

POLITICAL WEAPONS OR JUDICIAL OFFICERS: HOW THE  
UNITED STATES SUPREME COURT'S INCREASED POLITICAL  
POLARISATION HIGHLIGHTS AN IMMEDIATE NEED FOR  
REFORM

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Abstract

The “politicization of justice” has become a most unwelcome stereotype for our nation’s highest court. While it is understandable that Justices must still judge, and so in a practical matter, leaving their political views at the door is not always possible. When society can accurately and consistently predict the Justices’ votes solely based on their political ideology, it is difficult to see past the view that the Justices are consistently manipulating the Constitution and the facts of the cases before them to serve their own political agenda. And when an Executive can be elected into office primarily based on the Court overturning a long-standing Constitutional right, and when that Court—comprised of Justices placed there by the same Executive—then follows through on that promise and aligns itself with the Executive’s ideological viewpoint, *major questions* must be raised. This Article argues that the Appointments Clause is the source of this abhorrent issue. Thanks to the politicized process by which Supreme Court Justices arrive on the bench, politics and the Judiciary’s propensity to allow it to seep into its legal reasoning have blurred the lines of governmental separation of powers and prohibited the judiciary from being the last line of defense to an encroaching representative body that the Framers designed the judiciary to do. This Article argues that the Appointments Clause must be amended based on the United Kingdom Supreme Court’s independent selection commission process. This proposal would mean that, when a vacancy on the Court arises, the United States Supreme Court Chief Justice would convene an independent selection commission, headed by the ABA president, with four other distinguished judges and/or legal scholars randomly selected from the ABA’s rolling selection committee. This amendment would mean that the Executive would have limited control over who arrives to the Supreme Court, and the decision would be made entirely by an independent body, free from political pressure.

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## INTRODUCTION

Upon the backdrop of the white pillars of the White House, cloaked by star-spangled banners, President Trump, on an eerie day in January 2021, embarked on another caustic maneuver to reinforce his presidential

rhetoric that the November 2020 election was “rigged.”<sup>1</sup> Standing above thousands of those who had gathered, President Trump urged his supporters to “fight.”<sup>2</sup> To “fight” as if they were battling against an enemy combatant force overtaking their nation.<sup>3</sup> And to save their nation, to make it great again, they were to “walk down Pennsylvania Avenue.”<sup>4</sup> And that’s precisely what Trump’s garrison did.<sup>5</sup> Marching straight into the Capitol, disrupting all democratic serenity as they advanced, the rioters neutralized Congress’s assembly convened to certify President Biden’s election victory.<sup>6</sup>

In the coming days and months, President Trump became branded as the leader, no longer of the nation, but of an anti-democratic faction that would rather incite violence and insurrections than lose its power.<sup>7</sup> And the House agreed, making President Trump the first president to be impeached twice.<sup>8</sup> The House found that President Trump engaged in an “insurrection against the government . . . giving aid . . . to its enemies” and asked the Justice Department to “charge” him for “incit[ing] . . . an

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1. See President Donald Trump, Remarks on the Ellipse (Jan. 6, 2021) (transcript available at <https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27> [<https://perma.cc/6FTC-7JBK>]) (declaring that the Democratic party rigged the election like they had never done before by using “fake news media” and “Big Tech”).

2. See *id.* (“And we fight. We fight like hell. And if you don’t fight like hell, you’re not going to have a country anymore.”).

3. See JOHN RENNIE SHORT, *INSURRECTION* 9 (2024) (stating that President Trump’s supporters were “obeying his call to action”).

4. See Trump, *supra* note 1 (pronouncing that he, along with the thousands of “American patriots” gathered there to listen, would “walk down Pennsylvania Avenue . . . to the Capitol . . . to take back [their] country”).

5. See Michael Sozan & William Roberts, *January 6 Hearing Day 7: Donald Trump Summoned a Mob*, CTR. FOR AM. PROGRESS (July 13, 2022), <https://www.americanprogress.org/article/january-6-hearing-day-7-donald-trump-summoned-a-mob> [<https://www.americanprogress.org/article/january-6-hearing-day-7-donald-trump-summoned-a-mob/>] (“Donald Trump summoned a violent mob as a last attempt to overturn the valid election.”) (last visited May 23, 2026).

6. See SHORT, *supra* note 3, at 10 (highlighting that President Trump’s supporters disturbed Congress’s proceedings “in an act of insurrection that sought to overthrow the outcome of a legitimate election”).

7. See Steven Gardiner & Tarso Luís Ramos, *Capitol Offenses: January 6th 2021 & The Ongoing Insurrection*, POL. RSCH. ASSOCS. (Jan. 12, 2022), <https://politicalresearch.org/2022/01/12/capitol-offenses-january-6th-2021-ongoing-insurrection> [<https://perma.cc/6AZA-LADW>] (discussing how President Trump’s mob “assaulted and wounded more than 150 law enforcement personnel,” with both law enforcement and the “mob” having fatalities).

8. See Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html> [<https://perma.cc/4Y6P-9WBA>] (discussing how Speaker Nancy Pelosi declared the event “one of the darkest chapters in American history”).

insurrection.”<sup>9</sup> In response, President Trump insisted that his actions, no matter how egregious, were protected under presidential immunity.<sup>10</sup> And so it was then the duty of the judiciary to balance its scales and determine two issues: first, President Trump’s immunity and, secondly, whether the Fourteenth Amendment, “which prohibits any officeholder involved in an ‘insurrection or rebellion’ from holding official office[.]” would prevent the impeached president from barging into the Oval Office once more.<sup>11</sup>

Regarding the Court’s second inquiry, as evidenced by the 2024 election, we now know which way these scales tipped. The Supreme Court unanimously held that individual states were barred from enforcing Section 3 of the Constitution’s Fourteenth Amendment, holding that this was purely within Congress’s remit and outside the purview of the individual States.<sup>12</sup> And, therefore, reversed decisions in Colorado, Maine, and Illinois, which used the Fourteenth Amendment as a basis for removing President Trump from the presidential ballot altogether.<sup>13</sup> While this decision is rooted in satisfactory constitutional interpretation, it is this decision, together with how the Court deduced President Trump’s criminality, that has troublesomely allowed the two-time-

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9. See Charlie Savage, *Was Jan. 6 an Insurrection? If So, Did Trump Participate in It?*, N.Y. TIMES (May 27, 2025), <https://www.nytimes.com/live/2024/02/08/us/trump-supreme-court-colorado-ballot?searchResultPosition=4#was-jan-6-an-insurrection-if-so-did-trump-participate-in-it> [https://perma.cc/CKX5-EJES] (discussing how the clause President Trump was accused of violating, Section 3 of the Fourteenth Amendment, was written in light of “the South’s armed rebellion against the Union”).

10. See *Trump v. United States*, 603 U.S. 593, 593 (2024) (stating that Trump moved to dismiss his indictment, arguing that “a President has absolute immunity from criminal prosecution for actions performed within the outer perimeter of his official responsibilities”).

11. See Fandos, *supra* note 8 (highlighting President Trump’s efforts to pressure Georgia officials to “‘find’ him enough votes to overturn” the election and his “fight[ing]” speech at his rally on January 6, 2021).

12. See *Trump v. Anderson*, 601 U.S. 100, 110 (2024) (“States may disqualify persons holding or attempting to hold *state* office. But States have no power under the Constitution to enforce Section 3 [of the 14th Amendment] with respect to federal offices, especially the Presidency.”).

13. See *id.* at 117 (holding that the decision of the Colorado Supreme Court “cannot stand”); see also Zach Montellaro, *Maine Strips Trump from the Ballot, Inflaming Legal War Over His Candidacy*, POLITICO (Dec. 18, 2023), <https://www.politico.com/news/2023/12/28/maine-kicks-trump-off-ballot-under-14th-amendment-001332942> [https://perma.cc/4HVQ-V22N] (stating that Maine Secretary of State, Shenna Bellows, removed President Trump from the 2024 presidential election under the Fourteenth Amendment); Zach Montellaro & Shia Kapos, *Illinois Becomes Third State to Kick Trump off the Ballot Over Jan. 6*, POLITICO (Feb. 28, 2024), <https://www.politico.com/news/2024/02/28/illinois-trump-ballot-constitution-00144019> [https://perma.cc/8P89-QKFS] (stating that Judge Tracie Porter ruled that President Trump was ineligible to run for president under the Fourteenth Amendment).

impeached president to successfully mount another retaliatory effort for office.<sup>14</sup>

Concerning the first inquiry, the idea of executive immunity is not novel to the Court, and there is a long line of precedent to follow in the area. In fact, the Court has dealt with the constitutional provision with Presidents Nixon, Clinton, and Trump.<sup>15</sup> In *Nixon v. Fitzgerald*,<sup>16</sup> the Court outlined that a sitting president enjoys absolute immunity from civil suits for acts within his official conduct.<sup>17</sup> In *Clinton v. Jones*,<sup>18</sup> the Court, however, outlined the limitation that executive immunity does not extend to unofficial acts.<sup>19</sup> And in *Trump v. Vance*,<sup>20</sup> the Court paid lip service to the notion that the President is not above the law.<sup>21</sup> But in *Trump v. United States*,<sup>22</sup> the Court—primarily spearheaded by President Trump’s three appointees—stretched the absolute immunity provision in *Nixon* to new heights, allowing President Trump to plot his next move and lounge comfortably from the fictitious legal force field it created.<sup>23</sup> The Court again held that the executive enjoys absolute immunity from criminal conduct arising from his “core” presidential acts, which now include any interactions with the nation’s Justice Department.<sup>24</sup> But the Court stretched the outer periphery of the president’s official responsibilities so far that I’m sure it’s still casting a murky shadow over Washington, D.C., today.<sup>25</sup> The impact of this is nowhere more evident than in Justice Sonia Sotomayor’s dissent in *Trump v. United States*.

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14. See David Cole & Brett Max Kaufman, *Supreme Court Grants Trump, Future Presidents a Blank Check to Break the Law*, THE AM. C.L. UNION (July 3, 2024), <https://www.aclu.org/news/civil-liberties/supreme-court-grants-trump-future-presidents-a-blank-check-to-break-the-law> [<https://perma.cc/Z9PW-NUEP>] (discussing how the Court’s decision has allowed President Trump the possibility of winning re-election).

15. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Clinton v. Jones*, 520 U.S. 681 (1997); *Trump v. Vance*, 591 U.S. 786 (2020).

16. 457 U.S. 731 (1982).

17. *Id.* at 749 (finding absolute presidential immunity from damages stemming from President Nixon’s official acts because the executive’s immunity is functionally mandated due to his unique office).

18. 520 U.S. 681 (1997).

19. *Id.* at 685, 694–96 (holding that presidential immunity does not extend past the scope of action taken in the official capacity of his office; finding that President Clinton’s “‘abhorrent’ sexual advances” were beyond the scope of immunity).

20. 591 U.S. 786 (1982).

21. *Id.* at 810 (holding that no one, not even the president, is above the common, societal duty to produce evidence for a criminal hearing).

22. 603 U.S. 593 (2024).

23. *Id.*; see Cole & Kaufman, *supra* note 14 (discussing how the Court’s ruling hands future presidents a “blank check to break the law”).

24. See *Trump*, 603 U.S. at 641 (2024) (stating that the president’s immunity regarding his “core constitutional powers” must be absolute).

25. See Cole & Kaufman, *supra* note 14 (discussing how holding any president criminally accountable will be extraordinarily difficult in light of the Court’s decision).

Justice Sotomayor wrote:

The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.<sup>26</sup>

And yes, the majority's decision is alarming. And yes, it is frightening to ponder the potential presidential possibilities that Justice Sotomayor has presented.<sup>27</sup> But even more alarming than this is why this *Supreme* Court reached this decision.<sup>28</sup> The thought that our Justices are no longer doing their duty by interpreting the Constitution as legal scholars, but instead allowing their political ideologies to manipulate the foundational text of this nation, is shuddering.<sup>29</sup> It is vital for any civic democracy that a nation's judiciary is separate from all outside forces<sup>30</sup> and to be a check on all other branches of government.<sup>31</sup> But, when these lines become blurred, and Justices become power-hungry celebrities in their own right, the stark reality is the one we have before us today:<sup>32</sup> a judiciary that is so interwoven with the ideologies of the executive that they are willing to allow the "most powerful person" in the world to be a criminal.<sup>33</sup>

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26. *Trump*, 603 U.S. at 685 (Sotomayor, J., dissenting).

27. *Id.* (highlighting that a future president could assassinate a political rival or organize a military coup and be immune from criminal prosecution).

28. See Tom Clark, B. Pablo Montagnes & Jörg L. Spenkuch, *Supreme Court Justices Become Less Impartial and More Ideological When Casting the Swing Vote*, KELLOGG INSIGHT (Sep. 13, 2018), <https://insight.kellogg.northwestern.edu/article/supreme-court-justices-become-less-impartial-and-more-ideological-when-casting-the-swing-vote> [<https://perma.cc/RZY2-TKBR>] (highlighting that "[s]ince the 1940s, political scientists have known that the ideology of a judge—whether conservative or liberal—often predicts which way he or she will vote" and that these "results prompt serious questions about the neutrality of the judicial branch, since it suggests that a justice may treat a case differently just because it presents a chance for them to shape policy").

29. See Tom S. Clark et al., *Politics from the Bench? Ideology and Strategic Voting in the U.S. Supreme Court 2* (CESifo Working Paper No. 7264, 2018) (discussing how the Supreme Court justices are "strategic actors . . . motivated by instrumental considerations").

30. See Frank M. Johnson Jr., *The Role of the Judiciary with Respect to Other Branches of Government*, 11 GA. L. REV. 455, 463 (1977) (discussing the Founding Fathers' "deeply held belief" that the "powers of the government should be separate and distinct").

31. See *id.* at 464 (discussing how federal courts were given the mandate to "check and to restrain" any legislative or executive infringement).

32. See Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 153 (2019) (discussing how the Supreme Court has become undeniably "polarized along party lines" and that it will be viewed as a "party-dominated institution").

33. *Trump v. United States*, 603 U.S. 593, 685 (2024) (Sotomayor, J., dissenting).

However, the Supreme Court does not just decide issues with the president. It also strikes its gavel upon societal issues that change the face of this nation.<sup>34</sup> Whether that be deciding at what point a woman no longer has bodily autonomy, the civil rights of the nation's peoples, or examining Congress's delegative powers, this Court makes fundamental decisions that are felt throughout the States.<sup>35</sup> So the question becomes: Are the Justices of our Supreme Court, just, supreme to other judicial officers of this nation? That they are just simply better at interpreting the Constitution than the rest of us? Or is it instead that those Justices are politically intertwined with a supreme leader, who dictates their every move? It's sadly not too far-fetched to believe that it's the latter.

*And so, therefore, "with fear for our democracy, I dissent."*<sup>36</sup>

It is important to note that the Judiciary's politicization is a topic that has received substantial scholarship and is an issue that is well-known to scholars. Therefore, this Article's commentary on the topic does not seek to present, in its entirety, a novel stance on the Judiciary's inner workings. Instead, this Article uses this abhorrent politicization to critically compare the United States Supreme Court with its British counterpart.<sup>37</sup> And seeks to explain how the United States Supreme Court, with all of its democratic processes, is still considered by the American public to be an overreaching political body made up of judicial elitists.<sup>38</sup> Yet, the United Kingdom Supreme Court, which appears to be riddled with undemocratic intricacies, is the polar opposite—with the vast majority of Britons viewing it as a politically neutral and *solely* judicial body.<sup>39</sup>

This Article will offer reasoning for and methods for confronting the presence of political ideologies on the Court. Irrespective of political ideologies, the current president, or current Supreme Court justices, this Article positions itself as a critical analysis of whether the politicization of the modern-day Supreme Court aligns with the Constitution and how we can fix it. Part I will begin by laying the foundations of the American government and the role that the Framers gave to the Judiciary. I will focus primarily on the powers that the judiciary has and how Supreme Court Justices interpret their sworn Constitution. In Part II, I raise how

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34. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 280 (1957) (discussing how the Court is in an awkward intersection between the judiciary and other branches of government because the Court must decide cases that cause severe disagreement within the society, and thus, these cases have a "political" setting).

35. *Landmark United States Supreme Court Cases*, A.B.A., [https://www.americanbar.org/groups/public\\_education/programs/constitution\\_day/landmark-cases/](https://www.americanbar.org/groups/public_education/programs/constitution_day/landmark-cases/) [https://perma.cc/GR7P-T9GN] (last visited Mar. 19, 2026).

36. *Trump*, 603 U.S. at 686 (Sotomayor, J., dissenting).

37. See discussion *infra* Part III.

38. See *infra* notes 219–22 and accompanying text.

39. See *infra* notes 216–18 and accompanying text.

the method and manner of Supreme Court Justice nominations facilitate and are a vessel for politics to weave their way into the judiciary and the negative implications of this. This discussion surrounding judicial nominations is then used to discuss more broadly the impact and occurrence of ideological shifts due to Justices leaving and being appointed to the Court, and the effects this has on existing case law and precedent. Part II.B will then focus on the Major Questions Doctrine, which will be used to discuss the evolution of case precedent, emphasizing that due to an ideological shift in the Court, a legal precedent that had stood for over a century was changed, bringing with it dramatic implications. And finally, in Part IV, based upon a comparative analysis between the United States Supreme Court and the United Kingdom Supreme Court, I suggest potential reforms to help combat the prevalence of political polarization within the judiciary.

## I. BACKGROUND

The Founders crafted the Federal Constitution with the notion of Separation of Powers as its crowning jewel.<sup>40</sup> Based upon the works of Montesquieu, the U.S. Constitution, the building block of this nation, was shaped to prevent one person's "tyrannical concentration" of government powers.<sup>41</sup> To do that, the Founders explicitly afforded the Federal Government limited and specific enumerated powers and demarcated each branch's role in Articles I, II, and III of the Constitution.<sup>42</sup> Article I established that Congress—the legislative branch—would be the engine of the republic, wielding the power to enact "all laws necessary and proper" to the branch's enumerated powers.<sup>43</sup> Article II established the executive as the nation's enforcer, marking him as Commander in Chief and the responsibility to "take care that all laws are faithfully executed."<sup>44</sup> And Article III was reserved for the role of the judiciary, which allows federal courts to adjudicate cases or controversies.<sup>45</sup> The Constitution is also littered with other guardrails to the potential abuse of power, such as the bicameralism of Congress and presentment requirements of Article

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40. See Pelekeh H. Tapang, *Examining Presidential Immunity: The January 6 Riot, Trump, and the 14th Amendment – An Imperative Consideration of Constitutional Law*, 6 AM. J. POL. SCI. L. & CRIMINOLOGY 14, 17 (2024) (stating that Montesquieu's "'The Spirit of the Laws' laid the intellectual groundwork for the concept of separation of powers within [the] government").

41. See THE FEDERALIST NO. 48 (James Madison); see also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328 (2001) (discussing how Madison was overtly aware of the need to prevent tyranny arising within the federal government).

42. U.S. CONST. art. I, § 8.

43. U.S. CONST. art. I, § 8, cl. 18.

44. U.S. CONST. art. II, § 3.

45. U.S. CONST. art. III, § 2, cl. 1.

I.<sup>46</sup> Fundamentally, however, the horizontal separation between the branches of government, which enjoin upon the branches “separateness but interdependence,”<sup>47</sup> and the vertical separation between the States and the federal government, which protects Federalism and the States’ power, all establish the necessary checks and balances, which ensure that each cog within the American machine performs its designated function.<sup>48</sup> And as well as cases or controversies, Article III also outlined the Judiciary’s designated function and breadth of powers.<sup>49</sup>

### A. *The Power of the Judiciary*

The Framers intended that the judiciary would resolve conflicts with “principled adjudication,” rather than the “political will or force” of the legislative and executive branches.<sup>50</sup> The judiciary was intended to serve as the “bulwark of a limited constitution.”<sup>51</sup> To be a “faithful guardian[]” to this foundational text, resisting all political efforts to depart from its provisions.<sup>52</sup> In fact, an independent judiciary was an “excellent barrier” to any “encroachments and oppressions of the representative body.”<sup>53</sup> And it is by abiding by these fundamental principles laid out by Alexander Hamilton that the judiciary can “perpetuate the sanctity of the rule of law.”<sup>54</sup> And be the independent, constitutionally bound, resistant force to political powers and any authoritarian regimes.<sup>55</sup>

As noted above, Article III of the Constitution restricts the jurisdiction of federal courts to cases or controversies.<sup>56</sup> This means that for a court

46. See Clark, *supra* note 41, at 1328 (discussing that bicameralism and presentment requirement are “principal means of maintaining the constitutional separation of powers”).

47. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (discussing how the “dispersed powers” of the government will be integrated into a working government).

48. See Clark, *supra* note 41, at 1328–29 (discussing that “the interior structure of the government” would ensure that they would each “check each other” and “consider state prerogatives”).

49. See U.S. CONST. art. III.

50. See Clark, *supra* note 41, at 1348 (discussing the Supremacy Clause of the Constitution); see also Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 31–41 (2000) (discussing the implications for modern administrative law in light of the Founders’ expectation that the judiciary would exercise “judgment” as opposed to its “will”).

51. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

52. *Id.* at 468–70.

53. *Id.* at 465.

54. See Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 457 (1986) (discussing how the Supreme Court is the only national institution that gives moral force to the Constitution).

55. See *id.* at 456–57 (discussing both Hamilton and James Madison’s concerns that “all political power is of an encroaching nature” and that it was the judiciary’s responsibility to maintain constitutional boundaries).

56. See U.S. CONST. art. III, § 2; see also *Anthony v. Driehaus*, 573 U.S. 149, 157 (2014).

to hear a case, a plaintiff must have “standing”<sup>57</sup> to bring an issue that is not “moot[,]”<sup>58</sup> is “ripe[,]”<sup>59</sup> and does not involve a “political question.”<sup>60</sup> These justiciability requirements preserve the separation of powers and prevent the judiciary from “usurp[ing] the powers of the political branches.”<sup>61</sup> However, in its role as adjudicator within the separation of powers, the judiciary does not just hear private cases or controversies; the Court has also inferred from Article III the power of judicial review.<sup>62</sup> Outlined by Chief Justice Marshall in the seminal case, *Marbury v. Madison*,<sup>63</sup> the Court declared that it is “emphatically the province and duty of the judicial department to say what the law is.”<sup>64</sup> And because the Constitution is the “supreme law of the land,” along with the power of judicial review, the judiciary has the authority to review the Constitutionality of legislative and executive acts.<sup>65</sup>

### B. Constitutional Interpretation

In reviewing the Constitutionality of the matters before them, Supreme Court justices’ decision-making has been categorized into two categories: originalist and progressive.<sup>66</sup> Originalism contains three primary interpretative styles: original intent, textualism, and strict constructionism.<sup>67</sup> An original intent style asks what the Framers’ intent was when writing the relevant Constitutional provision.<sup>68</sup> Whereas a

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57. See *Driedhaus*, 573 U.S. at 157–58 (discussing that to satisfy standing, a plaintiff must show an (1) injury-in-fact that is concrete, particularized, and actual/imminent, (2) causation, and (3) redressability).

58. See *Uzuegbunam v. Preczewski*, 592 U.S. 279, 282 (2021) (stating that a plaintiff must maintain a “personal interest in the dispute” at all stages of litigation and if during the course of litigation, the court determines that it can no longer provide the plaintiff effective relief, the case is considered moot).

59. See *Driedhaus*, 573 U.S. at 156 (discussing three factors that determine whether a case is “ripe for review: (1) likelihood that the alleged harm would come to pass; (2) whether the factual record was sufficiently developed; and (3) the hardship to the parties if judicial relief was denied”).

60. See *Baker v. Carr*, 369 U.S. 186, 210–11 (1962) (outlining that if an issue is “committed by the Constitution to another branch of government, or” if the branch’s action exceeds the authority it has been given, then the matter is considered a political question and non-justiciable).

61. *Driedhaus*, 573 U.S. at 157.

62. See *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (stating that “the judicial power of the United States is extended to all cases arising under the Constitution”).

63. See *Marbury*, 5 U.S. at 177.

64. *Id.*

65. See *id.* at 180.

66. See Adam G. Rutkowski, *Constitutional Interpretation Styles of US Supreme Court Justices*, in *OPEN JUDICIAL POLITICS* (Rorie Spill Solberg & Eric Waltenburg eds., 2nd ed. 2021).

67. See *id.*

68. See Frederick Shauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825, 827 (2022) (discussing how original intent originalism looks to the “meaning of the language at the time of enactment”).

Justice with a textualism style looks solely at the text of the Constitution itself, analyzing the plain meaning and relationship of words from both the contemporary time the Constitution was written and the present day.<sup>69</sup> And strict constructionism limits Constitutional interpretation to the Constitution's enumerated clauses.<sup>70</sup> In comparison, a progressive interpretive style treats the Constitution as a living document meant to adapt and evolve over time.<sup>71</sup>

But, there is also a third, not so positive, way that Supreme Court Justices have been categorized, and that is as judicial activists.<sup>72</sup> Judicial activism refers to when a Justice "abandon[s] their responsibility to interpret the Constitution and instead decide cases to advance their preferred policies."<sup>73</sup> Instead of being "faithful guardian[s]" or "bulwark[s]" to the Constitution, they abandon their duty and supplant the Framers' vision of our nation with their own.<sup>74</sup> They choose to legislate from the bench, change our nation's laws, and manipulate the Constitution's text on a whim, depending on their own political ideologies.<sup>75</sup> And it is an issue that has plagued the Court for decades.<sup>76</sup> In fact, society has accused the Court of engaging in a "sustained attack from an arrogant judicial elite" against civic democracy for at least the past decade.<sup>77</sup> And when society can accurately and consistently predict the Justices' votes purely based on their political ideology, it is difficult to see past the view that Justices are abandoning their duty to this nation and manipulating the Constitution and the facts of the cases before them purely to serve their own political agenda.<sup>78</sup>

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69. See Rutkowski, *supra* note 66.

70. See Rutkowski, *supra* note 66.

71. See Shauer, *supra* note 68, at 826 (discussing how a living Constitution theory takes in account the "shifting and evolving nature of the world['s]" problems).

72. See Jane S. Schacter, *Putting the Politics of Judicial Activism in Historical Perspective*, 2017 SUP. CT. REV. 209, 211 (2017) (discussing how the Court has frequently been described as plagued by "judicial activism").

73. Tina Rodia, *What Defines Judicial Activism? Not Being an Activist, Says Kermit Roosevelt*, PENN TODAY (July 15, 2022), <https://penntoday.upenn.edu/news/what-defines-judicial-activism-not-being-activist-says-kermit-roosevelt> [<https://perma.cc/TS8S-DXR9>].

74. See *supra* notes 51–52 and accompanying text.

75. See Schacter, *supra* note 72, at 211 (discussing how Congress acted to respond to "activist court judges overstepping their constitutional authority by legislating from the bench").

76. See Schacter, *supra* note 72, at 211 (discussing how the court has been accused of "judicial activism" since the 1990s).

77. See Ted Cruz, *Constitutional Remedies to a Lawless Supreme Court*, NAT'L REV. (June 26, 2015, at 21:39 ET), <https://www.nationalreview.com/2015/06/ted-cruz-supreme-court-constitutional-amendment/> [<https://perma.cc/WK7S-V4S4>].

78. See Rutkowski, *supra* note 66.

### C. *United States Supreme Court Judicial Appointments*

But can we blame them? After all, the process by which any Justice arrives at their comfy throne is by jumping through countless political hoops and being at the mercy of our political elite.<sup>79</sup> The appointment process is enshrined within Article II of the Constitution and gives the President the power to “nominate, and by and with the Advice and Consent of the Senate, [to] appoint . . . Judges of the supreme Court.”<sup>80</sup> However, because the Senate approves around ninety percent of the names presented to them, the President’s political appointment power and influence over the Court cannot be underestimated.<sup>81</sup> In fact, it is well-assumed that Presidents will only select a nominee that they believe will further their political agenda.<sup>82</sup> And if the President wants to tackle a particularly salient, divisive issue, they are inclined to nominate a controversial, politically extreme Justice, no matter the other potential consequences.<sup>83</sup>

The “politicization of justice” has become an unwelcome stereotype of the American government, and judicial appointments have become a prominent weapon in a president’s toolbox.<sup>84</sup> But while it has always been clear that a president will nominate a judge to appease their party, today’s dramatic, extreme ideological gap between justices was ignited during President Reagan’s Administration.<sup>85</sup> President Reagan started the trend of Republican presidents appointing more conservative justices, and Democratic presidents followed suit by subsequently appointing more liberal justices.<sup>86</sup> Our last two presidents have fit perfectly into this

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79. See BARRY J. McMILLION, CONG. RSCH. SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT’S SELECTION OF A NOMINEE 1 (2022) (discussing the Constitution’s Appointments Clause).

80. U.S. CONST. art. II, § 2.

81. See John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 MICH. L. REV. 1436, 1439 (2000) (discussing that before 2000, in the last 100 years, the Senate had approved eighty-nine percent of the President’s Supreme Court nominees).

82. See McMILLION, *supra* note 79, at 8 (discussing that presidents will only nominate individuals they believe will consistently vote with the President’s policy preferences).

83. See McMILLION, *supra* note 79, at 8–9 (discussing how a President who wishes to select a “controversial nominee” will have to balance the benefits against the costs of a political battle).

84. See Pawel Laidler, *Setting the Stage: The Supreme Court and the 2022 Midterm Elections*, in THE CROSSROADS ELECTIONS 51, 70 (Renata Duda & Maciej Turek eds., 2024) (discussing how because of the judiciary’s prominent position, politicians are trying to enhance their political position through the Court’s membership).

85. See Baylynn Brunetti, *Restructuring the United States Supreme Court*, NYU AM. PUB. POL’Y REV. (Jan. 8, 2024), <https://nyuappr.pubpub.org/pub/zytcx8ij/release/2> [<https://perma.cc/3K7S-Z467>] (recognizing the executive’s appointment power but highlighting that the polarized ideologies we see today only developed since President Reagan).

86. See *id.*

mold<sup>87</sup> both of whom have further divided the extremist views of the Court and deepened the perception that the Court is a political football to be thrown between each party.<sup>88</sup> President Biden's appointment of Jackson and President Trump's appointments of Gorsuch, Kavanaugh, and Barrett are all stark examples of the executive manipulating its power to further polarize ideologies.<sup>89</sup> In light of Justice Breyer's departure from the bench, Justice Jackson's appointment process was characterized by left-leaning liberal readings of constitutional issues such as abortion, gender identity, and judicial activism.<sup>90</sup> In her short time on the bench, she has proved to be an integral member of the developing three-women liberal coalition with Justices Kagan and Sotomayor.<sup>91</sup> In contrast, President Trump's judicial appointments of Gorsuch, Kavanaugh, and Barrett were three of his 230 judicial appointments that saw the Republican Party try to manufacture a conservative-leaning judiciary.<sup>92</sup>

This was also highlighted in the stark contrast between the nominations of Obama's liberal Supreme Court candidate, Garland, and Trump's now-Justice Barrett.<sup>93</sup> Just forty days before the 2020 presidential election, the death of Justice Ruth Bader Ginsburg, a liberal stalwart defender of the rights of women, ethnic, and sexual minorities, allowed President Trump to make his third judicial appointment: Justice Amy Coney Barrett—who joined Justices Gorsuch and Kavanaugh as the third Trump-trooper.<sup>94</sup> And whereas the Republican-led Senate dragged its feet for over seven months and blocked Obama's candidate, it confirmed Barrett in less than a month so that Trump could pack *his* Court before Election Day.<sup>95</sup> However, this appointment did not just add to the

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87. See generally Laidler, *supra* note 84, at 70 (showcasing how presidents will appoint ideologically aligned justices).

88. See Brunetti, *supra* note 85.

89. See Laidler, *supra* note 84, at 70 (showcasing how presidents will appoint ideologically aligned justices).

90. See Laidler, *supra* note 84, at 55 (discussing how President Biden's nomination of Justice Jackson was seen as an effort to preserve the departing Justice Breyer's liberal ideology).

91. Elie Mystal, *Ketanji Brown Jackson Is Redefining What It Means to Be a Liberal Justice*, THE NATION (Aug. 5, 2024), <https://www.thenation.com/article/society/ketanji-brown-jackson-legal-philosophy/> [<https://perma.cc/ME4X-LK5M>] (highlighting that Justice Jackson has been “eager to call out her colleagues’ frequent attempts to inflate the Supreme Court’s power”).

92. Alanna D. Richer & Lindsay Whitehurst, *Trump Transformed the Supreme Court. Now the Justices Could Decide His Political and Legal Future*, ASSOCIATED PRESS (Dec. 21, 2023, at 9:33 ET), <https://apnews.com/article/donald-trump-14th-amendment-immunity-supreme-court-d3f001f66c5c3e85302b8772753ed769> [<https://perma.cc/6XRK-2B72>] (discussing how President Trump's plan was a “part of a GOP push to transform the ideological landscape of the bench”).

93. See Laidler, *supra* note 84, at 71–72 (highlighting how “President Trump’s approach to Supreme Court nominations” was akin to “Court packing”).

94. See Laidler, *supra* note 84, at 54 (discussing how Justice Ginsburg “played the same role for liberal constitutional interpretation as [Justice] Scalia did” for the conservatives).

95. See Laidler, *supra* note 84, at 71–72.

sheer number of conservative appointees; it also meant that a fierce liberal constitutionalist was replaced by a deeply conservative judge whose views on human and civil rights were the polar opposite of Ginsburg's.<sup>96</sup>

It is true that the Supreme Court has been slowly drifting toward a conservative majority for decades.<sup>97</sup> However, the nation has not been at the mercy of such a polarized Court in nearly a century.<sup>98</sup> Today, the Court stands with a 6-3 conservative majority, with Justices Kagan, Sotomayor, and Jackson battling for the left, while Justices Gorsuch, Kavanaugh, Barrett, Thomas, Alito, and Roberts all bestowing a conservative ideology.<sup>99</sup> The power of this polarization was shown no clearer than in three cases decided in a single week in June 2022: *New York State Rifle & Pistol Association, Inc. v. Bruen*, *Dobbs v. Jackson Women's Health Organization*,<sup>100</sup> and *West Virginia v. EPA*.<sup>101</sup> Following which, the concern about the Court's political nature was vaulted to saliency due to the conservative majority's willingness to cast aside "Chief Justice Roberts' incremental approach to change."<sup>102</sup> In doing so, the Court revealed its true political agenda: to reverse well-cemented constitutional liberties and dismantle the administrative state.<sup>103</sup>

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96. See Laidler, *supra* note 84, at 54 (highlighting how the significance of Justice Ginsburg's jurisprudence made Justice Barrett's appointment "highly political").

97. See Meghan Koza & Michael S. Vaughan, *The Supermajority: How the Supreme Court Divided America*, 36 J. CRIM. JUST. EDUC. 4, 805–08 (2024) (reviewing MICHAEL WALDMAN ET AL., *THE SUPERMAJORITY: HOW THE SUPREME COURT DIVIDED AMERICA* (2023)) (highlighting that the Court has not seen such a Conservative Court since the 1930s).

98. See *id.* (explaining how the polarized Court is a result of Justice Barrett replacing Justice Ginsburg).

99. Bernd Debusman Jr., *How the Supreme Court Became a Political Battlefield*, BBC (July 2, 2024), <https://www.bbc.co.uk/news/articles/crg4rz6zedyo> [<https://perma.cc/8VT7-7TGD>].

100. 597 U.S. 215 (2022).

101. 597 U.S. 697 (2022); Koza & Vaughan, *supra* note 97, at 805.

102. See Koza & Vaughan, *supra* note 97, at 805 (highlighting how the Court's disregard for Chief Justice Robert's incremental approach to change shows an "abrupt right turn" that "deviates from public consensus and reveals the Court's agenda").

103. See Koza & Vaughan, *supra* note 97, at 805 ("[T]he era of a 'living constitution' is over, as the conservative supermajority highlights textualism and originalism.").

## II. ANALYSIS

### A. *The Impact of the Court's Polarization on Existing Case Law*

The first case that evidenced the trajectory of how this Court would treat case law was in *Bruen*.<sup>104</sup> Following the most mass shootings in the nation's history, the Court granted *certiorari* to hear the case and proceeded to revolutionize how the Court views the Second Amendment.<sup>105</sup> Perhaps some may say that, in response to the most mass shootings in a nation's history, a rational response to such an issue would be to restrict the availability of such weapons. However, Justice Thomas had other ideas.<sup>106</sup> Justice Thomas, in authoring the 6–3 majority opinion, conveniently disregarded over a century of legal decisions and societal gun reform to reach an ideological decision that supported the Court's supermajority preference to expand gun rights.<sup>107</sup> But this is not the first time that Justice Thomas has *conveniently disregarded* a relevant political issue.<sup>108</sup> In fact, Justice Thomas recently refused to recuse himself from Trump's insurrection cases, despite his wife's "controversial involvement" in the insurrection and calls for Arizona lawmakers to appoint "independent electors who would call the state for Trump."<sup>109</sup> Not to mention the slew of vacations, yacht trips, private jets, sporting events, and luxury stays that Thomas has been treated to for the last thirty years by wealthy conservative donors while on the bench.<sup>110</sup> So perhaps Thomas's opinion should come as no surprise.

The second case that evidenced the Court's willingness to disregard precedent and turn the tables of society was *Dobbs v. Jackson Women's*

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104. See Brannon P. Denning & Glenn H. Reynolds, *Retconning Heller: Five Takes on New York State Rifle & Pistol Association, Inc. v. Bruen*, 65 WM. & MARY L. REV. 79, 82 (2023) (discussing how the case was a highly anticipated indication of how the Court would function in the future).

105. See Koza & Vaughan, *supra* note 97, at 805 (highlighting how the nation experienced "unprecedented carnage in American schools, churches . . . and public venues").

106. See Denning & Reynolds, *supra* note 104, at 82–83 (discussing how Justice Thomas' opinion swept aside a "consensus standard of review among the courts of appeals").

107. See Koza & Vaughn, *supra* note 97, at 805–06 (stating that Justice Thomas disregarded "over a 100 years of legal decisions and societal recalibrations on gun control across the country to reach an ideological decision").

108. See Rodia, *supra* note 73 (highlighting how Justice Thomas' reluctance to recuse himself has been met with widespread criticism, and accusations of judicial activism).

109. Rodia, *supra* note 73.

110. See Noah Bookbinder & Dennis Aftergut, *Supreme Court Justice Clarence Thomas' Corruption Is Intolerable. Here's What We Can Do About It*, L.A. TIMES (Aug. 10, 2023, at 15:57 PT), <https://www.latimes.com/opinion/story/2023-08-10/supreme-court-justice-clarence-thomas-corruption-gifts-propublica-ethics-congress> [<https://perma.cc/HQ8F-5G5M>] (highlighting how Justice Thomas' acceptance of gifts from "super-wealthy conservative donors [for] over three decades," none of whom he knew prior to arriving at the Court, are in direct violation of legal and ethical standards and "represent intolerable corruption within the highest court in the land").

*Health Organization*.<sup>111</sup> Writing for the same 6–3 majority, it was now Justice Alito’s turn to snatch away and dismantle every woman’s fundamental right to choose an abortion.<sup>112</sup> For almost half a century since the Court’s decision in *Roe v. Wade*,<sup>113</sup> the constitutional right to privacy was thought to encompass the right to terminate a pregnancy.<sup>114</sup> But *Dobbs* aggressively overturned this—finding that the *Roe v. Wade* decision was “egregiously wrong” and “on a collision course with the Constitution.”<sup>115</sup> The decision meant that the states were given the green light to try and ban abortion.<sup>116</sup> Since then, twenty states have banned abortion or imposed restrictions on the procedure earlier in pregnancy than the standard set in *Roe v. Wade*.<sup>117</sup> The effect of this is that communities that already face barriers to health care are disproportionately impacted, and even in states where abortion remains legal, the strain on resources means that patients must travel further and incur greater expenses.<sup>118</sup> Moreover, the *Dobbs* decision also means that the United States is now out of step, and even counter, to international human rights law, which have recognized the right to an abortion as a fundamental human right.<sup>119</sup> However, it is not only concerning that six conservative Justices have taken it upon themselves to dictate the extent

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111. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022) (holding that *Roe v. Wade* “must be overruled”).

112. See Mary Ziegler, *Should Constitutional Rights Reflect Popular Opinion? Interpreting Dobbs v. Jackson Women’s Health Organization*, 6 MOD. AM. HIST. 88, 88 (2023) (highlighting how the “fundamental right to choose abortion” was among a line of “recognized unenumerated liberties related to parenting, marriage, and contraception tied to the constitutional right to privacy”).

113. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by*, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

114. See Ziegler, *supra* note 112, at 88 (discussing that the constitutional rights to privacy were thought to be broad enough to include rights associated with parenting, marriage, and contraception).

115. *Dobbs*, 597 U.S. at 268.

116. See Rise E. Kaufman & Katy Mayall, *One Year Later: Dobbs v. Jackson Women’s Health Organization in Global Context*, A.B.A. (July 26, 2023), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-end-of-the-rule-of-law/one-year-later-dobbs-in-global-context/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-end-of-the-rule-of-law/one-year-later-dobbs-in-global-context/) [<https://perma.cc/GX2X-BR3F>] (“[A]bortion bans are forcing medical professionals to deviate from the standard of care and leading to delays in care and adverse health outcomes.”).

117. Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Bans Across the Country*, N.Y. TIMES (Nov. 6, 2024), <https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/G3XL-SDBA>].

118. See Kaufman & Mayall, *supra* note 116 (“[A]ccess to medication abortion is under threat nationwide.”).

119. See Kaufman & Mayall, *supra* note 116 (highlighting how the United States ratified the International Covenant on Civil and Political Rights in 1992, which protects “the right to life, which limits the restrictions that states can place on abortion access and obligated governments to ensure access to abortion services”).

of women’s individual rights over their own body, nor is it only concerning that the world now scowls at the U.S.’ defiance in affording its citizens fundamental human rights, but—scarily—this decision highlights where this Court may go next.<sup>120</sup> That is toward the further dismantling of rights to “same-sex marriage, individual intimacy, [and/or] contraception” (emphasis added).<sup>121</sup>

The third and final case that exemplified the politically combatant conservative supermajority was *West Virginia v. EPA*, in which the Court took its politically charged scalpel, under the guise of the Major Questions Doctrine, to the administrative state and Congress’s delegative powers.<sup>122</sup> And it did so with the help of the Major Questions Doctrine.<sup>123</sup> The rest of this Article will now focus on the Court’s use of the Doctrine and its journey from the broom closet to the judicial limelight.<sup>124</sup> I have chosen to use the Major Questions Doctrine as my vessel to highlight the power of ideological shifts on the Court, as it is rooted in a vital aspect of our constitutional structure—the separation of powers.<sup>125</sup> Therefore, by using this Doctrine and examining how the Court has manipulated it, I will show how the Court has conveniently manipulated the separation of powers doctrine with the help of the Executive and Legislature’s use of the Appointments Clause.<sup>126</sup>

### B. *The Major Questions Doctrine*

This time, Justice Gorsuch was the conservative’s chosen wordsmith and adopted the role of dismantling *Chevron*’s forty-year precedent by placing a “Major Questions”-sized stake through the administrative state.<sup>127</sup> He did so under the disguise of the non-delegation principle.<sup>128</sup> This principle, while not having much air time in the Court’s current 236 year-long-inning, has, however, reared its head previously.<sup>129</sup> In 1935, nearly 150 years after the nation’s Founding, the Court invalidated two

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120. See Ziegler, *supra* note 112, at 88 (transferring the same doctrinal approach used in *Dobbs* to other Constitutional liberties).

121. Ziegler, *supra* note 112, at 88.

122. *West Virginia v. EPA*, 597 U.S. 697, 735 (2022).

123. *Id.*

124. See *infra* Part II.B.

125. 597 U.S. at 735.

126. See *infra* Part II.B.

127. See 597 U.S. at 697 (invoking the Major Questions Doctrine as a method to invalidate EPA climate change regulation); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

128. See *West Virginia v. EPA*, 598 U.S. 697, 750 (2022) (Gorsuch, J., concurring).

129. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).

federal statutes on nondelegation grounds.<sup>130</sup> The Court held that Congress had delegated too much of its legislative authority to the Executive and its federal agencies.<sup>131</sup> Since then—and before the reappearance of the Major Questions Doctrine—the Court had not invalidated another statute on non-delegation grounds.<sup>132</sup> Instead, the Court had adopted a deferential approach to legislative delegation, permitting Congress to delegate quasi-legislative power to federal agencies, so long as Congress provided an “intelligible principle” that constrained the Executive and its federal agencies and not simply a blank check to operate freely.<sup>133</sup>

### 1. Before the Major Questions Doctrine: The “Intelligible Principle” Doctrine and *Chevron* Deference

This deference has become widely understood under the *Chevron* framework. This framework has two steps.<sup>134</sup> First, the court asks “whether Congress has directly spoken to the precise question at issue.”<sup>135</sup> If Congress has spoken, then the courts’ hands are bound by legislative directive.<sup>136</sup> But if Congress has not articulated with specificity and the statute is ambiguous, then courts, under the second step, will consider whether the agency’s statutory interpretation is “permissible” or reasonable.<sup>137</sup> If such interpretation is reasonable, i.e., it is not arbitrary or capricious, then the administrative interpretation is controlling.<sup>138</sup> This rationale, as expressed in *Chevron*, permitted Congress to meet the demands of contemporary America in guiding and instructing federal agencies as quasi-legislative bodies to assist in the nation’s governance.<sup>139</sup>

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130. See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1017 (2023) (discussing how in *Panama Refining Co.* the Court held that a “provision of the National Industrial Recovery Act unconstitutionally delegated authority to the president to prohibit the transportation of oils taken above established quotas” and how, in *Schechter Poultry Corp.*, the Court held another provision of the same Act to unconstitutionally “authorize the president to approve codes of fair competition proposed by certain trade associations”).

131. See *id.*

132. Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 454 (2016).

133. See Deacon & Litman, *supra* note 130, at 1017.

134. *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

135. *Id.* at 842.

136. *Id.* at 842–43.

137. *Id.* at 843.

138. *Id.*

139. See Meaghan Dunigan, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today’s Administrative State*, 91 ST. JOHN’S L. REV. 247, 256 (2017) (discussing how the “intelligible principle” was created for “practical reasons”).

The *Chevron* Court justified this framework and the deferential approach to Congress's delegative powers because federal agencies have "greater political accountability than the judiciary,"<sup>140</sup> they "wield unique expertise and experience to administer 'technical and complex' regulatory programs,"<sup>141</sup> and they are in the best position to resolve any statutory ambiguities in "light of everyday realities."<sup>142</sup> "Judges are not experts in the field, and are not part of either political branch of the Government,"<sup>143</sup> and so the judicial branch was intentionally prohibited from assessing political policy choices of public interest.<sup>144</sup>

## 2. The Birth of the Major Questions Doctrine

Well, that was until Justice Gorsuch started seriously questioning it.<sup>145</sup> The Major Questions Doctrine first surfaced in *King v. Burwell*,<sup>146</sup> where the Court analyzed the IRS's interpretation of the Affordable Care Act's tax-credit provision.<sup>147</sup> The Court concluded that the Act depended on three interrelated reforms, with the tax credits serving as the core component.<sup>148</sup>

Writing for the 6–3 majority, Chief Justice Roberts emphasized that these reforms functioned together to prevent the insurance market's "economic 'death spiral.'"<sup>149</sup> While the Court did ultimately uphold the IRS's interpretation, it declined to apply *Chevron* deference.<sup>150</sup> Instead, it held that in "extraordinary cases" it would be imprudent to blindly follow *Chevron*'s framework and find that Congress's intention was an

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140. See Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479, 482 (2016); *Chevron, U.S.A., Inc.*, 467 U.S. at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .").

141. Leske, *supra* note 140, at 482.

142. See *Chevron, U.S.A., Inc.*, 467 U.S. at 865–66 (highlighting that any statutory uncertainty may have been as a political consequence of Congress's inability "to forge a coalition on either side of the question").

143. *Id.* at 865.

144. *Id.* at 866 ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'").

145. See *Gundy v. United States*, 588 U.S. 128, 149–79 (2019); *West Virginia v. EPA*, 597 U.S. 697 (2022) (Gorsuch, J., concurring).

146. *King v. Burwell*, 576 U.S. 473, 498 (2015).

147. See Monast, *supra* note 132, at 499–500 (discussing the Court's analysis of IRS' statutory interpretation that granted federal tax credits to purchasers of insurance through a federal healthcare exchange).

148. Monast, *supra* note 132, at 450.

149. Monast, *supra* note 132, at 450; see *King*, 576 U.S. at 473, 480, 492.

150. Monast, *supra* note 132, at 450.

“implicit delegation,” and that this was one such case.<sup>151</sup> Accordingly, because the “heart of the case raised questions of deep ‘economic and political significance,’” the Court invoked the Major Questions Doctrine and held that deference was inappropriate.<sup>152</sup>

Even in its infancy, the doctrine provoked opposition.<sup>153</sup> However, unlike its present-day equivalent, it was the ideologically right-wing justices who accused the Court of legislating from the bench to reach a political decision.<sup>154</sup> In fact, Justice Scalia chastised his peers in a manner emblematic of present-day conditions in the *Burwell* dissent by stating that “the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.”<sup>155</sup> However, this was not the first time that Justice Scalia had raised concerns about the Major Questions Doctrine.<sup>156</sup> In fact, even prior to his appointment to the bench, he accused Supreme Court justices of “judicial activism” in *Industrial Union Department v. American Petroleum Institute*,<sup>157</sup> where the Court invoked the Major Questions Doctrine.<sup>158</sup>

That opposition continued through the Doctrine’s adolescence where scholars noted “how uncertain and subjective the putative ‘major questions canon’ is. Not only is the canon out of step with the development of the nondelegation doctrine, it is inconsistently applied as a principle of *Chevron* review.”<sup>159</sup> This sentiment was also felt by then-First Circuit Judge Stephen Breyer, who wrote in the aftermath of *Chevron* that the Major Questions Doctrine was “inherently unstable and likely to change.”<sup>160</sup> And boy, was he right.<sup>161</sup>

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151. *King*, 576 U.S. at 485; see also Deacon & Litman, *supra* note 130, at 1012 (discussing how the “Court applied the doctrine to take the question wholly outside of [the] *Chevron* [framework]”).

152. Monast, *supra* note 132, at 450 (quoting *King*, 576 U.S. at 485–86).

153. See *King*, 576 U.S. at 498–518 (Scalia, J., dissenting).

154. See *id.* (stating, on behalf of a three-person dissent consisting of Scalia, Alito, and Thomas, that the majority had engaged in “somersaults of statutory interpretation” to reach their desired outcome); Monast, *supra* note 132, at 452.

155. See *King*, 576 U.S. at 518 (Scalia, J., dissenting).

156. See Antonin Scalia, *A Note on the Benzene Case*, 4 REGULATION 25, 26 (1980).

157. 448 U.S. 607, 662 (1980) (limiting OSHA’s authority by requiring a “significant risk” threshold).

158. See Scalia, *supra* note 156, at 25–26.

159. Austin Schlick & Michael Steffen, *Should Courts Defer the Least When It Matters the Most?: Judicial Deference to Agencies on Major Issues*, 44 MD. B.J. 13, 17 (2011).

160. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 365 (1986).

161. See *West Virginia v. EPA*, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring).

### 3. The Revival of the Major Questions Doctrine: An Indication of the Future

Despite significant examples of concern regarding the Doctrine's application, Justice Gorsuch's dissent in *Gundy v. United States*<sup>162</sup> vaulted the Doctrine back into significance by reviving the non-delegation principle and the vitality of Major Questions.<sup>163</sup> In *Gundy*, the Court considered a nondelegation challenge to a provision of the Sex Offender Registration and Notification Act (SORNA),<sup>164</sup> which gave the Attorney General authorization to "specify the applicability of the requirements" of the Act to sex offenders charged prior to SORNA's enactment.<sup>165</sup> To which Justice Kagan, writing on behalf of a four-person plurality, rejected the nondelegation challenge by utilizing—and defending—the Court's application of the intelligible principle standard, giving Congress wide latitude to guide agencies creating legislation.<sup>166</sup> The Court granted Congress this latitude as it understood that "Congress simply cannot do its job absent an ability to delegate power."<sup>167</sup> And that the delegation in SORNA "easily passe[d] muster" in relation to precedent.<sup>168</sup> Prompting Justice Gorsuch to provide us with the first indication of what a conservative majority could do, i.e., to drop the guillotine on a nearly century-old precedent as soon as the conservative block could gather enough votes.<sup>169</sup>

In dissent, Justice Gorsuch indicated that the "intelligible principle" should be overruled, with more significant limits that restrain Congress's delegative powers to take its place.<sup>170</sup> Without any legislative shackles, the "intelligible principle test would render 'the '[v]esting [c]lauses', and indeed the entire structure of the Constitution, [to] 'make no sense.'"<sup>171</sup> Ironically, it was Justice Gorsuch's concern that without more restrictions, the "legislation would risk becoming nothing more than the

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162. *Gundy v. United States*, 588 U.S. 128, 149–79 (2019).

163. See *Gundy*, 588 U.S. at 149–79 (Gorsuch, J., dissenting); see also Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 265 (2022) (discussing how "the world of administrative law has recently been on tenterhooks" with Gorsuch's revival of the Doctrine).

164. See *Gundy*, 588 U.S. at 128.

165. See Deacon & Litman, *supra* note 130, at 1018; *Gundy*, 588 U.S. at 128.

166. See *Gundy*, 588 U.S. at 135, 145–48; see also *supra* note 133 and accompanying text. It is also important to note that the Justices that accompanied Justice Kagan in the Court's plurality were fellow libertarians; Justices Breyer, Kagan, and Sotomayor.

167. See *Gundy*, 588 U.S. at 135 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

168. *Id.* at 145.

169. See *id.* at 149–79 (Gorsuch, J., dissenting); *West Virginia v. EPA*, 597 U.S. 697 (2022) (Gorsuch, J., concurring).

170. *Gundy*, 588 U.S. at 162–64 (Gorsuch, J., dissenting).

171. *Id.* at 155.

will of the current President.”<sup>172</sup> But hasn’t that already happened? I guess Justice Gorsuch forgot how the legislature rolls over onto its back whenever the President brings a judicial nominee—or at least whenever a conservative President does.<sup>173</sup> Justice Gorsuch’s reasoning also conveniently forgets why the Court’s *Chevron* deference was implemented. Its purpose was not to blur the lines of the separation of powers—as Justice Gorsuch indicates. Instead by allowing *Chevron* deference, the legislature’s actions would be directly answerable to the people.<sup>174</sup> But now, despite Justice Scalia’s warnings, the Court has replaced the will of the people with its own.<sup>175</sup>

Justice Gorsuch’s preferred approach was to only permit legislative delegation in three distinct scenarios: (1) if Congress makes the policy decisions when regulating private conduct, it may authorize another branch to “fill up the details”; (2) once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding; and (3) Congress may assign the executive and judicial branches certain non-legislative responsibilities.<sup>176</sup> Chief Justice Roberts and Justice Thomas joined Justice Gorsuch in dissent.<sup>177</sup> Justice Alito filed a concurrence with the judgment, voting to reject the nondelegation challenge.<sup>178</sup> But, and importantly for Justice Gorsuch and the other conservative Justices, Justice Alito also stated his support for future efforts to reconsider the intelligible principle standard when doing so would not result in an evenly divided court—as the Court heard oral arguments prior to Justice Kavanaugh’s confirmation—or, in other words, when the conservatives have their majority.<sup>179</sup> And later that year, in *Paul v. United States*,<sup>180</sup> Justice Kavanaugh did just that, stating that the nondelegation doctrine “may warrant further consideration in future cases.”<sup>181</sup>

Therefore, following the *Gundy* case, the liberal block, which consisted of Justices Kagan, Ginsburg, Breyer, and Sotomayor, was in favor of the intelligible principle. The conservative block of Justices Gorsuch, Chief Justice Roberts, and Justice Thomas championed the

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172. *Id.*

173. *See supra* notes 78–82 and accompanying text.

174. *See supra* notes 133–37 and accompanying text.

175. *See supra* notes 148–50 and accompanying text; *infra* Parts II.B.4–5.

176. *See Gundy*, 588 U.S. at 157–59 (Gorsuch, J., dissenting); *see also* Deacon & Litman, *supra* note 130, at 1018.

177. *Gundy*, 588 U.S. at 149 (Gorsuch, J., dissenting).

178. *Id.* at 148–49 (Alito, J., concurring).

179. *Id.*; Deacon & Litman, *supra* note 130, at 1018.

180. 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

181. *Id.*

Major Questions Doctrine, with fellow conservative Alito patiently waiting for Kavanaugh to arrive from stage-door left and become state.<sup>182</sup>

#### 4. The Court's Implied Use of the Major Questions Doctrine for Issues of "Vast Economic and Political Significance"

That's exactly what happened three years later in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration* (OSHA)<sup>183</sup> when the Court's ideological landscape had shifted bringing dramatic implications.<sup>184</sup> The case regarded the Occupational Safety and Health Act, which authorized the Secretary of Labor to promulgate "occupational safety and health standard[s]," which were "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."<sup>185</sup> Along with protecting employees from "grave danger," the Act permitted the application of "emergency temporary standard[s] to take immediate effect."<sup>186</sup> In response to the COVID-19 pandemic, OSHA did just that and issued an emergency temporary standard mandating employees to "adopt a testing and masking regime, or, alternatively, establish a vaccination requirement."<sup>187</sup> The Court subsequently held that OSHA's emergency mandate was not authorized under the Act's grant of regulatory authority, as Congress did not speak clearly when authorizing the agency to exercise such powers of vast economic and political significance.<sup>188</sup> Accordingly, the Court framed their statutory analysis around the Major Questions Doctrine.<sup>189</sup>

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182. See *id.* (Gorsuch, J., dissenting); *West Virginia v. EPA*, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring). Therefore, at the time the Court heard *Gundy*, the court was ideologically aligned 4–4.

183. 595 U.S. 109 (2022).

184. See Post-RBG: "Tectonic Shift," *Changing Dynamics at U.S. Supreme Court*, A.B.A. (Aug. 16, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2021/08/post-rbg---tectonic-shift---changing-dynamics-at-u-s--supreme-co/?login> [https://perma.cc/7BMJ-JDKE] (discussing how the Supreme Court's ideological balance underwent a "tectonic shift," and that the Court has changed "dramatically"). The authors discussed the impact of Justice Amy Cohen Barrett replacing Justice Ruth Bader Ginsburg on the Court, which meant that the Court went from being ideologically balanced at 4–4 in *Gundy*, to a Conservative 6–3 majority in *OSHA*. *Id.*

185. 29 U.S.C. § 651(b)(3); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 114.

186. 29 U.S.C. § 655(c)(1).

187. Deacon & Litman, *supra* note 130, at 1026.

188. See Deacon & Litman, *supra* note 130, at 1027 (discussing how the Court treated OSHA's rule as "no 'everyday exercise of federal power'"); Sohoni, *supra* note 163, at 274 (stating that the Gorsuch concurrence indicated that the utilization of the Major Questions Doctrine is a "firm rule" that "this Court has established").

189. See Deacon & Litman, *supra* note 130, at 1027 (discussing how this was the first time the Court had used the Major Questions Doctrine in assist in statutory interpretation).

And how did the majority lay out the analysis to a ruling that took away the protection of millions of workers from a disease which had already killed one million Americans and hospitalized four million?<sup>190</sup> In a “single short paragraph,” relying primarily on italicization, the Court stated that (a) the Secretary had the authority “to set *workplace* safety standards, not broad public health measures”<sup>191</sup>; and (b) that authority was limited to address only dangers “unique” to, or “particular” to, the workplace, and not dangers such as the COVID-19 pandemic that had killed millions of Americans;<sup>192</sup> even though the limiting words—“unique” and “particular”—were not found in the Act.<sup>193</sup> The Court also utilized the novelty of OSHA’s enabling statute to hold that the mere fact that OSHA had not implemented an equivalent “broad public health regulation” in its existence, as a “telling indication” that the mandate extended “beyond the agency’s legitimate reach”—even though the nation had not experienced such a destructive, devastating pandemic as COVID-19 in more than a century, and, thus, any “emergency” mandate aimed at protecting the millions of American workers who were at risk, would have always been a regulation which the federal agency had never done.<sup>194</sup> In other words, the Court utilized its new shiny political scalpel (The Major Questions Doctrine) to take an Act that authorized the Secretary to manage workplace dangers to a “related” but very distinct conclusion that the Secretary only had the authority to regulate dangers specific to a workplace.<sup>195</sup>

##### 5. The Court’s Express Use of the Major Questions Doctrine as a “Clear Statement Rule”

The Court didn’t stop there. In *West Virginia v. EPA*, Justice Gorsuch’s vision was complete.<sup>196</sup> His child, the Major Questions Doctrine, which he had carefully nurtured like a loving paternal father,

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190. See *Nat’l Fed’n of Indep. Bus.*, 595 U.S. at 127 (Breyer, J., dissenting) (highlighting how the disease has “transformed” the workplaces of most Americans).

191. Deacon & Litman, *supra* note 130, at 1028.

192. See Deacon & Litman, *supra* note 130, at 1028.

193. See Deacon & Litman, *supra* note 130, at 1029 (discussing the Court’s mistaken belief that the Act did not authorize OSHA’s temporary mandate).

194. See *Nat’l Fed’n of Indep. Bus.*, 595 U.S. at 119 (holding that the “lack of historical precedent” together with the breadth of the Act’s implementation is a useful indicator to prove unconstitutionality).

195. See Deacon & Litman, *supra* note 130, at 1029 (evaluating the Court’s holding with emphasis on the fact that Congress had not “explicitly limited” OSHA in the manner that the Court has read into the statute).

196. See *West Virginia v. EPA*, 597 U.S. 697, 735–53 (2022) (Gorsuch, J., concurring) (discussing how the Doctrine was a “clear-statement rule,” a phrase that Justice Gorsuch used eleven times in his concurrence).

had finally matured into the political dagger of his dreams.<sup>197</sup> The aforementioned case focused on the Clean Air Act,<sup>198</sup> and, in turn, showed the judiciary's willingness to bow down to the Executive's directive. Despite the tremendous societal implications, the conservative majority aligned itself with President Trump's climate change narrative.<sup>199</sup> Perhaps, this was a "thank you" for the life-long tenure President Trump bestowed on them.<sup>200</sup> The Act was passed to promote reasonable governmental actions to reduce air pollution, and it had done just that, successfully reducing air pollutants by up to seventy-four percent.<sup>201</sup> The Clean Air Act granted the EPA authority to regulate emissions "so long as the regulations 'reflect the "best system of emission reduction" that the EPA has determined to be "adequately demonstrated."'"<sup>202</sup> To which the Court held that the EPA's Clean Power Plan had exceeded statutory authorization using the Major Questions Doctrine as a "clear statement rule."<sup>203</sup> But interestingly, while the Court had relied on the nondelegation doctrine as the birthplace of the Major Questions Doctrine, in the case that established the Doctrine as a "clear-statement rule," the only notion of it in the *EPA* opinion is the statement that "in certain extraordinary cases, both separation of powers principles ... and legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."<sup>204</sup> In fact, in a manner that resembles the Court's *OSHA* decision, the Court's *EPA* opinion held that it was "not plausible" for Congress to authorize the EPA to enact such a "new" and "big" regulation.<sup>205</sup> And so, when the EPA selected "generation shifting" as the "best system," the Justices felt it

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197. See *infra* Part II.B.

198. See Davis P. Rosser, *Climate Change and the Death of the Administrative State?: West Virginia v. Environmental Protection Agency*, 32 J.L. & POL'Y 205, 217–21 (2023) and Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

199. See *supra* notes 78–82 and accompanying text.

200. See Rosser, *supra* note 198, at 217.

201. Rosser, *supra* note 198, at 217.

202. Rosser, *supra* note 198, at 217.

203. See *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (holding that in "extraordinary cases" the Court must rely on the "economic and political significance" of the issue before them); Deacon & Litman, *supra* note 130, at 1031 (discussing how the EPA's Clear Power Plan relied on the Clean Air Act that authorized the EPA to establish performance standards for sources that cause or significantly contribute to air pollution, after which the EPA can establish the "'best system of emission reduction' that the agency determines is 'adequately demonstrated'"); 42 U.S.C. § 7411.

204. See *infra* Part II.B; Sohoni, *supra* note 163, at 298 (discussing how there is "no inkling" or identification of a nondelegation obstacle to the EPA's regulation in the Court's opinion); 597 U.S. at 735 (showing that the Court's majority opinion did not mention the nondelegation doctrine once).

205. See 597 U.S. at 756 (Kagan, J., dissenting) (discussing that the EPA's regulation was to regulate power plants' emissions through generation shifting).

more appropriate for them to decide what was “plausible,” even though that’s precisely what Congress did when it authorized the EPA to select the “best system of emission reduction” for power plants.<sup>206</sup> Therefore, the Court “appoint[ed] itself—instead of Congress or an expert agency—the decision-maker on climate policy,” even though it “does not have a clue about how to address climate change.”<sup>207</sup> So, the Court stepped into their political shoes, engaged “in a bit of traditional interpretative throat-clearing,” and with a Major Questions disguise, tore apart the administrative state and, with it, left substantial unanswered questions and a lack of guidance for lower courts, all thanks to lack-luster statutory analysis and “scant mentioning of constitutional concerns about delegation.”<sup>208</sup>

The Major Questions Doctrine prevailed thanks to Gorsuch’s conservative block, and because *Chevron*’s “intelligible principle” had been pushed aside, but at what cost?<sup>209</sup> Well, in *Chevron*, the Court backed quasi-legislative federal agencies as they had greater “political accountability,” “unique expertise,” and were in a better position to solve statutory ambiguities than nine Supreme Court Justices.<sup>210</sup> And now, less than fifty years later, we have an ideologically polarized bench, which has implemented a Doctrine that takes these political decisions out of the hands of Congress’s elected officials and instead into the hands of nine Justices who have life tenure and are unanswerable to the American people.<sup>211</sup> We now have Justices who believe they have greater unique expertise in areas such as climate change, worldwide pandemics, gun

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206. See *id.* at 783–84 (stating that Congress authorized the “‘best system’ full stop—no ifs, ands, or buts of any kind relevant here”).

207. See *id.* at 756.

208. See Jonathan H. Adler, *West Virginia v. EPA: Some Answers About Major Questions*, 2021 CATO SUP. CT. REV. 37, 38–39, 52 (2021) (discussing how the Court did not have to hear the case, so by doing so, it had an opportunity to provide clear answers and guidance, but instead, it left even more questions about Major Questions than it had before).

209. See *West Virginia v. EPA*, 597 U.S. 697, 735–53 (2022) (Gorsuch, J., concurring) (discussing how the Doctrine was a “clear-statement rule”); see also Sohoni, *supra* note 163, at 264 (discussing how the Court has “silently ousted” the *Chevron* framework).

210. See *supra* notes 140–44 and accompanying text.

211. See 597 U.S. at 743 (Gorsuch, J., concurring) (discussing how the Major Questions Doctrine applies “when an agency claims the power to resolve a matter of great ‘political significance’ . . . or end an ‘earnest and profound debate across the country’”); see also Yoo, *supra* note 81, at 1439 (discussing how the Senate approves around 90% of the names that the Executive presents to them). But see Molot, *supra* note 50, at 31–41 (discussing the implications for modern administrative law in light of the Founders’ expectation that the judiciary would exercise “judgment” as opposed to its “will”).

But is this not exactly what the Court have now forced themselves to do? To decipher and be led by society’s prevailing political attitudes in a certain area. And does this not run directly against the Framers’ vision that the judicial would resolve conflicts with “principled adjudication,” rather than the “political will or force” of the legislative and executive branches?

reform, and the bodily autonomy of women (just to name a few) than independently curated boards of experts in federal agencies.<sup>212</sup> We now have Justices who feel it appropriate to supplant Congress's legislative intent with their own vision of the nation.<sup>213</sup>

But why did they do this? Well, what underlies the Court's fundamental shift in constitutional interpretation is that in between *Gundy* and *OSHA/EPA*, the liberal block lost one of its core stalwarts in Justice Ginsburg and was replaced by the third-Trump-Trooper and newest member to the conservative block, Justice Amy Coney Barrett, which gave the bench a 6–3 ideological weighted-tether to the conservatives.<sup>214</sup> This was all thanks to a Republican-led-Legislature that blocked Obama's liberal candidate for seven months, just to confirm Trump's appointee in less than a month to preserve their ideological and political advantage on the bench.<sup>215</sup> As a result of political forces manipulating the Appointments Clause, a long-standing doctrine was changed, which may not have been changed had Obama's liberal candidate—Garland—been appointed.<sup>216</sup> This allegiance to party politics was then repaid in *OSHA* and *EPA*.<sup>217</sup> In *OSHA*, the Court restricted efforts of recognizing COVID-19 and protecting American workers from the pandemic, which suspiciously worked hand-in-hand with President Trump's anti-vaccination movement and rhetoric, which paved the way for his re-election.<sup>218</sup> In *EPA*, the Court's conservative majority was again in

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212. See 597 U.S. at 756 (Kagan, J., dissenting).

213. *Gundy*, 588 U.S. at 148–49 (Alito, J., concurring).

214. See Peter Baker & Maggie Haberman, *Trump Selects Amy Coney Barrett to Fill Ginsburg's Seat on the Supreme Court*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/2020/09/25/us/politics/amy-coney-barrett-supreme-court.html> [<https://perma.cc/C3HS-JQSN>] (Meaning that at the time the Court heard *OSHA*, the Conservatives had a 6–3 ideological advantage (as there were now nine justices on the bench, as opposed to the eight that heard *Gundy*)); see also Sohoni, *supra* note 163, at 282 (highlighting how the author's "textualist" predictions of how the Major Questions cases would be resolved were completely wrong). Sohoni emphasized that not a single Justice casted their votes in the author's predicted "purely textualist approach." *Id.* And therefore, either a Harvard Law School professor is "lousy at textualism," "all nine of them are," or "it indicates that "textualism is not doing the work of deciding these cases." *Id.*

215. See *supra* notes 98–101 and accompanying text.

216. See Laidler, *supra* note 84, at 71–72.

217. See *supra* Part II.B.4–5.

218. See Matthew J. Hornsey et al., *Donald Trump and Vaccination: The Effect of Political Identity, Conspiracist Ideation, and Presidential Tweets on Vaccine Hesitancy*, 88 J. EXPERIMENTAL SOC. PSYCH. 1, 1–7 (2020) (discussing how President Trump is the first U.S. president to adopt an anti-vaccination stance, and how this position closely reflects the views of his supporters); see also Deacon & Litman, *supra* note 130, at 1026 (highlighting the reason why the *OSHA* Court "treated the policy as major was because of its politically controversial nature"); Sheryl Gay Stolberg, *Senate Confirms Kennedy, a Prominent Vaccine Skeptic, as Health Secretary*, N.Y. TIMES (Feb. 13, 2025), <https://www.nytimes.com/2025/02/13/us/rfk-jr-hhs-senate-confirmation.html> [<https://perma.cc/B4YM-5VB2>] (highlighting how Justice Gorsuch and

alignment with President Trump's view that climate change is a "hoax" as they blocked the EPA's effort to tackle the problem right from the beginning.<sup>219</sup> From start to finish, the Major Questions Doctrine has been uncertain and used as a disguise for alternative motives, but what is abundantly clear is that under the traditional *Chevron* analysis, the Executive branch tends to lose, and under the Court's application of Major Questions, *he* wins.<sup>220</sup> It is also clear that thanks to the politicized process by which Supreme Court Justices arrive on the bench, their subsequent constitutional and statutory interpretation has become intertwined with the ideologies of the Executive and Legislative branches, making it impossible to decipher where one branch ends and the other begins. And therefore, due to the Executive and Legislature's use of the Appointments Clause, politics and the Judiciary's propensity to allow it to seep into its legal reasoning, has blurred the lines of governmental separation of powers and prohibited the judiciary from being the "essential" last line of defense to any "encroachments and oppressions of the representative body" that the Framers designed the judiciary to do.<sup>221</sup>

### III. POTENTIAL REFORMATION

#### A. *Why Do We Need Reformation?*

Fundamentally, the Court has forcefully implemented a Doctrine that requires the Justices to categorize certain issues as political.<sup>222</sup> As a direct consequence of an ideological shift, the Court now blinds itself, its analytical framework, and its statutory interpretation by adjudicating political matters.<sup>223</sup> As a direct consequence of the Justices' stark ideological polarization, the Court has allowed itself to be influenced by society's political public issues, to decide cases by "politically"

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President Trump conducted Kennedy's ceremony, marking the "vaccine skeptic" as health secretary).

219. See Hornsey et al., *supra* note 218, at 1 (discussing how Trump has endorsed "unsubstantiated accounts of reality," which include that climate change is a hoax); *West Virginia v. EPA*, 597 U.S. 697, 755 (2022) (Kagan, J., dissenting) (discussing how the Court "stayed" the Obama Administration's Clean Power Plan in an "unprecedented" decision, which allowed the Trump Administration to "repeal . . . the rule").

220. See Monast, *supra* note 132, at 448–49 (discussing how the Court is inconsistent in its application of the Major Questions Doctrine and that, in a certain application of the Doctrine, the Executive seems to win). Monast equates the Court's use of the Major Questions Doctrine to the Court's "description of pornography—you know it when you see it." *Id.*

221. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton).

222. See 597 U.S. at 743 (Gorsuch, J., concurring) (discussing how the Major Questions Doctrine applies "when an agency claims the power to resolve a matter of great 'political significance' or end an 'earnest and profound debate across the country'").

223. See Daniel Epps & Ganesh Sitaraman, *supra* note 32, at 155 (2019) (discussing how Supreme Court Justices have become known as "political agents").

categorizing the policy at hand, and to ultimately engage in bench-made politics.<sup>224</sup> And it has done so thanks to the Constitution's Appointments Clause, which has engrained political forces into our most supreme judicial court, and has melted away any notion of the separation of powers.<sup>225</sup>

This raises important questions: Does this coincide with the Framers' vision that the judiciary would be a resistant force to political powers?<sup>226</sup> Would the judiciary be a "faithful guardian []" to the Constitution?<sup>227</sup> Would the judiciary be an independent, last line of defense against the political manipulations of the other branches?<sup>228</sup> It does not. Instead, it gives the Executive and Legislative branches so much control over who arrives at each of those nine comfy thrones, so that once a Justice gets there—no matter their ideological preference—they exhibit a loyalty to their party instead of a loyalty to the text they have sworn to protect.<sup>229</sup>

And do we have to blindly follow and trust the Justices that it is a coincidence that their votes, votes that change century-old precedent, votes that are based on self-proclaimed political questions, votes that just so happen to be in direct alignment with the political party of the Executive, are not guided by political ideology?<sup>230</sup> Again, as raised at the beginning of this Article, the Supreme Court does not just decide cases regarding the separation of powers and legislative limitations on federal agencies, but extremely individual and intimate issues regarding every American citizen,<sup>231</sup> whether that be at what point a woman no longer has bodily autonomy or every citizen's reasonable expectation of privacy from government scrutiny.<sup>232</sup> This Court has been given the final say on

224. See Deacon & Litman, *supra* note 130, at 1026 (discussing how a main motivator of the Court's decision was the policy's major-ness because of its "politically controversial nature").

225. See Part I.C.

226. See Hamilton, *supra* note 51, at 468–70.

227. Hamilton, *supra* note 51, at 468–70.

228. Hamilton, *supra* note 51, at 465.

229. See Yoo, *supra* note 81, at 1439 (discussing how the Senate approves around 90% of the names that the Executive presents to them); see generally Meese III, *supra* note 54, at 456–57 (discussing both Hamilton and James Madison's concerns that "all political power is of an encroaching nature" and that it was the judiciary's responsibility to maintain Constitutional boundaries).

230. See Clark, Montagnes & Spenkuch, *supra* note 28 (highlighting that "since the 1940s, political scientists have known that the ideology of a judge—whether conservative or liberal—often predicts which way he or she will vote," and that these results "prompt serious questions about the neutrality of the judicial branch, since it suggests that a justice may treat a case differently just because it presents a chance for them to shape policy").

231. See Dahl, *supra* note 34, at 280 (discussing how the Court is at an awkward intersection between the judiciary and other branches of government because the Court must decide cases that cause severe disagreement within society, and thus, these cases have a "political" setting).

232. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (holding that *Roe v. Wade* "must be overruled"); see also *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia,

issues that have an everlasting and omnipresent effect on this nation, and together with society's express distrust in the governmental branch that is meant to be the last frontier to an authoritarian regime (like those that have become present in modern-day society), something has to change.<sup>233</sup>

### B. *How Would This Reform Happen?*

Because the root of the Judiciary's problem lies in the Appointments Clause, this change will require a Constitutional amendment. Four separate procedures authorize a Constitutional amendment: (1) a two-thirds Congressional supermajority can propose the change, which is ratified by three-quarters of states' legislative votes; (2) a two-thirds Congressional supermajority can propose the change, which is ratified by three-quarters of states in conventions; (3) two-thirds of states petition to Congress for a Constitutional convention, which is ratified by three-quarters of states' legislative votes; and (4) two-thirds of states petition to Congress for a Constitutional convention, which is ratified by three-quarters of states in conventions.<sup>234</sup>

I cannot confront the stark reality that successfully obtaining a Constitutional amendment is near-enough impossible.<sup>235</sup> In fact, today, the Republican Party has a 220–215 advantage in the House of Representatives and a 53–47 advantage in the Senate, and therefore, maintaining a supermajority—regardless of the controlling political party now or in the future will always be difficult.<sup>236</sup> In the 12,000 amendment

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J., concurring) (emphasizing that the majority's reasoning means that society's standard for what they deem to be a "reasonable expectation of privacy" is an "uncanny resemblance to those expectations of privacy that this Court considers reasonable"). Thus, the Court had supplanted what society may view as a fundamental human right, as their own. *See id.*

233. See Devon Ombres, *The Major SCOTUS Cases: Threats to the Rule of Law Posed by the Supreme Court's 2023 Term*, CTR. FOR AM. PROGRESS (June 18, 2024), <https://www.americanprogress.org/article/the-major-scotus-cases-threats-to-the-rule-of-law-posed-by-the-supreme-courts-2023-term/> [<https://perma.cc/HNX6-GUYE>] (highlighting how between 2022 and 2024, "the extreme right-wing majority on the Supreme Court ended affirmative action in higher education; overturned *Roe v. Wade*, allowing states to enact abortion bans; and created new legal doctrines to gut environmental protections"); Ellen Knight, *Reformation of the Supreme Court: Keeping Politics Out*, 52 NEW ENG. L. REV. 345, 353 (2018) (discussing how in 2018, the American peoples' distrust in the Court was because its "decisions [were] entrenched in politics" and that the Court only had about "45% of the American's people's confidence"). This figure is probably less today.

234. Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. 1, 22 (2018).

235. See Marcia Coyle, *A Constitution "Hard, But Not That Hard" to Change*, NAT'L CONST. CTR. (Aug. 19, 2024), <https://constitutioncenter.org/blog/how-difficult-should-the-constitution-be-to-amend> [<https://perma.cc/Q7XP-LBUT>] (discussing how difficult the Constitution is to amend and that Justice Scalia actually supported making the Constitution easier to change).

236. See *U.S. House Election Results*, N.Y. TIMES (Mar. 4, 2025), <https://www.nytimes.com/interactive/2024/11/05/us/elections/results-house.html> [<https://perma.cc/EVL9-CX2B>] (showing that the Republican Party has a 220–215 advantage in the House of

attempts since the Constitution's creation 238 years ago, only twenty-seven have become official, giving Constitutional amendment proposals a whopping 0.002% chance of success.<sup>237</sup> That is the way it was meant to be, as proclaimed by Chief Justice Marshall in *McCulloch v. Maryland*,<sup>238</sup> the Constitution was written “to endure for ages to come.”<sup>239</sup> That is precisely what it has done, making the United States Constitution the oldest active codified Constitution in the world.<sup>240</sup> The Framers' vision was of a nation free from autocratic reign, safeguarded by government functionalities, and ultimately, a nation supported by a “government of the people, by the people, for the people.”<sup>241</sup>

But does that notion survive today? We have a re-elected President who incited an insurrection against his own nation—just to prevent the peaceful handing over of power, we have a Legislature that is more concerned with Executive accountability than the people, and we have a Judiciary that now openly uses political issues to decide monumental and life-changing cases.<sup>242</sup> And if the Framers failed to anticipate the development of political parties, and therefore, in turn, failed to account for how polarized political parties can erode governmental barriers—as shown by the Court's introduction of the Major Questions Doctrine.<sup>243</sup> Even if it was neigh-on impossible to pass an amendment, and even if it would mean that the nation would have to come together in a manner that seems unlikely. I believe the American people can agree with President John Adams that “a division of the republic into two great parties ... is to

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Representatives (218 is required to control)); *U.S. Senate Election Results*, N.Y. TIMES (Mar. 4, 2025), <https://www.nytimes.com/interactive/2024/11/05/us/elections/results-senate.html> [<https://perma.cc/CH8U-EJ6J>] (showing that the Republican Party has a 53–47 advantage in the Senate (fifty is required to control)).

237. See Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CAL. L. REV. 2005, 2007 (2022) (discussing how most of the amendments occurred within the first third of the Constitution's lifespan).

238. 17 U.S. 316, 415 (1819).

239. See *id.* (discussing how the Framers' Constitution prescribes governmental action for all future time).

240. Steven Mintz, *Historical Context: The Survival of the US Constitution*, THE GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-survival-us-constitution> [<https://perma.cc/X346-SHAR>] (last visited Mar. 21, 2026).

241. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (transcript available at <https://www.loc.gov/resource/rbpe.24404500/?st=text> (last visited May 23, 2026)).

242. See *supra* notes 1–9, 79–82, 210–14 and accompanying text.

243. *Nominating Presidents*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/parties-leadership/nominating-presidents.htm#:~:text=Its%20framers%20failed%20to%20anticipate,up%20would%20be%20vice%20president> [<https://perma.cc/J4QX-XHHL>] (last visited Mar. 21, 2025).

be dreaded as the greatest political evil,”<sup>244</sup> and therefore, support a Constitutional Amendment to combat this.

*C. What Would Potential Supreme Court Reformation Look Like?*

But, saving the Court from this “great political evil” and restoring the Court to the Framers’ vision will require substantial reform efforts to eradicate the disease that is politics from the bench.<sup>245</sup> To do this, any potential reform should target the main areas that political parties can use to manipulate Supreme Court Justices; therefore, reformation efforts should target how the Court operates and how Justices are selected.<sup>246</sup> But before we get to any reform, it is also imperative to recognize that any reform, which will ultimately aim at reducing the Justices’ power, must be iron-clad, as it is unlikely that Supreme Court Justices will willingly reduce their influence and that any constitutional amendment would be extremely hard to pass in the near term.<sup>247</sup> Moreover, any discussion centered around Supreme Court reform is a topic that has garnered significant scholarly research, and it is a topic that deserves its own dedicated article; therefore, I will focus my suggestions on a novel area that has not been researched for American comparative purposes and will base my suggested reforms upon the make-up of the United Kingdom Supreme Court (UKSC).

Fundamentally, there must be a change in how Supreme Court Justices are nominated and arrive at the bench.<sup>248</sup> Currently, as described in Part I.C, the American government’s political branches are intertwined in the nomination process.<sup>249</sup> So much so that President Trump ran a campaign by promising to nominate an ideologically conservative Justice to the Court so that *he* could bring change to the American people.<sup>250</sup>

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244. Letter from John Adams to Jonathan Jackson (Oct. 2, 1780) (on file with the National Archives).

245. See Daniel Epps & Ganesh Sitaraman, *supra* note 32, at 148 (discussing how saving “the Court’s legitimacy as an institution above politics will require a radical rethinking of how the Court has operated for more than two centuries”).

246. See *id.* at 169 (discussing how the main reformation efforts should target the ways in which the Court operates and the way Justices are selected).

247. See *id.* at 171 (stating that statutory reform must be “constitutionally sound[,]” as the Conservative majority would likely be skeptical to and want to strike any reform that reduces the Court’s power); see also U.S. CONST. art. V (stating that there are two ways that an amendment may be proposed, either by Congress with a two-thirds majority vote in both the House of Representatives and the Senate, or by a constitutional convention called by two-thirds of the State legislatures). But see *supra* note 236.

248. See Knight, *supra* note 233, at 358 (discussing how it has become “impossible to focus on anything other than ideology during the nomination process”).

249. See *supra* Part I.C.

250. See Knight, *supra* note 233, at 358 (discussing how President Trump’s promise led to a one-million-dollar advertisement campaign). This, irrespective of whether Trump is

Moreover, the Senate then has the chance to cross-examine every judicial nominee, with this discussion mostly centering around ideological preferences.<sup>251</sup> Not to mention the impact of special interest groups and donors who can tempt and financially implicate any Supreme Court justice and nominee.<sup>252</sup> And the media, which can ignite a frenzy surrounding any Supreme Court nomination in an instant.<sup>253</sup> So what is the solution? The American legislature should imitate the method by which the UKSC Justices are nominated.

In the United Kingdom (UK), the “process for selecting Justices of the UKSC is overseen by an independent selection commission.”<sup>254</sup> This means that Justices in the UK are not elected by the people, or by those answerable to the people.<sup>255</sup> Instead, this “independent selection commission” comprises “the President of the UKSC, . . . a senior UK judge nominated by the President of the UKSC; a member of the Judicial Appointments Commission; a member of the Judicial Appointments Board for Scotland; and a member of the Northern Ireland Judicial Appointments Commission.”<sup>256</sup> With any Justice’s selection based solely on “merit” and so long as they “are people of exceptional intellectual and legal ability.”<sup>257</sup> The Judicial Appointments Commission (JAC) (which is the same for the Scottish and Northern Irish Commissions) is a statutorily created body that selects candidates “on merit” and “who are of good character.”<sup>258</sup> The JAC’s members come from a diverse background to ensure that the Commission “has a breadth of knowledge, expertise, and independence.”<sup>259</sup>

### 1. The United Kingdom Supreme Court’s Selection Process

The key steps in the UKSC selection process are as follows. First, the Lord Chancellor convenes the independent selection commission, the

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democratically elected and serves the voice of the people, is evidence of an Executive’s influence over the Court.

251. Knight, *supra* note 233, at 358 (discussing how it has become “impossible to focus on anything other than ideology during the nomination process”).

252. See Noah Bookbinder & Dennis Aftergut, *supra* note 110 (highlighting Justice Thomas’ infractions of accepting “gifts” by wealthy conservative donors during his time on the bench).

253. See Knight, *supra* note 233, at 359 (discussing how the media’s interest in Supreme Court nominations has increased in recent history and that, because of the increased scrutiny, the nomination process has become more of a spectacle than a transparent judicial process).

254. *Appointment of Justices*, UK SUP. CT., <https://supremecourt.uk/appointments-of-justices> [https://perma.cc/GZ9H-N466] (last visited Mar. 22, 2026).

255. *Id.*

256. *Id.*

257. *Id.*

258. JUDICIAL APPOINTMENTS COMM’N, <https://judicialappointments.gov.uk/> [https://perma.cc/43XJ-6AGM] (last visited Mar. 22, 2026).

259. See *id.*

make-up of which is outlined above.<sup>260</sup> Second, the bench's vacancy is advertised, with applications sought from a wide range of candidates who are invited to submit a personal statement, examples of their previous work, and details of independent assessors.<sup>261</sup> Third, the "Lord Chancellor, the First Minister in Scotland, the First Minister for Wales, the Northern Ireland Judicial Appointments Commission, and senior judges across the UK are consulted."<sup>262</sup> Fourth, all of the applicants are then streamlined and shortlisted based on merit, and the independent commission interviews all shortlisted candidates.<sup>263</sup> Fifth, the independent selection commission then submits to the Lord Chancellor who they have selected.<sup>264</sup> Sixth, the Lord Chancellor then consults with the First Ministers and senior judges again.<sup>265</sup> Next, when the individual has been selected, the Lord Chancellor has three options: they may accept, reject, or require the independent commission to reconsider their position.<sup>266</sup> However, the Lord Chancellor may only reject or require reconsideration in specific scenarios.<sup>267</sup> These scenarios occur when the Lord Chancellor has concerns regarding the competence, character, or experience, with any rejection or reconsideration request being based solely on merit and not political reasons.<sup>268</sup> Then, "if the independent commission's selection is accepted, the Lord Chancellor notifies the Prime Minister," who then announces the appointment.<sup>269</sup> I will now explain how this process can be emulated in the United States.

## 2. How The UKSC's Selection Process Can Be Emulated in the U.S.A.

First, in the United Kingdom, the independent selection commission and the procedures for selecting a UKSC justice, as laid out above, are convened by the Lord Chancellor.<sup>270</sup> The Lord Chancellor is one of the most ancient titles in the state, but in reality, the Lord Chancellor functions as the head of the Ministry of Justice and the Secretary of State for Justice.<sup>271</sup> Now, the U.S.A. does not have a similar-titled position, and so, therefore, we will have to look for an equivalent position; I will

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260. *See* UK SUP. CT., *supra* note 254.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. UK SUP. CT., *supra* note 254.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Lord Chancellor*, UK PARLIAMENT, <https://www.parliament.uk/site-information/glossary/lord-chancellor/> [<https://perma.cc/G3QK-PAEX>] (last visited Mar. 22, 2026).

271. *Id.*

address this position as the Secretary of the Judiciary. As I see it, there are two options: the U.S. Attorney General or the United States Supreme Court Chief Justice.

The Attorney General is the head of the Department of Justice and is the chief law enforcement officer of the federal government.<sup>272</sup> It is their duty to represent the United States in legal matters and give advice and options to the Executive branch when requested.<sup>273</sup> Therefore, because they are positioned as the head of the Department of Justice, they would be in a good position to act as the Secretary of the Judiciary. However, a problem with giving the Attorney General this power is that it may not do anything. As highlighted by Justice Sotomayor's dissent in *Trump v. United States*, the Executive's official powers now extend to matters concerning the Department of Justice, and therefore, an Executive can be shielded by presidential immunity for anything they order the DOJ, and in turn, the Attorney General, to do.<sup>274</sup> Therefore, there is no space for impartiality between the Executive and the Attorney General, and an Attorney General's decision can still be corrupted by Executive directive; thus, by giving the Attorney General this power, the problem of an over-reaching Executive is not resolved, it is merely moved to an alternative political battlefield. Thus, as of now, the Attorney General may not have the impartiality required for the position.

The same worries exist for the current U.S. Supreme Court Chief Justice, Chief Justice Roberts. Chief Justice Roberts was appointed by President George W. Bush in 2005, and since then, has exhibited an internal struggle between pushing a conservative agenda and protecting the Court's public perception.<sup>275</sup> And it seems that while Chief Justice Roberts had expressed a preference for an incremental approach to change in years gone by, his conservative persuasion has overtaken his position on the Court, as evidenced by the Court's destruction of the administrative state.<sup>276</sup> Still, more hope for impartiality may exist for the Chief Justice than the Attorney General, as one would hope that Roberts would understand the gravity of the situation and act as a neutral judicial umpire, but because of the Court's political predilection, that remains to be seen.<sup>277</sup> But, even though these issues exist, because the Secretary of

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272. *Office of the Attorney General*, U.S. DEP'T OF JUST., <https://www.justice.gov/ag> [<https://perma.cc/RV49-X9BW>] (last visited Mar. 22, 2026).

273. *Id.*

274. *Trump v. United States*, 603 U.S. 593, 679–80 (2024) (Sotomayor, J., dissenting).

275. Joan Biskupic, *The Chief: The Life and Turbulent Times of Chief Justice John Roberts*, ASPEN IDEAS, <https://www.aspenideas.org/sessions/the-chief-the-life-and-turbulent-times-of-chief-justice-john-roberts> [<https://perma.cc/F8QK-Z89S>] (last visited Mar. 22, 2026).

276. Kristin Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 95–96 (2022) (discussing how the Court's incremental change in the past indicated what the "major alterations" would be to the administrative state).

277. *See supra* Parts I.C and II.

the Judiciary would only be able to veto a candidate in very specific circumstances, their power is reserved to checking off the appointment box rather than choosing the candidate themselves.<sup>278</sup> This means that, unlike the Garland & Barrett fiasco, any appointment decision would not be left to political branches to wield their political currency; it would be solely based on the candidate's competence and expertise.<sup>279</sup> Therefore, the United States Supreme Court Chief Justice will be the Secretary of the Judiciary and will convene the independent selection commission. But what and who will make up this commission?

The commission should be governed by the American Bar Association (ABA).<sup>280</sup> The ABA was founded more than 150 years ago on the "commitment to set the legal and ethical foundation of the American nation."<sup>281</sup> And "today, it exists as a membership organization and stands committed to its mission of defending liberty and pursuing justice."<sup>282</sup> Therefore, as an independent commission whose purpose would be to restore ethical neutrality in judicial appointments, I think it would be a prudent option.<sup>283</sup> The president of the ABA should head the commission and be the equivalent of the UKSC president.<sup>284</sup> The rest of the four positions should be comprised of distinguished judges and/or legal scholars who apply to the ABA to become members. Moreover, the ABA could also institute a rolling selection committee, where only a select few of the selection committee board (i.e., there will be more members on the independent selection committee than required) are chosen each time there is a judicial opening. This type of rolling make-up of the selection committee would further integrate neutrality and deter political opinions from influencing the decision-making process. Therefore, once the ABA creates the independent commission, applicants will apply to the commission.<sup>285</sup>

Next, following the UKSC's process, all senior judges must be consulted.<sup>286</sup> At this stage, the ABA's independent selection commission should consult with all the state supreme court chief justices. Following this, the independent selection commission will communicate its chosen candidate to the Supreme Court Chief Justice, who will notify the Legislative and Executive branches of the appointment.<sup>287</sup>

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278. See UK SUP. CT., *supra* note 254.

279. See UK SUP. CT., *supra* note 254; see also Part I.C.

280. THE AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/about\\_the\\_aba/](https://www.americanbar.org/about_the_aba/) [https://perma.cc/ADE8-Z632] (last visited Feb. 16, 2025).

281. *Id.*

282. *Id.*

283. *Id.*

284. See UK SUP. CT., *supra* note 254.

285. UK SUP. CT., *supra* note 254

286. *Id.*

287. *Id.*

#### D. *What Would the Impact of this Reformation Be?*

This manner of judicial appointment will take the power away from the Executive and Legislative branches of government, meaning that instead of being the drivers of the judicial process, they are mere spectators.<sup>288</sup> In fact, in this scenario, the Executive has no control over who would arrive at the Supreme Court, and the decision would be entirely made by an independent body, and away from political pressures.<sup>289</sup> It is with the hope that this will deter political influence on the Court and restore the Court's judicial duty.<sup>290</sup>

But while this will require a Constitutional amendment and may sound undemocratic in its nature as it will take some power away from the people, the benefits will preserve the independence and power of the judiciary to be the adjudicator the Framers had envisioned.<sup>291</sup> Even though the British people do not have the same democratic appointment power as Americans, as of 2022, nearly sixty percent of Brits have confidence in the Supreme Court to do its job, one in five say “the [UKSC] gets too involved in politics,” nearly forty percent would prefer UKSC Justices to be selected from “a panel of senior judges and legal figures” or “through a vote of all lawyers and judges in the country,” and forty-two percent of all Britons think the UKSC has the “right” amount of powers.<sup>292</sup> All while almost two-thirds of the Britons have never heard of or know the work of the UKSC.<sup>293</sup> Now, let's compare this to the United States.

Compared to the sixty percent of Britons who think the UKSC does its job, over half of Americans have an unfavorable view of the Court, with “favorable views of the Supreme Court remain[ing] close to [a] three-decade low.”<sup>294</sup> Compared to the one in five Britons who view the UKSC as political, nearly half of Americans view the Court as conservative.<sup>295</sup> Compared with the forty-two percent of Brits who believe the UKSC has the right amount of power, half of Americans say

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288. *See supra* notes 254, 281 and accompanying text.

289. *Id.*

290. *See supra* Part I.A.

291. *See* Kieran Pedley & Cameron Garrett, *6 in 10 Have Confidence in the UK Supreme Court to Do Its Job Despite Most Not Knowing Much About Its Work*, IPSOS (June 1, 2022), <https://www.ipsos.com/en-uk/6-10-have-confidence-uk-supreme-court-do-its-job-despite-most-not-knowing-much-about-its-work> [<https://perma.cc/A6H6-HGYJ>] (stating how despite the British public knowing very little about the inner-workings of the British judiciary, it has confidence in the system).

292. *Id.*

293. *Id.*

294. Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Sep. 3, 2025), <https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/> [<https://perma.cc/7B5H-FHHY>].

295. *Id.*

the Supreme Court has the right amount of power.”<sup>296</sup> And ultimately, only fourteen percent of Americans believe that the Supreme Court Justices “are doing an excellent or good job” at keeping their political views out of their decision-making.<sup>297</sup>

Now, of course, these data points are not exactly comparable and cannot be solely relied upon. Still, they create a firm foundation to state that even though the British public has less power over the UKSC and its Justices, Brits have a more favorable opinion of the court; they believe they are better able to adjudicate cases neutrally, and most believe that it is not a political body.<sup>298</sup> Something that the American public cannot say.<sup>299</sup> Therefore, to remove the politics from the judicial nomination process, to preserve the Framers’ judicial vision, and ultimately, to restore the public perception of the Court, there should be a constitutional amendment to place the power of Supreme Court Justices’ appointment with an independent selection committee modelled on the UKSC.<sup>300</sup>

#### CONCLUSION

The gravity of the situation before us cannot be underestimated. The Framers built this nation upon an overt fear of autocratic rule.<sup>301</sup> They feared for a nation where one individual—i.e., the British monarchy—could manipulate the nation.<sup>302</sup> It was because of this fear that they institutionalized the separation of powers to hold each branch of government accountable.<sup>303</sup> The Judiciary was to be held as the final frontier, the last barricade, the last hope and defense of resistance, to uphold America’s civic democracy and to implement the Constitution with an unwavering commitment.<sup>304</sup> But sadly—irrespective of who sits in the Oval Office, whether you are a Republican or Democrat, or whoever is on the Supreme Court—the Judiciary has replaced their sworn duty to protect this undying text and replaced it with a commitment to political ideology and the party that positioned them on the bench.<sup>305</sup>

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296. *Id.*

297. *Id.*

298. See Pedley & Garrett, *supra* note 291 (finding that 59% of Britons have confidence in the UK Supreme Court to do its job well).

299. See *supra* notes 228–232 and accompanying text.

300. See *Why US Top Court Is So Much More Political Than UK’s*, BBC (Sep. 21, 2020), <https://www.bbc.com/news/world-us-canada-45632035> [https://perma.cc/FCF2-VJHC] (discussing that this unique process means that “political positions of nominees are often unknown or irrelevant in the process”).

301. See discussion *supra* Part I.

302. See *supra* Part I.

303. See *supra* Part I.

304. See *supra* Part I.

305. See *supra* Part II.

Now, this has dire consequences, no matter who the president is.<sup>306</sup> With each passing day, the Judiciary not holding the Executive and Legislative branches accountable, is another day the nation takes a step toward Putin's Russia or Xi Jinping's China.<sup>307</sup> Each passing day, when the Judiciary acts as an obedient subsidiary to the other branches that support a political agendas by pushing aside the Constitution and blurring the lines between the branches of government into one political oligopoly, it is another day the nation is divided and not protected by the nine Justices who swore to protect it.<sup>308</sup>

I understand that this Article contains passionate rhetoric, which is typically not seen in a Law Review article, but it reflects the current situation we are in. Something has to change, and it has to change now. No matter who the president is, or which political party controls the legislature, when they have free rein to do what they please, we no longer live in a democracy but in a nation controlled by one political party, without judicial restraint.<sup>309</sup> And this has occurred because the Judiciary has been willing to allow politics into their decision-making, thanks to the Executive's and Legislative's use of the Appointments Clause.<sup>310</sup>

Therefore, unlike the current situation, where ninety percent of the Executive's candidates are passed by the Senate, we need a Constitutional Amendment to the Appointments Clause, that places this power in an independent selection committee, such as the ABA, modelled on the UKSC.<sup>311</sup> This will ensure that, instead of political forces driving the appointment and then influencing future decision-making, an independent body will choose who enters the Judiciary based solely on merit, not politics.<sup>312</sup> This will move public perception of the Court closer to that of Britain and mean that the American public has more trust that the Judiciary will act as a neutral judiciary, solely tethered to its sworn text and not a political party.<sup>313</sup>

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306. See David Pimentel, *Balancing Judicial Independence and Accountability in a Transitional State: The Case of Thailand*, 33 UCLA PAC. BASIN L.J. 155, 165–66 (2016) (discussing how we must demand judicial impartiality and accountability to deter corruption).

307. See generally *Autocratic Countries 2026*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/autocratic-countries> [https://perma.cc/TMG8-C2F3] (last visited Mar. 22, 2026) (outlining the world's autocratic nations).

308. See *supra* Part II.

309. See *supra* Part II.

310. See *supra* Part II.

311. See *supra* Parts II–III.

312. See *supra* Part III.

313. See *supra* Part III.