RECENCY BIAS AND THE SUPREME COURT: THE PROBLEM IS THE INSTITUTION, NOT THE PEOPLE WHO SIT ON IT

*Eric J. Segall**

> You seem to consider the judges as ultimate arbiters of all constitutional questions; a very dangerous doctrine, indeed, and one which would place us under the despotism of an oligarchy. The constitution has erected no such single tribunal.
>
> –Thomas Jefferson[1]

I. INTRODUCTION

There is rampant and substantial despair on the political left (and maybe in the center as well) about the Supreme Court's six-three conservative majority.[2] In just a few years, the Court has decimated women's reproductive freedoms,[3] enlarged gun rights,[4] essentially ended affirmative action,[5] read the Free Exercise Clause broadly,[6] deleted the

---

* Ashe Family Chair Professor of Law, Georgia State University College of Law. I'd like to thank the students of the *Hofstra Law Review* for putting together a wonderful symposium on Accountability and the Future of the Supreme Court. This paper is a longer and more detailed version of ideas originally expressed in this blog post: Eric Segall, *Recency Bias and the Supreme Court as a Broken Institution*, DORF ON L. (Apr. 11, 2022), https://www.dorfonlaw.org/2022/04/recency-bias-and-supreme-court-as.html [https://perma.cc/Q6N8-6V5J]. I'd also like to thank Professors Mark Tushnet and Christopher Sprigman for helpful comments on this piece.

1. Arnold Loewy & Charles Moster, *Can the President Ignore an Order from the U.S. Supreme Court*, LUBBOCK AVALANCHE-J. (Mar. 3, 2019, 12:01 AM), https://www.lubbockonline.com/story/opinion/columns/guest/2019/03/03/its-debatable-can-president-ignore-order-from-us-supreme-court/984915007 [https://perma.cc/8997-Z7PN].
2. Charles C. W. Cooke, *Nobody Cared About Biden's Commission on the Supreme Court Because It Was Pointless*, NAT'L REV. (Oct. 18, 2021, 4:49 PM), https://www.nationalreview.com/corner/nobody-cared-about-bidens-commission-on-the-supreme-court-because-it-was-pointless [https://perma.cc/5RE4-V5VN].
3. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).
4. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 10 (2022).
5. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230-31 (2023).
6. *See* Carson v. Makin, 596 U.S. 767, 792 (2022) (Breyer, J., dissenting).

Establishment Clause from the Constitution,[7] and is dramatically cutting back the ability of the administrative state to handle difficult national problems.[8] The dread is justified.

This new ultra-conservative Court, after Senator Mitch McConnell's norm-breaking manipulation of the confirmation process, led to President Biden's Supreme Court reform commission, which has had no lasting effect and is now just a blip from the past.[9] Additionally, the new "ethics code" the Justices signed on to has no enforcement mechanism and does not count as meaningful reform.[10]

The left has responded to the dramatic shift to the right by writing hundreds of essays, blog posts, books, and articles lamenting the current Justices and advocating numerous fixes, including packing the Court, stripping the Court of jurisdiction, and authorizing a committee of lower court judges to decide which cases the Court should hear.[11] I am sympathetic to these reforms not because the Court's politics are different than mine but because the institution itself, as opposed to the Justices who sit there, has needed substantial change for a long time.

To facilitate major change to the Court, liberals and progressives would be better off focusing on the contentious history of the institution rather than on current events and unpopular decisions. Recency bias has played a significant role in deceiving Court watchers that we are in more challenging times than ever before when it comes to the Justices' decisions and behavior. But the truth is that the Court has been broken for well over 150 years. The Court needs to be fixed not because it is too conservative or at times too liberal but because unelected, life-tenured judges should not play such an influential role in our country's politics. And that problem is anything but new.

---

7. *See id.* at 805-06.

8. West Virginia v. EPA, 597 U.S. 697, 783-84 (2022) (Kagan, J., dissenting).

9. *See* Cooke, *supra* note 2.

10. *See* Sharon Zhang, *Lawmakers Slam SCOTUS's New Nonbinding Ethics Code as "Useless" PR Stunt*, TRUTHOUT (Nov. 14, 2023), https://truthout.org/articles/lawmakers-slam-scotuss-new-non-binding-ethics-code-as-useless-pr-stunt [https://perma.cc/3EMZ-9CJN].

11. *See* Sara Dorn, *Democrats Push for Court-Packing After Controversial Supreme Court Rulings: Why the Proposal Is Likely Doomed*, FORBES (July 5, 2023, 4:57 PM), https://www.forbes.com/sites/saradorn/2023/07/05/democrats-push-for-court-packing-after-controversial-supreme-court-rulings-why-the-proposal-is-likely-doomed [https://perma.cc/XU8T-HAMW]; Thomas Tai, *The Lochner Court: Substantive Due Process and Its Effect on the Supreme Court Today*, LEAGUE WOMEN VOTERS BLOG (Oct. 19, 2023), https://www.lwv.org/blog/lochner-court-substantive-due-process-and-its-effect-supreme-court-today [https://perma.cc/6VY8-U7CV]; Mark Tushnet, *An Open Letter to the Biden Administration on Popular Constitutionalism*, BALKINIZATION (July 19, 2023), https://balkin.blogspot.com/2023/07/an-open-letter-to-biden-administration.html [https://perma.cc/3KWQ-ASLE].

Part II summarizes how controversial the Court has been throughout American history. Part III tentatively suggests one radical path forward to reforming an institution whose members have life tenure and largely unreviewable power. Given their job description, they should decide cases with much more humility and deference and leave American politics to, well, politics. To accomplish that goal, however, will require aggressive action by the President or other political actors. Action that is unlikely to happen but, as this essay argues, is urgently needed.

II. THE COURT'S LONG AND TORTURED PATH

A. Pre-Ratification

Even before the Constitution was ratified, a man writing under the pen name Brutus complained about the concept of judges with life tenure having power to strike down state and federal laws.[12] He wrote the following:

> There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[13]

Alexander Hamilton replied to this critique of the proposed judiciary in Federalist No. 78 by arguing that the soon-to-be Justices had neither "purse" nor "sword" and their power would depend on the people's trust.[14] He observed that the Supreme Court "may truly be said to have neither [force] nor [will], but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[15] He also said the Court would not declare laws unconstitutional unless there was an "irreconcilable variance" between a statute and the Constitution.[16] Hamilton, like many of the Founding Fathers, thought judicial review would be a tool for judges to use infrequently, modestly,

---

12. *See* NewDealdemocrat, *'Brutus,' the Anti-Federalist to Presciently Foresaw [sic] the Imperial Supreme Court*, ANGRY BEAR (Nov. 11, 2021, 10:32 AM), https://angrybearblog.com/2021/11/brutus-the-anti-federalist-to-presciently-foresaw-the-imperial-supreme-court [https://perma.cc/2TXE-9NED].

13. *Brutus, No. 15*, *in* 4 THE FOUNDERS' CONSTITUTION 141 (Philip B. Kurland & Ralph Lerner eds., 1987).

14. THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

15. *Id.*

16. *Id.* at 394.

and only upon a strong showing by the plaintiff of clear constitutional error.[17]

But it turns out that Brutus was right, and Hamilton was wrong. Throughout American history, the Supreme Court has issued country-changing decisions invalidating state and federal laws that no judge could seriously argue were at an "irreconcilable variance" with the Constitution. A comprehensive compilation of such cases would be much too long for this essay, but below are representative and important examples of dangerous and harmful judicial overreaching.[18]

Before getting to that list, however, it is worth remembering that, even before the Court issued any major constitutional law decision, its political nature and its controversial Chief Justice (John Marshall) were deemed so disruptive to American politics that the 1801 Congress, working with President Thomas Jefferson, canceled the Court's June 1802 term.[19] Because Article III of the Constitution requires there to be a Supreme Court, this move was likely unconstitutional,[20] but it reflects how intertwined the Supreme Court was with politics and controversy even at the beginning of our country's history.

B. The Nineteenth Century

Perhaps the first truly momentous and controversial case the Court decided was *Dred Scott v. Sanford*,[21] decided in 1857. In this decision, which Chief Justice Hughes later called a "self-inflicted wound,"[22] the Court held that Black people were not and could not be citizens of the United States and that Congress could not end slavery in the new territories.[23] This decision was strongly contested even at the time.[24] The South, of course, liked the decision which sided with slaveholders, but the North's reaction was exactly the opposite:

---

17. *See* Eric J. Segall, *Judicial Engagement, New Originalism, and the Fortieth Anniversary of Government by Judiciary*, 86 FORDHAM L. REV. ONLINE, 2017, at 47, 53-54.

18. *See infra* Part II.B–D.

19. *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 6, 112, 157, 159 (2005).

20. U.S. CONST. art. III, § 1.

21. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

22. Matthew Mangino, *The High Court's 'Self-Inflicted Wounds': A Look Backward*, CRIME REP. (July 13, 2022), https://thecrimereport.org/2022/07/13/the-high-courts-self-inflicted-wounds-a-backward-look [https://perma.cc/9ZY8-6K8U].

23. *See Sanford*, 60 U.S. (19 How.) at 400, 410.

24. *See* Melvin I. Urofsky, *Dred Scott Decision: Reception and Significance*, BRITANNICA, https://www.britannica.com/event/dred-scott-decision/reception-and-significance [https://perma.cc/5MFL-43VT] (last visited Apr. 15, 2024).

> [T]he North exploded in denunciations of Taney's opinion. Several sober appraisals in the Northern press decimated the chief justice's tortured legal reasoning. The Republican editor Horace Greeley published Justice Curtis's dissent as a pamphlet to be used in the elections of 1858 and 1860. The press and pulpit echoed with attacks on the decision that were as heated as Southern defenses of it. Taney's hopes of settling the issue lay smashed. If anything, *Scott v. Sandford* inflamed passions and brought the Union even closer to dissolving.[25]

Not only did the decision likely push us closer to civil war, but it was so controversial and contested that President Lincoln tried to limit its reach in a famous speech questioning judicial supremacy.[26] Moreover, after the Court held that Black people were not and could not be citizens, which as a jurisdictional matter should have ended the case, the Justices went on to say that the federal statute was unconstitutional even though they already found the Court lacked jurisdiction—something judges should not do.[27] Over 160 years ago, the Court was already not acting like a real court of law by disregarding real limitations on its power to issue decisions.

There is one more aspect of *Dred Scott* that requires mentioning. As Professor Mark Graber has detailed, that decision was leaked to the President by one of the Justices a few weeks before it was announced.[28] Justice Catron leaked the result to the President out of fear that the decision would be five-to-four divided along North/South lines.[29] After talking with President Buchanan, Justice Catron asked the President of the United States to "drop [Justice] Grier a line, saying how necessary it is [and] how good the opportunity is, to settle the agitation by an affirmative decision of the Supreme Court, the one way or the other."[30]

Professor Graber describes what happened next:

> Buchanan was agreeable. He immediately wrote his fellow Pennsylvanian urging Grier to sign up for the majority's result, even if he could not fully endorse the majority's logic. Grier responded favorably . . . [and] wrote Buchanan, "On conversation with the chief

25. *Id.*
26. *(1857) Abraham Lincoln, "The Dred Scott Decision and Slavery,"* BLACKPAST (Mar. 15, 2012), https://www.blackpast.org/african-american-history/1857-abraham-lincoln-dred-scott-decision-and-slavery [https://perma.cc/GFD9-DMKJ].
27. *Sanford*, 60 U.S. (19 How.) at 452.
28. Mark A. Graber, *Judicial Leaking Nineteenth Century Style*, CONSTITUTIONALIST (May 3, 2022), https://theconstitutionalist.org/2022/05/03/judicial-leaking-nineteenth-century-style [https://perma.cc/C64X-AHBA].
29. *Id.*
30. *Id.*

> justice I have agreed to concur with him." . . . The Justice from Pennsylvania, after further prodding from Catron and Buchanan, kept his word. Grier's three sentence concurring opinion in *Dred Scott* declared, "I . . . concur with the opinion of the court as delivered by the Chief Justice, that the act of Congress of 6th March, 1820," the ban in Missouri Compromise on human bondage in territories north of the 36° 30′ line, "is unconstitutional and void."[31]

This ex parte behavior was obviously inappropriate and not the kind of conduct either a Justice or a President should engage in. In modern times, the recent leak of the *Dobbs* opinion before its release seems almost tame compared to the behind-the-scenes conversations and political strategies leading up to *Dred Scott*.

During the Civil War, Congress for the first time issued paper money, or "greenbacks," to pay debts.[32] The Constitution, however, only gives the Congress power over "coin."[33] After the war concluded, debtors tried to pay back their creditors with the new greenbacks, but creditors often wanted gold or silver because of hyperinflation.[34] The legal debate over whether Congress had the power to make paper money legal tender for prior debts was likely the most important economic issue of the time.

In the first decision, the Justices held that Congress could not make paper money legal tender for prior debts.[35] The decision altered both our economy and the rationale of the landmark decision, *McCulloch v. Maryland*.[36] Just one year later, however, with two new Justices appointed by President Grant for the specific purpose of overturning the case, the Court reversed itself for no other reason than the presence of those two new Justices.[37] These cases were the *Roe v. Wade*[38] or *Citizens United v. FEC*[39] decisions of their day.

After the Court's reversal of a landmark case decided only a year earlier, conservative newspapers were angry and did not hesitate to show it. *The New York World* commented that the decision "provokes the indignant contempt of thinking men. It is generally regarded . . . as a base

31. *Id.*
32. Lloyd W. Klein, *US Government Financing of the Civil War*, EMERGING CIV. WAR (July 27, 2021), https://emergingcivilwar.com/2021/07/27/us-government-financing-of-the-civil-war [https://perma.cc/CM2L-N4QH].
33. U.S. CONST. art. I, § 8, cl. 5.
34. Klein, *supra* note 32.
35. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 626 (1870).
36. 17 U.S. (4 Wheat.) 316 (1819).
37. *See* Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553-54 (1871).
38. 410 U.S. 113 (1973).
39. 558 U.S. 310 (2010).

compliance with Executive instructions by creatures of the President placed upon the Bench to carry out his instructions."[40] More than a century and a half ago, the Court was so controversial that the Justices were criticized for being "creatures of the President" by the media of the time.[41]

C. 1900-1936

During the Court's judicially aggressive *Lochner* era from 1900 to 1936, the Justices struck down state and federal laws regulating minimum wages, child labor, overtime rules, worker safety, and union protections.[42] This era ended with the Court overturning important New Deal laws, leading to President Roosevelt's harsh rebuke of the Justices and his now-famous Court-packing proposal.[43] In a national radio address in 1937, he famously criticized the Court as follows:

> In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body. . . . [T]he majority of the Court has been assuming the power to pass on the wisdom of these Acts of the Congress—and to approve or disapprove the public policy written into these laws. . . . We have, therefore, reached a point as a Nation where *we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men*.[44]

These harsh public statements about the Court by a sitting President on the leading media of the day were met with favor or disfavor depending on one's politics. These events occurred over eighty years ago during a time at least as politically contentious as the one in which we find ourselves when it comes to the Court. The end of that story is that around the time of the Court-packing proposal, the Justices (or more accurately one Justice) changed direction, and

---

40. Sidney Ratner, *Was the Supreme Court Packed by President Grant?*, 50 POL. SCI. Q. 343, 348 (1935) (quoting 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 526 (1926)).

41. *Id.* at 352.

42. Tai, *supra* note 11.

43. *See* Franklin D. Roosevelt, U.S. President, Fireside Chat on the Plan for Reorganization of the Judiciary (Mar. 9, 1937).

44. *Id.* (emphasis added).

economic legislation would be rubber-stamped by the Court for generations.[45] FDR's threat worked.

D. 1936-Today

In the 1950s, there were "Impeach Earl Warren" signs throughout the South after the Court handed down *Brown v. Board of Education*.[46] The Court's early 1960s decisions banning organized, teacher-led school prayers, according to Professor Corinna Barrett Lain, "provoked more outrage, more congressional attempts to overturn [them], and more attacks on the Justices than perhaps any other decisions in Supreme Court history."[47]

The Warren and early Burger Court eras were fraught with calls by lawyers, judges, and scholars that the Court was extending its reach too far and issuing unduly activist decisions.[48] In the words of one Court watcher:

> The Warren Court's landmark decisions spurred a backlash on the political right. Social conservatives railed against the [C]ourt's rulings against prayer in public schools and legalized access to contraception. Southern whites rebelled against desegregation orders, at times prompting the federal government to enforce the Supreme Court's decision by force. Libertarians denounced the vast expansion of federal power at the perceived cost to individual liberty. From this medley of opposition grew the intellectual foundations of the modern Republican Party.[49]

Although neither President Nixon nor President Reagan used language as harsh as FDR employed in his fireside chat, both men exploited what they and much of the public thought were Warren and Burger Court excesses.[50] Nixon ran effectively against *Miranda v.*

---

45. *See* John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine*,*"* 73 OKLA. L. REV. 229, 232-33 (2021).

46. 347 U.S. 483 (1954); *see* "Impeach Earl Warren" Postcard, HIST. GALLERY, http://www.historygallery.com/law/impeachwarren/impeachwarren.htm [https://perma.cc/893Z-3BGS] (last visited Apr. 15, 2024).

47. Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing* Engel, 67 STAN. L. REV. 479, 479 (2015).

48. *See* Matt Ford, *Conservatives' Coming War on the Warren Court*, NEW REPUBLIC (Mar. 4, 2019), https://newrepublic.com/article/153208/conservatives-coming-war-warren-court [https://perma.cc/FAA6-3HQT].

49. *Id.*

50. *See* NCC Staff, *Examining the Legacy of Chief Justice Warren Burger*, NAT'L CONST. CTR. BLOG (June 9, 2023), https://constitutioncenter.org/blog/examining-the-legacy-of-chief-justice-warren-burger [https://perma.cc/QU9F-A8T5].

Arizona,[51] making law and order a central part of his campaign.[52] Reagan used *Roe v. Wade* to bring evangelical Christians into the Republican Party, where they remain today affecting the balance of power in this country between the religious and the nonreligious.[53] Nixon's campaigns were conducted fifty years ago, and Reagan's harsh critiques of the Court were over forty years ago. These attacks from the right were every bit as controversial and important as today's criticisms of the Court from the left.

Then, of course, came *Bush v. Gore*.[54] The Court divided along partisan lines to cut off Florida's recount of a tightly contested election, effectively handing the presidency to George W. Bush (who may or may not have won anyway).[55] There are no reliable metrics to ascertain how damaging the case was to the credibility of the Court, but common sense suggests it was quite a bit over the long run. One prominent liberal law professor argued that the mostly conservative Court moved left for a few years after the decision to try and repair the damage.[56] It is also hard to know how damaging the case might have been had Al Gore not graciously accepted the decision. In any event, *Bush v. Gore* was highly contested, extremely controversial, and in some people's views, a terrible decision with even worse consequences.[57]

There is no question that, as I stated at the outset, the last few years have brought enormous changes to constitutional law in such controversial areas as abortion, affirmative action, gun control, and the separation of church and state.[58] And these changes came after *Citizens United v. FEC*,[59] *Shelby County v. Holder*,[60] and *Obergefell v. Hodges*,[61] which polarized the public and caused enormous stress on our entire legal and

---

51. 384 U.S. 436 (1966).

52. Terence McArdle, *The 'Law and Order' Campaign That Won Richard Nixon the White House 50 Years Ago*, WASH. POST (Nov. 5, 2018, 7:00 AM), https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago [https://perma.cc/2XF5-BB69].

53. Steven M. Gillon, *Reagan Tied Republicans to White Christians and Now the Party Is Trapped*, WASH. POST (Mar. 22, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/03/22/reagan-tied-republicans-white-christians-now-party-is-trapped [https://perma.cc/PU4T-9TUG].

54. 531 U.S. 98 (2000).

55. David Cole, *The Liberal Legacy of* Bush v. Gore, 94 GEO. L.J. 1427, 1428-29 (2006).

56. *See id.* at 1433-35, 1440-44, 1447.

57. *See* Mark S. Brodin, Bush v. Gore*: The Worst (or at Least Second-to-the-Worst) Supreme Court Decision Ever*, NEV. L.J. 563, 563-64, 570 (2012).

58. *See supra* notes 2-8 and accompanying text.

59. 558 U.S. 310 (2010).

60. 570 U.S. 529 (2013).

61. 576 U.S. 644 (2015).

political systems, including both state and national elections. The Roberts Court has effectively declared war on the Warren and early Burger Courts.[62] The probability is quite high that eventually a new Court will declare war on the Roberts Court, and so it goes.

In most eras of American history, the Supreme Court has overreached and maximized its influence in ways that were controversial and even at times crisis-generating. This malfunction has occurred when the Court has been conservative, when it has been liberal, and when it has been moderate.

There is no doubt that the Court has issued positive decisions over the years, especially in cases implicating the rights of criminal defendants, who have few political allies supporting them, and more recently, the rights of LGBTQ folks. But there are exceptions to every rule, and generalizations are just that—overall conclusions with limited exceptions. My reading of American history is that, since 1857, the Court has much more often than not negatively infected our politics with overreaching or ill-timed decisions that have inflamed and polarized our politics and our people. It is well past time to take a harder look at this complex hybrid legal/political institution.

III. THE PATH FORWARD

The left's calls for term limits, Court packing or balancing, and jurisdiction stripping, if implemented, could make a difference around the edges of the Justices' behavior, but such reforms are unlikely to make a real and substantial change. There may be a better way.

But before we get there, we must ask why any country would decide to delegate to elite, life-tenured judges decision-making authority over controversial and difficult public policy issues such as gun control, abortion, and affirmative action, to name a few contentious questions. We can distinguish those kinds of disputes from cases involving double jeopardy, self-incrimination, unreasonable searches and seizures, and related issues that directly impact criminal defendants, juries, evidence, and courtrooms. Those issues are appropriate for the tribunal sitting on top of a national legal system with state and federal courts trying hundreds of thousands of criminal cases a year.

But judges simply do not have any similar expertise on questions like abortion and gun control that could explain why they should have a roving veto power over how the state and national governments deal

62. *See* Ford, *supra* note 48.

with these issues.[63] The original idea, as expressed by Hamilton in Federalist 78, was for strongly deferential and modest judicial review.[64] But government officials will do what government officials do—take as much power as they can—and so have the Justices on the Court. The result of this power grab is centuries of judicial second-guessing of state and federal laws that do not come close to constituting clear constitutional error—the requirement for the exercise of judicial review that was almost universal at the Founding.[65] If originalism really were the method used by the current Justices who self-identify as originalists, far fewer state and federal laws would fall prey to the Supreme Court's overreaching.[66]

The late Justice Antonin Scalia argued in a dissent in an abortion case that value judgments are to be voted on by the people, not dictated by unelected, life-tenured judges.[67] Unfortunately, Scalia did not heed his own advice, as he voted to strike down many laws during his time on the bench, almost none of which were at an "irreconcilable variance" with the Constitution. In fact, no Supreme Court Justice in modern times has consistently deferred to state and federal laws under a clear error standard.[68]

Maybe it is time for the people or the President to stop acceding to Supreme Court decisions striking down laws unless the Justices make an explicit showing of clear constitutional error. Now that the Court has tried to end all affirmative action, if universities refuse to comply and the Biden Administration sides with the universities, what is the Court going to do? It has neither purse nor sword. A lower court can enter a judgment against a university and the Supreme Court can affirm it, but without the help of the executive branch, what can the Court really do? Similarly, a blue state might decide to not abide by a Court decision striking down much-needed gun reform. Unless the President is willing to use force to coerce compliance with the opinion, there is little the Court can do. And, according to Hamilton in Federalist 78, that executive discretion was an important check on runaway judicial power.[69]

---

63. ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 167 (2012).

64. *See supra* notes 12-17 and accompanying text.

65. *See* Segall, *supra* note 17, at 55.

66. *See* Eric Segall, *We Are All Legal Realists Now*, DORF ON L. (Aug. 26, 2020), https://www.dorfonlaw.org/2020/08/we-are-all-legal-realists-now.html [https://perma.cc/8QVR-LA34].

67. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996, 999-1001 (1992) (Scalia, J., concurring in part and dissenting in part).

68. *See* Segall, *supra* note 17, at 52-54.

69. *See* THE FEDERALIST NO. 78, *supra* note 14, at 392 (Alexander Hamilton).

This strategy of resistance might cause people to remember that the Governor of Arkansas in the 1950s argued that *Brown v. Board of Education* did not apply to his state, leading the Court to unanimously say that it did.[70] Eventually, President Eisenhower called in the National Guard to enforce the decision.[71] The specter of such chaos may justifiably make folks nervous about other branches of government disobeying the Court.

But the President's enforcement of *Brown* was textually justifiable under the Equal Protection Clause of the Fourteenth Amendment and stands for universal principles of equality and morality we should all share. When the state creates two different school systems based on race with one being more secure, having more experienced teachers, more resources, and increased potential for college placements and jobs, that is literally a denial of the "equal protection of the laws" and satisfies the Hamilton "irreconcilable variance" test.[72] That clarity is quite unusual for Supreme Court litigation. Most of the Court's other constitutional law cases involve issues reasonable people can disagree about. In such circumstances, the Court should stand down.

Our political and legal systems were constructed by the Framers such that the executive branch has the discretion to refuse to enforce Court decisions.[73] In the words of New York University Law Professor Christopher Sprigman,

> Hamilton argued the [C]ourt's utter dependence on the executive branch to enforce its judgments meant the [C]ourt was no real threat to liberty. But for that argument to make sense it must also be true that, at least in cases where a [C]ourt ruling provokes some disquiet, the president will make an independent assessment before enforcing it.[74]

Just so.[75]

---

70. *See* Cooper v. Aaron, 358 U.S. 1, 17-20 (1958).

71. *Id.* at 12.

72. U.S. CONST. amend. XIV; THE FEDERALIST NO. 78, *supra* note 14, at 394 (Alexander Hamilton).

73. *See* THE FEDERALIST NO. 78, *supra* note 14, at 392 (Alexander Hamilton).

74. Christopher Jon Sprigman, *The Supreme Court Radically Altered the Meaning of the 1st Amendment—in an Unsigned Opinion*, ALTERNET (May 28, 2021), https://www.alternet.org/2021/05/supreme-court-first-amendment [https://perma.cc/TKZ8-N4RF].

75. *See* Ryan Cooper, *Democrats Need to Get Over Their Pathetic Fear of the Supreme Court*, AM. PROSPECT (May 25, 2023), https://prospect.org/economy/2023-05-25-democrats-fear-supreme-court [https://perma.cc/Q9JH-JXXB] (stating that, with respect to President Biden's concern that the Court might say he cannot unilaterally repudiate the debt ceiling statute: "A sensible president would not be preemptively conceding the Court's authority in this area. They would be attacking its legitimacy, and preparing—as Franklin Roosevelt did in a similarly dire circumstance—to disobey it").

In complicated and highly contested areas of public policy, the Court needs serious reform, and we are running out of options. It is time for the President or a state to consider ignoring the United States Supreme Court when it unduly burdens and interferes with our democracy without first showing an "irreconcilable variance" between a law and clear constitutional text or largely undisputed history behind the text. We have data showing the current system of judicial supremacy simply does not work.

Such a stance would be consistent with how most other countries enforce their constitutions. As two Court scholars have argued, "Notably, other healthy and robust democracies do not allow courts to play an exclusive role in constitutional interpretation but promote dialogues among the branches in which legislatures or chief executives respond to judicial interpretations by offering their own competing interpretations."[76] Those two scholars also recommended the type of executive resistance I am advocating:

> The central tenet of the solution that we recommend—Popular Constitutionalism—is that courts do not exercise exclusive authority over constitutional meaning. In practice, a President who disagrees with a court's interpretation of the Constitution should offer and then follow an alternative interpretation. If voters disagree with the President's interpretation, they can express their views at the ballot box. Popular Constitutionalism has a proud history in the United States, including Abraham Lincoln's refusal to treat the Dred Scott decision as a political rule that would guide him as he exercised presidential powers.[77]

The academics who wrote those words are both on the left, but some conservative scholars agree. According to Professor Michael Stokes Paulsen, a prominent and conservative Federalist Society member, it is fully appropriate for the Executive and Congress to non-acquiesce "in judicial precedent that, in the independent judgment of these other actors, conflicts with the Constitution."[78]

The *National Review*'s Ed Whelan "states the case [even] more bluntly": "We live in a legal culture besotted by the myth of judicial supremacy . . . . According to this myth, the Constitution means whatever five Supreme Court [J]ustices claim it means, and all other governmental

---

76. Tushnet, *supra* note 11.

77. *Id.*

78. Damon Root, *Can the President Lawfully Ignore a Supreme Court Decision?*, REASON (June 4, 2015, 12:45 PM), https://reason.com/2015/06/04/can-the-president-lawfully-ignore-a-supr [https://perma.cc/3KWQ-ASLE].

actors are duty-bound to abide by that supposed meaning."[79] Whelan believes that the President is not constitutionally obligated to abide by Supreme Court decisions if the President's "own readings of the Constitution" contradict the Court's interpretations.[80]

The most serious objection to this kind of Departmentalism is that it would render "every branch a law unto itself, which seems inconsistent with the Framers' idea of a written Constitution to check the branches' tendency to wrongfully augment their power and of an independent judiciary to keep the political branches within their constitutional boundaries."[81] The problem is who gets to mark the contours of those boundaries when constitutional text is unclear or imprecise and there is little or no relevant history to answer the question. To delegate broad questions of public policy disguised as legal issues to unelected, life-tenured government officials has not worked well throughout American history (as Part II illustrated) and is not replicated in most other countries.[82]

Our Supreme Court violates a cardinal rule of representative constitutional democracies and republics: never give a committee of government officials largely unreviewable power for life. Our country has been struggling mightily with that mistake since at least 1857. It is well past time for major reforms of the broken institution we call a Supreme Court, which acts much more like a political veto council than a court of law.[83]

IV. CONCLUSION

These difficult and stormy times are not materially different than the chaos the Court has created throughout American history. Recency bias should not blind us to all that has come before and the need for Congress and the President to take strong steps to substantially weaken the Supreme Court of the United States. Resistance to an obviously contestable and damaging Supreme Court opinion by the President of the United States would be a helpful place to start.

79. *Id.*
80. *Id.*
81. *Id.* (quoting University of San Diego School of Law Professor Michael Ramsey).
82. *See supra* Part II.
83. *See* SEGALL, *supra* note 63, at 7-8.