ESSAYS

SACRIFICING LEGITIMACY IN A HIERARCHICAL JUDICIARY

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

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INTRODUCTION

From time to time, Supreme Court watchers predict that we are on the verge of a constitutional revolution.[1] Many commentators today

1. See, e.g., Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 24–25 (1992) [hereinafter Sullivan, Justices] (noting that after Presidents Ronald Reagan and George H.W. Bush "filled five vacancies," various "Court-watchers claimed . . . a conservative revolution was at hand"); Amelia Thomson-DeVeaux & Laura Bronner, How a Conservative 6-3 Majority Would Reshape the Supreme Court, FiveThirtyEight (Sept. 28, 2020), https://fivethirtyeight.com/

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

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features/how-a-conservative-6-3-majority-would-reshape-the-supreme-court [https://perma.cc/ZD9R-8VV3] (asserting that "the chances of 'a conservative revolution' on the court are high"); see also Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045, 1051–61 (2001) (discussing "a veritable revolution in constitutional doctrine" with respect to federalism and civil rights).

2. See Clare Huntington, Abortion Talk, 117 Mich. L. Rev. 1043, 1044 (2019) (noting that many "anticipate significant" changes "if not a complete repudiation of *Roe v. Wade*").

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

4. See Adam Liptak, Justice Barrett's Vote Could Tilt the Supreme Court on Gun Rights, N.Y. Times (Nov. 30, 2020), https://www.nytimes.com/2020/11/30/us/supreme-court-barrett-gun-rights.html (on file with the *Columbia Law Review*) (noting the anticipated changes to Second Amendment doctrine).

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

6. Some commentators endorse certain aspects of the predicted change in doctrine. See, e.g., John Yoo & James Phillips, Roberts Thwarted Trump, but the Census Ruling Has a Second Purpose, Atlantic (July 11, 2019), https://www.theatlantic.com/ideas/archive/2019/07/liberals-helped-roberts-undercut-bureaucratic-state/593737 (on file with the *Columbia Law Review*) (celebrating that "[t]he counterrevolution is on . . . against an administrative state run amok"); see also Joyce Lee Malcolm, Defying the Supreme Court: Federal Courts and the Nullification of the Second Amendment, 13 Charleston L. Rev. 295, 311 (2018) (arguing that "[i]t is long past time for the Supreme Court" to protect the Second Amendment).

7. See supra notes 2–5.

8. The attacks on the Court's legitimacy were ignited in part by recent confirmation battles: Critics argue that Republicans used underhanded means to cement a conservative majority on the Court—and thereby make possible a constitutional revolution. See Tara Leigh Grove, The Supreme Court's Legitimacy Dilemma, 132 Harv. L. Rev. 2240, 2240–42 (2019) [hereinafter Grove, Legitimacy Dilemma] (discussing the controversies surrounding Merrick Garland, Neil Gorsuch, and Brett Kavanaugh and the attacks on the Court's "legitimacy"); see also, e.g., John F. Harris, The Supreme Court Is Begging for a Legitimacy Crisis, Politico (Oct. 29, 2020), https://www.politico.com/news/magazine/2020/10/29/supreme-court-begging-for-legitimacy-crisis-433573 [https://perma.cc/UZ3C-L2A4] (arguing that the confirmation of Amy Coney Barrett "days before a presidential election" undermines the Court's legitimacy).

9. See Opinion, How to Fix the Supreme Court, N.Y. Times (Oct. 27, 2020), https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html (on file with the *Columbia Law Review*) (collecting proposals); Larry Kramer, Pack the Courts, N.Y. Times (Oct. 27, 2020), https://www.nytimes.com/interactive/2020/10/27/opinion/pack-supreme-court.html (on file with the *Columbia Law Review*). Some critics call for a federal statute imposing term limits on Supreme Court Justices. See John Kruzel, Dozens of Legal Experts Throw Weight Behind Supreme Court Term Limit Bill, Hill (Oct.

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

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

Let us begin with the first tradeoff: To most effectively ensure legal change on high-profile and contested issues, the Court should clarify the law through broad, rule-like precedents. Although ideology plays a limited role in most lower court decisions, empirical research suggests that judges are more likely to vote in predictable "conservative" or "progressive" directions on issues such as abortion, affirmative action, or gun rights.[11] As a result, the Supreme Court should take special care to guide—or "rein in"—its judicial inferiors in these areas. But the Justices may feel considerable pressure *not* to issue broad, rule-like doctrines in precisely

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23, 2020), https://thehill.com/regulation/court-battles/522447-dozens-of-legal-experts-throw-weight-behind-supreme-court-term-limit [https://perma.cc/WRW9-B6LM]. Suzanna Sherry advocates a statute prohibiting concurring and dissenting opinions—to reduce the emphasis on individual Justices' votes. See Suzanna Sherry, Our Kardashian Court (and How to Fix It), 106 Iowa L. Rev. 181, 182 (2020). Dan Epps and Ganesh Sitaraman have provocatively called for either a fifteen-member Supreme Court or one that would consist of nine-member panels drawn from the entire pool of federal appellate court judges. See Daniel Epps & Ganesh Sitaraman, How to Save the Supreme Court, 129 Yale L.J. 148, 181–84 (2019) (proposing a "Supreme Court Lottery," under which the Court would consist of all federal appellate court judges, who would randomly serve on nine-Justice panels for two-week periods); id. at 193–96 (proposing in the alternative a "Balanced Bench," which would encompass a fifteen-member Court, with five affiliated with the Democratic Party, five affiliated with the Republican Party, and the remaining five selected by the first ten); see also Stephen E. Sachs, Supreme Court as Superweapon: A Response to Epps & Sitaraman, 129 Yale L.J. Forum 93, 94–100 (2019) (critiquing the proposals). But much recent discussion focuses on expanding the size of the Supreme Court (a reform that is often described as "court packing"). See Richard Wolf, Pack the Court? Battles Between Republicans and Democrats Fuel Clash over Supreme Court's Future, USA Today (Oct. 25, 2020), https://www.usatoday.com/story/news/politics/2020/10/25/could-amy-coney-barretts-confirmation-fuel-supreme-court-expansion/3716562001 [https://perma.cc/H2ZD-QDN4]. The calls for court packing push against a strong norm. See Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers, 105 Geo. L.J. 255, 278–87 (2017); Tara Leigh Grove, The Origins (and Fragility) of Judicial Independence, 71 Vand. L. Rev. 465, 505–17 (2018) [hereinafter Grove, Judicial Independence]; see also infra notes 315–320 and accompanying text (noting other proposed Court reforms).

10. This Essay focuses on the lower federal courts, which seem most likely to handle the hot-button issues that are the focus of so much commentary today. State court legitimacy raises important but different questions, which I hope to address in later work.

11. See infra section III.A; see also Lee Epstein, William E. Landes & Richard A. Posner, The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice 168, 213–14, 237 (2013) (reporting that "ideological voting is less frequent" in the lower courts than in the Supreme Court).

these high-profile contexts—particularly when the Justices perceive that the Supreme Court is under attack. Broad doctrinal rules raise the stakes of any decision and could invite additional attacks against the Court or even lead to noncompliance. Accordingly, the Justices may be tempted to issue narrow decisions or flexible standards or to deny certiorari in high-profile cases—and allow the lower federal courts to work out the details. In short, to preserve the external reputation (sociological legitimacy) of the Supreme Court, the Justices may opt not to issue the broad, rule-like doctrines most conducive to legal change.

But that leads to a second tradeoff: There are considerable risks to the lower courts when they must take the lead on the content of federal law in high-profile areas. As noted, absent clear guidance from the Supreme Court, inferior federal judges tend to be more influenced by ideology in ruling on certain high-profile cases, such as those involving abortion or affirmative action. At a minimum, political actors and interest groups *assume* that the law in these areas will depend on the composition of the lower federal courts.[12] This assumption puts pressure on Presidents and senators to emphasize judicial ideology in lower federal court appointments. And, indeed, over the past several decades, the selection of inferior federal court judges has grown increasingly partisan and divisive.[13] Some research suggests that this very divisiveness undermines public respect for—that is, the legitimacy of—the lower federal courts.[14]

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

Two prominent historical episodes vividly illustrate this conundrum.[15] The "all deliberate speed" formula in *Brown II* was, in significant part, an effort to protect the Court's public reputation; the Justices worried that segregationists would refuse to comply with a firm deadline.[16] This opaque test, in turn, both sacrificed meaningful legal change and delegated desegregation to the inferior federal judiciary—leading to some of the earliest lower court confirmation wars. In *Planned Parenthood v. Casey*, the Justices—again, to protect the Court's sociological legitimacy—declined either to overrule *Roe v. Wade* or to retain its broad, rule-like trimester framework.[17] Instead, the Court crafted the "undue burden" standard, which inferior federal judges have applied in distinct and often

12. See infra section III.C.1.

13. See infra section III.C.1.

14. See infra section III.C.3.

15. See infra Part II.

16. See Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (directing federal district courts to enforce desegregation orders with "all deliberate speed").

17. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878–79 (1992) (plurality opinion) (O'Connor, Kennedy & Souter, JJ.) (rejecting "the rigid trimester framework of *Roe v. Wade*" while reaffirming the case's "central holding").

ideologically predictable ways.[18] This test has also raised the stakes for—and the contentiousness of—lower court selection.

Recent events underscore the risks to the inferior federal judiciary. There seems to have been an uptick in negative rhetoric about the lower courts—including, specifically, accusations that federal judges decide cases on ideological grounds. President Trump, for example, denounced adverse lower court rulings as the handiwork of "Obama judges."[19] Although Chief Justice Roberts and other jurists have pushed back against the charge that there are "Obama judges" or "Trump judges,"[20] some commentators insist that lower court judges vote in ideologically predictable directions.[21] This commentary has, however, failed to appreciate that any such ideological voting depends in significant part on Supreme Court precedent. The Court could rein in its judicial inferiors through broad, rule-like doctrines—and thereby help protect the public reputation of the lower federal courts. But the Justices may opt instead for opaque tests in an effort to safeguard the reputation of the Court itself.

This analysis has important implications for constitutional scholarship and jurisprudence. First, this account pushes against the assumption of some scholars that the Supreme Court can easily resolve controversial issues of constitutional law and thereby launch a constitutional revolution.[22] To the extent that the Justices are concerned about the Court's public reputation, they may be *least* inclined to resolve precisely those issues on which lower courts *most* need guidance.[23]

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18. See id. at 874–79; infra notes 154–157 and accompanying text (discussing how lower federal courts have applied the "undue burden" standard).

19. See infra notes 236–238 and accompanying text.

20. Mark Sherman, Roberts, Trump Spar in Extraordinary Scrap over Judges, AP News (Nov. 21, 2018), https://www.apnews.com/c4b34f9639e141069c08cf1e3deb6b84 [https://perma.cc/Q9SG-TVDL]; see also Jess Bravin, No Obama or Trump Judges Here, Appointees of Both Declare, Wall St. J. (Sept. 15, 2019), https://www.wsj.com/articles/judges-say-they-arent-extensions-of-presidents-who-appointed-them-11568566598 (on file with the *Columbia Law Review*).

21. See Ramesh Ponnuru, The Chief Justice's Defense of the Federal Judiciary, Nat'l Rev. (Nov. 21, 2018), https://www.nationalreview.com/corner/chief-justice-john-roberts-defends-the-federal-judiciary (on file with the *Columbia Law Review*) (arguing that Chief Justice Roberts's statement that there are no "Obama judges or Trump judges" is "pretty obviously untrue" because "[t]he decisions of judges appointed by Clinton and Obama generally differ, in predictable ways, from the decisions of judges appointed by Bush and Trump"); Marc A. Thiessen, Opinion, Chief Justice Roberts Is Wrong. We Do Have Obama Judges and Trump Judges., Wash. Post (Nov. 23, 2018), https://www.washingtonpost.com/opinions/chief-justice-roberts-is-wrong-we-do-have-obama-judges-and-trump-judges/2018/11/23/ee8de9a2-ef2c-11e8-8679-934a2b33be52_story.html (on file with the *Columbia Law Review*).

22. See supra notes 1–7 and accompanying text; see also Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1385 (1997) (viewing the Court "as the authoritative settler of constitutional meaning").

23. This analysis thus links up with the important literature on "stealth overruling" or "narrowing" of Supreme Court precedents. Compare Barry Friedman, The Wages of Stealth Overruling (with Particular Attention to *Miranda v. Arizona*), 99 Geo. L.J. 1, 4–5 (2010)

Second, and more fundamentally, this analysis underscores that scholarship on judicial legitimacy has focused too narrowly on the Supreme Court.[24] Many scholars argue that the Justices *should* decide cases with an eye to protecting the Court's sociological legitimacy.[25] Alexander Bickel and Cass Sunstein, for example, urge the Court to issue narrow ("minimalist") rulings or deny certiorari in controversial matters so as to avoid provoking external criticism.[26] These scholars have overlooked the impact that such narrow or nonexistent decisions may have on the long-term legitimacy of the remainder of the federal bench. As this Essay underscores, once we take into account the entire judicial system, it is far from clear which level of the federal judiciary is better equipped to shoulder external attacks.

At the outset, a few points of clarification. First, this Essay focuses on *sociological* legitimacy: the external reaction to the decisions of the Supreme Court and the lower federal courts. But this Essay does not simply consider the reaction of the general public; the broader public is often unaware of the actions of the judiciary, particularly the lower courts. Accordingly, this Essay also considers—as relevant to sociological legitimacy—the perspective of government officials and political elites (including interest groups) who tend to care deeply about judicial decisionmaking.[27] When the Justices refrain from issuing a broad ruling, they may be concerned about the reaction of any of these external

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(criticizing "stealth overruling"), with Richard M. Re, Narrowing Precedent in the Supreme Court, 114 Colum. L. Rev. 1861, 1865–66 (2014) (defending "narrowing").

24. See infra Part I and section IV.B.

25. See, e.g., Deborah Hellman, The Importance of Appearing Principled, 37 Ariz. L. Rev. 1107, 1151 (1995) (arguing that "the Court must take care to preserve the esteem in which it is held"); Gillian E. Metzger, Considering Legitimacy, 18 Geo. J.L. & Pub. Pol'y 353, 364 (2020) (asserting that "concerns about preserving public support for the Court fall within the bounds of reasonable constitutional adjudication"); Tom R. Tyler & Gregory Mitchell, Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights, 43 Duke L.J. 703, 712 (1994) ("The Court wisely attends to its legitimacy in the eyes of the public . . . ."); Michael L. Wells, "Sociological Legitimacy" in Supreme Court Opinions, 64 Wash. & Lee L. Rev. 1011, 1051 (2007) (urging that the Court should decide cases so as to preserve "sociological legitimacy"); infra Part IV.

26. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 69–72, 132, 250–56 (2d ed. 1986) [hereinafter Bickel, Least Dangerous Branch]; Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 3–23, 39–41 (1999) [hereinafter Sunstein, One Case]; infra section IV.B.

27. Over the past several decades, Presidents, senators, and interest groups have increasingly zeroed in on the lower federal courts. See infra sections II.A.3, II.B.3, III.C.1.

groups.[28] Likewise, any of these groups may zero in on the composition of the inferior federal courts.[29]

Second, this Essay does not claim that there is a legitimacy tradeoff with respect to every constitutional question. The analysis here focuses on legal issues that are both highly salient *and* contested, such as abortion, affirmative action, and gun rights. In less salient (or less contested) areas of constitutional law, the Justices may have little to lose in articulating clear doctrine, and lower court nominees are unlikely to be quizzed about their views on low-profile issues. But notably, the category of highly salient and contested areas is not a static one. An issue may become more or less salient over time.[30] This Essay thus does not aim to define a fixed set of highly salient and contested issues but instead seeks to identify a phenomenon—legitimacy tradeoffs within the federal judicial hierarchy—that can arise with respect to whatever divisive issues exist at a given point in our constitutional development.

Finally, this Essay does not argue that the contentious nature of lower court selection can be traced exclusively to Supreme Court doctrine. There are several interrelated factors, including the rise in party polarization, the growing influence of interest groups, and changes in Senate procedure.[31] But the historical events and social science research canvassed in this Essay demonstrate that the Court's doctrinal choices are an important—and largely overlooked—contributing factor.

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28. Scholars debate whether the Justices are primarily concerned about the views of elites or the general public. For purposes of this Essay, it is sufficient to assume—to the extent the Justices consider external views—that they may care about any of these external groups. Compare Neal Devins & Lawrence Baum, The Company They Keep: How Partisan Divisions Came to the Supreme Court, at xi (2019) (arguing that the Justices are "elites who seek to win favor with other elites"), with Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 16 (2009) [hereinafter Friedman, Will of the People] (arguing that the Supreme Court "ratif[ies] the American people's considered views about the . . . Constitution"), and Jeffrey Rosen, The Most Democratic Branch: How the Courts Serve America 3 (2006) (arguing that Supreme Court decisions often reflect public opinion better than Congress).

29. See Nancy Scherer, Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process 21–22 (2005) (emphasizing interest group influence over judicial nominations); Amy Steigerwalt, Battle over the Bench: Senators, Interest Groups, and Lower Court Confirmations 10–13 (2010) (recognizing that, at least by the 1980s, interest groups focused on lower court confirmations); see also Lauren Cohen Bell, Warring Factions: Interest Groups, Money, and the New Politics of Senate Confirmation 8–12 (2002) (discussing interest group influence in executive and judicial nominations).

30. As discussed below, abortion became a more divisive matter in national politics after the Court's decision in *Roe v. Wade*. See infra section II.B.1.

31. See Sarah A. Binder & Forrest Maltzman, Advice & Dissent: The Struggle to Shape the Federal Judiciary 145 (2009) [hereinafter Binder & Maltzman, Advice] (emphasizing the importance of the "institutional rules and practices" of the Senate); Scherer, supra note 29, at 4–5, 21–22 (arguing that "the parties use [lower court] nominations to curry favor with only an elite constituency within each party"); Benjamin Wittes, Confirmation Wars: Preserving Independent Courts in Angry Times 57–60 (updated paperback ed. 2009)

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

I. THE (OVER)EMPHASIS ON SUPREME COURT LEGITIMACY

There is a rich literature on the legitimacy of the Supreme Court. Political scientists focus on sociological legitimacy, arguing that the Court can function effectively only if it has external support.[32] After all, the Court has no army; it must rely on others to comply with its decrees.[33] Government officials and the general public are more likely to obey if they view the Court as "legitimate"—that is, as an institution that should have the power to determine legal rights and obligations.[34] It is particularly important that those who *disagree* with a given ruling view the Court as legitimate; such disappointed individuals will respect the adverse decision if they consider the institution itself to be authoritative.[35] Political scientists thus often say that "legitimacy is for losers."[36]

Political scientists disagree about the source and nature of the Supreme Court's sociological legitimacy. Many scholars argue that the

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(tracing "the decline of the [lower court selection] process . . . to the growth of judicial power that began with the *Brown* decision"); Keith E. Whittington, Partisanship, Norms, and Federal Judicial Appointments, 16 Geo. J.L. & Pub. Pol'y 521, 530 (2018) [hereinafter Whittington, Partisanship] (emphasizing growing party polarization).

32. See, e.g., Brandon L. Bartels & Christopher D. Johnston, On the Ideological Foundations of Supreme Court Legitimacy in the American Public, 57 Am. J. Pol. Sci. 184, 184 (2013) ("For an institution like the U.S. Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy . . . .").

33. See Mark D. Ramirez, Procedural Perceptions and Support for the U.S. Supreme Court, 29 Pol. Psych. 675, 675 (2008) (noting that "the Supreme Court does not possess the budgetary power of Congress or the enforcement power of the President").

34. See James L. Gibson & Gregory A. Caldeira, Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People 38–39 (2009); Bartels & Johnston, supra note 32, at 184.

35. See Gibson & Caldeira, supra note 34, at 38–39 ("Legitimate institutions are those recognized as appropriate decision-making bodies even when one disagrees with the outputs of the institution." (emphasis omitted)).

36. E.g., James L. Gibson, Milton Lodge & Benjamin Woodson, Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority, 48 Law & Soc'y Rev. 837, 839 (2014).

Court enjoys broad "diffuse support."[37] Under this view, the public generally sees the Court as performing a different function from the political branches and treats its decisions as reasonable and binding, regardless of the outcome of a specific case.[38] But a growing literature challenges this perspective. The challengers—"specific support" scholars—argue that members of the public tend to support the Court only if they like the results in specific high-profile cases.[39] In other words, "individuals grant or deny the Court legitimacy based on the ideological tenor of the Court's policymaking."[40]

Notably, even diffuse support scholars assert that public respect for the Supreme Court is contingent, at least in the long run. Recall that it is crucial for the "losers" to view the Court as an authoritative decisionmaker so that they will respect an adverse decision. Scholars agree that a series of adverse decisions in salient cases could lessen the Court's support among a particular group.[41] If the Supreme Court, for example, repeatedly issued "conservative" (or "progressive") decisions in high-profile cases, its institutional reputation would eventually decline with the "loser" group.

Accordingly, both camps agree that the Supreme Court's decisions in high-profile cases can affect its sociological legitimacy, at least in the long

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37. Political scientists differentiate "specific support" (support for a single Court action) from "diffuse support" (long-term support, regardless of the Court's actions). See Walter F. Murphy & Joseph Tanenhaus, Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes, 2 Law & Soc'y Rev. 357, 370 (1968).

38. See Gibson & Caldeira, supra note 34, at 61–62 ("[S]upport for the Court has little if anything to do with ideology and partisanship."); James L. Gibson & Michael J. Nelson, Changes in Institutional Support for the U.S. Supreme Court: Is the Court's Legitimacy Imperiled by the Decisions It Makes?, 80 Pub. Op. Q. 622, 623–24 (2016) (offering empirical support for the conventional view that diffuse support is "sticky").

39. See Bartels & Johnston, supra note 32, at 185–87 (arguing that high-profile cases, i.e., those that "receive ample attention from the media and political elites, are important topics in election campaigns, and have facilitated the formation of significant ideological cleavages in American politics," play an outsized role in how the "mass public" forms opinions about the Court's legitimacy); Neil Malhotra & Stephen A. Jessee, Ideological Proximity and Support for the Supreme Court, 36 Pol. Behav. 817, 819 (2014) (finding that individuals "who are ideologically closest to the Court's position tend to exhibit the highest levels of trust and approval"); see also Dino P. Christenson & David M. Glick, Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy, 59 Am. J. Pol. Sci. 403, 415–16 (2015) (finding that public attitudes can be changed by "a single, albeit salient, case"); supra note 37 (defining "specific support").

40. Bartels & Johnston, supra note 32, at 185.

41. See Gibson & Caldeira, supra note 34, at 43 ("[O]ver the long haul, the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution's legitimacy in the eyes of disaffected groups."); see also id. (noting that support for the Court among African Americans has declined in recent decades); James L. Gibson & Michael J. Nelson, The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto, 10 Ann. Rev. L. & Soc. Sci. 201, 206–07 (2014) ("[T]he Court's diffuse support could suffer once some accumulated threshold level of dissatisfaction is reached.").

run. And for those who accept the "specific support" view, any individual decision in a salient case may affect the Court's external reputation.

This possibility raises a challenging normative question for jurists and legal scholars: Should the Justices decide cases so as to preserve the sociological legitimacy of the Court? A number of scholars argue yes, emphasizing that the Court cannot function without some level of external support.[42] Others raise questions about whether any such consideration of sociological legitimacy is *legally* legitimate—that is, a normatively acceptable mode of legal reasoning.[43] But at a minimum, scholars seem to agree that the Justices *do* decide at least some high-profile cases so as to protect the sociological legitimacy of the Court.[44]

This Essay will return to some of these normative questions. For now, the important point is that this debate over legal and sociological legitimacy focuses almost exclusively on the Supreme Court.[45] Lost in the discussion is the inferior federal judiciary. But this Essay aims to show that, to the extent the Justices decide cases so as to protect the public reputation of the Court, they may create risks for the remainder of the federal bench. As Part IV discusses, once we expand our focus to the entire federal judiciary, the normative question—should the Justices decide cases so as to protect the Court's legitimacy?—becomes significantly more nuanced and complex.

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42. See supra notes 25–26 and accompanying text; infra sections IV.B–.C.

43. See infra section IV.B.1; see also Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court 21 (2018) [hereinafter Fallon, Law and Legitimacy] (distinguishing sociological, moral, and legal legitimacy); Robert C. Post & Neil S. Siegel, Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin, 95 Calif. L. Rev. 1473, 1473–74 (2007) (examining the tension between "the social legitimacy of the law as a public institution" and "the legal legitimacy of the law as a principled unfolding of professional reason").

44. See Fallon, Law and Legitimacy, supra note 43, at 111 (asserting that "the Justices might [under threat] feel externally constrained to adopt positions that they think constitutionally erroneous"); Or Bassok, The Sociological-Legitimacy Difficulty, 26 J.L. & Pol. 239, 240–42, 272 (2011); Erin F. Delaney, Analyzing Avoidance: Judicial Strategy in Comparative Perspective, 66 Duke L.J. 1, 3–4 (2016); Allison Orr Larsen, Judging "Under Fire" and the Retreat to Facts, 61 Wm. & Mary L. Rev. 1083, 1090–91 (2020); see also Michael D. Gilbert & Mauricio A. Guim, Active Virtues, 98 Wash. U. L. Rev. 857, 860 (2021) (arguing that the Justices should not only avoid controversial cases but also take on politically uncontroversial cases—what the authors call "unity cases"—in order to bolster the Court's external legitimacy).

45. There is at least one exception. Neil Siegel argues that the Supreme Court can at times work together *with* the lower courts to promote the external legitimacy of the *entire* federal judiciary. See Neil S. Siegel, Reciprocal Legitimation in the Federal Courts System, 70 Vand. L. Rev. 1183, 1186–87 (2017) [hereinafter Siegel, Reciprocal Legitimation]. Section III.D discusses Siegel's thoughtful piece in greater detail. For now, it is enough to note that Siegel does not address the issue at the heart of this Essay: the legitimacy *tradeoffs* within the federal judicial hierarchy.

II. PRESSURE ON THE LOWER FEDERAL JUDICIARY

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

A. *The Consequences of "All Deliberate Speed"*

1. *The Creation of "All Deliberate Speed".* — In 1954, the Supreme Court announced its watershed unanimous ruling in *Brown*, declaring that, "in the field of public education the doctrine of 'separate but equal' has no place."[46] But the Court did not issue a remedy. Instead, the Justices scheduled the case for reargument to determine how the Court should carry out its constitutional ruling.[47]

During the oral argument in *Brown II*, then-NAACP attorney Thurgood Marshall implored the Justices to establish a firm deadline for desegregation, directing that the process be complete by September 1956 at the latest.[48] Absent a clear deadline, Marshall warned, "[T]he Negro in this country would be in a horrible shape," as the lower courts allowed the "several states [to] decide in their own minds as to how much time was necessary."[49] Indeed, Marshall suggested that an open-ended standard might leave students "worse off" than the "separate but equal" doctrine because it would be challenging for NAACP attorneys to show when a school district was violating the law.[50] "In separate but equal," Marshall explained, "we could count the number of books, the number of bricks, the number of teachers and find out whether the school was physically

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46. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

47. See id. at 495–96 & n.13 (directing further argument over whether the Court should itself "formulate detailed decrees" or instead "remand to the [district] courts" and, if the latter, "what general directions" the Court should offer).

48. Transcript of Oral Argument, *Brown II*, 349 U.S. 294 (1955) (Nos. 1 to 5), *in* Argument: The Oral Argument Before the Supreme Court in *Brown vs. Board of Education of Topeka*, 1952–55, at 337, 393–94 (Leon Friedman ed., 1969) [hereinafter *Brown II* Transcript] (urging the Court to "put a date certain" on desegregation (quoting Thurgood Marshall)); see also Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 313 (2004) (noting that the NAACP "pressed for immediate desegregation").

49. *Brown II* Transcript, supra note 48, at 400 (quoting Thurgood Marshall).

50. Id.

equal or not."[51] But if the Court issued an opaque test to govern desegregation, "enforcement of [*Brown*] will be left to the judgment of the district court with practically no safeguards."[52]

By contrast, the other participants in the case urged the Court to proceed with caution. U.S. Solicitor General Simon Sobeloff argued that the Court should require desegregation only "as speedily as feasible"—to allow an "effective gradual adjustment."[53] And the attorneys for the states argued for virtually unlimited district court discretion:[54] The Court should "trust the district judge to carry out the constitutional provisions" even if, in some school districts, "it may well prove impossible to have unsegregated schools in the reasonably foreseeable future."[55] Indeed, the South Carolina attorney general suggested that it may be necessary to wait until society was ready for desegregation—a change that might not occur until "2015 or 2045."[56]

Notwithstanding the pleas of the NAACP, and the candor of some state attorneys, the Justices were wary of issuing a firm decree. As other scholars have recounted, the Justices worried that "[t]he more specific and immediate the relief ordered, the greater the chances of defiance" by segregationists.[57] And any such noncompliance would harm the Supreme Court's public reputation.[58] As Justice Black put it during the internal deliberations over the case, "[N]othing could injure the court more than to issue orders that cannot be enforced."[59]

Accordingly, the Court in *Brown II* instructed district courts to "enter such orders . . . as are necessary and proper" to school systems to ensure desegregation "with all deliberate speed."[60] To be sure, as Justin Driver emphasizes, the Court's decision did not purport to authorize indefinite

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51. Id.

52. Id.

53. Id. at 508–09 (quoting Simon E. Sobeloff).

54. See J.W. Peltason, Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation 16 (1961) (noting that the southern lawyers argued for a "wide-open mandate" (internal quotation marks omitted)).

55. *Brown II* Transcript, supra note 48, at 420–21 (quoting Robert McCormick Figg).

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

57. Klarman, supra note 48, at 314; see also Jeffrey K. Staton & Georg Vanberg, The Value of Vagueness: Delegation, Defiance, and Judicial Opinions, 52 Am. J. Pol. Sci. 504, 505, 507 (2008) (arguing that *Brown II* illustrates how the Court may issue "vague" decrees out of concern for the "institutional prestige" of the Court).

58. See Klarman, supra note 48, at 314 (noting "the justices' concern about issuing futile orders" and how that could undermine "the Court's prestige").

59. Friedman, Will of the People, supra note 28, at 246 (quoting Justice Black and other Justices concerned about noncompliance); see also Klarman, supra note 48, at 314 (recounting the Justices' internal deliberations).

60. *Brown II*, 349 U.S. 294, 301 (1955).

delays.[61] The Court declared that the lower courts should "require . . . a prompt and reasonable start toward full compliance with our [*Brown*] ruling."[62] Yet largely out of concern for the Court's sociological legitimacy, the Justices declined to issue the firm deadline requested by the NAACP. As Michael Klarman observes, the Justices seemingly "valu[ed] the Court's prestige—its dignity interest in avoiding the issuance of futile orders—over the plaintiffs' constitutional rights[]."[63]

2. *Sacrificing Meaningful Change*. — Many scholars have recognized that the Supreme Court's decision in *Brown II* failed to produce meaningful legal change.[64] As Charles Ogletree laments, "the Court removed much of the force of its [*Brown*] decision by allowing proponents of segregation to end it not immediately but with 'all deliberate speed.' . . . This compromise left the decision flawed from the beginning."[65] Indeed, even ten years after *Brown*, fewer than two percent of Black schoolchildren attended integrated schools.[66] Derrick Bell thus forcefully charges: "Having promised much in its first *Brown* decision, the Court in *Brown II* said in effect that its landmark earlier decision was more symbolic than real."[67]

Brown II failed to achieve meaningful legal change in large part because it delegated to the lower courts the task of defining "all deliberate speed." And federal district judges implemented the ruling in vastly different ways. In 1964, political scientist Kenneth Vines found what he described as "extreme differences among the judges in the disposition of race relations cases."[68] According to Vines, federal judges during this era

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61. See Justin Driver, The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind 256–58 (2019) ("*Brown II* contained some countervailing language, now generally forgotten, suggesting that the Court would not countenance substantial delays . . . ."). Perhaps for that reason, Thurgood Marshall suggested in private correspondence that he was satisfied with the *Brown II* decision. See Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality 749–50 (2d ed. 2004).

62. *Brown II*, 349 U.S. at 300.

63. Klarman, supra note 48, at 314.

64. See, e.g., Erwin Chemerinsky, The Case Against the Supreme Court 138–39 (2014) (arguing that the Warren Court "deserves a good deal of the blame" for "racial segregation in education" because "[t]he Court gave no deadlines or timetables[] [and] prescribed no techniques or approaches to desegregating schools"); J. Harvie Wilkinson III, From *Brown* to *Bakke*: The Supreme Court and School Integration: 1954–1978, at 126 (1979) (urging that "southern school desegregation ran a most uneven course").

65. Charles J. Ogletree, Jr., All Deliberate Speed: Reflections on the First Half Century of *Brown v. Board of Education*, at xiii (2004).

66. See Kluger, supra note 61, at 755.

67. Derrick Bell, Silent Covenants: *Brown v. Board of Education* and the Unfulfilled Hopes for Racial Reform 19 (2004) [hereinafter Bell, Silent Covenants].

68. Kenneth N. Vines, Federal District Judges and Race Relations Cases in the South, 26 J. Pol. 337, 348 (1964). Notably, Vines did not focus exclusively on school desegregation cases. But his findings are consistent with historical accounts about the implementation of *Brown* during this era. See infra notes 71–83 and accompanying text.

fell into three camps: "integrationists" who ruled in favor of most civil rights claims, "segregationists" who rejected most such claims, and "moderates" who fell between the other two extremes.[69] In fact, according to Vines, there were extremes within these camps: From 1954 to 1962, four judges ruled for civil rights plaintiffs in more than ninety percent of cases, while seven judges *never* granted relief to a single civil rights claimant.[70]

Historical accounts corroborate these findings. Some judges ("integrationists") went to great lengths to make the *Brown* promise a reality. Then-District Judge J. Skelly Wright, for example, "courageously and imaginatively enforced" desegregation in New Orleans, Louisiana.[71] By contrast, other judges ("segregationists") were openly hostile to *Brown*.[72] In Dallas, Texas, Judge T. Whitfield Davidson declined to "name any date or issue any order" for desegregating the public schools, stating that "the white man has a right to maintain his racial integrity and it can't be done so easily in integrated schools."[73]

The "all deliberate speed" formulation enabled segregationist judges like Davidson to resist desegregation. But the lack of clarity in *Brown II* was perhaps most problematic for judges in the moderate camp—the bulk of the southern judiciary.[74] Although these judges were less hostile to *Brown*, they were reluctant to issue firm desegregation orders because they would face severe repercussions from their local communities. As then-Professor J. Harvie Wilkinson explained:

> *Brown II* gave trial judges little to hide behind. The enormous discretion of the trial judge in interpreting such language as "prompt and reasonable start" and "all deliberate speed" made his personal role painfully obvious. If the judge did more than the bare minimum, he would be held unpleasantly accountable. Bold movement meant community opprobrium. Segregationists were always able to point to more indulgent judges elsewhere.[75]

Other commentators have offered a similar assessment.[76] In 1961, political scientist Jack Peltason argued that "[t]he directions of the United

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69. See Vines, supra note 68, at 349.

70. See id. at 348–49.

71. Victor S. Navasky, Kennedy Justice 272 (1977); see also Jack Bass, Unlikely Heroes 112–35 (1981) (discussing Judge Wright's efforts).

72. See, e.g., Comment, Judicial Performance in the Fifth Circuit, 73 Yale L.J. 90, 97–98 (1963) (describing how a Savannah federal judge "denied the requested injunctive relief 'solely on the basis' of a factual finding that . . . integrated schools were harmful to both races").

73. Peltason, supra note 54, at 118–19 (internal quotation marks omitted) (quoting Judge Davidson); see also Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 91 (paperback ed. 1993) (noting Judge Davidson's resistance to *Brown*).

74. See Peltason, supra note 54, at 8; infra notes 75–83 and accompanying text.

75. Wilkinson, supra note 64, at 80–81 (footnote omitted).

76. See Bell, Silent Covenants, supra note 67, at 19 ("The judge who, in trying to enforce *Brown*, did more than the bare minimum, would be held unpleasantly accountable by the very active, vocal, and powerful opposition that surrounded him."); see also Lawrence

States Supreme Court" in *Brown II* were "not clear and explicit, and this [was] the crucial problem."[77] Absent the cover of a clear higher court decision, district judges who "issued antisegregation orders, however mild," would be socially ostracized, receive threatening letters and anonymous and obscene phone calls, and likely need extra security.[78] Consider, in this regard, the experience of Judge Wright, who pushed for desegregation in New Orleans. The judge received death threats, witnessed a cross-burning on his lawn, and needed an around-the-clock security detail.[79] As Jack Bass puts it, "By the end of 1960, Skelly Wright had become the most hated man in New Orleans . . . . With few exceptions, old friends would step across the street to avoid speaking to him."[80]

By contrast, a judge "who delay[ed] injunctions and avoid[ed] anti-segregation rules" would be "a local hero."[81] For many judges, the choice was clear.[82] According to Peltason, that is exactly what the southern state attorneys hoped for in *Brown II*: "If they could persuade the Supreme Court to leave the exact timing and precise nature of integration orders to the discretion of southern federal judges, they knew they could operate segregated schools for a long, long time."[83]

The courts of appeals could, of course, provide some guidance to district judges. In 1967, Fifth Circuit Judge John Minor Wisdom argued that appellate courts had an obligation to step in: "District courts are . . . understandably loath" to issue desegregation orders "without firm mandates" from higher courts.[84] Circuit judges, Wisdom emphasized, "are not more courageous or more enlightened than district judges. They are

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Baum, Lower Court Response to Supreme Court Decisions: Reconsidering a Negative Picture, 3 Just. Sys. J. 208, 214–15 (1978) (noting that southern judges "could suffer opprobrium and isolation as a result of a perceived devotion to civil rights"); Michael W. Giles & Thomas G. Walker, Judicial Policy-Making and Southern School Segregation, 37 J. Pol. 917, 918 (1975) (observing that "the district courts have not relished altering local customs by judicial decree").

77. Peltason, supra note 54, at 13 (urging that southern district judges "can hardly be expected on their own initiative to move against the local power structure").

78. Id. at 10.

79. See Bass, supra note 71, at 115 ("Pairs of federal marshals alternated in eight-hour shifts at [Judge Wright's] home to ensure his physical safety, and they escorted him to and from work.").

80. Id.

81. Peltason, supra note 54, at 9 (recounting that such a southern judge "will hear himself referred to as one of the nation's 'great constitutional scholars'").

82. Many judges permitted delays or required at most "token compliance." Wilkinson, supra note 64, at 81–82; see also Comment, supra note 72, at 99–100 ("Delay, and the ability of district courts successfully to administer it, is at the heart of the problem in the Fifth Circuit.").

83. Peltason, supra note 54, at 13; see also Rosenberg, supra note 73, at 89 (finding that "Southern segregationists" fought to "vest control of civil rights in lower-court judges").

84. John Minor Wisdom, The Frictionmaking, Exacerbating Political Role of Federal Courts, 21 Sw. L.J. 411, 420 (1967) (arguing that, "[t]o fill the vacuum" left by the Supreme Court, "the circuit court must step in").

just not on the firing line . . . ."[85] Judge Wisdom observed that the same reasoning extended to his superiors: "The Supreme Court, almost wholly removed from the local scene, by this criterion has an obligation to lead or at least point out the logical line of development of the law."[86] But the Court had failed to fulfill that function in school desegregation cases.[87] Accordingly, "because of the dearth of explicit directions . . . from the Supreme Court," the courts of appeals were "forced into a policy-making position."[88]

There were, however, important differences among—and within—the courts of appeals as well. Although several members of the Fifth Circuit, including Judge Wisdom, were among "the most prominent integrationists," other appellate judges were far more resistant to *Brown*.[89] Fifth Circuit Judge Ben Cameron, for example, was known for his states' rights philosophy and open hostility to desegregation and, on that basis, became a "hero in Mississippi."[90]

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

Notably, this focus on judicial ideology was a significant change. For much of American history, lower federal court appointments were patronage, not policymaking, opportunities.[91] Moreover, senators tended to be in charge of this patronage: Under the norm of senatorial courtesy, Presidents deferred to the wishes of home-state senators, at least when they were from the same political party as the President.[92] When both home-

85. Id. Notably, Congress has long required federal district judges to live in the district to which they were appointed. See Act of June 25, 1948, Pub. L. No. 80-773, § 134, 62 Stat. 869, 896 (codified as amended at 28 U.S.C. § 134(b) (2018)) (stating that, with few exceptions, "[e]ach district judge . . . shall reside in the district or one of the districts for which he is appointed").

86. Wisdom, supra note 84, at 420.

87. See id. at 420–21 ("[T]he general direction [of] 'all deliberate speed' has allowed a wide variety of action at both the district court and appellate levels.").

88. Id. at 426–27.

89. Navasky, supra note 71, at 269 (noting that the Fifth Circuit contained a mix of "integrationists," "moderates," and "segregationists"); see also Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan 126–31 (1997) [hereinafter Goldman, Picking Federal Judges] (discussing the judges on the Fourth and Fifth Circuits).

90. Bass, supra note 71, at 84–96.

91. See Steigerwalt, supra note 29, at 3; see also Scherer, supra note 29, at 13 ("[L]ower court judgeships [were long] . . . distributed to friends and campaign contributors . . . .").

92. See Steigerwalt, supra note 29, at 4–5 ("Beginning with George Washington, presidents deferred to [home-state] senators . . . ."). Senators took the lead with respect to

state senators were from an opposing party, Presidents often turned to other same-party state officials to suggest nominees.[93] To be sure, this patronage system meant that Presidents usually selected individuals from the same political party. But Presidents and senators rarely focused on how lower court judges were likely to vote on specific legal issues.[94]

Moreover, in the mid-twentieth century, a judge's partisan affiliation did not say very much about how he[95] might vote on high-profile issues like desegregation. The Democratic and Republican parties were internally divided on civil rights; there were social progressives and social conservatives in both parties.[96] Likely in part for that reason, Vines found that "integrationist," "moderate," and "segregationist" judges were not neatly divided along party lines.[97]

In the wake of "all deliberate speed," however, Presidents and senators increasingly emphasized judicial ideology, at least with respect to civil rights. The presidential administrations of the 1950s and 1960s largely pushed for judges who would support integration. Although President Eisenhower had a somewhat tepid attitude toward *Brown*,[98] he largely delegated judicial selection to his Justice Department,[99] and his Attorneys

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not only district court but also most appellate court nominees; a seat on a regional circuit court was seen as designated for a particular state. See Goldman, Picking Federal Judges, supra note 89, at 136.

93. See Goldman, Picking Federal Judges, supra note 89, at 135 (discussing how the Eisenhower administration turned to Republican leaders in southern states, "which had no Republican senators in the 1950s").

94. There were some notable exceptions. For example, after watching lower court judges repeatedly strike down New Deal legislation, President Franklin Roosevelt paid closer attention to which individuals were elevated to the inferior federal bench (although he was still also guided by "more traditional party considerations"). Id. at 30–31; see also Binder & Maltzman, Advice, supra note 31, at 33 (finding that, in the nineteenth century, political actors sometimes noted a nominee's views on the Fugitive Slave Act).

95. This Essay uses the pronoun "he" because the patronage system almost entirely excluded female nominees to the lower federal bench. See Goldman, Picking Federal Judges, supra note 89, at 357.

96. See Morris P. Fiorina, Divided Government 1 (2d ed. 1996) (observing that, by 1968 and 1972, the Democratic Party was still "hopelessly split" over civil rights); Keith E. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History 268–69, 273 (2007) [hereinafter Whittington, Political Foundations] (noting that, by the mid-twentieth century, both parties had "integrat[ed] disparate ideological elements . . . that persistently resisted the direction of presidential and party leadership").

97. Interestingly, Vines found that Republican judges were "disproportionately among the Moderates and Integrationists." Vines, supra note 68, at 350. He suggested that Republican appointees may have been less keyed into the social circles of the South—and thus less likely to care about social ostracism for supporting *Brown*. See id. at 351.

98. President Eisenhower's view of *Brown* is a matter of dispute. Compare 2 Stephen E. Ambrose, Eisenhower: The President 190 (1984) ("Eisenhower personally wished that the Court had upheld *Plessy v. Ferguson* . . . ."), with Goldman, Picking Federal Judges, supra note 89, at 127 (arguing that Eisenhower later came to support *Brown* because he "believed it was his duty to carry out the Court's rulings").

99. See Goldman, Picking Federal Judges, supra note 89, at 113, 123.

General, Herbert Brownell and William Rogers, strongly supported desegregation.[100] President Kennedy had campaigned in part on a platform of advancing civil rights,[101] and both he and his successor Lyndon Johnson endeavored to place integrationists on the bench.[102] Indeed, in discussing lower court nominees, President Johnson would often direct White House officials to "[c]heck to be sure he is all right on the Civil Rights question. I'll approve him if he is."[103]

Southern Democratic senators, however, also understood the significance of the lower federal courts—and pushed for segregationists.[104] Victor Navasky writes that "the hard-core Southern Senators" emphasized "the importance of 'not letting any more Skelly Wrights slip through.'"[105]

These divergent preferences set the stage for some challenging judicial selection battles. Eisenhower officials had an important tactical advantage because they were part of a Republican administration: The Justice Department was not expected to defer completely to the recommendations of the uniformly Democratic southern senators.[106] But that does not mean it was easy for the Eisenhower Administration to place integrationists on the bench.[107] For example, Eisenhower officials gave the

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100. See id. at 129–30; Richard L. Pacelle, Jr., Between Law and Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation 74–75 (2003).

101. See Arthur M. Schlesinger, Jr., A Thousand Days: John F. Kennedy in the White House 928–29 (1965). As a candidate, Kennedy did not support civil rights wholeheartedly—in part because he worried about losing southern white Democratic votes. See Steven Levingston, Kennedy and King: The President, the Pastor, and the Battle over Civil Rights 99 (2017) (recounting that then-campaign manager Robert Kennedy was concerned that an emphasis on civil rights would hurt Kennedy's support among southern whites).

102. See Navasky, supra note 71, at 254 (urging that, had the matter been up to the Kennedys, "undoubtedly no segregationists would have been appointed to the Southern bench").

103. Goldman, Picking Federal Judges, supra note 89, at 170–71 ("President Johnson, starting in mid-1966, insisted on knowing the civil rights view of candidates for the judiciary.").

104. See Navasky, supra note 71, at 253–54, 258; Donald E. Campbell & Marcus E. Hendershot, Show Me the Money: An Empirical Analysis of Interest Group Opposition to Federal Courts of Appeals Nominees, 28 S. Cal. Interdisc. L.J. 71, 81 (2018) (arguing that "Southern senators . . . were determined to keep control of the judges charged with enforcing" *Brown*).

105. Navasky, supra note 71, at 254, 258.

106. See Vines, supra note 68, at 351 (finding that Eisenhower could appoint judges in the South with "relative freedom" because he was not "restricted by senatorial courtesy"). Eisenhower appointed several prominent supporters of integration, including Fifth Circuit Judges John Minor Wisdom, Elbert Tuttle, and John Brown, and Alabama district court Judge Frank Johnson, Jr. See Bass, supra note 71, at 19, 23–32, 245.

107. See Goldman, Picking Federal Judges, supra note 89, at 130–31 (recalling Eisenhower's efforts to reassure a southern Democratic ally that past support for segregation would not automatically disqualify candidates for appointment to the federal bench); Peltason, supra note 54, at 5–6 ("[E]ven Eisenhower had to do business with the southern Democrats . . . .").

green light to Mississippi Senator James Eastland's suggestion of Ben Cameron for the Fifth Circuit, and he turned out to be a strong opponent of *Brown*.[108] And Democratic senators confirmed some integrationists—such as Judge Wisdom in 1957—largely because their attitudes toward *Brown* were uncertain.[109]

The Kennedy and Johnson Administrations also struggled with lower federal court appointments. These Democratic Presidents felt considerable pressure to defer to the preferences of home-state Democratic senators, and thus—much to the chagrin of civil rights leaders—put some segregationists on the federal bench.[110] Kennedy, for example, went along with Senator Eastland's insistence on District Judge W. Harold Cox, who developed an "unmatched record" of "obstruct[ing] civil rights progress in Mississippi."[111] And when there was an opening on the Fifth Circuit, Kennedy was strongly encouraged by progressives to nominate Judge Wright in recognition of his brave work implementing *Brown* in New Orleans.[112] But Louisiana Senator Russell Long vetoed that option.[113] Kennedy instead nominated Judge Wright to the Court of Appeals for the D.C. Circuit (a court without a home-state senator).[114] Meanwhile, southern Democrats carefully scrutinized Kennedy's nominee to replace Judge Wright in New Orleans: Frank Ellis.[115] At a subcommittee hearing, Senator Eastland pointedly asked, "Now, if we approve you, you are not going to be another Skelly Wright, are you?"[116]

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108. Navasky, supra note 71, at 265–66. Apparently, Senator Eastland had more information about Cameron's views on civil rights. See Bass, supra note 71, at 84–86.

109. See Peltason, supra note 54, at 27–28.

110. See Goldman, Picking Federal Judges, supra note 89, at 166–72, 171 n.v (noting that Johnson nominated an individual who "had signed the Southern Manifesto" and that Kennedy too "appointed segregationist judges"); Navasky, supra note 71, at 243–76 (detailing and criticizing Kennedy's record); Claude Sitton, Robert Kennedy Backs Naming of Segregationists to the Bench, N.Y. Times, Apr. 27, 1963, at 9, https://nyti.ms/383EaES (on file with the *Columbia Law Review*) (noting the "growing criticism from civil rights advocates" of certain Kennedy appointees).

111. Bass, supra note 71, at 164–66. Kennedy officials later explained that Cox "was not associated with . . . [specified] racist groups, and there was no public record of racist speeches or activity." Goldman, Picking Federal Judges, supra note 89, at 167; see also Navasky, supra note 71, at 250 (stating that Eastland likely told Cox not to join openly racist groups).

112. See Navasky, supra note 71, at 272–73.

113. See id. at 273.

114. See id.

115. See id. at 275–76 (documenting Judge Ellis's confirmation process).

116. Nomination of Frank B. Ellis to Be United States District Judge for the Eastern District of Louisiana: Hearing Before Subcomm. of the S. Comm. on the Judiciary, 87th Cong. 1, 7 (1962) (statement of Sen. Eastland). Judge Ellis was later confirmed and proceeded to largely undo Judge Wright's desegregation order for New Orleans. A Fifth Circuit panel (consisting of Judges John Minor Wisdom, Richard Rives, and John Robert Brown) later reversed. See United Press Int'l, Federal Court Spurs Integration of New Orleans Public Schools, N.Y. Times, Aug. 7, 1962, at 1, 18, https://nyti.ms/3afXr8U (on file with the *Columbia Law Review*).

The post-*Brown II* lower court selection process contains the seeds of our modern-day era. To be sure, Presidents and senators focused on ideology only with respect to civil rights. Otherwise, judicial selection continued to be a patronage opportunity.[117] But as to this crucial issue, both sides—southern Democratic senators and pro-civil-rights presidential administrations—were determined to put individuals with the "correct views" on the lower federal courts. As a result, only those whose views on desegregation were largely unknown seemed likely to receive a judicial nomination.[118] As Peltason put it during this era: "Since 1954 any extreme public position, even one for segregation, lowers a man's chances of being elevated to the federal bench to near zero."[119]

B. *The Impact of the Undue Burden Standard*

1. *Background:* Roe*'s Trimester Framework and the Political Response.* — The Supreme Court's journey with respect to the right to terminate a pregnancy differs in an important respect from the school desegregation cases. When the issue came upon the federal judicial scene in *Roe v. Wade*,[120] abortion was not yet an issue of national political prominence.[121] And Justice Blackmun's majority opinion famously provided a broad, rule-like doctrine: the trimester framework.[122]

Although some commentators criticized *Roe* for its prophylactic character, many women's-rights advocates praised the Court's decision to paint with a broad brush.[123] In 1973, some abortion-rights supporters emphasized the contrast with the "all deliberate speed" formula, stating that *Roe* "should be more immediately enforceable than the *Brown*

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117. See Goldman, Picking Federal Judges, supra note 89, at 172 ("With the exception of civil rights, neither Kennedy nor Johnson appeared to view the courts as vehicles of public policy relevant to their agendas. It is therefore not surprising to find that the policy agenda played a relatively minor role in judicial selection."); Steigerwalt, supra note 29, at 3 (noting that "[l]ower federal court nominations were traditionally patronage[] . . . opportunities" until the latter part of the twentieth century).

118. See Peltason, supra note 54, at 6–7; see also Goldman, Picking Federal Judges, supra note 89, at 129, 167 (observing that presidential administrations tended to veto individuals who had made publicly racist statements or joined pro-segregation organizations).

119. Peltason, supra note 54, at 7.

120. 410 U.S. 113 (1973).

121. See Eva R. Rubin, Abortion, Politics and the Courts: *Roe v. Wade* and Its Aftermath 94 (1987) (asserting that, until 1976, "abortion had been a negligible issue in national politics"); Neal Devins, Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government, 69 Vand. L. Rev. 935, 948–49 (2016).

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

123. See Rubin, supra note 121, at 63–64.

decision was for racial desegregation."[124] The majority in *Roe* went "out of its way to spell out the ground rules very clearly."[125]

In the wake of *Roe v. Wade*, however, the issue of abortion became one of intense national importance.[126] The pro-life movement (which was only nascent prior to *Roe*) became a powerful force in national politics, and just eight years after *Roe*, helped propel Ronald Reagan to the presidency.[127] Reagan and his successor, George H.W. Bush, promised to nominate judges "who respect[] . . . the sanctity of innocent life."[128]

2. *The Creation of the Undue Burden Standard.* — With the growth of the pro-life movement, there was a push for another broad, rule-like approach to abortion: a decision that would reverse *Roe v. Wade* and return the issue to the legislatures of the fifty states. And when the Supreme Court heard *Planned Parenthood v. Casey*, many onlookers believed that the Court would do precisely that; after all, Reagan and Bush had placed five Justices on the high bench.[129]

As it turns out, the Justices did come close to overruling *Roe*. Chief Justice Rehnquist drafted an "Opinion of the Court" that would have subjected abortion regulations to rational basis review.[130] But late in the

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124. Janice Goodman, Rhonda Copelon Schoenbrod & Nancy Stearns, *Doe* and *Roe*: Where Do We Go from Here?, 1 Women's Rts. L. Rep. 20, 27, 29 (1973) (footnote omitted) (internal quotation marks omitted) (first quoting Janice Goodman; then quoting Rhonda Copelon Schoenbrod); see also Rubin, supra note 121, at 63–64.

125. Goodman et al., supra note 124, at 27 (quoting Janice Goodman).

126. See Rubin, supra note 121, at 89–113 (recounting how *Roe* became a subject of national controversy); Laurence H. Tribe, Abortion: The Clash of Absolutes 16–21, 143–47 (1990) [hereinafter Tribe, Clash] (urging that *Roe* helped "galvanize a right-to-life movement"); Ben Depoorter, The Upside of Losing, 113 Colum. L. Rev. 817, 851–52 (2013). For a forceful argument that *Roe* was only one of several factors that led to the political escalation over abortion, see Linda Greenhouse & Reva B. Siegel, Before *Roe v. Wade*: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling 256–59 (2010).

127. See Tribe, Clash, supra note 126, at 16–17.

128. Scherer, supra note 29, at 57–58 (internal quotation marks omitted) (first quoting 1980 Republican Party Platform, *in* 2 The Encyclopedia of the Republican Party 660, 688 (George Thomas Kuran & Jeffrey D. Schultz eds., 1997); then quoting 1988 Republican Party Platform, *in* 2 The Encyclopedia of the Republican Party, supra, at 741, 755).

129. See Linda Greenhouse, Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey 197–200 (2005) (arguing that, "[w]ith the new makeup of the Court"—the replacement of Justices Brennan and Marshall with Souter and Thomas—"*Roe* had never looked so imperiled"); Mary Ziegler, Abortion and the Law in America: *Roe v. Wade* to the Present 94 (2020) ("After Anthony Kennedy took a seat on the Court, it seemed that the justices would overrule *Roe*."); Sullivan, Justices, supra note 1, at 24 (noting that many observers expected the Court to "gut the abortion right").

130. See Greenhouse, supra note 129, at 203 (describing the other Justices' reactions to Justice Rehnquist's twenty-seven-page draft); Kathryn A. Watts, Judges and Their Papers, 88 N.Y.U. L. Rev. 1665, 1698 (2013) (recounting that Justice Blackmun "was convinced that *Roe* was doomed when a court majority led by Chief Justice William H. Rehnquist appeared ready to effectively overrule *Roe*" (internal quotation marks omitted) (quoting Fred Barbash, Blackmun's Papers Shed Light into Court: Justice's Trove Opened by Library of Congress, Wash. Post, Mar. 5, 2004, at A1–A12 (on file with the *Columbia Law Review*))).

deliberations, Justice Kennedy (who had sided with the Chief Justice at conference) switched his vote.[131] Kennedy then, along with Justices O'Connor and Souter, authored a joint opinion, which purported to reaffirm *Roe*—with some important modifications.

The *Casey* joint opinion makes clear that the Justices declined to overrule *Roe v. Wade* in large part out of concern for the Supreme Court's sociological legitimacy.[132] The Justices recognized that there was a powerful pro-life movement urging the rejection of *Roe*.[133] But they insisted: "[T]o overrule under fire" would "subvert the Court's legitimacy beyond any serious question" because it would seem that the Court had "surrender[ed] to political pressure."[134] Accordingly, the Court had to stand firm:

> [P]ressure to overrule the [*Roe v. Wade*] decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.[135]

As the ACLU attorneys in *Casey* later observed, "pro-choice mobilization may have . . . impacted the Court's decision to spare *Roe*."[136] In the months leading up to *Casey*, advocates had warned that a reversal of *Roe* would harm the Court's external legitimacy—by suggesting that the

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131. See Greenhouse, supra note 129, at 203–05 (noting that, "suddenly, everything changed," but not speculating as to why Justice Kennedy switched his vote); see also Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court 52–53 (2007) (discussing Kennedy's "dramatic switch").

132. Many scholars have commented on this aspect of the decision. See, e.g., Or Bassok, The Supreme Court's New Source of Legitimacy, 16 U. Pa. J. Const. L. 153, 186 (2013) (finding that *Casey* "included an explicit and rare admission that public opinion . . . as well as public confidence in the Court affected the decision"); Barry Friedman, The Importance of Being Positive: The Nature and Function of Judicial Review, 72 U. Cin. L. Rev. 1257, 1302 (2004) ("[I]t seems hard to gainsay that the [*Casey*] plurality understood that the eyes of the public were on them, and that they acted accordingly."); Hellman, supra note 25, at 1117 ("Recognizing a level of public distrust about the principled character of Supreme Court opinions, the plurality [in *Casey*] argues that the Court must attend to its appearance in order to preserve its ability to be effective.").

133. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (plurality opinion) (O'Connor, Kennedy & Souter, JJ.) ("Whether or not a new social consensus is developing on that issue [of personal choice to undergo abortion], its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense.").

134. Id. at 866–67.

135. Id. at 869.

136. Linda J. Wharton & Kathryn Kolbert, Preserving *Roe v. Wade* . . . When You Win Only Half the Loaf, 24 Stan. L. & Pol'y Rev. 143, 154 (2013). Pro-choice advocates apparently took the issue to the Court in 1992 so that, if the Court were to overrule *Roe v. Wade*, it would do so in an election year. See Greenhouse, supra note 129, at 201.

Justices "would allow their political views to dictate the outcome of their decisions."[137]

Yet the Justices also did not reaffirm *Roe* in full. Importantly, the joint opinion dispensed with what it described as "the rigid trimester framework of *Roe v. Wade*" and substituted a new test: the undue burden standard.[138] State regulations of abortion prior to viability would be permissible, as long as they did not impose an "undue burden" on the right to terminate a pregnancy.[139]

It is curious—particularly after the joint opinion's emphasis on stare decisis[140]—that the joint opinion dispensed with the trimester framework. Although the Justices likely crafted the undue burden standard for various reasons,[141] some commentators suggest that one central concern was the Court's sociological legitimacy.[142] Robert Post and Reva Siegel, for example, view the undue burden test as an effort "to respond to both sides of the abortion dispute by fashioning a constitutional law in which each side can find recognition."[143] The flexible undue burden standard would be more acceptable because it would better balance the concerns of the pro-life and pro-choice communities.[144] Under this view, *Casey* turns out to be a "Janus-faced holding": While the joint opinion insisted in its stare decisis discussion "on the independence of law"—and thus refused to

137. Wharton & Kolbert, supra note 136, at 154.

138. *Casey*, 505 U.S. at 878.

139. See id. at 874–78; see also Melissa Murray, The Symbiosis of Abortion and Precedent, 134 Harv. L. Rev. 308, 315 (2020) ("*Casey*'s fidelity to *Roe* was selective . . . .").

140. See *Casey*, 505 U.S. at 854–69.

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

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

143. Post & Siegel, *Roe* Rage, supra note 142, at 429.

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

overrule *Roe* "under fire"—it also "subject[ed] law to democratic pressure by dismantling the trimester system of *Roe*."[145]

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

Notably, *Casey* came upon the legal scene at a time when Presidents, senators, and interest groups were already beginning to focus more on lower court selection. As discussed, through the 1950s and 1960s, outside the context of civil rights, such appointments remained largely an opportunity for political patronage.[146] The Reagan Administration, however, started a new trend.[147] Beginning in 1980, Reagan emphasized judicial ideology across several issue areas—including abortion, school prayer, and the use of busing to desegregate schools—and at all levels of the federal judiciary.[148] Both Reagan and his successor, George H.W. Bush, promised "the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent life."[149]

By the end of Reagan's first term, progressive interest groups were paying more attention to lower court selection—and pushing like-minded senators to oppose some nominees.[150] Senators began using procedural tools, such as the blue slip, informal holds, and even the filibuster, to block—or at a minimum delay—certain nominations.[151] Senator Ted Kennedy, for example, sought to filibuster J. Harvie Wilkinson's nomination to the Fourth Circuit, calling him "the least qualified nominee

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145. Post & Siegel, *Roe* Rage, supra note 142, at 429–30; see also id. at 430 ("*Casey* illustrates how a constitutional decision can be politically responsive at the same time as it affirms a commitment to the law/politics distinction.").

146. See supra section II.A.3.

147. The Carter Administration inadvertently paved the way for this trend. President Carter sought to replace the patronage system with a merit-based system that would enable more women and minorities to join the federal bench. But in so doing, Carter centralized judicial selection in the White House. See Goldman, Picking Federal Judges, supra note 89, at 11 n.i, 360.

148. See id. at 2; Scherer, supra note 29, at 161.

149. Scherer, supra note 29, at 160–61 (emphasis added) (internal quotation marks omitted) (quoting 1980 Republican Party Platform, *in* 2 The Encyclopedia of the Republican Party, supra note 128, at 660, 688).

150. See Steigerwalt, supra note 29, at 11 (finding that, "[a]fter witnessing the presidential shift from patronage to political appointments" under Reagan, progressive activists "transferred their attention to lower court confirmations" and formed "judicial watchdog groups").

151. See Binder & Maltzman, Advice, supra note 31, at 56.

ever submitted for an appellate court vacancy."[152] Although most nominees were still confirmed, the temperature of the process was clearly rising.[153]

The Supreme Court's decision in *Casey* added fuel to this growing fire. As many scholars have recognized, inferior federal courts applied the undue burden standard in markedly different—and often ideologically predictable—ways.[154] Although some studies suggest that, prior to 1990, there was little difference in the way that Democratic- and Republican-appointed jurists approached abortion cases,[155] scholars have observed "powerful evidence of ideological voting" in abortion cases beginning in the 1990s.[156] Political scientist Nancy Scherer found that, between 1994 and 2001, a Democratic-appointed lower court judge was more likely to strike down an abortion restriction "by 44 percentage points compared with a Republican-appointed judge."[157]

Accordingly, the Supreme Court's "undue burden" test raised the stakes for lower court appointments.[158] As Scherer recounts, prominent

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152. 130 Cong. Rec. 21,590 (1984) (statement of Sen. Kennedy); see also Scherer, supra note 29, at 148 (noting that the Wilkinson nomination was the first "use of the filibuster to keep lower court judges off the bench on ideological grounds").

153. The overall confirmation rate was still high. See Lee Epstein & Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointments 75–76 (2005) (finding that "[t]he vast majority (about four out of every five)" of federal judicial nominees are "rather handily confirmed"). But there were more battles and delays. See Scherer, supra note 29, at 2–3, 136 (finding that "the percentage . . . *not* confirmed" "increased dramatically . . . in the George H.W. Bush administration" and that the average days between nomination and confirmation increased tenfold from around thirty during the Carter Administration to over 300 during the Clinton and George W. Bush Administrations).

154. See Karen A. Jordan, The Emerging Use of a Balancing Approach in *Casey*'s Undue Burden Analysis, 18 U. Pa. J. Const. L. 657, 660 (2015) (describing the lower courts' "variable and difficult to reconcile results"); see also Linda J. Wharton, Susan Frietsche & Kathryn Kolbert, Preserving the Core of *Roe*: Reflections on *Planned Parenthood v. Casey*, 18 Yale J.L. & Feminism 317, 353, 355–56 (2006) (finding "mixed results" in lower court challenges to abortion restrictions).

155. See, e.g., Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, Are Judges Political? An Empirical Analysis of the Federal Judiciary 92–93 (2006) ("It is striking to see that between 1971 and 1990 there are no party effects [in abortion cases]: Democratic appointees cast a pro-choice vote 62 percent of the time, and Republican appointees do so 58 percent of the time.").

156. Id. at 93; see also Scherer, supra note 29, at 41 (finding that Democratic-appointed judges are "less likely to vote to uphold an abortion restriction by 44 percentage points compared with a Republican-appointed judge"); Adam M. Samaha & Roy Germano, Are Commercial Speech Cases Ideological? An Empirical Inquiry, 25 Wm. & Mary Bill Rts. J. 827, 830, 842, 861 (2017) [hereinafter Samaha & Germano, Commercial Speech] (finding, from 2008 to 2016, "a significant degree of judicial disagreement over abortion policy," with "[g]aps of more than twenty-five percent").

157. Scherer, supra note 29, at 41.

158. See id. at 19–20 (finding increased attention to lower court decisions among pro-choice activists after *Casey*); Devins, supra note 121, at 989 ("[F]ederal courts of appeal have divided over the . . . undue burden standard . . . . [I]t is little wonder that partisans on the Senate Judiciary Committee now fight tooth and nail over . . . nominations . . . .").

interest groups recognized that, after *Casey*, "all important legal issues in the pro-choice/pro-life debate are being decided" by the inferior federal judiciary.[159] Some pro-choice groups thus scrutinized every lower court nominee—and castigated President Clinton in the 1990s when he considered placing a pro-life individual on the federal district court bench.[160] A legal director of NARAL Pro-Choice America, an advocacy and lobbying organization, put the point candidly:

> There's a real recognition that the lower court judges hold vast power over women's reproductive lives . . . . *Casey*, in 1992 . . . empowered lower court judges because it established an undue burden standard . . . which is obviously a mushier standard [than the test in *Roe*], and more fact dependent and subject to the interpretations of district and court of appeals judges.[161]

Put another way, "because of the dearth of explicit directions . . . from the Supreme Court," the lower courts are "forced into a policy-making position" on the scope of the right to terminate a pregnancy.[162]

III. TRADEOFFS WITHIN THE JUDICIAL HIERARCHY

Brown II and *Casey* vividly illustrate the conundrum faced by the federal judiciary in high-profile contexts. Although the Supreme Court could constrain lower court judges through broad, rule-like precedents,[163] the Justices may be reluctant to do so in salient areas. They may instead craft more open-ended tests, leaving the details to be ironed out by the inferior federal judiciary. Presidents, senators, and interest groups then zero in on the composition of the lower courts—in ways that threaten the long-term legitimacy of the inferior federal bench. This Part argues that these legitimacy tradeoffs are a significant (albeit largely overlooked) feature of our federal judicial scheme.

A. *Can Supreme Court Precedent Constrain?*

At the outset, this Essay addresses a preliminary question: *Could* the Supreme Court constrain inferior federal judges in high-profile cases? As scholars have observed, the Justices can often more effectively oversee their judicial inferiors by articulating broad, rule-like doctrines.[164] But this

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159. Scherer, supra note 29, at 19.

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

161. Id. at 19–20 (quoting Interview by Nancy Scherer with Elizabeth Cavendish, former Legal Dir., NARAL Pro-Choice Am., in Washington, D.C. (July 10, 2002)).

162. Wisdom, supra note 84, at 426–27.

163. See infra section III.A.

164. See infra notes 170–176 and accompanying text; see also Andrew Coan, Rationing the Constitution: How Judicial Capacity Shapes Supreme Court Decision-Making 23–26 (2019) ("Clear rules also promote uniformity among lower-court decisions, reducing the need for Supreme Court review to achieve this end."); Tara Leigh Grove, The Structural

Essay contends that such formalistic doctrines are particularly crucial in high-profile and contested areas. It is reasonable to assume that lower court judges, like people generally, often have strong views on salient issues, such as abortion, affirmative action, or gun rights. Accordingly, the Justices likely have greater need in these areas to rein in their judicial inferiors—and limit the impact of ideology in lower court decisionmaking. And the available evidence suggests that the Justices can do so: Given the norms of our judicial practice, lower federal courts will obey broad, rule-like Supreme Court precedents, even in high-profile cases.

1. *The Legal Obligation and Norms of Constraint.* — Legal scholars overwhelmingly agree that Article III creates a hierarchical judiciary,[165] such that the inferior federal courts are bound by the Supreme Court's articulation of federal law.[166] But do inferior federal courts in fact aim to comply with the edicts of their judicial superiors? Existing research strongly indicates that the answer is yes.

As political scientist John Kastellec has observed, empirical studies have repeatedly found "widespread compliance by lower courts" with Supreme Court precedents.[167] That research accords with the declarations

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Case for Vertical Maximalism, 95 Cornell L. Rev. 1, 3, 40–50 (2009) [hereinafter Grove, Vertical Maximalism] (arguing that, since the modern Court reviews only a fraction of lower court decisions, it can most effectively guide its judicial inferiors through broad precedents); Randy J. Kozel & Jeffrey A. Pojanowski, Discretionary Dockets, 31 Const. Comment. 221, 222–25 (2016) (urging that the Court could issue broad precedents in some contexts and supervise others on a case-by-case basis); cf. Maggie Gardner, Abstention at the Border, 105 Va. L. Rev. 63, 90–93 (2019) (offering a thoughtful analysis of doctrinal design).

165. See, e.g., Akhil Reed Amar, Some Opinions on the Opinion Clause, 82 Va. L. Rev. 647, 668–69 & n.92 (1996); Amy Coney Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324, 362 (2006); James E. Pfander, Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals, 78 Tex. L. Rev. 1433, 1453 (2000). But see David E. Engdahl, What's in a Name? The Constitutionality of Multiple "Supreme" Courts, 66 Ind. L.J. 457, 503–04 (1991) (contending that the Constitution does not require a hierarchical judiciary).

166. See Steven G. Calabresi & Gary Lawson, The Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia, 107 Colum. L. Rev. 1002, 1032–33 (2007); Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 829 n.49, 832–34 (1994); Charles Fried, Impudence, 1992 Sup. Ct. Rev. 155, 189–90; Ryan C. Williams, Lower Court Originalism Harv. J.L. & Pub. Pol'y (forthcoming) (manuscript at 8), https://ssrn.com/abstract=3847891 (on file with the *Columbia Law Review*). But see Michael Stokes Paulsen, Accusing Justice: Some Variations on the Themes of Robert M. Cover's *Justice Accused*, 7 J.L. & Religion 33, 82–88 (1989) (suggesting that lower courts can disregard "clearly erroneous" decisions); Richard M. Re, Precedent as Permission, 99 Tex. L. Rev. 907, 938 (2021) (arguing that purportedly mandatory aspects of stare decisis "do not constrain" to the extent that they are "merits-sensitive").

167. John P. Kastellec, The Judicial Hierarchy, Oxford Rsch. Encyc. of Pol. (Jan. 25, 2017), https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-99 (on file with the *Columbia Law Review*) (providing an overview of the literature).

of lower court judges themselves.[168] Federal judges have asserted that they have a "constitutional obligation" to "apply whatever decisions the [Supreme] Court issues."[169]

2. *The Theory: The Constraining Impact of Rules.* — Not all Supreme Court precedent constrains in the same way, however. Lower courts have far more discretion in applying legal doctrines that take the form of standards rather than rules.[170] For that reason, some political scientists argue that the Justices should use rules, rather than standards, if they anticipate that lower court judges will be reluctant to carry out their superiors' commands.[171]

Legal scholars have also asserted that the Supreme Court can more effectively constrain its judicial inferiors through broad, rule-like doctrines, such as *Miranda v. Arizona*,[172] one-person, one-vote,[173] or the

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168. See Harry T. Edwards, Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit, 56 U. Colo. L. Rev. 619, 622 (1985) ("[T]he lower courts . . . are bound to follow Supreme Court rulings . . . ."); see also J. Woodford Howard, Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits 156 (1981) (finding, based on interviews, that judges "felt obliged to obey the Supreme Court").

169. Stephen Reinhardt, The Supreme Court, the Death Penalty, and the *Harris* Case, 102 Yale L.J. 205, 206 (1992).

170. See Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 68 (2006) ("Rules and standards allocate decisionmaking authority in different ways . . . between different levels of a hierarchical institution . . . ."); Scott Baker & Pauline T. Kim, A Dynamic Model of Doctrinal Choice, 4 J. Legal Analysis 329, 333, 336–37 (2012) ("[T]he more rule-like the doctrine, the more likely it is that the lower courts will follow the directive . . . ."); Jeffrey R. Lax, Political Constraints on Legal Doctrine: How Hierarchy Shapes the Law, 74 J. Pol. 765, 766 (2012) (arguing that "a bright-line rule" is more likely to "prevent strategic non-compliance"); see also Richard M. Re, Narrowing Supreme Court Precedent from Below, 104 Geo. L.J. 921, 924–26 (2016) (discussing how "ambiguous Supreme Court precedents" offer lower courts "interpretive flexibility"). For a sample of the vast literature on rules and standards, see Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 159 (1991) (offering an in-depth comparison of rules and standards and emphasizing how rules can "operate as tools for the allocation of power" among individuals and institutions (emphasis omitted)); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 562–63, 601 (1992) (defining "[a] legal command . . . to be rule-like to the extent that greater effort has been expended *ex ante*, rather than requiring such effort to be made *ex post*").

171. See Frank Cross, Tonja Jacobi & Emerson Tiller, A Positive Political Theory of Rules and Standards, 2012 U. Ill. L. Rev. 1, 26 ("[A] rule . . . constrains lower court judges who hold antithetical policy preferences more than a standard would."); Lax, supra note 170, at 772 (arguing that "[t]he greater the likelihood of conflict" between a higher court and a lower court, "the greater the desirability of the bright-line rule").

172. 384 U.S. 436, 444–45 (1966) (holding that police must inform individuals of certain specified rights before beginning a custodial interrogation); see also Grove, Vertical Maximalism, supra note 164, at 55–56 (noting that *Miranda* "created a broad prophylactic rule" to protect the Fifth Amendment right against self-incrimination).

173. See Reynolds v. Sims, 377 U.S. 533, 568 (1964) (establishing the one-person, one-vote rule for legislative apportionment).

tiers of scrutiny.[174] Toby Heytens contends, for example, that the Supreme Court can use rules to ensure that its handiwork "can and will be faithfully implemented" by lower court judges.[175] By contrast, "complicated or open-ended standards increase the risk of good faith misunderstandings and create opportunities for disguising deliberate noncompliance."[176]

These assumptions presumably motivated then-NAACP attorney Thurgood Marshall to request a firm deadline for desegregation. Marshall anticipated that "the Negro in this country would be in a horrible shape" if the Court left the "enforcement of [*Brown*] . . . to the judgment of the district court with practically no safeguards."[177] But despite this request, the Supreme Court articulated the "all deliberate speed" test. As Fifth Circuit Judge Wisdom commented (with some understatement), that test gave "the inferior federal courts . . . a greater latitude for action," and "[i]t has not worked out well."[178]

3. *Empirical Support.* — Some empirical evidence supports the assumption that broad, rule-like doctrines constrain inferior federal court judges to a greater degree than standards, even in high-profile contexts. Recall, for example, that scholars have found "no party effects" in abortion cases decided by the lower courts prior to 1990 but have uncovered "powerful

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174. See Tara Leigh Grove, Tiers of Scrutiny in a Hierarchical Judiciary, 14 Geo. J.L. & Pub. Pol'y 475, 476–77 (2016) (defending the tiers as a way to oversee lower courts); see also Kathleen M. Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 U. Colo. L. Rev. 293, 295–96 (1992) ("[T]he Court has attempted to limit its own freedom to balance in many areas by employing fixed 'tiers' of review. The Court ties itself to the twin masts of 'strict scrutiny' and 'rationality review' precisely in order to resist the siren song of the sliding scale."). To be sure, the tiers of scrutiny do not always operate in a rule-like fashion. Intermediate scrutiny, after all, is a balancing test, and the Court has at times applied a weakened strict scrutiny standard or heightened rational basis review. See Suzanne B. Goldberg, Equality Without Tiers, 77 S. Cal. L. Rev. 481, 482 (2004); see also Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 795–96 (2006) (asserting, based on an empirical study, that "strict scrutiny is survivable in fact"); infra notes 187, 194–196, and accompanying text (noting that the Court has applied a more relaxed "strict scrutiny" standard in the affirmative action context). But in many cases, the tiers of scrutiny provide lower courts with considerable guidance. Indeed, one of the most common criticisms of the tiers of scrutiny is that they are far too rigid. See Jud Mathews & Alec Stone Sweet, All Things in Proportion? American Rights Review and the Problem of Balancing, 60 Emory L.J. 797, 799–801 (2011) (commenting that the American system of tiered review "limits the flexibility of judges"); Jeffrey M. Shaman, Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny, 45 Ohio St. L.J. 161, 182 (1984) (arguing that the tiered system "always has been and always will be an overly rigid structure"); see also Vicki C. Jackson, Constitutional Law in an Age of Proportionality, 124 Yale L.J. 3094, 3097, 3152 (2015) (advocating "a fresh look at proportionality" and suggesting that "whether a classification violates equal protection should depend not on rigid ex ante categories"). To the extent the goal is to guide lower courts, that very rigidity is a virtue.

175. Toby J. Heytens, Doctrine Formulation and Distrust, 83 Notre Dame L. Rev. 2045, 2046 (2008) (emphasis omitted).

176. Id. at 2048.

177. *Brown II* Transcript, supra note 48, at 400 (quoting Thurgood Marshall).

178. Wisdom, supra note 84, at 420.

evidence of ideological voting" in abortion cases after that time.[179] That is, since the 1990s, lower court judges appointed by either Republican or Democratic Presidents vote in distinct ways.[180] There may be multiple reasons for this difference, but one likely factor is the Supreme Court's shift from the rule-like trimester framework of *Roe v. Wade* to the undue burden standard of *Casey*.[181] As political scientist Sheldon Goldman observed in 1989, "The most anti-abortion Reagan [lower court] appointee [had to] follow *Roe v. Wade* until it [was] modified or overturned by the Supreme Court itself."[182]

One can also see the constraining impact of broad, rule-like doctrines in administrative law (an area that, as discussed below,[183] has grown in political salience). A recent study by Kent Barnett, Christina Boyd, and Christopher Walker looks at *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which directs lower courts to defer to a federal agency's reasonable construction of an ambiguous federal statute.[184] The authors find that *Chevron* "powerfully, even if not fully, constrain[s] ideology in judicial decisionmaking. When applying *Chevron*, panels of all ideological stripes use the framework similarly and reveal modest ideological behavior."[185] This study supports Peter Strauss's earlier assessment that *Chevron* "can be seen as a device for managing the courts of appeals that

179. Sunstein et al., supra note 155, at 92–93.

180. There are, of course, different measures of judicial "ideology." This discussion relies on one common metric: the party of the nominating President. See Samaha & Germano, Commercial Speech, supra note 156, at 830 (noting that this is a "standard metric"). This metric seems most likely to impact the judicial selection process.

181. One might assume that the difference relates to changes within the Republican and Democratic parties. Until the 1990s, there was no clear split between Democrats and Republicans on the abortion issue. See Devins, supra note 121, at 947–48, 966. But whatever the views of the party base, Presidents Reagan and George H.W. Bush consciously sought to nominate pro-life judges to the federal bench in the 1980s. See supra notes 128, 149, and accompanying text. Accordingly, one might have expected to see some ideological voting from those judges. The fact that ideological voting appears later suggests that the change relates to shifts in Supreme Court doctrine.

182. Sheldon Goldman, Reagan's Judicial Legacy: Completing the Puzzle and Summing Up, 72 Judicature 318, 328 (1989) [hereinafter Goldman, Reagan] (footnote omitted).

183. See infra section IV.A.

184. See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984); Kent Barnett, Christina L. Boyd & Christopher J. Walker, Administrative Law's Political Dynamics, 71 Vand. L. Rev. 1463, 1467–68 (2018) (examining 1,382 published opinions from 2003 through 2013).

185. Barnett et al., supra note 184, at 1467–68. Earlier studies offered a more mixed assessment of the impact of *Chevron* (although it appears that those studies were less comprehensive than that of Barnett et al.). See Frank B. Cross & Emerson H. Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 Yale L.J. 2155, 2166–67 (1998) (surveying the literature and noting that the first studies found significant constraint, while later studies found less).

can reduce (although not eliminate) the Supreme Court's need to police their decisions for accuracy."[186]

By contrast, empirical scholarship has found that lower court judges vote in more predictable "conservative" or "progressive" directions in certain high-profile contexts—involving affirmative action,[187] abortion (since the 1990s),[188] and (increasingly) the Second Amendment.[189] In each of these areas, the Supreme Court has articulated opaque doctrines that offer inferior federal courts considerable leeway. As we have seen, the undue burden test governs abortion cases.[190] In the Second Amendment context, although the Court in 2008 and 2010 declared that the Constitution protects an individual's right to keep and bear arms,[191] the Court has said very little about what that right means. The Justices have repeatedly denied certiorari in gun rights cases and have declined to articulate any tiers of scrutiny for Second Amendment claims.[192] As Seventh Circuit Judge Diane Sykes put it, the Supreme Court has not "give[n] us any doctrine about . . . how to reconcile conflicts between

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186. Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1121 (1987).

187. See Sunstein et al., supra note 155, at 24–25 (finding "striking evidence of ideological voting" on affirmative action); Samaha & Germano, Commercial Speech, supra note 156, at 830, 842, 861 (finding "[g]aps of more than twenty-five percent" in judicial ideology scores for affirmative action cases from 2008 to 2016).

188. See Epstein & Segal, supra note 153, at 128–29, 133 (finding that "Democrats are far more likely to cast pro-choice votes (70 percent) than Republicans (49 percent)"); Scherer, supra note 29, at 41 (finding that Democratic-appointed judges are "less likely to vote to uphold an abortion restriction by 44 percentage points compared with a Republican-appointed judge"); Samaha & Germano, Commercial Speech, supra note 156, at 827, 830, 842 (finding significant gaps in judicial ideology scores between 2008 and 2016).

189. See Adam M. Samaha & Roy Germano, Judicial Ideology Emerges, At Last, in Second Amendment Cases, 13 Charleston L. Rev. 315, 319–20, 325–26, 341 (2018) [hereinafter Samaha & Germano, Judicial Ideology] ("[T]he party of the appointing president is now predictive of judge votes in civil gun rights cases."). In an earlier study (from 2008 to 2016), Adam Samaha and Roy Germano found no ideological divide; judges of all stripes tended to deny Second Amendment claims. See Samaha & Germano, Commercial Speech, supra note 156, at 860–61 (finding no statistical significance between the judicial ideology of judges on gun rights claims). But in an updated study, the authors found a difference—apparently because Democratic appointees over time became less likely to support gun rights claims. Samaha & Germano, Judicial Ideology, supra, at 319–20, 325–26, 341.

190. See supra section II.B.3; see also Erwin Chemerinsky & Michele Goodwin, Abortion: A Woman's Private Choice, 95 Tex. L. Rev. 1189, 1220 (2017) (observing that *Casey* "offers no guidance as to which laws are an undue burden and which are not").

191. See McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (ruling that the Second Amendment is applicable to states); District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008) (finding a right to possess a handgun in the home for purposes of self-defense).

192. See *Heller*, 554 U.S. at 628–29 (concluding that a prohibition on handguns in the home fails "[u]nder any of the standards of scrutiny"); infra note 211 and accompanying text (noting the certiorari denials); see also infra note 218 (noting a grant of certiorari in one recent case).

Second Amendment gun rights and the public's right to regulation of dangerous instrumentalities."[193]

With respect to affirmative action, the Court has suggested that lower courts should apply a significantly more relaxed strict scrutiny standard than appears in other areas of constitutional law,[194] allowing public universities to consider race as one factor in admissions, as long as they stay away from quotas or other sharp numerical measures.[195] As Adam Samaha and Roy Germano observe in an empirical study (which found ideological voting in lower court affirmative action cases), the uncertain "doctrinal messages" in the Supreme Court's affirmative action precedents "make room in law for disagreements in practice."[196]

4. *The Potential Value of Constraint.* — The available evidence thus suggests that the Justices could constrain their judicial inferiors by issuing broad, rule-like legal tests. Notably, the need for such doctrines is more pressing for the modern Supreme Court than it was in the past. In our modern judicial system, the Court has expansive discretionary certiorari jurisdiction and hears only a small fraction of federal question cases that arise in the lower federal courts.[197] Meanwhile, the lower courts have

193. Diane Sykes, Circuit Judge, U.S. Ct. of Appeals for the Seventh Cir., Remarks at Public Understanding and Opinion of the U.S. Supreme Court, at 2:45:50–2:47:48 (Oct. 21, 2019), https://law-media.marquette.edu/Mediasite/Play/38960cec7b224ffebc49ad811eba83891d (on file with the *Columbia Law Review*).

194. See Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003) (noting that "[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker"); see also Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 247 (5th Cir. 2011) (Garza, J., concurring), vacated, 570 U.S. 297 (2013) (finding that *Grutter* "applied a level of scrutiny markedly less demanding" than traditional strict scrutiny); Suzanna Sherry, Foundational Facts and Doctrinal Change, 2011 U. Ill. L. Rev. 145, 166 (noting *Grutter*'s "alteration of . . . strict scrutiny").

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

196. Samaha & Germano, Commercial Speech, supra note 156, at 846.

197. See 28 U.S.C. § 1254(1) (2018) (granting the Supreme Court broad discretionary certiorari jurisdiction); see also John G. Roberts, Jr., 2019 Year-End Report on the Federal Judiciary 5–6 (2019), https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf [https://perma.cc/8QMF-7DMF] (reporting that the Supreme Court decided sixty-nine cases in the 2018 term, while also noting that, between September 2018 and September 2019, there were 48,486 filings in the lower federal courts of appeals, 297,877 filings in the federal district courts, and 776,674 filings in bankruptcy courts). The Court would face capacity constraints, even if it reinvigorated an alternative process for review: certification by the lower federal courts. For a discussion of certification, see Amanda L. Tyler, Setting the Supreme Court's Agenda: Is There a Place for Certification?, 78 Geo. Wash. L. Rev. 1310, 1312, 1319–26 (2010) (suggesting that "the certification of issues by lower federal courts to the Supreme Court—a practice that dates back almost as far as the federal courts themselves, but one that is now largely a 'dead letter'—deserves a good dusting off" (footnote omitted) (quoting Edward A. Hartnett, Questioning Certiorari: Some

mandatory jurisdiction; accordingly, they cannot decline to hear a case, no matter how controversial.[198] Thus, as Judge Sykes stated, those courts cannot "duck the hard Second Amendment case . . . . We need to decide it."[199]

In this environment, the Supreme Court cannot oversee the inferior federal judiciary simply by correcting errors in specific cases.[200] The Court must articulate doctrines that will help guide the lower courts in the many cases that the high Court cannot review. This Essay assumes that, in some contexts, the Justices may provide sufficient guidance to their judicial inferiors through open-ended standards. But in high-profile and contested areas—such as abortion, affirmative action, and gun rights—the Justices have good reason to use more rule-like doctrines. Although lower federal court judges do not appear to be influenced by ideology with respect to many issues, we do see different voting patterns by Democratic and Republican appointees with respect to these salient issues.[201] Accordingly, the Justices are well-advised to guide, and thereby constrain, their judicial inferiors in these contexts through broad, rule-like legal tests.

Such an approach would serve a valuable function. There is a longstanding debate over whether judges are guided more by "law" or

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Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643, 1712 (2000))). An extended discussion of certification is beyond the scope of this Essay. But this Essay's analysis of legitimacy tradeoffs in the federal judiciary could provide an additional justification for allowing lower federal court judges to ask the Supreme Court to resolve issues of federal law.

198. See 28 U.S.C. § 1291 (mandating review by courts of appeals).

199. Sykes, supra note 193, at 2:46:24–2:46:35.

200. By contrast, through much of the nineteenth century, the Supreme Court could often effectively supervise its judicial inferiors through case-by-case error correction. See Grove, Vertical Maximalism, supra note 164, at 45–57. Indeed, in the late eighteenth and early nineteenth centuries, the Court's rulings were not widely available, and so the Justices often could not guide the lower courts by establishing precedents. See id. at 4, 45–46, 59.

201. See Epstein et al., supra note 11, at 168, 213–14, 237 (reporting that "ideological voting is less frequent" in the lower courts than in the Supreme Court); supra sections II.A.3, II.B.3, and III.A.3 (discussing the empirical research showing ideological voting in high-profile areas). These differences may be exacerbated by geography. Lower federal judges must live in the district or circuit to which they were appointed. See 28 U.S.C. § 134(b) (stating that, with few exceptions, "[e]ach district judge . . . shall reside in the district or one of the districts for which he is appointed"); id. § 44(c) ("Except in the District of Columbia, each circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service."). To the extent that ideology is partly determined by geography ("red states" versus "blue states"), one might expect lower court judges from different parts of the country to vote differently. See Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1590–91 (2008) (suggesting that lower federal judges may reflect the ideology of their respective regions). Regional differences certainly impacted the implementation of *Brown II*. See supra section II.A.1. Today, however, it may be that partisan affiliation matters far more than geographic region. Cf. Jessica Bulman-Pozen, Partisan Federalism, 127 Harv. L. Rev. 1077, 1078–82 (2014) (arguing that partisanship is the dominant feature of federal–state disputes and stating that, "[i]nsofar as state identification is driven by partisanship, individuals may . . . affiliate with states they do not inhabit").

"politics."[202] This Essay assumes that judges may be influenced by both forces, particularly in salient cases. But as the preceding discussion suggests, lower court judges—regardless of their background ideological leanings—do follow the clear edicts of their judicial superiors. Accordingly, the Supreme Court could significantly reduce the relevance of *politics* in lower court decisionmaking by articulating *law* in the form of broad, rule-like doctrines. Such constraint could, in turn, help contribute to the external legitimacy of the inferior federal bench.

B. *Protecting Supreme Court Legitimacy*

Nevertheless, in certain high-profile contexts, the Supreme Court has issued opaque tests or denied certiorari entirely. To be sure, the Justices may decline review or opt for narrow or open-ended doctrines for any number of reasons, including the difficulty of reaching agreement on a multimember Court.[203] But, as *Brown II* and *Casey* suggest, in high-profile and contested areas, the Justices may be hesitant to articulate a broad new doctrine out of concern for the Supreme Court's sociological legitimacy. The Justices opted for the "all deliberate speed" formula in large part to protect "the Court's prestige—its dignity interest in avoiding the issuance of futile orders."[204] And in *Casey*, the Justices sought to protect the Court's legitimacy by declining to overrule *Roe v. Wade*, while also "subject[ing] law to democratic pressure by dismantling the trimester system of *Roe*."[205]

A similar script has played out in the context of affirmative action. Commentators argue that, in 2003, at least some Justices voted to allow affirmative action on university campuses in order to preserve the Court's reputation with political and business elites.[206] Then, just one decade later, it looked as though a bare majority of the Court would invalidate an affirmative action plan from the University of Texas—and thereby transform the

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202. For an overview of the debate, see Barry Friedman, The Politics of Judicial Review, 84 Tex. L. Rev. 257, 257–62, 264–70 (2005); see also Michael D. Gilbert, Does Law Matter? Theory and Evidence from Single-Subject Adjudication, 40 J. Legal Stud. 333, 336–38, 354–56 (2011) (discussing prior tests and offering a new one to analyze the relative impact of law). Meanwhile, it is widely assumed that judges *should not* decide cases based on their ideological preference for a specific result. See David E. Pozen & Adam M. Samaha, Anti-Modalities, 119 Mich. L. Rev. 729, 746–50, 753–56 (2021).

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

204. Klarman, supra note 48, at 313–14.

205. Post & Siegel, *Roe* Rage, supra note 142, at 429–30.

206. See Devins & Baum, supra note 28, at 47–48 (noting the influence of elites, particularly businesses and the military, on the Court's affirmative action decisions); Toobin, supra note 131, at 211–14, 218–20 (suggesting that amicus briefs from retired military officers praising how affirmative action programs were used by West Point, Annapolis, and Colorado Springs influenced Justice O'Connor's vote).

Court's jurisprudence in that arena.[207] Justice Kennedy drafted a majority opinion that would have done precisely that.[208] But, according to Joan Biskupic, after Justice Sotomayor penned a blistering draft dissent, Justice Kennedy pulled the draft opinion and assembled a different majority to send the case back to the court of appeals for a second look.[209] A central concern, Biskupic writes, was "how Sotomayor's personal defense of affirmative action and indictment of the majority would ultimately play to the public."[210]

Legitimacy concerns also seem likely to weigh on the Justices as they consider the next steps with respect to the Second Amendment. The Justices remained silent on the issue for years, denying certiorari in *every* gun rights case until 2019, when they opted to review a somewhat obscure New York City regulation.[211] While the case was pending, the New York state legislature passed a state law that preempted the city regulation, a fact that led the Court ultimately to dismiss the claim as moot.[212]

But for present purposes, an important—and extraordinary—aspect of the case was a brief filed by several Democratic senators, which suggested that a decision in favor of the gun rights claim could compromise the Court's sociological legitimacy.[213] The senators underscored that organizations like the National Rifle Association spent considerable sums to push for the confirmation of recent Supreme Court nominees Neil Gorsuch and Brett Kavanaugh.[214] As a result, the senators charged, any decision in favor of gun rights would make the Court appear to be part of the pro-gun "political agenda."[215] The senators concluded with a not-so-subtle warning (which harkened back to recent calls for court

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207. See Joan Biskupic, Breaking In: The Rise of Sonia Sotomayor and the Politics of Justice 200–01 (2014) [hereinafter Biskupic, Breaking In] (recounting that, during the conference vote in Fisher v. University of Texas at Austin (*Fisher I*), 570 U.S. 297 (2013), "it initially looked like a 5-3 lineup").

208. See id. at 206.

209. See *Fisher I*, 570 U.S. at 314–15; Biskupic, Breaking In, supra note 207, at 201–02, 205–10.

210. Biskupic, Breaking In, supra note 207, at 206.

211. See Adam Liptak, Supreme Court Will Review New York City Gun Law, N.Y. Times (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/us/politics/supreme-court-guns-nyc-license.html (on file with the *Columbia Law Review*) (suggesting that the law was the only one preventing gun owners from carrying handguns to second homes or to out-of-city shooting ranges).

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

213. See Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kirsten Gillibrand as Amici Curiae in Support of Respondents at 9–18, *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. 1525 (No. 18-280), 2019 WL 3814388.

214. See id. at 4–8 (discussing the advocacy for Justices Gorsuch and Kavanaugh). Justice Barrett had not at that time joined the Court.

215. Id. at 3.

packing): "The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.'"[216] Whether or not the senators' brief influenced the Court's decision to dismiss the New York gun rights case,[217] history suggests that at least some Justices will be concerned about the external reaction to a future Second Amendment decision—particularly as gun violence becomes a matter of increasingly prominent public concern.[218]

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216. Id. at 17. Senator Whitehouse later claimed that the brief did not say anything about court packing. Sheldon Whitehouse, The Supreme Court Has Become Just Another Arm of the GOP, Wash. Post (Sept. 6, 2019), https://www.washingtonpost.com/opinions/the-supreme-court-has-become-just-another-arm-of-the-gop/2019/09/06/8ad36642-d0e2-11e9-87fa-8501a456c003_story.html (on file with the *Columbia Law Review*). But many other commentators, including all fifty-three Republican senators who signed a letter in opposition to the amicus brief, interpreted the brief as a threat to pack the Court with additional members. See Letter from Fifty-Three United States Senators to Scott S. Harris, Clerk, Sup. Ct. of the U.S. (Aug. 29, 2019), https://senmcconnell.app.box.com/s/nnes38e3zb8019nn1qrrhl2lnb5lar9x [https://perma.cc/TFR9-YR69] ("The implication is as plain as day: Dismiss this case, or we'll pack the Court."); see also Editorial Board, Senators File an Enemy-of-the-Court Brief, Wall St. J. (Aug. 15, 2019), https://www.wsj.com/articles/senators-file-an-enemy-of-the-court-brief-11565911608 (on file with the *Columbia Law Review*) (asserting that, "[b]y 'restructured,' [Democrats] mean packed with new Justices").

217. Interestingly, in a November 2020 speech, Justice Alito discussed this episode and opined that the senators and other observers might view the Court's decision as capitulating to the senators' "warning." He stated:

> Five United States senators . . . wrote that the Supreme Court is a sick institution and that if the Court did not mend its ways, well, it might have to be, quote, "restructured." After receiving this warning, the Court did exactly what the City and the senators wanted. It held that the case was moot, and it said nothing about the Second Amendment . . . . I am not suggesting that the Court's decision was influenced by the senators' threat. But I am concerned that the outcome might be viewed that way by the senators and others with thoughts of bullying the Court . . . .

Samuel Alito, Assoc. Just., Sup. Ct. of the U.S., Address at the Federalist Society Annual Lawyers' Convention, at 40:40–45:43 (Nov. 12, 2020), https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society [https://perma.cc/WN67-XQ5A] (video on file with the *Columbia Law Review*).

218. See Nate Cohn & Margot Sanger-Katz, On Guns, Public Opinion and Public Policy Often Diverge, N.Y. Times (Aug. 10, 2019), https://www.nytimes.com/2019/08/10/upshot/gun-control-polling-policies.html (on file with the *Columbia Law Review*) (noting that public support for gun control has increased in the wake of recent shootings, but that it is also polarized, with Republicans showing greater support for gun rights). Just before this Essay went to press, the Supreme Court granted certiorari in a new Second Amendment case. See Adam Liptak, Supreme Court to Hear Case on Carrying Guns in Public, N.Y. Times (Apr. 26, 2021), https://www.nytimes.com/2021/04/26/us/supreme-court-gun.html (on file with the *Columbia Law Review*). Notably, the Court narrowed the question on review. Although the petition asked the Court to consider generally whether the Second Amendment protects a right to carry a handgun outside the home for self-defense, the Court opted to focus on the denial of the petitioners' licenses. Compare Petition for Writ of Certiorari at i, N.Y. State Rifle & Pistol Ass'n v. Corlett, No. 20-843 (U.S. filed Dec. 17, 2020), 2020 WL 7647665 (defining the original question presented as "[w]hether the Second Amendment

The Justices' interest in the public reputation of the Court is understandable. (For now, this Essay brackets the question—discussed below[219]—whether it is legally legitimate for the Justices to take such concerns into account in deciding cases.) After all, the Supreme Court cannot function as an institution without some degree of sociological legitimacy.[220] Accordingly, the Justices may often be tempted to issue narrow rulings or deny review in politically controversial cases. But commentators have overlooked the fact that, in the course of protecting the legitimacy of the Supreme Court, the Justices may put at risk the remainder of the federal bench.

C. *Overlooked Effects on the Lower Courts*

To underscore the stakes for the inferior federal judiciary, this section begins with additional background on the lower court selection process, which has become increasingly partisan and divisive in recent years.[221] This process is important for a few reasons. First, the contentious nature of the process illuminates the external reputation of the lower courts among elites: If political actors and interest groups assumed that Democratic- and Republican-appointed jurists would approach legal issues in the same way, it would be hard to understand the fuss over judicial selection. Accordingly, the process itself indicates that many elites view the inferior federal judiciary in ideological terms. Second, and crucially, some research suggests that this divisive selection process could have a detrimental impact on the long-term public reputation of the inferior federal judiciary.[222]

To be sure, Supreme Court doctrine is not solely responsible for the contentiousness of the lower court selection process. There are several interrelated factors, including the polarization of the political parties and changes in Senate procedure.[223] But as the historical accounts of *Brown II* and *Casey* underscore, Supreme Court doctrine is an important—and often overlooked—part of the story. And this makes sense: When the Court issues opaque doctrines in high-profile and contested areas (such as abortion, affirmative action, or gun rights), that opens up space for lower court judges to vote in more ideologically predictable ways. Presidents,

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allows the government to prohibit ordinary law-abiding citizens from carrying handguns outside the home for self-defense"), with N.Y. State Rifle v. Corlett, No. 20-843, 2021 WL 1602643, at *1 (Apr. 26, 2021) (noting that the grant of certiorari was "limited to the following question: Whether the State's denial of petitioner[s]' applications for concealed-carry licenses for self-defense violated the Second Amendment"). One commentator suggests that the Court could issue "an extremely narrow, fact-bound decision." Aaron Tang (@AaronTangLaw), Twitter (Apr. 26, 2021), https://twitter.com/AaronTangLaw/status/1386754841679073283 (on file with the *Columbia Law Review*).

219. See infra section IV.B.1.

220. See supra Part I.

221. See infra section III.C.1.

222. See infra section III.C.2.

223. See supra note 31 and accompanying text.

senators, and interest groups begin to recognize that "all important legal issues [in these salient areas] are being decided" by the inferior federal judiciary.[224] Political actors and interest groups thus have a strong incentive to focus on the composition of the lower federal bench.

1. *Elite Attitudes Toward the Lower Federal Courts.* — Although many commentators have recounted the contentious and partisan fights over Supreme Court nominees,[225] there has been far less attention paid to the selection of inferior federal court judges. This Essay aims in part to introduce readers to that history: As discussed, for many years, lower court appointments were patronage, not policymaking, opportunities. That began to change in the wake of *Brown II*, and even more so during the Reagan presidency.[226] But attacks on lower court nominees became far more common during the Clinton and George W. Bush Administrations.[227] Starting in the late 1990s, Keith Whittington writes, "the odds of a circuit court nomination being confirmed" seemed "little better than a coin flip."[228]

Throughout this period, Presidents, senators, and interest groups increasingly sought to discern how a lower court nominee might vote in politically salient cases. As Ninth Circuit Judge Diarmuid O'Scannlain lamented in 2003, "The politics that has come to dominate today's nomination process is a politics that aims, before the fact, to ascertain how a given nominee will decide a particular case—or, to be more precise, a series of hot-button cases," such as those pertaining to abortion or affirmative action.[229] Fifth Circuit Judge Carolyn King made a similar observation in 2007, noting that both political actors and interest groups scrutinized a nominee's position on "politically salient issues including abortion [and] civil rights."[230]

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224. Scherer, supra note 29, at 19.

225. There is an important literature on the Supreme Court confirmation process. For a small sample, see Stephen L. Carter, The Confirmation Mess: Cleaning Up the Federal Appointments Process 11–13 (1994) (comparing the contemporary model of the confirmation process with the intent of the Framers); Carl Hulse, Confirmation Bias: Inside Washington's War over the Supreme Court, from Scalia's Death to Justice Kavanaugh 17–18 (2019) (describing the political strategy behind the delay to confirm the late Justice Scalia's seat); Laurence H. Tribe, God Save this Honorable Court: How the Choice of Supreme Court Justices Shapes Our History 77–79 (1985) (arguing that the Senate fulfills its role in acting as a check on the President's power when rigorously scrutinizing Supreme Court nominees); Henry Paul Monaghan, The Confirmation Process: Law or Politics?, 101 Harv. L. Rev. 1202, 1202–03 (1988) (claiming that the Senate's role in the confirmation process is largely political).

226. See supra sections II.A.3, II.B.3.

227. See Steigerwalt, supra note 29, at 3 (noting that "ideological tensions over the staffing of the federal bench had grown to a fever pitch" by this time).

228. Whittington, Partisanship, supra note 31, at 525.

229. Diarmuid F. O'Scannlain, Today's Senate Confirmation Battles and the Role of the Federal Judiciary, 27 Harv. J.L. & Pub. Pol'y 169, 172, 174 (2003).

230. Carolyn Dineen King, Lecture, Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts, 90 Marq. L. Rev. 765, 773 (2007) (expressing

The temperature rose further during the Obama Administration.[231] After Republicans repeatedly blocked or delayed nominations (including those with support from a Republican home-state senator), the Democratic-controlled Senate in 2013 exercised the "nuclear option"—a procedural reform that dispensed with the filibuster for lower court selection and allowed judges to be confirmed by simple majority vote.[232] This rule change allowed President Obama to fill a number of vacancies (and far more quickly), while the President enjoyed a Senate controlled by the same political party.[233] But confirmations slowed to a near standstill in 2015, when Republicans took over the Senate.[234] Judicial confirmations did not pick up again until 2017, when President Trump came into office with a Republican-controlled Senate.[235] Indeed, for the foreseeable future, we may have seen the end of bipartisan support for lower federal court nominees.

Meanwhile, there has been an apparent rise in political rhetoric characterizing the inferior federal judiciary in partisan or ideological

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concern about "an ever increasing and contentious focus" on whether appellate court nominees "are committed . . . to particular positions on . . . salient issues").

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

232. See 159 Cong. Rec. 17,825–26 (2013) (statement of Sen. Leahy) (noting the change); Binder & Maltzman, New Wars, supra note 231, at 48 (finding that during Obama's first term, "Senate Republicans launch[ed] filibusters against nominees who had the support of" home-state Republican lawmakers).

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

234. See Whittington, Partisanship, supra note 31, at 532 ("When the Democrats lost the chamber . . . , judicial confirmations largely ground to a halt.").

235. See Kevin Freking, Trump Spotlights Confirmation of 150-Plus Federal Judges, AP News (Nov. 6, 2019), https://apnews.com/article/7d0c948029a54dab940e4c986cfa01a3 (on file with the *Columbia Law Review*); Carrie Johnson, Trump's Judicial Appointments Were Confirmed at Historic Pace in 2018, NPR (Jan. 2, 2019), https://www.npr.org/2019/01/02/681208228/trumps-judicial-appointments-were-confirmed-at-historic-pace-in-2018 [https://perma.cc/H5PJ-K69P] (finding that the Trump Administration has "exceed[ed] the pace of the last five presidents"). In April 2019, the Senate further streamlined the process by limiting debate on district court nominees. See Paul Kane, Republicans Change Senate Rules to Speed Nominations as Leaders Trade Charges of Hypocrisy, Wash. Post (April 3, 2019), https://www.washingtonpost.com/politics/republicans-change-senate-rules-to-speed-nominations-as-leaders-trade-charges-of-hypocrisy/2019/04/03/86ec635a-5615-11e9-aa83-504f086bf5d6_story.html (on file with the *Columbia Law Review*) (noting the change from thirty hours of debate to two).

terms. President Trump, for example, in 2018 dismissed a lower court decision as the handiwork of an "Obama judge."[236] When Chief Justice Roberts responded by insisting that "[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges,"[237] President Trump shot back: "Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges' . . . . It would be great if the 9th Circuit was indeed an 'independent judiciary.'"[238]

Progressive elites, in turn, have sounded the alarm at what they describe as the Republicans' effort to "nominat[e] extremely conservative judges and confirm[] them at a breakneck speed."[239] A May 2020 report prepared by Democratic Senators Debbie Stabenow, Chuck Schumer, and Sheldon Whitehouse declared that the judiciary is now "pack[ed] . . . with far-right extremists," most of whom "were chosen not for their qualifications or experience—which are often lacking—but for their demonstrated allegiance to Republican Party political goals."[240]

2. *Long-Term Effects on Public Reputation.* — Elites, it seems, increasingly view the lower federal courts in ideological terms. But the question remains whether the contentiousness surrounding the inferior federal judiciary may also impact its long-term legitimacy with the broader public. Some federal judges have worried about such an impact. Over a decade ago, Fifth Circuit Judge King asserted that "[j]udicial independence is

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236. Adam Liptak, Trump Takes Aim at Appeals Court, Calling It a 'Disgrace', N.Y. Times (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html (on file with the *Columbia Law Review*).

237. Sherman, supra note 20 (internal quotation marks omitted) (quoting Chief Justice Roberts).

238. Robert Barnes, Rebuking Trump's Criticism of 'Obama Judge,' Chief Justice Roberts Defends Judiciary as 'Independent', Wash. Post (Nov. 21, 2018), https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html (on file with the *Columbia Law Review*) (quoting President Trump).

239. Trump Continues to Reshape Judiciary at Breakneck Speed, Am. Const. Soc'y: In Brief (Jan. 24, 2019), https://www.acslaw.org/inbrief/trump-continues-to-reshape-judiciary-at-breakneck-speed [https://perma.cc/9UBY-7GGS]; see also Freking, supra note 235 (collecting views of progressives).

240. Debbie Stabenow, Chuck Schumer & Sheldon Whitehouse, Democratic Pol'y & Commc'ns Comm., Captured Courts: The GOP's Big Money Assault on the Constitution, Our Independent Judiciary, and the Rule of Law 3 (2020), https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf [https://perma.cc/T73P-CFWY]; see also Freking, supra note 235 (noting that the judiciary is now "packed with young judges whose views are far outside the mainstream" and that, "[i]nstead of serving as neutral arbiters, these judges will push a conservative agenda that will have lasting effects for generations"); Carl Hulse, Trump and Senate Republicans Celebrate Making the Courts More Conservative, N.Y. Times (Nov. 6, 2019), https://www.nytimes.com/2019/11/06/us/trump-senate-republicans-courts.html (on file with the *Columbia Law Review*) (reporting that Senator Schumer, D-NY, described Trump's nominees as "the most unqualified and radical nominees in my time in this body" (internal quotations marks omitted)).

undermined . . . by the high degree of political partisanship and ideology that currently characterizes the process by which the President nominates and the Senate confirms federal judges."[241] Such a "highly partisan or ideological judicial selection process conveys the notion to the electorate that judges are simply another breed of political agents, that judicial decisions should be in accord with political ideology, all of which tends to undermine public confidence in the legitimacy of the courts."[242]

A 2006 survey by political scientists Sarah Binder and Forrest Maltzman provides some empirical support for this intuition.[243] The authors found that lower court judges "who come to the bench via a contested nomination fare worse in the public's eye than do judges who sailed through to confirmation."[244] Although "strong partisans" were pleased when their own party's President selected a controversial nominee (that is, someone who was strongly contested by the opposing party), other members of the public tended to view the judge's decisions with more suspicion.[245] Binder and Maltzman warn: "[P]artisan differences over judicial nominees may be undermining the perceived legitimacy of the federal judiciary—a worrisome development for an unelected branch in a system of representative government."[246]

Bert Huang offers another sobering account. In 2019, Huang examined public reactions to lower court decisions on the Deferred Action for Childhood Arrivals (DACA) program.[247] Multiple lower courts had held unlawful the Trump Administration's efforts to rescind Obama's DACA program.[248] But Huang found that, even when the lower courts ruled the same way, self-identified Republicans were more likely to trust the legal analysis of a Bush appointee than a Clinton appointee.[249]

3. *Why Lower Court Sociological Legitimacy Matters.* — The empirical studies of lower court sociological legitimacy are limited; as discussed, most scholars still focus on the Supreme Court.[250] But the existing research supports the commonsense intuition that the contentiousness surrounding the inferior federal judiciary is not good for the long-term health of

241. King, supra note 230, at 773.

242. Id. at 782.

243. See Binder & Maltzman, Advice, supra note 31, at 127–28.

244. Id. at 128.

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

246. Id. at 11.

247. See Bert I. Huang, Judicial Credibility, 61 Wm. & Mary L. Rev. 1053, 1055 (2020).

248. See id.; see also NAACP v. Trump, 298 F. Supp. 3d 209, 215–16 (D.D.C. 2018); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1046 (N.D. Cal. 2018). The Supreme Court later agreed that the rescission was invalid. See Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (holding that the rescission was arbitrary and capricious under the Administrative Procedure Act because DHS did not "provide a reasoned explanation for its action").

249. See Huang, supra note 247, at 1060, 1076.

250. See supra Part I.

those courts. After all, the inferior federal judiciary—no less than the Supreme Court—can function effectively only if it enjoys external legitimacy. The lower federal courts also have no army; they must rely on other actors to enforce and obey their decrees.[251] Those external actors are more likely to comply if they view the lower federal courts as legitimate—that is, as institutions that do and should have the power to make authoritative decisions.

Moreover, recall that "legitimacy is for [the] losers."[252] Lower court judges need the support of those who *disagree* with a decision, so that those "losers" will obey the adverse ruling. Fifth Circuit Judge King was, at bottom, concerned about compliance. She argued that the "highly partisan or ideological judicial selection process . . . tends to undermine public confidence in the legitimacy of the courts."[253] The resulting "loss of public confidence in the legitimacy of the courts—confidence that courts will decide impartially, in accordance with the rule of law—could, in turn, undermine compliance by the public with unpopular decisions."[254]

Notably, some commentators have suggested that President Trump's attacks on lower federal courts were an attempt to undermine their public reputation so that it would be easier for the Trump Administration to defy a court order going forward.[255] My own work tracing the historical norms of judicial independence suggests that such concerns are not without foundation. As that work recounts, since at least the mid-twentieth century, there has been a strong norm of compliance with federal court orders.[256] But this norm developed in part because of bipartisan political rhetoric that treated noncompliance as off-the-wall.[257] Accordingly, this norm—like

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251. See The Federalist No. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("The judiciary . . . has no influence over either the sword or the purse . . . . It . . . must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

252. Gibson et al., supra note 36, at 839.

253. King, supra note 230, at 782.

254. Id.

255. See Siegel, Reciprocal Legitimation, supra note 45, at 1244–45 (noting "the concern that the President may be trying to establish a narrative that he can use after an attack in order to rally a fearful public into accepting his disregard of judicial authority"). Other commentators have questioned whether the Trump Administration would adhere to adverse federal court orders. See Aaron Blake, Constitutional Crisis? What Happens if Trump Decides to Ignore a Judge's Ruling., Wash. Post: The Fix (Feb. 5, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/05/constitutional-crisis-what-happens-if-trump-decides-to-ignore-a-judge (on file with the *Columbia Law Review*); Nina Totenberg, Trump's Criticism of Judges Out of Line with Past Presidents, NPR (Feb. 11, 2017), https://www.npr.org/2017/02/11/514587731/trumps-criticism-of-judges-out-of-line-with-past-presidents [https://perma.cc/P6RG-PAUK] (reporting these concerns).

256. See Grove, Judicial Independence, supra note 9, at 488–505, 531–32.

257. See id. at 498–505, 531–32 (noting also the lack of contrary rhetoric).

other norms of judicial independence—may be weakened if the rhetoric surrounding the federal judiciary changes.[258]

To be sure, it is difficult to assess the degree or immediacy of any risk of defiance by the federal executive branch. The Trump Administration, for its part, generally endeavored to comply with adverse federal court decrees.[259] But the very fact that observers have raised these concerns underscores an implicit recognition of the importance of sociological legitimacy—not only for the Supreme Court but also for the inferior federal bench. Threats to the "perceived legitimacy of the [inferior] federal judiciary" are "a worrisome development for an unelected branch in a system of representative government."[260]

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258. See id. at 544 ("These conventions of judicial independence . . . could be deconstructed . . . if we alter the way in which we think and talk about the federal judicial power."); cf. Aziz Z. Huq, Why Judicial Independence Fails, 115 Nw. U. L. Rev. 1055, 1115–18 (2021) (suggesting that the increasingly partisan nature of the judicial appointments process at both the Supreme Court and lower federal court level might be problematic for judicial independence).

259. See Grove, Judicial Independence, supra note 9, at 501 (noting the Trump Administration's compliance with the injunctions blocking the President's travel bans as of early 2018); see also Tara Leigh Grove, The Power of "So-Called Judges," 93 N.Y.U. L. Rev. Online 14, 17–20 (2018) (arguing that the federal executive has political and institutional incentives to comply). Two recent cases warrant mention. First, according to media reports, in early 2020, DHS removed an individual from the United States, despite a federal court order granting a stay of removal. But DHS asserted that it did not knowingly violate a court order because the individual was on the plane before DHS received a copy of the order. See Deirdre Fernandes, Northeastern Student from Iran Removed from U.S. Is Just the Latest Sent Away at Logan, Bos. Globe (Jan. 21, 2020), https://www.bostonglobe.com/2020/01/21/metro/iranian-student-removed-us-before-court-hearing-lawyer-says (on file with the *Columbia Law Review*). The second case involves litigation over the 2020 census. In fall 2020, a federal district court found invalid the Trump Administration's decision to stop counting on September 30, 2020—and indicated that counting should continue until the (previously announced) October 31 deadline. See Nat'l Urb. League v. Ross, 489 F. Supp. 3d 939, 1003 (N.D. Cal. 2020). The Census Bureau then announced that the count would cease on October 5. The district court accused the Administration of disobeying the earlier order, directed the Administration to inform all census takers that the count would continue until the end of October, and threatened executive officials with sanctions or contempt if they failed to comply with the new order. See Hansi Lo Wang, After 'Egregious' Violation, Judge Orders Census to Count Through Oct. 31 for Now, NPR (Oct. 2, 2020), https://www.npr.org/2020/10/02/919224602/after-egregious-violation-judge-orders-census-to-count-through-oct-31-for-now [https://perma.cc/7B3L-RB3U]. At that point, the Census Bureau complied, indicating that the count would continue until October 31. See 2020 Census Will Continue Until October 31 After Successful Legal Challenge, ABC News (Oct. 3, 2020), https://abc30.com/census-2020-u.s.-bureau-vote/6725827 [https://perma.cc/9JU7-RNV7]. The Census Bureau changed its approach again only after the district court's order was stayed by the Supreme Court. See Ross v. Nat'l Urb. League, 141 S. Ct. 18, 18 (2020); Nicholas Bogel-Burroughs, Adam Liptak & Michael Wines, The Census, the Supreme Court and Why the Count Is Stopping Early, N.Y. Times (Jan. 18, 2021), https://www.nytimes.com/article/census-supreme-court-ruling.html (on file with the *Columbia Law Review*).

260. Binder & Maltzman, Advice, supra note 31, at 11.

D. *The Likelihood of a Tradeoff*

This Essay argues that, when the Supreme Court is invited to change the law in high-profile and contested areas, the Justices may face an unappealing tradeoff. To preserve the external legitimacy of the Court, the Justices may feel pressure not to issue the broad, rule-like doctrines that can most effectively guide the lower courts. The Justices may thereby not only sacrifice meaningful legal change but also pose risks for the long-term sociological legitimacy of the inferior federal bench.

How likely are the Justices to face such a tradeoff? In recent work, Neil Siegel asserts that, at least in a subset of salient cases, the Supreme Court may be able to work *with* the inferior federal courts to promote the legitimacy of both.[261] Siegel points to recent litigation over same-sex marriage: The Court in *United States v. Windsor* struck down the Defense of Marriage Act, which prohibited the federal government from recognizing state-approved same-sex marriages.[262] Lower federal courts then, Siegel argues, used *Windsor* "to legitimate their [subsequent] decisions" striking down state bans on same-sex marriage.[263] And when the Supreme Court itself required states to recognize same-sex marriage in *Obergefell v. Hodges*, the Court sought to "blunt threats to its own legitimacy by invoking those [earlier] district and circuit court decisions."[264] Siegel describes this phenomenon as "reciprocal legitimation."[265]

Siegel identifies an important phenomenon—one that seems to capture the same-sex marriage saga. But "reciprocal legitimation" seems unlikely to work with respect to many high-profile issues today. This phenomenon envisions a federal judiciary that shares a common project—and thus seeks to push the law in a single direction. As Siegel describes, in the wake of *Windsor*, both a majority of Justices and most inferior federal judges ruled in favor of marriage equality.[266]

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261. See Siegel, Reciprocal Legitimation, supra note 45, at 1186–87.

262. 570 U.S. 744, 757–58, 769–70, 775 (2013); see also Siegel, Reciprocal Legitimation, supra note 45, at 1186–87 (discussing *Windsor* and recent same-sex marriage litigation).

263. Siegel, Reciprocal Legitimation, supra note 45, at 1186.

264. Id. at 1186; see also Obergefell v. Hodges, 576 U.S. 644, 662–63, app. A (2015) (collecting cases).

265. Siegel, Reciprocal Legitimation, supra note 45, at 1186 ("The process is reciprocal because lower federal courts and the Supreme Court each enlist the support of the other."). For a different perspective on this litigation, see Emily Buss, The Divisive Supreme Court, 2016 Sup. Ct. Rev. 25, 25–26 (arguing that the Supreme Court should have denied certiorari in *Obergefell* and left the issue to the lower federal courts, who serve as "federal representatives of the people of their states").

266. See Siegel, Reciprocal Legitimation, supra note 45, at 1204, 1226–27 (stating that the Court may use this approach if it anticipates that it can "persuade other federal courts to decide an issue in the Court's preferred way"). Siegel argues that a similar phenomenon occurred with respect to reapportionment and desegregation outside the school context. See id. at 1186, 1203–05. Siegel focuses on *Brown*, arguing that, by ruling only on school segregation, the Court invited lower courts to invalidate desegregation in other contexts, such as restaurants, streetcars, and parks—and that lower courts largely accepted that

But such a common project seems unlikely with respect to many of the high-profile issues that are the focus of commentary today. As we have seen, absent guidance from the Supreme Court, Democratic- and Republican-appointed lower court judges often vote in distinct ways on issues such as abortion, affirmative action, and gun rights. The lower courts thus seem likely to push the law in *opposing* directions—and develop a patchwork of disparate decisions (as happened in the wake of *Brown II* and *Casey*)—rather than converge on a common project.

That is particularly true given that the lower federal judiciary has for some time been an ideological patchwork. Over the past several decades, the presidency has repeatedly changed hands between the Republican and Democratic parties. And since Reagan, each President has sought to influence the ideological direction of the lower federal courts. When Reagan entered office in 1981, more than sixty percent of the federal judiciary had been selected by Democratic Presidents.[267] By the end of his presidency, Reagan alone had appointed nearly half of the judiciary (forty-seven percent), creating a majority of Republican appointees.[268] Following the Clinton presidency, the inferior federal courts were roughly evenly split between Democratic- and Republican-appointed jurists.[269] And although George W. Bush increased the number of Republican appointees,[270] President Obama largely evened the balance during his first term in office.[271] Obama made even greater strides after Democrats eliminated the filibuster (and before Republicans retook the Senate), such that he "was finally able to shift the overall partisan balance on the lower federal courts in the Democrats' favor."[272] Over four years, with a Republican-controlled

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invitation. See id. at 1203–05. This Essay does not seek to contest Siegel's historical account as to desegregation outside the school context. For present purposes, the important point is that reciprocal legitimation is most likely to work when the Supreme Court and the inferior federal judiciary are engaged in a common project. In our currently divided polity—with increasingly divided courts—that seems unlikely in various salient areas.

267. See Goldman, Picking Federal Judges, supra note 89, at 260.

268. See Goldman, Reagan, supra note 182, at 318–19.

269. See Binder & Maltzman, Advice, supra note 31, at 102 (noting that, even by 2002, "the active judiciary was composed of 380 judges appointed by Republican presidents and 389 judges appointed by Democratic presidents").

270. See Slotnick et al., supra note 233, at 410 (stating that, at the beginning of Obama's presidency, "the cohort of judges appointed by Democrats" was 39.1%).

271. Binder & Maltzman, New Wars, supra note 231, at 56 ("After four years of Obama appointments . . . , the bench is coming closer to parity . . . .").

272. Slotnick et al., supra note 233, at 410, 414–15 (finding that "the cohort of judges appointed by Democrats increased from 39.1% to 51.6%" and that eight of the twelve regional courts of appeals had Democratic majorities); see also Anne Joseph O'Connell, Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014, 64 Duke L.J. 1645, 1649–50 (2015); U.S. Courts, Judgeship Appointments by President, https://www.uscourts.gov/sites/default/files/apptsbypres.pdf [https://perma.cc/DJ4Z-J3H7] (reporting that Obama appointed 268 district judges and forty-nine regional appellate court judges, for a total of 317). One recent study argues that the elimination of the filibuster itself is likely to lead to a more

Senate (and no filibuster), President Trump again transformed the lower federal courts. Trump alone appointed around 200 judges, including over one-quarter of the federal courts of appeals.[273] Yet many Democratic-appointed jurists remain on the federal bench.[274]

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

IV. IMPLICATIONS

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

A. *What It Takes for a Constitutional Revolution*

Those who follow the Supreme Court from time to time predict a constitutional revolution. Today, commentators forecast an overhaul of the Court's jurisprudence on topics including abortion, affirmative action,

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polarized judiciary. See Jonathan Remy Nash & Joanna Shepherd, Filibuster Change and Judicial Appointments, 17 J. Empirical Legal Stud. 646, 649 (2020).

273. See Devan Cole & Ted Barrett, Senate Confirms Trump's 200th Judicial Nominee, CNN (June 24, 2020), https://www.cnn.com/2020/06/24/politics/trump-200-judicial-appointments-cory-wilson/index.html [https://perma.cc/X4RT-NQKP]; see also Joan Biskupic, Trump Transformed the Supreme Court that Mostly Helped Advance His Agenda, CNN (Jan. 19, 2021), https://www.cnn.com/2021/01/19/politics/trump-supreme-court-legacy/index.html [https://perma.cc/EU4J-DF9W] ("After four years, the President has filled 177 of the 682 district court judgeships (26%) and 54 of the 179 appeals court judgeships (30%) . . . .").

274. See supra notes 271–272 and accompanying text.

gun rights, and the administrative state.[275] But this Essay suggests that any such revolution faces significant obstacles.

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

We may soon see a similar pattern with respect to the administrative state. Conservative and libertarian elites have, in recent years, led a sustained attack on government regulation (a trend that Gillian Metzger dubbed "anti-administrativism"),[276] and many observers in June 2019 expected the Supreme Court to begin a revolution in administrative law—by reversing prior decisions that require deference to agency interpretations of regulations: *Auer* deference.[277] Instead, Justice Kagan's majority opinion in *Kisor v. Wilkie* purported to reaffirm *Auer*, while crafting a complex new five-part test, such that "*Auer* deference is sometimes appropriate and sometimes not."[278]

Kisor not only failed to provide the legal change sought by conservatives and libertarians but also seems likely to put considerable pressure on the inferior federal judiciary. As some commentators have observed, the scope of "*Kisor* deference" will depend heavily on the lower

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275. See supra notes 1–7 and accompanying text (collecting sources). Recent events are likely to deepen these concerns. Just before this Essay went to press, the Supreme Court granted certiorari in a gun rights case (although it narrowed the question on review). See supra note 218. The Court also opted to hear a case involving a state law that, with few exceptions, prohibits abortion after fifteen weeks. See Brent Kendall & Jess Bravin, Supreme Court to Review Mississippi Law Limiting Abortion Rights, Wall St. J. (May 17, 2021), https://www.wsj.com/articles/supreme-court-to-consider-abortion-restrictions-from-mississippi-11621259099 (on file with the *Columbia Law Review*).

276. Metzger, Administrative State, supra note 5, at 3–7, 64–69 (critiquing the "attack on the national administrative state" led by "business interests and conservative forces"); see also Christopher J. Walker, Attacking *Auer* and *Chevron* Deference: A Literature Review, 16 Geo. J.L. & Pub. Pol'y 103, 104 (2018) (detailing "a growing call from the federal bench, on the Hill, and within the legal academy to rethink" administrative deference doctrines).

277. See Auer v. Robbins, 519 U.S. 452, 461 (1997); Tom Lorenzen, Dan Wolff & Sharmistha Das, The Final *Auer*: Midnight Approaches for an Important Deference Doctrine, ABA (March 8, 2019), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/march-april-2019/the-final-auer (on file with the *Columbia Law Review*) ("The demise of *Auer* seems imminent.").

278. 139 S. Ct. 2400, 2408, 2414–18 (2019).

federal courts.[279] And *Kisor* comes on the legal scene at a time when Presidents, senators, and interest groups are already more closely focused on judicial attitudes toward the administrative state.[280] According to then-Trump White House Counsel Don McGahn, a new "litmus test" for Republican judicial appointees at all levels is skepticism toward federal regulation.[281] Thus, like *Casey*, *Kisor* may increase the pressure on the lower court selection process, with Republicans and Democrats seeking to put individuals with the "correct views" on the inferior federal bench.

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

B. *The Narrow Focus on Supreme Court Legitimacy*

Prominent scholars have argued that the Supreme Court should decide cases so as to preserve its sociological legitimacy.[282] Notably, the force of this argument depends in part on a given Justice's approach to constitutional interpretation; some interpretive methods likely foreclose such considerations. But, significantly for purposes of this Essay, the argument also reflects scholars' singular emphasis on the Supreme Court. As the next section explores, the normative question—should the Justices aim to protect the Court's reputation?—becomes far more challenging once we consider the entire federal judiciary.

1. *A Contingency: Interpretive Method.* — At the outset, this Essay addresses a preliminary question: whether it is *legally* legitimate for a

279. See Gillian E. Metzger, The Roberts Court and Administrative Law, 2019 Sup. Ct. Rev. 1, 8, 66 (noting that the Court "punt[ed] the difficult questions back to the lower courts," and thus, "it will be how the lower courts apply *Kisor* . . . that will establish *Kisor*'s impact on administrative law in practice"); Christopher J. Walker, What *Kisor* Means for the Future of *Auer* Deference: The New Five-Step *Kisor* Deference Doctrine, Yale J. on Regul.: Notice & Comment (June 26, 2019), https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine [https://perma.cc/WY9W-77RH] (comparing the *Kisor* test to the "less-deferential *Skidmore* doctrine, under which administrative interpretations of law receive deference based on their 'power to persuade'").

280. See supra note 276 and accompanying text.

281. Jeremy W. Peters, Trump's New Judicial Litmus Test: Shrinking 'the Administrative State', N.Y. Times (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html (on file with the *Columbia Law Review*); see also Craig Green, Deconstructing the Administrative State: Constitutional Debates over *Chevron* and Political Transformation in American Law 109–10 (Temple Univ. Legal Stud. Rsch. Paper No. 2018-35, 2018), https://ssrn.com/abstract=3264482 (on file with the *Columbia Law Review*) (discussing the Trump Administration's efforts to "deconstruct" the administrative state by "decreasing administrative flexibility, endorsing judicially imposed constitutional limits, and appointing Neil Gorsuch to the Supreme Court").

282. See supra notes 25–26 and accompanying text.

Justice to take external legitimacy into account in deciding cases. The answer depends in significant part on a Justice's approach to constitutional interpretation. Notably, throughout this discussion, the Essay presumes that there is no one "correct" interpretive method, and thus each individual judge has substantial discretion to select her preferred interpretive approach.[283] The goal here is to explore whether some methods could be open to the consideration of external legitimacy.

In past work, I have suggested that, under a variety of interpretive methods, it is *not* legally legitimate for a Justice to switch a vote—by, for example, voting to uphold rather than strike down a law—in order to protect the Supreme Court's public reputation.[284] But my past work did not address whether a Justice may consider sociological legitimacy at all—for example, in fashioning an operative doctrine such as "all deliberate speed" or "undue burden." This Essay takes up that question.

Under some methods of interpretation, any reliance on sociological legitimacy is likely legally illegitimate. For example, under prominent versions of originalism, judges have an obligation to enforce the original meaning of constitutional provisions.[285] Such an approach should exclude consideration of the Court's modern-day reputation.[286]

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283. Cf. Fallon, Law and Legitimacy, supra note 43, at 131 (making a similar assumption); Abbe R. Gluck & Richard A. Posner, Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals, 131 Harv. L. Rev. 1298, 1345 (2018) (finding that a majority of lower court judges surveyed believe either that the Supreme Court cannot dictate a method of statutory interpretation or that it does not do so in a fashion that is consistent enough to be precedential).

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

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

286. Some versions of new originalism may allow the consideration of "sociological legitimacy" as part of the construction zone. See infra note 295 and accompanying text. Originalist approaches that take a more positivist turn—and argue for originalism on the ground that it is "our law"—are a more complex case. One would presumably need evidence that the Court looked to sociological legitimacy in its early days—and perhaps that it did so candidly and openly. For the positivist theory, see William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2351–53, 2363–86 (2015); Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. & Pub. Pol'y 817, 844–74 (2015). One might need similar evidence for original methods originalism, a theory that advocates using only those interpretive rules in place around the time that the Constitution was adopted. For an

The opinions of two prominent originalists help to illustrate this point. In *Casey*, Justice Scalia was "appalled by[] the Court's suggestion" that a judicial decision "must be strongly influenced" by "public opposition . . . . Instead of engaging in the hopeless task of predicting public perception—a job not for lawyers but for political campaign managers—the Justices should do what is legally right . . . ."[287] Along the same lines, Justice Thomas chastised the Court for denying certiorari in a case involving Medicaid benefits because "some respondents . . . are named 'Planned Parenthood.'"[288] Justice Thomas insisted that even a "tenuous connection to [the] politically fraught issue [of abortion] does not justify abdicating our judicial duty. If anything, neutrally applying the law is all the more important when political issues are in the background."[289]

Ronald Dworkin's theory of law as integrity also largely forecloses reliance on sociological legitimacy. Under this approach, judges must find the "right answer" to legal questions by relying on text, history, and "moral principles about political decency and justice."[290] According to Dworkin, the Justices should *not* decline to recognize constitutional rights in order to protect the "standing and legitimacy" of the Supreme Court.[291] Although this theory does leave room for consideration of sociological legitimacy in extraordinary cases—"if the authority of the Supreme Court or of the constitutional arrangement as a whole were actually at stake"—

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account of original methods originalism, see John O. McGinnis & Michael B. Rappaport, Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction, 103 Nw. U. L. Rev. 751, 751–53, 758–72 (2009).

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

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

289. Id. at 410.

290. Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 2–3, 10–11 (1996) (advocating a "*moral* reading" of the abstract clauses of the Constitution); see also Ronald Dworkin, Justice in Robes 41–43, 133–34 (2006) [hereinafter Dworkin, Justice in Robes] (reiterating the moral reading and advocating the one-right-answer thesis); Ronald Dworkin, Law's Empire 266–71 (1986) (advocating the one-right-answer thesis and discussing criticisms).

291. Dworkin, Justice in Robes, supra note 290, at 256–58 (arguing against such a "passive or cautionary strategy"). Admittedly, Dworkin does not focus on implementing doctrines (such as "all deliberate speed" or "undue burden"), so it is possible that his theory would work differently in that context. But his analysis seems, at a minimum, to cast doubt on the legal legitimacy of any consideration of sociological legitimacy.

Dworkin is skeptical that such a situation is likely to arise.[292] Accordingly, this theory does not seem to countenance reliance on external legitimacy.

Many other interpretive approaches, however, seem open to at least some consideration of sociological legitimacy. That is, under these methods, it may be legally legitimate for a Justice to articulate legal doctrine so as to safeguard the Supreme Court's external reputation. For example, a Justice who favors pragmatism,[293] common law constitutionalism,[294] and some forms of new originalism,[295] may take into account functional concerns.[296] And there is a strong functional reason for the Justices to consider sociological legitimacy in formulating doctrine: "[B]ecause the Court's power depends on its image, in order to maintain its effectiveness, the Court must take care to preserve the esteem in which it is held."[297]

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

293. See Richard A. Posner, How Judges Think 230–50 (2008) (advocating pragmatism).

294. See David A. Strauss, The Living Constitution 43–49 (2010) (articulating and defending common law constitutionalism).

295. Some versions of new originalism would seem to allow the consideration of "sociological legitimacy" as part of the construction zone. See, e.g., Jack M. Balkin, Living Originalism 179–82 (2011) (relying, in part, on functional concerns in examining the implementation of the Commerce Clause over time).

296. Philip Bobbitt's *Constitutional Fate* does not focus on operative doctrines such as "all deliberate speed." But Bobbitt endorses Alexander Bickel's passive virtues more generally, suggesting that the Court's legitimacy is an acceptable "prudential" concern in constitutional decisionmaking. See Philip Bobbitt, Constitutional Fate: Theory of the Constitution 66–69, 213 (1982) (favorably discussing Bickel's view that, "by prudently avoiding some controversies and by handling others in subtle, indirect ways the Court could preserve its independence and authority for those few cases that should be decided on the merits"); id. at 7 (identifying various acceptable modalities of constitutional argument, including historical, textual, structural, prudential, doctrinal, and ethical arguments); see also infra section IV.B.2 (discussing Bickel's passive virtues).

297. Hellman, supra note 25, at 1151; see also Wells, supra note 25, at 1015 ("[T]he Court, in order to achieve its goals, has to be concerned with what other people think of it."). There is, however, one complication. Many scholars assert that the Justices cannot openly admit that they considered sociological legitimacy. See, e.g., Wells, supra note 25, at 1051 (arguing that the Justices should sometimes subordinate legal legitimacy—defined as candor in legal reasoning—to the imperative of achieving "sociological legitimacy"); see also Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 Tex. L. Rev. 1307, 1356, 1388–94 (1995) (urging that "full candor may harm perceived judicial legitimacy" in some contexts). But see Hellman, supra note 25, at 1149–50 (advocating "[t]he *candid* recognition of the importance of the continued vitality of the Court"). That is, the Justices may have to sacrifice what many view as a central element of legal legitimacy: judicial candor. See Fallon, Law and Legitimacy, supra note 43, at 129–32, 142–48; Micah Schwartzman, Judicial Sincerity, 94 Va. L. Rev. 987, 990–91 (2008) (defending an approach in which "judges have a general duty to comply with a principle of sincerity in their decisionmaking"); David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 736–38 (1987) (advocating "a strong presumption in favor of candor"); see also Henry P. Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 25 (1979) (suggesting that opinions should include all the grounds on which judges relied); cf. Richard H. Fallon, Jr., A Theory of Judicial Candor, 117 Colum. L. Rev. 2265, 2282–83 (2017) (articulating a minimal and ideal norm of candor in judicial decisionmaking). There may thus be another tradeoff: in this

2. *Saving the Court: Minimalism and the Passive Virtues.* — Many interpretive methods thus seem to allow the Justices to articulate doctrine with an eye toward preserving the Supreme Court's external reputation. Yet how should the Justices go about that task? Scholars do not always explain this point with great clarity, but Alexander Bickel and Cass Sunstein have concrete suggestions: The Justices should issue narrow or open-ended ("minimalist") rulings, or perhaps avoid deciding cases entirely, in order to deflect "public outrage."[298] This work vividly illustrates the tendency of scholars to focus on the external legitimacy of the Supreme Court alone.

In *The Least Dangerous Branch*, Bickel famously articulates the "countermajoritarian difficulty," the idea that the Supreme Court's power of judicial review is "a deviant institution in the American democracy."[299] But importantly, Bickel's goal is not to undermine Supreme Court review. On the contrary, he seeks to defend the Court's constitutional role—and to articulate how it can be exercised cautiously and prudently.[300] Bickel aims to show how the Justices can decide cases so as to safeguard constitutional rights, while also protecting the Supreme Court's long-term sociological legitimacy.

Part of Bickel's answer lies in what he dubs the "passive virtues": The Court should use jurisdictional devices (such as standing, the political question doctrine, and certiorari dismissals) to "stay[] its hand" in some controversial cases so that the Court can play its full role in other cases.[301] But Bickel does not focus exclusively on jurisdiction. Bickel also applauds the "all deliberate speed" formula as a way to reconcile principle with expediency.[302] Given the possibility of noncompliance by segregationists, Bickel argues, the Supreme Court was correct to reject the "shock treatment" proposed by the NAACP and instead to allow a more gradual approach.[303] Through "all deliberate speed"—a phrase that, according to

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case, between legal and sociological legitimacy. A full examination of this issue is beyond the scope of this Essay. But I hope to explore it in future work.

298. Cass R. Sunstein, If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 Stan. L. Rev. 155, 158–59 (2007) [hereinafter Sunstein, Outraged].

299. See Bickel, Least Dangerous Branch, supra note 26, at 16–18.

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

301. Bickel, Least Dangerous Branch, supra note 26, at 69–72, 112–33. See generally Alexander M. Bickel, The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 Harv. L. Rev. 40 (1961) (discussing the Supreme Court's use of doctrines like standing and political question to decline the exercise of jurisdiction otherwise granted to it). For a prominent critique, see generally Gerald Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1 (1964) (advancing various difficulties with Bickel's thesis). For discussion of additional critiques of Bickel, see Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665, 714–18 (2012).

302. See Bickel, Least Dangerous Branch, supra note 26, at 253–54.

303. Id. at 250, 252–53 (arguing that caution was the wiser approach, particularly given that "resistance could be expected").

Bickel, "resembles poetry"—"[t]he Court placed itself in position to engage in a continual colloquy with the political institutions" and enable them to gradually accept the principle of desegregation.[304]

Bickel expressly states in *The Least Dangerous Branch* that he does not seek to address the lower federal bench.[305] According to Bickel, "[I]n no event is constitutional adjudication in the lower federal courts the equivalent of what can be had in the Supreme Court."[306] "[T]he lower courts can act in constitutional matters as stop-gap or relatively ministerial decisionmakers only."[307]

Even in 1962, when Bickel first published *The Least Dangerous Branch*, that was an extraordinary statement. As this Essay has underscored, the success (or failure) of desegregation depended tremendously on the "fifty-eight lonely men" who, at the time, comprised the inferior federal judiciary across the South.[308] As Judge Wisdom explained in 1967, "[T]here [were] so few Supreme Court decisions on school desegregation that inferior courts must improvise . . . . To this extent, the [courts of appeals were] forced into a policy-making position as to decisions only tangentially dependent on the Supreme Court."[309]

Bickel is not alone in his singular emphasis on the Supreme Court. Most of the literature on the Court's sociological legitimacy has likewise overlooked the remainder of the federal judiciary.[310] For example, building on his work on judicial minimalism,[311] Sunstein argues that the Justices should at times issue narrow rulings in order to deflect "public outrage."[312] Such a minimalist approach is particularly urgent today, Sunstein insists, as Supreme Court watchers anticipate a constitutional revolution: Following the appointment of Justices by President Trump, "the nation could be in for a wild ride" with respect to issues including abortion and affirmative action, such that "the meaning of the Constitution looks a lot like the political convictions of the Republican

304. Id. at 253–54.

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

306. Id. at 126.

307. Id. at 198.

308. Peltason, supra note 54, at 28–29; see also supra section II.A.2 (describing the discretion that federal district judges wielded over the pace of desegregation in their respective districts).

309. Wisdom, supra note 84, at 426–27.

310. See supra notes 42–45.

311. See, e.g., Sunstein, One Case, supra note 26, at 3–23 (advocating minimalism).

312. See Sunstein, Outraged, supra note 298, at 158–59, 169–75, 211 (aiming to justify this approach largely on consequentialist grounds); see also Andrew B. Coan, Well, Should They? A Response to *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 Stan. L. Rev. 213, 215 (2007) (suggesting that "judges should care about public outrage out of respect for democracy" (emphasis omitted)).

Party."[313] Sunstein argues: "That would be ugly and dangerous . . . . As much as any time in American history, this is a period for judicial minimalism" at the Supreme Court.[314]

C. *Expanding the Focus to the Entire Judiciary*

When one focuses exclusively on the Supreme Court, it is easy to see the appeal of narrow rulings or certiorari denials in high-profile areas. Broad, rule-like doctrines seem likely to trigger attacks on the Court. Indeed, today, we see signs of precisely that. As commentators forecast a complete overhaul of Supreme Court doctrine—on issues such as abortion, affirmative action, and gun rights—there has been an uptick in anti-Court rhetoric.[315] Some critics advocate strong measures: It may be time to end life tenure (by statute),[316] strip federal jurisdiction,[317] impeach

313. Cass R. Sunstein, Kavanaugh Confirmation Won't Affect Supreme Court's Legitimacy, Bloomberg (Sept. 30, 2018), https://www.bloomberg.com/opinion/articles/2018-09-30/kavanaugh-confirmation-won-t-affect-supreme-court-s-legitimacy (on file with the *Columbia Law Review*) [hereinafter Sunstein, Kavanaugh Confirmation] (arguing that, given the "cloud" cast by the Kavanaugh hearings on the Court's legitimacy, "[a]s much as any time in American history, this is a period for judicial minimalism"). Sunstein made these comments following the appointments of Justices Gorsuch and Kavanaugh. But this argument could be seen as even more pressing in the wake of Justice Ginsburg's death, and Justice Barrett's subsequent appointment to the Court. See supra notes 8–9 (noting that these events seem to have led to an increase in the attacks on the Court's legitimacy).

314. Sunstein, Kavanaugh Confirmation, supra note 313.

315. See supra notes 1–9 and accompanying text. This rhetoric has only increased since the tragic passing of Justice Ginsburg. See Matt Ford, The Consequences of Ruth Bader Ginsburg's Death for American Democracy, New Republic (Sept. 18, 2020), https://newrepublic.com/article/159425/consequences-ruth-bader-ginsburgs-death-american-democracy [https://perma.cc/6G6Q-PBR2] (arguing that Justice Ginsburg's "death amplifies a growing legitimacy crisis for the Supreme Court"); see also David Yaffe-Bellany, Liberals Weigh Jurisdiction Stripping to Rein in Supreme Court, Bloomberg (Oct. 6, 2020), https://www.bloomberg.com/news/articles/2020-10-06/to-rein-in-supreme-court-some-democrats-consider-jurisdiction-stripping (on file with the *Columbia Law Review*) (noting that "progressive lawmakers and left-wing activists are calling for" term limits, court packing, and jurisdiction stripping, as they "[f]ac[e] the prospect of a 6-3 conservative majority on the high court following the death of Justice Ruth Bader Ginsburg").

316. See Ian Ayres & John Fabian Witt, Opinion, Democrats Need a Plan B for the Supreme Court. Here's One Option., Wash. Post (July 27, 2018), https://www.washingtonpost.com/opinions/democrats-need-a-plan-b-for-the-supreme-court-heres-one-option/2018/07/27/4c77fd4e-91a6-11e8-b769-e3fff17f0689_story.html (on file with the *Columbia Law Review*) (advocating a statute setting "18-year terms . . . followed by life tenure" on a lower federal court); Kermit Roosevelt & Ruth-Helen Vassilas, Opinion, Supreme Court Justices Should Have Term Limits, CNN (Sept. 30, 2019), https://www.cnn.com/2019/09/30/opinions/supreme-court-term-limits-law-roosevelt-vassilas/index.html [https://perma.cc/URH7-BVG4]. Several Democratic lawmakers are reportedly working on such a bill. See Juliegrace Brufke, House Democrat to Introduce Bill Imposing Term Limits on Supreme Court Justices, Hill (Sept. 25, 2020), https://thehill.com/homenews/house/518195-house-democrat-to-introduce-bill-imposing-term-limits-on-supreme-court [https://perma.cc/SC4V-MG88].

317. See Ryan D. Doerfler & Samuel Moyn, Democratizing the Supreme Court, 109 Cal. L. Rev. (forthcoming 2021) (manuscript at 6–7, 22–25), https://ssrn.com/abstract=3665032 (on file with the *Columbia Law Review*) (arguing that stripping jurisdiction from the Supreme

Justices,[318] disobey Supreme Court decisions,[319] or "pack" the Court with additional members.[320]

In this environment, the Justices may be reasonably concerned about the sociological legitimacy of the Supreme Court—and drawn to the approach suggested by Bickel and Sunstein. In an era of political turbulence, it may seem that the most effective way to preserve the Court's public reputation is either to deny review altogether in high-profile cases or to issue narrow doctrines that do not clearly push the law in any specific direction. "As much as any time in American history," this may seem like "a period for judicial minimalism" at the Supreme Court.[321]

1. *The Impact of a Minimalist Approach.* — Once we consider the entire federal judiciary, however, the picture becomes significantly more nuanced and complex. Importantly, narrow or opaque (or nonexistent) Supreme Court rulings do not simply return a legal issue to the political branches—as Bickel and Sunstein have at times suggested.[322] The issue goes to the lower courts. And, in contrast to the Supreme Court, the lower federal courts cannot simply decline review; they have mandatory jurisdiction.[323] Accordingly, the lower courts must decide high-profile cases, with or without guidance from their judicial superiors. For example,

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Court "would favor progressive outcomes immediately" even though the long-term partisan impact would be unpredictable); Christopher Jon Sprigman, Congress's Article III Power and the Process of Constitutional Change, 95 N.Y.U. L. Rev. 1778, 1780–82 (2020) (suggesting that broad congressional authority to strip jurisdiction from the Supreme Court could "help reconcile constitutionalism with democracy" and thereby "help preserve the legitimacy of courts as enforcers of constitutional rules").

318. See Ronald J. Krotoszynski, Jr., Opinion, The Case for Impeaching Kavanaugh, N.Y. Times (Sept. 20, 2018), https://www.nytimes.com/2018/09/20/opinion/kavanaugh-impeachment.html (on file with the *Columbia Law Review*).

319. See Mark Joseph Stern, How Liberals Could Declare War on Brett Kavanaugh's Supreme Court, Slate (Oct. 4, 2018), https://slate.com/news-and-politics/2018/10/brett-kavanaugh-confirmation-constitutional-crisis.html [https://perma.cc/WV22-AA9C] (arguing that "[b]lue states may be pressured to disregard [the] decisions" of a conservative-dominated court).

320. See supra notes 9, 213–216, and accompanying text. Just before this Essay went to press, a group of House and Senate Democrats introduced legislation to expand the size of the Supreme Court from nine to thirteen members. See Carl Hulse, Democrats' Supreme Court Expansion Plan Draws Resistance, N.Y. Times (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/us/politics/democrats-supreme-court-expansion.html (on file with the *Columbia Law Review*).

321. Sunstein, Kavanaugh Confirmation, supra note 313.

322. See Bickel, Least Dangerous Branch, supra note 26, at 254 (arguing that, with the "all deliberate speed" formula, "[t]he Court placed itself in position to engage in a continual colloquy with the political institutions"); Sunstein, One Case, supra note 26, at 118 (claiming, with respect to affirmative action, that the Court's "complex, rule-free, highly particularistic opinions have had the salutary consequence of helping to stimulate" democratic debate).

323. Compare 28 U.S.C. § 1254(1) (2018) (granting the Supreme Court broad discretionary certiorari jurisdiction), with id. § 1291 (mandating review by courts of appeals).

as Seventh Circuit Judge Sykes observed, the Supreme Court has not "give[n] us any doctrine about . . . how to reconcile conflicts between Second Amendment gun rights and the public's right to regulation of dangerous instrumentalities."[324] Nevertheless, the inferior federal courts cannot "duck the hard Second Amendment case . . . . We need to decide it."[325]

When the Supreme Court issues a minimalist decision on a high-profile issue (and fails to later clarify the law), the lower federal courts must take the lead on the content of federal law. And, without the constraining force of broad, rule-like precedents, inferior judges in high-profile and contested cases tend to be more influenced by their background ideological leanings. That is precisely what worried Thurgood Marshall during the *Brown II* argument: Without a firm deadline for desegregation, "the Negro in this country would be in a horrible shape" because the enforcement of *Brown* would be "left to the judgment of the district court with practically no safeguards."[326] Likewise, in the wake of *Casey*'s undue burden standard, there is considerable evidence that Democratic- and Republican-appointed jurists vote in ideologically predictable directions.[327] As one activist lamented, "There's a real recognition that the lower court judges hold vast power over women's reproductive lives."[328]

Delegation of high-profile issues to the lower courts not only leads to a patchwork of decisions but also poses risks to the inferior federal judiciary itself. To the extent that lower courts are in charge of high-profile issues, Presidents, senators, and interest groups have a strong incentive to focus on the composition of the inferior federal bench—creating a divisive process that puts at risk the long-term public reputation of the lower courts. As Judge King suggests, a "highly partisan or ideological judicial selection process conveys the notion to the electorate that judges are simply another breed of political agents, that judicial decisions should be in accord with political ideology," and these messages may "undermine public confidence in the legitimacy of the [lower federal] courts."[329]

2. *Exploring the Legitimacy Tradeoffs.* — The goal of this Essay is not to argue that the Justices should grant certiorari or issue a broad, rule-like doctrine in every high-profile case. There are various reasons that the Justices may opt not to hear a case or may struggle to formulate a broad

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324. Sykes, supra note 193, at 2:45:50–2:47:48; see also supra notes 191–192 (discussing the lack of clarity in the Court's gun rights decisions).

325. Sykes, supra note 193, at 2:46:24–2:46:35.

326. *Brown II* Transcript, supra note 48, at 400 (quoting Thurgood Marshall).

327. See supra section II.B.3.

328. Scherer, supra note 29, at 19–20 (quoting Interview by Nancy Scherer with Elizabeth Cavendish, supra note 161).

329. King, supra note 230, at 782; see also id. ("The loss of public confidence in the legitimacy of the courts . . . could, in turn, undermine compliance . . . .").

doctrine.[330] Instead, this Essay seeks to emphasize a point that seems to have been overlooked by the literature on sociological legitimacy: the potential tradeoffs between the Supreme Court and the lower federal courts.

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

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

At the outset, we should recognize that it can be challenging to discern whether a broad, rule-like decision will in fact undermine the Supreme Court's legitimacy. Consider, in this regard, the reapportionment cases. When the Court first considered *Baker v. Carr*,[331] Justices Frankfurter and Harlan implored their colleagues to find the issue nonjusticiable; they worried that the Court's sociological legitimacy would be severely damaged by entering that "political thicket."[332] Yet, as Barry Friedman has pointed out, the Court's decisions both to treat the issue as justiciable and to adopt the one-person, one-vote rule turned out to be quite popular with the public.[333] A further complication involves the

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330. See supra note 203 and accompanying text (acknowledging, for example, the difficulty of reaching agreement on a multimember Court).

331. 369 U.S. 186 (1962).

332. Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion) (Frankfurter, J.) (concluding that a challenge to congressional districts was nonjusticiable, and admonishing the Court not to enter the "political thicket"); see also Kim Isaac Eisler, A Justice for All: William J. Brennan, Jr., and the Decisions that Transformed America 171–74 (1993) (noting that Justice Frankfurter advocated dismissal in *Baker v. Carr* because he feared that a decision on the merits "would constitute such a usurpation of court prerogatives, that it would undermine the authority of the Court itself"); Whittington, Political Foundations, supra note 96, at 126 (noting that Justices Frankfurter and Harlan both believed that a decision on reapportionment "could only damage the Court in the long run"); Tara Leigh Grove, The Lost History of the Political Question Doctrine, 90 N.Y.U. L. Rev. 1908, 1960–61 (2015) (discussing Justice Frankfurter's concerns during the deliberations over *Baker v. Carr*). Justice Frankfurter's dissent in *Baker v. Carr* underscored these concerns. See 369 U.S. at 267, 277–80 (Frankfurter, J., dissenting) (arguing that the reapportionment lawsuits should have been dismissed as nonjusticiable and warning that "[d]isregard" of such limits "may well impair the Court's position" by undermining "public confidence in its moral sanction").

333. See Friedman, Will of the People, supra note 28, at 268–69 (noting that, although some officials opposed the Court's decisions—and even attempted to strip federal jurisdiction over reapportionment issues—the Court's decisions were quickly implemented, and stating that "[t]he reason for the prompt action and the defeat of all attempts to

Court's sociological legitimacy across time. *Brown v. Board of Education* was controversial in 1954, and the Court may have faced resistance if it had issued a firm deadline in *Brown II*.[334] But over time, *Brown* has become canonical (that is, one of the most respected decisions in Supreme Court history),[335] and the Court's failure to do more in *Brown II* has been viewed by many as a tragic mistake.[336] It is worth asking whether the Court's long-term public reputation would have been enhanced by a more rule-like implementation scheme for desegregation.

Nevertheless, despite such examples, commentators—and, more importantly, many Justices—have long assumed that broad, rule-like decisions in high-profile areas create risks for the Court's external legitimacy. The Justices are therefore likely to perceive such a threat and to be tempted to issue narrow or open-ended doctrines (or deny certiorari) in order to preserve the Court's public reputation. The remainder of this section explores whether the perceived benefits to the Supreme Court outweigh the risks to the remainder of the federal judiciary.

Some readers may suggest that the Supreme Court's reputation is far more fragile than that of any given inferior federal court (or the lower federal judiciary as a whole). The Court's decisions—at least in high-profile cases such as those involving abortion, affirmative action, or gun rights—tend to garner more media attention than those of the lower courts. And a Supreme Court decision would likely apply nationwide. Accordingly, the effects of a broad, rule-like decision would be felt by individuals throughout the country—and for that reason could generate considerable resistance.

Yet the calculus is not so clear. Precisely because of the Supreme Court's prominence in our society, it can be far more challenging to attack the Court than a single district court judge (or the inferior federal judiciary as a whole). Consider some prominent examples of court curbing: court packing, jurisdiction stripping, and defiance of court orders. An attempt to enlarge the Supreme Court may be far more controversial than an expansion of the lower federal judiciary because the Court is seen as far more consequential. Some scholars argue that Franklin

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forestall it was obvious: the public loved these decisions"); see also Louis L. Jaffe, Was Brandeis An Activist? The Search for Intermediate Premises, 80 Harv. L. Rev. 986, 991 (1967) ("At least some of us who shook our heads over *Baker v. Carr* are prepared to admit that it has not been futile, that it has not impaired, indeed that it has enhanced, the prestige of the Court. It has been a peculiarly popular opinion.").

334. See supra section II.A.I.

335. See J.M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 Harv. L. Rev. 963, 1018 (1998) (describing *Brown* as "[t]he classic example" of a canonical case); Jamal Greene, The Anticanon, 125 Harv. L. Rev. 379, 381 (2011) (arguing that "the constitutional canon [is] the set of decisions whose correctness participants in constitutional argument must always assume" and "*Brown* . . . is the classic example").

336. See Bell, Silent Covenants, supra note 67, at 23 (describing *Brown II* as a "mistake" in large part because it failed to guide and constrain lower federal courts); supra section II.A.2 (noting criticisms of *Brown II*).

Roosevelt's presidency was severely damaged because of his (unsuccessful) attempt to pack the Supreme Court.[337] And, as my past work has documented, although there are political obstacles to any jurisdiction stripping effort, there have historically been more roadblocks in the way of attempts to cut off Supreme Court review.[338] Executive officials and legislators often prefer the finality and uniformity that comes from a Supreme Court decision; accordingly, throughout our history, many political actors have defended the Court's jurisdiction, even when they anticipated an adverse decision from the high bench.[339]

That brings us to the concern at the heart of sociological legitimacy: compliance. A presidential decision to defy a Supreme Court ruling would likely create quite a stir. But a presidential decision to disobey a single district court ruling (or perhaps multiple district court rulings) might not garner as much attention, precisely because it would be seen as less consequential. That is, it may be politically easier for a President to defy an inferior federal court.[340]

Accordingly, it is not clear which level of the judiciary is better equipped to shoulder external criticisms. Consider the case of desegregation. Some readers may share Bickel's intuition that the Supreme Court in *Brown II* properly rejected the "shock treatment"

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337. See William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 156–61 (1995).

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

339. See Grove, Article II Safeguards, supra note 338, at 285; Grove, Structural Safeguards, supra note 338, at 920–22.

340. The picture is further complicated by the possibility that district courts may issue nationwide or universal injunctions. Presidents may be more inclined to defy such broad orders. And yet the high-profile nature of such injunctions may also help insulate the district judges who issue them. For a small sample of the rich literature on this topic, see Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 420 (2017) (characterizing nationwide injunctions as a "recent development" in the history of equity and advocating that federal courts should issue only "plaintiff-protective injunction[s]" that restrain defendants' conduct "only with respect to the plaintiff"); Amanda Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. Rev. 1065, 1069 (2018) (offering a "qualified" defense of nationwide injunctions as "the only means" in certain cases "to provide plaintiffs with complete relief and avoid harm to thousands of individuals similarly situated to the plaintiffs"); Mila Sohoni, The Lost History of the "Universal" Injunction, 133 Harv. L. Rev. 920, 924 (2020) (arguing that federal courts have issued nationwide injunctions for "well over a century" and that "the Article III objection to the universal injunction should be retired").

proposed by the NAACP and instead allowed a more gradual approach through the "all deliberate speed" formula.[341] But Judge Wisdom offered a very different assessment. Precisely because desegregation was a fraught issue, Judge Wisdom argued that "[t]he Supreme Court . . . has an obligation to lead or at least point out the logical line of development of the law."[342]

CONCLUSION

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

341. Bickel, Least Dangerous Branch, supra note 26, at 250, 252–53.

342. Wisdom, supra note 84, at 420.