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Judicial Fidelity

Caprice L. Roberts

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ABSTRACT

Judicial critics abound. Some say the rule of law is dead across all three branches of government. Four are dead if you count the media as the fourth estate. All are in trouble, even if one approves of each branch's headlines, but none of them are dead. Not yet.

Pundits and scholars see the latest term of the Supreme Court as clear evidence of partisan politics and unbridled power. They decry an upheaval of laws and norms demonstrating the dire situation across the federal judiciary. Democracy is not dead even when the Court issues opinions that overturn precedent, upends long-standing constitutional rights, leaks confidential drafts, and countenances judicial failures to recuse despite questionable impartiality. Assuming all these claims are true, not all of them are inherently bad for democracy and the rule of law. Rather, democracy has seen and survived overruling of precedent, counter-majoritarian rulings, and a pendulum of opinions steeped in politics. It has survived ethical failings. Some of these occurrences are measurably bad for the federal judiciary and society, and they threaten democracy, but ultimately, the rule of law will survive. It must.

For its survival, ink must be spilled, reforms must flow, partisan advocates must be careful what they wish for, and judges themselves must do better. The measure of a person is what one does in the face of a crisis. This Article asserts that this crisis is not unprecedented, but it is nonetheless real and serious. Perhaps it is a genuine moment to look to higher powers and within ourselves to "save this honorable Court" and, in turn, save democracy.

This Article defines and promotes novel conceptions of judicial fidelity.

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Judges must answer to a duty beyond pure individualistic or tribal motives. Judicial fidelity requires aiming towards judicial ideals such as judicial humility, a balance of heart and mind, transparent reasoning, respect for coordinate branches, fairness towards litigants, and good-faith decisionmaking. This work offers positive and negative examples in recent Supreme Court cases from high-visibility constitutional cases to low-visibility remedial and procedural cases. We are past the claim of neutral principles devoid of any normative wants, but judges can transparently show their reasoning, values, and favored interpretive methods. Accountability must increase for thoughtful critics to promote meaningful reform. Ideally, each party's judicial nominations will be better stewards of this sacred role federal judges play individually and collectively. A well-functioning federal judiciary must perform its essential functions under Article III with healthy separation-of-powers tension with other government branches, basic procedural checks visibly in place and operating, well-reasoned opinions, and the wise exercise of discretion where the case or its remedy dictate a pivot in the law. Otherwise, those tears in the fabric of democracy will continue to fray and the very foundational constitutional rights at stake will lose their force. With a renewed fidelity to judicial ideals by all actors, the federal judiciary can do its part to protect the rule of law and serve democratic values.

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PROLOGUE: A JUDGE'S JUDGE[1]

This topic will include an exploration of the proper role of federal judges and the meaning of judicial fidelity as a good-faith model of judicial temperament, independence, and transparent reasoning. It will also explore various competing methods of constitutional interpretation, judicial philosophies, and doctrines of restraint such as separation of powers, constitutional avoidance, and stare decisis through the lens of watershed cases like *Dobbs*[2] and *Bremerton*.[3]

This Article explores the proper role of federal judges. That broad topic warrants monographic treatment to articulate and analyze the ideal balance of judicial power and restraint.[4] The examination of the proper judicial role also requires examining the individual jurist as well as the collective. The instant treatment focuses on the aspiration of judicial fidelity.

The focus on judicial fidelity is not the application of litmus tests such as whether a jurist consistently votes for reproductive freedoms or adheres to originalism. Instead, the emphasis is on a macro-judicial fidelity. But a macro-judicial fidelity to what, then? Judicial fidelity to norms of wise judging. The aim is to foster dialogue about judicial norms. As a structural matter, this Article promotes the use of such norms in the selection of jurists and the evaluation of judicial performance—namely, jurists who strive towards

1. *See, e.g.*, Sol Wachtler, *A Judge's Judge*, 28 TOURO L. REV. 547, 547 (2013) (commemorating Judge Leon D. Lazer as "quite literally, a judge's judge" with a notable example of the determination and care with which Judge Lazer assumed responsibility for creating a four-volume set of model jury charges); Barry Sullivan, *Just Listening: The Equal Hearing Principle and the Moral Life of Judges*, 48 LOY. U. CHI. L.J. 351, 410–11 (2016) [hereinafter *Just Listening*] (advocating that judges must aim to truly listen to both sides to learn from perspectives of others and, though they may fall short of this ideal, aim they must); Barry Sullivan, *To See Life Steadily and to See It Whole: For Judge Wisdom in His Ninety-first Year*, 53 WASH. & LEE L. REV. 3, 3 (1996) [hereinafter *To See Life Steadily*] (discussing the import and legacy of Judge John Minor Wisdom's judicial work as a teacher of law and "talking seriously" about cases like *Plessy* and so much more).

2. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (unraveling federal constitutional protection for women's right to choose an abortion and overturning *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny). For extensive treatment and critique of the *Dobbs* opinion, see Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728 (2024).

3. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2433 (2022) (protecting a football coach's First Amendment free exercise of religion and free speech rights to engage in prayer on public high school grounds).

4. *Judicial Power and Restraint* is the title of a future book project inspired by a seminar law class I created and taught at several law schools, including West Virginia University College of Law, Florida State University College of Law, and University of Florida Levin College of Law.

judicial ideals and operate in good faith. It applies above the partisan interests that led to the federal jurist's nomination and confirmation. An ideal judge must place judicial role above all else.

It sounds implausible because charges of judicial activism,[5] overt partisanship, and ends-based decisionmaking run rampant throughout the federal and state benches.[6] Any modicum of realism forces recognition of the influence of politics at work. Fidelity to proper judicial role does not replace all else. Rather, it is an overriding commitment that must not be completely ignored.

This dedication to judicial good faith must be paramount despite other pulls on the judicial conscience. However, even though prioritizing normative components of the judicial role is an important goal, not every goal is met, and human failings are also in play.[7] This tension between human temptation and ideals is unavoidable. Yet, neither the existence of this tension nor visible failings should cause a surrender of judicial ideals.[8]

The focus is on the federal judiciary where judicial independence is an essential element of our constitutional structure.[9] State judges also matter.[10] Judicial independence is vital for state judges, though not necessarily part of the structural foundation for states that authorize political election of judges.[11] Some states have a parallel structure that tracks the federal appointment method with care for incorporating judicial independence as core to the role.

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5. *See, e.g.*, Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 65–67 (2007) (defining judicial activism "in three objectively verifiable ways: a justice's willingness to invalidate federal legislation, to invalidate state legislation, and to overturn precedent" and analyzing decisions made by the Rehnquist Court in accordance with this definition).

6. *See, e.g.*, Stefanie A. Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POL'Y REV. 61, 65 (2017) (analyzing state supreme court judges' propensities to overrule existing precedent or invalidate legislative enactments as influenced by the judge's appointment method).

7. *See generally Just Listening*, *supra* note 1, at 409–12 ("Judges must give themselves existentially to the case, and success or failure ultimately will be judged as much by the quality of that engagement as by the outcome of the case.").

8. Stone v. Williams, 891 F.2d 401, 405 (2d Cir. 1989) ("The figure representing justice is blindfolded so that the scales are held even, but justice is not blind to reality.").

9. U.S. CONST. art. III, § 1.

10. Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 597–98 (1991) (exploring the occurrences that gave rise to the perception that federal courts and federal judges are superior to state courts and state judges).

11. *Compare* U.S. CONST. art. III, § 1 *with* LA. CONST. art. V, pt. III (lifetime appointment for federal judges versus ten-year term limits and elections for Louisiana state court judges).

State judicial selection, however, is varied such that many states maintain an election method[12] or a hybrid system.[13] For those states that contrast with the federal appointment method, judicial independence may not be at the heart of the role.[14] Yet, regardless of selection method, certain vectors of independence remain vital to all judges.[15] Independence from politics may not exist, but decisional independence[16] remains paramount. For example, in several states, judges are political partisans who must win an election, but those same judges must decide cases fairly without bias against or preference for a litigant.[17] Accordingly, the judicial fidelity advanced in this Article has utility for state and federal judges.

There are many types of loyalty judges owe. All federal judges take an oath of office.[18] Many federal judges purport to adhere strictly to the original

12. *See, e.g.*, Alex B. Long, *An Historical Perspective on Judicial Selection Methods in Virginia and West Virginia*, 18 J. L. & POL'Y 691, 691–772, 699–701 (2002) (exploring the history of two neighboring states that ended up with very distinct selection methods: appointment for Virginia and partisan elections for West Virginia). For data on state election methods—partisan and non-partisan—across multi-court levels, see *Judicial Selection in the States*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_the_states (last visited Oct. 15, 2023).

13. *See Significant Figures in Judicial Selection*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures (last updated Apr. 14, 2023) (providing statistics on variety of state judicial selection methods). Some states use a combination of selection methods like gubernatorial appointment followed by a retention election several years later, and many states use gubernatorial appointment for interim vacancies even if otherwise judges ascend the bench via election. *Id.*

14. *See* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 334 (1999) ("If there is a unifying thread in the studies of state courts, it may be the adverse effect that partisan politics and interest-group politics can have on tenure of office and hence, potentially, on judicial independence.").

15. *See id.* at 336 ("For this purpose the concept requires, close to the core, that those responsible for judicial decisions interpreting or making law themselves be impartial: free of interests, prejudices, or incentives that could materially affect the character or results of the judicial process.").

16. *See generally* Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 591–95 (2007) (discussing how judicial activism is carried out in a variety of ways, including the judicial decisionmaking process).

17. *See* Lindquist, *supra* note 6, at 62–63 (describing the influence of appointment method on judges' partisan behavior on the bench).

18. 28 U.S.C. § 453 ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.'").

meaning of the United States Constitution and the plain meaning of statutes.[19] Such chosen fidelity is an interpretative preference among several methods of interpretation.[20] Other scholars examine and critique such interpretive methods and their lack of coherent, consistent application.[21] A jurist's particular interpretive preference is not core to the definition of judicial fidelity that this Article advances. Rather, a jurist's use of preferences such as textualism, purposivism, or imaginative reconstruction may comport with judicial fidelity if transparently exercised with good faith.

Federal judges must hold themselves to an extraordinarily high bar—proper judicial role above human desires and weaknesses. That priority requires faithfulness to paramount principles such as judicial independence and fairness to litigants. Yet, importantly, proper judicial role does not require an utter absence of humanity, preferences, or even ideological undercurrents.

I. INTRODUCTION: THE JUDICIAL BRANCH CRISIS

Judicial strife within the federal judicial branch and with the political branches of government is nothing new.[22] A sustained drumbeat of criticism

19. *See generally* Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J. L. & LIBERTY 44 (2020) (discussing the tension that exists for lower court judges who are "bound by Supreme Court precedents interpreting the Constitution" even if the precedent is not originalist); Edward Heath, Essay, *How Federal Judges Use Legislative History*, 25 J. LEGIS. 95, 97 (1999) ("The Supreme Court and the lower federal courts have generally adhered to the plain meaning rule when interpreting statutes.").

20. *See* Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/ (discussing the benefits of judges utilizing the originalist view of the Constitution).

21. *See, e.g.*, ERIC J. SEGALL, ORIGINALISM AS FAITH 1–7 (2018) (examining the originalism doctrine to show how judges use it as pretext for reaching politically preferred ends); ERIC J. SEGALL, SUPREME MYTHS—WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 5–7 (2012) (exposing the lack of neutrality of Supreme Court justices by examining judicial reasoning in key controversial cases and arguing that the Supreme Court should not be entrusted with important decisions that affect the lives of all); Richard H. Fallon, Selective Originalism and Judicial Role Morality 3–7 (Feb. 3, 2023) (unpublished manuscript), https://ssrn.com/abstract=4347334 (discussing the current Court's trend towards originalism, but noting that this trend is being selectively applied). *But cf.* Lee J. Strang, *Originalism's Promise: An Intentionally Thin, Natural Law Account of Our Fundamentally Just, Complex, Constitutional System*, 12 FAULKNER L. REV. 103, 104 (2023) (responding to criticisms of originalism and providing reasons for Americans "to support the Constitution's original meaning").

22. *See* Mark A. Lemley, Essay, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022) ("The Court has taken significant, simultaneous steps to restrict the power of Congress, the administrative state, the states, and the lower federal courts.").

no doubt exists: concerned commentators decry how the Supreme Court is losing its way.[23] But strife has permeated public life since the founding of the federal government over two hundred years ago.[24] It should be no surprise given the very Madisonian compromise[25] at the heart of Article III of the U.S. Constitution.[26] "The Judicial branch was thus born not on the lofty peaks of pure reason, but in the trenches of partisan politics."[27]

A. Perceived and Actual Crisis: Now More Than Ever?

Still, it is easy to assume that it has never been as bad as it is right now. There is a tendency towards "generational narcissism"[28]—this generation thinks this moment is the absolute worst anything has ever been. This belief is understandable, but perspective likely proves otherwise. Unpopular

23. *See, e.g.*, ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 5–6 (2023) (detailing how the Supreme Court no longer serves its historical and constitutional duties such as protecting minorities, upholding constitutional rights, and protecting property against states' rights); ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA, at xv–xvi (2020) (discussing how recent Supreme Court decisions have been "shattering" in contrast to decisions by the Warren Court in the mid-twentieth century).

24. *See, e.g.*, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 56–57 (Max Farrand ed., 1911), https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-vol-2 (documenting debates taking place during the Constitutional Convention of 1787).

25. *See* MICHAEL P. ALLEN, MICHAEL FINCH, & CAPRICE L. ROBERTS, FEDERAL COURTS: CONTEXT, CASES, AND PROBLEMS 131 (Wolters Kluwer, 3d ed. 2020) ("During the Constitutional Convention, a deadlock about the existence and role of inferior federal courts arose. One contingent of Framers urged the adoption of a constitutional mandate for the creation of lower federal courts. Another contingent pressed a constitutional bar to the lower courts' creation, which they thought unnecessary in light of existing state court tribunals, which would be subject to Supreme Court review. The 'Madisonian Compromise' resolved the deadlock by granting Congress the discretion to create lower federal courts, as evidenced by the Ordain and Establish Clause. Congress immediately exercised its discretion in the Judiciary Act of 1789 by creating the lower federal courts. But Congress has never conferred these courts with the full extent of the jurisdictional grant articulated in Article III.").

26. U.S. CONST. art. III.

27. William J. Brennan Jr., Lecture, *Reason, Passion, and "The Progress of the Law*," 10 CARDOZO L. REV. 3, 7 (1988).

28. *See* Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593, 597 (2006) ("Whenever a crisis threatens to boil over, the inclination is that this moment is the worst it has ever been; it feels more monumental, pressing, nuanced and complex than ever before. Thus, it simply may be an example of generational narcissism in which the crisis of the day appears paramount for all time for those held in its clutches.").

opinions authored by the Supreme Court are not new.[29] Also, reactions to groundbreaking opinions are not uniform.[30] In fact, many Americans have cause to celebrate recent Supreme Court opinions and view recent controversial Supreme Court opinions as a course correction rather than disobedience to precedent.[31] Advocates of the modern trends coming out of the Roberts Court view the underlying precedent in many recently decided key cases as lacking any legitimate basis.[32] Vocal critics of the Supreme Court, however, are distraught about the substance, interpretive methods, procedures, and rhetoric.[33]

Critics declare that diminished rights and less access to justice are

29. *See* Richard Wolf, *The 21 Most Famous Supreme Court Decisions*, USA TODAY, https://www.usatoday.com/story/news/politics/2015/06/26/supreme-court-cases-history/29185891/ (last updated May 7, 2019, 1:26 PM) (highlighting controversial decisions made by the Court, some of which date back to the 1800s).

30. *See, e.g.*, Dobbs's *Impact on Employers, Law Firms, Women Lawyers, and Future Lawyers,* A.B.A. (Apr. 28, 2023), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2023/april/dobbs-impact-employers-law-firms-women-lawyers-and-future-lawyers/ (describing the reactions of employers, law firms, women lawyers, and future lawyers to the *Dobbs* decision).

31. *See* Devin Dwyer, *After* Roe *Ruling, Is 'Stare Decisis' Dead? How the Supreme Court's View of Precedent Is Evolving*, ABC NEWS (June 24, 2022, 9:20 AM), https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supreme-court-view/story?id=84997047 ("The perceived 'rightness' of a settled case has taken on new salience with the current Supreme Court, where five conservative justices—three appointed in the last five years—have signaled growing openness to revisit old 'wrongs.'").

32. *See, e.g.*, Hunter Baker, *Storming the Gates of a Massive Cultural Investment: Reconsidering* Roe *in Light of Its Flawed Foundation and Undesirable Consequences*, 14 REGENT U. L. REV. 35, 36, 64–65 (2001) (arguing for "a constitutional right to life for the fetus as a matter of intellectual honesty" and using Dostoevsky's Karamazov brothers dialogue to show that it is not acceptable to condone the suffering of even one child for the sake of the happiness and personal autonomy of other adults); Samuel W. Calhoun, *Justice Lewis F. Powell's Baffling Vote in* Roe v. Wade, 71 WASH. & LEE L. REV. 925, 967 (2014) ("Justice Powell, with his *Roe* vote, deviated from his principles of restraint in the worst possible circumstances. Not only did *Roe* unjustifiably disarm pro-lifers politically in a vitally important and hotly contested public policy dispute, it did so by taking sides in the underlying substantive moral debate. Justice Powell's baffling *Roe* vote therefore regrettably, but unavoidably, tarnishes his legacy as a devotee of restraint."); John J. Coleman III, Roe v. Wade*: A Retrospective Look at a Judicial Oxymoron*, 29 ST. LOUIS U. L.J. 7, 11–12 (1984) (lamenting the stare decisis respect given *Roe* and exposing fundamental flaws of *Roe*); MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 157 (1996) (maintaining support for the legality of abortion on an equal rights basis, but noting "[t]he case against *Roe* seems even stronger than the case against legal abortion. The Constitution does not explicitly protect abortion rights, and Americans have not historically thought that abortion is a fundamental liberty.").

33. *See, e.g.*, David Leonhardt, *Supreme Court Criticism*, N.Y. TIMES (May 22, 2023, 10:27 A.M.), https://www.nytimes.com/2023/05/22/briefing/supreme-court-criticism.html (quoting the *Times*'s chief Washington correspondent: "Democrats used to respectfully disagree with the justices. Now they call them illegitimate and corrupt, partisan and extreme.").

destroying the essential functions of Article III courts.[34] Others see enhanced rights and an improved substantive direction of the Supreme Court.[35] They celebrate a triumph of promised conservatism ushered in by elected officials.[36] Such satisfaction may be fleeting, of course, given the looming potential that the balance of the Court may tack back towards progressive jurists.[37] Additional nominations and any court-packing efforts will take time and political will. Perceived victories are temporary and reversible.[38]

This partial state of acrimony is not new. Historically, our judiciary, and in particular the United States Supreme Court, has been steeped in controversy

34. *See generally id.* (discussing recent political tension surrounding the federal judiciary that is causing some lawmakers to consider "lay[ing] the groundwork for laws that could constrain the court's authority or change its makeup").

35. *See generally* Ron Elving, *How the Supreme Court's Conservative Majority Came to Be*, NPR (July 1, 2023, 10:00 AM), https://www.npr.org/2023/07/13/1185496055/supreme-court-conservative-majority- thomas-trump-bush ("The current supermajority on the court exists because of major political factors that have favored Republicans in the postwar era and historic circumstances that were windows of opportunity for all six conservatives to be appointed and confirmed."); Annenberg Public Policy Center, *Over Half of Americans Disapprove of Supreme Court as Trust Plummets*, U. PA. ANNENBERG SCH. FOR COMMC'N (Oct. 10, 2022), https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummets ("In most of the years the policy center has conducted this survey, differences in trust in the court by party affiliation have not been meaningful. That changed in 2022, with a wide gap separating Republicans from Democrats and independents on some attitudes toward the court.").

36. *See* Elving, *supra* note 35 ("Two Republicans who lost the popular vote reached the Oval Office by prevailing in the Electoral College. Those two—George W. Bush and Donald Trump—would eventually appoint the five justices who, with Thomas, make up the current 6–3 conservative supermajority.").

37. *See* Adam Liptak & Alicia Parlapiano, *Along with Conservative Triumphs, Signs of New Caution at Supreme Court,* N.Y. TIMES (July 1, 2023, 11:17 PM), https://www.nytimes.com/2023/07/01/us/supreme-court-liberal-conservative.html ("Thanks largely to alliances with Chief Justice Roberts and one or more of President Donald J. Trump's three appointees—Justices Kavanaugh, Neil M. Gorsuch and Amy Coney Barrett—the court's three liberals were in the majority in a considerable number of important cases. . . . 'Looking across the entire docket—not just the term's last two days—the data show a shift from the most conservative and aggressive court in modern history to one that has moderated,' said Lee Epstein, a law professor and political scientist at the University of Southern California. 'Perhaps the justices—especially Roberts, Barrett and Kavanaugh—have faced up to the public's waning confidence and decided to self-adjust.'").

38. *See* Krishnadev Calamur & Nina Totenberg, *Democrats Unveil Long-Shot Plan to Expand Size of Supreme Court from 9 to 13*, NPR (Apr. 15, 2021, 3:04 PM), https://www.npr.org/2021/04/15/987723528/democrats-unveil-long-shot-plan-to-expand-sizeof-supreme-court-from-9-to-13 ("Liberal congressional Democrats unveiled [the Judiciary Act of 2021] Thursday to expand the number of seats on the U.S. Supreme Court from nine to 13—a move Republicans have blasted as 'court packing' and which has almost no chance of being voted on after House Speaker Nancy Pelosi said she has 'no plans to bring it to the floor.'").

and even held in deep disdain.[39] The very creation of a national court was controversial, and creation of lower federal courts was not automatic.[40] Forged through debate and compromise, the Supreme Court debuted, along with federal congressional power to ordain and establish—the discretion—to create the lower federal courts.[41] Congress walked through that door, and the federal judiciary is now thirteen circuits with ninety-four district courts.[42]

Controversy was no stranger to the early history of the federal branch. Examples of controversial power exerted by the Court are evident in early cases involving federal court power and role such as *Marbury v. Madison*[43] and *Chisolm v. Georgia*.[44] So, controversy and critique are not new to the federal judiciary.[45] Yet, despite historical analogues, we are currently facing our own judicial crisis of conscience.

Our judicial crisis exists against the backdrop of American history, but

39. Gregory A. Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1210 (1986) ("This image of a revered and deified Supreme Court gathers scant support in the much more critical and human portrayals in the empirical research conducted since the 1950s.").

40. *See* ALLEN, FINCH, & ROBERTS, *supra* note 25, at 131; *ArtIII.S1.8.2 Historical Background on Establishment of Article III Courts*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-8-2/ALDE_00013558/ (last visited Oct. 6, 2023) ("At the Constitutional Convention, the delegates agreed early on to depart from existing practice and establish an independent federal Judicial Branch including a Supreme Court. The Framers generally accepted that state courts would play a significant role in interpreting and applying federal law. But, in light of concerns about whether state courts would apply federal law correctly, uniformly, and without bias, the Framers provided for a federal Supreme Court with the power to review state judicial decisions involving issues of federal statutory or constitutional law. However, the Framers debated whether the Constitution should also provide for the existence of lower federal courts.").

41. ALLEN, FINCH, & ROBERTS, *supra* note 25, at 131.

42. *See Court Role and Structure*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Sept. 15, 2023) (explaining the current structure of the federal judiciary).

43. 5 U.S. 137, 153–80 (1803) (enshrining federal judicial review including the ability to declare laws violative of the Constitution).

44. 2 U.S. 419, 479 (1793) (ruling that the state of Georgia did not have sovereign immunity from suit brought by a non-citizen of Georgia); *see also* ALLEN, FINCH, & ROBERTS, *supra* note 25, at 401 ("*Chisholm* was said to have 'created . . . a shock of surprise throughout the country,'" and triggered the passage of the Eleventh Amendment to the U.S. Constitution (quoting Hans v. Louisiana, 134 U.S. 1, 11 (1890)). Of course, some argued that *Chisolm* was not a such a surprise given sentiments of the day. *Id.* at 400–01 (noting that Justices in the majority relied on the "plain language of Article III").

45. DANIELLE ROOT & SAM BERGER, STRUCTURAL REFORMS TO THE FEDERAL JUDICIARY: RESTORING INDEPENDENCE AND FAIRNESS TO THE COURTS 3–5 (2019), https://www.americanprogress.org/wp-content/uploads/sites/2/2019/05/JudicialReform-report-1.pdf (expounding upon the enduring structural issues and prejudicial tendencies of the federal judiciary).

that is not the only relevant frame. Judicial independence is threatened around the world.[46] The U.S. federal judiciary, even with all its flaws, remains a model for democratic nations worldwide.[47] Of course, the U.S. judicial branch needs to be worthy of its mantle. Judiciaries around the globe face significant threats to core principles such as judicial independence.[48] Take, for example, Israel, where formidable political efforts arose to weaken the judiciary, and such efforts threatened a constitutional crisis.[49] These challenges are external and have the potential to unravel the fabric of democracy by making political branches uncheckable.[50] By comparison, the American federal judiciary is not presently under significant siege[51] by the President or Congress.[52] Unfortunately, there have been isolated acts of violence and protests that cause genuine concern about the safety of our jurists.[53] Overall, though, federal judges

46. *See* Martin Shapiro, *Judicial Independence: New Challenges in Established Nations*, 20 IND. J. GLOBAL LEGAL STUD. 253, 253, 258–60, 273–74 (2013) (explaining ways in which judicial systems are challenged across the world).

47. *See* Ugo Stefano Stornaiolo Silva, Is the American Judiciary the Best Model for Other Countries? 19–21 (Aug. 20, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4542847 (examining the role of the United States in inspiring the democratic structure of other nations).

48. ALLEN, FINCH, & ROBERTS, *supra* note 25, at 14–15 (discussing comparative federal courts and threats to judiciaries in other countries, including Pakistan).

49. Dan Ephron, *'An Unprecedented Constitutional Crisis:' What Netanyahu's Assault on the Supreme Court Means for Israel*, FOREIGN POL'Y (Feb. 14, 2023, 11:33 AM), https://foreignpolicy.com/2023/02/14/israel-supreme-court-netanyahu-constitutional-crisis-amir-tibon/ ("The government of Israeli Prime Minister Benjamin Netanyahu is going ahead with legislation designed to weaken the country's Supreme Court, a move that analysts are warning could lead to an erosion of democracy and a dramatic constitutional crisis.").

50. Hadas Gold, Richard Allen Greene, & Amir Tal, *Israel Passed a Bill to Limit the Supreme Court's Power. Here's What Comes Next*, CNN, https://edition.cnn.com/2023/07/24/middleeast/israel-judicial-reforms-vote-explained-mime-intl/index.html (last updated July 24, 2023, 10:51 AM) (discussing the plausible repercussions on Israel's democracy resulting from the legislative restrictions imposed on judicial power).

51. For a discussion of historic efforts to strip federal courts of jurisdiction, see Roberts, *Jurisdiction Stripping*, *supra* note 28.

52. Rachel M. Cohen & Marcia Brown, *Court Order: Congress Has the Power to Override Supreme Court Rulings. Here's How*, INTERCEPT (Nov. 24, 2020, 5:00 AM), https://theintercept.com/2020/11/24/congress-override-supreme-court/ (discussing Congress's current lack of interference with the judicial system). Recent failure to take legislative action to override questionable decisions demonstrates Congress's minimal involvement at present. *Id.*

53. JOHN G. ROBERTS JR., 2022 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–4 (2022), https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf; Becky Sullivan, *The Supreme Court Marshal Asks State Officials to Act on Protests at Justices' Homes*, NPR (July 3, 2022, 12:02 PM), https://www.npr.org/2022/07/03/1109614708/protests-at-homes-of-supreme-court-justices.

are going about their business without real separation-of-powers concerns about overreach by political branches.[54] Rather, the erosion is, for the most part, self-inflicted. It is due to both real and perceived shortfalls and weaknesses.[55] It results from massive change on matters of grave significance.[56] For those reasons, the U.S. federal judiciary must be vigilant in conducting a self-assessment on performance of its essential functions.[57] Then, real steps may be necessary to ensure that the highest standards of judicial independence and good faith remain the goal of the federal bench both institutionally and individually for its jurists.

B. Judicial Power Players

Despite the popular characterization of the federal judiciary as the "least dangerous branch,"[58] these days the Judiciary garners frequent and fervent charges of excessive power and encroachments on the other political branches: Congress and the Executive.[59] Any search of recent articles on the

54. Cohen & Brown, *supra* note 52 (critiquing Congress's laissez-faire approach to judicial intervention in recent decades, by which "overriding judicial decisions . . . ha[ve] fallen by the wayside.").

55. Carolyn Dineen King, Remarks, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 665–66, 670, 680 (2006) (describing the financial, structural, and evolutionary challenges of the federal judicial system in recent years).

56. Victoria Bekiempis, *The Week the Supreme Court Shaped America: 'We're Being Hurled Back Decades,'* GUARDIAN (July 2, 2022, 4:00 AM), https://www.theguardian.com/us-news/2022/jul/02/us-supreme-court-abortion-guns-america (commenting on the breadth and severity of recent Supreme Court decisions). The momentous overturn of *Roe v. Wade* instigated conversation over the series of rulings that have gravely impacted Americans' rights over the past several years. *Id. See generally* Roe v. Wade, 410 U.S. 113, 164–65 (1973) (legalizing women's abortion rights).

57. *See, e.g.*, Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953) (discussing the essential role of Article III courts that must be protected against congressional encroachments). An essential or core function of the Supreme Court includes the power of judicial review to declare and interpret the law and enforce supremacy. *Id.*; *see also About the Supreme Court*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about (last visited Sept. 15, 2023) ("[D]ue to its power of judicial review, [the Supreme Court] plays an essential role in ensuring that each branch of government recognizes the limits of its own power.").

58. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (Yale U. Press 1986).

59. Alison Frankel, *The Attorney General Attacks "Judicial Encroachment." Who's His Real Audience?*, REUTERS (Oct. 17, 2018, 5:18 PM), https://www.reuters.com/article/us-otc-ag-idUSKCN1MQ2VK (asserting that "an increasing number of judges are ignoring . . . boundaries" and thus encroaching on the power of fellow branches).

judicial role reveals a clear theme: "[J]udges are out of control."[60] Professor Chafetz asserts, "the John Roberts-helmed judiciary has engaged in a remarkable power grab"[61] and "systematically empower[ed] its own institution at the expense of others."[62] He asserts that judges "are inventing out of whole cloth new principles that disempower other governing institutions and empower themselves."[63] According to Professor Chafetz, this "new judicial power grab"[64] by "the judiciary as an institution"[65] is in "election law, congressional oversight, and administrative law."[66]

Professor Mark Lemley echoes the charge of a power grab by the nation's highest court.[67] According to Professor Lemley, "[t]he common denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court."[68] And, he continues, these judicial power grabs concurrently weaken "the power of Congress, the administrative state, the states, and the lower federal courts."[69] Professor Lemley leaves any substantive critique of these Supreme Court opinions to others.[70] He focuses his analysis on the Court's application of "policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself."[71] The danger is not that the Court is granting power to favor those with which it aligns, but that it is "undercutting the ability of any entity to do something the Justices don't like."[72] For this reason, Professor Lemley asserts and laments: "We are in the

60. Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 635 (2023).

61. *Id.*

62. *Id.* at 636.

63. *Id.* at 637 (describing this recent judicial power grab phenomenon as resting "primarily but by no means exclusively [on] Republican judges").

64. *Id.*

65. *Id.* (emphasis omitted).

66. *Id.*

67. Lemley, *supra* note 22, at 97 (analyzing the troubling nature of judicial implementation of policy preferences into decisionmaking).

68. *Id.*

69. *Id.*; *see also id.* at 104–05 (noting that "the Court has proved no more welcoming to new judicial initiatives than it has to those from Congress or the executive branch" and "has curbed the traditional powers of federal courts in equity . . . .").

70. *Id.* at 97 ("My goal in this essay is not to criticize these decisions on the merits, though there is much to criticize; lots of others will do that.").

71. *Id.*

72. *Id.*

era of the imperial Supreme Court."[73]

The theme of the day fits with our historical moment: fear of unbridled power by all branches of government and perhaps especially by the Supreme Court.[74] The Court's wielding of significant power is troublesome given the precariousness of and potential abuses by the political branches because, ideally, the Court is a fail-safe check on the other branches.[75] Before letting democracy die due to action or inaction of another branch, one hopes the Court would save it.[76] But, if the Supreme Court itself is increasing its own power, fear intensifies.[77] These tensions cause current critics to decry that the Court is out of control, engaging in a power grab, and imperial. Still, these complaints are not unprecedented. The adjectives vary, but the gist is the same. Consider charges of judicial activism[78]—e.g., judges making law.[79] These charges are hollow unless they usher in a deeper conversation about judicial reasoning[80] rather than, simply, acting as a proxy for judges or their opinions

73. *Id.*

74. Domenico Montanaro, *There's a Toxic Brew of Mistrust Toward U.S. Institutions. It's Got Real Consequences*, NPR (May 3, 2023, 5:01AM), https://www.npr.org/2023/05/03/1173382045/americans-arent-thrilled-with-the-government-thesupreme-court-is-just-one-example ("The conservative-majority court is suffering from a historic lack of trust and confidence after unpopular decisions in the last couple of years, particularly on abortion rights.").

75. Laurence H. Tribe, *Judicial Review: The Final Say*, N.Y. TIMES (Sept. 13, 1987), https://www.nytimes.com/1987/09/13/magazine/judicial-review-the-final-say.html (describing the value of the judiciary in finalizing constitutional matters initially addressed by other branches).

76. *See* Steven Levitsky & Daniel Ziblatt, *The Crisis of American Democracy*, AM. EDUCATOR, Fall 2020, at 7, https://files.eric.ed.gov/fulltext/EJ1272137.pdf (depicting the fragility of American democracy and the plausibility of its demise without reform).

77. *See generally* Liam Bourque, Yonatan Weitzner, Jake Hopkins, Eli Thrasher, & Kevin Baisden, Opinion, *Who's Afraid of the Supreme Court?*, WALL STREET J. (Feb. 28, 2023, 7:09 PM), https://www.wsj.com/articles/whos-afraid-of-the-supreme-court-judiciary-judicial-review-precedent-congress-separation-of-power-three-branches-53ab4bbf (exploring various students' views on whether an increase in judicial power evokes a sense of fear or a sense of comfort).

78. *See* Roberts, *supra* note 16, at 568–70 (criticizing the overuse of inflammatory labels and seeking to quantify the qualitative issue of proper judicial role).

79. *Id.* at 572 (demonstrating the judicial branch's role in making and changing laws through "invalidation of state and federal statutes and the overturning of precedent").

80. *See id.* at 570 ("If discussion of judicial activism constitutes an attempt to articulate improper judicial roles, an exploration of such material may be helpful in resolving the ultimate issue of what constitutes a judge's proper role. That core issue is deeper and more central than whether a decision is 'wrong on the merits' or whether a judge has made politically controversial rulings. The question of whether a judge has exceeded her institutional role ultimately requires us to examine the institution of the judiciary within our broader constitutional design.").

that one does not like.[81]

The labels are different, but the points are similar: the federal judiciary is abusing its power. And often, the concern is that our independent judiciary is not independent at all.[82] Rather, decisions are ideologically determined and rooted in partisan preferences.[83] This view does not comport with the promise of an independent judiciary as designed by Article III and articulated more fully in the Federalist Papers.[84] It does not adhere to the ideal promoted so famously by Chief Justice Roberts during his confirmation hearing: "Judges are like umpires."[85] For many, there is a magnetic attraction to the notion that all a jurist must do or can do is call balls and strikes.[86] There is simplicity in

81. Scott Shane, *Ideology Serves as a Wild Card on Court Pick*, N.Y. TIMES (Nov. 4, 2005), https://www.nytimes.com/2005/11/04/us/front%20page/ideology-serves-as-a-wild-card-on-court-pick.html ("'I told my class the other day I have no idea what judicial activism is . . . . ,' Professor Epstein said. 'Maybe the best definition of a judicial activist is a judge you don't like.'").

82. ROOT & BERGER, *supra* note 45, at 5–8 (illustrating the increasing tendency of courts to implement partisan preferences into decisionmaking).

83. *Id.*

84. *See* U.S. CONST. art. III; THE FEDERALIST NO. 47 (James Madison) (explaining the Constitution's keeping with Montesquieu's frame of three separate and distinct branches of government); NO. 78 (Alexander Hamilton) (describing good behavior as a protection of judicial independence from encroachment by the political branches).

85. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts Jr., nominee to be Chief Justice of the United States), https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ROBERTS.pdf. A key exchange illuminates now Chief Justice Roberts's conception:

> Senator KOHL: Judge, about your analogy of the judge as an umpire, neutral umpire . . . . [D]on't you and all judges bring their own life experiences, their philosophies to the bench in deciding cases? Or would you have us believe—and if not, you can correct that—that judges merely operate as automatons?
>
> Judge ROBERTS: Not automatons, no, Senator. I appreciate that, that judges don't. And, of course, we all bring our life experiences to the bench. But I will say this: that the ideal in the American justice system is epitomized by the fact that judges, Justices, do wear the black robes, and that is meant to symbolize the fact that they're not individuals promoting their own particular views, but they are supposed to be doing their best to interpret the law, to interpret the Constitution, according to the rule of law, not their own preferences, not their own personal beliefs. That's the ideal.

Id. at 204–05; *see also* Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525, 525–47, 527–29 (2009) (defending Chief Justice Roberts's analogy by reminding the public that analogies are meant to be loose representations of that to which they refer and further detailing how the role of an umpire compares to that of a judge).

86. Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 35 (2009) (illustrating the

the very definitions. Yet, the reality of interpretive moments is lost, especially for the extremely small set of close-call and gray-area cases that land before the Supreme Court.[87] However well-intended, the symbol of an umpire sets forth an unrealistic, if not impossible, ideal in hard cases. An ideal may mean we fall short of what the Judge as Oracle[88] or Judge as Hercules[89] entails, but the question is whether the targets are worthy goals that can be attained with fidelity to judicial role.

If one's most acute problem with the Supreme Court is the amassing of power, it is worth accounting for counterexamples where the Court declines the temptation to increase (or even hold on to existing) judicial power. An example of this phenomenon is the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*.[90] The Court narrowly construed the relevant federal statute to not include a long-utilized remedy by the FTC.[91] This ruling fits with a shift to greater textualism as well as sustained efforts to shrink agency powers.[92] But the Court's interpretation also discounts historic equitable powers of the federal judiciary, which have included crafting disgorgement awards as ancillary to injunction power.[93] Ultimately, this decision

real and perceived role of judges). Despite the popular umpire analogy, "judges often must render discretionary decisions that require a judge to do much more than merely 'call balls and strikes.'" *Id.*

87. Sarah Turberville & Anthony Marcum, Perspective, *Those 5-to-4 Decisions on the Supreme Court? 9 to 0 Is Far Too Common*, WASH. POST (June 28, 2018, 6:00 AM), https://www.washingtonpost.com/news/posteverything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/ ("The court values consensus, and justices agree far more often than they disagree. The ratio is staggering. According to the Supreme Court Database, since 2000 a unanimous decision has been more likely than any other result—averaging 36 percent of all decisions.").

88. Brennan, *supra* note 27, at 5.

89. RONALD DWORKIN, LAW'S EMPIRE 245 (1986).

90. 141 S. Ct. 1341 (2021).

91. *Id.* at 1352; Press Release, Rebecca Kelly Slaughter, FTC Acting Chairwoman, Statement by FTC Acting Chairwomen Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMC Capital Management LLC v. FTC* (Apr. 22, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us-supreme-court-ruling-amg-capital (discussing the FTC's reliance on Section 13(b) of the Federal Trade Commission Act to enforce its policies and the weakening of the FTC as an agency).

92. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2612–16 (2022) (operationalizing the major questions doctrine and reaching the conclusion that the EPA lacks the power to mandate that power plants move away from using coal).

93. *See* Brief for Remedies, Restitution, and Intellectual Property Law Scholars as Amici Curiae Supporting Respondent, AMG Cap. Mgmt. v. FTC, 141 S. Ct. 1341 (2021) (No. 19-508) (arguing that the long-held tradition of equitable injunctive power inherently includes ancillary powers for a judge to order restitutionary disgorgement of a defendant's wrongful profit, among other equitable relief options).

weakens both agency power and the power of federal judges to remedy statutory violations, which the Supreme Court previously sanctioned for over forty years.[94] The Court's justification is deference to Congress, and Congress had not clearly and explicitly provided for this exact remedy in addition to the statutorily-listed injunction power.[95] It is possible to view this interpretation as a combination of flexing judicial muscle while shrinking not just agency power, but also the federal judicial branch's overall equitable power.[96]

Such cases show that the imperial and power-grab theories do not explain all the Court's modern rulings. The irony is that the Court is increasing power in controversial rulings while exercising more restraint than necessary in cases like *AMG*.[97] The reasoning for judicial restraint may lie more in the particulars of certain cases, or may even reflect the Court's other motivations, including its increased skepticism of agency power.[98] The Roberts Court may desire this goal more than it values pure judicial power for power's sake.[99] Also, nuance exists such that cases that may appear to include restraint are also quite powerful in the larger frame. *Marbury v. Madison* is the quintessential case demonstrating exactly that nuanced duality.[100] *Marbury* is an

94. *See* Lemley, *supra* note 22, at 101 ("In recent years the Court has taken away the power of the Federal Trade Commission (FTC) to seek disgorgement remedies in enforcement actions in federal court, following what does appear to be the plain language of the FTC Act but overruling or ignoring its own prior precedent and the historical understanding of equitable powers.").

95. So Jung Kim, Note, *Post*-FTC v. AMG*: Consumer Redress Through Other Means*, 2022 U. CHI. L. REV. ONLINE 1, 2 (2022) (discussing the Court's comparison of the FTC Act to the Emergency Price Control Act of 1942 and the Fair Labor Standards Act, reasoning how Section 19 of the FTC Act limits monetary relief and presumably excludes it from Section 13(b), the section at issue).

96. *See generally* John Harrison, *Federal Judicial Power and Federal Equity Without Federal Equity Powers*, 97 NOTRE DAME L. REV. 1911, 1931 (2022) (reviewing the limits on federal courts' ability to change equitable remedies absent legislative support).

97. *See, e.g.*, Romag Fasteners v. Fossil, Inc., 140 S. Ct. 1492, 1495 (2020) (interpreting judicial power anemically despite relevant statutory authorization of remedies "subject to the principles of equity"); *see also* Lemley, *supra* note 22, at 105 n.47 (criticizing the breathtaking erasure of equitable power and remedies).

98. *See generally* Lemley *supra* note 22, at 113 ("[T]here is no consistent explanation for the cases that fits any of the conventional axes of Supreme Court politics. There is one consistent theme in the cases, however. They centralize power in the Supreme Court, which today is not only the most activist of any Court in the past century, but increasingly the locus of all legal power.").

99. *See* Robin Kundis Craig, *Administrative Law in the Roberts Court: The First Four Years*, 62 ADMIN. L. REV. 69, 122–23 (2010) (referencing the decisions of the Roberts Court during its first four years and its interpretation of federal agency decisions when they intersect with prior Supreme Court precedent).

100. *See* Marbury v. Madison, 5 U.S. 137, 153–80 (1803); *see also* Samuel R. Olken, *The Ironies*

incredibly powerful case enshrining judicial review power[101] while ultimately showing weakness in the Court's inability to offer a remedy for a proven right where jurisdiction falters.[102] Overall, certain cases like *AMG* show judicial restraint, but modern federal courts are exercising incredible power in high-profile, controversial cases.[103] It is wise to keep a close eye on the stated and unstated rationales of the Supreme Court and federal appellate courts that have the last word in most cases.

Even if critics are correct about the dangers of the Supreme Court flexing its power, a distinct concern exists regarding cases in which the Court fails to act. Several examples exist. The simplest is the Supreme Court's denial of certiorari.[104] Another is the dismissal of cases on justiciability grounds where the grounds are at best debatable, or dismissal on prudential rather than constitutional grounds.[105] Lastly, the Court has anemic jurisprudence on remedies

of Marbury v. Madison *and John Marshall's Judicial Statesmanship*, 37 J. MARSHALL L. REV. 391, 399 (2004) ("It is also ironic that in a constitutional decision often noted for its distinction between law and politics, the chief justice deftly carved a set of legal issues from the political circumstances of the case in order to assert the factual importance of the Court in matters of constitutional interpretation.").

101. *Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also* City of Boerne v. Flores, 521 U.S. 507, 524, 536 (1997) (declaring that *Marbury*'s assertion "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary," remains in full force); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (asserting *Marbury*'s import as situating the federal judiciary as supreme in constitutional exposition and maintaining that this essential "principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system"); Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 ARIZ. ST. L.J. 709, 723 (2009) (arguing the Court has exercised this *Marbury* power to invalidate statutory law too frequently).

102. *See Marbury*, 5 U.S. at 173–76 (declaring the jurisdictional grant unconstitutional and accordingly withholding the requested remedy of mandamus).

103. *See, e.g.*, Washington Desk, *Here Are the Major Supreme Court Decisions Decided This Term*, NPR, https://www.npr.org/2023/06/06/1180175155/supreme-court-decisions-affirmative-action-voting-rights-student-loans (last updated June 30, 2022, 3:10 PM) (describing the numerous major, impactful cases the Supreme Court decided during the 2022–2023 term).

104. Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination*, 54 U. PITT. L. REV. 861, 862 (1993) ("On a practical level, postponing definitive resolution of a conflict sanctions the twin evils of uncertainty and inconsistency in the circuits.").

105. *See* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 121 (2007) (criticizing the unclear purpose and laborious nature behind the justiciability requirements); Bradford Monk, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. 413, 413–14 (2013) ("In light of the Court's conflicting dicta about the importance of prudential standing doctrine, it is not surprising that lower federal courts have split over whether prudential standing requirements are jurisdictional or whether such barriers may be waived if a party fails to raise the issue.").

in important areas, including constitutional rights.[106] Overall, given all the ways in which the Court declines judicial assistance, it is possible to say the Court should do more rather than less with its docket and remedies. For those generally satisfied with the current flow and results of the Roberts Court and the federal judiciary, a crisis of confidence remains that warrants serious attention.

C. Erosion of Independence and Public Trust

Concerns about the Supreme Court and the federal judiciary echo beyond academic walls. Countless news articles evidence the scope and depth of frustration and skepticism.[107] It is impossible to discuss the Supreme Court and the federal judiciary without encountering extensive questions that often lead to eyerolls.[108] Much of the public increasingly experiences disillusionment and disdain.[109]

Independence and public trust are a matter of reality and appearance. A classical ethical guide for federal and state judges is to avoid the appearance of impropriety.[110] The appearance of impropriety is an objective-based

106. *See generally* Ronald J. Krotoszynski, Jr. & Caprice L. Roberts, *Reimagining First Amendment Remedies*, 109 IOWA L. REV. (forthcoming 2024) (arguing for the federal judiciary to reimagine remedies in cases where a plaintiff successfully shows free expression and free speech encroachments).

107. *See, e.g.*, Jessica Winter, *The* Dobbs *Decision Has Unleashed Legal Chaos for Doctors and Patients*, NEW YORKER (July 2, 2022), https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients (discussing the "chaotic post-*Dobbs* landscape" that makes it difficult for physicians and patients to access reproductive healthcare).

108. *See* Raymond J. Lohier, Jr., Jeffrey S. Sutton, Diane P. Wood, & David F. Levi, *Losing Faith: Why Public Distrust in the Judiciary Matters—And What Judges Can Do About It*, 106 JUDICATURE 70, 71 (2022) (discussing the rating of public confidence in the Supreme Court reaching a historic low in 2022).

109. Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP, https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx (last updated Oct 6, 2022).

110. *Code of Conduct for United States Judges*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#:~:text=Canon%202A.,as%20a%20judge%20is%20impaired. (last visited Oct. 7, 2023) (detailing that Canon 2 states: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities"); *see also* Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 236–37 (1978) (reviewing the history behind Congress codifying the recusal standards in 28 U.S.C. §§ 144 and 455); MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS'N 2020) (exemplifying federal recusal standards); Karen Sloan, *ABA Presses U.S. Supreme Court to Adopt Ethics Rules*, REUTERS (Feb. 6, 2023, 3:35 PM), https://www.reuters.com/legal/legalindustry/aba-presses-us-supreme-court-adopt-ethics-rules-

standard that relates to perceptions.[111] For most jurists, but notably and regrettably not Supreme Court Justices,[112] this standard calls for recusal when relevant thresholds are crossed that establish a potential violation of the appearance of impropriety.[113] Though an imperfect boundary,[114] perceptions matter. Perhaps not more than substance, but, especially when faith in institutions and democracy is shaken,[115] ethical oughts and outward signs matter.[116]

D. All Hope Is Not Lost

Humans, though quite fallible, can save democracy and bring the judiciary back into higher regard. Efforts to fix the judiciary abound. The President

2023-02-06/ (discussing an American Bar Association resolution "urging the court to put in place a binding ethics code similar to the Judicial Conference of the United States' Code of Conduct").

111. *See* Nancy J. Moore, *Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century?*, 41 LOY. U. CHI. L.J. 285, 285, 296 (2010) (arguing the appearance of impropriety standard is useful criteria for judges regardless of the standard's variability).

112. *See* Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 154–55 (2004); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 KAN. L. REV. 531, 552 (2005).

113. 28 U.S.C. § 455(a) (dictating to the federal courts that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."). This section comprises what is known as an "appearance of impropriety" standard. *See id.*

114. *See, e.g.*, W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV 727, 729–33 (2012) ("The task of legal ethics is to understand what constitutes right and wrong conduct by lawyers. Right conduct may be, as I argue, exhibiting respect for the law in advising one's clients and in representing clients in litigation, and the reason this is right for lawyers may relate to the social goods sought to be secured by the law. This does not mean, however, that one can always conclude that the law represents a positive good for a particular client in a particular case."); *see also* Cheney v. U.S. Dist. Ct., 541 U.S. 913, 926–27 (2004) (writing a memo denying the motion to recuse himself and criticizing the impartiality standard); Roberts, *supra* note 112, at 144 ("A sample formulation of the test for the appearance of impropriety calls for disqualification where 'an objective, disinterested, lay observer fully informed of the facts . . . would entertain a significant doubt about a judge's impartiality.").

115. Dan Mangan, *Senators Relaunch Bill Seeking to Force Supreme Court to Televise Sessions*, CNBC, https://www.cnbc.com/2023/03/16/senators-bill-would-force-supreme-court-to-televise-sessions.html (last updated Mar. 16, 2023, 5:55 PM) (describing a bipartisan bill demanding televised oral argument in the Supreme Court, especially considering the import and public reaction to *Dobbs* and *Bruen*).

116. Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POLITICS 1114, 1114 (1997) (discussing the threat of legitimacy the Supreme Court risks in the face of public disapproval).

appointed a Presidential Commission on the Supreme Court,[117] which resulted in a 294-page final report.[118] Key suggestions include the creation of term limits for Justices,[119] legislative overrides of Supreme Court decisions,[120] and imposing a code of conduct for the Court.[121] The Commission also introduces numerous structural reforms to alter the composition of the Court beyond basic expansion, such as a rotation of Justices with the lower federal courts, creating panels for different subject matters within the Court, and authorizing the President to appoint two Justices to the Court during a four-year term.[122] Scholars continue to advance normative visions and propose tangible fixes.[123] Think tanks and non-profit groups are hard at work exposing alleged flaws and offering solutions.[124] With any reform effort, one must be diligent, thoughtful, and long-winded. Even still, detractors will declare abject failure of the project.[125]

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117. Exec. Order No. 14023, 86 Fed. Reg. 19,569 (Apr. 9, 2021).

118. PRESIDENTIAL COMM'N ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 1 (2021) (hereinafter FINAL REPORT), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

119. *Id.* at 111–17.

120. *Id.* at 183–92.

121. *Id.* at 216–24; *see generally* Laurie L. Levenson, *The Word is "Humility": Why the Supreme Court Should Adopt a Code of Judicial Ethics*, 51 PEPP. L. REV. (forthcoming March 2024) (articulating an ideal code of conduct based on the need for judicial humility). Under mounting pressures, the Supreme Court unanimously adopted a Code of Conduct for Justices of the Supreme Court of the United States. *See* CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf (hereinafter "CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT" discussed *infra notes* 127–32 and accompanying text).

122. FINAL REPORT, *supra* note 118, at 84–85. The report also addresses potential constitutional concerns regarding most of the recommendations, especially the structural reforms. *Id.* at 85–89.

123. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181–205 (2019) (proposing two reforms: "the 'Supreme Court Lottery,' a plan in which the Court would sit in panels selected at random from a large pool of potential Justices who would also serve as judges on the U.S. court of appeals" and "the 'Balanced Bench,' in which the Supreme Court would be composed of an equal number of Democratic- and Republican-selected Justices, plus additional Justices drawn from the circuit courts on whom the 'partisan' Justices would have to agree unanimously.").

124. *See, e.g.*, *The Fixes*, FIX THE CT., https://fixthecourt.com/the-fixes/ (last visited Sept. 16, 2023) (referencing the proposals of a non-profit organization focused on ending life tenure and implementing term limits for Supreme Court Justices). This organization urges the judiciary to allow broadcasts in courtrooms of oral arguments and advocates for the expansion of the ethics code for judges and Justices alike. *Id.*

125. Austin Sarat, *Why Did Biden's Supreme Court Commission Fail So Completely?*, SLATE (Dec.

Due to rising pressures, the Supreme Court unanimously adopted a judicial code of conduct modeled on the Code of Conduct for U.S. Judges,[126] but it adapted the code to the Supreme Court's "unique institutional setting."[127] It is unprecedented as an official adoption. Though this pronouncement is a watershed moment, the Court quickly cautioned readers that it is a myth that the Supreme Court justices have been unbounded by ethical restraints.[128] Still, the Court perceived the need to debunk that myth by adopting an official Code of Conduct.[129] This step is important for the Court's acknowledgment of the public's loss of faith and its admission of the need for a course correction. A danger is that the Code itself is more rhetorical and advisory than meaningful and mandatory. It does contain the quintessential ethical norms from avoiding the appearance of impropriety to refraining from political activity, in addition to guidance on conflicts of interest and financial activities.[130] But it speaks in the language of "should" and possesses discretionary levers when necessity requires relaxation of rules rather than strict disqualification.[131] Notably, the Court's new Code lacks any enforceable limits. It is long on aspirations and short on bite. Still, it is a step towards progress as a matter of the Court's recognition of the need for, and declaration of, ethical boundaries. Time will tell whether the individual justices endeavor to meet this Code and whether the Court's justices collectively will serve as an internal supports bolstering enforcement. As humans, they may fall short, but now at least they may aim

9, 2021, 12:21 PM), https://slate.com/news-and-politics/2021/12/bidens-scotus-commission-was-a-failure-from-the-start.html; *see also* Madeleine Carlisle, *Behind the Scenes of President Biden's Supreme Court Reform Commission*, TIME (Dec. 10, 2021, 4:51 PM), https://time.com/6127632/supreme-court-reform-commission/ (criticizing the Commission's report as a mere analysis that does not provide sufficient answers).

126. *See Code of Conduct for United States Judges*, *supra* note 110.

127. CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT, *supra* note 121, at 10.

128. *Id.* at *Statement of the Court Regarding the Code of Conduct* ("For the most part these rules and principles are not new: The Court has long had the equivalent of common law ethics rules, that is, a body of rules derived from a variety of sources, including statutory provisions, the code that applies to other members of the federal judiciary, ethics advisory opinions issued by the Judicial Conference Committee on Codes of Conduct, and historic practice.").

129. *Id.* ("The absence of a Code, however, has led in recent years to the misunderstanding that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules. To dispel this misunderstanding, we are issuing this Code, which largely represents a codification of principles that we have long regarded as governing our conduct.").

130. *Id.* at Canons 1, 4, 5.

131. *Id.*; *see also id.* at Canon 3B(3) ("The rule of necessity may override the rule of disqualification."); *id.* at 10 ("In many cases, however, these Canons are broadly worded general principles informing conduct, rather than specific rules requiring no exercise of judgment or discretion.").

their sights towards reinforced norms.

Yet, all that ink and all those ideas are not a panacea. And, even if promising, they are not easily implemented.[132] Further, any reform coming through political strides runs the risk of temporary, fleeting adjustments that will likely garner political retaliation.[133] Political sparring may well disserve the judiciary as an institution.[134] Court-packing,[135] for example, is a temporary maneuver to address perceived ills, but it will not constitute a meaningful, lasting cure.[136] Scholars warn of the impracticability of other reforms and so-called "nuclear" options, including congressional jurisdiction-stripping maneuvers to sweep controversial constitutional subject matters from federal courts or the Supreme Court[137] via congressional Article III powers.[138] Term limits,

132. Terence J. Lau, *Judicial Independence: A Call for Reform*, 9 NEV. L.J. 79, 81, 125–29 (2008) (advocating for long-term judicial reform movements in light of the constitutional scheme's insulation of the judiciary).

133. *See* Epps & Sitaraman, *supra* note 123, at 152 (describing how society's increased bipartisan polarization is turning the Court into a "political football," giving rise to the need to find new ways to preserve the neutrality of the Court).

134. *See id.* (noting that many prominent reforms are not able to garner enough bipartisan support, increasing the polarization of the Court).

135. *See generally* Written Statement of Marin K. Levy, Professor, Duke Univ. Sch. of Law, to the Presidential Comm'n on the Supreme Court of the United States (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Levy-Testimony.pdf (noting the norm against court-packing and the startling efforts to pack courts, and describing state court-packing and "un-packing" maneuvers).

136. *See* Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2749–51 (2020) (discussing the negative impacts of repeated court-packing maneuvers, as the technique would lead to expansion of the Court until "the Court became so large that its legitimacy pops.").

137. *See* Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 124 COLUM. L. REV. (forthcoming 2024) (manuscript at 63), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1011&context=law_scholarship (demonstrating, as practical matter, that political efforts to strip jurisdiction will accomplish little and may exacerbate the targeted problem).

138. Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030, 1035 (1982) (advancing a broad view of congressional power over lower federal court jurisdiction, including congressional authority to strip jurisdiction over full categories of constitutional topics); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 898 (1984) (endorsing plenary congressional power of lower federal court jurisdiction but emphasizing that attention should focus on the "wisdom" of such maneuvers with "constitutional statesmanship" in mind). Scholars often declare that Congress has plenary power over the lower federal courts via the Ordain and Establish Clause of Article III and the power to make exceptions and regulations to the Supreme Court's appellate jurisdiction. *See, e.g.*, Bator, *supra*, at 1030 ("Article III of the Constitution provides that the 'judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.' As we know from the records of the

however, may have more promise,[139] though political compromise requires creative implementation to maintain political equilibrium.[140]

Still, calls for reform, and even threats, may well be a healthy part of keeping the judicial branch in check.[141] In certain instances, such pressure

Constitutional Convention, this text was the product of a compromise between those who thought that the Constitution itself should establish a full set of federal courts, and those who thought that the Constitution should authorize no federal courts inferior to the Supreme Court whatever. The purpose of the compromise was to leave it to legislative judgment, to be made from time to time, whether and to what extent lower federal courts are needed to assure the effectiveness and supremacy of federal law."). Other scholars, with whom I agree, stress that structural and constitutional limits should protect the federal judiciary, or at least the Supreme Court, from evisceration of its essential functions. *See, e.g.*, Hart, *supra* note 57, at 1365 (asserting that Congress cannot constitutionally exercise Article III power to "destroy the essential role of the Supreme Court in the constitutional plan"); Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 935 (1982) (resisting the plenary interpretation and promoting the view that Congress cannot eliminate essential functions like supremacy and uniformity).

139. *See* Epps & Sitaraman, *supra* note 123, at 173–75 (discussing the "most popular reform proposal" that would allow Justices to serve eighteen-year terms, but also noting that this method may make the court more political).

140. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 17 (Harvard Univ. Press rev. ed. 1999) ("The aim is to rule out those principles that it would be rational to propose for acceptance, however little the chance of success, only if one knew certain things that are irrelevant from the standpoint of justice. For example, if a man knew that he was wealthy, he might find it rational to advance the principle that various taxes for welfare measures be counted unjust; if he knew that he was poor, he would most likely propose the contrary principle."); Amber Phillips, *What Is Court Packing, and Why Are Some Democrats Seriously Considering It?*, WASH. POST (Oct. 8, 2020 12:13AM), https://www.washingtonpost.com/politics/2020/09/22/packing-supreme-court/ (outlining general attitudes towards court packing along with possible future consequences for whichever party implements such reforms). Some have advocated for a compromised rollout on the timing of any court packing to achieve greater fairness and garner broader political support. *But see* Epps & Sitaraman, *supra* note 123, at 176–77 (asserting that "court-packing is politically inflammatory and unstable" because each party would seize the opportunity to expand the Court whenever in power). A delayed implementation model is a way to approach a Rawlsian veil of ignorance in which legislators agree to add more jurists but in future years when the political majority party is unknown. *See generally* Thomas Jipping & GianCarlo Canaparo, *Why Court Packing Would Be Devastating to Our Republic*, HERITAGE FOUND. (Oct. 5, 2020), https://www.heritage.org/courts/commentary/why-court-packing-would-be-devastating-our-republic (detailing the negative long-term effects that would result if the Court were expanded).

141. Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 870 (2020) (drawing a connection between the increase in the severity of issues plaguing the judiciary and the decline in judicial reform over the last several decades); *see, e.g.*, Epps & Sitaraman, *supra* note 123, at 171 (arguing that threats and calls for reform can be proactive in reeling in judicial power, as their defiance against proposed reforms will perpetuate even bigger reforms to be enforced in the future).

may cause reflection and course correction by the branch itself.[142] Where the federal judiciary self-corrects, then there is at least an acknowledgement of the problem, and ideally, a modicum of a cure.[143] Calls for greater reforms, however, should continue because self-regulation should not operate alone or in secrecy. Ultimately, as matters become worse (in frequency, gravity, and appearance), it is key to implement structures beyond the branch.[144] In those moments, it is insufficient to repeatedly say "trust us,"[145] because "no one ought to be a judge in his own cause."[146]

In many respects, we are exactly where we should be. Reforms are gaining an audience, and (in some cases) traction.[147] The upshot is that power

142. *See, e.g.*, John Branston, *McCalla Put on Leave*, MEMPHIS FLYER (Aug. 29, 2001, 4:00 AM), https://www.memphisflyer.com/mccalla-put-on-leave (discussing findings of judicial misconduct by a district court judge, ultimately requiring the judge to take a six-month leave of absence and attend behavioral counseling for his "improper and intemperate conduct" in the courtroom). The committee appointed to investigate this judicial misconduct did not hold a hearing to evaluate the truthfulness of the allegations because Judge McCalla admitted the veracity of the allegations and apologized. *Id.* Judge McCalla accepted the committee's recommendations and promised to abide by them. *Id.*

143. *See* Caroline Fredrickson, *Will American Democracy Last in Light of the Shadow Docket?*, 23 NEV. L.J. 727, 763 (2023) (highlighting that the judiciary must implement some self-regulation to ensure it does not overreach into the other branches' realms of power, unless the democratic processes is threatened).

144. *See generally* John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 234–36 (1994) (discussing the Judicial Conduct and Disability Act of 1980 and explaining that while there are benefits to the secrecy of self-regulation, they are outweighed by the public mistrust caused by concealing judicial misconduct).

145. *See* Roberts, *supra* note 112, at 118–19 (explaining and critiquing the "trust us" rationale used when Justice Scalia asked a recusal movant to take him at his word about the lack of improper influence, despite having recently gone duck hunting with one of the litigants, Dick Cheney); *id.* at 118 n.55 (noting that "Justice Scalia rejected a 'trust us' argument" in his dissenting opinion in Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting)).

146. *Selected Writings of Sir Edward Coke, Vol. I*, ONLINE LIBR. LIBERTY, https://oll.libertyfund.org/title/shepherd-selected-writings-of-sir-edward-coke-vol-i?html=true (last visited Dec. 27, 2023) (discussing conflict of interest where a ruling judge's financial interests were at issue). "*Aliquis non debet esse judex in propria causa*" means "no one ought to be a judge in his own cause." *Id.* In Selma, Alabama, Martin Luther King Jr., spent time in jail for refusing to comply with an injunction order that prohibited peaceful marching and demonstrations. Walker v. City of Birmingham, 388 U.S. 307, 340–41 (1967) (Brennan, J., dissenting). The legal challenge failed because it was brought *after* disobeying the temporary restraining order. *Id.* at 320–21. The Supreme Court's logic was that no person can be the judge in their own case. *Id.* at 321. Instead, one must first obey the law and then challenge it. *Id*. at 320. The Court enforced the collateral bar rule that blocks collateral challenges to judicial orders, even if likely unconstitutional and invalid, if the original order is not first obeyed. *Id.*

147. Charles Geyh, William Ross, & Tonja Jacobi, *More Judicial Reforms Are Needed, But Observers Diverge on Scope*, BLOOMBERG L. (Mar. 30, 2023, 9:56 AM),

checks are increasing, and the public is paying closer attention.[148] Elections matter—some citizens have cause for celebration,[149] while others are dismayed and distraught but motivated to rally votes for elected officials and substantive reforms.[150] Nihilism is not productive unless skepticism is used to breed explicit reforms.[151] Meanwhile, if we can forestall any deep unraveling of underlying norms, democracy may be strengthened in the end.

This Article explores notions of judicial fidelity during current threats to judicial norms and democracy. In Part II, the focus is on modern trends of the Supreme Court and shifting norms. This discussion includes (i) departure from precedent across major case reversals such as *Dobbs*, *Brown*, *Lawrence*, and *Bremerton*; (ii) the impact of counter-majoritarian rulings where the Supreme Court overturns state or federal statutes; and (iii) the level and import of separation-of-powers encroachments by the Supreme Court on the political branches. Part II also situates concerns about the Supreme Court within the context of the broader federal judiciary. It considers alleged power grabs and acts of defiance. Other topics include non-controversial cases, court business, the shadow docket, certiorari, and access and remedies. Part II ends with a discussion of the *Dobbs* leak within the frame of other historic leaks. Part III presents the judicial fidelity thesis and provides positive and problematic examples. In Part IV, this Article charts a course for restoring faith in ideals

https://news.bloomberglaw.com/us-law-week/more-judicial-reforms-are-needed-but-observers-diverge-on-scope (commenting on renewed interest in judicial reforms in the wake of Supreme Court scandals, including judges receiving gifts and leaked drafts).

148. *See generally* Matthew A. Seligman, *Court Packing, Senate Stonewalling, and the Constitutional Politics of Judicial Appointments Reform*, 54 ARIZ. ST. L.J. 585, 596 (2022) (establishing the public's recent and urgent demands for reform due to large ideological gaps).

149. *See* Epps & Sitaraman, *supra* note 123, at 150–51 (exploring the political significance of Supreme Court nominees, and more generally, partisan attitudes towards events affecting the judiciary); Gram Slattery, *Republican 2024 Hopefuls Back Abortion Limits After* Roe v. Wade, REUTERS (June 23, 2023, 3:33 PM), https://www.reuters.com/world/us/republican-2024-hopefuls-back-abortion-limits-one-year-after-roe-v-wade-2023-06-23/ (discussing the impact of the Supreme Court's overturning of *Roe* on the electorate).

150. *See* Epps & Sitaraman, *supra* note 123, at 150–51 (exploring the political significance of Supreme Court nominees, and more generally, partisan attitudes towards events affecting the judiciary); Jenna Amatulli, *Protests Planned Across US to Mark One Year Since Loss of Abortion Rights*, GUARDIAN (June 24, 2023, 4:00PM), https://www.theguardian.com/us-news/2023/jun/24/roe-v-wade-overturned-anniversary-protests-abortion-ban (discussing the continued fight to restore abortion rights after the Supreme Court's controversial decision in *Dobbs*).

151. *See generally* Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 398–99 (2021) [hereinafter Epps & Sitaraman II] (arguing there remains hope for Supreme Court reform advocates despite extensive political hurdles).

despite our fallibility. It articulates practical consequences including increased access to justice, more and better remedies for proven wrongs, enhanced transparency of reasoning and recusal decisions, and deeper accountability. Overall, this Article insists on keeping faith in the import of refining and reaching for judicial norms. This Article concludes that federal judiciary norms are at the heart of protecting democratic ideals, and democracy is worth fighting for. So too it is worth fighting for a more ideal judiciary.[152]

II. MODERN TRENDS AND SHIFTING NORMS

This Part provides commentary on modern trends and shifting norms. The focal points include stare decisis, counter-majoritarian rulings, and decisions that encroach on the separation of powers. Some shifts, reversals, and encroachments sit better than others, but all shifts and potential infringements on other branches are worthy of reflection.[153] This Part also examines broader issues across the federal judiciary including acts of judicial rebellion and other perceived failures.

To end this Part, the Article discusses the explosive Supreme Court leak preceding the *Dobbs* opinion and provides relevant historical parallels for comparison. Overall, this Part situates the crisis so that the fever pitch does not cause the pendulum of reform to swing too far. Real reform is nonetheless essential, but there is a real risk of overreach to perceived and actual failings of the federal judiciary.[154] Keeping perspective and balance is essential, as is inclusion and consideration of a broad variety of stakeholders, commentators, and critics.[155] Of course, this Part acknowledges that the existence of prior difficulties with the state of our judiciary does not negate that today's

152. Doug Rendleman, Brown II's *"All Deliberate Speed" at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1615 (2004) (referring to the promise of *Brown v. Board of Education*: "*Brown* is an ideal—'and like most ideals . . . its merit is not that it is readily achieved, but that it is worth struggling for.'") (quoting Richard Thompson Ford, Brown*'s Ghost*, 117 HARV. L. REV. 1305, 1333 (2004)).

153. *See generally* Molly J. Walker Wilson, *The Supreme Court, Self-Persuasion, and Ideological Drift*, 83 MISS. L.J. 1071, 1072–73 (2014) (discussing the ideological drift in the Supreme Court and its resulting influence on issues such as constitutional interpretation).

154. *See, e.g.*, Epps & Trammell, *supra* note 137, (manuscript at 63) (arguing that jurisdiction stripping, while powerful in curbing Supreme Court power, would be overreaching and disrupt the separation-of-powers dynamic).

155. Epps & Sitaraman, *supra* note 123, at 152 (proposing that effective reform, while it may not initially have broad bipartisan support, must be "something that both sides might be able to live with in the long term, leading to a fair equilibrium").

problems are real. They are. In fact, current grievances with the federal judiciary are intensifying, and proof is mounting.[156] All of which reveals that, regardless of one's state of satisfaction with modern federal courts, the perceived problems require serious attention and action.

A. Supreme Court

1. Departure from Precedent[157]

A significant destabilizing factor is the Supreme Court's upending of long-established precedent, especially in areas that matter most.[158] For example, the Supreme Court's opinion in *Dobbs*.[159] The break from precedent is itself a norm departure—breaking from stare decisis principles.[160] Principles are not marching orders[161] and, in fact, may become ineffective as a restraint mechanism.[162] Much depends on how a jurist interprets the scope of the

156. Lawrence Weschler, *How the US Supreme Court Lost Its Legitimacy*, NATION (Sept. 17, 2018), https://www.thenation.com/article/archive/how-the-us-supreme-court-lost-its-legitimacy/ ("As it happens, 'misbegotten' may be the most appropriate term available to describe today's Supreme Court.").

157. *See generally* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576–79 (1987) (exploring the binding nature of precedent and the art of identifying like cases).

158. *See generally* Lemley, *supra* note 22, at 97 (discussing public and political grievances concerning the Court's centralization of power and disregard for stare decisis). All cases are important to the litigants involved. They are also important as precedent in future cases. Certain cases may also matter more due to the implication of public rights affecting many. Constitutional litigation generally fits this description and causes an acute impact on a topic of great public debate and disagreement. *See generally* David Feldman, *Public Interest Litigation and Constitutional Theory in Comparative Perspective*, 55 MOD. L. REV. 44, 72 (1992) ("Constitutional adjudication should therefore be seen as part of a dialectical process in which values and ideas coming from different periods and groups confront one another. Judges must decide on the weight to be given to different values, including fairness, consistency and loyalty to tradition; their views on these matters are constitutive of their picture of the judicial role.").

159. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (overturning precedent, including *Roe v. Wade*, 410 U.S. 113, 166–67 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 901 (1992)).

160. *See* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1846, 1846–48 (2023) (discussing the stability that stare decisis analysis creates and the reliance interests that people had in the right to abortion prior to the *Dobbs* ruling).

161. *See* Daniel B. Rice, *Repugnant Precedents and the Court of History*, 121 MICH. L. REV. 577, 579–80, 637 (2023) (explaining that "constitutional doctrine is teeming with artifacts that are culturally unrecognizable" and arguing that the Supreme Court has the power to "dislodge antiquated" precedents that shock modern sensibilities).

162. Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT.

precedent[163] and compares the newer case arguably covered by precedent.[164] Sometimes Supreme Court Justices hold tightly to stare decisis;[165] other times, Justices overtly call for reversal of certain precedents.[166] Still, overruling precedent is destabilizing because, in several recent instances, the departure comes with an elimination of a prior right.[167] If the very ground on which the rule of law sits is unmoored at a time of deep instability worldwide due to the pandemic,[168] it is no wonder that times feel worse than ever for many, but not

REV. 121, 124, 127 (2018) ("It is the provenance and not the wisdom of a directive that provides a reason to follow it, and thus there is, for those who accept the authority of the law, a (not necessarily conclusive) reason to follow legal directives that have little or no wisdom supporting them."); *see also* Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 910 (2021) (discussing precedent as either "a shortcut or a shield (or both)" and noting that such conceptions "in no way require that precedent be mandatory" but instead offer persuasive arguments as a "carrot" rather than a "stick").

163. *See, e.g.*, Steven Menashi, *The Prudent Judge*, 16 HARV. J. L. & PUB. POL'Y PER CURIAM 1, 11 (2023) (maintaining that Justice "Alito demonstrates a conception of stare decisis that is faithful not simply to precedential power but to precedential scope."). Judge Menashi, a former law clerk to Justice Alito, explores Justice Alito's emphasis of practical approach over theory with an emphasis on facts and Justice Alito's view of stare decisis as faithful humility to the "judgments and the wisdom that are embodied in prior judicial decisions[,]" while accounting for the "particulars of the case." *Id.* at 10–12 (relying on Justice Alito's statements in journal writings and at his confirmation hearing). Ultimately, Judge Menashi aligns Justice Alito's approach to a "Burkean" jurist who restricts the "role of legal reasoning and the judicial function," but would "let judges be judges." *Id.* at 14 (quoting Samuel A. Alito Jr., The Wriston Lecture: Let Judges Be Judges (Oct. 13, 2010)).

164. *See id.* at 11 (contrasting competing stances on stare decisis from Hein v. Freedom from Religion Foundation, Inc., 551 U.S. 587, 609, 615, 618 (2007), in which Justice Scalia's concurrence called for overruling the Flast v. Cohen, 392 U.S. 83, 106 (1968), taxpayer-standing exception, while Justice Alito's plurality opinion reasoned that *Flast* be limited to its facts).

165. *See, e.g.*, *id.* (describing the perception of Justice Alito's application of the doctrine of stare decisis as "robust") (quoting Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 512 (2019)).

166. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2300–04 (2022) (Thomas, J., concurring) (calling for the Supreme Court to reconsider prior precedent enshrining rights to contraception, same-sex relationships, and same-sex marriage); Glossip v. Gross, 576 U.S. 863, 909 (2015) (Breyer, J., dissenting) (calling into doubt Supreme Court precedents on capital punishment and the Eighth Amendment).

167. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2285 (overruling *Roe* and *Casey* and taking away the constitutional right to abortion); Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2175–76 (2023) (striking down affirmative action policies in institutions of higher education). Note, rulings that strip existing constitutional rights may include advancement of a competing right. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392–93 (1937) (restricting the constitutional right of freedom to contract to allow states to use police powers to enforce minimum wage laws).

168. *See, e.*g., Kristalina Georgieva, *Facing Crisis Upon Crisis: How the World Can Respond* (Apr. 14, 2022), https://www.imf.org/en/News/Articles/2022/04/14/sp041422-curtain-raiser-sm2022 ("To put it simply: we are facing a crisis on top of a crisis. First, the pandemic: it turned our lives and

all, Americans.[169] Even if not worse, such shifts signify a lessening of norms and the power of partisan currents.[170]

This subsection explores several of the Supreme Court's major precedential shifts. This Article is not an exhaustive treatment of jurisprudential shifts or all key controversial cases. For example, other scholars focus on *Bruen*.[171] The cases explored in this Article are emblematic examples of massive jurisprudential shifts. All involve major rights, deep cultural disagreement, and a significant shift in precedent.[172]

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economies upside down—and it is not over. The continued spread of the virus could give rise to even more contagious or worse, more lethal variants, prompting further disruptions—and further divergence between rich and poor countries.").

169. *See, e.g.*, *Two Years into the Pandemic, Americans Inch Closer to a New Normal*, PEW RES. CTR. (Mar. 3, 2022), https://www.pewresearch.org/2022/03/03/two-years-into-the-pandemic-americans-inch-closer-to-a-new-normal/ (detailing, descriptively and with data, the ways the pandemic upended American life and brought "weariness and frustration" with freefalling confidence in government leaders and public health experts, but noting that three years since the outbreak, Americans may have adjusted to "pandemic life" as the "new normal").

170. *Id.* (reporting that "the partisan divides that became so apparent in the first year of the pandemic" not only failed to subside, but, "[i]f anything, they intensified and moved into new arenas."); *see also* Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 18, 2022), https://carnegieendowment.org/2022/01/18/what-happens-when-democracies-become-perniciously-polarized-pub-86190 (finding that existing evidence of polarized politics and deep political divides in the United States have (1) "crippled efforts at legislative compromise," (2) "eroded institutional and behavioral norms," (3) "incentivized politicians to pursue their aims outside of gridlocked institutions, including through the courts," (4) pushed "Americans across the country to divide themselves into distinct and mutually exclusive political camps," and (5) signaled "[t]he rise of an 'us versus them' mindset and political identity in American sociopolitical life . . . evident in everything from [(a)] the rise of highly partisan media to [(b)] the decline in Americans' willingness to marry someone from the opposing political party . . . to [(c)] a steep rise in political violence."); Aaron Zitner, *Why Tribalism Took Over Our Politics*, WALL STREET J., https://www.wsj.com/politics/why-tribalism-took-over-our-politics-5936f48e (last updated Aug. 26, 2023, 12:00 AM) (indicating that political allegiance has become a "mega-identity," affecting judgement, behavior, heightened intolerance, group bias, and ability to compromise, with "[m]ore than 60% of Republicans and more than half of Democrats now view[ing] the other party 'very unfavorably,' about three times the shares when Pew Research Center polled on it in the early 1990s.").

171. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 67 (2023) (criticizing the Supreme Court's *Bruen* decision for its focus on historical silence that "imbues an absent past with more explanatory power than it can bear").

172. *See, e.g.*, Len Niehoff, *Unprecedented Precedent and Original Originalism: How the Supreme Court's Decision in* Dobbs *Threatens Privacy and Free Speech Rights*, 38 COMM. LAW. 24, 24 (2023), https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/communications-lawyer-38-3-issue.pdf ("[I]n *Dobbs*, the Court took an unprecedented approach to precedent . . .

This Part will show those shifts. It also highlights the rhetoric of dissenting opinions to demonstrate the breakdown.[173] The fight is not simply a matter of competing methods of interpretation. It also goes to the core, such as basic disagreements about the very facts of the case.[174] Framing of the facts has always been important to judicial reasoning and persuasion, but recent cases seem to show a more fundamental departure between the majority and dissenting opinions about what transpired in these cases.[175] These fights show a crisis of confidence that is both external and internal. Is the Court—dissenters in particular—taking the bait on tribalism and calling out abuses of power, or is the Court bringing more disrepute onto itself? Do the dissents show a lack of good-faith judging by the Court or some of its jurists?

a. From Roe *to* Dobbs

Both *Roe* and *Dobbs* are legal opinions that most Americans know by name. Both have generated worldwide news coverage.[176] Justice Samuel

.”); Kevin H. Smith, *The Jurisprudential Impact of* Brown v. Board of Education, 81 N.D. L. REV. 115, 124 (2005) (“*Brown* was a jurisprudential sea change, a sea change made possible only by a court overruling a long-standing precedent that had both a profound importance to existing constitutional jurisprudence and a profound impact on society.”); Daniel Hurewitz, *Sexuality Scholarship as a Foundation for Change:* Lawrence v. Texas *and the Impact of the Historians' Brief*, 7 HEALTH & HUM. RTS. 205, 206–07 (2004) (“In part, the excitement of *Lawrence* lay in the fact that it overturned the Supreme Court's own precedent in *Bowers v. Hardwick* . . . .”); Jack Ruello, *Looking Forward After* Kennedy v. Bremerton School District, LA. L. REV., https://lawreview.law.lsu.edu/2023/01/17/looking-forward-after-kennedy-v-bremerton-school-district (last visited Oct. 7, 2023) (asserting that in *Kennedy v. Bremerton*, the Court seemingly overruled and overturned *Lemon v. Kurtzman* by substituting the “endorsement test” with a “historical approach test”).

173. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2350 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting) (“With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.”).

174. *Id.* at 2341 (opining that “the majority can point to neither legal nor factual developments in support of its decision.”).

175. *See, e.g.*, Joan E. Greve, *What the Liberal Justices' Scorching Dissent Reveals About the US Supreme Court*, GUARDIAN (July 11, 2022, 5:00 AM), https://www.theguardian.com/law/2022/jul/11/us-supreme-court-liberal-justices-dissenting-opinions (noting several recent cases in which “liberals [took] issue with the majority's presentation of the facts of a case.”).

176. *See, e.g.*, Roe v. Wade: *US Supreme Court Ends Constitutional Right to Abortion*, BBC (June 24, 2022), https://www.bbc.com/news/world-us-canada-61928898 (reporting on the controversial opinion in *Dobbs* and the demonstrations that occurred as a result of the ruling); Adam Liptak, *U.S. Supreme Court Overturns* Roe v. Wade *Abortion-Rights Ruling*, JAPAN TIMES (June 25, 2022), https://www.japantimes.co.jp/news/2022/06/25/world/us-roe-wade-overturned/ (“The U.S. Supreme Court on Friday overturned *Roe v. Wade*, eliminating the constitutional right to abortion after almost

Alito penned the majority opinion in *Dobbs*[177] and declared the result necessary to "heed the Constitution and return the issue of abortion to the people's elected representatives."[178] State legislatures responded with immediate prohibitions (often known as "trigger laws" that were awaiting the overturning of *Roe* to enable state restrictions)[179] or reinforcements of *Roe*-inspired protections.[180] State courts are actively granting and denying emergency injunctive requests to halt new prohibitions or stop *Roe* endorsements.[181]

Those who argue that *Dobbs* is a travesty consider *Roe* to be a landmark precedent for enshrining constitutional protection for bodily autonomy and, more specifically, a woman's right to choose the purposes of her body.[182]

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50 years in a decision that will transform American life, reshape the nation's politics and lead to all but total bans on the procedure in about half of the states."); Elizabeth Nash & Isabel Guarnieri, *Six Months Post-*Roe*, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Jan. 10, 2023), https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup (summarizing data on state enactments in the wake of *Dobbs*).

177. 142 S. Ct. at 2239.

178. *Id.* at 2243. *But cf.* Murray & Shaw, *supra* note 2(examining and criticizing the *Dobbs* opinion's purported vindication of democratic principles on both an intellectual and substantive basis).

179. Kimberlee Kruesi, *Three More GOP-Led States Enact Abortion 'Trigger Laws'*, ASSOCIATED PRESS (Aug. 25, 2022, 2:53 PM), https://apnews.com/article/abortion-us-supreme-court-health-nashville-idaho-3c1fa60987ad945b4935d2ac8c1f318f ("To date, 13 states have passed so-called trigger laws that were designed to outlaw most abortions if the high court threw out the constitutional right to end a pregnancy."); *see, e.g.*, S.B. 300, 2023 Reg. Sess. (Fla. 2023) (Florida bill prohibiting abortion after six weeks and making violation a third-degree felony); S.B. 342, 2022 Reg. Sess. (La. 2022) (Louisiana fetal personhood bill prohibiting abortion in most circumstances).

180. Katie Kindelan & Mary Kekatos, *Where Abortion Stands in Your State: A State-By-State Breakdown of Abortion Laws*, ABC NEWS (June 27, 2022, 7:24 AM), https://abcnews.go.com/Health/abortion-stands-state-state-state-breakdown-abortion-laws/story?id=85390463 ("Some states have trigger laws in place that immediately ban abortion once [*Roe*] was overturned. Others guarantee the right to an abortion via laws or constitutional amendments.").

181. *See, e.g.*, Smith v. Planned Parenthood S. Atl., No. 2022-001005, 2022 WL 3478531, at *2 (S.C. Aug. 17, 2022) ("The public policy issue of abortion has been returned to the people of the respective states.").

182. Sonia M. Suter & Naomi Cahn, *The Disembodied Pregnant Person*, NAT'L L.J. (July 1, 2022, 9:00 AM), https://www.law.com/nationallawjournal/2022/07/01/the-disembodied-pregnant-person/ ("Nowhere does the [C]ourt recognize the significant personal and bodily intrusion of forcing people to carry pregnancies to term."); Sonia M. Suter & Naomi Cahn, *More Than Abortion Rides on SCOTUS in* Dobbs, BLOOMBERG L. (May 10, 2022, 1:00 AM), https://news.bloomberglaw.com/us-law-week/more-than-abortion-rides-on-scotus-in-dobbs [hereinafter *More Than Abortion*] ("*Roe*'s demise could also challenge other ordinary aspects of our lives: sexual privacy, buying contraceptives, or even living with our grandparents."); Mary Ziegler, *If the Supreme Court Can Reverse* Roe*, It Can*

Some lauded *Roe* upon its pronouncement[183] and continue to maintain its persuasiveness.[184] Those who appreciate *Roe* mainly like its result more than its reasoning.[185] Others criticized the reasoning,[186] emphasized political polarization,[187] and predicted backlash.[188] Even Justice Ruth Bader Ginsburg, an ardent supporter of women's rights and reproductive rights, questioned whether the issues raised in *Roe* should have percolated longer to gain gradual political momentum.[189] Justice Ginsburg also criticized the opinion's logic for being "physician-centered" rather than "woman-centered."[190]

The *Dobbs* opinion broke from *Roe* and *Planned Parenthood v. Casey*.[191]

Reverse Anything, THE ATLANTIC (June 24, 2022), https://www.theatlantic.com/ideas/archive/2022/06/roe-overturned-dobbs-abortion-supreme-court/661363/ ("How can it be that people had a constitutional right for nearly half a century, and now no more? How can it not matter that Americans consistently signaled that they did not want this to happen, and even so this has happened?").

183. Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2081 & n.183 (2011) (detailing rising support for legalization of abortion after *Roe*); *see also* Roe v. Wade: *The Supreme Court Gives Women the Right to Choose While Also Rendering an Important Lesson on the Practical Workings of Democracy*, THE NATION (Feb. 5, 1973), thenation.com/article/activism/roe-v-wade/ (explaining that *Roe* is an example of the Court shifting in connection with public movement on the controversy and noting that *Roe* is a first step); *cf*. Joseph B. Tamney, Stephen D. Johnson, & Ronald Burton, *The Abortion Controversy: Conflicting Beliefs and Values in American Society*, 31 J. SCI. STUDY RELIGION 32, 32 (1992) (examining ideological bases for views and political action concerning abortion rights).

184. *See, e.g.*, Murray & Shaw, *supra* note 2; Mary Ziegler, *The Framing of a Right to Choose:* Roe v. Wade *and the Changing Debate on Abortion Law*, 27 L. & HIST. REV. 281, 329–30 (2009) (reframing the arguments surrounding the abortion debate and discussing how "*Roe* was a major factor in changing the arguments and coalitions on either side of the debate.").

185. Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1569 (1979) (explaining that most proponents of *Roe*'s result are frustrated with the rationale and offering a rewrite of the *Roe* opinion on equal protection grounds).

186. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2275–76 (2022) (asserting the many failings of *Roe* including diluted standards, disregard of res judicata, warped First Amendment doctrines, and more).

187. David Brooks, Op-Ed., Roe*'s Birth, and Death*, N.Y. TIMES (Apr. 21, 2005), https://www.nytimes.com/2005/04/21/opinion/roes-birth-and-death.html (lamenting the political divide caused by *Roe* and the related poisoning of public life since the Court's ruling).

188. *But cf.* Greenhouse & Siegel, *supra* note 183, at 2081 & n.183. (highlighting the increase in support for legal abortions following the decision in *Roe*).

189. Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of* Roe v. Wade *During Law School Visit*, U. CHI. SCH. LAW (May 15, 2013), https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit.

190. *Id.*

191. *Dobbs*, 142 S. Ct. at 2268–77.

These cases are complex in their holdings and rationales.[192] It is worth reading a variety of interpretations to deepen one's understanding of these cases and their import. And, of course, the public should also read primary sources when possible. As opinions get longer and use heavy citation and legalese, reading primary documents alone is not always illuminating.[193] Still, it is important to stay in conversation with friends and family who perceive results differently to keep one's own thinking in balance. Staying in dialogue is harder as information silos increase.[194] Of course, scholarly criticism of *Dobbs* has been swift and loud,[195] but not utterly uniform.[196] It is important to examine several points of view and to decide for oneself. Regardless of satisfaction or displeasure with the outcome of *Dobbs*, all would benefit from examining the Court's reasoning. Further, all would benefit from imagining whether a political shift in appointments and proposals for reform are sustainable and persuasive.

Professor Nina Varsava, for example, argues that the *Dobbs* opinion disregarded the public's reliance interest on the former judicial opinions.[197] Professor Mary Ziegler warns that no right is safe with the overturning of *Roe*.[198] Ziegler asserts that *Dobbs* constitutes "a kind of constitutional partisanship, dictated by the interpretive philosophies and political priors of whoever

192. Eric R. Claeys, Dobbs *and the Holdings of* Roe *and* Casey, 20 GEO. J. L. & PUB. POL'Y 283, 290 (2022) (examining the precedential effects of *Roe*, *Casey*, and eleven other Court constitutional abortion-rights decisions).

193. *See generally* Jake S. Truscott & Adam Feldman, *Lengthier Opinions and Shrinking Cohesion: Indications for the Future of the Supreme Court*, SCOTUSBLOG (July 28, 2022, 4:26 PM), https://www.scotusblog.com/2022/07/lengthier-opinions-and-shrinking-cohesion-indications-for-the-future-of-the-supreme-court/ (noting that increasing ideological disagreement, fewer unanimous decisions, and discernably lengthier opinions "could become the new normal").

194. *See generally* Allison Chaney, *Is Personalization in Our Media Consumption Polarizing Us?*, YOUTUBE (Aug. 28, 2020), https://www.youtube.com/watch?v=k8ggRxmvtxA (describing how media silos contribute to ideological convergence).

195. Murray & Shaw, *supra* note 2.

196. *See* Evan D. Bernick, *Vindicating Cassandra: A Comment on* Dobbs v. Jackson Women's Health Organization, 2022 CATO SUP. CT. REV. 227, 269 (2022) (arguing that the constitutional conflict behind *Dobbs* is nothing new: "*Roe* didn't start it, and *Dobbs* won't finish it" and asserting that "[t]he [*Dobbs*] opinion lands some justified blows on *Roe* but falls well short of demonstrating that it was 'egregiously wrong'").

197. Varsava, *supra* note 160, at 1846–48 (showing that the majority opinion in *Dobbs* disregarded any reliance interest in precedents protecting abortion rights).

198. Ziegler, *supra* note 182 ("But if the Court can so blithely reverse *Roe*—when all that has changed is that conservatives finally had the votes—we should wonder whether this *is* just about abortion.").

currently has a majority on the Court and nothing more."[199] Other scholars seek to reconcile *Dobbs* and other recent opinions with concepts of history and tradition.[200]

The majority opinion in *Dobbs*, drafted by Justice Samuel Alito, is jaw-dropping for several reasons. Many predicted *Roe* might be overruled, but few appreciated the scale with which Justice Alito would obliterate *Roe* and *Casey*.[201] It is sweeping rather than incremental.[202] In the majority opinion, as leaked, Justice Alito declared that *Roe* was fundamentally flawed from the beginning.[203] Key to the reframing, the Court emphasized the lack of textual support in the Constitution for any such right to an abortion.[204] Rather, the Court reasoned that the "profound moral question" must return to elected state representatives.[205] Ultimately, the Court applied rational basis review to uphold a Mississippi statute banning most abortions after fifteen weeks of pregnancy.[206]

Regardless of one's ideological, religious, and moral stance on *Dobbs*, the stakes are undoubtedly high. The dissenting opinion asserts that the majority's reasoning is full-blown partisanship at work, and thus not judicial.[207] In a joint dissenting opinion by Justices Breyer, Sotomayor, and Kagan, the dissenters acknowledged the complexity and "divisiveness" of the abortion issue, but focused their critique on autonomy: "Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial

199. *Id.*

200. Lawrence B. Solum & Randy E. Barnett, *Originalism after* Dobbs, Bruen, *and* Kennedy: *The Role of History and Tradition*, 118 NW. U. L. REV. 433, 435–40 (2023) (advancing a comprehensive plan for incorporating history and tradition in constitutional jurisprudence). *But cf.* Eric Segall (@scotussegall), *The* Bruen *Gun Case is Constitutional Insanity*, TIKTOK (Mar. 6, 2023), https://www.tiktok.com/@scotussegall/video/7207466568958102827?_r=1&_t=8aQlMRNM575 (maintaining that the *Bruen* gun case is "constitutional insanity" because it prohibits judges from considering public safety benefits of gun laws).

201. *See* Kevin C. Walsh, *The Elevation of Reality Over Restraint in* Dobbs v. Jackson Women's Health Organization, 25 HARV. J. L. & PUB. POL'Y PER CURIAM 1, 1 (2023) ("Alito . . . completely dismantled *Roe* and *Casey* before burying them . . . .").

202. *Id.* at 2 ("Alito's clear-eyed judiciousness in addressing the enormous errors of *Roe* and *Casey* contrasts sharply with Chief Justice Roberts's squinting solo concurrence. Roberts's proposal was *partial* overruling (which also would have amounted to partial upholding).").

203. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) ("*Roe* was egregiously wrong from the start.").

204. *Id.*

205. *Id.* at 2284.

206. *Id.* at 2243, 2284.

207. *Id.* at 2348 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

choice over this most personal and most consequential of all life decisions."[208] The dissent maintains that the majority disrupts the delicate balance that *Roe* and *Casey* struck and forewarns that draconian state restrictions will follow.[209] It also emphasizes "[t]he majority's cavalier approach to" stare decisis and lack of respect for public reliance.[210] With flourish, the dissenters assert the partisan nature of the *Dobbs* ruling: "The Court reverses course today for one reason and one reason only: because the composition of this Court has changed."[211] If true, the meaning of constitutional law loses its integrity.[212] All should care about that.

b. From Plessy *to* Brown

Plessy[213] is a landmark case in which the Supreme Court determined that racial segregation laws in Louisiana comported with the Constitution so long as racially separate facilities and accommodations were equal in quality.[214] Thus, the famous "separate but equal" frame arose.[215] The ruling provided support for segregation in accommodations, including trains and buses.[216]

The case drew a lone dissenter, John Marshall Harlan.[217] Justice Harlan worried that the majority opinion relied on a view that Black people were inferior, and he accused the Court of willful ignorance on the topic.[218] In Justice Harlan's opinion, the Constitution does not abide a dominate class of citizens.[219] Rather, all citizens are equal before the law and deserve equal civil

208. *Id.* at 2317 (Breyer, Sotomayor, & Kagan, JJ., dissenting).
209. *Id.* at 2317–18 (Breyer, Sotomayor, & Kagan, JJ., dissenting).
210. *Id.* at 2319 (Breyer, Sotomayor, & Kagan, JJ., dissenting).
211. *Id.* at 2319–20 (Breyer, Sotomayor, & Kagan, JJ., dissenting).
212. *Id.* at 2320 (Breyer, Sotomayor, & Kagan, JJ., dissenting); *see also* Jeannie Suk Gersen, *When the Supreme Court Takes Away a Long-Held Constitutional Right,* NEW YORKER (June 24, 2022), https://www.newyorker.com/news/daily-comment/when-the-supreme-court-takes-away-a-long-held-constitutional-right ("*Dobbs* leaves no doubt that the federal constitutional right to abortion is gone. And it ushers in an era of grave doubt about the status of liberty in the United States.").
213. Plessy v. Ferguson, 163 U.S. 537, 552 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).
214. *Id.* at 550–51.
215. *Id.* at 552 (Harlan, J., dissenting)
216. *Id.* at 548–49 (addressing majority opinion) (upholding the Louisiana statute regulating segregation on railways).
217. *See id.* at 552 (Harlan, J., dissenting).
218. *Id.* at 560 (Harlan, J., dissenting).
219. *Id.* (Harlan, J., dissenting).

rights.[220] This view is the import of a color-blind Constitution.[221]

Much depends on how one views the facts of the case and on how one interprets a meaningful reliance interest that arises in case precedent like *Plessy*:

> What counts as cognizable reliance, for instance, is inextricably linked to what interests are legally recognized and condemned. Take segregationists' reliance on the "separate but equal" principle of *Plessy v. Ferguson*. From one standpoint, there was vast reliance on *Plessy*, which underwrote much of southern society. But it is impossible, or repulsive, to evaluate that reliance without reference to an underlying theory of legal rights. Segregationists' reliance on *Plessy*, no matter how vast, cannot possibly "count"—perhaps not at all, but certainly not in a way that might override the interests of persons legally entitled to equality in basic aspects of life.[222]

Despite a reliance interest for some, the basis for overruling *Plessy* overcame that reliance interest in the eyes of the Supreme Court and in the eyes of history.[223] The Supreme Court overruled *Plessy* in *Brown v. Board of Education*.[224] The *Brown* Court held that racially segregated public schools were unconstitutional, regardless of the purported equal quality of the facilities.[225]

Of course, the overturning of *Plessy* in *Brown* did not occur overnight. It involved behind-the-scenes efforts to allow sufficient percolation to garner a unanimous Supreme Court vote to upend *Plessy*.[226] Thurgood Marshall, described as "the most important American lawyer of the twentieth century" and

220. *Id.* (Harlan, J., dissenting).

221. *See id.* (Harlan, J., dissenting) ("The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race.").

222. Re, *supra* note 162, at 940 (citations omitted).

223. *See generally* William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681, 694 (2023) (discussing the role of public reliance interests in statutory and constitutional interpretation.).

224. 347 U.S. 483, 494–95 (1954).

225. *Id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

226. JACK M. BALKIN, *The History of the* Brown *Litigation*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 29, 37–39 (2001) (detailing the NAACP's lawsuit strategy and Chief Justice Warren's dedication to getting a unanimous opinion).

who would later become a Supreme Court Justice, spearheaded the effort.[227] *Brown* is not without critics,[228] but its broader principles persevere and garner significant public support.[229]

c. From Bowers *to* Lawrence

Justice Anthony Kennedy delivered the majority opinion in *Lawrence v. Texas*.[230] The decision constituted a jurisprudential shift from *Bowers v. Hardwick*,[231] which the Court decided seventeen years earlier.[232] Justice Kennedy's interpretation in *Lawrence* moved the Supreme Court from a morality frame to a liberty approach.[233] Of course, *Lawrence* was also groundbreaking for overturning *Bowers*,[234] and for providing substantive constitutional protection against prosecution for sexual activity by same-sex couples in their homes.[235] The majority, however, stopped short of declaring a fundamental right to same-sex intimate relations.[236]

227. *Id.* at 29.

228. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959) ("I find it hard to think the judgment really turned upon the facts. Rather, it seems to me, it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved. For many who support the Court's decision this assuredly is the decisive ground. But this position also presents problems. Does it not involve an inquiry into the motive of the legislature, which is generally foreclosed to the courts?"). *But cf.* Derrick A. Bell Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522 (1980) (arguing that Professor Wechsler's "neutral principles" argument in response to the *Brown* decision was incorrect).

229. BALKIN, *supra* note 226, at 4 (characterizing *Brown* as "the single most honored opinion in the Supreme Court's corpus").

230. 539 U.S. 558, 562 (2003).

231. 478 U.S. 186, 187 (1986) (5–4 decision).

232. *See Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

233. *See* Martin Camper, *Justice Kennedy's Definitional Construction of Gay Rights in* Lawrence *and* Obergefell*: Legal Rhetorical Analysis with the Interpretive Stases*, *in* THE RHETORIC OF JUDGING WELL: THE CONFLICTED LEGACY OF JUSTICE ANTHONY M. KENNEDY 45–46 (David A. Frank & Francis J. Mootz III eds., 2023) (exploring the notion that "[d]efinition played a key rhetorical role in the public debate over same-sex marriage in the United States" and discussing how Justice Kennedy defined "liberty" in *Lawrence*).

234. *See Lawrence*, 539 U.S. at 578.

235. *Id.* at 578–79.

236. *Id.* at 568–69.

In dissent, Justice Scalia lambasted the majority's substantive due process and liberty theory as well as the legal sources cited in support.[237] Justice Scalia emphasized the historic legality of criminal regulation of immoral behavior—specifically the historic and popular prohibition against sodomy regardless of the sexuality of the individuals coupling.[238] On stare decisis, Justice Scalia shamed the majority for unjustifiably overruling *Bowers*, but he distinguished any future effort to overrule *Roe* given the history leading up to *Roe*.[239]

Then, given the reversal of *Roe* that Justice Scalia may have foreshadowed, some commentators fear that the Roberts Court may come for *Lawrence* next.[240] Both the willingness to overrule precedent and the jurisprudential tenor of the Court show a potential unravelling, which is further evidenced by certiorari grants in the wake of *Dobbs* and *Masterpiece Cakeshop*.[241]

d. From Lemon *to* Bremerton

In *Bremerton*, the majority pivoted from a potential Establishment Clause problem to a free exercise frame.[242] Specifically, the Court, led by Justice Gorsuch, ruled that a public high school football coach had constitutional free exercise and free speech rights that protected his individual religious observance against governmental reprisal.[243] The Court focused on the unfair repercussions[244] on Coach Kennedy for the exercise of his First Amendment rights.[245] Accordingly, the Court vindicated the individual's rights to engage

237. *Id.* at 593–95 (Scalia, J., dissenting).

238. *Id.* at 596 (Scalia, J., dissenting).

239. *Id.* at 591 (Scalia, J., dissenting) ("What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe*, which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of, and restrictions upon, abortion were determined legislatively State by State.").

240. *See* Ziegler, *supra* note 182; *More Than Abortion*, *supra* note 182.

241. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

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

243. *Id.* at 2433 ("Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.").

244. *Id.* at 2416. A related sentiment of stigma and ostracization arose in the majority opinion in *Masterpiece Cakeshop* as well. *See Masterpiece Cakeshop*, 138 S. Ct. at 1730–31.

245. *Bremerton*, 142 S. Ct. at 2425–30.

in prayer before games.[246]

The dissent, penned by Justice Sotomayor, claimed the majority drafter is not an honest broker regarding the facts of the case and endeavors to set the factual record straight.[247] With the full facts in view, the dissent explained that the coach's prayers were not solely personal but instead placed players under pressure to conform.[248] This pressure, according to the dissent, is exactly the type of danger weakening the wall between church and state.[249] Further, the dissent accused the majority of ends-based reasoning, including unfair logic and disingenuous rationales.[250]

In *Bremerton*, there were calls—met with resistance, or more likely with an inability to garner sufficient votes—to overturn the *Lemon* test.[251] According to the majority, *Lemon* was already dead.[252] Accordingly, the *Lemon* precedent may not survive much longer, even though the majority did not explicitly overrule it.[253] The dissent asserted that the majority did overrule *Lemon*.[254]

All these cases demonstrate we are all on unstable ground. For some Americans, the trajectory is improving.[255] For others, the trend is nothing

246. *Id.* at 2433.

247. *Id.* at 2407, 2434 (Sotomayor, J., dissenting). Disparate framing of issues is nothing new, but fundamental disagreements about relevant facts may be on the rise. *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 77–78 (2020) (Breyer, J., dissenting) (viewing facts and science differently than the per curiam and the concurring opinions*)*; *id.* at 79 (Sotomayor, J., dissenting) (contesting Justice Gorsuch's view on the risks of COVID-19).

248. *Bremerton*, 142 S. Ct. at 2443 (Sotomayor, J., dissenting).

249. *Id.* at 2453 (Sotomayor, J., dissenting) ("[The majority] elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all.").

250. *Id*. at 2446 (Sotomayor, J., dissenting).

251. *See id.* at 2427.

252. *Id.* ("What the [lower courts] overlooked, however, is that the 'shortcomings' associated with this 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause became so 'apparent' that this Court long ago abandoned *Lemon* and its endorsement test offshoot.") (citation omitted).

253. *See id.*

254. *Id.* at 2434 (Sotomayor, J., dissenting) ("Today's decision goes beyond merely misreading the record. The Court overrules Lemon v. Kurtzman, 403 U. S. 602 (1971), and calls into question decades of subsequent precedents that it deems 'offshoot[s]' of that decision.") (alteration in original) (citation omitted).

255. *See, e.g.*, Stef W. Kight, *Republicans Used to Hate the Supreme Court. Now Democrats Do*, AXIOS (Aug. 2, 2023), https://www.axios.com/2023/08/02/america-us-supreme-court-poll-approval (noting the increase in the Supreme Court's approval rating amongst Republican voters).

short of dire.[256] The gravity is severe, and the rights at stake are critical.[257] Regardless of where one stands, these dramatic shifts in precedent reveal that there is a crisis in confidence, internally and externally.[258] We must continue to pay closer attention, offer analysis, and, as appropriate, propose reforms. History and public opinion will also have their moment to reflect on the long-term legitimacy of controversial opinions and supporting rationale.

2. Counter-Majoritarian Difficulties[259]

Judicial supremacy, as cemented in *Marbury*, requires that the judiciary have the power to invalidate federal and state statutes that violate the Constitution or other supreme law.[260] Some use such rulings as a judicial activism metric.[261] This role places judges in a precarious position of power.[262] The judiciary can strike a law validly passed by the legislature and signed by the executive.[263] Even more to the point, striking a law as unconstitutional is a direct rejection of what the will of the people have chosen through their elected officials.[264] Alexander Bickel described this predicament as counter-majoritarian difficulties.[265]

No doubt, the decision to invalidate a statute is serious business, but it is not in and of itself an abuse of power.[266] It is easy to label every instance of invalidation as judicial activism, but this is a mistake.[267] Political scientists and law professors create and mine data on every instance of a judge striking

256. *See* Suter & Cahn, *supra* note 182.

257. *Id.* (pointing out the broad and negative consequences the *Dobbs* decision possibly has on contraception, same-sex intimacy, same-sex marriage, and interracial marriage).

258. *See* Albert Hunt, *High Court, Low Standards and a Crisis of Confidence*, THE HILL (May 15, 2022), https://thehill.com/opinion/judiciary/3489000-high-court-low-standards-and-a-crisis-of-confidence/.

259. BICKEL, *supra* note 58, at 14, 16. For this reason, some constitutional law scholars advocate that the exercise of judicial supremacy be extremely rare, such as when the statute is patently unconstitutional. Segall, *supra* note 101, at 711.

260. Marbury v. Madison, 5 U.S. 137 (1803); *see also* BICKEL, *supra* note 58, at 12.

261. Ringhand, *supra* note 5, at 49.

262. *See* BICKEL, *supra* note 58, at 12 (elaborating on how federal and state judges implement the Supremacy Clause).

263. *Id.*

264. *Id.* at 16–17.

265. *Id.* at 7.

266. Roberts, *supra* note 16, at 605.

267. *Id.* at 577.

a statute.[268] Capturing the data, although fraught with interpretive determinations, can be useful.[269] It may reveal trends and inconsistencies in approach.[270] But there is real danger in quantifying the qualitative.[271] Further, it is dangerous to overly rely on the simple fact of invalidation as equating to improper judicial behavior.[272] The Supremacy Clause of the Constitution exists, and *Marbury* enshrines the judiciary's proper role.[273] Striking a violative law may well be utterly proper where the statute violates the Constitution.[274] There is no substitute for doing the hard work of examining the reasoning of the judicial opinion and the relevant support to determine whether the ruling is an abuse of this delicate power.[275] Reasonable minds will disagree, but only time, exposure, and analysis will reveal whether the exercise of the *Marbury* power is justified.[276] It is the hard work of detailed examination that must occur rather than quick labels and faulty accusations.[277]

3. Separation of Powers

Another key angle to consider is judicial opinions[278] that encroach upon the authority of other branches of government.[279] Such encroachments violate

268. *See, e.g.*, LEE J. EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS (6th ed. 2015); Ringhand, *supra* note 5, at 49.

269. Roberts, *supra* note 16, at 602–03.

270. *Id.*

271. *Id.* at 570.

272. *Id.* at 610.

273. U.S. CONST. art. VI, cl. 2; 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."); *see also* Roberts, *supra* note 16, at 577.

274. *Marbury*, 5 U.S. at 180 ("[A] law repugnant to the constitution is void . . . ."); *see also* Roberts, *supra* note 16, at 577.

275. Roberts, *supra* note 16, at 611–12.

276. *Id.*; *see also* Joseph M. Farber, *Justifying Judicial Review: Liberalism and Popular Sovereignty*, 32 CAP. U. L. REV. 65, 72–73 (2003) ("[J]udicial review in the United States allows the Supreme Court ultimate authority to enforce and interpret not just the Bill of Rights, but the *entire* Constitution.").

277. Roberts, *supra* note 16, at 611–12; *see also* Farber, *supra* note 276, at 74.

278. G. Sweetman Smith, *Judicial Encroachment upon the Legislative Prerogative*, 3 BI-MONTHLY L. REV. L. DEP'T U. DET. 1, 2 (1920). Here, the focus is the federal judiciary, but the same analysis is relevant to state courts. *Id.*

279. *Id.*

the separation of powers required by the very structure of the Constitution.[280] An example where scholars assert that the current Court is violating the separation of powers is *West Virginia v. EPA*.[281] Yet, proponents of the decision maintain the opposite declaring that West Virginia "took on the swamp and won[:] Unelected bureaucrats must yield to Congress—Congress decides the major questions of the day!!"[282]

But, again, the challenge is that we cannot insert a case into a machine and learn if the result is or is not an encroachment. The Constitution does not readily provide the answer. It is a matter of interpretation of all the relevant provisions and precedent.[283]

B. The Full Frame of the Federal Judiciary

The Supreme Court is drawing significant consternation of late, but it is not alone in receiving criticism.[284] The broader federal judiciary is also generating skepticism and complaints, if not ire.[285]

1. Headline: Federal Court Power Grabs and Judicial Defiance

It is not only the Supreme Court that issues opinions that are examples of court power.[286] The debate over so-called national or universal injunctions shows that concerns over excessive power are not limited to the Supreme Court, but extend to all the lower courts, including federal district court judges.[287] Such judges issue an injunction that stops an executive order or

280. *See* U.S. CONST. arts. I, II, III.

281. 142 S. Ct. 2587, 2628 (2016) (Kagan, E., dissenting) ("The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote.").

282. Kimberly Wehle, *The Supreme Court's Extreme Power Grab*, THE ATLANTIC (July 19, 2022), https://www.theatlantic.com/ideas/archive/2022/07/west-virginia-v-epa-scotus-decision/670556/ (reporting West Virginia Attorney General Patrick Morrisey's tweet).

283. *See generally* BRANDON J. MURRILL, CONG. RESEARCH SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION (Mar. 15, 2018), https://crsreports.congress.gov/product/pdf/R/R45129 (asserting the Court interprets broad Constitutional provisions before applying them to factual scenarios, including the roles of the branches of government).

284. *See* discussion *supra* Section I.C.

285. *See* discussion *supra* Section I.C.

286. *See generally* Chafetz, *supra* note 60, at 636, 641, 646 (giving examples of cases where the federal court system worked conjunctively to assert extreme court power).

287. *See* Amanda Frost, *Academic Highlight: The Debate over Nationwide Injunctions*,

legislation from governmental enforcement.[288] Such maneuvers arise to challenge laws of both major political parties.[289]

Another example by certain federal judges is disobedience to Supreme Court remands and flouting precedent.[290] The lower courts are bound to adhere, and if they do not, the rule of law suffers.[291] Respect for the rule of law always matters, but especially in eras of intense destabilization and skepticism.[292] Such are the moments to give even political archrivals the benefit of the law.[293] But to what extent can they express dissatisfaction or full civil disobedience?[294] During the Civil Rights Era, some federal judges refused to follow discriminatory rulings.[295]

SCOTUSBLOG (Feb. 1, 2018, 10:21 AM), https://www.scotusblog.com/2018/02/academic-highlight-debate-nationwide-injunctions/ (defining "nationwide" and "universal injunctions" and demonstrating their increased use by federal district courts).

288. *Id.* (explaining the use of injunctions by the district courts to stop government enforcement of policies, bans, and recissions).

289. *Id.* (explaining that such injunctions are nonpartisan).

290. *See* Brannon Denning, *Can Judges Be Uncivilly Obedient?*, 60 WM. & MARY L. REV. 1, 14–33 (2018) (arguing that uncivil judicial obedience is possible and providing examples).

291. *See generally* Richard M. Re, *Legal Scholarship Highlight: When Lower Courts Don't Follow Supreme Court Precedent*, SCOTUSBLOG (Oct. 18, 2016, 10:02 AM), https://www.scotusblog.com/2016/10/legal-scholarship-highlight-when-lower-courts-dont-follow-supreme-court-precedent/ (citing examples of lower court rulings going against their duty to treat the Court's precedent as controlling, thus undermining the Court's power).

292. *Id.* ("In short, the precedential universe is now too complex to rely only on the familiar concepts of following and overruling, or to limit one's view to conventional precedent.").

293. *See generally* Weinberger v. Romero-Barcelo, 456 U.S. 305, 335 n.20 (1982) (Stevens, J., dissenting) ("The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh, there I'm a forester . . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.") (internal marks and citation omitted).

294. *See* Denning, *supra* note 290, at 14–33 (arguing that uncivil judicial obedience is possible and providing examples).

295. *See, e.g.*, Alyssa Cochran, *Judicial Courage, Judicial Heroes, and the Civil Rights Movement*, AM. BAR ASS'N (Feb. 5, 2019), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2019/winter/judicial-courage-judicial-heroes-and-the-civil-rights-movement/ (explaining the impact of the Fifth Circuit judges on the civil rights movement).

2. Full Story: Noncontroversial Business of the Federal Courts

Less controversial cases may show some normalcy, but potential problems are still lurking beneath the surface. Scholars can improve the current literature by examining more mundane issues resolved by multiple judges in less controversial cases.[296]

Some of the more mundane issues and less controversial cases are unanimous—why? Deeper analysis of such results would benefit our overall understanding of what federal courts do and how well they are doing it. Such cases involve denials of veteran back pay, and unified opinions on elevating procedural and remedial hurdles across broad subject matters.[297] Where the Court may be more functional, it issues unified rulings in narrowing of access to federal courts and federal remedies.[298]

3. Of Shadow Dockets and Certiorari

The Supreme Court's "shadow docket"[299] is problematic for several reasons.[300] The decisions occur without full briefing and argument.[301]

296. *See generally* Devin Dwyer, *Supreme Court Defies Critics with Wave of Unanimous Decisions*, ABC NEWS (June 29, 2021, 2:12 AM), https://abcnews.go.com/Politics/supreme-court-defies-critics-wave-unanimous-decisions/story?id=78463255 (discussing recent controversial cases decided unanimously by the Supreme Court).

297. *See* Arellano v. McDonough, 598 U.S. 1, 14 (2023) (unanimously denying equitable tolling for veterans applying for disability claims); *see also infra* Section II.B.4 (discussing the federal courts' limiting of access to the courts and to federal remedies).

298. *See infra* Section II.B.4.

299. William Baude, *Opinion: The Supreme Court's Secret Decisions*, N.Y. TIMES (Feb. 3, 2015), https://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html (coining the phrase "shadow docket").

300. STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 12–25 (Basic Books 2023) (exposing the magnitude of Supreme Court orders occurring in secrecy without full briefing or judicial reasoning, though such decisions affect fundamental rights); *see also The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary* 12–17 (2021) (testimony of Stephen I. Vladeck), https://www.justsecurity.org/wp-content/uploads/2021/02/*Vladeck*-Shadow-Docket-Testimony-02-18-2021.pdf [hereinafter *Vladeck Hearing*] (listing several reasons why the rise of the Supreme Court's shadow docket is a problem, including the absence of reasoning and unpredictable timing of the decisions).

301. *See Vladeck Hearing*, *supra* note 300, at 14; *see also* William Baude, *Foreword: The Supreme Court's Shadow Docket* 1, 25 (U. Chi. Pub. L. & Legal Theory, Working Paper No. 508, 2015), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1961&context=public_law_and_legal_theory.

Consideration is private.[302] And the rulings often have enormous effects.[303] Shedding much needed light onto the number and gravity of such rulings is vital.[304] The Court should take this scrutiny seriously and reflect. Otherwise, external reforms are likely to flow.[305]

The irony of all the controversy that arises from the Supreme Court's rulings is the extremely small size of the Court's docket.[306] It continues to shrink.[307] Many scholars call for an additional appellate court to resolve circuit splits or handle special matters like national injunctions.[308] Such proposals are worthy of deeper consideration, especially given *Marbury*'s placement of supremacy and uniformity as essential to an ideal judicial branch in a democratic society.[309]

4. The Import of Access and Remedies

In addition to the decreasing number of cases garnering certiorari, narrowed access to courthouse doors and to judicial relief are deeply troubling facets of modern federal court jurisprudence. Professor Judith Resnik argues that federal courts and the Supreme Court have dramatically decreased access to justice and relief.[310] In a seminal work, Professor Resnik focused on the Rehnquist Court,[311] but the phenomenon is only more acute with the Roberts

302. *See* VLADECK, *supra* note 300, at 13–14.
303. *See id.* at 192–95.
304. *See Vladeck Hearing*, *supra* note 300, at 17.
305. *Id.* at 18–19.
306. *Id.* at 16.
307. *Id.*
308. *See* Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1403 (2020) (describing certain scholars' call for reform to resolve circuit splits, including additional courts); *see also* Jonathan M. Cohen & Daniel S. Cohen, *Ironing out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 990 (2020) (stating that a congressional commission proposed to establish "a new layer of appellate court").
309. *See* Marbury v. Madison, 5 U.S. 137, 178 ("The judicial power of the United States is extended to all cases arising under the constitution.").
310. Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224–25 (2003).
311. *Id.*

Court.[312] The hurdles to entry are higher and the remedies are shrinking.[313] Many scholars decry the disappearing access to federal courts and the anemic remedies.[314] These features coincide with vanishing rights[315] in certain areas, such as constitutional criminal procedural rights.[316] The combination of the diminishment of all three—access, remedies, and rights—makes the impact on democratic functioning of the judicial branch sting.[317] These deficiencies affect the lives of real people every day, as well as corporations.[318]

C. Lions and Tigers and Leaks, Oh My![319]

The Leak![320] Somehow a draft opinion leaked from the Supreme Court

312. *See* Gene R. Nichol, *The Roberts Court and Access to Justice*, 59 CASE W. RES. L. REV. 821, 825 (2009).

313. *Id.* ("[T]he Roberts tribunal seems to show greater zest for limiting the forms, remedies, and processes of constitutional adjudication than in reversing the bold strokes of its predecessors on the merits.").

314. *See supra* notes 310–313 and accompanying text.

315. Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 102 (1989) (arguing that the Supreme Court eroded constitutional rights and liberties). Again, such charges are not unprecedented. *See id*.

316. *See* ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE JUDICIARY 135–67 (Simon & Schuster 2010) (asserting that "right-wing" justices have diminished constitutional rights in such areas as individual liberties, criminal procedural protections, and the wall between church and state).

317. *See generally supra* notes 316–315 and accompanying text (discussing the impact of diminished access to the courts and federal remedies).

318. *See generally supra* notes 315–316 and accompanying text (discussing the impact of diminished access to the courts and federal remedies).

319. THE WIZARD OF OZ (Metro-Goldwyn-Mayer Studios, Inc. 1939) ("Lions and Tigers and Bears, Oh My!").

320. *See* Chris McRoy, *'A Grave Betrayal': Justice Alito Says* Dobbs *Leak Shook Supreme Court*, 9NEWS, https://www.9news.com/article/news/nation-world/alito-dobbs-leak-assassination/507-00ef270b-1de3-470e-a606-f0e7f9e207f6 (last updated Oct. 26, 2022, 2:16PM). The leak of a draft opinion in *Dobbs* to overturn *Roe* sent shockwaves through the judiciary and the country. *Id.*; *see also* SCOTT D. GERBER, SCOTUS 2022: MAJOR DECISIONS AND DEVELOPMENTS OF THE US SUPREME COURT 201–09 (2023) (exploring the circumstances surrounding the leak). Recent revelations about current and former government officials—both Democrats and Republicans—possessing classified documents is a different problem by political branch actors, but it exacerbates a tendency for the public to yield its faith in all branches of government. *See* Alan Feuer, Maggie Haberman, William K. Rashbaum, & Ben Protess, *Justice Department Charges Trump in Documents Case*, N.Y. TIMES, https://www.nytimes.com/2023/06/09/us/politics/trump-indictment-charges-documents-justice-department.html (last updated Aug. 9, 2023); Carol E. Lee, *Biden Classified Documents Investigation Shows Few Signs of Wrapping Up Soon*, NBC NEWS (June 8, 2023, 10:00AM), https://www.nbcnews.com/politics/white-house/biden-classified-documents-investigation-shows-signs-wrapping-soon-rcna88313.

before the much-anticipated ruling in *Dobbs*,[321] involving a direct challenge to *Roe v. Wade*[322] and its progeny.[323] It is no small incident. Rather, it "was an extraordinary breach of the [C]ourt's usual secrecy."[324] It rocked public consciousness,[325] broke ethical bounds,[326] and appears to have escaped accountability.[327] Before unpacking the *Dobbs* leak, historical perspective is key.

1. History of Leaks

Historical leaks are incredibly rare, though not unprecedented.[328] Even in the Supreme Court, leaks have occurred.[329] The circumstances of some of the historical leaks are distinguishable from the *Dobbs* leak.[330] To start, historic

321. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022).

322. 410 U.S. 113, 166 (1973).

323. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) ("[T]he essential holding of *Roe v. Wade* should be retained and once again affirmed.").

324. Charlie Savage & Adam Liptak, *Supreme Court Says It Hasn't Identified Person Who Leaked Draft Abortion Opinion*, N.Y. TIMES (Jan. 19, 2023), https://www.nytimes.com/2023/01/19/us/politics/supreme-court-leak-roe.html.

325. *Id.*

326. *See, e.g.*, Richard W. Painter, *SCOTUS Draft Opinion Leak is a Breach of Legal Ethics*, BLOOMBERG L. (May 6, 2022, 1:00AM), https://news.bloomberglaw.com/us-law-week/scotus-draft-opinion-leak-is-a-breach-of-legal-ethics ("Was the leak a breach of ethics? Yes. Law clerks are not technically in a lawyer-client relationship with justices, but the duty of confidentiality is much the same. The code of ethics for U.S. Supreme Court clerks makes this point crystal clear.").

327. *See, e.g.*, Elie Mystal, *The Supreme Court's Big Investigation into the* Dobbs *Leak is a Big Bust*, THE NATION (Jan. 19, 2023), https://www.thenation.com/article/politics/supreme-court-investigation-into-dobbs-leak-a-bust/ ("The report says the [C]ourt has been 'unable to identify a person responsible by a preponderance of the evidence.'"). The article asserts that the Court never really wanted to find the leaker. *Id.* ("[T]he leak and the attendant pearl-clutching over it has been a giant distraction from the true level of corruption and bias emanating from the Supreme Court—a distraction fueled by a media that is more comfortable repeating the gossip behind the latest Popsugar tweet than it is reading legal opinions and tracking the dark-money forces that bought them.").

328. *See, e.g.*, Chad Marzen & Michael Conklin, *Information Leaking and the United States Supreme Court*, 37 BYU J. PUB. L. 1, 6–7 (2022), (discussing how rare leaks are, but that they are not unprecedented); Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of* Regents of the University of California v. Bakke, 19 YALE L. & POL'Y REV. 341, 342–43 (2000).

329. Marzen & Conklin, *supra* note 328, at 7–8.

330. *Id.* at 7 (noting that although there have been Supreme Court leaks in the past, there has never been an entire leaked opinion like that of Dobbs); *see also* Mark Movsesian, *Why the* Dobbs *Leak is Dangerous*, FIRST THINGS (May 5, 2022), https://www.firstthings.com/web-exclusives/2022/05/why-the-dobbs-leak-is-dangerous ("Past leaks from law clerks typically have come after the Court has

leaks were not in the same manner or intensity as the leak of the *Dobbs* draft opinion.[331] Some leaks were purposeful and in consultation with media for timed release.[332] But the rollouts were not always as negotiated.[333] For example, in 1973, Justice Powell's law clerk provided the *Roe v. Wade* opinion to *Time* once finalized, but on the condition that it would not be published until the ruling was public.[334] The Court delayed its announcement of the opinion, but *Time* still published the opinion before the ruling became public.[335]

Law clerks do not emerge unscathed in leak controversies. There were leaks about the monumental Supreme Court decision of *Bush v. Gore*.[336] The leak occurred during the pendency of the case and was breathtaking in magnitude.[337] In an investigative article by *Vanity Fair*, sitting law clerks to several Supreme Court Justices broke the code of silence to discuss the inner-workings of the Supreme Court's decisionmaking, the potential partisanship, and the ultimate building of majority versus dissenting opinions.[338] The clerks expressed their extreme dismay and offered a simple justification for their breach of decorum: the breakdown of the rule of law by the Court's majority opinion.[339]

Interestingly, the law clerk leak was not a leak of the opinion, but instead, it was law clerks speaking to media about behind-the-scenes discussions and

issued a decision . . . . If they come before a decision, leaks are usually spare and vague, hints at a likely vote tally or outcome . . . . But the leak of an entire draft opinion in the middle of deliberations in a vitally important case suggests something very different, a desire to either bully or destroy the Court as an effective institution.").

331. *See* Marzen & Conklin, *supra* note 328, at 7–8 (describing the circumstances surrounding prior historical leaks); Movsesian, *supra* note 330; Jessico Gresko, *Court That Rarely Leaks Does So Now in Biggest Case in Years*, ASSOCIATED PRESS (May 3, 2022, 5:36 PM), https://apnews.com/article/roe-wade-supreme-court-leaked-draft-opinion-cba923f6e370672f4a5ccfd3be325786 ("[T]here have been leaks before, though not of the magnitude of the document posted by Politico.").

332. *Abortion on Demand*, TIME, Jan. 29, 1973, at 46–47, https://time.com/vault/issue/1973-01-29/page/50/; Rachel Treisman, *The Original* Roe v. Wade *Ruling Was Leaked, Too*, NPR (May 3, 2022, 11:53 AM), https://www.npr.org/2022/05/03/1096097236/roe-wade-original-ruling-leak.

333. Treisman, *supra* note 332.

334. *Id.*

335. *Id.*

336. 531 U.S. 98, 111 (2000).

337. Marzen & Conklin, *supra* note 328, at 8 (discussing prior leaks for Supreme Court decisions).

338. David Margolick, Evgenia Peretz, & Michael Shnayerson, *The Path to Florida*, VANITY FAIR (Oct. 2004), https://archive.vanityfair.com/article/2004/10/the-path-to-florida.

339. *Id.*

inner dynamics leading up to the decision.[340] It shows empowerment and may garner applause, or it shows utter disobedience and triggers disdain depending on one's perspective.[341] After the leak, Justice Scalia enhanced norms by requiring his law clerks to submit to an oath.[342] Of course, an oath in a power dynamic may have some force in addition to cultural norms.[343] For clerks, they are also bound by the Code of Conduct for Judicial Employees.[344] But, what of Justices?

All of this results in a cultural era of distrust.[345] Skeptics wonder if the Court knows, but won't say what happened, and if so, which consequences would remain hidden.[346] If not known, then it appears as a procedural failure from beginning to end.[347] Regardless, it demonstrates a lack of accountability

340. *Id.* Leaks have occurred that reveal voting switches by individual jurists. For example, one exposed that Chief Justice Roberts changed his vote at the last minute. *See* Steven Lubet & Clare Diegel, *Stonewalling, Leaks, and Counter-Leaks: Scotus Ethics in the Wake of* NFIB v. Sebelius, 47 VAL. L. REV. 1, 2 (2013).

341. *See generally* Marzen & Conklin, *supra* note 328, at 9, 20 ("Ian Millhiser, senior correspondent at Vox, where he covers the Supreme Court, praised the leaker . . . . [p]olitical commentator Keith Olbermann agreed.").

342. Roy Strom, *Who Leaked the U.S. Supreme Court Draft? Suspicion Falls on the Clerks*, NAT'L POST (May 4, 2022), https://nationalpost.com/news/world/who-leaked-the-u-s-supreme-court-draft-suspicion-falls-on-the-clerks-as-probe-begins (reporting that in the wake of earlier leaks to media, Justice Scalia emphasized the importance of loyalty and the consequences of disloyalty to his law clerks: "If I ever discover that you have betrayed the confidences of what goes on in these chambers, I will do everything in my power to ruin your career.") (citing source as former Justice Scalia's law clerk, Ian Samuel, former law professor at Indiana Law); *see also* Jack Shafer, *It's About Time Someone Punctured the Supreme Court's Veil of Secrecy*, POLITICO (May 3, 2022, 8:27 PM), https://www.politico.com/news/magazine/2022/05/03/supreme-court-draft-opinion-secrecy-00029815 ("The late Justice Antonin Scalia became famous for making his clerks pledge silence about what they saw and heard.").

343. *See generally* Hugo Mercier, *The Cultural Evolution of Oaths, Ordeals, and Lie Detectors*, J. OF COGNITION & CULTURE 1, 7–14 (2020) (discussing the impact of an oath and how society views oaths).

344. GUIDE TO JUDICIARY POLICY §§ 310, 320 (U.S. CTS. 2022), https://www.uscourts.gov/sites/default/files/guide-vol02a-ch03.pdf; *see also* Strom, *supra* note 342 (explaining that clerks follow the oaths).

345. *See* Pema Levy, *The* Dobbs *Leak Didn't Wreck the Supreme Court—the Justices' Scandals Did*, MOTHER JONES (May 2, 2023), https://www.motherjones.com/politics/2023/05/supreme-court-scandals/ (discussing how there has been a decrease in trust in the Supreme Court since the leak); *see also* Savage & Liptak, *supra* note 324 ("The inconclusive report comes as opinion polls have shown weakened trust that the court is motivated by the law rather than by politics . . . .").

346. *See* Savage & Liptak, *supra* note 324 (emphasizing the lack of trust in the Supreme Court).

347. *See* Mystal, *supra* note 327 ("[T]his report reveals that the very investigation into the leak was a shambolic exercise that almost appears as if it had been designed to produce no actionable results.");

for this extraordinary breach of trust.

2. The *Dobbs* Leak

Here's what the Court has said publicly regarding the leak.[348] First, the Court expressed the severity of the matter:

> [T]his Court suffered one of the worst breaches of trust in its history: the leak of a draft opinion. The leak was no mere misguided attempt at protest. It was a grave assault on the judicial process . . . . It is no exaggeration to say that the integrity of judicial proceedings depends on the inviolability of internal deliberations.
>
> For these reasons and others, the Court immediately and unanimously agreed that the extraordinary betrayal of trust that took place last May warranted a thorough investigation.[349]

Despite this strong language, the Court then explains that the investigation and forensic analysis yielded no answers.[350] The Court offered that the investigators would pursue any additional leads.[351] The remainder of the report details the investigator's process and relevant ethical structures, including the law clerk ethical code of conduct.[352] It offers a who, when, where, what type of analysis,[353] but ultimately, the investigation bore no real fruit.[354] This lack of answers, despite inquiries, leaves the public and critics wondering what happened and what, if anything, will ever be done to address this epic

see also Glenn Fine, *Why the Supreme Court's Leak Investigation Failed*, THE ATLANTIC (Mar. 6, 2023), https://www.theatlantic.com/ideas/archive/2023/03/supreme-court-dobbs-leak-investigation-internal-oversight/673283/ (stating that the court does not know how to police itself or conduct an investigation properly).

348. Press Release, U.S. Sup. Ct., Statement of the Court Concerning the Leak Investigation (Jan. 19, 2023), https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

breach.[355]

3. Potential Consequences

These negative characteristics remind the public of other shortcomings, from the recusal process to the shadow docket.[356] The problematic nature of the Supreme Court's handling of recusal: trust us, we're handling this issue. This leads us back to the black box just like the leak investigation.

Lack of recusal standards for the Supreme Court is not the only procedural shortfall.[357] Professor Scott Dodson notes the lack of literature on Supreme Court rules and posits that the reason is the "black box" of the Supreme Court's rulemaking process.[358] Secrecy is part, but not all, of the problem. According to Professor Dodson, the Supreme Court, at times, issues orders amending rules without warning, rationale, and disclosure of who provided input.[359] After extensive treatment, Professor Dodson concludes that the rationales for the existing system are unpersuasive, and then offers modest reform measures that will improve the rulemaking process at a minimal cost to the Court.[360] This project is important for two reasons: it shines light where there is too much darkness, and it offers a path forward for an enhanced rulemaking system that better serves all constituencies.[361]

Another vector that deeply affects judicial reputation and public respect

355. *See* Savage & Liptak, *supra* note 324 (describing the failure to identify the leaker); *see also* Mystal, *supra* note 327; Zoe Tillman & Sabrina Willmer, *The Supreme Court Leak Probe Leaves Mystery: Were Justices Queried?*, BLOOMBERG L. (Jan. 20, 2023, 7:08 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-leak-probe-leaves-mystery-were-justices-queried.

356. *See* Geyh, Ross, & Jacobi, *supra* note 147 (discussing how the public is questioning the Court's recusal process); *see also* Russ Feingold, *The Leaked Dobbs Opinion is a Call to Action*, AM. CONST. SOC'Y (May 5, 2022), https://www.acslaw.org/inbrief/the-leaked-dobbs-opinion-is-a-call-to-action/ (discussing how there are many things about the Court's procedural process that needs to be changed, including the shadow docket).

357. *See Making the Case—Clean Up on Aisle SC*, MAKING THE CASE (July 19, 2023) (stream on Spotify) (interviewing Representative Hank Johnson, Fix the Court Executive Director Gabe Roth, and Campaigning Legal Center Senior Director of Ethics Kedric Payne about the Supreme Court's inadequate ethical standards, dark money, leaks, and Congress's power to bolster the Supreme Court's ethical requirements).

358. Scott Dodson, *The Making of the Supreme Court Rules*, 90 GEO. WASH. L. REV. 866, 869 (2022) (exposing the secrecy and importance of Supreme Court rulemaking and advancing transparency).

359. *Id.* at 883.

360. *Id.* at 917–25.

361. *Id.* at 925–66.

is when serious allegations of misconduct arise.[362] When proven, the impact is real.[363] The erosion of trust is significant.[364] But, even when not proven, the processes matter.[365] When litigants or law clerks accuse judges of behaving badly, it is vital that the public not perceive that judges are acting above the law because the system shows no signs of holding them accountable.[366] This includes the serious allegations of sexual harassment made against Judge Kozinski.[367] Fifteen women, including law clerks and staffers, alleged incidents of sexual harassment.[368] Inquiry began, but ultimately, Judge Kozinski retired to avoid further repercussions.[369]

This incident is not a singular occurrence. Concerns arose about the process used for handling the allegations of Dr. Christine Blasey Ford.[370] There

362. *See* David J. Sachar, *Judicial Misconduct and Public Confidence in the Rule of Law*, U.N. OFF. ON DRUGS AND CRIME, https://www.unodc.org/dohadeclaration/en/news/2019/08/judicial-misconduct-and-public-confidence-in-the-rule-of-law.html (last visited Oct. 9, 2023) (discussing how judicial misconduct leads to a decrease in public confidence in the Court); *see also* Josh Gerstein, *Fighting for Trust: The Painful Journey for the Supreme Court After* Dobbs, POLITICO (June 25, 2023,7:00AM), https://www.politico.com/news/2023/06/25/supreme-court-dobbs-00102730 (emphasizing the lack of public trust in the Supreme Court).

363. *See* Sachar, *supra* note 362 (describing the decrease in public trust); *see also* Gerstein, *supra* note 356 ("A long string of polls has shown record-low levels of public trust in the court. And some of the justices themselves have aired concerns about damage to the institution.").

364. *See* Sachar, *supra* note 362 (discussing how the judiciary, more than any other branch of government, relies on citizens' public faith to effectuate its authority because it does not command armies or police forces like the executive branch, and it does not have the "power of the purse" like the legislative branch).

365. *Id.* (arguing that it "behooves the judiciary to support measures that hold it accountable" because such processes provide a meaningful way of protecting the public from judicial misconduct).

366. *Id.* (noting that the rule of law is vulnerable when others perceive a judge as acting above the law and quoting President Theodore Roosevelt to support this notion: "No man is above the law . . . nor do we ask any man's permission when we ask him to obey it. Obedience to the law is demanded as a right, not asked as a favor.").

367. Patricia Barnes, *He's Back. After Resigning, Federal Judge Accused of Sexual Harassment Returns as a Practitioner*, FORBES (Dec. 6, 2019, 11:23 PM), https://www.forbes.com/sites/patriciagbarnes/2019/12/06/hes-back-after-resigning-federal-judge-accused-of-sexual-harassment-returns-as-a-practitioner/?sh=505f14b45388.

368. *Id.*; *see also* Matt Zapotosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior Including Four Who Say He Touched or Kissed Them*, WASH. POST (Dec. 15, 2017, 8:17 PM), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html.

369. Barnes, *supra* note 367; *see also* Zapotosky, *supra* note 368.

370. Seung Min Kim, Ann E. Marimow, Mike DeBonis, & Elise Viebeck, *Kavanaugh Hearing: Supreme Court Nominee Insists on His Innocence, Calls Process "National Disgrace*," WASH. POST

are historical instances of known and unknown allegations against jurists.[371] Of course, over time, a subset of judges has behaved unethically as well as criminally.[372]

In a town of internal investigators, it is hard to fathom that there are no viable leads or a baseline of accountability.[373] The special investigator, Gail A. Curley, conducted 126 formal interviews with 97 employees, all of whom denied any knowledge.[374] In the police force, it is called a "blue code of silence" when all officers refuse to speak based on loyalty to the department.[375] All these examples show systemic issues of secrecy, lack of accountability, and lack of adherence to minimal protocols.

Even beyond allegations of misconduct, there is room for reform of the confirmation process. Calls for political reform include abandoning the blue slip process.[376] This process enables legislators to oppose and block nominees from their jurisdiction without providing any rationale.[377] Another proposal is to enhance questioning to improve the focus on substance and minimize legislative grandstanding and other theatrics.[378]

(Sept. 27, 2018, 8:30 PM), https://www.washingtonpost.com/politics/kavanaugh-hearing-christine-blasey-ford-to-give-senate-testimony-about-sexual-assault-allegation/2018/09/27/fc216170-clc3-11e8-b338a3289f6cb742_story.html (providing a timeline of Brett Kavanaugh's confirmation hearing, including a recounting of the Judiciary Committee's handling of Dr. Christine Blasey Ford's allegations against Brett Kavanaugh).

371. *History: New York State Commission of Judicial Conduct*, N.Y. ST. COMM'N ON JUD. CONDUCT, https://cjc.ny.gov/General.Information/Gen.Info.Pages/Mandate.History.html (last visited Aug. 27, 2023) (detailing the history of the Commission of Judicial Conduct, which has investigated known and unknown allegations made against judges since 1974).

372. *See, e.g.*, United States v. Nixon, 506 U.S. 224, 226, 228–38 (1993) (denying jurisdiction over the Senate impeachment process based on the political question doctrine to a federal judge who was criminally convicted and impeached for false statements).

373. *See* Press Release, U.S. Sup. Ct., *supra* note 348 (linking to an investigation report, which revealed that the Office of the Marshall of the Supreme Court—the internal investigator that conducted the search for the source of the leaked majority opinion of *Dobbs*—could not identify the source of the leak).

374. Savage & Liptak, *supra* note 324.

375. Jerome H. Skolnik, *Corruption and the Blue Code of Silence*, 3 POLICE PRAC. & RES. 7, 9–10 (2002) (explaining that the "Blue Code of Silence" is an unwritten normative injunction that exists within police subculture because of feelings of loyalty and brotherhood among police officers).

376. Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 76−83 (2001) (detailing the historical origins and consequences of Senate use of blue slips in the federal judicial confirmation process).

377. *Id.*

378. *See generally* Summer Concepcion & Frank Thorp V, *Sen. Kennedy Stumps Biden Judicial*

Despite threats to democracy, Americans must remain committed to progress, resilience, and never giving up.[379] In the most recent State of the Union (SOTU), President Biden declared: "[O]ur democracy remains unbound and unbroken."[380] Professor Kate Shaw recently called for President Biden to use the bully pulpit to call the Court to the carpet during the SOTU[381] for such

Nominee with Basic Questions About Constitution, NBC NEWS, https://www.nbcnews.com/politics/congress/sen-kennedy-stumps-biden-judicial-nominee-basic-questions-constitution-rcna67703 (last updated Jan. 26, 2023, 12:22PM) (detailing Judge Charnelle Bjelkengren's inability to explain what Article V and Article II of the Constitution contain). Many of the questions are not written to garner meaningful answers. *Id.* At times, the questions may be posed in hopes of stumping a nominee with basic constitutional questions—like the meaning of Article V—asked by Senator Kennedy (R-La.). *Id.*

379. Politico Staff, *State of the Union 2023 Transcript & Analysis*, POLITICO (Feb. 8, 2023, 11:42AM), https://www.politico.com/interactives/2023/biden-state-of-the-union-2023-watch-live-analysis-2-7-23/. During the 2023 State of the Union (SOTU) Address, President Joseph Biden emphasized hope in the face of increasing threats to democracy:

> Folks, the story of America is the story of progress and resilience. Of always moving forward, and never, ever giving up. It is a story unique among all nations. We are the only country that has emerged from every crisis we have ever entered stronger than we got into it. Two years ago, Covid had shut down the world. Today, Covid no longer controls our lives. Two years ago, democracy faced its [sic] greatest threat since the Civil War. And today, our democracy remains unbound and unbroken.

Id.

380. *Id.*

381. Kate Shaw, Opinion, *This Is Biden's Chance to Tell Us Exactly What the Supreme Court Has Done*, N.Y. TIMES (Feb. 7, 2023), https://www.nytimes.com/2023/02/07/opinion/biden-supreme-court-state-union.html (President Biden should use the State of the Union as an "opportunity to begin a deliberate, sustained process of reminding both the public and the justices that the [C]ourt is part of the nation's democratic fabric—and that neither the court's decisions nor its members are beyond criticism . . . . [I]t's critical that Mr. Biden makes sure Americans know what the court has done—and what it may yet do. Many items on Mr. Biden's policy agenda are vulnerable to the [C]ourt's anti-democratic override. The [C]ourt has already agreed to hear the challenge to Mr. Biden's student loan forgiveness plan; there's a very real chance that five or six justices will invalidate it. Most meaningful gun regulation will be exceedingly difficult to defend under the Supreme Court's newly minted test. Virtually every major executive branch agency initiative could fall under the [C]ourt's invented 'major questions doctrine,' which purports to hold that 'major questions' are for Congress, but really means to reserve such questions for the court."). In January 2010, President Barack Obama used the SOTU platform to offer a pointed critique of the Supreme Court for its ruling in Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), which "triggered something equally usual[:] Justice Samuel Alito, a conservative backer of the ruling, frowned and appeared to mouth the words 'not true.'" Alan Silverleib, *Gloves Come Off After Obama Rips Supreme Court Ruling*, CNN (Jan. 28, 2010, 6:26 PM), https://edition.cnn.com/2010/POLITICS/01/28/alito.obama.sotu/index.html (recounting President Obama's SOTU unprecedented critique of the Court: "With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates

opinions as *Dobbs*.[382] This call is an example of incentives and pressure for political actors to increase tactics, address the issues, and, when appropriate, offer tangible fixes.

III. JUDICIAL FIDELITY THESIS

A. Emblematic Components

It is not possible to provide a definite list. This Article is an invitation to a longer conversation. To start this conversation, consider some essential ingredients for improving judicial fidelity.

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for special interests—including foreign corporations—to spend without limit in our elections. . . . I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems."). After this public friction, some justices declined to attend later SOTUs. *See* Bill Mears, *After 2010 State of the Union Jab, How Many Justices Will Attend?*, CNN (Jan. 24, 2011), https://edition.cnn.com/2011/POLITICS/01/24/sotu.supreme.court/index.html (discussing at least one Justice stating that he would not attend the SOTU after President Obama's criticism of the Supreme Court). As a matter of norms, Justices should attend SOTU and the President should refrain from direct attacks during SOTU when the Justices are a captive audience lacking a proper platform to respond. *See, e.g.*,. Silverleib, *supra* (discussing criticisms of President Obama's critique of the Supreme Court when they were impassively listening to the SOTU). White House press briefings are fair game for such presidential critiques. *See Everything You Need to Know About White House Press Briefings*, CBS NEWS (June 28, 2017, 6:00 AM), https://www.cbsnews.com/news/everything-you-need-to-know-about-white-house-press-briefings/ (describing the history of White House press briefings and the importance of these briefings for presidents to explain their plans). Of course, the promotion of legislation to undo Supreme Court rulings is also a wise illustration of politics—there's even a way to suggest a reversal without directly attacking sitting Justices. *See, e.g.*, *Remarks of President Joe Biden—State of the Union Address as Prepared for Delivery*, WHITE HOUSE (Feb. 7, 2023) (transcript available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/). President Biden's latest SOTU attempted to chart a bit more delicate and with a separation-of-powers frame, yet still political course regarding the Supreme Court's landmark ruling in *Dobbs*:

> Congress must restore the right the Supreme Court took away last year and codify *Roe v. Wade* to protect every woman's constitutional right to choose. The Vice President and I are doing everything we can to protect access to reproductive health care and safeguard patient privacy. But already, more than a dozen states are enforcing extreme abortion bans. Make no mistake; if Congress passes a national abortion ban, I will veto it.

Id.

382. *See* Shaw, *supra* note 381 (arguing that President Biden should ensure that the public knows what the Court has done, such as discarding popular precedent in *Dobbs*, passing decisions that make firearm regulation difficult, and curtailing the ability of federal agencies to regulate climate change).

1. Judicial Role, First

Judges must strive to have judicial humility. Jurists should rule with heart and head. Justice Cardozo described the importance of these two features of judging.[383] Other jurists have discussed the importance of empathy, but at times, we expect jurists to be devoid of feeling and to be purely analytical—as if that were possible.[384]

Human traits and temptations will remain. Failings will be visible and invisible. Regardless, jurists must strive to place their sacred role above other interests, motivations, and temptations.[385] Honest reasoning should be paramount.

2. Transparency and Reasoned Elaboration

The distrust and lack of faith in the judicial branch weigh in favor of more norms, not less.[386] Greater transparency in decisionmaking will enhance review and perception of judicial opinions.[387] To improve opinions actually and

383. Brennan, *supra* note 27, at 3–5; *see also* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10–13 (1921).

384. *See* Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1960 (2012) (arguing that empathy plays a significant role in the judicial process and that jurists should not rely on pure rationality all the time); *see also* Devin Dwyer, *Judge Jackson Takes Empathetic Approach to Impartiality: Analysis*, ABC NEWS (Mar. 25, 2022, 12:02 PM), https://abcnews.go.com/Politics/judge-jackson-takes-empathetic-approach-impartiality-analysis/story?id=83658311 (discussing judges, such as Justice Breyer and Justice Kennedy, who have stressed the importance of empathy in judicial decisions and others who wish for judges to make decisions based strictly on the law, not empathy).

385. *See Code of Conduct for United States Judges*, *supra* note 110 (detailing the ethical and professional responsibilities for federal judges, which includes prioritizing the "duties of judicial office . . . over all other activities"); *see generally* MODEL RULES OF PROF'L CONDUCT PREAMBLE & SCOPE (AM. BAR ASS'N 2023) (outlining the ethical and professional responsibilities for lawyers, which includes placing one's role as a lawyer above competing interests).

386. Jones, *supra* note 109 (discussing various poll-related measures assessing Americans' trust in the judiciary, including how only 47% of Americans trust the judicial branch in 2022 when the previous low was 53%); *Issue 2: Preserving Public Trust, Confidence, and Understanding*, U.S. CTS., https://www.uscourts.gov/statistics-reports/issue-2-preserving-public-trust-confidence-and-understanding (last visited Oct. 9, 2023) (describing four overarching strategies developed by the United States Courts systems to establish new norms, such as increasing transparency, preserving public trust and confidence, and understanding in the court systems).

387. *See* Caprice L. Roberts, *Towards an Improved Judiciary—Decisionmaking Consistency on Constitutional Remedies*, JOTWELL (May 16, 2023), https://lex.jotwell.com/towards-an-improved-judiciary-decisionmaking-consistency-on-constitutional-remedies/ ("[G]reater transparency in judicial

visibly, judges should, at minimum, explain their logic by showing analytical reasoning[388] and any departures from, and interpretations of, potentially binding precedent.[389]

The emphasis on more formalistic components of judging does not endorse or require rigid legal formalism.[390] A model judge should be able to exercise flexibility when necessary.[391] Rigor and well-reasoned logic are possible without inflexibility or blind adherence to formalism.[392]

Judges should at least provide unpacked reasoning, if not more complete "reasoned elaboration."[393] Professor Fallon, in an examination of the Hart-Wechsler paradigm, summarizes the concept as core to judicial process as envisioned in the legal process movement.[394] Reasoned elaboration dictates that judges crafting opinions should not only explain their logic, but also elaborate on principles and policies and link those principles to more democratically based sources and actors.[395]

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reasons for any departure will aid judicial, public, and scholarly debate on the validity of judicial approaches and reasoning.").

388. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 970–71 (1994) (reflecting on the influence of Professors Hart and Wechsler including the rise and fall of the Legal Process Movement of the 1950s). Fallon specifically examines the seminal federal courts casebook: HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d. ed. 1973). Fallon, *supra*, at 961–62. For an example of formalism in action in a majority opinion of the Supreme Court, see eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391–92 (2006) (demonstrating formalism in requiring lower courts to avoid categorical thinking but instead analysis relevant equitable factor).

389. Katherine Mims Crocker, *Constitutional Rights, Remedies & Transsubstantivity*, 110 VA. L. REV. (forthcoming 2024) (advancing the case for consistency of principles in judicial reasoning across constitutional remedies cases); *see also* Roberts, *supra* note 387 (emphasizing the value of Professor Crocker's contribution).

390. *See* Rachel Bayefsky, *Order Without Formalism*, 90 GEO. WASH. L. REV. 1458, 1459, 1462 (2022) (explaining how Justice Ginsburg's work is an exemplary of how a justice can accomplish structure while not adhering to traditional formalism).

391. *See id.* at 1464 (discussing that while Justice Ginsburg valued order, her judicial restraint required flexibility).

392. *See id.* at 1461, 1465, 1470 (exploring Justice Ruth Bader Ginsburg's judicial commitments as a way to accomplish "order without formalism").

393. Fallon, *supra* note 388, at 966; *see generally* G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 280–91 (1973) (explaining the history of and defining "reasoned elaboration").

394. Fallon, *supra* note 388, at 966; *see also* Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363–64 (1953).

395. Fallon, *supra* note 388, at 966 ("But while the judicial role is irreducibly creative in some respects, it is limited to the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers.").

Like all human actors, judges need boundaries—even more so given the import of the role. They have many, though judges may not always abide by them.[396] This Article argues that they should heed boundaries and explain departures. A judge that explains logic is more accountable on review (if any) and to the public.[397] It is a type of boundary-setting device. Another related device is coherence, both with precedent and the larger narrative of the federal branch or even with the jurist.[398]

It is also important for a jurist to show any interpretative method.[399] All methods are value choices, but visibility is key to accountability for those choices.[400] Is the logic durable when subject to appeal and outside scrutiny? The key is not to hide the method or otherwise engage in *judicial cheating*.[401] Still, a judge may engage in apparent ends-based reasoning, but then reverse-engineer the opinion to offer a logical basis.[402] Judges should strive to use good-faith reasoning and exercise judicial wisdom as much as feasible.

3. Judicial Review and Accountability

Given the import of *Marbury* to our constitutional democracy, the nature of the Supreme Court's docket merits continued examination and dialogue.[403]

396. *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2249 (2019) (discussing particular boundaries on the Court set by political or social norms); Bayefsky, *supra* note 390, at 1470 (discussing how every judge is inconsistent at times, even to their own personal boundaries).

397. *See* Kermit V. Lipez, *The Ways of a Judge on Appeal*, 63 ME. L. REV. 440, 440–41, 451 (2011) (detailing how judges must explain themselves to a wary public to combat the assumption of judges imposing their personal preferences).

398. *See* Crocker, *supra* note 389 (manuscript at 49–50) (discussing the theory of transsubstantivity and the need for judges to be accountable by explaining departure from precedent).

399. *See* Ronald Dworkin, *Law as Interpretation*, 9 CRITICAL INQUIRY 179, 194 (1982).

400. *See* Lipez, *supra* note 397, at 440–41.

401. Joel Feinberg, *Law from the Perspective of the Judge—The Dilemmas of Judges Who Must Interpret "Immoral Laws*," *in* PHILOSOPHY OF LAW 118–19 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000) (describing ways in which judges "cheat" by "stat[ing] that the law is not what he believes it to be, and thus preserve an appearance (to others) of the conformity to law and morality") (quoting in part ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 6 (1975)) (discussing the tensions between judicial duty and conscience).

402. *See* Michael D. Daneker, *Moral Reasoning and the Quest for Legitimacy*, 43 AM. U. L. REV. 49, 49, 52 (1993) (discussing how judges will use morality in opinion writing to create legitimacy for their opinion, even if morality played little role in their decisionmaking).

403. Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787, 827–28 ("Because the Supreme Court decides whether to hear cases pursuant

Congress and the public have a right to learn more about motivations that shift the Court's focus on which cases it opts to exercise judicial review, and which cases it never will.[404] Greater accountability will lead to external pressures that may have some effect on the Court.[405] Congressional oversight on the statistics reported by the Chief Justice may be worthwhile.[406] Academics can also continue to examine certiorari decisions as more becomes known over time.[407]

4. Balancing Tensions and Restraint

Judges must act as fiduciaries of the judicial branch and the public trust. Professor Neil Siegel advocates for judges to practice judicial statesmanship[408] as part of the proper judicial role.[409] Professor Lawrence Solum advocates for a virtue-ethics[410] approach to understand law and to improve judging.[411] He examines negatives like corruption and bad judicial temperament[412] and suggests virtuous traits such as impartiality and judicial integrity.[413] He also emphasizes judicial wisdom as core to judicial virtue.[414] Judicial wisdom involves "sound practical judgment" with the goal of justifying judicial equity and rationales for deviating from rule-based reasoning based on distinct

to vague and often unknowable criteria, subjective to each justice, however, the public should know as much as possible about that process.").

404. *Id.* at 788, 828–29 (discussing the discretion the Court has in deciding which cases to hear, and the importance of the process becoming more transparent).

405. *See id.* at 825, 829, 832, 846 (emphasizing the public's inability to hold the Court accountable if it cannot review its decisionmaking process).

406. *See id.* at 844 (explaining that congressional oversight of the judiciary would not violate separation of powers).

407. *See id.* at 847 (explaining that knowledge of reasoning for certiorari decisions is critical to American history).

408. Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 963 (2008) (weighing when jurists should act delicately given a torn country versus when judges should intervene to ameliorate conflict).

409. *See, e.g.*, *id*.

410. Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 178–79 (2003) (explaining that virtue ethics resources are massive, but for the instant inquiry, the foundation lies in Aristotelian thinking).

411. *Id.* at 182–83 (advancing a normative and descriptive theory of law that relies on virtue ethics to address core issues in legal philosophy).

412. *Id.* at 186–87.

413. *Id.* at 189–94.

414. *Id.* at 192–93.

facts.[415] Professor Solum also explores the relationship of judicial virtue to justice, and how the judicial quest for justice raises "special concern for fidelity to law and for the coherence of law."[416]

These goals fit with the conception of judicial fidelity advanced in this Article. The challenge remains how to test such fidelity without partisanship overly infecting the inquiry.[417] As noted, judicial fidelity is not an effort to enforce conformity with a particular manner of interpretation or certain desired consequences. Rather, it is fidelity to a higher calling and, within that duty, the interest in advancing justice with a fidelity to law and its coherence. But how can we examine fidelity to law? If partisan views cause some to argue that we have two constitutions, can we analyze faithfulness to constitutional commands? We must do so—even through disagreement about the very essence of the governing laws and standards—vigorously and iteratively. In dialogue, we must assess judicial adherence to law and seek to persuade others of the successes and failures of such adherence.[418] The law and its judges are responsible for maintaining legitimacy[419] and helping to articulate any requirements.[420] The level of coherence of law in the broader context should also provide a useful way to validate judicial performance especially over time.[421] Professor Dworkin envisioned judges operating as if part of a chain novel that must maintain a coherent storyline.[422] It will not be easy, but this work is essential to ensuring a well-functioning judiciary.[423] If enough citizens view the judiciary as broken, and especially if those citizens have diverging political views, then momentum will rise for serious reforms such as

415. *Id.* at 190, 192–93.

416. *Id.* at 196–97.

417. *See* Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 266–67, 271 (2019) (discussing the increased polarization of the judiciary and how judges' decisions are influenced by their ideological beliefs).

418. *See* Siegel, *supra* note 408, at 969, 1032 (assessing adherence to the law by measuring judicial statesmanship). Scholars attempt to measure judicial adherence by many standards, and Professor Siegel's article is one example of an attempt to measure adherence. *See id*.

419. *See id.* at 1032 ("[L]aw is an institution that must account for the conditions of its own legitimation . . . .").

420. *See id.* at 979, 983, 1101, 1030–32 (explaining how judges must adhere to certain standards to maintain legitimacy of the court).

421. *See id.* at 1032.

422. DWORKIN, LAW'S EMPIRE, *supra* note 89, at 228–32 (1986) (comparing judges to chain novelists that create a unified novel, but with caselaw instead of stories).

423. *See* Siegel, *supra* note 408, at 970–71, 974–75 (providing justification for the reasoning which causes judges to maintain coherence with the law).

term limits.[424] The boundaries are debatable and the precise thresholds unknown, yet courts, scholars, and the public must examine judicial reasoning for fitness to law and coherence as part of judicial fidelity.

All exercises of power bring the potential for abuse.[425] Judging regularly involves interpretation and discretion.[426] Judges must engage in interpretation of which cases are sufficiently comparable to govern the question in dispute.[427] Cases also regularly involve statutory interpretation about the meaning of terms and application to facts of the case.[428] Gaps in statutory and case precedents exist, and judges must resolve the instant dispute unless justiciability hurdles are insurmountable, or abstention warranted.[429] Where equitable remedies are sought, for example, judges must exercise discretion in evaluating relevant factors and determining whether to grant relief.[430] Discretion also includes the ability to craft relief.[431] Further equitable discretion includes the power to deny equitable relief.[432] Even if one is deeply skeptical about exercises of equity power, equity is essential to protecting rights when the harm is ongoing and irreparable.[433] Discretion is a necessary feature of both

424. *See* Epps & Sitaraman II, *supra* 152, at 402, 412 (discussing potential reforms the public might want for the Supreme Court due to political battles).

425. *See, e.g.*, Mark G. Kalpakis, *Abuse of Discretion by a Trial Judge*, 7 N. KY. L. REV. 311, 311, 313, 320, 322 (1980) (illustrating a trial judge's abuse of power).

426. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 191 (1986) (explaining that even when the text is unclear, judges must interpret statutes by figuring out what outcome will best advance the goal of the litigation).

427. *See* Richard H. Fallon, Jr., *A Constructionist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1202–03 (1987) (discussing how judges must frequently evaluate which precedent cases govern the matter at hand).

428. *See* Posner, *supra* note 426, at 189–90, 201–13 (breaking down specific examples of the Court interpreting statutes in different factual scenarios).

429. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 209 (1962) (holding that even with the existence of a political question, while difficult to decide, the case was still justiciable and remanding it to the lower court to make a ruling).

430. *See, e.g.*, Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY. L. REV. 609, 613, 654, 656 (1997) (illustrating a judge's discretion when granting equitable relief in a specific study of Michigan courts).

431. *See, e.g.*, *id.*

432. Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982).

433. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 552–53 (2016) (explaining that because compensation is an imperfect remedy, unable to compel any behavior of an offending party except payment, courts must have a way to compel action or inaction through equitable remedies).

common law interpretation and equitable remedy power.[434]

Fear of interpretation increases the commitment of some to impose rigid rules and endorsement of only certain methods of interpretation.[435] But a particular canon should not be considered the only permissible, or even the most desirable, method.[436] Originalism should not dictate results any more than purposivism or functionalism.[437] All methods should be clearly articulated along with supporting evidence. Then, the analysis is subject to appellate review as well as scholarly and public critique for faulty logic and inconsistencies.[438] Discretion may also cause consternation in both the ultimate disposition and remedy, or even in the manner of writing.[439] Although concerns may be valid, judges should not be stripped of all moments for discretion. It is through the wise, reasoned exercise of discretion and persuasive interpretation that humans *as judges* display advancement of knowledge and ideally justice.

434. *See* Kennedy, *supra* note 430, at 609 (1997) ("[E]quity means the power to do justice in a particular case by exercising discretion to mitigate the rigidity of strict legal rules.").

435. *See* Dana Steinberg & Philippa Strum, *Constitutional Interpretation*, WILSON CTR. (Mar. 23, 2005), https://www.wilsoncenter.org/article/constitutional-interpretation (stating that Justice Scalia "warned of the dangers of rewriting or redefining a constitutional text rather than interpreting it in its original form," which he suggested would "destroy the Constitution").

436. *See* VALERIE C. BRANNON, CONG. RESEARCH SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 2 (2018) (finding that most judges do not identify as "pure purposivists or textualists," as most modern purposivists use the statutory text as a starting point and constraint, while most textualists will look to discover the context and Congress's purpose for acting).

437. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 778–79 (2022) (explaining that the archrival debate between originalists and nonoriginalists continues without resolution, and then advocating that escaping the loop is not to view originalism as a better way of reaching constitutional answers, but instead, to see originalism as a standard—rather than a "decision procedure"—a step-by-step procedure for finding correct constitutional answers).

438. *See* J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review*, 47 L. & CONTEMP. PROBS. 1, 1 (1984) (explaining appellate courts' control over the timing, standards, and "scope of review of trial court decisions"); *see also* Viet D. Dinh, *Threats to Judicial Independence, Real & Imagined*, 137 DAEDALUS 64, 64, 66 (2008) (describing that public criticism of federal courts for judicial opinions and judicial activism is "nothing new" and "commonplace" throughout American history).

439. Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 105 (2021) (lamenting the judicial discretion exercised in the opinion writing styles that degrade the integrity of the court and arguing for greater judicial restraint in opinion rhetoric); Richard A. Posner, *What Is Obviously Wrong With the Federal Judiciary, yet Eminently Curable, Part I*, 19 GREEN BAG 187, 197 (2016) (explaining that judges no longer write eloquently due to cultural shifts that destroyed the humanities and asserting that clarity and plain language are the modern coin of the judicial realm); Richard Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable, Part II*, 19 GREEN BAG 257, 261 (2016) (arguing that judges should abandon jargon); Josh Blackman, *Judicial Courage*, 26 TEX. REV. L. & POL. 355, 358 (2022) (examining how the Supreme Court has called for and criticized the notion of "judicial courage").

B. Avoid Calls for Radical Reform

No matter how serious the crises may be in one's opinion, reform should be methodical and likely incremental. Rapid radical reforms may cause new problems and will garner political backlash.[440] However, like any movement, voices calling for more extreme measures may create space for compromise and result in less drastic suggestions becoming reality.[441] For this reason, continued exposure of shortfalls and calls for robust reform may be essential—even if something more gradual and incremental will be best to implement—if we want the relief to be both proportional to the problem, corrective in its effect, and lasting over time.[442]

C. Anti-Nihilism and the Import of Maintaining Judicial Norms

All governmental actors are human. Some humans will fail to abide by the edicts of the office and the goals of ideal judging. Some will lack fidelity, integrity, virtue, and statesmanship. A few may fail spectacularly and publicly. Still, these failings should not translate into a surrender of judicial norms.[443] The temptation of moving from disappointment and sarcasm to

440. *See* Greg Berman, *In Defense of Incrementalism: A Call for Radical Realism*, THE HILL (Nov. 27, 2020, 12:00 PM), https://thehill.com/opinion/white-house/527568-in-defense-of-incrementalism-a-call-for-radical-realism/ (explaining that because radical change is "almost guaranteed to engender significant backlash," incrementalism is the "only way" to produce change without alienating "huge swaths" of the United States). *But see* Anders Aslund, *The Case for Radical Reform*, 5 J. DEMOCRACY 63, 65 (1994) (questioning Western and Eastern political criticism of rapid reform in post-Communist states).

441. *See, e.g.*, Terry Gross, *Black Power Scholar Illustrates How MLK and Malcolm X Influenced Each Other*, NPR (Aug. 12, 2020, 12:39PM), https://www.npr.org/2020/08/12/901632573/black-power-scholar-illustrates-how-mlk-and-malcolm-x-influenced-each-other ("Malcolm X . . . injects a political radicalism on the scene that absolutely makes Dr. King and his movement much more palatable to mainstream Americans."); Danielle McLeod, *Cooler Heads Prevail*, GRAMMARIST, https://grammarist.com/idiom/cooler-heads-prevail/ (last visited Aug. 27, 2023) (discussing meaning and potential origin). Yet a range of efforts may create space for certain suggestions to be palatable as moderate options—take Shakespeare's Theseus: "Lovers and madmen have such seething brains,/Such shaping fantasies, that apprehend/More than cool reason ever comprehends." WILLIAM SHAKESPEARE, A MIDSUMMER NIGHT'S DREAM act 5, sc. 1, l1, 4–6.

442. *See generally* Aslund, *supra* note 440, at 72 (explaining that the first step in rapid political and economic reform is a "democratic breakthrough" which can then lead to an opportunity to implement a new economic system).

443. *See* Lord Neuburger, Amal Clooney, Helena Kennedy, & Can Yeginsu, *The Need for Independent Judges and a Free Press in a Democracy*, U.N. OFF. ON DRUGS & CRIME,

anger and nihilism is real.[444] The fate of our democracy hangs not just on the federal judiciary, but also on our citizens continuing to believe that it is worth holding government actors accountable for their ethical and interpretative failings.[445] Of course, the frustration with proven failings is the inability to hold federal judges accountable.[446] There are no retention elections or term limits.[447] For now, at least. There may be value in good-faith efforts to propose and pursue reforms for greater accountability.[448] The conversation on performance is meaningful in and of itself, and the good-faith threat of reforms may serve to redirect most federal jurists towards fulfilling judicial norms.[449]

IV. RESTORING FAITH IN THE IDEALS OF OUR REPUBLIC

A. Increase Access to Justice

Cases involving access to justice and perceptions of access to justice are

https://www.unodc.org/dohadeclaration/en/news/2021/05/the-need-for-independent-judges-and-a-free-press-in-a-democracy.html (last visited Oct. 9, 2023) (reasoning that judges acting independently is essential for a democratic society).

444. *See* David Chapman, *The Emotional Dynamics of Nihilism*, MEANINGNESS, https://meaningness.com/emotional-dynamics-of-nihilism (last visited Aug. 25, 2023) (describing the phenomenon that when people are "bitterly disappointed," they may commit themselves to nihilism to avoid being "fooled again").

445. *See* David F. Levi, Raymond J. Lohier, Diane P. Wood, & Jeffrey S. Sutton, *Losing Faith: Why Public Trust in the Judiciary Matters*, 106 JUDICATURE 70, 72 (2022) (asserting the importance of noticing waning public confidence in the judiciary because any loss of confidence makes the rule of law vulnerable, detracting from the judicial branch's legitimacy); *see also* Charles G. Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 916 (2006) (espousing the importance of judicial accountability in promoting public confidence and protecting the rule of law from detriment).

446. *See, e.g.*, Montanaro, *supra* note 74 (citing the NPR/PBS NewsHour/Marist poll in which 62% of respondents said they have "not very much or no" confidence in the Supreme Court).

447. *See* NCC Staff, *The Continuing Debate Over the Supreme Court and Term Limits*, NAT'L CONST. CTR. (Jul. 6, 2015), https://constitutioncenter.org/blog/the-continuing-debate-over-the-supreme-court-and-term-limits (describing the national controversy and constitutional challenge to implement term limits and retention elections for Supreme Court justices, who currently have life tenure).

448. *See* Geyh, *supra* note 445, at 916 (describing how judicial accountability is an instrumental value that promotes "the rule of law, public confidence in the courts, and institutional responsibility"); *see also* Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. FOR AM. PROGRESS (Aug. 3, 2020), https://www.americanprogress.org/article/need-supreme-court-term-limits/ (outlining various proposals for judicial term limits).

449. *See* Epps & Sitaraman II, *supra* note 151, at 398, 402 (hoping to expand the scholarly conversation on Supreme Court reform and demonstrate that "the Court itself might wisely choose to reform itself in small ways in order to reduce calls for more significant reform.").

trending in unhealthy directions.[450] From standing to abstention, federal judges are reaching the merits in fewer cases.[451] The Supreme Court continues shrinking its docket.[452] Receiving a grant of writ of certiorari is exceedingly rare.[453] As a result, many federal circuit splits remain unresolved.[454] Proposals for another national court to resolve splits may warrant further consideration.[455] At minimum, study and conversation may reveal how seriously our Judicial Branch values supremacy and uniformity.[456]

Access to justice issues also exist in the lower federal courts. One strain of critique focuses on *pro se* litigants.[457] Congress has dictated many of the additional hurdles that such litigants must overcome.[458] Still, the criticism targets the federal judiciary's overly swift, dismissive consideration of *pro se*

450. Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1797–1808 (2001) (explaining how the Supreme Court has limited access to justice in both civil and criminal proceedings).

451. *See generally* Heather Elliot, *Does the Supreme Court Ignore Standing Problems to Reach the Merits? Evidence (or Lack Thereof) from the Roberts Court*, 23 WM. & MARY BILL RTS. J. 189, 191–95 (2014) (concluding that the Roberts Court does not manipulate standing to reach the merits of a case, but remaining inconclusive about whether the Roberts Court manipulates standing to *avoid* the merits of a case).

452. *See* Michael Heise, Martin T. Wells, & Dawn M. Chutkow, *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1567 (2020) (finding that the Supreme Court today "decides markedly fewer appeals than its predecessors"—the Court decided about 177 appeals per term in the 1940s, compared to only sixty-eight appeals in 2017).

453. *U.S. Supreme Court Research Guide: Overview*, U. MICH. L. LIBR., https://libguides.law.umich.edu/scotus (last visited Aug. 25, 2023) (stating that out of 7,000 to 8,000 certiorari petitions filed each term, the Court typically grants certiorari on about eighty cases).

454. Cohen & Cohen, *supra* note 308, at 990 (finding that as a consequence of the "Supreme Court significantly redu[cing] the number of cases it decides," there "has been an increase in the number of unresolved 'circuit splits'").

455. *See id.* (noting several reforms have been proposed to "minimize the number and impact of circuit splits" including "establishing a new layer of appellate court or creating a new 'inter-circuit tribunal'").

456. *See id.* at 999 (emphasizing that the proposed National Court of Appeals would hear cases to "assure consistency and uniformity by resolving conflicts between circuits"); *see also* Martha J. Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 536 (2010) ("[A] necessary corollary of supremacy is uniformity in the interpretation and application of federal law throughout the United States.").

457. *See* Mitchell Levy, *Empirical Patterns of* Pro Se *Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1820 (2018) (detailing how Judge Richard Posner resigned partly due to his critique over treatment of *pro se* litigants).

458. *See, e.g.*, Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e (2013).

complaints and motions.[459] The hard part is how to improve the system. Reform efforts may easily lose steam despite genuine passion and early momentum.[460]

A related concern is the unintended consequences of accountability measures.[461] For example, based on a perceived crisis in the federal judiciary, Congress passed legislation requiring federal judges to report backlogged cases every six months ("six-month motion list").[462] The intention behind the accountability public listing requirements included incentivizing judges to enhance justice and efficiency.[463] Ultimately, the six-month motion list perversely incentivized closing cases just prior to the deadline and making more errors.[464] Critics argue that the list is a "shaming mechanism" that has negative, unintended consequences.[465] Reforms should focus on how to facilitate improved incentives.[466] Alternatively, scholars who have studied the issue and its intended incentives conclude that "given the difficulty of evaluating the key output of judges—high quality decisions—our preferred approach is to eliminate incentives altogether."[467] Again, all should beware of overly quantifying the qualitative.

459. Kevin Bliss, *Former Seventh Circuit Judge Posner Founds Short-Lived Project to Help* Pro Se *Litigants*, PRISON LEGAL NEWS (Jan. 9, 2020), https://www.prisonlegalnews.org/news/2020/jan/9/former-seventh-circuit-judge-posner-founds-short-lived-project-help-pro-se-litigants/ (reporting that Judge Posner retired from the United States Court of Appeals for the Seventh Circuit "because the justice system was far from just when it came to pro se litigants[,]" and explaining that Judge Posner's *pro se* litigant assistance project shattered after almost a year given crushing demand that exceeded the organization's capacity). Former Judge Richard Posner lamented that "the legal system has made representation less affordable while at the same time created a maze of rules governing court proceedings, making it nearly impossible for *pro se* litigants to navigate." *Id.*

460. *Id.*

461. Miguel F. P. de Figueiredo, Alexandra D. Lahav, & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363, 366 (2020).

462. *Id.*; *see also* Civil Justice Reform Act of 1990 ("CJRA"), 28 U.S.C. §§ 471–82, including the Six-Month List provision, at § 476.

463. *See* de Figueired, Lahav, & Siegelman, *supra* note 461, at 372–73 ("[The] stated purpose of the CJRA was to speed-up case disposition time in the federal courts and to reduce delays . . . [by creating a] mild shaming sanction for dilatory judicial behavior.").

464. *See id.* at 368.

465. *Id.* at 366.

466. *See id.* at 446–48 (suggesting, until congressional reform, supplemental reporting on more regular intervals that focuses on the mean or median duration and including, for example, a judge's aggregate performance over all handled cases coupled with a risk adjustment measure).

467. *Id.* at 448.

B. Enhance Maxims with Staying Power: For Every Wrong, There is a Remedy

Any reform proposals and scholarly critiques should examine the federal judiciary's performance on historic maxims. Of course, not all maxims maintain modern-day force of logic. So, again, this suggestion is not in favor of rigid or blind adherence. Instead, this recommendation is for judges to grapple with potentially relevant maxims. Federal judges should examine whether the reason for the doctrine continues to justify following the maxim.[468] A maxim with clear continued vitality is "for every wrong, there is a remedy."[469] Departure from this maxim warrants an explicit demonstration of the grounds for failing to satisfy this basic function of justice at the heart of the judicial system.[470] Accordingly, where plaintiff proves a violated right, federal courts should strive to render relief.[471] Latitude will persist regarding the type of remedy warranted unless a governing statute dictates limited options.[472] If involving equity, the federal judiciary should maintain historic equity unless Congress explicitly strips it of such power.[473] Even then, Congress may be

468. *See* Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1622 (2013) ("Maxims provide the background information for consistent, coherent, predictable, and procedurally even-handed governance."); *cf.* Andrew B. Ayers, *What If Legal Ethics Can't Be Reduced to a Maxim*, 26 GEO. J. LEGAL ETHICS 1, 2–3 (2013) (discussing the limitations of comprehensive legal maxims as everyday tools for practicing lawyers and exploring other conceptual tools to guide legal professionals).

469. Brian Elzweig, *Caste Discrimination and Federal Employment Law in the United States*, 44 UNIV. ARK. LITTLE ROCK L. REV. 57, 96 (2021) (describing this maxim as "[o]ne of the cardinal principles of jurisprudence").

470. *See, e.g.*, Anne Abramowitz, *A Remedy for Every Right: What Federal Courts Can Learn from California's Taxpayer Standing*, 98 CALIF. L. REV. 1595, 1599 (2010) (discussing reasons why federal courts have historically limited standing for suits by taxpayers against perceived excessive government spending or taxation).

471. *See* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1198–99 (1992) (examining remedy guarantees in state constitutions and the lack of a corresponding guarantee in the United States Constitution); *see also* Tracy A. Thomas, *Ubi Jus, Ibi Remdium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1637 (2004) ("[T]he United States Supreme Court from its earliest time has recognized the bedrock principle that deprivations of law require remedies.").

472. *See, e.g.*, Patent Act, 35 U.S.C. §§ 284–89 (reforming available patent remedies). The Supreme Court later interpreted § 289 of the Patent Act as eliminating the disgorgement of profits remedy. Samsung Elecs. Co. v. Apple Inc., 580 U.S. 53, 59–60 (2016) (holding that the District Court's reading of the phrase "article of manufacture" as covering only the completed product sold to the consumer was too narrow of a reading of 35 U.S.C. § 289).

473. *See* Riley T. Keenan, *Functional Federal Equity*, 74 ALA. L. REV. 879, 881, 889–90, 892 (2023) (detailing the development of the federal judiciary's historical approach to equitable remedies).

abusing its power by infringing on the judiciary's essential functions.[474]

C. More Transparency of Reasoning and of Recusal Determinations

Recusal issues and the lack of binding ethical provisions on the Supreme Court remain ripe for critique and reform.[475] The Supreme Court repeatedly explains that it warrants special treatment, but ethical reform is a must because of the combination of serious allegations and the secrecy within which those contentions receive any attention.[476] Beyond the lack of binding rules to the Supreme Court, the Justices are also not required to offer any opinion or memorandum explaining a decision to recuse or not to recuse themselves.[477] For example, Justice Scalia did not participate in one case without explanation,[478] though the case involved a "suggestion for recusal."[479] But, in other instances where a party requests recusal of a Supreme Court Justice,[480] the Justice may opt to provide a memorandum of explanation on a recusal determination.[481] Serious reform debates should continue, and if the Supreme Court wants to continue self-regulation, it should up the standards under which recusal determinations are made.

Calls for transparency include whether the Supreme Court should allow televisions into its chambers.[482] This is another arena where the Court

474. *See id.* at 881 ("By requiring specific historical antecedents for relief not expressly authorized by Congress, the Court's new approach all but forecloses the judge-driven change that was once equity's hallmark.").

475. *See* Carmen Abella, *"Bias is Easy to Attribute to Others and Difficult to Discern in Oneself": The Problem of Recusal at the Supreme Court*, 33 GEO. J. LEGAL ETHICS 339, 341 (2020) ("[T]he current 'conspiracy of silence' around Supreme Court recusals . . . undermines the Supreme Court's appearance of integrity and democratic legitimacy.").

476. Roberts, *supra* note 112, at 109–10.

477. Abella, *supra* note 475, at 345 ("[U]nlike lower federal judges and state supreme court justices, each of the Supreme Court Justices' recusal decisions are absolutely insulated from review and they are unbound from any formal ethical code.").

478. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 3 (2004) (noting Justice Scalia did not partake in the opinion but without further comment).

479. Suggestion for Recusal of Justice Scalia at 8, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (No. 03-7).

480. *See, e.g.*, Motion to Recuse, Cheney v. U.S. Dist. Ct., 542 U.S. 367 (2004) (No. 03-475).

481. *See, e.g.*, Cheney v. U.S. Dist. Ct., 541 U.S. 913, 926–27 (2004) (refusing to recuse himself).

482. *See* Erwin Chemerinsky & Eric J. Segall, *Cameras Belong in the Supreme Court*, 101 JUDICATURE 14, 15 (2017).

maintains that it is special and that such an intrusion would denigrate the Court.[483] Critics vehemently disagree and maintain that cameras will achieve the opposite effect.[484] If nothing else, greater transparency will bring the Court out of the shadows.[485]

D. More Visibility and Accountability

Last, judicial tools should be used in an accountable fashion from nomination to opinions.[486] Recent confirmation battles have stimulated calls for reforms in the handling of sexual harassment and assault allegations.[487] Regardless of one's satisfaction with recent confirmations, the confirmation process has not handled such allegations well.[488] Whether one looks back to the abysmal treatment of Anita Hill during the confirmation of Clarence Thomas,[489] or looks more recently to Dr. Ford's allegations against Brett Kavanaugh,[490] there is room for improvement.[491]

An important, related issue is accountability across the federal Judicial

483. *Id.* at 15–16 (discussing reservations of some of the Supreme Court Justices about allowing filming of Court proceedings and the potential impacts on the freedom and quality of the resulting arguments).

484. *Id.* at 15–17 (arguing that allowing cameras into the Supreme Court will promote transparency and democracy).

485. *See generally* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 1 (1979); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 3 (2008) (discussing the "conservative rebellion" in the Court and a rare instance of Supreme Court transparency after Justice Rehnquist's death).

486. *See, e.g.*, *Who Can Rein in the Supreme Court?*, N.Y. TIMES (May 25, 2023), https://www.nytimes.com/2023/05/25/opinion/supreme-court-ethics-act.html (suggesting various judicial tools to promote greater accountability and transparency of the United States Supreme Court).

487. *See, e.g.*, Lisa Avalos, *The Innocence Standard: Supreme Court Nominees and Sexual Misconduct*, 56 CONN. L. REV. (forthcoming 2024) (manuscript at 5–7) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4409435 (arguing that the Senate must thoroughly investigate all allegations of sexual misconduct by Supreme Court nominees).

488. *Id.* (manuscript at 6–7).

489. Sarah Pruitt, *How Anita Hill's Testimony Made America Cringe—And Change*, HISTORY, (Feb. 9, 2021), https://www.history.com/news/anita-hill-confirmation-hearings-impact (noting "the uncomfortable spectacle" with "brutally uncomfortable questioning" by all white male senators).

490. Avalos, *supra* note 487 (manuscript at 13).

491. *See id.* (manuscript at 8) ("[I]t is no surprise that the executive and legislative branches of our government have been slow to recognize the critical importance of establishing a process for vetting allegations of sexual misconduct against SCOTUS nominees.").

Branch.[492] Silence is often the norm, which does not help ensure the system addresses any abuse.[493] Law clerks and others exposed to abuse may not feel able to report incidents, or may believe that judges will not be held accountable.[494] Necessary improvements include greater education and enhanced access to channels for reporting, investigating, and handling abuse allegations.

V. CONCLUSION: A PATH FORWARD WITH JUDICIAL FIDELITY

A well-functioning federal judiciary must perform its essential functions under Article III with a healthy separation of powers tension with other government branches, basic procedural checks visibly in place and operating, well-reasoned opinions, and the wise exercise of discretion where the case or its remedy dictate a pivot or stretch in the law.[495] Otherwise, those tears in the fabric of democracy will continue to fray,[496] and the very foundational constitutional rights at stake will lose their force.[497] Scholars, journalists, non-profit organizations, and the public must remain vigilant in observing the federal judiciary and analyzing opinions within the full context of the day and with respect to precedent. Further, Congress should consider good-faith reforms that will serve long-term interests rather than partisan whims. With renewed fidelity to judicial ideals by all actors, the federal judiciary can do its part to protect the rule of law and serve democratic values.

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492. Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 220 (2003) ("The rise of customary judicial independence has been accompanied by a corresponding decline in extrajudicial accountability . . . .").

493. *See* Aliza Shatzman, *The Clerkships Whisper Network: What It Is, Why It's Broken, and How to Fix it*, 123 COLUM. L. REV. 110, 116 (2023) ("The legal community has created a culture of silence and fear around the judiciary . . . .").

494. *See id.*; *see also* LEGAL ACCOUNTABILITY PROJECT, https://www.legalaccountabilityproject.org/ (last visited Sept. 23, 2023) (unmasking the culture of hierarchy, secrecy, and lack of accountability); Aliza Shatzman, *Why Are Judges Above the Laws They Enforce?,* BALLS & STRIKES (Mar. 17, 2022), https://ballsandstrikes.org/ethics-accountability/judicial-accountability-act-2021/.

495. *See* Lemley, *supra* note 22, at 115 ("Right now the danger is mostly apparent in the dismantling of political institutions and the withdrawal of individual rights, because the substantive tenor of the conservative majority has targeted those things."); *see also* JUD. CONF. OF THE U.S., STRATEGIC PLAN FOR THE FED. JUDICIARY 4 (2020), https://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary (identifying maintaining public trust and proper separation of powers from other branches of government as two key goals for the federal judiciary).

496. *See* Lemley, *supra* note 22, at 115 (emphasizing the implications).

497. *See id.* (tying the Supreme Court's dismantling of norms to the erasure of political institutions and diminishment of constitutional rights).

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