

Presidential Commission on the Supreme Court of the United States

Hearing on “The Contemporary Debate over Supreme Court Reform: Origins and Perspectives”

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Introduction

The contemporary national discussion about Supreme Court reform inevitably reflects a long tradition of criticism and debate about the Court and its functions. The current iteration of the debate is, however, primarily occasioned by an emerging change in the unwritten political norms surrounding the confirmation of justices. Voices from the left and the right argue about whether the proper starting point for understanding the change should be the Senate’s rejection of Judge Robert Bork’s nomination in 1987 or the Senate’s refusal to vote on the confirmation of Judge Merrick Garland when he was nominated in 2016. But most close observers of whatever political persuasion would agree that today, it is increasingly unlikely that a Senate controlled by a majority from a different political party than the party of the president would be willing to confirm any nominee to the Court.

This norm change means that, absent formal reforms enacted by statute or constitutional amendment, we are entering the era of what we might call the incredible shrinking Supreme Court. In this scenario, when the president and the Senate majority come from different parties, no justices will be confirmed even if sitting justices retire or die. Eventually, when the president and Senate majority come from the same party, the seats will presumably all be filled in short order, and the full statutory complement of nine justices will be restored. In the interim, the Court will have to do its business short-handed.

It is possible to decry or celebrate this emergent change in political confirmation norms. Regardless, the change is certainly permissible under the written Constitution. Article II, section 2 of the Constitution gives the president the authority to nominate Supreme Court justices and for them to be appointed “by and with the advice and consent of the Senate.” Pursuant to this provision, the Senate acts within its authority when it rejects the presidential nominee for any reason at all, including reasons of judicial ideology or political partisanship. And of course, the Constitution does not specify the number of Supreme Court justices, a matter that the framers of the Constitution left to legislation.

Proposals to reform the Supreme Court in response to this change are therefore normative claims about the best policy. They are not claims about what the Constitution or current laws require.

To assess such proposals, we need to ask two essential questions: What is the Supreme Court good for in the context of our existing institutions? And would specific reform proposals advance or impede the objectives that the Court ought to serve?

The short answer to the first question is that the Court enforces and protects the rule of law, articulates the standards that ensure individual liberty and equality, and oversees the system of constitutional democracy.

The general answer to the second question is that, with regard to these values, we collectively have much more to gain by preserving the institutional legitimacy of the Supreme Court than by breaking it. Taken as a whole, the Supreme Court's modern power has made it into an *integral, irreplaceable part of our constitutional system*. Whatever alternative designs might once have existed in theory, sapping that power would, in practice, leave the current system with no institutional actor capable of protecting the rule of law, fundamental rights, or the structure of democracy and motivated to do so.

This point cannot be emphasized too strongly. It is capable of being embraced regardless of your constitutional politics and how you feel about the current configuration of the Supreme Court. In essence, it amounts to the proposition that we are better off as a nation with the Supreme Court playing its current role than we would be without it.

Although people on both sides of the political spectrum would like the Court to interpret the Constitution only as they believe to be correct, that possibility is not available to either side over the long term. Judicial review in its current form is inherently subject to multiple schools of constitutional interpretation, embraced by different justices. To accept the constitutional role that the Court presently occupies requires acknowledging forthrightly that the Court will decide some cases, including some extremely important cases, in ways that conflict with the views of many Americans. Our collective disagreements about the meaning of the Constitution will find expression in majority and dissenting opinions of the Court.

The strongest opposing view, which sees the court in its current role as fundamentally counter-majoritarian and even anti-democratic, depends on the hope (or fantasy) that some other abstract entity – perhaps “the people” -- would somehow fulfill the Court's functions if the Court no longer did so. Given the fact that the current constitutional system is the product of a complex process of evolution, in which the different elements of the system have involved in dynamic relation to each other, radically altering the capacities of one crucial organ in the system creates a meaningful risk of overall systemic failure.

Some possible reforms, such as a carefully crafted constitutional amendment imposing term limits on justices, might conceivably reinforce the court's legitimacy or even mildly enhance it. It is troubling that tracking the future of our Constitution requires public speculation about the physical health and retirement-timing of the justices. Other proposals, notably court-packing and some forms of jurisdiction-stripping, are overwhelmingly likely to break the institutional legitimacy of the Court. Indeed, they are sometimes intended to do exactly that.

Yet at the same time, perhaps counterintuitively, the background possibility that Congress and the president could pack the Court or strip it of jurisdiction over certain subjects helps preserve the institutional legitimacy of the Court. The implicit possibility of losing their role serves to remind the justices that, if they interpret the Constitution in ways that go too much against the beliefs of the great majority of Americans, their efforts can ultimately be reversed through court-packing or curtailed through jurisdiction-stripping. These possibilities serve as an indirect check on the Court's power – and therefore protect the Court's legitimacy against the possibility of its being squandered by justices who exercise their power without reference to the beliefs about the Constitution held by the great majority of the people.

A Page of History

The early history of the Republic has value for understanding the function of the Supreme Court today. But it must be kept in mind that the Supreme Court functioned very differently in that era than it eventually came to function after the passage of the Fourteenth Amendment and the consequent expansion of judicial review to encompass state laws.

The main relevant takeaway from the founding era is that the framers intended to create an independent judiciary, and did so. As Alexander Hamilton famously put it in Federalist No.78, “The complete independence of the courts of justice is peculiarly essential in a limited Constitution.” He went on to explain that:

If ... the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

However, the extent of power exercised by that judiciary was sharply limited before the Court's later embrace of judicial review. The form of judicial review that Hamilton described in the same essay was, at least on its face, limited to circumstances where a federal statute clearly violated the Constitution – and may well have been limited to judicial application of the statute.

It is therefore fair to say that the founding generation did not fully anticipate the modern practice of robust judicial review that both empowers the judiciary to protect rights and democratic norms and simultaneously renders the judiciary more capable of harming democracy than it would be without it. After the rise of judicial review, Hamilton's “least dangerous branch” is no longer much weaker than its legislative and executive counterparts. Its powers – and the dangers associated with them -- are much more closely comparable to those of the other branches.

Thus, when John Adams and the Federalist-controlled Senate contrived to create new judicial positions and then appoint the so-called midnight judges to fill them in the closing days of Adams' single presidential term, their actions took place against the backdrop of a set of judicial institutions that were still very much in their nascent phase. *Marbury v. Madison* had not yet been decided. (Indeed, the case emerged out of the very efforts that the Adams administration

made, and the Jefferson administration's refusal to countenance those efforts.) It follows that this episode, while including actions on both sides that are regrettable in retrospect, should not be treated as a precedent either for or against judicial reform by statute today. The Court simply had not yet taken on anything like its current functional role. The same is true, albeit to a slightly lesser degree, of antebellum changes to the number of justices and the temporary reduction of the size of the Court during the administration of President Andrew Johnson.

To understand what the Supreme Court is for and what it does best today, the place to open the historical record is with the passage of the Fourteenth Amendment and its guarantees that no state may deny citizens the equal protection of the laws or the due process of law. These provisions, enacted at a time when judicial review was no longer imagined to be minor, effectively raised the Supreme Court to the constitutional role of guardian of Fourteenth Amendment values. Those values, in turn, were fundamental to the new constitutional order that the Fourteenth Amendment created: the equality of citizens and the assurance of fundamental rights to all citizens relative to state action.

Values and Function

The modern functions of the Supreme Court flow from the principle of judicial independence enshrined in the Constitution of 1787 and from the constitutional rights to equality, liberty, and due process encompassed by the Fourteenth Amendment. In historical terms, the Court's embrace of these functions emerged over time, in fits and starts, with steps backwards as well as steps forward. Nevertheless, they can be summarized.

1. The Supreme Court is the constitutional institution that protects the rule of law.
2. The Supreme Court articulates the standards that ensure liberty and equality for people living under the jurisdiction of the United States.
3. The Supreme Court supervises and oversees the system of constitutional democracy.

The Court's role as protector of the rule of law derives from and depends on the idea that the judiciary is independent. This role operated already at the federal level from the time of the founding; but it was greatly enhanced by the passage of the Fourteenth Amendment and its subsequent interpretation by the Court. The basic idea is that the principles of the Constitution -- the paramount law -- control and limit the conduct of the legislative and executive branches and of the states.

The mechanism for that limitation is that the lower courts and the Supreme Court that sits at their apex constrain and cabin all state action in the United States according to the dictates of constitutional law. The Supreme Court, on this view, necessarily has the last word both on the meaning of the Constitution and on how it should be applied to concrete instances of state action. The modern case that most exemplifies this principle is *Cooper v. Aaron*, in which the Court associated the finality of its interpretation of the Constitution with the supremacy clause of the Constitution. If the Constitution and laws made pursuant thereto are the law of the land, and the

Court says what the Constitution means, then the Court occupies a position of supremacy with respect to the meaning of law.

Beginning in the last quarter of the nineteenth century, the Supreme Court took an active role in defining constitutional standards for liberty and equality under the Constitution. It has continued to occupy that role ever since. This is not the place to tell the story of its unquestioned historical failures – such as the outrageous decision in *Plessy v. Ferguson* – or of its relative successes – such as *Brown v. Board of Education*. Nor is it the place to discuss the complex, contested legacy of substantive due process analysis, either in the *Lochner* era or the era of *Obergefell*. Rather, the key point for our purposes is that the court's engagement with questions of liberty and equality for the last 150 years have established a set of expectations for the court's role as a guarantor of equality and civil liberties.

In turn, this role has produced a second kind of legitimacy for the Supreme Court, beyond the legitimacy established by independence. The Court has gained tremendous public legitimacy by its iterated, seriously undertaken activity of fulfilling a key constitutional role that the other branches of government and states frequently do not seek to occupy at all. That role makes the Court the final arbiter of the meaning of the rights to liberty and equality enshrined in the Constitution. Given that the Constitution itself does not fully define those rights and in any case cannot self-execute, *some* institution must play the role of interpretation and application. While it could just conceivably have been possible for constitutional interpretation and application to be shared among the branches of government and the states, the absence of a final arbiter would have – and sometimes did -- create tremendous opportunities for conflict.¹

To be clear, what is at issue is not whether you believe that the Court has on the whole done a good job on the whole or a bad one in this work of interpreting and applying constitutional rights. What matters is whether you believe that this function is necessary in a constitutional democracy -- and whether you believe that the Court is the only credible institutional actor capable of fulfilling this function today. If you do, then you should evaluate the value of reform in terms of enabling the Court to continue to do this work.

The Supreme Court's role as active overseer of constitutional democracy is arguably a later development than either of the other two roles. To be sure, the Fifteenth Amendment guarantees a justiciable right to vote. And as early as 1919, some of the Court's justices, in particular Justices Oliver Wendell Holmes Jr. and Louis Brandeis, began to conceive First Amendment jurisprudence in the service of (two rather different) conceptions of democracy. Nevertheless, it was not until the civil rights era and in particular the Court's decision in *Reynolds v. Sims* that the justices began to conceptualize the Court as the supervisor of constitutional standards of equality and fairness in democratic elections.

Notwithstanding its relative modernity, the democratic oversight function has become central to the legitimacy of the Court. Even the most vocal critics of *Bush v. Gore* tend to consider the *Reynolds* principle of one person, one vote to be foundational to U.S. democracy and want the Court to protect voting rights. And even conservative critics of the Court's voting rights

jurisprudence typically favor the Court's decision in *Shelby County v. Holder* as an appropriate use of judicial review to constrain Congress's intervention in state voting practices.

Justice Felix Frankfurter and after him Justice John Marshall Harlan the younger were both deeply skeptical of the Court's entry into the "political thicket" in order to act as a guarantor of democratic practices and procedures. Their view, whether it was correct or not, has now been rendered obsolete by the evolution of the Court's role in the broader constitutional system. Today, there is no other institution that could even plausibly fulfill this function in the United States. While the Supreme Court will inevitably be subject to the criticism that its members allow partisan politics to affect their decisions on voting rights and democracy, it is, as an institution, far more capable of playing the role of oversight than Congress, the president, or state legislatures.

Constitutional Interpretation and its Discontents

The obvious conceptual difficulty with these roles that the Court occupies is that people who are not a majority of Supreme Court justices can also say what the meaning of the Constitution is. They can disagree with the majority of the Supreme Court. And as part of the disagreement, they can assert that the Court is not in fact interpreting the Constitution at all, but rather substituting its own political preferences. In a somewhat difficult passage in Federalist No. 78, Hamilton anticipated – and dismissed -- this criticism:

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature ... The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

Hamilton's argument seems to be that the criticism cannot be right because it proves too much: if judicial interpretation is taken as an exercise of will rather than of properly formulated judgment about the meaning of the Constitution, then it would not make sense to have judges separate from the legislature.

Hamilton's reason for rejecting the criticism is perhaps overstated. He was right, of course, that any act of judicial interpretation can be attacked as based on political preference. And he was right that this criticism, if applied universally, would lead to the conclusion that judges are nothing but legislators. But it is far from clear that this observation means the criticism is of "no weight." (Hamilton excelled at this kind of extreme rhetoric.) In fact, the criticism does have weight. Yet the ultimate answer to the criticism is indeed that the distinctive social practice of judicial review can and must be distinguished from pure legislative preference – by its phenomenology, by its real-world effects, and by the ways we collectively choose to understand it.

In practice, very few close observers of the courts think that judges *always* exercise political preference rather than legitimate constitutional or legal judgment.² Most, though not all, critics of the Court believe that the rule of law is possible in principle. They believe that judges follow the law most of the time. They typically criticize instances of judicial interpretation of the Constitution as mere political preference in contentious, high-profile cases where they sincerely believe the majority of the justices got the issue wrong.

There can be no permanent, satisfactory theoretical answer to this challenge -- or at least no answer yet offered has managed to satisfy everybody permanently. Originalists claim that history can constrain judicial interpretation so that judicial independence and supremacy does not give rise to the substitution of political preference. Yet originalists also have to acknowledge that reasonable people disagree about both original meaning and how to apply it. As a result, even they must admit that the Supreme Court ultimately decides cases based on how many justices vote each way, not based on the true or accurate meaning and application of the Constitution. The same problem exists for those who, like the late Ronald Dworkin, believe the Constitution is susceptible of correct interpretation based on correct morality. In practice, they must admit, justices disagree about the right way to interpret the Constitution, and the rule of decision is the rule of five, not the rule of "whoever is morally correct, wins."

The practical solution to this quandary developed by our constitutional tradition is for the Supreme Court to derive its institutional legitimacy from its performance of the functions of protecting the rule of law, individual rights, and democratic regularity. In these schema of institutional legitimacy, we accept that a majority of the justices may not always get the Constitution right by our lights. But we accept that, on the whole, the justices are interpreting the Constitution correctly *by their own lights*. And we accept the rule of five as the rule of decision because we think that there is no better way to ensure the functioning of the Court in the roles it has assumed than by assigning decisional authority to a majority of justices.

Pursuant to this pragmatic model of institutional legitimacy, we recognize that we may disagree with the Court's decisions, but we think it is better for us that the court preserve its role as protector of the rule of law, of fundamental rights, and democracy than for those functions to be undercut by compromising the Court's legitimacy. To use a phrase applied by Chief Justice William Rehnquist in a different context, we take the bitter with the sweet. We acknowledge that judicial independence opens the possibility of the assertion of political preference by the justices; but we weigh this risk as less dangerous than the alternative of having no independent judiciary in place devoted to protecting the rule of law, fundamental rights, and democracy.

Reasonable people could disagree about the value of the judiciary in this formulation. Some might think that we would be better off without an independent judiciary, or with a judiciary whose constitutional decisions could be overruled by the legislature or the executive or by a public referendum, rather than requiring constitutional amendment. These views can be grounded in a theory of majoritarian democracy that sees the unelected nature of the justices as a reason to consider their powers as undemocratic.

A thoroughgoing defense of the democratic nature of the functions fulfilled by the Supreme Court today is beyond the scope of this statement. Much turns on the definition of constitutional democracy and whether it requires and entails the rule of law, fundamental rights, and the protection of democratic regularity. If it does, then the Court's functions are not undemocratic but necessary to the structure of constitutional democracy. It is also worth noting that even critics who consider all constitutional law to be a species of politics usually concede that all government should not be conducted by referendum. They therefore concede that the design of political institutions always involves trade-offs about how "direct" the democracy should be. That concession means they, too, are involved in an argument about the pragmatic design of constitutional institutions in which the current configuration of the Supreme Court must be measured by whether its functions can be effectively taken up by an alternative institution in its absence.

I think it is fair to say that, in the American political scene as currently configured, the great majority of people accept the trade-off according to which the Supreme Court fulfills its current constitutional functions even while sometimes reaching decisions that they themselves consider wrong. That is, the majority of Americans believe that protecting the rule of law, fundamental rights, and democracy are sufficiently important that they outweigh the dangers of a judiciary that decides cases against what they believe to be the right interpretation of the Constitution.

Reform and Its Consequences

This brings us to the question of court reform. In my view, any reform that would seriously compromise judicial independence would powerfully undermine the court's institutional legitimacy, and thus its ability to protect the rule of law, fundamental rights, and the democratic process. Such reforms would therefore be inadvisable unless absolutely necessary to save the Court from losing the legitimacy that enables it to perform its current functions.

As a case in point, consider court-packing. A conventional definition of court-packing would be the addition of members to the Supreme Court so as to enable the president and Senate then in power to appoint members of the court in order to form a majority whom they expect to change the course of the Court's jurisprudence in predictable ways.

Under almost all ordinary circumstances, court-packing would seriously undermine the legitimacy of the Supreme Court. The reason is that adding new justices for the purpose of changing the direction of constitutional jurisprudence would indicate to the public that Congress and the president seek to control the meaning of the Constitution. To be sure, that control would be exercised through new justices who themselves would be part of the nominally independent judiciary. Yet because those justices would be appointed to positions created specifically in order to change the direction of constitutional jurisprudence, it would be clear that they were not being appointed to be independent, but rather to effectuate a particular jurisprudential view.

On the surface, it would appear that the same could be said about any justice chosen by any president with an eye to how that justice might rule. In a sense, that is true: presidents do indeed

try to predict, within the bounds of the possible, how justices might vote. In a certain sense, that prediction might be seen as undermining the ideal of judicial independence.

Why doesn't that reality lead us to conclude that the judiciary is not generally independent? The answer, I think, is that under existing conditions, presidents must wait for the happenstance of the judicial vacancy opening before they can appoint a Supreme Court justice. Those opportunities are distributed roughly randomly across time.³ They are therefore in an important way accidents. That accidental feature preserves the independence of the judiciary even in the face of the reality of the political appointment process. Who controls the court, jurisprudentially speaking, is at least to some degree the result of chance.⁴

In contrast, in a world of court-packing, there would be no accident in the direction taken by the jurisprudence. It would be, by definition, shaped by the appointments made in order to pack the court. The elimination of the element of randomness would highlight the reality of congressional and presidential control over the judicial branch, and hence detract from judicial independence.

Consider what would happen next. Any party that happened to control both houses of Congress and the presidency would then have a powerful incentive to pack the court itself. Court-packing would likely become a tit-for-tat practice. Instead of the incredible shrinking Supreme Court, we would see the incredible growing Supreme Court, as the number of justices rose with each instance of court-packing.

The likely consequences of this process would be for the Supreme Court to come to be – and to be seen -- as a kind of legislature in itself, albeit one whose members were selected by the political branches rather than elected. Although individual justices might continue to rely on their own independent judgment, the court would often not be in a position to function as a check on the legislative or executive branches except where at least one house of Congress was controlled by the party different from the that of the president. When the president and majority in both houses of Congress came from the same party, any check by the Court would be met with more court-packing.

The upshot of this analysis is that packing the Court would severely undermine the Court's power to check the other branches of government or indeed the states. It would effectively put an end to the Court's ability to act as a protector of the rule of law. It would do all this by drastically reducing the court's institutional legitimacy.

Or consider jurisdiction-stripping. Without taking a view on the constitutionality of Congress blocking the Supreme Court from taking jurisdiction over claims of fundamental constitutional violations, it is still possible to observe that the practice could potentially devastate the Court's ability to fulfill its functions. Denying the Supreme Court the capacity to decide whether a given law violates the Constitution would effectively end the Court's capacity to function as the guarantor of the rule of law with respect to that law. After all, the basic theory of judicial review rests on the proposition that the Constitution is paramount law and that statutes in violation of it are therefore no law at all. If the Court cannot say that (and jurisdiction means "saying the law"), then the Court cannot fulfill its function of ensuring that the paramount law applies in the United States.

It is also manifestly clear that, if Congress and the president begin the practice of jurisdiction-stripping to protect certain laws from constitutional challenge, there is no logical stopping point. It is extremely unlikely that jurisdiction-stripping would be limited to laws with no chance to threaten fundamental rights to liberty or equality. And in the case of laws implicating the basic functioning of democracy, jurisdiction-stripping would make Congress and the president into the final arbiters or judges of the democratic system. I find it difficult to understand the view that would suggest these inherently political and partisan branches of government would do a better job overseeing democratic institutions than would the Court, no matter that the justices can never escape the criticism that they are acting politically.

The Hidden Virtues of the Threat to Independence

In almost all imaginable circumstances, the negative effects of court-packing or jurisdiction-stripping in the long run would outweigh the harms associated with the adoption of judicial interpretations of the Constitution that I might by hypothesis consider wrong. There is, however, one set of circumstances in which court-packing and jurisdiction-stripping, or at least a credible threat of them, might have desirable effects. That is the situation where, over time, the Court manages to squander its institutional legitimacy on its own by a series of decisions that radically countermand the constitutional commitments held by the great majority of the American people.

Imagine a situation in which the Court, wielding the Constitution as a sword, strikes down major legislation favored by a large majority of the public over an extended period of time. Imagine further that the interpretation of the Constitution adopted by the Court to reach these results is rejected by the great majority of the American people. In these circumstances, the institutional legitimacy of the Court would begin to erode, perhaps drastically. If the great majority of Americans believed that the justices were exercising what Hamilton called will, not judgment, then the public would cease to view the Court as legitimately preserving the rule of law. Instead, the public would see the Court as distorting the rule of law to reach its preferred political outcomes.

What constitutional check exists to stop the Supreme Court from acting in this way? One answer is the possibility of constitutional amendment under Article V. But as is well-known, the prescribed process for constitutional amendment is long and arduous and requires not only a supermajority but a very large supermajority of the people's elected representatives to support any amendment. So the Article V check is of limited use.

In contrast, court-packing (and if you think it is constitutional, jurisdiction-stripping) are available whenever the president and the majority in Congress agreed to do it. In an environment where the justices have lost their institutional legitimacy, there would be relatively little reason for Congress and the president not to pack the court. They could do so either in the hopes of restoring the courts legitimacy or, more likely, under circumstances where they accept that the Court's legitimacy is gone for good but want the Court to adopt interpretations of the Constitution that conform with their political preferences.

It follows that, at any given moment in time, the justices must be aware that if their interpretation of the Constitution strays too far from the beliefs held by the majority of Americans, they face the risk of having the Court packed by a president and Congress who no longer think that the preservation of institutional legitimacy is a good reason not to pack the court. (Or having their jurisdiction over the constitutional cases taken away.) In other words, the implicit threat of court-packing and jurisdiction-stripping themselves function as a check on the Court. The justices can still interpret the Constitution by their own lights. But if their interpretations over time go so far away from mainstream constitutional opinion that they cause the court to lose legitimacy, the justices know that it could lead to substantial loss of independence in the form of court-packing, jurisdiction-stripping, and their consequences.

Without entering into the dense historical argument about what actually happened at the Court in the second half of the 1930s, it is at least worth noting that many contemporary observers thought that the Supreme Court reacted to the threat of court-packing by President Franklin Delano Roosevelt and an overwhelmingly Democratic Congress by changing its interpretation of the Constitution so as to allow for the constitutionality of major New Deal legislation. If that account is correct, the events arguably demonstrate the threat of court-packing functioning as a check on the judiciary.

Conclusion

Given the evolution of our constitutional democracy and the role of the Supreme Court within it, we are better off -- much better off, I would say -- preserving the institutional legitimacy of the Supreme Court in order to protect the rule of law, fundamental rights, and the democratic process.

In a longer presentation, I would defend this position more fully, focusing on the ways that judicial review in constitutional cases shapes institutional legitimacy and is in turn shaped by it. For now, let me note simply that the view I am propounding is *not* based on the claim that there is no political element to constitutional decision-making. To the contrary: the meaning of the Constitution is central to the survival and self-determination of the American *polis*. The rule of law, fundamental rights, and the functioning of democracy are all political values. It would therefore be conceptually strange to think that constitutional law is somehow outside the realm of politics.

Yet recognition of the political aspects of constitutional law simply requires us to be upfront in asking whether the Supreme Court as it currently operates fulfills the crucial functions for the *polis* better than any alternative candidate existing at the moment. I have argued here that it does, and that no credible alternative exists. If the institutional legitimacy of the Supreme Court should be destroyed or significantly reduced, we would find ourselves far worse off than we are with respect to preserving the rule of law, fundamental rights, and democracy.

¹ James Madison believed that a major flaw in the Constitution that emerged from the Philadelphia convention of 1787 was its failure to create an institution specifically tasked with reviewing the constitutionality of state laws. He repeatedly suggested the creation of such institution at the convention and was repeatedly rebuffed. The Fourteenth Amendment as interpreted by the Supreme Court arguably repaired the deficit by making the Supreme Court the final decision-maker. It took a civil war to do it.

² Ronald Dworkin, late in his career, did take the view that every act of judicial interpretation relies ultimately on political morality. This conclusion was in tension with his earlier, more influential view that judicial interpretation includes both constraining factor of the interpretive fit with existing legal materials as well as the moral question of how to interpret those materials in their best light. And there exists a body of critical analysis of the courts that insists that every judicial decision must be understood as the product of politics.

³ Some justices may choose to retire when the presidency and the Senate are controlled by the party whom they prefer to name their successors. In general, that would not lead to a change in the court's ideological makeup, so I pass over it here.

⁴ Of course, if one party controls the presidency in the Senate much more than the other, it will have statistically more opportunities to appoint Supreme Court justices. But the disparity would have to be rather great to overcome the randomness currently built into the system.