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COMMENT

TAMING THE SUPREME COURT

Martin Wishnatsky[†]

*When from yon mysterious vault, the enrobed nine send forth their tomes . . . when essaying some new constitutional construction, as they call their attacks upon the rights of the States and their citizens, we are taught to bow without question, as the faithful to the decrees of the Grand Lama.*¹

*I love judges and I love courts . . . They are my ideals. They typify on earth what we shall meet hereafter in heaven under a just God.*²

I. INTRODUCTION

Is the Supreme Court an out-of-control policymaking institution ravishing the ideal of self-government enshrined in the Constitution? Some think so.³ To see if their claims are true, we first return in Part II to the

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1. 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1856-1918), at 57 (1922) (quoting remarks of Rep. Philemon Bliss (R-Ohio) on the House floor (Feb. 7, 1859)).

2. Paul D. Carrington, *Checks and Balances: Congress and the Federal Courts*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 137, 147 (Roger C. Cramton & Paul D. Carrington eds., 2006) (quoting then Presidential candidate and later Chief Justice, William Howard Taft).

3. “Since the advent of the modern Court in 1937, constitutional ‘interpretation’ by the Court had become self-consciously a matter of judicial legislation, employing a balancing approach (that is, an essentially discretionary power) to read policies into key constitutional provisions.” CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 291 (1986). A century ago, one jurist acknowledged that judges “base their judgments upon broad considerations of policy to which the traditions of the bench would hardly have tolerated a reference fifty years ago.” OLIVER WENDELL HOMES, THE COMMON LAW 78 (1909). See also Anthony Lewis, *A Man Born to Act, Not to Muse*, N.Y. TIMES MAG., June 30, 1968, at 49 (“Earl Warren is the closest thing that the United States has had to a Platonic Guardian, dispensing law from a throne without any sensed limits of power except what is seen as the good of society.”); RAOUL BERGER,

eighteenth century to see what the Framers and Ratifiers of the Constitution had in mind when they composed and accepted the document as the governing charter for a new nation. Then, in Part III, we take a step into the nineteenth century to see what the Civil War amendments signified. In Part IV, we arrive at the present day, surveying the reality that Supreme Court decision-making mirrors the legislative process. Part V addresses proposals to reform the institution to curb its legislative forays.

Those who are familiar with the origins of judicial review as a limited mandate to police the Constitution may wish to skim Part II to refresh their understanding. Part III provides a history of the Fourteenth Amendment to demonstrate that the Framers intended to apply the Bill of Rights to the states through the Privileges or Immunities Clause and assigned to Congress, not the Courts, the express power of enforcing it. Following the historical sections, Part IV demonstrates that the Supreme Court has become a second legislature, dominating the one assigned this power by Article I of the Constitution. Part V, the remedies section, analyzes alternatives for reigning in the Court's unauthorized invasion of the legislative power, concluding that the best solution is a constitutional amendment requiring consent of seven justices for the Court to invalidate a state or federal law as unconstitutional.

II. WHAT WAS THE FOUNDERS' MANDATE FOR JUDICIAL REVIEW?

The Constitution vests the judicial power of the United States in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁴ The Supreme Court has appellate jurisdiction over all cases arising under the Constitution and laws of the United States.⁵ The Court also has original jurisdiction in a small number of cases.⁶ Congress has power to make exceptions and to regulate the Court's appellate jurisdiction.⁷ Where federal law, constitutional or statutory, conflicts with state law, federal law prevails.⁸ The Constitution specifically requires state court judges to enforce federal law, "any Thing in the

DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982) ("[T]he Court assumed power to alter and amend the Constitution, a power exclusively reserved to the people themselves, a power usurped by the Court disguised in soothing double-talk").

4. U.S. CONST. art. III, § 1.

5. *Id.* art. III, § 2, cl. 1, 2.

6. *Id.* art. III, § 2, cl. 2 ("all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party").

7. *Id.* ("with such Exceptions, and under such Regulations as the Congress shall make").

8. *See id.* art. VI, cl. 2 ("supreme Law of the Land").

Constitution or Laws of any state to the Contrary notwithstanding.”⁹ The jurisdiction and powers of the federal judiciary, and the duties of state courts under the Constitution and laws of the United States, arise from these provisions.

A. Judicial Review by the States and of the States

Although the Constitution does not say expressly that federal courts may review congressional or state laws for constitutionality, Article VI does mandate judicial review of state laws in state courts for conformity to the U.S. Constitution. In the states, the Constitution is not merely a hortatory or visionary document, but supreme law that judges are “bound” to apply to all cases otherwise properly before them for decision in which relief is sought pursuant to its provisions.¹⁰ A strong, but not inevitable, implication of the “arising under” jurisdiction is that the Supreme Court may review decisions of state courts that turn on federal questions.¹¹ This provision, however, may also possibly be construed to apply only to cases arising in federal courts. Thus, without the establishment by Congress of inferior federal courts, the Supreme Court theoretically could be limited to its modest original jurisdiction.¹²

1. Alexander Hamilton

The need to clarify the appellate jurisdiction of the Supreme Court over final decisions of state courts on federal questions did not escape the attention of the writers of the Federalist Papers. Relying on the phrase “all cases,” Alexander Hamilton determined that “an appeal would certainly lie from the [state courts] to the Supreme Court of the United States.”¹³

The constitution in direct terms gives an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance, in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and

9. *Id.*

10. *Id.* (“the Judges in every State shall be bound thereby”).

11. *See id.* art. III, § 2, cl. 1.

12. *See supra* note 6.

13. THE FEDERALIST No. 82 (Alexander Hamilton).

from the reason of the thing, it ought to be construed to extend to the state tribunals.¹⁴

Considering that the phrase “all cases” is unqualified, Hamilton here construed the Supreme Court’s appellate jurisdiction to include federal cases arising in state courts. Otherwise, the Constitution would be subject to a different construction in each state, and “the judiciary authority of the union may be eluded at the pleasure of every plaintiff or prosecutor.”¹⁵ He further stated:

The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the union. To confine, therefore, the general expressions which give appellate jurisdiction to the supreme court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.¹⁶

The lack of any express limit on the cases subject to appeal in the Supreme Court, and “the reason of the thing,” namely the “avowed purposes of the proposed government” to create a workable union that would not be embarrassed in its measures, combined to establish the power of the U.S. Supreme Court to hear appeals of federal questions decided in state courts. Hamilton further elaborated: “The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.”¹⁷

2. James Madison

James Madison, though not a political ally of Hamilton,¹⁸ shared his view of the unifying role of the federal judiciary. “A paramount or even a

14. *Id.*

15. *Id.*

16. *Id.*

17. THE FEDERALIST NO. 80 (Alexander Hamilton).

18. For their political differences, see Colleen A. Sheehan, *Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion*, 98 AM. POL. SCI. REV. 405 (2004). “[T]he divergence between us took place — from [Hamilton] wishing . . . to administer the Government into what he thought it ought to be; while, on my part, I endeavored to make it

definitive Authority in the individual States,” he wrote, “would soon make the Constitution & laws different in different States, and thus destroy that equality & uniformity of rights & duties which form the essence of the Compact”¹⁹ Madison expressed this view publicly on January 16, 1788,²⁰ only four months after the signing of the Constitution.²¹ The federalist system proposed by the Constitution, he argued, necessitated an arbiter to adjudicate the line of demarcation between the power of the national government and that of the states. “[I]n controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government.”²² Although this tribunal must decide impartially “according to the rules of the constitution,” its establishment “is clearly essential to prevent an appeal to the sword, and a dissolution of the compact”²³ That such a tribunal could be safely established only under the general government “is a position not likely to be combated.”²⁴ Writing to Thomas Jefferson thirty-five years later, he reiterated that judicial review of state law on constitutional questions was the “prevailing view of the subject when the Constitution was adopted & put into execution,” and that he personally had “never yielded my original opinion indicated in the ‘Federalist’ No. 39”²⁵

Several years later, at the age of seventy-eight,²⁶ Madison conveyed the same point in unmistakable terms. Except in the case of unavoidable resort to revolution, “there is & must be an Arbiter or Umpire in the

conform to the Constitution” N.P. Trist: Memoranda (Sept. 27, 1834) (statement of James Madison), in 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 534 (Max Farrand ed., 1911) [hereinafter RECORDS].

19. Letter from James Madison to Thomas Jefferson (June 27, 1823), in 9 THE WRITINGS OF JAMES MADISON 137, 141 (Gaillard Hunt ed., 1910) [hereinafter WRITINGS]. See also Letter from James Madison to Joseph C. Cabell (Sept. 7, 1829), in WRITINGS, *supra* at 346, 349 (speaking of “the necessity of a definitive power on questions between the U.S. and the individual States, and the necessity of its being lodged in the former, where alone it could preserve the essential uniformity”).

20. THE FEDERALIST NO. 39 (James Madison).

21. U.S. CONST. art. VII (“done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the year of our Lord one thousand seven hundred and Eighty seven . . .”).

22. THE FEDERALIST NO. 39 (James Madison).

23. *Id.*

24. *Id.*

25. Letter from James Madison to Thomas Jefferson (June 27, 1823), in WRITINGS, *supra* note 19, at 137, 142.

26. James Madison (1751-1836), THE PAPERS OF JAMES MADISON, <http://www.virginia.edu/pjm/biography1.htm> (last visited Mar. 9, 2012).

constitutional authority provided for deciding questions concerning the boundaries of right & power. The particular provision, in the Constitution of the U.S. is in the authority of the Supreme Court, as stated in the 'Federalist,' No. 39.²⁷ Three years later, now eighty-one,²⁸ Madison again confirmed his words penned over four decades earlier: "My view of the supremacy of the [federal] court when the [Constitution] was under discussion will be found in the Federalist."²⁹

As Madison recalled, the Convention had considered three "modes" to control state laws: "1. A Veto on the passage of the State Laws. 2. A Congressional repeal of them. 3. A Judicial annulment of them."³⁰ Because of the difficulty for Congress effectively to monitor for constitutionality "the multiplicity of state laws" across a large country, the Convention chose the mode of judicial annulment by litigation of aggrieved parties "as now provided by the Constitution."³¹

I have never ceased to think that this supremacy was a vital principle of the Constitution as it is a prominent feature in its text. A supremacy of the Constitution & laws of the Union, without a supremacy in the exposition and execution of them, would be as much a mockery as a scabbard put into the hand of a Soldier without a sword in it. I have never been able to see, that without such a view of the subject the Constitution itself could be the supreme law of the land; or that the *uniformity* of the Federal Authority throughout the parties to it could be preserved; or that without this *uniformity*, anarchy & disunion could be prevented.³²

3. Virginia Challenges the Judiciary Act of 1789

The Judiciary Act of 1789, codifying the Supreme Court's appellate jurisdiction over state courts, resolved any latent ambiguity about the

27. Letter from James Madison to Joseph C. Cabell (Sept. 7, 1829), in WRITINGS, *supra* note 19, at 346, 351. See also Letter from James Madison to N.P. Trist (Feb. 15, 1830), in WRITINGS, *supra* note 19, at 353, 353 n.1 (Supreme Court, as final decider of controversies between the federal and state governments, "is a vital element, a sine qua non, in an efficient & permanent [government.]").

28. See *supra* note 26.

29. Letter from James Madison to Joseph C. Cabell (Dec. 27, 1832), in WRITINGS, *supra* note 19, at 492-93.

30. Letter from James Madison to N.P. Trist (Dec. 1831), in WRITINGS, *supra* note 19, at 471, 473.

31. *Id.*

32. *Id.* at 476.

authority of the Supreme Court to review final decisions of state courts.³³ Should state judges find federal laws invalid, state laws “repugnant” to the Constitution, or construe federal law against a party, the decisions “may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error”³⁴ Only matters of federal law may be appealed to the U.S. Supreme Court from a final disposition in state court.³⁵ Claiming that Section 25 of the Judiciary Act was an unconstitutional intrusion on state sovereignty, the Virginia Supreme Court in 1813 refused to obey a mandate from the U.S. Supreme Court.³⁶ The Court argued that the power to remove cases from state to federal court sufficed to ensure uniformity of interpretations of federal law.³⁷ The Virginia Supreme Court recognized the supremacy of federal law in its own court, but denied that one sovereign could review the decisions of another.³⁸

Justice Story’s opinion, answering these contentions, insisted, like Hamilton, that the appellate power was plenary, extending to all cases.³⁹ If the jurisdiction were to reach all cases, but could not review cases from state courts, then the federal courts must perforce have exclusive jurisdiction over federal questions.⁴⁰ But the Constitution through the Supremacy Clause precludes this eventuality.⁴¹ Because the U.S. Supreme Court must have appellate jurisdiction over state courts in order to extend its power, as granted in the Constitution, to *all* cases arising under the Constitution and laws of the United States, the Judiciary Act of 1789, specifically designating the means of exercising this authority, “is supported by the letter and spirit of the Constitution.”⁴² Story explains:

33. The Judiciary Act was “passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning.” *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (citation omitted), *overruled in part by Milwaukee Cnty. v. M. E. White Co.*, 296 U.S. 268 (1993). Of the ten senators on the committee to draft the bill, five had been delegates to the Philadelphia Convention. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 57 (1923).

34. The Judiciary Act of 1789, Ch. 20, § 25, 1 Stat. 73, 85-86.

35. *Id.*

36. *Hunter v. Martin*, 18 Va. (4 Munf.) 1 (1813).

37. *Id.* at 15-16

38. *Id.* at 58 (holding that “the appellate power of the Supreme Court of the United States, does not extend to this court”).

39. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 339-41 (1816).

40. *Id.*

41. *Id.*

42. *Id.* at 351.

The appellate power is not limited by the terms of the third article to any particular courts. . . . It is the *case*, then, and not *the court*, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. . . .

....

. . . We find no clause in [the Constitution] which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.⁴³

Story also noted the “historical fact” that federal appellate power over state courts was widely recognized as a feature of the Constitution during the period of ratification, and had been exercised without a breath of judicial doubt prior to Virginia’s act of refusal.⁴⁴

Although the Virginia Supreme Court was correct that “the *residuary* sovereignty of the states[] [is] not less inviolable, than the *delegated* sovereignty of the United States,”⁴⁵ the presence of an unlimited enumerated appellate power over “all cases”⁴⁶ reasonably displaces the sovereignty of the state judiciary on dispositive questions of federal law. The power of judicial review that Article VI granted to the states subjects them to a comparable review by the U.S. Supreme Court under Article III. As Madison stated, resort to the Supreme Court as the final authority in determining the constitutionality of state law “is expressed by the articles declaring that the federal Constitution & laws shall be the supreme law of the land, and that the Judicial Power of the U. S. shall extend to all cases arising under them.”⁴⁷

43. *Id.* at 338, 351.

44. *Id.* at 351-52.

45. *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 9 (1813). See THE FEDERALIST NO. 39 (James Madison) (stating that jurisdiction of the proposed government “extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects”).

46. U.S. CONST. art III, § 2, cl. 1.

47. Letter from James Madison to Thomas Jefferson (June 27, 1823), in WRITINGS, *supra* note 19, at 142. For further analysis, see C. Perry Patterson, *James Madison and Judicial Review*, 28 CAL. L. REV. 22, 33 (1939) (documenting Madison’s view that judicial review “was intentionally and deliberately granted to the courts in specific clauses of the Constitution”).

B. *Judicial Review of Congress*

Chief Justice John Marshall did not invent judicial review of federal legislation in *Marbury v. Madison*;⁴⁸ he merely carried out the recognized intent of the Founders.⁴⁹ Federalist and anti-Federalist writers alike acknowledged the power of the Supreme Court to declare federal laws unconstitutional, the first group with sober approbation⁵⁰ and the second with undisguised outrage.⁵¹ The specific requirement that state judges enforce the Constitution signaled the necessity that federal judges do the same. If state laws had to bow to the new Constitution, would federal laws be exempt? Would the federal Constitution be the supreme law in the states, but not in the national government?⁵²

Many observers puzzle at this “countermajoritarian”⁵³ institution planted at the heart of the Constitution. The Framers, however, feared that the legislature might devour property rights.⁵⁴ They created the Senate and the Presidential veto to counter the popular voice in the House of Representatives,⁵⁵ and the Supreme Court to crush with finality—and with

48. 5 U.S. (1 Cranch) 137 (1803). “Those who hold that the framers of the Constitution did not intend to establish judicial control over federal legislation sometimes assert that Marshall made the doctrine out of whole cloth and had no precedents or authority to guide him. This is misleading.” CHARLES A. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 115 (1912).

49. See *infra* text accompanying notes 59-81.

50. *Id.*

51. “[T]o consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.” Letter from Thomas Jefferson to William C. Jarvis (Sept. 28, 1820), 12 *THE WORKS OF THOMAS JEFFERSON* 162 (Paul Leicester Ford ed., 1905).

52. See Edward S. Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 *MICH. L. REV.* 538, 564 n.74 (1914) (asking “where the State courts get their power to pass on the validity of acts of Congress save as it is intrinsic to judicial power under a constitution regarded as law”).

53. *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

54. CHARLES WARREN, *CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT* 78 (1925) (stating that “the more conservative men in the community . . . took the lead in seeking the adoption of a new frame of government”). Asserting that “the public liberty [is] in greater danger from Legislative usurpations than from any other source,” Gouverneur Morris at the Philadelphia Convention itemized the anticipated depredations: “emissions of paper money, largesses to the people—a remission of debts and similar measures.” 2 *RECORDS* 76, 299. See also *THE FEDERALIST* NO. 44 (James Madison) (commenting on the “pestilential effects of paper money”).

55. James Madison endorsed division of the legislature “into different branches . . . to guard against dangerous encroachments.” *THE FEDERALIST* NO. 51. He considered the Senate “a salutary check on . . . schemes of usurpation or perfidy” and “a defense to the people

no recourse except by impeachment⁵⁶—any popular enthusiasms that transcended the grant of power in Article I.⁵⁷ The Supreme Court is a massive anti-democratic element deliberately designed to restrain the popular will and direct it into predetermined channels.⁵⁸

1. Madison, Hamilton and Judicial Review of Congress

Both Madison and Hamilton asserted and defended the necessity of judicial review of federal legislation.⁵⁹ Will not the prohibition against Congress passing *ex post facto* laws,⁶⁰ Madison asked, “oblige the judges to declare such interference null & void?”⁶¹ Defending the proposed Constitution, Madison answered those who feared that the “necessary and

against their own temporary errors and delusions.” THE FEDERALIST NOS. 62 & 63. Edmund Randolph of Virginia recommended “a good Senate” to check “the turbulence and follies of democracy.” 1 RECORDS 51. Alexander Hamilton commended the presidential veto as “a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.” THE FEDERALIST NO. 73.

56. “This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.” THE FEDERALIST NO. 79 (Alexander Hamilton).

57. “Instead of being uncontrollable, the legislative authority is placed, as it ought to be, under just and strict control. The effects of its extravagancies may be prevented, sometimes by the executive, sometimes by the judicial authority of governments . . .” 1 COLLECTED WORKS OF JAMES WILSON 572 (Kermit L. Hall & Mark David Hall eds., 2007). One careful scholar concludes: “A growing popular sentiment was disgusted with legislators and wanted to check them and to that end was willing to make the courts paramount.” Edward S. Corwin, *Book Review*, 7 AM. POL. SCI. REV. 330, 332 (1913) (reviewing CHARLES A. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1912)).

58. “Since to resist a majority the judiciary must be independent of that majority, the character of judicial review is properly antidemocratic.” George Mace, *The Antidemocratic Character of Judicial Review*, 60 CAL. L. REV. 1140, 1149 (1972).

59. See THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing that judicial tenure during good behavior is an “excellent barrier to the encroachments and oppressions of the representative body”). See also *id.* (noting “the rights of the courts to pronounce legislative acts void”); *id.* (reiterating that “the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority”); THE FEDERALIST NO. 81 (Alexander Hamilton) (explaining that judicial review is essential “to set bounds to the legislative discretion”); THE FEDERALIST NO. 48 (James Madison) (stating that “it is against the enterprising ambition of [the legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions”).

60. U.S. CONST. art. I, § 9, cl. 3.

61. 2 RECORDS, *supra* note 18, at 440.

proper” clause⁶² would permit Congress to exercise unwarranted powers: “In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts[.]”⁶³

Speaking of the mutual relations among the “coordinate” branches of the federal government, “each equally bound to support the Constitution,” Madison noted that “the judicial department most familiarizes itself to the public attention as the expositor, by the *order* of its functions in relation to the other departments; and attracts most the public confidence by the composition of the tribunal.”⁶⁴ The judiciary, reviewing legislation after its enactment, thus acts as the final expositor. Madison endorsed this happy sequence of events.

It is the judicial department in which questions of constitutionality, as well as of legality, generally find their ultimate discussion and operative decision: and the public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities implied in its members; by the gravity and deliberation of their proceedings; and by the advantage their plurality gives them over the unity of the Executive department, and their fewness over the multitudinous composition of the legislative department.⁶⁵

For these reasons, Madison had full confidence in the judiciary as enforcer of the Constitution. “[I]t may always be expected that the judicial bench, when happily filled, will, for the reasons suggested, most engage the respect and reliance of the public as the surest expositor of the Constitution[.]”⁶⁶

Hamilton argued that constitutional limits on the legislature necessitated judicial review. “Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.”⁶⁷ He further stated: “A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain

62. U.S. CONST. art. I, § 8, cl. 18.

63. THE FEDERALIST NO. 44 (James Madison).

64. Letter from James Madison to Mr. --- (1834), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON: 1829-1836, at 349 (1884).

65. *Id.* at 349-50.

66. *Id.* at 350.

67. THE FEDERALIST NO. 78 (Alexander Hamilton).

its meaning as well as the meaning of any particular act proceeding from the legislative body.⁶⁸ If the two are irreconcilable, judges should prefer the will of the people declared in the Constitution to that of the legislature expressed in the statute.⁶⁹ Professor Edwin Corwin wrote that Hamilton was “endeavoring to reproduce the matured conclusions of the Convention itself . . . thus notifying those to whom the Constitution had been referred for ratification the grounds upon which its framers and supporters based the case for judicial review.”⁷⁰

2. The Federal Convention

Hamilton’s argument for judicial review finds support in the statements of delegates to the Constitutional Convention.⁷¹ On the floor of the Convention on July 17, 1787, Gouverneur Morris of Pennsylvania opposed a proposal to empower the national legislature to set aside state laws that contradicted the proposed Constitution.⁷² “A law that ought to be negated,” he said, “will be set aside in the judiciary department, and if that security should fail, may be repealed by a national law.”⁷³ Luther Martin of Maryland opposed creating a Council of Revision comprised of the President and several judges.⁷⁴ Contending that the constitutional veto of the judges would be sufficient without also giving them a veto over legislation in general, he explained: “[T]he Constitutionality of laws . . . will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative.”⁷⁵

George Mason of Virginia also agreed that the judges could find laws unconstitutional, but wanted them also to judge the policy of a law by

68. *Id.*

69. *Id.* Chief Justice John Marshall’s subsequent rationale for judicial review parallels Hamilton’s reasoning. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78 (1803). Prior to the definite exposition in *Marbury*, the Supreme Court, driven by litigants raising constitutional questions, was edging close to the mode of decision that Madison had anticipated. See, e.g., *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (Chase, J.) (acknowledging that lawyers practicing before the Court concede that the Supreme Court can declare an act of Congress to be unconstitutional, but that as of yet “there is no adjudication of the Supreme Court itself upon the point”).

70. Corwin, *supra* note 52, at 561.

71. See generally RECORDS, *supra* note 18.

72. 2 RECORDS, *supra* note 18, at 28 (punctuation, capitalization, and abbreviations altered to assist comprehension).

73. *Id.*

74. *Id.* at 76.

75. *Id.*

participation in the Council of Revision.⁷⁶ As he explained to the Convention delegates:

It had been said (by Mr. L. Martin) that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void.⁷⁷

Acting in their “expository capacity,” judges could declare legislation unconstitutional. But if laws “unjust, oppressive, or pernicious” did not violate the Constitution, “they would be under the necessity as Judges to give it a free course.”⁷⁸ Mason wanted judges to participate in a Council of Revision to “prevent[] every improper law.”⁷⁹ Rufus King of Massachusetts agreed with Luther Martin: “[T]he Judicial ought not to join in the negative of a Law, because the Judges will have the expounding of those Laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution.”⁸⁰ Elbridge Gerry, also of Massachusetts, seconded his colleague’s opinion.

Mr. Gerry doubts whether the Judiciary ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had [actually] set aside laws as being against the Constitution. This was done too with general approbation.⁸¹

3. The Ratifying Conventions

Delegates to the ratifying conventions made similar statements supporting judicial review.⁸² Patrick Henry, Governor of Virginia,

76. *Id.* at 78.

77. *Id.*

78. *Id.*

79. *Id.*

80. 1 RECORDS, *supra* note 18, at 109.

81. *Id.* at 97.

82. Madison considered the ratification debates the best source, apart from the text, for understanding the meaning of the Constitution.

[T]he legitimate meaning of the instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be not in the opinions or intentions of the body which planned and proposed the Constitution, but in the sense

ultimately voted against ratification. Yet he stated: "I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."⁸³ He further added, expressing his concern that state judges might fall under federal domination: "The judiciary are the sole protection against a tyrannical execution of the laws."⁸⁴ John Marshall, a delegate to the Virginia convention, posed the question whether Congress could exceed its delegated powers.⁸⁵ He responded to his fellow delegates as he did fifteen years later in *Marbury v. Madison*: "If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."⁸⁶ He further stated: "To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection."⁸⁷ William R. Davie, a delegate to the Philadelphia Convention, brought the same message home to North Carolina. Without judicial enforcement, he said, the Constitution would be a "dead letter."⁸⁸ Therefore, "the judiciary ought to be competent to the decision of any question arising out of the Constitution itself."⁸⁹

Commenting on proposed language eventually embodied in the Tenth Amendment,⁹⁰ Samuel Adams, delegate to the Massachusetts ratifying convention, stated: "[I]f any law made by the federal government shall be extended beyond the power granted by the proposed Constitution . . . it will be an error, and adjudged by the courts of law to be void."⁹¹ Oliver

attached to it by the people in their respective State Conventions where it received all the Authority which it possesses.

Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), WRITINGS, *supra* note 19, at 72.

83. 3 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 325 (2d ed., 1836) [hereinafter ELLIOT'S DEBATES].

84. *Id.* at 539.

85. *Id.* at 553.

86. *Id.*

87. *Id.* at 554.

88. 4 ELLIOT'S DEBATES 157.

89. *Id.* at 156.

90. "[A]ll powers not expressly delegated to Congress are reserved to the several states, to be by them exercised." 2 ELLIOT'S DEBATES 131. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

91. 2 ELLIOT'S DEBATES 131.

Ellsworth, an active participant in the Philadelphia Convention,⁹² stated in the Connecticut debates that the judiciary would protect the Constitution from both federal and state usurpation:

This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so.⁹³

James Wilson, a delegate to the Philadelphia Convention and later an associate justice of the Supreme Court, spoke these words during the Pennsylvania debates: “If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence . . . will declare such law to be null and void; for the power of the Constitution predominates.”⁹⁴

III. THE EFFECT OF THE FOURTEENTH AMENDMENT

Delegates to the Constitutional Convention presumed that the Supreme Court would review the actions of Congress for constitutionality.⁹⁵ The Constitution itself requires state court enforcement. The “all cases” clause brings these decisions to the Supreme Court for review. The fear among anti-Federalists that judicial review would mean judicial despotism is further proof of the existence of the power.⁹⁶ But what about the effect of

92. WILLIAM GARROTT BROWN, *THE LIFE OF OLIVER ELLSWORTH* 116-176 (MacMillan & Co. 1905). Ellsworth is credited with the origin of the term “United States.” *Id.* at 128.

93. 2 ELLIOT’S DEBATES 196.

94. *Id.* at 489. See also 1 COLLECTED WORKS OF JAMES WILSON 743 (Kermit L. Hall & Mark David Hall eds., Liberty Fund, Inc. 2007) (arguing that judicial review is “a noble guard against legislative despotism”).

95. See *supra* text accompanying notes 59-81.

96. “This power in the judicial will enable them to mold the government into almost any shape they please.” Brutus Essay XI (January 31, 1788), in *THE AMERICAN CONSTITUTION: FOR AND AGAINST* 63 (J.R. Pole ed., 1987).

the Fourteenth Amendment, which the Court has employed extensively to extend its constitutional mandate over the states?

A. *Overturing Barron v. Baltimore*

Prior to the Civil War and the resulting constitutional amendments enlarging federal jurisdiction over the states,⁹⁷ the Supreme Court held that the Bill of Rights did not limit state action.⁹⁸ “These amendments,” stated Chief Justice Marshall, “demanded security against the apprehended encroachments of the general government—not against those of the local governments.”⁹⁹ Noting that the Constitution provided for specific restraints on state legislation in Article I, Section 10, Marshall found no parallel provision restraining the States from violation of the first eight amendments: “[I]f in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.”¹⁰⁰ Finding no such express application of the federal amendments to the states, Marshall declined to imply one: “These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”¹⁰¹

In the aftermath of the Civil War, the Congressional Joint Committee on Reconstruction drafted the Fourteenth Amendment,¹⁰² in part to remedy this defect.¹⁰³ Senator Jacob Howard of Michigan drafted the first sentence of Section 1 of the Amendment,¹⁰⁴ and Rep. John Bingham of Ohio the second.¹⁰⁵ Introducing the amendment on the floor of the Senate, Howard

97. See e.g., U.S. CONST. amends. XIII, XIV, & XV.

98. *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833).

99. *Id.* at 250.

100. *Id.* at 249.

101. *Id.* at 250.

102. “The legislative origin of the first section of the Fourteenth Amendment seems to have been in the Joint Committee on Reconstruction.” *Adamson v. California*, 332 U.S. 46, 92 app. (1947) (Black., J., dissenting).

103. See CONG. GLOBE, 39TH CONG., 1ST SESS. 2764-66 (1866) (statement of Sen. Jacob Howard on purpose of amendment).

104. “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1, cl. 1. For Howard’s authorship, see CONG. GLOBE, 39TH CONG., 1ST SESS. 2890 (1866) (“This amendment which I have offered . . .”).

105. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

explained that the “privileges or immunities of citizens of the United States” referenced in the amendment included “the personal rights guaranteed and secured by the first eight amendments of the Constitution[.]”¹⁰⁶ He then described in particular the content of these amendments—from the First Amendment right of “freedom of speech and of the press” through the Eighth Amendment right “to be secure against excessive bail and against cruel and unusual punishments.”¹⁰⁷ Referring generally, but not by name, to *Barron v. Baltimore*,¹⁰⁸ Howard explained that “the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts.”¹⁰⁹ They did not operate “in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them”¹¹⁰ Referring to the Takings Clause of the Fifth Amendment, the exact provision at issue in *Barron*,¹¹¹ Howard noted that “it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.”¹¹²

Having identified the problem—finding a means to enforce the first eight amendments against the States, a power then denied to the national government¹¹³—Howard explained that “[t]he great object of the first section of this amendment is, therefore, to restrain the power of the States

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1, cl. 2. For Bingham’s authorship, see CONG. GLOBE, 42ND CONG., SPEC. SESS. App. 84 (1871) (“I did imitate the framers of the original Constitution.”).

106. CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866).

107. *Id.*

108. 32 U.S. 243 (1833).

109. CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866).

110. *Id.*

111. “The plaintiff in error contends, that it comes within that clause in the fifth amendment to the constitution, which inhibits the taking of private property for public use, without just compensation.” *Barron*, 32 U.S. at 247.

112. CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866).

113. “Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. . . . the states are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year.” *Id.* at 2765-66.

and compel them at all times to respect these great fundamental guarantees.”¹¹⁴

Arguing in the House on behalf of his original version of the amendment,¹¹⁵ Representative Bingham also raised the problem of *Barron v. Baltimore*:

A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution had been denied. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment.¹¹⁶

Bingham then cited *Barron v. Baltimore* for the proposition that “the existing amendments are not applicable to and do not bind the states.”¹¹⁷ Five years later during House debate, Bingham recalled how Marshall’s citation to the “No state shall” phraseology in Article I, § 10 of the Constitution had inspired him to recast the amendment into its final form.¹¹⁸

In reëxamining that case of *Barron*, . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: “Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.”

Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said “no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;” imitating their example and imitating it to the letter, I prepared the provision of the first

114. *Id.* at 2766.

115. “The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.” *Id.* at 1088.

116. *Id.* at 1089.

117. *Id.* at 1089-90.

118. CONG. GLOBE, 42ND CONG., SPEC. SESS. App. 84 (1871) (citation omitted).

section of the fourteenth amendment as it stands in the Constitution¹¹⁹

Bingham also explained that the privileges and immunities of the Fourteenth Amendment “are chiefly defined in the first eight amendments to the Constitution of the United States.”¹²⁰

The construction placed on the Fourteenth Amendment by Bingham and Howard, its authors and advocates, carries significant weight in construing Congress’s intent in approving it for consideration by the states. Justice Hugo Black, a member of the Senate from 1927 to 1937, explained:

I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means.¹²¹

Bingham and Howard recommended enactment of the Fourteenth Amendment to overturn *Barron v. Baltimore*, and thereby through the Privileges or Immunities Clause, convey authority to the national government to apply the Bill of Rights against the states.¹²² Bingham understood the use of this phrase in the amendment to carry a broader meaning than in Article IV, § 2 of the Constitution where it signified only that “the State could not refuse to extend to citizens of other States the same general rights secured to its own.”¹²³ He explained the distinction:

Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured

119. *Id.* (citation omitted).

120. *Id.*

121. *Duncan v. Louisiana*, 391 U.S. 145, 165 (1968) (Black, J., concurring). For a similar approach to legislative intent, see Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 746 n.11 (1984) (placing “primary reliance on the actions and statements of most vocal and active proponents or drafters of the document, on the assumption that the views would have been openly challenged or corrected if out of step with the remainder of the supporters of the document”).

122. Congressman Wilson recognized Bingham’s intent, referring to “the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution.” CONG. GLOBE, 39TH CONG., 1ST SESS. 1294 (1866).

123. CONG. GLOBE, 42ND CONG., SPEC. SESS. App. 84 (1871).

by the provision of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations?¹²⁴

B. *Congressional Enforcement of the Fourteenth Amendment*

Bingham and Howard had more in mind than simply enshrining a “glittering generality” in the Constitution.¹²⁵ They wanted to enact an enforcement mechanism to overcome southern recalcitrance. Unless the proposed amendment compelled observance of the Bill of Rights in the former confederacy, “the loyal minority of white citizens and the disfranchised colored citizens will be utterly powerless” against a vengeful “majority of rebels.”¹²⁶ Once the federal armies withdrew, only the “force of national laws” could restrain a swift return to oppression.¹²⁷ Bingham feared a potential reign of terror against loyalists and emancipated blacks: “Where is the power in Congress, unless this or some similar amendment be adopted, to prevent the reenactment of those infernal statutes of banishment and confiscation and imprisonment and murder under which people have suffered in those States during the last four years?”¹²⁸

The Thirteenth Amendment, abolishing slavery, granted Congress an indispensable enforcement power.¹²⁹ Bingham declared:

Let any State try the experiment of again enslaving men, and we will see, whether it is not competent for the Congress of the United States to make it a felony punishable by death to reduce any man, white or black, under color of State law, to a system of enforced human servitude or slavery¹³⁰

Without a similar provision the proposed amendment would be a dead letter. “Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely

124. *Id.*

125. *Id.* at 83.

126. CONG. GLOBE, 39TH CONG., 1ST SESS. 1094 (1866).

127. *Id.* at 1093-94.

128. *Id.* at 1093.

129. “Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII, § 2.

130. CONG. GLOBE, 42ND CONG., SPEC. SESS. App. 85 (1871).

essential to the safety of the people that it should be enforced.”¹³¹ Section 5 of the new amendment supplied the necessary power.¹³² Bingham continued:

The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the constitution today. It “hath that extent—no more.”¹³³

The amendment, according to Bingham, had a dual impact: imposing new limitations upon the states and granting new powers to Congress, neither of which had existed before.¹³⁴ “Gentlemen who oppose this amendment,” he concluded, “oppose the grant of power to enforce the bill of rights.”¹³⁵

In the Senate, Jacob Howard explained the interlocking relationship between the prohibitions of Section 1 and the enforcement power of Section 5:

[S]ection one is a restriction upon the States, and does not, of itself, confer any power upon Congress. The power which Congress has, under this amendment, is derived, not from that section, but from the fifth section, which gives it authority to pass laws which are appropriate to the attainment of the great object of the amendment. I look upon the first section, taken in connection with the fifth, as very important.¹³⁶

C. *The Fourteenth Amendment as a Mandate for Congressional Policy Making*

The Fourteenth Amendment, according to its sponsors, extended the Bill of Rights to the states through the Privileges or Immunities Clause,¹³⁷ and

131. CONG. GLOBE, 39TH CONG., 1ST SESS. 1090 (1866).

132. “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

133. CONG. GLOBE, 39TH CONG., 1ST SESS. 1088 (1866).

134. CONG. GLOBE, 42ND CONG., SPEC. SESS. App. 85 (1871).

135. CONG. GLOBE, 39TH CONG., 1ST SESS. 1090 (1866).

136. *Id.* at 2766 (1866). Another Senator posed the question whether the Bill of Rights was more than “a mere declaration of rights, carrying with it no power of enforcement.” CONG. GLOBE, 42ND CONG., 1ST SESS. 476 (1871) (Senator Dawes).

137. For agreement with this position, see *Adamson v. California*, 332 U.S. 46, 71-123 (1947) (Black, J., dissenting); *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3058-88 (2010)

empowered Congress to enforce these rights by appropriate legislation. Until Congress acts, however, the courts arguably have no independent authority to enforce the substantive provisions.¹³⁸ Senator Oliver Morton, a contemporary, explained that “the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress.”¹³⁹ Ten years after ratification, the Supreme Court stated:

It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress

(Thomas, J., concurring in part and concurring in the judgment) (Second Amendment). A long scholarly article refuted Justice Black’s argument that the Framers intended the Fourteenth Amendment to incorporate the Bill of Rights. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). “In his contention that Section I was intended and understood to impose Amendments I to VIII upon the states, the record of history is overwhelmingly against him.” *Id.* at 139. Fairman, in turn, met his own discreditor. William W. Crosskey, *Charles Fairman, “Legislative History,” and The Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954). Subsequent scholarship tends to confirm Crosskey, and thus reestablish Black’s credibility. See Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995); Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968) (“[F]ramers of the Fourteenth Amendment deemed the various provisions of the first eight amendments to the United States Constitution to be among the privileges and immunities of United States citizenship which no state could abridge.”); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 Geo. L. J. 329, 432 (2011) (“Bingham crafted the Privileges or Immunities Clause in order to protect the personal rights expressly listed in the Constitution, in particular the first eight amendments of the Bill of Rights.”); see generally Michael Kent Curtis, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

138. The Due Process and Equal Protection Clauses are also subject to Section 5 of the Fourteenth Amendment.

139. CONG. GLOBE, 42D CONG., 2D SESS. 525 (1872). See Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1356 (1964) (“[T]he framers and backers of the fourteenth amendment were primarily interested in enlarging the powers of Congress, not those of the federal judiciary, which was looked upon with considerable distrust.”), cited in *Katzenbach v. Morgan*, 384 U.S. 641, 648 n.7 (1966) (stating that historical evidence suggests that “the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary”).

which has been enlarged[.] Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.¹⁴⁰

Although the Founders expected the Supreme Court to review congressional acts for constitutionality and to hear appeals of federal questions from state courts,¹⁴¹ the Framers of the Fourteenth Amendment provided for congressional, not judicial, enforcement of the Reconstruction amendments.

The Court's modern employment of the Fourteenth Amendment as a license to engage in enforcement of constitutional rights collides with this express allocation of power. As Justice Black observed: "[T]he people, in § 5 of the Fourteenth Amendment, designated the governmental tribunal they wanted to provide additional rules to enforce the guarantees of that Amendment. The branch of Government they chose was not the Judicial Branch but the Legislative."¹⁴²

One may safely assert that Congress, at a minimum, has coequal power with the Supreme Court to enforce the Fourteenth Amendment. A leading scholar states: "Section Five was born of the conviction that Congress—no less than the courts—has the duty and the authority to interpret the Constitution."¹⁴³ Another scholar states: "Judicial enforcement against the will of Congress would convert 'Congress shall' into 'the Court shall.' Such a conversion would usurp power withheld."¹⁴⁴ Yet the Court in a 1997 case scolded Congress for acting under Section 5 to enforce the Fourteenth Amendment more strictly than the Court would desire.¹⁴⁵ Liberal scholars,

140. *Ex Parte Virginia*, 100 U.S. 339, 345 (1879).

141. *See supra* § II.B.

142. *Harper v. Virginia Bd. of Educ.*, 383 U.S. 663, 678-79 (1947) (Black, J., dissenting).

143. Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 183 (1997).

144. Raoul Berger, *Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801, 807 (1980).

145. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("[T]he Court will treat its precedents with the respect due them . . . and contrary expectations must be disappointed. . . . [T]his Court's precedent . . . must control."). *See also id.* at 545-46 (O'Connor, J., dissenting) ("[W]hen it enacts legislation in furtherance of its delegated powers, Congress must make its judgments consistent with this Court's exposition of the Constitution."). Leading scholars were appalled at the Court's assumption of an exclusive prerogative to interpret the Fourteenth Amendment. *See Douglas Laycock, Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 765, 792 (1998) ("Congress did not entrust the fruits of the Civil War to the unchecked discretion of the Court that decided *Dred Scott v. Sandford* . . . [yet] [t]he Court now asserts unchecked power to shrink the

unhappy with the federalism opinions of the Rehnquist court striking down favored social legislation, have also taken up the Section 5 cause.¹⁴⁶

IV. THE SUPREME LEGISLATURE

Legislatures look forward; courts look backward. The legislature sets policy to govern future behavior; courts determine whether that policy has been obeyed. Today, however, the Supreme Court functions as the final policymaker in the American system of government, requiring its rules of decision to have prospective and plenary effect.¹⁴⁷ Waving its constitutional wand, the High Court wields veto authority over all legislative bodies on matters that a litigant might plausibly construe to implicate the Constitution. By reliance on elastic provisions like the Due Process and Equal Protection Clauses,¹⁴⁸ and the attribution of unenumerated rights, the Court has transformed the Constitution into an undifferentiated lump of clay, whose plasticity it may mold into any form desired.

The Framers did not intend that courts would displace ordinary legislative policymaking. The Constitutional Convention, in fact, rejected a

Fourteenth Amendment to as small a scope as it chooses.”); McConnell, *supra* note 143, at 182 (“It is doubtful that the Republicans who drafted and adopted the Amendment would be greatly impressed with the ‘primary authority’ of the institution that had so recently produced *Dred Scott*.”). A contemporary newspaper stated: “The Reconstruction Acts are full of the rights and liberties of millions of men; and to have these stricken down, by the decision of some old fossil on the Supreme Bench whose political opinion belongs to a past era, would be an outrage on humanity.” INDIANAPOLIS JOURNAL, Jan. 25, 1868, *quoted in* WARREN, *supra* note 1, at 190.

146. See generally Ruth Colker, *The Supreme Court’s Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783 (2002); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001). For a broader view of the consistency of the Court, liberal or conservative, in asserting judicial supremacy see Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002). John Bingham criticized the Court for daring to descend “to the settlement of political questions which it has no more right to decide for the American people than has the Court of St. Petersburg.” CONG. GLOBE, 40TH CONG., 2D SESS. 483 (1868).

147. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 563, 565 (2001) (reprinted from 6 J. PUB. L. 279 (1957)) (finding that the Supreme Court is a policymaking political institution, compelled into that role by the vagueness of the Constitution, or propelled by the Justices’ personal policy preferences); Richard Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 40 (2005) (“[T]he Supreme Court, when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature’s.”).

148. U.S. CONST. amend. XIV, § 1.

Council of Revision that would have allowed the Supreme Court justices to overrule the legislature on policy grounds. No matter how bad a law appeared, they had no power to disturb it unless the Constitution itself was offended.¹⁴⁹ When the Supreme Court attempted to act as national policymaker in the *Dred Scott* case,¹⁵⁰ the first time it overturned a federal law since *Marbury v. Madison*,¹⁵¹ Abraham Lincoln strenuously objected:

[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.¹⁵²

Although the selective incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment has been very questionable textually, the Framers of the amendment anticipated a similar result via the Privileges or Immunities Clause.¹⁵³ Thus, this tortured construction of the Due Process Clause does not necessarily work a great substantive evil. By employing that same clause, however, to constitutionalize “unenumerated” rights not specified in the Bill of Rights, the Court soars on a magic carpet ride into purely legislative realms. The embedding of the sexual revolution in the Constitution is the most egregious example.¹⁵⁴ The Court has imposed a regime of sexual license on the country without any textual basis in the Constitution, creating rights of privacy and sexual autonomy nowhere mentioned in the document. Scholars on both ends of the cultural spectrum acknowledge the flimsy foundation for these opinions.¹⁵⁵ No consensus has emerged on a suitable remedy, in part because those pleased

149. See *supra* text accompanying notes 72-81.

150. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

151. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

152. Abraham Lincoln, Inaugural Address (March 4, 1861).

153. U.S. CONST. amend. XIV, § 1. See *supra* notes 102-24 and accompanying text. See also McConnell, *supra* note 143, at 170 (“It is [the Privileges or Immunities Clause] that ‘incorporated’ provisions of the Bill of Rights and made them applicable to the states—not, as the Court has often stated, the Due Process Clause.”).

154. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

155. For a liberal’s revulsion at the absurdity of one opinion, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

by the results have no incentive to temper the Court's excursion into creative law making. Of course, this power is two-edged: conservative majorities can also make law.¹⁵⁶

A good example of values in action is *Epperson v. Arkansas*,¹⁵⁷ a challenge to the Arkansas law that forbade the teaching of evolution in public schools.¹⁵⁸ Like the contraception cases, the Justices, bereft of Biblical understanding, instinctively rejected a public policy that contradicted modern secularism.¹⁵⁹ Since the Constitution does not speak about contraception, and the Fourteenth Amendment was not designed to promote sexual license, the Court invented a "right of privacy" to invalidate laws outlawing contraception. Similarly, in *Epperson*, the Justices knew what they wanted to do—strike the law. Finding a legal justification for the result was the hard part.

Some of the Justices, searching for a rationale, suggested a generic "vagueness" invalidation: "I would rest on the vagueness of this law as the safest basis," said Chief Justice Warren.¹⁶⁰ Justice White, though uncertain of the rationale, agreed on the result. "I could go on vagueness if someone can articulate it, as I have not been able to I reverse doubtfully on vagueness."¹⁶¹ Justice Fortas, however, wishing a bolder attack, argued for striking the law as an establishment of religion.¹⁶² His view prevailed. Justice Stewart, concurring, argued that the teacher had a First Amendment right to discuss evolution—a theory that would divest school boards of

156. See *supra* note 146 and accompanying text.

157. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

158. *Id.* at 98.

159. Justice Fortas, for the majority, commented on "the discomfort which the statute's quixotic prohibition necessarily engenders in the modern mind." *Id.* at 102. He suggested that those who favored the law were snobs who considered human beings superior to monkeys, and did not wish to be associated with their simian ancestors. *Id.* at 102 n.10 (quoting R. HOFSTADTER & W. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 324 (1955)). He used the uncomplimentary term "fundamentalist" three times. *Id.* at 98 ("the upsurge of 'fundamentalist' religious fervor"); *id.* ("fundamentalist sectarian conviction"); *id.* at 102 n.9 ("fundamentalist theory").

160. *THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS* 406 (Del Dickson ed., 2001).

161. *Id.* at 408. One scholar comments: "White had no interest in theory. He believed in 'good' outcomes, and that was sufficient. His vote in constitutional cases never varied from his views on the merits of the underlying policy. What was good was constitutional; what was bad was not." LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 210 (2000).

162. *THE SUPREME COURT IN CONFERENCE*, *supra* note 160, at 408.

curriculum control.¹⁶³ Justice Black, concurring on vagueness grounds, questioned whether a law that had never been enforced in its forty years of existence, presented a justiciable controversy.¹⁶⁴ He also objected to the Establishment Clause rationale, arguing that removing a divisive issue from the curriculum was a state prerogative and that forcing the teaching of evolution reflected hostility towards religion.¹⁶⁵

A secularist,¹⁶⁶ Justice Fortas disliked the “monkey law.”¹⁶⁷ When his clerk argued that the statute was not being enforced, he responded, “Maybe you’re right—but I’d rather see us knock this out.”¹⁶⁸ “Justice Fortas had always admired John Scopes,” wrote legal historian Peter Irons, “and felt that striking down the Arkansas law would also erase the blot on Tennessee’s history.”¹⁶⁹ “As a Justice,” his biographer relates, “he was a legal strategist As always, what mattered to him were results. Despite his attempt to present himself as ‘a man of law,’ Fortas rarely believed that [the] law commanded him to act against his own wishes.”¹⁷⁰ According to John Griffiths, one of Fortas’ first clerks, he viewed legal analysis as “a necessary form of packaging that had to be provided for things he wanted to do.”¹⁷¹ After revising one memorandum, Fortas returned it to Griffiths with the brief order: “Decorate it.”¹⁷² Griffiths adorned the draft with the requisite legal citations.¹⁷³ Fortas’ biographer concluded that Fortas “reached decisions first and rationalized them later.”¹⁷⁴

Utilizing the law as a tool of social policy, Justice Fortas almost retained a majority for the proposition that criminalizing a chronic alcoholic for

163. *Epperson*, 393 U.S. at 115-16 (Stewart, J., concurring in the result).

164. *Id.* at 109, 112 (Black, J., concurring).

165. *Id.* at 112-13.

166. “He had championed a secular, national culture all his life.” LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 275 (1990).

167. Fortas used the term “monkey law” three times in the opinion. See *Epperson*, 393 U.S. at 98, 101, 108.

168. KALMAN, *supra* note 166, at 274.

169. *Id.* (quoting PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 214 (1988)).

170. KALMAN, *supra* note 166, at 276.

171. *Id.* at 271.

172. *Id.* at 271-72.

173. *Id.*

174. *Id.* at 272. See also Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 730, 754-55 (1995) [hereinafter Tushnet, *Themes*] (noting “Fortas’s fluidity; if one doctrinal approach did not attract enough support, another one might. Only the outcome mattered; the law did not.”).

public drunkenness violated the Eighth Amendment.¹⁷⁵ Regardless of one's view of Fortas' sympathy for the habitual inebriate, the idea that the Framers of the Eighth Amendment in 1791, or the Fourteenth Amendment in 1868, envisioned extending constitutional protection to the town drunk in the public exhibition of his condition is beyond the understanding of any man, drunk or sober. But, as explained above, neither Fortas, nor most of his other liberal colleagues on the Warren Court, had any regard for the intent of the drafters of the instrument they swore to support.¹⁷⁶ Being a Supreme Court Justice was a free ticket to a policy-making playground, a license to legislate one's vision of justice into law.

Not only are the outcomes legislative, but often so is the process. Political scientists and legal scholars have limned in detail the protracted internal bargaining that lies behind many key judicial opinions—a process of give-and-take, indistinguishable from the essence of the legislative process.¹⁷⁷ A

175. *Powell v. Texas*, 392 U.S. 514, 554-55 (1968) (Fortas, J., dissenting). Fortas had five votes for his revolutionary proposition when Justice White defected. KALMAN, *supra* note 166, at 257-59. “*Powell v. Texas* is the one thing I can remember that he really cared about,” one clerk recalled. *Id.* at 257. See also *Budd v. California*, 385 U.S. 909, 913 (1966) (Fortas, J., dissenting from denial of certiorari) (“The use of the crude and formidable weapon of criminal punishment of the alcoholic is neither seemly nor sensible, neither purposeful nor civilized.”).

176. U.S. CONST. art. VI, § 1, cl. 3 (All judicial officers “shall be bound by Oath or Affirmation, to support this Constitution . . .”).

177. See, e.g., Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of Regents of the Univ. of Cal. v. Bakke*, 19 YALE L. & POL'Y REV. 341 (2001) (offering an inside view of court decision-making from a Brennan memoir that reveals intense bargaining over words and phrases) [hereinafter Epstein & Knight, *Piercing the Veil*]; LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (portraying the Court as an intense bargaining arena where Justices negotiate to maximize policy preferences); Samuel A. Alito, Jr., Note, *The Released Time Cases Revisited: A Study of Group Decisionmaking by the Supreme Court*, 83 YALE L.J. 1202 (1974) (offering one of the first detailed studies of internal bargaining on the Court, and demonstrating that the opinion of the Court, like a legislative compromise, may reflect the outcome of the negotiation process). See *id.* at 1235 (“[T]he written opinion may not represent the position of any of the Justices who signed it.”); FORREST MALTZMAN, JAMES F. SPRIGGS II, & PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT* (2000) (analyzing the politics of coalition formation on the Court); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964) (presenting the first comprehensive study of the Court as a political institution); BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* (1985) (collecting early opinion drafts indicating that legal rationales are a malleable means to policy ends); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957) (criticizing tendency of Court to adjudicate by assertion rather than reason and to produce unanimous opinions in politically controversial cases that display the “vacuity characteristic of desperately negotiated documents”); Howard E. Dean, *Judicial*

Supreme Court opinion, like the Constitution itself, may reflect bargaining between competing factions.¹⁷⁸ Some Justices concede that their views are political, deriving more from a personal conception of justice than from the text of the Constitution, which they deride as vague or outdated.¹⁷⁹ An intriguing example of the legislative process at work on the Court is the unrestrained acceptance of amicus briefs from all quarters, many frankly no more than elaborate policy arguments laced with extra-record factual assertions.

A. *Judicial Lobbying through Amicus Briefs*

Prior to the era of Supreme Court policymaking, amicus curiae briefs offered a neutral analysis of significant points of law that the parties may have overlooked or inadequately addressed.¹⁸⁰ The amicus was truly a friend of the court, not a supplementary advocate for a party. Often the Court invited the brief.¹⁸¹ As the Supreme Court assumed the role of national policymaker, however, the amicus brief became a tactical interest-group weapon to drive the court to a desired outcome.¹⁸² Rather than offering unbiased and judicious analysis aimed at easing the Court's

Review, Judicial Legislation, and Judicial Oligarchy, 34 OR. L. REV. 20 (1954) (reviewing criticism of the Court as a legislature); Geoffrey C. Hazard, Jr., *The Supreme Court as a Legislature*, 64 CORNELL L. REV. (1978) (arguing that the Court performs legislative functions and endorsing the practice); Richard L. Hasen, *Rules, Politics, and Policy: The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. (2004) (using the Brennan, Marshall, and Powell papers to provide an inside look at creation of a court opinion).

178. "The justices bargain and compromise, they think prospectively, and they use whatever information they have to persuade others of the rightness of their views." Epstein & Knight, *Piercing the Veil*, *supra* note 177, at 371.

179. See *infra*, § IV(B).

180. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 694 (1963) ("A friend of the court. A term applied to a bystander, who without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge.") (quoting ABBOTT'S DICTIONARY OF TERMS AND PHRASES USED IN AM. OR ENG. JURIS. 62 (1879)).

181. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 687 (2008) ("[W]hen judges perceive a need for additional information they will occasionally request amicus participation.").

182. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 752-53 (2000) (Amicus submissions increased from 531 in the 1946-1955 decade to 4907 in the 1986-1995 decade; cases with amicus briefs filed increased from 23% to 85% in the same period.).

analytical task, amicus briefs today are frankly partisan.¹⁸³ Judge Richard Posner observes: “In my experience in two decades as an appellate judge . . . it is very rare for an amicus curiae brief to do more than repeat in somewhat different language the arguments in the brief of the party whom the amicus is supporting.”¹⁸⁴ Consequently, the briefs are frequently of no practical help, except to provide firepower for positions already staked out by opposing Court factions. The value of an array of interest-group briefs is questionable. “Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed.”¹⁸⁵ Judge Posner remonstrates:

The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief. Such amicus briefs should not be allowed. They are an abuse. The term “amicus curiae” means friend of the court, not friend of a party.¹⁸⁶

In high-profile cases, the amicus submissions dwarf the parties’ briefs.¹⁸⁷ The Patient Protection and Affordable Care Act¹⁸⁸ cases, for example,

183. “The amicus is no longer a neutral, amorphous embodiment of justice, but an active participant in the interest group struggle.” Krislov, *supra* note 180, at 703. “The increased use of *amicus* briefs today has taken on the appearance of group combat.” JOSEPH F. MENEZ, *DECISION MAKING IN THE SUPREME COURT OF THE UNITED STATES* 111 (1984).

184. *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, C.J., in chambers).

185. *Sierra Club v. Env’tl. Prot. Agency*, 358 F.3d 516, 518 (7th Cir. 2004).

186. *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers). *See also* Philip B. Kurland & Dennis J. Hutchinson, *With Friends Like These . . .*, A.B.A. J., Aug. 1984, at 16 (noting that amicus briefs, more often than not, “are expressions of votes rather than reasons”).

187. *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) (Second Amendment) (56 amici briefs); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (abortion) (30 amici briefs); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (detainee habeas) (52 amici briefs); *Gutter v. Bollinger*, 539 U.S. 306 (2003) (affirmative action) (94 amici briefs); *Lawrence v. Texas*, 539 U.S. 558 (2003) (sodomy) (33 amici briefs); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (right-to-die) (63 amici briefs); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (abortion) (29 amici briefs); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (abortion) (79 amici briefs); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (affirmative action) (84 amici briefs). For docket sheets listing filings of the current and previous term, *see Docket*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/docket/docket.aspx> (last visited Mar. 9, 2012).

188. Pub. L. No. 111-148, 124 Stat. 119 (2010).

attracted a record 136 amici.¹⁸⁹ The competing fusillades of amicus briefs parallel the lineup of interest groups at a Congressional hearing, who present testimony, oral and written, for and against proposed legislation.¹⁹⁰ Indeed, commentators routinely characterize the competitive employment of amicus briefs to sway the court as “judicial lobbying.”¹⁹¹ The Court freely accepts these widely diverse submissions¹⁹² that have not passed through the rigor of the adversarial process,¹⁹³ acting more as a legislative body responsive to organized interest-group pressure than as a judicial forum for the resolution of disputes between particular litigants.¹⁹⁴ The willing

189. See Terry Baynes, “Friends” Line Up for Obamacare Supreme Court Challenge, REUTERS NEWS, Mar. 18, 2012, <http://www.reuters.com/article/2012/03/18/us-usa-supremecourt-friends-idUSBRE82H09F20120318>.

190. “Political scientists have long perceived an analogy between interest groups lobbying legislatures and interest groups seeking to influence judicial decisions through the filing of amicus briefs.” Kearney & Merrill, *supra* note 182, at 783. Amicus briefs provide “the judicial counterpart of lobbying and congressional hearings in the legislative process.” Krislov, *supra* note 180, at 717.

191. Frederick B. Wiener, *The Supreme Court’s New Rules*, 68 HARV. L. REV. 20, 80 (1954) (noting that an amicus brief is “essentially an instrumentality designed to exert extrajudicial pressure on judicial decisions”). See also Andrew P. Morriss, *Private Amici Curiae and the Supreme Court’s 1997-1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823, 829 (1999) (“[A]micus’s view of their own efforts is akin to that of groups lobbying before Congress.”); Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 110 U. PA. L. REV. 1172, 1172 (1953) (“The lobbying device available for use before the Court is the brief amicus.”); *id.* at 1173 (observing that lobbying groups treat the Court like a “political-legislative body, amenable and responsive to mass pressures from any source”).

192. “An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.” SUP. CT. R. 37(1).

193. Parties can also offend in this regard, arguing facts not of record in briefs to the Court. Far from rejecting this “evidence,” the Court has relied on it. See *Sykes v. United States*, 131 S. Ct. 2267, 2274-75 (2011) (using statistical studies first appearing in the case in the Government’s brief to support its decision about the dangerousness of vehicle flight to evade police). Justice Scalia complained of “untested judicial factfinding masquerading as statutory interpretation.”

Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally give parties more robust protection, leaving important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery. An adversarial process in the trial courts can identify flaws in the methodology of the studies that the parties put forward; here, we accept the studies’ findings on faith, without examining their methodology at all.

Id. at 2286 (citations omitted).

194. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (noting the transformation of the federal judiciary from a body resolving

admission of extra-record evidence¹⁹⁵ and novel arguments¹⁹⁶ on appeal leaves the judicial process—and the Rules of Evidence—in the dust, as the Court sifts through piles of amicus briefs¹⁹⁷ in search of helpful tidbits¹⁹⁸ or conclusive evidence¹⁹⁹ to craft its *de novo* resolution of the issues.²⁰⁰ Any facts that an amicus brief might supply are suspect as advocacy

disputes between private litigants to a freewheeling crafter and administrator of public policy).

195. See Simard, *supra* note 181, at 696-97 (noting that Justice Ginsburg found “extra-record factual information” submitted by amici to be valuable in *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

196. The Supreme Court applied the exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), overturning prior precedent, even though only an amicus brief urged that result. *Id.* at 646 n.3. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court relied on the Fifth Amendment Self-Incrimination Clause to impose custodial interrogation rules on the states. None of the four consolidated cases under consideration led with the Fifth Amendment argument. Two omitted it, and the other two relied primarily on the Sixth Amendment holding from *Escobedo v. Arizona*, 378 U.S. 478 (1964). See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 118 & n.45 (1998). The ACLU amicus brief emphasized the Fifth Amendment, and provided excerpts from police manuals demonstrating the routine employment of psychologically coercive interrogation. *Id.* The Court “followed the basic approach” of the ACLU brief, Weisselberg, *supra*, at 119, quoting extensively from the cited manuals. *Miranda*, 384 U.S. at 448-55. See also *Davis v. United States*, 512 U.S. 452, 457 n.* (1994) (noting that in the right circumstances “we will consider arguments raised only in an *amicus* brief”); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion of O’Connor, J.) (addressing retroactivity issue that had been raised only in an amicus brief).

197. See Simard, *supra* note 181, at 688 (reporting that “[Ginsburg’s] clerks often divide the amicus briefs into three piles: those that should be skipped entirely, those that should be skimmed, and those that should be read in full”).

198. Justice Ginsburg noted that a “gem” could be missed in the sheer volume of the briefs. *Id.* at 700.

199. See, e.g., Rick Perlstein, *What Gay Studies Taught the Court*, WASH. POST, July 13, 2003, at B3. The Court’s overturning of *Bowers v. Hardwick*, 478 U.S. 186 (1986), in *Lawrence v. Texas*, 539 U.S. 558 (2003), relied significantly on historical analysis presented in amicus briefs from pro-gay-rights history professors, the ACLU, and the Cato Institute. See also William N. Eskridge, Jr., *Yale Law School and the Overruling of Bowers v. Hardwick*, 51 YALE L. REP. 36 (Winter, 2004) (stating that the reasoning in *Lawrence* tracked amicus briefs submitted by Yale Law School professors and graduates: “the overruling of *Bowers v. Hardwick* was a Yale Law School seminar”).

200. “Can social ‘facts’ which could never successfully be introduced at trial be freely entered and accepted at the appellate stage? Is, in other words, litigation at the Supreme Court level in fact sometimes a trial *de novo*?” Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1234 n.121 (1975).

ammunition, untried by peer review or any independent confirmation.²⁰¹ The sidestepping of the discipline and constraint of the adversarial process²⁰² suggests that the Court enjoys its position atop the judicial hierarchy as the legislature of last resort.²⁰³

The Court does not rely solely on amici to supply legislative facts.²⁰⁴ Justices assign their clerks to search for citable books and articles that support their preferred outcomes. After the Court granted review of three death penalty cases in June, 1971,²⁰⁵ Justice Douglas instructed his clerks: "The question of the death penalty has been a hobby of mine for some years. I have always thought it was extremely unwise as public policy to enforce it."²⁰⁶ To determine if the death penalty also violated the Eighth Amendment, he asked his clerks to research "the sociological, penological, psychiatric, and legislative aspects of this whole problem."²⁰⁷ On a policy-making quest, he specifically instructed the clerks not to research judicial opinions. "[J]udges," he explained, "are pretty ignorant people."²⁰⁸ His

201. "Amicus curiae briefs sometimes try to fill empirical gaps . . . but these are advocacy documents, not subject to peer review or other processes for verification." Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 Harv. L. Rev. 32, 48 (2005).

202. As non-litigants, amici are not bound by standing requirements, joinder rules, justiciability, subject matter jurisdiction, adversarial evidence testing, or preclusion rules that prohibit bringing up the same issue time and again. Simard, *supra* note 181, at 674-75. "[W]hen facts are freely found at the appellate level through an expansive use of judicial notice, the lawsuit is in fact retried in the appellate court but without benefit of counsel." Miller & Barron, *supra* note 200, at 1216.

203. Commenting on the receipt of "about 60 friend-of-the-court briefs from organizations of doctors, psychologists, nurses, hospice workers and people with handicaps" in the right-to-die case of *Washington v. Glucksberg*, 521 U.S. 702 (1997), Justice Breyer stated: "Such briefs play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions." *Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, N.Y. TIMES, Feb. 17, 1998, at A17.

204. A court that creates public policy "is acting legislatively . . . [and] the facts which inform the tribunal's legislative judgment are called legislative facts." Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

205. See *Furman v. Georgia*, 408 U.S. 238 (1972).

206. THE DOUGLAS LETTERS 194-95 (Melvin I. Urofsky ed., 1987).

207. *Id.*

208. *Id.* Appellate judges supposedly are bound by the facts in the trial record. Legislators, of course, may seek understanding on a subject from any source. Douglas, enjoying the euphoria of legislating, disparages his colleagues who act merely as adjudicators.

subsequent concurrence read like a college term paper on the death penalty.²⁰⁹

A decade earlier, Justice William Brennan, a Catholic, spent two and one-half months researching and writing a seventy-page concurrence in the school Bible-reading case²¹⁰ aimed at convincing the Catholic hierarchy that his vote to abolish the practice was sound historically and as a matter of law.²¹¹ Aiming at this curial audience, he neither invited nor accepted joins from the other Justices. He wanted the concurrence to be purely his own voice—a lone opinion aimed at a particular constituency.²¹² His biographer relates: “He and his clerks worked seven days a week exhaustively researching the issue. Brennan wrote out his opinion in longhand while his clerks added footnotes gleaned from the shelves full of books and articles they found inside the Court’s library or borrowed from the Library of Congress and universities.”²¹³ The result, laden with seventy-eight dense multi-source footnotes discussing historical and social science research, “read less like a court opinion than a historical study.”²¹⁴ Brennan personally created his own extra-record amicus brief and inserted it into the *U.S. Reports*.

By welcoming a torrent of amicus briefs and doing their own independent factual research on policy questions,²¹⁵ the Justices act not as a

209. *Furman*, 408 U.S. at 240-57 (Douglas, J., concurring). At some point during his last few years on the Court, Douglas wrote to Harvard seeking a graduate student in political science as a clerk. Personal knowledge of author.

210. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230-304 (1963) (Brennan, J., concurring).

211. SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 172-73 (2010).

212. *Id.* at 173. “He made clear to his colleagues that he wished this to be his statement alone. He would accept no offers to join the opinion.” *Id.*

213. *Id.* at 172. His clerks were Richard A. Posner, later a Seventh Circuit judge, and Robert O’Neil, later President of the University of the Virginia.

214. *Id.* at 173.

215. See James R. Acker, *Social Science in Supreme Court Death Penalty Cases: Citation Practices and Their Implications*, 8 JUST. Q. 421 (1991) (noting widespread use of social science research to support opinions, a practice analogous to legislative fact-finding). For *Miranda v. Arizona*, 384 U.S. 436 (1966), Chief Justice Earl Warren did his own outside research, contacting the publishers of police interrogation manuals cited in the ACLU amicus brief for statistics on their distribution. Weisselberg, *supra* note 196, at 119 n.48 (citing letters in the Earl Warren Papers at the Library of Congress). See *Miranda*, 384 U.S. at 449 n.9 (“All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.”).

Most recently, Justice Breyer not only had the Supreme Court librarians research a case for him, but also boldly cited their research methodology and results in a separate

court but as a legislature.²¹⁶ Bypassing the adversarial process and the rules of evidence,²¹⁷ they graze at will in legislative pastures, ruminating contentedly over their next venture in constitutional law-making.²¹⁸

appendix! *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2771-79 (2011) (Breyer, J., dissenting) (“With the assistance of the Supreme Court Library, I have compiled these two appendixes listing peer-reviewed academic journal articles . . .”). As the majority noted, “the vast preponderance of this research is outside the record. . . .” *Id.* at 2739 n.8 (majority opinion). Fifteen years earlier, Justice Breyer repeated the same feat, inserting into *U.S. Reports* his own thirteen-page bibliography identifying over 150 government and academic sources linking violence in schools and workplace productivity. *United States v. Lopez*, 514 U.S. 549, 619, 631-644 (1995) (Breyer, J., dissenting). Justice Souter extended his thanks to Justice Breyer, and encouraged Congress to “help” the Court in the future. “The research underlying Justice Breyer’s dissent was necessarily a major undertaking; help is welcome, and it not incidentally shrinks the risk that judicial research will miss material scattered across the public domain or buried under pounds of legislative record.” *Id.* at 614 (Souter, J., dissenting). How charming that Legislature No. 2 should ask Legislature No. 1 for assistance!

216. Some scholars, apparently unconcerned about respecting the separation of powers, welcome this development. See John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law* 25 CONST. COMMENT. 69, 71 (2008) (arguing that the Supreme Court through the briefing process is a “superior fact-finder” to Congress and also less “biased”); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 40-46 (2009) (contending that judicial fact-finding is superior to that of legislatures). See also Daniel O. Conkle, *Toward A General Theory Of The Establishment Clause*, 82 NW, U. L. REV. 1113, 1193 (1988) (arguing that “institutional characteristics” permit the Court “to make decisions that are politically and morally superior to the decisions reached by the majoritarian process”).

217. Justice Potter Stewart sounded a cautionary note in *Ballew v. Georgia*, 435 U.S. 223 (1978). After reading Justice Blackmun’s social-science-laden plurality opinion on why five-person juries violated the Sixth Amendment, but six-person juries did not, he questioned the wisdom and necessity of “heavy reliance on numerology derived from statistical studies.” Furthermore, he said, “neither the validity nor the methodology employed by the studies cited was subjected to the traditional testing mechanisms of the adversary process. The studies relied on merely represent unexamined findings of persons interested in the jury system.” *Id.* at 246 (Powell, J., concurring in the judgment).

218. Two professors suggest formalizing the Court’s legislative process by appointing “a panel of resident social scientists, who would be requested to investigate matters of legislative fact which appear to the Court to require further study.” Miller & Barron, *supra* note 200, at 1240-42. See generally Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131 (2008) (recommending formalizing ethical and procedural rules governing independent research by judges).

B. *Legislating the Living Constitution: Justice William Brennan, Jr.*

1. Policy Maker

At the age of ninety, six years after retiring from the bench and within a year of his death, Justice William J. Brennan, Jr. reiterated his staunch dedication to a legislative definition of the judicial role.²¹⁹ Fealty to the text of the Constitution and to the intent of the Framers was secondary, even unhelpful. “The genius of the Constitution rests not in any static meaning it may have had in a world that is dead and gone but in the adaptability of its great principles to cope with current problems and present needs.”²²⁰ Declaring his “faith in a malleable Constitution . . . infused with a vision of human dignity,”²²¹ Brennan freely employed the judicial office effectively to further his personal vision of justice.²²² Decrying the death penalty as fatal to human dignity because it treats “members of the human race as nonhumans, as objects to be toyed with and discarded,”²²³ he nonetheless

219. William J. Brennan, Jr., *My Life on the Court*, in *THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION?* 9 (Bernard Schwartz ed., 1998) [hereinafter Brennan, *My Life*].

220. *Id.* at 10. “Justice Brennan has not pretended that the constitutional revolution in which he has played a leading role was dictated by the text of the Constitution or by the intentions of its framers.” Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 *HARV. L. REV.* 13, 14 (1990).

221. Brennan, *My Life*, *supra* note 219, at 10.

222. “[T]he most important and influential official in terms of domestic social policy during the last half of the twentieth century was an unelected, electorally unremovable official, Justice Brennan, whom most Americans could not identify.” Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?*, 34 *HARV. J.L. & PUB. POL’Y* 73, 88 (2011). See also David Halberstram, *The Common Man as Uncommon Man*, in *REASON & PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE* 24 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) (“quite likely the dominating figure of the Court over more than a third of a century, and equally likely the most influential political figure in America in the postwar years”); MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 8 (1998) (“the most important intellectual influence on the Warren Court”); Chief Judge Richard A. Posner, *In Memoriam: William J. Brennan, Jr.*, 111 *HARV. L. REV.* 9, 14 (1997) (affirming “Brennan’s historical importance as a central figure in a judicial revolution”); Anthony Lewis, *Reason and Passion*, *N.Y. TIMES*, July 28, 1997, at A17 (“probably the most influential justice of the century”) (quoting remarks of Justice Antonin Scalia); Hon. Daniel J. O’Hern, *A Tribute to Justice William J. Brennan, Jr.*, 8 *SETON HALL CONST. L.J.* 313, 313 (1998) (“the dominant influence on American law in the twentieth century”). For a detailed biography based on unrestricted access to case documents and former clerks, see STERN & WERMIEL, *supra* note 211.

223. *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

unwaveringly upheld the court-decreed slaughter of the unborn.²²⁴ Behind the scenes, he was its chief architect.²²⁵ Brennan matched this hypocrisy²²⁶ with a cloying self-righteousness. “If I have drawn one lesson in my ninety years, it is this: To strike another blow for freedom allows a man to walk a little taller and raise his head a little higher. And while he can, he must.”²²⁷ And while he could, he did: a primary author of a holocaust of unborn human life that far exceeds in the annals of infant slaughter the combined

224. See, e.g., *Ohio v. Akron Center for Reprod. Health*, 497 U.S. 502, 524 (1990) (joining dissent from upholding of judicial bypass procedure because the procedure tends to discourage abortion); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 537 (1989) (joining concurring and dissenting opinion, reaffirming *Roe* without modification); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (striking requirements for mandatory informed-consent information and attendance of a second physician for a post-viability abortion); *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416 (1983) (striking requirements for 24-hour waiting period, performance of second-trimester abortions in a hospital, parental consent or judicial bypass for minors under fifteen, physician provision of information about risks of abortion, and humane disposal of fetal remains); *Harris v. McRae*, 448 U.S. 297, 329 (1980) (dissenting from denial of Medicaid funding for abortion); *Beal v. Doe*, 432 U.S. 438, 448 (1977) (same); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (striking parental consent, spousal consent, and a ban on saline abortions); *Roe v. Wade*, 410 U.S. 113 (1973) (striking all state laws outlawing abortion).

225. Although he authored 1360 separate opinions (majority, dissenting, and other), more than any other justice in history except for William O. Douglas, Brennan did not write a single majority opinion in the major abortion cases. See *supra* note, at 224. Conceptualizing behind the scenes, however, he urged Justice Harry Blackmun to abandon vagueness as a rationale for overturning the Texas statute in *Roe*, and instead to base the opinion on the “core issue” of a right to abortion. Martin Wishnatsky, *The Roll of the Log: Behind the Scenes at Roe v. Wade*, 1 LIBERTY LEGAL J. 10, 12 n.19 (2010). Previously, Brennan had strongly recommended that Justice Douglas adopt a “right to privacy” approach in *Griswold v. Connecticut*, 381 U.S. 479 (1965), thus laying the doctrinal basis for the abortion right. STERN & WERMIEL, *supra* note 211, at 283-85. See also BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 237-39 (1985); David J. Garrow, *Reproductive Rights and Liberties: the Long Road to Roe*, in REASON & PASSION, *supra* note 222, at 110-11. Writing for the Court in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the contraceptive right of *Griswold* to the unmarried), Justice Brennan cleverly stated that the right to privacy included “the decision whether to bear or beget a child.” Use of the word “bear” deliberately foreshadowed *Roe*, then pending before the Court. See STERN & WERMIEL, *supra* note 211, at 370; MARK R. LEVIN, MEN IN BLACK 58-60 (2005); Garrow, *supra*, at 113. Brennan used *Eisenstadt* “as another strong leg on which a future opinion legalizing abortions could stand.” KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR. AND THE DECISIONS THAT TRANSFORMED AMERICA 226 (1993).

226. “Odd how liberals prate about morality when it comes to saving vicious killers from a richly deserved fate, but have no breath to spare for the lives of the innocent, born or unborn.” JUDGE ROBERT H. DIERKER JR., THE TYRANNY OF TOLERANCE 94 (2006).

227. Brennan, *My Life*, *supra* note 219, at 12 (90th birthday speech in 1996).

villainy of Pharaoh and Herod.²²⁸ Insistent on writing into the Constitution his own ungodly values, Brennan is a sober reminder that the “genius of the Constitution” lies in its purposeful design to thwart anyone from wielding the oligarchical power he enjoyed for thirty-four years and celebrated until his dying breath. “Too many wrongs cry out to be righted,”²²⁹ he wrote in his last year on earth, unaware that his own work as a judicial legislator stands as one of the greatest of these wrongs. The Constitution, Brennan wrote a decade earlier, “is a sparkling vision of the supremacy of the human dignity of every individual.”²³⁰ Every individual, that is, except those waiting to be born.

Brennan enlarged the traditional judicial role of resolving disputes between litigants to take on the grandiose task of directing “the course of vital social, economic, and political currents.”²³¹ He welcomed public interest litigation that bypassed the legislative arena by “casting social, economic, philosophical, and political questions in the form of lawsuits.”²³² The Constitution, in his hands, became a means for resolving “the most fundamental issues confronting our democracy” and a vehicle “to resolve public controversies.”²³³ Though not alone in this pretense, he consciously saw his role as speaking for the community on “issues upon which contemporary society is most deeply divided.”²³⁴

228. *Exodus* 1:15-22; *Matthew* 2:13-18. During the period from the issuance of the *Roe v. Wade* opinion in 1973 until Brennan’s retirement from the Court in 1990, 25 million abortions were performed in the United States. Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, 43 PERSPS. ON SEXUAL & REPROD. HEALTH 41, 43 (2011), available at <http://www.guttmacher.org/pubs/journals/4304111.pdf>. By the time he died in 1997, the total had risen to 35 million. *Id.* By 2008 the number had further increased to 49 million. *Id.*

229. Brennan, *My Life*, *supra* note 219, at 11.

230. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 439 (1986) [hereinafter Brennan, *Ratification*].

231. *Id.* at 434.

232. *Id.*

233. *Id.*

234. *Id.*; accord Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 161 (“[I]n so many areas the Supreme Court today views constitutional litigation as a means of settling the great conflicts of the social order.”); STERN & WERMIEL, *supra* note 211, at xiii (Justice Brennan “came to embody an assertive vision for the courts in which judges aggressively tackled the nation’s most complicated and divisive social problems.”).

Brennan viewed the Constitution as a license to legislate his vision of justice into law.²³⁵ He enjoyed the thrill of absolute power. “[I]t’s a pretty awesome feeling, believe me,” he said, “to appreciate that something you’re doing, when it’s decided, will have an enormous impact among two hundred-odd million people. And that feeling *never* leaves you.”²³⁶ Noble or ignoble as this aspiration might have been, it far exceeds, indeed transgresses, the judicial role envisioned by the Founders.²³⁷ Similarly, the Framers of the Fourteenth Amendment, mindful of *Dred Scott*,²³⁸ lodged implementation with Congress, not the Court.²³⁹ Brennan exercised power he did not lawfully possess. He is almost universally lauded as perhaps the most effective Supreme Court justice of the twentieth century. But few contemplate that his success arose from the exercise of illegitimate power.

The constitutional design is for Congress to be the legislative body, not the Court. “The goal of universal equality, freedom and prosperity is far from won[,]” Brennan asserted in his final year on the Court, and “ugly inequities continue to mar the face of our nation.”²⁴⁰ If combating perceived social ills was his purpose, he should have—like his father²⁴¹—run for public

235. “I was finally convinced,” Brennan noted in a personal history of one case, “that affirmative action programs were not only justified as a matter of history and constitutional principle, but that they were sorely needed if the place of minorities in society were ever to advance.” Epstein & Knight, *Piercing the Veil*, *supra* note 177, at 357. Justice Harry Blackmun uttered similar sentiments. Dissenting from the Court’s refusal to command that Medicaid pay for abortion, he stated: “This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us.” *Beal v. Doe*, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting). The Justice Department later criticized the “free-ranging, essentially legislative, process of devising regulatory schemes that reflect [judicial] notions of morality and social justice.” Brief for the United States as Amicus Curiae Supporting Appellants, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379), 1985 WL 669620 at *20 (alteration in original).

236. Nat Hentoff, *Profiles: The Constitutionalist*, *NEW YORKER*, Mar. 12, 1990, at 54; *see also id.* at 70 (“It’s just incredible . . . to be a participant in decisions that have such enormous impact on our society.”). Justice Blackmun also enjoyed the thrill of being the ultimate policy maker. “[I]t has been exciting,” he explained, “to be centrally placed in the development and resolution of an issue that is so decisive and emotional . . .” The Justice Harry A. Blackmun Oral History Project 505 (1994-95), <http://www.loc.gov/rr/mss/blackmun>.

237. *See supra*, § II.

238. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

239. *See supra*, § III(C).

240. Hentoff, *supra* note 236, at 68. Justice Douglas shared a similar vision. *See WILLIAM O. DOUGLAS, POINTS OF REBELLION* 95 (1970) (stating that “today’s Establishment is the new George III”).

241. STERN & WERMIEL, *supra* note 211, at 9-12, 14-16.

office and practiced the legislative arts in the branch of government designated for that purpose. Instead, joining with like-minded oligarchs, he malformed a judicial institution into a legislative one. The Court needs to be shorn of its legislative functions, and returned to the judicial role of deciding particular cases, rather than setting social policy. In a republican form of government, the people are entitled to corrupt or ennoble themselves through their own elected representatives, rather than by the policy inclinations of unelected judges appointed for life. When judges usurp the legislative function, they also enervate the democratic process. Complaining about a particularly egregious example, Chief Justice Warren Burger stated:

[W]hen this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy.²⁴²

2. Minority Whip of the Court

Justice Brennan joined Chief Justice Warren and Justices Black and Douglas to form a strong four-justice liberal bloc on the Court.²⁴³ He functioned as the “whip,” keeping track of the voting alignment on particular cases, and trolling for a fifth vote while monitoring his own side for potential defections.²⁴⁴ The logic of judicial opinions was a means to an end, frequently a calculated compromise to win a majority for incrementally advancing the liberal agenda.²⁴⁵ Brennan often sought to establish a narrow foothold in one case as a basis for expansion in the future.²⁴⁶ The liberal bloc also used certiorari grants as a means of furthering

242. *Plyler v. Doe*, 457 U.S. 202, 253 (1982) (Burger, C.J., dissenting).

243. STERN & WERMIEL, *supra* note 211, at 157-58.

244. *Id.* at 158 (describing Brennan as “the group’s strategist, scouting out opportunities to advance their views and plotting out how a current loss could contribute to future victories”).

245. “We were plowing new ground,” Brennan explained. “And when you do that sort of thing, you make progress by stages. You don’t do it in one fell swoop.” *Id.* at 240.

246. *Baker v. Carr*, 369 U.S. 186, 211 (1962), as one example, established the justiciability of apportionment challenges as a prelude to *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (“one person, one vote”) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)). “With the principle of intervention once established in *Baker*, . . . the Court could go on to successively tougher cases, each following the ‘command’ of the Constitution as expressed in the holding or dictum of the last . . . a process of de facto constitutional amendment.” Ward E. Y. Elliott,

their agenda, looking for promising cases which could be employed to create desired outcomes.²⁴⁷ Since a cert grant required only four votes, the bloc could call up any case that suited their purposes, as long as they could reasonably anticipate finding a fifth vote to control the outcome.²⁴⁸

Brennan sifted cert petitions in search of helpful vehicles to implement a predetermined policy agenda.²⁴⁹ He described one petition as an “ideal opportunity” to apply a rule of criminal procedure against the states. “I do think,” he wrote to his liberal confreres, “we’ll wait a long time before we get a question as sharply presented.” Although fearful the fifth vote might not be found, his inclination was “to vote to grant and take a chance.”²⁵⁰ In the late 60s, he was looking through cert. petitions in search of the “ideal vehicle” to transform welfare payments from a privilege to a property-like entitlement whose deprivation required due process. He finally found a petition, his biographer writes, “that presented the issue exactly as he hoped.”²⁵¹ Although he could not assemble a majority to recognize a constitutional right to receive welfare, he did succeed in the due process campaign.²⁵²

THE RISE OF GUARDIAN DEMOCRACY: THE SUPREME COURT’S ROLE IN VOTING RIGHTS DISPUTES, 1845-1969, at 115-16 (1974). A *New York Times* reporter, present for the announcement of the decision in *Sims*, felt like he was at “the second American Constitutional Convention.” Anthony Lewis, *The Legacy of the Warren Court*, in *THE WARREN COURT: A RETROSPECTIVE* 398, 398 (Bernard Schwartz ed., 1996). The run-up to *Roe v. Wade*, 410 U.S. 113 (1973), was similar. See *supra* note 225. Brennan deliberately teed up a doctrine in one case and then proliferated it into future opinions, citing the first case as precedent. See Laurence H. Tribe, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 41, 44 (1997) (noting “Justice Brennan’s work as constitutional architect: his ability to decide a case, and particularly to craft an opinion, in a way that would lay the foundation for future decisions”).

247. “Brennan viewed culling through potential cases as a critically important part of his role as a justice, in part because it was the means by which he flagged promising strategic opportunities.” STERN & WERMIEL, *supra* note 211, at 363; see also William J. Maledon, *Justice William J. Brennan, Jr.: A Personal Tribute*, 22 ARIZ. ST. L.J. 823, 826 n.8 (“Justice Brennan personally read and considered every petition to the Court . . .”).

248. STERN & WERMIEL, *supra* note 211, at 158.

249. Brennan and Warren regularly strategized “to decide which cases might work best for incorporating the requirements of the Bill of Rights against the states.” *Id.* at 251.

250. *Id.* at 183.

251. *Id.* at 336-41.

252. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that procedural due process entitles welfare recipients to a pretermination hearing). Justice Harlan was careful to require that Brennan’s majority opinion contain no reference to a substantive due process right to receive welfare, lest even a negative mention be exploited in the future. See STERN & WERMIEL, *supra* note 211, at 343 (“[M]any of Brennan’s colleagues learned to watch for the seemingly innocuous casual statement or footnote—seeds that would be exploited to their

The liberal bloc, later augmented *seriatim* by Justices Goldberg, Fortas, and Marshall, did not simply apply the law to cases that came before the Court.²⁵³ Instead, they actively sought out cases that fit their agenda and used them as vehicles to change the law. In that process, the result of the case was far more important than the opinion itself.²⁵⁴ Brennan willingly and frequently sacrificed the quality and even the logic of an opinion to “put a court together.”²⁵⁵ One commentator, himself a former clerk characterized *Baker v. Carr*,²⁵⁶ a case that recognized a right, but provided little guidance on remedy, as “a perfect illustration of Brennan’s willingness to say virtually anything (or nothing) if a key member of his majority requested it, so long as the opinion reached the right outcome.”²⁵⁷ In another case, Brennan had sought to declare illegal immigrants a “suspect class” and to create a fundamental right to education for their children.²⁵⁸ He had to backtrack on both goals to keep a majority to declare the law unconstitutional.²⁵⁹ To get the result, Brennan had to dilute the doctrine. One law professor commented that the case “ha[d] no doctrinal significance

logical extreme in a later case.”); see also JAN CRAWFORD GREENBURG, *SUPREME CONFLICT* 124 (2007) (relating that Justice Powell warned Justice O’Connor that Brennan “tended to include footnotes in his opinions that he would later argue were major points of law”); Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1873 n.153 (1995) [hereinafter Tushnet, *Powell*] (noting Brennan’s practice “of planting seeds for later, liberal development”).

253. Justice Hugo Black, a proponent of applying the Bill of Rights against the States, was sternly opposed to the recognition of unenumerated rights. See *Griswold v. Connecticut*, 381 U.S. 479, 525 (1965) (Black, J., dissenting). He resisted his liberal colleagues when they condoned a broad “right to privacy.” See *id.* at 507-10. He also drifted away from the liberal bloc on issues of civil disobedience and continuing expansion of criminal procedure protections. Thus, the battle for the fifth vote continued, even with the addition of first Goldberg and then Fortas. STERN & WERMIEL, *supra* note 211, at 287-89. With the confirmation of Thurgood Marshall in August, 1967, the bloc again had a reliable fifth vote. *Id.* at 294-95.

254. “As in most of his monumental decisions, Brennan reached the decision first, then worked on the best reasoning that could ‘capture a court.’” EISLER, *supra* note 225, at 225.

255. Maledon, *supra* note 247, at 824. See also STERN & WERMIEL, *supra* note 211, at 183 (noting Brennan’s “willingness to sacrifice the quality of an opinion’s legal reasoning to get the outcome he wanted”).

256. *Baker v. Carr*, 369 U.S. 186 (1962) (recognizing an equal protection right to challenge malapportionment).

257. STERN & WERMIEL, *supra* note 211, at 190 (quoting POWE, *supra* note 161, at 202).

258. Tushnet, *Themes*, *supra* note 174, at 764-66.

259. *Id.* See *Plyler v. Doe*, 457 U.S. 202 (1982). For details of Brennan’s unsuccessful effort to gain Justice Powell’s assent to these doctrinal innovations, see Tushnet, *Powell*, *supra* note 252, at 1862-73.

except . . . that it embodies the view that the Court can find unconstitutional statutes that a majority of the Justices believe to be unwise social policy.”²⁶⁰

These practices are quintessentially legislative. A measure of a Congressman is his ability to “move legislation.”²⁶¹ To do so, he must be able to craft bills, attract needed votes, rally public opinion, and “manage the procedural intricacies necessary to see a bill enacted into law.”²⁶² Vote-tracking is a key skill. “At bottom,” wrote a former Senate staffer, “legislatures are organized vote-counting bodies.”²⁶³ Brennan’s role in the liberal bloc was very similar to that of a party whip. The objective of party whips, who serve as the assistant majority and minority leaders, “is to win votes for legislation supported by their parties and to determine whether certain legislation has sufficient support within the body.”²⁶⁴ Party leaders rely on the whips to “know where the votes are.”²⁶⁵ Brennan served the same function, corralling the votes of other justices and keeping track of the tally.²⁶⁶ Additionally, he screened the cert petitions for good cases that would further the “party” agenda. On Thursdays, prior to the Court’s weekly Friday conference, he caucused with his “party leader,” Earl Warren.²⁶⁷

To be effective, a whip needs early intelligence about voting alignments. Unlike a Congressional whip, who must keep count of 100 senators or 435 representatives, Brennan only had to track eight other votes besides his own. The Court typically assembles in conference every Friday to vote on cases argued earlier in the week. To be most effective in Conference, Brennan had to know ahead of time how his colleagues were leaning. He accomplished this through the clerks’ underground. One clerk relates:

We might find out, from his or her clerk, where a Justice is leaning on a particular case. When we know what that Justice is thinking, we keep that in mind when we write out two-page

260. Tushnet, *Themes*, *supra* note 174, at 765.

261. Michael Edmund O’Neill, *A Legislative Scorecard for the United States Senate: Evaluating Legislative Productivity*, 36 J. LEGIS. 297, 298 (2010).

262. *Id.* at 299.

263. *Id.*

264. *Id.* at 306.

265. *Id.* See Ceci Connolly, *Plain-Talking Hastert Poised to Be Speaker*, Wash. Post, Dec. 21, 1998, at A1, <http://www.washingtonpost.com/wp-srv/politics/govt/leadership/stories/hastert122198.htm> (describing Majority Whip Tom Delay and Deputy Whip Dennis Hastert as building “a vote-counting operation that is the envy of other Republicans”).

266. “Brennan liked building majorities,” wrote his biographers. He was “tasked by the chief justice with corralling majorities.” STERN & WERMIEL, *supra* note 211, at 352.

267. *Id.* at 250-52.

summaries of each case for Brennan to emphasize at the conference. The points he hits may be pitched entirely to that one Justice.²⁶⁸

During opinion-writing in a close case, the same process occurred: "While an opinion is being written in our chambers," recalled a Brennan clerk, "we might talk to a clerk for a Justice who we knew would be a tough fifth vote. And we would ask this clerk what was really bugging his guy about Brennan's draft."²⁶⁹

3. The Rule of Five

As minority and, at times, majority whip, Brennan kept close track of his colleagues positions on pending cases, gauging how far he could push the liberal agenda without losing a majority and, alternatively, what doctrinal concessions he must make to keep one. "He sees his life's work," wrote a journalist, "as a continual battle for five votes . . ."²⁷⁰ He initiated new clerks into the importance of collecting votes. His biographers relate:

Brennan liked to greet his new clerks each fall by asking them what they thought was the most important thing they needed to know as they began their work in his chambers. The pair of stumped novices would watch quizzically as Brennan held up five fingers. Brennan then explained that with five votes, you could accomplish anything.²⁷¹

Some clerks report that Brennan identified the Rule of Five as "the most important rule in constitutional law."²⁷² At his annual clerks' reunion, "Brennan spoke so candidly over dinner about how the votes were lining up in pending cases that his former clerks felt for one night like they had never

268. Hentoff, *supra* note 236, at 60 (quoting Jeffrey Leeds, 1985-86 clerk for Justice Brennan).

269. *Id.*

270. *Id.* at 70.

271. STERN & WERMIEL, *supra* note 211, at 196. *See also id.* at 278 (Brennan "welcomed each new pair of clerks every summer by raising five fingers to stress the importance on the Court of five votes.").

272. Tushnet, *Themes*, *supra* note 174, at 763. *See also* Hentoff, *supra* note 236, at 60 (quoting Brennan's "five-finger speech": "Five votes. Five votes can do anything around here.").

left his chambers.”²⁷³ Brennan trained his clerks as vote-hunters—junior whips.²⁷⁴

C. *Solidifying the Imperium: Chief Justice William Rehnquist*

The Warren Court imposed upon the states policies deemed wise by a majority of the Justices. The Rehnquist Court, by contrast, clashed with Congress over legislation perceived to intrude on state sovereignty.²⁷⁵ On the prerogative of the Court to exercise monopoly control over the meaning of the Constitution, however, the Rehnquist Court did not vary from its predecessors.²⁷⁶ In *City of Boerne v. Flores*, the Court assailed Congress for daring to employ its Fourteenth Amendment enforcement power contrary to a Supreme Court interpretation of the Free Exercise Clause.²⁷⁷

In *Dickerson v. United States*,²⁷⁸ the Court rebuked Congress for legislating its own view on the admissibility of confessions.²⁷⁹ In 1968, Congress had passed a law that *Miranda* warnings²⁸⁰ were not mandatory,

273. STERN & WERMIEL, *supra* note 211, at 291.

274. The impressive skill set Brennan employed to lobby his Supreme Court colleagues should not be underestimated. He had a keen intellect as well as a warm personality. See William Cohen, Book Review, *Justice in the Balance*, 81 VA. L. REV. 927, 929 (1995) (stating that Brennan’s “influence stemmed as much from his warm personality as from the strength of his ideas”). Justice Brennan’s “lobbying” occurred largely through the exchange of opinion drafts that creatively accommodated the views of his fellow justices. See Hentoff, *supra* note 236, at 59. Additionally, he was a very hard worker, rising early and working late. See Maledon, *supra* note 247, at 824 n.2 (remarking on Justice Brennan’s “astonishing and indefatigable pace”); Hentoff, *supra* note 236, at 70 (quoting Brennan that his work on the Court “takes up practically all your waking hours”). By sheer energy, determination, and industriousness, Brennan gained an edge. Thinking strategically, he gave his all—working the internal politics of the Court to achieve his vision of justice.

275. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (Congress has no power under Article I to abrogate a state’s sovereign immunity from suit in federal court.); *accord* *Fed. Mar. Comm’n v. S.C. States Ports Auth.*, 535 U.S. 743, 760 (2002) (same for federal administrative hearing); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (same for action in state court).

276. “[T]he fiercest opposition is mounted to protect the Supreme Court’s authority to interpret the Constitution. That authority lies at the core of the Supreme Court’s power since, when exercised, it is virtually unchallengeable.” *Lepre v. Dep’t of Labor*, 275 F.3d 59, 74 (D.C. Cir. 2001) (Silberman, J., concurring).

277. See *supra* note 145.

278. *Dickerson v. United States*, 530 U.S. 428 (2000).

279. *Id.* at 437.

280. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

but only factors to consider in evaluating voluntariness.²⁸¹ Because the Justice Department decided not to rely on § 3501 in prosecutions, the statute lay dormant for decades.²⁸² In 1999, a Fourth Circuit panel, responding to an amicus brief, raised § 3501 *sua sponte*.²⁸³ Citing Supreme Court precedent that the *Miranda* warnings were not constitutionally mandated, but only a “prophylactic” rule and “not themselves rights protected by the Constitution,” the panel found that statutory law prevailed over a judicial rule of evidence.²⁸⁴ As a result, the defendant’s voluntary confession, though not preceded by the *Miranda* warnings, was deemed admissible.²⁸⁵

To lessen the effect of *Miranda* on law enforcement, the Supreme Court had previously allowed admission of unwarned confessions for impeachment purposes,²⁸⁶ and also identified a “public safety” exception when immediate application of the warnings before talking with a suspect could endanger the public.²⁸⁷ The *Miranda* warnings thus functioned more as a protective force field around the Fifth Amendment rule against self-incrimination than as a constitutional requirement per se. As such, Congress’s express Section 5 authority under the Fourteenth Amendment “to enforce, by appropriate legislation, the provisions of this article,” should have given the legislators a clear field to substitute their view of Fifth Amendment implementation for that of the Justices. But this could not be allowed.²⁸⁸

Even though conservative majorities had previously vitiated the disqualifying impact of failure to provide the iconic warnings, the liberal Justices, quasi-conservative Justices, and Chief Justice closed ranks to resist any Congressional intrusion into their monopoly power to define and implement the Constitution.²⁸⁹ Faced with a congressional alternative to

281. 18 U.S.C. § 3501(b) (2010), *invalidated by* *Dickerson v. United States*, 530 U.S. 428 (2000).

282. *United States v. Dickerson*, 166 F.3d 667, 680-82 (4th Cir. 1999).

283. *Id.*

284. *Id.* at 689 (citations omitted).

285. *Id.* at 695.

286. *Harris v. New York*, 401 U.S. 222 (1971).

287. *New York v. Quarles*, 467 U.S. 649, 655 n.5 (1984) (noting that “failure to provide *Miranda* warnings in and of itself does not render a confession involuntary”).

288. See *Dickerson v. United States*, 530 U.S. 428, 460 (2000) (Scalia, J., dissenting) (“The power with which the Court would endow itself under a ‘prophylactic’ justification for *Miranda* goes far beyond what it has permitted Congress to do under authority of [Section 5].”).

289. Christopher Wolfe explains that “the Rehnquist Court is composed of three different blocs: first, a politically liberal modern bloc (Stevens, Ginsburg, Breyer, and Souter),

judicial policy making, Legislature No. 2 firmly closed the door on Legislature No. 1.²⁹⁰ No, Mr. Legislator, you do not play on the constitutional ball field. To shift metaphors, no congressional cooks in the constitutional kitchen! “In sum,” stated the *Dickerson* majority, reversing the Fourth Circuit, “we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.”²⁹¹

Although not designated as such, the Court actually legislated a Fifth Amendment penumbra, and then imposed it on Congress as a constitutional mandate. After all, as Justice Scalia noted, “§ 3501 excludes from trial precisely what the Constitution excludes from trial, viz., compelled confessions.”²⁹² Describing the Court’s result as “power-judging,” and protesting against the Court’s imposition of its own legislative rules on the constitutionally-designated legislature,²⁹³ Justice Scalia decried “the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States.”²⁹⁴ By a 7-2 margin, the “conservative” Rehnquist Court validated one of the landmarks of the Warren era. Protecting the exclusivity of the Court’s access to the constitutional arena trumped more customary policy inclinations.²⁹⁵

second, a centrist modern bloc that is typically, but not always, conservative (O’Connor, Kennedy), and third, a traditional bloc (Scalia, Thomas), with Rehnquist himself straddling the last two blocs.” Christopher Wolfe, *The Rehnquist Court*, in *THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION 199*, 204 (Christopher Wolfe ed. 2004). In *Dickerson*, only the core traditionalists dissented.

290. “Chief Justice Rehnquist was hardly a fan of *Miranda* but nevertheless wrote *Dickerson* in order to highlight the deference he felt lawmakers owed to Court interpretations of the Constitution.” Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *GEO. L.J.* 1515, 1576 n.339 (2010).

291. *Dickerson*, 530 U.S. at 444 (majority opinion). Four years after *Dickerson*, when judicial superiority was not an issue, the Chief Justice reverted to his historic anti-*Miranda* stance. See *United States v. Patane*, 542 U.S. 630 (2004) (joining Justice Thomas’ plurality opinion that evidence acquired as a result of an unwarned statement does not violate the Fifth Amendment).

292. *Dickerson*, 530 U.S. at 445 (Scalia, J., dissenting). Compare U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”) with 18 U.S.C. 3501(a) (A confession “shall be admissible in evidence if it is voluntarily given.”).

293. See *Dickerson*, 530 U.S. at 446, 460 (Scalia, J., dissenting) (describing *Miranda*’s “detailed code” as a “legislative achievement”).

294. *Id.* at 461.

295. That the warnings (“You have a right to remain silent. Anything you say . . .”) had become embedded in popular culture also influenced the Court. Why disappoint the public by disavowing the memorable phrases that every policeman carried on a tattered card in his wallet, and countless dramas had engraved on the public mind? See *id.* at 443 (majority

“The Supreme Court,” writes one scholar, “has made the Fourteenth Amendment a blank check, authorizing the Court to arrogate to itself policymaking on any issue in which the justices take an interest.”²⁹⁶ If *Boerne* and *Dickerson* are any indication, the Rehnquist Court, inheriting the checkbook from its predecessors, continued to write.²⁹⁷

V. REMEDIES

The lifetime appointment, meant to protect the Constitution from political manipulation, became instead the “divine right of judges”²⁹⁸ to shape society according to their vision of “social progress.”²⁹⁹ “Like a jealous Cyclops,” wrote one commentator, “[the Court] was willing to rule the domain that it guarded.”³⁰⁰ “Ultimate legislative power in the United States,” a New Deal strategist concluded, “has come to rest in the Supreme Court.”³⁰¹ What can be done?

A. *The Appointment Power*

The greatest form of popular control over the Court is the appointment power—jointly shared between the President and the Senate.³⁰² The Court is not self-perpetuating. Unlike some boards of directors, the justices do not

opinion) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”). Justice Scalia was unmoved by this affection for the Court’s “extra constitutional constraints upon Congress and the States.” *Id.* at 465 (Scalia, J., dissenting).

296. Lino Graglia, *Joseph Grano and Judicial Review*, 46 WAYNE L. REV. 1419, 1422 (2000).

297. See Jules Lobel, *The Supreme Court and Enemy Combatants*, 54 WAYNE L. REV. 1131, 1135 (2008) (noting “the increased confidence of the judiciary in its relations with Congress and the Executive, an assertiveness that transcends the liberal and conservative labels”); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 657, 662 (2000) (“The concept that the Supreme Court is the ultimate, and in some cases exclusive, interpreter of the Constitution flourished in the 1990s. . . . The theory places the Supreme Court at the apex of a pyramid that encompasses all other government officials.”).

298. “The divine right of judges has supplanted . . . the institutions of parliamentary democracy, and the Constitution itself.” Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1307 (1937).

299. Brennan, *Ratification*, *supra* note 231, at 436.

300. Lerner, *supra* note 298, at 1309.

301. ADOLF BERLE, *THE THREE FACES OF POWER* 3 (1967).

302. The President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court[.]” U.S. CONST. art. II, § 2, cl. 2.

choose their successors.³⁰³ The electoral tides that shape the Presidency and the Senate determine the selection pool and the viability of judicial nominees. Although, in 1937, the Court arguably changed direction to deflect a clash with the elected branches,³⁰⁴ President Roosevelt's opportunity to select seven new justices in four years³⁰⁵ mooted any lingering conservatism. In 1936, manufacturing, mining, and agriculture were beyond the scope of the Commerce Clause.³⁰⁶ By 1941, however, the same Commerce Clause empowered Congress to regulate wheat grown for consumption on a farm.³⁰⁷ The court-packing plan was no more than the presidential appointment power turbocharged. President Roosevelt sought to appoint a coadjutor for every judge over 70.³⁰⁸ The plan seemed audacious at the time: a sudden addition of six new justices.³⁰⁹ Nevertheless, it had the great appeal of being a variant of the appointing power—historically the most effective way to move the Court ideologically.³¹⁰ As one Senator stated: “When the judges change, the law changes.”³¹¹

303. Non-profit corporations, lacking shareholders, often select new board members by vote of the current board, especially if the organization has no members or excludes them from governance. See Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 830 (2003) (stating that “self-perpetuating boards are the norm . . . particularly among charitable or public benefit nonprofits”).

304. For a typical history of the “switch in time,” see WALTER F. MURPHY, *CONGRESS AND THE COURT* 53-62 (1962). For more detail, including the genesis of the court-packing plan in the Justice Department, see William Leuchtenburg, *The Origins of Franklin D. Roosevelt's “Courtpacking” Plan*, 1966 SUP. CT. REV. 347, 389 (1966) (crediting Princeton professor Edward S. Corwin with originating the “age-limit proposal”).

305. Hugo Black (1937), Stanley Reed (1938), Felix Frankfurter (1939), William O. Douglas (1939), Frank Murphy (1940), James F. Byrnes (1941), Robert H. Jackson (1941). See *Biographical Directory of Federal Judges*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Apr. 6, 2012).

306. *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (“[T]he local character of mining, of manufacturing, and of crop growing is a fact, and remains a fact, whatever may be done with the products.”).

307. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

308. Leuchtenburg, *supra* note 304, at 395.

309. When Roosevelt submitted the legislation to Congress on February 5, 1937, see Leuchtenburg, *supra* note 304, at 399, six justices were over 70: Louis Brandeis (80), Willis Van Devanter (77), James McReynolds (75), George Sutherland (74), Charles Evans Hughes (74), and Pierce Butler (70). See *Biographical Directory of Federal Judges*, *supra* note 305.

310. In the view of one scholar, the New Deal revolution was not the result of conservative Justices wilting under the pressure of the court-packing plan, but it was instead solely the consequence of retirements opening the way to appointment of pro-New Deal justices. See Barry Cushman, *Regime Theory and Unenumerated Rights: A Cautionary Note*, 9

When the Court imposed abortion-on-demand as a constitutional requirement,³¹² the nation split between libertine supporters of its mandate³¹³ and Christian resisters of this offense against the sanctity of life.³¹⁴ The controversy fueled political party conflict and redefinition. Libertines aligned with the Democrats, and pro-life Christians with the Republicans.³¹⁵ By mobilizing Baptists—traditionally wary of aspiring for earthly power—and evangelicals to register and vote for a pro-life president, Jerry Falwell significantly contributed to Ronald Reagan's election in 1980.³¹⁶ This polarization made the Supreme Court appointment process a political battleground and the Court itself a focus of the vehemence.³¹⁷

The battle over appointments waxed red-hot when President Ronald Reagan nominated Judge Robert Bork to replace retiring Justice Lewis Powell.³¹⁸ A year before, the nomination of Antonin Scalia, also a conservative, raised hardly a peep of opposition.³¹⁹ Before Scalia's

U. PA. J. CONST. L. 263, 278 (2006) ("The appointments process . . . was the mechanism through which this particular jurisprudential transformation was achieved.").

311. George W. Norris (I-Neb.), 80 CONG. REC. 1887 (1936).

312. In *Roe v. Wade*, 410 U.S. 113, 163-64 (1973), the Court purported to allow a post-visibility ban on abortion, but the broad discretion allowed to the physician throughout pregnancy in the companion case of *Doe v. Bolton*, 410 U.S. 179, 192 made this option meaningless.

313. See generally RICKIE SOLLINGER, *PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA* (2007)

314. See generally RANDALL A. TERRY, *OPERATION RESCUE* (1988).

315. The grass-roots activists—radical, feminist Democrats and fundamentalist, Christian Republicans—pulled the two parties in opposite directions doctrinally, sharpening Congressional conflict over judicial appointments. See generally NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* (2005).

316. MACEL FALWELL & SEAN HANNITY, *JERRY FALWELL: HIS LIFE AND LEGACY* 107-30 (2008).

317. "We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators . . ." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 535 (1989) (Scalia, J., concurring); see also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 379 (1985) ("*Roe v. Wade* . . . occasioned searing criticism of the Court, over a decade of demonstrations, a stream of vituperative mail addressed to Justice Blackmun . . .").

318. Nomination of Robert H. Bork To Be an Associate Justice of the Supreme Court of the United States, 1 PUB. PAPERS 736-37 (July 1, 1987).

319. Scalia was confirmed 98-0 on September 17, 1986. 132 CONG. REC. 23,813 (1986). Having just grilled Rehnquist for a week on his nomination to be Chief Justice, the Senators may have exhausted their zeal for scrutinizing Reagan court nominees. Senator Howell Heflin observed: "Scalia may be Italian, but he has the luck of the Irish." Judith Lichtman, *Public Interest Groups and the Bork Nomination*, 84 NW. U. L. REV. 978, 978 (1990); see also

confirmation, the Court had three justices who regularly dissented from the abortion regime created in *Roe*: Byron White and William Rehnquist, the two original *Roe* dissenters,³²⁰ and Sandra Day O'Connor.³²¹ O'Connor's views appeared to indicate principled opposition to *Roe*.³²² Thus, with Scalia added to the Court, the abortion majority had apparently shrunk to five justices.³²³ Threatening to tip the balance, Judge Bork provoked the furies. As one scholar stated: "Obviously, when Justice Powell resigned, it was widely felt that the swing vote on an increasingly polarized Court was 'up for grabs' With the appointment of Judge Bork, it was felt, a new conservative majority dedicated to radically transforming constitutional doctrine would take power."³²⁴ Justice Scalia replaced Chief Justice Warren Burger.³²⁵ Although Burger had voted, albeit with some cautionary comments, for *Roe* and *Doe*,³²⁶ he had most recently dissented in an abortion regulation case.³²⁷ Thus, Scalia's appointment did not, in the pro-abortionist's view, alter the balance of power on the Court. Although describing Scalia as "very conservative," Joe Biden, Chairman of the Senate Judiciary Committee, stated: "I do not, however, find him significantly more conservative than Chief Justice Burger; therefore, I do not have undue

132 CONG. REC. 23,806 (1986) (statement of Sen. Robert Dole) ("Perhaps Judge Scalia indirectly benefited from the 'controversy' that swirled around the Rehnquist nomination.").

320. See *Roe v. Wade*, 410 U.S. 113, 171-78 (Rehnquist, J., dissenting). Justice White's dissent appeared in the companion case of *Doe v. Bolton*, 410 U.S. 179, 221-23 (1973).

321. See *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452-75 (1983) (O'Connor, J., dissenting); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814-33 (1986) (O'Connor, J., dissenting).

322. See *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting) (finding that a "State's interest in protecting potential human life exists throughout the pregnancy"); *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting) (criticizing the "Court's unworkable scheme for constitutionalizing the regulation of abortion").

323. Justices Brennan, Marshall, Blackmun, Powell, and Stevens. A close reading of Justice O'Connor's dissents would have indicated that her opposition to *Roe* was to the degree of regulation prohibited, not to the abortion "liberty" per se. See *supra* notes 321-22.

324. Morton J. Horowitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT L. REV. 655, 655 (1989).

325. Letter Accepting the Resignation of Warren E. Burger as Chief Justice of the United States, 1 PUB. PAPERS 780 (June 17, 1986).

326. *Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring) ("Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.").

327. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 782-85 (1986) (Burger, C.J., dissenting).

concern about the impact of this appointment on the balance of the Court."³²⁸

Within an hour of the announcement of the Judge Bork nomination, however, Senator Edward Kennedy unleashed a brutal attack, signaling all-out war against the nomination.³²⁹ With *Roe* now in the balance, the libertine power in American politics organized for battle. Rather than hold hearings in the summer to enable seating of the new justice for the October term, Senator Biden postponed the hearing until after Labor Day.³³⁰ Meanwhile, throughout the summer, the opponents of conservative constitutionalism launched one ideological volley after another, accusing Judge Bork in detail of all the egregious sins catalogued in Senator Kennedy's initial broadside.³³¹ In Judge Bork's view, his potential to be the fifth vote against *Roe*, rather than his conservative judicial philosophy *per se*, animated the opposition.

I was perceived as the swing vote on abortion. I think *Roe v. Wade* was probably the litmus issue. The opposition didn't want a narrow focus on a matter that would be pending before the Court, and a matter on which many people agreed with me, so they got people all worked up about false and extraneous issues. They used anything they could dream up, without regard to truth.³³²

Senate rejection of the Bork nomination signaled a new and contentious era in judicial appointments. Like competing tsunamis, the Reagan Revolution and the formerly ascendant liberal consensus crashed into each

328. 132 CONG. REC. 23,805 (1986); *see also id.* (statement of Sen. Howard Metzenbaum) (voting for Scalia "because I do not believe that his presence on the Court will shift the Court dramatically and dangerously to the right").

329. James Reston, *Kennedy and Bork*, N.Y. TIMES, July 5, 1987, §4, at 15.

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens.

Id.

330. Lichtman, *supra* note 319, at 979.

331. *Id.*

332. DC Bar, *Legends in the Law: A Conversation with Robert H. Bork*, BAR REP., Dec./Jan. 1998, available at http://www.dcbbar.org/for_lawyers/resources/legends_in_the_law/bork.cfm.

other in boiling, acrimonious turmoil.³³³ The myth of judicial aloofness and impartiality dissolved in the roaring waves. The sensualist, for whom pleasure without responsibility was a higher value than life, girded for battle with a determined Christian remnant. “My body, my life” contended with the divine commandment, “Thou shalt not kill,” in a religious war to enforce values in a legal realm not easily subject to legislative alteration.³³⁴

Each President tends to choose nominees who embody his side of the struggle. But these same nominees, careful to avoid catalyzing a filibuster, engage in a stylized, confirmation-hearing kabuki dance³³⁵ to seduce and disarm their ideological rivals.³³⁶ Aiming to gain long-term ascendancy on the Court, Presidents—in most cases—nominate deeply-committed partisans, chosen for youth as well as proven reliability.³³⁷ Sitting justices, in turn, time retirements to hand the nomination of a successor to a President whose views they approve.³³⁸ Post-Bork, the politicization of the judiciary ascended to new heights, affecting the lower federal courts as well.

333. One judge lamented this continuing contest between “warring political and cultural factions whose goal is nothing less than a Supreme Court constituted by nine justices, all reflective of the point of view of the respective factions.” Hon. 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, 2 (2009).

334. See *supra* notes 223-230 and accompanying text.

335. A “Kabuki dance” is a “traditional Japanese popular drama performed with highly stylized singing and dancing.” MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/kabuki>. See Richard Brust, *Supreme Court 2.0*, A.B.A. J., Oct. 2008, at 39 (“a Senate confirmation process that has been likened to a soap opera or a Kabuki dance”).

336. For a critique of this process, see Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994)).

337. “[P]eople now understand the role of the court in modern society when it comes to social change. That’s why we fight so hard to put on the court people who see the world like us. That’s true from the left, and that’s true from the right.” *Sen. Graham Questions Judge Sotomayor at Supreme Court Nomination Hearings*, WASH. POST, July 16, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071601659.html> (quoting Senator Lindsey Graham (R-SC)). The stakes are high. Federal judges receive lifetime appointments. Only one state (Rhode Island) has life tenure for judges. All the others provide for removal by election, mandatory retirement, or legislative vote. Paul Taylor, *Congress’s Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today’s Congress and Courts*, 37 PEPP. L. REV. 847, 928-29 n.383 (2010).

338. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 774, 806-07 (2006) (noting that the “current system allows for strategic timing of retirements [and] encourages the appointment of young nominees to the Court”). The practice of timed retirement is not recent. The

Five-four splits in the Supreme Court on major decisions reflect this knife-edge balance of power. A sub-theme of every Presidential election is who will fill openings on the Court. The post-election challenge is to pick a nominee with impeccable legal credentials, the heart of a partisan, and the paper trail of a eunuch. New appointments may alter the ideological balance on the Court in either direction, but they rarely affect the Court's institutional determination to maintain its position of supremacy. To command the policy-making high ground, Presidents tend to appoint skilled partisans to the Court, who have strong policy views and are masters of the persuasive arts. Such individuals are unlikely to assume a modest view of the Court's functions.

A vivid example of this practice came to light when Ed Whelan posted online a confidential letter that Harvard Law Professor Laurence Tribe wrote to President Obama about Supreme Court appointments.³³⁹ The purpose of his letter, Professor Tribe wrote, was to urge the President to "move the Court in a pragmatically progressive direction."³⁴⁰ The new Justice, like the retiring David Souter, should have the capacity to prevent centrist Anthony Kennedy from drifting to the right on individual rights.³⁴¹ Proposed appointee, Sonia Sotomayor, Tribe feared, would lack Souter's "purchase on Tony Kennedy's mind," and solidify the conservative wing of the Court.³⁴² By contrast, he argued, Elena Kagan's "combination of intellectual brilliance and political skill" would make her "a more formidable match for Justice Scalia."³⁴³

Professor Tribe's letter exemplifies the prevailing political approach to choosing Supreme Court nominees.³⁴⁴ The appointment power, far from constraining the Court's operation as a legislative body, magnifies that propensity. Rather than attacking the practice of judicial law making, Presidents simply seek to have it work in their favor.

Nation reported on July 28, 1881 that Justice Nathan Clifford, though declining mentally, refused to resign "in the hope that the election of a Democratic President might render certain the appointment of a Democratic successor." WARREN, *supra* note 1, at 345 n.2.

339. Ed Whelan, *Tribe to Obama: Sotomayor Is "Not Nearly As Smart As She Seems To Think She Is,"* NAT'L REV. ONLINE (Oct. 28, 2010), <http://www.nationalreview.com/benchmemos/251301/tribe-obama-sotomayor-not-nearly-smart-she-seems-think-she-ed-whelan>.

340. Letter from Laurence H. Tribe to President Barack Obama, at 1 (May 4, 2009), available at http://www.eppc.org/docLib/20101028_tribeletter.pdf (last visited Mar. 1, 2012).

341. *Id.*

342. *Id.*

343. *Id.* at 1-2.

344. President Obama, of course, though choosing Judge Sotomayor as his first appointment, made Elena Kagan his next.

B. Impeachment: the Power of Removal

The impeachment power is not plenary but limited to “Treason, Bribery, or other high Crimes and Misdemeanors.”³⁴⁵ Does this power permit removal of Supreme Court Justices who read unenumerated rights into the Constitution, striking otherwise valid state or federal laws? Or can this authority only reach actual violations of criminal law by particular justices?

The Constitution clearly distinguishes between conviction for crime and removal from office.³⁴⁶ Thus, an accusation of criminality is not a prerequisite to impeachment.³⁴⁷ Noting that the purpose of impeachment is not to secure a criminal conviction against an individual, but rather to prevent the further exercise of official power, Justice Joseph Story commented: “[A]n impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender, as to secure the state against gross official misdemeanors. It touches neither his person, nor his property; but simply divests him of his political capacity.”³⁴⁸ Hamilton’s survey of the subject further indicates that the purpose of impeachment is to protect the community against official misconduct, not merely to act as an adjunct to the condemnation of formal criminality.

The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL,

345. “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4.

346. “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.” U.S. CONST. art. I, § 3, cl. 7.

347. “Indeed, it appears to be all but universally agreed that an offense need not be a violation of criminal law at all in order for it to be impeachable as a high crime or misdemeanor.” Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 GEO. WASH. L. REV. 712, 717 (1999). See also 116 Cong. Rec. 11,913 (1970) (statement of Rep. Gerald Ford) (noting the “common misconception[]” that federal judges “can be removed only by being convicted . . . of violating the law”).

348. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 801 (1833), available at http://www.constitution.org/js/js_310.htm.

as they relate chiefly to injuries done immediately to the society itself.³⁴⁹

The purpose of impeachment is to allow the people as a whole through their representatives to address misconduct that affects the national welfare. "What," Hamilton asks, "is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men?"³⁵⁰ Thus, the "inquisitors for the nation" should be "the representatives of the nation themselves."³⁵¹

Because the goal of impeachment is to protect the community from misuse of power that "endangers the Republic,"³⁵² its function rises far above "the ouster of dreary little judges for squalid misconduct."³⁵³ Nonetheless, if the criminal law does not delimit the impeachment power, is Congress constrained only by its own sense of propriety or the ultimate sanction of the ballot box in preferring and hearing charges? Because the Senate has "the sole Power to try all Impeachments,"³⁵⁴ the Supreme Court does not review its judgments.³⁵⁵ In 1970, after the Senate rejected two of President Nixon's Supreme Court nominees, Congressman Gerald Ford, as a counterpoint, introduced a resolution of impeachment against Justice William O. Douglas. Questioned as to the grounds for the resolution, he claimed plenary power: "[A]n impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history[.]"³⁵⁶

The delegates to the Constitutional Convention wrestled with this issue. Some thought Congress should have no power at all to impeach,³⁵⁷ others that the power should be vague and capacious.³⁵⁸ George Mason recommended adding the word "maladministration" to treason and bribery

349. THE FEDERALIST NO. 65 (Alexander Hamilton). See 4 ELLIOT'S DEBATES 113 ("acts of great injury to the community") (statement of James Iredell).

350. THE FEDERALIST NO. 65 (Alexander Hamilton).

351. *Id.*

352. Tribe, *supra* note 347, at 713.

353. RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 3 (1973).

354. U.S. CONST. art. I, § 3, cl. 6.

355. "The commonsense meaning of the word 'sole' is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted." *Nixon v. United States*, 506 U.S. 224, 231 (1993).

356. 116 CONG. REC. 11,913 (1970).

357. Charles Pinckney of South Carolina. 2 RECORDS, *supra* note 18, at 66 (stating that he "did not see the necessity of impeachments").

358. Edmund Randolph of Virginia. "Guilt wherever found ought to be punished." *Id.* at 67.

to broaden the definition of impeachment. "Treason as defined in the Constitution will not reach many great and dangerous offences," he stated. "Attempts to subvert the Constitution may not be Treason as above defined."³⁵⁹ James Madison countered that "maladministration" was too broad. "So vague a term will be equivalent to a tenure during pleasure of the Senate," he said.³⁶⁰ Mason then withdrew his motion to add "maladministration" and substituted instead "high crimes and misdemeanors."³⁶¹ The revised motion passed 8-3.³⁶²

The term "high crimes and misdemeanors," narrower than "maladministration," is of English origin, designating "offenses of a public nature, which may affect the nation."³⁶³ The term "high" refers not to the nature or degree of the crime, but to the grave effect upon the public of misconduct in high places, known generically as political crime.³⁶⁴ Thus, "high crimes and misdemeanors" are offenses against the body politic, crimes only made possible by the occupation of high office. They violate the public trust and oath of office, just as adultery violates a marriage covenant. "For unto whomsoever much is given, of him shall be much required: and to whom men have committed much, of him they will ask the more."³⁶⁵ The impeachment power remedies great public scandal, for which other correction or redress is unavailable.³⁶⁶ Implicating faithlessness and corruption of the public trust, such offenses are far more serious than mere policy disagreements.³⁶⁷ This "superiour [sic] power, acting for the whole

359. *Id.* at 550. "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. CONST. art. III, § 3.

360. 3 RECORDS, *supra* note 18, at 550.

361. *Id.*

362. *Id.*

363. BERGER, *supra* note 353, at 60, 62 (quoting 16 HOWELL'S STATE TRIALS (1809-1826)) (statement of Serjeant Pengelly during the impeachment of Lord Chancellor Macclesfield in 1725).

364. *Id.* at 62.

365. *Luke* 12:48.

366. "[T]he power of impeachment will probably be applied . . . where the remedy would otherwise be wholly inadequate, and the grievance be incapable of redress." 2 STORY, *supra* note 348, § 744.

367. The Constitutional Convention rejected a proposal for removal of judges by majority vote of Congress as undermining the independence of the judiciary. 2 RECORDS, *supra* note 18, at 428-29. "The Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Government." *Id.* (statement of James Wilson). Removal thus required a finding of serious culpability.

people,” explained Justice Story, “is put into operation to protect their rights, and to rescue their liberties from violation.”³⁶⁸

Although the impeachment power is unreviewable,³⁶⁹ Gerald Ford’s statement that its exercise is completely discretionary overlooks the grave misconduct the Founders contemplated for the prosecution of such proceedings. The Constitution limits congressional authority to impeach to “Treason, Bribery, or other high Crimes and Misdemeanors.”³⁷⁰ The latter phrase, which Congressman Ford described as “nebulous,”³⁷¹ clearly contemplates offenses comparable to treason and bribery.³⁷² When trying a high official for abuse of trust, Congress should not itself engage in such abuse.³⁷³

Part of the opposition to a broad definition of impeachment as affecting the Executive arises from the electoral check. On the one hand, the people are entitled to see the magistrate they elected complete his term.³⁷⁴ On the other hand, the four-year term of the Presidency operates as a periodic opportunity for removal.³⁷⁵ In the case of the judiciary, however, no popular remedy exists. Is a continual course of judicial usurpation that saps the foundations of self-government sufficient to qualify as an “abuse or violation” of the public trust? Hamilton said yes. Impeachment, he wrote that impeachment provides a “constitutional check” against the “danger of judiciary encroachments on the legislative authority.”³⁷⁶ The power of

368. 2 STORY, *supra* note 348, § 749.

369. *But see* Nixon v. United States, 506 U.S. 224, 253-54 (1993) (Souter, J., concurring) (arguing that frivolous Senate action “might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence”).

370. U.S. CONST. art. II, § 4.

371. 116 CONG. REC. 11,913 (1970).

372. Under the maxim of *noscitur a sociis*, a word is known by the company it keeps. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (employing the maxim “to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words . . .”); BERGER, *supra* note 353, at 62 (reasoning that because treason and bribery are political crimes, so are “high crimes and misdemeanors”).

373. “If there are indeed ‘limits’ to the impeachment power, the Senate may no more act in excess of those limits when it acts ‘judicially’ than when it acts ‘legislatively.’” BERGER, *supra* note 353, at 300.

374. Removal of the President by impeachment “cancels the results of the most solemn collective act of which we as a constitutional democracy are capable: the national election of a President.” Tribe, *supra* note 347, at 723.

375. “An election of every four years will prevent maladministration.” 3 RECORDS, *supra* note 18, at 550 (statement of Gouverneur Morris).

376. THE FEDERALIST NO. 81 (Alexander Hamilton).

“punishing their presumption, by degrading them from their stations,” he argued, would deter the justices from “a series of deliberate usurpations” that hazarded “the united resentment” of the legislators.³⁷⁷ Reflecting on English history, Justice Story noted that judges had been impeached “for attempts to subvert the fundamental laws, and introduce arbitrary power.”³⁷⁸ Justice Frankfurter noted that the only appeal from decisions of the Court is “impeachment or constitutional amendment.”³⁷⁹

Lawyers as a profession tend to resist impeachment as an attack on their own professional habitat.³⁸⁰ Chief Justice Rehnquist described impeachment as a threat to “separation of powers,”³⁸¹ even though Hamilton considered it essential to the preservation of the legislative power from judicial encroachment.³⁸² Calling the impeachment power “a complete security” against judicial overreaching, Hamilton argued that the deterrence affords “a cogent argument for constituting the Senate a court for the trial of impeachments.”³⁸³

The Framers designed impeachment as the sole means of removing Supreme Court justices.³⁸⁴ After the Senate acquitted Samuel Chase, Thomas Jefferson stated: “[E]xperience has already shown that the impeachment [the Constitution] has provided is not even a scarecrow.”³⁸⁵ Though not since employed against a sitting Supreme Court justice, impeachment remains a formidable means of disciplining the Court.³⁸⁶ The

377. *Id.*

378. 2 STORY, *supra* note 348, § 798. “The model, from which the national court of impeachments is borrowed, is, doubtless, that of Great Britain . . .” *Id.* § 742.

379. *Rochin v. California*, 342 U.S. 165, 172 (1952).

380. See Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111, 113-17 (1998) (detailing massing of state and national bar associations and law school deans against impeachment rumblings in the wake of *Romer v. Evans*, 517 U.S. 620 (1996) (overturning Colorado constitutional amendment that disallowed preferred legal status for homosexuals)).

381. William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. UNIV. L. REV. 903, 918 (1991).

382. THE FEDERALIST NO. 81 (Alexander Hamilton).

383. *Id.*

384. See THE FEDERALIST NO. 79 (Alexander Hamilton) (“The precautions for their responsibility, are comprised in the article respecting impeachments. . . . This is the only provision on the point . . .”).

385. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 12 THE WORKS OF THOMAS JEFFERSON, *supra* note 51, at 137.

386. In 1953, the House Judiciary Committee held a hearing on impeachment of Justice Douglas after he stayed the execution of Julius and Ethel Rosenberg. When the full court overruled the stay, the impeachment resolution was tabled. See Fitschen, *supra* note 380, at 138.

procedural requirement of a House majority³⁸⁷ and two-thirds assent in the Senate,³⁸⁸ however, makes impeachment for political causes unlikely. Even strongly partisan swings in congressional elections rarely achieve a 60% majority for the dominant party in one house, let alone both. Furthermore, a majority of the justices are unlikely to issue a decision so alienating as to consolidate a two-thirds vote for removal against them individually or collectively.³⁸⁹

Although the Court's decisions often produce outrage from one side of the divide, they simultaneously draw admiration from the other. Where the soul of the nation is divided, mustering a two-thirds majority to oust judges for ideological reasons seems remote.³⁹⁰ The judicial imposition of sodomite marriage on the nation, however, could change this calculus, especially if it provoked an electoral landslide.³⁹¹ A new justice could tip the balance, resulting in a reversal of the offending decision. Alternatively, the pendency of an impeachment trial might inspire the contemporary equivalent of the 1937 "switch in time."³⁹²

387. U.S. CONST. art. I, § 2, cl. 5.

388. U.S. CONST. art. I, § 3, cl. 6.

389. See, for example, *Planned Parenthood v. Casey*, 505 U.S. 833, 869-73 (1992), where the court, though considering itself called to resolve the abortion debate through "a common mandate rooted in the Constitution," *id.* at 867, provided something to each side: it upheld *Roe's* central ruling, but dismantled the regulation-limiting trimester framework. See also Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 698 (1992) (arguing that the Court deftly compromised the abortion issue in *Casey*, deliberately giving something to both sides).

390. If the President were of the opposite party to the congressional majorities, impeachment could be ineffectual. The replacement nominee might be similar in values to the ousted justice. However, the message sent to the Court would be unmistakable, especially if more than one justice were removed simultaneously. See A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/2010/11/04/us/politics/04judges.html?pagewanted=all> (discussing "[a]n unprecedented vote to remove three Iowa Supreme Court justices").

391. *Roe* uprooted laws protecting the sanctity of life that dated from the nineteenth century, but had been eroded by degenerating sexual mores. By contrast, thirty state constitutions contain amendments, all passed since 1997, prohibiting same-sex marriage. *List of State Constitutional Amendments Banning Same-Sex Unions by Type*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_defense_of_marriage_amendments_to_U.S._state_constitutions_by_type (last visited Mar. 19, 2011).

392. See MURPHY, *supra* note 304; see also *id.* at 246 (describing the Court's moderation of its race relations and cold war decisions in the late 1950s as a "tactical withdrawal" in the face of Congressional resistance).

C. *The Exceptions Clause*

The Exceptions Clause³⁹³ arguably grants Congress power to withdraw completely the appellate jurisdiction of the Supreme Court, reducing its power to the small set of original jurisdiction cases.³⁹⁴ Under such an arrangement, the Supreme Court would be a specialized trial court whose decisions were not subject to appeal. Cases “affecting ambassadors, other public ministers and consuls” are rare. Those involving a state, under the Eleventh Amendment³⁹⁵ and principles of sovereign immunity,³⁹⁶ would probably be limited to boundary and water rights disputes. No jurisdiction at all would exist over general federal legislation. Constitutional litigation would occur only in state court under the Supremacy Clause,³⁹⁷ the Arising Clause³⁹⁸ would be a virtual nullity. The result would be the system Madison and Hamilton decried; only instead of a thirteen-headed hydra,³⁹⁹ the monster would have fifty heads.⁴⁰⁰ Constitutional law would develop independently in each state. Alternatively, under Article III, § 1, Congress could abolish all lower federal courts, or strip their jurisdiction over constitutional issues.

In the 1960s and 1970s, two bills to strip the federal courts of original and appellate jurisdiction over particular subject matter areas passed one house of Congress, but went no further. The House, responding to *Reynolds v. Sims*,⁴⁰¹ passed a bill in 1964 to eliminate federal court jurisdiction over state legislative apportionment. The Tuck Bill failed in the Senate.⁴⁰² Seeking

393. “[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2.

394. *Id.* (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”).

395. “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

396. *Hans v. Louisiana*, 134 U.S. 1, 10 (1890).

397. U.S. CONST. art. VI, cl. 2.

398. U.S. CONST. art. III, § 2, cl. 1.

399. *See supra* text accompanying note 17.

400. *See supra* text accompanying notes 18-47.

401. *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring apportionment by population in both houses of all state legislatures). James McClellan, *Congressional Retraction of Federal Court Jurisdiction to Protect the Reserved Powers of the States: The Helms Prayer Bill and a Return to First Principles*, 27 VILL. L. REV. 1019, 1019 (1982). *See also* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 901 n.177, para. 3 (2011) (discussing history of Tuck Bill).

402. McClellan, *supra* note 401, at 1019.

to nullify *Engel v. Vitale*,⁴⁰³ the Senate passed a bill in 1979 stripping federal courts of jurisdiction over state laws on voluntary prayer in public schools. The Helms Prayer Bill died in committee in the House.⁴⁰⁴ Similarly, in 1982, the Senate passed a bill to deny federal courts power to order school busing, but the House did not concur.⁴⁰⁵ Though escaping an Exceptions Clause rebuke, the justices were keenly aware that reckless offense to public opinion could threaten an assault on their jurisdiction. “[Chief Justice Earl] Warren,” wrote Justice Brennan’s authorized biographer, “realized the Court had to pick and choose the areas in which it would run ahead of public opinion if it was to stave off congressional threats to prune its jurisdiction.”⁴⁰⁶ When Brennan sought to appoint a clerk who had led a contingent to the 1962 Communist youth festival in Helsinki, and had written for the *People’s World*, the Party’s West Coast paper, public reaction was sharp. Interviewing the candidate, Brennan reminded him that threats to strip the Court of jurisdiction “remained real.” He ultimately rescinded the appointment.⁴⁰⁷

Two decades later, still mindful of the episode, Justice Brennan explained to an interviewer that the threat of a congressional investigation, conveyed by the FBI through Justice Abe Fortas, caused him to rethink the appointment.⁴⁰⁸ He remembered in particular a serious jurisdiction-stripping bill introduced in the Senate in 1958 in response to Court opinions on subversion.

Remember, a little before this happened, the Senate came very close to passing the Jenner Bill, which would have stripped the Court of jurisdiction over cases involving the powers of congressional investigations, loyalty rules for teachers and

403. 370 U.S. 421 (1962).

404. McClellan, *supra* note 401, at 1019-20.

405. Grove, *supra* note 401, at 907-09. In 2004, the House passed a bill withdrawing federal jurisdiction over the Defense of Marriage Act. See Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (as passed by House of Representatives, July 22, 2004); Grove, *supra*, at 915. In 2004 and 2006, the House passed bills withdrawing federal jurisdiction from cases about the Pledge of Allegiance. See Pledge Protection Act of 2004, H.R. 2028, 108th Cong. (as passed by House of Representatives, Sept. 23, 2004); Pledge Protection Act of 2005, H.R. 2389, 109th Cong. (as passed by House of Representatives, July 19, 2006); Grove, *supra*, at 911-15.

406. STERN & WERMIEL, *supra* note 211, at 257.

407. *Id.* at 264-70; see also MICHAEL E. TIGAR, FIGHTING INJUSTICE 52-59 (2002); EISLER, *supra* note 225, at 198-201.

408. Hentoff, *supra* note 236, at 61-62.

federal employees, state anti-subversion laws, and state regulations for admission to the bar.⁴⁰⁹

The Court has at times indicated that jurisdiction-stripping laws would be valid,⁴¹⁰ but, if directly challenged, would probably read the Exceptions Clause narrowly to avoid nullifying the Arising Clause and the Vesting Clause.⁴¹¹ The Court's willingness to assert supreme authority to construe the Constitution in Fourteenth Amendment enforcement cases⁴¹² indicates that it would resist such an attack on its prerogatives.⁴¹³ However, like

409. *Id.* at 62. For the history of the Jenner Bill, see MURPHY, *supra* note 304, at 154-83, 207-08.

410. See, e.g., *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

411. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . .").

412. See *supra* note 145 and accompanying text.

413. See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (describing the "responsibility of this Court as ultimate interpreter of the Constitution"); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating as "a permanent and indispensable feature of our constitutional system" that "the federal judiciary is supreme in the exposition of the law of the Constitution . . ."). For academic commentary on the scope of the Exceptions Clause, see Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1981) (arguing for a broad and plenary reading of congressional power to define the Court's jurisdiction under the Exceptions Clause); Raoul Berger, *Commentary, Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801 (1980) (welcoming use of the Exceptions Clause to reign in a runaway Court, and also emphasizing congressional power under section 5 to enforce the Fourteenth Amendment); Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971 (2008) (discussing the scope of the Exceptions Clause and its use as a substitute for amendment); Morris D. Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter be Limited by Congressional Power under the Former?*, 72 W. VA. L. REV. 238 (1970) (arguing that the Exceptions Clause cannot eliminate judicial review or trench upon individual rights); Alex Glashauser, *A Return to Form for the Exceptions Clause*, 51 B.C. L. REV. 1383 (2010) (arguing that the 1787 Constitutional Convention did not intend the Exceptions Clause to limit the power of judicial review); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984) (Congress has power under the Exceptions Clause to limit certain issues to state court consideration.); James J. Lenoir, *Congressional Control over the Appellate Jurisdiction of the Supreme Court*, 5 U. KAN. L. REV. 16 (1956) (examining the Exceptions Clause in light of precedent, and finding that Congress has control of the Court's appellate jurisdiction within limits); Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959 (1982) (recommending use of Exceptions Clause to curb unconstitutional Court decisions); Harrison Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B.U. L. REV. 1 (1951) (arguing for a constitutional amendment to confirm the power of judicial review in the Supreme Court, and thus eliminate the Exceptions Clause as an alternative to Article V); William W. Van Alstyne, *A Critical Guide to Ex Parte*

Brennan's retrenchment in the Tigar matter, the Court is likely to tuck closer to public opinion long before such legislation ripens.⁴¹⁴ Actual use of the Exceptions Clause to remove piecemeal the Court's jurisdiction over hot-button issues creates the possibility of potential reversal and whipsawing by changing political majorities.⁴¹⁵ Faced with such furious political winds, however, the Court historically has relented, as the sensitivity expressed by Justices Warren and Brennan indicates.

D. *An Override Amendment: Congressional Review of Supreme Court Decisions*

From time to time, opponents of judicial review, or the abuse thereof, have argued that the assumption of legislative powers by the Court requires by constitutional amendment⁴¹⁶ an assumption of judicial power by

McCardle, 15 ARIZ. L. REV. 229 (1973) (stating that the Exceptions Clause, though a broad power, may be inexpedient to utilize in a major way).

414. To protect the Court from a recurrence of the 1937 court-packing experience, the American Bar Association after World War II proposed a constitutional amendment fixing the size of the Court at nine, requiring mandatory retirement at seventy-five, and eliminating the Exceptions Clause for cases arising under the Constitution. See *Supreme Court of the U.S.: Amendments of the Constitution Are Proposed*, 34 A.B.A. J. 1, 1 (1948) (recommending amendment of Article III, Section 2 to add the following: "In all Cases arising under this Constitution the supreme Court shall have appellate jurisdiction both as to Law and Fact."). See generally David Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1028-43 (2000) (describing in detail the rise and demise of the ABA amendment).

The growing support for an Amendment to protect the Court's jurisdiction over constitutional issues collapsed after the 1954 desegregation decision and opinions that appeared to protect communists. Conservative legislators, in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), and the subversion opinions, wanted to retain as much leverage over the Court as possible. See Garrow, *supra*, at 1041-43 (noting that "what most fundamentally altered congressional sentiment concerning the Court was not its desegregation holdings but the series of decisions negating various anti-Communism measures and investigations").

415. "If this game of 'exceptions,' as an instrument of party warfare, be once fairly entered on," wrote the *Nation* in early 1868, "we venture to say that, in the course of the next twenty years, the constitutionality of half the statutes at large would be withdrawn from the cognizance of the Supreme Court." WARREN, *supra* note 1, at 193.

416. Without a constitutional amendment, legislative review of final judgments would violate separation of powers. The Constitution vests the judicial power of the United States in the federal courts. U.S. CONST. art. III, § 1; see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (Congress may not reopen final judgments by statute.).

Congress to correct the situation.⁴¹⁷ During the impeachment of Samuel Chase, despairing of maintaining the independence of the Court, Chief Justice John Marshall suggested such an expedient: "I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature certainly would better comport with the mildness of our character than the removal of the judge, who has rendered them."⁴¹⁸ Marshall's argument has great appeal. First, the judicial authority of the Court over all cases and controversies arising under the Constitution would remain undisturbed. Second, the remedy is structural rather than piecemeal. Third, Congress would finally have the means to control the unconstitutional assumption of legislative power by the judiciary.

A congressional override amendment, by supermajority or otherwise,⁴¹⁹ would make Congress the final court of appeal. Lodging judicial authority in the legislature is not without precedent. Historically, the House of Lords, the second branch of Parliament, has performed this function.⁴²⁰ Congress would not have appellate authority over all cases, but only those in which the Supreme Court declared federal or state law unconstitutional. Managing this small, but significant, docket would not tax the institution or significantly delay the administration of justice. An additional delay in cases where the Court declared a law unconstitutional would be warranted by the

417. The Founders conceded that separation of powers does not require an airtight division of functions. The presidential veto, for instance, is an executive exercise of legislative power. U.S. CONST. art. I, § 7, cls. 2 & 3.

418. Letter from John Marshall to Samuel Chase (Jan. 13, 1804), in 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 177-78 (1919). Some colonial legislatures had power to override judicial decisions, primarily by vacating a judgment and ordering a new trial. See *Plaut*, 514 U.S. at 219 ("In the 17th and 18th centuries colonial assemblies and legislatures functioned as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments."); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398 (1798) (opinion of Iredell, J.) (noting that the Connecticut legislature "has been in the uniform, uninterrupted, habit of exercising a general superintending power over its courts of law, by granting new trials.").

419. Texas Governor Rick Perry proposed enacting a legislative override by a two-thirds vote in both houses, "which risks increased politicization of judicial decisions, but also has the benefit of letting the people stop the Court from unilaterally deciding policy." RICK PERRY, *FED UP! OUR FIGHT TO SAVE AMERICA FROM WASHINGTON* 183 (2010). Alexander Hamilton feared that lodging final judicial power in the legislature could allow "the pestilential breath of faction [to] poison the fountains of justice." *THE FEDERALIST* NO. 81 (Alexander Hamilton).

420. Canada's Bill of Rights has a legislative override provision. See Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 *WAKE FOREST L. REV.* 451 (2003).

weightiness of the issue. In some ways, congressional review would add to efficiency. Frequent legislative attempts to modify stricken laws to satisfy the Court can produce additional years of litigation before a final resolution.⁴²¹ Just as a presidential veto suspends enactment of a law unless a two-thirds override can be mustered,⁴²² the Override Amendment would suspend the effect of a Supreme Court case pending an override attempt in Congress.

Granting Congress power to override a judicial veto would install a pleasing parallelism in the Constitution, restoring full recognition to the exclusive grant of legislative power to Congress in Article I.⁴²³ The Supreme Court's veto would be subject to the same potential for override as a Presidential veto. Since the Supreme Court is driven more by policy considerations than by legal constraints, its veto should be subject to reversal the same as the President's.

Use of this power would be rare. Congress historically has overridden less than ten percent of presidential vetoes.⁴²⁴ Gathering a two-thirds vote in both houses contrary to the Court on hotly disputed cultural issues would be an uncommon occurrence,⁴²⁵ especially with the known capacity of the

421. For Congressional attempts to protect children from internet pornography in the face of First Amendment barriers erected by the Court, see *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Reno v. ACLU*, 521 U.S. 844 (1997). The partial-birth abortion ban took a decade to become law. *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000).

422. U.S. CONST. art. I, § 7, cls. 2 & 3.

423. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of representatives."). Rather than reconsidering the offending decision itself, Congress could simply reinstate the rejected law, taking testimony on its merits as is customary for a legislative body. The Court would then continue with the case on "remand." See WILLIAM G. ROSS, *A MUTED FURY* 193-217 (1994) (recounting history of 1920's proposal of Senator Robert La Follette for amendment to permit Congress conclusively to reinstate invalidated statutes).

424. See MITCHEL A. SOLLENBERGER, *CONG. RESEARCH SERV.*, 98-157, *CONGRESSIONAL OVERRIDES OF PRESIDENTIAL VETOES 1* (2004), available at <http://www.au.af.mil/au/awc/awcgate/crs/98-157.pdf> (noting that "Presidents have vetoed 1,484 bills and Congress has overridden only 106 of them"); see also William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991) (providing a detailed history of Congressional statutory overrides).

425. "[T]aking action against the Court requires a congruence of agreement and action among the political branches. This will work in all but the most extraordinary circumstances to immunize the Court." Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 *GEO. L.J.* 1, 5 (2002).

Court to adapt to political pressure.⁴²⁶ The more likely effect of an override amendment would be to cause the Court to moderate its opinions to avoid reversal.⁴²⁷

E. A Supermajority Amendment

Perhaps the most effective and most elegant amendment would be a requirement that the Court have a three-fourths majority to find a law unconstitutional.⁴²⁸ Two state constitutions, Nebraska and North Dakota, require a judicial supermajority to invalidate legislation. Nebraska requires five judges to concur out of seven (71.4%);⁴²⁹ North Dakota requires four out of five (80%).⁴³⁰ The supermajority solution avoids adding another layer to the appellate process and has its own appealing parallelism. If the Court is to act as a continuing constitutional convention, then it should be bound by the supermajority requirements of Article V, namely, ratification by a three-fourths majority.⁴³¹ Requiring a supermajority to invalidate legislation on constitutional grounds also endorses the principle of presuming constitutionality in close cases. A federal appellate judge wrote: “When a

426. See *supra* note 392.

427. See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) (finding that the Court has historically altered its behavior when threatened with majoritarian pressure).

428. Three-fourths of nine is 6.75, thus requiring a minimum 7-2 vote to find a law unconstitutional. For a survey of judicial supermajority proposals, see Evan Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 88-94 (2003). See also *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79-80 (1930) (upholding an Ohio supermajority provision against due process attack); Lynn I. Perrigo, *Proposals to Restrict Judicial Nullification of Statutes*, 8 ROCKY MTN. L. REV. 161, 177-79, 185 (1936) (proposing a two-thirds vote for the Court to declare a statute unconstitutional).

429. “No legislative act shall be held unconstitutional except by the concurrence of five judges.” NEB. CONST. art. V, § 2. See Paul W. Madgett, Comment, *The “Five-Judge” Rule in Nebraska*, 2 CREIGHTON L. REV. 329, 329 (1969).

430. “[T]he supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide.” N.D. CONST. art. VI, § 4. See Editorial, *Supermajority Rule Could Help U.S. Supreme Court*, GRAND FORKS HERALD, May 16, 2010, available at 2010 WLNR 10279205.

431. Amendments “shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress” U.S. CONST. art. V. Cf. Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 893-94 (2003) (suggesting a two-thirds majority rule as “symmetrical and appropriate” to invalidate 5-4 federalism decisions of Rehnquist court).

constitutional question is so close, when conventional interpretive methods do not begin to resolve the issue decisively, the tie for many reasons should go to the side of deference to democratic processes.⁴³² Because of the cultural divide, such a supermajority would rarely, if ever, coalesce to dramatically change the cultural mores of the country. Although *Roe v. Wade*⁴³³ was a 7-2 vote, Chief Justice Burger may well have refused his assent if his vote had controlled the outcome. More to the point, *Roe* would have died in 1992, when more than two justices were willing to overrule it.⁴³⁴ Likewise, *Lawrence v. Texas*, embracing sodomy as a constitutional value, would not have succeeded.⁴³⁵ In general, a Supermajority Amendment would massively deter public law litigation designed to overturn the legislative wishes of the majority.⁴³⁶ The government of the people would again be government by the people rather than government by judiciary.⁴³⁷ The other great advantage of a Supermajority Amendment is that it would place the burden on the Court to gather the supermajority, rather than, under an override amendment, upon Congress.⁴³⁸

1. 1868: The Two-Thirds Bill

In the aftermath of the Civil War, the House of Representatives, fearing that the Supreme Court would overturn Reconstruction measures,⁴³⁹ and desirous of discouraging any future adventures like *Dred Scott*,⁴⁴⁰ passed a bill requiring a two-thirds majority of the Court to find an Act of Congress

432. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 267 (2009).

433. 410 U.S. 413 (1973).

434. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (5-4).

435. 539 U.S. 558 (2003) (6-3).

436. Cf. Chayes, *supra* note 194.

437. See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (2d ed. 1997).

438. For a history of supermajority provisions in the Constitution, see Brett W. King, *The Use of Supermajority Provisions in the Constitution: the Framers, the Federalist Papers and the Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L.J. 363 (1997). The supermajority could also arguably be enacted legislatively as a regulation of the Court's appellate jurisdiction. U.S. CONST. art. II, §2, cl.2.

439. CONG. GLOBE, 40TH CONG., 2D SESS. 486 (1868) (describing the bill as a proposal "to muzzle the Supreme Court to the end that that court may not interfere with the will of this Congress with respect to the reconstruction measures") (statement of Rep. Richard Hubbard).

440. "I have reasons, very strong reasons, for insisting upon such legislation. I consider the utterance in the *Dred Scott* case . . . as furnishing a substantial reason for such legislation." *Id.* at 484 (statement of Rep. John Bingham).

unconstitutional.⁴⁴¹ A lengthy debate on the bill took place on January 13, 1868.⁴⁴² Henry Dawes (R-Mass.)⁴⁴³ suggested the Exceptions Clause⁴⁴⁴ as authority for the bill.⁴⁴⁵ Beginning with the Judiciary Act of 1789, Congress routinely determined the size of the Court.⁴⁴⁶ The first Court had six justices, and thus required a two-thirds majority—four of six—to reach a decision.⁴⁴⁷ “[B]y fixing the number of judges,” said John Bingham (R-Ohio), “we have the whole power . . . for what we may do indirectly we may do directly[.]”⁴⁴⁸

Representative Spalding argued that Congress could modify the default majority rule inherited from the common law. “[T]he law-making power has always had in its hands the power to say whether a mere majority should be sufficient, or whether two thirds or three fourths or the whole

441. The relevant clause read:

That no cause pending before the Supreme Court of the United States which involves the action or effect of any law of the United States shall be decided adversely to the validity of such law without the concurrence of two thirds of all the members of said court in the decision upon the several points in which said law or any part thereof may be deemed invalid.

Id. at 478. The bill passed 116-39. *Id.* at 489.

442. *Id.* at 478-89.

443. For biographical information on individual representatives, see the BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/biosearch/biosearch.asp> [hereinafter BIOGRAPHICAL DIRECTORY].

444. “[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2.

445. “Does not the phrase ‘under such regulations’ cover the whole case?” CONG. GLOBE, 40TH CONG., 2D SESS. 487 (1868) (statement of Rep. Dawes). After passage, the bill sponsor, Representative Williams, accepted a recommendation to add “and to regulate the jurisdiction thereof” to the title. *Id.* at 489.

446. The Constitution, stated Rufus Spalding (R-Ohio), “does not fix the number of judges which shall constitute the Supreme Court; hence the number has at times been increased by Congress and again diminished at its pleasure.” *Id.* at 482.

447. The Judiciary Act of 1789, Ch. XX, § 1, 1 Stat. 73 (“That the supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum . . .”).

448. CONG. GLOBE, 40TH CONG., 2D SESS. 487 (1868). By reducing the Court to three Justices, Bingham argued, Congress could similarly force a two-thirds rule for decision. *Id.* at 483. “If in 1789 they could make that court consist of six judges, who is here to say we cannot make it consist of three?” *Id.* at 484. By reducing it to two, unanimity would be required. *Id.* at 483. “And if by law you may so organize this court that there must be unanimity may you not by law establish the two thirds rule . . . ?” *Id.* Congress had also previously established the size of a quorum of the Court: four out of six in 1789; five out of eight in 1837. *Id.* at 482 (statement of John Prunyn).

number of judges should be required to render a decision.”⁴⁴⁹ He explained that for “everything except its official life that tribunal must look to an act of Congress. Without the authority of an act of Congress it could have no clerks, it could have no power to administer oaths.”⁴⁵⁰ Congress can grant a smaller degree of jurisdiction to the Court than the Constitution authorizes, he argued, citing the jurisdictional minimum for diversity suits as an example.⁴⁵¹ “If Congress can adopt such a provision as that,” Spalding said, “it certainly can say that in a decision upon a high constitutional question the concurrence of a certain number of judges more than a bare majority shall be necessary.”⁴⁵² Spalding also noted “the analogy existing in the Constitution itself.”⁴⁵³

Sir, I contend that the same process of reasoning which would show a public utility in requiring two thirds of the Senate and House of Representatives to enact a law over the opinion of the President of the United States requires two thirds of the Supreme Court to reverse our action on the ground of its unconstitutionality.⁴⁵⁴

To support the supermajority proposal, representatives also cited the “clear case” rule. Thomas Williams (R-Penn.) noted “that it is a well-settled principle that no act of the law-making power should ever be declared invalid upon constitutional grounds unless it be a clear case.”⁴⁵⁵ Arguing for a stringent rule of unanimity, he stated: “Now, I hold that wherever, with a bench composed of eight judges,⁴⁵⁶ there is one dissenting member, the case is to be regarded as by no means a clear one.”⁴⁵⁷ Mr. Wilson from Indiana

449. *Id.* at 482 (statement of Rufus Spalding). George Boutwell (R-Mass.) asked: “[I]s it not entirely competent for the legislative authority to change the common law if there be no specific inhibition in the Constitution?” *Id.* at 485.

450. *Id.* at 482.

451. *Id.* at 482-83.

452. *Id.* at 483.

453. *Id.* at 481.

454. *Id.* Spalding, a Yale graduate and an attorney, served in the Ohio House of Representatives (1839-1842), was an associate justice of the Ohio Supreme Court (1849-1852), and served three terms in Congress (1863-1869). See BIOGRAPHICAL DIRECTORY, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000697>.

455. CONG. GLOBE, 40TH CONG., 2D SESS. 479 (1868).

456. In 1868, the Supreme Court consisted of eight Justices. *Id.* at 481. “A short time ago it consisted of ten; then nine; and now eight.” *Id.* (statement of Rufus Spalding).

457. *Id.* at 479. Williams’ proposal to require a unanimous vote to declare an Act of Congress unconstitutional failed by a vote of 25-124. *Id.* at 489.

concurrent. “[T]hat you have a divided court proves of itself that the question before it is in doubt[.]”⁴⁵⁸

His unanimity proposal, Mr. Williams argued, drew strength from the propensity of the Supreme Court to usurp the legislative power.

A majority of the Committee on the Judiciary think that two thirds are enough. I think that where eight men claim the power of legislating by construction by ruling what the Constitution of the United States is and what it is not, we may well require the concurrent voices of all these men when they are expected to overthrow the decision of perhaps one hundred and sixty lawyers of the two Houses of Congress.⁴⁵⁹

James Wilson (R-Iowa), sponsor of the two-thirds-measure, approved in principle, but felt that less than unanimity was “the better rule.”⁴⁶⁰ He agreed with Mr. Williams that the Supreme Court exercised legislative power.

We are simply declaring that the Supreme Court of the United States shall not have legislative power without the concurrence at least of two thirds of its members. That body makes law when it decides a case. . . . And it is not merely a *legislative* rule but an *organic* rule which is established by the Supreme Court by the decisions which it utters[.]⁴⁶¹

In light of the “gigantic, crushing power” of the Court, Wilson concluded, imposition of a two-thirds rule before declaring a law unconstitutional was not an excessive exercise of Congressional power.⁴⁶²

After passing the House on January 13, 1868, the bill went to the Senate. Charles Sumner (R-Mass.) stated: “I do not think it is reasonable that a bare

458. *Id.* at 488. Mr. Wilson’s state designation may be a misnomer. The correct identification is probably of James Wilson of Iowa, the sponsor of the bill. Indiana did not have a representative named Wilson in the 40th Congress. See BIOGRAPHICAL DIRECTORY, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000594>.

459. CONG. GLOBE, 40TH CONG., 2D SESS. 478 (1868).

460. *Id.* at 488.

461. *Id.*

462. *Id.* Mr. Spalding noted that the two-thirds rule, in the event of a divided court, would prevent the power of decision from resting in the hand of one man. “It is not to be made by a single voice when the court consists of seven, three on one side and three on the other, and one man turns the scale. But it requires the united opinion of two thirds of all the members of the Supreme Court” *Id.* at 482.

majority of any court should declare an act of Congress unconstitutional.”⁴⁶³ Commenting on referral of the bill to the Senate Judiciary Committee, he added: “I hope they will consider whether they should not go further and require something more than a two-thirds vote of the Supreme Court in order to set aside an act of Congress; consider whether they should not require a three-fourths vote, a four-fifths vote, possibly a unanimous vote.”⁴⁶⁴ Ultimately, the Senate did not act.⁴⁶⁵

Since 1789, Congress has determined the number of Justices on the Supreme Court⁴⁶⁶ and how many shall constitute a quorum. By the same logic, Congress should also be able to determine the number of Justices necessary to form a majority in constitutional cases. However, to institute such a powerful reform by statute makes the reform vulnerable to reversal by statute. Thus, a constitutional amendment is a more stable solution. Additionally, if the Supreme Court were to find a supermajority statute unconstitutional by a 7-2 vote, they could defeat the statute while ostensibly complying with it.⁴⁶⁷ In that event, Congress could impeach, but the sounder approach is by amendment.

2. The “Clear Case” Rule

As Representatives Williams and Wilson stated,⁴⁶⁸ the two-thirds bill is really a restoration of the “clear case” rule. Chief Justice Morrison Waite explained:

[A] declaration [that an act of Congress is void] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.

....

The safety of our institutions depends in no small degree on a strict observance of this salutary rule.⁴⁶⁹

463. CONG. GLOBE, 40TH CONG., 2D SESS. 504 (1868).

464. *Id.*

465. See WARREN, *supra* note 1, at 193. In 1923, Senator William Borah (R-Idaho) introduced a bill requiring seven members of the Court to concur before finding an Act of Congress unconstitutional. See WARREN, *supra* note 54, at 179.

466. See CONG. GLOBE, 40TH CONG., 2D SESS. 2127 (1868) (speech of Sen. Buckalew reciting the laws of 1837, 1863, and 1866 changing the size of the Court).

467. Responding to the passage of the two-thirds bill in the House, the *Springfield Republican* raised the question: “If the Supreme Court should decide the two-thirds law to be unconstitutional, and by a two-thirds vote, what is to be done next?” WARREN, *supra* note 1, at 192.

468. See *supra* text accompanying notes 455-58.

The Supreme Court, in Hamilton's words, may only invalidate a law when it is "contrary to the manifest tenor of the Constitution."⁴⁷⁰ "Manifest," meaning clear, obvious, and undisputed, is comparable to the legal concept of "clear error," which *Black's Law Dictionary* defines as "unquestionably erroneous."⁴⁷¹ The Court *may* act, but only in *clear* cases. When the Court is divided 5-4 on a hotly contested issue, the very division of opinion is evidence that whatever error is at issue is *not* clear. When the Court is unanimous, by contrast, one can say that the error is so clear that all agree as to its presence. In close votes, however, the error is manifestly unclear, and thus, not sufficient to warrant voiding the law.

As demonstrated above,⁴⁷² the Founders contemplated judicial review. But the judicial review they anticipated was limited to laws that "manifestly" violated the written text of the Constitution, and did not include those that the Justices merely considered unwise. Substituting the Justices' personal legislative views for the will of Congress is an unconstitutional act. Yet that is what the Court habitually does.

Hamilton further stated that the Court may invalidate a statute only in case of an "irreconcilable variance."⁴⁷³ Again, in cases of doubt, a law should be affirmed. How can a statute be unquestionably erroneous, irreconcilably at variance with the Constitution, and manifestly contrary to its tenor when the judges appointed to discern this variance cannot agree among themselves on the fact? The very division on the Court is substantial evidence that the statute is reasonably compatible with the Constitution, and thus valid.

Hamilton gave an example of constitutional prohibitions the courts may police. "By a limited Constitution," he wrote, "I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like."⁴⁷⁴ He referred to specific defined prohibitions.⁴⁷⁵ Justice Marshall,

469. *Sinking Fund Cases*, 99 U.S. 700, 718 (1879). *See similarly* *Nicol v. Ames*, 173 U.S. 509, 515 (1899) (The Court should hold an Act of Congress unconstitutional "only when the question is free from any reasonable doubt."); Robert Eugene Cushman, *Constitutional Decisions by a Bare Majority of the Court*, 19 MICH. L. REV. 771, 776 (1921) (noting the ubiquity of the reasonable doubt rule as "the only correct and orthodox rule of judicial construction").

470. THE FEDERALIST NO. 78 (Alexander Hamilton).

471. BLACK'S LAW DICTIONARY (9th ed. 2009).

472. *See supra* § II.

473. THE FEDERALIST NO. 78 (Alexander Hamilton).

474. *Id.*

475. *See* U.S. CONST. art I, § 9.

in *Marbury v. Madison*, used the same example.⁴⁷⁶ One scholar notes: “Marshall chose hypothetical statutes that no reasonable person could believe were constitutional . . . evincing his commitment to the prevalent understanding that judicial review authorized invalidation of only obviously unconstitutional laws.”⁴⁷⁷ These instances do not imply a *carte blanche* power to overrule the legislature to further the Court’s collective vision of justice. They represent, as Senator Charles Drake (R-Mo.) stated in 1869, a power to reverse only “plain, palpable, and self-evident violation of the Constitution.”⁴⁷⁸ As Lino Graglia writes, “the Constitution is a very short document that wisely precludes very few policy choices; . . . examples of clearly unconstitutional laws are difficult to find.”⁴⁷⁹ And yet Supreme Court rulings of unconstitutionality rarely invoke specific prohibitions, but instead resort to generic glosses like “reasonable expectation of privacy”⁴⁸⁰ to avoid the specific words of the document and create broad rubrics for the exercise of unfettered judicial legislation.

Hamilton’s limiting conditions on judicial review find an echo in early Supreme Court decisions. The Justices very cautiously contemplated the exercise of this awful power. “[A]s the authority to declare [a law] void is of a delicate and awful nature,” wrote Justice James Iredell, “the Court will never resort to that authority, but in a *clear and urgent case*.”⁴⁸¹ The converse of the clear case is the doubtful case. “The deliberate decision of the National Legislature,” wrote Justice Samuel Chase “would determine me, if the case was doubtful, to receive the construction of the Legislature.”⁴⁸² In *Ogden v. Saunders*,⁴⁸³ Justice Bushrod Washington

476. “The constitution declares ‘that no bill of attainder or ex post facto law shall be passed.’ If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?” 5 U.S. (1 Cranch) 137, 178 (1803).

477. Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1121 (2001). In a later case, Marshall offered a somewhat less stringent standard, closer to clear and convincing: “The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810).

478. CONG. GLOBE, 41ST CONG., 2D SESS. 89 (1869).

479. Graglia, *supra* note 296, at 1422 & n.9.

480. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (construing the Fourth Amendment).

481. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.) (emphasis added); *see id.* at 395 (Chase, J.) (“I will not decide any law to be void, but in a very clear case.”).

482. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173 (1796) (Chase, J.); *see also* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 625 (1819) (declaring that “in no doubtful case, would [the Court] pronounce a legislative act to be contrary to the

considered his “difficulty and doubt” about a statute to be “a satisfactory vindication of it,” presuming its validity until violation of the Constitution “is proved beyond all reasonable doubt.”⁴⁸⁴ The Chief Justice of Pennsylvania in 1811 also used a “beyond a reasonable doubt” standard.

For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the legislature is not to be declared void, unless the violation of the constitution is *so manifest as to leave no room for reasonable doubt*.⁴⁸⁵

Warning that courts “must not step into the shoes of the law-maker,” James Bradley Thayer explained that judges do not apply to the legislature “their own opinion of the true construction of the constitution.”⁴⁸⁶ They merely determine whether the statute is “unconstitutional beyond a reasonable doubt.”⁴⁸⁷

3. The Jury Analogy

The most venerable supermajority institution in American law is the trial jury.⁴⁸⁸ Most commonly composed of twelve members,⁴⁸⁹ juries typically follow a rule of unanimity.⁴⁹⁰ Reviewing a state law that permitted less than unanimous verdicts, the Court decided that criminal conviction by nine votes out of twelve satisfied the reasonable doubt standard⁴⁹¹ as “a

constitution”); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (Paterson, J.) (“[T]o authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication.”). See generally, Taylor, *supra* note 337, at 916-920; Barkow, *supra* note 146, at 246-51.

483. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827).

484. *Id.* at 270.

485. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140 (1893) (emphasis added), quoted in *Ashwander v. TVA*, 297 U.S. 288, 354 n.12 (1936) (Brandeis, J., concurring).

486. Thayer, *supra* note 485, at 151.

487. *Id.* (noting “[t]he constant declaration of the judges that the question for them is not one of the mere and simple preponderance of reasons for or against, but of what is very plain and clear, clear beyond a reasonable doubt”).

488. See *Duncan v. Louisiana*, 391 U.S. 145, 151-54 (1968) (tracing jury trial back to Magna Carta).

489. *Williams v. Florida*, 399 U.S. 78, 87-89 (1970).

490. *Apodaca v. Oregon*, 406 U.S. 404, 407-08 (1972).

491. *Johnson v. Louisiana*, 406 U.S. 356 (1972).

substantial majority” and “a heavy majority.”⁴⁹² By analogy, the need to satisfy a reasonable doubt standard to find a law unconstitutional should also require at least a three-quarters majority.⁴⁹³

4. Supermajorities in the Constitution

The purpose of a supermajority provision is to make action difficult and thus to hinder the exercise of power. Only in the most compelling of circumstances, when almost all agree to its necessity, will power constrained by a supermajority rule be exercised.

The Constitution has many such provisions. The trial of an impeachment, a most solemn matter, requires “two thirds of the Members present” to convict.⁴⁹⁴ Each House of Congress may “with the Concurrence of two thirds, expel a Member.”⁴⁹⁵ To override Presidential disapproval of a bill, two thirds of each House must consent.⁴⁹⁶ The same is true of “[e]very Order, Resolution, or Vote.”⁴⁹⁷ A quorum of two-thirds of the states in the House or Senate is necessary to resolve a tie or lack of a majority in the Electoral College.⁴⁹⁸ The President may make treaties “provided two thirds of the Senators present concur.”⁴⁹⁹ To amend the Constitution, “two thirds of both Houses” shall propose an amendment, or “two thirds of the several states” shall apply to call a convention. The proposed amendments shall be valid if ratified by “three fourths of the several states” or conventions thereof.⁵⁰⁰ Ratification of the Constitution required the assent of nine out of thirteen states, slightly over two-thirds.⁵⁰¹ No person, having taken an oath as a state or federal officer or legislator who then engaged in the insurrection shall later hold a state or federal office except by a vote of two-thirds of each House of Congress.⁵⁰² If, after a period of incapacity, the President declares he is able to discharge his duties, but the Vice President

492. *Id.* at 362; *see also id.* at 366 (Blackmun, J., concurring) (noting that “a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty”).

493. Thayer suggests that the Supremacy Clause may make the calculation differ when the Supreme Court reviews state laws. Thayer, *supra* note 485, at 154-55.

494. U.S. CONST. art. I, § 3, cl. 6.

495. U.S. CONST. art. I, § 5, cl. 2.

496. U.S. CONST. art. I, § 7, cl. 2.

497. U.S. CONST. art. I, § 7, cl. 3.

498. U.S. CONST. art. II, § 1, cl. 3 (repealed); amend. XII.

499. U.S. CONST. art. II, § 2, cl. 2.

500. U.S. CONST. art. V.

501. U.S. CONST. art. VII.

502. U.S. CONST. amend. XIV, § 3.

and designated others disagree, a “two-thirds vote of both Houses” is necessary to prevent him from continuing in office.⁵⁰³

Supermajority requirements in ten clauses of the Constitution indicate that this method of ensuring the correctness of a decision, or minimizing the possibility of error, is an integral part of the constitutional plan. Judicial repeal of legislation is surely as solemn and significant an event as an impeachment trial, expulsion of a legislator, override of a Presidential veto, or ratification of a constitutional amendment.⁵⁰⁴ The Court has been described as a “continuing Constitutional convention.”⁵⁰⁵ To require a supermajority of the Supreme Court to void state or federal law would simply make the Court subject to the same constitutional rigor as the other branches.

F. *Amicus Reform*

By amending the Federal Rules of Evidence, Congress could require a citation to the record on appeal for every material fact stated in an opinion. This simple regulation would curtail the Court’s freewheeling appellate fact-finding through amicus briefs, and turn it back to being a judicial body, bound by the testimony and exhibits of record.⁵⁰⁶ The influence of high-powered lobbying groups, able to fund advocacy briefs, should not predominate, as is typical, over the work product of the litigants. Too often the case itself is just a pretext for the Court to sort out the policy issues. This abuse of the judicial role calls for serious reform.

VI. CONCLUSION

The remedies surveyed above provide a toolbox from which Congress may effectually address—through legislation or constitutional amendment—the unwarranted transformation of the Supreme Court into a

503. U.S. CONST. amend. XXV, § 4.

504. See *supra* notes 494, 495, 496, 500 and accompanying text.

505. See *Coleman v. Alabama*, 399 U.S. 1, 22-23 (1970) (Burger, J., dissenting) (criticizing the Court for making it “dangerously simple for future Courts, using the technique of interpretation, to operate as a ‘continuing Constitutional convention’”); *Lepre v. Dep’t of Labor*, 275 F.3d 59, 75 (D.C. Cir. 2001) (Silberman, J., concurring) (“Supreme Court decisions—particularly in the last century—have resembled more the periodic declarations of a continuing constitutional convention than efforts to read the Constitution as a body of positive law.”); Philip B. Kurland, Book Review, 47 U. CHI. L. REV. 185, 192 (1979) (stating that “the Great Chief Justice [John Marshall] started the Court on its road to becoming a council of revision and a continuing constitutional convention”).

506. See *supra* § IV.A.

third and superior house of Congress. Justice Robert Jackson noted that “the Constitutional Convention deliberately withheld from the Supreme Court power that was political in form, such as a forthright power to veto or revise legislation.”⁵⁰⁷ The Court that today routinely exercises a legislative power of revision, needs to be forced back over the line of adjudication that separates the constitutional from the legislative. The real issue is not the existence of judicial review, but the abuse of that power. The Supreme Court may police the boundaries of the Constitution, but may not, on a pretext of good police work, assume, as it has done, the power to legislate.⁵⁰⁸

Adoption of a “clear case” rule would return the Court to its limited constitutional jurisdiction. The only way structurally to force such a reform is to adopt a supermajority amendment requiring the assent of three-quarters of the Court to invalidate federal or state law. Such a rule, like that in the Nebraska and North Dakota Constitutions, will reflect the majorities the Constitution requires to ratify a constitutional amendment. The Court, habitually acting as a continuing constitutional convention, is incapable of voluntarily surrendering its assumed legislative authority. Powerful actors in the political system compete for its favors as a shortcut to desired results.⁵⁰⁹ Each side believes that with “one more justice,” it can swing the balance in its favor. The legislative suitors that pound daily on the Court’s door need to be driven out of the Temple of Justice, and the mounds of amicus briefs removed to the dumpster.

“In questions of power, then,” said Thomas Jefferson in a memorable phrase, “let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.”⁵¹⁰ The Court has broken free of the existing chains and is running amok in the legislative garden. But a three-quarters-majority amendment will be a chain not easily broken.

507. Robert H. Jackson, *The Supreme Court as a Political Institution*, in *THE SUPREME COURT: VIEWS FROM THE INSIDE* 153, 153 (Alan F. Westin ed. 1961).

508. “The distinction between what has been called bench legislation and judicial interpretation is by a line not easy to be drawn, but necessary to be observed.” Letter from James Madison to David Hoffman (June 13, 1832), in *4 LETTERS OF JAMES MADISON*, *supra* note 64, at 223.

509. Because the Court is primarily a political actor, and only incidentally a law-finding institution, “players in the political process will seek to advance their preferences via Supreme Court nominations.” John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 *MICH. L. REV.* 1436, 1437 (2000).

510. Thomas Jefferson, *Draft of the Kentucky Resolutions* (1798), in *7 PAUL LEICESTER FORD, THE WRITINGS OF THOMAS JEFFERSON: 1795-1801*, at 305 (1896).