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Sacrificing Legitimacy in a Hierarchical Judiciary

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SACRIFICING LEGITIMACY IN A HIERARCHICAL JUDICIARY

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Scholars have long worried about the legitimacy of the Supreme Court. But commentators have largely overlooked the inferior federal judiciary—and the potential tradeoffs between Supreme Court and lower court legitimacy. This Essay aims to call attention to those tradeoffs. When the Justices are asked to change the law in high-profile areas—such as abortion, affirmative action, or gun rights—they face a conundrum: To protect the legitimacy of the Court, the Justices may be reluctant to issue the broad precedents that will most effectively clarify the law—and thereby guide the lower courts. The Justices may instead opt for narrow doctrines or deny review altogether. But such an approach puts tremendous pressure on the lower courts, which must take the lead on the content of federal law in these high-profile areas. Presidents, senators, and interest groups then zero in on the composition of the lower courts—in ways that threaten the long-term legitimacy of the inferior federal judiciary. Drawing on political science and history, this Essay explores these legitimacy tradeoffs within our federal judicial hierarchy. To the extent that our legal system aims to protect the legitimacy of the judiciary, we should consider not simply the Supreme Court but the entire federal bench.

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INTRODUCTION

From time to time, Supreme Court watchers predict that we are on the verge of a constitutional revolution.[1] Many commentators today forecast a sea change in the Court's jurisprudence on high-profile issues such as abortion,[2] affirmative action,[3] gun rights,[4] and the administrative state.[5] Although some observers celebrate this prospect,[6] many others fear the anticipated revolution.[7] Accordingly, the Supreme Court is increasingly under fire. Critics have questioned the Court's legitimacy[8] and called for structural reforms that would have been almost unthinkable a few years ago, including "packing" the Court with additional members.[9]

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[1] *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 24-25 (1992) (noting that, after Presidents Reagan and George H.W. Bush "filled five vacancies…, various Court-watchers claimed…a conservative revolution was at hand"); Amelia Thomson-DeVeaux, *Is The Supreme Court Heading For A Conservative Revolution?*, FIVETHIRTYEIGHT (Oct. 7, 2019); *see also* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1051-61 (2001) (discussing "a veritable revolution in constitutional doctrine" with respect to federalism and civil rights).

[2] *See* Clare Huntington, *Abortion Talk*, 117 MICH. L. REV. 1043, 1044 (2019) (many "anticipate significant" changes "if not a complete repudiation of *Roe v Wade*").

[3] *See, e.g.*, Erwin Chemerinsky, *The Supreme Court and Public Schools*, 117 MICH. L. REV. 1107, 1117 (2019) (predicting that "there are now five justices to strike down all affirmative action programs.").

[4] *See* Adam Liptak, *Supreme Court Will Review New York City Gun Law*, N.Y. Times, at A1 (Jan. 23, 2019) (noting the anticipated legal changes as to the Second Amendment).

[5] *See* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3-4 (2017) (critiquing this "contemporary anti-administrativism").

[6] Some commentators endorse certain aspects of the predicted change in doctrine. *See, e.g.*, John Yoo & James Phillips, *Roberts Thwarted Trump, but the Census Ruling Has a Second Purpose*, THE ATLANTIC (July 11, 2019) (celebrating that "[t]he counterrevolution is on" "against an administrative state run amok"); *see also* Joyce Lee Malcolm, *Defying the Supreme Court: Federal Courts and the Nullification of the Second Amendment*, 13 CHARLESTON L. REV. 295, 311 (2018) ("[i]t is long past time for the Supreme Court" to protect the Second Amendment).

[7] *See supra* notes 2-5 (citing sources).

[8] The attacks on the Court's legitimacy were ignited in part by recent confirmation battles: Critics argue that Republicans used underhanded means to cement a conservative majority on the Court—and thereby make possible a constitutional revolution. *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240-42 (2019) (discussing the controversies surrounding Merrick Garland, Neil Gorsuch, and Brett Kavanaugh and the attacks on the Court's "legitimacy").

[9] Some critics call for a federal statute imposing term limits on Supreme Court Justices. *See* Kermit Roosevelt & Ruth-Helen Vassilas, *Supreme Court justices should have term limits*, CNN (Sept. 30, 2019). Suzanna Sherry advocates a statute prohibiting concurring and dissenting opinions—to reduce the emphasis on individual Justices' votes. *See* Suzanna Sherry, *Our Kardashian Court (and How to Fix It)* (manuscript at 2). Dan Epps and Ganesh Sitaraman have provocatively called for either a fifteen- or 180-member Supreme Court. *See* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181-84, 193-96 (2019) (proposing a "Supreme Court Lottery," under which the Court would consist of all 180 appellate court judges, who would

Whatever one thinks of the merits of the anticipated legal changes (or structural reforms), it seems that all eyes are on the Supreme Court.

This Essay argues that the narrow emphasis on the Supreme Court overlooks the broader reality of the federal judiciary. The Court cannot achieve legal change unilaterally; it must act through the lower federal courts.[10] And with respect to high-profile issues, the Justices often face a two-fold dilemma: unappealing tradeoffs between legitimacy and legal change, and between Supreme Court and lower court legitimacy.

Let us begin with the first trade-off: To most effectively ensure legal change on high-profile issues, the Court should clarify the law through broad, rule-like precedents. Although ideology plays a limited role in most lower court decisions, empirical research suggests that judges are more likely to vote in predictable "conservative" and "progressive" directions on issues such as abortion, affirmative action, or gun rights.[11] As a result, the Supreme Court should take special care to guide—or "rein in"—its judicial inferiors in these areas. But the Justices may feel considerable pressure *not* to issue broad, rule-like doctrines in precisely these high-profile contexts—particularly during eras like our current political moment, when the Supreme Court is under attack. Broad doctrinal rules raise the stakes of any decision and could invite additional attacks against the Court or even lead to noncompliance. Accordingly, the Justices may be tempted to issue narrow decisions or flexible standards or deny certiorari in high-profile cases—and allow the lower federal courts to work out the details. In short, to preserve the external reputation (sociological legitimacy) of the Supreme Court, the Justices may opt not to issue the broad, rule-like doctrines most conducive to legal change.

But that leads to a second tradeoff: There are considerable risks to the lower courts, when they must take the lead on the content of federal law in high-profile areas. As noted, absent clear guidance from the Supreme Court, inferior federal judges tend to be more influenced by

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randomly serve for two-week periods, or a "Balanced Bench," which would encompass a fifteen-member Court, with five chosen by Democrats, five chosen by Republicans, and the remaining five selected by the first ten); *see also* Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, YALE L.J. FORUM 93, 94 (Nov. 4, 2019) (critiquing the proposals). But the most common argument has been for "packing" the Court with a few additional members to change the future direction of its decisions. *See, e.g.*, MARK TUSHNET, THE SUPREME COURT: PUTTING COURTS ON THE PROGRESSIVE AGENDA (forthcoming); Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE BLOG (Oct. 15, 2018) [https://perma.cc/F2BE-GJWU]. The calls for court packing push against a strong norm. *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 278-87 (2017); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 505-17 (2018).

[10] This project focuses on the lower federal courts, which seem most likely to handle the hot-button issues that are the focus of so much commentary today.

[11] *See* Part III(A); *see also* LEE EPSTEIN, WILLIAM E. LANDES, & RICHARD POSNER, THE BEHAVIOR OF FEDERAL JUDGES 168, 213-14, 237 (2013) (reporting that "ideological voting is less frequent" in the lower courts than in the Supreme Court).

ideology in ruling on high-profile cases, such as those involving abortion or affirmative action. At a minimum, political actors and interest groups *assume* that the law in these areas will depend on the composition of the lower federal courts. This assumption puts pressure on presidents and senators to emphasize judicial ideology in lower federal court appointments. And, indeed, over the past several decades, the selection of inferior federal court judges has grown increasingly partisan and divisive. Some research suggests that this very divisiveness undermines public respect for—that is, the legitimacy of—the lower federal courts.

We thus see the two-fold dilemma: To avoid sacrificing the legitimacy of the Supreme Court, the Justices may sacrifice both meaningful legal change and the long-term legitimacy of the inferior federal bench.

Two prominent historical episodes vividly illustrate this conundrum.[12] The "all deliberate speed" formula in *Brown II* was in significant part an effort to protect the Court's public reputation; the Justices worried that segregationists would refuse to comply with a firm deadline. This opaque test, in turn, both sacrificed meaningful legal change and delegated desegregation to the inferior federal judiciary—leading to some of the earliest lower court confirmation wars. In *Planned Parenthood v. Casey*, the Justices—again, to protect the Court's sociological legitimacy—declined either to overrule *Roe v. Wade* or to retain its broad, rule-like trimester framework. Instead, the Court crafted the "undue burden" standard, which inferior federal judges have applied in distinct and often ideologically predictable ways. This test has also raised the stakes for—and the contentiousness of—lower court selection.

Recent events underscore the risks to the inferior federal judiciary. There seems to have been an uptick in negative rhetoric about the lower courts—including, specifically, accusations that federal judges decide cases on ideological grounds. Most prominently, President Trump has denounced adverse lower court rulings as the handiwork of "Obama judges."[13] Although Chief Justice Roberts and other jurists have pushed against the charge that there are "Obama judges" or "Trump judges,"[14] some commentators insist that lower court judges vote in ideologically predictable directions.[15] This commentary has, however, failed to appreciate that any such ideological voting depends in significant part on

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[12] *See* Part II.

[13] *See infra* notes 214-216 and accompanying text.

[14] Mark Sherman, *Roberts, Trump spar in extraordinary scrap over judges*, ASSOCIATED PRESS (Nov. 21, 2018); *see* Jess Bravin, *No Obama or Trump Judges Here, Appointees of Both Declare*, WALL STREET JOURNAL (Sept. 15, 2019).

[15] *See* Ramesh Ponnuru, *The Chief Justice's Defense of the Federal Judiciary*, NAT'L REV. (Nov. 21, 2018) (arguing that Chief Justice Roberts's statement that there are no "Obama judges or Trump judges" is "pretty obviously untrue. The decisions of judges appointed by Clinton and Obama generally differ, in predictable ways, from the decisions of judges appointed by Bush and Trump"); Marc A. Thiessen, *Chief Justice Roberts is wrong. We do have Obama judges and Trump judges*, WASH. POST (Nov. 23, 2018).

Supreme Court precedent. The Court could rein in its judicial inferiors through broad, rule-like doctrines—and thereby help protect the public reputation of the lower federal courts. But the Justices may opt instead for opaque tests in an effort to safeguard the reputation of the Court itself.

This analysis has important implications for constitutional scholarship and jurisprudence. First, this account pushes against the assumption of some scholars that the Supreme Court can easily resolve controversial issues of constitutional law and thereby launch a constitutional revolution.[16] To the extent that the Justices are concerned about the Court's public reputation, they may be *least* inclined to resolve precisely those issues on which lower courts *most* need guidance.[17]

Second, and more fundamentally, this analysis underscores that scholarship on judicial legitimacy has focused too narrowly on the Supreme Court.[18] Many scholars argue that the Justices *should* decide cases with an eye to protecting the Court's sociological legitimacy.[19] Alexander Bickel and Cass Sunstein, for example, urge the Court to issue narrow ("minimalist") rulings or deny certiorari in controversial matters so as to avoid provoking external criticism.[20] These scholars have overlooked the impact that such narrow or nonexistent decisions may have on the long-term legitimacy of the remainder of the federal bench. As this Essay underscores, once we take into account the entire judicial system, it is far from clear which level of the federal judiciary is better equipped to shoulder external attacks.

At the outset, I offer two points of clarification. First, this Essay focuses in large part on *sociological* legitimacy: the external reaction to the decisions of the Supreme Court and the lower federal courts. But I do not simply consider the reaction of the general public; the broader public

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[16] *See supra* notes 1-7 and accompanying text; *see also* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1385 (1997) (viewing the Court "as the authoritative settler of constitutional meaning").

[17] This analysis thus links up with the important literature on "stealth overruling" or "narrowing" of Supreme Court precedents. *Compare* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 4-5 (2010) (criticizing "stealth overruling"), *with* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1865-66 (2014) (defending "narrowing").

[18] *See* Parts I, IV(A).

[19] *See, e.g.*, Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1151 (1995) (arguing that "the Court must take care to preserve the esteem in which it is held"); Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 364 (2020) (asserting that "concerns about preserving public support for the Court fall within the bounds of reasonable constitutional adjudication"); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 712 (1994) ("[t]he Court wisely attends to its legitimacy in the eyes of the public"); Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1051 (2007) (urging that the Court should decide cases so as to preserve "sociological legitimacy"); Part IV.

[20] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 69-72, 132, 250-56 (2d ed. 1986); CASS R. SUNSTEIN, ONE CASE AT A TIME (1999); Part IV(B).

is often unaware of the actions of the judiciary, particularly the lower courts. Accordingly, I also consider—as relevant to sociological legitimacy—the perspective of government officials and political elites (including interest groups) who tend to care deeply about judicial decisionmaking.[21] When the Justices refrain from issuing a broad ruling, they may be concerned about the reaction of any of these external groups.[22] Likewise, any of these groups may zero in on the composition of the inferior federal courts.[23]

Second, I do not contend that the contentious nature of lower court selection can be traced exclusively to Supreme Court doctrine. There are several interrelated factors, including the rise in party polarization, the growing influence of interest groups, and changes in Senate procedure.[24] But the historical events and social science research canvassed in this Essay demonstrate that the Court's doctrinal choices are an important—and largely overlooked—contributing factor.

The analysis proceeds as follows. Part I introduces readers to the literature on legitimacy, which has long emphasized the Supreme Court alone. Part II then provides a historical overview of how the Court has struggled to provide clear guidance on high-profile issues, such as desegregation and abortion, and both Parts II and III explore how that lack of guidance impacts the lower federal courts. Finally, Part IV examines how this analysis implicates normative debates over judicial legitimacy, minimalism, and the passive virtues. Jurists and scholars, the Essay contends, should begin to reckon with the legitimacy tradeoffs within our hierarchical system.

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[21] Over the past several decades, presidents, senators, and interest groups have increasingly zeroed in on the lower federal courts. *See* Parts II, III.

[22] Scholars debate whether the Justices are primarily concerned about the views of elites or the general public. For my purposes, it is sufficient to assume—to the extent the Justices consider external views—that they may care about any of these external groups. *Compare* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP x (2019) (arguing that the Justices are "elites who seek to win favor with other elites"), *with, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE 16 (2009) (arguing that the Supreme Court "ratif[ies] the American people's considered views about the…Constitution"); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH 3 (2006) (arguing that Supreme Court decisions often reflect public opinion better than Congress).

[23] *See* NANCY SCHERER, SCORING POINTS 21-22 (2005) (emphasizing interest group influence over judicial nominations); AMY STEIGERWALT, BATTLE OVER THE BENCH 10-13 (2010); *see also* LAUREN COHEN BELL, WARRING FACTIONS 8-12 (2002) (discussing interest group influence in executive and judicial nominations).

[24] *See* SARAH A. BINDER & FORREST MALTZMAN, ADVICE & DISSENT 145 (2009) (emphasizing the importance of the "institutional rules and practices" of the Senate); SCHERER, *supra* note 23, at 4-5, 21-22 (arguing "the parties use [lower court] nominations to curry favor with an elite constituency within each party"); BENJAMIN WITTES, CONFIRMATION WARS 57-60 (2006) (tracing "the decline of the [lower court selection] process…to the growth of judicial power that began with the *Brown* decision"); Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J. L. & PUB. POL'Y 521, 530 (2018) (emphasizing growing party polarization).

I. THE (OVER)EMPHASIS ON SUPREME COURT LEGITIMACY

There is a rich literature on the legitimacy of the Supreme Court. Political scientists focus on sociological legitimacy, arguing that the Court can function effectively only if it has external support.[25] After all, the Court has no army; it must rely on others to comply with its decrees.[26] Government officials and the general public are more likely to obey if they view the Court as "legitimate"—that is, as an institution that should have the power to determine legal rights and obligations.[27] It is particularly important that those who *disagree* with a given ruling view the Court as legitimate; such disappointed individuals will respect the adverse decision if they consider the institution itself to be authoritative.[28] Political scientists thus often say that "legitimacy is for losers."[29]

Political scientists disagree about the source and nature of the Supreme Court's sociological legitimacy. Many scholars argue that the Court enjoys broad "diffuse support."[30] Under this view, the public generally sees the Court as performing a different function from the political branches and treats its decisions as reasonable and binding, regardless of the outcome of a specific case.[31] But a growing literature challenges this perspective. The challengers—"specific support" scholars—argue that members of the public tend to support the Court only if they like the results in specific high-profile cases.[32] In other words,

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[25] *See, e.g.*, Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013) ("For an institution like the Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy").

[26] *See* Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 POL. PSYCH. 675, 675 (2008).

[27] *See* JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS 38-39 (2009); Bartels & Johnston, *supra* note 25, at 184.

[28] *See* GIBSON & CALDEIRA, *supra* note 27, at 38-39 ("Legitimate institutions are those recognized as appropriate decision-making bodies *even when* one disagrees with the outputs of the institution.").

[29] *E.g.*, James L. Gibson, Milton Lodge, & Benjamin Woodson, *Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC'Y REV. 837, 839 (2014).

[30] Political scientists differentiate "specific support" (support for a single Court action) from "diffuse support" (long-term support, regardless of the Court's actions). *See* Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court*, 2 LAW & SOC. REV. 357, 370 (1968).

[31] *See* GIBSON & CALDEIRA, *supra* note 27, at 61-62 ("support for the Court has little if anything to do with ideology and partisanship"); James L. Gibson & Michael J. Nelson, *Changes in Institutional Support for the U.S. Supreme Court: Is the Court's Legitimacy Imperiled By the Decisions It Makes?*, 80 PUB. OP. Q. 622, 623-24 (2016) (offering empirical support for the conventional view that diffuse support is "sticky").

[32] *See* Bartels & Johnston, *supra* note 25, at 185-86; Neil Malhotra & Stephen A. Jessee, *Ideological Proximity and Support for The Supreme Court*, 36 POL. BEHAVIOR 817, 819 (2014) (individuals "who are ideologically closest to the Court's position tend to exhibit the highest levels of trust and approval"); *see also* 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, 415-16 (2015) (finding that public

"individuals grant or deny the Court legitimacy based on the ideological tenor of the Court's policymaking."[33]

Notably, even diffuse support scholars assert that public respect for the Supreme Court is contingent, at least in the long run. Recall that it is crucial for the "losers" to view the Court as an authoritative decisionmaker, so that they will respect an adverse decision. Scholars agree that a series of adverse decisions in salient cases could lessen the Court's support among a particular group.[34] If the Supreme Court, for example, repeatedly issued "conservative" (or "progressive") decisions in high-profile cases, its institutional reputation would eventually decline with the "loser" group.

Accordingly, both camps agree that the Supreme Court's decisions in high-profile cases can affect its sociological legitimacy, at least in the long run. And for those who accept the "specific support" view, any individual decision in a salient case may affect the Court's external reputation.

This possibility raises a challenging normative question for jurists and legal scholars: Should the Justices decide cases so as to preserve the sociological legitimacy of the Court? A number of scholars argue yes, emphasizing that the Court cannot function without some level of external support.[35] Others raise questions about whether any such consideration of sociological legitimacy is *legally* legitimate—that is, a normatively acceptable mode of legal reasoning.[36] But at a minimum, scholars seem to agree that the Justices *do* decide at least some high-profile cases so as to protect the sociological legitimacy of the Court.[37]

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attitudes can be changed by "a single, albeit salient, case"); *infra* note 30 (defining "specific support").

[33] Bartels & Johnston, *supra* note 25, at at 185.

[34] *See* GIBSON & CALDEIRA, *supra* note 27, at 43 ("[O]ver the long haul, the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution's legitimacy in the eyes of disaffected groups."); *see also id.* (noting that support for the Court among African Americans has declined in recent decades); James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. LAW SOC. SCI. 201, 206-07 (2014) ("the Court's diffuse support could suffer once some accumulated threshold level of dissatisfaction is reached.").

[35] *See supra* notes 19-20 and accompanying text; Part IV(B),(C).

[36] *See* Part IV(B)(1); *see also* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018) (distinguishing sociological, moral, and legal legitimacy); 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, 1473-74 (2007) (examining the tension between "the social legitimacy of the law as a public institution" and "the legal legitimacy of the law as a principled unfolding of professional reason").

[37] *See* FALLON, *supra* note 36, at 111 ("the Justices might [under threat] feel externally constrained to adopt positions that they think constitutionally erroneous"); Allison Orr Larsen, *Judging "Under Fire" and the Retreat to Facts*, 61 WM. & MARY L. REV. 1083, 1090-91 (2020); Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 240-42, 272 (2011); *see also* Michael D. Gilbert & Mauricio A. Guim, *Active Virtues*, 98 WASH. U. L. REV. (forthcoming 2021) (manuscript at 4) (arguing that the Justices not

I return to some of these normative questions later in this Essay. For now, the important point is that this debate over legal and sociological legitimacy focuses almost exclusively on the Supreme Court.[38] Lost in the discussion is the inferior federal judiciary. But this Essay aims to show that, to the extent the Justices decide cases so as to protect the public reputation of the Court, they may create risks for the remainder of the federal bench. As discussed in Part IV, once we expand our focus to the entire federal judiciary, the normative question—should the Justices decide cases so as to protect the Court's legitimacy?—becomes significantly more nuanced and complex.

II. PRESSURE ON THE LOWER FEDERAL JUDICIARY

To illustrate the tradeoffs faced by the federal judiciary, I begin with two prominent historical examples: the aftermath of *Brown v. Board of Education* and *Planned Parenthood v. Casey*. These episodes vividly show how the Supreme Court's doctrinal choices may not only fail to achieve meaningful legal change but also put tremendous pressure on the inferior federal courts. Although there is a voluminous literature on desegregation and abortion—and different scholars have recounted aspects of the stories told here (accounts that I draw upon)—prior scholars have not focused on the lesson of this Essay: what these episodes have to tell us about the legitimacy tradeoffs within the federal judicial hierarchy.

A. The Consequences of "All Deliberate Speed"

1. The Creation of "All Deliberate Speed"

In 1954, the Supreme Court announced its watershed and unanimous ruling in *Brown*, declaring that "in the field of public education the doctrine of 'separate but equal' has no place."[39] But the Court did not issue a remedy. Instead, the Justices scheduled the case for reargument to determine how the Court should carry out its constitutional ruling.[40]

During the oral argument in *Brown II*, then-NAACP attorney Thurgood Marshall implored the Justices to establish a firm deadline for desegregation, directing that the process be complete by September 1956

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only avoid controversial cases but also take on politically uncontroversial cases—what the authors call "unity cases"—in order to bolster the Court's external legitimacy).

[38] I have identified one exception. Neil Siegel argues that the Supreme Court can at times work together *with* the inferior courts to promote the external legitimacy of the *entire* federal judiciary. *See* Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1186-87 (2017). I discuss Siegel's thoughtful piece in Part III(D). For now, it is enough to note that Siegel does not address the issue at the heart of this Essay: the legitimacy *tradeoffs* within the federal judicial hierarchy.

[39] Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

[40] *See id.* at 495-96 (directing further argument over whether the Court should itself "formulate detailed decrees" or instead "remand to the [district] courts" and, if the latter, "what general directions" the Court should offer).

at the latest.[41] Absent a clear deadline, Marshall warned, "the Negro in this country would be in a horrible shape," as the lower courts allowed the "several states [to] decide in their own minds as to how much time was necessary."[42] Indeed, Marshall suggested that an open-ended standard might leave students "worse off" than the "separate but equal" doctrine, because it would be challenging for NAACP attorneys to show when a school district was violating the law.[43] "In separate but equal," Marshall explained, "we could count the number of books, the number of bricks, the number of teachers and find out whether the school was physically equal or not."[44] But if the Court issued an opaque test to govern desegregation, "enforcement of [*Brown*] will be left to the judgment of the district court with practically no safeguards."[45]

By contrast, the other participants in the case urged the Court to proceed with caution. U.S. Solicitor General Simon Sobeloff argued that the Court should require desegregation only "as speedily as feasible"—to allow an "effective gradual adjustment."[46] And the attorneys for the states argued for virtually unlimited district court discretion:[47] the Court should "trust the district judge to carry out the constitutional provisions," even if in some school districts, "it may well prove impossible to have unsegregated schools in the reasonably foreseeable future."[48] Indeed, the South Carolina attorney general suggested that it may be necessary to wait until society was ready for desegregation—a change that might not occur until "2015 or 2045."[49]

Notwithstanding the pleas of the NAACP, and the candor of some state attorneys, the Justices were wary of issuing a firm decree. As other scholars have recounted, the Justices worried that "[t]he more specific and immediate the relief ordered, the greater the chances of defiance" by segregationists.[50] And any such noncompliance would harm the Supreme

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[41] Transcript of Oral Argument, Brown v. Board of Education, 349 U.S. 294 (1955) (Nos. 1 to 5) (statement of Thurgood Marshall), in ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN VS. BOARD OF EDUCATION OF TOPEKA, 1952-1955 393-94 (Leon Friedman, ed. 1969) [hereinafter "*Brown II* Transcript"] (urging the Court to "put a date certain" on desegregation); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 313 (2004) (noting that the NAACP "pressed for immediate desegregation").

[42] *Brown II* Transcript, *supra* note 41, at 400 (statement of Thurgood Marshall).

[43] *Id*.

[44] *Id.*

[45] *Id.*

[46] *Brown II* Transcript, *supra* note 41, at 508-09 (statement of Simon E. Sobeloff).

[47] *See* J.W. PELTASON, FIFTY-EIGHT LONELY MEN 16 (1961) (noting that the southern lawyers argued for a "'wide-open mandate'").

[48] *Brown II* Transcript, *supra* note 41, at 420-21 (statement of Robert McCormick Figg).

[49] *Id.* at 412 (statement of S.E. Rogers) (arguing that parts of South Carolina could not easily "push the clock forward abruptly to 2015 or 2045").

[50] KLARMAN, *supra* note 41, at 314; *see* Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. J. POL. SCI. 504, 505, 507 (2008) (arguing that *Brown II* illustrates how the Court may issue "vague" decrees out of concern for the "institutional prestige" of the Court).

Court's public reputation.[51] As Justice Black put it during the internal deliberations over the case, "nothing could injure the court more than to issue orders that cannot be enforced."[52]

Accordingly, the Court in *Brown II* instructed district courts to "enter such orders … as are necessary and proper to school systems" to ensure desegregation "with all deliberate speed."[53] To be sure, as Justin Driver emphasizes, the Court's decision did not purport to authorize indefinite delays.[54] The Court declared that the lower courts should "require … a prompt and reasonable start toward full compliance with our [*Brown*] ruling."[55] Yet largely out of concern for the Court's sociological legitimacy, the Justices declined to issue the firm deadline requested by the NAACP. As Michael Klarman observes, the Justices seemingly "valu[ed] the Court's prestige—its dignity interest in avoiding the issuance of futile orders—over the plaintiffs' constitutional rights."[56]

2. Sacrificing Meaningful Change

Many scholars have recognized that the Supreme Court's decision in *Brown II* failed to produce meaningful legal change.[57] As Charles Ogletree laments, "the Court removed much of the force of its [*Brown*] decision by allowing proponents of segregation to end it not immediately but 'with all deliberate speed.' .... The compromise left the decision flawed from the very beginning."[58] Indeed, even ten years after *Brown*, fewer than two percent of black schoolchildren attended integrated schools.[59] Derrick Bell thus forcefully charges: "Having promised much in its first *Brown* decision, the Court in *Brown II* said in effect that its landmark earlier decision was more symbolic than real."[60]

Brown II failed to achieve meaningful legal change in large part because it delegated to the lower courts the task of defining "all deliberate

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[51] *See* KLARMAN, *supra* note 41, at 314 (noting "the justices' concern about issuing futile orders" and how that could undermine "the Court's prestige").

[52] FRIEDMAN, *supra* note 22, at 246 (quoting Justice Black and other Justices concerned about noncompliance); *see* KLARMAN, *supra* note 41, at 314 (recounting the Justices' internal deliberations).

[53] Brown v. Board of Education, 349 U.S. 294, 301 (1955).

[54] *See* JUSTIN DRIVER, THE SCHOOLHOUSE GATE 256-58 (2019) ("*Brown II* contained some countervailing language, now generally forgotten, suggesting that the Court would not countenance substantial delays"). Perhaps for that reason, Thurgood Marshall suggested in private correspondence that he was satisfied with the *Brown II* decision. *See* RICHARD KLUGER, SIMPLE JUSTICE 749-50 (2d ed. 2004).

[55] Brown v. Board of Education, 349 U.S. 294, 300 (1955).

[56] KLARMAN, *supra* note 41, at 314.

[57] *See, e.g.,* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 139-40 (2014) (arguing that the Warren Court "deserves a good deal of the blame" for "racial segregation in education.…The Court gave no deadlines or timetables"); J. HARVIE WILKINSON, FROM BROWN TO BAKKE 126 (1979) (urging that "southern school desegregation ran a most uneven course").

[58] CHARLES J. OGLETREE, ALL DELIBERATE SPEED xiii (2004).

[59] *See* KLUGER, *supra* note 54, at 755.

[60] DERRICK BELL, SILENT COVENANTS 19 (2004).

speed." And federal district judges implemented the ruling in vastly different ways. In 1964, political scientist Kenneth Vines found what he described as "extreme differences among the judges in the disposition of race relations."[61] According to Vines, federal judges during this era fell into three camps: "integrationists" who ruled in favor of most civil rights claims; "segregationists" who rejected most such claims; and "moderates" who fell between the other two extremes.[62] In fact, according to Vines, there were extremes within these camps: from 1954 to 1962, four judges ruled for civil rights plaintiffs in more than 90 percent of cases, while seven judges *never* granted relief to a single civil rights claimant.[63]

Historical accounts corroborate these findings. Some judges ("integrationists") went to great lengths to make the *Brown* promise a reality. District Judge J. Skelly Wright, for example, "courageously and imaginatively enforced" desegregation in New Orleans, Louisiana.[64] By contrast, other judges ("segregationists") were openly hostile to *Brown*.[65] In Dallas, Texas, Judge T. Whitfield Davidson declined to "name any date or issue any order" for desegregating the public schools, stating that "'the white man has a right to maintain his racial integrity and it can't be done so easily in integrated schools.'"[66]

The "all deliberate speed" formulation enabled segregationist judges like Davidson to resist desegregation. But the lack of clarity in *Brown II* was perhaps most problematic for judges in the moderate camp—the bulk of the southern judiciary.[67] Although these judges were less hostile to *Brown*, they were reluctant to issue firm desegregation orders, because they faced severe repercussions from their local communities. As then-Professor J. Harvie Wilkinson explained:

> *Brown II* gave trial judges little to hide behind. The enormous discretion of the trial judge in interpreting such language as "prompt and reasonable start" and "all deliberate speed" made his personal role painfully obvious. If the judge did more than the bare minimum, he would be held unpleasantly accountable. Segregationists were always able to point to more indulgent judges elsewhere.[68]

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[61] Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POL. 337, 348 (1964). Notably, Vines did not focus exclusively on school desegregation cases. But his findings are consistent with historical accounts about the implementation of *Brown* during this era. *See infra* notes 64-76 and accompanying text.

[62] *See* Vines, *supra* note 61, at 349.

[63] *See id.* at 348-49.

[64] VICTOR S. NAVASKY, KENNEDY JUSTICE 272 (1977); *see* JACK BASS, UNLIKELY HEROES 112-35 (1981) (discussing Judge Wright's efforts).

[65] *See, e.g.*, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90, 97 (1963) (describing how a Savannah federal judge "denied the requested injunctive relief 'solely on the basis' of a factual finding that…integrated schools were harmful to both races").

[66] PELTASON, *supra* note 47, at 118-19; *see also* GERALD N. ROSENBERG, THE HOLLOW HOPE 91 (2d ed. 2008) (noting Judge Davidson's resistance to Brown).

[67] *See* PELTASON, *supra* note 47, at 8; *infra* notes 68-76 and accompanying text.

[68] WILKINSON, *supra* note 57, at 80-81.

Other commentators have offered a similar assessment.[69] In 1961, political scientist Jack Peltason argued that "[t]he directions of the United States Supreme Court" in *Brown II* were "not clear and explicit, and this [was] the crucial problem."[70] Absent the cover of a clear higher court decision, district judges who "issued antisegregation orders, however mild," would be socially ostracized, receive threatening letters and anonymous and obscene phone calls, and likely need extra security.[71] Consider, in this regard, the experience of Judge Wright, who pushed for desegregation in New Orleans. The district judge received death threats, witnessed a cross-burning on his lawn, and needed an around-the-clock security detail.[72] As Jack Bass puts it, "By the end of 1960, Skelly Wright had become the most hated man in New Orleans….With few exceptions, old friends would step across the street to avoid speaking to him."[73]

By contrast, a judge "who delay[ed] injunctions and avoid[ed] antisegregation rules," would be "a local hero."[74] For many judges, the choice was clear.[75] According to Peltason, that is exactly what the southern state attorneys hoped for in *Brown II*: "If they could persuade the Supreme Court to leave the exact timing and precise nature of integration orders to the discretion of southern federal judges, they knew they could operate segregated schools for a long, long time."[76]

The courts of appeals could, of course, provide some guidance to district judges. In 1967, Fifth Circuit Judge John Minor Wisdom argued that appellate courts had an obligation to step in: "District courts are … understandably loath" to issue desegregation orders "without firm mandates" from higher courts.[77] Circuit judges, Wisdom emphasized, "are not more courageous or more enlightened than district judges. They

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[69] *See* BELL, *supra* note 60, at 19; *see also* Lawrence Baum, *Lower Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUSTICE SYSTEM J. 208, 214-15 (1977-78) (southern judges "could suffer opprobrium and isolation as a result of a perceived devotion to civil rights"); Michael W. Giles & Thomas G. Walker, *Judicial Policy-Making and Southern School Segregation*, 4 J. POL. 917, 918 (1975).

[70] PELTASON, *supra* note 47, at 13 (urging that southern district judges "can hardly be expected on their own initiative to move against the local power structure").

[71] *Id.* at 10.

[72] *See* BASS, *supra* note 64, at 115 ("Pairs of federal marshals alternated in eight-hour shifts at [Judge Wright's] home to ensure his physical safety, and they escorted him to and from work."); Richard H. Fallon, Jr., *Greatness in a Lower Federal Court Judge: The Case of J. Skelly Wright*, 61 LOYOLA L. REV. 29, 30, 35-36 (2015).

[73] BASS, *supra* note 64, at 115.

[74] PELTASON, *supra* note 47, at 9 (recounting that such a southern judge "will hear himself referred to as one of the nation's 'great constitutional scholars'").

[75] Many judges permitted delays or required at most "token compliance." WILKINSON, *supra* note 57, at 81-82; *see Judicial Performance*, *supra* note 65, at 99-100.

[76] PELTASON, *supra* note 47, at 13; *see also* ROSENBERG, *supra* note 66, at 89 ("Southern segregationists" fought to "vest control of civil rights in lower-court judges").

[77] John Minor Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 SW. L. J. 411, 420 (1967) ("To fill the vacuum" left by the Supreme Court, "the circuit court must step in").

are just not on the firing line."[78] Judge Wisdom observed that the same reasoning extended to his superiors: "The Supreme Court, almost wholly removed from the local scene, by this criterion has an obligation to lead or at least point out the logical line of development of the law."[79] But the Court had failed to fulfill that function in school desegregation cases.[80] Accordingly, "because of the dearth of explicit directions … from the Supreme Court," the courts of appeals were "forced into a policy-making position."[81]

There were, however, important differences among—and within—the courts of appeals as well. Although several members of the Fifth Circuit, including Judge Wisdom, were among "the most prominent integrationists," other appellate judges were far more resistant to *Brown*.[82] Fifth Circuit Judge Ben Cameron, for example, was known for his states' rights philosophy and open hostility to desegregation, and, on that basis, became a "hero in Mississippi."[83]

3. A More Contentious Appointments Process

In the wake of *Brown II*, presidents and senators began to realize that the content of "all deliberate speed" would depend tremendously on the composition of the inferior federal bench. Political actors thus sought to ensure that a lower federal court nominee would vote the "correct way" in civil rights cases. In this post-*Brown II* era, we thus see the early seeds of the divisiveness that characterizes our modern judicial selection process.

Notably, this focus on judicial ideology was a significant change. For much of American history, lower federal court appointments were patronage, not policymaking, opportunities.[84] Moreover, senators tended to be in charge of this patronage: Under the norm of senatorial courtesy, presidents deferred to the wishes of home-state senators, at least when they were from the same political party as the President.[85] When both home-state senators were from an opposing party, presidents often turned to other same-party state officials to suggest nominees.[86] To be sure, this

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[78] *Id.*
[79] *Id.*
[80] *See id.* at 420-21 ("[T]he general direction [of] 'all deliberate speed' has allowed a wide variety of action at both the district court and appellate levels.").
[81] *Id.* at 426-27.
[82] NAVASKY, *supra* note 64, at 269 (noting the Fifth Circuit contained a mix of "integrationists," "moderates," and "segregationists"); *see* SHELDON GOLDMAN, PICKING FEDERAL JUDGES126-31 (1997) (discussing the judges on the Fourth and Fifth Circuits).
[83] BASS, *supra* note 64, at 84-96, 94.
[84] *See* STEIGERWALT, *supra* note 23, at 3; *see also* SCHERER, *supra* note 23, at 13 ("lower court judgeships [were long] distributed to friends and campaign contributors").
[85] *See* STEIGERWALT, *supra* note 23, at 4 ("Beginning with George Washington, presidents deferred to [home-state] senators"). Senators took the lead with respect to not only district court but also most appellate court nominees; a seat on a regional circuit court was seen as designated for a particular state. *See* GOLDMAN, *supra* note 82, at 136.
[86] *See* GOLDMAN, *supra* note 82, at 135.

patronage system meant that presidents usually selected individuals from the same political party. But presidents and senators rarely focused on how lower court judges were likely to vote on specific legal issues.[87]

Moreover, in the mid-twentieth century, a judge's partisan affiliation did not say very much about how he[88] might vote on high-profile issues like desegregation. The Democratic and Republican parties were internally divided on civil rights; there were social progressives and social conservatives in both parties.[89] Likely in part for that reason, political scientist Kenneth Vines found that "integrationist," "moderate," and "segregationist" judges were not neatly divided along party lines.[90]

In the wake of "all deliberate speed," however, presidents and senators increasingly emphasized judicial ideology, at least with respect to civil rights. The presidential administrations of the 1950s and 1960s largely pushed for judges who would support integration. Although President Eisenhower had a somewhat tepid attitude toward *Brown*,[91] he largely delegated judicial selection to his Justice Department,[92] and his Attorneys General Herbert Brownell and William Rogers strongly supported desegregation.[93] President Kennedy had campaigned in part on a platform of advancing civil rights,[94] and both he and his successor Lyndon Johnson endeavored to place integrationists on the bench.[95] Indeed, in discussing lower court nominees, President Johnson would

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[87] There were some notable exceptions. For example, after watching lower court judges repeatedly strike down Neal Deal legislation, President Franklin Roosevelt paid closer attention to which individuals were elevated to the inferior federal bench (although he was still also guided by "more traditional party considerations"). GOLDMAN, *supra* note 82, at 30-31. *See also* BINDER & MALTZMAN, *supra* note 24, at 33 (in the nineteenth century, political actors sometimes noted a nominee's views on the Fugitive Slave Act).

[88] I use the pronoun "he," because the patronage system almost entirely excluded female nominees to the lower federal bench. *See* GOLDMAN, *supra* note 82, at 357.

[89] *See* MORRIS P. FIORINA, DIVIDED GOVERNMENT 16 (2003); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 268–69, 273 (2007).

[90] Interestingly, Vines did find that Republican judges were "disproportionately among the Moderates and Integrationists." Vines, *supra* note 61, at 350. He suggested that Republican appointees may have been less keyed into the social circles of the South—and thus less likely to care about social ostracism for supporting *Brown*. *See id.* at 351.

[91] President Eisenhower's view of *Brown* is a matter of dispute. *Compare* 2 STEPHEN E. AMBROSE, EISENHOWER: THE PRESIDENT 190 (1984) ("Eisenhower personally wished that the Court had upheld *Plessy v. Ferguson*, [163 US 537 (1896)]."), *with* GOLDMAN, *supra* note 82, at 127 (arguing that Eisenhower later came to support *Brown*).

[92] *See* GOLDMAN, *supra* note 82, at 113, 123.

[93] *See id.* at 129; RICHARD L. PACELLE, JR., BETWEEN LAW AND POLITICS 74-75 (2003).

[94] *See* ARTHUR M. SCHLESINGER, A THOUSAND DAYS 928-29 (1965). As a candidate, Kennedy did not support civil rights wholeheartedly—in part because he worried about losing southern white Democratic votes. *See* STEVEN LEVINGSTON, KENNEDY AND KING 99 (2017) (recounting that then-campaign manager Robert Kennedy was concerned that an emphasis on civil rights would hurt Kennedy's support among southern whites).

[95] *See* NAVASKY, *supra* note 64, at 254 (urging that, had the matter been up to the Kennedys, "undoubtedly no segregationists would have been appointed to the Southern bench"); *infra* note 96 and accompanying text (discussing Johnson).

often direct White House officials to "[c]heck to be sure he is all right on the Civil Rights question. I'll approve him if he is."[96]

Southern Democratic senators, however, also understood the significance of the lower federal courts—and pushed for segregationists.[97] Victor Navasky writes that "the hard-core Southern Senators" emphasized "the importance of 'not letting any more Skelly Wrights slip through.'"[98]

These divergent preferences set the stage for some challenging judicial selection battles. Eisenhower officials had an important tactical advantage because they were part of a Republican administration: the Justice Department was not expected to defer completely to the recommendations of the uniformly Democratic southern senators.[99] But that does not mean it was easy for the Eisenhower administration to place integrationists on the bench.[100] For example, Eisenhower officials gave the green light to Mississippi Senator James Eastland's suggestion of Ben Cameron for the Fifth Circuit, and he turned out to be a strong opponent of *Brown*.[101] And Democratic senators confirmed some integrationists—such as Judge Wisdom in 1957—largely because their attitudes toward *Brown* were uncertain.[102]

The Kennedy and Johnson administrations also struggled with lower federal court appointments. These Democratic presidents felt considerable pressure to defer to the preferences of home-state Democratic senators, and thus—much to the chagrin of civil right leaders—put some segregationists on the federal bench.[103] Kennedy, for example, went along with Senator Eastland's insistence on District Judge W. Harold Cox, who developed an "unmatched record" of "obstruct[ing] civil rights progress in Mississippi."[104] And when there was an opening on the Fifth Circuit,

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[96] GOLDMAN, *supra* note 82, at 170-71 ("President Johnson, starting in mid-1966, insisted on knowing the civil rights view of candidates for the judiciary").

[97] *See* NAVASKY, *supra* note 64, at 253-54, 258; Donald E. Campbell & Marcus E. Hendershot, *Show Me the Money: An Empirical Analysis of Interest Group Opposition to Federal Courts of Appeals Nominees*, 28 S. CAL. INTERDISC. L.J. 71, 81 (2018) ("Southern senators…were determined to keep control of the judges charged with enforcing" *Brown*).

[98] NAVASKY, *supra* note 64, at 254, 258.

[99] *See* Vines, *supra* note 61, at 351. Eisenhower appointed several prominent supporters of integration, including Fifth Circuit Judges Wisdom, Elbert Tuttle and John Brown, and Alabama district court Judge Frank Johnson. *See* BASS, *supra* note 64, at 23-32, 245.

[100] *See* GOLDMAN, *supra* note 82, at 130-31; PELTASON, *supra* note 47, at 5-6 ("even Eisenhower had to do business with the southern Democrats").

[101] NAVASKY, *supra* note 64, at 266. Apparently, Senator Eastland had more information about Cameron's views on civil rights. *See* BASS, *supra* note 64, at 84-86.

[102] *See* PELTASON, *supra* note 47, at 27-28.

[103] *See* NAVASKY, *supra* note 64, at 243-76 (detailing and criticizing Kennedy's record); GOLDMAN, *supra* note 82, at 170-71 & n.v (noting Johnson nominated an individual who "had signed the Southern Manifesto"); Claude Sitton, *Robert Kennedy Backs Naming of Segregationists to the Bench*, N.Y. TIMES, at 9 (April 27, 1963) (noting the "growing criticism from civil rights advocates" of certain Kennedy appointees).

[104] BASS, *supra* note 64, at 164-66. Kennedy officials later explained that Cox "was not associated with [specified] racist groups, and there was no public record of racist

Kennedy was strongly encouraged by progressives to nominate Judge Wright—in recognition of his brave work implementing *Brown* in New Orleans.[105] But Louisiana Senator Russell Long vetoed that option.[106] Kennedy instead nominated Judge Wright to the D.C. Circuit Court of Appeals (a court without a home-state senator).[107] Meanwhile, southern Democrats carefully scrutinized Kennedy's nominee to replace Judge Wright in New Orleans: Frank Ellis. At a subcommittee hearing, Senator Eastland pointedly asked, "Now, if we approve you, you are not going to be another Skelly Wright, are you?"[108]

The post-*Brown II* lower court selection process contains the seeds of our modern-day era. To be sure, presidents and senators focused on ideology only with respect to one issue: desegregation. Otherwise, judicial selection continued be a patronage opportunity.[109] But as to this crucial issue, both sides—southern Democratic senators and pro-civil rights presidential administrations—were determined to put individuals with the "correct views" on the lower federal courts. As a result, only those whose views on desegregation were largely unknown seemed likely to receive a judicial nomination.[110] As Peltason put it during this era: "Since 1954 any extreme public position, even one for segregation, lowers a man's chances of being elevated to the federal bench to near zero."[111]

B. The Impact of the Undue Burden Standard

1. Background: Roe*'s Trimester Framework and the Political Response*

The Supreme Court's journey with respect to the right to terminate a pregnancy differs in an important respect from the school desegregation cases. When the issue came upon the federal judicial scene in *Roe v. Wade*, abortion was not yet an issue of national political prominence.[112]

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speeches or activity." GOLDMAN, *supra* note 82, at 129, 167; *see also* NAVASKY, *supra* note 64, at 250 (stating that Eastland likely told Cox not to join openly racist groups).

[105] *See* NAVASKY, *supra* note 64, at 272-73.

[106] *See id.* at 272.

[107] *See id.*

[108] Nomination of Frank B. Ellis To Be U.S. District Judge for the Eastern District of La.: Hearing Before Subcomm. of the S. Comm. on the Judiciary, 87th Cong. 1, 7 (1962) (statement of Sen. Eastland, D-Miss.). Judge Ellis was later confirmed and proceeded to largely undo Judge Wright's desegregation order for New Orleans. A Fifth Circuit panel (consisting of Judges Wisdom, Rives, and Brown) later reversed. *See Federal Court Spurs Integration of New Orleans Public Schools*, N.Y. TIMES, at 1 (Aug. 7, 1962).

[109] *See* STEIGERWALT, *supra* note 23, at 3.

[110] *See* PELTASON, *supra* note 47, at 7; *see also* GOLDMAN, *supra* note 82, at 129, 167 (observing that presidential administrations tended to veto individuals who had made publicly racist statements or joined pro-segregation organizations).

[111] *See* PELTASON, *supra* note 47, at 7.

[112] *See* 410 U.S. 113 (1973); EVA R. RUBIN, ABORTION, POLITICS AND THE COURTS 64 (1987) (asserting that until 1976, "abortion had been a negligible issue in national politics"); Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 948-49 (2016).

And Justice Blackmun's majority opinion famously provided a broad, rule-like doctrine: the trimester framework.[113]

Although some commentators criticized *Roe* for its prophylactic character, many women's rights advocates praised the Court's decision to paint with a broad brush.[114] In 1973, some abortion rights supporters emphasized the contrast with the "all deliberate speed" formula, stating that *Roe* "should be more immediately enforceable than the *Brown* decision was for racial desegregation."[115] The majority in *Roe* went "out of its way to spell out the ground rules very clearly."[116]

In the wake of *Roe v. Wade*, however, the issue of abortion became one of intense national importance.[117] The pro-life movement (which was only nascent prior to *Roe*) became a powerful force in national politics, and just eight years after *Roe*, helped propel Ronald Reagan to the presidency.[118] Reagan and his successor George H.W. Bush promised to nominate judges "'who respect[] … the sanctity of innocent life.'"[119]

2. The Creation of the Undue Burden Standard

With the growth of the pro-life movement, there was a push for another broad, rule-like approach to abortion: a decision that would reverse *Roe v. Wade* and return the issue to the legislatures of the fifty states. And when the Supreme Court heard *Planned Parenthood v. Casey*, many onlookers believed that the Court would do precisely that; after all, Reagan and Bush had placed five Justices on the high bench.[120]

As it turns out, the Justices did come close to overruling *Roe*. Chief Justice Rehnquist drafted an "Opinion of the Court" that would have subjected abortion regulations to rational basis review.[121] But late in the deliberations, Justice Kennedy (who had sided with the Chief Justice at

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[113] *See* Roe v. Wade, 410 U.S. 113, 164-65 (1973) (establishing a framework under which virtually all regulation was invalid in the first trimester; restrictions were permitted to preserve maternal health in the second trimester; and abortion could be restricted or banned in the third trimester, if there was an exception to protect maternal life and health).

[114] *See* RUBIN, *supra* note 112, at 63-64.

[115] Janice Goodman, Rhonda Copelon Schoenbrod, & Nancy Stearns, Doe *and* Roe*: Where Do We Go from Here?*, 1 WOMEN'S RTS. L. REP. 20, 27 (1973); *see* RUBIN, *supra* note 112, at 63-64.

[116] Goodman, Schoenbrod, & Stearns, *supra* note 115, at 27 (statement of Jan Goodman).

[117] *See* RUBIN, *supra* note 112, at 89-113 (recounting how *Roe* became a subject of national controversy); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 16, 143 (1990) (*Roe* helped "galvanize a right-to-life movement"); Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 851-52 (2013). For a forceful argument that *Roe* was only one of several factors that led to the political escalation over abortion, see LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE* 304-17 (2012).

[118] *See* TRIBE, *supra* note 117, at 16-17.

[119] SCHERER, *supra* note 23, at 57-58.

[120] *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 198, 200 (2005) ("[w]ith the new makeup of the Court"—the replacement of Justices Brennan and Marshall with Souter and Thomas—"*Roe* had never looked so imperiled"); Sullivan, *supra* note 1, at 24 (many observers expected the Court to "gut the abortion right").

[121] *See* GREENHOUSE, *supra* note 120, at 203; Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665, 1728 (2013).

conference) switched his vote.[122] Kennedy then, along with Justices O'Connor and Souter, authored a joint opinion, which purported to reaffirm *Roe*—with some important modifications.

The *Casey* joint opinion makes clear that the Justices declined to overrule *Roe v. Wade* in large part out of concern for the Supreme Court's sociological legitimacy.[123] The Justices recognized that there was a powerful pro-life movement urging the rejection of *Roe*.[124] But they insisted: "[T]o overrule under fire" would "subvert the Court's legitimacy beyond any serious question," because it would seem that the Court had "surrender[ed] to political pressure."[125] Accordingly, the Court had to stand firm:

> [P]ressure to overrule the [*Roe v. Wade*] decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.[126]

As the ACLU attorneys in *Casey* later observed, "pro-choice mobilization may have … impacted the Court's decision to spare *Roe*."[127] In the months leading up to *Casey*, advocates had warned that a reversal of *Roe* would harm the Court's external legitimacy—by suggesting that the Justices "would allow their political views to dictate the outcome of their decisions."[128]

Yet the Justices also did not reaffirm *Roe* in full. Importantly, the joint opinion dispensed with what it described as "the rigid trimester framework of *Roe v. Wade*" and substituted a new test: the undue burden standard.[129] State regulations of abortion prior to viability would be permissible, as long as they did not impose an "undue burden" on the right to terminate a pregnancy.[130]

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[122] *See* GREENHOUSE, *supra* note 120, at 204-05 (noting that "suddenly, everything changed" but not speculating as to why Justice Kennedy switched his vote); *see also* JEFFREY TOOBIN, THE NINE 52-53 (2007) (discussing Kennedy's "dramatic switch").

[123] Many scholars have commented on this aspect of the decision. *See, e.g.*, Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 186 (2013) (*Casey* "included an explicit and rare admission that public opinion…as well as public confidence in the Court affected the decision"); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1302 (2004); Hellman, *supra* note 19, at 1117.

[124] *See* Planned Parenthood v. Casey, 505 U.S. 833, 869 (1992).

[125] *Id.* at 866-67.

[126] *Id.* at 869.

[127] Linda J. Wharton & Kathryn Kolbert, *Preserving* Roe v. Wade*...When You Win Only Half the Loaf*, 24 STAN. L. & POL'Y REV. 143, 154 (2013). Pro-choice advocates apparently took the issue to the Court in 1992, so that (if the Court were to overrule *Roe v. Wade*), it would do so in an election year. *See* GREENHOUSE, *supra* note 120, at 201.

[128] Wharton & Kolbert, *supra* note 127, at 154.

[129] Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992).

[130] *See id.* at 874-78.

It is curious—particularly after the emphasis on stare decisis—that the joint opinion dispensed with the trimester framework. Although the Justices likely crafted the undue burden standard for various reasons,[131] some commentators suggest that one central concern was the Court's sociological legitimacy.[132] Robert Post and Reva Siegel, for example, view the undue burden test as an effort "to respond to both sides of the abortion dispute by fashioning a constitutional law in which each side can find recognition."[133] The flexible undue burden standard would be more acceptable, because it would better balance the concerns of the pro-life and pro-choice communities.[134] Under this view, *Casey* turns out to be a "Janus-faced holding": While the joint opinion insisted in its stare decisis discussion "on the independence of law"—and thus refused to overrule *Roe* "under fire"—it also "subject[ed] law to democratic pressure by dismantling the trimester system of *Roe*."[135]

3. Casey *and the Lower Court Selection Process*

The Supreme Court in *Casey* not only failed to provide the legal change sought by pro-life advocates but also declined to retain the broad, rule-like formula of *Roe*. For that reason, *Casey* had an important but seemingly unanticipated impact: it granted considerable discretion to the inferior federal courts to determine what qualified as an "undue burden" on the right to terminate a pregnancy—and thereby put tremendous pressure on the lower court selection process.

Notably, *Casey* came upon the legal scene at a time when presidents, senators, and interest groups were already beginning to focus more on lower court selection. As discussed, through the 1950s and

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[131] The authors of the joint opinion had a general (albeit not universal) preference for standards over rules. *See* Sullivan, *supra* note 1, at 90-91; *but see* New York v. United States, 505 U.S. 144, 176 (1992) (showing that all three Justices favored a rule prohibiting Congress from "commandeer[ing]" state legislatures). Justice O'Connor had suggested an "undue burden" standard in previous cases. But the test in *Casey* differed in important respects from O'Connor's earlier formulation. *See* Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2036 (1994) (noting the differences).

[132] *See* Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481, 532-33 (2002) (arguing that to protect "the nation's confidence in its judiciary," the "center of the Court" opted to "affirm[]…a woman's right to choose" but also "walk[] away from the…trimester framework" and "substitute…the undue burden standard"); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 427-30 (2007) (*Casey* "subjects law to democratic pressure by dismantling the trimester system of *Roe*"); *see also* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 976, 1028-29 (2008) (the "'undue-burden standard'…reflected the plurality's belief that *Roe* did not sufficiently validate" anti-abortion concerns).

[133] Post & Siegel, *supra* note 132, at 429.

[134] This reading finds support in the joint opinion, which asserted that the new test better "reconcil[ed] the State's interest [in protecting potential life] with the woman's constitutionally protected liberty." 505 U.S. 833, 874, 876 (1992).

[135] Post & Siegel, *supra* note 132, at 429-30; *see id.* at 430 ("*Casey* illustrates how a constitutional decision can be politically responsive at the same time as it affirms a commitment to the law/politics distinction.").

1960s, outside the context of desegregation, such appointments remained an opportunity for political patronage.[136] The Reagan administration, however, started a new trend.[137] In both 1980 and 1984, Reagan emphasized judicial ideology across several issue areas—including abortion, school prayer, and the use of busing to desegregate the schools—and at all levels of the federal judiciary.[138] Both Reagan and his successor George H.W. Bush promised "the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent life."[139]

By the end of Reagan's first term, progressive interest groups were paying more attention to lower court selection—and pushing like-minded senators to oppose some nominees.[140] Senators began using procedural tools, such as the blue slip, informal holds, and even the filibuster, to block—or at a minimum delay—certain nominations.[141] Senator Ted Kennedy, for example, sought to filibuster J. Harvie Wilkinson's nomination to the Fourth Circuit, calling him "the least qualified nominee ever submitted for an appellate court vacancy."[142] Although most nominees were still confirmed, the temperature of the process was clearly rising.[143]

The Supreme Court's decision in *Casey* added fuel to this growing fire. As many scholars have recognized, inferior federal courts applied the undue burden standard in markedly different—and often ideologically predictable—ways.[144] Although some studies suggest that, prior to 1990, there was little difference in the way that Democratic- and Republican-

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[136] *See* Part II(A)(3).

[137] The Carter administration inadvertently paved the way for this trend. Carter sought to replace the patronage system with a merit-based system that would enable more women and minorities to join the federal bench. But in so doing, Carter centralized judicial selection in the White House. *See* GOLDMAN, *supra* note 82, at 11 n. i, 360.

[138] *See* GOLDMAN, *supra* note 82, at 2; SCHERER, *supra* note 23, at 161.

[139] SCHERER, *supra* note 23, at 160-61.

[140] *See* STEIGERWALT, *supra* note 23, at 10 ("[a]fter witnessing the presidential shift from patronage to political appointments" under Reagan, progressive activists "transferred their attention to lower court confirmations" and formed "judicial watchdog groups").

[141] *See* BINDER & MALTZMAN, *supra* note 24, at 56.

[142] 130 CONG. REC. 21590 (1984) (statement of Sen. Edward Kennedy, D-Mass.); *see also* SCHERER, *supra* note 23, at 148 (noting that the Wilkinson nomination was the first "use of the filibuster to keep lower court judges off the bench on ideological grounds").

[143] The overall confirmation rate was still high. *See* LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT 75-76 (2005); STEIGERWALT, *supra* note 23, at 10. But there were more battles and delays. *See* SCHERER, *supra* note 23, at 2-3, 136 (finding that "the percentage…*not* confirmed" "increased dramatically…beginning in the George H.W. Bush administration" and the average number of days between nomination and confirmation increased ten-fold from around 30 days during the Carter administration to over 300 days during the Clinton and George W. Bush administrations).

[144] *See* Karen A. Jordan, *The Emerging Use of a Balancing Approach in* Casey*'s Undue Burden Analysis*, 18 U. PA. J. CONST. L. 657, 660 (2015) (describing the lower courts' "variable and difficult to reconcile results"); *see also* Linda J. Wharton et al., *Preserving the Core of* Roe: *Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 355-56 (2006) (finding "mixed results").

appointed jurists approached abortion cases,[145] scholars have observed "powerful evidence of ideological voting" in abortion cases beginning in the 1990s.[146] Political scientist Nancy Scherer found that between 1994 and 2001, a Democratic-appointed lower court judge was more likely to strike down an abortion restriction "by forty-four percentage points compared with a republican-appointed judge."[147]

Accordingly, the Supreme Court's "undue burden" test raised the stakes for lower court appointments.[148] As Scherer recounts, prominent interest groups recognized that, after *Casey*, "all important legal issues in the pro-choice/pro-life debate are being decided" by the inferior federal judiciary.[149] Some pro-choice groups thus scrutinized every lower court nominee—and castigated President Clinton in the 1990s when he considered placing a pro-life individual on the federal district court bench.[150] A legal director of NARAL Pro-Choice America put the point candidly:

> There's a real recognition that the lower court judges hold vast power over women's reproductive lives…. *Casey*, in 1992 … empowered lower court judges because it established an undue burden standard …. which is obviously a mushier standard [than the test in *Roe*], and more fact dependent and subject to the interpretations of district and court of appeals judges.[151]

Put another way, "because of the dearth of explicit directions … from the Supreme Court," the lower courts are "forced into a policy-making position" on the scope of the right to terminate a pregnancy.[152]

III. TRADE-OFFS WITHIN THE JUDICIAL HIERARCHY

Brown II and *Casey* vividly illustrate the conundrum faced by the federal judiciary in high-profile contexts. Although the Supreme Court

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[145] *See* CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN, & ANDRES SAWICKI, ARE JUDGES POLITICAL? 92-93 (2006) ("It is striking to see that between 1971 and 1990 there are no party effects [in abortion cases]: Democratic appointees cast of pro-choice vote 62 percent of the time, and Republican appointees do so 58 percent of the time.").

[146] *Id.* at 93; *see* SCHERER, *supra* note 23, at 41; Adam M. Samaha & Roy Germano, *Are Commercial Speech Cases Ideological? An Empirical Inquiry*, 25 Wm. & Mary Bill Rts. J. 827, 830, 842, 861 (2017) (finding, from 2008 to 2016, "a significant degree of judicial disagreement over abortion policy," with "[g]aps of more than twenty-five percent").

[147] SCHERER, *supra* note 23, at 41.

[148] *See* SCHERER, *supra* note 23, at 19; Devins, *supra* note 112, at 989 ("federal courts of appeal have divided over the…undue burden standard….[I]t is little wonder that partisans on the Senate Judiciary Committee now fight tooth and nail over…nominations").

[149] SCHERER, *supra* note 23, at 19.

[150] *See id.* at 17, 63, 123 ("liberal activists let [Clinton] know there would be no free rides when it comes to lifetime appointment to the bench").

[151] *Id.* at 19-20 (quoting interview with Elizabeth Cavendish, former legal director of NARAL Pro-Choice America).

[152] Wisdom, *supra* note 77, at 426-27.

could (as discussed below) constrain lower court judges through broad, rule-like precedents, the Justices may be reluctant to do so in salient areas. They may instead craft more opaque tests—leaving the details to be ironed out by the inferior federal judiciary. Presidents, senators, and interest groups then zero in on the composition of the lower courts—in ways that threaten the long-term legitimacy of the inferior federal bench. This Part argues that these legitimacy tradeoffs are a significant (albeit largely overlooked) feature of our federal judicial scheme.

A. Can Supreme Court Precedent Constrain?

At the outset, I wish to address a preliminary question: *Could* the Supreme Court constrain inferior federal judges in high-profile cases? As scholars have observed, the Justices can often more effectively oversee their judicial inferiors by articulating broad, rule-like doctrines.[153] But this Essay contends that such formalistic doctrines are particularly crucial in high-profile areas. It is reasonable to assume that lower court judges, like people generally, often have strong views on salient issues such as abortion, affirmative action, or gun rights. Accordingly, the Justices likely have greater need in these areas to rein in their judicial inferiors—and limit the impact of ideology in lower court decisionmaking. And the available evidence suggests that the Justices can do so: Given the norms of our judicial practice, lower federal courts will obey broad, rule-like Supreme Court precedents, even in high-profile cases.

1. The Legal Obligation and Norms of Constraint

Legal scholars overwhelmingly agree that Article III creates a hierarchical judiciary,[154] such that the inferior federal courts are bound by the Supreme Court's articulation of federal law.[155] But do inferior federal

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[153] *See infra* notes 159-165 and accompanying text; *see also* ANDREW COAN, RATIONING THE CONSTITUTION (2019); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 3, 40-50 (2009) (given that the modern Court reviews only a fraction of lower court decisions, it can most effectively guide its judicial inferiors through broad precedents); Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221, 222-25 (2016) (the Court could issue broad precedents in some contexts and supervise others on a case-by-case basis); *cf.* Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 90-93 (2019) (offering a thoughtful analysis of doctrinal design).

[154] *See* U.S. CONST. art. III; *e.g.*, Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 668-69 & n.92 (1996); Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 362 (2006); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1453 (2000). *But see* David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 503–04 (1991) (contending the Constitution does not require a hierarchical judiciary).

[155] *See* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1032-33 (2007); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 829 n.49, 832-34 (1994); Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 189–90; Ryan Williams, *Lower*

courts in fact aim to comply with the edicts of their judicial superiors? Existing research strongly indicates that the answer is yes.

As political scientist John Kastellec has observed, empirical studies have repeatedly found "widespread compliance by lower courts" with Supreme Court precedents.[156] That research accords with the declarations of lower court judges themselves.[157] Federal judges have asserted that they have a "constitutional obligation" "to apply whatever decisions the [Supreme] Court issues."[158]

2. The Theory: The Constraining Impact of Rules

Not all Supreme Court precedent constrains in the same way, however. Lower courts have far more discretion in applying legal doctrines that take the form of standards, rather than rules.[159] For that reason, some political scientists argue that the Justices should use rules, rather than standards, if they anticipate that lower court judges will be reluctant to carry out their superiors' commands.[160]

Legal scholars have also asserted that the Supreme Court can more effectively constrain its judicial inferiors through broad, rule-like doctrines, such as *Miranda v. Arizona*,[161] the tiers of scrutiny,[162] or *Chevron* deference.[163] Toby Heytens contends, for example, that the

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Court Originalism (draft on file with author). *But see* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 82–88 (1989) (lower courts can disregard "clearly erroneous" decisions).

[156] *See* John P. Kastellec, *The Judicial Hierarchy*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS 5-8 (2017) (providing an overview of the literature).

[157] *See* Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 622 (1985) ("the lower courts…are bound to follow Supreme Court rulings"); *see also* J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 156 (1981) (finding, based on interviews, that judges "felt obliged to obey the Supreme Court").

[158] Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the* Harris *Case*, 102 YALE L.J. 205, 206 (1992); *see supra* note 157.

[159] *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 68 (2006); Scott Baker & Pauline T. Kim, *A Dynamic Model of Doctrinal Choice*, 4 J. LEGAL ANALYSIS 329, 333, 336-37 (2012) ("[T]he more rule-like the doctrine, the more likely it is that the lower courts will follow the directive"); Jeffrey R. Lax, *Political Constraints on Legal Doctrine: How Hierarchy Shapes the Law*, 74 J. POL. 765, 766 (2012) ("a bright-line rule" is more likely to "prevent strategic non-compliance."); *see also* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 924-26 (2016) ("ambiguous Supreme Court precedents" offer lower courts "interpretive flexibility").

[160] *See* Frank Cross, Tonja Jacobi & Emerson Tiller, *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1, 26 (2012) ("[A] rule…constrains lower court judges who hold antithetical policy preferences more than a standard would."); Lax, *supra* note 159, at 772.

[161] 384 U.S. 436 (1966); Grove, *Vertical Maximalism*, *supra* note 153, at 55-56.

[162] *See* Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. Pol'y 475, 476-77 (2016) (defending the tiers as a way to oversee lower courts).

[163] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (directing lower courts to defer to a federal agency's reasonable construction of an ambiguous federal statute); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial*

Supreme Court can use rules to ensure that its handiwork "can and will be faithfully implemented" by lower court judges.[164] By contrast, "complicated or open-ended standards increase the risk of good faith misunderstandings and create opportunities for disguising deliberate noncompliance."[165]

These assumptions presumably motivated then-NAACP attorney Thurgood Marshall to request a firm deadline for desegregation. Marshall anticipated that "the Negro in this country would be in a horrible shape," if the Court left the "enforcement of [*Brown*] … to the judgment of the district court with practically no safeguards."[166] But the Supreme Court articulated the "all deliberate speed" test. As Fifth Circuit Judge Wisdom commented (with some understatement), that test gave "the inferior federal courts … a greater latitude for action" and "[i]t has not worked out well."[167]

3. Empirical Support

Some empirical evidence supports the assumption that broad, rule-like doctrines constrain inferior federal court judges to a greater degree than standards—even in high-profile contexts. Recall, for example, that scholars have found "no party effects" in abortion cases decided by the lower courts prior to 1990 but uncover "powerful evidence of ideological voting" in abortion cases after that time.[168] That is, since the 1990s, lower court judges appointed by either Republican or Democratic presidents vote in distinct ways.[169] There may be multiple reasons for this difference, but one likely factor is the Supreme Court's shift from the rule-like trimester framework of *Roe v. Wade* to the undue burden standard of *Planned Parenthood v. Casey*.[170] As political scientist Sheldon Goldman observed in 1989, "[t]he most anti-abortion Reagan [lower court]

Review of Agency Action, 87 COLUM. L. REV. 1093, 1121 (1987) (describing *Chevron* "as a device for managing the courts of appeals").

[164] Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2046, 2046 (2008)

[165] *Id.* at 2048.

[166] *Brown II* Transcript, *supra* note 41, at 400 (statement of Thurgood Marshall).

[167] Wisdom, *supra* note 77, at 420.

[168] *Supra* notes 144-147 and accompanying text.

[169] There are, of course, different measures of judicial "ideology." This discussion relies on one common metric: the party of the nominating president. *See* Samaha & Germano, *Commercial Speech*, *supra* note 146, at 830 (noting this is a "standard metric"). This metric seems most likely to impact the judicial selection process.

[170] One might assume that the difference relates to changes within the Republican and Democratic parties. Until the 1990s, there was no clear split between Democrats and Republicans on the abortion issue. *See* Devins, *supra* note 112, at 947-48, 966. But whatever the views of the party base, Presidents Reagan and George H.W. Bush self-consciously sough to nominate pro-life judges to the federal bench in the 1980s. *See supra* notes 119, 139 and accompanying text. Accordingly, one might have expected to see some ideological voting from those judges. The fact that ideological voting appears later suggests that the change relates to shifts in Supreme Court doctrine.

appointee must follow *Roe v. Wade* until it is modified or overturned by the Supreme Court itself."[171]

One can also see the constraining impact of broad, rule-like doctrines in administrative law (an area that, as discussed below, has grown in political salience). A recent study by Kent Barnett, Christina Boyd, and Christopher Walker looks at *Chevron v. Natural Resources Defense Council*, which directs lower courts to defer to a federal agency's reasonable construction of an ambiguous federal statute.[172] The authors find that *Chevron* "powerfully, even if not fully, constrain[s] ideology in judicial decisionmaking. When applying *Chevron*, panels of all ideological stripes use the framework similarly and reveal modest ideological behavior."[173] This study supports Peter Strauss's earlier assessment that *Chevron* can "be seen as a device for managing the courts of appeals that can reduce (although not eliminate) the Supreme Court's need to police their decisions for accuracy."[174]

By contrast, empirical scholars have found that lower court judges vote in more predictable "conservative" or "progressive" directions in certain high-profile contexts—involving affirmative action,[175] abortion (since the 1990s),[176] and (increasingly) the Second Amendment.[177] In each of these areas, the Supreme Court has articulated opaque doctrines that offer inferior federal courts considerable leeway. As we have seen,

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[171] Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing up*, 72 JUDICATURE 318, 328 (1989).

[172] *See* 467 U.S. 837, 842–44 (1984); Kent Barnett, Christina L. Boyd, & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1467-68 (2018) (examining 1,382 published opinions from 2003 through 2013).

[173] Barnett, et al, *supra* note 172, at 1467-68. Earlier studies offered a more mixed assessment of the impact of *Chevron* (although it appears that those studies were less comprehensive than Barnett-Boyd-Walker). *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2166-67 (1998) (surveying the literature and noting the first studies found significant constraint, while later studies found less).

[174] Strauss, *supra* note 163, at 1121.

[175] *See* SUNSTEIN, et al, *supra* note 145, at 24-25 (finding "striking evidence of ideological voting" on affirmative action); Samaha & Germano, *Commercial Speech*, *supra* note 146, at 830, 842, 861 (finding "[g]aps of more than twenty-five percent" from 2008 to 2016).

[176] *See* EPSTEIN & SEGAL, *supra* note 143, at 128-29, 133 (finding "Democrats are far more likely to cast pro-choice votes (70 percent) than Republicans (49 percent)"); SCHERER, *supra* note 23, at 41; Samaha & Germano, *Commercial Speech*, *supra* note 146, at 827, 830, 842 (finding significant gaps between 2008 and 2016,).

[177] *See* Adam M. Samaha & Roy Germano, *Judicial Ideology Emerges, At Last, in Second Amendment Cases*, 13 CHARLESTON L. REV. 315, 319-20, 325-26, 341 (2018) ("the party of the appointing president is now predictive of judge votes in civil gun rights cases"). In an earlier study (from 2008 to 2016), Adam Samaha and Roy Germano found no ideological divide; judges of all stripes tended to deny Second Amendment claims. But in an updated study, the authors found a difference—apparently because Democratic appointees over time became less likely to support gun rights claims. *See id.*

the undue burden test governs abortion cases.[178] In the Second Amendment context, although the Court in 2008 and 2010 declared that the Constitution protects an individual right to keep and bear arms,[179] the Court has said very little about what that right means. The Justices have repeatedly denied certiorari in gun rights cases and have declined to articulate any tiers of scrutiny for Second Amendment claims.[180] With respect to affirmative action, the Court has suggested that lower courts should apply a significantly more relaxed strict scrutiny standard than appears in other areas of constitutional law,[181] allowing public universities to consider race as one factor in admissions, as long as they stay away from quotas or other sharp numerical measures.[182] As Adam Samaha and Roy Germano observe in an empirical study (which found ideological voting in lower court affirmative action cases), the uncertain "doctrinal messages" in the Supreme Court's affirmative action precedents "make room in law for disagreements in practice."[183]

4. The Potential Value of Constraint

The available evidence thus suggests that the Justices could constrain their judicial inferiors by issuing broad, rule-like legal tests. Such an approach would serve a valuable function. There is a longstanding debate over whether judges are guided more by "law" or "politics."[184] This Essay assumes that judges may be influenced by both forces, particularly in salient cases. But as the preceding discussion

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[178] See Part II(A)(3); *see also* Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEXAS L. REV. 1189, 1220 (2017) (*Casey* "offers no guidance as to which laws are an undue burden and which are not").

[179] *See* District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008) (finding a right to possess a handgun in the home for purposes of self-defense); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

[180] *See* Heller, 554 U.S. at 628-29 (concluding that a prohibition on handguns in the home fails "[u]nder any of the standards of scrutiny"); *infra* note 193 and accompanying text (noting the certiorari denials).

[181] *See* Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003); *see also* Fisher v. University of Texas at Austin, 631 F.3d 213, 247 (5th Cir. 2011) (Garza, J., concurring) (*Grutter* "applied a level of scrutiny markedly less demanding" than traditional strict scrutiny); Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 166 (noting *Grutter*'s "alteration of…strict scrutiny").

[182] *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2214–15 (2016) (upholding a program that considered race as one factor); Grutter v. Bollinger, 539 U.S. 306, 336-37, 343–44 (2003); *see also* Gratz v. Bollinger, 539 U.S. 244, 271-72, 275-76 (2003) (striking down an undergraduate program, which "automatically distribute[d] 20 points to every single applicant from an 'underrepresented minority' group").

[183] Samaha & Germano, *Commercial Speech*, *supra* note 146, at 846.

[184] For an overview of the debate, see Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005); *see also* Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single-Subject Adjudication*, 40 J. L. STUD. 333, 336-38, 354-56 (2011) (discussing prior tests and offering a new one to analyze the relative impact of law). Meanwhile, it is widely assumed that judges *should not* decide cases based on their ideological preference for a specific result. *See* David E. Pozen & Adama Samaha, *Anti-Modalities*, 119 MICH. L. REV. (forthcoming 2021) (manuscript at 15-19, 22-24).

suggests, lower court judges—regardless of their background ideological leanings—do follow the clear edicts of their judicial superiors. Accordingly, the Supreme Court could significantly reduce the relevance of *politics* in lower court decisionmaking by articulating *law* in the form of broad, rule-like doctrines. Such constraint could, in turn, help contribute to the external legitimacy of the inferior federal bench.

B. Protecting Supreme Court Legitimacy

Nevertheless, in certain high-profile contexts, the Supreme Court has issued opaque tests or denied certiorari entirely. To be sure, the Justices may decline review, or opt for narrow or opaque doctrines, for any number of reasons, including the difficulty of reaching agreement on a multi-member Court.[185] But as *Brown II* and *Casey* suggest, in high-profile areas, the Justices may be hesitant to articulate a broad new doctrine out of concern for the Supreme Court's sociological legitimacy. The Justices opted for the "all deliberate speed" formula in large part to protect "the Court's prestige—its dignity interest in avoiding the issuance of futile orders."[186] And in *Casey*, the Justices sought to protect the Court's legitimacy by declining to overrule *Roe v. Wade*, while also "subject[ing] law to democratic pressure by dismantling the trimester system of *Roe*."[187]

A similar script has played out in the context of affirmative action. Commentators argue that, in 2003, at least some Justices voted to allow affirmative action on university campuses in order to preserve the Court's reputation with political and business elites.[188] Then, just one decade later, it looked as though a bare majority of the Court would invalidate an affirmative action plan from the University of Texas—and thereby transform the Court's jurisprudence in that arena.[189] Justice Kennedy drafted a majority opinion that would have done precisely that.[190] But according to Joan Biskupic, after Justice Sotomayor penned a blistering draft dissent, Justice Kennedy pulled the draft opinion and assembled a different majority to send the case back to the court of appeals for a second look.[191] A central concern, Biskupic writes, was "how Sotomayor's

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[185] It may, for example, be hard to put together a majority for a broad rule. *See* Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 840 (2008). Moreover, some Justices may have a jurisprudential preference for narrow decisions or more standard-like solutions to legal problems. *See* Sullivan, *supra* note 1, at 27, 95-96.

[186] KLARMAN, *supra* note 41, at 314.

[187] Post & Siegel, *supra* note 132, at 429-30.

[188] *See* DEVINS & BAUM, *supra* note 22, at 47-48 (noting the influence of elites, particularly businesses and the military, on the Court's affirmative action decisions); TOOBIN, *supra* note 122, at 211-14, 218-20.

[189] *See* JOAN BISKUPIC, BREAKING IN 200-01 (2014) (recounting that, during the conference vote in *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013) (*Fisher I*), "it initially looked like a 5-3 lineup").

[190] *See id.*

[191] *See* Fisher, 570 U.S. at 314–15; BISKUPIC, *supra* 189, at 201-02, 205-10.

personal defense of affirmative action and indictment of the majority would ultimately play to the public."[192]

Legitimacy concerns also seem likely to weigh on the Justices as they consider the next steps with respect to the Second Amendment. The Justices remained silent on the issue for years, denying certiorari in *every* gun rights case until 2019, when they opted to review a somewhat obscure New York City regulation.[193] While the case was pending, the New York state legislature passed a state law that preempted the city regulation, a fact that led the Court ultimately to dismiss the claim as moot.[194]

But for present purposes, an important—and extraordinary—aspect of the case was a brief filed by several Democratic senators, which suggested that a decision in favor of the gun rights claim could compromise the Court's sociological legitimacy.[195] The senators underscored that organizations like the National Rifle Association spent considerable sums to push for the confirmation of recent Supreme Court nominees Neil Gorsuch and Brett Kavanaugh.[196] As a result, the senators charged, any decision in favor of gun rights would make the Court appear to be part of the pro-gun "political agenda."[197] The senators concluded with a not-so-subtle warning (which harkened back to recent calls for court packing): "The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.'"[198] Whether or not the senators' brief influenced the Court's decision to dismiss the New York case, history suggests that at least some Justices will be concerned about the external reaction to a future Second Amendment decision—

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[192] BISKUPIC, *supra* 189, at 205.

[193] *See* Liptak, *supra* note 4 (suggesting the law was the only one preventing gun owners from carrying handguns to second homes or to out-of-city shooting ranges).

[194] The Court held that the plaintiffs' request for declaratory or injunctive relief was moot. *See* New York State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525, 1526-27 (2020) (per curiam). The Court remanded the case to give the plaintiffs an opportunity to seek leave to amend their complaint to add a damages claim. *See id.*

[195] *See* Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kirsten Gillibrand as Amici Curiae in Support of Respondents, New York State Rifle and Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (No. 18-280).

[196] *See id.* at 4-8 (discussing the advocacy for Justices Gorsuch and Kavanaugh).

[197] *Id.* at 3.

[198] *Id.* at 17. Senator Whitehouse later claimed that the brief did not say anything about court packing. Sheldon Whitehouse, *The Supreme Court has become just another arm of the GOP*, WASH. POST (Sept. 6, 2019). But many other commentators, including all fifty-three Republican senators who signed a letter in opposition to the amicus brief, interpreted the brief as a threat to pack the Court with additional members. *See* Letter to Scott S. Harris, Clerk, U.S. Supreme Court, New York State Rifle and Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (No. 18-280) (August 29, 2019) ("The implication is as plain as day: Dismiss this case, or we'll pack the Court."); *see also* Editorial Board, *Senators File an Enemy-of-the-Court Brief*, WALL STREET JOURNAL (Aug. 15, 2019) ("By 'restructured,' they mean packed with new Justices" by Democrats).

particularly as gun violence becomes of matter of increasingly prominent public concern.[199]

The Justices' interest in the public reputation of the Court is understandable. (For now, I bracket the question—discussed below—whether it is legally legitimate for the Justices to take such concerns into account in deciding cases.) After all, the Supreme Court cannot function as an institution without some degree of sociological legitimacy.[200] Accordingly, the Justices may often be tempted to issue narrow rulings or deny review in politically controversial cases. But commentators have overlooked that, in the course of protecting the legitimacy of the Supreme Court, the Justices may put at risk the remainder of the federal bench.

C. Overlooked Effects on the Lower Courts

To underscore the stakes for the inferior federal judiciary, I begin with additional background on the lower court selection process, which has become increasingly partisan and divisive in recent years. This process is important for a few reasons. First, the contentious nature of the process illuminates the external reputation of the lower courts among elites: If political actors and interest groups assumed that Democratic- and Republican-appointed jurists would approach legal issues in the same way, it would be hard to understand the fuss over judicial selection. Accordingly, the process itself indicates that many elites view the inferior federal judiciary in ideological terms. Second, and crucially, some research suggests that this divisive selection process could have a detrimental impact on the long-term public reputation of the inferior federal judiciary.

To be sure, Supreme Court doctrine is not solely responsible for the contentiousness of the lower court selection process. There are several interrelated factors, including the polarization of the political parties and changes in Senate procedure.[201] But as the historical accounts of *Brown II* and *Casey* underscore, Supreme Court doctrine is an important—and often overlooked—part of the story. And this makes sense: When the Court issues opaque doctrines in high-profile areas (such as abortion, affirmative action, or gun rights), that opens up space for lower court judges to vote in more ideologically predictable ways. Presidents, senators, and interest groups begin to recognize that "all important legal issues [in these salient areas] are being decided" by the inferior federal judiciary.[202] Political actors and interest groups thus have a strong incentive to focus on the composition of the lower federal bench.

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[199] *See* Nate Cohn and Margot Sanger-Katz, *Support for Gun Control Is Rising. Why Congress May Still Do Nothing*, N.Y. TIMES, at A18 (Aug. 11, 2019) (noting public support for gun control has increased in the wake of recent shootings, but that it is also polarized, with Republicans showing greater support for gun rights).

[200] *See* Part I.

[201] *See supra* note 24 and accompanying text.

[202] SCHERER, *supra* note 23, at 19.

1. Elite Attitudes Toward the Lower Federal Courts

Although many commentators have recounted the contentious and partisan fights over Supreme Court nominees,[203] there has been far less attention to the selection of inferior federal court judges. This Essay aims in part to introduce readers to that history: As discussed, for many years, lower court appointments were patronage, not policymaking, opportunities. That began to change in the wake of *Brown II*, and even more so during the Reagan presidency.[204] But attacks on lower court nominees became far more common during the Clinton and George W. Bush administrations.[205] Starting in the late 1990s, Keith Whittington writes, "the odds of a circuit court nomination being confirmed" seemed "little better than a coin flip."[206]

Throughout this period, presidents, senators, and interest groups increasingly sought to discern how a lower court nominee might vote in politically salient cases. As Ninth Circuit Judge Diarmuid O'Scannlain lamented in 2003, "[t]he politics that has come to dominate today's nomination process is a politics that aims, before the fact, to ascertain how a given nominee will decide a particular case—or, to be more precise, a series of hot-button cases," such as those pertaining to abortion or affirmation action.[207] Fifth Circuit Judge Carolyn King made a similar observation in 2007: Both political actors and interest groups scrutinized a nominee's position on "politically salient issues including abortion [and] civil rights."[208]

The temperature rose further during the Obama administration.[209] After Republicans repeatedly blocked or delayed nominations (including those with support from a Republican home-state senator), the Democratic-controlled Senate in 2013 exercised the "nuclear option"—a procedural reform that dispensed with the filibuster for lower court

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[203] There is an important literature on the Supreme Court confirmation process. For a small sample, see STEPHEN L. CARTER, THE CONFIRMATION MESS 11-13 (1994); CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT 17-18 (2019); LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 77-79 (1985).

[204] *See* Parts II(A)(3),(B)(3).

[205] *See* STEIGERWALT, *supra* note 23, at 3 (noting that "ideological tensions over the staffing of the federal bench had grown to a fever pitch" by this time).

[206] Whittington, *Partisanship*, supra note 24, at 525.

[207] Diarmuid F. O'Scannlain, *Today's Senate Confirmation Battles and the Role of the Federal Judiciary*, 27 HARV. J.L. & PUB. POL'Y 169, 172, 174 (2003).

[208] Carolyn Dineen King, Lecture, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 MARQ. L. REV. 765, 773 (2007) (expressing concern about "an ever increasing and contentious focus" on whether appellate court nominees "are committed…to particular positions on…salient issues").

[209] *See* Sarah Binder & Forrest Maltzman, *New Wars of Advice and Consent: Judicial Selection in the Obama Years*, 97 JUDICATURE 48, 48 (2013) ("In many ways, advice and consent worsened over the Obama years"); *see also* Josh Chafetz, Essay, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 97-110 (2017) (describing the judicial selection battles).

selection and allowed judges to be confirmed by majority vote.[210] This rule change allowed President Obama to fill a number of vacancies (and far more quickly), while the President enjoyed a Senate controlled by the same political party.[211] But confirmations slowed to a near standstill in 2015, when Republicans took over the Senate.[212] Judicial confirmations did not pick up again until 2017, when President Donald Trump came into office with a Republican-controlled Senate.[213] Indeed, for the foreseeable future, we may have seen the end of bipartisan support for lower federal court nominees.

Meanwhile, there has been an apparent rise in political rhetoric characterizing the inferior federal judiciary in partisan or ideological terms. President Trump, for example, in 2018 dismissed a lower court decision as the handiwork of an "Obama judge."[214] When Chief Justice Roberts responded by insisting that "'[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges,'"[215] President Trump shot back: "Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges'…. It would be great if the 9th Circuit was indeed an 'independent judiciary.'"[216]

Progressive elites, in turn, sound the alarm at what they describe as the Republicans' effort "to nominat[e] extremely conservative judges and confirm[] them at a breakneck speed."[217] In 2019, Democratic

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[210] *See* 159 CONG. REC. S8417–18 (daily ed. Nov. 21, 2013) (statement of President pro tempore Sen. Patrick Leahy, D-Vt.) (noting the change); Binder & Maltzman, *New Wars*, *supra* note 209, at 51 (during Obama's first term, "Senate Republicans launch[ed] filibusters against nominees who had the support of" home-state Republican lawmakers).

[211] *See* Christina L. Boyd, Michael S. Lynch, & Anthony J. Madonna, *Nuclear Fallout: Investigating the Effect of Senate Procedural Reform on Judicial Nominations*, 13 FORUM 623, 635-37 (2015) (observing that the rate of confirmation increased from around 62% to 80%). President Obama likely could have placed even more judges on the federal bench, but for Democratic Senate Judiciary Committee Chairman Patrick Leahy's decision to honor all (or virtually all) blue slips from Republican senators. *See* Elliott Slotnick, Sara Schiavoni, & Sheldon Goldman, *Obama's Judicial Legacy: The Final Chapter*, 5 J. L. & COURTS 363, 369-70, 373 (2017).

[212] *See* Whittington, *Partisanship*, *supra* note 24, at 532 ("When the Democrats lost the chamber…, judicial confirmations largely ground to a halt.").

[213] *See* Kevin Freking, *Trump spotlights confirmation of 150-plus federal judges*, WASH. POST (Nov. 6, 2019); Carrie Johnson, *Trump's Judicial Appointments Were Confirmed At Historic Pace In 2018*, NPR (Jan. 2, 2019) (the Trump administration has "exceed[ed] the pace of the last five presidents"). In April 2019, the Senate further streamlined the process by limiting debate on district court nominees. See Paul Kane, *Republicans change Senate rules to speed nominations as leaders trade charges of hypocrisy*, WASH. POST (April 3, 2019) (noting the change from thirty to two hours of debate).

[214] Adam Liptak, *Judge's Ruling on Asylum Provokes President to Call Appeals Court a 'Disgrace,*' N.Y. TIMES, at A11 (Nov. 21, 2018).

[215] Mark Sherman, *Roberts, Trump spar in extraordinary scrap over judges*, ASSOCIATED PRESS (Nov. 21, 2018) (quoting the Chief Justice).

[216] Robert Barnes, *Rebuking Trump's criticism of 'Obama judge,' Chief Justice Roberts defends judiciary as 'independent*,' WASH. POST (Nov. 21, 2018) (quoting the President).

[217] *Trump Continues to Reshape Judiciary at Breakneck Speed*, AM. CONST. SOC.: IN BRIEF (Jan. 24, 2019); *see* Freking, *supra* note 213 (collecting views of progressives).

Senators Diane Feinstein and Chuck Schumer declared that the judiciary is now "packed with young judges whose views are far outside the mainstream.… Instead of serving as neutral arbiters, these judges will push a conservative agenda that will have lasting effects for generations."[218]

2. Long-Term Effects on Public Reputation

Elites, it seems, increasingly view the lower federal courts in ideological terms. But the question remains whether the contentiousness surrounding the inferior federal judiciary may also impact its long-term legitimacy with the broader public. Some federal judges have worried about such an impact. Over a decade ago, Fifth Circuit Judge King asserted that "[j]udicial independence is undermined … by the high degree of political partisanship and ideology that currently characterizes the process by which the President nominates and the Senate confirms federal judges."[219] Such a "highly partisan or ideological judicial selection process conveys the notion to the electorate that judges are simply another breed of political agents, that judicial decisions should be in accord with political ideology, all of which tends to undermine public confidence in the legitimacy of the courts."[220]

A 2006 survey by political scientists Sarah Binder and Forrest Maltzman provides some empirical support for this intuition.[221] The authors found that lower court judges "who come to the bench via a contested nomination fare worse in the public's eye than do judges who sailed through to confirmation."[222] Although "strong partisans" were pleased when their own party's president selected a controversial nominee (that is, someone who was strongly contested by the opposing party), other members of the public tended to view the judge's decisions with more suspicion.[223] Binder and Maltzman warn: "[P]artisan differences over judicial nominees may be undermining the perceived legitimacy of the federal judiciary—a worrisome development for an unelected branch in a system of representative government."[224]

Bert Huang offers another sobering account. In 2019, Huang examined public reactions to lower court decisions on the Deferred Action for Childhood Arrivals (DACA) program.[225] Multiple lower courts had held unlawful the Trump administration's efforts to rescind Obama's

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[218] Freking, *supra* note 213 (quoting Senator Feinstein, D-CA); *see* Carl Hulse, *President Celebrates Leaving His Mark on the Courts*, N.Y. TIMES, at A20 (Nov. 7, 2019) (Senator Schumer, D-NY, described Trump's nominees as "'the most unqualified and radical nominees in my time in this body'").

[219] King, *supra* note 208, at 773.

[220] *Id.* at 782.

[221] *See* BINDER & MALTZMAN, *supra* note 24, at 127-28.

[222] *Id.* at 128.

[223] *Id*. at 128, 138. The authors asked members of the public for their reaction to a judge's decision about a gun regulation. *See id.* at 138-40.

[224] *Id.* at 10.

[225] *See* Bert I. Huang, *Judicial Credibility*, 61 WILLIAM & MARY L. REV. 1053 (2020).

DACA program.[226] But Huang found that, even when the lower courts ruled the same way, self-identified Republicans were more likely to trust the legal analysis of a Bush appointee than a Clinton appointee.[227]

3. Why Lower Court Sociological Legitimacy Matters

The empirical studies of lower court sociological legitimacy are limited; as discussed, most scholars still focus on the Supreme Court.[228] But the existing research supports the common-sense intuition that the contentiousness surrounding the inferior federal judiciary is not good for the long-term health of those courts. After all, the inferior federal judiciary—no less than the Supreme Court—can function effectively only if it enjoys external legitimacy. The lower federal courts also have no army; they must rely on other actors to enforce and obey their decrees. Those external actors are more likely to comply if they view the lower federal courts as legitimate—that is, as institutions that do and should have the power to make authoritative decisions.

Moreover, recall that "legitimacy is for losers."[229] Lower court judges need the support of those who *disagree* with a decision, so that those "losers" will obey the adverse ruling. Fifth Circuit Judge King was, at bottom, concerned about compliance. She argued that the "highly partisan or ideological judicial selection process … tends to undermine public confidence in the legitimacy of the courts."[230] The resulting "loss of public confidence in the legitimacy of the courts—confidence that courts will decide impartially, in accordance with the rule of law—could, in turn, undermine compliance by the public with unpopular decisions."[231]

Notably, some commentators have suggested that President Trump's attacks on lower federal courts may be an attempt to undermine their public reputation, so that it will be easier for his administration to defy a court order going forward.[232] My own work tracing the historical

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[226] *See id.*; *see also* NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018); Regents of Univ. of California v. United States Dep't of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal. 2018). The Supreme Court later agreed that the rescission was invalid. *See* Department of Homeland Security v. Regents of the University of California, 140 S. Ct. 1891, 1916 (2020) (holding that the rescission was arbitrary and capricious under the Administrative Procedure Act, because the Department of Homeland Security did not "provide a reasoned explanation for its action").

[227] *See* Huang, *supra* note 225, at 1060, 1076.

[228] *See* Part I.

[229] Gibson, et al., *supra* note 29, at 839.

[230] King, *supra* note 208, at 782.

[231] *Id.*

[232] *See* Siegel, *Reciprocal*, *supra* note 38, at 1244-45 (noting "the concern that the President may be trying to establish a narrative that he can use after an attack in order to rally a fearful public into accepting his disregard of judicial authority."). Other commentators have questioned whether the Trump Administration would adhere to adverse federal court orders. *See* Aaron Blake, *What Happens If Trump Decides to Ignore a Judge's Ruling?*, WASH. POST (Feb. 5, 2017) [https://perma.cc/XP8V-GGYF]; Nina Totenberg, *Trump's Criticism of Judges out of Line with Presidents*, NPR: POL. (Feb. 11, 2017, 6:19 AM), [https://perma.cc/6X5U-ESFJ] (reporting these concerns).

norms of judicial independence suggests that such concerns are not without foundation. As I have recounted, since at least the mid-twentieth century, there has been a strong norm of compliance with federal court orders.[233] But this norm developed in part because of bipartisan political rhetoric that treated noncompliance as off-the-wall.[234] Accordingly, this norm—like other norms of judicial independence—may be weakened if the rhetoric surrounding the federal judiciary changes.[235]

To be sure, it is difficult to assess the degree or immediacy of any risk of defiance by the federal executive branch. The Trump administration, it seems, has endeavored to comply with adverse federal court decrees.[236] But the very fact that observers are raising these concerns underscores an implicit recognition of the importance of sociological legitimacy—for not only the Supreme Court but also the inferior federal bench. Threats to the "perceived legitimacy of the [inferior] federal judiciary" is "a worrisome development for an unelected branch in a system of representative government."[237]

D. The Likelihood of a Tradeoff

This Essay argues that, when the Supreme Court is invited to change the law in high-profile areas, the Justices may face an unappealing

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[233] *See* Grove, *Judicial Independence*, *supra* note 9, at 488-505, 531-32.

[234] *See id.* at 498-505, 531-32 (noting also the lack of contrary rhetoric).

[235] *Id.* at 544 ("These conventions of judicial independence…could be deconstructed…if we alter the way in which we think and talk about the federal judicial power.").

[236] *See* Grove, *Judicial Independence*, *supra* note 9, at 501 (noting the Trump administration's compliance as of March 2018); *see also* Tara Leigh Grove, *The Power of "So-Called Judges*," 93 N.Y.U. L. REV. ONLINE 14, 17-20 (2018) (arguing that the federal executive has political and institutional incentives to comply). Two recent cases warrant mention. First, according to media reports, in early 2020, the Department of Homeland Security removed an individual from the United States, despite a federal court order granting a stay of removal. But DHS asserted that it did not knowingly violate a court order; the individual was on the plane before DHS received a copy of the order. *See* Deirdre Fernandes, *Northeastern student from Iran removed from US is just the latest sent away at Logan*, BOSTON GLOBE (Jan. 21, 2020). The second case involves litigation over the 2020 census. In fall 2020, a federal district court found invalid the Trump administration's decision to stop counting on September 30, 2020—and indicated that counting should continue until the (previously announced) October 31 deadline. *See* National Urban League v. Ross, __ F.Supp.3d __, at *48 (N.D. Cal. Sept. 24, 2020). The Census Bureau then announced that the count would cease on October 5. The district court accused the administration of disobeying the earlier order, directed the administration to inform all census takers that the count would continue until the end of October, and threatened executive officials with sanctions or contempt if they failed to comply with the new order. *See* Hansi Lo Wang, *After 'Egregious' Violation, Judge Orders Census To Count Through Oct. 31 For Now*, NPR (Oct. 2, 2020), https://www.npr.org/2020/10/02/919224602/after-egregious-violation-judge-orders-census-to-count-through-oct-31-for-now. At that point, the Census Bureau complied, indicating that the count would continue until October 31. *See 2020 Census will continue until October 31 after successful legal challenge*, ABC NEWS (Oct. 3, 2020), https://abc30.com/census-2020-u.s.-bureau-vote/6725827.

[237] BINDER & MALTZMAN, *supra* note 24, at 10.

tradeoff. To preserve the external legitimacy of the Court, the Justices may feel pressure not to issue the broad, rule-like doctrines that can most effectively guide the lower courts. The Justices may thereby not only sacrifice meaningful legal change but also pose risks for the long-term sociological legitimacy of the inferior federal bench.

How likely are the Justices to face such a tradeoff? In recent work, Neil Siegel asserts that, at least in a subset of salient cases, the Supreme Court may be able to work *with* the inferior federal courts to promote the legitimacy of both.[238] Siegel points to recent litigation over same-sex marriage: the Court in *United States v. Windsor* struck down the Defense of Marriage Act, which prohibited the federal government from recognizing state-approved same-sex marriages.[239] Lower federal courts then, Siegel argues, used *Windsor* "to legitimate their [subsequent] decisions" striking down state bans on same-sex marriage.[240] And when the Supreme Court itself required states to recognize same-sex marriage in *Obergefell v. Hodges*, the Court sought to "blunt threats to its own legitimacy by invoking those [earlier] district and circuit court decisions."[241] Siegel describes this phenomenon as "reciprocal legitimation."[242]

Siegel identifies an important phenomenon—one that seems to capture the same-sex marriage saga. But "reciprocal legitimation" seems unlikely to work with respect to many high-profile issues today. This phenomenon envisions a federal judiciary that shares a common project—and thus seeks to push the law in a single direction. As Siegel describes, in the wake of *Windsor*, both a majority of Justices and most inferior federal judges ruled in favor of marriage equality.[243]

But such a common project seems unlikely with respect to many of the high-profile issues that are the focus of commentary today. As we have seen, absent guidance from the Supreme Court, Democratic- and Republican-appointed lower court judges often vote in distinct ways on

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[238] *See* Siegel, *Reciprocal*, *supra* note 38, at 1186-87.

[239] *See* United States v. Windsor, 133 S. Ct. 2675, 2686, 2693, 2695-96 (2013); see Siegel, *Reciprocal*, *supra* note 38, at 1186-87.

[240] Siegel, *Reciprocal*, *supra* note 38, at 1186.

[241] *Id.* at 1186-87; *see* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

[242] Siegel, *Reciprocal*, *supra* note 38, at 1186 ("The process is reciprocal because lower federal courts and the Supreme Court each enlist the support of the other").

[243] *See id.* at 1204, 1226-27 (stating that the Court may use this approach if it anticipates that it can "persuade other federal courts to decide an issue in the Court's preferred way"). Siegel argues that a similar phenomenon occurred with respect to reapportionment and desegregation *outside* the school context. *See id.* at 1186, 1203-05. Siegel focuses on *Brown I*, arguing that by ruling only on *school* segregation, the Court invited lower courts to invalidate desegregation in other contexts, such as restaurants, streetcars, and parks—and that lower courts largely accepted that invitation. *See id.* at 1203-05. I do not seek here to contest Siegel's historical account as to desegregation outside the school context. For present purposes, the important point is that reciprocal legitimation is most likely to work when the Supreme Court and the inferior federal judiciary are engaged in a common project. In our currently divided polity—with increasingly divided courts—that seems unlikely.

issues such as abortion, affirmative action, and gun rights. The lower courts thus seem likely to push the law in *opposing* directions—and develop a patchwork of disparate decisions (as happened in the wake of *Brown II* and *Casey*)—rather than converge on a common project.

That is particularly true, given that the lower federal judiciary has for some time been an ideological patchwork. Over the past several decades, the presidency has repeatedly changed hands between the Republican and Democratic parties. And since Reagan, each President has sought to influence the ideological direction of the lower federal courts. When Reagan entered office in 1981, more than 60 percent of the federal judiciary had been selected by Democratic presidents.[244] By the end of his presidency, Reagan alone had appointed nearly half of the judiciary (47 percent), creating a majority of Republican appointees.[245] Following the Clinton presidency, the inferior federal courts were roughly evenly split between Democratic and Republican-appointed jurists.[246] And although George W. Bush increased the number of Republican appointees,[247] President Obama largely evened the balance during his first term in office.[248] Obama made even greater strides after Democrats eliminated the filibuster (and before Republicans retook the Senate), such that he "was finally able to shift the overall partisan balance on the lower federal courts in the Democrats' favor."[249] In the past few years, with a Republican-controlled Senate (and no filibuster), President Trump has again transformed the lower federal courts: Trump alone has appointed around 200 judges, including over one-quarter of the federal courts of appeals.[250] Yet many Democratic-appointed jurists remain on the federal bench.[251]

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[244] *See* GOLDMAN, *supra* note 82, at 262.

[245] *See* Goldman, *Reagan*, *supra* note 171, at 318-19.

[246] *See* BINDER & MALTZMAN, *supra* note 24, at 101 (noting that, even by 2002, "the active judiciary was composed of 380 judges appointed by Republican presidents and 389 judges appointed by Democratic presidents."),

[247] *See* Slotnick, et al., *supra* note 211, at 410 (stating that, at the beginning of Obama's presidency, "the cohort of judges appointed by Democrats" was 39.1%).

[248] Binder & Maltzman, *New Wars*, *supra* note 209, at 56 ("After four years of Obama appointments…, the bench is coming closer to parity").

[249] Slotnick, et al., *supra* note 211, at 410, 414-15 ("the cohort of judges appointed by Democrats increased from 39.1% to 51.6%" and eight of the twelve regional courts of appeals had Democratic majorities"); *see* U.S. Courts: Judgeship Appointments By President, https://www.uscourts.gov/sites/default/files/apptsbypres.pdf (Obama appointed 268 district judges, 49 regional appellate court judges, for a total of 317"); Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1650 (2015). One recent study argues that the elimination of the filibuster itself is likely to lead to a more polarized judiciary. *See* Jonathan Nash & Joanna Shepherd, *Filibuster Change and Judicial Appointments*, _ J. EMPIRICAL STUD. _ (2021).

[250] *See Devan Cole & Ted Barrett, Senate confirms Trump's 200th judicial nominee*, CNN (June 24, 2020, https://www.cnn.com/2020/06/24/politics/trump-200-judicial-appointments-cory-wilson/index.html.

[251] *See supra* notes 248-249 and accompanying text.

Accordingly, for the past several decades, the lower federal judiciary has been populated by a mix of Republican and Democratic appointees. This mix likely does not matter in many areas of law. But as we have seen, in high-profile contexts, when Supreme Court doctrine is opaque, there is a noticeable difference in the voting patterns of Democratic- and Republican-appointed jurists. That is why the Justices have good reason to articulate broad, rule-like doctrines to rein in their judicial inferiors. By contrast, when the Court fails to provide such guidance, lower court judges are unlikely to converge on a common approach. Instead, we can expect to see what we in fact do see: noticeable differences in lower court decisions in salient cases—in ways that raise the stakes for judicial appointments and pose risks for the long-term legitimacy of the inferior federal bench.

IV. IMPLICATIONS

This Essay aims in large part to draw attention to two (related) phenomena that have been overlooked in the literature: the potential tradeoffs between legal change and legitimacy, and between Supreme Court and lower court legitimacy. To preserve the sociological legitimacy of the Court, the Justices may sacrifice both meaningful legal change and the long-term reputation of the remainder of the federal bench. This Part argues that these trade-offs complicate several practical and theoretical debates about the role of the federal judiciary in the constitutional scheme.

A. What It Takes for a Constitutional Revolution

Supreme Court watchers from time to time predict a constitutional revolution. Today, commentators forecast an overhaul of the Court's jurisprudence on topics including abortion, affirmative action, gun rights, and the administrative state.[252] But this Essay suggests that any such revolution faces significant obstacles.

In order to ensure a revolution in the high-profile areas that are of interest to commentators, the Justices should issue broad, rule-like doctrines. Such precedents will most effectively guide—and constrain—the lower courts. But out of concern for the legitimacy of the Supreme Court as a whole, the Justices may feel pressure *not* to issue broad, rule-like precedents in precisely those high-profile areas. Instead, the Justices may opt for more opaque tests or deny certiorari entirely. In our federal judiciary—where the lower courts have for decades been populated by a mix of Democratic and Republican appointees (with fundamentally different perspectives on issues such as abortion, affirmative action, and gun rights)—opaque tests are unlikely to lead to any revolution. Instead, we are likely to see a patchwork of highly variant lower court rulings—as occurred in the wake of *Brown II* and *Casey*.

[252] *See supra* notes 1-7 and accompanying text (collecting sources).

We may soon see a similar pattern with respect to the administrative state. Conservative and libertarian elites have in recent years led a sustained attack on government regulation (a trend that Gillian Metzger has dubbed "anti-administrativism"),[253] and many observers in June 2019 expected the Supreme Court to begin a revolution in administrative law—by reversing prior decisions that require deference to agency interpretations of regulations: *Auer* deference.[254] Instead, Justice Kagan's majority opinion in *Kisor v. Wilkie* purported to reaffirm *Auer*, while crafting a complex new five-part test, such that "*Auer* deference is sometimes appropriate and sometimes not."[255]

Kisor not only failed to provide the legal change sought by conservatives and libertarians but also seems likely to put considerable pressure on the inferior federal judiciary. As some commentators have observed, the scope of "*Kisor* deference" will depend heavily on the lower federal courts.[256] And *Kisor* comes on the legal scene at a time when presidents, senators, and interest groups are already more closely focused on judicial attitudes toward the administrative state.[257] According to then-Trump White House Counsel Don McGahn, a new "litmus test" for Republican judicial appointees at all levels is skepticism toward federal regulation.[258] Thus, analogous to *Casey*, *Kisor* may increase the pressure on the lower court selection process, with Republicans and Democrats seeking to put individuals with the "correct views" on the inferior federal bench.

The Justices have repeatedly proven resistant to issuing the broad, rule-like doctrines needed to guide the inferior federal courts in high-profile contexts. This analysis not only underscores the difficulty of a Supreme Court-led revolution as a descriptive matter but also has significant normative implications for scholarly debates over judicial legitimacy—to which the Essay now turns.

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[253] Metzger, *supra* note 5, at 3-7, 64-69 (critiquing the "attack on the national administrative state" led by "business interests and conservative forces"); *see also* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 104 (2018) (noting "a growing call from the federal bench, on the Hill, and within the legal academy to rethink" administrative deference doctrines).

[254] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997); *e.g.*, Tom Lorenzen, et al., *The final* Auer: *Midnight approaches for an important deference doctrine*, AMERICAN BAR ASS'N (March 8, 2019) ("The demise of Auer seems imminent.").

[255] Kisor v. Wilkie, 139 S. Ct. 2400, 2408, 2414-18 (2019).

[256] *See* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 8, 66 (noting that the Court "punt[ed] the difficult questions back to the lower courts," *id.* at 8, and thus "it will be how the lower courts apply *Kisor* … that will establish *Kisor*'s impact on administrative law in practice," *id.* at 66); Christopher J. Walker, *What* Kisor *Means for the Future of* Auer *Deference: The New Five-Step* Kisor *Deference Doctrine*, 36 YALE J. ON REG.: NOTICE & COMMENT (June 26, 2019).

[257] See supra note 253 and accompanying text.

[258] Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking "the Administrative State"*, N.Y. TIMES, Mar. 26, 2018, at A8; *see also* Craig Green, *Deconstructing the Administrative State* (draft on file with author) (discussing this political movement).

B. The Narrow Focus on Supreme Court Legitimacy

Prominent scholars have argued that the Supreme Court should decide cases so as to preserve its sociological legitimacy.[259] Notably, the force of this argument depends in part on a given Justice's approach to constitutional interpretation; some interpretive methods likely foreclose such considerations. But, significantly for purposes of this Essay, the argument also reflects scholars' singular emphasis on the Supreme Court. As explored in the next section, the normative question—should the Justices aim to protect the Court's reputation?—becomes far more challenging once we consider the entire federal judiciary.

1. A Contingency: Interpretive Method

At the outset, I wish to address a preliminary question: whether it is *legally* legitimate for a Justice to take external legitimacy into account in deciding cases. The answer depends in significant part on a Justice's approach to constitutional interpretation. Notably, throughout this discussion, I presume (with others) that there is no one "correct" interpretive method, and thus each individual judge has substantial discretion to select her preferred interpretive approach.[260] My goal here is to explore whether some methods could be open to the consideration of external legitimacy.

Notably, in separate work, I have suggested that, under a variety of interpretive methods, it is *not* legally legitimate for a Justice to switch her vote—by, for example, voting to uphold rather than strike down a law—in order to protect the Supreme Court's public's reputation.[261] But I did not address whether a Justice may consider sociological legitimacy at all—for example, in fashioning an operative doctrine such as "all deliberate speed" or "undue burden." I take up that question here.

Under some methods of interpretation, any reliance on sociological legitimacy is likely legally illegitimate. For example, under prominent versions of originalism, judges have an obligation to enforce

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[259] *See supra* notes 19-20, 35 and accompanying text.

[260] *See* FALLON, *supra* note 36, at 131; *see also* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1345 (2018) (finding lower court judges did not believe the Supreme Court could dictate a statutory interpretive method).

[261] *See* Grove, *supra* note 8, at 2245-46, 2254-72 (arguing that such switches are likely not legally legitimate and must thus be justified, if at all, on alternative normative grounds). Some commentators allege that Chief Justice Roberts switched his vote in *NFIB v. Sebelius*, which upheld the Affordable Care Act's individual mandate under the federal taxing power. *See* 567 U.S. 519, 575 (2012) (opinion of Roberts, C.J.); Grove, *supra* note 8, at 2243, 2254-55; *see also* JOAN BISKUPIC, THE CHIEF 221–22, 233–48 (2019) (detailing the Chief Justice's change in a chapter entitled "A Switch in Time").

the original meaning of constitutional provisions.[262] Such an approach should exclude consideration of the Court's modern-day reputation.[263]

The opinions of two prominent originalists help to illustrate this point. In *Casey*, Justice Scalia was "appalled by[] the Court's suggestion" that a judicial decision "must be strongly influenced" by "public opposition…. Instead of engaging in the hopeless task of predicting public perception—a job not for lawyers but for political campaign managers—the Justices should do what is legally right."[264] Along the same lines, Justice Thomas chastised the Court for denying certiorari in a case involving Medicaid benefits, because "some respondents … are named 'Planned Parenthood.'"[265] Thomas insisted that even a "tenuous connection to [the] politically fraught issue [of abortion] does not justify abdicating our judicial duty. If anything, neutrally applying the law is all the more important when political issues are in the background."[266]

Ronald Dworkin's theory of law as integrity also largely forecloses reliance on sociological legitimacy. Under this approach, judges must find the "right answer" to legal questions by relying on text, history, and "moral principles about political decency and justice."[267] According to Dworkin, the Justices should *not* decline to

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[262] *See, e.g.*, Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (underscoring that "two core ideas of originalist constitutional theory" are that "[t]he meaning of the constitutional text is fixed when each provision is framed and ratified" and that "the original meaning of the constitutional text should constrain constitutional practice"); *but see* Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157 (2017) (arguing that the "conventional" view is "mistaken" and that "[o]riginalism is not about the text").

[263] Some versions of new originalism may allow the consideration of "sociological legitimacy" as part of the construction zone. *See infra* note 272 and accompanying text. Originalist approaches that take a more positivist turn—and argue for originalism on the ground that it is "our law"—are a more complex case. One would presumably need evidence that the Court looked to sociological legitimacy in its early days—and perhaps that it did so candidly and openly. For the positivist theory, see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015). One might need similar evidence for original methods originalism. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 783 (2009).

[264] Planned Parenthood v. Casey, 505 U.S. 833, 997-99 (1992) (Scalia, J., dissenting); *see also id.* at 998 ("[W]hether it would 'subvert the Court's legitimacy' or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening.").

[265] Justices Alito and Gorsuch joined the opinion. *See* Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 408-09 (2018) (Thomas, J., dissenting from the denial of certiorari) (arguing that the Court should resolve the question presented—involving private rights of action under Medicaid—and stating: "So what explains the Court's refusal to do its job here? I suspect it has something to do with the fact that some respondents in these cases are named 'Planned Parenthood'").

[266] *Id.* at 410.

[267] RONALD DWORKIN, FREEDOM'S LAW 2–3, 10–11 (1996) (advocating a "*moral* reading," *id.* at 2, of the abstract clauses of the Constitution); RONALD DWORKIN, LAW'S EMPIRE 266–71 (1986) (advocating the one-right-answer thesis although

recognize constitutional rights in order to protect the "standing and legitimacy" of the Supreme Court.[268] Although this theory does leave room for consideration of sociological legitimacy in extraordinary cases—"if the authority of the Supreme Court or of the constitutional arrangement as a whole were at stake"—Dworkin is skeptical that such a situation is likely to arise.[269] Accordingly, this theory does not seem to countenance reliance on external legitimacy.

Many other interpretive approaches, however, seem open to at least some consideration of sociological legitimacy. That is, under these methods, it *is* legally legitimate for a Justice to articulate legal doctrine so as to safeguard the Supreme Court's external reputation. For example, a Justice who favors pragmatism,[270] common law constitutionalism,[271] and some forms of new originalism,[272] may take into account functional concerns. And there is a strong functional reason for the Justices to consider sociological legitimacy in formulating doctrine: "[B]ecause the Court's power depends on its image, in order to maintain its effectiveness, the Court must take care to preserve the esteem in which it is held."[273]

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discussing criticisms); *see also* RONALD DWORKIN, JUSTICE IN ROBES 41–43, 133–34 (2006) (reiterating the moral reading and the "right answer" thesis).

[268] DWORKIN, JUSTICE IN ROBES, *supra* note 267, at 256-58 (arguing against such a "passive or cautionary strategy"). Admittedly, Dworkin does not focus on implementing doctrines (such as "all deliberate speed" or "undue burden"), so it is possible that his theory would work differently in that context. But his analysis seems at a minimum to cast doubt on the legal legitimacy of any consideration of sociological legitimacy.

[269] *Id.* at 259 ("I'm tempted to think…[the Court] can survive almost anything.").

[270] *See* RICHARD POSNER, HOW JUDGES THINK 230–50 (2008) (advocating pragmatism).

[271] *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 43–49 (2010) (articulating and defending common law constitutionalism).

[272] Some versions of new originalism would seem to allow the consideration of "sociological legitimacy" as part of the construction zone. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 179-82 (2011) (relying in part on functional concerns in examining the implementation of the Commerce Clause over time).

[273] Hellman, *supra* note 19, at 1151; *see* Wells, *supra* note 19, at 1015 ("the Court, in order to achieve its goals, has to be concerned with what other people think of it."). There is, however, one complication. Many scholars assert that the Justices cannot openly *admit* that they considered sociological legitimacy. *See, e.g.*, Wells, *supra* note 19, at 1051 (arguing that the Justices should sometimes subordinate legal legitimacy—defined as candor in legal reasoning—to the imperative of achieving "sociological legitimacy"); *see also* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1356, 1388-94 (1995) ("full candor may harm perceived judicial legitimacy" in some contexts). *But see* Hellman, *supra* note 19, at 1149-50 (advocating "[t]he *candid* recognition of the importance of the continued vitality of the Court"). That is, the Justices may have to sacrifice what many view as a central element of legal legitimacy: judicial candor. FALLON, *supra* note 36, at 129-32, 142-48; David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–38 (1987) (advocating "a strong presumption in favor of candor"); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990-91 (2008); *see also* Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 25 (1979) (suggesting that opinions should include all the grounds on which judges relied); *cf.* Richard H. Fallon, Jr., Essay, *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2282-83 (2017) (articulating a minimal and ideal

2. Saving the Court: Minimalism and the Passive Virtues

Many interpretive methods thus seem to allow the Justices to articulate doctrine with an eye toward preserving the Supreme Court's external reputation. Yet how should the Justices go about that task? Scholars do not always explain this point with great clarity, but Alexander Bickel and Cass Sunstein have concrete suggestions: the Justices should issue narrow or opaque ("minimalist") rulings, or perhaps avoid deciding cases entirely, in order to deflect "public outrage."[274] This work vividly illustrates the tendency of scholars to focus on the external legitimacy of the Supreme Court alone.

In *The Least Dangerous Branch*, Bickel famously articulates the "countermajoritarian difficulty," the idea that the Supreme Court's power of judicial review is "a deviant institution in the American democracy."[275] But, importantly, Bickel's goal is not to undermine Supreme Court review. On the contrary, he seeks to defend the Court's constitutional role—and to articulate how it can be exercised cautiously and prudently.[276] Bickel aims to show how the Justices can decide cases so as to safeguard constitutional rights, while also protecting the Supreme Court's long-term sociological legitimacy.

Part of Bickel's answer lies in what he dubs the "passive virtues": the Court should use jurisdictional devices (such as standing, the political question doctrine, and certiorari dismissals) to "stay[] its hand" in some controversial cases, so that the Court can play its full role in other cases.[277] But Bickel does not focus exclusively on jurisdiction. Bickel also applauds the "all deliberate speed" formula as a way to reconcile principle with expediency.[278] Given the possibility of noncompliance by segregationists, Bickel argues, the Supreme Court was correct to reject the "shock treatment" proposed by the NAACP and instead to allow a more gradual approach.[279] Through "all deliberate speed"—a phrase that,

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norm of candor in judicial decisionmaking). There may thus be another tradeoff: in this case, between legal and sociological legitimacy. A full examination of this issue is beyond the scope of this Essay. But I hope to explore it in future work.

[274] *E.g.*, Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 158-59 (2007).

[275] *See* BICKEL, *supra* note 20, at 16-18.

[276] *See id.* at 132; *see also* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 159 (2002) (emphasizing that "*The Least Dangerous Branch* was a defense of judicial review").

[277] BICKEL, *supra* note 20, at 70, 132, 69–72, 112-33; *see* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: Passive Virtues*, 75 HARV. L. REV. 40 (1961). For a prominent critique, see Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); *see also* Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 714-18 (2012) (discussing critiques).

[278] *See* BICKEL, *supra* note 20, at 253-54.

[279] *Id.* at 250, 252-53 (arguing that caution was the wiser approach, particularly given that "resistance could be expected").

according to Bickel, "resembles poetry"—"[t]he Court placed itself in position to engage in a continual colloquy with the political institutions" and enable them to gradually accept the principle of desegregation.[280]

Bickel expressly states in *The Least Dangerous Branch* that he does not seek to address the lower federal bench.[281] According to Bickel, "in no event is constitutional adjudication in the lower federal courts the equivalent of what can be had in the Supreme Court."[282] "[T]he lower courts can act in constitutional matters as stop-gap or relatively ministerial decisionmakers only."[283]

Even in 1962, when Bickel first published *The Least Dangerous Branch*, that was an extraordinary statement. As this Essay has underscored, the success (or failure) of desegregation depended tremendously on the "fifty-eight lonely men" who at the time comprised the inferior federal judiciary across the South.[284] As Judge Wisdom explained in 1967, "there [were] so few Supreme Court decisions on school desegregation that inferior courts must improvise…. To this extent, the [courts of appeals were] forced into a policy-making position as to decisions only tangentially dependent on the Supreme Court."[285]

Bickel is not alone in his singular emphasis on the Supreme Court. Most of the literature on the Court's sociological legitimacy has likewise overlooked the remainder of the federal judiciary.[286] For example, building on his own work on judicial minimalism,[287] Sunstein argues that the Justices should at times issue narrow or opaque rulings in order to deflect "public outrage."[288] Such a minimalist approach is particularly urgent today, Sunstein insists, as Supreme Court watchers anticipate a constitutional revolution: Following the appointment of Justices Gorsuch and Kavanaugh, "the nation could be in for a wild ride" with respect to issues including abortion and affirmative action, such that "the meaning of the Constitution looks a lot like the political convictions of the Republican Party."[289] Sunstein argues: "That would be ugly and

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[280] *Id.* at 253-54.

[281] *Id.* at 198 ("I have not addressed myself, in this chapter or elsewhere, to the role of the lower federal courts").

[282] *Id.* at 126.

[283] *Id.* at 198.

[284] PELTASON, *supra* note 47, at 28-29; *see* Part II(A).

[285] Wisdom, *supra* note 77, at 426-27.

[286] *See supra* notes 35-38.

[287] *See, e.g.*, SUNSTEIN, *supra* note 20 (advocating minimalism).

[288] *See* Sunstein, *Outraged*, *supra* note 274, at 158-59, 169-75, 211 (aiming to justify this approach largely on consequentialist grounds); *see also* Andrew B. Coan, *Well, Should They? A Response to* If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 213, 215 (2007) (suggesting "judges should care about public outrage out of respect for democracy" (emphasis omitted)).

[289] Cass R. Sunstein, *Kavanaugh Confirmation Won't Affect Supreme Court's Legitimacy*, BLOOMBERG (Sept. 30, 2018) [https://perma.cc/6EXA-UKSJ] (arguing that, given the "cloud" cast by the Kavanaugh hearings on the Court's legitimacy, "[a]s much as any time in American history, this is a period for judicial minimalism").

dangerous…. As much as any time in American history, this is a period for judicial minimalism" at the Supreme Court.[290]

C. Expanding the Focus to the Entire Judiciary

When one focuses exclusively on the Supreme Court, it is easy to see the appeal of narrow rulings or certiorari denials in high-profile areas. Broad, rule-like doctrines seem likely to trigger attacks on the Court. Indeed, today, we see signs of precisely that. As commentators forecast a complete overhaul of Supreme Court doctrine—on issues such as abortion, affirmative action, and gun rights—there has been an uptick in anti-Court rhetoric.[291] Some critics advocate extreme measures: It may be time to end life tenure (by statute),[292] strip federal jurisdiction,[293] impeach Justices,[294] disobey Supreme Court decisions,[295] or—most commonly—"pack" the Court with additional members.[296]

In this environment, the Justices may be reasonably concerned about the sociological legitimacy of the Supreme Court—and drawn to the approach suggested by Bickel and Sunstein. In an era of political turbulence, it may seem that the most effective way to preserve the Court's public reputation is either to deny review altogether in high-profile cases

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[290] *Id.*

[291] *See supra* notes 1-9 and accompanying text. This rhetoric has only increased since the tragic passing of Justice Ginsburg. *See* Matt Ford, *The Consequences of Ruth Bader Ginsburg's Death for American Democracy*, THE NEW REPUBLIC (Sept. 18, 2020), https://newrepublic.com/article/159425/consequences-ruth-bader-ginsburgs-death-american-democracy (arguing that Justice Ginsburg's "death amplifies a growing legitimacy crisis for the Supreme Court"); *see also* David Yaffe Bellany, *Liberals Weigh Jurisdiction Stripping to Rein in Supreme Court*, BLOOMBERG (Oct. 6, 2020), https://www.bloomberg.com/news/articles/2020-10-06/to-rein-in-supreme-court-some-democrats-consider-jurisdiction-stripping (noting that "progressive lawmakers and left-wing activists are calling for" term limits, court packing, and jurisdiction stripping, as they "[f]ac[e] the prospect of a 6-3 conservative majority on the high court following the death of Justice Ruth Bader Ginsburg").

[292] *See* Ian Ayres & John Fabian Witt, Opinion, *Democrats Need a Plan B for the Supreme Court. Here's One Option*, WASH. POST (July 27, 2018) [https://perma.cc/62VS-RXYL] (advocating a statute setting "18-year terms … followed by life tenure" on a lower federal court); Kermit Roosevelt & Ruth-Helen Vassilas, *Supreme Court justices should have term limits*, CNN (Sept. 30, 2019). Several Democratic lawmakers are reportedly working on such a bill. *See* Juliegrace Brufke, *House Democrat to introduce bill imposing term limits on Supreme Court justices*, THE HILL (Sept. 25, 2020), https://thehill.com/homenews/house/518195-house-democrat-to-introduce-bill-imposing-term-limits-on-supreme-court. The measure would apply only to future nominees, not to any current member of the Court. *See id.*

[293] *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. (forthcoming 2021); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. (forthcoming 2020).

[294] *See* Ronald J. Krotoszynski Jr., Opinion, *The Case for Impeaching Kavanaugh*, N.Y. TIMES (Sept. 20, 2018), https://nyti.ms/2Dhd29m [https://perma.cc/WG2G-SLBR].

[295] *See* Mark Joseph Stern, *How Liberals Could Declare War on Brett Kavanaugh's Supreme Court*, SLATE (Oct. 4, 2018, 6:53 PM) [https://perma.cc/WV22-AA9C].

[296] *See supra* notes 9, 195-198 and accompanying text.

or to issue opaque doctrines that do not clearly push the law in any specific direction. "As much as any time in American history," this may seem like "a period for judicial minimalism" at the Supreme Court.[297]

1. The Impact of a Minimalist Approach

Once we consider the entire federal judiciary, however, the picture becomes significantly more nuanced and complex. Importantly, narrow or opaque (or nonexistent) Supreme Court rulings do not simply return a legal issue to the political branches—as Bickel and Sunstein have at times suggested.[298] The issue goes to the lower courts. And, in contrast to the Supreme Court, the lower federal courts cannot simply decline review; they have mandatory jurisdiction.[299] Accordingly, the lower courts must decide high-profile cases, with or without guidance from their judicial superiors. For example, as Seventh Circuit Judge Diane Sykes observed, the Supreme Court has not "give[n] us any doctrine about … how to reconcile conflicts between Second Amendment gun rights and the public's right to regulation of dangerous instrumentalities."[300] Nevertheless, the inferior federal courts cannot "duck the hard Second Amendment case…. We need to decide it."[301]

When the Supreme Court issues a minimalist decision on a high-profile issue (and fails to later clarify the law), the lower federal courts must take the lead on the content of federal law. And without the constraining force of broad, rule-like precedents, inferior judges in high-profile cases tend to be more influenced by their background ideological leanings. That is precisely what worried Thurgood Marshall during the *Brown II* argument: Without a firm deadline for desegregation, "the Negro in this country would be in a horrible shape," because the enforcement of *Brown* would be "left to the judgment of the district court with practically no safeguards."[302] Likewise, in the wake of *Casey*'s undue burden standard, there is considerable evidence that Democratic- and Republican-appointed jurists vote in ideologically predictable directions.[303] As one

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[297] Sunstein, *Kavanaugh Confirmation*, *supra* note 289.

[298] *See* BICKEL, *supra* note 20, at 254 (arguing that, with the "all deliberate speed" formula, "[t]he Court placed itself in position to engage in a continual colloquy with the political institutions"); SUNSTEIN, *supra* note 20, at 118 (claiming, with respect to affirmative action, that the Court's "complex, rule-free, highly particularistic opinions have had the salutary consequence of helping to stimulate" democratic debate).

[299] *Compare* 28 U.S.C. § 1254(1) (granting the Supreme Court broad discretionary certiorari jurisdiction), *with* 28 U.S.C. § 1291 (mandating review by courts of appeals).

[300] Public Understanding and Opinion of the U.S. Supreme Court, Marquette University Law School: 2:45:50 – 2:47:48 (Oct. 21, 2019) (statement of Judge Diane S. Sykes, U.S. Court of Appeals for the Seventh Circuit) https://law-media.marquette.edu/Mediasite/Play/38960cec7b224ffebc49ad811eba83891d; see supra notes 179-180 (discussing the lack of clarity in the Court's gun rights decisions).

[301] Public Understanding, *supra* note 300.

[302] *Brown II* Transcript, *supra* note 41, at 400 (statement of Thurgood Marshall).

[303] *See* Part II(B)(3).

activist lamented, "[t]here's a real recognition that the lower court judges hold vast power over women's reproductive lives."[304]

Delegation of high-profile issues to the lower courts not only leads to a patchwork of decisions but also poses risks to the inferior federal judiciary itself. To the extent that lower courts are in charge of high-profile issues, presidents, senators, and interest groups have a strong incentive to focus on the composition of the inferior federal bench—creating a divisive process that puts at risk the long-term public reputation of the lower courts. As Judge King suggests, a "highly partisan or ideological judicial selection process conveys the notion to the electorate that judges are simply another breed of political agents, that judicial decisions should be in accord with political ideology," and these messages may "undermine public confidence in the legitimacy of the [lower federal] courts."[305]

2. Exploring the Legitimacy Tradeoffs

My goal here is not to argue that the Justices should grant certiorari or issue a broad, rule-like doctrine in every high-profile case. There are various reasons that the Justices may opt not to hear a case or may struggle to formulate a broad doctrine.[306] Instead, this Essay seeks to emphasize a point that seems to have been overlooked by the literature on sociological legitimacy: the potential tradeoffs between the Supreme Court and the lower federal courts.

Relatedly, this Essay aims to inspire both theoretical and empirical scholarship on lower court legitimacy. As discussed, virtually all work on judicial legitimacy is focused on the Supreme Court. Given the increasingly contentious nature of lower court selection—and recent attacks on "Obama judges" or "Trump judges"—there is a need to systematically examine the lower courts' external reputation among elites and the general public.

At bottom, this Essay contends that scholars and jurists should begin to debate whether protecting the Supreme Court's external reputation—through narrow decisions or certiorari denials—is worth the costs to the remainder of the federal bench. That is by no means an easy analysis.

Some readers may suggest that the Supreme Court's reputation is far more fragile than that of any given inferior federal court (or the lower federal judiciary as a whole). The Court's decisions—at least in high-profile cases such as those involving abortion, affirmative action, or gun rights—tend to garner more media attention than those of the lower courts. And a Supreme Court decision would likely apply nationwide.

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[304] SCHERER, *supra* note 23, at 19-20 (quoting interview with Elizabeth Cavendish, former legal director of NARAL Pro-Choice America).

[305] King, *supra* note 208, at 782; *see id.* ("The loss of public confidence in the legitimacy of the courts…could, in turn, undermine compliance").

[306] *See supra* note 185 and accompanying text (acknowledging, for example, the difficulty of reaching agreement on a multimember Court).

Accordingly, the effects of a broad, rule-like decision would be felt by individuals throughout the country—and for that reason could generate considerable resistance.

Yet the calculus is not so clear. Precisely because of the Supreme Court's prominence in our society, it can be far more challenging to attack the Court than a single district court judge (or the inferior federal judiciary as a whole). Consider some prominent examples of court curbing: court packing, jurisdiction stripping, and defiance of court orders. An attempt to enlarge the Supreme Court is likely to be far more controversial than an expansion of the lower federal judiciary because the Court is seen as far more consequential. Some scholars argue that Franklin Roosevelt's presidency was severely damaged because of his (unsuccessful) attempt to pack the Supreme Court.[307] And, as I have documented, although there are political obstacles to any jurisdiction-stripping effort, there are more roadblocks in the way of attempts to cut off Supreme Court review.[308] Executive officials and legislators often prefer the finality and uniformity that comes from a Supreme Court decision; accordingly, throughout our history, many political actors have defended the Court's jurisdiction, even when they anticipated an adverse decision from the high bench.[309]

That brings us to the concern at the heart of sociological legitimacy: compliance. A presidential decision to defy a Supreme Court ruling would likely create quite a stir. But a presidential decision to disobey a single district court ruling (or perhaps multiple district court rulings) might not garner as much attention, precisely because it would be seen as less consequential. That is, it may be politically easier for a President to defy an inferior federal court.[310]

Accordingly, it is not clear which level of the judiciary is better equipped to shoulder external criticisms. Consider the case of desegregation. Some readers may share Bickel's intuition that the

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[307] *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 156-61 (1995).

[308] *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 874, 888-916, 920-22 (2011) (providing a detailed review of jurisdiction-stripping efforts, which underscores the political obstacles to taking away the Supreme Court's appellate review power); *see also* Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 253, 268-90 (2012) (detailing how the executive branch has repeatedly opposed efforts to strip Supreme Court jurisdiction); *see also* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 960-62 (2013) (discussing other failed court-curbing efforts, including proposals to impose a supermajority requirement for striking down federal legislation).

[309] *See* Grove, *Structural Safeguards*, *supra* note 308, at 920-22; Grove, *Article II Safeguards*, *supra* note 308, at 285.

[310] The picture is further complicated by the possibility that district courts may issue nationwide or universal injunctions. Presidents may be more inclined to defy such broad orders. And yet the high-profile nature of such injunctions may also help insulate the district judges who issue them. For a small sample of the rich literature on this topic, see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020).

Supreme Court in *Brown II* properly rejected the "shock treatment" proposed by the NAACP and instead allowed a more gradual approach through the "all deliberate speed" formula.[311] But Judge Wisdom offered a very different assessment. Precisely because desegregation was a fraught issue, Judge Wisdom argued, "[t]he Supreme Court … has an obligation to lead or at least point out the logical line of development of the law."[312]

CONCLUSION

Scholars have largely overlooked the legitimacy tradeoffs within our judicial hierarchy. To avoid sacrificing the sociological legitimacy of the Supreme Court, the Justices may decline to issue the broad, rule-like precedents that will most effectively clarify the law and guide lower courts in high-profile cases. Instead, the Justices may issue narrow doctrines or deny review altogether. Such an approach not only sacrifices meaningful legal change but also poses risks to the long-term legitimacy of the inferior federal judiciary. To the extent that our legal system aims to protect sociological legitimacy, we should consider not simply the Supreme Court but the entire federal bench.

[311] BICKEL, *supra* note 20, at 250, 252-53.
[312] Wisdom, *supra* note 77, at 420.