THE SUPREME COURT'S CRISIS OF AUTHORITY: LAW, POLITICS, AND THE JUDICIARY ACT OF 1925

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Before the Judiciary Act of 1925, the Supreme Court functioned as an apex tribunal whose docket was dominated by trivial cases it was required to decide due to its expansive mandatory appellate jurisdiction. The Judiciary Act of 1925 substituted discretionary writs of certiorari for a large proportion of these mandatory appeals, thus allowing the Court to determine the nature of its own docket. The point of the Act was to allow the Court to select cases that would clarify important questions of law and establish national priorities in constitutional and legal matters.

Over time, these criteria for case selection have led both the public and the Court to imagine its proper role as supervising the development of federal law. The difficulty is that we lack any account of judicial authority that might justify the Court's assumption of this essentially policymaking role.

The most basic source of judicial legitimacy derives from the dispute settlement function of courts. American courts may make law and policy, but they are justified in doing so only when necessary to decide concrete cases. This can be seen in how our legal system conceives the relationship between dicta and holding in a judicial opinion, and in how it differently treats judicial opinions and judicial judgments. The need to settle disputes was also the basis of Marbury*'s claim that federal courts were entitled to engage in judicial review. If the forward-looking lawmaking of a legislature is justified by its representative nature, the forward-looking lawmaking of a court is justified by the need to resolve disputes.*

The structure created by the Judiciary Act of 1925 eventually encouraged the Court to imagine that it could exercise a lawmaking authority that was virtually free-

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standing and independent of the retrospective need to settle disputes. The Court now exercises this authority not only in self-consciously using certiorari to set the nation's constitutional agenda, but in using its cases primarily as vehicles for the declaration of forward-looking law. This shift has produced a profound crisis of the Court's legitimacy. A court that nakedly exercises its lawmaking authority is vulnerable to the charge that it can no longer settle disputes in a fair and impartial manner. The Court has undermined its most basic claim to legitimacy.

It was during the era of the Warren Court when the Court first fully inhabited the policymaking role made possible by the Judiciary Act of 1925. At that time the Court imagined itself as the leader of American constitutional culture. Modern American constitutional theory developed as an effort to explain and justify the independent lawmaking authority of the Warren Court. But because judicial lawmaking, like any lawmaking, must ultimately be vindicated by popular acceptance, professional legal theory cannot insulate a court from popular opposition. The irony of the present situation is that although the Roberts Court has rejected the substantive doctrine of the Warren Court, it has nevertheless fully embraced the judicial role pioneered by the Warren Court.

Like its predecessor, the Roberts Court seeks to lead the constitutional culture of the country. This has put its legitimacy profoundly at risk, a danger that cannot be averted merely by the proliferation of constitutional theories. Instead the Court must find some way to make its constitutional views acceptable to the nation.

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INTRODUCTION

The Judiciary Act of February 13, 1925,[1] often called the Judges' Bill because it was authored by the Supreme Court itself, is now in its centennial year. The legislation was effectively an act of judicial self-emancipation. Buried in an avalanche of petty appellate cases because of its expansive mandatory jurisdiction, the Court designed the Act to substitute discretionary writs of certiorari for a very large proportion of its compulsory docket. Although proposed as a simple procedural measure to correct a serious practical problem, the Act would over the next hundred years contribute to a fundamental change in the nature of the Supreme Court as an institution.[2]

Over the course of the twentieth century, the Court would evolve from an apex appellate tribunal into something quite different. It would become the acknowledged supervisor of the system of federal law, a role envisioned by the Act and warmly embraced by the Court. But because the nation has yet to agree upon a jurisprudence capable of conceptualizing and justifying the immense powers of this new role, the transformation has provoked an ever-deepening crisis of the Court's authority. The purpose of this essay is to clarify the historical and structural roots of this crisis.

I. THE JUDICIARY ACT OF 1925

It is almost impossible for modern observers to imagine what the Supreme Court was like before the Judiciary Act of 1925. It comes as something of a shock, for example, to read the letter sent by Justice Clarke to President Woodrow Wilson to explain Justice Clarke's abrupt and unexpected resignation from the Court in 1922. Justice Clarke complained that "You little realize the amount of grinding, uninteresting, bone labor there is in writing more than half the cases decided by the Supreme Court."[3] He wrote that "[m]uch more than ½ the cases are of no considerable importance whether considered from the point of view of the principles or of the property involved in them," adding that "I protested often, but in vain, that too many trifling cases were

1 Judiciary Act of 1925, ch. 229, 43 Stat. 936.

2 I use the word "contribute" advisedly. The Act both made possible certain institutional developments and offered certain structural incentives for the Court to take advantage of these developments. My intention in this paper is to describe these events as a historian, not to make claims of formal causality, either of the necessary or sufficient variety.

3 Letter from John H. Clarke to Woodrow Wilson (Sept. 9, 1922) (on file with the Library of Congress, the Woodrow Wilson Papers: Series 2, Family and General Correspondence, 1786–1924; 1922, Aug. 10–Oct. 23, images 420–26).

being written, that our strength should be conserved for better things . . . ."[4]

It is safe to say that no contemporary Justice could plausibly lodge a similar complaint. Virtually every case at the modern Court is now, in one way or another, legally significant, even if not politically salient or controversial.[5] The working conditions of the Court have in this respect changed dramatically in the hundred years since the enactment of the Judges' Bill. The transformation is due to the relentless and effective leadership of Chief Justice Taft,[6] who sought legislative relief for the bone-crushing labor of deciding endless, trivial, mandatory appeals.

Almost immediately upon becoming Chief Justice, Taft appointed a committee of the Court consisting of Justices Van Devanter, McReynolds, and Day to draft what would become the Judges' Bill.[7] For the next three and a half years, Chief Justice Taft personally and persistently lobbied the President, the Congress, and the Bar to push for its

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4 *Id.* Justice Clarke's diagnosis was shared by his peers. When Justice Sutherland testified before the Judiciary Committee of the House of Representatives in 1924, he flatly asserted that "the docket is burdened with a large number of trifling cases." *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing on H.R. 8206 Before the H. Comm. on the Judiciary*, 68th Cong. 24–25 (1924) [hereinafter *1924 House Hearing*] (statement of Hon. George Sutherland); *see Procedure in Federal Courts: Hearing on S. 2060 and S. 2061 Before a Subcomm. of the Comm. on the Judiciary*, 68th Cong. 47 (1924) [hereinafter *1924 Senate Hearing*] (statement of Hon. George Sutherland) ("[F]rom my observation thus far, . . . a very large proportion of the cases that come to that court—I would not undertake to say what proportion—ought never to be there at all."). Testifying before the Senate, Justice Sutherland allowed "that perhaps half of the cases that come to our court now ought to stop with the Circuit Court of Appeals." *1924 Senate Hearing*, *supra*, at 48. Justice Van Devanter stated that "one-third of the business which now comes to the Supreme Court results in no advantage to the litigants or the public." *1924 House Hearing*, *supra*, at 12 (statement of Hon. Willis Van Devanter). Justice Van Devanter explained that "[o]ur obligatory jurisdiction operates to give a review . . . even though the decision is obviously correct. A further review in such a case serves no useful purpose. It is of no benefit to anyone." *Id.* "In such cases," Justice Van Devanter continued, "the review usually is sought for purposes of delay or in an obstinate effort to wear out an adversary." *Id.*

5 Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 708 (2018) "([M]any, or even most, legal issues selected through the certiorari process *are* important . . . ."). On the Court's low salience cases, see Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 9 (2006).

6 Justin Crowe, *The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft*, 69 J. POL. 73, 83 (2007) (arguing that "the shift to certiorari jurisdiction" could not have happened "without [Chief Justice Taft's] entrepreneurship").

7 WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 138–39 (1964).

enactment.[8] The Court designed the bill to "cut . . . to the bone"[9] the Court's own mandatory jurisdiction, replacing appeals and writs of error with discretionary writs of certiorari.[10]

The Bill's "drastic limitations" upon the Court's compulsory appellate jurisdiction constituted "a new dispensation"[11] that was instantly recognized as revolutionary.[12] The Court could select a large proportion of the cases it would decide, allowing it for the first time in its history to control its own docket. As Chief Justice Taft wrote his son, the Court could now "pick and choose most of the cases that we shall hear."[13] The Judiciary Act of 1925 constituted "the most sweeping alteration of the Supreme Court's role ever passed in American history."[14] As the profound implications of the Act began to sink into the consciousness of the Justices, the Court would eventually evolve into the institution that we now know, a marmoreal tribunal clothed in an aureole of momentous cases that seem each year to set the nation's legal and constitutional agenda.[15]

8 The fascinating and controverted story is told in detail in ROBERT POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–30, at 476–501 (2024); MURPHY, *supra* note 7, at 132–45; and Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1660–1703 (2000). The final version of the Act was largely drafted by Justice Van Devanter. POST, *supra*, at 485.

9 Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 CORNELL L.Q. 499, 504 (1928). In the October 1921 Term, for example, seventy-one percent of the Court's full opinions were issued in cases that came to the Court by way of its mandatory jurisdiction. POST, *supra* note 8, at 600. Only twenty-eight percent of its full opinions were issued in cases that came to the Court through the discretionary writ of certiorari. *Id.* By the October 1928 Term, when the Judges' Bill was almost fully in effect, only thirty-eight percent of the Court's opinions were issued in cases that came to the Court by way of its mandatory jurisdiction. *Id.*

10 The exact technical, operative terms of the Act are well described in William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1 (1925); see also Charles W. Bunn, *The New Appellate Jurisdiction in Federal Courts*, 9 MINN. L. REV. 309 (1925); and Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System: VII. The Judiciary Act of 1925*, 40 HARV. L. REV. 834 (1927).

11 Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 1 (1928).

12 *See* Bunn, *supra* note 10, at 309.

13 Letter from William Howard Taft, C.J., Sup. Ct., to Robert A. Taft (Feb. 3, 1925) (on file with the Library of Congress, the William H. Taft Papers: Series 3, General Correspondence and Related Material, 1877–1941; 1925 Jan. 17–Feb. 23, images 762–63).

14 Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1, 14 (2008).

15 Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 936–37 (2022) [hereinafter Narechania, *Important Cases*] ("The decision to take a case often both reflects contemporary concerns, and, significantly, helps to 'shape[] the nation's political, social, and economic agenda.'" *Id.* at 936 (quoting Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH. L. REV. 1345, 1357 (2018))).

In 1925, however, the primary justification urged for the Act was far more modest. It was argued that the Act would "relieve the congestion resulting from the present overcrowded docket of the Supreme Court" by eliminating the numerous petty cases imposed by its mandatory jurisdiction.[16] The Act would allow the Court to focus its limited time and attention on cases "of a character and importance which render a review of right in the Supreme Court desirable from a public point of view."[17]

In the 1920s, this argument carried weight. The Court was then "from 15 to 18 months" behind on its docket.[18] Because of the large influx of cases due to the recently ratified Eighteenth Amendment and the recently concluded World War, the Court feared that its arrears might soon grow to the catastrophic proportions of the early 1890s, when the Court was "three years behind the disposition of its cases."[19] At that time, Congress came to the Court's assistance by passing the Evarts Act,[20] which created the modern federal courts of appeals and which also empowered the Supreme Court to transform the old common law writ of certiorari into a potent instrument for the

16 *1924 Senate Hearing*, *supra* note 4, at 6 (containing, as one of its sections, "An Analysis of S. 2060, to Amend the Judicial Code, Further to Define the Jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for Other Purposes". This "Analysis" was prepared by the Supreme Court itself. *Id.* at 1). The Hearing also contained a document entitled "A General Review of S. 2060." *See id.* at 20. The General Review, also prepared by the Court itself, offered a distinct justification for the Act. *See id.* at 20–21. ("This is primarily a bill to relieve the Supreme Court of the increasingly heavy burden of hearing cases which do not involve questions of sufficient importance to take its time, and which prevent its prompt disposition of serious cases of great moment.").

Chief Justice Taft himself explained that the Act was "primarily a bill to bring within the jurisdiction of the Supreme Court all the business of the country in such a way that it can keep up with its docket." *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary*, 67th Cong. 2 (1922) [hereinafter *1922 House Hearing*] (statement of Hon. William Howard Taft). According to the Senate Report on the bill, the purpose of the Act was to promote "the prompt and efficient administration of justice." 65 CONG. REC. 5832 (1924) (Report of the Subcommittee on S. 2060). This remains the prevailing view of the purpose of the Act. "The predominant reason for granting the Court so much control over its docket was concern about its caseload." Louis J. Virelli III, *Transparency and Policymaking at the Supreme Court*, 32 GA. ST. U. L. REV. 903, 908 (2016).

17 *1924 Senate Hearing*, *supra* note 4, at 7.

18 *Id.* at 6. Chief Justice Taft testified in 1922 that "[i]t now takes from 18 months to two years to reach a case on the docket." *1922 House Hearing*, *supra* note 16, at 9.

19 William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 602, 601–02 (1922); *see also* Frankfurter & Landis, *supra* note 10, at 836.

20 Evarts Act, ch. 517, 26 Stat. 826 (1891).

discretionary selection of cases.[21] The Evarts Act decreed that many kinds of cases decided by the new federal courts of appeals would not be entitled to mandatory review at the Supreme Court.[22] Although the Evarts Act successfully reduced the large backlog then clogging the Supreme Court's docket,[23] the Court's arrears had begun once again to grow after World War I.[24]

As a measure designed to enable the Court to control its own docket, the Judiciary Act of 1925 was a "marvelous"[25] success. Felix Frankfurter and James Landis noted in 1928 that "[n]ot for a hundred years has the Court reached for argument on the regular calendar cases docketed during the term. Last term it achieved this dispatch in its business."[26] By the end of the Court's 1929 Term, Justice Van Devanter could proclaim that "the Court is now more nearly current with its work than it has been at any time in many years. . . . The members of the Court are all agreed that the new system is a great improvement over the old and that it works to the real advantage of litigants."[27]

Most subsequent commentators have accepted this verdict. Chief Justice Vinson, for example, told the American Bar Association in 1949 that "[t]he Court will soon have been operating under its basic jurisdictional statute for a quarter of a century, and experience has eloquently proved the wisdom of its architects."[28] "The days before the passage of the 1925 Act, when it took 18 to 24 months for the Court to reach a case on its docket," said Chief Justice Vinson, "are forgotten."[29] And Merlo Pusey, writing in 1976, could confidently assert that time "has removed all doubt as to the wisdom" of the legislation.[30] The Act enabled the Supreme Court "to dispose of its backlog of cases and to reduce its intake to a point where it was manageable."[31]

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21 *See* Hartnett, *supra* note 8, at 1650–57. "The writ of certiorari was originally a means of supplying information to a superior court by way of certification." JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 159 (5th ed. 2019).

22 The Act was badly drafted and caused endless jurisdictional confusion. *See* POST, *supra* note 8, at 489 n.23.

23 *See id.* at 478 fig.III-9.

24 *See id.*

25 GREGORY HANKIN & CHARLOTTE A. HANKIN, PROGRESS OF THE LAW IN THE U.S. SUPREME COURT 1929–1930, at 2 (1930).

26 Frankfurter & Landis, *supra* note 11, at 14.

27 Willis Van Devanter, *The Supreme Court of the United States*, 5 IND. L.J. 553, 560 (1930).

28 Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949), *in* 69 S. Ct., at v, v (1949).

29 *Id.* (citation omitted).

30 Merlo J. Pusey, *The "Judges' Bill" After Half a Century*, 1976 Y.B. SUP. CT. HIST. SOC'Y 73, 76.

31 *Id.*; *see* Eugene Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 744 (1964) ("Present experience demonstrates that the 1925 act has achieved its goal.").

Notwithstanding these glowing verdicts of success, scholarly literature discussing the Act has expressed significant concerns. The Act summons a view of judicial obligations under Article III that is radically inconsistent with Chief Justice Marshall's categorical declaration: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."[32] Edward Hartnett has argued that this inconsistency creates a serious tension between the Judges' Bill and the basic justification for judicial review, which is that courts are obligated to decide all cases properly within their jurisdiction.[33]

It did not escape the observation of contemporaries that the Judges' Bill seemed to portend some kind of fundamental transformation in the nature of the Supreme Court. One prescient commentator in 1928 noted that after the Bill the "specific rights of particular parties are no longer the essence of the controversies before the Supreme Court. They are mere vehicles whereby the Constitution and the laws of the United States are interpreted . . . ."[34] The commentator continued that "[i]n this respect one might well say that the Supreme Court is abandoning its character as a court of last resort, and is assuming the function of a ministry of justice."[35]

In more modern times, it has been said that the Act altered the "primary function" of the Court from that of a tribunal "of last resort, concerned primarily with correcting errors and vindicating the rights of particular litigants," to that of a "supervisor of the federal judiciary and enunciator of legal rules and principles in cases with broad legal or social significance."[36] As a consequence, writes another scholar, the Act has "altered cases to render them law-shaping instruments of judicial policy," which in turn has entailed "radical changes in the Court's function and relationship to litigants and in the institutional ecology of its opinions."[37]

It seems plain that the Judiciary Act of 1925 has affected the Supreme Court in ways that far transcend the mere timeliness of its docket. In this brief Essay, I analyze one such effect. I argue that the Act has over time contributed to changes in the public perception of

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32 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); *see* Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 389 (2004).

33 Hartnett, *supra* note 8, at 1713–30.

34 Gregory Hankin, *U.S. Supreme Court Under New Act*, 12 J. AM. JUDICATURE SOC'Y 40, 40 (1928).

35 *Id.*

36 Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 2 (2003).

37 Peter G. Fish, *Judiciary Act of 1925*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 549, 549 (Kermit L. Hall et al. eds., 2d ed. 2005).

the Supreme Court, as well as to changes in the Court's own self-understanding, which have facilitated a significant crisis of the Court's authority.

Prior to the Act, the Court was largely an apex appellate tribunal that definitively settled the disputes of litigants. It was therefore invested with what I shall call the "authority of finality," which is the authority conclusively to end the disputes of particular litigants. But when the Judiciary Act of 1925 redirected the Court to the task of supervising the development of federal law, the Court was required to emphasize a quite different form of authority, which I shall call "lawmaking authority."

Lawmaking authority endows tribunals with the competence to articulate standards that govern the future behavior of non-parties. American courts routinely exercise lawmaking authority, but they almost always do so as justified by the need conclusively to settle the legal controversies of parties. The lawmaking authority of American courts is ordinarily circumscribed and constrained by their authority of finality.

As the Judges' Bill encouraged the Supreme Court to evolve into the proactive manager of federal law, the Court over time began to liberate its lawmaking authority from many of the traditional constraints associated with the narrow task of retrospective dispute settlement. The Court accordingly came to be perceived as increasingly competitive with other independent lawgivers, including representative institutions like Congress.

These developments have set the scene for an intractable crisis of the Court's legitimacy. The question is how the Supreme Court, as a democratically unaccountable institution, can properly exercise, and be seen as exercising, essentially free-standing lawmaking authority.

II. THE VAST DISCRETIONARY POWER OF CERTIORARI

The procedural innovation of the Judiciary Act of 1925 was to invest the Supreme Court with "the vast discretionary power"[38] to select

38 *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A. J. 721, 726 (1973) [hereinafter *Warren Attacks*]. "The Act of 1925 . . . provided relief by giving the Court almost complete discretion to select the cases that it would decide." Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711, 1712 (1978). Chief Justice Taft viewed the Court's discretion to grant or deny writs of certiorari as "absolute and arbitrary." William H. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 18 (1916). Justice Van Devanter, however, who drafted the Court's rule informing the public about the Court's criteria for considering writs of certiorari, *see* POST, *supra* note 8, at 497 n.51, used the more modest sounding but essentially mysterious phrase "sound judicial discretion." SUP. CT. R. 35(5), 266 U.S. 681 (1925) (repealed 1928).

its own docket.[39] This innovation was attacked by those who believed that it betrayed the fundamental role of the Supreme Court, which was to vindicate the federal rights of litigants. Iowa Supreme Court Justice Benjamin I. Salinger, for example, testified before the House Judiciary Committee in 1922 that "I can not help thinking that every case of violating Federal rights is important in the sense that injury inflicted by the violation should entitle the sufferer, as a matter of right, to have redress in the Supreme Court."[40] The function of the Supreme Court, Justice Salinger argued, was to protect federal rights.

The proponents of the Judges' Bill were determined to repudiate this "obstinate conception that the Court was to be the vindicator of all federal rights."[41] Taft had eloquently spoken out against this conception of the Court since at least 1908, when he ran for President. "Generally in every system of courts there are a court of first instance, an intermediate court of appeals and a court of last resort," Taft explained in a popular magazine article.[42] Although the "court of first instance and the intermediate appellate court should be for the purpose of finally disposing in a just and prompt way of all controversies between litigants," Taft argued,

> [s]o far as the litigant is concerned, one appeal is all that he should be entitled to; the community at large is not interested in his having more; for the function of the court of last resort, usually called the Supreme Court, is not primarily for the purpose of securing a second review or appeal to the particular litigant whose case is carried to that court.[43]

Instead, continued Taft,

> the chief reason for granting such a review is to enable the Supreme Court to lay down general principles of law in the interpretation of State or Federal constitutions or statutes, or in the application of

39 The Court would eventually achieve virtually complete discretionary control of its own docket with the enactment of the Supreme Court Case Selections Act, Pub. L. No. 100-352, 102 Stat. 662 (1988). *See* Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Epitaph for Mandatory Jurisdiction*, 74 A.B.A. J., Dec. 1, 1988, at 66, 68.

40 *1922 House Hearing*, *supra* note 16, at 15–16 (statement of Hon. Benjamin I. Salinger).

41 Frankfurter & Landis, *supra* note 10, at 839–40 (footnotes omitted). The Judges' Bill "completely overrode" the idea that the function of the Court was to vindicate federal rights. *Id.* at 840.

42 William H. Taft, *Delays and Defects in the Enforcement of Law in this Country*, 187 N. AM. REV. 851, 851 (1908).

43 *Id.*

> the common law, for the benefit and guidance, not of the particular litigant affected, but of the communities at large.[44]

Taft drew from this reasoning the conclusion that "the appellate jurisdiction of the Supreme Court should generally be limited to those cases which are typical and which give an opportunity to the court to cover the whole field of the law upon the subject involved."[45] The proper role of the Court was "to guide the other branches of the Government and the people of the United States."[46]

Taft continued to press this same point as President of the United States[47] and later as President of the American Bar Association.[48] When he became Chief Justice in June 1921,[49] Taft almost immediately began to push Congress to enact a program of law reform that included the Judges' Bill.[50] At every point he stressed that the fundamental function

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44 *Id.* at 851–52. Taft was not the first to make this distinction. The 1894 New York Constitution, for example, was in 1899 interpreted to signify that the apex New York Court of Appeals

> was justified only by the necessity that some tribunal should exist with supreme power to authoritatively declare and settle the law uniformly throughout the state. That court was continued, not that individual suitors might secure their rights, but that the law should be uniformly settled, to the end that the people might understand the principles which regulated their dealings and conduct and thus, if possible, avoid litigation.

Reed v. McCord, 54 N.E. 737, 738 (N.Y. 1899).

45 Taft, *supra* note 42, at 852.

46 *Id.*

47 46 CONG. REC. 25 (1910) (President's Annual Message) ("The proper and chief usefulness of a supreme court, and especially of the Supreme Court of the United States, is, in the cases which come before it so to expound the law, and especially the fundamental law—the Constitution—as to furnish precedents for the inferior courts in future litigation and for the executive officers in the construction of statutes and the performance of their legal duties.").

48 William Howard Taft, Address of the President (Oct. 20, 1914), *in* 37 ANN. REP. A.B.A. 359, 384 (1914); *see* Taft, *supra* note 38, at 18.

49 POST, *supra* note 8, at 1.

50 William Howard Taft, *Three Needed Steps of Progress*, 8 A.B.A. J. 34, 35–36 (1922). Chief Justice Taft told the Chicago Bar in December 1921:

> [T]he moving cause of the proposed reform is the feeling that many have, that there must be some method adopted by which the cases brought before that Court shall be reduced in number, and yet the Court may retain full jurisdiction to pronounce the last word on every important issue under the Constitution and the statutes of the United States and on all important questions of general law with respect to which there is a lack of uniformity in the intermediate Federal courts of appeal. . . . A Supreme Court where there are intermediate courts of appeal is not a tribunal constituted to secure, as its ultimate end, justice to the immediate parties. They have had all that they have a right to claim when they have had two courts in which to have adjudicated their controversy. The use of the Supreme Court is merely to maintain uniformity of decision for the various

of the Supreme Court was not to provide "justice to the immediate parties," but instead to make "the law clearer for the general public."[51] "The function of the Supreme Court is . . . not the remedying of a particular litigant's wrong," Chief Justice Taft emphasized, "but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court."[52]

> courts of appeal, to pass on constitutional and other important questions for the purpose of making the law clearer for the general public. Litigants, therefore, can not complain where they have had their two chances that there should be reserved to the discretion of the Supreme Court to say whether the issue between them is of sufficient importance to justify a hearing of it in the Supreme Court. The Supreme Court already has a wide jurisdiction by certiorari. . . . This power enables the Court to get rid of a very large mass of cases that have but little importance save as between the parties, some of which are frivolous, many of which involve no principle that needs settlement by the court of final appeal because already well settled. Indeed, it often happens that in such cases, had the Supreme Court heard them, the results might have been different, but the difference would have arisen only from the peculiar facts and special application of the law to unusual facts, a decision of which by the Supreme Court would not be particularly useful.
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> The new law proposes, therefore, to enlarge the field in which certiorari is to take the place of obligatory jurisdiction. The situation is rendered critical by the accumulating mass of litigation growing out of the war, and especially of claims against the Government which, if allowed to come under the present law to the Supreme Court, will throw us hopelessly behind. . . . Congress has shown itself in the past quite willing to follow suggestions with reference to such changes in its jurisdiction as may enable it to keep up with its work, and I hope that we shall find Congress in the same attitude of mind when this bill is perfected and introduced.

Id.

51 *Id.* at 35.

52 Taft, *supra* note 10, at 2. As Chief Justice Taft testified before the House:

> The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.

1922 House Hearing, *supra* note 16, at 2. "Every case is important to parties," Chief Justice Taft explained, but the Court would accept certiorari only of a case that

> is important to have a general exposition of it for the benefit of the lawyers, for the benefit of the inferior courts, and for the benefit of the public at large, especially with respect to any constitutional issues involved. . . .
>
> . . . .
>
> . . . Only those cases should come to the highest court which are sufficiently important pro bono publico, without regard to the interest of the litigants. . . . [T]wo chances are enough for any litigated interest . . . .

Id. at 2–3.

Chief Justice Taft later wrote New York Senator Royal Copeland that

The Justices who testified in favor of the bill adopted the same basic argument. Justice McReynolds, for example, was frank to say that "[i]t is perfectly apparent that our court is getting more cases than it can dispose of" and that it needs a "practical" solution to the problem.[53] Justice McReynolds pleaded for relief because the Court was "overburdened with matters . . . of importance only to the immediate litigant."[54] He explained that the "general theory" of the Act "is that after one has had two trials in the Federal courts . . . mere private litigation should stop. But if the cause involves matter of general importance, . . . it should come to us for final disposition."[55] Justice Van

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> the district court and the circuit court of appeals shall furnish all the hearings that any litigant should have, and that the business of the Supreme Court should be to consider and decide for the benefit of the public and for the benefit of uniformity of decision only questions of importance.

66 CONG. REC. 2920 (1925) (Letter from William H. Taft to Royal S. Copeland).

53 *1924 House Hearing*, *supra* note 4, at 19 (statement of Hon. James C. McReynolds).

54 *Id.* at 20.

> The problem is whether the time and attention and energy of the court shall be devoted to matters of large public concern, or whether it shall be consumed by matters of less concern without especial general interest, and because the litigant wants the court of last resort to pass upon their rights.

Id. at 21; *see id.* at 22. Justice McReynolds's enthusiastic endorsement should be compared to the careful circumspection evidenced by the more recently appointed Justice Sutherland, who testified before his former Senate colleagues:

> I would say that perhaps half of the cases that come to our court now ought to stop with the Circuit Court of Appeals; that when a litigant has had a trial before a trial judge, and has gone to a court of appeals of as high rank as the Circuit Court of Appeals of the United States he ought to stop there. The result of crowding the calendar here is, as both my brothers have said, to delay inordinately the hearing of cases that are meritorious and that ought to be heard in the Supreme Court of the United States.
>
> That is all I care to say about that bill.

1924 Senate Hearing, *supra* note 4, at 48.

55 *1924 Senate Hearing*, *supra* note 4, at 45. Justice McReynolds, who was a Democrat and a former Attorney General under President Woodrow Wilson, wrote Democratic Senator Thomas J. Walsh, who was a major opponent of the bill:

> If a hearing must be given & oral argument offered in every Federal question involved in every suit important things must be neglected or delayed beyond reason.
>
> The general theory of the pending bill I think is good. After a litigant has had a hearing in all the State courts or in two Federal Courts the matter may properly end unless there is something about the cause which the court can see is of general importance. The use of certiorari is the only practical way of [which] I am aware by [which] this end can be reached. And personally I incline to think it will be necessary at some time to confine the jurisdiction of the court almost wholly to causes taken up on certiorari. . . .
>
> . . . .

Devanter affirmed that the Court would grant certiorari depending upon

> whether the questions presented in the case are of wide or public importance or concern only the parties to the particular case . . . .
>
> Generally speaking, the chief question is whether the case is of such a character that the last word, the ultimate guiding rule, should be announced by the Supreme Court . . . .[56]

Members of the Court have continued to explain the significance of the Judiciary Act of 1925 in exactly this way. So, for example, Chief Justice Hughes testified before the Senate in 1935 that "The parties have the right of appeal to the circuit courts of appeal. That satisfies the rights of individual litigants. When it comes to a further review by the Supreme Court of the United States, the higher principle of importance to the public at large is involved."[57] Two years later, in his

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> The great fundamental purpose of the Supreme Court, as I understand, is to settle the law for guidance of courts [and] counsel and this I think makes it necessary to relieve the court from a multitude of unimportant things [which] consumes time [and] strength which should [be] devoted elsewhere.

Letter from James C. McReynolds, J., Sup. Ct., to Thomas J. Walsh, Sen., Senate (June 30, 1922) (Walsh Papers) (on file with author).

In a similar vein, Republican Justice Day wrote Senator Walsh:

> I have thought for some time that it would be wise to increase the certiorari power of the Court along the line embodied in the bill now before Congress. That course will enable the Court to winnow the wheat from the chaff and to give its attention more fully to the great questions of constitutional law and kindred matters which constitute the great purposes for which the Court was created.

Letter from William R. Day, J., Sup. Ct., to Thomas J. Walsh, Sen., Senate (July 10, 1922) (Walsh Papers) (on file with author).

56 *1924 Senate Hearing*, *supra* note 4, at 29–30 (statement of Hon. Willis Van Devanter). Fully aware that the Court's seeking to control its own docket would place it in a controversial position, the sly Justice Van Devanter sought to disarm opponents by asserting that the "main purpose" of the statute was "to bring together and correlate the statutes relating to the appellate jurisdiction of the Supreme Court and the circuit courts of appeals; to adapt these statutes to present conditions and needs; and to make them plain." *1924 House Hearing*, *supra* note 4, at 6 (statement of Hon. Willis Van Devanter); *see 1924 Senate Hearing*, *supra* note 4, at 26–27 (statement of Hon. Willis Van Devanter). Although the Judges' Bill did in fact offer a much needed and skillful codification of the Court's jurisdictional statutes, and although this was certainly an important achievement, no one was fooled that codification was the "main" purpose of the Judges' Bill. Indeed, the candid Chief Justice Taft was explicit that it was merely "a secondary reason why [the] bill should pass." Taft, *supra* note 19, at 603.

57 *Appeals from Federal Courts: Hearing on S. 2176 Before the S. Comm. on the Judiciary*, 74th Cong. 7 (1935) (statement of Hon. Charles Evans Hughes). Chief Justice Hughes explained to the American Law Institute that Supreme Court

> review . . . is in the interest of the law, not in the interest of particular parties. It is not the importance of the parties or the amount involved that is controlling,

famous letter opposing President Franklin Delano Roosevelt's Court-packing plan, Chief Justice Hughes was even more explicit:

> Under our Federal system, when litigants have had their cases heard in the courts of first instance, and the trier of the facts . . . has spoken and the case on the facts and law has been decided, and when the dissatisfied party has been accorded an appeal to the Circuit Court of Appeals, the litigants, so far as mere private interests are concerned, have had their day in court. If further review is to be had by the Supreme Court it must be because of the public interest in the questions involved. . . . Review by the Supreme Court is . . . in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants.[58]

Chief Justice Vinson explained to the American Bar Association in 1949 that "[t]o remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."[59] Lawyers whose petitions for certiorari were granted, therefore, should know "that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country."[60]

By the 1970s, former Chief Justice Warren could flatly declare that the discretionary power authorized by the 1925 Act was designed "to permit the Court not only to achieve control of its docket but also *to establish our national priorities in constitutional and legal matters*."[61] "The establishment of those priorities," Warren continued, "is a function that Congress, the bar, and the public expect the Supreme Court to perform. It is a function that involves the selection of those few issues of truly national significance that four or more justices deem appropriate for resolution by the Court."[62] The Court, argued Warren, requires

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> but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered.

Charles Evans Hughes, C.J., Sup. Ct., Address of the Chief Justice (May 10, 1934), *in* 11 A.L.I. PROC. 313, 315 (1934).

58 *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong. 489 (1937) (statement of Sen. Burton K. Wheeler reading letter from Hon. Charles Evans Hughes).

59 Vinson, *supra* note 28, at vi. In extending a writ of certiorari, said Chief Justice Vinson, "the Court is interested in . . . the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations." *Id.*

60 *Id.*

61 *Warren Attacks*, *supra* note 38, at 728 (emphasis added).

62 *Id.*

the discretion provided by the Judges' Bill to fulfill its proper and expected function, which is to supervise the development of federal law.

III. THE AUTHORITY OF COURTS

A. *Triadic Decisionmaking and the Retrospective Authority of Finality*

Why does it matter whether the function of the Supreme Court is to vindicate the federal rights of litigants who appear before it, or instead "to establish our national priorities in constitutional and legal matters"?[63]

In his classic study of the institution of courts, political scientist Martin Shapiro observes that courts derive their most "basic source of legitimacy" from their role as resolvers of conflict.[64] "Cutting quite across cultural lines, it appears that whenever two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution."[65] Shapiro notes that "this simple social invention of triads" is so universal "that we can discover almost no society that fails to employ it. And from its overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere."[66] Triadic dispute settlement institutions, Shapiro writes, are stable when the parties believe that their controversy will be settled by an impartial third party who applies "preexisting legal norms."[67]

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63 *Id.*

64 MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 56, 55–56 (1981).

65 *Id.* at 1; *see* P.H. Gulliver, *Case Studies of Law in Non-Western Societies*, *in* LAW IN CULTURE AND SOCIETY 11, 18–19 (Laura Nader ed., 1969).

66 SHAPIRO, *supra* note 64, at 1. "[E]veryone seems to agree that conflict resolution is a basic task of courts." *Id.* at 17. Vilhelm Aubert writes that

> [m]odern positivist philosophies of law have emphasized the conflict-solving machinery, the courts, as the essential element in law.
>
> Legal thinking and conceptualization seem to be uniquely adapted to an interaction situation in which two conflicting parties are submitting their difficulties to a third person. In terms of small-group structure, the triad, based upon the original conflict-ridden dyad, is the social setting in which law has developed as a distinct way of structuring social events.

Vilhelm Aubert, *Researches in the Sociology of Law*, 7 AM. BEHAV. SCIENTIST, Dec. 1, 1963, at 16, 17 (footnote omitted).

67 SHAPIRO, *supra* note 64, at 1. "The legitimacy of courts as independent, neutral conflict resolvers depends on judges deciding disputes according to preexisting legal rules. Therefore, judges will discover and announce specific, preexisting legal rules even in statutes that are very unclear, garbled, or ambiguous." Martin Shapiro, *Judicial Independence: New Challenges in Established Nations*, 20 IND. J. GLOB. LEGAL STUD. 253, 257 (2013)

The need to settle disputes is universal. In the United States, courts meet this need by resolving controversies through the application of law.[68] Courts can thus decisively end disputes only if they are also authorized decisively to articulate law. It follows that a court serving the function of dispute settlement must be invested with what I have elsewhere called the "authority of finality."[69] The essence of this form of authority was memorably expressed by Justice Robert Jackson when he quipped that "[w]e are not final because we are infallible, but we are infallible only because we are final."[70] Courts cannot satisfy their dispute settlement function unless they are authorized definitively to declare law needed to "impose a final resolution."[71]

The authority of finality does not depend upon better or worse articulations of law. Litigants must accept judicial judgments so that disputes can end. The authority of finality exists because "it is more important that a termination be provided than that a just solution be

(footnotes omitted); *see id.* at 274; Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 155–56 (1994); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 81 (2008). On the emergence of triadic forms of dispute resolution and their connection to impartiality and existing normative structures, see Vilhelm Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 J. CONFLICT RESOL. 26 (1963).

The requirement that courts be impartial follows directly from the structural form of the triad, in which neither party would knowingly choose a third-party decisionmaker who was already aligned with the opposition. *See id.* at 35–36. The basic thought underlying the idea that courts should settle disputes using pre-existing law is that it would be unfair to judge parties on the basis of standards unknown to them when their dispute arose. *See* SHAPIRO, *supra* note 64, at 1–2. Parties are typically taken to have "consented" to the application of pre-existing law. *See id.* at 2. Lon Fuller has also keenly observed that courts should avoid imposing "a result incongruent with established expectations" because that "would be to disrupt a functioning and accepted system which served to regulate the parties' relations with one another." LON L. FULLER, THE MORALITY OF LAW 228 (rev. ed. 1969).

68 As Abram Chayes puts it: "Traditionally, adjudication has been understood to be a process for resolving disputes among private parties which have not been privately settled." Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976); *see* Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 304 (1989); Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4 (1982); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 17 (1979); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN L. REV. 937, 937–38 (1975); Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 269 (1944).

69 POST, *supra* note 8, at 655; *see id.* at 654–55.

70 Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result); *see, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 141 (3d ed. 2012) ("A supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was 'wrong' has no consequences within the system: no one's rights or duties are thereby altered. . . . Consideration of these facts makes it seem pedantic to distinguish, in the case of a supreme tribunal's decisions, between their finality and infallibility.").

71 SHAPIRO, *supra* note 64, at 7.

reached. For the endless continuation of a dispute often creates psychological, social, and/or economic costs that neither the parties nor the society is prepared to bear."[72]

Courts can maintain the authority of finality so long as litigants trust that courts are the kind of impartial decisionmakers required by the triadic form of dispute settlement.[73] But if litigants come to suspect that courts are systematically biased, as for example when labor in the 1920s came to regard federal courts as dedicated instruments of capitalist oppression,[74] the utility of courts as dispute settlement institutions is undermined. It is no accident that jurisdiction-stripping

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72 *Id.* at 45; *see, e.g.*, Comm'r v. Sunnen, 333 U.S. 591, 597 (1948) ("[C]onsiderations of economy of judicial time and public policy favor[] the establishment of certainty in legal relations. . . . [W]hen a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1876))); Reed v. Allen, 286 U.S. 191, 198–99 (1932) (referring to "the general and well-established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy," *id.* at 198–99, and emphasizing "the mischief which would follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife," *id.* at 199 (citing United States v. Throckmorton, 98 U.S. 61, 65, 68–69 (1878))).

73 As Thomas W. Shelton, a Southern lawyer who was the powerful chair of the American Bar Association's Committee on the Uniformity of Judicial Procedure and a close friend of Chief Justice Taft, asserted in an article about the Judges' Bill placed into the record of the Senate hearings:

> It is respectfully submitted that faith in and submission to the Supreme Court is the cohesion binding together the Union of the States. . . .
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> . . . .
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> . . . [T]here abides in the hearts of the people of this country a sublime faith in their highest tribunal that makes of submission the noblest attribute of national character. That faith is the corner stone upon which rests the very existence of the Republic. It is as beautiful as filial bondage and stronger than the duress of arms. . . .
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> . . . .
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> . . . As a question of psychology, the people must continue to visualize the Supreme Court as the most deliberate and painstaking and most nearly perfect of human organizations.

1924 Senate Hearing, *supra* note 4, at 49–50 (quoting Thomas W. Shelton, *The Danger of the Increased Burden Upon the Federal Supreme Court from its Continually Expanding Docket*, 92 CENT. L.J. 279, 279–81 (1921)); *see id.* at 69 (statement of Thomas Shelton) ("Of course it is not in order for us to express our approval of what the Supreme Court does, you know. We accept it.").

74 *See generally* POST, *supra* note 8, at 1227–429.

exercises, like the Norris-LaGuardia Act of 1932,[75] arise in such circumstances. To the extent that the public loses confidence in the impartiality of courts, their authority of finality is diminished because they are no longer seen as honest brokers to whom disputes can be entrusted for a fair and final resolution. The logic of the triad is broken.

B. Serving the State and the Prospective Authority of Lawmaking

Courts typically exercise other forms of authority than that of finality. Shapiro notes that government-established courts are almost never merely neutral triadic decisionmakers.[76] They are always also agents of the government that establishes them, which means that they inevitably resolve disputes by pronouncing versions of law that create and serve state policy.[77] In that capacity, judges necessarily assume the function of "social control and lawmaking" in addition to the function of dispute settlement.[78]

Courts assume a lawmaking function when they articulate rules to guide the future behavior of nonparties.[79] It is apparent that "[i]f the judge is consciously seeking to formulate general rules for future application, his considerations must range far beyond the immediate clash of interests of the two parties."[80] A judge who makes law must thus articulate principles that transcend the particular litigants who happen to be before the court. "Yet the basic social logic of courts as

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75 *See* Norris-LaGuardia Act, ch.90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–15).

76 *See* SHAPIRO, *supra* note 64, at 16–17.

77 *See id.*

78 *Id.* at 17.

> When the two parties must go to a third who is an officer, it is as evident to them as to the observer that they are no longer going to a disinterested third. Instead they are introducing a third interest: that of the government, the church, the landowner, or whoever else appoints the official.

Id. at 18.

79 On the distinction between the "dispute-resolution function" of courts and the "law making or law announcing" function, see David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, *in* COMMON LAW THEORY 134, 146, 146–47 (Douglas E. Edlin ed., 2007). The dispute-resolution function is "backward looking—settling the past dispute—and focuses on the immediate and limited audience of the litigants, their counsel, and others affected," *id.* at 146, whereas the lawmaking function is "forward-looking" and reaches "out to a wider audience, including the public, the bar, the media, academics, and other courts," *id.* at 147. The tension between these two judicial functions fuels an ongoing American scholarly debate about whether "courts exist to decide cases" or instead whether "the essential purpose of courts is not to resolve disputes, but rather to carry out public policy and vindicate public values." Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 574, 573–74. Of course, in actual sociological fact, courts nearly always serve both purposes.

80 SHAPIRO, *supra* note 64, at 34–35.

conflict resolvers is so strong . . . that courts would be foolish not to enlist this conflict resolution social logic in behalf of their social control and lawmaking activities."[81]

In the United States, almost all courts both resolve disputes and declare law, but, in contrast to some continental European legal systems, there may at times be significant tension between these two distinct functions. The potential for this tension is especially acute for American appellate courts. Although the "principal job of appellate courts is lawmaking,"[82] Shapiro perceptively notes that American appellate courts nevertheless "continuously seek to reiterate their connection with the basis of all judicial legitimacy, conflict resolution" and hence "do their lawmaking under the guise of doing substantial justice between man and man in particular cases—and they must do this if they are to be perceived as and supported as courts."[83] An apex appellate tribunal like the Supreme Court may claim the authority of finality because it conclusively resolves the disputes of litigants, but in fact "constitutional review by the highest appeals courts in federal systems" is always also "a principal device of centralized policymaking."[84]

Appellate courts in the United States must thus negotiate a very delicate tension. Litigants expect appellate courts to be good faith triadic decisionmakers who impartially apply preexisting law. Yet appellate courts must also make law to decide cases.[85] Appellate courts typically manage this high-wire act by making law in ways that litigants can accept as legitimate extensions of already existing law. In the words of Justice Scalia, appellate courts make law "*as though* they were 'finding'

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81 *Id.* at 17.

82 *Id.* at 42.

> [A]ppellate institutions are more fundamentally related to the political purposes of central regimes than to the doing of individual justice. . . .
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> Even if judges did nothing but conflict resolution, appeal would be an important political mechanism both for increasing the level of central control over administrative subordinates and for ensuring the authority and legitimacy of rulers. . . . The "questions of law" passed on to the appeals courts are in reality requests for uniform rules of social conduct . . . .
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> . . . .
>
> . . . Appeal . . . ensures that [trial courts] are following rules or laws or policies of social control acceptable to the regime.

Id. at 52–54.

83 *Id.* at 42–43.

84 *Id.* at 55.

85 *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgment) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.").

it."[86] Whether this fiction actually misleads the public is an open question, for Americans seem willing to tolerate judicial lawmaking so long as they believe that it is grounded in the need to fairly resolve pending cases. Hence appellate courts in this country typically cloak their lawmaking in a veil of dispute settlement. They know they can run into serious trouble if that veil is pierced and they are perceived as independently forging law in ways unrelated to traditional triadic decisionmaking.

Deeply embedded in the American legal system is a constraint meant to avert this danger. Black letter doctrine holds that judicial lawmaking can be exercised only as necessary to settle disputes. This constraint is meant to structure the implicit tension between judicial dispute resolution and judicial lawmaking by subordinating the latter to the former. Legal professionals are trained to honor as the "holding" of a case those declarations of law required to resolve the particular dispute before a court. Legal professionals are also trained to dismiss as "dicta" judicial efforts to articulate law unnecessary to resolve the controversy before them.[87] The hierarchical relationship between holding and dicta signifies disapproval of freestanding judicial lawmaking.[88] In the United States, judicial lawmaking is justified and channeled by the need to settle disputes.[89]

In practice, however, the lawmaking function of American courts, and of the Supreme Court in particular, is not strictly confined by their dispute settlement function.[90] Supreme Court opinions about federal questions govern all lower courts, and it would be a bold judge indeed

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86 *Id.*

87 *See, e.g.*, Stein v. Kaiser Found. Health Plan, Inc., 115 F.4th 1244, 1248–50 (9th Cir. 2024) (Forrest, J., concurring); United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988) ("What is at stake in distinguishing holding from dictum is that a dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject."); United States v. Rubin, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'"), *aff'd*, 449 U.S. 424 (1981).

88 *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1258–59 (2006).

89 In other legal systems, like those of continental Europe, which do not employ the distinction between dicta and holdings, freestanding judicial lawmaking is much more acceptable than in the United States. Jan Komarek, *Precedent and Judicial Lawmaking in Supreme Courts: The Court of Justice Compared to the US Supreme Court and the French Cour de Cassation*, 11 CAMBRIDGE Y.B. EUR. LEGAL STUD. 399, 401–02 (2009). This reveals a great deal about the nature of state authority in such systems.

90 *See* David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2021 (2013) ("In the first systematic empirical study of lower court invocations of the distinction, we show that lower courts hardly ever refuse to follow a statement from a higher court because it is dictum.").

who would seek to evade a Supreme Court opinion on the ground that it is mere dicta.[91] A Supreme Court that understands its primary function to be lawmaking, rather than dispute settlement, will write opinions with the overt purpose of guiding and coordinating the future behavior of nonparties, and the distinction between dicta and holding will likely prove quite blurry.

I shall use the term "lawmaking authority" to denominate the authority necessary to sustain the promulgation of forward-looking law directed to governing the future behavior of nonparties. The promulgation of law is a paradigmatically political function. The exemplary exercise of lawmaking authority is the enactment of legislation. But whereas the lawmaking authority of a legislature is theoretically sustained by its representative character, in the United States the forward-looking lawmaking authority of a court is theoretically sustained by its backward-looking dispute settlement function.[92]

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91 The Court is of course well aware of this fact and has encouraged it. *See* Royal Canin U.S.A., Inc. v. Wullschleger, 145 S. Ct. 41, 57 n.10 (2025). During the argument of *Royal Canin U.S.A., Inc. v. Wullschleger*, Justice Alito remarked that "I was on a court of appeals for 15 years. If I saw a strong dictum in a Supreme Court decision, I would very likely just salute and move on." Transcript of Oral Argument at 36, *Royal Canin*, 145 S. Ct. 41 (No. 23-677). There is in fact explicit law on this subject in the courts of appeals. *See, e.g.*, Manning v. Caldwell, 930 F.3d 264, 282 (4th Cir. 2019) ("[L]ower courts grappling with complex legal questions of first impression must give due weight to guidance from the Supreme Court, so as to ensure the consistent and uniform development and application of the law."); Holt v. City of Battle Creek, 925 F.3d 905, 910 (6th Cir. 2019) ("[L]ower courts are obligated to follow Supreme Court dicta . . . ." (quoting *In re* Baker, 791 F.3d 677, 682 (6th Cir. 2015))); Peterson v. BMI Refractories, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997) ("[D]icta from the Supreme Court is not something to be lightly cast aside."); United States v. Baird, 85 F.3d 450, 453 (9th Cir. 1996) (stating that lower courts must "treat Supreme Court dicta with due deference"); Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) (stating that lower courts are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements"); McCoy v. MIT, 950 F.2d 13, 19 (1st Cir. 1991) (stating that lower courts are "bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings"); United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975) ("While [Supreme Court] dictum is not binding upon us, it must be given considerable weight and can not be ignored in the resolution of the close question we have to decide." (footnote omitted)).

For a rare example of a lower court judge distinguishing a Supreme Court opinion as dicta, see *United States v. Trump*, 740 F. Supp. 3d. 1245, 1253–54 (S.D. Fla. 2024) (Cannon, J.) (holding aspects of *United States v. Nixon*, 418 U.S. 683, 694 (1974), to be dicta). (I am grateful to Tom Schmidt for this reference.)

92 On the distinction between "forward-looking" law declaration and "backward-looking" dispute settlement, see *supra* note 79. This distinction is fundamental for common law systems.

IV. LAWMAKING, COMMON LAW, AND POSITIVISM

Classical common law adjudication explicitly joins lawmaking authority with the authority of finality. Common law courts simultaneously resolve disputes between parties and articulate law to govern future cases. The explicit union of these two distinct forms of authority introduces a notorious instability into common law decisionmaking, for it seems unfair to apply previously unarticulated law retrospectively to settle old disputes. Common law courts traditionally sought to deflect this difficulty by explaining that they did not really articulate new law but only enforced "public sentiment . . . crystallized in general custom."[93] The common law was said to be nothing other than the "settled conviction of the people as to what the rule of right and conduct should be on the subject to which it relates."[94]

Common law courts justified holding litigants retroactively accountable to what were in fact new legal standards on the ground that judges were enforcing principles that the public had already accepted. Common law courts thus sidestepped the political responsibility of making new law and asserted that they were instead applying preexisting (although heretofore unarticulated) social norms. No less a figure than Thomas Cooley argued that the public could therefore be expected more "spontaneously" to obey common law decrees than the artificial statutes promulgated by legislatures.[95]

During the decade of the 1920s, when America was violently divided by bitter controversies over issues like Prohibition and the status of labor,[96] it became increasingly implausible to imagine that courts could speak for the "general custom" or "settled conviction" of the people of the United States.[97] Courts were instead required to intervene into intense social conflicts, in which constitutive disagreement

93 T.M. Cooley, *Labor and Capital Before the Law*, 139 N. AM. REV. 503, 503 (1884).

94 *Id.*

95 *See id.* At the turn of the twentieth century, leading members of the bar regarded legislation as artificial because it did not arise from preexisting and traditional understandings. Legislation was therefore dismissed as "a mere product of sovereignty" or "the mere product of the popular will or of a legislative majority of the hour." John F. Dillon, Address of the President (Aug. 24, 1892), *in* 15 ANN. REP. A.B.A. 167, 200 (1892). Leaders of the bar routinely contrasted legislation to real "law." *See id.* "[T]he lawyer makes a sad mistake who supposes law to be the mere equivalent of written enactments or judicial decisions." *Id.* at 201. The American legal elite regarded legislation as "commands imposed upon society from without, either by an individual sovereign or superior, or by a sovereign body constituted by representatives of society itself." James C. Carter, Annual Address: The Ideal and the Actual in the Law (Aug. 21, 1890), *in* 13 ANN. REP. A.B.A. 217, 235 (1890). Law, by contrast, was the spontaneous self-ordering of society itself, "one of the elements of society springing directly from habit and custom." *Id.*

96 *See generally* POST, *supra* note 8, at 917–1100, 1217–429.

97 *See* Cooley, *supra* note 93, at 503.

undermined the conceptual rationale for common law decisionmaking. This was fertile ground for the rise of positivism as an alternative account of proper judicial behavior.

Drawing on his violent experience of the Civil War, Oliver Wendell Holmes, Jr., had since the late nineteenth century argued that society was a scene of struggle, not consensus.[98] To imagine courts as applying preexisting and commonly accepted customs and traditions was thus to perpetrate an ideological illusion.[99] Constructing the foundations of modern American positivism, Justice Holmes contended that courts ought instead to apply positive law enacted by legislatures,[100] whose representative nature invested them with a more legitimate form of lawmaking authority than common law courts could muster under conditions of social disagreement.[101] The relevance and urgency of Justice Holmes's revolutionary jurisprudential perspective[102] was reinforced by the massive federal administrative interventions required by Prohibition, which over great public objection ran roughshod over traditional customs and yet which required continuous and sustained judicial support.[103]

As the conceptual framework of positivism took hold, lawmaking in America began to move decisively away from courts and towards legislative bodies.[104] A dense network of legislation began to displace the spider's web of judge-made common law.[105] Judicial lawmaking

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98 *See* POST, *supra* note 8, at 169–70.

99 In his famous essay on *The Path of the Law*, Justice Holmes charged that much judge-made law, including the constitutional law of substantive due process, was the result of the "fear" of "the comfortable classes of the community" that they could "no longer hope to control the legislatures." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897). The Constitution, Justice Holmes later said in dissent in *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* Ferguson v. Skrupa, 372 U.S. 726 (1963), was "made for people of fundamentally differing views." *Id.* at 76 (Holmes, J., dissenting).

100 Justice Holmes stressed that legislatures should be regarded as the authentic "mouthpiece" of the State. The Hamilton, 207 U.S. 398, 404 (1907). The job of a court, according to Justice Holmes, was to enforce the will of the sovereign, which consisted of "the dominant forces of the community" represented in the legislature. *See* POST, *supra* note 8, at 170 (quoting Letter from Oliver Wendell Holmes, J., Sup. Ct., to Felix Frankfurter (Mar. 24, 1914), *in* HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934, at 19 (Robert M. Mennel & Christine L. Compston eds., 1996)).

101 *See* POST, *supra* note 8, at 169–72. Justice Holmes referred to "the right of a majority to embody their opinions in law." *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

102 To appreciate the revolutionary implications of Justice Holmes's positivism, compare the dominant view of the American legal establishment described *supra* note 95.

103 For a discussion, see generally POST, *supra* note 8, at 917–1095.

104 *See id.* at 993–98.

105 *See id.* at 994. During the 1920s, the Court interpreted the Constitution with the authority of a common law court. *Id.* at 1198. It conceived itself as speaking for "the general and dominant opinion of all the people in a community of common purpose, common

authority accordingly came under severe theoretical pressure, because positivism seemed to question the legitimacy of forward-looking, independent, judicially made law.[106] Yet the need for courts to declare law to settle existing disputes remained a stubborn fact of Article III adjudication.

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ideals and the common enjoyment of the blessings of liberty and justice." William Howard Taft, *Is Prohibition a Blow at Personal Liberty?*, 36 LADIES' HOME J., May 1919, at 31, 78; *see* POST, *supra* note 8, at 822–25. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), however, the Court deliberately renounced this common law authority, thereby producing an intellectual crisis about how to determine the substance of the positive law of the Constitution. POST, *supra* note 8, at 1197–99.

106 Positivists believed that the job of judges was to apply positive law, which was chiefly made by legislatures. *See* POST, *supra* note 8, at 1198. But they recognized that, in the words of H.L.A. Hart,

> in any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law . . . . If in such cases the judge is to reach a decision . . . he must exercise his *discretion* and *make* law for the case instead of merely applying already pre-existing settled law.

HART, *supra* note 70, at 272. Emphasizing the fundamental centrality of judicial dispute resolution, however, Hart explained that such judicial lawmaking

> may be regarded as a necessary price to pay for avoiding the inconvenience of alternative methods of regulating them such as reference to the legislature; and the price may seem small if judges are constrained in the exercise of these powers and cannot fashion codes or wide reforms but only rules to deal with the specific issues thrown up by particular cases.

Id. at 275.

Ronald Dworkin challenged positivism on the ground that it failed to recognize that fundamental moral principles could also be authoritative sources of law. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1977). By expanding the definition of law in this way, Dworkin was able to argue that judges could typically find preexisting law capable of deciding a case; they need not be put into the uncomfortable position of making new law. *Id.* at 46. "[J]udges neither should be nor are deputy legislators, and the familiar assumption, that when they go beyond political decisions already made by someone else they are legislating, is misleading." *Id.* at 82.

In essence, Dworkin sought to rehabilitate the structure of traditional common law adjudication, in which explicit judicial lawmaking was justified on the ground that judicially made law was always preexisting. The irony of Dworkin's position is that although it superficially seemed to oppose independent judicial lawmaking, it in fact justified far more aggressive judicial lawmaking than could be countenanced by positivists, who had cut their teeth opposing traditional common law adjudication. Just as with common law adjudication, the law made by a Dworkinian judge was most decidedly new law with respect to the public, although it may not be new law from the perspective of a judge who in good faith sought to apply what she regarded as preexisting law. *See infra* notes 246–47 and accompanying text.

It should be noted that many forms of contemporary common law doctrine, like those turning on standards of "reasonableness," explicitly require judges to continue the ancient common law tradition of ascertaining and applying preexisting social norms. *See, e.g.*, Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989).

These developments dramatically increased the stakes of ostentatiously subordinating judicial lawmaking authority to the authority of finality. Because the authority of finality is firmly anchored in the fundamental social need to settle disputes, American courts enjoy what political scientists call "diffuse support," which is a large "reservoir of good will."[107] This diffuse support endows American courts with room to declare law, even unpopular law,[108] so long as such lawmaking is perceived as necessary for resolving controversies.[109] But diffuse support for courts can deteriorate if courts are seen instead as more intent on forging new law than on retrospectively resolving controversies as impartial triadic decisionmakers.[110] Not only can courts then forfeit the

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107 James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 356 (2003); *see also* JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 3–4 (2009). Many social scientists are inclined to attribute this "institutional loyalty," GIBSON & CALDEIRA, *supra*, at 7, to the effective influence of "symbols of judicial legitimacy." *Id.* at 4. The question, however, is *why* these symbols are effective. Political scientist Tom Clark quotes a Justice as observing, "Once the public ceases to believe that the Court is not a political institution, they will no longer support the Court." TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 17–18 (2011). This suggests that the Court maintains diffuse support so long as the public believes that it is not acting politically but is instead functioning as a proper triadic decisionmaker, which is to say as an institution that impartially decides cases according to existing law. "[A] first principle for the Supreme Court is the maintenance of judicial legitimacy, which in part consists of the maintenance of the image of the courts as apolitical, legal institutions." *Id.* at 21.

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> Scholars distinguish between performance evaluations ("specific support") and institutional support ("diffuse support"), and argue that institutional support provides a "reservoir of goodwill" (institutional loyalty) that allows the institution to rule against the preferences of the majority, at least in the short term. If citizens are willing to stand by the institution even when dissatisfied with its decisions, then the institution is free to do its job as it sees fit.

James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the US Supreme Court: Is the Court's Legitimacy Imperiled by the Decisions It Makes?*, 80 PUB. OP. Q. 622, 625 (2016).

109 "A central tenet of the prevailing positivity theory model is that the fact that people view the Court legalistically insulates legitimacy from ideological updating effects." Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 412–13 (2015) (citation omitted); *see also supra* note 107.

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> For those who believe the Court proceeds on a case-by-case basis, legitimacy is quite high and is not as strongly rooted in ideological preferences. . . . [I]t is in the Court's best interests to convey this type of approach and perception to the public. For the roughly half of the public that sees the Court as issuing rulings on a case-by-case basis, legitimacy is quite high and ideology has a modest impact. For the other half of the public that sees the Court as liberal or conservative,

insulation that their dispute settlement function might otherwise provide for promulgating unpopular law,[111] but they can also become vulnerable to accusations that they are pursuing their own independent legal agenda instead of impartially settling disputes. It is thus very dangerous for American courts nakedly to assert the very lawmaking authority that they in fact habitually exercise.

V. THE INTRINSIC INSECURITY OF JUDICIAL LAWMAKING: PEREMPTORY JUDICIAL JUDGMENTS AND PROVISIONAL JUDICIAL OPINIONS

Appellate courts, Shapiro writes, "always exist in a state of tension between their basic source of legitimacy as . . . triadic resolvers of conflict and their position as government agencies imposing law on the citizenry."[112] This tension is manifest in the fraught relationship in American law between judicial *judgments* and judicial *opinions*.

Judicial judgments embody the authority of finality. They definitively settle disputes that are before a court. Judicial opinions, by contrast, serve both to explain a court's judgment to the parties as well as to lay down principles to guide the future behavior of persons who are not before the court.[113] If judgments embody the authority of finality, judicial opinions are vehicles for a court's lawmaking authority.

Rendering a judgment is the most fundamental function of a court. "The operative legal act performed by a court is the entry of a judgment . . . ."[114] Although it is difficult to imagine a court that does not issue judgments, it is common for some courts some of the time to

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> legitimacy is strongly rooted in ideological preferences, with those who disagree with the Court's policymaking registering the lowest legitimacy.

Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 197 (2013). The complex dynamic by which courts can come to lose public trust that they are functioning as impartial triadic decisionmakers may explain the fact that "a single incident may not destroy" judicial legitimacy, "but repeated violations of expectations over time can entirely deplete loyalty." GIBSON & CALDEIRA, *supra* note 107, at 5.

111 "[W]hen the Court is perceived as using an ideological decision-making process, pleasing decisions increase legitimacy and displeasing ones decrease legitimacy. . . . [W]hen the Court is perceived as using a principled decision-making process, legitimacy always increases regardless of the policy content of the decision." Benjamin Woodson, *The Dynamics of Legitimacy Change for the U.S. Supreme Court*, 39 JUST. SYS. J. 75, 89 (2018); *see also* Gibson & Nelson, *supra* note 108, at 626 ("[P]erceptions of procedural fairness may cushion the consequences of disappointment in an unwanted Court decision.").

112 SHAPIRO, *supra* note 64, at 56.

113 Of course, judicial opinions can serve other functions as well, like that of assuring judicial accountability. *See, e.g.*, Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19 (2005).

114 Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999).

function without opinions.[115] Judicial judgments must be final. "'[T]he judicial Power' means the power to decide cases with finality,"[116] so much so that if a legislature renders a court's judgments revisable, they are no longer cognizable as judicial judgments.[117] The judgments of a court command obedience.[118] They are peremptory.[119]

Judicial judgments have these properties because they settle disputes between parties. There is general agreement that the function of conclusively resolving conflicts is both socially indispensable and fundamental to courts. As between parties, we often care more that a controversy be resolved—that there be a judgment—than that the judgment be correct.

Judicial opinions are sometimes addressed to litigants in a case, so parties can more readily and willingly accept a judicial judgment. This use of a judicial opinion is ancillary to the dispute settlement function of a court. But insofar as a court is also exercising its lawmaking function, it uses opinions to offer guidance to nonparties about law that a court will apply in reaching future judgments.[120] Court opinions of this kind merit deference but are not binding.[121] "Under *Marbury*, the Court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is declared."[122]

Even if nonparties disagree with a court judgment, they may not ordinarily interfere with it or alter it.[123] By contrast, nonparties who oppose the reasons and conclusions in a court opinion frequently seek to limit and undermine the future force of the opinion. They may create test cases to prompt subsequent courts to revisit and revise prior judicial reasoning; they may work to enact legislation that will overturn

115 *See, e.g.*, Dennis Crouch, *Wrongly Affirmed Without Opinion*, 52 WAKE FOREST L. REV. 561, 566–69 (2017); Philip Marcus, *Affirmance Without Opinion*, 6 FORDHAM L. REV. 212, 213 (1937).

116 Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1314 (1996) (emphasis omitted).

117 *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113–14 (1948); United States v. Ferreira, 54 U.S. (13 How.) 40, 47 (1852).

118 *See* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993); Lawson & Moore, *supra* note 116, at 1313–14.

119 *See* 18 U.S.C. § 401 (2018).

120 *See, e.g.*, *supra* note 47.

121 *See* Hartnett, *supra* note 114, at 148–49, 154.

122 Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

123 *See, e.g.*, Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 692 n.32 (1979); Habelt v. iRhythm Techs., Inc., 83 F.4th 1162, 1164–65 (9th Cir. 2023); Marino v. Ortiz, 484 U.S. 301, 304 (1988) (per curiam); United States v. Hall, 472 F.2d 261, 262 (5th Cir. 1972); Kasper v. Brittain, 245 F.2d 92, 96 (6th Cir. 1957); 18 U.S.C. § 1509 (2018).

law declared in past court opinions; they may seek to obtain judicial opinions declaring different law in other jurisdictions; they may seek to change the composition or jurisdiction of a court.[124] "Disagreement with opinions is not the same as disobedience of judgments. . . . [A]ctions premised on disagreement with judicial opinions [are] commonplace."[125]

Insofar as judicial opinions can be said to create formal law, it is through the doctrine of stare decisis.[126] The doctrine applies to specific courts, but neither to courts generally[127] nor to the general public.[128] Even where stare decisis applies, moreover, sophisticated actors typically seek to channel the force of prior opinions by dismissing as dicta reasoning they find unconvincing. Judicial opinions written to serve as precedents are continuously modified through the endless play of dicta and holdings, not to mention outright overrulings. The Court has recently instructed us that without the ability to break free from stare decisis "American constitutional law as we know it would be unrecognizable, and this would be a different country."[129] It is by contrast extremely difficult to use ancillary suits subsequently to alter final judicial judgments.[130]

The carefully limited authority of judicial opinions suggests that outside the constraints of stare decisis, and to some nontrivial extent even within those constraints, judicial opinions acquire force when they are convincing to third parties. Opinions accumulate impact

124 *See* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1040–42 (2004).

125 Hartnett, *supra* note 114, at 154.

126 *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997–98 (1994) ("On the one hand, Article III's case-or-controversy requirement prohibits federal courts from issuing advisory opinions. Federal courts may not decide 'abstract, hypothetical or contingent questions'; they must instead limit their exercise of judicial authority to concrete disputes that arise out of the adversary process. On the other hand, the precept that like cases should be treated alike—rooted both in the rule of law and in Article III's invocation of the 'judicial Power'—rests upon the assumption that judicial decisions are necessarily abstract or general. To say that the reasoning in a prior case supports or even requires the same or similar result in a later case is to recognize that the first case does not merely resolve a dispute between the parties but announces a general principle applicable in future cases as well. Thus, Article III contains both a concreteness norm and an abstraction norm." (footnotes omitted) (quoting Ala. State Fed'n Lab. v. McAdory, 325 U.S. 450, 461 (1945))).

127 The opinion of one federal court of appeals, for example, does not control through stare decisis the decisions of a federal court of appeals in a different circuit.

128 A member of the general public litigating in a different jurisdiction than that of a negative court opinion, for example, is perfectly free to challenge the force of that opinion.

129 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2264 (2022); *see also id.* at 2263 n.48.

130 *See* United States v. Beggerly, 524 U.S. 38, 47 (1998) (holding that independent action for relief from judgment "should be available only to prevent a grave miscarriage of justice"); FED. R. CIV. P. 60.

through persuasion, which is a complex process. Judicial judgments are peremptory and monologic; a court speaks and we obey. But the persuasion attempted by a judicial opinion does not operate in this peremptory fashion. Persuasion cannot be compelled; it must be earned. Hence it is said that "[a] Court which . . . regards the continuing vitality of a decision as dependent 'altogether on the force of the reasoning by which it is supported' necessarily initiates a dialogue when it pronounces an opinion."[131]

The fundamental difference between opinions and judgments reflects the fact that the function of judgments is to decide, whereas a major function of opinions is to articulate law that a court believes should govern future behavior. We accept the peremptory quality of judicial judgments because we accept that disputes must be conclusively settled by decisions, even if decisions are arbitrary.[132] But we do not attach an analogous authority of finality to opinions. We do not invest judicial lawmaking with anything like the preclusive force of judicial judgments. The "business of the . . . judiciary is deciding cases, not saying what the law is."[133] Hence we hedge about the vitality of judicial opinions, both within and outside the profession.

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131 Wechsler, *supra* note 122, at 1003 (footnote omitted) (quoting Smith v. Turner, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting)).

132 *See, e.g.*, Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398–99 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. As this Court explained in *Baltimore S.S. Co. v. Phillips*, an 'erroneous conclusion' reached by the court in the first suit does not deprive the defendants in the second action 'of their right to rely upon the plea of *res judicata*. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action].' We have observed that '[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert.'" (alteration in original) (citations omitted) (first quoting Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 325 (1927); and then quoting Reed v. Allen, 286 U. S. 191, 201 (1932)).

133 Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 349 (1994). Eisgruber continues:

> Of course, judges must decide cases according to law, and so they must be able to say what law governs the case before them. But that feature of judicial practice does not distinguish the judiciary from any other branch of the federal government. To execute the law, the President must be able to say what law is being executed. And as for Congress, what is the legislative power, if not the power to say what the law is?

Id. at 349–50.

The stark contrast between our treatment of judicial judgments and our treatment of judicial opinions underscores the insecurity that, in the United States, envelops the practice of judicial lawmaking. We may accept the authority of finality and the power of courts definitively to declare the law as between litigants, but we are decidedly ambivalent about judicial lawmaking authority. That is why judicially declared law is continuously subject to opposition, reappraisal, and revision. Judicial lawmaking is in fact so provisional that it provokes the question of how it can ever be vindicated. How can we know whether the law declared in a judicial opinion is ever truly the law?

Lawyers and scholars typically seek to ascertain the validity of judicial opinions by evaluating them according to professional criteria of craft and competence. They may, for example, assess them within specific jurisprudential frames (like originalism or textualism). But these well-meaning efforts simply push back the fundamental question, for it must be then asked how the authority of professional criteria or jurisprudential frames can themselves be vindicated.

Insofar as judicial lawmaking is addressed not merely to the legal profession but to the general public,[134] judicial lawmaking authority, like all lawmaking authority, must ultimately be vindicated by public acceptance.[135] Its authority must arise from support in the "opinion" of the governed.[136] That opinion may be influenced by the practices

134 *See, e.g.*, *1922 House Hearing*, *supra* note 16, at 2 (statement of Hon. William Howard Taft) ("The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit.").

135 I realize that this account of the authority of law is in tension with a standard positivist account, which locates the authority of law in the application of secondary rules derived from a master rule of recognition. I am concerned here less with an internal account of legal authority than with an explanation of how law comes to exercise actual authority with regard to the public. That question depends upon a great deal more than the structure of rules. For a statement of law to exercise legal authority it must be respected by its addressees *as* law, which can never be completely determined by the properties of the rules authorizing the statement. A prominent example of a constitutional text that unquestionably met the rule of recognition and yet did not carry the authority of law for large swaths of the population is the Eighteenth Amendment, which created Prohibition. *See* POST, *supra* note 8, at 921–47. Pauline Sabin, head of the Women's Organization for National Prohibition Reform, put the matter most succinctly: supporters of Prohibition "thought they could make prohibition as strong as the Constitution, but instead have made the Constitution as weak as prohibition." *Four Women Lead Attack on Dry Law; Referendum Urged*, N.Y. TIMES, Feb. 14, 1930, at 18.

136 DAVID HUME, *Of the First Principles of Government*, *in* DAVID HUME ON MORALS, POLITICS, AND SOCIETY 147, 147 (Angela Coventry & Andrew Valls eds., 2018) ("[A]s FORCE is always on the side of the governed, the governors have nothing to support them but opinion. It is therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and

and judgments of legal professionals, but it is not determined by them.[137] The ultimate authority of judicial lawmaking, like that of all lawmaking purporting to govern the general public, derives from its political legitimacy.[138]

Hannah Arendt writes that "[t]o be political" means to reach decisions "through words and persuasion and not through force and violence."[139] We may support judicial judgments with force and violence, but judicial opinions possess primarily the force of their reasoning and narratives. Opinions that fail to persuade are drained of vitality; their force is clipped and cabined.[140] If judicial judgments are peremptory and definitive, the law declared in judicial opinions persists at the sufferance of professional and public acceptance.

Abraham Lincoln's classic discussion of *Dred Scott*[141] in his first Inaugural Address well describes the complex and fraught relationship in American law between judicial opinions and judicial judgments:

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most popular."). "[T]he Court relies on political will in order to be an efficacious governing institution." CLARK, *supra* note 107, at 260.

137 Legal professionals determine the competence of law made in judicial opinions by applying professional practices of legal interpretation and application. These practices are heavily influenced by underlying jurisprudential perspectives, which can be more or less controversial. The judgment of legal professionals may significantly affect how judicially made law is received by the public. But professional judgments do not *determine* the public's reception of judge-made law, which will ultimately turn on the political factors by which public opinion is formed. Those factors may of course include an appreciation of maintaining a professionally autonomous rule of law, with all the elaborate apparatus of secondary rules implied by such a rule of law. But it must nevertheless be kept clearly in mind that the professional appraisal of judicial opinions and the ultimate authority of the law declared in those opinions are two distinct concepts. *See supra* note 135 and accompanying text; *infra* note 138 and accompanying text.

138 Richard Fallon calls this "sociological legitimacy" and posits that it resides in public "acceptance." Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1840 (2005). Fallon contrasts sociological legitimacy with "legal legitimacy," which turns on "legal authorization" as determined by "constitutional and legal norms." RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 35 (2018). Legal legitimacy depends upon "intrasystemic criteria," which refers to the judgment of legal professionals. *Id.* Fallon notes "that legal legitimacy depends fundamentally on sociological legitimacy." Fallon, *supra*, at 1848; *see also supra* note 137.

139 HANNAH ARENDT, THE HUMAN CONDITION 26 (2d ed. 1998).

140 *Compare, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968), *with* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982); Roe v. Wade, 410 U.S. 113 (1973), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *with* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); Reed v. Town of Gilbert, 576 U.S. 155 (2015), *with* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), *with* United States v. Rahimi, 144 S. Ct. 1889 (2024).

141 Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all paralel [sic] cases, by all other departments of government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if 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.[142]

VI. THE CHANGING NATURE OF SUPREME COURT OPINIONS

Before the Judiciary Act of 1925, the Supreme Court of the United States functioned chiefly as an ordinary final appellate tribunal. Its docket was dominated by cases arising in its mandatory jurisdiction, a large proportion of which were routine and trivial.[143] The opinion writing practices adopted by the Court were appropriate to that role. The Court wrote a great many opinions designed to dispose of trifling cases.[144] In such circumstances, a primary function of the Court's opinions was to explain to litigants the final judgments of the Court.[145]

This is not to deny, of course, that the Court could also publish significant opinions making important prospective law for the nation. Some of the Court's best known and most consequential decisions, stretching back to the days of Marshall, featured opinions of this kind, which scholars collect and reproduce in constitutional law textbooks. Many of these decisions were in their time enormously controversial, as illustrated by the examples of *Dred Scott* and *Lochner*.[146] But the bulk

142 Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* THE WRITINGS OF ABRAHAM LINCOLN 324, 329–30 (Steven B. Smith ed., 2012).

143 *See supra* Part I.

144 *See supra* Part I.

145 It was said, for example, that Justice Brandeis "seemed to believe that the opinion should be powerful enough to convince even the losing party, and when a rehearing was sought he felt a sense of failure." Paul A. Freund, *Justice Brandeis: A Law Clerk's Remembrance*, 68 AM. JEWISH HIST. 7, 11 (1978).

146 *See Dred Scott*, 60 U.S. (19 How.) 393; Lochner v. New York, 198 U.S. 45 (1905), *overruled by* Ferguson v. Skrupa, 372 U.S. 726 (1963). For a prominent example of such an opinion during the 1920s, see POST, *supra* note 8, at 755–91 (discussing Adkins v. Child's Hosp., 261 U.S. 525 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)).

of the Court's opinions were not of this character.[147] Mostly the Court authored opinions analogous to the run-of-the-mill decisions characteristic of a contemporary federal court of appeals.

A statistical portrait of the Court's opinions lends credence to this characterization. In the 1924 Term, for example, the Court published 231 signed majority opinions, which averaged about six pages in length.[148] On average, these opinions were delivered about seventy days after argument, and about ninety percent of them were unanimous.[149] These numbers are significantly different from those that characterize the opinions of the contemporary Court, which, thanks to the Judiciary Act of 1925, is no longer a court designed "to ensure that justice is done in the particular case" but instead an institution designed "to manage a system whose goal is to provide justice."[150] During the 2005–2011 Terms, the contemporary Court decided an average of only seventy-eight fully argued cases per Term.[151] The Court's majority opinions averaged a whopping sixteen pages in length and took an average of 95.1 days to produce after argument.[152] Only thirty-four percent of the Court's fully-briefed and argued decisions were unanimous.[153]

These numbers demonstrate that the contemporary Court decides far fewer cases per term than the pre-1925 Court. The Court's majority opinions are now almost three times longer than those of the pre-1925 Court, and the contemporary Court takes about thirty-five percent longer to write these more elaborate opinions. Contemporary court decisions are far more contentious than those produced in the era before the Judges' Bill; the percentage of unanimous opinions has dropped by about two-thirds.

No doubt many diverse circumstances have contributed to these enormous changes in the Court's opinion writing practices, but certainly one important factor is that the Court now selects its cases on the basis of whether it believes that an opinion is necessary for the future development of federal law. This means that the Court writes opinions less to justify judgments to litigants than to provide prospective "guidance"[154] and to make the law "clearer for the general

147 *See* POST, *supra* note 8, at 603.

148 *Id.*

149 *See id.* at 603, 611 fig.IV-12.

150 Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 717 (1984).

151 *See* POST, *supra* note 8, at 604 fig.IV-4.

152 *See id.* at 603.

153 *See id.* at 611 fig.IV-12.

154 *See supra* text accompanying notes 44 and 46.

public."[155] This major shift in orientation was the explicit purpose of the Judiciary Act of 1925.

The shift implies that the Court's judgments now matter less and its opinions more. "[O]ver the past half century," Ashutosh Bhagwat wrote in 2000, "the Supreme Court has evolved into an institution different in kind from all other federal courts, functioning as a rule maker and legislature . . . rather than a resolver of disputes."[156] The consequence of what Henry Monaghan calls "the triumph of the law declaration model"[157] is that the Court now relies less on its authority of finality and more on its lawmaking authority.[158] Because the Court has become "predominantly a law-declaration court, not a dispute-resolution court,"[159] its opinions have become longer, more complex, and more contentious. This transformation is a little theorized but momentous implication of the Judges' Bill.[160]

To appreciate the significance of this change, we need to keep in mind the tentative and vulnerable nature of judicial lawmaking.[161]

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155 *See* Taft, *supra* note 50, at 35.

156 Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"*, 80 B.U. L. REV. 967, 968 (2000). "For all practical purposes, then, the modern Supreme Court does not resolve disputes between litigants, it does not decide cases, and it does not enforce legal rights or duties. . . . What is surprising is that the Supreme Court seems to make law *in the same way* as Congress and other legislatures . . . ." *Id.* at 993–94. "The Court's almost complete abandonment of its dispute resolution function in favor of abstract rulemaking appears to be a modern phenomenon." *Id.* at 995.

157 Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 722 (2012). On the distinction between the law-declaration model and the dispute-settlement model, see *supra* note 79.

158 This shift is reinforced by the modern practice of the Court to grant certiorari to decide specific questions of law rather than to resolve an underlying controversy. As a practical matter, therefore, the Court uses the power of the Judges' Bill to consider "abstract" questions of law rather than to settle disputes. *See* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 846 (2022) (noting that as a result of the Judges' Bill "the 'interesting' questions could be plucked from the record and considered in the abstract" and that "the Court gradually abandoned the case adjudication model in certiorari"); Monaghan, *supra* note 157, at 689–90.

159 Thomas P. Schmidt, *Orders Without Law*, 122 MICH. L. REV. 1003, 1017 (2024) (footnote omitted) (book review).

160 Analogous changes occurred in the opinion practices of state supreme courts once they were awarded discretionary control over their dockets. Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 981–84, 991–92, 995–97 (1978). After achieving control over their own dockets, such courts produced fewer, longer, and often (but not always) more contentious opinions. *Id.* State supreme courts were invested with discretionary control over their caseload so that they could "concentrate primarily on the most important cases, on articulating and elaborating principles of law." *Id.* at 1000. The change "weakened some traditional institutional restraints on activism." *Id.* at 1001.

161 *See supra* text accompanying notes 120–31.

Judicial lawmaking authority is especially problematic in the area of constitutional law, an awkwardness vividly captured by Alexander Bickel's acerbic evocation of the "counter-majoritarian difficulty."[162] Bickel coined the phrase to emphasize the potential embarrassment entailed in substituting judicial lawmaking "by mostly unaccountable jurists for a different judgment by politically accountable actors."[163] The uneasy nature of judicial lawmaking authority in America is manifest in the earnest efforts of many to deny its existence and to claim that courts do not make forward-looking law but simply excavate preexisting law in the facts of original public meaning[164] or in the facts of history and tradition.[165]

Whether we call it "interpretation,"[166] or "construction,"[167] or "analogy,"[168] however, lawmaking is inevitable for a court, and especially for a Court whose entire docket consists of close, difficult, and controverted cases. The fact of judicial lawmaking has been apparent since the 1920s, when sophisticated observers came to understand that, in Holmes's elegant and influential account, courts in a "doubtful case" must exercise "the sovereign prerogative of choice."[169] As Benjamin Cardozo more delicately and perhaps more accurately put the point in 1921, "I have grown to see that the [judicial] process in its highest reaches is not discovery, but creation."[170]

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162 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (Yale Univ. Press, 2d ed. 1986).

163 Michael C. Dorf, *Constitutional Courts in Defective Democracies*, 62 VA. J. INT'L L. ONLINE 47, 51 (2021) (footnote omitted). "[M]uch has been written on the subject of whether and when the Supreme Court usurps legislative power." Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 164 (2011); *see, e.g.*, Smith, *supra* note 79, at 592.

164 *See, e.g.*, Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) [hereinafter Solum, *The Fixation Thesis*]; Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 278 (2017); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 415 (2013).

165 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022); Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & PUB. POL'Y 59 (2023).

166 *See* Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 13–14 (1990).

167 *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5 (1999); Solum, *The Fixation Thesis*, *supra* note 164, at 5.

168 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

169 Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460–61 (1899). Virtually all cases on the docket of the contemporary Court are in this sense "doubtful."

170 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166 (1921); *see* POST, *supra* note 8, at 650.

VII. LAWMAKING WITHOUT DISPUTE SETTLEMENT

American legal practice justifies and cabins judicial lawmaking authority in terms of a court's need to assert its authority of finality. It is generally accepted that if a court must settle a dispute according to law, it must also determine so much of the law as is necessary to resolve the case. If a court has no choice but to decide a case, it has no choice but *pro tanto* to articulate relevant law, even if that law is forward-looking.[171] Courts use their opinions to explain the law they have made, and so much of their opinions as are necessary to support their judgments will be given future effect as law through the doctrine of stare decisis.[172] This is the nub of the logic that *Marbury* found compelling.[173]

This logic justifies judicial lawmaking authority on the ground that courts must decide cases.[174] It postulates that a court's dispute settlement function is primary and its lawmaking function secondary. It is apparent, then, that this logic does not justify judicial lawmaking directed primarily to the general public rather than to litigants. It does not justify the claim in *Cooper v. Aaron* that judicial lawmaking is "of binding effect" on "[e]very state legislator and executive."[175] Nor does it support the claim made by the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that the Court is "invested with the

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171 *See supra* Section III.A.

172 Through the application of "vertical," as distinguished from "horizontal," stare decisis, the binding legal effect of a decision of the Supreme Court on a matter of federal law is especially strong because a Supreme Court decision putatively controls all lower court decisions on the question. *See* Dorf, *supra* note 126, at 2025; Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 436–37 (1992); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994). But even in this context it is well to remember Chief Justice Taney's comment that he was

> quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

Smith v. Turner, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting).

173 See *supra* text accompanying note 122.

174 Professor John Harrison notes that

> [t]he Constitution allocates to the courts the case deciding power, the power to issue judgments, that is where the duty to obey judgments comes from. The power to interpret the Constitution, however, comes from the case-deciding power. To suggest that the power to interpret is primary and the case deciding power secondary, is to misinterpret the Constitution and to confuse cause and effect.

John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 373 (1988).

175 Cooper v. Aaron, 358 U.S. 1, 18 (1958).

authority to . . . speak before all others" for the "constitutional ideals" of the people.[176]

Although many have noted that in recent decades the Court has with increasing confidence claimed expansive lawmaking authority of this kind,[177] it is far from clear what might sustain this claim. It does not follow from the narrow need to settle disputes. If it is to be justified, it must be by reference to an entirely different kind of rationale.[178] What is for our purposes striking, however, is that the procedural

176 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992), *overruled by* Dobbs v. Jackson Women's Health Org. 142 S. Ct. 2228 (2022).

177 *See, e.g.*, Monaghan, *supra* note 157, at 669 ("Current doctrinal developments reflect a powerful drive to ensure that (a) the Court can have the final say when any other court, state or federal, rules on the constitutionality of government conduct; and (b) the Court possesses wide-ranging agenda-setting freedom to determine what issues are to be (or not to be) decided, irrespective of the wishes of the litigants."); Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 41 (2023) (arguing that "the Roberts Court has elevated judicial self-aggrandizement to new heights"); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 113 (2022) (arguing that the Roberts Court "is consolidating its power, systematically undercutting any branch of government, federal or state, that might threaten that power"); Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 487 (2018) ("The idea that the Supreme Court has ultimate authority in matters of constitutional interpretation . . . has acquired strong currency. . . . [I]t has substantially eclipsed 'departmentalist' theories . . . ."); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 963 (2004) ("After *Cooper v. Aaron*, the idea of judicial supremacy seemed gradually, at long last, to find active and widespread public acceptance." (footnote omitted)); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003) (describing how the Court has increasingly claimed exclusive authority to interpret the Constitution); Akhil Reed Amar, *The Supreme Court, 1999 Term–Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 82–83 (2000) (observing that the Rehnquist Court was "fond of sweeping assertions of judicial supremacy, regularly proclaiming itself the Constitution's 'ultimate' interpreter, a self-description that nowhere appears in *Marbury* and never appeared in the *United States Reports* until the second half of the twentieth century" (footnote omitted)).

The Court's expansive claims of power extend across substantive areas and institutional practices. *See, e.g.*, Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 2 (arguing that the Roberts Court's revival of the major questions doctrine syphons power from the political branches to the Court); Amanda L. Tyler, *Judicial Review in Times of Emergency: From the Founding Through the COVID-19 Pandemic*, 109 VA. L. REV. 489, 525–46 (2023) (describing how the Roberts Court was exceptionally active in asserting its power against the political branches during the COVID-19 pandemic compared to past emergency-era Courts).

178 For an especially elegant and influential effort to articulate such a rationale, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (relying on the need for courts to protect representation-reinforcing values).

innovations of the Judges' Bill gesture powerfully toward exactly this kind of expansive lawmaking.[179]

The rules of the Court, for example, state that a grant of certiorari will in part depend upon whether "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court."[180] Some such rule has been in place since the Judges' Bill was passed in 1925.[181] The rule refers neither to a particular kind of dispute nor to a particular class of litigants, but instead to what Charles Evans Hughes once called "the appropriate settlement of questions of general importance."[182] The rule thus positions the Court as the guardian of the law's integrity. It presupposes that the Court independently knows which questions of federal law are significant enough to require uniform national articulation, as well as what an "appropriate" resolution of these questions might be.[183]

The Judiciary Act of 1925 endows the Court with discretion to choose which disputes to decide because a "higher principle of

179 It should be noted in this context that Taft's appointment was generally understood to form part of a larger political agenda to return the nation to "normalcy." *See* POST, *supra* note 8, at 681–82. Montana District Judge George Bourquin once noted in a published opinion:

> It is said that Chief Justice White admitted that "in my time we relaxed constitutional guarantees from fear of revolution," and that Chief Justice Taft declared that "at a conference I announced 'I have been appointed to reverse a few decisions,' and," with his famous chuckle, "I looked right at old man Holmes when I said it."

Invs.' Syndicate v. Porter, 52 F.2d 189, 196 (D. Mont. 1931) (Bourquin, J., dissenting), *rev'd*, 286 U.S. 461 (1932), *aff'd on reh'g*, 287 U.S. 346 (1932). The chief opponent of the Judges' Bill, Montana Senator J. Walsh, who would later become FDR's choice for Attorney General, remarked:

> The House Committee on the Judiciary was told by the Chief Justice that the bill is the work of the Justices of the Supreme Court. If so, it exemplifies that truism, half legal and half political, that a good court always seeks to extend its jurisdiction, and that other maxim, wholly political, so often asserted by Jefferson, that the appetite for power grows as it is gratified.

62 CONG. REC. 8547 (1922).

180 SUP. CT. R. 10(c).

181 The original rule explaining criteria for granting writs of certiorari was drafted by Justice Van Devanter and published in 1925. *See* POST, *supra* note 8, at 497 n.51. It provided that a grant of certiorari would in part depend upon whether a federal circuit court of appeals "has decided an important question of federal law which has not been, but should be, settled by this court." SUP. CT. R. 35(5)(b), 266 U.S. 681 (1925) (repealed 1928).

182 *See* Hughes, *supra* note 57, at 315.

183 Tejas N. Narechania estimates that grants of certiorari to decide "important" questions "account for about one-third to one-half of the Court's entire docket." Narechania, *Important Cases*, *supra* note 15, at 938.

importance to the public at large is involved."[184] The Court's apparent obligation is to use its opinions, rather than its judgments, to clarify such principles. The implication is that the Court should use case selection as a vehicle to supervise the proper development of federal law, thereby transmuting cases into "law-shaping instruments of judicial policy."[185] This virtually inverts the logic of *Marbury*. It makes the Court's lawmaking authority primary and its dispute settlement function secondary.[186] In the context of constitutional law, the country might well ask how the Court can claim authority to "establish our national priorities" in this way.[187]

The Court itself sometimes seems uncomfortable with explicitly owning and defending any such broad policymaking authority. In the controversial case of *Bush v. Gore*, for example, while emphasizing its deep respect for "the vital limits on judicial authority," the Court nevertheless defended its momentous and far-reaching decision with these odd words: "When contending parties invoke the process of the courts, however, it becomes our *unsought responsibility* to resolve the federal and constitutional issues the judicial system has been forced to confront."[188]

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184 *See Appeals from Federal Courts*, *supra* note 57, at 7 (statement of Hon. Charles Evans Hughes). One criterion for granting certiorari that the Court has articulated from the outset has been the need to resolve conflicts among the circuits of the federal courts of appeals. *See* SUP. CT. R. 35(5)(b), 266 U.S. 681 (1925) (repealed 1928); *cf.* SUP. CT. R. 10(a). Studies estimate that the Court chooses to resolve only about one-third of circuit splits, *see* Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 449 (2019), and that decisions involving lower court disagreements about federal law account for "about 45% of the Court's cases," Narechania, *Important Cases*, *supra* note 15, at 938 n.71.

185 Fish, *supra* note 37, at 549; *see supra* text accompanying note 37; Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1166 (2011) (stating that the Judges' Bill transformed the Court into "an agenda-setting agency").

186 *See* Cordray & Cordray, *supra* note 32, at 404 ("[T]he . . . result . . . of the certiorari process is to make the votes cast on certiorari seem almost legislative or prerogative in character.").

187 *Warren Attacks*, *supra* note 38, at 728; *see supra* text accompanying note 61. In defending the Court's wide-ranging discretion to determine its own docket, Justice Goldberg once argued that "[t]he power to decide cases presupposes the power to determine what cases will be decided." Arthur J. Goldberg, *The Case Against a National Court of Appeals*, WASH. POST, Jan. 6, 1973, at A14. Harvard Professor Paul Freund immediately shot back: "Whence comes this asserted principle? Not, surely, from the Constitution, as the history of criminal appeals demonstrates." Paul A. Freund, *Why We Need the National Court of Appeals*, 59 A.B.A. J. 247, 251 (1973); *see* Cordray & Cordray, *supra* note 32, at 395 n.33.

188 Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam) (emphasis added). On the Court's discomfort with the essentially political responsibility of exercising its vast discretion with regard to petitions for certiorari, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9–10 (1959).

Bush v. Gore came to the Court through the discretionary writ of certiorari.[189] The Court was not "forced" to decide anything; it *sought* the responsibility of resolving the constitutional issues involved in the case, which concerned the selection of an American President.[190] It is reasonable for members of the public to ask why the Court chose that moment and that occasion to exercise its dispute settlement and lawmaking functions.[191] Although the Supreme Court indisputably possesses authority definitively to resolve a specific case, we lack any accepted explanation of why it can also claim authority to set the constitutional agenda for the nation.

VIII. SUPREME COURT OPINIONS AND DEMOCRATIC ACCOUNTABILITY

By emphasizing the Court's lawmaking function at the expense of its dispute settlement function, the Judiciary Act of 1925 set in motion profound changes in the orientation of Supreme Court opinions. A century after the Act, the Court no longer decides routine cases. It addresses only significant disputes that the Court has itself selected as appropriate vehicles for offering prospective guidance to the public.[192] It is natural, therefore, for Justices on the Court now to assume that the fundamental purpose of a Court opinion is to establish "law and judicial action, aimed at the future"[193] rather than retroactively to apply pre-existing law to settle specific disputes. And it is also natural for "Congress, the bar, and the public" to "expect the Supreme Court"[194] to assume a large "role 'as a prominent [national] policymaker,'"[195] and to regard Justices as "policy entrepreneurs."[196]

The contemporary Court selects cases and crafts opinions consciously designed "authoritatively"[197] to clarify "tremendously important principles, upon which are based the plans, hopes, and

189 *See* Bush v. Gore, 531 U.S. at 100.

190 *See id.* at 103.

191 *See, e.g.*, Robert Post, *Sustaining the Premise of Legality: Learning to Live with* Bush v. Gore, *in BUSH V. GORE*: THE QUESTION OF LEGITIMACY 96, 103 (Bruce Ackerman ed., 2002) ("It is evident that at every stage the Court deliberately chose to intervene in the Florida election, and the question is why.").

192 It might be more accurate to state that the Court now frequently decides only those important questions of law that it grants certiorari to consider. *See supra* note 158.

193 STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 86 (2021).

194 *Warren Attacks*, *supra* note 38, at 728; *see supra* text accompanying note 62.

195 Brian Christopher Jones, *The Legal Contribution to Democratic Disaffection*, 75 ARK. L. REV. 813, 854 (2023) (alteration in original) (quoting Buchman, *supra* note 36, at 1).

196 RICHARD L. PACELLE, JR., THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION 31 (1991).

197 Taft, *supra* note 10, at 2; *see supra* text accompanying note 52.

aspirations of a great many people throughout the country."[198] So, for example, in the highly controversial case of *Trump v. United States* the Court did not even bother to resolve the specific controversy before it, but instead concentrated on formulating general constitutional principles to guide judges and government officials in the future.[199] As Justice Gorsuch remarked during the oral argument of the case, "We're writing a rule for the ages."[200] Justice Kavanaugh quickly agreed, stating that "like Justice Gorsuch, I'm not focused on the here and now of this case. I'm very concerned about the future."[201]

Justices Gorsuch's and Kavanaugh's spontaneous remarks reveal a great deal about the current orientation of the Court. They underscore the extent to which present members of the Court conceive their task as making "the law clearer for the general public,"[202] regardless of the actual controversy before them.[203] They illustrate the diminishing traction of the traditional distinction between holdings and dicta. And they therefore force us to ask how the Court might *justify* prospective lawmaking of this kind, which seems quite remote from retrospective

198 Vinson, *supra* note 28, at 552; *see supra* text accompanying note 60.

199 Trump v. United States, 144 S. Ct. 2312 (2024).

200 Adam Liptak, *Split Court Hints at Some Immunity for Ex-Presidents*, N.Y. TIMES, Apr. 26, 2024, at A1; *see* Transcript of Oral Argument at 141, Trump v. United States, 144 S. Ct. 2313 (No. 23-939).

201 Transcript of Oral Argument, *supra* note 200, at 143. (I am grateful to Gerson Zweifach for this reference.)

202 Taft, *supra* note 50, at 35; *see supra* text accompanying note 51.

203 It has thus been said that the Court "no longer sits as a mere law court with its specific duties defined by others but is indeed now a self-defining superlegislature, or even a constitutional convention in black robes." Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 597 (2009); *see* Samuel R. Olken, *The Decline of Legal Classicism and the Evolution of New Deal Constitutionalism*, 89 NOTRE DAME L. REV. 2051, 2088–89 (2014). Oddly enough, when James M. Beck, the Solicitor General of the United States and "perhaps the leading conservative constitutional theorist of the 1920s and 1930s," MARK V. TUSHNET, THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930–1941, at 552 (2021), testified before Congress in 1922 in favor of the Judges' Bill, he did so in part because:

> [T]he Supreme Court of the United States is a quasi constitutional convention. The Federal convention of 1787 simply worked out the ground plan and left it to the future builders to build upon it. . . .
>
> Now, please remember that your whole form of government is being slowly evolved, the superstructure slowly erected, brick on brick, pillar upon base, and capital upon pillar, by this court. Now, to do that adequately there must be time, but unfortunately to-day, on these constitutional questions, there is generally insufficient time to argue them with the care and learning that was bestowed upon similar arguments in bygone generations. We go through these cases like an express train and the wonder is how admirably, upon the whole, the court has done its work, when the time for deliberation and oral argument is so limited.

1922 House Hearing, *supra* note 4, at 17 (statement of Hon. James M. Beck). Beck was frank to assert that the court was "a political juridical body." *Id.* at 26.

triadic dispute resolution and yet which also seems explicitly contemplated by the Judiciary Act of 1925.

It took a very long time for members of the Supreme Court to begin routinely structuring their opinions toward prospective lawmaking rather than retrospective dispute resolution. As this new orientation started to sink in, however, obvious questions started bubbling to the surface. It became important to distinguish judicial lawmaking from lawmaking by representative institutions like Congress, legislatures, or city councils. By the 1950s, this issue had become an obsession among legal scholars and professionals, and it has remained so ever since.[204]

It is particularly difficult to justify prospective judicial lawmaking in the context of constitutional decisionmaking. Although we still believe Congress might possibly act to correct judicial misinterpretations of federal legislation—so that we might imagine statutory interpretation as a potential dialogue between Court and Congress—everyone also understands that constitutional amendments to correct judicial errors are now essentially impossible to ratify. This creates severe tension between the peremptory nature of judicial judgments, which must be accepted by litigants, and the dialogic nature of forward-looking constitutional lawmaking, which must ultimately earn authority by persuasion.

The most foundational principle of American democracy is that lawmaking authority must be responsive to the views of citizens.[205] We take great pains to design our lawmaking institutions to facilitate this responsiveness.[206] That is why democracy is often defined as "government by public opinion,"[207] and why in the United States we strive through First Amendment protections to ensure that "[a]uthority . . .

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204 Exemplary is Wechsler, *supra* note 188. For my own effort to address this perennial question, see Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319 (2010).

205 *See* Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, *in* DEMOCRATIC COMMUNITY: NOMOS XXXV 163 (John W. Chapman & Ian Shapiro eds., 1993).

206 *See, e.g.*, ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 13–14 (2014).

207 CARL SCHMITT, CONSTITUTIONAL THEORY 275 (Jeffrey Seitzer ed. and trans., Duke Univ. Press 2008); *see, e.g.*, HANS KELSEN, GENERAL THEORY OF LAW AND STATE 287–88 (Anders Wedberg trans., 1945) ("A democracy without public opinion is a contradiction in terms."); CHARLES HORTON COOLEY, SOCIAL ORGANIZATION: A STUDY OF THE LARGER MIND 118 (1909) (noting that democracy is "the organized sway of public opinion"); Jos. R. Long, *The Freedom of the Press*, 5 VA. L. REV. 225, 225 (1918) ("[D]emocracy is government by public opinion."); Ashutosh Bhagwat, *Judge Johnson and the Kaleidoscopic First Amendment*, 71 ALA. L. REV. 755, 762 (2020) ("[P]ublic opinion . . . has always been understood to be at the heart of a democracy based on popular sovereignty.").

is . . . controlled by public opinion, not public opinion by authority."[208] Although constitutional lawmaking in America acquires authority through popular support,[209] we lack institutional mechanisms designed clearly to express public opinion when the Court chooses to make prospective constitutional law.[210]

Responsiveness to public opinion, moreover, is precisely problematic in the context of the judicial dispute settlement function. Public opinion should not control judgments imposed on litigants by courts. Such judgments should instead reflect professionally competent understandings of law. As Justice Alito, quoting Chief Justice Rehnquist, recently asserted in *Dobbs*: "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution."[211]

Justice Alito and Chief Justice Rehnquist refer to the legitimacy that courts derive from authoritatively settling disputes. Courts possess the authority to issue preemptory legal judgments because we require that disputes be definitively settled and demand that they be resolved according to impartial law. We want such judgments to reflect competent legal expertise rather than public sentiment. But insofar as the Court's constitutional opinions address the general public and not the "mere interest of the litigants,"[212] the Court cannot justify the exercise of its lawmaking authority on the basis of its dispute settlement function. It must instead appeal to forms of accountability that are appropriate for making constitutional law, which, in American democracy, can never lie solely in the exercise of professional competence.[213] The

208 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

209 *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1499–1500 (1988) ("I take American constitutionalism—as manifest in academic constitutional theory, in the professional practice of lawyers and judges, and in the ordinary political self-understanding of Americans at large—to rest on two premises regarding political freedom: first, that the American people are politically free insomuch as they are governed by themselves collectively, and, second, that the American people are politically free insomuch as they are governed by laws and not men [sic]." (alteration in original) (footnotes omitted)).

210 By contrast, in the context of federal statutory interpretation, popular support might perhaps be inferred by the action or inaction of a democratically accountable Congress.

211 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2278 (2022) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part)). "[W]e cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work." *Id.*

212 *See supra* text at note 58.

213 "When judges assume the role of lawmakers . . . they invite political accountability of the sort to which we subject our legislators." Carrington & Cramton, *supra* note 203, at 594; *see supra* note 142 and accompanying text.

legitimacy of our constitutional law always also involves a measure of democratic responsiveness.[214]

As a practical matter, our courts typically decide cases by asserting *both* lawmaking authority and the authority of finality. By speaking simultaneously to the public and to litigants, courts blend these two different forms of authority inextricably together, even though each must ultimately answer to its own distinct logic, temporality, and audience. It is thus very difficult for the public to respond to judicial lawmaking in a coherent and organized way. The dispute settlement function of a court decision might merit respect, even if its lawmaking function is otherwise objectionable.

For our purposes, it is important to stress that one conclusion stands out clearly from this confusion: courts lack the requisite authority to decree the constitutional fate of the American nation. Courts are authorized peremptorily and professionally to decide the fate of litigants, but not of the whole American people. That is the enduring point made by Lincoln in the context of *Dred Scott*.[215]

The upshot is that the vitality of salient Court constitutional opinions primarily designed "to guide the other branches of the Government and the people of the United States,"[216] opinions specifically encouraged and facilitated by the Judges' Bill, in fact depend largely on diffuse forms of public acceptance that can take decades to materialize. It took almost half a century for our best scholars to perceive and theorize this point. Herbert Wechsler articulated it *en passant* in 1965,[217] but in the following decade Alexander Bickel gave it full and lucid formulation.

"Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives," Bickel wrote.[218] "They are never, at the start, conversations between equals. The Court has an edge, because it initiates things with some immediate action, even if limited. But conversations they are . . . ."[219] Bickel did not shy away from the startling

214 Compare, for example, Justice Alito's comment in *Dobbs*, *supra* note 211 and accompanying text, with Justice Kagan's comment that "it would be a 'dangerous thing' for the court and for democracy if the justices stray too far from public sentiment and lose the confidence of Americans," Nick Ehli & Robert Barnes, *Kagan Says Questions of Legitimacy Risky for Supreme Court*, WASH. POST (July 21, 2022, 6:07 PM EDT), https://www.washingtonpost.com/politics/2022/07/21/elena-kagan-supreme-court-legitimacy/ [https://perma.cc/E5LB-B5SH].

215 *See supra* text accompanying note 142.

216 Taft, *supra* note 42, at 852; *see supra* text accompanying note 46.

217 *See supra* text accompanying note 131.

218 ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91 (Yale Univ. Press, 2d ed. 1978) (1970).

219 *Id.*

implication of this thought: "[T]o say that the Supreme Court lays down the law of the land is to state the ultimate result, following upon a complex series of events, in some cases, and in others it is a form of speech only."[220]

Bickel's insight explains the seeming puzzle of Archibald Cox's striking apercu that "the principle of *Brown v. Board of Education* became more firmly law after its incorporation into title VI of the Civil Rights Act of 1964."[221] The passage of the Civil Rights Act signified public acceptance of the groundbreaking constitutional principles advanced by the Court ten years before in *Brown*. The Act showed that the people were at last and after much controversy prepared to accept those principles as self-binding law.[222] Cox's elliptical comment emphasizes that the Court's lawmaking in *Brown* required popular support for its ultimate vindication. *Brown* became "more firmly law" only because the nation itself positively responded to the Court's call for a new understanding of the Fourteenth Amendment.[223]

IX. DISTINGUISHING LAWMAKING AUTHORITY FROM THE AUTHORITY OF FINALITY

It is fair to say that Justices of the Court in the era prior to the Judiciary Act of 1925 would not have imagined the authority of Supreme Court opinions in this way. They would instead have viewed that authority almost entirely through the lens of the Court's dispute settlement function, which is to say that they would have understood the Court's opinions as definitive and peremptory statements of law vindicated by official authority and professional reason rather than by public acceptance.[224]

This perspective is understandable, because in those years the Court produced a great many opinions constructed to dispose of routine cases.[225] When the Court did compose an opinion seeking

220 *Id.* Bickel elaborated in another work: "The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed." BICKEL, *supra* note 162, at 239.

221 Archibald Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966).

222 For a long time after 1954, "[e]lected officials were reluctant to enforce desegregation following *Brown* because the public did not approve of the decisions and would punish their representatives if they were to act against segregation." CLARK, *supra* note 107, at 3. On the political struggles that defined the principles that the nation would ultimately attribute to *Brown*, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004).

223 Cox, *supra* note 221, at 94.

224 On the distinction between official authority and professional reason as paths for vindicating Court opinions, see POST, *supra* note 8, at 649–79.

225 *See id.* at 603.

proactively to change the public law of the country, it assumed that the opinion would carry the same authority of finality with respect to the nation as it did with respect to litigants before the Court.[226] As Justice McReynolds affirmed apropos of the Judges' Bill, the "great fundamental purpose of the Supreme Court . . . is to *settle* the law."[227]

This fusion of the authority of finality and lawmaking authority is what underlay the astonishingly high rates of unanimity that characterized Supreme Court opinions in the era before the Judiciary Act of 1925. It has been accurately observed that the "increase in the frequency of the issuance of separate opinions is a central event in the history of the Court's opinion-delivery practices."[228] Between 1912 and 1936, unanimity rates for fully briefed and argued Court decisions hovered in the range of seventy-five to ninety percent; by 1948 they had collapsed into the range of twenty-five to forty percent.[229]

The old practice of unanimity rested on the belief that judicial opinions should carry the same peremptory authority as judicial judgments. Dissent was suspect because it undermined the Court's twin obligations definitively to resolve a case and conclusively to settle the substance of the law.[230] The point was clearly expressed by a legal commentator in 1898:

> There never should be a dissenting opinion in a case decided by a court of last resort. No judge, lawyer or layman should be permitted to weaken the force of the court's decision, which all must accept as an unappealable finality. . . .
>
> . . . .
>
> It is a maxim of the law that it is to the interest of the public that there should be an end to litigation. It certainly is to the interest of

226 *See id.* at 655.

227 Letter from James C. McReynolds to Thomas J. Walsh, *supra* note 55 (emphasis added); *see also* Taft, *supra* note 50, at 35–36 (arguing that the function of the Court is "to pronounce the last word on every important issue" and to declare every "principle that needs settlement"); Hughes, *supra* note 57, at 315 (arguing that the function of the Court is to secure "the appropriate settlement of questions of general importance."). In 1909, in his treatise on the New York Court of Appeals, the apex tribunal in the New York system of courts, Judge Cardozo affirmed that the "court's function in our judicial system" is "settling the law." BENJAMIN N. CARDOZO, THE JURISDICTION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK § 6, at 11 (2d ed. 1909); *see supra* note 44.

228 John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 178 (1999).

229 POST, *supra* note 8, at 611.

230 *See id.* at 610–48. As the prominent constitutional commentator Hampton Carson once put it: "As a general rule, dissenting opinions receive slight attention. The active practitioner is chiefly concerned with the law as it is declared by the majority of a court, and pays little heed to a shrill or feeble shriek as to what it might or ought to be." Hampton L. Carson, *Great Dissenting Opinions*, 50 ALB. L.J. 120, 120 (1894).

> the public that when a question is settled by the highest tribunal, it should remain settled for all time. The result of a dissenting opinion is simply to open up for future discussion, bickering and litigation the question which should then be finally settled by that tribunal. Somebody must settle the question; it must be settled somewhere; that tribunal has been selected as the final arbiter, and when it once settles it, it should remain settled forever.[231]

Insofar as legal professionals at the turn of the twentieth century imagined judicial opinions as both providing "an end to litigation" and settling "for all time" questions of law, they conceptualized the authority of finality as inseparable from lawmaking authority.[232] They believed that the function of a court decision was both conclusively to resolve a particular controversy and to fix "forever" the substance of law.[233] Almost all Justices in the early twentieth century regarded dissent as anomalous because it interfered with these two functions.[234]

Underlying this attitude toward dissent lies the assumption that law is static and stable, which is why the Court's declarations of law could be imagined to be as permanent and as definitive as its judgments. The Judiciary Act of 1925, however, was premised on a very different conception of law. The Act charged the Court with the task of supervising the development of federal law, which presupposes the ongoing evolution of federal law over time. Once law is conceived as malleable in this way, dissent becomes meaningful, and perhaps even attractive, because, in the words of Charles Evans Hughes, it constitutes "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[235]

The collapse of the Court's unanimity rates was connected to the Court's growing understanding that its lawmaking authority was distinct from its authority of finality. If the audience of the latter are

231 *Evils of Dissenting Opinions*, 57 ALB. L.J. 74, 74–75 (1898).

232 *Id.* at 75.

233 *Id.*

234 As Justice Edward Douglass White once put it, "[t]he only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort." Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 608 (1895) (White, J., dissenting), *vacated*, 158 U.S. 601 (1895). Even Justice Holmes believed that it was "useless and undesirable, as a rule, to express dissent." N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). Although Justice Brandeis abided by the same "norm of acquiescence" that was accepted by all Justices in the 1920s, POST, *supra* note 8, at 627, he nevertheless was also working toward a conception of law as developing in time that would eventually justify more modern conceptions of dissent. *See id.* at 388–89, 630.

235 CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS, AN INTERPRETATION 68 (1928).

litigants immediately before the Court, the audience of the former are members of the public who potentially stretch far into the future. If lawsuits demand definitive resolution, declarations of law require instead legitimacy, which depends upon acceptance by the "intelligence" of professionals and of the governed, a condition that can change over time.[236] It is for this reason impossible to fix and settle law in the same way that the outcome of litigation can be fixed and settled.

Dissents thus operate quite differently in the context of the Court's authority of finality than in the context of its lawmaking authority. Although dissents may be unavailing against the force of a judgment, they can mightily influence the future vitality of an opinion. Dissents accordingly become more important to Justices as the Court's lawmaking authority grows in significance relative to its dispute settlement function, and as the Court begins to understand itself as declaring the kind of law that will evolve in response to the developing "intelligence" of the nation.[237]

There are of course many reasons other than the enactment of the Judges' Bill that caused American judges to imagine law as evolving over time. The idea that law must adjust to changing circumstances lay close to the core of American legal realism, in both its Darwinian and pragmatic dimensions. But it is also indisputable that the Judiciary Act of 1925 put the concept of malleable law squarely at the center of the Court's own jurisdictional practices. It encouraged Justices to imagine certiorari decisions as implicating the possible creation of potentially distinct legal futures. If dissenting practices are any guide, it took something more than a decade for members of the Court to internalize the profound implications of conceiving law as developing over time, which in turn required the Court to distinguish its lawmaking function from its dispute settlement function, its opinions from its judgments.

The old view of Supreme Court opinions as definitive, however, still lingers. One can hear its echoes whenever one reads that the Court's constitutional opinions rule controversial issues "off-limits to politics" or that such opinions are "*democracy-foreclosing*."[238] These characterizations of Supreme Court opinions privilege the peremptory finality asserted by the dispute settlement function of the Court. It imagines judicial opinions as participating in the preclusive force of judicial judgments. But insofar as Court opinions are a form of prospective lawmaking, such claims radically misperceive how salient Court opinions actually work in American life. As Jon Stewart

236 *Id.*

237 *Id.*

238 CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 26 (1999).

ironically said twenty years ago of *Roe v. Wade*[239]: "The Court rules that the right to privacy protects a woman's decision to have an abortion and the fetus is not a person with constitutional rights, thus ending all debate on this once-controversial issue."[240]

X. THE CHANGING PERCEPTION OF THE SUPREME COURT AS AN INSTITUTION

It might at this point be objected that the Supreme Court has always exercised *both* dispute settlement and lawmaking obligations. Shapiro was in fact explicit that this duality is characteristic of all government-established courts, especially appellate courts.[241] And so, the objection would run, the Judiciary Act of 1925 did not really alter anything. As the examples of *Lochner* and *Dred Scott* illustrate, the Court's seemingly narrow authority of finality could always provide a springboard for virtually unbounded proactive lawmaking authority. Whereas the Court's judgments were ordinarily regarded as binding, the Court's lawmaking was always in fact exercised at the sufferance of public opinion, regardless of whether legal professionals imagined that the Court was declaring law permanently fixed by timeless canons of legal reasoning.[242] None of this was changed by the Judges' Bill.

Although there is truth to this objection, it overlooks the fact that the institutional authority of an American appellate court very much depends upon the balance between its dispute settlement and lawmaking functions. It is one thing to be a court that chiefly settles disputes but that occasionally must also write opinions declaring proactive law with far-reaching public consequences. It is quite another to be a court whose chief task is to compose long, complex opinions designed to make far-reaching and significant prospective law at the expense of virtually invisible litigants. The institutional imperative of conflict resolution cannot plausibly justify the lawmaking authority of the second kind of court.

The Judiciary Act of 1925 was a pivotal moment in the Court's evolution from the first kind of institution to the second. Over time, the Act has helped change the Court from a tribunal that was perceived as making law in the context of settling disputes into one whose chief

239 Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

240 JON STEWART ET AL., AMERICA (THE BOOK): A CITIZEN'S GUIDE TO DEMOCRACY INACTION 90 (2004).

241 *See supra* notes 76–78, 80–84, 112 and accompanying text.

242 That the substance of American constitutional law is, and has always been, imbricated in the unfolding intellectual history of the nation is a basic fact that ought to counsel caution to those who advocate for forms of constitutional interpretation that imagine themselves outside of historical time.

task is now understood to be setting the national agenda for the future development of constitutional law.[243] It is apparent that the second kind of institution must vindicate its authority in very different ways than the first. The palpable difference between these two distinct types of institutions is visible today in the contrast between ordinary federal appellate courts and the Supreme Court.[244]

Although it can accurately be said that both ordinary federal appellate courts and the Supreme Court must resolve disputes and at the same time make law, the equilibrium between these two functions differs radically as between these two distinct kinds of tribunals. Because courts of appeals are the front line for resolving the inevitable controversies that afflict our society, we regard them as institutions in which the function of dispute settlement is primary and the function of lawmaking is secondary.[245] Because courts of appeals must maintain their status as impartial triadic decisionmakers, they properly seek to make law in the guise of Dworkin's Hercules,[246] who modestly articulates his

243 For a detailed study of the Court's agenda-setting techniques, see generally PACELLE, *supra* note 196.

244 *See, e.g.*, Monaghan, *supra* note 157, at 684 ("The Court's current place in our constitutional order distinguishes it in kind, not in degree, from other courts."); Charles M. Cameron & Lewis A. Kornhauser, *Theorizing the U.S. Supreme Court*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS 4 (2017) ("[T]he Supreme Court is unlike other courts in the U.S. judicial hierarchy in that its primary business is not disposing of cases—though it must always do that—but rather creating policies.").

245 *See, e.g.*, Bhagwat, *supra* note 156, at 1002 ("[T]he modern Supreme Court has bifurcated the 'judicial power' of the United States into two different powers: the traditional dispute-resolving, precedent-making power wielded by the 'inferior' federal courts; and the power to establish abstract rules, disconnected from legal reasoning or the facts of individual cases, wielded by the Supreme Court."); BICKEL, *supra* note 162, at 173 (noting that lower federal courts must "resolve all controversies within their jurisdiction, because the alternative is chaos").

246 *See generally* DWORKIN, *supra* note 106, at 105–30. Dworkin created the model of Hercules to show that a sufficiently talented judge could claim that pre-existing law typically provided adequate resources for deciding virtually any case. *Id.* at 115–16. Judges therefore did not need to make new law to decide cases. To reach this conclusion, however, Dworkin was forced to concede that he was deploying an indeterminate concept of pre-existing law. Dworkin explained that Hercules may not

> reach exactly the same conclusions that any other judge would reach about disputed cases . . . . On the contrary, he will then become like any reflective member of the community willing to debate about what fairness or equality or liberty requires on some occasion. But we now see that it is wrong to suppose that reflective citizens, in such debates, are simply setting their personal convictions against the convictions of others. They . . . are contesting different conceptions of a concept they suppose they hold in common.

Id. at 128. The clear implication of this concession is that although the law made by Hercules may not be new from Hercules's perspective, it will almost certainly be received as new by the public.

own best view of what the law already is.[247] Before the Judiciary Act of 1925, the Supreme Court was largely (although not entirely) regarded as a court of this kind.[248]

But the Judiciary Act of 1925 eventually pushed the Court to evolve into a very different kind of institution. The Supreme Court is no longer on the front line to resolve disputes. No one now believes that the Supreme Court functions like an ordinary federal appellate court that is passively dedicated to settling controversies. The Supreme Court is instead viewed as an institution whose purpose is proactively to reach out to clarify standards when the law is uncertain or otherwise in need of a firm guiding hand to direct its future growth. Hence the veil of dispute settlement can no longer effectively cloak the Court's lawmaking authority, which must be deployed almost in full public view.

That is why the country experiences the Court as an "effective policy maker"[249] whose task is to set "national priorities in constitutional and legal matters."[250] The Justices who opposed the National Court of Appeals (NCA) proposed by Paul Freund's blue-ribbon Study Group in 1973,[251] and who argued that the NCA was undesirable because it would disable the Court's discretionary ability to select cases that would serve as proper vehicles for setting the national constitutional

247 *See supra* notes 85, 106, and 246. On the need to resolve disputes on the basis of pre-existing law, see *supra* note 67. When lower court judges lose their appreciation of this distinctive role and begin to write opinions that "audition" for promotion to the Supreme Court, which is to say opinions that explicitly seek to make new law, they undermine the stability of the dispute settlement function of lower courts. *See, e.g.*, Sean O'Driscoll, *Aileen Cannon 'Auditioning' for Trump Supreme Court Spot: Legal Analyst*, NEWSWEEK (July 29, 2024, 4:09 AM EDT), https://www.newsweek.com/donald-trump-aileen-cannon-jack-smith-florida-classified-documents-mar-lago-1918891 [https://perma.cc/LP7H-BB34]; *see also supra* note 91. For a normative account of the difference between the role of Supreme Court Justices and the minimalist role of judges in lower federal courts, see Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829 (2022).

248 Prior to the Act, "the Court was in many respects a supreme corrector of errors, a common law court which on sporadic occasions concerned itself with great national legal issues." Gressman, *supra* note 31, at 756. The contemporary Court, by contrast, is an overtly "politico-legal institution." *Id.* at 759.

249 James L. Gibson, Milton Lodge & Benjamin Woodson, *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 L. & SOC'Y REV. 837, 839 (2014).

250 *Warren Attacks*, supra note 38, at 728; *see supra* text accompanying note 61. "[T]he Court's conduct has solidly reflected the conviction, increasingly widespread among lawyers as well as academic theorists, that they are a primary framer of what the law ought to be, and not merely a reporter of what it is." Carrington & Cramton, *supra* note 203, at 604 (emphasis omitted).

251 *See* Freund, *supra* note 187, at 247; Estreicher & Sexton, *supra* note 150, at 689–704; Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 813–23 (2020).

agenda,[252] unmistakably signaled that the Court's lawmaking authority had become primary and its dispute settlement function secondary.[253]

This altered equilibrium has profoundly changed the public perception of the Supreme Court as an institution. In the candid but perhaps overly blunt assessment of Judge Posner, the Court "has departed from the conventional model of appellate adjudication," and we need "to accept its basically legislative character."[254] "[T]he Court tries to use the few cases that it agrees to hear as occasions for laying down rules or standards that will control a large number of future cases . . . ."[255] It has become "political in the sense of having and exercising discretionary power as capacious as a legislature's."[256]

The distinctive institutional orientation of the modern Court carries important implications for how Justices go about their job. Commentators worry that "the Justices themselves, engaged in work that is increasingly distinct from that of other courts, will have ever greater difficulty in adhering to the line that separates the judicial role from the legislative."[257] The vast proliferation of constitutional theory, which was quite scant in the years before the Judiciary Act of 1925, suggests how seriously those within the legal system take the task of justifying and channeling an expansive lawmaking authority that seems liberated from the quotidian constraints of dispute settlement.[258]

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252 *See* Estreicher & Sexton, supra note 150, at 691. Freund's Study Group proposed that the NCA would determine which cases the Supreme Court would decide on the merits. *See* Freund, *supra* note 187, at 250.

253 *See, e.g.*, William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477, 481 (1973) (arguing that "the screening function [of discretionary certiorari] is second to none in importance" in part because it allows Justices to identify "appropriate vehicles for . . . dissents"); *Warren Attacks*, *supra* note 38, at 728 (expressing concern that the NCA's selection of cases "would be divorced from any intimate understanding of the concerns and interests and philosophies of the Supreme Court justices"); Goldberg, *supra* note 187, at A14; *see also* Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J. 253, 254–55 (1973).

254 Richard A. Posner, *The Supreme Court 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 37 (2005).

255 *Id.*

256 *Id.* at 40.

257 Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 437.

258 "[N]ormative constitutional theorists have developed various prescriptions for the use of judicial review by the Court." CLARK, *supra* note 107, at 3. On the relatively recent development of constitutional theory, see Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 512 (2000). Mark Tushnet identifies the 1960s as the beginning of an era of "grand theory" in constitutional law. *See* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 1 (1988). For a prominent example of such constitutional theory, see ELY, *supra* note 178.

It was perhaps during Chief Justice Warren's leadership that the Court began most fully and self-consciously to inhabit the role enabled by the Judiciary Act of 1925.[259] The Warren Court deliberately seized control over the direction and substance of American constitutional law. It imagined itself as a leader of the nation's constitutional culture. There is little doubt that the modern explosion of American constitutional theory was provoked by *Brown v. Board of Education*,[260] which was a monumental and contested exercise of the Warren Court's lawmaking authority.[261] Although the efflorescence of constitutional theory largely sought to legitimate the role of the Warren Court,[262] legal scholarship was ultimately powerless to quell the intense controversy sparked by the Court's conspicuous and unapologetic exercise of lawmaking authority.

Constitutional theory, however masterful, can never substitute for the processes of political legitimation that must ultimately vindicate judicial lawmaking.[263] Even though much judicial lawmaking is barely noticed by the public, judicial lawmaking that is salient and contentious is subject to political, not theoretical challenge. *Brown* has endured because the Warren Court correctly understood the temper of the American people. But many aspects of the Warren Court's agenda provoked such sustained political opposition that, in the hands of President Ronald Reagan's Attorney General Edwin Meese, it found expression in a new jurisprudence of originalism that sought to counter "the radical egalitarianism and expansive civil libertarianism of the Warren Court."[264]

Those who opposed the constitutional vision of the Warren Court now hold the reins of judicial power. In part inspired by the example of Meese, the contemporary Court espouses forms of doctrine that were developed to attack Warren Court decisions, including *Brown*

259 *See, e.g.*, *supra* text accompanying notes 61–62. Warren's defense of the Judges' Bill comes very close to being an explicit defense of the importance of the Court's role in setting the agenda for American constitutional law.

260 Brown v. Bd. of Educ., 347 U.S. 483 (1954). On the connection between the emergence of constitutional theory and *Brown*, see Whittington, *supra* note 258, at 512–13.

261 *Brown* is famous for distinguishing between questions of law and issues of remedy, *Brown*, 347 U.S. at 495, thus opening a large conceptual gulf between the Court's lawmaking and dispute resolution functions.

262 *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); ELY, *supra* note 178; Fiss, *supra* note 68.

263 *See supra* notes 137–38.

264 Edwin Meese III, Att'y Gen., Dep't of Just., Speech to the American Bar Association (July 9, 1985) (transcript available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf [https://perma.cc/XT68-DTE3]); *see* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1138–69 (2023).

itself.[265] On questions of substance, therefore, the Roberts Court could not be more different from the Warren Court. But the deep historical irony of our current situation is that the Roberts Court, while dismantling the jurisprudence of its predecessor, has at the same time fully and unconditionally embraced the judicial *role* pioneered by the Warren Court.

Like the Warren Court, the contemporary Court plainly and publicly aspires to reshape the landscape of American constitutional law.[266] The Roberts Court makes little effort to cloak its lawmaking power in the necessity of dispute settlement. And it is this conspicuous role as an agenda setter and lawmaker—a gift of the Judiciary Act of 1925—that continues to prompt political contention and crisis. Once the Court openly embraces judicial lawmaking unconstrained by dispute settlement, its essential legitimacy becomes dangerously vulnerable to challenge. Not only is the Court at risk of losing its diffuse support, but its fundamental role as an impartial triadic decisionmaker is undermined if the public comes to believe that the Court is intently pursuing its own independent constitutional agenda.

265 Reva Siegel convincingly argues that the theoretical origins of originalism trace back to the South's defense in *Brown v. Board of Education*. As *Brown* became a canonized decision, the immediate target of originalism shifted to the arena of gender equality and to decisions like *Griswold v. Connecticut* and *Roe v. Wade*. *See* Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 118–19, 123–125 (2023); *see also* Calvin Terbeek, *"Clocks Must Always be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821 (2021).

266 *See, e.g.*, Karen M. Tani, *The Supreme Court 2023 Term—Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 27 (2024) ("[T]he Court's discretion has flowed along particular channels—toward issues that have preoccupied the conservative legal movement and the people that constitute it . . . ."); Richard M Fre, *Foreword: To a Conservative Warren Court*, 139 HARV. L. REV. 1, 3 (2025) ("The present Court is a 'Conservative Warren Court.' That is, it possess the defining traits that the Warren Court did, but in political opposite."); Josh Chafetz, *The New Judicial Power*, 67 St. Louis U.L.J. 635, 635 (2023) ("The judges are out of control."). In his contribution to this symposium, Judge Hardiman rejects "the notion that the Roberts Court has 'maintain[ed] the Warren Court's wholesale commitment to judicial lawmaking.'" Thomas M. Hardiman, *The Judiciary Act of 1925: Essential Change for the Supreme Court and the United States Courts of Appeals*, 100 NOTRE DAME L. REV. 2093, 2120 (2026). I would have thought that decisions like *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), and *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), would have been unmistakable evidence of the Roberts Court's ambitions in this regard. But if irrefutable evidence of a deep ambition to remake the landscape of American constitutional law is still required, I would suggest that the reader consult the Court's decision in *Trump v. Slaughter*, 606 U.S. __ (2025). The Roberts Court is apparently so anxious to overrule *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), that it cannot even defer its decision until after a decent briefing and full argument.

By maintaining the Warren Court's wholesale commitment to judicial lawmaking at the expense of dispute settlement, the Roberts Court has put itself in precisely the same precarious position as its predecessor. Because challenges to judicial lawmaking are political in nature, substantive jurisprudential theories, however masterful, are no more able to save the Roberts Court than they were able to save the Warren Court back in the 1960s.[267] The Roberts Court can promulgate authoritative and enduring law only if it can find some way to endow the law it declares with political legitimacy.[268]

XI. THE LOOMING CRISIS OF SUPREME COURT AUTHORITY

The Court now faces a powerful dilemma. The more prominent the Court's lawmaking function grows, the more vulnerable becomes the Court's claim to be an impartial third-party referee who settles controversies on the basis of pre-existing law.[269] This creates a serious temptation for the Court to deny its own lawmaking authority and to claim, as Chief Justice Roberts did at his confirmation hearings, that "Judges and Justices are servants of the law, not the other way around.

267 *See supra* note 137.

268 The project of democratic constitutionalism espoused by Reva Siegel and me is designed to offer a solution to this problem, one which takes full account of the fact that the legitimacy of prospective judicially constructed law must in the end be determined by the opinion of the people. *See, e.g.*, Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003). As the political scientist Tom Clark puts it, "[i]n order to protect" their "legitimacy . . . courts—the Supreme Court in particular—often have an incentive to engage in a deeply political calculation." CLARK, *supra* note 107, at 21–22. An important question is whether democratic constitutionalism can be sustained under conditions of extreme polarization. *See* FALLON, *supra* note 138, at 157–58.

269 Attacks on the Court's legitimacy as an impartial triadic decisionmaker are common whenever its lawmaking is sufficiently controversial. *See, e.g.*, DONALD GRIER STEPHENSON, JR., CAMPAIGNS & THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS 157 (1999) (describing how President Franklin Delano Roosevelt announced in a "Fireside Chat" that "[t]he Court has been acting not as a judicial body, but as a policy-making body" (quoting Franklin D. Roosevelt, Defending the Plan to "Pack" the Supreme Court (Mar. 9, 1937), *in* FDR'S FIRESIDE CHATS 83, 88 (Russell D. Buhite & David W. Levy eds., 1992))); *id.* at 181 (describing how President Richard Nixon criticized members of the Court during his 1968 presidential campaign for acting like "super-legislators with a free hand to impose their social forces and political viewpoints on the American people" (quoting E.W. Kenworthy, *Nixon, in Texas, Sharpens His Attack: Nixon Scores 'Indulgence,'* N.Y. TIMES, Nov. 3, 1968, at 1)); *id.* at 204 (describing how Ronald Reagan pitched his campaign as seeking to appoint judges who possess a "judicial philosophy of self-restraint to allow the people, not judges, to govern"). "To the extent that people come to view nominees to the high bench as 'politicians in robes,' the distinctive non-political character of the Supreme Court can be undermined, opening the door for reconsideration of loyalties toward the institution itself." GIBSON & CALDEIRA, *supra* note 107, at 14.

Judges are like umpires. Umpires don't make the rules, they apply them."[270] One can easily understand why Justice Kavanaugh recently felt impelled to assert in the pages of the United States Reports that the Court should adopt a "properly neutral judicial role" which refuses to impose "policy views on the American people."[271]

The Judiciary Act of 1925 has so transformed the Supreme Court that such claims are, to put it politely, radically implausible. The Act has created a structure in which the Court virtually has no choice but to exercise proactive and highly visible lawmaking authority. The Court's use of its "vast discretion" to set the constitutional agenda for the nation is open, flagrant, and undeniable.[272] To pretend that the Court is not exercising this lawmaking authority endangers the very trust required by the Court to perform its dispute settlement function.[273] Chief Justice Roberts and Justice Kavanaugh have put themselves in the compromised position of denying the obvious, and this awkward stance threatens potentially grave consequences.

Although the Court's authority of finality is peremptory, it is also brittle. Once confidence in the Court's trustworthiness as an impartial triadic decisionmaker is lost, attacks on its jurisdiction are to be

270 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th CONG. 55 (2005) (statement of Hon. John G. Roberts, Jr.).

271 United States v. Rahimi, 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring). Justice Kavanaugh explicitly repeated the claim that "[j]udges are like umpires, as THE CHIEF JUSTICE has aptly explained." *Id.*

272 *See, e.g.*, Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779 (2012); Narechania, *Important Cases*, *supra* note 15, at 934–35.

273 *See supra* text accompanying note 73. In his contribution to this symposium, Judge Hardiman reaffirms the "umpire" metaphor. Hardiman, *supra* note 266, at 2121. Judge Hardiman appears to mean by this metaphor that judges should not act in "a political or ideological way," *id.*, which is both unobjectionable and correct. But Chief Justice Roberts and Justice Kavanaugh invoke the metaphor to mean something very different, which is that judges merely find and apply *pre-existing* law; they do not "make" law. Yet even Justice Scalia has explicitly asserted that neither he nor "our forebears" were "naive" enough to accept that proposition. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgment); *see supra* note 85. As the very phenomenon of circuit splits suggests, no one knows what the law "is" until the Court decides it by majority vote. And even after the Court has "decided" the law, the nation often continues to debate the merits of its opinions, *see supra* text accompanying notes 215–23, so that in truth we do not know what the law "is" until that debate has ended. It may be, however, that Judge Hardiman means only to claim that when the Court announces "what the law is," Hardiman, *supra*, at 2119 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)), it does so with the full authority of our highest and final court. If so, then Judge Hardiman is of course correct, and the precise question raised is the authority of our highest and final court to settle the law with respect to non-parties.

expected.[274] Public confidence is endangered if the Court insists on flatly denying what everyone otherwise knows, which is that the Court is proactively making law. It is far too late to attempt to conceal what even a first-year law student can plainly see.

Insofar as the contemporary Court wishes to continue in the footsteps of the Warren Court by conspicuously using lawmaking authority to reshape American federal law, it must find some way to acknowledge and justify its unique authority by rendering it accountable and persuasive.[275] Failing that, the Court will remain entangled in a serious double bind. The continuous, prominent, and proactive exercise of its lawmaking authority threatens to undermine public perceptions of its impartiality, but the far-fetched denial of its lawmaking threatens to undermine its credibility. This double bind portends a sadly downward spiral in the legitimacy of the Court as an institution.[276]

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274 *See, e.g.*, *supra* text accompanying notes 73–75; David H. Gans, *Court Reform and the Promise of Justice: Lessons from Reconstruction*, 27 LEWIS & CLARK L. REV. 825 (2023); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021) (providing an overview of court reform mechanisms and advocating reforms that strip the courts of power); Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 992–93 (1982). Historically, Court disempowerment has been advocated by both the political left and the political right. For conservative efforts to strip power from the Court, see Travis Christopher Barham, *Congress Gave and Congress Hath Taken Away: Jurisdiction Withdrawal and the Constitution*, 62 WASH. & LEE L. REV. 1139, 1143–44 (2005) ("During the 1970s and 1980s, several bills proposed stripping the federal courts of jurisdiction over school prayer, abortion, and busing cases. Between 1935 and 1981, at least sixty-four such bills were introduced in Congress." (footnotes omitted)). For progressive efforts, see WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937 (1994).

275 Alexander Bickel thought that the Court could achieve this end only if it exercised the responsibility of judicial statesmanship. *See* David Wolitz, *Alexander Bickel and the Demise of Legal Process Jurisprudence*, 29 CORNELL J.L. & PUB. POL'Y 153, 159 (2019); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 979–93 (2008); Post & Siegel, *supra* note 177, at 28–29; Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1487 (2007).

276 *See, e.g.*, Brendan Rascius, *Supreme Court approval rating sinks to a new low, poll finds*, Miami Herald (August 8, 2025), [https://perma.cc/9Y9S-7DZE]; https://www.miamiherald.com/news/nation-world/national/article311637428.html; Press Release, Quinnipiac Univ. Poll, Nearly 7 in 10 Favor a Limit on How Long SCOTUS Justices Can Serve, Quinnipiac University Poll Finds, (May 18, 2022), https://poll.qu.edu/poll-release?releaseid=3846 [https://perma.cc/9LMW-PFAK] ("A majority of Americans (63 percent) say the Supreme Court is mainly motivated by politics, while 32 percent say the Supreme Court is mainly motivated by the law."); Andrew Romano, *Poll: Confidence in Supreme Court has Collapsed Since Conservatives Took Control*, YAHOO! NEWS (May 10, 2022, 8:24 AM EDT), https://www.yahoo.com/news/poll-confidence-in-supreme-court-has-collapsed-since-conservatives-took-control-122402500-122402682.html [https://perma.cc/LJ94-9TUD] ("A full three-quarters of registered voters (74%) now think the court has become 'too

Of course, the Court is caught in this double bind primarily because it is choosing to make law that is both politically salient and highly controversial. In the past, however, the Court has enjoyed some insulation from the full consequences of making unpopular law due to the diffuse support it enjoys on account of its dispute settlement function. But this support depends upon public perception that the Court is in fact engaged in bona fide triadic decisionmaking.[277] It is not surprising, therefore, that the Roberts Court has repeatedly sought to reassert the connection between its lawmaking and conflict resolution by prominently invoking standing doctrine to assure the public that it still makes law only in the context of real disputes.[278] The difficulty, however, is that even the most stringent standing doctrine cannot endow the Court's proactive lawmaking with the diffuse support generated by triadic decisionmaking.

A Court that imagines its central role to be promulgating forward-looking law, an orientation well illustrated by *Trump v. United States*,[279] cannot be constrained by standing doctrine. The importance of prospective lawmaking was at the heart of the Judges' Bill, which encouraged the Court to issue rules "for the benefit and guidance, not of the particular litigant affected, but of the communities at large."[280] Standing doctrine may limit the parties before the Court, but it does nothing to restrain a Court determined to use its cases primarily as vehicles for making proactive law.

A Court that decides less than one hundred carefully selected cases each year is in any event unlikely to be associated in the public mind with the social function of conflict resolution. It is more likely to

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politicized' . . . ."); Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [https://perma.cc/55FG-EE8L] ("By all Gallup measures, then, Americans' opinions of the Supreme Court are the worst they have been in 50 years of polling."). We can perhaps theorize this collapse in the Court's legitimacy as the loss of the "diffuse support" generated by the Court's dispute settlement function, which makes the Court more vulnerable to those who oppose the substance of the law it is declaring. *See supra* text accompanying notes 107–11. I do not mean to imply, however, that the diminishment of the Court's dispute settlement function is solely responsible for the alarming collapse of the Court's legitimacy. There are obviously many other factors at play, including the recent growth of a stark and unforgiving polarization in American political life.

277 *See supra* text accompanying notes 107–11; *cf.* Brendan Rascius, *Supreme Court Approval Rating Sinks to a New Low, Poll Finds. What Caused Shift?*, MIA. HERALD (Aug. 8, 2025, 4:04 PM), https://www.miamiherald.com/news/nation-world/national/article311637428.html [https://perma.cc/3T59-ZU7Y].

278 For recent prominent examples, see, for example, FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1554–58 (2024); and Murthy v. Missouri, 144 S. Ct. 1972, 1985–86 (2024).

279 Trump v. United States, 144 S. Ct. 2312 (2024); *see supra* text accompanying notes 199–203.

280 *See* Taft, *supra* note 42, at 852; *supra* text accompanying note 44.

be associated, as it should be, with the substance of the law it chooses to make through its small, curated docket. So long as the Court is free to decide *which* disputes to adjudicate, the public will not unreasonably perceive it to be selecting cases that serve the Court's own independent agenda for the development of federal law.[281] Insofar as that agenda is politically controversial, the Court will face direct and unmediated political opposition. It will be forced to justify making law not required by its dispute settlement function. Because we presently lack any generally accepted justification for such lawmaking, the Court will likely lose diffuse support despite the fact that the litigants on its docket undeniably possess standing.

The Judiciary Act of 1925 set in motion forces that prompted the Supreme Court to use its opinions primarily to clarify the future development of the law rather than to settle existing controversies.[282] Standing doctrine cannot retard this expansion of the Court's lawmaking propensity. It cannot reverse the Supreme Court's evolution into an institution that is viewed, and that largely understands itself, as a lawgiver who drives the constitutional commitments of the nation. The Supreme Court may enjoy the superficial trappings of an ordinary court, but at the invitation of the Judges' Bill it has morphed into something quite different. It has all but abandoned the distinct function of dispute settlement and chosen to baldly exercise an undisguised authority proactively to make law.

This remarkable transformation has underwritten an increasingly urgent crisis of the Court's authority. The looming and unanswered question is how the Court might justify its continuous efforts to direct the country's constitutional destiny. The need to respond to this question affects every aspect of the Court's daily operations, from its shadow docket[283] to the ordinary construction of its opinions. It grows more pressing every time the Court implausibly claims that it is merely

281 *See supra* text accompanying notes 171–91.

282 Prospective opinions of this kind can, of course, also be written by judges in courts with mandatory jurisdiction, as is illustrated by the distressing phenomenon of lower courts judges who "audition" for the Supreme Court by composing ambitious opinions designed to make forward-looking law rather than to settle a dispute. *See supra* note 247. The point, therefore, is not that discretionary jurisdiction is required to write such opinions, but rather that the discretionary jurisdiction conferred by the Judges' Bill encouraged the Court to write opinions of this kind.

283 A major "source of the powers involved in the shadow docket comes from 28 U.S.C. § 2101(f). This section was first included in William Howard Taft's 'Judges' Bill' of 1925." Benjamin H. Barton, *Why Are These Justices Using the Shadow Docket More than Past Justices?*, 23 NEV. L.J. 845, 845–46 (2023) (footnotes omitted). On the "deeply politicized issues with far-reaching implications" that often infiltrate the shadow docket, see Kristen E. Parnigoni, *Shades of Scrutiny: Standards for Emergency Relief in the Shadow Docket Era*, 63 B.C. L. REV. 2743, 2746 (2022).

finding rather than making law.[284] Its dour effects have infected every corner of that imposing marble building at 1 First Street that former-President Taft designed and caused to be constructed.[285]

Although the Judiciary Act of 1925 may not be the sole and immediate cause of this crisis, the depth and intractability of the controversy now engulfing the Court are surely unintended but deeply consequential legacies of that landmark legislation.

284 *See, e.g.*, Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 586 (2024).

285 *See* Ed Pilkington, *The 'Stench' of Politicization: Sonia Sotomayor's Supreme Court Warning*, GUARDIAN (Dec. 4, 2021, 02:00 EST), https://www.theguardian.com/us-news/2021/dec/04/us-supreme-courrt-sonia-sotomayor-abortion [https://perma.cc/9BG2-6L4Q]. On Taft's role in designing and funding the current Supreme Court building, see POST, *supra* note 8, at 550–93.