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Note

For the Right Reasons: The Rules of the Game for Institutionalists

RICK JOSLYN

The United States judiciary demonstrates better than any other constitutional institution the inherent fragility of American democracy. There is a reasonable debate to be had over when and exactly how the Supreme Court squandered the precious legitimacy on which its very existence rests. Yet, today, observers must confront with renewed urgency the impact crater of discontent that has been driven into the institution. The Court has been weaponized, politicized, and villainized; it has been lionized for its institutional heft. But increasingly loud voices have called for foundational reforms. There is a scramble for solutions to check the Court's newly-emboldened right-wing majority and their ruthless quest to destroy long-standing legal precedents. Some have questioned whether a countermajoritarian enterprise such as the Supreme Court ought to exist. Standing amidst that crucible are the nine Supreme Court Justices and the consequences of their decisions.

It is here, at this discordant juncture, where understanding why and how Justices make decisions reveals peculiar insights into the judiciary's role in American democracy. It is also a place to investigate the primary motivation for Justices that observers have called "institutionalist"—that is, jurists for whom the above legitimacy crises animate their judicial philosophy. This Note begins and ends with a curiosity into institutionalism as a legal and political phenomenon. For the institutionalist, the legitimate ends justify the quasi-legal means. Thus, institutionalism represents both a symptom and a cure of our affected judiciary and our fragile democracy.

This Note ventures forth into this legal terra nullius. It unpacks the institutionalist ethos by identifying the reasons that such consequentialist choices are made and under which authority. Finally, it offers a compelling justification to accept and respect institutionalist judging: to check the ominous march of authoritarianism and populist demagoguery in the United States and around the world. Conceiving of institutionalism as democracy's Excalibur sword may raise more questions than it answers. But, this Note asks whether it may represent a budding prospect for global freedom.

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For the Right Reasons: The Rules of the Game for Institutionalists

RICK JOSLYN [*]

INTRODUCTION

Institutionalism is having a moment.[1] Amidst a conflagration of crises, sensible words and temperate actions from leaders, perhaps unsurprisingly, attract the attention of worried citizens. Maybe because it subverts our expectations to observe government actors prioritizing stability over personal ambition, the institutionalist is a fascinating creature to study during a time of endemic public distrust of institutions and the figures who

[*] Juris Doctor, University of Connecticut School of Law, Class of 2022. Many thanks to my faculty advisor, Professor Kiel Brennan-Marquez, who supported me throughout the entire writing process and helped to turn my hazy ideas into cogent legal analysis; to Professor Mathilde Cohen for her intellectual counsel and for sparking my interest in this topic; and to my Great-Uncle, Professor Dennis F. Thompson, for his inspiration. Thanks also to Professor Jamelia Morgan for her helpful input; Olivia Benson, my Notes & Comments Editor, for keeping me and this Note moving forward; Mallori Thompson, for her leadership and encouragement; and our Editor-in-Chief, Marla Katz, and everyone at *Connecticut Law Review* for their belief in this project and tireless work improving this Note. This Note is dedicated to my wife, Donielle Joslyn, for supporting and loving me through law school and life.

[1] Adam Liptak, *John Roberts Was Already Chief Justice. But Now It's His Court*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html (describing John Roberts as an institutionalist who wields substantial power on an ideologically divided Supreme Court); Chris Hayes, *How Will History Judge Barack Obama?*, NATION (Dec. 15, 2016), https://www.thenation.com/article/archive/how-will-history-judge-barack-obama ("Despite his pledge to 'fundamentally change the way Washington works,' Barack Obama was always an institutionalist."); *PBS News Hour: Shields and Brooks on Hillary Clinton's Election Candor, Trump's Dealing with Democrats* (PBS television broadcast Sept. 15, 2017) (describing Hillary Clinton, *New York Times* columnist David Brooks refers to her as an "institutionalist" and attributes her election loss to Donald Trump to the reality that "[t]his election was about anti-institutionalism"); Chris Cillizza, *Mitch McConnell Just Went Off on Donald Trump and the Election Deniers*, CNN, https://www.cnn.com/2021/01/06/politics/mitch-mcconnell-trump-electoral-vote/index.html (Jan. 6, 2021, 4:37 PM) (suggesting that the reason Senate Republican Leader Mitch McConnell delivered a speech excoriating efforts by President Trump and congressional Republicans to invalidate electoral votes is because McConnell is "an institutionalist through and through"); Lisa Lerer, *How Joe Biden Became a Steady Hand Amid So Much Chaos*, N.Y. TIMES, https://www.nytimes.com/2021/01/20/us/politics/president-joe-biden.html (Oct. 8, 2021) ("Even in the 1960s, Mr. Biden was something of an institutionalist in a blow-it-up generation."). Commentators have prognosticated that President Biden's persistent centrist approach to government will allow him to succeed where past presidents have failed. *Id. But see* Eugene Robinson, *Ketanji Brown Jackson Must Wonder What She Has Gotten Herself Into*, WASH. POST (May 5, 2022, 4:15 PM), https://www.washingtonpost.com/opinions/2022/05/05/katanji-brown-jackson-must-wonder-what-joining-the-supreme-court-means/. The Court's present composition may temper the influence of Chief Justice Roberts, who "no longer has the power to act as a swing vote between the court's evenly balanced liberal and conservative factions." *Id.* As of this writing, Chief Justice Roberts faces an uphill battle reining in the Court's five dependably right-wing Justices.

control them.[2] Most prominently, President Joe Biden tapped into the popular, de-escalating appeal of institutionalism throughout his winning presidential campaign which fixated on a theme of "unity." His Inaugural Address implored Americans not to preoccupy themselves with what divides them, stating that "politics need not be a raging fire destroying everything in its path."[3] The appeal of that message lies somewhere in a recognition that, during times of crisis, democratic institutions—taken for granted during calmer times—appear more fragile than in the recent past.

For a democracy to succeed, caring for important institutions must not be limited to the political branches of government. This Note investigates how judicial actors can care for such democratic institutions when they set aside ideological interests and decide cases with an eye towards guarding certain unwritten rules and accepted norms that allow these institutions to persist.[4] Given the special emphasis on neutrality in the courts, there is a sense that the institutionalist judge can better withstand the pressures of political schisms and render verdicts that are not just fair but are in furtherance of maintaining a functional republic. Yet, predictable problems arise when democratic caretaking is left to judges. The reasons that make institutionalism noble in the political branches can simultaneously raise

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[2] *See Americans' Views of Government: Low Trust, but Some Positive Performance Ratings*, PEW RSCH. CTR. (Sept. 14, 2020), https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings (explaining polling research showing that "public trust in the federal government has hovered at near-record lows"). Just twenty percent of Americans reported that they trust the federal government. *Id.*; *see also* CLIFFORD YOUNG & CHRIS JACKSON, IPSOS, OUR AGE OF UNCERTAINTY: A ROAD MAP FOR UNDERSTANDING THE POLITICAL NEW NORMAL (2018), https://www.ipsos.com/en-us/knowledge/society/our-age-of-uncertainty-presentation (explaining public opinion research revealing alarming levels of distrust in institutions, growing numbers of people who believe "the system is broken," political tribalism, and changing demographics that have all contributed to political breakdown); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 1–10 (2018) (outlining the eroding democratic norms in American society and how persistent threats to institutions pave the path for autocrats to subvert democracy and oppress the people, as evidenced by democracies around the world that have failed). As of this writing, there is no substantial research as to whether President Biden's nascent administration has been able to reverse any of these trends.

[3] *See* Inaugural Address, 2021 DAILY COMP. PRES. DOC. 2 (Jan. 20, 2021). President Biden delivered his Inaugural Address, in which he promised to work "to restore the soul and to secure the future of America," at the U.S. Capitol only one week after "a riotous mob thought they could use violence to silence the will of the people, to stop the work of our democracy, and to drive us from this sacred ground." *Id.* at 1–2. *But see* Charles Creitz, *Hannity Pans Biden's 'Truly Unremarkable, Totally Forgettable' Inaugural Address*, FOX NEWS (Jan. 20, 2021), https://www.foxnews.com/media/sean-hannity-reaction-biden-inaugural-address-radical-agenda (criticizing the Inaugural Address, Sean Hannity, an influential conservative commentator and vocal supporter of President Trump, called President Biden's "unity" theme "laughable and completely disingenuous" because of Biden's "radical" agenda and unwillingness to "end[] the vitriol in his own party").

[4] LEVITSKY & ZIBLATT, *supra* note 2, at 109–13 (identifying the judiciary as one of the "guardrails" of democracy that maintain important democratic norms in constitutional systems where inherent gaps threaten to undermine them).

questions about its appropriateness in a branch that applies the law to "cases" and "controversies" before it.[5]

When Alexander Hamilton wrote, in 1788, that the judiciary "will always be the least dangerous to the political rights of the Constitution," he explicated the limited powers that the Constitution conferred upon the courts.[6] Practically, this means that judges must specifically identify the constitutional authority that permits them to arrive at a conclusion. Formal authority constrains judges and binds them to an ordained method for applying the facts of any given case to the law. Authority also makes outcomes more predictable and, crucially, reduces opportunities for rogue judges to substitute personal opinions and agendas for neutral judgment. But, strict adherence to formal authority must, at least occasionally, produce inequitable, offensive, or otherwise unwanted outcomes. The risk remains that those inequitable, offensive, or unfavorable outcomes will tarnish the judiciary enough to impair its legitimacy as a democratic institution. As this Note finds, illegitimate institutions present existential risks to democracy.

In American democracy, the fundamental answer to any question of political authority is premised on the idea that the government derives its power from the consent of the governed, so it follows that the American judiciary does, as well.[7] The legitimacy of the judicial branch as a democratic institution requires that courts adhere to, and not transcend, the powers outlined by the people. But, the Constitution is the product of thorny compromises between competing eighteenth-century political factions, which created latent ambiguities that lurk throughout the text.[8] Justices who improperly navigate constitutional ambiguities that involve the scope of judicial authority can threaten the popular legitimacy of the institution specifically and American democracy more broadly.

The mark of an institutionalist is the conscious aversion of outcomes that present existential risks to the law and to legal systems.[9] Of particular interest to this Note is when judges pursue overarching commitments to

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[5] U.S. CONST. art. III; *cf.* Ilya Shapiro, Commentary, *How the Supreme Court Undermines Its Own Legitimacy*, CATO INST. (July 18, 2019), https://www.cato.org/commentary/how-supreme-court-undermines-its-own-legitimacy (criticizing "cynical tactic[s]" of the American left who "work[] the refs" by preying on the institutionalist sympathies of judges like Chief Justice Roberts because "it's when [J]ustices think about legitimacy that they act most illegitimately").

[6] THE FEDERALIST NO. 78 (Alexander Hamilton) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.").

[7] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[8] *See* Michael C. Dorf, *The Coherentism of* Democracy and Distrust, 114 YALE L.J. 1237, 1251–53 (2005) (comparing constitutional interpretation to interpreting music given how ambiguities in the text lend themselves to multiple competing interpretations).

[9] *See* Mark A. Graber, *Institutionalism as Conclusion and Approach*, *in* RESEARCH METHODS IN CONSTITUTIONAL LAW: A HANDBOOK 6–7 (David Law & Malcolm Langford eds.) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3157358 (explaining that institutionalists are united in their *conclusions* about the best way to organize the law and legal systems).

ensure that the larger public and other branches of government perceive the judiciary as a legitimate institution. Part I demonstrates that institutionalist judges are animated by goals that are decidedly *extralegal* because they do not necessarily derive from the legal texts that are being interpreted. Further, the willingness of institutionalist judges to bypass formal legal analysis, which is grounded in clear authority, demands an answer to the question: *where* exactly do judges find the authority to determine which outcome protects the legitimacy of the judiciary? In response, Part II constructs a foundation for the constraint of institutionalist judges. Specifically, this Note finds support for institutionalist decision-making within (1) cornerstone principles of liberty inherent to the Constitution, (2) formal and informal constraints on judicial power, and (3) the framers' vision for the role of the judiciary as a check on the political branches. Finally, Part III is motivated by threats to institutions in the present watershed period of global democracy, including the ongoing COVID-19 pandemic, economic uncertainty, violent societal unrest, political instability, and general questions about the ability of the Constitution to address these crises. A central finding here is that institutionalist judges, for better or for worse, can impact the legitimacy of the democratic institutions that must hold firm against the rising tide of authoritarianism.

This Note does not advocate for any approach to judging that bolsters the institutional legitimacy of the Supreme Court. Though this Note embraces important aspects of living constitutionalism, it proceeds beyond the research of scholars who identify how living constitutionalism can solve contemporary legal problems. In particular, this Note draws on lessons from the presidency of Donald Trump, whose electoral appeal derived from his eagerness to scrap unwritten rules and norms and to actively take steps to weaken democratic institutions that interfered with his idiosyncratic brand of populism. President Trump's anti-democratic pathology climaxed in his outrageous refusal to accept his loss in the 2020 election, then in his incitement of the riotous insurrection at the U.S. Capitol that killed six people in an attempt to overturn the election and prevent the peaceful transfer of power.[10] Finally, this Note implicitly contrasts institutionalism

[10] *See generally Select Committee Hearing: Hearing Before U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022) (statement of Rep. Bennie Thompson, Chairman, Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol) (introducing the findings of the Select Committee that concluded that President Trump was at the center of "a sprawling, multi-step conspiracy aimed at overturning the election" and "January 6 was the culmination of an attempted coup"); Press Release, Sen. Mitt Romney, Romney Condemns Insurrection at U.S. Capitol (Jan. 6, 2021), https://www.romney.senate.gov/romney-condemns-insurrection-us-capitol (documenting Utah Republican and 2012 Republican presidential candidate Senator Mitt Romney's speech on the Senate floor once insurrectionists had been cleared from the Capitol). Senator Romney stated, "We gather today due to a selfish man's injured pride and the outrage of his supporters whom he has deliberately misinformed for the past two months and stirred to action this very morning. What happened here today was an insurrection, incited by the President of the United States." *Id.* Senator

with legal myopia that furthers partisan aims and results in self-inflicted wounds for the judicial branch. Anti-institutionalism on the Supreme Court reached a climax when the five dependably right-wing Justices overturned the fifty-year-old *Roe v. Wade*[11] precedent and eliminated the fundamental right to choose an abortion.[12] Prior to the publication of that decision—which was rendered shortly before the publication of this Note—an early draft of the majority opinion was inexplicably leaked to the press, which clearly foreshadowed the demise of *Roe* and punctured new wounds into the Court's legitimacy.[13] Speculation abounds regarding what precedent could be next on the chopping block for the "newly constituted Court," as Justice Sonia Sotomayor acknowledged.[14] Under these circumstances, this Note explains why we allow institutionalist judging and how it has the capacity to further democracy by tying judicial legitimacy to larger themes about global institutional breakdown.

The tasks at hand are to challenge presumptions about institutionalism and to look to constitutional law and universal democratic principles. The chosen method is to examine institutionalism as a calling—a judicial ethos—deriving authority from the spirit of the Constitution in order to guard against anti-constitutional forces. We cannot be naïve. As the character Octave complains in Jean Renoir's 1939 film, *The Rules of the Game*, "The awful thing about life is this: everybody has their reasons."[15] We must ensure that there are limits to when, how, and for what reasons judges prioritize democratic legitimacy over strict interpretation of the law.

Romney also declared that those who refused to accept the results of a democratic election were "complicit in an unprecedented attack against our democracy." *Id.* Commentators took seriously President Trump's anti-democratic tendencies even prior to January 6, 2021. *See* LEVITSKY & ZIBLATT, *supra* note 2, at 176–203 (arguing that President Trump exhibited "authoritarian instincts" and outlining instances in which he attempted to undermine democratic rules and norms by "capturing the referees, sidelining the key players, and rewriting the rules to tilt the playing field against opponents"); Jonathan Lemire, *How Trump Has Rewritten the Rules of the Presidency*, PBS (Dec. 27, 2018, 11:56 AM), https://www.pbs.org/newshour/politics/how-trump-has-rewritten-the-rules-of-the-presidency (finding that President Trump rejected rules, norms, and traditions that restrained previous presidents and that "Trump himself believes his unpredictability is what holds Americans' attention and fuels his success").

[11] 410 U.S. 110 (1973).

[12] Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. June 24, 2022). The implications of *Dobbs*, the opinion of which was officially released a week before this Note went to print, is beyond the scope of this Note.

[13] *The Threat to* Roe v. Wade *and to the Supreme Court's Legitimacy*, CBS NEWS: SUNDAY MORNING (May 8, 2022, 9:15 AM), https://www.cbsnews.com/news/roe-v-wade-abortion-draft-opinion-leak-supreme-court-legitimacy/ (quoting constitutional law expert Mary Ziegler's remarks on the magnitude of an opinion overruling *Roe*: "This will be something that professors of constitutional law, and indeed professors of any kind of law, will be talking about, probably for more than 100 years from this conversation").

[14] *See, e.g.*, Egbert v. Boule, No. 21-147, slip op. at 14 (U.S. June 8, 2022) (Sotomayor, J., dissenting) ("[A] restless and newly constituted Court sees fit to refashion the standard[s] anew to foreclose remedies in yet more cases. . . . inconsistent with governing precedent.").

[15] THE RULES OF THE GAME (Nouvelles Éditions de Films 1939).

I. RECOGNIZING THE INSTITUTIONALIST APPROACH

The "institutionalist" label describes a judge's attitude towards the judiciary as an institution. It may not hint at that judge's ideology. In common parlance, there can be a tendency to use the term with a positive connotation. For example, Supreme Court Justices are praised as "institutionalists" when they defy prior expectations and side with ideological opposites on the Court for a just cause.[16] Yet, other commentators have used "institutionalist" as a warning label to temper expectations and emphasize that a judge is not *really* a convert to a cause, even if he delivers a victory for a particular side on a particular occasion.[17] Conceptually, there is an agreement that institutionalists are "united by their conclusions about the law and legal systems rather than by the methods they use to reach those conclusions."[18] But there is a problem of identifying some consistency from case to case that demands a fuller understanding of what we mean when we talk about institutionalism. In an effort to determine some criteria, this Part begins by dissecting how judges approach cases. For that, a brief review of the theories of judicial interpretation is in order to first develop a contrast for institutionalism.

A. *How Judges Make Decisions*

All judges, including institutionalist ones, make choices about the law based on the facts at bar, so understanding institutionalism begins with understanding how judges approach the most significant aspect of their jobs: making decisions. We want to know—and our constitutional republic requires—that judges make decisions that (1) are not arbitrary and (2) are rooted in clear authority within the Constitution, an Act of Congress, or another source of law. Scrutinizing judicial decision-making helps to

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[16] *See, e.g.*, Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, ATLANTIC, https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/ (July 14, 2020, 12:56 PM) ("[Chief Justice] Roberts said he would try to persuade his colleagues to put institutional legitimacy first by encouraging them to converge around narrow, bipartisan decisions to avoid 5-4 partisan splits."); Jamie Crooks & Samir Deger-Sen, Opinion, *We Were Clerks at the Supreme Court. Its Legitimacy Is Now in Question.*, N.Y. TIMES (Oct. 25, 2020), https://www.nytimes.com/2020/10/25/opinion/supreme-court-amy-coney-barrett.html (explaining that the authors opposed Amy Coney Barrett's nomination to the Supreme Court not because they are "liberals" who disagree with her originalist methodology, but rather because they are "institutionalists" who are concerned that "the [C]ourt's decisions won't be accepted" if multiple Justices are viewed as occupying stolen seats).

[17] *See, e.g.*, Maya Manian, *Winning by Losing: Chief Justice Roberts's Strategy to Eviscerate Reproductive Rights and Justice*, HARV. L. & POL'Y REV. (Aug. 10, 2020), https://harvardlpr.com/2020/08/10/winning-by-losing-chief-justice-robertss-strategy-to-eviscerate-reproductive-rights-and-justice/ (outlining the possible duplicity of institutionalism, specifically in how Chief Justice Roberts decides cases). Manian argues that "Roberts voted with the liberal bloc [in *June Medical Services v. Russo*] to protect the legitimacy of the Supreme Court while still advancing a doctrinal agenda that will dismantle reproductive rights." *Id.*

[18] Graber, *supra* note 9, at 3.

demystify the misleadingly straightforward notion that judges merely apply facts to law.

Because of that need for accessibility and accountability, a set of theories for interpreting the Constitution emerged. The Constitution is a legal document that features numerous textual ambiguities, which the framers did with the purpose of providing a degree of flexibility to future generations who would apply it to modern cases and controversies.[19] Phillip Bobbitt described approaches for interpreting these ambiguities as "constitutional modalities," which provide "ways in which legal propositions are characterized as true from a constitutional point of view."[20] In Bobbitt's modalities framework, there are six categories of sound arguments that judges can deploy to determine the answer to a legal question in light of the constitutional ambiguities: (1) the historical; (2) the textual; (3) those making structural inferences; (4) the doctrinal, looking to prior precedent; (5) the ethical, looking to rules derived from "moral commitments of the American ethos that are reflected in the Constitution;" and (6) the prudential, which "balance[s] the costs and benefits of a particular rule."[21] These classifications provide fundamental principles for competing visions of judicial decision-making.[22] While it is possible that certain considerations might be excluded, the categories help to "test the legitimacy of constitutional arguments."[23] To answer constitutional questions, judges may deploy multiple interpretive approaches that overlap and mesh together, or they may use the facts to highlight flaws in competing approaches. Thus, the viability of each approach means that judges have a wide latitude to confront constitutional questions and retain legitimacy. Bobbitt's framework will aid our search for an institutionalist approach to constitutional interpretation, but institutionalism does not fit neatly into any of his modalities.

For example, consider a legal analysis that falls squarely into a formalist, or non-consequentialist,[24] category. Justice Antonin Scalia spent multiple

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[19] *See, e.g.*, Missouri v. Holland, 252 U.S. 416, 433 (1920) (addressing the inherent ambiguity of the Tenth Amendment, Justice Holmes explains that "[w]ith regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters").

[20] PHILIP CHASE BOBBITT, CONSTITUTIONAL INTERPRETATION 12 (1991).

[21] *Id.* at 12–13.

[22] *See id.* at 22 (clarifying that his proposed modalities can be used to construct a series of competing political ideologies, but "they need only stand alone to provide the means for making constitutional argument").

[23] André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate Over Originalism*, 119 PENN. ST. L. REV. 131, 141 n.33 (2014).

[24] Nonconsequentialism, generally, "denies that the rightness or wrongness of our conduct is determined *solely* by the goodness or badness of the consequences." Note, *Rights in Flux: Nonconsequentialism, Consequentialism, and the Judicial Role*, 130 HARV. L. REV. 1436, 1439 (2017) (citation omitted).

paragraphs of his majority opinion in *Crawford v. Washington*[25] detailing the legal evolution of the Confrontation Clause, allowing us to safely categorize his analysis into the "historical" modality and see that he was less focused on the rightness or wrongness of the conduct at issue.[26] In *Crawford*, Justice Scalia tracked the right to confront one's accusers in a court of law from its origins "back [in] Roman times" up through its adoption into English common law, codification under Queen Mary I, and inclusion into the Bill of Rights.[27] Reframing the Confrontation Clause as intended to prohibit "trial by affidavit," the *Crawford* Court held that the Confrontation Clause excludes hearsay evidence that is "testimonial" in nature.[28] Justice Scalia drew on other modalities, but his logic is grounded in the text of the Confrontation Clause, and he claims unambiguous authority in the intentions of the framers in including the Sixth Amendment in the Bill of Rights. Looking to the formalism in *Crawford* is helpful because it demonstrates an approach to judging that appeals to formal authority as opposed to wrangling with issues of workability.

B. *Thinking About Other Reasons to Decide a Case*

Unlike formalism, the institutionalism discussed in this Note defies clean categorization into one constitutional modality—partly because it is more accurate to characterize a *judge* as an institutionalist, as opposed to his constitutional analysis. As we examine the institutionalist approach, we look at cases where a Supreme Court Justice could fit into the institutionalist mold. We look at instances in which a Justice justifies a move away from a particular methodological or consequentialist approach and, instead, moves toward an analysis with extralegal considerations. From this angle, we see institutionalist choices that better insulate the Court from public backlash, reinforce the neutrality of the Court, or appeal to larger moral truths.

1. *Optics: Protecting the Reputation of the Court*

The first extralegal consideration to study is the optics of a judicial decision—specifically, how the opinion of the legal community and the public influences how a Justice approaches a case. Optical considerations are a logical place to start for three reasons. First, because a concern for the

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[25] 541 U.S. 36 (2004).

[26] *Id.* at 36–37; *see also* BOBBITT, *supra* note 20, at 13 ("Historical, or 'originalist' approaches to construing the text . . . are distinctive in their reference back to what a particular provision is thought to have meant to its ratifiers.").

[27] *Crawford*, 541 U.S. at 43. Because the Sixth Amendment merited inclusion in the Bill of Rights, which protects citizens from government abuse, Justice Scalia reasons that the Framers must have contemplated a contemporary, odious practice inflicted upon colonists by the British Crown—prosecuting individuals based on evidence that consisted of written affidavits of their supposed wrongdoing. *Id.* at 50–51.

[28] *Id.* at 53.

Court's reputation has no basis in written law, a formalist would not spend time caring about the optics of his decision. Second, Chief Justice Roberts' 2020 "switch" on abortion restrictions has been roundly described as an example of his institutionalism because of the consequences that upholding the abortion restriction statute could have for the public reputation of the Court.[29] Third, Chief Justice Roberts' concurring opinion in *June Medical Services L.L.C. v. Russo*[30] evidences why there is a hazy understanding of the makings of an institutionalist approach, especially because optical considerations are only discernable in the context in which the case was decided.

Chief Justice Roberts, appointed by Republican President George W. Bush, issued largely predictable conservative decisions for much of his tenure, although observers have noted his growing willingness to side with the Court's liberals.[31] This inclination has increased since the retirement of resident "swing" Justice Anthony Kennedy in 2018 and Justice Brett Kavanaugh's subsequent confirmation, which tinted the Court with a clear 5-4 majority.[32] Among the most prominent immediate repercussions was the potential that the reinforced conservative majority would overturn or scale down the central holding of *Roe v. Wade*: that the right to terminate a pregnancy was a fundamental constitutional right.[33] Indeed, anti-abortion activists swiftly schemed to capitalize on Justice Kavanaugh's confirmation.[34] By litigating a new restrictive abortion statute that was substantially similar to one that the Court had struck down while Justice Kennedy was still on the bench, there was an opportunity to rewrite history with a more friendly Justice.[35] But instead, Chief Justice Roberts voted with the Court's liberals in

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[29] *See, e.g.*, Mary Ziegler, *Upholding Precedent While Rewriting It in* June Medical Services v. Russo, BILL OF HEALTH (July 17, 2020), https://blog.petrieflom.law.harvard.edu/2020/07/17/precedent-abortion-stare-decisis-supreme-court/ (noting that Chief Justice Roberts has been described as an "institutionalist" and that "*June Medical* illuminates how Roberts may be able to make his opinions backlash-proof"); Sonia Suter, Opinion, *New Abortion Laws May Save* Roe v. Wade, BALT. SUN (May 31, 2019, 6:00 AM), https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0602-abortion-scotus-20190530-story.html ("Because Chief Justice John Roberts is an institutionalist . . . he cannot be eager for the court to consider the constitutionality of statutes . . . [that] thumb their noses at precedent that has stood for nearly half a century . . . ."); Margaret Talbot, *Possible Responses to the Major Abortion Case Before the Supreme Court*, NEW YORKER (Mar. 4, 2020), https://www.newyorker.com/news/daily-comment/possible-responses-to-the-major-abortion-case-before-the-supreme-court (explaining that, before the ruling was handed down, abortion rights activists could only hope that "[Chief] Justice Roberts's institutionalism will kick in" and uphold the prior precedent striking down similar abortion restrictions).

[30] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

[31] Rosen, *supra* note 16.

[32] *Id.*

[33] *See generally id.*; Ian Millhiser & Anna North, *The Supreme Court Case that Could Dismantle* Roe v. Wade*, Explained*, VOX, https://www.vox.com/2019/10/4/20874618/roe-wade-supreme-court-louisiana-abortion-gee (Jan. 22, 2020, 10:53 AM).

[34] *Id.*

[35] *Id.*

holding that the "almost word-for-word identical" Louisiana abortion statute was unconstitutional based on the earlier precedent.[36] Because Chief Justice Roberts had dissented in a case that dealt with an "almost word-for-word identical" statute four years earlier, an analysis of his concurring opinion in *June Medical Services* could, in theory, help unpack his institutionalism.

But institutionalist reasoning is elusive in written opinions. To wit, Chief Justice Roberts begins his *June Medical Services* opinion with lofty quotations from W. Blackstone, Edmund Burke, and Alexander Hamilton as authorities extolling the importance of *stare decisis*.[37] In a decision that he writes as though it were preordained, Chief Justice Roberts rests his conclusion on strict adherence to *Whole Woman's Health v. Hellerstedt*,[38] the recent precedent that the Louisiana abortion statute is an undue burden to a woman's right to seek an abortion.[39] Clarifying that he "continue[s] to believe that [*Whole Woman's Health*] was wrongly decided," he defends his refusal to correct the mistake by writing, "[a]dherence to precedent is necessary to 'avoid an arbitrary discretion in the courts.'"[40] Chief Justice Roberts makes clear that he agrees with the reasoning of the plurality that "*Casey*'s requirement of finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis for the decision, as it was in *Whole Woman's Health*."[41] However, Chief Justice Roberts does not express a concern for the reproductive rights of Louisiana women at any point, and he ultimately rejects the plurality's opinion fortifying the undue burden balancing test for protecting abortion rights.[42]

Here, institutionalism surfaces somewhere in Chief Justice Roberts's ultimate decision that the optics of the Court reaching an opposite conclusion in 2020 were unfavorable, even though his position on the merits may not have changed. If anti-abortion activists can take obvious steps to manipulate judicial precedent—by campaigning for an openly pro-life President, publicly supporting his judicial nominees through two historically contentious confirmation hearings, and strategically litigating an abortion restriction statute that directly challenges a previous Court ruling—it undoubtedly would have instigated a debate about the Roberts Court's

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[36] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020).

[37] *Id.* at 2134–35 (Roberts, C.J., concurring).

[38] 136 S. Ct. 2292 (2016). An abortion restriction substantially similar to that in *June Medical Services* was invalidated by the Court in *Whole Woman's Health*. *Id.*

[39] *June Med. Servs.*, 140 S. Ct. at 2134–35 (Roberts, C.J., concurring).

[40] *Id.* at 2133–34 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

[41] *Id.* at 2139 (relying on Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), for discussion).

[42] Some commentators have argued that Chief Justice Roberts actually *undermined* abortion rights by rejecting a balancing test and asking "only whether the burdens imposed by an abortion regulation amount to a substantial obstacle to accessing abortion care." Manian, *supra* note 17.

partiality and respect for precedent.[43] Further, the Court faced the unseemly prospect of five men exercising significant power over a hot-button women's health issue, with two of those men (Justices Kavanaugh and Gorsuch) having been nominated by a white, male President who lost the popular vote and made a campaign promise that he would present judicial nominees who would "automatically" overturn *Roe v. Wade*.[44] Chief Justice Roberts' switch prevented widespread condemnation of the Court on these grounds and demonstrated that the Supreme Court would not function as an extension of the Republican Party.[45] In light of these optical considerations, as opposed to individual legal conclusions, Chief Justice Roberts' decision is characterized as "institutionalist."

2. *Competitive Balance: Delivering Wins for Both Political Parties*

An essential element of the institutionalist ethos is judicial recognition that organized political interests wage war in court. It accepts that, in America's competitive two-party system, one party can gain a major advantage over the other by "winning" in court. With partisan judicial battle in mind, Professor Zachary Price advocates for courts adopting an ethos of "symmetric constitutionalism."[46] Constitutional symmetry principles instruct that courts should, "when possible, favor outcomes, doctrines, and rationales that distribute benefits across the country's major ideological divides."[47] The rationale for this conclusory approach is that it promotes equal outcomes among America's competing political factions.[48] By grounding decisions in rules that give both parties a chance to "win" in court, the judiciary maintains its institutional legitimacy across the political spectrum when public opinion is strongly polarized.[49] Like institutionalists, then, judges who adopt symmetric constitutionalism are freed from the mandates of any particular approach that could lead to disturbing outcomes or could unduly inflame partisan passions.

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[43] Caitlin Moscatello, *Will the Supreme Court Strike a Devastating Blow to Abortion Rights?*, CUT (June 17, 2020), https://www.thecut.com/2020/06/supreme-court-case-june-medical-v-russo-may-change-abortion.html.

[44] *See generally id.* ("Not only will the Court's decision disproportionately impact low-income women, who may lack the means to travel out of state for care, but Black women. Due to an intersection of factors, including discrimination within the health-care system and lack of access to affordable, quality care, Black women terminate pregnancies at higher rates than white and Hispanic women.").

[45] *Cf.* Manian, *supra* note 17 (concluding that "Chief Justice Roberts set forth a strategy for winning the war against reproductive rights").

[46] *See* Zachary S. Price, *Symmetric Constitutionalism: An Essay on* Masterpiece Cakeshop *and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1274–75 (2019) (arguing for an approach to the law that responds to the partisan divide by leaving room for judicial discretion and allowing courts to moderate competition between "competing partisan visions").

[47] *Id.* at 1278.

[48] *Id.* at 1275.

[49] *Id.* at 1283.

Symmetric constitutionalism may help explain the outcome of *National Federation of Independent Business v. Sebelius*[50]—another case that bolstered Chief Justice Roberts' reputation as an institutionalist.[51] Here, Chief Justice Roberts writes for the Court that the Patient Protection and Affordable Care Act (ACA) is a constitutional exercise of Congress' power to tax.[52] The Court held that the ACA—a federal law that expands access to health insurance by requiring Americans who do not "maintain minimum essential health insurance coverage" to make a "shared responsibility payment to the Federal Government"—is not a "penalty," as it had been characterized, but it is rather a "tax incentive" created by Congress. [53]

In his analysis, Chief Justice Roberts genuflected at the altars of textualism,[54] structuralism,[55] and doctrinalism.[56] Notably, his analysis deviated sharply from that of the four conservative dissenters, who wrote that the government had not sufficiently briefed or argued the issue of whether the sanction, if it was a tax, was a direct one.[57] In response, Chief Justice Roberts detoured from his constitutional analysis to counter his ideological brethren's argument that "we cannot uphold § 5000A as a tax because Congress did not 'frame' it as such," by determining that Congress had merely mislabeled the "practical effect" of the Act.[58] Perhaps Chief Justice Roberts was nodding to institutionalist imperatives by referencing Chief Justice John Marshall and foundational principles of judicial review. Citing Chief Justice Marshall's landmark *McCulloch v. Maryland* opinion as "background" to the case at bar, Chief Justice Roberts exalted the weight of deciding the constitutionality of the ACA.[59] Ultimately, Chief Justice Roberts disguised any possible consequentialism about a potential health insurance crisis. His analysis is grounded in constitutional law, and it pushes

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[50] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 669 (2012).

[51] *See, e.g.*, Gillian Metzger, *John Roberts the Institutionalist?*, TAKE CARE (June 22, 2019), https://takecareblog.com/blog/john-roberts-the-institutionalist (examining the claim that Chief Justice Roberts is an "institutionalist" for his opinions in cases like *Sebelius*).

[52] *Sebelius*, 567 U.S. at 574.

[53] *Id.* at 539, 572.

[54] *See id.* at 563 ("[T]he mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS.").

[55] *See id.* at 566 ("[T]he payment is collected solely by the IRS through the normal means of taxation . . . .").

[56] *See id.* ("The reasons the Court in *Drexel Furniture* held that what was called a 'tax' there was a penalty support the conclusion that what is called a 'penalty' here may be viewed as a tax.").

[57] *Id.* at 669 (Scalia, J., dissenting). Justices Kennedy, Thomas, and Alito joined Justice Scalia's dissent. *Id.* at 646.

[58] *Id.* at 569–70 (majority opinion).

[59] *Id.* at 533–34, 538 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 , 405 (1819)); *see also* JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 9–10 (2019) (quoting Chief Justice Roberts on his desire to be remembered more like Chief Justice John Marshall than Chief Justice Roger Taney).

back against the dissent's criticism.[60] Chief Justice Roberts made no appeals to the far-reaching consequences of striking down the ACA, which offered a way for millions of Americans to access healthcare. Here, as in *June Medical Services*, it is more illuminating to examine the circumstances surrounding the result in *Sebelius*. Given what we know about Chief Justice Roberts, it is reasonable to believe that he changed his vote in response to growing concerns that the Court exercised unchecked power in support of conservative causes.[61] Specifically, the critical question is how the political sectarianism, intensified during the Obama administration, prompted Chief Justice Roberts to switch his position on the ACA and to uphold the law.

At the time of the *Sebelius* decision, the ACA represented the signature legislative achievement of the Democratic administration of President Barack Obama, the first Black President of the United States, whose name became a shorthand for the law that expanded healthcare coverage for millions of Americans. Only two years prior, the Supreme Court's decision to strike down parts of a federal campaign finance reform law in *Citizens United v. Federal Election Commission*[62] infuriated liberals and raised the ire of President Obama himself, who rebuked the ruling in his 2010 State of the Union Address.[63] Further, before the Court's decision on *Sebelius*, President Obama condemned, in no uncertain terms, that he felt such a decision would be an "unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress."[64]

Meanwhile, Chief Justice Roberts had been clearly aggravated by President Obama's accusations that the Court served conservative interests.[65] Over the course of several months from late 2011 through early 2012, Chief Justice Roberts felt compelled to return to an argument that, seemingly, the government had not fully developed—that the individual

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[60] BISKUPIC, *supra* note 59, at 236, 238 (discussing the impact of conversations that Chief Justice Roberts had with Justice Kennedy, in which Justice Kennedy shared that he believed that the unconstitutionality of the individual mandate required the Court to invalidate the entire ACA).

[61] *Id.* at 10.

[62] 558 U.S. 310 (2010).

[63] *See* Address Before a Joint Session of Congress on the State of the Union, 2010 DAILY COMP. PRES. DOC. 8 (Jan. 27, 2010) (criticizing the Supreme Court for granting "the special interests and their lobbyists even more power in Washington"); David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES (Jan. 21, 2010), https://www.nytimes.com/2010/01/22/us/politics/22donate.html (explaining that the decision ignored the economic recession that hurt many Americans and would largely benefit Republicans, who are "the traditional allies of big corporations, who have more money to spend than unions").

[64] *See* President Barack Obama, President Felipe Calderón & Prime Minister Stephen Harper, Joint Press Conf. (Apr. 2, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/04/02/joint-press-conference-president-obama-president-calderon-mexico-and-pri (responding to a reporter's question about the upcoming Supreme Court decision on the constitutionality of the individual mandate).

[65] Bill Mears, *Chief Justice Chides State of the Union as 'Political Pep Rally'*, CNN (Mar. 11, 2010, 7:33 AM), http://www.cnn.com/2010/POLITICS/03/10/obama.supremecourt/index.html.

mandate was a constitutional exercise of Congress' taxing power.[66] Striking down the ACA would have led—at least superficially—to an asymmetric result that tilted the Supreme Court's "outcomes, doctrines, and rationales" in favor of the Republicans.[67] Given the stakes of the case and the President's open admonishment of the Court's motivations, the opposite result could have made the Court out to be a loaded weapon in the arsenal of conservatives.

3. *Rights and Wrongs: Making Sense of Substantive Due Process and Universality*

Another aim of an institutionalist judge might be to secure a result that respects particular moral or ethical values as a means of preserving the Court's legitimacy. In other words, an institutionalist might strive to enumerate *unenumerated* principles that seem important in a democratic system of government and to steer outcomes to match them. For example, *Griswold v. Connecticut*[68] announced a general right to privacy that emanates from the Bill of Rights, thus tracking evolving values of sexual freedom in the 1960s and standing for the belief that the government should not meddle in the bedroom of an opposite-sex married couple.[69] Judges wield imposing power over the lives of others. In court, personal health, financial security, and freedom from incarceration may be on the line. Justice Benjamin Cardozo recognized room for appealing to moral truths in writing that "[t]he final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."[70] Given the gravity of a court's decisions, then, judges may tap into their moral intuitions, without straying too far from the boundaries of the law, to achieve outcomes that are deemed more conscionable. But the search for moral truth and the search for legal truth are different beasts, and there exists a degree of aversion to the idea that judges should insert their own moral judgments into the law—even to avoid morally unconscionable results.[71]

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[66] BISKUPIC, *supra* note 59, at 238; *cf.* Jack M. Balkin, *Tax Power: The Little Argument That Could*, CNN, https://www.cnn.com/2012/06/28/opinion/balkin-health-care/index.html (June 30, 2012, 10:21 AM) (explaining that the crux of the government's argument was that the individual mandate was valid under the Commerce Clause, but noting that "[Solicitor General Donald B.] Verrilli had quietly beefed up the tax power arguments in his final brief before the Supreme Court"); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 669 (2012) (Scalia, J. et al., dissenting) (pointing out that the government had failed to develop the taxing power argument in great enough depth and that the Court needed "more than a fly-by-night briefing and argument before deciding a difficult constitutional question of first impression").

[67] Price, *supra* note 46, at 1280.

[68] 381 U.S. 479 (1965).

[69] *Id.* at 484–85. *See* Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 103–04 (2018) (explaining the Supreme Court's announcement of a right to privacy as a byproduct of changing sexual mores of the 1960s).

[70] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921).

[71] *See* LeDuc *supra* note 23, at 134–35, 135 n.13 (explaining a theory of constitutional law that is predicated on fundamental truths held by our society and listing sources that warn against this approach);

A central debate in this area focuses on the power of judges to right moral wrongs in society and judges' deployment of this power. In constitutional law, substantive due process—in which litigants can demonstrate that an activity unenumerated in the Constitution implicates a fundamental right—is ripe for institutionalists to incorporate moral truths that seem important to American democracy.[72] Because of the subjectiveness of substantive due process, though, the workability of moral considerations in legal analysis has prompted debates over whether fundamental rights "trump" other important interests or if fundamental rights should be balanced against "mere" interests.[73] Professor Jamal Greene finds that a consistent problem in deciding that a fundamental right trumps other interests is that it presents a binary rhetorical question about which party has a right that is worthy of vindication, which puts undue pressure on the question of whether a right is actually at stake.[74] When courts probe how far a right should extend, Greene submits, it creates a "world of enemies" in which "[t]he government's claim is necessarily that the rights-bearer is wholly beneath constitutional concern, and the rights-bearer's claim is that the government is a bad actor and not just a clumsy one."[75] This type of war over rights and moral truths risks cheapening

cf. Romer v. Evans, 517 U.S. 620, 620, 634–35 (1996) (concluding that a Colorado constitutional amendment denying "special rights" to gays and lesbians was motivated by "animosity toward the class of persons affected"); *id.* at 644 (Scalia, J., dissenting) (explaining that the Colorado amendment was not motivated by "animus," but by "moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional").

[72] The fundamental rights analysis is flexible by nature, and the Supreme Court has used a balancing approach to determine whether to create one for an activity. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (balancing a child's right to public education against its "costs to the Nation"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992) (balancing a woman's right to terminate a pregnancy against "the interest of the State in the protection of potential life"); Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (balancing an unmarried biological parent's right to establish paternity rights to his child against the rights of a marital parent to protect his family).

[73] *Compare* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 10 (Bloomsbury Acad. ed. 2013) (1977) (arguing that rights are trump cards and that to subject fundamental rights to a balancing test is to deny them altogether), *with* Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1379–82 (1990) (advocating for a pragmatic approach to constitutional interpretation that weighs the various legal and moral consequences of a decision).

[74] Greene, *supra* note 69, at 65–67. Greene illustrates the rhetorical problem of the rights-as-trumps approach by highlighting how opposing litigants came to the Supreme Court armed with absolutist conclusions about the extent of their rights in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). Greene, *supra* note 69, at 31–32. Greene observes that "one consequence of rarely subjecting rights to balancing is that the rights themselves must be articulated with care and specificity. The line demarcating those who hold rights and those who do not becomes a momentous one . . . ." *Id.* at 32. Greene does not necessarily dispute Dworkin's framing of the nature of rights but rather how courts apply it. *Id.*; *see also id.* at 32–33 ("Less momentous cases sit uneasily within a rights-as-trumps frame. The frame induces our identification of rights to track the categories judges are able to access, articulate, and delimit rather than the moral, political, or even constitutional justice the rights mean to promote. And so Americans have a right to market pharmaceuticals to doctors or to parlay the corporate form into electioneering expenditures, both of which the Court categorizes as 'speech,' but no federal constitutional right to food, shelter, or education, which are harder to corral.") (citations omitted).

[75] *Id.* at 65.

the protection of rights to the point that they can be denied in cases where they are needed most.[76] Yet, Greene also expresses concern that proportionality—which he argues is a more favorable alternative to rights as trumps—can fail to distinguish *rights* from mere interests.[77] The crux of Greene's appeal—for courts to take rights "reasonably" instead of taking one side of absolutist partisan battles—seems to require a kind of institutionalist mindset that reimagines how courts approach fundamental rights. Changing how rights are created and examined demands some flexibility and prudence, as discussed in this subpart, and it seems clear that doing so involves moral judgment.

Understanding our wars over rights relates to collective intuitions about the unassailable correctness of the Supreme Court's decision in *Brown v. Board of Education of Topeka*.[78] The universal assessment that *Brown* is undeniably correct interacts with the emerging agreement that segregating schoolchildren by race was unconscionable and that the Court did right by the country when it finally ended a longstanding injustice. But, really, this intuition reflects more about the moral truth of the wrongness of segregation in a democratic polity than it does about sound constitutional analysis.[79] First, the *Plessy v. Ferguson*[80] precedent restrained the Warren Court's authority to end legal segregation. "Separate but equal" represented the 8-1 judgment of the 1896 Court, and several states relied on *Plessy* for their existing legal structures. In striking down school segregation laws, the Warren Court decided to override stare decisis, and it unanimously held that *Plessy* was wrongfully decided.[81] Second, in 1954, it could not be seriously contended that the "history and traditions" of the United States did not include racial discrimination and white supremacy.[82] It would have required

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[76] *Id.* at 37.

[77] *See id.* at 87–89 (explaining the common criticism of proportionality, which is that judges, whose backgrounds are in legal analysis, are not ideal candidates for distinguishing rights from interests). Greene advocates instead for a more mechanical approach to adjudication that reserves the balancing of interests for the final stage of analysis. *Id.*

[78] 347 U.S. 483, 495 (1954) (holding that segregation of children in public schools on the basis of race deprives children of the minority group equal protection of the law under the Fourteenth Amendment). *See, e.g.*, LeDuc, *supra* note 23, at 185 (explaining that, in constitutional law, there is virtual unanimity in the community that *Brown* is a better interpretation of the Fourteenth Amendment than *Plessy*); Posner, *supra* note 73, at 1374 ("No constitutional theory that implies that *Brown v. Board of Education* . . . was decided incorrectly will receive a fair hearing nowadays . . . .").

[79] *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381–82 (2011) (explaining that *Brown* "was in tension with the original expected application of the Fourteenth Amendment, was not compelled by the text of the Equal Protection Clause, and has required a Herculean effort—one well beyond the Court's competence—to implement comprehensively") (citations omitted).

[80] 163 U.S. 537 (1896).

[81] *Brown*, 347 U.S. at 494–95.

[82] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857) (concluding that Black descendants of slaves were never intended to be included as "citizens" under the Constitution). The *Dred Scott* Court found that enslaved people "were at that time considered as a subordinate and inferior class of beings,

a strained interpretation of the history of racism for the Court to contend that Jim Crow laws violated some fundamental right of people of color in the United States to experience equal treatment or for their children to learn alongside white children. Rather, the *Brown* Court determined that (1) outlawing segregated education is consistent with the intent of the framers of the Fourteenth Amendment, even if they did not specifically intend for it;[83] (2) education held a special status in society, and segregation generated a stigmatic "feeling of inferiority" among Black students;[84] and (3) social science suggested that legal segregation hurt "the educational and mental development" of Black students.[85] The result was the beginning of the end for de jure segregation, and it represented an important moral step in addressing systematic racism and the legacy of racial slavery in American history.[86]

An unanswered question after *Brown* was how to reconcile the sweeping impact of ending legal segregation with the traditional role of the courts. Prioritizing moral vindication over answering thorny legal questions left it up to the political branches of government to decide. Yet, *Brown* endures as a landmark case that advanced the civil rights of Black Americans. In a few pages of a written opinion, the Supreme Court openly appealed to a moral truth—that subjecting children to legal segregation is *wrong*. By refining a universal democratic principle and unilaterally righting one of the most fundamental wrongs in American history, *Brown* and the subsequent dismantling of Jim Crow laws bolstered the institutional reputation of the Court.

C. *Bad Judgment: The Anti-Canon & the Price of Consequentialism*

Judges earn an "institutionalist" badge by appealing to lofty policy

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who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority." *Id.* As evidence for this claim, the Court pointed to "the public history of every European nation" and that the inferiority of the Black race was "at that time fixed and universal in the civilized portion of the white race." *Id.* at 407. *See generally* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 15, 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ (explaining how the legacy of racial slavery and anti-Black racism in the United States leaves an enduring mark on communities of color).

[83] *Brown*, 347 U.S. at 489–90.

[84] *Id.* at 494.

[85] *Id.*

[86] Reflecting on the importance of *Brown*, Dr. Martin Luther King, Jr. said:

> To all men of goodwill, this decision came as a joyous daybreak to end the long night of human captivity. It came as a great beacon light of hope to millions of colored people throughout the world who had had a dim vision of the promised land of freedom and justice. It was a reaffirmation of the good old American doctrine of freedom and equality for all men. And this decision came as a legal and sociological deathblow to an evil that had occupied the throne of American life for several decades.

Dr. Martin Luther King, Jr., Desegregation and the Future, Address Delivered at the Annual Luncheon of the National Committee for Rural Schools (Dec. 15, 1956).

goals. But, after discussing the merits of extralegal considerations, this Note must address the elephant in the courtroom: that extralegal considerations come with clear risks, mainly the risk that a judge, despite (or perhaps *because* of) his lifetime of legal experience, will occasionally make a bad judgment. Supreme Court history shows that mere mistakes in legal analysis,[87] lack of foresight about consequences,[88] or bare unscrupulous intentions[89] can impair the decision-making of a judge as much as any other human. A judicial system that cannot or will not constrain judges from wielding the sword of institutionalism to steer outcomes of important cases must occasionally confront the aftershocks of bad judgments.

One case that illustrates the pitfalls of extralegal considerations and, arguably, the risks inherent in deciding cases with an eye towards preserving institutional legitimacy is *Korematsu v. United States*.[90] This is clearly an ignominious example; *Korematsu* is an undisputed addition to what scholars have called the "anti-canon" of constitutional cases, meaning "the set of legal materials so wrongly decided that their errors . . . we would not willingly let die" in spite of no longer being good law.[91]

Korematsu's most condemnable feature is the Court's approval of

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[87] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986) (holding that the Court would not "announce . . . a fundamental right to engage in homosexual sodomy" because it is "obvious" that "consensual sodomy" among LGBTQ people is neither "implicit in the concept of ordered liberty" nor "deeply rooted in this Nation's history and tradition") (citations omitted). Justice Harry Blackmun chided the majority for its "obsessive focus on homosexual activity" in his dissent. *Id.* at 200 (Blackmun, J., dissenting). *Bowers* was overruled only seventeen years later as "not correct when it was decided, and it is not correct today." Lawrence v. Texas, 539 U.S. 558, 578 (2003); *see also* Greene, *supra* note 79, at 432–33 ("The analytic problems of the *Bowers* majority opinion appear almost willful.").

[88] *See, e.g.*, Justin Sink, *O'Connor Worries Supreme Court Was Wrong to Rule in* Bush v. Gore, HILL (Apr. 29, 2013, 3:09 PM), https://thehill.com/blogs/blog-briefing-room/news/296681-oconnor-supreme-court-may-have-erred-in-considering-bush-v-gore (reporting on comments made by Justice O'Connor in an interview in which she expressed regret about taking the case because it was a major election issue, evidence suggested that Florida election authorities made serious mistakes, and the decision "gave the court a less-than-perfect reputation").

[89] *See, e.g.*, Ian Millhiser, INJUSTICES: THE SUPREME COURT'S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICTING THE AFFLICTED 77–79 (2015) (recounting the egotism, bigotry, anti-Semitism, and misogyny displayed by Justice James Clark McReynolds, including incidents in which he referred to President Franklin Roosevelt as "that crippled son-of-a-bitch . . . in the White House," refused to speak to Justice Louis Brandeis for three years because Brandeis was Jewish, exclaimed, "I see the female is here" and left the courtroom on the rare occasion a woman argued a case before the Supreme Court, and "turned his back on the courtroom" when a Black advocate argued a case in front of the Court). Millhiser wrote, "McReynolds was lazy. He often would not even open the briefs lawyers filed to prepare him to hear a case until hours before the case was argued, and he frequently spent just a few hours crafting opinions that would govern all other courts in the country." *Id.* Though Justice McReynolds' legal conclusions do not necessarily reveal his bigotry, laziness and personal animus have to cast doubt on the wisdom of his judgements, and it seems important for a judicial system to constrain judges like him.

[90] 323 U.S. 214 (1944).

[91] Greene, *supra* note 79, at 386. *Korematsu* was condemned as "gravely wrong" and "overruled in the court of history" in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

sweeping racial profiling against Japanese Americans to validate a misguided internment policy that was based on faulty logic and naked racism.[92] Further, as Justice Jackson contended in his dissenting opinion, the evacuation and internment order was a flagrant violation of due process, and "a judicial construction that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself . . . ."[93] But, for the *Korematsu* majority, the "military urgency of the situation" on the West Coast in the early years of the Pacific War provided a compelling governmental interest for the race-based exclusionary order.[94] The Court refused to query the findings brought forward by the military, however suspect or unfounded,[95] that at least some Japanese Americans pledged allegiance to the Japanese Emperor and that this imperiled U.S. national security interests.[96] In spite of the clear constitutional violations at stake, the Court was too bashful to deride a judgment of the military and the popular President Roosevelt during the waning days of World War II. It is possible to recognize the wrongness of the decision while having sympathy for the uncomfortable position in which the Court found (or placed) itself. As Justices on the *Korematsu* Court expressed in later years, it felt awkward for an unelected group of legal experts to debate military necessity with the lionized forces who had achieved an Allied victory in World War II.[97] This extraordinary deference to the executive branch and the military reveals an overarching concern regarding the ramifications of a decision that came out the opposite way. In 1944, the Court made a judgment that it, *as an institution*, must not appear uncommitted to an American victory in World War II. Thus, for reasons that were decidedly extralegal, the Court charted a path that clashed the least with a military prerogative. Regrettably, that path

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[92] Greene, *supra* note 79, at 423. For a fuller understanding of *Korematsu* among the injustices committed by the American government against Japanese Americans during World War II, see, e.g., ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II xiii-xv (2001).

[93] *Korematsu*, 323 U.S. at 245–46 (Jackson, J., dissenting); *see also id.* at 246 (explaining that the military's reasons for an unconstitutional order, no matter how compelling, should never receive validation from the Court, lest the precedent "lie[] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need").

[94] *Id.* at 223 (majority opinion).

[95] In 1984, a federal district court overturned Korematsu's conviction on the ground that the government had "knowingly withheld information from the courts when they were considering the critical question of military necessity." *Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984). Four years later, Congress passed legislation acknowledging "the fundamental injustice" of the forced evacuation and allowed reparations for individuals forced out of their homes. An Act to Implement Recommendations of the Commission on Wartime Relocation and Internment of Civilians, Pub. L. No. 100-383, 102 Stat. 903 (1988).

[96] *Korematsu*, 323 U.S. at 219.

[97] *See* Greene, *supra* note 79, at 458 (excerpting a passage from Justice William O. Douglas' book in which he expresses regret for joining the *Korematsu* majority, but suggests that the terrifying stakes that the government presented to the Court could have imperiled the legitimacy of the Court).

meant that the Court used its institutional clout to approve a racist governmental action.[98]

Further, other cases that have been permanently placed in the anti-canon have made improper appeals to extralegal considerations when members believed that they needed to bolster the Court's institutional reputation. Greene reviews the primary criticisms targeted at *Dred Scott v. Sandford* (its unwarranted substantive due process and its being overly positivist and originalist); *Plessy v. Ferguson* (its allowance of racial categorizations and its being "overly formalistic about race, missing the social meaning of Jim Crow");[99] and *Lochner v. New York*[100] (its reliance on a substantive due process doctrine that prefers liberty of contract and laissez-faire capitalism).[101] Each indulged in an ill-advised judgment about the best interests of the Court. As with *Korematsu*, the court of history has pinned them each on a wall of shame. Subsequent scholarship consistently cites them as partially responsible for the disastrous consequences that followed these decisions.[102] Institutionalism, examined in this way, loses its allure when these infamous cases are included as a part of a discussion on the merits. But, highlighting missteps is critical because of what they reveal about the risks and rewards of institutionalism. Judges who step outside the boundaries of law to insert extralegal considerations are capable of protecting the natural rights and fundamental dignity of litigants. When viewed as a holistic body of decisions, positive outcomes have outweighed negative consequences such that the judiciary still holds institutional legitimacy in American democracy that is sufficient to check the political branches.

II. BOUND TO CONSTITUTIONAL GOALS

Part I conceptualizes the landscape of the institutionalist approach. It outlines how judges choose à la carte from extralegal considerations, making the approach more of a constitutional ethos than a theory of interpretation. Specifically, this Note has examined how a judge can decide on a case-by-case basis *when* to deploy extralegal considerations in order to reach results that insulate the Court from public criticism, to give partisan camps a comparable number of court victories, or to stand for precedents that are morally conscionable. Altogether, this shows the faith and trust that our system places in the judiciary to make prudent use of that power for the goal of stabilizing, rather than degrading, democracy. But, given the potential fallibility of these judgments—especially the bad judgments considered in Part I.C.—it seems crucial for the institutionalist approach to yield to some actual constitutional authority. In other words, we need to articulate

[98] *Id.* at 425.
[99] *Id.* at 460.
[100] 198 U.S. 45 (1905).
[101] Greene, *supra* note 79, at 460.
[102] *Id.* at 462.

what tethers institutionalists to binding rule of law. Perhaps even more importantly, we need to identify what authority constrains rogue judges who operate under the guise of institutionalism in the event that the degradation of democracy comes from inside the courtroom. To do that, first, this Part discusses theories that ground institutionalism in the Constitution. Next, it advances popular alternative theories to formalism in the hopes that they can help support a constitutional foundation for extralegal considerations. Finally, this Part explains why the special role of the judiciary, as suggested by its Hamiltonian moniker of "the least dangerous" branch,[103] makes it the best branch to wield the double-edged sword on quests that protect institutional legitimacy. The goal is to revamp institutionalist theory, so that it appears more like traditional, or formalist, modes of constitutional interpretation. This aims to bolster the integrity of institutionalist opinions, so, hopefully, a Justice would not feel compelled to "hide [his] head in a bag" out of shame if he signed onto one.[104]

A. *Applying for a Constitutional License*

As this Note provided in Part I.A., theories of interpretation exist to determine the basic truth of an answer to a constitutional question. Building a foundation for constitutional truth establishes the source of the authority for the decision. For example, originalism is an appealing method of constitutional interpretation for some scholars because it "accords binding authority to the text of the Constitution or the intentions of its adopters."[105] While generations of scholars and judges have developed competing ideas about how to determine what exactly the framers meant when they drafted the Constitution, the communicative content of the Constitution is "fixed."[106] Regardless of one's approach, originalists judges are, in theory,

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[103] *See* THE FEDERALIST NO. 78, *supra* note 6 (explaining a popular, yet debated, view that the American judiciary poses a comparatively minor threat to the constitutional rights of citizens because it retains little actual power and depends on the political branches to uphold its judgments).

[104] Institutionalism, specifically its appeal to extralegal considerations discussed in this Note, has been subject to contempt and ire, especially from formalist originalists. For example, in *Obergefell v. Hodges*, 576 U.S. 644 (2015), Justice Scalia added a footnote to his scathing dissent for the express purpose of mocking Justice Kennedy's majority opinion's perhaps metaphysical opening line: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Id.* at 719 n.22 (Scalia, J., dissenting) (referencing *id.* at 651–52 (majority opinion)). Justice Scalia sneers that if, for whatever reason, he somehow felt obliged to sign onto an opinion that began with such a line, then "I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie." *Id.* at 719 n.22 (Scalia, J., dissenting). This acerbic rebuke exemplifies the importance of developing a working theory of constitutional authority for institutionalism.

[105] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

[106] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 21, 27 (2015) (explaining one theory of originalist analysis purporting that

constrained by the original public meaning of the Constitution.[107] Institutionalists, though, may seek flexibility to move away from the fixed, original communicative content of the framers or to formulate implied rights. They may even seek to oscillate between multiple theories of interpretation—thus diminishing the predictability of adjudication.[108] To determine the correctness of an answer that is animated by an institutionalist approach, this subpart searches the limits of constitutional authority for grounds on which to stake institutionalism.

First, with respect to constitutional authority, generally, the logical place to start an investigation is the text of the Constitution. Where the text itself is ambiguous, judges and constitutional scholars have debated the respective merits of two competing visions of statutory interpretation: purposivism (that is, understanding and enforcing the intent of Congress as accurately as possible) versus textualism (that is, applying the plain meaning of the language in the text as it would be understood by the average person today).[109] Both purposivists and textualists claim to respect authority, whether it is the expressed or implied intentions of the body that promulgated a law or the plain meaning of the language that appears in the promulgated law.[110] But, it should be clear why institutionalist prerogatives do not fit neatly within the boundaries of either of these theories. If anything, the institutionalist judge selects from both purposivism and textualism à la carte, depending on whether text or intent brings him to his preferred

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the communicative content of a text is "fixed at the time of framing and ratification, but the facts to which the text can be applied change over time," and explaining how we can discern meaning by embracing the "original public meaning" of statutory language at the time of ratification) (emphasis omitted).

[107] *Id.* at 7.

[108] *See generally* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 336 (2005) (explaining the legality doctrine and how it relates to the idea of rule of law by providing both "fair notice" and "fair adjudication").

[109] *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006) ("Textualists give precedence to *semantic context*—evidence that goes to the way a reasonable person would use language under the circumstances. Purposivists give priority to *policy context*—evidence that suggests the way a reasonable person would address the mischief being remedied.").

[110] *See, e.g.*, *id.* at 73–74 (explaining the basis for such a view); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85–88 (2005) (explaining why a purposive approach to constitutional interpretation is more consistent with the theory of democracy in the Constitution and advocating for a "reasonable member of Congress" standard in discerning intent); HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 45 (1968) (arguing that he takes an absolutist approach to laws restricting speech—"without deviation, without exception, without any ifs, buts, or whereases"—because of the "clear wording of the First Amendment . . . . 'Congress shall make no law' *means Congress shall make no law*") (emphasis added); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 15–16 (2012) (explaining that a textualist approach to statutory interpretation is ideal because, "in its purest form, [it] begins and ends with what the text says and fairly implies"); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) ("The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text.").

conclusion most efficiently.[111]

This paradigm matters because crossing the lines delineated by this debate can cause judges to occupy an ignominious space: the land of hopelessly biased rogue judges decried by critics as judicial activists. The judicial activist serves as a foot soldier in ordinary partisan warfare and wields the law as a blunt object to further one side of a political skirmish.[112] Labelling a judge as a "judicial activist" is to condemn him for overstepping his constitutional duties and for engaging in "results-oriented judging" that fits his preferred ideology, furthers a political party's policy goals, or fulfills some other self-serving extralegal purpose.[113] Some scholars have defended "activist" judges and challenged the presumption that judicial activism is inherently wrong.[114] But, the point of this subpart is not to acquit institutionalists, who look to extralegal considerations in furtherance of perceived threats to democracy, of the possible crime of judicial activism. Rather, the point is to suggest theories of legal restraints for institutionalist judges whose consequentialism motivates their analyses. Thus, institutionalists operate not as rogue judges, but rather as disciples of an ordered constitutional code of conduct when they interpret constitutional ambiguities.

1. *The Representation-Reinforcement Theory*

The first theory of constitutional authority for institutionalism stems from John Hart Ely's renowned conception of judicial review, which outlines the role of the courts in achieving the Constitution's clear goal of representative democracy.[115] Ely's theory addresses the tension that exists between the core American governmental principle of majority rule from the

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[111] *Compare supra* notes 54–56 and accompanying text (explaining how Chief Justice Roberts evaded the intent of the legislature that wrote the individual mandate into the ACA by interrogating the plain meaning of the language used in the provision, which, he decided, meant that the individual mandate had the legal effect of a tax), *with supra* note 82 and accompanying text (describing the *Brown* Court as institutionalist and explaining how the unanimous majority found that the Fourteenth Amendment prohibited segregated schools, even if it was not the specific intent of the framers of the amendment).

[112] *See* Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1752–53 (2007) (describing the "negative connotation" associated with judicial activism and discussing how both conservatives and liberals use the term to attack judges who make decisions with which they disagree).

[113] *Id.* at 1766.

[114] *See id.* at 1753 (referencing scholarly contentions that judicial activism enables courts "to live up to [their] obligation to serve as citadel[s] of the public justice").

[115] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77–78 (1980) (establishing that the American system purports to create a "representative government," which protects minorities from the tyranny of the majority and forms the basis of his thesis); Greene, *supra* note 69, at 37–38 (explaining the representation reinforcement theory "as Professor John Hart Ely famously envisioned it" in the context of a political process that cannot be trusted with protecting the rights of minorities); Adam Liptak, *John Hart Ely, a Constitutional Scholar, Is Dead at 64*, N.Y. TIMES (Oct. 27, 2003), https://www.nytimes.com/2003/10/27/us/john-hart-ely-a-constitutional-scholar-is-dead-at-64.html (describing Ely as one of the most cited legal scholars of all-time).

consent of the governed and the problem that "a majority with untrammeled power to set governmental policy is in a position to deal itself benefits at the expense of the remaining minority."[116] Because of this tension, Ely reasons that the Constitution must ipso facto include methods for protecting the rights of political minorities that are "not a flagrant contradiction of the principle of majority rule."[117] According to Ely, the solution lies within the Constitution's consistent guarantees of "procedural fairness" and "broad participation in the processes . . . of government."[118] Applying those principles to judicial review, the Constitution prescribes that judges take:

> [A] representation-reinforcing approach . . . [which] is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy. [And] such an approach . . . involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials.[119]

Critically for institutionalist purposes, Ely avers that the Constitution also supplies a *limiting principle* to the Court's ability to interpret ambiguous provisions in contravention of majority rule. A representation-reinforcing approach to the judiciary restricts courts from recognizing or creating fundamental rights that do not involve issues of representation.[120] Harnessing Justice Harlan Stone's thematic summation of judicial review in his renowned footnote to *United States v. Carolene Products Co.*,[121] Ely explains that it is enabling universal participation in the *political process*—not making value judgments about whether substantive rights are "fundamental"—that licenses judicial authority.[122] Thus, the representation-reinforcement theory constrains judges by requiring them to exercise judicial review when laws implicate the

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[116] ELY, *supra* note 115, at 7.

[117] *Id.* at 8.

[118] *Id.* at 87.

[119] *Id.* at 88.

[120] *Id.*

[121] 304 U.S. 144 (1938).

[122] ELY, *supra* note 115, at 77; *see Carolene Prods. Co.*, 304 U.S. at 152–53 n.4 (suggesting that the ordinary presumption of a law's constitutionality may not apply if a law (1) appears to violate a specific provision of the Constitution; (2) "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"; or (3) involves "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"). *Contra* Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 140, 142 (1981) ("[The] representation-reinforcing enterprise is shot full of value choices, starting with the decision of just *how* representative our various systems of government ought to be and who ought to be included in the political community, and ending with (covert) choices about who is justifiably the object of prejudice and whether legislative goals are sufficiently important to warrant the burdens they impose on some members of society. . . . For in his heroic attempt to establish a value-free mode of constitutional adjudication, John Hart Ely has come as close as anyone could to proving that it can't be done.").

rights of minorities vis-á-vis the political process. Simultaneously, it prevents them from making personal value judgments about the existence of other fundamental rights.

Representation-reinforcement instructs judges to resolve the tension between majority rule and minority rights. The theory affirms the artfulness inherent to interpreting a Constitution that alternates between speaking in "majestic generalities" and "elegant specificity."[123] Yet representation-reinforcement is *not* a general license for judges to embark on a journey of unfettered consequentialism while using judicial review as a bulldozer to arrive at their policy preferences. Rather, it gives institutionalist judges a license with substantial restrictions. The Constitution directs the judiciary to interpret ambiguities in favor of increasing participation in the political process and to create rights protecting minorities from the majority.[124] Because the Court is encumbered with this responsibility, rather than the political branches, it links the institutional health of the Court with the political health of discrete and insular minorities. Viewed this way, the Court is a guardrail against the tyranny of the majority. Therefore, the Constitution empowers judges to craft opinions with the express purpose of avoiding bad outcomes, such as a decision that upholds the constitutionality of segregated schools, which a more formalist methodology might allow.

But, given Ely's restriction on the ability of judges to create new fundamental rights, representation-reinforcement theory still does not quite answer how institutionalist judges have the authority to update rights that are *not* clearly related to the goals of representative government. As Paul Brest retorted to Ely, a representative theory of judicial review still must involve *some* value judgments about political participation.[125] The problem with constitutionally licensing institutionalist judging, then, rests with this hopeless lack of neutrality. Value judgments can be arbitrary, and skeptics insist that such arbitrariness cancels out any purported limiting principle.[126] Put succinctly, the response to Brest's critique is that the judiciary can (and should) be entrusted with good-faith adherence to constitutional constraints on its role as a democratic institution that protects minority rights—an idea that will be developed in depth later in this Part.[127] For now, though, a working

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[123] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 846 (2015) (Roberts, C.J., dissenting) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)) (acknowledging that ambiguities limit the helpfulness of the text in interpreting certain provisions of the Constitution, such as the First and Fourth Amendment).

[124] *See* ELY, *supra* note 115, at 102 (explaining why the need for perspective means "a representation-reinforcing approach assigns judges a role they are conspicuously well situated to fill").

[125] Brest, *supra* note 122, at 140, 142.

[126] Donald W. Fisher, *The Problem of the Value-Judgment*, 12 PHIL. REV. 623, 623–24 (1913).

[127] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25–26 (2d. ed. 1986) ("[C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.").

theory of institutionalism demands another foothold in constitutional authority. It must explain why American democracy allows courts to take liberties with the inherent flexibility of a representation-reinforcement approach to political rights.

2. *The Rules of Stare Decisis*

The second theory of authority for institutionalism is embedded in the process by which judges interpret, frame, and develop the law in accordance with their constitutional duties. Under that view, legal scholars comprehend American constitutional law as a "mixed system," comprising *both* text and precedent, much like common law.[128] Connecting constitutional law to common law principles illuminates the work that judges do when they interpret ambiguous constitutional text, and, given the evolutionary process of common law adjudication, it positions the institutionalist judge as a major component in that system.[129] Elaborating on this point, Professor David Strauss contends that judges interpret provisions of the Constitution in a manner that is similar to how precedents in a common law system are "expanded, limited, qualified, reconceived, relegated to the background, or all-but ignored."[130] Essentially, there is a judgment about the most favorable, workable version of constitutional text as applied at law, based on the facts of particular cases, and then subsequent judges confront the precedent resulting from those particular cases—as opposed to engaging with the actual text of the Constitution or the discerned intent of the framers.[131] Of course, judges may not contravene the explicit rules set forth in the Constitution, but, as Strauss argues, the task of constitutional interpretation is an "evolutionary process[]."[132] Considering the Constitution as a text whose meaning evolves over time presupposes a foundation for freeing judges from the specific restraints created by the purposivist/textualist

[128] David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 13 (2015). *See generally* K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 1–3 (1934) (developing this theory of a common law approach to constitutional law upon which Strauss and other subsequent scholars have expanded).

[129] Strauss, *supra* note 128, at 28 (citing examples of precedents that judges use to interpret ambiguous constitutional provisions and describing the mixed system as one that takes text and "common law-like evolutionary processes and combin[es] them in a way that lacks clear priority rules"). *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 392 (1970) ("It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles . . . .").

[130] Strauss, *supra* note 128, at 4–5.

[131] *Id.* Strauss further elaborates on the common law aspect of constitutional precedent that, "[o]nce a large body of precedent-based law has developed, the text will recede from view." *Id.* at 5. As an example, he points out that a landmark precedent like *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), may be invoked by judges for "rhetorical effect" to embody principles of judicial review, but "the reasoning and precise holding of *Marbury* do not determine the scope of judicial review today." Strauss, *supra* note 128, at 5. The text of the Constitution operates on a similar level. *Id.*

[132] Strauss, *supra* note 128, at 28.

debate. If authority is not limited to rote application of the text or the intent of the legislating body, then the institutional constraints that bind judges to that prior precedent—stare decisis—emerges instead.

Stare decisis, and the deference given to it by common-law judges, bestows a limiting principle onto the power of individual judges. Principles of stare decisis require judges to remain in their constitutional lanes by seeking their respect for past precedent. Justice Elena Kagan defended her loyal respect for past precedent in her dissenting opinion in *Knick v. Township of Scott*,[133] which overturned precedent on the issue of eminent domain in the context of state law:

> "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Stare decisis*, of course, is "not an inexorable command." But it is not enough that five Justices believe a precedent wrong. Reversing course demands a "special justification—over and above the belief that the precedent was wrongly decided."[134]

Judges routinely disagree about what kind of a "special justification" actually licenses a court to scrap an existing precedent.[135] But, stare decisis remains a foundational truth of the American judiciary. By examining stare decisis, we see the numerous ways in which the Constitution entrusts limited power to the judiciary.

The special authority that the American "mixed" system imparts on judges to develop, modify, and change legal precedents has its ultimate origins in the separation of powers that divides judicial and political authority.[136] Professor Kiel Brennan-Marquez explains that stare decisis represents the principle that "distinguishes the form of power wielded by judges from that wielded by other officials."[137] Unlike a lawmaker, who has

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[133] 139 S. Ct. 2162 (2019).

[134] *Id.* at 2189 (Kagan, J., dissenting) (citations omitted).

[135] *See* Kiel Brennan-Marquez, *Aggregate Stare Decisis*, 97 IND. L.J. 571, 572–78 (2022) (comparing two theories about what justifies overruling past precedent). The first theory, articulated by Justice Kagan, is that a "special justification" is required. *Id.* at 573, 573 n.5 (quoting *Knick*, 139 S. Ct. at 2189 (Kagan, J., dissenting)). The second theory, espoused by Justice Kavanaugh, is that only "grievously or egregiously wrong" precedent—not a "garden-variety error or disagreement"—can be overturned. *Id.* at 575, 575 n.9 (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020)).

[136] *Id.* at 582–83; *see also id.* at 578–79 nn.25–26 (summarizing scholars and judges who have theorized that stare decisis flows from Article III's "cases and controversies" requirement and from the features that distinguish courts from legislatures or enforcement institutions).

[137] *Id.* at 581–82 (discussing stare decisis as a unique feature of courts that is "imaginable . . . across time, working alongside the political process—but also distinct from it—to reflect and produce our self-conception as a polity."). Brennan-Marquez notes that "judges must take precedent seriously—not because it will necessarily lead to favorable results, but because precedent reflects the reasoned judgment of predecessors and, on that basis alone, warrants solicitude." *Id.* at 583.

absolutely no duty to abide by past decisions of the legislative body—as the lawmaker is a part of the political process that is geared toward change—a judge stands as one mere mortal in a line of jurists "who grappled with the same questions and left their mark on the law."[138] That canonization of the decisions of fellow judges constructs the boundaries on judicial power.[139] The result is that stare decisis checks the institutional benefits of the judiciary, such as life tenure for judges and lack of political accountability for decisions.[140] Thus, the judiciary is both defined and organized according to its function in the American political system as an institutional body. It is this institutional body that we inherently trust to use its judgment to formulate the law based on precedent and *some other special reasons*, even the extralegal considerations outlined earlier in this Note. Using the same rationale that is behind the principles of stare decisis, we can apprehend the constitutional license that institutionalist judges use to base decisions on extralegal considerations. Because these extralegal considerations guard the integrity of the institutional body, institutionalism conforms to the specific authority granted by their constitutional roles.

However, a question remains that challenges this analysis: what exactly constrains judges who, even under this framework, retain substantial discretion to make and break precedents on which future judges will rely?[141] Consider a retort from a formalist like Justice Scalia: that proponents of a living, common-law constitution want to strip "the people" of the power to decide political issues and delegate it to judges.[142] Under that view, institutionalists are "not looking for legal flexibility[;] they are looking for rigidity" for these extralegal considerations, and stare decisis may not be sufficient to stop them.[143] Indeed, as scholars have noted, addressing that

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[138] *Id.* at 581–82.

[139] *Id.* at 581.

[140] *Id.*

[141] *See id.* (challenging the presumption that respect for precedent represents a limitation on judicial power, not "a mechanism for entrenchment" for judges who actually create precedent).

[142] Jonathan Ewing, *Scalia Has Harsh Words for Those Who Believe in 'Living Constitution'*, LAW.COM (Feb. 15, 2006), https://www.law.com/almID/900005547733/ (quoting Justice Scalia's declaration that "you would have to be an idiot" to believe that the Constitution "has to change with society, like a living organism, or it will become brittle and break" because "[t]he Constitution is not a living organism, it is a legal document").

[143] *Id.* Justice Scalia lists "the right to abortion" and "the right to homosexual activity" as examples of the kind of rigidity that living constitutionalists wish to impose on the American people. *Id.* Without engaging Justice Scalia on the merits of why these rights are fundamental, it suffices to point out that self-proclaimed originalists tend to abandon their formalism when rights that the Republican Party like are at stake. *See generally* Enrique Schaerer, *What the* Heller*?: An Originalist Critique of Justice Scalia's Second Amendment Jurisprudence*, 82 U. CIN. L. REV. 795, 799–801 (2014) (exploring the flaws in Justice Scalia's majority opinion for *District of Columbia v. Heller*, 554 U.S. 570 (2008), which argues that the Second Amendment confers an individual right to possess any weapon in "common use at some ever-changing 'present' time"). In general, when it comes to the Second Amendment, originalists tend to happen upon new elasticity in the text that allows them to expand gun ownership rights.

loophole may require more significant structural reforms to better check the judicial branch.[144] Setting aside Justice Scalia's dubious conviction that only originalists do not resolve cases in favor of a preferred political agenda, it does appear important to manage the discretion conferred upon courts. Regarding stare decisis, Brennan-Marquez proposes an "aggregate voting rule" which quantifies a precedent based on how many judges comprised the majority that instituted the rule in the first place, then qualifies its continuation on the number of judges in favor of overturning the rule.[145] This proposal aims to solve the problem of vesting judges with the discretion to willfully make and break precedent as they see fit. For now—that is, until the judiciary seriously considers or adopts a less theoretical approach—the real authoritative constraint on institutionalist judges may have to come from their function as one of three coequal branches in the American constitutional government.

B. *Why Not the Judiciary?*

Part III concludes by advancing a final argument about why the Constitution authorizes institutionalist judges to deploy extralegal considerations in furtherance of institutional goals. This theory draws from both representation-reinforcement and principles of stare decisis, which lead to the question: why *shouldn't* judges have institutional power? In fact, the Constitution and the principles of liberty contemplated by the framers when they created the judiciary provide satisfying insights.

The first explanation for trusting judges with this institutional power is found in the proposition that, while judges represent a counter-majoritarian element of American democracy, their constitutional authority derives from the people just as much as the other branches of government.[146] As Justice Breyer explained, "though the power is dispersed, the people themselves continue to control the policy-making activities of these different branches of government."[147] From this idea, the Constitution is driven by the quest to produce a government that is not only democratic or protective of individual liberty, but "practically workable" and functionally able to protect

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[144] *See generally* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 152 (2019) (explaining the need for Supreme Court reform and outlining theories that could achieve such reform).

[145] *See* Brennan-Marquez, *supra* note 135, at 576 (outlining a "non-merits" approach to modifying precedents). The aggregate voting rule allows precedent to be modified "only if the tally of votes across both courts—the court that fashioned the precedent at t_1 and the one scrutinizing it at t_2—totals a majority." *Id.*

[146] *See* BREYER, *supra* note 110, at 26–27 (explaining that the Framers of the Constitution conceived of the nonlegislative branches as recipients of power that the people submit in "allotment[s]" to a representative government).

[147] *Id.* at 27.

individuals from oppression by the ruling political faction of the majority.[148] To that end, James Madison explained that the framers created a government that "secure[s] the public good and private rights against the danger of [factionalism], and at the same time . . . preserve[s] the spirit and form of popular government."[149] The role of the Court, then, is to interpret the Constitution in the spirit of that framework and to ensure that the people can actively participate in their government.[150] Thus, it follows that the framers envisioned an ethos for judges that gears courts towards identifying the contours of the rights held by non-majorities.

At this point, we still find ourselves trapped in a theoretical sketch of how courts define rights. Here, the legal boundaries of institutionalism may rest on the framers' desire for an independent judiciary and the function of the judiciary in American constitutional law. The argument certainly involves constraining judges with structural safeguards, which define a system of checks and balances among federal branches that prevents tyrannical actions of any one branch.[151] But, it may be important to concede that additional structural reforms are necessary to most effectively prevent a free-wheeling institutionalist judge from making bad judgments. What remains is an admittedly fragile system that empowers judges to interpret the Constitution with an eye towards the conclusions that fulfill the judiciary's responsibility to preserve a democratic tradition. Legal customs, judicial precedent, and democratic norms make up the bulwark of constitutional authority for institutionalist judging. Still, the institutionalist ethos remains broad.

The position staked regarding the constitutionality of an institutionalist approach to judging remains murky and possibly in need of structural reform. Yet, the position offers a strong foundation for understanding why the framers—and generations since—have trusted judges to make responsible, temperate choices about using extralegal considerations to solve cases. Occasional bad outcomes are tolerable in light of the larger purpose that the judiciary fills in a functional democracy. Whether judges can and should be trusted, and how much we can afford to tolerate bad judgments, implicates the legitimacy of courts as an institution, as Part III explores.

III. INSTITUTIONAL BREAKDOWN: HOW ILLEGITIMATE COURTS WRECK DEMOCRACIES

The constitutional authority that grants judges a license to issue institutionalist opinions is reasonable in light of the role of the judiciary, although it remains speculative. But, as Part III argues, the effect that

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[148] *Id.* at 27–28.

[149] *Id.* at 28–29 (quoting THE FEDERALIST NO. 10 (James Madison)).

[150] *Id.* at 33.

[151] *Id.* at 31.

institutionalism has on the preservation of judicial legitimacy may be its most important function in a fragile democracy. Because courts function as critical safeguards against the rise of autocracy in a fragile democracy, legitimacy serves as a compelling reason for the Constitution to permit these kinds of judges. This Part shows that good faith attempts by judges to avoid outcomes that would further erode the legitimacy of courts could help stave off total breakdown of democratic institutions in the United States and across the globe in an age of institutional crisis. It advances reasons why the benefits of allowing institutionalist judges outweigh the risks.

A. *Democratic Institutions Face a Legitimacy Crisis*

1. *The Authoritarian Rule of Law*

Today, written constitutions alone may fail to save democracy. The urgent context for the conversation on judicial authority involves the persistent worldwide degradation of democracies, which coincides with the gradual rise of authoritarianism.[152] According to Freedom House, the catastrophic COVID-19 pandemic, prolonged economic crises, political crises, and violent conflicts pointed to the deepening of a "long democratic recession" in 2021.[153] Freedom House found that governments faced few consequences for repressive measures, leaving women and racial, ethnic, and religious minorities particularly vulnerable to human rights abuses.[154] Further, Freedom House cited "[t]he eclipse of US leadership" and "[t]he exposure of US democracy's vulnerabilities" as major factors in the rise of anti-democratic regimes.[155] Highlighting President Trump's refusal to admit defeat in the 2020 election based on false allegations of voter fraud, as well as President Trump's calls for disproportionate violence by police in response to racial justice protests throughout 2020, Freedom House concluded that, in order to prevent further democratic backsliding, the United States must "strengthen its institutional safeguards, restore its civic norms, and uphold the promise of its core principles for all segments of society."[156] Despite this backsliding, Freedom House cited the resolve of

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[152] *See* SARAH REPUCCI & AMY SLIPOWITZ, FREEDOM HOUSE, FREEDOM IN THE WORLD 2021: DEMOCRACY UNDER SIEGE 1 (2021), https://freedomhouse.org/sites/default/files/2021-02/FIW2021_World_02252021_FINAL-web-upload.pdf (writing that "democracy's defenders sustained heavy new losses in their struggle against authoritarian foes, shifting the international balance in favor of tyranny" to preface a finding that global freedom declined for the fifteenth consecutive year and that more countries experienced deteriorations than experienced improvements).

[153] *Id.* Freedom House is a non-governmental organization that "produces research and reports on a number of core thematic issues related to democracy, political rights and civil liberties." *About Us*, FREEDOM HOUSE, https://freedomhouse.org/about-us (last visited Apr. 8, 2021).

[154] REPUCCI & SLIPOWITZ, *supra* note 152, at 1–2.

[155] *Id.* at 8–10.

[156] *Id.* at 2–3.

U.S. courts in holding strong during the election process.[157] These findings help articulate how courts uphold the rule of law and neutralize authoritarian threats to democracy.

First, it is necessary to establish whether courts can successfully stave off democratic decline and check authoritarianism when deploying constitutional law. To begin, we must query what *really* allows American democracy to function. It is not the Constitution—neither its text nor the intent of its framers.[158] Instead, it is the trust that Americans place in the legitimacy of political institutions to stand up against unconstitutional forces and, in each branch of government, to make good-faith efforts to "check" the other branches.[159] For the Supreme Court, legitimacy means that the Court must maintain the American people's "faith in the Supreme Court's ability to render impartial justice" and "[to] resolve important questions in ways that all Americans can live with."[160] Over the years, the Court has mostly succeeded in maintaining this public confidence.[161] By serving as an effective check on the political branches of government, the Court's legitimacy has survived and has instilled public confidence in the rule of law.[162] Because of their function in establishing the rule of law, courts can serve as the final bulwark against authoritarians who aim to degrade a democracy. Yet, that hinges on their ability to check the political branches

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[157] *Id.* at 9. Freedom House also took note of the constitutional court of Malawi, which resisted bribery attempts from the party in power and called for a new election after evidence emerged that the incumbent president *had* won because of election fraud. *Id.* at 14–15. The opposition candidate ended up winning the new election and taking power. *Id.* Malawi demonstrates an example of legitimate courts checking authoritarianism and propping up democracy—an idea that animates much of this Part.

[158] *See* Marek D. Steedman, *Taming Leviathan*, 52 TULSA L. REV. 621, 622, 632 (2017) (reviewing ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1944–1972 (2015)) (reviewing Mickey's claim that the Jim Crow Southern states operated as "a set of authoritarian enclaves nestled with a larger federal democracy" and explaining his conclusion that "democratic façades are easier to construct and maintain than the institutions and norms that make for democratic realities").

[159] *See* THE FEDERALIST NO. 51 (James Madison) ("[U]surpations are guarded against by a division of the government into distinct and separate departments. . . . Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

[160] Epps & Sitaraman, *supra* note 144, at 151.

[161] *See, e.g.*, *id.*; Ilya Somin, *Is the Supreme Court Going to Suffer a Crisis of Legitimacy?*, REASON: VOLOKH CONSPIRACY (Oct. 9, 2018, 3:02 PM), https://reason.com/volokh/2018/10/09/is-the-supreme-court-going-to-suffer-a-c/ (explaining evidence that the predictions of danger to the institution "may well be overblown, as they often have been in the past"); Amelia Thomson-DeVeaux & Oliver Roeder, *Is the Supreme Court Facing a Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018, 6:00 AM), https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/ (analyzing historical data that shows that Americans "have more trust in the Supreme Court than in other political institutions" and that the Court "has recovered from moments of potential partisan taint before"). The Supreme Court regularly scores higher public approval ratings than the President or Congress. Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP (Sept. 20, 2017), https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx.

[162] Epps & Sitaraman, *supra* note 144, at 151.

in a manner that is reliable and in good faith.

2. *Judicial Tampering and Other American Vulnerabilities*

The present intensification of political division along party lines spreads to the Supreme Court. That development jeopardizes public confidence in democracy in novel, volatile ways. Of course, throughout the history of the Supreme Court, bouts of political conflict, economic crises, national security threats, and social change have tested the durability of America's constitutional system. But, scholars caution that there is scant historical precedent for a Supreme Court that is viewed by a majority of the public as a "party-dominated institution."[163] Professors Daniel Epps and Ganesh Sitaraman clarify that the present moment is without comparison because, first, earlier American political tribalism has been aligned more on regional or geographical, as opposed to partisan, grounds, and, second, current Supreme Court Justices are less likely than ever to vote against the party of the president who appointed them.[164] This rise of a partisan Court has transformed the judiciary into a weapon of mass destruction in a constitutional arms race centered on a partisan battle for federal judicial appointments.[165] Throughout the past several years, we have seen what these challenges for the Court look like when party affiliation matters more than anything in the lengths that partisan actors go to control the courts.

Clearly, judicial legitimacy suffers because of partisan cage fights over courts.[166] Since 2016, political parties have increasingly exploited constitutional quirks in the process of judicial appointments to control courts. Republicans would argue that the "original sin" instigating unfair partisanship in judicial appointments occurred decades earlier, in 1987, when Senate Democrats rejected President Ronald Reagan's nomination of Judge Robert Bork, although the Merrick Garland incident represented an even more egregious attempt to strip away the appointment power of a sitting president.[167] In a major violation of norms, Senate Majority Leader

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[163] Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html; *see also* LEVITSKY & ZIBLATT, *supra* note 2, at 8–9 (emphasizing that "[o]ur Madisonian system of checks and balances has endured for more than two centuries," surviving "the Civil War, the Great Depression, the Cold War, and Watergate," but cautioning that history shows how "extreme partisan polarization" involving "existential conflict over race and culture" can "kill democracies").

[164] Epps & Sitaraman, *supra* note 144, at 155–56.

[165] *Id.* at 155.

[166] Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2242 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).

[167] Epps & Sitaraman, *supra* note 144, at 156–57; Grove, *supra* note 166, at 2274 nn.156–57 (citing sources on competing sides of the debate considering which party began the trend of politicizing the Supreme Court and has engaged in "hardball" to a greater degree). Taking this power to its logical conclusion in the run-up to the 2016 election, some Republican senators even vowed to oppose any Supreme Court nominee of Democratic candidate Hillary Clinton if she won the election. Sabrina

Mitch McConnell refused to hold confirmation hearings for President Obama's Supreme Court nominee for the vacancy left by Justice Scalia's 2016 death.[168] After President Trump's unexpected election victory in the 2016 election, Senate Republicans unabashedly employed the "nuclear option" to defy fierce Democratic opposition and to confirm Trump's replacement nominee, Justice Gorsuch, by a historically slim margin.[169] Less than two years later, President Trump's second nominee, Justice Kavanaugh, was confirmed, also by a slim margin. Republicans defended Justice Kavanaugh in spite of an outrageous confirmation process that involved sexual assault allegations and his shocking Senate testimony that overtly accused Democrats of leading a smear campaign against his nomination.[170] Justice Kavanaugh's confirmation marked a new level of partisan hostility and looming danger to the Court's legitimacy.[171]

Extraordinary events towards the end of President Trump's term added fuel to the political fire, particularly the Senate's acquittal of two independent impeachment charges against the President, the COVID-19 pandemic, strict lockdowns, and a summer of widespread racial justice protests. In September, the Supreme Court faced another contentious confirmation process. Hours after Justice Ruth Bader Ginsburg died of complications from metastatic pancreatic cancer, the Republican Senate majority, in a shameless reversal of position from 2016, began a rush to confirm President Trump's third Supreme Court nominee, Justice Amy Coney Barrett, mere *weeks* before the 2020 election.[172] Finally, courts became embroiled in President Trump's quixotic post-election lawsuits to challenge his loss. Almost instantly after networks projected that Biden had been elected President, winning with an Electoral College margin of 306-232, President Trump commenced a series of lawsuits to overturn the election results in key swing states, making repeated, baseless claims of

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Siddiqui, *Republican Senators Vow to Block Any Clinton Supreme Court Nominee Forever*, GUARDIAN (Nov. 2, 2016, 9:02 AM), https://www.theguardian.com/law/2016/nov/01/republican-senators-oppose-clinton-supreme-court-nominee.

[168] Epps & Sitaraman, *supra* note 144, at 156–57.

[169] Epps & Sitaraman, *supra* note 144, at 157.

[170] *Id.* at 158–59.

[171] Thomson-DeVeaux & Roeder, *supra* note 161.

[172] The Republican Senate confirmed Justice Barrett—an avowed conservative—on a strict 52-48 party-line vote just over one week before the November 3, 2020 election in the midst of the ongoing COVID-19 pandemic. Nicholas Fandos, *The Senate Confirms Barrett on a Nearly Party-Line Vote, Delivering a Win to Trump that Tips the Supreme Court to the Right.*, N.Y. TIMES, https://www.nytimes.com/live/2020/10/26/us/trump-biden-election/the-senate-confirms-barrett-on-a-nearly-party-line-vote-delivering-a-win-to-trump-that-tips-the-supreme-court-to-the-right (Nov. 8, 2020). One Republican, Senator Susan Collins of Maine, voted in opposition to the confirmation of Justice Barrett. *Id.* This rapid confirmation created a scenario in which Justice Barrett could have presided over a potential election challenge at the Supreme Court.

voter fraud.[173] In spite of the rise of the partisan court, federal judges—even ones appointed by President Trump—quickly dismissed sixty-one of the sixty-three lawsuits filed in states that President Trump lost as without merit.[174] Thus, courts protected American democracy from a grave threat in 2021. But their quick dismissals of post-election lawsuits also failed to dissuade the sitting President from propagating a dangerous, false narrative of a stolen election.

Obvious losses in federal courts did not deter President Trump and many congressional Republicans who continued to cast doubt on the legitimacy of President Biden's win. President Trump's "stolen victory" narrative climaxed when his supporters, at his unsubtle urging, violently stormed and overran law enforcement at the United States Capitol as Congress counted the electoral votes, in a desperate attempt to overturn President Biden's election victory, resulting in six deaths.[175] Here, too, the Supreme Court was involved: first, when President Trump initiated a long-shot lawsuit brought by the state of Texas to throw out Pennsylvania's electoral votes—which the Supreme Court rejected for lack of standing;[176] and second, when revelations surfaced that Virginia Thomas, the wife of Justice Clarence Thomas and "vocal right-wing activist," actively participated in the promotion of the insurrection and efforts to overturn the election.[177] As of the date of this writing, new information comes to light on a regular basis regarding the insurrection, attempted coup, and the complicity of major government figures. The diligent investigation of the House Select Committee has uncovered extraordinary evidence that exceeds anything that was

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[173] William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY, https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/ (Jan. 6, 2021, 10:50 AM) (explaining the scope of the Trump campaign's lawsuits in Pennsylvania, Michigan, Arizona, and Georgia).

[174] *Id.*

[175] *See* Dylan Stableford, *New Video Shows Trump Rally Crowd Cheering Call to 'Storm the Capitol'*, YAHOO! NEWS (Jan. 25, 2021), https://news.yahoo.com/trump-jan-6-rally-crowd-storm-the-capitol-video-184828622.html (reporting that rioters stormed the Capitol immediately following a speech by Trump in which he stated, "We're going to walk down to the Capitol . . . you'll never take back our country with weakness. You have to show strength, and you have to be strong."). For inciting this deadly insurrection against Congress, President Trump, for the second time in four years, was impeached by the House and acquitted by the Senate. Anthony Zurcher, *Trump Impeachment Trial: What Verdict Means for Trump, Biden and America*, BBC (Feb. 13, 2021), https://www.bbc.com/news/world-us-canada-56057849.

[176] Adam Liptak, *Supreme Court Rejects Texas Suit Seeking to Subvert Election*, N.Y. TIMES, https://www.nytimes.com/2020/12/11/us/politics/supreme-court-election-texas.html (Jan. 15, 2021) ("[President Trump] was right that an election dispute would end up in the Supreme Court. But he was quite wrong to think the [C]ourt, even after he appointed a third of its members, would do his bidding.").

[177] Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court?*, NEW YORKER (Jan. 21, 2022), https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court. Ginni Thomas has declared that America is in "existential danger" because of the "deep state" and the "fascist left," which includes "transsexual fascists." *Id.*

foreseeable when the first draft of this Note was submitted at the beginning of 2022.

3. *Self-Inflicted Wounds*

In spite of this outrageous effort by a sitting President to deny his reelection defeat, America's constitutional institutions withstood the challenge. Federal courts were unanimous in their conclusions that the election challenges were without merit, and President Biden was inaugurated without further incident. But, while President Biden announced his intention to "lower the temperature" in politics, political tribalism remains intense. Any hope that Republicans would abandon President Trump and his authoritarian tendencies following his eviction from the White House has evaporated, as Republicans "continue to demonstrate respect for, or fear of" President Trump's influence in the party.[178] In deference to the imposing stakes and perhaps fearful of Republican constitutional hardball, Justice Breyer chose to retire from the Court in January 2022, while President Biden still presided over a Democratic Senate.[179] A firm institutionalist and committed constitutional pragmatist, Justice Breyer knelt before the power of partisan politics.[180] While Justice Breyer might recoil over such an appearance of partisanship, his timely retirement blazed a clear path for Justice Ketanji Brown Jackson's relatively tranquil confirmation as the first Black woman on the Supreme Court.[181] Justice Jackson's tenure is nascent, yet her indomitable confirmation represents a sturdy volley of Democratic return fire. Partisan parity was conserved, though Republican appointees still dominate. Therefore, the Breyer-Jackson swap demonstrates an attempt to restore judicial legitimacy by resorting to constitutional hardball.

However, anxiety over the Supreme Court's legitimacy crisis reached a thunderous crescendo when a draft of Justice Samuel Alito's astonishing opinion[182] overruling *Roe v. Wade* in *Dobbs v. Jackson Women's Health*

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[178] Anthony Zurcher, *JD Vance: Trump-Backed Contender Clinches Ohio Senate Race*, BBC (May 4, 2022), https://www.bbc.com/news/world-us-canada-61315649. According to Senator Romney, an avowed critic, President Trump is also "very likely" to be the Republican nominee for President in 2024 and "[i]t's hard to imagine anything that would derail his support." Dominick Mastrangelo, *Romney: Trump 'Very Likely' to Be 2024 Republican Nominee if He Runs Again*, HILL (May 5, 2022, 10:08 AM), https://thehill.com/news/3478176-romney-trump-very-likely-to-be-2024-republican-nominee-if-he-runs-again/.

[179] Jeffrey Rosen, *The Court Loses Its Chief Pragmatist*, ATLANTIC (Jan. 26, 2022), https://www.theatlantic.com/ideas/archive/2022/01/stephen-breyer-retirement-supreme-court-biden/619331/.

[180] *Id.*

[181] Mary Clare Jalonick and Mark Sherman, *Jackson Confirmed as First Black Female High Court Justice*, AP NEWS (Apr. 7, 2022), https://apnews.com/article/ketanji-brown-jackson-supreme-court-confirmation-f39263cdbb0c59c8a20a48edf9b6786e.

[182] Samuel Alito, *1st Draft, Supreme Court of the United States, No. 19–1392, Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al., Petitioners, v. Jackson Women's*

Organization[183] was leaked to the press under mysterious circumstances.[184] The new conservative majority's willingness to eviscerate *Roe* and reward conservatives' decades-long effort to dismantle reproductive rights for women has "rocked" confidence in the Court and left commentators to speculate over what precedents could be next.[185] Republican authoritarianism and the conservative Supreme Court supermajority's eagerness to make drastic and consequential transformations to American law cast uneasiness on the future legitimacy of the Supreme Court.[186] In the 2022 term, the Court previewed its "ruthlessly efficient" power to render "speedy and definitive" outcomes on issues ranging from abortion, guns, religion, and climate change in favor of "the conservative movement and the Republican party."[187] Thus, upcoming election cycles may well become the crucible where pro-democratic forces are tested and either embraced or discarded.

The tumult of the Trump administration has yet to be fully unpacked, but it demonstrates the challenging landscape that judges will face as they make decisions. It also provides a chilling template for how declining judicial independence could undermine democracy.

Health Organization, et al. (Feb. 10, 2022); Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO, https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 (May 3, 2022, 2:14 PM) (publicizing the leaked draft opinion).

[183] Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. June 24, 2022).

[184] *See* Calvin Woodward, Hannah Fingerhut & The Associated Press, *Supreme Court Leak Shakes Trust in One More American Pillar*, FORTUNE (May 7, 2022, 9:58 AM), https://fortune.com/2022/05/07/supreme-court-leak-shakes-trust-in-one-more-american-pillar/ (contextualizing the impropriety of the leaked opinion and the demise of a woman's right to terminate her pregnancy with polls that show how trust in the Supreme Court has deteriorated).

[185] *Id.* Chief Justice Roberts called the leak "absolutely appalling," which seemed to authenticate the veracity of the opinion and *Roe*'s demise. Ariane de Vogue and Maria Cartaya, *John Roberts Calls the Supreme Court Leak "Absolutely Appalling"*, CNN, https://www.cnn.com/2022/05/05/politics/john-roberts-supreme-court-leak/ (May 6, 2022, 8:08 AM).

When the *Dobbs* decision was released, the public became privy to Chief Justice Roberts' opinion on the issue. Chief Justice Roberts concurred in the judgment of *Dobbs*, only. *See Dobbs*, slip op. at 1 (Roberts, C.J., concurring in part). Chief Justice Roberts wrote that he would have taken a more "measured" approach in deciding this case, one that "extends [to women] a reasonable opportunity to choose, but need not extend any further . . . to viability." *Id.* at 1–2. Chief Justice Roberts called the decision "thoughtful and thorough," yet admonished it for being "dramatic[,] . . . consequential[,] . . . [and] unnecessary" for the issues presented in *Dobbs*. *Id.* at 2.

[186] The Court's conservative majority is willing and able to annihilate decades of precedent, which may dramatically alter American life as it is currently known. *See, e.g.*, *Dobbs*, slip op. at 3 (Thomas, J., concurring). Justice Thomas, in his concurring opinion in *Dobbs*, ominously wrote, "In future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is demonstrably erroneous, we have a duty to correct the error established in those precedents." *Id.* (internal citations omitted) (internal quotation marks omitted).

[187] *See generally* Mark Joseph Stern, *Why Today Felt Like the Most Hopeless Day of the SCOTUS Term*, SLATE (Jun. 30, 2022), https://slate.com/news-and-politics/2022/06/climate-change-epa-supreme-court-revolution.html. In this excoriation of the Supreme Court's July 2022 term and congressional realities, Stern writes that "[r]eal power in this country no longer lies in the people. It resides at the Supreme Court." *Id.*

B. *Courts Must Hold the Line Against Authoritarianism*

1. *Authoritarians Target Courts*

President Trump's hectic term inspired substantial amounts of recent scholarship analyzing the impact of his brand of populist, extremist demagoguery on our constitutional system, as well as its impact on the judiciary. In *How Democracies Die*, Professors Steven Levitsky and Daniel Ziblatt take stock of the emerging threats to American democracy.[188] Their research examines the weaponizing of institutions by studying countries where democracies had been subverted and fatally broken down until despotism prevailed.[189] Levitsky and Ziblatt identify how would-be authoritarians around the world, typically after winning democratic elections, take persistent steps to subtly undermine nonpartisan institutions like courts—in legal ways, at first—under the pretext of reforming democracy, "cleaning up" elections, "combating corruption," or "enhancing national security."[190] After eroding public confidence in courts, a president has the latitude to remove perceived opponents and instill loyalists.[191] Levitsky and Ziblatt illustrate how authoritarians in several countries eventually obtained de facto control of the judiciary. Violating judicial norms was a crucial step in the process of democratic breakdown because it gave the authoritarians both shields against legal consequences and swords for unleashing their institutional authority on political opponents.[192] Here, the emphasis on democratic backsliding as a gradual process highlights the reasons to be concerned with the decisions of judicial actors, who represent the rule of law. Individual choices to ignore or dismiss threats to democracy can have tremendous and tragic impacts. Judges must be vigilant and uncompromising against these kinds of threats to the constitutional order.

To explain the impact of individual choices, Levitsky and Ziblatt describe how democratic institutions operate using unwritten rules and shared codes of conduct that serve as "soft guardrails" against democratic

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[188] *See generally* LEVITSKY & ZIBLATT, *supra* note 2. Significantly, Levitsky and Ziblatt's book on the precarious state of American democracy was published in 2018—obviously preceding President Trump's astonishing attempts to undermine faith in the 2020 election and his encouragement of his supporters to storm the Capitol as Congress counted electoral votes on January 6, 2021. *Id.* Additionally, reading *How Democracies Die* reportedly motivated President Biden to run for president against President Trump. Ashley Parker, *Weightlifting, Gatorade, Birthday Calls: Inside Biden's Day*, WASH. POST (May 24, 2021, 5:30 AM), https://www.washingtonpost.com/politics/biden-daily-routine-gatorade/2021/05/23/b6f608c2-b40e-11eb-a3b5-f994536fe84a_story.html.

[189] LEVITSKY & ZIBLATT, *supra* note 2, at 7–10.

[190] *Id.* at 77.

[191] *Id.* at 79.

[192] *See generally id.* at 79–81 (describing how four authoritarian leaders in former democracies eventually succeeded in conscripting the judiciary to their partisan goals, ultimately leading to the subjugation of their people under despotic regimes).

decline.[193] The constitutional system survives and provides Madisonian checks and balances because these guardrails inculcate politics with two fundamental values. The first value is mutual toleration, which means dealing with political opponents as constitutional rivals rather than as existential enemies.[194] The second value is institutional forbearance, which means "avoiding actions that, while respecting the letter of the law, obviously violates its spirit."[195] In other words, democracies die when institutional actors discard these two values and when they fail to restrain actors who reject them. Thus, our constitutional order should have a space that promotes and protects mutual toleration and institutional forbearance. In light of the role of the judiciary, then, institutionalist judges are the best actors available to fill that space.

2. *How Institutionalism Promotes Legitimacy*

For courts, which serve a critical purpose in the constitutional system, retaining legitimacy and public confidence is intrinsically linked to the health of democracy. Although there is persistent faith that American democracy is exceptional or that the Constitution is a "perfect" document, the failures of formerly solid democracies around the world demonstrate why judges must be vigilant and uncompromising in response to these threats. Courts stand as a bulwark against the trampling of political and human rights by partisan actors. Further, authoritarian governments pose particular threats to women, people of color, ethnic minorities, religious minorities, and LGBTQ+ individuals. As such, the judiciary must not capitulate to, enable, or ignore the increasing aggression of authoritarian forces in a democracy.

Institutionalists tend to the legitimacy of the judiciary by making judgments on the basis of extralegal considerations to steer courts away from bad outcomes that could harm its legitimacy. Thus, because courts are integral institutions to the health and wellbeing of democracy, institutionalists contribute to the protection of rights of citizens contemplated by the Constitution. Yet, there remains significant skepticism of judges who set aside legal analysis and use only the case at bar to address a pressing legitimacy crisis.[196] Professor Tara Leigh Grove posits that there is no consistent, accepted theory that allows judges to be transparent about deciding cases

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[193] *Id.* at 101.

[194] *Id.* at 102.

[195] *Id.* at 106.

[196] *See* Grove, *supra* note 166, at 2269 (noting that "it does not appear to be *legally* legitimate for a Justice to vote in a way she deems legally incorrect in order to preserve the Court's public reputation"). Grove argues that the way scholars discuss "legitimacy" is incomplete and should focus on the difference between legal legitimacy (i.e., a decision is legally correct), moral legitimacy (i.e., the decision is morally preferable), and sociological legitimacy (i.e., the decision is respected by the American people). *Id.* at 2244, 2269.

based on legitimacy, arguing that"[i]t is difficult to imagine a Justice saying openly to a litigant, 'The government has violated the Constitution. But we cannot rule in your favor, because the consequences for our institution might be too great.'"[197] Grove's point is valid in that greater transparency about process would benefit democracy and that judges should have more concrete guidance for resolving "trade-offs among types of legitimacy."[198] This Note does not attempt to construct such a legal system that may, in fact, be overly unrealistic and unachievable. Likewise, Grove concedes that any judicial reforms would first demand improvements to the political process.[199] But, given the urgent crises of today, this Note posits that devising new laws to account for legitimacy concerns may not matter or, at least, they may be a fruitless exercise. First, any judicial reform would require the involvement of the political branches, which is unlikely given intense partisan hostilities. Second, whether our justifications for institutionalists are based on a desire to place a unique trust in judges rather than political actors, or a belief that the Constitution is an evolving document, or a preference for the current way that judges resolve cases, tending to legitimacy is an *inherent* concern of the judiciary. Judges not only *can* act to strengthen courts against authoritarianism, but it is their constitutional *duty* to do so. In short, the present moment demands affirmative action from judges to protect vulnerable Americans from the clear and present danger posed by anti-institutionalist tyranny.

At this vista, we can see a recent example of how the Court threads the needle between two bad outcomes to reach a place that maximizes its perceived legitimacy. In *Trump v. Vance*[200]—another opinion crafted by Chief Justice Roberts—the Supreme Court considered whether the President enjoys "absolute immunity from state criminal process."[201] The consequences of finding that he did or, alternatively, that a state prosecutor must show a "heightened need" before issuing a subpoena to a sitting president implied that the President was, at least partially, above the law.[202] Given that the opinion was announced months before the 2020 election, the Court also had the power to determine whether President Trump could continue to hide his tax returns from the public.[203] Ultimately, the opinion asserts the common law maxim that, "[i]n our judicial system, 'the public has a right to every man's evidence.'"[204] It continues, "Since the earliest days of the Republic, 'every man' has included the President of the United

[197] *Id.* at 2271.
[198] *Id.*
[199] *Id.* at 2275.
[200] 140 S. Ct. 2412 (2020).
[201] *Id.* at 2420.
[202] *Id.* at 2429.
[203] *Id.* at 2412.
[204] *Id.* at 2420, 2431.

States," concluding that the Constitution does not support holding state subpoenas of a President to a higher standard and that a New York prosecutor could subpoena Trump's tax records.[205] But, Chief Justice Roberts provided that the President could argue that "compliance with a particular subpoena would impede his constitutional duties," and the Court returned the case to the lower courts for further litigation.[206] Litigating this issue meant that the public would not see Trump's tax records before voting in the 2020 election.[207] Yet, although the public did not see Trump's tax records before the 2020 election, Chief Justice Roberts swatted down the strains of President Trump's argument that would have permitted him to behave like an authoritarian above judicial accountability.[208] The institutionalism of *Trump v. Vance* sets a firm standard for executive accountability, while simultaneously reducing the political impact of a Supreme Court decision in an election year—that is, by avoiding headlines accusing the Supreme Court of playing an active role in defeating President Trump at the ballot box. For these reasons, *Vance*'s institutionalist attitude fulfilled dual purposes: checking the power of the President and bolstering the legitimacy of the judiciary.

In the judicial branch, decisions about the workability of outcomes are a part of the job. As a result of its resilience, adherence to norms, and structural continuity, the law makes the judiciary autonomous as compared to the political branches.[209] Judges navigate this inherent autonomy in the context of formal laws that limit available options with the aim of arriving at outcomes that represent the best choices for the given parties and for future courts. In many ways, then, all judges whose decisions impact the lives of fellow citizens engage in a kind of institutionalist reasoning about good and bad consequences. Overall legitimacy—legal, moral, or sociological—is really another choice about the consequences that judges make. The inherently fragile American constitutional system contemplates such a role for courts. To preserve it, there is a strong incentive for allowing institutionalists the latitude to shore up the legitimacy of the judicial branch in an era of democratic backsliding. Far from threatening it, the American republic may depend upon judges making choices for the right reasons.

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[205] *Id.*

[206] *Id.* at 2425–2429.

[207] *See* Adam Serwer, *The Roberts Court Completes Trump's Cover-Up*, ATLANTIC (July 10, 2020), https://www.theatlantic.com/ideas/archive/2020/07/the-roberts-court-has-completed-trumps-cover-up/614023/ (advancing an argument that Chief Justice Roberts was motivated by a desire to affirm the independence of the Supreme Court's conservative majority while simultaneously granting President Trump what he wanted—hiding his tax returns from the public before the election).

[208] *Vance*, 140 S. Ct. at 2429–2431 (explaining why a state grand jury seeking to subpoena a President's records does not need to satisfy a "heightened need standard"). This roundly rejects the reasoning of the President's lawyers and opens the door for future state criminal investigations of the President.

[209] Graber, *supra* note 9, at 7, 10.

CONCLUSION

As this Note has imparted, the stakes for courts are precipitous. Judicial decisions impact rights, duties, fundamental freedoms, and, ultimately, the fabric of our constitutional republic. Thus, following four years of a profoundly *anti*-institutionalist president and during a time of extreme political polarization, any weaknesses in the foundations of the judicial branch as a component of American democracy will be exposed. With these weaknesses being exposed, observing how the political branches of government have sought to exploit them by playing constitutional hardball makes clear the urgency of repairing, reforming, and fortifying democratic institutions.[210] President Biden has at least four years to make his mark on the judiciary and to fulfill his promise to cool the crucible of American politics, and the institutionalists will remain relevant.

Institutionalist judges have their reasons, making judgments informed by extralegal considerations that are steered towards the Court's ability to maintain its viability as a legitimate institution under the law. This Note identified three important extralegal considerations. But, this Note also took pains to clarify that it does *not* represent a ringing endorsement of such considerations and that judges are susceptible to making bad judgments about the propriety of deferring to one or another in any given case. Instead, we entrust judges to make good-faith determinations on an ad hoc basis because of a belief in the power of the Constitution to constrain them and because of a belief in the court's role as a neutral arbiter. This Note also provides some thoughts on why, exactly, the system allows institutionalists to act in that way, which is related to an idea about the sanctity of democratic institutions and the flexibility we want for institutions that stand in the way of authoritarian forces.

Further scholarship could help make better determinations about both the legality of these judgments and the actual efficacy of institutionalist

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[210] As a result of Democrats retaking the Senate, some Democrats called for constitutional hardball of their own, exemplified by Justice Breyer finally capitulating to relentless liberal pressure to retire so that President Biden can name his replacement before Republicans have the opportunity to retake the Senate. *See* Dahlia Lithwick, *The Deep Irony of Stephen Breyer's Bare-Knuckled Exit From the Supreme Court*, SLATE (Jan. 26, 2022, 2:29 PM), https://slate.com/news-and-politics/2022/01/stephen-breyer-justice-retirement-supreme-court-reason.html ("It is ironic that the sitting justice who has staked his career on the proposition that justices are *not* political actors, *not* partisan shills, and *not*, in his parlance, a bunch of 'junior varsity politicians' is choosing to leave the court in a move timed precisely to coincide with a closing window of opportunity for the president and the Senate."); *see also* Nick Niedzwiadek, *Biden Signs Executive Order on Supreme Court Reform Commission*, POLITICO, https://www.politico.com/news/2021/04/09/biden-supreme-court-reform-commission-480582 (Apr. 9, 2021, 12:35 PM) (reporting on President Biden's announcement that he is "empaneling a commission to examine possible reforms to the Supreme Court and federal judiciary"). At present, the Supreme Court is controlled by a 6-3 majority of Republican-appointed conservative Justices, with Chief Justice Roberts increasingly siding with the liberals and Justice Kavanaugh emerging as a swing Justice. *Id.* As a result, Democrats—who regained control of the political branches in 2021—have begun to plot how to counter that majority, including, recently, by studying the idea of adding more seats to the Supreme Court. *Id.*

tactics. For example, this Note does not offer a way to measure the durability of decisions issued by institutionalists or link it to public confidence in the judiciary. Moreover, this Note does not try to develop and prescribe legal reforms that would constrain judicial actors, while also allowing them to shut down would-be authoritarians. Instead, it is more important to understand and accept the gravity of this new American style of authoritarian and how this movement exploits institutions such as courts. For now, saving American democracy from further backsliding during times of crisis justifies allowing judges the latitude to make the pro-democratic decisions.