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Introduction

Amy Coney Barrett

Notre Dame Law School, abarrett@nd.edu

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SYMPOSIUM STARE DECISIS AND NONJUDICIAL ACTORS

INTRODUCTION

*Amy Coney Barrett**

In 2006, the South Dakota legislature passed a statute, since repealed, that rendered all abortion, including first trimester abortion, a crime in the state of South Dakota.¹ At a minimum, this statute reflected South Dakota's judgment that *Roe v. Wade*² was wrongly decided. What more this statute reflected is unclear. It may have reflected South Dakota's judgment that *Roe* was ripe for overruling and its desire to present the United States Supreme Court with an opportunity to do it. Or, it may have reflected less South Dakota's hope for overruling than its belief that *Roe*, even if affirmed, does not constrain the states from acting in accordance with their own interpretation of the Fourteenth Amendment. Whatever South Dakota's beliefs, its action throws a spotlight on the complicated relationship between the Supreme Court and nonjudicial actors. What means can the states, the Congress, the President, and even private citizens legitimately employ to express disagreement with the Supreme Court? If nonjudicial actors register such disagreement, how, if at all, should the Supreme Court take account of it? These are the kinds of questions with which this Symposium grapples.

This Introduction frames these questions by pausing to reflect upon the variety of ways in which nonjudicial actors have, over time,

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* Associate Professor of Law, Notre Dame Law School.

1 See South Dakota Women's Health and Human Life Protection Act, 2006 S.D. Sess. Laws 171, 171-72 (repealed by referendum Nov. 7, 2006).

2 410 U.S. 113 (1973).

registered their disagreement with decisions of the United States Supreme Court. Both public officials and private citizens have battled the Court on any number of occasions since its inception, and they have employed a diverse range of tactics in doing so. They have resisted Supreme Court judgments. They have denied the binding effect of Supreme Court opinions. They have sought to overrule the Court by statute or constitutional amendment. They have sought overruling in the Court itself. They have tried to discipline the Court through jurisdictional limitations or onerous procedural regulation. And they have pressured the Court by appealing to public opinion. Some of these means, like constitutional override of a disfavored opinion, are generally consistent with the notion that Supreme Court precedent is the law of the land. Others, like interfering with the enforcement of a Supreme Court judgment, represent a head-on challenge to the Court's authority. In what follows, I will describe some notable examples of each of these kinds of protest, noting, along the way, the problems posed by each.

I. RESISTING SUPREME COURT JUDGMENTS

Most dramatic are those situations in which federal or state officials have either refused to enforce or interfered with the enforcement of Supreme Court judgments. The conventional view is that whatever obligations public officials may have with respect to Supreme Court opinions, they must obey Supreme Court judgments.³ That view, however, has not commanded universal assent. Some academics have provocatively argued that public officials have the freedom to disregard Supreme Court judgments that conflict with their own understanding of what the Constitution requires.⁴ There have been a number of occasions throughout history on which both state and federal actors have evidenced that same belief.

While state resistance to Supreme Court judgments is virtually nonexistent today, it occurred with some frequency during the antebellum period.⁵ By one count, state governments defied federal court

3 See, e.g., Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 146 (1999) (noting that "judgments call for obedience; opinions do not").

4 See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 222-23 (1994) (defending, on grounds of departmentalism, the executive's prerogative to refuse to enforce judgments the executive believes to be unconstitutional).

5 See LESLIE FRIEDMAN GOLDSTEIN, *CONSTITUTING FEDERAL SOVEREIGNTY* app. a, at 170-71 (2001). According to Goldstein, official state resistance to federal authority, including resistance to federal judgments, all but ceased after the Civil War. *Id.* at 19.

orders on at least twenty occasions between 1790 and 1859.⁶ Even apart from these instances of actual defiance, there were threats of such defiance. In 1821, in the midst of public outrage over the Supreme Court's decision in *Cohens v. Virginia*,⁷ the *Richmond Enquirer* proposed that the Virginia legislature pass a bill imposing heavy penalties upon "any person who should enforce within the Commonwealth any judgments of the Supreme Court or any other foreign tribunal which reviews a judgment of the courts of this Commonwealth."⁸ The *Enquirer's* proposal is moderate compared to the Georgia legislature's authorization of the death penalty for anyone who attempted to execute the judgment entered in *Chisholm v. Georgia*.⁹ While contrary

6 See *id.* at 20. Goldstein's tally includes both judicial and nonjudicial resistance and resistance to inferior courts as well as to the Supreme Court. While this Symposium focuses on nonjudicial resistance to the Supreme Court, one ought not forget that judicial actors sometimes resist the Supreme Court as well, and, pertinent to the accompanying discussion, they sometimes do so by disregarding Supreme Court orders. See, e.g., *Tyler v. Magwire*, 84 U.S. (17 Wall.) 253, 281–83 (1873) (describing the refusal of the Missouri Supreme Court to obey a United States Supreme Court mandate with which it disagreed); Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 188–90 (characterizing Judge Harry Pregerson of the Ninth Circuit as "impudent" for staying an execution less than one hour after the Supreme Court had rejected a stay in the same case).

7 19 U.S. (6 Wheat.) 264, 351 (1821) (holding that the Supreme Court had appellate jurisdiction over criminal as well as civil cases from the state courts when those suits raised a federal question).

8 Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 18–19 (1913) (quoting the *Richmond Enquirer*). Another example of threatened defiance is the Kentucky legislature's reaction to *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823), a case described in more detail below. See *infra* notes 106–17 and accompanying text. There, the Kentucky legislature invited the governor to consider whether to "call forth the physical power of the State to resist the execution of the decision of the Court, or in what manner the mandates of the said Court should be met by disobedience." See Warren, *supra*, at 22–23 (quoting 29 NILES REC. 228, 229 (1825)).

9 2 U.S. (2 Dall.) 419 (1793); see Warren, *supra* note 8, at 166 (describing the Georgia statute providing that anyone who executed any process of any federal court in the case should be "deemed guilty of felony, and shall suffer death without the benefit of clergy, by being hanged" (quoting the Georgia statute)); see also Introduction to Collected Documents on *Chisholm v. Georgia*, in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 127, 135–36 (Maeva Marcus, ed., 1994) (describing both the legislation and the debate about it); *An Intemperate Resolution of Georgia*, AM. MINERVA, Jan. 15, 1794, reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra*, at 237, 237–38 (reporting on legislation in Georgia responding to *Chisholm*); *Jack Ketch*, CONN. COURANT, Jan. 27, 1794, reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra*, at 249, 249 (same); *Proceedings of the Georgia House of Representatives*, AUGUSTA CHRON., Nov. 19, 1793, reprinted in 5

to our modern sensibilities, disregard of Supreme Court judgments was viewed by many during this period as a perfectly legitimate way of fighting the Court.

A particularly colorful example of this kind of protest occurred in 1809, when the State of Pennsylvania actually called out its militia to stymie the enforcement of a Supreme Court order. While Pennsylvania was ultimately forced to acquiesce in the execution of the federal judgment, the story of its effort to avoid the judgment is one worth telling.

The case began with the capture of a British ship, the *Active*, during the Revolutionary War. The *Active* carried four American prisoners, including one Gideon Olmstead, a resident of Connecticut.¹⁰ On September 6, 1778, Olmstead and his companions overcame the *Active*'s master and crew and confined them to the cabin.¹¹ Two days later, as Olmstead sailed the ship into New Jersey's Egg Harbor, the ship was forcibly taken by the captain of an American ship, the *Convention*, owned by the State of Pennsylvania.¹² The *Convention* escorted the *Active* into the port of Philadelphia, where Olmstead and the State of Pennsylvania lodged competing prize claims to the ship in the Pennsylvania Court of Admiralty.¹³ Under the law of prize, the captor of the *Active* was entitled to the proceeds from the sale of the ship and its cargo.¹⁴ The primary question before the court was whether Olmstead or Pennsylvania should be treated as the captor for this purpose.¹⁵ The Pennsylvania Court of Admiralty resolved this

THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra*, at 236, 236–37 (same); Governor George Mathews, Address to the Senators and Representatives of Georgia (Jan. 1, 1794), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra*, at 237, 237 (commenting on his support of legislation responding to *Chisholm*).

10 See Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401, 411–12 (2004).

11 See *United States v. Peters*, 9 U.S. (5 Cranch) 115, 119 (1809).

12 See *id.*

13 See *id.* The captain of the *Convention* and a privateer cruising in concert with the *Convention* also lodged claims for the prize. See *id.* For simplicity's sake, and because the ensuing court dispute involved only the claims of Olmstead and Pennsylvania, I omit these claims from the discussion.

14 See *id.* at 119, 137.

15 Specifically, Olmstead claimed that he had full control of the *Active* when the *Convention* approached, and that he was thus entitled to all of the proceeds. See *id.* at 119. Pennsylvania, by contrast, claimed that Olmstead had only partial control of the ship when it entered Egg Harbor; that the *Convention* had done the lion's share of the work in wresting the ship from British control; and that Pennsylvania was consequently entitled to the lion's share of the proceeds. See Rowe, *supra* note 10, at 412.

question in favor of Pennsylvania,¹⁶ and Olmstead appealed that decision to a federal body: the Court of Commissioners of Appeals in Prize Cases for the United States of America.¹⁷ The court of appeals reversed the Pennsylvania court,¹⁸ and so began a long-running and heated conflict between state and federal authority.

The Pennsylvania Court of Admiralty refused to enforce the federal order on the ground that the court of appeals lacked authority to enter it.¹⁹ The federal court of appeals retorted that Pennsylvania “was bound to pay obedience [to its decree].”²⁰ Nonetheless, it refused to institute contempt proceedings “lest consequences might ensue at this juncture dangerous to the public peace of the United States.”²¹ The judge of the admiralty court turned over Pennsylvania’s share of the proceeds to David Rittenhouse, the state’s treasurer,²² who, like all government officials of the time responsible for disposing of disputed funds, held the money as his personal property pending a conclusive resolution of ownership.²³

After several more years and several more legal permutations, Olmstead took his fight to the newly established federal court for the district of Pennsylvania. In 1803, Judge Richard Peters decreed that the original federal judgment was valid and that David Rittenhouse’s two daughters, now the executors of his estate, must turn over the disputed money to Olmstead.²⁴ Within days, the Pennsylvania General Assembly responded with an act declaring Judge Peters’ ruling to be in violation of the Eleventh Amendment, ordering the Rittenhouse

16 See Rowe, *supra* note 10, at 414 (noting that Olmstead received one-quarter of the proceeds, with the remainder going to the *Convention*).

17 See *Peters*, 9 U.S. (5 Cranch) at 119. This body appears to have been a committee of the Continental Congress. See Rowe, *supra* note 10, at 414.

18 See *Peters*, 9 U.S. (5 Cranch) at 119.

19 See *id.* at 120, 123.

20 *Id.* at 123.

21 *Id.*

22 See *id.*

23 He held the funds as his own because under the then applicable law of agency, he would have been personally liable to Olmstead if a court ultimately awarded Olmstead the proceeds. See Rowe, *supra* note 10, at 431 n.105 (explaining the then governing law). Rittenhouse would have relinquished the funds to Pennsylvania in exchange for Pennsylvania’s promise to indemnify him if Olmstead later asserted a rightful claim to the money. See *Peters*, 9 U.S. (5 Cranch) at 138 (describing a memorandum to that effect in Rittenhouse’s papers). Because Pennsylvania failed to give him an adequate bond of indemnity, Rittenhouse, exercising due caution, held onto the funds. For a detailed explanation of the legal dilemma in which Rittenhouse (and eventually his executors) found themselves, see Rowe, *supra* note 10, at 431 n.105.

24 See *Peters*, 9 U.S. (5 Cranch) at 125–26.

daughters to pay the funds in question into the state treasury, and authorizing the governor to take “‘any further means and measures that he may deem necessary’” to protect Pennsylvania’s interest.²⁵ It specifically authorized the governor to prevent the Rittenhouse daughters from being served with any federal process that might issue as a result of their disobeying Judge Peters’ order.²⁶ Furious, Olmstead asked Judge Peters to force the Rittenhouse daughters to comply by issuing a writ of attachment to enforce the judgment, but, reluctant to “‘embroil[] the government of the United States and that of Pennsylvania . . . on a question which has rested on my single opinion,’” Judge Peters declined to do so.²⁷

Thus, at this point, two federal courts—the old court of appeals in prize cases and the Pennsylvania district court—had hesitated to enforce their judgments for fear of conflict with Pennsylvania. The United States Supreme Court did not so hesitate. In 1809, Olmstead asked the United States Supreme Court to issue a writ of mandamus ordering Judge Peters to issue an attachment executing the judgment. The Supreme Court, directly engaging Pennsylvania, agreed.²⁸ Pennsylvania’s central legal claim resembles one that Professor Paulsen has elsewhere defended: it claimed that it need not acquiesce in a federal court’s interpretation of the United States Constitution.²⁹ On the contrary, Pennsylvania believed itself entitled to its own constitutional opinion, even if that opinion carried it to the point of interfering with the execution of a federal judgment. Pennsylvania did temper its claim with a nod to federal authority; it did not claim a “universal right . . . to interpose in every case whatever,” but only in cases in which it determined that the Constitution deprived federal courts of jurisdiction.³⁰ Here, however, Pennsylvania believed that such a jurisdictional question was at stake. Pennsylvania maintained that the Eleventh Amendment deprived Judge Peters of jurisdiction to enforce

25 *Id.* at 133 (reprinting the Pennsylvania Act).

26 *See id.*

27 *Id.* at 117 (quoting the July 18, 1808 order of Judge Peters).

28 *See id.* at 141.

29 *See* Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2736 (2003) (“[S]tate government officials . . . are not bound to submit docilely to unconstitutional actions of the agencies of the national government. By the logic of *Marbury*, they cannot be bound by the erroneous constitutional views of organs of the national government, but are empowered, even required, to interpret the Constitution directly.”).

30 *Peters*, 9 U.S. (5 Cranch) at 136.

the judgment of the Continental Congress' admiralty court of appeals, and that it could thus treat Judge Peters' judgment as a nullity.³¹

The Supreme Court roundly rejected the notion that Pennsylvania possessed the independent authority to determine what the Eleventh Amendment requires. It held that it alone possessed the right to determine the bounds of federal jurisdiction, and that recognizing any right on the part of any state to annul a federal judgment would be to turn the Constitution into a "solemn mockery."³² After holding that the Eleventh Amendment did not apply, it issued a mandamus to Judge Peters ordering him to issue the process necessary to enforce his judgment.³³

Pennsylvania did not take the Supreme Court's decision lying down. Upon learning of it, the governor of Pennsylvania called out the militia. His aim was to use whatever means necessary to prevent the United States from serving the Rittenhouse daughters with process.³⁴ When the federal marshal arrived at the Rittenhouse home, he was met with a line of bayonets pointed at his chest. After warning both the militia and their commander, General Michael Bright, that they could be prosecuted for treason,³⁵ the marshal began assembling a posse comitatus to aid him in execution of his writ.³⁶ The standoff continued for roughly three weeks, causing much agitation in the city of Philadelphia, and attracting the attention of (but little support from) the other states.³⁷ In large part because the Rittenhouse daugh-

31 Pennsylvania's Eleventh Amendment argument was grounded in its belief that suing Rittenhouse was the equivalent of suing the state, because it was Pennsylvania, not Rittenhouse, who had the real stake in the funds. *See id.* at 138–41.

32 *Id.* at 136.

33 *See id.* at 141. The Supreme Court held the Eleventh Amendment inapplicable because the funds were held by David Rittenhouse in his personal capacity rather than by the State of Pennsylvania. *See id.* at 139.

34 *See Rowe, supra* note 10, at 424. Rowe describes this conflict as the first clash between federal and state forces in the nation's history. *See id.*

35 *See* Letter from Michael Bright to Governor Simon Snyder (Mar. 25, 1809), *in* MESSAGE OF THE GOVERNOR TOGETHER WITH DOCUMENTS RELATIVE TO THE CASE OF GIDEON OLMSTEAD AND OTHERS, 1809, at 5, 5 (Benjamin Grimler ed., 1809) [hereinafter OLMSTEAD CASE DOCUMENTS] (informing the governor that "[o]ur situation is delicate—The Marshal has noted our men, with a determination to have them indicted for high treason, as well as myself.").

36 *See* Letter from Michael Bright to Governor Simon Snyder (Mar. 31, 1809), *in* OLMSTEAD CASE DOCUMENTS, *supra* note 35, at 6, 6 ("I have just learned from good authority, that the Marshal is serving summons on the citizens of this state, for the purpose of raising a posse to assist him in the execution of the duties of his office . . .").

37 General Bright, the commander of the militia dispatched to the Rittenhouse home, informed the secretary of the commonwealth that the situation was causing

ters grew tired of being under virtual house arrest, the conflict finally came to an end, and a somewhat comic one at that. A stepson of one of the women tipped off the federal marshal to a way in which he could gain access to an unguarded back door, and “disguised in a new set of clothes and a hat, [the marshal] climbed through the backyards and alleyways” to enter the home through the back door at six in the morning to fulfill his duty.³⁸ Defeated, the governor withdrew the militia and paid Olmstead with the funds that it had, in the interim, extracted from the Rittenhouse daughters.³⁹ The general who led the Pennsylvania militia was convicted of obstructing the service of federal process.⁴⁰

The Olmstead affair serves as an example of a state’s claiming the right to resist a Supreme Court judgment. The states are not alone in making this claim. Two Presidents have openly asserted the right to resist Supreme Court judgments: Andrew Jackson and Abraham Lincoln. Their claims in this regard resonate through all debates about executive obligation (or lack thereof) to the Court. Interestingly, these assertions occurred during roughly the same period as the rash of state resistance to Supreme Court judgments—the antebellum period, and, in Lincoln’s case, the very start of the Civil War.

Jackson’s confrontation with the Court stemmed from the Court’s holding unconstitutional a Georgia statute that, among other things, permitted whites to live among Indians only if they got a license to do so and swore an oath of loyalty to the State of Georgia.⁴¹ Samuel Worcester was convicted for his refusal to do either; the Supreme Court, holding the statute unconstitutional, overturned his conviction and ordered Georgia to release the prisoner.⁴² Georgia

“much alarm in the city.” Rowe, *supra* note 10, at 429 (quoting Letter from Michael Bright to Nathaniel B. Boileau (Mar. 25, 1809), in 4 PENNSYLVANIA ARCHIVES 9th ser. 2773, 2773 (Gertrude MacKinney ed., 1931)); *see also id.* at 427–28 (describing the lack of support from around the country, and even within large segments of Pennsylvania, for Pennsylvania’s position in the controversy).

38 *See id.* at 432 (“The clever disguise of a marshal, not to mention the fatigue of two elderly women, thus resolved a major constitutional dispute.”).

39 *See id.* at 433. Despite the Rittenhouse daughters’ reluctance to relinquish the funds without adequate assurance of indemnification from Pennsylvania, the Pennsylvania General Assembly had passed a statute that gave them little choice but to turn them over. *See id.*

40 *See id.* at 427, 430. President Madison pardoned him a week later. *See id.* at 427.

41 *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 577–78 (1832).

42 *See id.* at 597 (“[I]t is further ordered and adjudged, that the said judgment of the said superior court be, and hereby is reversed and annulled . . . and that all proceedings on the said indictment do for ever surcease; and that the said Samuel A.

refused.⁴³ With a federal judgment at stake, one might have expected Jackson to force Georgia's compliance, but he did not. Instead, tradition has it that Jackson proclaimed, "John Marshall has made his decision, now let him enforce it."⁴⁴ Jackson's failure to intervene, combined with rhetoric decrying the Supreme Court and defending Georgia, left Jackson vulnerable to the charge that he had violated the Constitution by failing to enforce the Court's decree.⁴⁵ Jackson was saved from a direct collision with the Court by the fact that he appeared to lack the authority to act. Timing and a procedural quirk had prevented the Supreme Court from dispatching the federal marshal to execute the judgment, and a federal statute authorized the President to intervene only if the marshal failed.⁴⁶ Thus, notwithstanding Jackson's fairly open approval of Georgia's defiance and his expressed willingness to defy the Court himself, he came only to the brink of refusing to enforce a federal judgment. His conduct nonetheless stands as an important, if symbolic, denial of an unqualified executive obligation to execute Supreme Court judgments.

In contrast to Andrew Jackson, Abraham Lincoln's stand against the binding effect of a Supreme Court judgment was more than rhetorical. Lincoln is the only President who has actually refused to enforce an order of the Court.⁴⁷ Lincoln suspended the writ of habeas corpus during the Civil War because he believed public safety required it.⁴⁸ Union troops took a large number of suspected secessionists into custody after they were attacked by a mob in Baltimore,

Worcester be, and hereby is henceforth dismissed therefrom, and that he go thereof quit without day [sic]. And that a special mandate do go from this court, to the said superior court, to carry this judgment into execution.").

43 See GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION* 49 (2007). Georgia's refusal, of course, makes this case double as an example of state resistance to a Supreme Court judgment. For another example of Georgia's refusing to execute a writ from the Supreme Court at about the same time, see Warren, *supra* note 8, at 167-68 (describing Georgia's execution of a Cherokee Indian in defiance of a Supreme Court writ).

44 MAGLIOCCA, *supra* note 43, at 49. This quote, while often repeated, may be apocryphal. See *id.*

45 See *id.* at 48-50.

46 *Id.* at 49-50; see Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-86 (current version at 28 U.S.C. § 1257 (2000)).

47 See Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1989) ("President Lincoln once [ignored an order of the Court] . . . but no other President has followed suit.").

48 Specifically, Lincoln authorized Union officers to suspend the writ if Union troops encountered resistance during a march from Philadelphia and Washington. See Paulsen, *supra* note 4, at 278. He did so with an eye toward Baltimore, which lies between these two cities and was known to be a "hotbed of secessionist activity." *Id.*

and one of them, John Merryman, petitioned Chief Justice Roger Taney for a writ of habeas corpus.⁴⁹ Taney held Lincoln's suspension of the writ unconstitutional and ordered Merryman freed.⁵⁰ Lincoln did not comply.⁵¹ In a speech to Congress shortly after Taney's opinion was issued, he reiterated his view that his suspension of the writ was constitutional, thereby clearly implying that his own constitutional judgment justified his disregard of Taney's order.⁵² The day after Lincoln's speech to Congress, his Attorney General issued an opinion making that claim explicit.⁵³

Historically, the force of a federal judgment has been an occasional flashpoint between the Supreme Court and the states and between the Supreme Court and the President, but not between the Supreme Court and Congress. That may be changing. Over the last several years, Congress has begun exploring whether it has the power to thwart the execution of federal judgments it deems erroneous by refusing to fund their execution.⁵⁴ These measures are a new instance of the same basic claim that animated Lincoln, Jackson, and antebellum Pennsylvania: the claim to the authority to nullify federal

49 *Ex parte Merryman*, 17 F. Cas. 144, 147–48 (C.C.D. Md. 1861) (No. 9487). Professor Paulsen observes that Merryman was “a lieutenant in a secessionist cavalry unit that had burned bridges and ripped down telegraph wires to try to prevent a Massachusetts regiment from passing through Maryland.” Paulsen, *supra* note 4, at 278.

50 See Paulsen, *supra* note 4, at 278.

51 See *id.* at 279 n.225 (“After a seven-week stay in Fort McHenry, Merryman was indicted by a federal grand jury in Maryland, transferred to civil jurisdiction, released on bail, and never brought to trial. The Union did release him much later.”).

52 See Abraham Lincoln, Special Session Message (July 4, 1861), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 3221, 3226 (James D. Richardson ed., 1897).

53 See Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 85 (1861).

54 See generally Jennifer Mason McAward, *Congress’ Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. (forthcoming 2008) (manuscript at 60–63), available at <http://ssrn.com/abstract=997879> (considering the constitutionality and propriety of such attempts). Thus far, these appropriations measures have targeted judgments from the inferior federal courts. For example, the House of Representatives recently proposed defunding the enforcement of the Ninth Circuit’s judgment in *Newdow v. U.S. Congress*, 292 F.3d 597, 612 (9th Cir. 2002), (holding unconstitutional the reference to God in the Pledge of Allegiance), *rev’d on other grounds sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), and the Eleventh Circuit’s judgment in *Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003) (holding unconstitutional the display of a Ten Commandments monument in the Alabama State Judicial Building).

judgments resting on contested constitutional interpretations.⁵⁵ These measures also underscore that, despite its relatively infrequent assertion in the sweep of history, the claim to this authority has more than theoretical importance.

II. RESISTING SUPREME COURT OPINIONS

Edward Hartnett has reminded us that there is a distinction between the Supreme Court's judgments and its opinions.⁵⁶ While the force of federal judgments is rarely challenged, the force of Supreme Court opinions is a matter of considerable controversy. Unsurprisingly, the Supreme Court itself has taken the position that its opinions are the law of the land.⁵⁷ Predictably, public officials have challenged that position. Many of these instances are well known, as the debate about the force of Supreme Court opinions is well traveled.⁵⁸ Nonetheless, it is worth briefly calling at least a few of them to mind.

The impetus for this Symposium is South Dakota's passage of legislation inconsistent with the Supreme Court's abortion jurisprudence. If South Dakota's action represents a state challenge to the Court's authority to bind it, that challenge is one with historical antecedents. As is the case with resistance to Supreme Court judgments, however, those antecedents are truly historical. During the antebellum period, the states defied the authority of federal court interpretations of law on at least thirty-two occasions.⁵⁹ During the twentieth

55 Cf. McAward, *supra* note 54 (manuscript at 9) (noting that Representative Hostettler defended such measures on the ground that "Congress is obligated and empowered to correct the federal courts' constitutional errors").

56 See Hartnett, *supra* note 3, at 126.

57 See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (asserting that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'").

58 For just a few of the many articles debating this question, see, for example, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Hartnett, *supra* note 3; Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991 (1987); Paulsen, *supra* note 4.

59 See GOLDSTEIN, *supra* note 5, at 20. One example stems from the Supreme Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). After that case was decided, the Ohio legislature passed resolutions refusing to be bound by the opinion and reasserting its agreement with the Kentucky Resolutions of 1798-1799. See Warren, *supra* note 8, at 16. Another is the controversy surrounding *Ableman v.*

and twenty-first centuries, by contrast, such blatant defiance (as opposed to subtle subversion) has been relatively rare.⁶⁰ The most vivid modern example of blatant defiance is that of Governor Faubus calling out the Arkansas National Guard to prevent the desegregation demanded by *Brown v. Board of Education*.⁶¹ Since the aftermath of *Brown*, states have not launched any real challenge to the Court's interpretive supremacy.⁶² To the extent that South Dakota is firing a shot over the federal-state divide, it is reopening a political debate about federal judicial supremacy that has been basically dormant since the southern showdowns over desegregation.

The President is the nonjudicial actor who has most frequently and consistently asserted the power to disagree with the Supreme Court in matters of constitutional interpretation. There are several

Booth, 62 U.S. (21 How.) 506 (1859). The Wisconsin Supreme Court granted habeas corpus to a newspaper editor convicted in federal court of violating the Fugitive Slave Act on the ground that the Act was unconstitutional, *see id.* at 508, and the United States Supreme Court reversed that decision, holding that the Wisconsin Supreme Court lacked jurisdiction to issue the writ and that, in any event, it was wrong about the constitutionality of the Act, *see id.* at 525–26. The Wisconsin legislature adopted a declaration refusing to accept the Supreme Court's opinion in either respect. *See Wisconsin Defies Federal Courts*, in STATE DOCUMENTS ON FEDERAL RELATIONS 303, 303–05 (Herman V. Ames ed., DeCapo Press 1970).

60 Even when states do not openly deny the binding effect of Supreme Court opinions, they sometimes indirectly do so by failing to comply fully with them. *See, e.g.*, Norman Lefstein et al., *In Search of Juvenile Justice and Its Implementation*, in THE IMPACT OF SUPREME COURT DECISIONS 175, 175–85 (Theodore L. Becker & Malcolm M. Feeley eds., 2d ed. 1973) (presenting data revealing spotty state compliance with *In re Gault*, 387 U.S. 1, 34–41 (1967), which held that juveniles have a right to counsel in delinquency hearings); *cf.* *Staub v. Baxley*, 355 U.S. 313, 318–21 (1958) (asserting that states cannot use procedural devices to avoid vindicating the assertion of federal rights).

61 349 U.S. 294 (1955); *see Cooper*, 358 U.S. at 8–15 (1958) (describing the stand-off). Governor Faubus defied both the Supreme Court's opinion in *Brown* and the district court order implementing it. Although two aspects of federal authority were at stake, Governor Faubus focused primarily on the claim that *Brown* did not bind him, and that was the claim to which the Court gave most attention in *Cooper*. *See id.* at 16–20. Governor Faubus was not alone in his opposition to *Brown*; the decision prompted massive resistance from the southern states. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 394–421 (2004). Albert P. Blaustein and Clarence C. Ferguson, Jr. have observed that until *Brown*, the debates about interposition and nullification had been “[v]irtually dormant for more than eighty years.” Albert P. Blaustein & Clarence C. Ferguson, Jr., *Avoidance, Evasion, and Delay*, in THE IMPACT OF SUPREME COURT DECISIONS, *supra* note 60, at 100, 102.

62 *Cf.* Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1143 (1999) (“Virtually all state courts agree that they are bound by U.S. Supreme Court decisions interpreting federal law.”).

oft-recounted examples of presidential refusal to follow the Court. Once again, Abraham Lincoln and Andrew Jackson loom large in the debate. Abraham Lincoln famously denied the binding effect of the Court's opinion in *Dred Scott v. Sandford*.⁶³ Andrew Jackson vetoed, on constitutional grounds, legislation to recharter the Bank of the United States,⁶⁴ despite the fact that the Supreme Court had already held the Bank to be constitutional.⁶⁵ Neal Devins and Louis Fisher point out that many other Presidents, including Franklin Delano Roosevelt, Richard Nixon, Ronald Reagan, and Bill Clinton have similarly claimed the prerogative to disagree with the Court in matters of constitutional interpretation.⁶⁶ Indeed, Professor Hartnett claims that "executive actions premised on disagreement with Supreme Court opinions are too numerous to count."⁶⁷

Congress has also acted contrary to Supreme Court opinions, although it has done so less frequently than the President. Child labor is probably the best known example of Congress digging in its heels on a matter of constitutional interpretation.⁶⁸ Despite the Supreme Court's repeated holdings that Congress lacked the authority to regulate child labor,⁶⁹ Congress repeatedly regulated child

63 60 U.S. (19 How.) 393 (1857); see Abraham Lincoln, From Sixth Lincoln-Douglas Debate, Quincy, Illinois (Oct. 13, 1858), in *SELECTED SPEECHES AND WRITINGS BY ABRAHAM LINCOLN* 184, 185 (Vintage Books/Library of Am. ed. 1992) (acknowledging the binding effect of the *Dred Scott* judgment, but denying its status "as a political rule which shall be binding on the voter, . . . on the members of Congress or the President.").

64 Andrew Jackson, Veto Message (July 10, 1832), in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 576, 581-83 (James D. Richardson ed., 1899) (explaining that his veto of the Bank rested on his construing the word "necessary" in Article I more narrowly than the Supreme Court did in *McCulloch*). Of course, Jackson could have vetoed the legislation approving the Bank on any number of grounds, but he went out of his way to note that he was doing so on the constitutional ground.

65 See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819).

66 See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 88-89 (1998) (giving examples).

67 Hartnett, *supra* note 3, at 154.

68 See, e.g., *id.* at 151-52 (recounting the story of the battle between the judiciary and Congress over child labor).

69 See *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918) (holding unconstitutional Congress' attempt to ban from interstate commerce all products made by manufacturers employing children under the age of fourteen), *overruled by* *United States v. Darby*, 312 U.S. 100, 115-17 (1941); see also *Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 259 U.S. 20, 39 (1922) (holding that Congress lacked the power to impose a ten percent tax on the net income of any manufacturer employing children under fourteen, as such tax was aimed at eliminating child labor, and Congress lacked the power to do so).

labor, until, over twenty years later, the Supreme Court finally acquiesced in Congress' interpretation of the Commerce Clause.⁷⁰ There have been occasions on which Congress has attempted to "overrule" the court legislatively,⁷¹ but, in contrast to its contest with the Court over child labor, it has generally surrendered its position upon the Court's first rebuff.

As this brief narrative reflects, over time there has been a faint but fairly consistent chorus of state and federal actors denying that Supreme Court precedent binds them. There has also been a long-standing debate about whether such claims are legitimate.⁷² It is worth situating this debate in the context of other means of battling Supreme Court precedent. The fight against disfavored precedent is not restricted to head-on challenge; many alternate tools exist. How, if at all, does the availability of alternate means of attack affect bald refusals to abide by Supreme Court precedent? Does the existence of these alternate ways of battling the Court inform the prudence of such outright challenge, even if the power to levy it exists?

III. CONGRESSIONAL OR CONSTITUTIONAL OVERRULING

Unpopular Supreme Court opinions often elicit proposals to "overrule" them by legislation or constitutional amendment.⁷³ It is often difficult to know what to make of such proposals. They may reflect the view that the Supreme Court got it wrong. Or they may reflect the view that the Supreme Court got it right, and thereby exposed some policy defect in the law itself. Whatever their motivation, such responses to unpopular Supreme Court opinions are common, often swift, and have been made since the earliest days of the Court. They are also, at least insofar as constitutional decisions are concerned, rarely successful.

⁷⁰ *Darby*, 312 U.S. at 116-17.

⁷¹ See *infra* notes 83-91 and accompanying text.

⁷² See *supra* note 58 and accompanying text.

⁷³ The accompanying text discusses legislative responses on the federal level. Interestingly, states have also attempted to override disfavored Supreme Court opinions by passing state statutes or amending state constitutions. For example, in response to *Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1 (1805), the Pennsylvania legislature passed legislation purporting to "overrule" the Court's opinion. See I CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 369 (1926). Unsurprisingly, the Supreme Court has greeted these attempts with even less enthusiasm than those made by Congress. See, e.g., GOLDSTEIN, *supra* note 5, app. a, at 169 (describing the Supreme Court's rejection of an Ohio constitutional provision purporting to overrule a Supreme Court opinion).

The story of the Eleventh Amendment, passed in direct response to the Supreme Court's decision in *Chisholm*, is well known.⁷⁴ The successful "overruling" of *Chisholm* ought not give the impression that many other Supreme Court decisions have been overridden in similar fashion. On the contrary, the Eleventh Amendment is one of only five amendments successfully added to the Constitution in direct response to a Supreme Court decision. (The others are the Fourteenth Amendment,⁷⁵ the Sixteenth Amendment,⁷⁶ the Nineteenth Amendment,⁷⁷ and the Twenty-Sixth Amendment.⁷⁸) Far more common are the failed proposals. To name just a few: the Child Labor Amendment⁷⁹, the School Prayer Amendment,⁸⁰ and the Flag Desecration

74 See, e.g., 1 JULIUS GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 728 (1974) (describing the reaction to *Chisholm*).

75 Section 1 of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It superseded *Dred Scott*, which held that African Americans were not citizens of the United States and enjoyed none of the privileges and immunities of citizenship. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–06 (1857).

76 The Sixteenth Amendment provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." It was passed in response to *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), which held that a federal income tax enacted in 1894 violated the Constitution because it was a direct tax not apportioned as required by Article I, Section 9 of the Constitution. See *id.* at 555.

77 The Nineteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." It was passed in response to *Minor v. Happersett*, 88 U.S. 162 (1875), which held that suffrage was not a necessary attribute of citizenship and that a state constitution could thus restrict voting to male citizens. See *id.* at 170–78.

78 The Twenty-Sixth Amendment provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." It was passed in response to *Oregon v. Mitchell*, 400 U.S. 112 (1970), which held that the federal government did not have the authority to lower the voting age for state and local elections to eighteen. See *id.* at 118 (opinion of Black, J.).

79 See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1475–76 (2001). The Child Labor Amendment would have permitted Congress to regulate or forbid the use of child labor. See *id.* It was proposed in response to *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and the *Child Labor Tax Case*, 259 U.S. 20 (1922), which had struck down previous attempts by Congress to prohibit interstate shipment in goods made by child labor and to regulate such goods via taxation. See *id.* at 39, 44; *Hammer*, 247 U.S. at 275–77.

Amendment.⁸¹ It is unlikely that the large number of failures reflects anything about responses to the Supreme Court in particular. The Constitution is difficult to amend, period.⁸²

Legislation seeking to override or at least circumvent an unpopular constitutional decision is easier to pass than a constitutional amendment and has accordingly been passed more frequently. The Court does not look kindly on such attempts. The Partial-Birth Abortion Ban Act of 2003,⁸³ passed to undermine *Stenberg v. Carhart's*⁸⁴ protection of partial-birth abortion, is a rare example of congressional success in this regard. Despite what some perceived as considerable tension with the Court's earlier opinion, the Court upheld that legislation.⁸⁵ The more common response to congressional incursions into

80 See, e.g., Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 826–27 (1983). The School Prayer Amendment would have rendered illegal any prohibition on voluntary individual or group prayer in public schools or institutions. See *id.* It was proposed in response to *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), which had invalidated state policies requiring daily prayers and Bible readings in public schools. See *id.* at 205; *Engel*, 370 U.S. at 422–24.

81 See, e.g., George Anastaplo, *Constitutionalism and the Good: Explorations*, 70 TENN. L. REV. 737, 834–35 (2003). The Flag Desecration Amendment would have permitted Congress and the States to forbid the flag's physical desecration. See *id.* It was proposed in response to *Texas v. Johnson*, 491 U.S. 397 (1989), which held that flag burning was protected by the First Amendment. See *id.* at 399.

82 As of 2001, there had been 11,262 proposals to amend the Constitution. 3 PROPOSED AMENDMENTS TO THE U.S. CONSTITUTION 1787–2001, at 1600, 1663 (John R. Vile ed., 2003). This number represents a combination of the Congressional Research Service's count of proposals to amend the Constitution from 1789–1990 and James Vile's count of proposed amendments from 1991–2001. The Constitution contains only twenty-seven amendments—or, by some counts, twenty-six. See generally Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101 (1994) (describing the controversy over the Twenty-Seventh Amendment's validity).

83 Pub. L. No. 108-105, 117 Stat. 1201, 1201–08 (codified at 18 U.S.C. § 1531 (Supp. IV 2004)).

84 530 U.S. 914, 945–46 (2000) (holding unconstitutional a Nebraska statute forbidding partial-birth abortion); see also *Gonzales v. Carhart*, 127 S. Ct. 1610, 1643 n.4 (2007) (Ginsburg, J., dissenting) (“The [Partial-Birth Abortion Ban Act of 2003’s] sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*.”).

85 See *Gonzales*, 127 S. Ct. at 1639 (majority opinion). The Act did not directly override *Stenberg* insofar as it accounted for some of the concerns that the Supreme Court expressed in that opinion. See *id.* at 1630–31 (describing the differences between the Nebraska and the federal statutes). It did, however, severely restrict the reach of the decision insofar as it honored only the narrowest reading of it. Cf. *id.* at 1652–53 (Ginsburg, J., dissenting) (complaining that the majority decision is unfaithful to precedent and essentially permits a “legislative override of our Constitution-based rulings”).

the Court's constitutional case law is rejection. For example, the Court held unconstitutional the Religious Freedom Restoration Act of 1993 (RFRA),⁸⁶ designed to replace outright the Supreme Court's interpretation of the Free Exercise Clause with Congress' own.⁸⁷ It held unconstitutional 18 U.S.C. § 3501, the statute designed to supersede the Court's interpretation of the Fifth Amendment in *Miranda v. Arizona*.⁸⁸ And the Flag Protection Act of 1989,⁸⁹ passed to counteract the Court's decision in *Texas v. Johnson*,⁹⁰ died the very next year with the Court's review of it in *United States v. Eichman*.⁹¹ As this pattern suggests, the Court has made perfectly clear its view that it is the ultimate interpreter of the Constitution, but that has not stopped Congress from continuing to test the limits of that claim.

IV. JUDICIAL OVERRULING

It is typically more fruitful for nonjudicial actors to seek overruling in the Court itself than overruling by constitutional or congressional means.⁹² Stare decisis is not a hard and fast rule, and the Court has shown itself willing on any number of occasions to reverse course entirely in its interpretation of the Constitution. The trick for nonjudicial actors is offering the Court an opportunity to do so. Sometimes, nonjudicial actors can create a test case by putting at issue the con-

86 Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)), *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

87 In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause did not bar the application of neutral, generally applicable laws to religious practices. *See id.* at 885. RFRA, which attempted to restore the pre-*Smith* understanding that state actors cannot burden the free exercise of religion in the absence of a compelling interest, was a "direct response" to this decision. *See Boerne*, 521 U.S. at 512. The Court held RFRA unconstitutional on the ground that Section 5 of the Fourteenth Amendment does not grant Congress the power to define what the Constitution requires, as opposed to the power to remedy violations of it. *See id.* at 519.

88 384 U.S. 436 (1966); *see Dickerson v. United States*, 530 U.S. 428, 444 (2000) (holding that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively").

89 Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (2000)).

90 491 U.S. 397, 420 (1989) (holding unconstitutional, on First Amendment grounds, a Texas statute that prohibited desecrating a flag).

91 496 U.S. 310, 319 (1990) (holding that the Flag Protection Act violated the First Amendment).

92 *See* Michael Klarman, *What's So Great About Constitutionalism?*, 93 Nw. U. L. Rev. 145, 181 (1998) ("Occasionally [judicial interpretations of the Constitution] are overruled by formal Article V methods. More frequently, they are overruled by the course of events or by subsequent judicial decisions.").

duct of others. For example, a private citizen might challenge a state's regime of segregated education, even though the system would be constitutional according to the Court's then-existing jurisprudence.⁹³ Other times, nonjudicial actors can create test cases only by themselves acting in a way that contradicts the Court's then-existing jurisprudence. This might be what South Dakota was doing with its abortion ban: provoking a challenge to its conduct that would give the Supreme Court an opportunity to retroactively justify it. This means of testing precedent presents a sticky problem for the government actor.

Take South Dakota. Assume that the state was perfectly willing to accept the basic proposition that the Supreme Court's interpretations of the Constitution are the law of the land. In other words, assume that South Dakota did not subscribe to Governor Faubus' position that it could treat its own constitutional interpretation as sound even in the face of contrary Supreme Court precedent. It just believed that the Supreme Court would have overruled *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁹⁴ if given the chance. But giving the Supreme Court that chance put South Dakota in a bind. South Dakota could not elicit an advisory opinion from the Supreme Court on the viability of *Roe*. Justiciability requirements mean that the Court can only act when presented with a live case.⁹⁵ Creating a live case, however, required South Dakota to act in a way that contradicted *Roe* and *Casey*. If the Supreme Court is right to characterize its opinions as the functional equivalent of the Constitution itself—supreme law that both state and federal actors are bound by oath to uphold—then South Dakota could only create a test case by deliberately acting unconstitutionally.⁹⁶

The above dilemma underscores that even those who support the Court's interpretive supremacy must confront the question of what it means to say that Supreme Court opinions "bind." Requiring unwavering obedience would leave many opinions susceptible to change only by constitutional amendment—an approach at odds with the

93 See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

94 505 U.S. 833 (1992).

95 See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

96 U.S. CONST. art. VI, cl. 3 (providing that "the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution"); cf. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (interpreting the Article VI oath as requiring state and federal officers to uphold the Court's interpretations of the Constitution).

Court's generally flexible approach to constitutional stare decisis.⁹⁷ At the same time, widespread disobedience would undermine the ostensibly binding effect of these opinions entirely. Should we seek middle ground? If so, where is it?

V. COURT PACKING, JURISDICTION STRIPPING, AND OTHER INDIRECT ATTACKS

With some frequency, nonjudicial actors have registered disagreement with Supreme Court opinions indirectly, by launching an institutional attack on the Court. Jurisdiction-stripping legislation is a common instance of this kind of attack. When the Supreme Court hands down a controversial decision, opponents of it often respond with a proposal to modify the Court's jurisdiction so as to remove future similar cases from the Court's docket (and, for that matter, all federal dockets), typically leaving their resolution to the state courts.⁹⁸ Jurisdiction-stripping measures have been introduced on any number of topics, including school prayer, abortion, busing, and affirmative action.⁹⁹ Most of the time, these proposals die in Congress.¹⁰⁰ Very

97 *Cf. Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (asserting that while statutory cases are rarely overruled, stare decisis ought to be more flexible in cases “involving the Federal Constitution, where correction through legislative action is practically impossible”), *overruled in part by Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938), *and Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938). Note that the qualified immunity standard already goes a long way toward insulating many opinions from change, despite the Court's flexible approach to constitutional stare decisis. That standard deprives government officials of immunity when they violate “clearly established” law. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001) (asserting that an officer loses qualified immunity if the law puts him on notice that his conduct is “clearly unlawful”). Thus, those who execute the law cannot test the strength of any “clearly established” law without risking personal liability.

98 Jurisdiction-stripping proposals have not always left the state courts as the default adjudicators. Sometimes, states or members of Congress have proposed creating an alternative tribunal to handle a subject-specific slice of the Court's workload. For example, in 1819, in response to *McCulloch*, Virginia instructed its senators to propose a constitutional amendment creating a special tribunal for cases addressing questions of federalism. *See* GOLDSTEIN, *supra* note 5, app. a, at 163. In 1871, Kentucky proposed in the Senate a constitutional amendment that would have created a separate tribunal comprised of one member from each state to decide all constitutional questions. *See* Warren, *supra* note 8, at 188.

99 For a description of jurisdiction proposals introduced in Congress over time, see RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 321–22 (5th ed. 2003).

100 *See* Jesse H. Choper & John C. Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 CAL. L. REV. 1243, 1244 (2007) (noting that before the Detainee Treatment Act of 2005, Congress had only passed two stat-

occasionally, they do become law—as did the Detainee Treatment Act of 2005,¹⁰¹ which, in response to the Court's decision in *Rasul v. Bush*,¹⁰² forbids any federal court to hear a petition for a writ of habeas corpus filed by an enemy combatant held at Guantanamo Bay.¹⁰³

Court opponents do not always set their sights on the Court's docket. Sometimes they try to move the Court away from objectionable precedent through personnel changes. Franklin Delano Roosevelt's court-packing plan is a case in point. Roosevelt, frustrated by Supreme Court opinions holding unconstitutional various New Deal initiatives, proposed retirement ages for the Justices, along with an increase in the number of Justices by the number of those who would not retire once they reached the specified age.¹⁰⁴ The hope, obviously, was that Roosevelt appointees would review sympathetically legislation he favored. Modern confirmation struggles spring from the same well insofar as partisans on all sides desire to control Supreme Court precedent by controlling its personnel.¹⁰⁵

The states lack direct control of the Court's jurisdiction and composition. But they can exert their influence over those who do. In response to the 1823 case *Green v. Biddle*,¹⁰⁶ which held unconstitu-

utes, one during the Reconstruction period and the other during the New Deal, clearly removing cases from the jurisdiction of the federal courts).

101 Pub. L. No. 109-48, div. A, tit. X, 119 Stat. 2739 (codified at 10 U.S.C.A. § 801 note, 28 U.S.C.A. § 2241, and 42 U.S.C.A. §§ 2000dd to 2000dd-1 (West Supp. 2007)).

102 542 U.S. 466, 483 (2004) (holding that the federal habeas statute gave the district court jurisdiction to hear habeas petitions filed by aliens held at Guantanamo Bay).

103 Detainee Treatment Act of 2005 § 1005(e)(1), 119 Stat. at 2742 (codified at 28 U.S.C.A. § 2241).

104 WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN* 133–34 (1995) (describing the court-packing plan); cf. GOLDSTEIN, *supra* note 5, app. a, at 165 (describing a proposal to make federal judges removeable upon the request of both houses of Congress and presidential consent); Warren, *supra* note 8, at 165 (describing an 1832 proposal to amend the Constitution to limit the term of office of federal judges). Barry Friedman points out that one of the more dramatic efforts to control judicial personnel was the impeachment of Federalist judges by the Republican Congress. See Barry Friedman, "Things Forgotten" in the Debate over Judicial Independence, 14 GA. ST. U. L. REV. 737, 740–41 (1998) (describing the impeachments of Justice Samuel Chase and Judge John Pickering).

105 Cf. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 381 (2007) ("It is well documented that the Reagan Justice Department self-consciously and successfully used judicial appointments to alter existing practices of constitutional interpretation.").

106 21 U.S. (8 Wheat.) 1 (1823).

tional Kentucky's "occupying claimant" laws,¹⁰⁷ Kentucky tried to engineer all manner of indirect attack on the Court: court packing, jurisdiction stripping, and some heavy-handed procedural regulation for good measure.¹⁰⁸ After the case was handed down, the Kentucky legislature sent Congress a formal remonstrance of the Supreme Court's decision.¹⁰⁹ The document contained a lengthy defense of Kentucky's views on the legal questions at stake as well as a claim that the primary responsibility for determining the constitutionality of any piece of legislation lay with the state itself.¹¹⁰ In making this claim, Kentucky did not altogether deny that the Supreme Court possessed the power of judicial review. Instead, it argued that the Court's right to hold any state law unconstitutional was restricted to those instances in which a state *egregiously* misjudged the constitutional limits upon its power.¹¹¹ To keep the Court so contained, Kentucky asked Congress to pass a law requiring that state laws be held invalid only upon the

107 *Id.* at 17. The "occupying claimant" laws were designed to protect the property rights of those occupying land as against those with competing claims to title. For a description of the conflict between Kentucky's "occupying claimants" and others with claims on land within Kentucky, see Paul W. Gates, *Tenants of the Log Cabin*, 49 *MISS. VALLEY HIST. REV.* 3, 4–10 (1962).

108 *Biddle* was a decision that, according to one Kentucky lawmaker of the time, "convulsed [Kentucky] to its very centre." 41 *ANNALS OF CONG.* 28 (1823) (statement of Sen. Johnson); see also 1823 Ky. Acts 516 (resolving that the Kentucky legislature "do hereby most solemnly protest, in the name and on behalf of the good people of Kentucky, against the erroneous, injurious and degrading doctrines of the Supreme Court of the United States, pronounced at the last session of that Court, in the case of Green and Biddle").

109 A Remonstrance to the Congress of the United States on the Subject of the Decision of the Supreme Court of the United States on the Occupying Claimant Laws of Kentucky, 1824 Ky. Acts 520; see also 42 *ANNALS OF CONG.* 2514 (1824) (statement of Rep. Letcher) (communicating the remonstrance to the House); 41 *ANNALS OF CONG.* 290 (1824) (statement of Sen. Talbot) (communicating the remonstrance to the Senate).

110 1824 Ky. Acts 526 ("It is the high prerogative of the Legislature, to correct whatever errors it may commit, within the legitimate sphere of its action. It is only when it transcends obviously and palpably, the limits assigned by the constitution, to the exercise of its powers, that the judiciary can vacate its enactments."); see also 42 *ANNALS OF CONG.* 2531–32 (1824) (statement of Rep. Wickliffe) (defending occupying claimant laws on the ground that both the Kentucky legislature and the Kentucky Supreme Court believed the laws constitutional).

111 1824 Ky. Acts 526. In this respect, Kentucky's claims resemble those advanced by Pennsylvania in *Peters*. See *supra* notes 29–31 and accompanying text. Both states asserted the right to act on their own interpretation of the Constitution, but neither portrayed that right as unqualified.

concurrence of at least two-thirds of the Court,¹¹² and that in such cases, the Justices be required to produce signed, seriatim opinions.¹¹³ In addition, in a move that foreshadowed Roosevelt's court-packing plan, Kentucky asked Congress "to increase[] the number of the judges, and thereby multiply[] the chances of the states, to escape the like calamities . . . by . . . an increased volume of intellect upon all such questions."¹¹⁴ Kentucky's claim that more Justices were needed to increase the Court's intellectual depth was no more sincere than Roosevelt's claim that more Justices were needed to disperse the Court's workload. The Justices that Kentucky proposed adding were all to come from states with interests similar to Kentucky's.¹¹⁵ Although the Kentucky proposals ultimately failed,¹¹⁶ they were debated in both the House and Senate with considerable passion for several years.¹¹⁷

112 1824 Ky. Acts 527. Once such legislation was proposed in the Senate, it extended the supermajority requirement to the invalidation of federal legislation as well. See 41 ANNALS OF CONG. 28 (1823) (statement of Sen. Johnson) (describing a proposal that, inter alia, required "a concurrence of at least seven judges in any opinion, which may involve the validity of the laws of the United States, or of the States respectively"). Kentucky's proposal in this regard was not the only one of its kind. See, e.g., Warren, *supra* note 8, at 188 (describing a bill introduced in the House in January of 1867 that would have required constitutional questions to be heard by a full bench and decided only upon unanimous consent); *id.* (describing an 1868 bill that passed the House that would have required a two-thirds majority to hold invalid any state law).

113 This portion of Kentucky's proposal was added when it was introduced to the Senate. See 41 ANNALS OF CONG. 32 (1823) (amending the resolution to require that in such cases, "the opinions of the judges should be given separately, and recorded").

114 1824 Ky. Acts 527.

115 Kentucky proposed adding three new judicial circuits, each with a new Justice to match. One circuit was to be composed of Tennessee and Alabama; another of Mississippi and Louisiana; and one of Indiana, Illinois, and Missouri. 41 ANNALS OF CONG. 38 (1823) (describing proposal); see also *id.* at 575-76 (statements of Sens. Johnson and Talbot) (emphasizing the need for the circuit system to represent the interests of western states).

116 For a description of the fate of the various bills that grew from this proposal, see GOLDSTEIN, *supra* note 5, at 187 n.5.

117 The Kentucky legislature's remonstrance was communicated to Congress in 1824. See *supra* note 109. In 1827, Kentucky lawmakers were still pushing to curb the Court's power. See, e.g., 3 REG. DEB. 775-76 (1827) (statement of Rep. Wickliffe) (urging the House to consider, once again, Kentucky's proposal related to the Supreme Court). Kentucky's anger at the Court was further fueled over this time period by the Court's decisions in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), and *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51 (1825), cases undermining Kentucky laws that postponed the execution of judgments against debtors.

One question this Symposium addresses is the degree to which the Supreme Court ought to take the views of nonjudicial actors into account.¹¹⁸ In that regard, it is worth considering the effect that both Roosevelt's court-packing plan and Kentucky's post-*Biddle* proposals may have had on the Court. Causation is difficult to establish, but coincidence is easy to observe. Roosevelt's proposed court-packing plan was followed by the proverbial "switch in time that saved nine."¹¹⁹ Similarly, while Kentucky's proposed supermajority requirement was never adopted by Congress, a version of it was ultimately adopted by the Court itself.¹²⁰ Assume arguendo that the Court permitted political pressure to shape its behavior in both of these instances. Should it have done so?

VI. THE COURT OF PUBLIC OPINION

Nonjudicial actors have also registered disagreement with the Court by taking it to task in the court of public opinion. Memorably, when the Supreme Court decided *Bush v. Gore*,¹²¹ 554 law professors took out a full page ad in the *New York Times* condemning the decision.¹²² More commonly, critiques of Court decisions appear on editorial pages and in news magazines.¹²³ They also occur inside the

118 See Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1171, 1219–24 (2008); Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1319–31 (2008).

119 Compare LEUCHTENBURG, *supra* note 104, at 142–44 (depicting a causal connection between the court-packing plan and the Supreme Court's jurisprudential turn), with G. Edward White, *Cabining the Constitutional History of the New Deal in Time*, 94 MICH. L. REV. 1392, 1399–416 (1996) (book review) (questioning Leuchtenburg's thesis).

120 See *City of N.Y. v. Miln*, 33 U.S. (8 Pet.) 120, 122 (1834) ("The practice of this Court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in the opinion, thus making the decision that of a majority of the whole court."); see also Warren, *supra* note 8, at 165 ("It is evident that the Supreme Court itself took warning by the character of some of the measures introduced to change its methods.").

121 531 U.S. 98 (2000).

122 Advertisement, *554 Law Professors Say*, N.Y. TIMES, Jan. 13, 2001, at A7. The advertisement was placed by the People for the American Way.

123 See, e.g., Editorial, *The Court's Troubling Term*, N.Y. TIMES, July 3, 2002, at A22 (criticizing, inter alia, *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002), which upheld a school voucher program against an Establishment Clause challenge); John Leo, *The Supreme's Sophistry*, U.S. NEWS & WORLD REP., July 14, 2003, at 7 (criticizing, inter alia, *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003), which held unconstitutional a Texas law criminalizing same-sex sodomy); Editorial, *A Supreme Court Retreat*, WASH. POST, Mar. 29, 1991, at A20 (criticizing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), which held that the harmless error rule applies to the admission of a

profession, in the law reviews, casebooks, and classrooms that influence the opinions of both lawyers-to-be and the professors who teach them.

Perhaps one of the most interesting forms of public argument about the Court is one that has emerged relatively recently in the Court's history: demonstrating before it. Public protests in front of the Court, at least those of any scale, did not begin in earnest until the 1960s and 70s.¹²⁴ Since then, if newspaper coverage is any gauge, demonstrations before the Court have quickly moved from the exception to the rule, at least in high-profile cases.¹²⁵ For example, in 1987, hundreds of gay men and women attempted to enter the Supreme Court building in protest of the Court's decision in *Bowers v. Hardwick*,¹²⁶ which upheld the enforcement of a Georgia sodomy law against homosexuals.¹²⁷ In 2002, death penalty opponents protested the Court's refusal to hold capital punishment unconstitutional with

coerced confession); Editorial, *An Outrage*, NAT'L REV. ONLINE, June 30, 2006, <http://author.nationalreview.com/?q=MjE1MQ==&p=MjAwNg==> (follow "An Outrage" hyperlink under "June 2006") (criticizing *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2793 (2006), which, inter alia, held the Geneva Conventions applicable to the trial of an alien detained at Guantanamo Bay on terrorism-related charges).

124 An early, and perhaps even the earliest, protest at the Court in response to a Supreme Court opinion occurred on May 29, 1968, when angry demonstrators from the Poor People's Campaign, representing the interests of Indians, stormed the Supreme Court in response to a ruling upholding the State of Washington's right to specify when fishing could take place in the state. See Earl Caldwell, *High Court Building Stormed in Demonstration by the Poor*, N.Y. TIMES, May 30, 1968, at 1. The first "March for Life," the still-continuing annual protest against *Roe v. Wade*, was held on January 22, 1974, the first anniversary of the decision. See Louis J. Palmer, Jr., *March for Life*, in ENCYCLOPEDIA OF ABORTION IN THE UNITED STATES 208, 208 (2002).

125 The popularity of such protests is the fulfillment of the prophecy uttered by Judge MacKinnon of the D.C. Circuit when the law forbidding them was held partially unconstitutional: "What would start as two lonely peaceful pickets today would eventually lead to the hordes of tomorrow, bannered and distributing leaflets . . . on abortion, school busing, prayers in public schools, civil rights . . . and a host of other issues." *Grace v. Burger*, 665 F.2d 1193, 1213 (D.C. Cir. 1981) (MacKinnon, J., dissenting), *aff'd in part, vacated in part sub nom.* *United States v. Grace*, 461 U.S. 171 (1986).

126 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); see Lena Williams, *600 in Gay Demonstration Arrested at Supreme Court*, N.Y. TIMES, Oct. 14, 1987, at B8 ("Hundreds of gay men and women deliberately subjected themselves to arrest today by attempting to enter the Supreme Court to protest a 1986 decision upholding enforcement of a Georgia sodomy law against homosexuals.").

127 *Bowers*, 478 U.S. at 189.

thirty-foot long banners reading “Stop Executions!”¹²⁸ The annual “March for Life” protesting *Roe v. Wade* has drawn as many as 36,000 abortion foes, and the last three Republican Presidents have participated in the march either by person or by phone.¹²⁹

The Court holds all of these demonstrations at arm’s length. Protesters are permitted to demonstrate on the sidewalk surrounding the Court, but they face arrest if they cross onto the courthouse steps.¹³⁰ The awkward reception the Court gives demonstrators is emblematic of the Court’s relationship with all of its critics. On the one hand, the Court, as an impartial dispenser of justice, is supposed to be governed by legal argument rather than political pressure. As Justice Scalia has argued, “To expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do.”¹³¹ On the other hand, as the late Chief Justice Rehnquist put it, “[I]f these tides of public opinion are sufficiently great and sufficiently sustained, they will very likely have an effect upon the decision of some of the cases decided within the courthouse.”¹³² The Court itself is caught between

128 Arthur Santana, *7 Cleared in Protest at Supreme Court*, WASH. POST, June 29, 2002, at B1 (describing the protest and the subsequent arrest and acquittal of protestors who climbed the steps of the Court building).

129 See Robin Toner, *A Ringing Endorsement from 700 Miles Away*, N.Y. TIMES, Jan. 22, 2003, at A18 (describing the phone calls made by both Presidents Bush to marchers); see also Robin Toner, *Reagan Exhorts Foes of Abortion at Capital Rally*, N.Y. TIMES, Jan. 23, 1986, at D25 (describing President Reagan’s live address to the roughly 36,000 participants in the 1986 March for Life). This Part, like this Symposium, focuses on the effect of Supreme Court decisions already made. It is worth observing, however, that protestors also convene in front of the Court in an attempt to influence Supreme Court decisions in the making. See, e.g., Elaine Sciolino, *On the Street, More Arguments Were Heard*, N.Y. TIMES, Dec. 12, 2000, at A1 (describing the demonstrations outside the Court while the Court was hearing argument in *Bush v. Gore*, 531 U.S. 98 (2000)).

130 Federal law makes it “unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.” 40 U.S.C. § 6135 (Supp. IV 2004). In *Grace*, the Supreme Court held that statute unconstitutional as applied to demonstrations on Supreme Court sidewalks. See *Grace*, 461 U.S. at 180–84. The Court continues, however, to apply it to demonstrators who cross over onto the courthouse steps. See *id.*

131 *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 920 (2004) (mem. of Scalia, J.); see also *Grace*, 461 U.S. at 183 (“Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing or pressure groups.”).

132 William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986); cf. Cass R. Sunstein, *If People Would Be Outraged by Their Rulings*,

these two positions. Belief that the latter one is right is what animates all those who signal their preferences to the Court, whether through live demonstrations or otherwise.

CONCLUSION

These stories depict just a few examples of the occasions on which both private citizens and public officials have protested decisions of the Supreme Court. Their choice to act on their disagreement with the Court and the means they choose to express it raise a host of questions. What are the limits of the Supreme Court's power to bind nonjudicial actors? Should its judgments be obeyed without question? Its opinions? Should we frown upon attempts to create test cases through a sort of "civil disobedience" to Supreme Court opinions? Is it laudable or despicable to launch institutional attacks on the Court in an attempt to engineer substantive results? Do demonstrations in front of the Court represent a fundamental misconception of the Court's role in our polity?

These stories do not make clear the answer to any of these questions, but they do make clear that disagreement with the Court is as old as the institution itself. Both the longevity of the disagreement and the occasional vehemence with which it is expressed may be a sign of vitality rather than dry rot. As Robert Post and Reva Siegel have observed, "So long as groups continue to argue about the meaning of our common Constitution, so long do they remain committed to a common constitutional enterprise."¹³³

Should Judges Care?, 60 STAN. L. REV. 155, 212 (2007) (arguing that there are circumstances in which "judges legitimately consider public outrage because and to the extent that consequences matter, and because and to the extent that outrage provides information about the proper interpretation of the Constitution").

133 Post & Siegel, *supra* note 105, at 427.