Anna-Bettina Kaiser/Niels Petersen/Johannes Saurer (eds.)

The U.S. Supreme Court and Contemporary Constitutional Law: The Obama Era and Its Legacy

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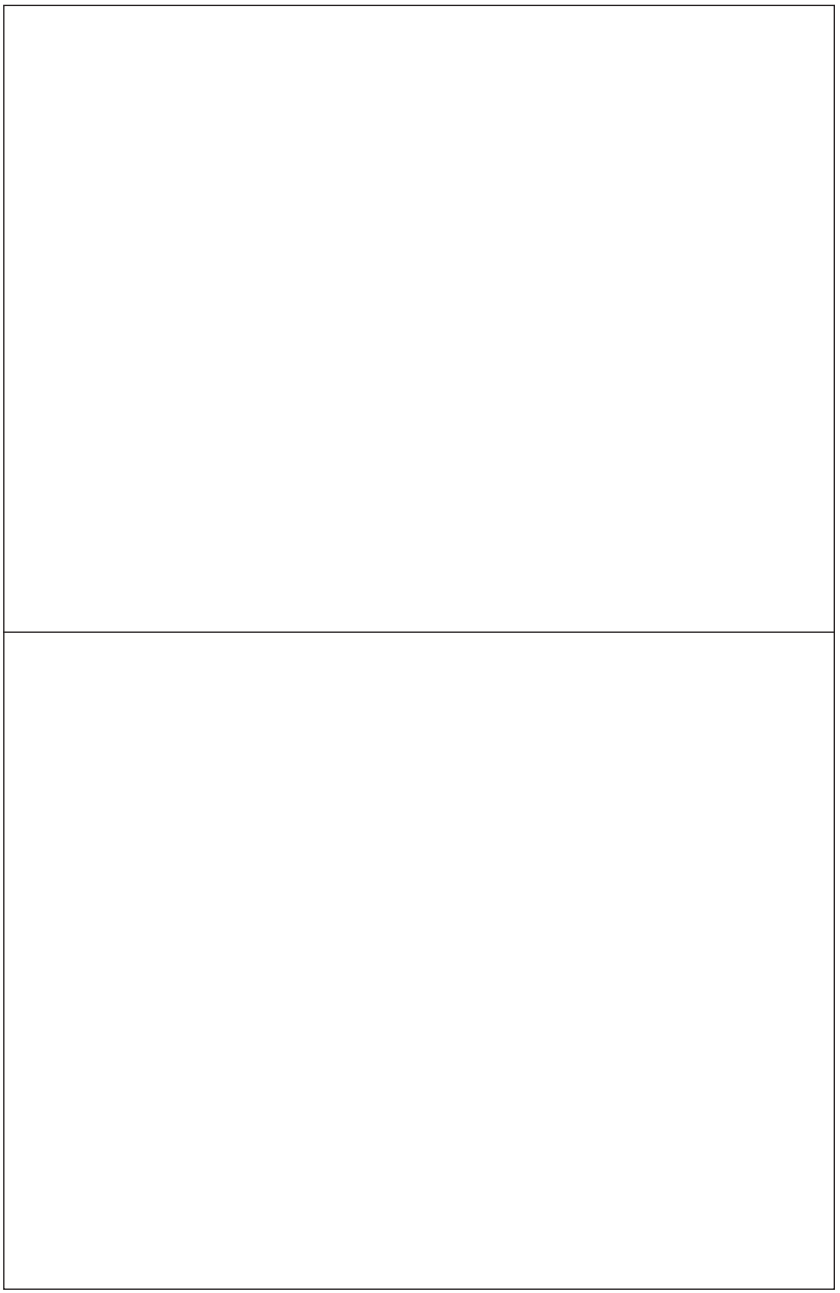

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Introduction

Anna-Bettina Kaiser, Niels Petersen & Johannes Saurer

The two terms of Barack Obama as President of the United States have ended. But the debate about how to characterize the jurisprudence of the U.S. Supreme Court during his presidency has only just begun. In 2016, the Economist pronounced the Supreme Court's 2014-15 term the most liberal in decades.[1] By contrast, a recent paper by Lee Epstein and Eric Posner claims that the Court has never been less deferential to the President than in the Obama era.[2] It is undisputable, however, that there has been a noticeable change in U.S. constitutional law during Obama's presidency. The Court has shaped, through several landmark judgments, the content of U.S. constitutional doctrine across different legal fields. These concern, among other subjects, the extent of federal powers with regard to the Obamacare health insurance legislation, executive law-making in environmental law, the deregulation of campaign financing and the strengthening of LGBT rights.

This book takes stock of these developments. It assembles contributions that have been first presented and discussed at the international conference "Obama's Court: Recent Changes in U.S. Constitutional in Transatlantic Perspective" that was held in Berlin at Humboldt University on October 28-29, 2016, with the support of the Fritz Thyssen Foundation and Humboldt University's Law & Society Institute. In this introduction, we will proceed in four steps. First, we will outline the institutional and historical context in which the Supreme Court operates. Second, we will briefly assess the constitutional legacy of the Obama presidency, which is analyzed in more detail in the contributions to this book, and explain how the individual contributions are related to the overall theme of the book. The third part will explain the specific comparative approach. The fourth part, finally, looks ahead to consider the Supreme Court under President Trump.

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1 The Economist (July 2, 2016), p. 40.

2 Lee Epstein & Eric Posner, *The Decline of Supreme Court Deference to the President*, Coase-Sandor Institute for Law and Economics Working Paper No. 800.

I. Context

Barack Obama was elected on a mandate for change. His agenda comprised reforms in different fields, notably regarding health care and the environment. In the first two years of his presidency, he also had a majority in both chambers of Congress to support his political agenda. Nevertheless, when he came into office in January 2009, Obama first had to react to the global financial crisis that had become acute with the bankruptcy of Lehman Brothers just weeks before his election. He introduced a major economic stimulus package to fight the macroeconomic recession and set out to reform the system of financial oversight. The latter effort resulted in the Dodd-Frank Act that introduced more stringent measures of banking regulation in 2010.

Still, his most significant legislative achievement was the enactment of the Patient Protection Affordable Care Act (ACA) in 2010, which is commonly known under the name Obamacare. The ACA introduced three major changes to health care regulation in the US. First, it subsidized the purchase of health insurance by low-income individuals. Second, it prohibited discrimination against people with pre-existing conditions. thereby enabling those individuals most in need of health insurance to actually get it. Third, it introduced an individual mandate that imposed financial fines on individuals that did not purchase health insurance.

The health care reform and, in particular, the individual mandate were very unpopular with substantial segments of the U.S. population. It is often cited as one reason why the Democrats lost control of the House and several Senate seats in the 2010 midterm elections.[3] Moreover, the effects of gerrymandering were increasingly felt. Over the years, the drawing of district lines along voting patterns had led to an increasing number of safe seats and therefore contributed to augmented polarization in Congress. As mainstream Republican representatives faced challenges from the conservative Tea Party Movement, their willingness to compromise was significantly reduced. For this reason, Obama based his policy initiatives, in particular with regard to the environment and immigration, more and more on means of presidential administration, such as executive rule-making pow-

3 *See* Paul Starr, Remedy and Reaction: The Peculiar American Struggle over Health Care Reform (2011); Risa Goluboff & Richard Schragger, *Obama's Court?*, *in* The Presidency of Barack Obama: A First Historical Assessment (Julian E. Zelizer ed., forthcoming 2018).

ers and governing through agency regulations. The Clean Power Plan to combat climate change and the Deferred Action for Childhood Arrivals (DACA) are probably the most prominent examples.

In the area of judicial nominations, Obama's highest profile appointments were his successful nominations of Justices Sonya Sotomayor and Elena Kagan to the Supreme Court as successors to the retiring Justices Souter and Stevens. The approach to judicial interpretation of both Justices Sotomayor and Kagan seems to be consistent with the views of Obama, who has explicitly supported a dynamic interpretation of the constitution as a "living document".[4] Nevertheless, fortunes changed in 2014, when the Republicans took control of the Senate in the midterms and blocked many of Obama's judicial appointments. Most notably, Obama failed with his nomination of Merrick Garland as successor to the deceased Justice Antonin Scalia.

The progressive polarization and the resulting gridlock of U.S. politics are also the central themes of two contributions to our volume. In their contribution, Moohyung Cho, Jason Todd and Georg Vanberg analyze how the polarization of the political landscape affects the Supreme Court. They find that it translates into an increasing polarization of the nomination process. Still, they see less of an effect when it comes to the actual voting behavior of judges. While voting is often separated along party lines, this is nothing entirely new. Rather, moderate levels of polarization can also be observed in earlier time periods.

Samuel Issacharoff makes a more normative point. While the main role of the Supreme Court is often considered to be the protection of individual rights, Issacharoff argues that the contribution of the Court to individual rights protection has been rather modest. Many decisions of the Court do not have the desired effect, are insufficiently implemented or cause a political backlash. Instead, the real importance of the Court lies in safeguarding the integrity of the democratic institutions. During the Obama era, the Court handed down some key decisions on executive powers and federal competencies. But the real test might come under President Trump, who has already shown authoritarian tendencies and little respect for the rule of law.

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4 Barack Obama, The Audacity of Hope 90 (2006).

II. Taking stock: The constitutional legacy of the Obama era

The judgments of the U.S. Supreme Court during the Obama era will shape the constitutional doctrines and the broader understanding of U.S. constitutional law for years to come. To that extent they constitute the constitutional legacy of the Obama era. With regard to the constitutional implications of the ambitious political reform agenda, an ambivalent picture of the constitutional legacy emerges.

If you only look at the results of the decisions, the record of the Obama administration appears mixed. One the one hand, the government scored some key victories. Above all, the Court left the marquee legislative achievement of the Obama presidency, the Affordable Care Act, largely intact.[5] Furthermore, the *Obergefell* decision on same-sex marriage was an important victory in the field of constitutional rights,[6] and decisions like *Whole Woman's Health* on abortion[7] preserved some already established constitutional principles. On the other hand, there are also significant cases that the Obama administration lost, most notably concerning voting rights[8], campaign financing[9], executive powers[10] and immigration issues[11].

Still, even the apparent victories of the Obama era might be less impressive than they look at first sight. This is demonstrated, for example, by Michaela Hailbronner who argues that *All same-sex marriage is not the same*. She takes a comparative perspective on the *Obergefell* decision and points out that the reasoning, relying on due process instead of equal protection, is more conservative than the reasoning of comparable in cases in other jurisdictions. Furthermore, Hailbronner highlights that the right to same-sex marriage, even if it is unlikely to be repealed in the foreseeable future, may be restricted in order to protect free speech or religious free-

5 National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).
6 Obergefell v. Hodges, 576 U.S. ___ (2015).
7 Whole Woman's Health v. Hellerstedt, 579 U.S. ___ (2016).
8 Shelby County v. Holder, 570 U.S. 2 (2013).
9 Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
10 National Labor Relations Board v. Noel Canning, 573 U.S. ___ (2014); Utility Air Regulatory Group v. EPA, 573 U.S. ___ (2014); Perez v. Mortgage Bankers Association, 575 U.S. ___ (2015); United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam).
11 Arizona v. United States, 567 U.S. 387 (2012); United States v. Texas, 136 S. Ct. 2271 (2016).

dom. One reaction of many conservative states to *Obergefell* was the establishment of religious freedom laws that allowed businesses to discriminate against gays and lesbians.[12] It remains to be seen how the Court reacts to such legislative state initiatives.

That constitutional rights do not necessarily favor liberal values is shown by the contributions of Antje von Ungern-Sternberg and Oliver Lepsius. Von Ungern-Sternberg notes in her article on *Freedom of religion* that the Supreme Court often uses the freedom of religion in order to promote conservative values. One of the core cases of the Obama era was the decision in *Hobby Lobby*, in which the Court held that private for-profit corporations have a right to opt out of health insurance plans providing funding for contraception for religious reasons. However, the author points out that the Supreme Court sometimes also extends religious freedoms to protect minorities, such as when it grants Muslims the right to grow a beard or to wear a headscarf at work.

Lepsius analyzes a constitutional right that is often criticized, the right to bear arms, which is deduced from the Second Amendment of the U.S. Constitution. He uses the right to bear arms to make a methodological point about originalism. Lepsius points out that originalists should, if they take their methodological approach seriously, be trained in historical methodology. However, they do not engage in a serious historical analysis, but only use the turn to history to confirm previously held political viewpoints.

The two immigration cases that are discussed by Amanda Frost in *Immigration and Obama's Court* were not decided on constitutional rights grounds. Instead, one was a federalism case, and the other involved separation of powers issues. Both cases dealt with the question whether the government could decide not to enforce certain immigration laws. In *Arizona v. United States*, the Court struck down most of a state law that aimed to enforce federal immigration law on the grounds that it was preempted by federal law.[13] In *United States v. Texas*, the Court was divided on whether the federal government could grant deferred action and work authorization to a significant part of the group of unauthorized migrants.[14] Frost argues that Congress' dysfunction ultimately forces the Supreme Court to the stage and leads to a further politicization of the Court.

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12 Goluboff & Schrager, *supra* note 3.

13 Arizona v. United States, 567 U.S. 387 (2012).

14 United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam).

Federalism and executive rule-making were also the subjects of two further contributions. Patricia Egli discusses the Supreme Court's ongoing efforts to delimit federal and state competencies in her contribution on *Key federalist cases during the Obama presidency*. Egli finds a mixed record. While the Court often accepted the extension of federal powers, it also imposed some notable limits. One example is the 2012 Obamacare decision, *National Federation of Independent Business v. Sebelius*[15]. While the statute was upheld, the majority of the justices concluded that it was justified neither under the Commerce Clause nor under the Necessary and Proper Clause. Instead, Chief Justice Roberts upheld the statute because he classified the financial penalty that individuals who did not sign up for health insurance incurred as a valid exercise of federal taxing powers. Another decision restricting federal competencies was *Shelby County*, in which the Court struck down a section of the federal Voting Rights Act that was supposed to protect minority voting rights on the grounds that it violated basic principles of federalism.

Jud Mathews deals with the development of executive rulemaking in his chapter *Presidential Administration in the Obama Era*. He notes two trends. First, there is an increase in executive rulemaking under Obama that is mostly attributed to the dysfunction of Congress. At the same time, however, the Supreme Court tended to accord the government and executive agencies less deference when it comes to the interpretation and implementation of rules and statutes. While the federal administrative state did not suffer immediate significant harm as a result of these decisions, the jurisprudence shows clear restraining tendencies.

Mathias Hong offers a comparative perspective in his contribution on *Campaign finance and freedom of speech*. In particular, he analyzes the *Citizens United* decision of the Supreme Court,[16] in which the Court struck down a statutory provision that limited the ability of private for-profit companies because it violated the freedom of speech. This decision had such strong political repercussions that Obama took the unusual step to openly criticize it in his State of the Union address in 2010. Hong argues that the case was correct in the specific instance, but that it should have been decided on narrower grounds. He claims that European-style

15 National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).
16 Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

proportionality would have been a better doctrinal instrument to fine-tune the decision.

The two contributions of Thomas Kleinlein and Thomas Wischmeyer take an explicitly comparative perspective to deal with developments related to international affairs. Kleinlein deals with free-trade agreement in *TTIP and the challenges of Investor-State-Arbitration*. He shows that there has been political backlash against free-trade agreements both in the United States and in Europe. However, in the United States, the courts have mainly watched from the sidelines. By contrast, in Germany, the Federal Constitutional Court has played a more active role. While it has not blocked the ratification of the CETA agreement between the EU and Canada, it has imposed certain limitations. Similar patterns are also described by Thomas Wischmeyer in his *Constitutional perspective on transatlantic data flow regulation*. The U.S. courts have been very deferential to the government because the issue touched security concerns. In contrast, the European courts – in this case the European Court of Justice – have been much more active in protecting the privacy of European citizens.

Marc Jacob, finally, analyzes the *Kiobel* decision of the Supreme Court.[17] He retraces the history of the U.S. jurisprudence regarding the Alien Tort Statute, which had been used by several foreign claimants to sue multinational corporations for human rights violations outside U.S. territory. This practice was halted when the Supreme Court decided in 2013 that the Alien Tort Statute did not apply to conduct on the territory of a sovereign nation other than the US. Jacob makes a normative assessment of the Supreme Court decision and its consequences and argues that the disadvantages of extraterritorial human rights jurisdiction of U.S. courts are not as severe as often claimed.

What do we take away from this picture of the Supreme Court jurisprudence during the Obama era? The most important concerns that the Court faced were structural issues related to the democratic process, executive power, and campaign financing. The Court applied increased scrutiny to executive rulemaking, where its role as arbiter becomes more and more important with the increasing dysfunction of Congress. Furthermore, it made American elections even more prone to financial influences by allowing private companies virtually unlimited spending in election cam-

17 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

paigns. With regard to individual rights, the record is mixed. The recognition of same-sex marriage is certainly a significant liberal achievement, but other decisions have a more conservative bent.

III. Comparative Approach

Some of the chapters in this volume add a comparative perspective. At first sight, such an approach might not seem self-evident for a book that aims at shedding light on how U.S. constitutional law has evolved during the Obama era. Comparing the Supreme Court to other apex courts might even divert attention from an in-depth analysis of the case law essential to better understand its role in the Obama era, and its legacy beyond. Nevertheless, this book explicitly subscribes to such an approach. It does so because comparative analysis is extremely valuable both as a means of expanding knowledge in general and as a means of better understanding law in particular.[18] Now, this hardly seems to be more than a truism, an oft-repeated platitude rather than a truly convincing argument. Still, once the core of this purported truism is untangled, the main asset of the comparative approach comes to light: irritation due to a constant change of perspectives. Lawyers' legal socialization differs tremendously across jurisdictions, and this has a large effect on our understanding of what law is and how it works. Comparison confronts us with differences that might have gone unnoticed otherwise, and might even produce a certain unease, in other words: irritate us.

Irritation might seem a peculiar main asset. It is not, however, if you bear in mind its two main consequences. First, a comparative account, and the irritation it brings with it, lead to a better understanding of another system.[19] To name just one example, in their contributions to this volume,

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18 H. Patrick Glenn, *The aims of comparative law*, *in* Elgar Encyclopedia of Comparative Law 66-7 (Jan M. Smits ed., 2012); Vicki C. Jackson, *Comparative Constitutional Law: Methodologies*, *in* The Oxford Handbook of Comparative Constitutional Law 70 (Michel Rosenfeld & András Sajó eds., 2012); Marc Ancel, Utilité et méthodes du droit comparé. Éléments d'introduction générale à l'étude comparative des droits 10 (Éditions Ides et Calendes ed. 1971); Esin Örücü, The Enigma of Comparative Law. Variations on a Theme for the Twenty-first Century 33 (Martinus Nijhoff ed. 2004); Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law 15 (Tony Weir trans., Clarendon 3. ed. 1998).

19 Jackson, *supra* note 18, at 69-70.

both Susanne Baer and Justin Collings mention the degree to which the Supreme Court is perceived of as a body of individuals, of strong personalities primarily speaking for themselves, while the Federal Constitutional Court (FCC) is regarded as a collegiate organ primarily speaking with one voice only.[20] Although this might irritate at first, it helps us to develop a better understanding of the Supreme Court and the German Constitutional Court by juxtaposing implicit (Collings) and explicit (Baer) comparisons.

Owing to this kind of irritation, comparison enhances the capacity for self-reflection because "the unnoticed in our practices may become visible in contrast with other cultural practices of law".[21] The change of perspectives thus leads to questioning certainties, and might link to alternatives where you think there are none. Justin Colling's U.S. American perspective on the wide disparity in style between the Supreme Court and the FCC is an example of how implicit comparison can be very revealing. [22] The FCC's style is often described as technocratic, while the Supreme Court Justices' opinions often seem to be bursting with rhetoric brilliance. While this contrast seems to be widely accepted today and both scholarly communities seem to see merits and weaknesses in either way of reasoning, this has, as Justin Collings shows, not always been the case: back in the 1960s, there were voices in Germany calling for a more 'statesman-like' and less technocratic style in the FCC's reasoning. When one's perspective spans more than one legal system and time period, even aspects taken for granted become less self-evident. A comparative approach might thus raise awareness of peculiarities – but there is also a flip-side to this coin: purported special paths often seem much less special if put into a broader perspective.[23]

Comparison might also teach broader lessons about constitutional systems. Bearing in mind that the U.S. Constitution is more than 200 years old and notoriously difficult to amend, much of the flexibility that has guaranteed its survival until now leads back to its interpretation by the Supreme Court. This can in no way be compared to the German Fundamental Law, where regular textual changes are unexceptional. Thus, com-

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20 *See* Susanne Baer, in this volume, and Justin Collings, in this volume.

21 Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 Michigan Law Review 2677, 2679 (2003); Jackson, *supra* note 18, at 70.

22 *See* Collings, *supra* note 20, in this volume.

23 Susanne Baer, Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus, 63 Jahrbuch des öffentlichen Rechts der Gegenwart n.F. 389, 398 (2015).

parison might also bring about an awareness of contrast and difference. Susanne Baer stresses the urgent need to study structural differences,[24] and this is one important way of learning about how deeply rooted courts are in their respective constitutional systems.

At the same time, comparison can prevent us from drawing conclusions prematurely. If we bear in mind all the differences in the interpretive methods of the two courts – not to mention the differences among the judges – their approaches seem very disparate. However, Justin Collings points the reader's attention to similarities the judges themselves might not have been aware of. Justice Scalia, the most prominent opponent to the use of foreign law by the Supreme Court, has proposed in an opinion what can be considered a seminal FCC approach: the analytical combination of disparate provisions, i.e. to see a provision in conjunction with another one to found a specific right for the individual.[25]

This book thus subscribes to a comparative account to foster insights that can only be brought about by a constant change of perspectives, and seeks to avoid premature and oversimplified answers to a complex set of questions.

IV. Outlook

With the inauguration of Donald Trump in January 2017, we now have a President in the White House who seems committed to the unwinding of the achievements of his predecessor. While the legislative repeal of the Affordable Care Act has so far failed, he has been successful on other fronts. He has pulled out of the treaty on the Trans-Pacific Partnership (TPP) and the Paris agreement on climate change. Furthermore, he has begun reversing many of Obama's executive policies on environmental and immigration matters, impairing the regulatory capacity of federal agencies and nominating judges to the federal courts, whose most important credentials are often their solidly conservative ideology.[26]

With the successful nomination of Neil Gorsuch to the Supreme Court, President Trump has solidified the conservative wing of the Court. The re-

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24 *See* Baer, *supra* note 20, in this volume.
25 *See* Collings, *supra* note 20, in this volume.
26 *Courts Reshaped At Fastest Pace in Five Decades*, N.Y. Times (Nov. 12, 2017), at A1.

tirement of long time "swing vote" Anthony Kennedy[27] and the confirmation of Brett Kavanaugh may even lead to a stable conservative majority for years to come. The challenges that lie ahead for the Court are significant. In particular, the outcome of gerrymandering cases might determine whether the trend of polarization in U.S. politics will continue or whether there are hopes of a reversal. Another issue that the Court has to deal with is the deregulation policies of federal agencies under Trump.[28] While the U.S. Supreme Court restrained the broad ambitions of the Obama administration's regulatory agenda, the Trump administration may have the opposite problem of under-regulating. It is likely that this issue will come to the Supreme Court sooner or later. But the most important challenge that the Supreme Court may face is the preservation of the integrity of democratic institutions.[29] What is certain is only that the Supreme Court will remain a key institutional player in the political system of the United States.

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27 *See* Katie Reilly, *How Anthony Kennedy's Swing Vote Made Him 'The Decider'*, http://time.com/5323863/justice-anthony-kennedy-retirement-time-cover/ (last visited September 24, 2018).

28 *See* Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 Harvard Law Review 1 (2017).

29 *See* Samuel Issacharoff, in this volume.

What Does the Supreme Court Do?

Samuel Issacharoff[*]

I. Introduction

> *To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system. For it is also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy.*[1]

Beginning with the failed confirmation proceedings for Robert Bork in 1986, the Supreme Court has served as a galvanizing issue in national American politics. For advocates, fundraisers, candidates, and much of the punditry, the United States is only one appointment away from Armageddon, whether defined by abortion, the death penalty, same sex rights, church/state relations, or just about any hot-button issue of our time. Nor is this particularly new. As far back as Tocqueville's wide-eyed travels in America, one of the defining features of the new world was the centrality of judicial oversight: "There is hardly any political question in the United States that sooner or later does not turn into a judicial question."[2]

And so follows the commonplace observation that the Supreme Court is in turn just another political body, a claim often accepted by the general

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* James Brennan, Daniel Loehr, and Whitney White provided indispensable research assistance.

1 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. Pub. L. 279, 279 (1957).

2 1 Alexis de Tocqueville, Democracy in America 441 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835).

public,[3] and rehearsed at times by America's most-cited judge,[4] veteran Court journalists,[5] and elected politicians of all stripes.[6] To the more cynical commentators, the Court is composed of politicians in robes who, under the guise of deciding cases, "legislate from the bench" as unelected, life-tenured partisans.[7] These criticisms proliferate whenever the Court

3 *See* Pew Research Ctr., Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction 3, 5-6, 12 (2015), http://www.people-press.org/files/2015/07/07-29-2015-Supreme-Court-release.pdf (finding 70% of the public believes the Supreme Court Justices "are often influenced by their own political views" and that 24% think the Justices "generally put their political views aside"); James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 Law & Soc'y Rev. 195, 207-08 (2011).

4 *See* Richard A. Posner, Opinion, *The Supreme Court Is a Political Court. Republicans' Actions Are Proof.*, Wash. Post (Mar. 9, 2016), https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html; Noah Charney, *How I Write: Richard Posner*, Daily Beast (Nov. 7, 2013, 5:45 AM), http://www.thedailybeast.com/how-i-write-richard-posner ("I don't like the Supreme Court. I don't think it's a real court. I think of it as basically... it's like a House of Lords. It's a quasi-political body. President, Senate, House of Representatives, Supreme Court. It's very political." (quoting Richard Posner) (ellipsis in original)).

5 *See, e.g.*, Linda Greenhouse, Opinion, *Law in the Raw*, N.Y. Times (Nov. 12, 2014), https://www.nytimes.com/2014/11/13/opinion/law-in-the-raw.html; *The Leonard Lopate Show: Inside the Politics of the Supreme Court*, WNYC (Apr. 15, 2016), https://www.wnyc.org/story/inside-politics-supreme-court/ (featuring Jeffrey Toobin and Nina Totenberg discussing the political nature of the Court, with Totenberg more carefully distinguishing "partisan" and "political" motivations).

6 *See* Jonathan Keim, *What GOP Contenders Want for the Supreme Court*, Nat'l Rev.: Bench Memos (June 26, 2015, 6:53 PM), http://www.nationalreview.com/bench-memos/420416/what-gop-contenders-want-supreme-court-jonathan-keim ("[W]e will need a conservative president who will appoint men and women to the Court who will faithfully interpret the Constitution and laws of our land *without injecting their own political agendas*." (quoting Governor Scott Walker) (emphasis added)).

7 *See, e.g.*, Eric Segall, *Supreme Court Justices Are Not Really Judges*, Slate (Nov. 14, 2014, 4:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/supreme_court_justices_are_not_judges_they_rule_on_values_and_politics_not.html; Andrew C. McCarthy, *Let's Drop the Charade: The Supreme Court Is a Political Branch, Not a Judicial One*, Nat'l Rev. (June 27, 2015, 4:00 AM), http://www.nationalreview.com/article/420417/lets-drop-charade-supreme-court-political-branch-not-judicial-one-andrew-c-mccarthy.

acts in the most politically controversial cases, where the Justices are described as "eager" to dictate their own policy preferences as law.[8]

II. The Political Cases

With every 5-4 opinion on a controversial topic, the claims of a politicized judiciary increase. And much as the Justices may try to claim that they are truly judges,[9] the sneaking popular suspicion is that they are just lying in wait for the next chance to override the political branches. For some critics, the claim that judges are just ideological preference satisfiers masquerading in robes is a bit too cynically harsh. Rather than being self-activating, a softer critique would have judges as beholden not simply to their own preferences but as well to other masters in some alchemists' mix of popular opinion,[10] congressional preference,[11] the health of the national economy,[12] and even the backgrounds of their law clerks.[13]

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8 *See* Rachel DiCarlo Currie, *The Supreme Court Shouldn't Be So Important*, Indep. Women's Forum (Sept. 27, 2016), http://iwf.org/blog/2801549/The-Supreme-Court-Shouldn't-Be-So-Important; *see also* sources cited *supra* note 7 (responding to developments in the Affordable Care Act cases).

9 *See, e.g.*, *Fresh Air: Justice Breyer: The Court, The Cases and Conflicts*, NPR, (Sept. 14, 2010), http://www.npr.org/templates/story/story.php?storyId=129831688 ("I know some pretty good politicians. That isn't what a judge is. And that isn't what we do."); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States) ("I have no platform. Judges are not politicians.... I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

10 *See, e.g.*, Barry Friedman, The Will of the People (2009); Michael W. Giles et al., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. Pol. 293 (2008); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective,* 58 J. Pol. 169, 184-98 (1996).

11 *See, e.g.*, Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000*, 31 Legis. Stud. Q. 533 (2006).

12 *See* Thomas Brennan, Lee Epstein & Nancy Staudt, *The Political Economy of Judging*, 93 Minn. L. Rev. 1503, 1527-31 (2009).

13 *See, e.g.*, Todd Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DePaul L. Rev. 51, 70-77 (2008).

In its distilled form, known in political science as the "attitudinal model," the argument is that a Supreme Court Justice is an ill-disguised ideological warrior for whom "'judicial ideology is all that matters.'"[14] Bluntly put,

> [B]ecause legal rules governing decision making (e.g., precedent, plain meaning) in the cases that come to the Court do not limit discretion; because the justices need not respond to public opinion, Congress, or the President; and because the Supreme Court is the court of last resort, the justices, unlike their lower court colleagues, may freely implement their personal policy preferences as the attitudinal model specifies.[15]

Wow. If true, my work as a teacher and scholar of law, not to mention by appearances in court, are but a frightful illusion. What a colossal waste of time it must be to write and teach on constitutional law, as if any of it made a difference. Undoubtedly there are those, including I fear myself, who have little aptitude for anything else. But why in the world would any serious academic institution permit the teaching of constitutional law or pretend that advocacy and the rule of legal institutions matter at all?

It is of course possible that, like practitioners of phrenology, law professors suffer the curse of bounded horizons, unable to see the bigger picture of what actually affects the vitality of an organism. This invites a simple empirical question about how we know that law does not operate to constrain decisionmaking relative to naked partisan preference. There have been many critiques of the empirical foundations of the attitudinal claim, as well summarized by Judge Harry Edwards and Professor Michael Liv-

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14 *See* Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 Colum. L. Rev. 1150, 1159 (2004) ("In its major form – 'judicial ideology is all that matters' – attitudinalism is pilloried for claiming too much."); *see also, e.g.*, Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 Duke L.J. 1895, 1913-18 (2009) (questioning the attitudinal model's assumptions about the role of law and the views of judges); Michael J. Gerhardt, *Attitudes About Attitudes*, 101 Mich. L. Rev. 1733, 1748-55 (2003) (reviewing Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002)).

15 *See* Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 111 (2002).

ermore.[16] But here I focus on one particular problem with the judges-as-politicians hypothesis: how robust an account it gives of what the Supreme Court actually does.

To start, let's examine the empirical foundation for the claimed determinative political account of the work of the Supreme Court. The most significant of the attitudinal models excludes from consideration any decision where the Justices are unanimous, thereby only examining cases of division rather than agreement.[17] For someone looking in from the outside, this appears methodologically akin to proving that cats like to swim by looking only at alley cats caught in sudden downpours. The more interesting question is to ask how likely are the Justices to divide, how significant are their divisions, and how central are the cases to the functioning of the Supreme Court as a judicial institution.

Just an examination of the vote tallies over time shows just how big a swath of the Court's activity is discarded as not relevant to a rigorous empirical account of the Court as an institution. The Table shows what has to be removed from consideration:

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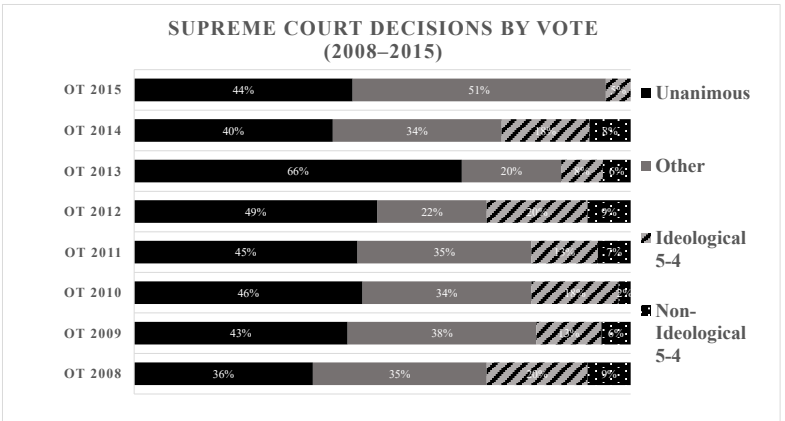
16 Edwards & Livermore, *supra* note 14. Among the problems are: the simplistic binary coding of liberal versus conservative case outcomes, *id.* at 1909; the range and inadequacy of proxies used to categorize judges into the same ideological binary, *id.* at 1918-20; the exclusion of unpublished studies from analysis, *id.* at 1923; the inability to account for case dispositions beyond "affirmed" and "reversed," *id.* at 1924; the subjectivity inherent in coding a case as liberal/conservative using only one issue in each case, *id.* at 1925; and the statistical equality of broad, sweeping decisions and narrow decisions on procedural issues, *id.* at 1926.

17 *See* Dona Roy & Donald R. Songer, *Does the Attitudinal Model Explain Unanimous Reversals?*, 31 Just. Sys. J. 342, 345-48 (2010) (listing several prominent attitudinalist works that are supported "almost completely" by analysis of non-unanimous decisions). Early versions of Posner's "rational choice" model followed a similar approach. *See* Richard A. Posner & William M. Landes, *Rational Judicial Behavior: A Statistical Study* 5-6 (John M. Olin Program in Law & Econ., Working Paper No. 404, 2008) (excluding unanimous decision from one set of analyses because "they are unlikely to involve the kind of ideological issues that divide judges" and unanimity "suggests that ideological considerations play a negligible role in the vote on the case"); Edwards & Livermore, *supra* note 14, at 1914 n.44.

Figure 1. Supreme Court Decisions by Voting Pattern[18]



Simply put, in searching for the telltale 5-4 ideological split, the attitudinal analysis has to exclude between 36 and 66 percent of cases over this period because those cases are decided unanimously. Given that the pure form of ideological split occurs in between 5 and 20 percent of the cases, that is a lot of chaff for the precious wheat. When strong attitudinal models are tested without excluding unanimous cases – even when tested on just a single legal issue – ideology does not exhibit its claimed explanatory power.[19] Such unanimity is a difficult phenomenon to explain away with a behavioral model that claims only political ideology matters.[20] Any case where Justices disagree with the resulting policy, but reach the same legal

18 Adapted from Kedar S. Bhatia, *Stat Pack for October Term 2015*, SCOTUSblog 20, 22 (June 29, 2016), http://www.scotusblog.com/wp-content/uploads/2016/06/SB_stat_pack_OT15.pdf. For these statistics, "unanimous" means all the Justices agreed in judgment, regardless of whether the reasoning was fully joined. *Id.* at 19. Note also that decisions with less than a full Court were always categorized as if they had a nine Justice vote. *Id.* at 5. For example, in OT 2015, *Fisher v. University of Texas* (*Fisher II*), 136 S. Ct. 2198 (2016) (4-3), is treated as an ideological 5-4 decision even though it was decided without Justice Scalia or Justice Kagan. *Id* at 5, 22.

19 Segal & Spaeth, *supra* note 15, at 324-26 (measuring the performance of the attitudinal model in search-and-seizure cases and finding 71% accuracy in "predicting" the justices' votes).

20 *See* Gerhardt, *supra* note 14, at 1743; Lee Epstein, William M. Landes & Richard A. Posner, The Behavior of Federal Judges 386 (2013).

conclusion anyway, is damning.[21] Also, the theory that Justice Alito's "conservative" ideology and Justice Ginsburg's "liberal" ideology prefer the same policy outcome 66% of the time[22] does not pass the smell test, unless one thinks that 66% of the lower court decisions that the Court reviews are either to the political left of Ginsburg or to the political right of Alito.[23]

Even this examination of the decided cases understates the amount of accord among not only the Justices but the most knowledgeable consumers of judicial decisionmaking: the lawyers who have to decide whether to seek Supreme Court review in any particular case. To understand what the Court principally does, it turns out to be helpful to consider what the Court says it does: namely, resolving circuit splits and correcting grave legal errors.[24] As the top of the federal judiciary, the Supreme Court is responsible for providing guidance for lower courts to follow. If circuit conflicts or clear legal errors go unaddressed, then one of the goals of a legal system – to function as a consistent, predictable system for organizing a priori behavior[25] – suffers. This result is generally frowned upon by judges, regardless of political ideology.[26]

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21 *See* Gerhardt, *supra* note 14, at 1743 n.32 (collecting high-profile examples of such cases).

22 Jeremy Bowers et al., *Which Supreme Court Justices Vote Together Most and Least Often*, N.Y. Times: The Upshot (July 3, 2014), https://www.nytimes.com/interactive/2014/06/24/upshot/24up-scotus-agreement-rates.html.

23 Which is not likely. *See* Roy & Songer, *supra* note 17, at 361-63.

24 *See* Sup. Ct. R. 10 ("Considerations Governing Review of Certiorari").

25 *Cf.* Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 Hastings L.J. 1601, 1615 (2015) ("[W]e need courts to provide authoritative resolutions of disputes that are left unsettled by the existing sources of law.").

26 *See* Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 Nw. U. L. Rev. 535, 572 (2011) ("[J]udges share a common goal – the production of a (relatively) coherent body of rules that can govern primary behavior in the real world and is viewed as authoritative."); *cf.* Kevin T. McGuire et al., *Measuring Policy Content on the U.S. Supreme Court*, 71 J. Pol. 1305, 1306 (2009) ("justices of *all* ideological stripes want to resolve conflict and address major policy questions.").

The Courts of Appeals terminate almost 60,000 cases per year.[27] Around 4,600 of those terminations are appealed to the Supreme Court[28] as part of the 7,000–8,000 total petitions for writ of certiorari the Court receives every term.[29] The Court denies an overwhelming majority of these petitions, deciding only 70–90 cases per term,[30] 50–70 of which are appeals from circuit courts.[31] Even with thousands of such petitions to review when setting the Court's docket, the typical Term has less than ten dissents from denial of certiorari.[32] And when it comes to deciding the cases the Court does hear, only 22% of the Court's decisions feature the

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27 *See* Admin. Office of the U.S. Courts, Statistical Tables for the Federal Judiciary: Table B-1 – U.S. Courts of Appeals – Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding During the 12-Month Period Ending December 31, 2016 at 1 (2017) (58,039 cases terminated in calendar year 2016, not including Federal Circuit); Admin. Office of the U.S. Courts, Statistical Tables for the Federal Judiciary: Table B-8 – U.S. Courts of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2016 (2017) (1,709 cases terminated).

28 Calculated from Adam Feldman, *Evaluating Speculation that the Ninth Circuit Is the Lower Court SCOTUS Overturns the Most*, Empirical SCOTUS (Feb. 27, 2017), https://empiricalscotus.com/2017/02/27/evaluating-speculation-ninth-circuit/. *See also* Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001–2015*, 61 Vill. L. Rev. 795, 812, 840 (2016) (describing the methodology for counting number of cert. petitions from each circuit).

29 *Frequently Asked Questions*, Supreme Court of the U.S. (July 16, 2017), https://www.supremecourt.gov/about/faq_general.aspx.

30 *See* Feldman, *supra* note 28; *cf. Frequently Asked Questions*, *supra* note 29 ("The Court grants and hears oral argument in about 80 cases.").

31 *See, e.g.*, Kedar S. Bhatia, *Stat Pack for October Term 2016*, SCOTUSblog 3 (June 28, 2017), http://www.scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf (51 cases from circuit courts in October Term 2016); Bhatia, *supra* note 18, at 3 (63 circuit cases in 2015); Kedar S. Bhatia, *Stat Pack for October Term 2014*, SCOTUSblog 3 (June 30, 2015), https://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_Stat_Pack_OT14.pdf (67 circuit cases in 2014).

32 *See* Adam Feldman, *Dissents from Denial of Cert* (*2010-2015*), Empirical SCOTUS (Oct. 17, 2016), https://empiricalscotus.com/2016/10/17/dissents-from-denial/. Statements that a Justice would grant the petition without an accompanying dissenting opinion are even rarer. *See generally Journal*, Supreme Court of the U.S. (July 19, 2017), https://www.supremecourt.gov/orders/journal.aspx (archiving the Journal of the Supreme Court of the United States, which lists in its index any petitions for certiorari where there was a dissent from denial or where a Justice noted she would grant the petition). However, the number of recorded dissents from de-

iconic 5-4 ideological split, while the Court's unanimity rate hovers around 30–40%.[33] This gives a strong boost to the Court's stated goals of clarifying the law and resolving splits among the courts of appeals.[34]

At this point a qualitative example might best illustrate the Court's quotidian mission. Consider the first case Justice Neil Gorsuch sat for on the Court, following a nasty partisan confirmation fight[35]: *Perry v. Merit Systems Protection Board*.[36] In *Perry*, the Court finally settled the landmark issue: "Is a Merit Systems Protection Board decision disposing of an employment discrimination case on jurisdictional grounds subject to judicial review in district court or in the U.S. Court of Appeals for the Federal Circuit?"[37] The political implications of either answer are far from salient. As Justice Kagan noted (to laughter), the consequences of overturning the

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nial of certiorari necessarily understates the amount of disagreement among the Justices in cert votes. For one thing, a Justice may decide not to publicize her disagreement in consideration of, among other things, collegiality norms and the salience of the issues at stake. *See, e.g.*, Timothy R. Johnson, Ryan C. Black & Eve M. Ringsmuth, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 Minn. L. Rev. 1560, 1568-73 (2009). Also, any Justices who voted not to grant cert on a petition that ultimately was granted are not made known outside of private papers. But, the maximum number of petitions with which this could occur is the small number of petitions the Court does grant.

33 *See* Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. Times, June 28, 2017, at A16; *see also Fresh Air: Justice Breyer*, *supra* note 9 ("Probably 30 to 40 percent of our decisions are unanimous.").

34 *Cf.* Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. Pol. 1062, 1072-73 (2009) ("That legal norms can thrive in such an environment [of nearly total discretion] is testament to their power..... The fact that legal concerns are relevant at all in such a private forum suggests, of course, that law matters.").

35 For the highlights of the confirmation process and Justice Gorsuch's first day on the bench, see generally Peter W. Stevenson, *The Real Reason Senate Democrats Are Going to Oppose Judge Gorsuch for the Supreme Court*, Wash. Post: The Fix (Mar. 20, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/03/20/the-real-reason-senate-democrats-are-going-to-oppose-judge-gorsuch-for-the-supreme-court; Matt Flegenheimer, *Republicans Gut Filibuster Rule to Lift Gorsuch*, N.Y. Times, Apr. 7, 2017, at A1; Adam Liptak, *Justice Gorsuch, Confirmation Fight Behind Him, Begins Court Term with Relish*, N.Y. Times, Apr. 18, 2017, at A13.

36 137 S. Ct. 1975 (2017) (7-2).

37 *Perry v. Merit Systems Protection Board*, Oyez, https://www.oyez.org/cases/2016/16-399 (last visited May 30, 2017); *see also* Brief for Petitioner at i, *Perry*, 137 S. Ct. 1975 (No. 16-399), 2017 WL 908856, at *i.

case's relevant line of precedent dating back to 1983 "would be a kind of revolution... to the extent that you can have a revolution in this kind of case."[38] *Perry* was also not a facile, pleasant distraction for the Court. The statutory scheme at issue was, at least to Justice Alito, "unbelievably complicated."[39] So complicated in fact, that he asked: "Who wrote this statute? Somebody who... takes pleasure out of pulling the wings off flies?"[40]

Instead of a unanimous decision, Justice Gorsuch, joined by Justice Thomas, dissented and insisted that the Federal Circuit was the correct answer.[41] If one assumes that Justices Gorsuch and Thomas are the two most conservative Justices,[42] then this decision provides statistical support to the attitudinal model's claims of political motivation.[43] But using this division of the Court as support for the claims of the attitudinal model shows the model's inability to address the strength, significance, and source of the Court's divisions – the stuff of which legal academics concern themselves.

One could of course strain to read into the division in *Perry* the ideological markers for other fights. There is a divide over the Court's ability to fix legislative error or to be a participant in a joint effort to smooth the workings of government.[44] Of course it might be "naïve[]" to think that

38 Transcript of Oral Argument at 50:16–51:3, *Perry*, 137 S. Ct. 1975 (No. 16-399).

39 *Id.* at 42:23–:24.

40 *Id.* at 43:11–:16.

41 *Perry*, 137 S. Ct. at 1988 (Gorsuch, J., dissenting).

42 A popular conclusion. *See* Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. Times (Feb. 1, 2017), https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html (citing Lee Epstein, Andrew D. Martin & Kevin Quinn, President-Elect Trump and his Possible Justices 8 (Dec. 15, 2016) (unpublished study), http://epstein.wustl.edu/research/PossibleTrumpJustices.pdf); Greg Stohr, *Gorsuch Joins Thomas as Supreme Court's New Conservative Anchor*, Bloomberg (June 27, 2017, 4:00 AM), https://www.bloomberg.com/news/articles/2017-06-27/gorsuch-joins-thomas-as-supreme-court-s-new-conservative-anchor.

43 *See* Ruger, Kim, Martin & Quinn, *supra* note 14, at 1157-58.

44 *Compare Perry,* 137 S. Ct. at 1988 (Gorsuch, J., dissenting) ("Perry asks us to tweak a congressional statute – just a little – so that it might (he says) work a bit more efficiently.") *with* 137 S. Ct. at 1988 (majority opinion) ("Perry asks us not to 'tweak' the statute but to read it sensibly." (citation omitted)). Justice Gorsuch, however, did not concede any point about his interpretation having worse results. *See* 137 S. Ct. at 1991 (Gorsuch, J., dissenting).

methods of statutory interpretation are politically neutral.[45] But it is hard to imagine the campaign fundraising missives that warn that we are only one vote away from overturning *Perry,* in any direction that might interest anyone with a claim on a normal life.

III. The Ideological Cases

While the frequency or centrality of the ideological 5-4 cases is overestimated in both the public mind and some of the political science literature, this does not mean these cases do not occur. Clearly politics and ideology do have a place in Supreme Court decisionmaking. There are some questions where the law truly runs out, and a Justice's ideological preference well predicts the outcomes reached.

Even here, two cautions. The first is that the existence of questions that challenge the boundaries of legal principles is not, in my view, an indictment of law or the judicial function. We long ago abandoned the 19th century view of judging as merely the discovery of eternal truths. Law is a complicated regulatory undertaking over dynamic societies. Law does not well anticipate all developments. As I have noted previously, the Constitution allows the federal government the power to create an army and a navy, and has different constitutional requirements for the budgeting of each. What about the air force? Does the textual silence mean that there cannot be a federal air force? Or does it require a teleological (and useless) inquiry into whether the fact of moving through air as a medium renders flight sufficiently fluid as to be an application of a navy? Or does the flight of a cannon ball anticipate the modern fighter jet? Absurd inquiries.

Where law does run out, the judiciary becomes a crystallized form of the politics of a prior generation. Law is an essentially conservative enterprise and the existence of courts with lifetime tenure is a constitutional commitment to the past being a check on excessive partisan exuberance of the present. That the judges do frequently divide along the lines of their partisan priors when confronting the questions at the boundaries of possi-

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45 Epstein, Landes & Posner, *supra* note 20; *see also* Richard A. Posner, *The Incoherence of Antonin Scalia*, New Republic (Aug. 24, 2017), https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism ("[T]ext as such may be politically neutral, but textualism is conservative.").

ble legal resolution should not be surprising. Nor should it serve as an indictment of the judicial process.

Second, where law does encounter politics, the law may frame the debate without resolving it. Allow me three brief illustrations.

A. Abortion

Few issues attract attention to the Supreme Court like abortion. When asked about the Court during the presidential campaign, candidate Trump quickly promised to use his Court appointment power to overturn *Roe v. Wade*;[46] Secretary Clinton vowed to protect *Roe* in the same fashion.[47] While the White House's view of abortion can vary dramatically between administrations, the Court's approach has proved less volatile. The undue burden standard of the compromise opinion in *Planned Parenthood v. Casey*,[48] which allows restrictions so long as they are not deemed to close to an outright ban on abortions, has provided an essentially stable legal doctrine in the area for over 25 years, if not without constant contestation.[49]

Stability in the legal doctrine, however, has not ensured a uniform, nationwide ability to have an abortion. States have continued to pass abortion restrictions since *Roe*, with a new wave of restrictions enacted after 2010.[50] The number of "middle-ground" states on abortion regulation is dwindling, and now a majority of reproductive-age women live in states

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46 410 U.S. 113 (1973).

47 *See* Aaron Blake, *The Final Trump-Clinton Debate Transcript, Annotated*, Wash. Post: The Fix (Oct. 19, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/ (transcribing the candidates' statements on the Court and *Roe*); *see also* Jacob Sullum, *Neither Trump Nor Clinton Understands What the Supreme Court Is Supposed to Do*, Reason: Hit & Run (Oct. 20, 2016, 6:30 AM), http://reason.com/blog/2016/10/20/neither-trump-nor-clinton-understands-wh (expressing dismay at the candidates' rhetoric about the Court's function, starting with *Roe*).

48 505 U.S. 833 (1992).

49 *See* Carol Sanger, About Abortion: Terminating Pregnancy in 21st Century America (2017).

50 *See The 334 Abortion Restrictions Enacted by States from 2011 to July 2016 Account for 30% of All Abortion Restrictions Since Roe v. Wade*, Guttmacher Inst. (July 21, 2016), https://www.guttmacher.org/infographic/2016/334-abortion-restrictions-enacted-states-2011-july-2016-account-30-all-abortion.