in *Whole Woman's Health*.<sup>308</sup>

The Court is clearly signaling that state sovereignty must acknowledge its new rights jurisprudence. Pennsylvania's attempt to challenge a Trump-era expansion of religious exemptions to the federal mandate for contraceptive coverage failed in the face of a majority that saw no issues with either the scope of change as it related to the ACA's stated purpose or the procedures through which the rule was promulgated.<sup>309</sup> The city of Philadelphia, too, found itself on the wrong side of the free exercise clause as the Court rejected its requirement that agencies involved in foster care respect same-sex marriage.<sup>310</sup> Religious liberty factored into emergency docket rulings on state-initiated pandemic restrictions, setting boundaries around the states' traditional authority to regulate in the interest of public health.<sup>311</sup> Another potentially significant ruling came in a case that held that plaintiffs objecting to limits on free exercise who could claim only nominal damages could nonetheless proceed against the state.<sup>312</sup> Likewise, as discussed above, the Court used the Fifth Amendment to invalidate a California measure that facilitated labor organizing on employers' property,

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304. *Am. Legion et al., v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019); *Carson v. Makin*, 142 S. Ct. 1987, 1993 (2022). Indeed, the Court made it clear that states cannot discriminate *against* religious expression in otherwise neutral settings in *Shurtleff v. Boston*, 142 S. Ct. 1583 (2022).

305. 139 S. Ct. 2484 (2019).

306. *Id.* at 2508.

307. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

308. *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021).

309. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

310. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

311. STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* 163–96 (2023); Richard W. Garnett & Mitchell Koppinger, *Tandon v. Newsom, South Bay Pentecostal, Diocese of Brooklyn and Cavalry Chapel on Religious Liberty and the Pandemic*, in *SCOTUS 2021*, at 119 (Morgan Marietta ed., 2022); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

312. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021).

and other recent cases have likewise relied on property rights to curtail state action.<sup>313</sup> And its expansion of Second Amendment guarantees signals its further willingness to manage state policy even in areas like public safety, in which state authority has traditionally held sway.<sup>314</sup>

*D. The Imperfect Analogy to the Gilded Age*

What then shall we make of the Roberts Court's agenda? It appears that rather than maintaining a dying regime, the Court is seeking to ground a new era of regime politics. This era, as close analysis shall illustrate, partially echoes the governance structure of the late nineteenth and early twentieth centuries—but does so while maintaining the augmented power of the federal judiciary, an empowered executive branch, and some forms of greatly expanded national authority that are all legacies of the developmental processes of the New Deal/Civil Rights era and the Reagan era that followed it.

Balkin likens the current stage of the constitutional cycle to the Gilded Age.<sup>315</sup> Some of the jurisprudential commitments and approaches of the Court particularly call to mind the Fuller Court. Melville Fuller became the Chief Justice in 1888 and held that position until 1910. The received narrative blames the Waite Court for Reconstruction's failure to achieve Congress's full intention to remake federalism, criticizing its damaging rulings in the *Slaughter-House Cases*<sup>316</sup> and the *Civil Rights Cases*.<sup>317</sup> Pamela Brandwein, however, shows that the Fuller Court's radical rereading of history and reinterpretation of the proper relationship between the states and the federal government were more significant and more destructive.<sup>318</sup> This reinterpretation resonated powerfully with the rise of cultural narratives about the Civil War as a tragic and fratricidal conflict, Reconstruction as a time of chaos and corruption, and the relentless white Democratic southern campaign to regain control of state and local government as redemption.<sup>319</sup>

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313. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

314. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

315. BALKIN, *supra* note 275, at 27.

316. 83 U.S. (16 Wall.) 36 (1872).

317. 109 U.S. 3 (1883). For a sample of this criticism, see C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1951); J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999); ROGERS SMITH, *CIVIC IDEALS* (1997); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (2000).

318. PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* (2011).

319. *Id.*; DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* (2001).

Some of the similarities between the Roberts and Fuller Courts are striking. The Fuller Court's racial jurisprudence rejected the transformations of Reconstruction and sought to create a new racialized constitutional order. *Plessy v. Ferguson*<sup>320</sup> was the most notable example, restricting the Reconstruction Amendments' reach to a narrowly defined range of rights and empowering the southern states to build racialized constitutional orders. The Fuller Court also doubled down on previous judicial collaborations with Congress to restrict Chinese immigration and to authorize the creation of the category of the illegal immigrant (though the Court, led by Justice Gray and with Fuller in dissent, did rule in favor of birthright citizenship for descendants of Chinese persons born in the United States).<sup>321</sup> The Court proved hostile to efforts to rein in capitalist excesses and the political dominance of the wealthy. In 1895 alone, for example, it limited the reach of the Sherman Antitrust Act to bust monopolies in *United States v. E.C. Knight Co.*,<sup>322</sup> legitimated the use of sweeping anti-labor injunctions to quell resistance in *In re Debs*,<sup>323</sup> and declared a national income tax to be unconstitutional in *Pollock v. Farmers' Loan and Trust Co.*,<sup>324</sup> a ruling later reversed by amendment.<sup>325</sup> While granting broad latitude to the states to structure and implement racialized political orders as they saw fit, the Court exercised stringent oversight regarding states' attempts to regulate the terms and conditions of labor, most notoriously ruling in *Lochner v. New York*<sup>326</sup> that statutory restrictions on bakers' hours of labor violated their liberty of contract.

Indeed, some left scholars have already charged the Roberts Court with regression to the *Lochner* Era or to other moments in constitutional history. First Amendment scholars debate whether the Court is using constitutional free speech in ways analogous to the *Lochner* Court's uses of due process to restrict regulatory authority.<sup>327</sup> Others simply see the Court's jurisprudence on business regulation as a *Lochner* retread.<sup>328</sup> These analogies are instructive, particularly in light of the conservatives' explicit efforts in some cases to revive long-dormant or abandoned constitutional doctrines like

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320. 163 U.S. 537 (1896).

321. See generally CAROL NACKENOFF & JULIE NOVKOV, *AMERICAN BY BIRTH: WONG KIM ARK AND THE BATTLE FOR CITIZENSHIP* (2021).

322. 156 U.S. 1 (1895).

323. 158 U.S. 564 (1895).

324. 157 U.S. 429 (1895).

325. U.S. CONST. amend. XVI.

326. 198 U.S. 52 (1905).

327. Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377 (2020).

328. Mark Joseph Stern, *A New Lochner Era*, SLATE (June 29, 2018), <https://slate.com/news-and-politics/2018/06/the-lochner-era-is-set-for-a-comeback-at-the-supreme-court.html>.

nondelegation. The particular constellation of issues and tactics—engaging in stronger oversight over Congress’s efforts to engage in statebuilding and providing a sharply bifurcated approach to state sovereignty that empowers the states in some areas but uses rights to leverage oversight in others—resonates as well.

The analogy does not fully capture the current Court’s place in the rot of the second Gilded Age. The Roberts Court, unlike its predecessor, has been the beneficiary of the long project of judicial empowerment described by Whittington.<sup>329</sup> Furthermore, the Roberts Court’s substantive agenda and orientation within the partisan environment are wholly different. As legal historian Herbert Hovenkamp observes, the Fuller Court “represented . . . the last stand of orthodoxy in the face of the Progressive revolution.”<sup>330</sup> The Court sustained a collapsing legal ideology by “unit[ing] its prejudices with an expansive and ill-considered conception of judicial power that enabled the Justices to strike down all manner of legislation by employing highly creative interpretations of the Constitution.”<sup>331</sup> In doing this work, the Court resisted two forces: the remnants of the egalitarian energy and national statebuilding ambitions left from Reconstruction, and the flowering of an array of interrelated and sometimes contradictory new Progressive ideas.

While the Fuller Court was advancing an ideological agenda that undercut important liberal principles, this agenda did not align perfectly with the partisan landscape of the time. Southern Democrats used the Court’s rulings on race to engage in party-building, and the Republican Party, after losing a substantial portion of its progressive wing in 1912, shifted to the right and took solace in the Fuller Court’s support for business. The Court of the Gilded Age was a significant policy player, but not to the extent that the current Court is. The current Court is the beneficiary of both institutional empowering, as Whittington and Crowe have described, and broader cultural and political empowerment brought about through the expansion of rights discourse and expectations, both among the general public and through activists’ broader reliance on litigation as a tool for movement mobilization and policy change.<sup>332</sup>

The partisan and political environment is also different in its impact on the Court. During the first Gilded Age and into the early twentieth century, political polarization was also quite high as reflected both in the public sphere

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329. See generally Whittington, *supra* note 300.

330. Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2310 (1995).

331. *Id.*

332. See generally Whittington, *supra* note 300, CROWE, *supra* note 259.



and in congressional roll call votes.<sup>333</sup> Polarization in both the House and the Senate from the late 1870s through 1911 remained at levels not seen again in both houses until the Obama administration.<sup>334</sup> Despite this partisan animosity, the Fuller Court's Justices, while ideological, did not sort as readily in a partisan fashion. Scholars Neal Devins and Larry Baum, in reviewing the Court's seventy-five most important rulings between 1790 and 1937 in which at least two Justices dissented, found that "in only one were all of the Justices on one side appointed by presidents of one party and all of the Justices on the other side appointed by presidents of the other party."<sup>335</sup> Quantitative measures available after 1910 for more comprehensive analysis likewise illustrate that Justices appointed by Democrats and Republicans were not ideologically distant from each other for the most part.<sup>336</sup> While Devins and Baum recognize that presidents appointed Justices with particular ideological or partisan aims in mind, overall decision-making by the Court did not fall out in alignment with partisanship, even during the intensely partisan period following Reconstruction's end and into the early Progressive Era.

Even during the Burger and Rehnquist Courts, while Justices fell into liberal and conservative categories, these alignments did not always track the party of the appointing President, and Justices themselves at times drifted during their years on the Court.<sup>337</sup> After 2010, however, ideology and partisanship on the Court began to align more frequently and the Justices increasingly split along the line of which party's president had appointed them. Furthermore, as the distance between Republican and Democratic appointees grew, the Justices within each group conformed with each other more, and neither side, "with the partial exception of Justice Kennedy," had a strong centrist voice.<sup>338</sup> The conservative bloc has not only grown more consolidated; it is more conservative, with the 2017 Court featuring four Justices—Roberts, Thomas, Alito, and Scalia—among the ten most conservative Justices to sit on the Court since 1937.<sup>339</sup> This tendency, since 2017, has only intensified since Devins and Baum conducted their study, with

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333. Sara Chatfield, Jeffrey A. Jenkins, & Charles Stewart III, *Polarization Lost: Exploring the Decline of Ideological Voting in Congress After the Gilded Age*, 1 J. HIST. POL. ECON. 183, 183–84 (2021).

334. *Id.* at 186.

335. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court Into a Partisan Court*, 2016 SUP. CT. REV. 301, 311.

336. *Id.* at 312.

337. *Id.* at 315.

338. *Id.* at 317.

339. *Id.* at 320.

Black and Johnson characterizing the Trump Justices as reliably conservative.<sup>340</sup>

It lies beyond the scope of this Article to explain how partisan polarization in the political sphere can directly produce partisan polarization in the federal courts, but polarization has spilled over the nomination and confirmation process to a degree rarely if ever seen in American history.<sup>341</sup> As Robinson Woodward-Burns has observed, congressional polarization alongside narrowing congressional majorities has led to reciprocal episodes of “constitutional hardball,” or a majority’s willingness to circumvent ordinary rules and supermajority requirements to advance “high-stakes policy, budget, tax, and judicial confirmation votes.”<sup>342</sup> Moreover, we have entered a period in which lawmakers are increasingly willing to engage in “*counter-majoritarian* constitutional hardball, in which lawmakers bend rules to win a legislative majority without winning an electoral majority.”<sup>343</sup> Through these tactics, a narrow legislative majority can entrench itself and defend against further losses; within a federal system, counter-majoritarian hardball can entail employing entrenchment devices at the national and subnational level to protect narrow national majorities. The most notable example is partisan gerrymandering through state-level processes that tilt the table appreciably toward a party in power for both state and national representative elections.<sup>344</sup>

Woodward-Burns identifies two periods in American history when partisan parity and high polarization facilitated both hardball generally and episodes of counter-majoritarian hardball. The first period was Congress’s passage of the Enabling Act of 1889,<sup>345</sup> in which a Republican Party that was rapidly losing power through the resurgence of the Democratic Party in the south sought to entrench itself by violating a longstanding norm of admitting new states to the union in pairs reflecting partisan or factional compromises. These maneuvers secured Republican control of the Senate until the New Deal.<sup>346</sup>

The second is the current period, which has featured Republican use of both hardball and counter-majoritarian hardball. Woodward-Burns notes particularly the aggressive use of partisan gerrymandering, the decline of Voting Rights Act enforcement, and the many legal challenges, including

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340. Black and Johnson, *supra* note 32, at 197.

341. *Is the Hyper-Partisan Supreme Court Confirmation Process “The New Normal”?*, PBS NEWS HOUR (Sept. 13, 2018), <https://www.pbs.org/newshour/nation/is-the-hyper-partisan-supreme-court-confirmation-process-the-new-normal>.

342. Woodward-Burns, *supra* note 187, at 380–81.

343. *Id.* at 382.

344. *Id.* at 384.

345. Enabling Act of 1889, ch. 180, 25 Stat. 676.

346. Woodward-Burns, *supra* note 187, at 386–89.

highly questionable ones, launched by the Trump campaign and congressional allies against the outcome of the 2020 presidential election.<sup>347</sup> He and other scholars remind us that the Electoral College (with some assistance by the Supreme Court) produced Republican Presidents in 2000 and 2016 who had lost the popular vote.<sup>348</sup> Since 1988, only one Republican candidate has won the popular vote for President, but seven of the eleven Justices placed on the U.S. Supreme Court over this period were appointed by Republicans—three during Trump’s administration following the election of 2016.<sup>349</sup>

Woodward-Burns’s analysis augments Balkin’s related concerns about the degree of control that conservative Republicans have secured over the federal courts through an appointment process that has prioritized both partisanship and ideology.<sup>350</sup> These developments help to explain both the Roberts Court’s conservative ideological agenda and its related, but to some degree independent, agenda of party-building and party maintenance. These interrelated agendas have led the Court beyond the boundaries of legitimate political action, placing it in a position of supporting fundamentally anti-democratic state-building that privileges partisan entrenchment and regime insurance over the ordinary—even if hotly contested—cycle of regime change.

Even without the component of aggressive, partisan-oriented regime insurance, the Supreme Court of the Gilded Age actively facilitated racial retrenchment across multiple political dimensions and legitimated a form of *herrenvolk* democracy<sup>351</sup> in the south that formally guaranteed full social, economic, and political citizenship only to white (and in some regards only to male) citizens.<sup>352</sup> Raw racism, in the form of the belief that Black individuals and other persons of color were inferior and therefore both unworthy and incapable of exercising these rights responsibly, was the foundation both of the federal courts’ acquiescence to these forms of state-building as well as the state-level state-building itself.<sup>353</sup> But race also intertwined with national and state-level political struggles both between the

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347. *Id.* at 390–91.

348. *Id.* at 392; *see generally* ALEXANDER KEYSSAR, *WHY DO WE STILL HAVE AN ELECTORAL COLLEGE?* (2020).

349. Woodward-Burns, *supra* note 187, at 392.

350. BALKIN, *supra* note 275, at 148.

351. This term, popularized by historian George Fredrickson in 1971, describes the system of democracy in the Jim Crow south, which united structural racial exclusion from governance with an egalitarian democratic sensibility, creating “a social consensus broadly resting on white racism.” David Brown, *A Vagabond’s Tale: Poor Whites, Herrenvolk Democracy, and the Value of Whiteness in the Late Antebellum South*, 79 *J. S. HIST.* 799, 802–803 (2013).

352. JULIE NOVKOV, *RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865-1954*, at 29–67 (2008).

353. *Id.* at 58–65.

major parties and within the parties themselves.<sup>354</sup> The Republican Party, once reliant on mobilizing Black votes and secure in its ability to retain them, faced serious criticism by Black elites in the early twentieth century, who even suggested reaching out to the Democratic Party to build a new political coalition.<sup>355</sup> For their part, southern Democrats maintained their stranglehold through racial politics but within the party, disagreements abounded over the propriety of populist race-baiting as a political tactic, laying the foundations for future divides in some states between a conservative and Klan wing of the party.<sup>356</sup>

Even though we may not be able to identify public opinion in that era to the degree that we can now, most observers would likely not hesitate to question both the legitimacy of these governance structures and the legitimacy of the Court that made them possible. The Fuller Court did not gain its highly negative reputation only because it rendered rulings that generated controversy and criticism. The problem was also in how these rulings facilitated democratic erosion and regression and legitimated unequal and illegitimate forms of government.

The Roberts Court is also facilitating democratic erosion and regression, but it does so specifically to strengthen and entrench Republican rule. The Court's handling of key cases reinforces and builds Republican ideology, seeking to legitimate it through originalist analysis. This analysis, as discussed above, upends settled conceptions of rights and national power and presses for new rights frameworks

### III. THE ROBERTS COURT AS THE FULLER COURT IN BAD DRAG

This Part will briefly recap the critique thus far and then introduce an alternative platform for critique derived from queer theory. If we understand the Court's work as performative,<sup>357</sup> we can compare its penchant for citing theories and approaches from the past to a drag show, in which judicial reasoning dons this garb, seeking to transform it into something provocative and new through its iterative citation. Understanding the Court's work as a form of drag, however, shows how its transformative project fails to achieve the standard of a good drag show.

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354. See generally KENESHIA N. GRANT, *THE GREAT MIGRATION AND THE DEMOCRATIC PARTY* (2020).

355. See generally Mark T. Tomecko, *Jumping Ship: The Decline of Black Republicanism in the Era of Theodore Roosevelt, 1901-1908* (Aug. 2012) (M.A. thesis, University of Akron), [https://etd.ohiolink.edu/acprod/odb\\_etd/ws/send\\_file/send?accession=akron1343975516&disposition=inline](https://etd.ohiolink.edu/acprod/odb_etd/ws/send_file/send?accession=akron1343975516&disposition=inline).

356. GLENN FELDMAN, *POLITICS, SOCIETY, AND THE KLAN IN ALABAMA, 1915-1949* (1999).

357. See *supra* notes 12–39 and accompanying text.

Up to this point, this Article has presented the conventional political liberal/contemporary Democratic Party case against the Roberts Court. To summarize: The Court has curtailed rights foundational to the New Deal/Civil Rights regime. Recently, it has accelerated its attack on the modern national administrative state to the point that it threatens the foundations of the New Deal/Civil Rights administrative order. Simultaneously, it has bolstered state sovereignty and rebalanced state authority as it relates to that of Congress in favor of the states. It has nonetheless established and advanced conservative rights through constitutional mechanisms, both instantiating them in constitutional law as independent checks on state power at all levels and as counterweights to the rights preferred by the contemporary left. These actions, particularly the aggressive stance of the 2021 term, seem to be producing a shift in public opinion regarding the Court. While views on the Court remain highly divided in a partisan sense, overall the institution's long and stable reservoir of support and trust seems to be eroding, a remarkable development in the wake of the rise of juristocracy worldwide and a long, slow trend of judicial empowerment in the United States.

A conventional critique of the Roberts Court would note additionally that the Court's deep engagement with the Republican Party is troubling on two levels. First, in terms of institutional norms and public expectations, the sight of a Court that is intentionally engaging in overt partisan collaboration should raise our eyebrows.<sup>358</sup> Far from being the neutral umpires championed in both legal elite circles and the popular imagination since the New Deal (with frequent critiques of individual Justices on all sides), the Roberts Court can credibly be read as putting a thumb on the scale for the party. Its rulings have facilitated Republican party-building at the state and federal levels through election law. Its choice to insert itself into the major "hot" issues of the day that resonate strongly with the Republican base—abortion, affirmative action, vaccine mandates, public and free expression of Christian values, and gun rights<sup>359</sup>—is notable in light of the percentage of the Court's active docket devoted to these issues.

Second is the kind of politics and partisan empowerment the Court is facilitating. The substantive issues discussed above are worthy of concern in their own right, but the Court is collaborating at least somewhat with forces that oppose the continuation of liberal democracy<sup>360</sup> in the United States and in some cases, the continuation of the United States itself. The brief against the Republican Party is long and alarming and has been detailed effectively

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358. *See supra* Section I.E.

359. *See supra* Sections I.A–D.

360. By which I mean to say liberal democracy in the centuries-long Enlightenment tradition of liberalism, not in reference to the contemporary ideological divide.

by others.<sup>361</sup> To note just a few highlights, however, the national party did not present a platform for the 2020 presidential election, choosing instead solely to declare its support for and loyalty to Donald Trump.<sup>362</sup> Several party members supported the narrative of a stolen election from Election Day through and even beyond the January 6 insurrection. The party continued to support election deniers on its ticket during the 2022 midterm elections.<sup>363</sup> Republicans at the state level have passed extreme abortion bans, continued their efforts to deter Democrats from voting, ideologically restricted teaching from kindergarten through higher education on the history of race in the United States, and advanced measures targeting transgender youth, to note only a few developments. The Republican attack on LGBTQ rights and equality has been particularly vicious, emerging as a central cultural focus in the party in the wake of the Court's decision in *Dobbs* that empowered further state-level legislation restricting abortion.<sup>364</sup> This agenda shows no sign of slowing and has been embraced by prominent Republicans in public fora.<sup>365</sup> The official 2022 Texas Republican Party platform presents a litany of grievances and challenges to multiple aspects of settled federal law and constitutional interpretation, declares the party to be adherents to "the laws of nature and nature's God," and endorses both nullification and secession.<sup>366</sup> And Republican Governor of Florida Ron DeSantis, setting himself up for a presidential run in 2024, has been identified as a direct threat to democracy.<sup>367</sup> This is the party that the Roberts Court has dedicated itself to empowering and entrenching.

But, ho hum. Liberals have been fretting for some time, even though the 2021 term, following on the heels of the insurrection, has generated a higher

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361. E.g., Gary Jacobson, *The Dimensions, Origins, and Consequences of Belief in Donald Trump's Big Lie*, 138 POL. SCI. Q. 133 (2023); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

362. REPUBLICAN NAT'L COMM., *Resolution Regarding the Republican Party Platform*, in REPUBLICAN NATIONAL PLATFORM (2020), [https://prod-cdn-static.gop.com/docs/Resolution\\_Platform\\_2020.pdf](https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf).

363. Adrian Blanco, Daniel Wolfe & Amy Gardner, *Tracking Which 2020 Election Deniers Are Winning, Losing in the Midterms*, WASH. POST, (Dec. 18, 2022, 5:05 PM), <https://www.washingtonpost.com/politics/interactive/2022/election-deniers-midterms/>.

364. Trip Gabriel, *After Roe, Republicans Sharpen Attacks on Gay and Transgender Rights*, N.Y. TIMES, (July 22, 2022), <https://www.nytimes.com/2022/07/22/us/politics/after-roe-republicans-sharpen-attacks-on-gay-and-transgender-rights.html>.

365. Isaac Arnsdorf, Josh Dawsey & Hannah Knowles, *Republican Opposition to LGBTQ Rights Erupts in Backlash to Pride Month*, WASH. POST, (July 1, 2023, 12:18 AM), <https://www.washingtonpost.com/politics/2023/06/30/republicans-pride-month-lgbtq/>.

366. *Report of the Permanent 2022 Platform & Resolutions Committee*, REPUBLICAN PARTY OF TEX. 1, 3 (June 16, 2022), <https://texasgop.org/wp-content/uploads/2022/06/6-Permanent-Platform-Committee-FINAL-REPORT-6-16-2022.pdf>.

367. Jonathan Chait, *Ron DeSantis Would Kill Democracy Slowly and Methodically*, N.Y. MAG. (July 11, 2022), <https://nymag.com/intelligencer/2022/07/ron-desantis-authoritarian-democracy-trump-2024-republican.html>.

volume of anxiety on the left. These arguments do little more than to reinforce liberal concerns. We are at an impasse.

*A. Drag as an Alternative Basis for Critique*

Constitutional scholar Susan Burgess noted in 2008 that many influential constitutional theorists recognized that the debate over judicial legitimacy had also reached an impasse, which Balkin's analysis confirms. Balkin's move is to look ahead in the hopes that a new and creative movement for constitutional reform will overcome the toxic conjunction of the waning of a dying regime, extreme partisan polarization, and high levels of constitutional rot.<sup>368</sup> Burgess, drawing from Robert Cover, focuses our attention more specifically on what is to be done. "New stories" are needed to "bring new worlds into being."<sup>369</sup> She advises that "careful attention to narrative analysis and popular culture in conjunction with the use of humor and parody may serve to move contemporary constitutional discourse beyond its current impasse, opening up space for new forms of democratic dissent and transformation."<sup>370</sup> She uses humor and parody to open up debates over the founding fathers and what it means to be committed to a foundational vision. Parody, she argues, "seeks to transform the audience's consciousness, so that it can no longer view the object of parody in the same way ever again."<sup>371</sup>

I propose therefore that we examine the Roberts Court as the Fuller Court in bad drag. The Roberts Court's jurisprudence, with its purposeful echoes of past eras, may be read (and at times, this reading seems quite explicit)<sup>372</sup> as an effort to revitalize and reclaim an earlier constitutional framework. The Court, by donning elements of the Fuller Court's garb, performs audaciously, reanimating lost and abandoned concepts to transform the contemporary administrative states and framework for rights into something entirely different. We may read this appropriation and transformation as a form of drag.

What is drag? Taylor and Rupp's classic sociological analysis argues that it is more than performance or entertainment. These performances "challenge the biological basis of gender and the fixed nature of sexual identity. As a place where . . . gay is normal and straight is other, drag shows use entertainment to educate."<sup>373</sup> As "central institutions in gay

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368. See *supra* notes 275–289 and accompanying text.

369. BURGESS, *supra* note 2, at 5.

370. *Id.*

371. *Id.* at 7.

372. DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

373. Verta Taylor & Leila J. Rupp, *Learning from Drag Queens*, 5 *CONTEXTS* 12, 12 (2006).

communities,” they serve both as a community forum and a place for straight people to encounter gay life on its own terms.<sup>374</sup> In this study, while the drag queens “dress in women’s clothing and can be as beautiful as biological women, there is no pretending.”<sup>375</sup> The performers are not merely mimicking feminine beauty and appearance; they are creating and presenting their own form of beauty as drag queens. Their performances undermine and complicate male/female binaries.<sup>376</sup> Central to the show is bringing audience members into the act and playfully subverting rigid lines of gender identity and sexual orientation. The performers particularly seek to arouse straight men, but also provoke unruly desires across the board. “Because the drag shows have the potential to arouse powerful desires that people perceive as contrary to their sexual identities, they have a real impact on people’s thinking about the boundaries of heterosexuality.”<sup>377</sup> It is thus both restorative and disruptive. In this analysis, the thrust of drag is to “make the world a better place.”<sup>378</sup> By providing a space for generative engagement, drag opens up new possibilities and shifts power hierarchies:

As one of the few ways that straight people encounter gay culture—where, in fact, straight people live for an hour or two in an environment where gay people are the majority—drag shows . . . have the potential to bring people together and to create new gender and sexual possibilities.<sup>379</sup>

The potential for change through drag comes through emotional engagement, but also through the fundamental shaking up of accepted divisions and structures, with the end result of freeing people.

The process itself as recombination is important as well:

Through a complex process of separating people into gender and sexual identity categories, then blurring and playing with those boundaries, and then bringing people all together again, the drag queens . . . succeed . . . in “freeing people’s minds,” “removing their blinders,” “opening their minds,” sometimes even “changing their lives.”<sup>380</sup>

Those who experience the performance might themselves be transformed, as the experience “makes it a little less possible to think in a simple way about gender and sexuality or to ignore the experiences of gay, lesbian, bisexual, and transgendered people in American society.”<sup>381</sup> By

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374. *Id.*

375. *Id.* at 13.

376. *Id.* at 15.

377. *Id.* at 16.

378. *Id.* at 17.

379. *Id.*

380. *Id.*

381. *Id.*



attracting people who might otherwise never encounter gay politics, the drag show introduces new questions about both empowerment and belonging. Drag can be understood as an elevated form of parody that can serve as a “technology of recovery,” subverting and transforming trauma narratives.<sup>382</sup>

Drag is also intrinsically political. The full scope of reconstructive work that drag can do is on display in Stephen Engel’s and Timothy Lyle’s analysis of the FX series *Pose*, a drama set in late 1980s New York about the underground drag ball scene. *Pose*, in their reading, excavates drag culture and celebrates its importance in building a meaningful and usable queer past. The series, and by extension its reading of drag, “articulates and advocates for a divergent pathway to dignity” through its “embrace of queer excess, its amplification of queer history, its resistance to institutional authority, and its adoption of alternative notions of kinship and belonging.”<sup>383</sup> Drag offers the opportunity to appropriate the tools and mechanisms of power and turn them to generative resistance.

Drag requires mimicry and transformation to be successful, with the queen as a figure that subverts and liberates femininity. In Engel and Lyle’s reading, it is generative, offering paths that destroy the oppressive nature of gender prisons, neoliberalism, and state-regulated family ties by creating new options for freer performances of gender, an ethic of care and community that transcends individualistic pursuit of economic success, and the chosen family that arises from this ethic.<sup>384</sup> The source material is present but turned around consciously and intentionally to create new opportunities.

How can we relate drag to the work of the Supreme Court? As discussed above in the opening section, the Court’s work in producing jurisprudential outcomes can be understood as a type of performance, and the practice of constructing arguments necessarily entails reiterating and transforming previous episodes through citation.<sup>385</sup> While the Court’s process of rendering decisions through the production of opinions is performative and invites an audience to experience transformation in response to it, as Robert Cover famously observes, “[l]egal interpretation takes place in a field of pain and death,” not boas and tiaras.<sup>386</sup> Yet at the same time, Supreme Court Justices inhabit a normative universe “held together by the force of interpretive commitments.”<sup>387</sup> Law, like drag, “may be viewed as a system of tension or

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382. Debra Ferreday, “No One Is Trash, No One is Garbage, No One Is Cancelled”: *The Cultural Politics of Trauma, Recovery and Rage in RuPaul’s Drag Race*, 11 CELEBRITY STUD. 464, 464 (2020).

383. STEPHEN M. ENGEL & TIMOTHY S. LYLE, *DISRUPTING DIGNITY: RETHINKING POWER AND PROGRESS IN LGBTQ LIVES* 173 (2021).

384. *Id.* at 171–219.

385. *See supra* notes 7–22 and accompanying text.

386. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1985).

387. Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 7 (1983).

a bridge linking a concept of a reality to an imagined alternative.”<sup>388</sup> The *nomos*, or normative universe, of law encompasses both the compositional narratives that give it substance and the possibility of transformation. Cover imagines the process of jurisgenesis, or the creation of legal meaning, taking place “through an essentially cultural medium.”<sup>389</sup> While the legal community is a contained world, and law is a distinctive institution and practice because of where and how it is produced as well as its effects, “the narratives that create and reveal the patterns of commitment, resistance, and understanding—patterns that constitute the dynamic between precept and material universe—are radically uncontrolled.”<sup>390</sup> All of this—like the drag show—generates space within which new meanings can be created. For Cover, jurisgenesis helps to bridge the space between visions of a new social order that requires “transformational politics” going beyond what is contained within the insular world of legal institutions, and jurisgenesis aligns with what he terms redemptive constitutionalism.<sup>391</sup> Redemptive constitutionalism can be likened to drag that achieves the highest standard of success: a use of past traditions and ideals to liberate, raise, and reimagine the constitutional—or, in the case of drag—gender order.

This multiplicity of meanings and openness to reconfiguration and interpretive energy calls to mind the world of drag, with its commitment to radical creativity that nonetheless takes place within an established structure and lexicon. Drag parallels Cover’s description of the creation of a constitutional vision, a sort of “normative mitosis” that turns the world inside out and generates new meaning.<sup>392</sup> Drag functions in the same way that Cover describes jurisgenesis, and drag’s creation of alternative possibilities that transform existing sex and gender paradigms calls to mind redemptive constitutionalism.<sup>393</sup> Cover illustrates the power of radical constitutionalism through his discussion of Frederick Douglass’s constitutionalism, which encompassed “a vision of an alternative world in which the entire order of American slavery would be without foundation in law.”<sup>394</sup> This redemptive alternative vision is like the transformative work of drag: It draws from an existing framework that appears to have little play in the joints for radical liberation and change, but through using the foundation, it articulates a new vision that radically challenges the framework itself.

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388. *Id.* at 9.

389. *Id.* at 11.

390. *Id.* at 17.

391. *Id.* at 34.

392. *Id.* at 31.

393. *Id.* at 31–34.

394. *Id.* at 38.

To distill: to understand drag as a metaphor for the practice of constitutional transformation, we must look for its components. First, there must be an established order that the transformative practice—drag or jurisprudential behavior—seeks to disrupt. The transformative practice begins its work from what is established and recognizable but takes these components and manipulates them into new relations with each other that disrupt, undermine, or transcend the existing order.

*B. The Court in Bad Drag*

The Roberts Court is doing these things. Its aim is clearly to disrupt the existing constitutional order, as detailed above in Part I. It has reached back to revitalize abandoned doctrinal concepts like nondelegation and pre-*Lemon* conceptualizations of religious free exercise, to note only two examples.<sup>395</sup> Its embrace of originalism provides a narrative about how it is building its transformative vision.

The drag metaphor works directly. The Roberts Court can be read as dressing in the style of the Fuller Court. It has appropriated some pieces of the Fuller Court's wardrobe: a labor jurisprudence that seeks to restrict union organization, a racial voting rights jurisprudence that empowers state actions that interfere with voting access for people of color, a hostility toward congressional oversight over and intervention into some problems that appear to have national scopes, to name just a few. Jurisprudential ideas like nondelegation serve as chest binders, transforming and flattening the law's body.

This process is particularly striking as it touches on gender and sexuality. Pre-*Roe* abortion laws, some dating back to the late nineteenth century, are freed to walk the stage, exciting attention and controversy. Lower federal courts, inspired by the Supreme Court's performances, are generating flamboyant performances of their own. Trump appointee, District Court Judge Matthew Kacsmaryk, enjoined the use of the drug mifepristone for medication abortions despite its approval for this purpose in 2000, relying on the Comstock Act and his finding that the FDA had not established that the drug itself was safe and effective and provided therapeutic benefits.<sup>396</sup> While the Fifth Circuit found that this ruling went too far, the panel partially upheld the district court's injunction, rescinding the 2016 broadening of mifepristone's availability.<sup>397</sup> In doing so, the Fifth Circuit granted standing

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395. See *supra* notes 98, 138–151 and accompanying text.

396. *All. for Hippocratic Med. v. FDA*, 2023 U.S. Dist. LEXIS 61474, at \*46–57 (N.D. Tex. Apr. 7, 2023) *aff'd in part and vacated in part*, 78 F. 4th 201 (5th Cir. 2023). This performance was too outrageous even for the Supreme Court, which enjoined the ruling pending an appeal to the Fifth Circuit. *Danco Lab's, LLC v. All. for Hippocratic Med.*, 143, S. Ct. 1075 (2023).

397. *All. for Hippocratic Med.*, 78 F.4th at 256.

in part based on the potential injury to emergency room doctors who might have to treat individuals presenting in emergency rooms with problems with the drug requiring the performance or completion of an abortion. The opinion accepted the drama-laden concern for potential injuries caused by requiring doctors to face conflicts with their sincerely held moral beliefs and the imposition of “mental and emotional strain above what is ordinarily experienced in an emergency-room setting.”<sup>398</sup>

The Roberts Court’s performance augments and bedazzles the traditions it revives. In some instances, it goes beyond revival and adapts with its own adornments, as with the new jurisprudence of the Second Amendment, its newly robust jurisprudence that uses free exercise as a weapon against both statutes and other constitutional imperatives, and its expansion of First Amendment principles to achieve other deregulatory agendas under its watchful eye. Particularly with the Second Amendment and nondelegation, the Court’s performance claims fidelity to principle and to the past, with originalism as the mechanism for transmission. Adjectives like flamboyant<sup>399</sup> and audacious<sup>400</sup> describe its behaviors. Unquestionably, the Roberts Court aspires not only to transform and overcome the existing constitutional order but also to create something to elevate in its place. Not all elements of the Court’s jurisprudence hearken back to the Fuller Court era, and its Second Amendment rulings present genuinely innovative readings of gun rights, albeit readings that the Justices insist have deep historical and even jurisprudential roots.<sup>401</sup> But the overall effort, between overt throwing back and the generation of new foundations for reworked rights that limit state regulatory authority, fulfills much of what we expect from drag.

The Court’s approach to originalism also incorporates elements of drag by operating both in a performative sense itself (with conservative Justices presenting it as the only appropriate way to engage in constitutional interpretation) and as the mechanism for launching its novel agendas. Morgan Marietta, in noting the distinctive nature of the 2021 term, highlights both the substantive rulings and the Court’s conservatives’ increasing willingness to coalesce around originalism. These changes are likely a function of numbers: “On the Supreme Court, five makes a majority, but six

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398. *Id.* at 229.

399. Sheldon Whitehouse, *With Supreme Court Mired in Dark Money, Time for Large Dose of Transparency*, JUST SEC. (Dec. 4, 2019), <https://www.justsecurity.org/67591/with-supreme-court-mired-in-dark-money-time-for-large-dose-of-transparency/>.

400. Joan Biskupic, *Conservative Justices Seized the Moment and Delivered the Opinion They’d Long Promised*, CNN (June 25, 2022, 5:48 AM), <https://www.cnn.com/2022/06/24/politics/conservative-supreme-court-analysis-roe-dobbs/index.html>.

401. *See* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2127 (2022).

can make a movement.”<sup>402</sup> The long-standing commitment of Justices Alito and Thomas to particular modes of interpretation and method, for which they have been advocating tirelessly in concurrences and dissents, have now won the day, and this victory marks the jurisprudential performances themselves rather than just the outcomes in cases. As Marietta describes it, “one can debate the proper name for the court’s dominant method of reading and applying the Constitution, but not the transformation in constitutional law that took place . . . under its banner.”<sup>403</sup> The rise of originalism can be read through the drag metaphor as a practice that seeks to disrupt settled understandings and transform them to ground new power relations.

How might we connect originalism to drag? The term “originalism” itself has been donned by different writers for different purposes historically, but only recently has the practice of claiming it as a principle of constitutional reasoning become fully dominant on the Supreme Court. While Paul Brest introduced the term in the early 1980s to describe a mode of interpretation that hews closely to the Constitution’s text and the intentions of its framers, discussions of original meanings date back at least to the 1930s.<sup>404</sup> Originalism, like gender and sex, is an ambiguous term, “complicated by the sociology of the legal academy and the politics of judicial interpretation.”<sup>405</sup> The so-called “New Originalism,” conventionally attributed to Justice Scalia, demands attention to the original public meaning of constitutional language as a means of resolving thorny interpretive debates. While Scalia’s approach emphasized the limits that this inquiry would place on interpreting rights guarantees, it proved more malleable than conservatives had initially hoped, attracting reworkings from other political standpoints.<sup>406</sup> Conservatives on the Rehnquist Court participated in these conversations in their concurring and dissenting opinions, seeking to define and direct not only the meaning of originalism but also its political orientation and collaborating with academic and conservative movement critics of the Warren Court and its expansive readings of the constitution.<sup>407</sup> Now, however, originalism is no longer a side conversation, having taken center stage. Its advocates have taken the broad idea of considering original intent or original public meaning as an interpretive tool and transformed it as Marietta describes, recombining

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402. Marietta, *supra* note 30, at 18.

403. *Id.*

404. Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 13 (Grant Huscroft & Bradley W. Miller eds., 2011).

405. *Id.* at 15.

406. *Id.* at 23–24.

407. See generally Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006).

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elements and recreating it as a fully-fledged and subversive interpretive approach.

Why then is it bad drag? How can referencing drag introduce an alternative layer of critique? To answer these questions, consider both drag's subversively liberative underpinnings and the distinction that Robert Cover draws between jurisgenerative activity—which I have likened to drag—and what he terms jurispathic activity, or the aggressive pruning of potential new directions in doctrinal development by selecting a single victorious concept or doctrine and narrowing or eliminating the alternatives. While judges can be jurisgenerative for Cover, facilitating and legitimating legal transformation, they more characteristically engage in jurispathic behavior, often a necessary and legitimate precursor to identifying winners and losers in cases: “Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.”<sup>408</sup> As the judge, particularly the constitutional adjudicator, asserts jurisdiction, the rule articulated can both close off alternative paths and justify the state's marshaling of power, including violent power, to achieve the chosen end. Jurispathic activity is not by any means illegitimate. The duty of a court is to choose, and by choosing one path, it necessarily creates winners and losers. But some jurispathic behavior, as Cover describes, “prevents courts from ever reaching the threatening questions.”<sup>409</sup>

What is the Roberts Court doing when it wears its Fuller Court garb? The Justices who promote this approach certainly see their work as worthy of admiration and their supporters applaud their transformative intent. Indeed, some observers throw dollars to express their appreciation and encourage further performance.<sup>410</sup> The work, however, misses the mark with regard to both drag and jurisgenesis. Drag performances seek to trouble and transform gender, sex, and their established binaries. They do so not only for themselves but also for their audiences, provoking desires that disrupt and invert existing power structures. The Roberts Court reaches back to recombine elements of past regimes to generate a new order that reinforces existing power structures. Many witnesses to this performance see it as bad and cynical, and some Justices' defensive responses to these critiques further undermine the Court's standing.<sup>411</sup>

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408. Cover, *supra* note 387, at 53.

409. *Id.* at 56.

410. *Friends of the Court: SCOTUS Justices' Beneficial Relationships with Billionaire Donors*, PROPUBLICA, <https://www.propublica.org/series/supreme-court-scotus> (last visited Sept. 24, 2023).

411. Jesús Rodríguez, *Samuel Alito Ventures into the Court of Public Opinion*, WASH. POST, (June 23, 2023, 5:23 PM), <https://www.washingtonpost.com/lifestyle/2023/06/23/samuel-alito-supreme-court-speaking-out/>.

The current iteration of originalism is highly jurispathic when the Court is clearing space for its own agendas. This is readily observed when we consider the Court's use of originalism in the 2021 term. To provide only the two most notorious examples, *Bruen* killed off the test that Courts of Appeals were using to evaluate Second Amendment claims, which allowed the government to justify regulations if it could show that gun-related conduct that it was attempting to regulate fell beyond the Second Amendment's original scope.<sup>412</sup> Reinterpreting *Heller*, the Court imposed an originalist test that simply asked whether the "plain text" of the Amendment covered an individual's conduct, and if so, demanded that the government "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."<sup>413</sup> The inquiry thus shifted to an entirely backward-looking enterprise, with no room for contemporary, much less forward-looking, analysis of guns and gun rights in a modern environment. While the outcome was different in *Dobbs*, with the Court upholding a state regulation, the jurispathic nature of the Court's approach was similar. The slaying of *Roe* and its progeny, whether or not one accepted *Casey* as legitimate offspring, was righteously undertaken by Justice Alito, who eschewed "half-measures" and found that "no such right is implicitly protected by any constitutional provision."<sup>414</sup> Justice Thomas's appetite for jurispathic behavior went further; in his concurrence he argued that the Justices "should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*" because by his originalist reading, "the Due Process Clause does not secure *any* substantive rights."<sup>415</sup> In these and other instances, the Court claims to be returning to a lost vision of the Constitution, reaching back to the past to claim to be clothed in principle, but the result is the reinstallation of hierarchy, not the disruption of power.

While the Court's originalism is undoubtedly transformational, claiming simultaneously to be recovering lost tradition and respecting prior constitutional commitments while creating new rules of law like the major questions doctrine, it rejects the types of transformation embedded in drag. Drag, like jurisgenesis, is fundamentally subversive of existing power arrangements. It commits to playful inversions of these arrangements in order both to critique them and to open minds to alternative possibilities. The mimicry of drag, its references to dominant performances of gender and

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412. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

413. *Id.* at 2129–30.

414. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

415. *Id.* at 2301 (Thomas, J., concurring). The Court's ruling in *Sackett*, which narrowed the scope of the Clean Water Act by pulling back on Congress's authority to regulate under the commerce clause can be understood in this vein as well. *Sackett v. EPA*, 143 S. Ct. 1322 (2023).

sexuality, incorporates the recognition that the mimicry is meant to create something beautiful and different that can be recognized in this register. The Roberts Court's jurisprudence, particularly in the era of the conservative supermajority, instead borrows the garb of prior conservative epochs to entrench Republican rule and consciously adopts an interpretive approach that Mark Graber identifies as reactionary.<sup>416</sup> Drag critiques its source material, but by creating something disruptive and subversive of the source, it holds within it the power to generate new communities of interest and new forms of beauty and belonging. The Roberts Court, in contrast, woodenly reanimates the dress it dons. The right wing of the Court uses its source material not to draw from it as critique of the substantive stances and approaches that it is reviving and transformatively embracing, but rather to strengthen them and use them to shore up a partisan regime.

#### CONCLUSION

“Is . . . judicial supremacy essential to constitutionalism[?]”<sup>417</sup>

How much does the legitimacy of the Court matter? Perhaps the legal community or even the public at large will find the Court's performance to be unpersuasive, uninspiring, and even damaging. The effort to reanimate an updated legal life world that makes space for the rise of herrenvolk democracy in the states—a purportedly legitimated form of democratic governance that functions by structurally excluding some groups of people from meaningful democratic participation—may persuade observers that not only the Court's decisions, but the Court itself, has crossed an important threshold. Previous individual decisions provoked anger and criticism, but these moments were relatively short-lived.<sup>418</sup> Now, however, the Court's combination of substantive support for reactionary shifts, its promotion of a jurispathic approach that targets existing and emerging constitutional theories that widen the circle of civic membership, and its commitment to partisan regime reinforcement encourage more persistent criticism and render that criticism more general and more politically salient. The fruits of bad drag are more than just a bored or dissatisfied audience that boos the performance.

If the institution suffers a serious decline in legitimacy that produces a collapse in public trust and institutional fidelity, perhaps it would not be the worst outcome. Scholars critical of juristocracy note the dangers of turning

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416. Mark Graber, University System of Maryland Regents Professor, Michael Oakeshott's Pen Revisited: The Reactionary, Not Conservative, Jurisprudence of the Roberts Court, Address at the Maryland Law Review Symposium: Understanding Modern Constitutional Law (Feb. 23, 2023).

417. WHITTINGTON, *supra* note 273, at 13.

418. See generally James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?* 59 AM. J. POL. SCI. 162 (2015).



to the courts for the resolution of fundamentally political problems.<sup>419</sup> Lesser trust in the legitimacy of the courts might also facilitate a shift away from what Stuart Scheingold terms the myth of rights and toward a politics of rights.<sup>420</sup> The myth of rights that has held sway centers law and litigation as pathways forward to a better and more just society and underlines the courts not only as a place for dispute resolution, but also as a place for the rational advance of both democracy and order.<sup>421</sup> The politics of rights decenters courts and litigation, allowing that, while legal change may indeed empower democracy and strengthen civic belonging, it is not the only path forward and legal change can be pursued in venues other than the courts. As Michael McCann and George Lovell have shown, while legal struggles for rights can contribute powerfully to the development of consciousness, group mobilization, strengthened organization, and political and social empowerment, the ultimate victories gained in policy terms are often fragile and overreliance on legal rights may limit the extent to which radical visions can flourish and ultimately take permanent root.<sup>422</sup> Perhaps, at long last, we can conclude that the courts' fall from grace to a political space in which they too must confront the problem of legitimacy directly and frequently is overdue, and a failure to overcome this problem might divert the flowering of political consciousness and resultant mobilization into more fruitful directions.

In our constitutional framework, however, courts are still critical players in propping up the entire enterprise. Balkin outlines three circumstances under which constitutions can fail in their core purpose of “making politics possible” and staving off the alternatives of violence, governmental collapse, or civil war.<sup>423</sup> First, political officials (particularly but not necessarily only the President) may decide no longer to abide by a constitution. Second, disaster may result from extreme fidelity to the constitution when people cannot agree on how a constitutional solution to a disaster can be achieved. Finally, disagreements over constitutional meaning may become so bitter and deep that the constitution can no longer quell violent political struggle or establish meaningful boundaries for political competition.<sup>424</sup> Balkin argues that our current anxieties are properly placed primarily with the third alternative, though he acknowledges that plenty of injustice can exist without provoking crisis and that genuine “constitutional crises” of any of the three

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419. See HIRSCHL, *supra* note 271.

420. STUART SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND SOCIAL CHANGE* (2d ed. 2004).

421. *Id.* at 62–82.

422. MICHAEL MCCANN & GEORGE LOVELL, *UNION BY LAW: FILIPINO AMERICAN LABOR ACTIVISTS, RIGHTS RADICALISM, AND RACIAL CAPITALISM* (2020).

423. BALKIN, *supra* note 275, at 38.

424. *Id.* at 37–40.

types are quite rare.<sup>425</sup> Perhaps though, even if we cannot count on the courts to advance justice, they cannot be dealt out of the responsibility for staving off or quelling constitutional crisis. In light of the Trump experience, the threat of true crisis does not seem so far-fetched, even to Balkin, though he continues to maintain that the real concern is rot.<sup>426</sup> His caution that the federal courts are unlikely to be the institution that will lead the way into a cycle of renewal is well taken.

The Roberts Court's apparent commitment to bad drag plays into these problems in two ways. First, the concrete outcomes the Court promotes, even if it (and other federal courts) continues to step away from overt election denialism, undermines democracy in its commitment to partisan regime reinforcement, both by advancing outcomes that benefit the Republican Party and by supporting agendas that play strongly to the Republican base. Second, the majority's approach to making these decisions, while appearing to generate new ideas and outcomes through a principled commitment to the consistent use of a particular interpretive mode, is cramped and mean-spirited. Bad drag makes the Court look bad and undermines its capacity to weigh in seriously and credibly on matters of great national concern.

If we return to the Fuller Court era and its aftermath, we see that the courts were not particularly helpful in engineering the path out, at least not until decades later. Constitutional change would come first through the Progressive Era amendments and then through major transformations in the late 1930s driven by the executive branch and Congress, with the Court largely following until the 1950s.<sup>427</sup>

These observations return us to Keith Whittington's question about judicial supremacy.<sup>428</sup> The Fuller Court era and the present differ in part because of the expansion of judicial supremacy and the international rise of juristocracy. But the Court may be moving toward the point of provoking, or at least being overtaken by, an appetite for constitutional reform that collides directly with its agenda and the destructive nature of partisan politics in the United States today. Perhaps such a collision would provoke a cycle of renewal, as Balkin suggests, and perhaps such a cycle would entail both broader and deeper democratic reform than previous cycles. A series of constitutional amendments could take seriously both the need to address massive economic inequality and corporate power and the need to lay the groundwork for building national capacity to address the national and international consequences of climate change and other foreseeable and

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425. *Id.* at 44.

426. *Id.* at 37–40.

427. *See generally* ROBERT MICKEY, *PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1944-1972* (2015).

428. *See supra* Section II.C.

unforeseeable crises. The Court need play little role in such a change; indeed, perhaps its most helpful contribution would be to stand out of the way.

If this seems too utopian—and perhaps it is—we the people are left with few choices. The hyperpartisan and damaged political biosphere, propped up by a Court that is both beholden to it and captured by it, seems incapable of bootstrapping itself up and out of the current mess. Without deep reform, we are left to struggle with the dilemma Mark Graber poses in *Dred Scott and the Problem of Constitutional Evil*: How much constitutional compromise can a system sustain in an environment in which some stakeholders see themselves in an unwanted political relationship with illegitimate or evil partners?<sup>429</sup>

This article has been severe in its discussion of the Fuller Court era and the early twentieth century more generally. Yet without a period of constitutional reform, the most readily available solution to the issues raised by the Roberts Court's jurisprudential agenda and its shoring up of Republican Party dominance might well be some sort of settlement along the lines of that negotiated and implemented between northern capitalist interests and southern revanchism in that period. Progressive era activists advanced reform, with individuals and movements working to secure state-level victories in regulating child labor and women's work, promoting initiatives and referenda, advancing civil service reform, and supporting labor empowerment.<sup>430</sup> These advances, however, left the legal structure of state-based racial subordination intact, allowed for violent repression of socialist ideas and movements, and either permitted or even actively supported a national commitment to racialized, xenophobic immigration policies.<sup>431</sup> States had the latitude to go in different directions, including directions that denied constitutional imperatives of equality and most fundamentally for life itself for some persons.<sup>432</sup>

In Balkin's terms, this settlement created space for renewal, though the seeds planted took a long time to germinate. Perhaps a similar settlement will be on the table, with the states that have been completely captured by one party or the other being left to design policies around their world views. Many individuals who are already cultural targets in these states will then pay the cost by serving as distractions for other state residents from inequality, disempowerment, and urgent crises brought on by climate change, international disruptions, or other unforeseen events like COVID-19. But if the alternative is to take seriously growing talk of national separation or

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429. GRABER, *supra* note 262.

430. See generally ALAN DAWLEY, *STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE* (1993).

431. See SMITH, *supra* note 317.

432. See NOVKOV, *supra* note 352.

secession,<sup>433</sup> such an option may seem like the lesser of evils, albeit at the cost of permitting illegitimate or immoral regimes to thrive subnationally.

The path forward will hinge in part on whether the Roberts Court continues its bad drag performance, and as this seems likely, how the American public responds to the performances. It would be difficult, if not impossible, to compel the Court to alter its behavior sufficiently to undo what it has accomplished or even to tone down its flamboyance. If the Roberts Court remains committed to its current path, it will thwart renewal, increase conflicts, and make good outcomes more difficult to achieve. And at least thus far, discussions among political elites about institutional interventions have borne little fruit.<sup>434</sup> But waiting for the Court to exhaust itself on the stage need not be the only solution. Justice Sotomayor, dissenting in *303 Creative*, panned the majority's opinion, warning that it had committed symbolic damage. But she continued, advising, "that does not mean that we are powerless in the face of the decision. The meaning of our Constitution is found not in any law volume, but in the spirit of the people who live under it."<sup>435</sup> Ultimately, the people who reject the cramped, regressive world advanced by the Roberts Court may find ways to disrupt, subvert, and transform, casting off the chains of the past in favor of a more just and capacious future.

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433. Michael J. Lee, *Secession Is Here: States, Cities, and the Wealthy Are Already Withdrawing from America*, CONVERSATION (Mar. 20, 2023, 8:42 AM), <https://theconversation.com/secession-is-here-states-cities-and-the-wealthy-are-already-withdrawing-from-america-200813>.

434. The Presidential Commission on the Supreme Court, convened by President Biden in April 2021 to study and report on the possibility of Supreme Court reform, was instructed only to provide an analysis of the pros and cons of Supreme Court reform and not to make recommendations. PRESIDENTIAL COM'N ON THE SUP. CT., FINAL REPORT 1 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

435. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2342 (2023) (Sotomayor, J., dissenting).