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THE ROBERTS COURT, STATE COURTS, AND STATE CONSTITUTIONS: JUDICIAL ROLE SHOPPING

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In this Article we reveal a dual dilemma, both material and institutional, that the Supreme Court in its current composition faces when reviewing liberal state court decisions based on the state constitution. The Article further describes substantive and procedural tactics that the Court adopts to address this dilemma, and illustrates the arguments by analyzing a number of recent Supreme Court decisions. The two dilemmas, the combination of which serve as a "power multiplier," of sorts, have arisen following the last three appointments to the Supreme Court, which resulted in a solid majority of conservative Justices nominated by Republican presidents. One dilemma, material in nature, that the Roberts Court faces, is between the federalist component of the conservative legal worldview, that requires federal courts to defer to state courts' rulings based on state constitutions, and its non-liberal component, based on conservative values. The second dilemma, institutional in nature, stems from the Roberts Court's legitimacy deficit among substantial sections of the American public, mainly supporters of the Democratic Party, which has increased as a result of the three recent appointments. The legitimacy deficit may make it difficult for conservative Justices to fully implement their judicial philosophy. We further argue that the emerging ambivalence of the Roberts Court, which is a consequence of the combination of these two dilemmas, is manifested, in addition to general avoidance doctrines and the

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specific state ground doctrine, also in two types of judicial tactics, substantive (such as seeking judicial compromise in order to reach a broad common denominator among the Justices) and procedural (such as encouraging other branches to carry out their obligations until the dispute is reasonably resolved), that the Court adopts in coping with liberal state court decisions based on the state constitution. In the last Part of the Article we illustrate our contentions by analyzing three recent Supreme Court decisions: Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission (2018), Espinoza v. Montana Department of Revenue (2020) following Trinity Lutheran Church of Columbia, Inc. v. Comer (2017), and Republican Party of Pennsylvania v. Boockvar (2020).

INTRODUCTION

It is common wisdom to assume that the United States Supreme Court became a strictly conservative court during President Donald Trump's tenure.[1] This Article seeks to challenge that assumption, insofar as it relates to Supreme Court cases concerning liberal decisions of state courts based on a state constitution. The Article reveals the emerging dual ambivalence, both material and institutional, of the Supreme Court in its current composition towards such state court decisions, describes substantive and procedural tactics that the Court adopts to address this ambivalence,

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[1] *See, e.g.*, David Orentlicher, *Supreme Court Reform: Desirable – And Constitutionally Required*, 92 S. CAL. L. REV. 29, 30 (2018) (asserting that "With Justice Brett Kavanaugh's appointment to the Supreme Court, it seems pretty clear that President Donald Trump and Senate Republicans have been able to solidify a staunchly conservative majority on the Court. In all likelihood, this new majority will stake out firmly conservative positions on a range of critical issues, including voting rights, reproductive rights, and corporate rights. With a second Trump nominee on the bench, the Supreme Court will bring a strong ideological bias to its decision making."); Amelia Thomson-DeVeaux, et al., *What the Supreme Court's Unusually Big Jump to the Right Might Look Like*, FIVETHIRTYEIGHT (Sept. 22, 2020) https://fivethirtyeight.com/features/what-the-supreme-courts-unusually-big-jump-to-the-right-might-look-like/ (noting that "[w]ith the death of Supreme Court Justice Ruth Bader Ginsburg, President Trump will have his third opportunity to nominate a justice to the country's highest court. This nomination, however, has the highest stakes yet for Trump, the Republican Party, and the conservative legal movement. If successful, it may cement a 6-3 conservative majority on the court that could fundamentally push law in the United States to the right."); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019) (arguing that the result of the nominations by President Trump is a Supreme Court whose justices—on both sides—are likely to vote along party lines more consistently than ever before in American history); NEAL DEVINS & LAURENCE BAUM, THE COMPANY THEY KEEP 4 (2019) (arguing that "the Court never had clear ideological blocs that coincided with party lines" before now).

and illustrates the arguments by analyzing a number of recent Supreme Court decisions.

The balance in the composition of the Supreme Court as well as the Court's legitimacy among substantial sections of the American public, mainly supporters of the Democratic Party, has been challenged with the three recent appointments by President Trump. All three nominations were approved by a narrow majority[2] and on questionable political grounds.[3] Justice Neil Gorsuch—nominated as the replacement for Justice Antonin Scalia, who passed away nearly a year earlier, after the Senate Majority Leader Mitch McConnell refused to allow an election-year vote on Democrat President Barack Obama's nominee, Judge Merrick Garland[4]—was approved by using the "nuclear option" to overcome Congressional gridlock.[5] Justice Brett Kavanaugh replaced Justice Anthony

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[2] *See* Orentlicher, *supra* note 1, at 29 (pointing out that "[w]hile the U.S. Senate approved the appointment of Justice Anthony Kennedy by a 97-0 vote, his successor, Justice Brett Kavanaugh, squeaked by on a vote of 50-48. Similarly, the Senate approved Justice Antonin Scalia by a vote of 98-0, while the vote on his successor, Justice Neil Gorsuch, was 54-45. Likewise, the Senate confirmed Justice Ruth Ginsburg by a vote of 96-3, while her successor, Amy Coney Barrett was confirmed to the Supreme Court by a vote of 52-48. *Supreme Court Nominations (1789-Present)*, U.S. SENATE, https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm) (last visited Dec. 1, 2021).

[3] For details of serious allegations concerning nominations and confirmation proceedings in the Senate of Justices Gorsuch and Kavanaugh, *see* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2242 (2019).

[4] *See, e.g.*, Barack Obama, *My Statement on the Passing of Justice Ruth Bader Ginsburg*, BARACK OBAMA (Sept. 19, 2020), https://obama.medium.com/my-statement-on-the-passing-of-justice-ruth-bader-ginsburg-5a925b627457;
Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs Over the Next Supreme Court Fight*, N.Y. TIMES (Sept. 19, 2020), https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html;
Nicholas Goldberg, *Amy Coney Barret's Confirmation was Shockingly Hypocritical*, L.A. TIMES (Oct. 26, 2020), https://www.latimes.com/opinion/story/2020-10-26/confirmation-amy-coney-barrett-silver-lining.

[5] *See, e.g.*, Ashley Killough & Ted Barrett, *Senate GOP Triggers Nuclear Option to Break Democratic Filibuster on Gorsuch*, CNN, https://edition.cnn.com/2017/04/06/politics/senate-nuclear-option-neil-gorsuch/index.html (last updated Apr. 7, 2017); Matt Flegenheimer, *Senate Republicans Deploy "Nuclear Option" to Clear Path for Gorsuch*, N.Y. TIMES

Kennedy, who despite being nominated by Republican President Ronald Reagan could not be clearly labeled as conservative or liberal.[6] Kavanaugh was confirmed after it was claimed he was involved in several cases of sexual misconduct in his youth.[7] The nomination of Justice Amy Coney Barrett to replace late Justice Ruth Bader Ginsburg, nominated by Democratic President Bill Clinton, created a solid conservative majority in the Supreme Court.[8] Justice Barrett's appointment was confirmed only a week before the 2020 presidential election. The appointment was brought to the Senate for confirmation at this time regardless of the precedent of avoiding confirmation procedures set with President Obama's

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(Apr. 6, 2017), https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html.

[6] *See, e.g.*, Neal Devins, *The Majoritarian Rehnquist Court?*, 67 L. & CONTEMP. PROBS. 63, 77 (2004) (noting that "Justices O'Connor's and Kennedy's refusal to both sign onto the social-conservative agenda and . . . to oppose the granting of certiorari on most 'social issues' cases"); RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 162 (2018) [hereinafter FALLON, LAW AND LEGITIMACY] (arguing that Kennedy swings from what liberals deride as conservative judicial activism in one case to what conservatives castigate as liberal judicial activism in another).

[7] *See, e.g.*, Christine Hauser, *The Women Who Have Accused Brett Kavanaugh,* N.Y. TIMES (Sep. 26, 2018), https://www.nytimes.com/2018/09/26/us/politics/brett-kavanaugh-accusers-women.html; Editorial Board, *The FBI Investigation of Brett Kavanaugh Turns Out to be More of a Sham Than it Seemed*, WASH. POST (Sept. 17, 2019), https://www.washingtonpost.com/opinions/the-fbi-investigation-into-brett-kavanaugh-turns-out-to-be-more-of-a-sham-than-it-seemed/2019/09/16/9fa9e6a6-d8c4-11e9-bfb1-849887369476_story.html. For the political fight involved in the appointment of Justice Kavanaugh *see, e.g.*, CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT, FROM SCALIA'S DEATH TO JUSTICE KAVANAUGH (2020); MOLLIE HEMINGWAY & CARRIE SEVERINO, JUSTICE ON TRIAL: THE KAVANAUGH CONFIRMATION AND THE FUTURE OF THE SUPREME COURT (2019).

[8] *See* Donald Alexander Downs, *Supreme Court Nominations at the Bar of Political Conflict: The Strange and Uncertain Career of the Liberal Consensus in Law*, 46 L. & SOC. INQUIRY 540, 542 (2021) ("[President] Trump's successful nomination of Judge Amy Coney Barrett just a month before the 2020 election by a strict party vote in the Senate raised the heat because Barrett replaced the late liberal icon Ruth Bader Ginsburg, thereby tilting the Court even further to the right at the same time that the polity remained divided").

nominee, Judge Garland, several months before the presidential election in 2016.[9]

In this Article, we contend that the Roberts Court, in its current composition, faces a combination of two dilemmas in cases involving liberal decisions of state courts based on a state constitution. One dilemma, material in nature, is between the federalist component of the conservative legal worldview,[10] and its non-liberal component. On the one hand, conservative attitudes favor deference of federal courts to decisions of state courts based on state laws. Federalism advocates limiting the power of the federal authorities in favor of the autonomy of the states[11] and requires federal courts to defer to state courts' rulings based on state constitutions.[12] On the other hand, conservative attitudes are also characterized by aspects associated with non-liberal ideologies,[13] which contain, inter alia, a belief in traditional American values, including values originating in Christianity,[14] enhanced national

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[9] *See, e.g.*, Obama, *supra* note 4; Liptak & Stolberg, *supra* note 4; Goldberg, *supra* note 4.

[10] Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 450–51 (2002) [hereinafter Fallon, *The "Conservative" Paths*] (seeing this aspect of conservatism as an expression of institutional conservatism). We categorize federalism as part of substantive conservatism because it is based on the interpretation of the Constitution, in contrast to the Judiciary's institutional policy considerations, such as the desire of the Supreme Court to gain public trust. In any case, the choice of appellations for different judicial policies is a matter of semantics, and has no real substantive importance.

[11] *See generally* Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874 (2006).

[12] *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (pointing out that "Our reasoning . . . does not . . . limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

[13] *See, e.g.*, Robert H. Smith, *Uncoupling the "Centrist Bloc" – An Empirical Analysis of the Thesis of a Dominant, Moderate Bloc on the United States Supreme Court*, 62 TENN. L. REV. 1, 11, n. 37 (1994) (pointing out that " . . . Chief Justice Rehnquist and other conservatives may support individuals in specific civil liberties cases for a variety of non-liberal reasons . . . .").

[14] *See, e.g.*, Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1027 (2005) (reviewing the New

security powers,[15] a concept of "law and order,"[16] free markets,[17] and individualism.[18] The interpretation of the Federal Constitution, supreme over state constitutions, by the United States Supreme Court, based on these conservative values, may yield different conclusions from those reached by liberal state courts. This is true not only in regard to "all matters pertaining economic liberties . . . [in which] state constitutions do in some fundamental ways at least differ from the United States Constitution."[19] This is also true in cases where there are no substantive differences between the wordings of the Federal Constitution and the state constitution.

The result is that when a state court issues a liberal ruling based on a state constitution, the conservative Justices who dominate the Roberts Court today find themselves in a dilemma between the

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Constitutional Order (2003)) ("As a Reagan conservative myself, with a slight libertarian streak and a commitment to Christianity, I must note that I disagree with libertarian lites on abortion, which I regard as a wrongful taking of innocent human life, as well as a number of other issues.").

[15] *See* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 9–10 (2006) ("Conservative judges are particularly unlikely to resist claims of national security – and the federal judiciary may be more conservative today than at any other time in the last half century.").

[16] *See* Madhavi M. McCall & Michael A. McCall, *Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323, 324 (2006) ("What is beyond most debates, however, is that Chief Justice Rehnquist was a staunch conservative who cast votes and marshaled majorities for decisions that reduced constitutional protections for the criminally accused . . . In terms of criminal justice issues, many undoubtedly will assess [Chief Justice] Rehnquist's tenure as a pendulum swing away from the more liberal rulings of the Warren Court. Such evaluations might characterize Rehnquist, and perhaps the Court more generally, as reflecting a broader political movement toward a "law and order" or social control posture.").

[17] *See* Mehmet K. Konar-Steenberg & Anne F. Peterson, *Forum, Federalism, and Free Markets: An Empirical Study of Judicial Behavior Under the Dormant Commerce Clause Doctrine*, 80 UMKC L. REV. 139, 140 (2011) (pointing out that "conservative free market ideology disfavors regulation . . . .").

[18] *See* M. Neil Browne et al., *Attacking Obesity: The Paternalistic Approach of France Versus the Conservative Approach of United States*, 39 WHITTIER L. REV. 1, 20 (2018) (The United States is a country founded on conservative ideals such as individualism, and capitalism.").

[19] Richard A. Epstein, *The Double-Edged Sword of State Constitutional Law*, 9 N.Y.U. J. L. & LIBERTY 723, 725 (2015).

federalist component of the conservative legal worldview and its non-liberal component.

A second major dilemma underlying the emerging ambivalence of the Roberts Court stems from the Court's deficit of legitimacy.[20] The last three appointments by President Trump to the Supreme Court have undermined the legitimacy of the Court among substantial sections of the American public, mainly supporters of the Democratic Party, which in any case have been perceived as

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[20] *See, e.g.*, Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 354–56 (2020) (discussing legitimacy in current Supreme Court decision-making); David Schraub, *Sadomasochistic Judging*, 35 CONST. COMMENT. 437, 440 (2020) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)); Marcia Coyle, *Will the U.S. Supreme Court Face a Crisis of Legitimacy?*, CONST. DAILY (Oct. 29, 2020), https://constitutioncenter.org/blog/will-the-u.s-supreme-court-face-a-crisis-of-legitimacy; Epps & Sitaraman, *supra* note 1, at 153 (" . . . the Supreme Court is facing an unprecedented legitimacy crisis in the wake of Justice Kennedy's retirement and Justice Kavanaugh's confirmation."). For an approach that refutes the claim that the current composition of the Supreme Court creates a significant problem of legitimacy, *see* Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J. F. 93, 95 (2019) ("[t]he last three years reflect not 'an unprecedented legitimacy crisis,' but a partisan realignment: something that might have occurred nearly thirty years ago, had circumstances been slightly different. That it *seems* like a crisis to many people is itself reflective of deep problems in our legal culture, which too often looks to judges for political guidance rather than for the decision of cases under law."); Lackland H. Bloom, Jr., *"Lawyers' Work": Does the Court Have a Legitimacy Crisis*?, 52 ST. MARY'S L.J. 285, 286–87 (2021); Ilya Somin, *Is the Supreme Court Going to Suffer a Crisis of Legitimacy?*, VOLOKH CONSPIRACY (Oct. 9, 2018, 3:02 PM), https://reason.com/volokh/2018/10/09/is-the-supreme-court-going-to-suffer-a-c/?nowprocket=1 ("Is the Court really about to suffer a legitimacy crisis? Predictions to that effect may well be overblown, as they often have been in the past. But the notion is worth taking seriously nonetheless. The deep anger of much of the left could lead to a stronger assault on the Court than has occurred in a long time."). For an alternative, less common view, which diminishes the significance of the crisis, *see* Benjamin Beaton, *The Ginsburg Court? A Contrarian View*, 121 COLUM. L. REV. 589, 598 (2021) ("But as politicos and press outside the courthouse decried the Court as a fundamentally broken institution, a strange thing happened inside the building: The Court's work continued, steadily and professionally. Alongside the outsider critiques, *How Appealing* featured other headlines—largely from insider perspectives focused on the day-to-day docket—which told quite a different story . . . .").

politicized because of the system of appointment.[21] The legitimacy problem intensifies when the United States Supreme Court, dominated by conservative Justices, intervenes in liberal decisions of state supreme courts based on the state constitution.

Against this background, we further argue that the emerging ambivalence of the Roberts Court, in its current composition, towards liberal constitutional decisions of state courts based on state constitutions is manifested in substantive and procedural judicial tactics; in addition to general avoidance doctrines (such as standing requirements, the last resort doctrine, and the measured steps doctrine), and the specific state ground doctrine. The substantive tactics are expressed in attempts to formulate a broad consensus among the Justices based on compromises and narrowly framed decisions grounded on specific characteristics. The procedural tactics include delaying the Court's decision as much is possible, and the use of the babysitting tactic which we described in a previous Article.[22]

Each of the two dilemmas may in itself lead the Supreme Court to adopt tactics of both types. However, the combination of the two dilemmas serves as a "power multiplier," of sorts, which may encourage the Court to adopt such tactics. Indeed, during the era of the Rehnquist Court it was observed that, "when federalism and material conservatism [came] into conflict, substantive conservatism frequently dominate[d]."[23] President Trump's appointment of three Justices to the Roberts Court has added an institutional dilemma to the material dilemma.

The Article proceeds as follows: In Part I we describe the shift in the role of state supreme courts, as it began to develop in the late

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[21] *See* David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1871 (2008) (For a variety of structural, external, and judicial reasons, however, the politics of federal judicial appointments have fundamentally changed in the last eighty years, especially since the 1980s. Today, for the Supreme Court and United States circuit courts of appeals, the appointments process is high-stakes, explosively partisan, and often nasty.").

[22] Ariel L. Bendor & Joshua Segev, *The Supreme Court as a Babysitter: Modeling* Zubik v. Burwell *and* Trump v. International Refugee Assistance Project Rights, 2018 MICH. ST. L. REV. 373, 401 (2018).

[23] Fallon, *The "Conservative" Paths*, *supra* note 10, at 434.

1960s, and discuss new judicial federalism, which is a parallel course for the protection of human rights based on state constitutions. In Part II we describe and discuss the legitimacy deficit of the Roberts Court in its current composition. In Part III we argue that the new judicial federalism combined with the legitimacy deficit creates both material and institutional dilemmas in cases involving liberal decisions of state courts based on a state constitution, in an era where most of the Supreme Court Justices are clearly conservative. In Part IV we point out two different types of tactics, substantive and procedural, that the Roberts Court adopts to address these dilemmas. Finally, in Part V we illustrate our suggestions through three recent Supreme Court decisions: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[24] *Espinoza v. Montana Department of Revenue*[25] following *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[26] and *Republican Party of Pennsylvania v. Boockvar*.[27]

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[24] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

[25] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

[26] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

[27] Republican Party of Pa. v. Boockvar, 141 S. Ct. 1 (2020).

I. FEDERALISM AND THE ROLES OF THE FEDERAL AND STATE SUPREME COURTS

A. The Shift in the Roles of the Federal and State Supreme Courts

Throughout American history, both the United States Supreme Court[28] and state supreme courts[29] have gone through dramatic changes. A considerable part of these changes is the result of the United States' geographic expansion, its continued growth of population, and its commercial, industrial, urban and technological development.[30] Some of the changes are the consequence of transformations in the nature of the federal state and the forms of the

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[28] *See, e.g.*, Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States – A Study in the Federal Judicial System I*, 38 HARV. L. REV. 1005 (1925); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States – A Study in the Federal Judicial System*, 40 HARV. L. REV. 431 (1927); Carl Brent Swisher, *The Supreme Court in a Changing Role*, 20 U. KAN. CITY L. REV. 1 (1951); John P. Frank, *The Historic Role of the Supreme Court*, 48 KY. L.J. 26 (1959); Charles E. Whittaker, *The Role of the Supreme Court*, 17 ARK. L. REV. 292 (1963); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); William H. Rehnquist, *The Changing Role of The Supreme Court*, 14 FLA. ST. U. L. REV. 1 (1986); Ronald D. Rotunda, *Foreword: The Role of the Modern Supreme Court*, 26 U. RICH. L. REV. 433 (1992); A. E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231 (2015).

[29] *See, e.g.*, Walter P. Armstrong, *The Increasing Importance of State Supreme Courts*, 28 A.B.A. J. 2, 3 (1942); Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN L. REV. 121 (1977); Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978) [hereinafter Kagan et al., *The Evolution of State Supreme Courts*]; Herbert M. Kritzer et al., *The Business of State Supreme Courts, Revisited*, 4 J. EMPIRICAL LEGAL STUD. 427 (2007).

[30] *See, e.g.*, Rehnquist, *supra* note 28, at 9; Kagan et al., *The Evolution of State Supreme Courts*, *supra* note 29 at 962; Swisher, *supra* note 28, at 2; Frank, *supra* note 28, at 29–31, 41–42; Arthur Selwyn Miller, *Constitutional Revolutions Consolidated: The Rise of the Positive State*, 35 GEO. WASH. L. REV. 172, 189 (1966); Edward W. Madeira Jr. & Mark D. Martin, *Justice is the Business of Government: The Crucial Role of State Supreme Court*, 49 JUDGES J. 7 (2010).

local government,[31] while others are the product of legislative reforms in the federal and state judicial systems.[32] A notable aspect of the changes involves judicial ideology,[33] and is manifested in the transformation of the philosophy of judging, including the understanding of federalism and separation of powers.

The jurisprudence and scholarship regarding the changes in the philosophy of judging are extensive. They contain myriad descriptive and normative judicial models, with wide ranging components and varied complexities and nuances.[34] Scholars from various legal backgrounds disagree on how to describe the changing role of supreme courts, the significance of the alleged ideological shift, and the wisdom and propriety of this transformation.[35] Some

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[31] *See* Frank, *supra* note 28, at 31 (identifying a change in the U.S. Supreme Court's role as derived from a new "conception of the responsibility of government to regulate"); Vincent Blasi, *The Rootless Activism of the Burger Court*, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198, 209–10 (Vincent Blasi ed., 1983) (suggesting an affinity between two destabilizing forces that led to changes in the function of the U.S. Supreme Court in the form of "corrective judicial review." The first is the growth of government bureaucracy, at the state as well as the federal level. The second is an augmentation of the legislative process, distorted by a single-issue electoral politics). *See also* Miller, *supra* note 30, at 179.

[32] *See, e.g.*, Rehnquist, *supra* note 28, at 8; Frank, *supra* note 28, at 32; Frankfurter, *supra* note 28, at 1005.

[33] *See, e.g.*, Erwin Chemerinsky, *Of Course Ideology Should Matter in Judicial Selection*, 7 NEXUS 3 (2002); Erwin Chemerinsky, *Political Ideology and Constitutional Decisionmaking: The Coming Example of the Affordable Care Act*, 75 L. & CONTEMP. PROBS. 1 (2012).

[34] For the role of supreme courts *see, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLES AND POLITICS IN CONSTITUTIONAL LAW (2009); RICHARD A. POSNER, HOW JUDGES THINK (2010); H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION (2008); RONALD DWORKIN, JUSTICE IN ROBES (2008); JED RUBENFELD, REVOLUTION BY JUDICIARY (2005); LAWRENCE G. SAGER, JUSTICE IN PLAIN CLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004); Ronald Dworkin, *The Judge's New Role: Should Personal Convictions Count?*, 1 J. INT'L CRT. OF JUST. 4 (2003); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

[35] *See supra* notes 28, 29 and 34. *Compare* Robert F. Williams, *Juristocracy in the American Courts?*, 65 MD. L. REV. 68 (2006), *with* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGIN AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

have termed the ideological transformation revolutionary.[36] The original view, according to which the principal role of supreme courts is to resolve disputes by saying what the law is,[37] typically when lower courts have offered conflicting resolutions of such cases,[38] has been abandoned, outweighed or supplemented by a new judicial function. This alleged function is "to resolve great issues,"[39] "to accept only the most important cases,"[40] or to review cases that involve "broader legal questions than merely, which of the two parties of the case ought to prevail."[41] Judges, especially those who head the federal and state legal systems, have come to espouse themselves a unique constitutional role to play: the guardians of the

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[36] Particularly the changes in jurisprudence that concern federalism and judicial federalism. *See, e.g.*, Kathleen M. Sullivan, *Dueling Sovereignties: United States Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 80 (1995); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1 (2004); Richard Albert, *The Next Constitutional Revolution*, 88 U. DET. MERCY L. REV. 707 (2011); Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793 (2000). *But compare* Charles Fried, *Revolutions?*, 109 HARV. L. REV. 13 (1995); Robert F. Nagel, *Real Revolution*, 13 GA. ST. U. L. REV. 985 (1997), *with* JED RUBENFELD, REVOLUTION BY JUDICIARY (2005).

[37] *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Osborn v. Bank of the U.S., 22 U.S. 738, 866 (1824) ("Courts are the mere instruments of the law, and can will nothing . . . Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."). *See also* THE FEDERALIST No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The interpretation of the laws is the proper and peculiar province of the courts.").

[38] *See generally*, Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205 (2007). *See also* Frank, *supra* note 28, at 32–33 (asserting that "[C]learly at all times any appellate court has a duty to make rules for the operation of the judicial system it heads, and this has been the task of the Supreme Court from the earliest to the most recent times. Nonetheless there are again some very great differences.").

[39] Whittaker, *supra* note 28, at 301.

[40] Robert F. Williams, *Justice Robert Utter, The Supreme Court of Washington, and the New Judicial Federalism: Judging and Teaching?*, 91 WASH. L. REV. ONLINE 27, 28 (2016).

[41] Rehnquist, *supra* note 28, at 10.

bill of rights, the font of individual liberties, and the engines of social change.[42]

The direct effect of this conceptual change has been a systematic increase in the power and prestige of both the United States Supreme Court and state supreme courts, which emerged in the last century as major policymakers.[43] Supreme courts have become increasingly involved in policymaking in some of America's hottest political and social conflicts.[44] This shift has generated a continual debate over the role supreme courts can and should play in the American society,[45] as well as the role of the United States Supreme Court vis-à-vis the role of state supreme courts.[46]

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[42] *See, e.g.*, Ronald Kahn, THE SUPREME COURT AND CONSTITUTIONAL THEORY 1953-1993 (1994); Rotunda, *supra* note 28, at 439; Whittaker, *supra* note 28, at 299; Lawrence T. Harris, *Guardians of the Constitution*, 57 AM. L. REV. 183, 219 (1923); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan 1986]; Randall T. Shepard, *The New Role of State Supreme Courts as Engines of Court Reform*, 81 N.Y.U. L. REV. 1535 (2006).

[43] *See, e.g.*, Williams, *supra* note 40, at 28; HENRY ROBERT GLICK, SUPREME COURTS IN STATE POLITICS: AN INVESTIGATION OF THE JUDICIAL ROLE (1971); Henry Robert Glick, *Policy-Making and State Supreme Courts: The Judiciary as an Interest Group*, 5 L. & SOC'Y REV. 271 (1970).

[44] *See, e.g.*, DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT'S ASSAULT ON THE CONSTITUTION 10, 11, 16 (2018); Whittaker, *supra* note 28; Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1635–36 (2010); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 4 (1995).

[45] *See, e.g.*, Bernard J. Ward, *A Symposium: The Role of the Supreme Court*, 44 A.B.A. J. 534 (1958); Charles E. Grassley, *The Role of the Supreme Court*, 26 U. RICH. L. REV. 449 (1992); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed., 2008).

[46] The dual enforcement of constitutional norms in the U.S., by both federal and state courts, entrusted with adjudicating constitutional disputes, raises a series of difficult questions. One of which is the question concerning "parity:" whether state courts can be trusted to enforce federal constitutional rights. For different approaches offered for this question *see, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999); Michael

The confrontational Harvard Law Review article by Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*,[47] dominated the discussions on the changing role of supreme courts in the United States. According to Brennan, the most significant development during the Warren Court era (1953-1969) was the nationalization of civil rights by incorporating the Bill of Rights and applying it to the states through the interpretation of the Fourteenth Amendment. By virtue of the Fourteenth Amendment, the Warren Court assured a minimum of fundamental rights (such as the right against self-incrimination, the right to trial by impartial jury, etc.) against encroachment by the federal and state governments alike.[48] Brennan acknowledged that while federal rights were enforced mainly by federal courts, state courts also took on an increased role in guarding individual rights and liberties in the Warren era.[49]

E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457 (2005); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 U.C.L.A. L. REV. 233 (1988); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 230 (1985); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499 (1928); Armstrong, *supra* note 29, at 3; Michael I. Krauss, *The Role of the Supreme Court in Preserving Federalism*, 1 GEO. J.L. & PUB. POL'Y 43 (2002).

[47] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan 1977]. *See also* Brennan 1986, *supra* note 42.

[48] Prior to the passage of the Fourteenth Amendment, the Supreme Court ruled that the Bill of Rights was applicable only to the Federal government and not to the states. Barron v. Baltimore, 32 U.S. 243 (1833). According to Brennan, a primary reason for the adoption of the Fourteenth Amendment was the fear that the former Confederate states would deny newly freed persons the protection of life, liberty and property formally provided by the state constitutions. In a 1961 lecture, Justice Brennan detailed the historical development between the Fourteenth Amendment, which he labeled a "modern Magna Carta," and the protection of civil rights in the states. *See* William Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961).

[49] *See* Brennan 1977, *supra* note 47, at 491 (Brennan views this complemented development as both necessary and desirable, since under the federal system "state courts are no less than federal are and ought to be guardians of our liberties."). *But see* William J. Brennan, Jr., *State Supreme Court Versus United States Supreme Court: A Change in Function and Perspective*, 19 U. FLA. L. REV. 225, 236 (1966).

By 1977, the year Brennan's Article was published,[50] the Warren era had ended, and the trend had changed. Warren Burger had succeeded Earl Warren as Chief Justice (1969), and five members of the Warren Court retired (1969-1976) and were replaced by nominees of Republican presidents. Justice Brennan believed that on grounds of federalism, the Burger Court curtailed the Fourteenth Amendment's scope, restricted individual liberties, and consequently diminished the rights applied to the states. Brennan identified that the weakening of the protection of individual rights under the Federal Bill of Rights has been accompanied by a regressive trimming of other constitutional doctrines (*habeas corpus*, political question, jurisdiction, standing, and remedy), which intensified the Burger Court's retreat from its proper constitutional role.[51]

Justice Brennan criticized this trend, arguing that shutting the courthouse door to litigants with legitimate claims of constitutional rights was detrimental to public trust in the Court.[52] Brennan claimed nevertheless that the Burger Court's contraction of its guardianship role on grounds of federalism should be interpreted as a "clear call to state courts to step into the breach" and take seriously their obligation as coequal guardians of civil rights.[53] He explained that the advantage of the federal system was that it provides a double source of protection and enforcement mechanisms for its citizens: federal judges are the guardians of the Federal Constitution, while state judges are the guardians of both the Federal Constitution and their own state constitution.[54] Thus, state constitutions, too, are a font of individual liberties, and their protection often extends beyond the Supreme Court's interpretation of the Federal

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[50] On the significance of Brennan's 1977 article *see* Robert F. Williams, *Symposium Foreword: Justice William J. Brennan, Jr., and the Evolving Development of State Constitutional Law*, 77 OHIO ST. L.J. 203 (2016).

[51] Brennan 1977, *supra* note 47, at 498. *See also* Brennan 1986, *supra* note 42, at 548; Tinsley E. Yarbrough, *Litigant Access Doctrine and the Burger Court*, 31 VAND. L. REV. 33 (1978).

[52] *See* Brennan 1977, *supra* note 47, at 498.

[53] *Id.* at 503. *See also* Brennan 1986, *supra* note 42, at 548.

[54] *See* Rotunda, *supra* note 28, at 439; Whittaker, *supra* note 28, at 299; Lawrence T. Harris, *Guardians of the Constitution*, 57 AM. L. REV. 183, 219 (1923); Brennan 1986, *supra* note 42.

Constitution.[55] In light of this, Brennan encouraged state courts to "thrust themselves into a position of prominence"[56] in the struggle to protect civil rights and liberties from governmental intrusions, and to interpret their state constitutions to provide more rights than those provided under the Federal Constitution by the Federal Supreme Court.[57]

Brennan's provocative and influential *State Constitutions and the Protection of Individual Rights*[58] drew attention to state constitutions and to the role of state supreme courts vis-à-vis the role of the United States Supreme Court in protecting constitutional rights. On the one hand, the Brennan Article presents the affinity between the role of the Warren Court in nationalizing the Federal Bill of Rights through the Fourteenth Amendment[59] and transforming the basic structure of constitutional safeguards that profoundly altered the character of the federal system and consequently changed modern constitutional understanding of the role of courts. On the other, Brennan's Article connects the traditional principle of federalism to a novel understanding of the role of state courts interpreting their own state constitutions in expanding the Federal Constitution's national minimum standards as held by the United States Supreme Court. Brennan's Article has greatly influenced the jurisprudence[60] and scholarly writing,[61] and

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[55] *See* Brennan 1977, *supra* note 47, at 491.

[56] *Id*. at 503.

[57] *See* Robert F. Williams, *The New Judicial Federalism Take Root in Arkansas*, 58 ARK. L. REV. 883 (2006).

[58] *See* Brennan 1977, *supra* note 47.

[59] The nationalization process of the Federal Bill of Rights through the Fourteenth Amendment's due process clause is still continuing. *See* Timbs v. Indiana, 139 S. Ct. 682 (2019).

[60] *See* Williams, *supra* note 40, at 28 (citing Brennan's 1977 article as "the most important factor" to the rise of state constitutions as an important element of American constitutionalism). *See also* James A. Gardner, *Justice Brennan and the Foundation of Human Rights Federalism,* 77 OHIO ST. L.J. 355 (2016); Ann M. Lousin, *Justice Brennan's Call to Arms – What Has Happened Since 1977?*, 77 OHIO ST. L.J. 387 (2016).

[61] In 2012, Brennan's 1977 article, *supra* note 47, was ranked 9th in the most cited law review articles of all time, *see* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Article of All Time*, 110 MICH. L. REV. 1483, 1489 (2012). *See also* Robert F. Williams, *Introduction: The Third Stage of the New*

is celebrated as the "Magna Carta of state constitutional law,"[62] a "wake-up call for state courts"[63] to resuscitate their state constitutions as the living documents they are; and a "call to arm for lawyers" to use state court systems to protect civil right and liberties.[64] This is the new judicial federalism.[65]

B. The New Judicial Federalism: Between Constitution Shopping and Judicial Role Shopping

Justice Brennan did not invent the new judicial federalism.[66] However, much of the criticism on this trend concerns the fact that the new judicial federalism began,[67] and, to some extent, still operates[68] as a means of confronting conservative decisions of the

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Judicial Federalism, 59 N.Y.U. ANN. SURV. AM. L. 211, 214 (2003); Ann Lousin, *Justice Brennan: A Tribute to a Federal Judge Who Believes in State Rights*, 20 J. MARSHALL L. REV. 1, 2 (1986).

[62] Stewart G. Pollack, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

[63] Kaye, *supra* note 44, at 11.

[64] Stephen Wermiel, *SCOTUS for Law Students: Justice William Brennan and Supreme Court Avoidance*, SCOTUSBlog (Nov. 21, 2018) http://www.scotusblog.com/2018/11/scotus-for-law-students-justice-william-brennan-and-supreme-court-avoidance/.

[65] For the new judicial federalism *see, e.g.*, Ken Gormley, *Silver Anniversary of New Judicial Federalism*, 66 ALB. L. REV. 797 (2003) (describing and evaluating the significance and implications of the new judicial federalism).

[66] Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 124 (1969); David J. Fine et al., *Towards an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

[67] *See* G. Alan Tarr, *Judicial Federalism in the United States: Structure, Jurisdiction and Operation*, 2 REVISTA DE INVESTIGACOES CONSTITUCIONAIS 7, 16–17 (2015).

[68] *See* Wermiel, *supra* note 64. Even before the last two new Trump judicial picks to SCOTUS, some commentators suggested that liberals avoid appealing to SCOTUS. *See* Ian Millhiser, *Liberal Just Need to Stay Away from the Supreme Court*, SLATE (May 21, 2014), https://slate.com/news-and-politics/2014/05/when-will-liberals-learn-to-stay-the-heck-away-from-the-supreme-court.html.

United States Supreme Court.[69] Liberal groups, eager to evade a less hospitable U.S. Supreme Court, have since shifted their efforts to state constitutions and ultimately to state supreme courts. Their choice represented a "tactical maneuver."[70] Indeed, since the 1980s, it can certainly be said that " . . . the old reluctance to rely on the states and hence on state constitutions has largely disappeared."[71] While in theory the new judicial federalism could serve conservative goals,[72] by the end of the Warren Era and throughout the Burger Era, its deployment by conservative litigators presented considerable difficulties and its usefulness was questionable.[73] In the end of the 1970s and throughout the 1980s, conservatives crystallized their main ideological tenets around judicial restraint ("resistance to the

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[69] *See* Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" & Its Critics*, 64 WASH. L. REV. 5, 6 (1989) (asserting that "since the early 1970s, what has troubled critics of the once [NJF] is the strategic use of state constitutional law in a way that expands the rights domain while insulating such state court decisions form otherwise adverse federal court review."). For a criticism on "Supreme Court Justices themselves to campaign to enact into unreviewable state constitutional law dissenting views about federal constitutional law which have been duly rejected by the United States Supreme Court" *see* Bator, *supra* note 46, at 606 n. 1. Brennan denied this claim. Brennan 1986, *supra* note 42, at 502 ("The essential point I am making, of course, is not the United States Supreme Court is necessarily wrong in its interpretation of the Federal Constitution, or that the ultimate constitutional truths come prepackaged in the dissent, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."). *But see* Earl M. Maltz, *False Prophet – Justice Brennan and the Theory of State Constitutional Law*, 15 HAST. CONST. L.Q. 429, 430 (1988) (arguing that while Brennan "described himself as a 'devout believer' in the concept of federalism, his judicial record suggests otherwise").

[70] *See* Tarr, *supra* note 67, at 16.

[71] Epstein, *supra* note 19, at 725.

[72] For example, to expand gun rights beyond the Second Amendment, to provide stronger protections to economic liberties, or to establish an implied right to life beyond the Due Process Clause.

[73] Maltz, *supra* note 69, at 433–34. There are exceptions. *See* James C. Kirby, Jr., *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241 (1981).

tyranny of the courts")[74] and originalism ("original intent"),[75] while exemplifying their commitment to the claim that the role of the Judiciary is "to say what the law is, not what it should be."[76] Using the new judicial federalism to further conservative ends presented the danger of "Lochnering"—referring to the period beginning of the twentieth century when federal and state courts struck down many progressive statutes.[77] For conservatives, the error of *Lochner* mainly rested on protecting the unenumerated right of "substantive due process," which conservatives associated with hated socially liberal decisions of the Warren and the Burger Courts, especially *Roe v. Wade*.[78]

Employing the new judicial federalism by conservatives presented a twofold challenge. On the one hand, they had to interpret the Federal Constitution narrowly in order to avoid scrutiny by an "accidental" liberal Supreme Court majority. On the other, they had to interpret a state constitution broadly, protecting rights that conservatives hold dear. This challenge was hard to navigate when state constitutional provisions were identical to, or only slightly different, from their federal counterparts[79] and when originalism was employed to discern the rights' meaning.[80] Certainly, conservatives could have appealed to some ideological

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[74] *See* Maltz, *supra* note 69, at 434; *see also* Mary Ziegler, *The Conservative Magna Carta*, 94 N.C. L. REV. 1653, 1654 (2016).

[75] *See* Ilya Somin, *A Revival of Lochner?*, CONST. L. JOTWELL (June 15, 2015), https://conlaw.jotwell.com/a-revival-of-lochner/; Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 870–71 (2014); Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1673 (2018); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

[76] For the moto of the Federalist Society *see* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTER REVOLUTION 147 (2015).

[77] Lochner v. New York, 198 U.S. 45 (1905). *See, e.g.*, Howard, *supra* note 66, at 880; Maltz, *supra* note 69, at 434.

[78] Somin, *supra* note 75.

[79] *See* Williams, *supra* note 57, at 885–86.

[80] *See* Fine et al., *supra* note 66, at 284 ("Conservative interpretation of state bills of rights is indeed precisely the thing that will make them worthless.").

justifications,[81] but by doing so they increasingly resembled liberals—for whom ideological and legal commitments are not completely separate. Furthermore, conservatives' initial reluctance to employ the new judicial federalism was based on the estimation that even if they were successful to secure their victory in state courts, there was always a possibility that a state supreme court ruling would be overridden by a liberal Supreme Court expanding federal rights.[82] In addition, the protection of certain rights is precisely identified with a conservative agenda. Thus, for example, Professor Ilya Somin noted that, from a conservative point of view, it is actually appropriate to "reject the view that federalism provides a strong reason for restricting judicial enforcement of constitutional property rights **by** federal courts."[83]

The fact, however, that the new judicial federalism was initially confined to few distinct "vanguard" state supreme courts, reinforced the concern that the new judicial federalism was being driven by (liberal) ideology.[84] Courts and commentators identified four interrelated difficulties affected by this ideological inclination:

First, *Constitution shopping*.[85] State supreme courts that approach cases with parallel state and federal constitutional provisions, pick the federal or state constitutional rule to be applied.[86] When state supreme courts ground their decisions on their

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[81] *See* Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 787–92 (1982).

[82] *See* Wermiel, *supra* note 64.

[83] Ilya Somin, *Federalism and Property Rights*, 2011 UNIV. CHI. LEGAL F. 53, 55 (2011) (emphasis added).

[84] *See, e.g.,* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1018 (1985); Maltz, *supra* note 69, at 432; Barry Latzer, *Whose Federalism? Or, Why "Conservative" States Should Develop Their State Constitutional Law*, 61 ALB. L. REV. 1399, 1402 (1998).

[85] The term "constitution shopping" was first used by Robin B. Johansen to justify the need for a "principled interpretation." *See* Robin B. Johansen, *The New Federalism: Towards a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 321 (1977).

[86] For example, specific charges of "constitution shopping" have been leveled against the California Supreme Court and the Utah Supreme Court. George Deukmejian & Clifford K. Thompson, *All Sail and No Anchor–Judicial Review Under the California Constitution*, 6 HAST. CONST. L.Q. 975, 989 (1979); *see generally* Ira Reiner & George Glenn Size, *The Law Through a Looking*

own state constitution, they avoid the directives of the U.S. Supreme Court, and even relitigate rights cases rejected by federal courts.[87] When state supreme courts ground their decisions on the U.S. Constitution, they avoid a backlash in the form of popular constitutional amendments, legislative review, or removal from office.

Second, *Result-oriented adjudication*. State supreme courts are applying their state constitutions to produce the predetermined result as to the outcome of a particular case.[88] State judges may well be the guardians of their state constitutions, but a state constitution does not interpret itself. The Constitution is, in practice, "what judges say it is."[89] Thus, the new judicial federalism enables state supreme courts to reach their preferred outcome in a given case, at the expense of well-established precedents of the U.S. Supreme Court.[90]

Glass: Our Supreme Court and Abuse of the California Declaration of Rights, 23 PAC. L.J. 1183 (1992); *see generally* Milo Steven Marsden, *The Utah Supreme Court and the Utah State Constitution*, 1986 UTAH L. REV. 319 (1986); *see generally* Galie, *supra* note 81. But some scholars view "constitution shopping" in a much more favorable light, since it enables individuals to choose between a state and a federal forum, and with state courts emerging as the most popular forum to bring civil liberties and defendants' rights suits. *See* Kathryn L. Girardat, *State v. Burkholder: Expansion of Individual Liberties Under the Ohio Constitution*, 47 OHIO ST. L.J. 221, 227 (1986).

[87] *See* Scott H. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 752–53 (1972); Gregory S. Bruch, *Michigan v. Long: Presumptive Federal Appellate Jurisdiction over State Cases Containing Ambiguous Grounds of Decisions*, 69 IOWA L. REV. 1081, 1095 (1984).

[88] *See* Johansen, *supra* note 85, at 297 n. 7 (discussing result-oriented decision making of state supreme courts interpreting their state constitutions).

[89] Charles Evans Hughes, Speech before the Elmira Chamber of Commerce (May 3, 1907), *in* ADDRESSES AND PAPERS OF CHARLES EVAN HUGHES, Apr. 24, 1908, at 133, 139; *see also* ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928–45 383 (Max Freedman ed., 1967) (comment by Professor Felix Frankfurter) ("People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is they who speak and not the Constitution. And I verily believe that is what the country needs most to understand."); Whittaker, *supra* note 28, at 299–300.

[90] On the problem of result-oriented adjudication in general, *see* Dee R. Dyer & Norman A. Fagin, *Result-Oriented Adjudication: A Lasting Injury*, 6 SAN FERNANDO VALLEY L. REV. 49 (1977).

Third, *State courts as interpreters of constitutional rulings of the Federal Supreme Court*. Since the Supreme Court often issues decisions that inconclusively interpret the Federal Constitution, different state supreme courts often interpret the same Supreme Court decision in different ways. As a result, similar provisions in state constitutions are interpreted and implemented by different state supreme courts in diverse ways. For example, Professor Ilya Somin, referring to the Supreme Court ruling in *Kelo v. City of New London*[91] involving the use of eminent domain to transfer land from one private owner to another private owner for further economic development, has noted:

> [S]tate courts have not reacted to *Kelo* by adopting similarly permissive approaches to public use issues. Three state supreme courts have explicitly repudiated *Kelo* as a guide to their state constitutions. Other recent state supreme court decisions have imposed constraints on takings that go beyond *Kelo,* even if they have not completely rejected the *Kelo* approach. Two state supreme courts—Rhode Island and Maryland—have also restricted so-called quick take condemnations, which governments use to condemn property under streamlined procedures that give owners few procedural rights.[92]

And fourth, *State courts as "mega-legislatures."* When state supreme courts interpret their own state constitution, their decisions are supreme in a twofold manner. First, their decisions are either totally or partly unreviewable by the U.S. Supreme Court due to the Court's material and institutional limitations.[93] Second, their decisions cannot be overruled by the state legislature or executive branch.[94] Thus, the new judicial federalism reallocates powers on

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[91] Kelo v. City of New London, 545 U.S. 469 (2005).

[92] ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* & THE LIMITS OF EMINENT DOMAIN 181 (2015).

[93] State supreme courts hear far more constitutional cases in numbers and variety than their federal counterpart, which means that the edicts of the Federal Supreme Court in regard to the Federal Constitution are always underenforced. *See* Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972).

[94] *See* Deukmejian & Thompson, *supra* note 86.

the national level from the U.S. Supreme Court to state supreme courts, and on the local level from the state legislatures and executives to state supreme courts.

Judges and scholars tried to develop the new judicial federalism in a way that would benefit both liberals and conservatives,[95] and both conservative and liberal courts would be able to "play" the game of state constitutionalism.[96] However, much of the jurisprudential and scholarly developments could be characterized as an attempt to curb and limit the tripolar interrelated difficulty of constitution shopping, result-oriented adjudication and state judges as mega-legislatures.

For example, in 1983, the U.S. Supreme Court issued the landmark decision *Michigan v. Long*,[97] according to which state courts must include a plain statement of the grounds of decision in order to preclude Supreme Court review. Commentators have suggested that the *Long* decision should be viewed favorably, since, on one hand, it increased the ability of the U.S. Supreme Court to supervise state supreme courts, and, on the other, the decision enhanced the political accountability of state supreme courts "as purely state grounds of decisions will be separated from federal grounds and barred for legislative and electoral review."[98] In 1986, the Washington Supreme Court established, in *State v. Gunwall*, six nonexclusive criteria to determine whether the Washington State Constitution provides greater protection to its citizens.[99] The Washington Supreme Court's criteria included: "the text of the state provision and its similarity to the federal provision; the history of the enactment of the provision; prior decisions of that state court; decisions of courts of other states with similar provisions; and unique state factors and specific local concerns."[100] The Washington

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[95] *See* Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985); *see also* Williams, *supra* note 57, at 888–89.

[96] *See* Latzer, *supra* note 84, at 1415.

[97] Michigan v. Long, 463 U.S. 1032 (1983).

[98] Bruch, *supra* note 87, at 1097. *But see* Ronald K. L. Collins, *Plain Statements: The Supreme Court's New Requirement*, 70 A.B.A. J. 92 (1984).

[99] State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (en banc).

[100] *See id.*; Timothy Stallcup, *The Arizona Constitutional Right to Privacy and the Invasion of Privacy Tort*, 24 ARIZ. ST. L.J. 687, 696 (1992); Ken Davis,

Supreme Court believed that these criteria guide and limit judicial discretion involved in independent state constitutional interpretation and, thus, prevent or significantly decrease the dangers of constitution shopping, result-oriented adjudication and courts as mega legislatures.

These developments of federal and state jurisprudence were supplemented by a huge volume of scholarly writings aimed to develop a principled approach to guide judicial discretion of state supreme courts and to avoid constitution shopping.[101] However, the partisan inclinations of judicial federalism still persisted for several interconnected reasons. First, no theory of state constitutional interpretation gained enough support or prestige to be adopted by all or even most of the fifty state supreme courts. Thus, politically motivated litigants, who used the courts as vehicles for social change, shopped among these theories of state constitutional interpretation.[102] Second, the shopping was not confined to state constitutions and their interpretation, since other components of judicial ideology (i.e. standing, justiciability, advisory opinion and etc.)[103] as well as other factors[104] influenced their forum selection. Aforesaid, a significant part of judicial ideology is the "proper role"

Washington Constitution Article 1, Section 7: The Argument for Broader Protection Against Employer Drug Testing, 16 U. PUGET SOUND L. REV. 1335, 1341 (1993).

[101] *See* Johansen, *supra* note 85; *see also* Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982); Pollack, *supra* note 62, at 717; Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 ARIZ. ST. L.J. 1005 (1989).

[102] *See* G. Alan Tarr & Mary Cornelia Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTING CONST. L.Q. 919, 952 (1982).

[103] *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (discussing the differences that exist between state courts that "draw heavily from the federal justiciability principles" and those that diverge from Article III doctrine by offering advisory opinion, resolving mute disputes, and deciding political questions); *see also* Jack L. Landau, *Couey v. Atkins: A Reevaluation of State Justiciability Doctrine*, 79 ALB. L. REV. 1467 (2015).

[104] *See, e.g.*, Rubenstein, *supra* note 46, at 624 n.100 ("A litigant might select a particular forum because of the speed with which her claims will be addressed; if this a primary concern, it could trump ideology or institutional competence in certain circumstances.").

of the state supreme court vis-à-vis the other state branches of government and vis-à-vis the U.S. Supreme Court, and thus interest-groups have often "role shopped" state supreme courts. Third, constitution shopping and role shopping among the fifty-one legal systems was utilized to reach optimal liberal activist outcomes and to better schedule the nationalization of "liberal rights" by the U.S. Supreme Court.

The existing partisan inclination of constitution shopping and role shopping is best illustrated by the legal rights struggle of same-sex marriage.[105] In a recent article, Professor Christine Nemacheck provides evidence that the landmark U.S. Supreme Court's 2015 recognition of marriage equality in *Obergefell v. Hodges*[106] was the result of a strategic decision made by the leaders of the marriage equality movement to win the right to marry in a subset, but not all of the states before taking the issue back to the Supreme Court.[107] Professor Nemacheck characterizes this maneuver as a little "twist" to Justice Brennan's conception of the new judicial federalism, which is justified as a means to a different end: the protection of marriage equality under the Constitution.[108] This "twist" was hardly new[109] or secretive.[110] Using the new judicial federalism this way, enabled the marriage equality movement to overcome the structural limitations of the new judicial federalism: the supremacy of federal

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[105] For the strategy of the gay marriage movement and its use of state supreme courts, *see generally*, WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS (2020).

[106] Obergefell v. Hodges, 576 U.S. 644 (2015).

[107] *See* Christine L. Nemacheck, *The Path to Obergefell: Saying 'I do' to New Judicial Federalism?*, 54 WASH. U. J.L. & POL'Y 149, 151–52 (2017).

[108] *See id.* at 152.

[109] An earlier example of securing rights by appealing to state courts first, and then appealing eventually to federal courts, pertains to the right to counsel for indigents defendants. *See* Lousin, *supra* note 60, at 402–03. *But see* George D. Knapp, *Death Qualification and the Right to Impartial Jury under the State Constitution: Capital Jury Selection in Utah after State v. Young*, 1995 UTAH L. REV. 625, 626 (1995) (securing the right to impartial jury in capital punishment trials).

[110] *See* Michael Adams et al., *Winning Marriage: What We Need to Do* (June 21, 2005), http://s3-us-west-2.amazonaws.com/ftm-assets/ftm/archive/files/images/Final_Marriage_Concept_Paper-revised_(1).pdf.

law and the likelihood that state constitutions would be amended to overturn unpopular state court decisions.[111]

At first, gay rights groups chose not to take their fight to the U.S. Supreme Court,[112] since the Court was posed to avoid resolving the same-sex marriage issue.[113] Thus, they waged their war for marriage equality in those state courts, like Massachusetts,[114] where the odds of winning were strongest and the odds of repeal by state constitutional amendment or otherwise were lowest.[115] After securing their victories in key liberal states and sustaining the foreseen backlash in the states and nationwide, they returned to federal courts to force the nationalization of the right to marry of same-sex couples.[116]

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[111] *See* Robert K. Fitzpatrick, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of individual Rights*, 79 N.Y.U. L. REV. 1833 (2004) (arguing that two structural limitations—the supremacy of federal law and the fact that state constitutions are often relatively easy to amend —secure the incremental exercise of new judicial federalism by state supreme courts); *see also* David R. Keyser, *State Constitutions and Theories of Judicial Review: Some Variation on a Theme*, 63 TEX. L. REV. 1051 (1985).

[112] *See* Kevin M. Chathcart, *The Sodomy of the Roundtable*, in LOVE UNITES US 51, 53–54 (Kevin M. Chathcart & Leslie J. Gabel-brett eds., 2016); *see also* Nemacheck, *supra* note 107, at 158.

[113] *See* Baker v. Nelson, 409 U.S. 810 (1972); Bowers v. Hardwick, 478 U.S. 186 (1986); Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); U.S. v. Windsor, 570 U.S. 744 (2013); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 450 (2005).

[114] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d. 941 (Mass. 2003). Obviously, the recognition of marriage equality in *Goodridge* could not be reduced to four "activist" judges. *See* Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 8, 25–6 (2005). However, it is clear that the decision to litigate the denial of marriage in Massachusetts state courts centered on a mix of factors, including the Massachusetts constitution, the judicial ideology of the Massachusetts Supreme Court and the ability to sustain the victory in the court of public opinion. On the difficulties of predicting the outcome in the *Goodridge* decision based on the personal and ideological characteristic of the judges, *see* Brian Sheppard, *Attitude Issues: The Difficulty of Using Personal and Ideological Characteristic to Predict Justice Martha B, Sosman's Decision in Goodridge v. Department of Public Health*, 42 NEW ENG. L. REV. 407, 413–14 (2008).

[115] *See* Matt Coles, *The Plan to Win Marriage*, in LOVE UNITES US 100, 104 (Kevin M. Chathcart & Leslie J. Gabel-brett eds., 2016); Nemacheck, *supra* note 107, at 161; Bonauto, *supra* note 114, at 21.

[116] *See* Nemacheck, *supra* note 107, at 161.

In the landmark decision *Obergefell v. Hodges*,[117] Justice Kennedy joined the liberal wing of the U.S. Supreme Court,[118] holding that state laws and constitutions depriving same-sex couples of the fundamental right to marry violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.[119] The Court assumed the role of adjusting the Constitution to changing times, reasoning that the people who wrote and ratified the Fourteenth Amendment entrusted the Court with the task of protecting liberty in all of its dimensions, as we have learned its meaning and scope over the years.[120] The Court explained that "new dimensions of freedom" often appear through requests, which are considered in "the political sphere and the judicial process."[121]

In this regard, the Court also gave significance to state court decisions recognizing same-sex marriage.[122] Specifically, the Court noted how the Massachusetts Supreme Court's pioneering decision, *Goodridge v. Department of Public Health*,[123] shaped our constitutional understanding that "the decision whether and whom to marry is among life's momentous acts of self-definition."[124] Furthermore, the Court rejected calls for judicial self-restraint and deference to further democratic legislation and litigation on the issue of same-sex marriage, since one "essential dimension" of the fundamental freedom secured by the constitution is "the right of the

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[117] Obergefell v. Hodges, 576 U.S. 644 (2015).

[118] Justices Ginsburg, Breyer, Sotomayor, and Kagan.

[119] *Obergefell*, 576 U.S. at 675.

[120] *Id*. at 663–64.

[121] *Id*. at 660.

[122] *Id*., at 2596685–8-7. State courts decisions were cited by the Court in Appendix B.

[123] *Id.* at 662. On the importance of *Goodridge* to the Court decision, *see also* Nemacheck, *supra* note 107, at 166 ("What is particularly clear in the majority's opinion is the importance of state courts and state constitutional law in shaping the debate that would eventually turn on federal constitutional protection."); *see also* Lousin, *supra* note 60, at 402 ("If it had not been for *Goodridge* and other state constitutional developments, there would have been no *Obergefell* – or at least, the route to the United States Supreme Court would have been quite different."); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 207 (Oxford Univ. Press ed., 2018) (arguing that "There is no *Obergefell* without *Goodridge*.").

[124] *Obergefell*, 576 U.S. at 666 (quoting *Goodridge*, 798 N.E.2d. at 955).

individual not to be injured by the unlawful exercise of governmental power."[125] Thus, the Court's opinion provides a systemic analysis, which highlights the mutual cooperation of the (liberal wing) of U.S. Supreme Court (accompanied by Justice Kennedy) with liberal state supreme courts (and some state legislatures), which mutually enhance their powers and reinforce their ideological vision. However, the *Obergefell* decision betrayed the longstanding principle of federalism that allows state experimentation, also known as the "laboratories of democracy" agenda.[126]

This point had not eluded the conservative wing of the Court.[127] They critiqued the "*super*-legislative power" the Court assumed,[128] stated the issue of same-sex marriage should have been decided by state voters and legislatures,[129] complained that "five lawyers"

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[125] *Obergefell*, 576 U.S. at 677 (quoting Schuette v. BAMN, 572 U.S. 291, 311 (2014)).

[126] *See* Michael Stachiw, *The Classically Liberal Roberts Court*, 10 N.Y.U. J.L. & LIBERTY 429, 464 (2016); *see also* Marc A. Greendorfer, *After Obergefell: Dignity for the Second Amendment*, 35 MISS. COLL. L. REV. 128 (2016); Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1317 (2019).

[127] Chief Justice Roberts wrote the principle dissent. *See Obergefell*, 576 U.S. at 686–714 (Roberts, C.J., dissenting, joined by Justices Scalia and Thomas). However, Justices Scalia, Thomas and Alito have each also dissented separately and forcefully. *See id.* at 713–21 (Scalia J., dissenting); *id.* at 721–37 (Thomas J., dissenting); *id.* at 736–42 (Alito J., dissenting).

[128] *See id.* at 717 (Scalia J., dissenting) (asserting that "this is a naked judicial claim to legislative – indeed, *super*-legislative power; claim fundamental at odds with our system of government."); *id.* at 686, 697 (Roberts, C.J., dissenting) (pointing out that "this Court is not a legislature . . . 'we do not sit as a super-legislature to weigh the wisdom of legislation.'").

[129] *See id.* at 686–87 (Roberts, C.J., dissenting) ("In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition."); *see also id.* at 736 (Alito J., dissenting) ("The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State."); *see also* Joshua R. Meddaugh & John R. Theadore, *Federalism Lost: The Roberts Court's Failure to Continue Rehnquist's Federalism Revolution*, 24 NAT'L ITALIAN AM. B. ASS'N L.J. 49, 78-9 (2016).

terminated the debate and the experiment on the issue,[130] and denounced the majority for imposing their own personal view on the rest of the country.[131] Most of the conservative Justices' critique was leveled against the federal courts and the liberal Supreme Court Justices that nationalized the right to same sex marriage, but they cynically remarked that the majority conclusion was that every state violated the Constitution for all the 135 years between the Fourteenth Amendment's ratification and Massachusetts Supreme Court's decision in *Goodridge*.[132]

II. THE LEGITIMACY DEFICIT OF THE ROBERTS COURT

The Roberts Court in its current composition is facing a challenge to its legitimacy,[133] or it is at least in a legitimacy deficit.[134] Although legitimacy problems are an inherent consequence of the fuzzy, norm-bound limits on judicial conduct,[135] the reservations held by Americans today regarding the legitimacy of the Roberts Court go beyond these inevitable difficulties.

According to some, "Republicans used underhanded means to place a conservative majority on the Supreme Court, rendering the institution itself (and, presumably, its decisions) less legitimate."[136]

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[130] *Obergefell*, 576 U.S. 644 at 687 (Roberts, C.J., dissenting) ("Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law."); *see also id.* at 736 (Alito J. dissenting) ("Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage.").

[131] *See id.* at 721 (Thomas J., dissenting) (accusing the majority of the Court had "roam[ed] at large in the constitutional field guided only by their personal views" as to the fundamental rights protected by the constitution).

[132] *See id*. at 718 (Scalia J., dissenting).

[133] *See* Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 411 (2021) [hereinafter Epps & Sitaraman, *The Future of Supreme Court Reform*]; *see also* Fallon, LAW AND LEGITIMACY, *supra* note 6, at 155.

[134] *See* Richard H. Fallon Jr., *Author's Response: Further Reflections on Law and Legitimacy in the Supreme Court*, 18 GEO. J.L. & PUB. POL'Y 383, 420 (2020).

[135] David Schraub, *Sadomasochistic Judging*, 35 CONST. COMMENT. 437, 444–45 (2020).

[136] Grove, *supra* note 3, at 2242.

It was even blatantly claimed that "the [Roberts] Court failed to protect democracy and instead defended the interests of the Republican Party."[137]

In an Op-Ed, published in December 2018, Professor Bruce Ackerman wrote:

> The Supreme Court has taken some serious hits to its reputation for independence and impartiality in these polarized times. Since the death of Justice Antonin Scalia, the Senate confirmation process has produced a series of power plays that have led ordinary Americans to wonder whether the Justices can function as legitimate arbiters in our system of checks and balances.[138]

A similar assessment was expressed by Professors Daniel Epps and Genesh Sitaraman:

> [T]he Supreme Court is facing an unprecedented legitimacy crisis in the wake of Justice Kennedy's retirement and his replacement with Justice Kavanaugh . . . . [S]everal serious dangers fac[e] the Court going forward . . . . These [legitimacy] concerns are by no means limited to the liberal commentariat, but have been voiced by mainstream political figures.[139]

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[137] Michael J. Klarman, *Foreword: The Degradation of American Democracy – and the Court,* 134 HARV. L. REV. 1, 224 (2020).

[138] Bruce Ackerman, *Trust in the Justices of the Supreme Court is Waning. Here are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), http://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html. Similar insights have also been raised by other commentators. *See, e.g.*, Michael Tomasky, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html; Paul Waldman, *Yes, the Supreme Court is Facing a Legitimacy Crisis. And We Know Exactly Whose Fault it is.*, WASH. POST (Sept. 24, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/09/24/yes-the-supreme-court-is-facing-a-legitimacy-crisis-and-we-know-exactly-whose-fault-it-is/?noredirect=on&utm_term=.6013dce98a6a.

[139] Epps & Sitaraman, *supra* note 1, at 153, 159.

The legitimacy deficit has led to various proposals to change the composition of the Court.[140]

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[140] *See, e.g.*, Klarman, *supra* note 137, at 242–53 (discussing the possibility of expanding the Supreme Court in order to create a majority of Democratic appointments); Epps & Sitaraman, *The Future of Supreme Court Reform*, *supra* note 133, at 400–01, pointing out that:

> in the wake of pitched political battles over the Court's membership in the last few years, Democratic politicians suddenly became willing to touch what was once seen as a third rail . . . .[I]n the wake of Republicans' hasty effort to confirm then-Judge Amy Coney Barrett to replace Justice Ginsburg, the calls for Court reform became louder. Leading progressives demanded that Democrats retaliate by adding seats to the Court once they regained power . . . .[N]ow-President Biden has named a commission, consisting of distinguished scholars and jurists. The Commission is tasked with providing, among other things, "[a]n analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals." (Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021)). Given that the commission was designed to be bipartisan, it may be unlikely to endorse bold structural reform, at least to the extent that such reform would have a partisan valence . . . . [E]ven so, that doesn't mean that *no* reform is possible. As we see it, there are a number of modest, though still meaningful, reforms that remain feasible and that are worthy of serious consideration. Some reforms would require congressional action, but others would not.

See also David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 949, 949 (2019) ("Ever since Brett Kavanaugh's' confirmation to the Supreme Court, liberal commentators have been pondering tactics such as impeachment, jurisdiction stripping, and especially 'packing the court' to a degree that would have been unthinkable a few years ago."); Stephen M. Feldman, *Court-Packing Time? Supreme Court Legitimacy and Positivity Theory*, 68 BUFF. L. REV. 1519, 1534–43 (2020) (comparing straight-forward court-packing – adding justices to shift the partisan balance on the Court – to other possible Court changes, such as court-curbing measures that would reduce the Court's power); Charles M. Leedom Jr., *Constrained Supreme Court Expansion: A Plan for Remediating the Effects of Mitch McConnell's Norm-Busting "Advice and Consent" Procedures*, 47 OHIO N.U.L. REV. 293 (2021) (proposing a plan to de-politicize the Supreme Court Justice nomination process, involving legislation that would immediately add two Supreme Court Justices for a limited time, as well as a Constitutional Amendment to freeze the Court size, initially, at eleven and, eventually, at nine upon the departures of Justices Gorsuch and Barrett). For

Sources of the Supreme Court's current legitimacy deficit can be tied to its dramatic *Bush v. Gore* decision.[141] According to Gallup polling, 65% of Americans expressed confidence in the Court as an institution in September 2000 and 62% expressed confidence in June 2001.[142] But, as Professor Erwin Chemerinsky puts it:

> [T]he Supreme Court's legitimacy is robust, not fragile, and no single decision is likely to make much difference in the public's appraisal of the Court.[143]

The uniqueness of the existing legitimacy deficit, after decades of high profile cases that have led people to realize that the Court makes value choices in deciding the meaning of the Constitution, appears to lie in the intense public and party controversy surrounding President Trump's three appointments to the Supreme Court, and, in particular, the appointment of Justice Kavanaugh—because of the accusations against him for sexual misconduct[144] and

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an outline a new framework for Supreme Court reforms, based on reforms that are plausibly constitutional (and thus implementable by statute) and that are capable of creating a stable equilibrium even if initially implemented using "hardball" tactics, *see* Epps & Sitaraman, *supra* note 1.

[141] *See* Bush v. Gore, 531 U.S. 98 (2000). For the debate over the legitimacy of the *Bush v. Gore* decision, *see, e.g.*, John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 755 (2001); BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002); Louise Weinberg, *When Courts Decide Elections: The Constitutionality of* Bush v. Gore, 82 B.U.L. REV. 609 (2002); David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001); Laurence H. Tribe, *The Unbearable Wrongness of* Bush v. Gore, 19 CONST. COMMENT. 571 (2002); Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law:* Bush v. Gore *and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087 (2002); Klarman, *supra* note 137, at 211–15.

[142] *See* Jeffrey M. Jones, *Hispanics, Whites Rate Bush Positively, While Blacks Are Much More Negative*, GALLUP (June 21, 2001), https://news.gallup.com/poll/4531/hispanics-whites-rate-bush-positively-while-blacks-much-more-negative.aspx.

[143] Erwin Chemerinsky, *How Should We Think About* Bush v. Gore?, 34 LOY. U. CHI. L.J. 1, 4–5 (2002).

[144] *See, e.g.*, Zack Beauchamp, *The Supreme Court's Legitimacy Crisis Is Here*, VOX (Oct. 6, 2018), https://www.vox.com/policy-and-politics/2018/10/6/17915854/brett-kavanaugh-senate-confirmed-supremecourt-legitimacy (asserting that "The Supreme Court's newest justice is a man who remains accused of sexual assault, nominated by a president who himself has been accused of several sexual assaults, to serve on a Court that already has a justice (Clarence

his clear political background.[145] Against this background, there were even those who claimed that "Justice Kavanaugh . . . is now a one-man legitimacy crisis for the court."[146]

The legitimacy problem intensifies when the U.S. Supreme Court intervenes, in accordance with conservative values, in liberal decisions of state supreme courts based on the state constitution. In such cases, not only is the intervention made by a court—the U.S. Supreme Court—whose composition includes three Justices appointed in controversial circumstances, but also the intervention is in the decisions of state supreme courts who interpret and enforce their own state constitution.

III. TWO DILEMMAS

As a result of the changes described in Parts I and II, the U.S. Supreme Court is in an era in which it is dominated by conservative Justices, including the three Justices appointed by President Trump. In this era, the Court faces two dilemmas.

One dilemma is material in nature and concerns substantive constitutional law. This dilemma stems from the tension between two conservative approaches: a federalist approach that supports a broad range of federal courts' deference to state court decisions

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Thomas) who has been accused of sexual harassment and, more recently, groping a female attorney at a dinner party. This, in and of itself, would likely damage the perception of the Court in the #MeToo era (at least among Democrats and people on the broader left.")).

[145] *See, e.g.*, J.F., *Justice Brett Kavanaugh*, THE ECONOMIST (Oct. 6, 2018), https://www.economist.com/democracy-in-america/2018/10/06/justice-brett-kavanaugh (arguing that "Mr Kavanaugh is not just one more conservative jurist. He worked in George W Bush's White House and on Ken Starr's team investigating Bill Clinton before taking his place on the federal bench 12 years ago. At his second hearing he dispensed with the mild neutrality offered by most nominees, and launched instead into an intemperate diatribe, treating Democratic senators with contempt . . . . For as long as he sits on the court, Democrats will doubt his impartiality – and hence the legitimacy of every 5-4 ruling that they lose.").

[146] Matt Ford, *Brett Kavanaugh Is the Point of No Return*, NEW REPUBLIC (Oct. 6, 2018), https://newrepublic.com/article/151597/brett-kavanaugh-confirmed-supreme-court-point-no-return.

based on state constitutions, and a non-liberal approach that advocates conservative values.

The second dilemma is institutional in nature and stems from the weakening of the legitimacy of the Supreme Court following the appointments of three Justices by President Trump. Specifically, the principle of judicial independence against the expectation for the Justices to rule in light of their conservative non-liberal legal views.

In this Part we describe the two dilemmas.

A. The Material Dilemma: Federalism v. Conservative Positions

The common meaning of federalism in the context of the Judiciary is that a federal court will accord substantial deference to the decisions of state courts based on state laws, hold them conclusive with respect to interpretation of their own laws,[147] and ask only whether the state court interpretation of the state constitution has fair support in state law.[148] Federalism has a series

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[147] *See* Rowan v. Runnels, 46. U.S. 134, 139 (1847).

[148] *See, e.g.*, Demorest v. City Bank Farmers Tr. Co., 321 U.S. 36, 42 (1944) ("Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of . . . [the Supreme] Court to inquire whether the decision of the state court rests upon a fair or substantial basis . . . . But if there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support [the judgment must be affirmed]"); Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1960 (2003) (asserting that "Courts and commentators alike now quite reflexively assume that narrow review suffices to maintain the supremacy of federal law. They ask only whether the state court interpretation has fair support in state law; that is, is the state court's description of state law reasonable?"); E. Brantley Webb, *How To Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192, 1196 (2011) ("Historically, the [Supreme] Court has applied a highly deferential predicate standard of review known as the fair support rule to antecedent state law grounds. This rule precludes the Court from disallowing state law grounds absent evidence that a state court has attempted to evade federal law."); Michael L. Wells, *Wrongful Convictions, Constitutional Remedies, and* Nelson v. Colorado, 86 FORDHAM L. REV. 2199, 2201 (2018) ("Ordinarily, the [Federal Supreme] Court will not examine the state law grounds for a state court's decision in such cases. An exception to this rule exists, however, for cases in which the relied-upon state law undermines federal rights and lacks fair support in prior state law.").

of advantages.[149] Its pros include, inter alia, satisfying diverse local preferences,[150] encouraging competition among states[151] or between the states and the Federal government,[152] and increasing political participation and community.[153]

Although federalism also has drawbacks,[154] it is one of the foundations of the American regime and no judge can ignore it. The

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[149] *See, e.g.*, Gregory v. Ashcroft, 501 US 452, 458 (1991); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1467–71 (1995); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U.L. REV. 89, 106 (2004); Dennis Murashko, *Accountability and Constitutional Federalism: Reconsidering Federal Conditional Spending Programs in Light of Democratic Political Theory*, 101 NW. U.L. REV. 931, 948–49 (2007); Jeffrey M. Hirsch, *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, 61 ALA. L. REV. 1025, 1052–54 (2010).

[150] *See, e.g.*, Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 27 (2001) (describing federalism as "constitutionally mandated decentralization" that is valuable because it enables adaptation to local preferences).

[151] *See, e.g.*, Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 291 (1990) ("traditional defense of a strong federalist system as a device for achieving a more efficient legal system by encouraging competition among the states.").

[152] *See e.g.*, Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107 (2004) (discussing the importance of competition between federal and state authorities in the process of developing regulation in the corporate and securities arenas).

[153] *See e.g.*, Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1507–10 (1987) (summarizing community and political participation rationales for federalism).

[154] *See, e.g.*, Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980) (asserting that the horizontal competition between states engendered by federalism discourages state officials from undertaking risky innovations); Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV. 843, 855 (1993) ("[B]enefits and burdens of a law may not be contained within the legislating jurisdiction"); Jacques Leboeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 565–74 (1994) (discussing loss of economies of scale and various externalities as disadvantages of federalism); Keith S. Rosenn, *Federalism in the Americas in Comparative Perspective*, 26 U. MIAMI INTER-AM. L. REV. 1, 7–8 (1994) (a survey of seven different disadvantages of federalism); Yishai Blank, *Federalism,*

differences between views on federalism are expressed through the spectrum of interpretative approaches to the clauses in the Constitution that form federalism in the United States.[155] On this spectrum, conservative judicial approaches are on the more federalist side of the spectrum, while liberal judicial approaches tend toward the less federalist side.[156]

The federalist approach, on the conservative side of the spectrum, may clash with conservative legal worldviews to the

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Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance, 37 FORDHAM URB. L.J. 509, 529–30 (2010) (noting several shortcomings of federalism); Jaclyn G. Ambriscoe, *Massachusetts Genetic Bill of Rights: Chipping Away at Genetic Privacy*, 45 SUFFOLK U. L. REV. 1177, 1200 (2012) ("A disadvantage to federalism is that by empowering each state to have its own penal code, criminal procedure throughout the nation is fragmented and often inconsistent. Conflict of laws is a common problem in U.S. criminal procedure – where two states have a central connection to a crime, but the states have contradictory laws.").

[155] *See, e.g.*, Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1766 (2006). Professor Chemerinsky points out:

> [O]ver the course of American history, the Supreme Court has shifted between two models of federalism. For the first century of American history, the Court expansively defined federal power and did not once declare a federal law unconstitutional as exceeding the scope of Congress's powers or as violating the Tenth Amendment. From the late nineteenth century through 1936, the Court shifted to a very different view of federalism, narrowly defining the scope of Congress's spending power and invalidating laws as violating a zone of activities reserved to the states by the Tenth Amendment. From 1937 until the early 1990s, the Court shifted back to upholding federal power; not once during this time was any law struck down for exceeding the scope of Congress's commerce power, and only once was a law found to violate the Tenth Amendment, but that case was overruled nine years later. Since the early 1990s, the Court again has used federalism to limit federal powers.

[156] *See, e.g.*, Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 154 (1996) ("Conservatives on the Court, led by Justices Rehnquist and O'Connor, have excoriated their brethren to protect state and local governments against excessive intrusions by a federal government ineffectively constrained via the political process. Liberals on the Court have issued equally impassioned warnings that the Court has no role to play in mediating what are essentially political disputes between the states and Congress.").

extent that a state constitution, as interpreted by liberal state courts, can derive more liberal consequences than the Federal Constitution can, when interpreted by a Supreme Court with a conservative majority. Indeed, as Professor Fallon puts it, "the relationship between a commitment to constitutional federalism and other conservative values is by no means always obvious."[157] Thus, for example, it has been argued that "[c]onsistency on states' rights [by the Rehnquist Court] . . . is noticeably absent in controversies in which defer[ence] to the states would amount to defer[ence] to a liberal agenda."[158] Empirically, the tendency to prefer ideology with respect to human rights issues over ideology related to federalism makes sense because "issues of federalism and judicial power are less ideologically charged than issues of personal liberty."[159]

Indeed, conservative judges have "interests in upholding 'conservative' statutes and invalidating 'liberal' ones."[160] Thus, generally speaking, it seems that conservative judicial positions are those disfavoring "the criminally accused" and civil rights/civil liberties claimants. However, that is not the case in affirmative action and Takings Clause cases, where the conservative position is pro-claimant; and in economic cases, conservative positions are anti-union, pro-business (in cases involving challenges to the

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[157] Fallon, *The "Conservative" Paths*, *supra* note 10, at 434.

[158] David Niven & Kenneth W. Miller, *Federalism by Convenience: The Supreme Court's Judicial Federalists on the Death Penalty and State's Rights Controversies*, 33 CAP. U. L. REV. 567, 567 (2005). *See* Michael J. Zydney Mannheimer, *When the Federal Death Penalty is "Cruel and Unusual,"* 74 U. CIN. L. REV. 819, 821 (2006) ("[T]he Eighth Amendment's proscription of 'cruel and unusual punishments' prohibits the federal government from imposing a sentence of death in any State that does not itself impose that punishment . . . . [T]his proposition is faithful to the vision of the Anti-Federalists who fought for a Bill of Rights that would impose an important constraint on the central government and would repose ultimate authority in the people of the several States to decide whether a particular mode of punishment is acceptable within their respective borders.").

[159] LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 106 (2013).

[160] Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 353 (2008).

government's regulatory authority), anti-liability, and anti-injured-person.[161]

Against this background, it seems, as Professor Fallon puts it, that while the "commitment to protecting federalism constitutes a core component of conservative judicial philosophies, . . . [s]ometimes, . . . state and local decision-making produces [liberal] outcomes that judicial conservatives find substantively objectionable."[162]

Thus, the material dilemma faced by conservative Supreme Court Justices deciding the constitutionality of liberal rulings of state courts based on the state constitution, is between political conservative ideology and judicial conservative ideology.

B. The Institutional Dilemma: The Supreme Court's Legitimacy Deficit v. Conservative Positions

Professor Fallon pointed out the growing danger to the legitimacy of the Supreme Court in the current era:

> In the United States today, the conjunction of democracy in constitutional interpretation with sharp ideological division in politics has produced, or at least threatens to generate, serious grounds for forward-looking worry about the legitimacy of constitutional adjudication in the Supreme Court, at least in the sociological and ultimately the moral sense.[163]

On this background, in addition to the material dilemma, the Roberts Court also faces an institutional dilemma. The institutional dilemma arises from the legitimacy deficit of the Supreme Court, and the legal positions and worldviews of conservative judges.

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[161] *See* Jeffrey A. Segal, et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 815 (1995). This categorical scheme is obviously crude since political conservatives include both libertarians, who generally believe that that government governs best which governs least, and social conservatives, who favor governmental regulations to protect traditional values and structures. *See* Fallon, *The "Conservative" Paths*, *supra* note 10, at 447.

[162] Fallon, *The "Conservative" Paths*, *supra* note 10, at 433–34.

[163] FALLON, LAW AND LEGITIMACY, *supra* note 6, at 157–58.

This legitimacy deficit may lead the Supreme Court to make strategic calculations that balance preserving public confidence in the Court and the Justices' judicial independence against their desire, and even commitment,[164] to realize their legal worldviews. As Professor Grove puts it: "In cases of conflict between sociological and legal legitimacy, the Justices face a challenging (and unappealing) normative choice."[165]

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[164] For the normative aspects of taking account by the Court of sociological legitimacy considerations *see* Grove, *supra* note 3, at 2250–72. Professor Grove points out at 2245:

> Consider . . . the assertion that one or more members of the Supreme Court should modify their jurisprudence in order to preserve the Court's legitimacy. This argument underscores an important tension between the internal (legal) and external (sociological) legitimacy of the Supreme Court. On the one hand, there is some evidence that Justices do in fact 'switch' their votes in response to public pressure – that is, to preserve the Court's sociological legitimacy . . . . On the other hand, there is reason to doubt that such 'switches' are legally legitimate. Assuming such changes occur . . . the Justices do not have a consistent or principled approach, and they are most certainly not candid about 'caving' to public pressure. To the contrary, the Justices (at least publicly) *deny* the influence of such external pressure. Thus, there is one legitimacy dilemma: in politically charged moments, the Justices may feel pressure to sacrifice the legal legitimacy of their judicial decisions in order to preserve the sociological legitimacy of the Court as a whole. (Footnotes omitted.)

See also Metzger, *supra* note 20, at 370–81. Professor Metzger asserts at 364:

> [C]oncerns about preserving public support for the Court fall within the bounds of reasonable constitutional adjudication-both as currently undertaken and in the form that Fallon advocates. The bigger problem is that overt consideration of the impact of a decision on the Court's standing
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> may prove self-defeating by leading the public to view the Justices as little more than politicians in robes, thereby undercutting the very institutional legitimacy the Justices sought to preserve. An alternative would be for the Justices to take sociological legitimacy into account, but only *sub rosa.*

[165] Grove, *supra* note 3, at 2270.

In light of the empirical findings regarding the influence of public opinion on the Supreme Court,[166] a decline in public confidence in the Court can erode judicial independence. The recent decline in public confidence in the Supreme Court has contributed to the erosion of the Court's independence during the Chief Justice Roberts' tenure.[167]

In an essay written shortly before the November 2020 election, in which a Democratic candidate won the presidential election and the Democratic Party won a majority in both the Senate and the House of Representatives, Professor Keith Wittington wrote:

> If Republicans continue to win electoral victories, the still-narrow conservative majority on the Roberts Court will be joined by reinforcements and will be able to count on support in the political branches. If not, then an aggressive conservative majority on the Court might find itself in political hot water and emboldening the growing chorus of activists and politicians on the left who are calling for Court-packing.[168]

Professor Wittington further claims that in an era of polarized politics, even judges deliberating in good faith may come to be perceived as illegitimate if they reach the "wrong" conclusions about high-profile, contentious constitutional issues.[169]

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[166] *See, e.g.*, Christopher J. Casillas, et al., *How Public Opinion Constraints the U.S. Supreme Cour*t, 55 AM. J. POL. SCI. 74, 86 (2011) (pointing out that the results of the empirical study conducted by the authors "suggest that the public opinion's influence on Supreme Court decisions is real, substantively important, and most pronounced in non-salient cases").

[167] Alison Higgins Merrill et al., *Confidence and Constraint: Public Opinion, Judicial Independence, and the Roberts Court*, 54 WASH. U. J.L. & POL'Y 209, 216–17 (2017).

[168] Keith E. Whittington, *Practice-Based Constitutional Law in an Era of Polarized Politics*, 18 GEO. J.L. & PUB. POL'Y 227, 238 (2020).

[169] *Id.* at 237.

At the same time, the Supreme Court Justices enjoy full judicial independence,[170] which can also be viewed as an obligation.[171] They are obviously not obliged to rule in accordance with the ideology of the President who appointed them. As Professor Donald Alexander Downs puts it, "[m]embers of the US Supreme Court are obligated to follow the evident dictates of law regardless of judicial predisposition."[172] However, the Justices are generally appointed on the basis of the views expressed in their previous positions.[173]

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[170] *See, e.g.*, Mario M. Cuomo, *Some Thoughts on Judicial Independence*, 72 N.Y.U. L. REV. 298, 304 (1997) ("The framers saw clearly that the judicial branch could play its part in democracy's balancing act only if it were free to maintain its loyalty to the Constitution and the federal law without direct interference by the legislature or executive. And so they made that independence inherent in the structure of the government.").

[171] *See* Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745, 776 (2001) ("Judicial restraint–by which I mean deciding cases in accordance with the discipline of legal reasoning, paying careful attention to the language of the statute or constitutional provision at issue, existing precedent and accumulated wisdom, coupled with that healthy distrust of the idea that judges must necessarily know better – is indeed the reciprocal obligation of judicial independence.").

[172] Downs, *supra* note 8, at 564.

[173] *See, e.g.*, STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 68 (1994) ("political considerations have entered into judicial appointments since the start, and sometimes, even in the early years of the Republic, the politics were about the nominee's likely votes."). Thus, for example, in an empirical study based on the examination of Justice Kavanaugh 's decisions as a judge in the United States Court of Appeals for the District of Columbia Circuit, it was found:

> Judge Kavanaugh is highly divisive in his decisions and rhetoric. He tends to dissent and be dissented against, typically along partisan lines . . . . Kavanaugh is in the top percentiles of dissents, especially against Democrat-appointed colleagues. This divisiveness ramps up during election season: Kavanaugh in particular is observed disagreeing with his colleagues more often in the lead-up to elections, suggesting that he feels personally invested in national politics . . . . Far more often than his colleagues, Judge Kavanaugh justifies his decisions with conservative doctrines, including politicized precedents that tend to be favored by Republican-appointed judges, the original Articles of the Constitution, and the language of economics and free markets . . . . [A]n exploratory sentiment analysis of his opinions shows that Judge Kavanaugh tends to speak negatively

IV. TYPES OF JUDICIAL TACTICS FOR ADDRESSING THE DILEMMAS

The difficulty that Supreme Court Justices' face when asked to decide controversial cases not in accordance with their constitutional views on the substance of the matter, does not mean that "it would be impossible to construct a theory – perhaps a 'meta theory' of legitimacy that would guide judges in resolving trade-offs among types of legitimacy."[174] Thus, the dual ambivalence, which we have described in previous Parts, may lead the Supreme Court—and, in practice, seems to have led it—to adopt tactics to cope with the two dilemmas we describe.

Over the years, the Supreme Court has developed various avoidance doctrines. Some avoidance doctrines, such as standing requirements, are based on the Case or Controversy Clause,[175] while others are based on judge-made doctrines that reflect judicial

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> of liberalism. He also expresses dislike toward government institutions and toward working-class groups.

Elliott Ash & Daniel L. Chen, *What Kind of Judge Is Brett Kavanaugh? A Quantitative Analysis*, 2018 CARDOZO L. REV. DE NOVO 70, 71–72. *See also* Chris Sagers, *Antitrust, Political Economy, and the Nomination of Brett Kavanaugh*, (Sept. 6, 2018), https://ssrn.com/abstract=3245279 (arguing that Judge Kavanaugh has demonstrated in his antitrust law decisions a strongly ideological agenda and a willingness to pursue it with substantial disregard for precedent and statute); Arnold W. Reitze, Jr., *Evaluation of Circuit Judge Kavanaugh's Opinions Concerning the CAA*, UTAH L. FAC. SCHOLARSHIP (Aug. 4, 2018), https://ssrn.com/abstract=3227006 (arguing that Kavanaugh believes a court's assessment of an agency's compliance with statutory limits does not depend on whether the agency's policy is good or whether the agency's intentions are laudatory, and that the courts must enforce statutory limits).

[174] Grove, *supra* note 3, at 2271.

[175] *See, e.g.*, Bradford C. Mank, *State Standing in* United States v. Texas*: Opening the Floodgates to States Challenging the Federal Government, or Proper Federalism?*, 2018 U. ILL. L. REV. 211, 214–15 ("While the Constitution does not explicitly require that every plaintiff establish "standing" to file suit in a federal court, the Supreme Court has implied from Article: III's limitation of judicial decisions to 'cases' and 'controversies' that federal courts must mandate standing requirements to ensure that a plaintiff has a genuine interest and a stake in the outcome of a case. For a federal court to have jurisdiction over a case, at least one plaintiff must show he has standing to seek each form of relief sought. Federal courts must dismiss a case if none of the plaintiffs meet the established Article: III standing requirements.").

minimalism.[176] Avoidance doctrines of the second category include, inter alia, the last resort doctrine, according to which a federal court should refuse to rule on a constitutional issue if the case can be resolved on a non-constitutional basis,[177] and the measured steps doctrine, whereby federal judges have to decide constitutional issues, when necessary, as narrowly as possible.[178]

Special relevance to the scope of the Supreme Court's judicial review of state court decisions based on the state constitution has the well-established adequate and independent state ground doctrine. According to this doctrine, when reviewing decisions of state courts, the U.S. Supreme Court will decline to hear a case—as a matter of judicial restraint[179]—if an adequate and independent state ground supports the state court decision.[180]

It can be assumed that the two dilemmas discussed above will lead the Roberts Court to expand the application of general avoidance doctrines as far as possible, and especially when the implementation of those avoidance doctrines relate specifically to

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[176] *See* Sanford G. Hooper, *Judicial Minimalism and the National Dialogue on Immigration: The Constitutional Avoidance Doctrine in* Zadvydas v. Davis, 59 WASH. & LEE L. REV. 975, 990 (2002) ("[C]ommentators who support the judiciary's use of the avoidance canon argue that it helps guarantee judicial minimalism rather than judicial activism . . . . [U]se of the constitutional avoidance doctrine can reduce conflict between the different branches of government and lead to validation, rather than invalidation, of congressional statutes.").

[177] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

[178] *See, e.g.,* Cass R. Sunstein, Opinion, *Kavanaugh Confirmation Won't Affect Supreme Court's Legitimacy,* BLOOMBERG (Sept. 30, 2018, 8:00 AM), https://www.bloomberg.com/opinion/articles/2018-09-30/kavanaugh-confirmation-won-t-affect-supreme-court-s-legitimacy [https://perma.cc/6 EXA-UKSJ] (arguing that the Supreme Court could preserve its legitimacy by issuing narrow ('minimalist') decisions). For the measured steps doctrine, see, e.g., Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297 (1996).

[179] *See Ashwander*, 297 U.S. at 341–56 (Brandeis, J., concurring).

[180] For the adequate and independent state ground doctrine *see, e.g.*, Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1061–65 (1994); Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 AM. U. L. REV. 1053, 1056–74 (1999).

reviewing state court rulings based on the state constitution. But as we will illustrate in Part V, the Court may also cope with these dilemmas by means of additional judicial tactics.

The control of the Supreme Court by conservative Justices may also oblige liberal judges to make tactical choices.[181] However, the main dilemmas of this type plague the conservative Justices, who are in the majority. This is because the conservative Justices have to balance their federalist view with their material constitutional views, and deal with the Court's current legitimacy problems.

In this Part we point out further Supreme Court tactics for addressing the dilemmas we have described in the previous Parts. The judicial tactics we describe are of two types: substantive and procedural.

Substantive Tactics: In terms of substantive law, the Court may try to seek judicial compromise in order to reach a broad common denominator among the Justices. The power of the Justices to form compromises was described as "legitimate if limited"[182] and in some

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[181] *See generally* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement,* 2019 SUP. CT. REV. 271 (2019) (discussing the Supreme Court's seven-to-two voting pattern in American Legion v. American Humanist Association, 139 S. Ct. 2067 (2019), rejecting an Establishment Clause challenge to state ownership and display of a 40-foot tall Latin cross). The authors point out:

> Faced with sharper divisions and likely defeats, the Court's more liberal Justices must make difficult choices. One option is simply to follow their considered interpretations of the Constitution. They can act on what they believe is the most justified conception of the law without regard to whether it exacerbates conflict. Another option is to behave strategically. Especially in cases where considerations of principle or precedent could support a range of outcomes, the Justices in the minority might take instrumental considerations into account. They could compromise, offering concessions in exchange for incremental progress. Or they could work to co-opt Justices who they believe may be willing to vote with them in future cases, offering them cooperation today in the hope of an alliance tomorrow. These strategies are fairly familiar.
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> Yet the liberal Justices might follow another approach—they could engage in appeasement.

Id. at 271–72.

[182] Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1943, 2008 (2019).

cases even as a "constitutional imperative."[183] Indeed, Supreme Court decisions based on judicial compromises do form and "presidents [that] will not be in a very strong position to challenge the Court, . . . may find ways to support the Court in the name of consensus or moderation."[184] Indeed, a series of examples of compromise between Justices can be found, with a view to reaching a consensus—among all the Justices, or at least between the majority Justices.[185] In a different context, it has been argued that

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[183] Samuel A. Marcosson, Masterpiece Cakeshop *and Tolerance as a Constitutional Mandate: Strategic Compromise in the Enactment of Civil Rights Laws*, 15 DUKE J. CONST. L. & PUB. POL'Y 139, 167 (2020).

[184] J. Mitchell Pickerill & Cornell W. Clayton, *The Roberts Court and Economic Issues in an Era of Polarization*, 67 CASE W. RES. L. REV. 693, 704 (2017).

[185] *See,* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 4-7 (1998) (relying on the conference notes of Justices Brennan and Powell to show that the intermediate level of scrutiny that is applied to gender discrimination claims was a product of compromise among the Justices in the majority coalition); William D. Araiza, *Was Cleburne an Accident?*, 19 U. PA. J. CONST. L. 621 (2017) (providing an in-depth history of the internal debates in City of Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432 (1985), and suggesting that the features that have caused many scholars to read it as an "animus" decision were not the result of deliberate doctrinal choices at all, but rather the result of a series of ad hoc unrelated compromises among the Justices in the majority); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 780 (1995) (pointing out that "Chevron [Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)] made sense as a compromise among Justices who knew that they were likely to produce an extraordinarily confusing body of case law if each Justice felt free to express his views with respect to the meaning of ambiguous provisions in agency-administered statutes"); Julie R. O'Sullivan, United States v. Johnson: *Reformulating the Retroactivity Doctrine*, 69 CORNELL L. REV. 166, 194 (1983) ("[T]he internally inconsistent *Johnson* decision [United States v. Johnson, 457 U.S. 537 (1982)] does not validate Harlan's retroactivity jurisprudence, but instead represents a compromise among Justices who use the retroactivity theory."); THE SUPREME COURT, 1986 TERM: LEADING CASES: *III. Federal Statutes and Regulations*, 101 HARV. L. REV. 270, 309, n.67 (1987) ("One explanation for the Court's failure [in Bowen v. Gilliard, 483 U.S. 587 (1987)] to broaden explicitly the permissible justifications for affirmative action is that the opinion reflects a compromise among the Justices who joined it."); Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of* Parents Involved, 69 OHIO ST. L.J. 1321, 1328 (2008) (pointing out that "[Parents Involved in Community Schools v. Seattle School District N. 1, 551 U.S. 701

the Supreme Court may "respond to both sides of the . . . dispute by fashioning a constitutional law in which each side can find recognition."[186] And it has been argued that considerations of public legitimacy of the Supreme Court influenced the vote of Chief Justice Roberts in a number of recent cases.[187] A further tactic on the

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(2007)] was the last major desegregation case in which the Court spoke with one voice. The unanimous opinion was the product of tense negotiation and behind-the-scenes compromise among the Justices . . . ."; Peter L. Giunta, *Unequalled Among Firsts*, 25 CARDOZO L. REV. 2079, 2086 (1994) (arguing that "United States v. Lopez [514 U.S. 549 (1995)] was a compromise that restricted the scope of the 'substantially affecting' interstate commerce standard created by the Court during the New-Deal Era. The compromise was between Justices O'Connor and Kennedy who favored stability and moderation, and Justice Thomas, who wanted to get back to the original meaning of the Constitution by limiting the power of Congress to impinge on areas of regulation reserved to the states."); J. Stephen Clark, *President-Shopping for a New Scalia: The Illegitimacy of "McConnell Majorities" in Supreme Court Decision-Making,* 80 ALB. L. REV. 743, 745 (2017) ("[T]he Court could try to avoid rendering 5-4 decisions that depend on the vote of a Justice who owes his or her seat to the kind of President-shopping that McConnell has now pioneered."). *See generally,* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (W.W. Nortion & Co., 11th ed., 2017).

[186] Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 429 (2007) (discussing Planned Parenthood v. Casey, 505 U.S. 833 (1992), in which the Supreme Court declined either to overrule Roe v. Wade or to retain its broad, rule-like trimester framework); *See also* Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1677 (2021) ("The *Casey* joint opinion makes clear that the Justices declined to overrule Roe v. Wade in large part out of concern for the Supreme Court's sociological legitimacy.").

[187] *See* Klarman, *supra* note 137, at 253 ("[I]n the ACA [Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012)] and census [Dep't of Com. v. N.Y., 139 S. Ct. 2551 (2019)] cases, Chief Justice Roberts apparently changed his mind at the last moment, voted against ideological conviction, and handed the liberals two important victories . . . . [H]e seems to have done the same thing three more times, but without the last-minute change of heart: the case involving the Trump Administration's suspension of President Obama's Deferred Action for Childhood Arrivals program [Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020)], the Louisiana abortion case [June Med. Servs., LLC v. Russo, 140 S. Ct. 1101 (2020)], and the Title VII cases [Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020)]. Perhaps the Chief was just playing the part of the proverbial umpire calling balls and strikes, but the smart money is betting that his

substantive law level is to prevent or delay Supreme Court rulings regarding the constitutionality of state court decisions based on the state constitution, narrowly ruling on a technical jurisprudence issue.[188]

Procedural Tactics: In terms of procedural policy, the Roberts Court may further develop the "Babysitter Model," which the Court has already implemented in *Zubik v. Burwell*[189] and *Trump v. International Refugee Assistance Project*.[190] According to this model, the Supreme Court does not provide a well-founded resolution, but rather accompanies, attends, and encourages other branches to carry out their constitutional obligations. The case is ongoing until the dispute is reasonably resolved.[191]

Another procedural tactic is delaying the Court's decision as much as possible. The Supreme Court has already adopted this tactic in certain cases, and it has been argued that the delay was beneficial both to the court and the parties.[192] Indeed, normally, "[i]f the Justices knew that there always would be an even sharing of power, they could not delay their rulings in the hope that they would later be able to secure a majority for their views."[193] However, the Supreme Court may delay a polarizing decision as long as the Court

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concern for the Court's legitimacy and his own historical reputation were the determinative factors.").

[188] Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 COLUM. L. REV. 1013, 1072 (2008).

[189] Zubik v. Burwell, 578 U.S. 403 (2016).

[190] Trump v. Int'l Refugee Assistance Program, 137 S. Ct. 2080 (2017).

[191] For the babysitter model, *see* Bendor & Segev, *supra* note 22.

[192] Martinez, *supra* note 188, at 1071–72 ("Better to delay the decision about substantive rights at Guantanamo for a few more years, the unstated reasoning goes, rather than run the risk of a wrong and premature decision. For the detainees, the fear is that judges in the immediate aftermath of September 11th might be too quick to uphold programs that, in a more sober atmosphere several years down the road, might be found unlawful. For the judges, the fear is that they will strike down a counterterrorism policy as unconstitutional today, only to wake up tomorrow to a nuclear bomb in New York City. For the government, an immediate ruling in favor of broad powers would, of course, be ideal, but no decision at all is better than a decision against the executive branch. Thus, one reason that much of the litigation has dragged on so interminably is that, in some cases, no one involved actually wants the merits issues decided anytime soon.").

[193] David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411, 425 (2018).

is in a legitimacy deficit. Furthermore, federal courts can delay decisions by requiring the litigants to pursue unclear state law issues in state courts before seeking a federal constitutional ruling.[194] However, excessive use by the Supreme Court of procedural tactics may be perceived by the public as procrastination, and may undermine the sociological legitimacy of the Court. We therefore anticipate that the Supreme Court will not make frequent use of such tactics.

V. THE ROBERTS COURT'S AMBIVALENCE AND TACTICS IN *MASTERPIECE CAKESHOP, ESPINOZA*, AND *BOOCKVAR*

This Part demonstrates the judicial tactics used by the Roberts Court to address the two dilemmas through an analysis of a number of recent Supreme Court decisions that deal with state court decisions based on state constitutions.

A. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,[195] illustrates a material judicial compromise, aimed to reach a broad common denominator among the Justices. The compromise enabled the Court to punt the case back to the state court.

Charlie Craig and David Mullins got married in Massachusetts.[196] They wanted to celebrate their wedding in their hometown in Colorado.[197] They went to a local bakery, Masterpiece Cakeshop, and sought to purchase a wedding cake for the celebration.[198] The Christian owner of Masterpiece Cakeshop, Jack Phillips, refused to design and bake the cake, saying that gay marriage violates his religious beliefs.[199] Craig and Mullins filed a

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[194] *See* Kloppenberg, *supra* note 180, at 1030.

[195] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018).

[196] *Id.* at 1724.

[197] *Id.*

[198] *Id.*

[199] *Id.*

discrimination complaint against Masterpiece Cakeshop and Phillips.[200] The Colorado Civil Rights Division found a probable cause that Phillips violated the Colorado Anti-Discrimination Act (hereinafter: the State Law),[201] that provides:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.[202]

The Colorado Civil Rights Commission "found it proper to conduct a formal hearing and sent the case to a State [administrative law judge (ALJ)]. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor."[203] The Commission agreed, and found that Phillips violated the State Law, since he would design and bake a cake for opposite-sex couples but not for same-sex couples.[204] The Colorado Court of Appeals affirmed the Commission's ruling[205] and the Colorado Supreme Court denied review.

In the *Masterpiece Cakeshop* decision,[206] the U.S. Supreme Court avoided answering whether forcing Masterpiece Cakeshop to

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[200] *Id.*at 1725.

[201] *Id.* at 1726; COLO. REV. STAT. § 24-34-601(2)(a) (2021).

[202] COLO. REV. STAT. § 24-34-601(2)(a) (2021).

[203] *Masterpiece Cakeshop*, 138 S. Ct. at 1726

[204] *Id.*

[205] Craig v. Masterpiece Cakeshop, Inc., 370 P. 3d 272, 283 (Colo. App. 2015).

[206] Although the decision was recently given by the Federal Supreme Court only recently, on June 4, 2018, the decision has already been discussed in numerous scholarly articles. For discussions of the *Masterpiece Cakeshop* decision *see, e.g.*, Brendan Beery, *Prophylactic Free Exercise: The First Amendment and Religion in a Post-Kennedy World*, 82 ALB. L. REV. 121 (2018); Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors?*, 2018 CATO SUP. CT. REV. 139; Chad Flanders & Sean Oliveira, *An Incomplete Masterpiece*, 66 UCLA L. REV. DISC. 154 (2019); Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171 (2019); Rodney K. Smith, *Flickering Lights on a Hill: The Decline in the Importance of the Right of Religious Conscience and its Implications*, 46 CAP. U. L. REV. 399 (2018). *See*

design and bake a cake for a same-sex wedding would violate free exercise of religion or freedom of speech under the First Amendment. The Court refrained from making any decision in regard to the constitutionality of the State Law. Instead, in a 7-2 decision delivered by Justice Kennedy with dissenting opinions by Justices Ginsburg and Sotomayor, the Court ruled narrowly that the Colorado agency decided Phillips' case in a way that indicated that the agency was biased against religious individuals and thus violated his First Amendment right to free exercise of religion.[207]

Justice Kennedy's majority opinion highlighted the importance of both gay rights and religious freedom. However, he invalidated the decision of the Commission on the ground that comments made by members of the Commission while adjudicating Phillips' claim, including the description of his refusal as "one of the most despicable pieces of rhetoric that people can use," have "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."[208]

In light of the reasoning in *Masterpiece Cakeshop*, some commentators argue that the decision may not be a religious liberty decision at all, but one about the violation of due process rights.[209] From a material point of view, *Masterpiece Cakeshop* can be read in different and even opposite ways. On the one hand, it has been argued that, according to the decision, there is no constitutional right to religious exemptions from neutral and generally applicable public accommodations laws; that the government's interest in avoiding dignitary harm is sufficient to defeat most claims for religious exemptions; that courts should be sensitive to evidence of government animus against vulnerable groups; and that for these purposes sexual orientation discrimination and racial discrimination are structurally parallel.[210] On the other hand, several passages of Justice Kennedy's opinion may be read to suggest that the basic

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also Erwin Chemerinsky, *Not a Masterpiece: The Supreme Court's Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 43 HUM. RTS. 93 (2018).

[207] *See Masterpiece Cakeshop*, 138 S. Ct. at 1727, 1732.

[208] *Id.* at 1729.

[209] *See* Flanders & Oliveira, *supra* note 206, at 174–75.

[210] *See* Sager & Tebbe, *supra* note 206, at 174–76.

structure of Colorado's civil rights law is unconstitutionally hostile to religion.[211]

Professor Zachary Price argues:

> [C]ourts in a polarized period should lean towards outcomes, doctrines, and rationales that confer valuable protections across both sides of the Nation's major political divides, and away from those that frame constitutional law as a matter of zero-sum competition between competing partisan visions.[212]

This approach, which Price calls "symmetric constitutionalism," "seeks to orient constitutional decision-making towards achieving bipartisan appeal (or at least acceptance) and away from zero-sum competition between partisan understandings."[213]

While the symmetric constitutionalism approach rests primarily with the *Masterpiece Cakeshop* decision, this approach is not limited to cases of friction between the position arising from federalism principles and the position on substantial constitutional questions. However, in our view, the decision can be understood first and foremost against the background of the dual ambivalence, both material and institutional, which we discussed in Part IV of this Article.

Justices appointed by both Republican and Democratic presidents may be required to reconcile different judicial views in cases like *Masterpiece Cakeshop*, where the Supreme Court reviews state court decisions based on the state constitution. Thus, in *Masterpiece Cakeshop*, conservative Justices were required to reconcile a federal conservative approach that advocates the deference of federal courts to state courts rulings based on state law, and a material conservative approach that opposes an imposition of obligation on governmental authorities and private individuals to respect same-sex marriage. On the other hand, liberal Justices were in a position where their general approach, allowing broad judicial

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[211] *See id*. at 172.

[212] Zachary S. Price, *Symmetric Constitutionalism: An Essay on* Masterpiece Cakeshop *and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1274–75 (2019).

[213] *Id.* at 1278.

review of state court rulings, might have been used as the basis for a conservative material decision.

The result reached by the Supreme Court in *Masterpiece Cakeshop*, supported by seven out of the nine Justices, including two Justices appointed by Democratic presidents and labeled as liberal, allowed Justices that are considered conservative and Justices considered liberal to bypass the difficulties we described and the ambivalence they cause.[214]

B. Espinoza v. Montana Department of Revenue and Trinity Lutheran Church of Columbia, Inc. v. Comer

Espinoza v. Mont. Dep't of Revenue[215] and *Trinity Lutheran Church of Columbia, Inc. v. Comer*[216] exemplify a combination of material and procedural Supreme Court tactics that enabled the Court to carefully address the problem of governmental funding of religious education.

The Montana Legislature established a program that grants tax credits to those who donate to organizations that awards scholarships for private school tuition.[217] The Montana Constitution contained a provision that bars government aid to schools controlled by church, sect, or domination.[218] The Montana "no aid" constitutional provision is similar to thirty-seven other states' constitutional provisions; known as Blaine Amendments.[219] In

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[214] Professor Manoj Mate brings Masterpiece Cakeshop as an example of conflicting rights guardianship involving a state court. *See* Manoj Mate, *Inverted Judicial Guardianship*, 17 STAN. J. C.R. & C.L. 53, 130–01 (2021).

[215] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

[216] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

[217] *See Espinoza*, 140 S. Ct. at 2251.

[218] MONT. CONST. art. X, § 6(1).

[219] *See, e.g.*, Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 65 (1992); Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 668 (1998); Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65, 110 (2002); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y 551, 573 (2003); Margo A. Borders, *The Future of State Blaine*

pursuant to the "no aid" provision, the Montana Department of Revenue promulgated a rule that excluded religious schools from the scholarship program.[220]

Three families who were blocked from using the scholarship funds for their children's tuition at a religious school sued the Department in state court, arguing that they were discriminated against due to their religious beliefs and the religious nature of their school.[221] The trial court enjoined the discriminatory rule.[222] However, the Montana Supreme Court reversed and invalidated the entire program set by the Montana Legislature because it violated the "no aid" provision.[223] The families petitioned the U.S. Supreme Court, arguing that the Montana Supreme Court's interpretation of the Montana Constitution violated their rights under the Free Exercise Clause of the First Amendment and Equal Protection Clause of the Fourteenth Amendment.[224]

A divided (5-4) U.S. Supreme Court reversed and remanded. Chief Justice Roberts delivered the opinion of the Court.[225] He ruled that the application of the no-aid provision by the Montana Supreme Court was in violation of the Free Exercise Clause of the Federal Constitution because it excluded religious school from public benefits solely because of their religious identity.[226] He stated that states are not compelled to subsidize private schools, but, if they choose to do so, they cannot exclude some private schools solely because they are religious.[227]

In our opinion, *Espinoza* should be explained through a broad institutional view that involves the legal struggle for government

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Amendments in Light of Trinity Lutheran: Strengthening the Nondiscrimination Argument, 93 NOTRE DAME L. REV. 2141, 2146 (2018).

[220] *Espinoza*, 140 S. Ct. at 2251.

[221] *Id.* at 2252.

[222] *Id*.

[223] Espinoza v. Dep't of Revenue, 435 P.3d 603, 615 (Mont. 2018).

[224] Petition for Writ of Certiorari, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195).

[225] Chief Justice Roberts was joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh. The four Justices at that time, who were nominated by Democratic presidents, Justices Ginsburg, Breyer, Sotomayor and Kagan, dissented. *See generally id.*

[226] *See id*. at 2256.

[227] *See id*. at 2261.

funding of religious education and the continuing effort to work out the division of power of judicial federalism and to curb its partisan inclinations. Since *Zelman v. Simmons-Harris*,[228] in which the Court upheld a Cleveland school vouchers program against an Establishment Clause challenge, the opponents of government funding of religious education turned to state constitutional law and state courts to thwart initiatives to publicly fund religious institutions.[229] While some state supreme courts adopted interpretations similar to *Zelman* for their own state constitution, others explicitly declared that the state constitution erects a higher wall of separation.[230] In *Locke v. Davey*[231] the Supreme Court held that a state could deny scholarship to students who were pursuing a devotional theology degree, and that there is "room for play in the joints" between the Establishment and the Free Exercise Clauses.[232] Thus, *Locke* suggested that each state has significant policymaking latitude in the room between the two religion clauses. However, *Locke*'s precise bounds were far from clear. The holding did not address the constitutionality of Blaine Amendments, and it did not mention judicial federalism.

The Roberts Court tried to confront these issues in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[233] in which it invalidated a Missouri decision to disqualify churches and other religious organizations from a program that awarded reimbursement grants to obtain safer playground surfaces made from recycled tires.[234] The Court (7-2) held that an organization cannot be excluded from a generally available public benefit program solely because of its religious identity.[235] Unlike the rest of the Court's opinion, footnote 3 was supported only by Chief Justice Roberts and by Justices Kennedy, Alito and Kagan, and substantially limited the

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[228] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[229] *See* Fitzpatrick, *supra* note 111, at 1864.

[230] *See id*. at 1865.

[231] Locke v. Davey, 540 U.S. 712 (2004).

[232] *Id*. at 718–21 (Rehnquist, C.J.).

[233] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

[234] *See id*. at 2017.

[235] *See id*. at 2024–25.

reach of the opinion to express discrimination based on religious identity with respect to playground resurfacing.[236]

However, a day after the Court had rendered *Trinity Lutheran*, it punted four cases back to state courts for further consideration in light of the decision.[237] The significance of this move was that *Trinity Lutheran* is not about playground resurfacing only,[238] and that the Court is in the opinion that the decision shall guide state courts addressing religious neutral educational aid programs while applying their state constitutions and Blaine Amendments.[239]

Trinity Lutheran's mixed signals and curious compromises regarding judicial federalism are also apparent in footnote 1, in which the Court discusses whether the case poses a live controversy due to events that occurred after the petition was filed.[240] When the Court was about to rule in *Trinity Lutheran*, Missouri elected new governor and attorney general,[241] who announced a change in the

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[236] *See id*. at 2024 n.3.

[237] U.S., Order List: 582 U.S. (June 27, 2017), https://www.supremecourt.gov/orders/courtorders/062717zr_6537.pdf .

[238] Erica L. Green, *Supreme Court Ruling Could Shape Future of School Choice*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/us/politics/supreme-court-school-choice-ruling.html.

[239] Doyle v. Taxpayers for Pub. Educ., 137 S. Ct. 2324 (2017) (concerning whether it violates the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally-available and religiously-neutral student aid program simply because the program affords students the choice of attending religious schools); Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ., 137 S. Ct. 2327 (2017) (concerning whether Colorado's Blaine Amendment, which the unrebutted record plainly demonstrates was born of religious bigotry, can be used to force state and local governments to discriminate against religious institutions without violating the Religion Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment); Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ., 137 S. Ct. 2325 (2017) (concerning whether requiring a state to categorically deny otherwise neutral and generally available public aid on the basis of religion violates the United States Constitution); N.M. Ass'n of Non-pub. Schs. v. Moses, 137 S. Ct. 2325 (2017) (concerning whether applying a Blaine Amendment to exclude religious organizations from a state textbook lending program violates the First and Fourteenth Amendments).

[240] *Trinity Lutheran*, 137 S. Ct. at 2019 n,1.

[241] *State of Missouri Official Election Results*, MO. SEC'Y OF STATE, https://enrarchives.sos.mo.gov/enrnet/default.aspx?eid=750003949 (last visited Oct. 17, 2021). For the 2016 election returns select from the dropdown menu

state's policy and allowed religious organizations to apply for state aid and grants on equal terms.[242] Ordinarily, these developments would have mooted the case. However, the Governor and the Attorney General insisted otherwise, reasoning that Missouri's courts may enjoin any future payments to the petitioner under the new policy, as well as that Missouri law grants standing to taxpayers who seek an injunction barring payments of state funds that would violate the State Constitution.[243] The Supreme Court accepted this claim in footnote 1, citing a letter from Counsel for the Missouri Department of Natural Resources, adopting the position of the Missouri Attorney General's Office, consistent with the Missouri Supreme Court's interpretation of Missouri Constitution, that there is no clearly effective barrier that would prevent the Department from reinstating its policy in the future.[244]

According to conventional wisdom, Supreme Court in *Trinity Lutheran*, like in other high-profile hot button cases, were seeking a broad consensus in order to avoid a 5-4 ideological split. Such a consensus, however, could only be reached on a very narrow ground.[245] Consequently, the commenters critique *Trinity Lutheran* as either too narrow or too broad, focusing on the substantive

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"State of Missouri – General Election, November 8, 2016". For the 2012 election returns select "State of Missouri – General Election, November 6, 2012."

[242] *See Governor Greitens Announces New Policy to Defend Religious Freedom*, OFF. OF MO. GOVERNOR (Apr. 13, 2017); Jason Hancock, *Gov. Greitens Reverses State Policy, Allowing Tax Dollars to Aid Religious groups*, THE KAN. CITY STARE (Apr. 13, 2017, 11:27 AM), https://www.kansascity.com/news/politics-government/article144497099.html; Celeste Bott, *Greitens Instructs DNR to Consider Religious Organizations for Grants*, ST. LOUIS POST-DISPATCH (Apr. 13, 2017), https://www.stltoday.com/news/local/crime-and-courts/greitens-instructs-dnr-to-consider-religious-organizations-for-grants/article_68b8bb5a-c6a8-56de-87d7-b6e31e2e2418.html. *Missouri Attorney General's Office Recuses from Trinity Lutheran Case*, MO. ATT'Y GEN. JOSH HAWLEY (Apr. 18, 2017).

[243] *See Trinity Lutheran Church of Columbia, Inc. v. Commer, Case No. 15-577 – Response to the Court*, D. JOHN SAUER, FIRST ASSISTANT AND SOLICITOR, MO. ATT'Y GEN. OFFICE (Apr. 17, 2017).

[244] *Trinity Lutheran*, 137 S. Ct. at 2019 n,1.

[245] *See, e.g.*, Fred Yarger, *Symposium: The Justices Reach Broad Agreement, but on a Narrow Question*, SCOTUSBLOG (June 27, 2017, 11:13 AM), https://www.scotusblog.com/2017/06/symposium-justices-reach-broad-agreement-narrow-question/.

constitutional issue, namely, that the Court further limited the play between the joints of the Establishment Clause and the Free Exercise Clause of the First Amendment.[246] It seems, however, that inclusion in *Trinity Lutheran* of this complex combination of signals and compromises was motivated, at least in part, by the state court's liberal activist role regarding standing and constitutional interpretation.

Indeed, the *Trinity Lutheran* decision is a federal constitutional case, involving only federal courts (the Federal District Court, the Eighth Circuit, and the Supreme Court). However, the decision of the Trinity Lutheran Church to wage its legal battle over state assistance to religious education in federal courts was not coincidence. It seems that it was intended to counter the opposing party's reliance on the Blaine Amendment and Missouri Supreme Court's restrictive interpretation of Missouri's Constitution.[247]

While the *Espinoza* decision, unlike the *Trinity Lutheran* decision, divided the Supreme Court in accord to the known ideological split of 5-4, Chief Justice Roberts' opinion in *Espinoza* is in direct continuum to *Trinity Lutheran*. Thus, Chief Justice Roberts' opinion in *Espinoza* is carefully maneuvering between the conflicting commitments to federalism, free exercise, judicial restraint, and the Supreme Court's precedents.

First, Chief Justice Roberts explained in his opinion in *Espinoza* that the case is controlled by *Trinity Lutheran* and not by *Locke*, since the plaintiff in *Locke* was denied a scholarship because of what he planned to do with the money—prepare for ministry, which is a religious enterprise.[248] By contrast, the Montana no-aid constitutional provision as applied by the Montana Supreme Court does not zero in on any religious activity, but rather bars benefits to

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[246] *See* Erin Morrow Hawley, *Symposium: Putting Some Limits on the 'Play in the Joints'*, SCOTUSBLOG (June 26, 2017), https://www.scotusblog.com/2017/06/symposium-putting-limits-play-joints/.

[247] *See* Tim Keller, Senior Attorney, Institute for Justice, *2019 Summit Panel: School Choice in the Courts*, YOUTUBE (May 21, 2019), https://www.youtube.com/watch?v=pUnujYSkMPs&t=244s (discussing the choice of venue by supporters and opponents of school choice in light of the Blaine Amendments).

[248] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257–61 (2020).

religious schools based on their religious nature.[249] Chief Justice Roberts points out that contrary to the *Locke* decision, that involved an historic and substantial state interest in not funding the training of clergy, Montana had no comparable tradition of disqualifying religious schools from public aid.[250] However, Chief Justice Roberts did accept Montana's claim that the historic record of the no-aid provision is complex, and was not willing to go as far as Justice Alito, who suggested in his concurring opinion that the Montana no-aid provision could not be separated from its original prejudiced motivation again Catholic immigrants.[251]

Second, Chief Justice Roberts rejected the arguments made by Justice Sotomayor, stressing that the Montana Supreme Court's decision did not violate the Free Exercise Clause since it rested on state law grounds, there was no violation of the Free Exercise Clause since the Montana Supreme Court invalidated the entire scholarship program and the religious schools, and religious parents were not excluded from any generally available benefit.[252] Chief Justice Roberts responded that her description was not accurate because although the Montana Legislature created the scholarship program, the Montana Supreme Court choose to end it altogether when it realized that there was no other mechanism to ensure that religious schools received no aid.[253] While the state court's final step was to eliminate the program harming religious and non-religious school alike, the state court erred when it applied the no-aid provision in one of those cases that violated the Free Exercise Clause of the Federal Constitution.[254]

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[249] *Id*. at 2249.

[250] *Id*. at 2257–59.

[251] *Id*. at 2270–72 (Alito, J., concurring).

[252] *Id*. at 2253–55.

[253] *Id*. at 2262.

[254] *Id*.

C. Republican Party of Pennsylvania v. Boockvar

The *Republican Party of Pennsylvania v. Boockvar* Supreme Court decision[255] demonstrates the use of the "Babysitter Model" of delaying decision on the constitutionality of decision by state courts.

The Supreme Court of Pennsylvania extended the statutory deadline, which had been set by the Pennsylvania Legislature, for receiving mail-in ballots by three days and ordered officials to count ballots even if they did not have postmarks indicating that the ballots were mailed by election day.[256] The Republican Party petitioned the Supreme Court arguing that the state court violated the United States Constitution by usurping the Pennsylvania Legislature's authority to determine the rules governing the conduct of elections for federal office.[257] The petitioners sought a stay of the Supreme Court of Pennsylvania's decision. They argued that the state court's decision sowed chaos into the electoral process in Pennsylvania, and would embolden lower federal courts and state courts all over the country to alter the enacted statutory deadlines in the final weeks before the 2020 presidential election.[258]

Three weeks after the filing, the Court denied the stay by an equally divided Court without explanation.[259] Although the Senate was about to hold a hearing on Judge Amy Coney Barrett's confirmation, the eight members of the Court did not wait. In the absence of a majority, four conservative Justices publicly indicated that they would have granted the stay. Four days later, the petitioners requested the Court to expedite the review and decide the underlying constitutional question prior to the election. The request was denied again by an equally divided vote.[260] The decision stated that the

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[255] Republican Party of Pa. v. Boockvar, 141 S. Ct. 1 (2020).

[256] Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).

[257] U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2.

[258] Emergency Application for Stay Pending the Filing and Disposition of a Petition for Writ of Certiorari at 31, Pa. Democratic Party v. Bookvar, 238 A.3d 345 (Pa. 2020) (No. 20A53), https://www.scotusblog.com/wp-content/uploads/2020/09/20A53-1.pdf.

[259] *See id*. (*cert. denied*).

[260] *Id*.

Court's new Justice, Amy Coney Barrett, did not participate in the deliberation.[261]

In a brief statement, Justice Alito, joined by Justices Thomas and Gorsuch, criticized the Court's unwillingness to promptly resolve the constitutional dispute of national importance, which "needlessly created conditions that could lead to serious post-election problems."[262] According to Justice Alito, "the Court simply denied the stay" by an equally divided vote.[263] Justice Alito opined the well-known conservative Justices position[264] that the Federal Constitution conferred on state legislatures, not state courts, the authority to make rules governing federal elections, and that this provision "would be meaningless" if state courts could override the rules set by the legislatures simply by appealing to the state constitutional provision that orders the conduct of fair election.[265] Justice Alito acknowledged, that at that late date, there was not enough time to decide the question before the election, but insisted the petition for certiorari remains before the Court and if granted, the case could be decided under a shortened schedule.[266] Justice Alito added that the State of Pennsylvania ordered county election boards to segregate ballots received after the polls closed on election day but before the extended deadline, so that if the state court's

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[261] According to the Court's Public Information Office, Justice Coney Barrett decided not to participate in order to allow the other Justices to act on the motion quickly, and since she had not fully reviewed the fillings. *See* Amy Howe, *Court Will not Weigh in on Pennsylvania's Mail-in Ballot Deadline Before Election*, SCOTUSBLOG (Oct. 28, 2020), https://www.scotusblog.com/2020/10/court-will-not-weigh-in-on-pennsylvanias-mail-in-ballot-deadline-before-election/.

[262] Justice Alito noted that the Republican Party of Pennsylvania had asked the Court to stay the state court's decision and that the Democratic Party of Pennsylvania in earlier proceedings agreed that the constitutionality of the state court's ruling was a matter of "national importance" and urged the Court to grant review and to decide the issue before the election. Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020).

[263] *Id.*

[264] *See* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000); Bush v. Gore, 531 U.S. 98 (2000).

[265] *See Boockvar*, 141 S. Ct. at 2.

[266] *See id.*

decision is ultimately overturned, a targeted remedy would be available.[267]

Justice Alito's criticism was apparently directed at Chief Justice Roberts, who preferred to postpone consideration of the case until after the election, hopping that it would be mooted, if the state court's decision to extend the deadline would not affect the overall election outcomes between Biden and Trump. Judicial stalling ("babysitting") as a cognized tactic is uncommon in the Supreme Court.[268] The federal constitutional structure provides the Supreme Court an almost absolute discretion to decide its docket, which enable it not to decide hot button controversial issues by letting them percolate in the lower courts[269] and by punting them back to lower court for reconsideration in accordance to its directives (like in *Masterpiece Cakeshop*)[270] until the Court decides it's time to intervene and resolve the dispute in accord to the Justices constitutional understanding.

However, in recent years there have been few cases where the Court has opted for a delaying or babysitting approach, especially in high profile social and political disputes where judges themselves are divided and polarized, such as in *Zubik v. Burwell*[271] and in *Trump v. International Refugee Assistance Project*.[272] The Babysitter Model is not decision oriented. The Supreme Court does

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[267] *Id.* Three days after the presidential election, and at the end of the extended deadline, Republican petitioners filed a motion to continue to segregate the ballots and not to include them in the final total of votes. This request was partially granted by Justice Alito, who is geographically responsible for the area that includes the state of Pennsylvania. Justice Alito ordered them to continue separating the ballots, but refused to order not to count them without the request being approved by the Supreme Court in full composition. *See* Republican Party of Pennsylvania v. Boockvar, 208 L. Ed. 2d 293 (Alito, Circuit Justice, 3d Cir. 2020).

[268] *See* Bendor & Segev, *supra* note 22.

[269] *See* Tom S. Clark & Jonathan P. Kastellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. POL.150 (2013).

[270] *See* Linda Greenhouse, *The Supreme Court is Showing an Instinct for Self-Preservation, at Least Until Next Year Election*, 2019 SUP. CT. PREVIEW 658 (2019).

[271] Zublik v. Burwell, 136 S. Ct. 1557, at 1559–60 (2016).

[272] Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017).

not provide a well-founded resolution, but rather accompanies attends, and encourages other branches to carry out their constitutional obligation. The case is ongoing until the dispute is reasonably resolved according to the Justices' understanding.

Justice Alito's critique shows that the Supreme Court's inaction and delay was not only a result of necessity (due to shortness of time to decide before election day), but also a product of Chief Justice Robert's ideology[273] that favors constitutional compromises over final or binary resolutions.[274] The Court's hesitation to intervene in the state court's ruling can be attributed to Chief Justice Roberts' lack of conviction that the Supreme Court's involvement was necessary or worthwhile.[275] Namely, the limited number of late arriving ballots was unlikely to affect the outcome of the election, and other contestations of significant irregularities,[276] like in *Texas v. Pennsylvania*,[277] were beyond the Court's limited constitutional role and limited tools to correct wrongs and defects in the election.[278]

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[273] *See* Henry T. Scott, Note, *Burkean Minimalism and the Roberts Court's Docket*, 6 GEO. J. L. & PUB. POL'Y 753, 761, 763 (2008).

[274] *See* S.M., *Shrewd Justice: The Supreme Court's Curious Compromise on the Travel Ban*, THE ECONOMIST (June 26, 2017), https://www.economist.com/blogs/democracyinamerica/2017/06/shrewd-justice.

[275] *See* Tom Goldstein, *The Dilemma of the Pennsylvania Injunction Request*, SCOTUSBLOG (Nov. 7, 2020, 1:32 PM), https://www.scotusblog.com/2020/11/the-dilemma-of-the-pennsylvania-injunction-request/.

[276] *See* Amy Howe, Texas Tries Hail Mary to Block Election Outcome, SCOTUSBLOG (Dec. 8, 2020, 1:20 PM), https://www.scotusblog.com/2020/12/texas-tries-hail-mary-to-block-election-outcome/.

[277] Texas v. Pennsylvania, 141 S. Ct. 1230 (2020).

[278] The Supreme Court declined to hear the petition of Texas, filed by its Attorney General, for a temporary order preventing Pennsylvania, Michigan, Georgia and Wisconsin from certifying their 2020 election results. Texas argued that changes to those states' election procedures in light of the COVID-19 pandemic, violated the Federal Constitution. None of the Justices President Trump has nominated has accepted this challenge. *See* Downs, *supra* note 8, at 563. The rejection was based on Texas' lack of standing to sue under Article III of the Constitution (the Election Clause), since Texas failed to prove it had a "judicial cognizable interest" in how other states conducted their elections. Justice Alito, joined by Justice Thomas, filed a short opinion, indicating that he would have allowed Texas to file its lawsuit, since it falls within the Court's original jurisdiction, but would have not granted other relief. Justice Alito added that he

The Supreme Court's cautious approach can be attributed to the Court's unwillingness to be perceived as being used for political ends in accord with the Justices' political preferences. The danger of politization was especially great, since the Court operated on an emergency basis, under factual uncertainty, without detailed opinions, and with the Justices divided on ideological lines.[279] By not granting or denying review, accompanied by a minimal administrative stay to segregate late arriving ballots, the Roberts Court found the middle ground to balance its constitutional commitment to the sovereignty of the state legislature and its commitments to judicial restraint and federalism. The Court's delay and inaction send mix signals. On one hand, the Court signaled its dissatisfaction with the state court's ruling, but, on the other, it maintained its commitment to judicial restraint and its legitimacy.

A month later, the Republican petitioners acknowledged in a brief that a decision in the case could not change the outcome of the 2020 election.[280] Nonetheless, they argued that the Court should grant review in order to clarify the law for future elections.[281] The

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expresses no view on any other issue raised in the lawsuit, and apparently hinted that the Pennsylvania Supreme Court's extension of the deadline was unconstitutional. For analysis on the Supreme Court's decision in *Texas v. Pennsylvania*, *see* Joshua Perry & William Tong, *Protecting Voting Rights After 2020: How State Legislatures Should Respond to Restrictive New Trends in Election Jurisprudence*, 53 CONN. L. REV. CONNTEMPLATIONS 1, 12 (2021), claiming:

> [A]lthough any reasonable Supreme Court Justice would have rejected Texas' fantastical original jurisdiction suit seeking to overturn the results in Pennsylvania and three other swing states, conservative justices in particular surely recoiled at the prospect of opening the courthouse doors for any state to sue any other state over its internal election procedures.

For analysis on the impact of the political question doctrine on claims under the Electors Clause *see* Scott Dodson, *Texas v. Pennsylvania and the Political-Question Doctrine*, 2021 U. ILL. L. REV. ONLINE 141 (2021). For *Texas v. Pennsylvania*, *see also* Brendan Williams, *Did President Trump's 2020 Election Litigation Kill Rule 11?*, 30 B.U. PUB. INT. L.J. 181, 197–98 (2021).

[279] *See* Goldstein, *supra* note 275.

[280] Reply Brief in Support of Petition for Writ of Certiorari at 9, Republican Party of Pa. v. Boockvar 141 S. Ct. 1 (2020) (No. 20-542).

[281] *See id.*

Supreme Court was not convinced, and the petition to review the state court's ruling was denied in a brief order.[282]

Three conservative Justices dissented also from that decision.[283] Justice Thomas noted that the case was an ideal opportunity to address, before the next election cycle, what authority non-legislative officials have to set election rules.[284] Justice Thomas pointed out that the Judiciary is ill equipped to address improper rule changes in the context of elections through real time post-election litigation.[285] In this case, the Supreme Court of Pennsylvania issued the decision six weeks before the election, leaving a short time for review in the Federal Supreme Court. He explained that the Supreme Court should use the available case to answer the above important issue, especially because it is capable of repetition.[286] Justice Thomas argued that there is a "reasonable expectation" that the Republican Party and the state legislators "will again confront nonlegislative officials altering election rules."[287] Thomas concluded that the Court's disposition of the case was "baffling," inviting more confusion and erosion of voter confidence.[288]

Justice Alito, joined by Justice Gorsuch, dissented separately.[289] Justice Alito noted that once the election is over, there is no reason to refuse to decide the important question posed by the case and provide important guidance for future elections.[290] Justice Alito referred to the Democratic respondents' claim that the case was moot, since the state court's decision stems from a "perfect storm"—"the COVID-19 pandemic, an increase in mail-in voting, and postal service delays"—which was not likely to reoccur.[291] Justice Alito rejected this claim, among other reasons, since it did not take into account the breadth of the state court decision, which established its authority to override the specific directives of the

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[282] Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732 (2021).

[283] *See id*.

[284] *See id.* at 735.

[285] *See id*.

[286] *See id*. at 737.

[287] *Id.*

[288] *Id.* at 738.

[289] *See id*.

[290] *Id*. at 738–39.

[291] *Id.* at 739.

state legislature by invoking state constitutional provisions that guarantee "free and equal" elections.[292] "[I]t would be surprising," Justice Alito asserted, if parties who are dissatisfied with the election rules set by the Pennsylvania legislature would not invoke this decision in the future.[293]

CONCLUSION

In many cases, petitioners may base their petitions on both the Federal Constitution and a state constitution. Such a choice allows petitioners constitutional and judicial role shopping.

Compromising opinions of conservative Supreme Court Justices can be understood in different ways.[294] Similarly, the reliance of the Supreme Court on avoidance doctrines or procrastination tactics can be understood in various manners.

In this Article we have suggested, however, that decisions of the Roberts Court, in its current composition, concerning liberal decisions of state courts based on a state constitution can be understood against the background of a combined impact of two dilemmas. The first is a material dilemma, between the federalist component of the conservative legal worldview and its non-liberal component. The second is an institutional dilemma that stems from the Roberts Court's legitimacy deficit among substantial sections of the American public, which may make it difficult for conservative Justices to fully implement their substantive judicial philosophy. We further described substantive and procedural tactics that the Supreme Court takes in addressing its dual ambivalence, and have

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[292] *Id.*

[293] *Id.*

[294] Thus, for example, Professor Eidelson argues that although many have cast Chief Justice Roberts's decisive votes and opinions in Dep't. of Com. v. N.Y., 139 S. Ct. 2551 (2019), and Dep't. of Homeland Sec. v. Regents of the U. of Cal., 140 S. Ct. 1891 (2020), "as efforts to protect the Court's public standing by skirting political controversy, taken, however, on their own terms, the opinions seem less about keeping the Court out of the political thicket and more about pushing the Trump Administration into it." Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L. J. 1748 (2021).

demonstrated how these tactics have played out in a number of recent court decisions.