

# WILL AMERICAN DEMOCRACY LAST IN LIGHT OF THE SHADOW DOCKET?

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## INTRODUCTION

What does the Supreme Court’s shadow docket have to do with democracy? In this symposium issue, a group of scholars considers the shadow docket from a range of perspectives and areas of law. Ostensibly, every court system needs a way to deal with emergency appeals. Why, however, has the Supreme Court’s practice of hearing such appeals—dubbed the “shadow docket” because of the lack of transparency about the rulings—become such a lightning rod for criticism and debate? Certainly, based on the number of law review articles, newspaper stories, and amount of legislative attention, the shadow docket has received a large amount of scrutiny in recent years.

The normal route by which the nine life tenured Supreme Court justices accept cases for review is through the grant of certiorari. They hear very few such cases per year; indeed, fewer and fewer it seems. In those cases, they have access to briefs from the parties, as well as amici curiae. After reading those materials and the opinions from lower courts, they hear oral arguments before issuing their opinions. Those justices authoring and joining an opinion are detailed on the decision, as well as those in dissent. They sign their names to their position and must stand by it—until they decide to join another opinion reversing course. While the Supreme Court is not known as the most transparent institution in the world, the certiorari process at least tells us who voted for which outcome and

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why. Each justice must stand before the public and defend their position, if only in the words of their opinions; that is how it should be, particularly in a system of life tenure and judicial supremacy under which a group of unelected judges get to determine what our Constitution means for all of us for generations.

By contrast, when issuing their brief decisions on the shadow docket, the justices do not identify themselves to the public (unless it is clear who wrote the opinion from other evidence or the rare occasion when a justice issues a written dissent to a shadow docket decision) nor are there reasons for an outcome. And yet they have decided cases of major import involving voting rights, abortion, and the very right to life or death. When hearing these cases, the justices often lack the benefit of a decision by lower courts because the cases, by definition, are rushed and partial. So without written lower court decisions, only fragmentary briefing or oral argument by parties, and a limited time span to consider the complex legal questions and contested facts, the Supreme Court nonetheless issues decisions that can have significant and long-lasting consequences, including making major changes to doctrine.

One very important area—and one in which the Court has been subject to much criticism on its regular docket as well—is in the realm of election administration, voting rights, and gerrymandering. While any decision on this docket that has far-reaching impacts should be scrutinized, the decisions involving the basic mechanisms of democracy need a particularly close and critical examination. The Supreme Court's recent use of the shadow docket calls for particularly critical appraisal, especially given the observation of Stephen Vladeck, a professor at the University of Texas School of Law, that granting stays of lower court rulings that would block the implementation of government policies has “historically been a rarity.”<sup>1</sup> In contrast to more restrained use of the shadow docket during the administrations of George W. Bush and Barack Obama, many of the Supreme Court's decisions involving the shadow docket during the Trump Administration divided the court.<sup>2</sup> Moreover, the Trump Administration saw an increase in the Court's decisions to grant stays through the shadow docket with the Court granting seventeen of the twenty-nine applications for emergency stays during the Administration as of June 17, 2020.<sup>3</sup> The Court's lack of express clarification of its reasoning—and the “disparity [that] seems to repeatedly favor conservative policies over progressive ones”—provide the impression that the current Court is “bending over backward to accommodate a particular political agenda” in shadow docket cases.<sup>4</sup> Such cases have significantly affected access to the ballot box, allowed racial gerrymandering, and hobbled efforts to ensure

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<sup>1</sup> Stephen I. Vladeck, *How the Supreme Court Is Quietly Enabling Trump*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/opinion/supreme-courts-trump-relief.html> [<https://perma.cc/NH7N-QGQG>].

<sup>2</sup> *Id.* (noting that during George W. Bush and Barack Obama's presidencies, no votes among the Justices to deny or grant relief through the shadow docket had been 5-4).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

elections are fair and free to all eligible voters. Especially in the last several years, many of the Court's most significant decisions in these areas came in the form of these unsigned and rarely detailed orders involving injunctions.

The question often posed by scholars regarding courts and democracy is how to resolve the so-called counter-majoritarian difficulty.<sup>5</sup> That is, how can judicial review exist in a majoritarian democratic system without undermining the very concept of democracy where the elected branches are supposed to make the policy decisions, at least in theory. But when majorities undermine key democratic rights of disfavored groups, then, many acknowledge, there may need to be judicial intervention to support those rights.<sup>6</sup> For example, those in favor of expanded civil rights and voting access have at times seen the courts as an important partner in restraining the tendency of a democracy to limit the rights of minorities—whether racial, political, or otherwise. Thus, the Supreme Court has played a role of protector of democratic rights even while blocking what may be a preference of a majority. Sometimes this type of judicial review is called “representation reinforcement.”<sup>7</sup> For many, this idea of judicial review satisfied any concerns of resolving the theoretical antagonism between the Court's power to strike down laws and the majority's right to have its way in a democracy.<sup>8</sup> But in the case of the current Supreme Court (no friend generally to voting rights) the counter-majoritarian force is itself undermining fundamental rights and doing so in an untransparent way. How then can we defend judicial review in a democracy? If in fact the Court is not acting as an effective check on other branches against tyranny but instead is weaponizing antidemocratic interests, how much does this call into question our understanding of the US constitutional structure of separation of powers and checks and balances? And most significantly, does the Court's practice of secretive and destructive decision-making in the area of elections put into question the resilience of American democracy?

This Article will attempt to analyze how shadow docket jurisprudence and practice fits into the broader analysis of democratic systems. Although this Symposium is focused on the “shadow docket,” my Article will situate the emergency rulings in the broader context of the Court's jurisprudence on the right to vote to demonstrate that the shadow docket is not an aberration; on both the emergency and the certiorari dockets, the current majority has embarked on a radical revisioning of what American democracy should look like. This tendency is just more hidden on the shadow docket. The increased use of the shadow docket speaks more to the impatience of some of the Justices with Chief Justice John Roberts's more deliberate pace in ripping the heart out of voting rights. The other Justices do not worry so much that the public will more easily perceive their

<sup>5</sup> See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998).

<sup>6</sup> See, e.g., *id.* at 338, 341, 345, 412; see also John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 466 (1978).

<sup>7</sup> See Ely, *supra* note 6, at 451.

<sup>8</sup> See, e.g., *id.* at 469, 471, 486–87.

disinterest in precedent, or judicial restraint, or respect for the democratic branches, or ultimately begin to lose respect and faith in the judicial system; they just want quick outcomes that seem designed to affect elections in a way favorable to the conservative electorate.

First, I will address the Court's election law jurisprudence and the particular danger of emergency rulings on election cases. Second, I will analyze these cases in light of democratic theory and the role of the judiciary in illiberal democracies. In particular, I will examine how illiberal democracies have manipulated court personnel in order to have a compliant judiciary. Lastly, I will attempt to offer some ideas about how we might best respond to the threat to our democratic system.

### I. ELECTION LAW AND THE ROBERTS COURT

Democracy has always been a work in progress in the United States. Its reach was quite limited initially. In the beginning of the republic, voting was mainly restricted to property-owning white men, which would later be extended to all men.<sup>9</sup> At least in theory, the Reconstruction Constitution was meant to ensure the enfranchisement of black men; but voter suppression in its many creative forms lived on in America well after the Civil War ended, enslaved people were liberated, and the Fifteenth Amendment guaranteed black men the right to vote. The Fifteenth Amendment was essentially written out of the Constitution in Jim Crow America by white supremacists, including the White Citizens Councils and the Ku Klux Klan, who prevented African Americans from voting through violence and intimidation.<sup>10</sup> Mississippi changed its constitution in 1890 explicitly to strip black men of the franchise, and other southern states soon followed suit.<sup>11</sup> In addition, throughout the twentieth century and particularly in the South, election officials devised numerous methods to keep African Americans from participating in elections. Literacy tests, poll taxes, property-ownership requirements, grandfather clauses (allowing only those citizens whose grandfathers had voted to vote), whites-only primaries, and other devices were used as barriers to voting for nonwhites.<sup>12</sup> While the right to vote was also eventually granted to women with the Nineteenth Amendment in 1920, white women were the main beneficiaries.<sup>13</sup>

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<sup>9</sup> *Voting Rights Throughout United States History*, NAT'L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/voting-rights-throughout-history> [https://perma.cc/GNH6-3CXN].

<sup>10</sup> See Neil R. McMillen, *White Citizens' Council and Resistance to School Desegregation in Arkansas*, 30 ARK. HIST. Q. 95, 98–99, 119 (1971); see also CONG. RSCH. SERV., R43626, *THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW* 6–10 (2015).

<sup>11</sup> ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA* 17 (2015).

<sup>12</sup> CONG. RSCH. SERV., *supra* note 10, at 8.

<sup>13</sup> See Paula A. Monopoli, *Gender, Voting Rights, and the Nineteenth Amendment*, 20 GEO. J.L. & PUB. POL'Y 91, 96, 120 (2022).

Black voter disenfranchisement was perpetuated by these laws and practices deliberately enacted to prevent African Americans from registering to vote and voting. As a result, nearly all southern black voters were disenfranchised.<sup>14</sup> The Supreme Court began striking down some of these measures in the early twentieth century; in 1915, the Court struck down grandfather clauses as unconstitutional in *Guinn v. United States*,<sup>15</sup> and in 1944, the Court struck down whites-only primaries as unconstitutional in *Smith v. Allwright*.<sup>16</sup> Building from this momentum, Congress passed the first civil rights legislation since Reconstruction, the Civil Rights Act of 1957, which authorized the attorney general to sue for injunctive relief on behalf of persons whose Fifteenth Amendment rights were violated.<sup>17</sup> Other changes included the creation of the Civil Rights Division within the Department of Justice,<sup>18</sup> the Commission on Civil Rights,<sup>19</sup> and the Civil Rights Act of 1960, which allowed federal courts to appoint referees to conduct voter registration in jurisdictions that engaged in voting discrimination.<sup>20</sup>

These changes only brought a marginal increase in black voter registration in the South as black southerners still faced discrimination in voting, as well as in access to public accommodations and government services; these injustices led to the Civil Rights Act of 1964.<sup>21</sup> However, the Act did not prohibit most forms of voting discrimination. It took pressure from civil rights organizations and leaders to spur President Lyndon B. Johnson to address a joint session of Congress on March 15, 1965, calling on legislators to enact expansive voting rights legislation.<sup>22</sup> The Voting Rights Act of 1965 was introduced in Congress two days later.<sup>23</sup>

Congress passed the Voting Rights Act of 1965 (VRA) to provide a federal backstop and enforcement powers designed to give the Fifteenth Amendment teeth.<sup>24</sup> The VRA was part of a suite of federal laws that sought to dismantle the racist laws and practices that barred African Americans from employment, housing, and access to restaurants and hotels. Most significantly, such laws and

<sup>14</sup> See CONG. RSCH. SERV., *supra* note 10, at 9.

<sup>15</sup> *Guinn v. United States*, 238 U.S. 347, 354–58, 363–68 (1915).

<sup>16</sup> *Smith v. Allwright*, 321 U.S. 649, 650–51, 661–62 (1944).

<sup>17</sup> *Historical Highlights: The Civil Rights Act of 1957*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1951-2000/The-Civil-Rights-Act-of-1957/> [<https://perma.cc/8E8A-G54D>].

<sup>18</sup> *Civil Rights Division*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt> [<https://perma.cc/A6ML-QT9F>].

<sup>19</sup> *FAQs: Overview*, U.S. COMM'N ON C.R., <https://www.usccr.gov/about/faqs> [<https://perma.cc/J6EL-87M6>].

<sup>20</sup> See *Legislation: Civil Rights Act of 1960*, AFR. AM. CIV. RTS. MOVEMENT, <http://www.african-american-civil-rights.org/civil-rights-act-of-1960> [<https://perma.cc/SUJ6-KSGR>].

<sup>21</sup> See *Legal Highlight: The Civil Rights Act of 1964*, U.S. DEP'T OF LAB.: OFF. OF THE ASSISTANT SEC'Y FOR ADMIN. & MGMT., <https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964> [<https://perma.cc/YZ5U-MRR3>].

<sup>22</sup> See CONG. RSCH. SERV., *supra* note 10, at 11–12.

<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.* at 11–12.

practices limited African Americans' ability to participate in elections.<sup>25</sup> President Johnson said that the VRA was meant to right “a clear and simple wrong . . . Millions of Americans are denied the right to vote because of their color. This law will ensure them the right to vote.”<sup>26</sup> John Lewis, elected to Congress with the help of newly enfranchised African American voters, said that “[w]hen Lyndon Johnson signed the Voting Rights Act . . . he helped free and liberate all of us.”<sup>27</sup>

The law barred any use of literacy tests or other devices dreamed up by the Jim Crow architects and gave the Department of Justice the power to stop covered jurisdictions—those states and localities with a history of denying voting rights to minorities—from making changes to their rules governing elections.<sup>28</sup> The VRA has multiple sections. Section 2 forbids any “standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.”<sup>29</sup> Section 5 requires certain states that have a history of racial discrimination in voting to obtain “preclearance” from either the D.C. District Court or the Department of Justice before making any changes to voting practices.<sup>30</sup> States must prove that the change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”<sup>31</sup> Section 4(b) contains the coverage formula that calculates which jurisdictions are required to gain preclearance for any voting practices changes.<sup>32</sup>

Section 5 ensured that six states (and certain counties in three other states) would have to submit every electoral change in advance for analysis by a team of civil rights lawyers at the Department of Justice before the changes could be adopted.<sup>33</sup> Moving polling places, redrawing voting jurisdictions, and altering voting hours and days would all need the blessing of Department of Justice lawyers before being implemented.<sup>34</sup> In subsequent reauthorizations of the VRA, Congress added provisions to allow eighteen-year-olds to vote, help groups with

<sup>25</sup> *Id.* at 8–10.

<sup>26</sup> Jim Rutenberg, *A Dream Undone*, N.Y. TIMES MAG. (July 29, 2015), <https://www.nytimes.com/2015/07/29/magazine/voting-rights-act-dream-undone.html> [<https://perma.cc/Z7GL-47TJ>].

<sup>27</sup> Ari Berman, *John Lewis's Long Fight for Voting Rights*, NATION (June 5, 2013), <https://www.thenation.com/article/politics/john-lewiss-long-fight-voting-rights/> [<https://perma.cc/A4KR-SRDY>].

<sup>28</sup> CONG. RSCH. SERV., *supra* note 10, at 13–16.

<sup>29</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

<sup>30</sup> CONG. RSCH. SERV., *supra* note 10, at 16.

<sup>31</sup> *Milestone Documents: Voting Rights Act (1965)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/voting-rights-act> [<https://perma.cc/985D-654M>].

<sup>32</sup> CONG. RSCH. SERV., *supra* note 10, at 15.

<sup>33</sup> *Id.*

<sup>34</sup> *See id.* at 16.

limited English proficiency vote in their native language, and bar literacy tests not just in the South but nationwide.<sup>35</sup>

The VRA bore immediate fruit as African Americans were able to register and vote in significantly higher numbers. In Mississippi, for example, voter registration among African Americans soared from 6.7 percent to 59.4 percent within just three years of the VRA's enactment.<sup>36</sup> And in the South overall, in the decades that followed, blacks increased from a 31 percent to a 73 percent registration rate, as people began to see their votes count.<sup>37</sup> The number of black elected officials went from a scant five hundred in 1965 to over ten thousand in the next several decades, with over forty African Americans serving in Congress by 2017.<sup>38</sup>

Voting rights advocates pressed for more mechanisms to ease the voting process, arguing that voting is a right—not a privilege—and that significant barriers to the franchise still existed.<sup>39</sup> Over time, they were successful in getting Congress to pass the National Voter Registration Act in 1993—otherwise known as the “Motor Voter Act” because voters could register while getting or renewing a driver’s license—as well as adding early voting and same-day voter registration in numerous states.<sup>40</sup> In the five years after the passage of Motor Voter, African American registration went up by 10 percent.<sup>41</sup> With every advance, more African Americans were able to participate. This increase in participation culminated in the election of President Barack Obama in 2008, when black voters turned out at nearly the same rate as white voters for the first time.<sup>42</sup>

While Republicans were originally the “party of Lincoln,” by the 1960s Democrats had become the party working to expand the franchise, at least at the

<sup>35</sup> BERMAN, *supra* note 11, at 6.

<sup>36</sup> David C. Colby, *The Voting Rights Act and Black Registration in Mississippi*, 16 PUBLIUS 123, 130 (1986).

<sup>37</sup> BERMAN, *supra* note 11, at 6.

<sup>38</sup> *Id.*; Katherine Schaeffer, *The Changing Face of Congress in 8 Charts*, PEW RSCH. CTR. (Feb. 7, 2023), <https://www.pewresearch.org/fact-tank/2023/02/07/the-changing-face-of-congress/> [<https://perma.cc/YS9T-28J4>].

<sup>39</sup> See generally Dean Searcy, *Voting: A Right, a Privilege, or a Responsibility?*, FAIR VOTE (Apr. 19, 2011), <https://fairvote.org/voting-a-right-a-privilege-or-a-responsibility/> [<https://perma.cc/AA6V-KX98>] (contending voting is a “fundamental right” that should be “granted to as many people as legally possible” and noting that “clear cases of denial of suffrage” are far more common than the exceedingly rare “proven cases of voter fraud”).

<sup>40</sup> *The National Voter Registration Act of 1993 (NVRA)*, U.S. DEP’T JUST., <https://www.justice.gov/crt/national-voter-registration-act-1993> [<https://perma.cc/V9LY-MXLP>]; see Michael P. McDonald, *A Brief History of Early Voting*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/a-brief-history-of-early\\_b\\_12240120](https://www.huffpost.com/entry/a-brief-history-of-early_b_12240120) [<https://perma.cc/PWL3-3DT2>] (discussing early voting); *Same Day Voter Registration*, NAT’L CONF. STATE LEGISLATURES (Oct. 11, 2022), <https://www.ncsl.org/elections-and-campaigns/same-day-voter-registration> [<https://perma.cc/JT52-YZDA>] (discussing same-day voter registration).

<sup>41</sup> Rutenberg, *supra* note 26.

<sup>42</sup> *Id.*

national level.<sup>43</sup> Even though southern white Democrats had instigated and perpetuated Jim Crow,<sup>44</sup> President Johnson saw the VRA as an important element of the civil rights legislative agenda that was now a major platform of the Democratic party.<sup>45</sup> He also acknowledged that the new law would accelerate the hemorrhaging of southern whites from the party as the party in the South became more protective of the rights of black voters—and ultimately more black.<sup>46</sup> Racism is still a powerful force today but the Republican Party now also has a pragmatic reason to suppress black votes: African Americans overwhelmingly vote Democratic.<sup>47</sup>

The adoption of the VRA forced conservative leaders to change their tactics. Overtly racist arguments for voter suppression laws mostly disappeared as conservatives learned new tropes to disguise the intent behind their policy proposals. In his book *Give Us the Ballot*, journalist Ari Berman characterized the post-VRA provisions as “subtler than those of the 1890s or 1960s, camouflaging efforts to deter voting with laws that rarely invoked race, introduced with equal fervor in North and South alike.”<sup>48</sup>

These anti-voting provisions followed two main approaches. The first was to change the debate around voting from increasing access to the ballot box to combating voter fraud—a fabricated bogeyman unsupported by any actual evidence.<sup>49</sup> Elevating a nonexistent problem offered a seemingly race-neutral rhetorical tool to undermine voting rights. The second approach was to attack the fundamental voting rights protections of the VRA as outdated and no longer necessary.<sup>50</sup> President George W. Bush’s Supreme Court appointees—including longtime opponent of the Voting Rights Act Chief Justice John Roberts<sup>51</sup>—

<sup>43</sup> See, e.g., Gary Miller & Norman Schofield, *The Transformation of the Republican and Democratic Party Coalitions in the U.S.*, 6 PERSPS. ON POL. 433, 438–39, 444 (2008) (discussing Democratic party support for voting rights legislation in the 1960s and the political realignment of the Republican party from the 1960s onward “in opposition to the federal government as sponsor of the social change” relating to the promotion of civil rights).

<sup>44</sup> See Mark Stern, *Lyndon Johnson and the Democrats’ Civil Rights Strategy*, 16 HUMBOLDT J. SOC. RELS. 1, 6–7 (1990).

<sup>45</sup> See *id.* at 18.

<sup>46</sup> *Id.* at 17–18.

<sup>47</sup> See Philip Bump, *When Did Black Americans Start Voting So Heavily Democratic?*, WASH. POST (July 7, 2015, 3:41 PM), <https://www.washingtonpost.com/news/the-fix/wp/2015/07/07/when-did-black-americans-start-voting-so-heavily-democratic/> [<https://perma.cc/79U7-D9SL>].

<sup>48</sup> BERMAN, *supra* note 11, at 11.

<sup>49</sup> See *id.* at 196, 216–17, 219, 230–33, 257, 299.

<sup>50</sup> See, e.g., John Schwartz, *Between the Lines of the Voting Rights Act Opinion*, N.Y. TIMES (June 25, 2013), <https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/25/us/annotated-supreme-court-decision-on-voting-rights-act.html> [<https://perma.cc/XU2L-SRKP>]

(summarizing Chief Justice Roberts’s arguments that the VRA’s voting rights protections are no longer relevant or useful given the changes in the country since the VRA’s enactment, as well as Justice Thomas’s contention that he would have found Section 5 of the VRA unconstitutional).

<sup>51</sup> See *id.*



undermined the core purpose of the VRA in *Shelby County v. Holder*.<sup>52</sup> That case made Section 5 unenforceable, calling the idea of requiring states to get approval for changing their election laws a relic of a former, benighted era and no longer relevant in an age when discrimination had been vanquished.<sup>53</sup>

Serving in the Justice Department under Attorney General Ed Meese,<sup>54</sup> John Roberts found the Voting Rights Act—indeed any racially targeted remedies—to be an affront to his vision of the Constitution.<sup>55</sup> Hailing from outside the American South, the Indiana native nonetheless believed that it was anathema to deny states the ability to make decisions about their own voting laws.<sup>56</sup> He had come to Washington D.C. to work as a law clerk to Justice William Rehnquist, who shared Roberts’s dislike of race-conscious legislation.<sup>57</sup> Consistent with that view, Rehnquist joined an opinion, *City of Mobile v. Bolden*,<sup>58</sup> that made enforcement of the VRA much more difficult by requiring proof of intent to disenfranchise African Americans rather than simply showing that the law had the effect of doing so.<sup>59</sup> Ari Berman explains that “Rehnquist’s opposition to civil rights laws on federalism grounds and the rebranding of that opposition as principled color blindness became a staple of the Reagan administration’s position on civil rights.”<sup>60</sup> Or as Randall Kennedy, a Harvard Law School professor, put it: “Color blindness became a mechanism for maintaining the old regime in a respectable way.”<sup>61</sup> Even some conservative commentators recognized this hypocrisy. Writing in the *New Republic*, Charles Krauthammer and Owen Fiss suggested that Rehnquist had erased the post-Civil War amendments from the Constitution, describing the Justice’s vision as “a return to the antebellum Constitution” when slavery was still the law.<sup>62</sup>

Rehnquist and Roberts had the intellectual support of conservative law professors, including Antonin Scalia, who had begun to attack any policy or legislation that sought to address the vestiges of slavery or racism.<sup>63</sup> Cynically

<sup>52</sup> *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

<sup>53</sup> See Schwartz, *supra* note 50.

<sup>54</sup> See Lynette Clemetson, *Meese’s Influence Looms in Today’s Judicial Wars*, N.Y. TIMES, Aug. 17, 2005, at A1.

<sup>55</sup> See Ari Berman, *Inside John Roberts’ Decades-Long Crusade Against the Voting Rights Act*, POLITICO (Aug. 10, 2015), <https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222/> [<https://perma.cc/J84K-Z7JV>].

<sup>56</sup> See *id.*

<sup>57</sup> *Id.*

<sup>58</sup> See *City of Mobile v. Bolden*, 446 U.S. 55 (1980), *superseded by statute*, 52 U.S.C. § 10301, *as recognized in* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>59</sup> See Berman, *supra* note 55.

<sup>60</sup> BERMAN, *supra* note 11, at 147.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 148. See generally Owen Fiss & Charles Krauthammer, *A Return to the Antebellum Constitution: The Rehnquist Court*, NEW REPUBLIC 14, 14, 16 (1982).

<sup>63</sup> See Antonin Scalia, Commentary, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race,”* 1979 WASH. UNIV. L.Q. 147, 147–49, 151–52, 154–56

claiming Martin Luther King Jr.'s "I Have a Dream" speech as their inspiration, their goal was the exact opposite of King's.<sup>64</sup> Scalia, who called affirmative action "disease as cure," wrote that he found it "an embarrassment" to teach equal protection law.<sup>65</sup> According to Scalia, there was no justification for having a different standard for blacks than that applied to whites.<sup>66</sup> Even with a history of discrimination and voter suppression, in Scalia's view, a race-based remedy such as the VRA was "based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need; that is to say . . . it is racist."<sup>67</sup>

By the time Roberts had moved from his clerkship to the Justice Department during the Reagan Administration, Congress had taken up the VRA reauthorization with an interest in fixing what VRA supporters saw as an error made by the Supreme Court in *City of Mobile v. Bolden*, which required a finding of intent to discriminate rather than just the effect of doing so.<sup>68</sup> At the Justice Department, future Chief Justice John Roberts fought hard for the intent standard, saying it should be a heavy burden to establish voting discrimination because these cases are "the most intrusive interference imaginable by the federal courts into state and local processes."<sup>69</sup> According to Roberts, looking at actual discrimination rather than at the intent to discriminate would "establish essentially a quota system for electoral politics."<sup>70</sup> Just as he argued that quotas are bad in other contexts, such as education and employment, he argued they are also bad in elections.<sup>71</sup> His argument that an effects test would require proportional representation was vigorously disputed, even by other lawyers in the Reagan Justice Department.<sup>72</sup> Nonetheless, Roberts worked to persuade his higher-ups at the Department of Justice that the Constitution should be "colorblind" and that the

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(1979) (criticizing affirmative action measures and conveying a disapproval of race-conscious policies).

<sup>64</sup> See David B. Oppenheimer, *Dr. King's Dream of Affirmative Action*, 21 HARV. LATINX L. REV. 55, 55, 59, 82–84 (2018); see also Jonathan Riehl, *The Federalist Society and Movement Conservatism: How a Fractious Coalition on the Right is Changing Constitutional Law and the Way We Talk and Think About It 206–07* (2007) (Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with the University of North Carolina at Chapel Hill) (describing former Secretary of Education William J. Bennett and other conservatives' construal of Martin Luther King Jr.'s "I Have a Dream" speech as support for racial colorblindness).

<sup>65</sup> Scalia, *supra* note 63, at 147.

<sup>66</sup> See *id.* at 148–50, 156.

<sup>67</sup> *Id.* at 154.

<sup>68</sup> See Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1353, 1355–56, 1381, 1383, 1390 (1983).

<sup>69</sup> Berman, *supra* note 55.

<sup>70</sup> Linda Greenhouse, *John Roberts's Long Game: Is This the End of the Voting Rights Act?*, ATLANTIC (Sept. 20, 2022), <https://www.theatlantic.com/magazine/archive/2022/10/john-roberts-supreme-court-voting-rights-act/671239/> [https://perma.cc/8JMT-ERVL].

<sup>71</sup> Rutenberg, *supra* note 26.

<sup>72</sup> BERMAN, *supra* note 11, at 151.

VRA reauthorization was not constitutional.<sup>73</sup> As Gerry Hebert, a longtime voting rights lawyer, told the *New York Times*,

In their zest for the colorblind society they professed to see, they didn't recognize that the long couple hundred years of segregation and discrimination continued to have present-day effects . . . I would say they had a fundamental lack of understanding of the 14th and 15th Amendments, and what Congress could do under those amendments—I still don't think Roberts understands it.<sup>74</sup>

More accurately, Roberts did not and does not believe Congress may act under the provisions of those amendments to address racial discrimination.<sup>75</sup> Roberts did not get his way in 1982, but he finally won once he became chief justice in 2005.<sup>76</sup>

In 2010, Shelby County, Alabama, sought declaratory judgment that the preclearance requirement/coverage formula of the VRA was unconstitutional.<sup>77</sup> Roberts agreed.<sup>78</sup> First, the Court noted that the VRA imposes current burdens that “must be justified by current needs” and its disparate treatment of the states must be “sufficiently related to the problem that it targets.”<sup>79</sup> Next, the Court stated that there had been “[s]ignificant progress” in eliminating first-generation barriers experienced by minority voters, including increased black voter registration and increased black political participation.<sup>80</sup> Not stated but implied was that Obama's ascendance into the presidency was also proof that the constitutional protections for previously disenfranchised minority groups (primarily black people) were no longer necessary.<sup>81</sup> Thus, the coverage formula was outdated, and the past success of the preclearance requirement was not adequate justification to retain the preclearance requirement.<sup>82</sup> Roberts's opinion hinged on a central theme—because the times have changed, the restrictions put in place for black voting were no longer necessary.<sup>83</sup>

In *Shelby County v. Holder*, Roberts wrote for the majority, holding that Section 5 of the VRA had been a “drastic departure from basic principles of federalism” and was, in any case, no longer necessary.<sup>84</sup> “[H]istory did not end in 1965,” he wrote.<sup>85</sup> “[L]argely because of the Voting Rights Act, voting tests were

<sup>73</sup> Rutenberg, *supra* note 26.

<sup>74</sup> *Id.*

<sup>75</sup> See Greenhouse, *supra* note 70.

<sup>76</sup> See *id.*

<sup>77</sup> *Shelby County v. Holder*, 570 U.S. 529, 529 (2013).

<sup>78</sup> *Id.* at 530, 557.

<sup>79</sup> *Id.* at 536, 551.

<sup>80</sup> *Id.* at 547 (quoting Fannie Lou Hamer, Rosa Parks, and Coretta Scott King, Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(1), 120 Stat. 577 (2006)).

<sup>81</sup> BERMAN, *supra* note 11, at 247.

<sup>82</sup> See *Shelby County*, 570 U.S. at 547–53, 557.

<sup>83</sup> See *id.* at 540, 547, 552, 557.

<sup>84</sup> See *id.* at 534–35.

<sup>85</sup> *Id.* at 552.

abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers.”<sup>86</sup> Justice Ruth Bader Ginsburg, in a fiery dissent, chastised Roberts for the opinion’s “[h]ubris,” noting that the Justice Department had, in fact, cataloged more problematic voting changes between 1982 and 2004 than it had between 1965 and the 1982 reauthorization.<sup>87</sup> The Justice Department had even cataloged cases of Republican legislators calling African Americans “Aborigines” and saying that black turnout needed to be suppressed before they were delivered to the polls via “HUD financed buses.”<sup>88</sup> Ginsburg challenged the fiction that black voters no longer faced discrimination because more of them were voting and getting elected to office.<sup>89</sup> She wrote prophetically in her dissent that “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”<sup>90</sup> The *Shelby County* decision let loose a flood of new voter suppression legislation, now blessed by a Supreme Court that saw a color-blind society, purged of racism.<sup>91</sup>

“In the immediate aftermath of the *Shelby County* decision, indeed within hours, states that had been blocked from adopting laws designed to limit the rights of minorities to vote, pulled those laws off the shelf and rushed them to votes.”<sup>92</sup> The decision also sparked discussions about voter fraud allegations, further crippling the VRA.<sup>93</sup> Justice Ruth Bader Ginsburg’s dissent had correctly forewarned that the decision would have exactly this result and noted that Roberts had misrepresented the necessity of the VRA; as it stood, the VRA was one of the legal mechanisms keeping voter disenfranchisement at bay.<sup>94</sup> By declaring the coverage formula unconstitutional, the Court had made paths for states to use now legitimized tools of voter suppression.<sup>95</sup>

<sup>86</sup> *Id.* at 553.

<sup>87</sup> *Id.* at 571, 587 (Ginsburg, J., dissenting).

<sup>88</sup> *See id.* at 584.

<sup>89</sup> *See id.* at 571–77.

<sup>90</sup> *Id.* at 590.

<sup>91</sup> *See* CAROLINE FREDRICKSON, *THE DEMOCRACY FIX: HOW TO WIN THE FIGHT FOR FAIR RULES, FAIR COURTS, AND FAIR ELECTIONS* 33 (2019).

<sup>92</sup> *Id.* at 42; *see id.* at 60. The North Carolina legislature pulled its voter ID bill that would have allowed multiple IDs and would have helped voters obtain free IDs. Instead, the North Carolina General Assembly replaced it with a bill that made early voting difficult for black people. The Fourth Circuit struck down this bill years later. *See* North Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 214–18 (4th Cir. 2016). However, other states have followed suit with their own voter ID laws. *See Voter ID in Wisconsin*, BALLOTPEdia, [https://ballotpedia.org/Voter\\_ID\\_in\\_Wisconsin](https://ballotpedia.org/Voter_ID_in_Wisconsin) [<https://perma.cc/9L7M-D8NQ>].

<sup>93</sup> *See* Abhishek Hariharan, *Shelby County v. Holder: Implications of a Weakened Voting Rights Act*, COLUM. UNDERGRADUATE L. REV. (Sept. 5, 2018), <https://www.culawreview.org/journal/shelby-county-v-holder-implications-of-a-weakened-voting-rights-act> [<https://perma.cc/DA45-6FMQ>].

<sup>94</sup> *See* *Shelby County v. Holder*, 570 U.S. 529, 563–66, 573–79, 582–83, 592 (2013) (Ginsburg, J., dissenting).

<sup>95</sup> *See id.* at 575–76, 590–93.

In *Husted v. A. Philip Randolph Institute*, the Supreme Court upheld Ohio's controversial voter purging practice because, according to the Court, it did not violate the National Voter Registration Act of 1993 or the Help America Vote Act of 2002.<sup>96</sup> The law at issue allowed Ohio to purge voters who missed a single federal election if they failed to send a response and did not vote for two federal elections.<sup>97</sup> Suggesting that he was simply following the text (a charged phrase for anyone versed in the extremely flexible use of textualism to serve conservative ends),<sup>98</sup> Justice Samuel Alito held the Ohio law fully comported with the National Voter Registration Act, or "Motor Voter Act."<sup>99</sup> Ostensibly designed to facilitate voter registration, the law also included a provision to ensure the accuracy of voter rolls, requiring states to "conduct a general program that makes a reasonable effort to remove the names" of those no longer eligible "by reason of" death or change in residence."<sup>100</sup> The state would send such voters a postcard and if those voters failed to send it back, they were removed.<sup>101</sup> Ohio's approach was to use a meat cleaver—removing the names of those who failed to vote for two years to approximate a list of who might have moved; a very effective trimming of the rolls. "We have no authority to second-guess Congress or to decide whether Ohio's Supplemental Process is the ideal method for keeping its voting rolls up to date," Alito wrote.<sup>102</sup>

Finally, in *Rucho v. Common Cause*, the Court abstained from weighing in on a partisan gerrymandering issue, stating that the gerrymandering claims were nonjusticiable political questions for which the Court lacks "judicially discoverable and manageable standards" to resolve.<sup>103</sup> Roberts's opinion focused on fairness and whether the courts were equipped to determine a "fair" amount of political representation for a party; apparently, such a set of considerations was beyond the competence of the federal courts because it "poses basic questions that are political, not legal."<sup>104</sup> Thus, even though the Court acknowledged that partisan gerrymandering is not compatible with democratic principles, Roberts called on voters to look to the state legislature and state court rather than the Supreme Court to protect their rights.<sup>105</sup> However, these were the same states that needed to be mandated to stop discriminating against minority populations via voter suppression with the VRA.<sup>106</sup> Justice Elena Kagan criticized the majority

<sup>96</sup> See *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1846 (2018).

<sup>97</sup> See *id.* at 1839–40.

<sup>98</sup> See generally William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718 (2021).

<sup>99</sup> See *Husted*, 138 S. Ct. at 1846.

<sup>100</sup> *Id.* at 1838.

<sup>101</sup> See *id.* at 1838–39.

<sup>102</sup> *Id.* at 1848.

<sup>103</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494, 2496 (2019).

<sup>104</sup> *Id.* at 2500.

<sup>105</sup> See *id.* at 2506–07.

<sup>106</sup> See *Shelby County v. Holder*, 570 U.S. 529, 573–75 (2013) (Ginsburg, J., dissenting).

opinion in her dissent by recognizing that partisan gerrymandering undermines that fundamental aspect of democracy—free and fair elections.<sup>107</sup> “[T]he partisan gerrymanders here debased and dishonored our democracy,” she proclaimed.<sup>108</sup> “If left unchecked, gerrymanders like the ones here may irreparably damage our system of government. . . . For the first time ever,” she declared, “this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.”<sup>109</sup>

These cases, demonstrating the advance of an ever narrower vision of democracy, could not more clearly show how the current Supreme Court is serving as a handmaiden to an illiberal future in America. The current majority’s cramped view of democratic practice despite the importance of voting in a system of popular sovereignty has made it ever harder to ensure that access to the ballot box is full and free for all eligible Americans. The conservative majority has issued decisions taking the narrowest possible approach to statutory protections and limited the sweep of broad constitutional language.<sup>110</sup> The result is an America where “we the people” has been circumscribed to exclude those the Court does not find worthy of protecting.

## II. THE SUPREME COURT SHADOW DOCKET AND ELECTIONS

The Supreme Court has clearly and aggressively cut back on voting rights and fair election administration through decisions issued through the normal process.<sup>111</sup> Perhaps yet more disturbing is how the Court has used its emergency docket to issue decisions that significantly limit access to the ballot box with binding effect and typically no reasoning at all.<sup>112</sup> By definition, emergency orders are meant to be short-term and allow for future development of the arguments through the regular court process.<sup>113</sup> But in the area of elections, they are practically the final word—certainly for the outcome at the ballot box. In decisions since 2016, this has been the case. For example, the Court’s ruling on the Census prevented an extension of the ability to collect and refine data under extreme circumstances;<sup>114</sup> and its decisions regarding voting by mail, in cars, and other accommodations during the pandemic affected access for many voters who

<sup>107</sup> See *Rucho*, 139 S. Ct. at 2509–13 (Kagan, J., dissenting).

<sup>108</sup> *Id.* at 2509.

<sup>109</sup> *Id.*

<sup>110</sup> See generally, Eskridge & Nourse, *supra* note 98; see also *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1846 (2018).

<sup>111</sup> See *Husted*, 138 S. Ct. at 1846; see also *Rucho*, 139 S. Ct. at 2495; see also *Shelby County*, 570 U.S. at 556.

<sup>112</sup> See *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (mem.); see also *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (mem.). See generally *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1208 (2020).

<sup>113</sup> See David Leonhardt, *Rulings Without Explanations*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/2021/09/03/briefing/scotus-shadow-docket-texas-abortion-law.html> [<https://perma.cc/KR23-MM2J>].

<sup>114</sup> See *Ross v. Nat’l Urb. League*, 141 S. Ct. 18 (2020) (mem.).

were prevented from participating, even when legislators or courts had tried to ensure that COVID would not result in a greatly limited franchise.<sup>115</sup>

Many of these decisions are the result of a fairly recent Supreme Court doctrine called the “*Purcell* principle.”<sup>116</sup> In *Purcell v. Gonzalez*, issued just one year after Roberts became chief justice, the Supreme Court suggested that courts should exercise caution in enjoining election practices when an election was approaching: “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”<sup>117</sup> Since that time, and especially in the last few years, the Roberts Court has broadened the application of *Purcell*, with the effect of making it harder to ensure fair elections in the face of voter suppression laws. The Court has turned the “principle” into a rule that bars injunctions in election cases where the Court has decided it is too close to Election Day, despite clear constitutional violations.<sup>118</sup> Normal approaches to equitable relief that focus on likelihood of success on the merits, the balance of hardships, and the public interest have been discarded in favor of a bright line rule—against voters.

After *Purcell*, the Court decided two other significant voting cases on the emergency docket. In *Veasey v. Perry*, Justice Ruth Bader Ginsburg, joined by Justices Sonia Sotomayor and Elena Kagan, used her dissent to explain how the Court’s elaboration on the so-called *Purcell* principle was cementing unconstitutional violations of the right to vote.<sup>119</sup> Equity principles have long informed how to approach such cases, Justice Ginsberg noted, reiterating the well-established requirement that those seeking a stay or interim injunctive relief must demonstrate that they have a “likelihood of success on the merits” and may suffer “irreparable injury.”<sup>120</sup> “*Purcell* held only that courts must take careful account of considerations specific to election cases,” she wrote, “not that election cases

<sup>115</sup> See *Merrill*, 141 S. Ct. at 190 (mem.); see also *Andino*, 141 S. Ct. at 10 (mem.); see also *Republican Nat’l Comm.*, 140 S. Ct. at 1208 (mem.).

<sup>116</sup> There has been much excellent commentary about the Supreme Court’s approach to injunctions in election cases that are “close” to an election. See generally Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428–29 (2016) (arguing that the Supreme Court should devote due consideration to other public interest factors besides the public’s interest in averting voter confusion, such as the public interests in preventing voter disenfranchisement and mitigating hardships that can affect election administrators, when determining whether to issue injunctions in election cases); Wilfred U. Codrington III, *Purcell in Pandemic*, 96 N.Y.U. L. REV. 941 (2021) (discussing the Supreme Court’s recurring application of the “*Purcell* principle,” particularly amid the COVID-19 pandemic, analyzing flaws in *Purcell*’s reasoning, and addressing how the case threatens voting rights); Ruoyun Gao, *Why the Purcell Principle Should Be Abolished*, 71 DUKE L.J. 1139, 1140 (2022) (calling for the elimination of the *Purcell* principle, noting the principle’s shortcomings and asserting that its ambiguities make a mere revision infeasible).

<sup>117</sup> *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

<sup>118</sup> See *Veasey v. Perry*, 135 S. Ct. 9, 12 (2014) (mem.) (Ginsburg, J., dissenting).

<sup>119</sup> See *id.*

<sup>120</sup> See *id.* at 10.

are exempt from traditional stay standards.”<sup>121</sup> If it is clear from the facts in the record that voters are threatened with unconstitutional abridgments of their right to vote, it is the role of the courts to protect them, even when close to Election Day.<sup>122</sup> “The greatest threat to public confidence in elections in this case is the prospect of enforcing a purposefully discriminatory law, one that . . . risks denying the right to vote to hundreds of thousands of eligible voters.”<sup>123</sup> The closeness of an election, she argued, was a factor to be considered, not an absolute rule barring courts from vindicating the Constitution.<sup>124</sup>

Subsequently, the Court continued to invoke the *Purcell* principle to block voting rights. In 2018, in *Brakebill v. Jaeger*, the Supreme Court allowed a voter identification law to go into effect without considering the impact on the thousands of Native American voters who would be disenfranchised.<sup>125</sup> Because many American Indian reservations rely on post office boxes rather than street addresses for inhabitants, the Native American residents could not comply with a new state law requiring such an address on their ID in order to vote.<sup>126</sup> Again, Justice Ginsburg denounced the decision, which had been issued in an unsigned and unexplained order, recognizing that “the risk of disfranchisement” and the “risk of voter confusion appears severe.”<sup>127</sup> Voters, she explained, were likely to come to vote only to find that they were blocked “because their formerly valid ID is now insufficient.”<sup>128</sup>

More recently, in April 2020, the Court significantly enlarged the scope of the *Purcell* principle in a case involving an effort in Wisconsin to ensure safe voting during the pandemic. In *Republican National Committee v. Democratic National Committee*, the Court blocked a lower court’s ruling that would have aided voters in seeking both to protect their health and vote by supporting an extension of the postmark date for absentee ballots.<sup>129</sup> A massive closure of polling places because of COVID—a reduction that resulted in the loss of 175 polling sites, leaving only five available for the entire city of Milwaukee—had a disproportionate impact on black and brown urban voters who were forced to stand in long lines to vote.<sup>130</sup> The unsigned order stated that “courts should

<sup>121</sup> *Id.*

<sup>122</sup> *See id.* at 12.

<sup>123</sup> *Id.*

<sup>124</sup> *See id.* at 10–11.

<sup>125</sup> *See Brakebill v. Jaeger*, 139 U.S. 10, 10 (2018) (mem.) (Ginsburg, J., dissenting); *see also Election Law—Voter IDs—Eighth Circuit Denies Facial Challenge Under Supreme Court Precedent—Brakebill v. Jaeger*, 932 F.3d 671 (8th Cir. 2019), 133 HARV. L. REV. 1079, 1079–82 (2020) [hereinafter *Election Law—Voter IDs*].

<sup>126</sup> *See Brakebill*, 139 U.S. at 10 (Ginsburg, J., dissenting); *see also Election Law—Voter IDs*, *supra* note 125, at 1079–82.

<sup>127</sup> *Brakebill*, 139 U.S. at 10 (Ginsburg, J., dissenting).

<sup>128</sup> *Id.* at 11.

<sup>129</sup> *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1205–06 (2020).

<sup>130</sup> JOHN CURIEL & ANGELO DAGONEL, WISCONSIN ELECTION ANALYSIS (2020), <https://web.m>



ordinarily not alter election rules on the eve of an election.”<sup>131</sup> Even though many voters had not received absentee ballots in time because of “supply chain” issues during the pandemic, the Court brushed aside the worries that voters would be disenfranchised.<sup>132</sup> Because of the local election administration’s difficulties in getting ballots sent out in a timely fashion, the lower court had allowed giving voters an extra six days to receive and return absentee ballots.<sup>133</sup> Nonetheless, the Supreme Court vacated the lower court’s rulings, forcing voters to put their health at risk by joining the long lines at the five remaining polling places or give up a fundamental right.<sup>134</sup>

With astounding chutzpah, the majority wrote that “[b]y changing the election rules so close to the election date[,] . . . the District Court contravened this Court’s precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.”<sup>135</sup> But in fact, it was the Supreme Court that had overridden the lower court’s decision after the election authorities had already changed the date for accepting mail ballots.<sup>136</sup> Further underscoring the illegitimacy of its own ruling under long-standing precedents, the Court cited only *Purcell* and two other emergency orders to note that “when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error.”<sup>137</sup> Justice Ginsburg rightly foretold the impact—that voters would be required to “brave the polls, endangering their own and others’ safety” or “lose their right to vote, through no fault of their own.”<sup>138</sup> Further, she wrote, the Court had failed to acknowledge that any reluctance to adjust election rules close to Election Day “pale[s] in comparison to the risk that tens of thousands of voters will be disenfranchised. Ensuring an opportunity for the people of Wisconsin to exercise their votes should be our paramount concern.”<sup>139</sup>

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it.edu/healthyelections/www/sites/default/files/2020-08/Wisconsin%20Election%20Analysis%20Version%20(1).pdf [https://perma.cc/748J-WBZ9].

<sup>131</sup> See *Republican Nat’l Comm.*, 140 S. Ct. at 1207.

<sup>132</sup> See *id.* at 1207–09.

<sup>133</sup> See *id.* at 1206–07.

<sup>134</sup> See *id.* at 1206, 1208.

<sup>135</sup> See *id.* at 1207.

<sup>136</sup> See *id.* at 1206.

<sup>137</sup> See *id.* at 1207.

<sup>138</sup> *Id.* at 1211.

<sup>139</sup> *Id.*

Subsequently, in the summer of 2020, the Court issued a whole series of orders—affecting voting in Alabama,<sup>140</sup> Florida,<sup>141</sup> Idaho,<sup>142</sup> Oregon,<sup>143</sup> and Texas<sup>144</sup>—underscoring its disinterest in protecting against voter suppression laws if a challenge could be designated as colorably “close” to an election.<sup>145</sup> But when else would a voter object to a change in voting laws except when the vote approaches? In her unfortunate role as the court’s Cassandra, Justice Sonia Sotomayor criticized the majority for “condoning disenfranchisement” and “forbid[ding] courts [from] mak[ing] voting safer during a pandemic.”<sup>146</sup> *Purcell*, she astutely analyzed, has simply become a means for the Court to justify allowing voter suppression.<sup>147</sup> The Court’s role, established in the case law prior to *Purcell*, had been to ensure the functioning of elections, with an eye to protecting voting rights and weighing whether and how a court should intervene. Especially because *Purcell* is so often applied in the shadow docket, it has an especially antidemocratic aspect as the disenfranchisement of voters comes with no or little accompanying explanation or justification. In the Alabama case, *Merrill v. People First of Alabama*, the Court overturned a lower court order that had enjoined Alabama laws that made it harder for vulnerable people to vote by imposing more stringent requirements on voting by mail.<sup>148</sup> In *Raysor v. DeSantis*, the Court upheld an Eleventh Circuit stay on a lower court ruling finding Florida’s requirement unconstitutional that voters pay all fines and fees before voting.<sup>149</sup> Justice Sotomayor denounced the order in her dissent, stating that it “prevents thousands of otherwise eligible voters from participating in Florida’s primary election simply because they are poor”<sup>150</sup> and “continues” the Court’s “trend of

<sup>140</sup> See *Merrill v. People First of Ala.*, 141 S. Ct. 25, 25–27 (2020) (mem.) (Sotomayor, J., dissenting).

<sup>141</sup> See *Raysor v. DeSantis*, 140 S. Ct. 2600, 2600 (2020) (mem.) (Sotomayor, J., dissenting).

<sup>142</sup> Amy Howe, *Court Reinstates Idaho Ballot Initiative Rules*, SCOTUSBLOG (July 30, 2020, 7:49 PM), <https://www.scotusblog.com/2020/07/court-reinstates-idaho-ballot-initiative-rules> [<https://perma.cc/H3QM-MCS9>].

<sup>143</sup> Amy Howe, *Court Reinstates Oregon Ballot-Initiative Rules*, SCOTUSBLOG (Aug. 11, 2020, 6:18 PM), <https://www.scotusblog.com/2020/08/court-reinstates-oregon-ballot-initiative-rules> [<https://perma.cc/V8R6-T946>].

<sup>144</sup> See *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015, 2015 (2020) (mem.).

<sup>145</sup> See Andrew Vazquez, *Abusing Emergency Powers: How the Supreme Court Degraded Voting Rights Protections During the COVID-19 Pandemic and Opened the Door for Abuse of State Power*, 48 *FORDHAM URB. L.J.* 967, 972–73, 991–96 (2021); see also *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30–31 (2020) (mem.) (Kavanaugh, J., concurring).

<sup>146</sup> *Raysor*, 140 S. Ct. at 2603 (Sotomayor, J., dissenting).

<sup>147</sup> See *id.*

<sup>148</sup> *Merrill v. People First of Ala.*, 141 S. Ct. 25, 26–27 (2020) (mem.) (Sotomayor, J., dissenting).

<sup>149</sup> *Raysor*, 140 S. Ct. at 2609 (Sotomayor, J., dissenting).

<sup>150</sup> *Id.* at 2600.

condoning disenfranchisement.”<sup>151</sup> The stay “disrupts a legal status quo and risks immense disenfranchisement,” the very “situation that *Purcell* sought to avoid.”<sup>152</sup>

Even when the plaintiffs had tried to get around *Purcell* by bringing the case well in advance of the election, the Court has found a way to deny relief. For example, in *Texas Democratic Party v. Abbott*, voters based their challenge to a Texas law, which provided no-excuse absentee balloting only to voters over sixty-five years of age, on the Twenty-Sixth Amendment.<sup>153</sup> The plaintiffs asked the Court to move quickly to rule on the law directly from a trial court stay to ensure a decision on the law well before Election Day.<sup>154</sup> The Court refused,<sup>155</sup> ensuring that *Purcell* would block the appeal from the Fifth Circuit.<sup>156</sup>

Both in its certiorari docket and the shadow docket, the Supreme Court has taken a hatchet to voting rights, significantly limiting the ability to protect vulnerable voters against disenfranchisement and enabling legislators who seek to circumscribe the right to vote to their favored constituency.

#### A. *Democratic Theory*

Clearly, the use of the shadow docket to thwart voting rights seems antidemocratic—perhaps even more obviously than the Roberts Court’s generally hostile attitude towards efforts to protect access to the ballot, especially for people of color. Writing about the many dangers facing the United States’ form of government, many commentators have weighed in on the fragility of American democracy.<sup>157</sup> What often gets overlooked in those discussions, however, is the Court itself as an enabler of vote suppression and a pivotal player in setting back our nation’s efforts for a free and fair system of democracy.

In order to better understand the deleterious impact of the Court’s jurisprudence, as well as its use of emergency orders, it is important to analyze these decisions and the overall trend in light of democratic theory. The use of the “shadow docket” and an emergency process to render important decisions is plainly alarming in any area of law. Justice Elena Kagan highlighted this incongruence between the current Supreme Court’s use of the shadow docket and the transparency that would align with democratic principles in her dissent in *Louisiana v. American Rivers*,<sup>158</sup> joined by Chief Justice John Roberts and Justices

<sup>151</sup> *Id.* at 2603.

<sup>152</sup> *Id.*

<sup>153</sup> See generally *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (mem.); see also *Texas Democratic Party v. Abbott*, SCOTUSBLOG, <https://www.scotusblog.com/election-litigation/texas-democratic-party-v-abbott> [<https://perma.cc/677M-JS4Q>].

<sup>154</sup> *Texas Democratic Party v. Abbott*, *supra* note 153.

<sup>155</sup> See *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015, 2015 (2020) (mem.).

<sup>156</sup> See *id.* (denying the petition for writ of certiorari).

<sup>157</sup> See, e.g., Ishaan Tharoor, *Trump’s Bitter Fight and the Fragility of U.S. Democracy*, WASH. POST (Jan. 6, 2021, 12:00 AM), <https://www.washingtonpost.com/world/2021/01/06/trumps-fight-fragility-american-democracy/> [<https://perma.cc/8EBJ-VUE6>].

<sup>158</sup> *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1349 (2022) (mem.) (Kagan, J., dissenting).

Stephen Breyer and Sonia Sotomayor.<sup>159</sup> Critiquing the use of the shadow docket to stay a lower court decision that had vacated a Trump Administration rule for the Environmental Protection Agency, Kagan wrote that the Supreme Court “goes astray” when it uses the shadow docket as “only another place for merits designations—except made without full briefing and argument.”<sup>160</sup> Richard J. Pierce Jr., a professor at George Washington University Law School, made a similar observation, noting “the problem with the shadow docket” is the fact that “no one can read the opinion unless the court writes it.”<sup>161</sup> The lack of express reasoning from the Supreme Court majority in recent shadow docket decisions prevents the public from “fully judging the outcome[s] for ourselves.”<sup>162</sup> In a democracy, it is particularly problematic when these terse and unexplained decisions affect how our elections are run.<sup>163</sup> So what is a democracy? The term has been much contested with distinctions made between democracy, liberal democracy, illiberal democracy, and the democratization process (both how countries become democracies and how they move away from democracy).

Democracy as a concept originated from ancient Greek philosophers, but its “modern usage” dates back to the eighteenth-century “revolutionary upheavals in Western society,” including the American Revolution.<sup>164</sup> Democracy is generally defined as both a form of government and a process of selecting governments through free, fair, and competitive elections; however, more expansive definitions define democracy by sources of authority for the government, purposes served by the government, and procedures for constituting the government.<sup>165</sup> The first two components focus more on the legitimacy of this form of governance that takes its authority from the rule of the people and as an “institutional arrangement for arriving at political . . . decisions,” in which individuals acquire the power to decide by means of a competitive struggle for

<sup>159</sup> *Id.* at 1348; see also Damon Root, *Elena Kagan’s Valid Critique of the Supreme Court’s ‘Shadow Docket,’* REASON (July 20, 2022, 11:58 AM), <https://reason.com/2022/07/20/elena-kagans-valid-critique-of-the-supreme-courts-shadow-docket/> [https://perma.cc/9GL5-AURH].

<sup>160</sup> Root, *supra* note 159.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See Ellis Champion, *With Redistricting, the U.S. Supreme Court Is Leaving Voters in the Shadows*, DEMOCRACY DOCKET (May 3, 2022), <https://www.democracydocket.com/analysis/with-redistricting-the-u-s-supreme-court-is-leaving-voters-in-the-shadows> [https://perma.cc/95PT-ELSQ]; see also Jackie Adelsberg, *The Supreme Court’s Shadow Docket Foreshadows Its Future Harmful Rulings*, ALL. FOR JUST. (May 4, 2022), <https://www.afj.org/article/the-supreme-courts-shadow-docket-foreshadows-its-future-harmful-rulings> [https://perma.cc/WNB5-GUJK] (articulating how the Supreme Court is using the shadow docket to secure far-reaching changes in the law concerning voting rights without providing express justification for those changes).

<sup>164</sup> SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 5–6 (1991).

<sup>165</sup> See Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFFS. 22, 24–26 (Nov./Dec. 1997). See generally BERMAN, *supra* note 11. See also HUNTINGTON, *supra* note 164, at 6–7.

the people's vote.<sup>166</sup> But generally, most agree that the process—a majoritarian approach to deciding political questions—is the most significant factor defining democracy. As Chief Justice Earl Warren once said: “The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”<sup>167</sup>

Because democracy is focused on process, some scholars have suggested that it is possible to have a democracy while restricting liberal rights, such as freedom of speech and association. Certainly, there are countries that claim to be democracies that do, in fact, engage in multiparty elections but also restrict liberal rights as speech, assembly, and dress. Liberalism, by contrast, means a constitutional system that protects civic rights, such as freedom of conscience, speech, and property, but does not guarantee popular participation in governance. Famously, Fareed Zakaria, in a 1997 article for *Foreign Affairs Magazine*, posited that because majoritarian governance could restrict liberal rights, by necessity, constitutional liberalism must be a precondition for democracy.<sup>168</sup>

Zakaria's article was a foundational piece on illiberal democracy that observed that the West often conflates democracy to mean liberal democracy by bundling constitutional liberal ideals like freedom of speech, assembly, religion, and property with democracy. Both are important for a well-functioning government, he argued, but countries do not necessarily need democracy for good governance.<sup>169</sup> They do, however, need constitutional liberalism. Zakaria emphasized that “[e]lections are an important virtue of governance, but they are not the only virtue.”<sup>170</sup> And while “[c]onstitutional liberalism has led to democracy . . . democracy does not seem to bring constitutional liberalism.”<sup>171</sup>

Other authors also argue that the simplistic view of democracy as competitive elections, while accurate, is insufficient. Liberal rights cannot be separated from democracy (at least in the United States) because they are necessary to ensuring the free and fair process, Aziz Huq and Tom Ginsburg argued in their law review article *How to Lose a Constitutional Democracy*.<sup>172</sup> Thus, the “civil and political rights employed in the democratic process, the availability of neutral electoral machinery, and the stability, predictability, and publicity of a legal regime usually captured in the term ‘rule of law’” are necessary components of democracy.<sup>173</sup> These liberal rights are necessary to sustain a democracy; a more apt term for this “thicker” version of democracy is

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<sup>166</sup> See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 242 (3d ed. 1950).

<sup>167</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>168</sup> Zakaria, *supra* note 165, at 40–42.

<sup>169</sup> *Id.* at 40–41.

<sup>170</sup> *Id.* at 40.

<sup>171</sup> *Id.* at 28.

<sup>172</sup> See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 87 (2018).

<sup>173</sup> *Id.*

constitutional liberal democracy.<sup>174</sup> While Huq and Ginsburg acknowledge that some countries may have “robust electoral democracies” without some of these elements, in the American context, these elements are intertwined.<sup>175</sup>

Huq and Ginsburg posit three requirements of constitutional liberal democracy, with which I agree: (1) elections, (2) speech and association rights, and (3) rule of law. Without these factors, there will be limited democratic responsiveness.<sup>176</sup> In the American context, each of these elements reinforces the other. More specifically, there must be a democratic electoral system with free and fair elections in which a losing side cedes power—true democracy requires the genuine possibility of a change in power.<sup>177</sup> Liberal rights to speech and association that are closely linked to democracy in practice, including free speech, assembly, and association, must be protected for democracy to function.<sup>178</sup> And there must be rule of law, which means legal stability, predictability, and integrity of the law and legal institutions.<sup>179</sup> All three requirements are necessary in the American context and work in equilibrium—electoral democracy is intertwined with the Bill of Rights and liberal rights facilitate political competition.<sup>180</sup>

Huq and Ginsburg challenge Zakaria as well for his assertion that capitalism is a prerequisite to democracy; in fact, economic inequality, which is exacerbated by laissez-faire capitalism, is a challenge for democracy—one that has been exacerbated by the current Supreme Court’s rulings in a host of areas.<sup>181</sup> Huq and Ginsburg do allow, however, that a constitutional liberal democracy can be consistent with illiberal policies—such as violation of racial, religious, sexual orientation autonomy, economic inequality, and other factors—even while admitting that this concession makes constitutional liberal democracy not as robust as it could be.<sup>182</sup>

Rosalind Dixon and David Landau define democracy with a similar set of requirements as Huq and Ginsburg. Landau and Dixon note that a “thin” or minimalist view of democracy would consist of “free and fair elections, with a minimum set of independent checks and balances on the elected government, rather than more maximal definitions that might contain a range of richer but far more contestable commitments such as deliberation or substantive equality. We have called this conception the ‘democratic minimum core.’”<sup>183</sup> Their definition

<sup>174</sup> *See id.* at 86–92.

<sup>175</sup> *Id.* at 88–89.

<sup>176</sup> *Id.* at 87.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *See id.*

<sup>180</sup> *Id.* at 89–90.

<sup>181</sup> *See, e.g.,* *Janus v. Am. Fed’n of State, County, and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2459–60 (2018); *see also* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

<sup>182</sup> Huq & Ginsburg, *supra* note 172, at 91–92.

<sup>183</sup> David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313, 1323 (2020).

is more encompassing than those who posit democracy only as a process, such as Joseph Schumpeter.<sup>184</sup> Instead, like Huq and Ginsburg, they recognize that a real democracy requires something more than simply holding an election; it also requires

commitments to a degree of protection for certain individual rights, such as freedom of expression, association and assembly, equality or universal access to the franchise, because these rights are closely bound up with electoral fairness, independent institutions capable of supervising the electoral process, and checking the arbitrary use of executive power.<sup>185</sup>

This approach mirrors that articulated in the Copenhagen criteria, which govern admission to the European Union (EU) and “includ[e] a commitment to democracy, the rule of law, human rights, and respect for and protection of minorities.”<sup>186</sup> And as a corollary, the EU also underscores that a commitment to democracy must include free elections; secret ballots; ability to form partisan organizations, like political parties, free from the state’s interference; free press, speech, and association; and the rule of law.<sup>187</sup>

Thus, a more contemporary view of democracy is that it really requires both constitutional liberalism and popular participation and therefore includes elections, speech and association rights, and the rule of law. In addition, Huq and Ginsburg do note that the more a population is steeped in and committed to the idea of democracy, the more likely that nation is to have civil society and civic engagement, which also serve to anchor democracy.<sup>188</sup> And cross-currents from democratic recession in other countries can raise headwinds for others where democracy is fragile.<sup>189</sup> Democracy, by definition, is stronger when surrounded by democracy. That is why scholars like Huntington argued that changes either in a positive or negative direction happen in waves. Similar events happen more or less simultaneously within different countries or political systems.<sup>190</sup> Liberal democracy, in short, is subject to an array of corroding forces arising both from specific partisan formations and actors and from cultural, socioeconomic, or geopolitical dynamics of a structural nature.

More recently, scholars have focused on the challenges to democracy in a more granular way, with an eye toward responding and strengthening the system against encroaching autocracy. Much of this literature was precipitated by or resulted from President Trump’s election and efforts to subvert the 2020 election. For example, in their book *How Democracies Die*, Steven Levitsky and Daniel Ziblatt explain how democracies die in an escalating mutual distrust between

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 1323–24.

<sup>188</sup> See Huq & Ginsburg, *supra* note 172, at 102.

<sup>189</sup> *Id.*

<sup>190</sup> HUNTINGTON, *supra* note 164, at 430–50.

leaders and opposition who rarely compromise, creating a polarized society.<sup>191</sup> This triggers a slow process which undermines the political establishment—including checks and balances—through an appearance of legality. Levitsky and Ziblatt spoke to the Trump/Orban/Putin-era zeitgeist in their timely book, with a detailed explanation of how budding autocrats and their allies go about dismantling democratic systems.<sup>192</sup> Each strategy they describe applies in different but related ways to how a supine judiciary enables autocrats and antidemocratic forces in their drive to power.<sup>193</sup> The strategies Levitsky and Ziblatt lay out include not only “capturing the referees” but also “sidelin[ing]” rivals and dissenters and “rewrit[ing] the rules.”<sup>194</sup> In thinking about the Supreme Court’s election jurisprudence, and particularly the shadow docket decisions, it is clear that all of these strategies are implicated.

Capturing the referees, according to Levitsky and Ziblatt, implicates the complicity of the judiciary as well as law enforcement and intelligence agencies, tax authorities, and regulatory bodies.<sup>195</sup> While Trump certainly put in loyalists at the top of many departments who were willing to dispense with legalities in service of lining their own pockets and giving lip service to Trump’s many lies and distortions, his great success came in filling the courts with adherents of right wing legal theories that are very dismissive of democracy. Certainly, Trump also hoped for these judges to give him and his allies impunity for legal violations—true in certain situations and not in others—as well as to help him in his targeting of opponents. Both of these aspects of “capturing the referees” have been employed by other leaders with autocratic tendencies who have used a malleable court system to consolidate power, deflect legal challenges, and prosecute opponents.

The second element that goes hand in hand with capturing the referees is sidelining rivals and dissenters. Obviously, putting your own judges on the Court ensures that those seats cannot be filled with those who hold different views—especially in a system with life tenure and limited means to remove judges, even those whose legal reasoning is far from the mainstream. But with a captured judiciary, the autocrat is permitted even more control of power; with a judiciary that upholds election law changes as well as restrictions on media and civil society, such a leader can exclude other rival politicians from exerting any power to challenge the ruler. In other contexts, autocrats have used the finances of the government to strengthen allies and sideline critics—for example, by giving lucrative government business to friendly media organizations, by imprisoning journalists or bringing defamation suits, or by making life difficult for certain businesses that do not play along.

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<sup>191</sup> STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 54–56, 60 (2018).

<sup>192</sup> *See id.* at 56–58.

<sup>193</sup> *See id.* at 48–49, 63.

<sup>194</sup> *Id.* at 47, 95.

<sup>195</sup> *See id.* at 97.



And the third element, “rewriting the rules,” is already implicit in the other two. Why capture referees if not in the interest of changing the rules governing participation in government to sideline opponents and cement power? Antidemocratic leaders have used an array of approaches to accomplish these ends.<sup>196</sup> At the most ambitious, some have pushed to adopt new constitutions or significant amendments. However, the most typical approaches are aggressive gerrymandering,<sup>197</sup> court-packing,<sup>198</sup> and minority disenfranchisement.<sup>199</sup>

### III. THE ROLE OF THE COURT IN A DEMOCRACY

While much of this literature on democracy in the age of Trump has mentioned court systems, it is not a major focus.<sup>200</sup> So unfortunately, readers may be left with the impression that the courts are either not at fault for enabling authoritarianism or, in fact, a force for democracy. This is true neither in the United States nor in other illiberal democracies.

Constitutional democracies require checks and balances, and an independent high court is an essential element for ensuring a strong balance.<sup>201</sup> Under the rule of law, and particularly the principle of judicial independence, the validity and force of judgments should not be dependent on the will of either the legislature or the executive, as “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>202</sup> In a functioning system, legislative and executive actions must conform to the Constitution and public authorities must operate on a legal basis.<sup>203</sup> Finally, the judiciary must be “free from external pressure and not subject to political influence.”<sup>204</sup> But what happens when the political influence is the product of a years-long effort to stack the judiciary with fellow travelers with an antidemocratic vision of the Constitution? And is not the idea of an independent judiciary doubly undermined when the handpicked judges use secret rulings to advance their radical viewpoint?

<sup>196</sup> *See id.* at 47–51.

<sup>197</sup> *Cf. id.* at 51–52 (explaining how the ruling UMNO party in Malaysia and the ruling Fidesz party in Hungary used gerrymandering in the early 2000s and the 2010s, respectively, to maintain their domination of their countries’ political systems).

<sup>198</sup> *Cf. id.* at 48 (noting how the use of court packing measures in Hungary and Poland restricted courts’ capacity to act independently as checks on the power of governments).

<sup>199</sup> *Cf. id.* at 70, 112 (describing Southern Democrats’ use of minority disenfranchisement to cement one-party rule in the American South following Reconstruction).

<sup>200</sup> *Cf. Landau & Dixon, supra* note 183, at 1321 (asserting that the extant literature has not devoted as much attention to the issue of courts taking active measures to subvert liberal democracy, as opposed to the issue of how courts can defend liberal democracy).

<sup>201</sup> EUR. COMM’N FOR DEMOCRACY THROUGH L., VENICE COMM’N, *Poland: Opinion on the Act on the Constitutional Tribunal*, 108th Sess., Doc. 860/2016, at 5–6, (Oct. 14, 2016), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)026-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)026-e) [<https://perma.cc/QS77-N9K6>] [hereinafter Poland Opinion].

<sup>202</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see Poland Opinion, supra* note 201, at 16.

<sup>203</sup> Poland Opinion, *supra* note 201, at 4.

<sup>204</sup> *Id.*

Rosalind Dixon and David Landau have written in depth about the role of courts in illiberal democracies, helpfully clarifying that courts are not always the backstop for civil and political rights that some scholars have contended.<sup>205</sup> According to Dixon and Landau, “across a range of countries, would-be authoritarians have fashioned courts into weapons for, rather than against, abusive constitutional change. In some cases, courts have upheld and thus legitimated regime actions that helped actors consolidate power, undermine the opposition, and tilt the electoral playing field heavily in their favor.”<sup>206</sup> They admit, however, that recognizing democratic backsliding, particularly where it involves courts, is always somewhat contextual as there is a range of institutions, historical practices, cultural factors, and other elements that may make something that looks problematic in one system perfectly legitimate in another.<sup>207</sup> As Landau and Dixon note, “one cannot simply make a list of ‘abusive’ changes in the abstract.”<sup>208</sup> Courts, they say, engage in abusive acts when their decisions have a “significant negative impact on the democratic minimum core.”<sup>209</sup> Usefully, Landau and Dixon propose an approach that will better enable understanding of the role of courts in illiberal democracies through their role of providing legitimacy to illegitimate actions:

We label courts’ intentional attacks on the core of electoral democracy ‘abusive judicial review,’ and we argue that it is an important but undertheorized aspect of projects of democratic erosion. Regimes turn to courts to carry out their dirty work because, in doing so, they benefit from the associations that judicial review has with democratic constitutional traditions and the rule of law. Having a court, rather than a political actor, undertake an antidemocratic measure may sometimes make the true purpose of the measure harder to detect, and at any rate it may dampen both domestic and international opposition. The nature of the practice of abusive judicial review, which masquerades as a legitimate exercise of an institution that is now almost-universally promoted, makes the practice challenging to prevent and respond to. Not all instances of abusive review will succeed, and not all courts will (willingly) engage in the practice. But, we suggest, the practice is likely to be a significant part of the authoritarian toolkit going forward.<sup>210</sup>

They do not, however, isolate examples of emergency rulings by courts, apart from blessing an “emergency law” giving an executive expanded powers, for example, or suspending some aspect of a nation’s constitution allegedly due to the pandemic, war, or migration challenges.<sup>211</sup> Nor do they recognize that the

<sup>205</sup> See Landau & Dixon, *supra* note 183, at 1316–17. See generally SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015).

<sup>206</sup> Landau & Dixon, *supra* note 183, at 1316–17.

<sup>207</sup> *Id.* at 1324–26.

<sup>208</sup> *Id.* at 1324.

<sup>209</sup> *Id.* at 1325.

<sup>210</sup> *Id.* at 1317.

<sup>211</sup> By contrast, the Venice Commission criticized the Polish government for imposing a delayed schedule on emergency appeals. Or, in essence, the flip side of what I discuss in this

Court itself may be the primary actor in enabling illiberal tendencies in its support of aggressive gerrymandering, court-packing, and minority disenfranchisement—something even more relevant to the American context. Nonetheless, their definition applies exceedingly well to the Court’s jurisprudence and particularly to the abuse of the shadow docket by the antidemocratic members of the Court. Landau and Dixon write:

Based on comparative evidence, [we believe that] the fear espoused by critics of the Supreme Court—that it might stand by passively as democracy is dismantled—is a reasonable one. But the prospect of courts standing idly by in the face of an antidemocratic threat is not actually the worst-case scenario.<sup>212</sup>

Indeed not. This is the aspect that they have missed in their analysis of the United States; the Supreme Court is hardly an idle bystander in this situation.

They do, however, recognize that:

[T]here are at least hints of the weak form [of abusive judicial review] in the Court’s consistent refusal to hear partisan gerrymandering claims and related issues, and routes through which the strong form could at some point emerge, for instance centered around the “weaponization” of the First Amendment. The United States in some ways would be a fertile ground for abusive judicial review: There is a history of judicial legitimacy on which authoritarians could draw, and the formal rules do not make the judiciary especially difficult to capture in comparative terms. At this point, the major impediment to review of this kind in the United States would seem to lie in informal norms, including norms of legal professionalism on the part of federal judges, and political norms of respect for the independence of the federal judiciary. But there are also signs that informal norms of this kind may be eroding.<sup>213</sup>

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Article—using delay in service of authoritarianism. Article 38.3 of the Act adopted by the government provides that hearings should be scheduled in the order in which cases are received by the Tribunal, with exceptions for urgent cases involving constitutional issues, political legislation, and international law. Poland Opinion, *supra* note 201, at 11. However, the Law and Justice (PiS) party’s amendment provided that the President of the Tribunal could set a date outside the “sequence order” if the President of Poland requested, undermining separation of powers between the Tribunal and President. *Id.* PiS also attempted to allow a delay in hearings of six months or more. While this requirement was amended from six months to thirty days to fifteen days, the Venice Commission noted that this “uncompressible period of [fifteen] days may still be too long in very urgent cases” and that long lapses for hearings deprive the Tribunal’s measures of much of their effectiveness; such delays contradict the requirements for a reasonable length of proceedings under Article 6 of the European Convention on Human Rights. *Id.* at 12–13. The Commission also found that the “rules allowing postponement of a case for a maximum of six months upon request by four judges lack justification” and could be used to “slow down proceedings in delicate cases.” *Id.* at 14. Such restrictions could lead to a case where four judges exert undue “influence on the presiding judge without any justification in a manner not related to the merits of the case.” *Id.* The Commission found that a “proposed solution providing that all judges of the Tribunal be replaced,” even if adopted by a majority of parliament, would be a “flagrant violation of . . . international standards.” *Id.* at 5. Further, they found that the disciplinary proceedings against judges should not be initiated by the president and the government. *Id.* at 8.

<sup>212</sup> Landau & Dixon, *supra* note 183, at 1316.

<sup>213</sup> *Id.* at 1318.

Sadly, those norms have not only eroded, but did so long ago.

Although the shadow docket rulings were not issued as obviously in service of a specific executive—such as a president or, as in other countries, a prime minister<sup>214</sup>—they have been used to undermine a system of free and fair elections.<sup>215</sup> As Dixon and Landau mention, democratic backsliding is contextual.<sup>216</sup> I argue that in the United States, the Court’s election law decisions, and particularly those issued through the emergency process, are exhibit A for democratic backsliding. My argument is that the shadow docket rulings and the election jurisprudence overall must be seen to fit into the set of dangers that democracy commentators have recognized in the American context. It becomes a clearer argument when made against the backdrop of how authoritarian regimes in other countries have used the judiciary as a tool to power. As Landau and Dixon explain, there are many ways courts can support antidemocratic policies. For example, they cite courts’ blessings of extensions of presidential terms,<sup>217</sup> banning of political parties,<sup>218</sup> and reducing the power of institutions that may have some independence from the executive.<sup>219</sup> And importantly, illiberal leaders can influence the judiciary for the long term. Landau and Dixon write, “[m]ost of these changes fall into one of two buckets: attempts to ‘pack’ a court by influencing its composition and attempts to ‘curb’ a court by threatening its institutional powers or resources.”<sup>220</sup> Choosing compliant judges for vacancies is the most direct way to do this. But creating new seats—by, for example, preventing a prior administration from filling seats—can also accomplish the same end. In certain contexts, expanding courts’ sizes could also be seen as antidemocratic.

Traditionally “packing the court” has meant simply expanding the number of seats to dilute the votes of one group of justices. Since the beginning of American history, in fact, the Supreme Court’s size has been adjusted in response to political and legal disputes. As is well-known to legal scholars but perhaps not to a broader public, the court’s size is not, surprisingly, fixed in the Constitution. Instead, the size has been left to Congress to determine, and Congress has changed the number of justices several times in American history. On several occasions in the country’s first century, Congress altered the size of the Court,

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<sup>214</sup> See *id.* at 1316, 1328–29, 1339–40, 1352 (describing the ways in which various countries’ courts have issued rulings that enhance the power of a particular executive or regime).

<sup>215</sup> See David Gans, *The Roberts Court, The Shadow Docket, and the Unraveling of Voting Rights Remedies*, AM. CONST. SOC’Y (Oct. 2020), [https://www.acslaw.org/issue\\_brief/briefs-landing/the-roberts-court-the-shadow-docket-and-the-unraveling-of-voting-rights-remedies/](https://www.acslaw.org/issue_brief/briefs-landing/the-roberts-court-the-shadow-docket-and-the-unraveling-of-voting-rights-remedies/) [<https://perma.cc/95T7-TUJJ>].

<sup>216</sup> See Landau & Dixon, *supra* note 183, at 1355, 1378.

<sup>217</sup> See *id.* at 1357–62.

<sup>218</sup> See *id.* at 1363–65.

<sup>219</sup> See *id.* at 1367–68.

<sup>220</sup> *Id.* at 1339.

starting in 1789 when Congress created a six-person court.<sup>221</sup> Soon after, in 1800, Congress reduced the size to five.<sup>222</sup> Other size changes happened episodically in the nineteenth century, motivated by a mix of institutional and political concerns. It was not until the presidency of Franklin Roosevelt and his so-called court-packing plan in 1937 that another attempt was made to expand or contract the court.<sup>223</sup>

But court “packing” does not necessarily have to mean changing the actual numbers. As often happens in the American context, we have our own way of doing this—a form of “American exceptionalism” in service of illiberalism. In the United States, stacking the courts’ personnel with antidemocratic zealots has been the result of a deliberate and protracted strategy on the Right, led most visibly by the Federalist Society, to remake the American judiciary, particularly in service of an extreme right wing and antidemocratic agenda. This effort has been long in the making.<sup>224</sup> Founded as a student organization by students at the University of Chicago, Harvard, and Yale Law Schools, it was designed to create an intellectual home for conservatives at what they felt were overwhelmingly liberal institutions.<sup>225</sup> Some of them had worked on the presidential campaign of Ronald Reagan and felt a particular interest in upending the prevalent law school ideology.<sup>226</sup> They had no problem getting funding and support from established conservative academics such as Robert Bork, Richard Posner, and Antonin Scalia, allowing the organization to grow to other law schools and to spread to lawyer chapters.<sup>227</sup>

The Federalist Society was assisted in its growth by timing; Republicans dominated the federal government, which meant that Federalist Society student members were able to ascend to influential clerkships and legal jobs in the Reagan White House and Justice Department.<sup>228</sup> Indeed, the Justice Department was a particularly welcoming institution and, under Attorney General Edwin Meese, the agency devoted resources to developing useful legal theories and

<sup>221</sup> NCC Staff, *Why Does the Supreme Court Have Nine Justices?*, NAT’L CONST. CTR. (July 6, 2018), <https://constitutioncenter.org/blog/why-does-the-supreme-court-have-nine-justices> [<https://perma.cc/UH9D-WRWJ>].

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> See generally FREDRICKSON, *supra* note 91, at 106–07, 109–10 (describing the multifaceted efforts of the Federalist Society since 1982 to influence US politics and the makeup of the federal judiciary in a way that promotes conservative aims and does not come off as transparently political).

<sup>225</sup> *Id.* at 110; see also Brian Duignan, *Federalist Society*, BRITANNICA (Mar. 12, 2021), <https://www.britannica.com/topic/Federalist-Society> [<https://perma.cc/SM3U-BRCN>].

<sup>226</sup> FREDRICKSON, *supra* note 91, at 110; see also AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION I* (2015).

<sup>227</sup> FREDRICKSON, *supra* note 91, at 110; see also Duignan, *supra* note 225 (discussing the expansion of the Federalist Society, as well as early conservative support for the Federalist Society from academics, donors, foundations, and corporations).

<sup>228</sup> FREDRICKSON, *supra* note 91, at 110–11.

strategies to generate conservative outcomes.<sup>229</sup> On arrival at the Department of Justice, some of these young Federalist Society lawyers were perceived by mainstream Republicans as radical.<sup>230</sup> Charles Fried, who was the solicitor general for the last four years of Reagan's presidency, was not of the same view as the attorney general, who welcomed the ideas and the organization.<sup>231</sup> Fried believed that the positions society members crafted for Meese's speeches, including "questioning the constitutionality of independent agencies [and] suggesting that the president need not obey Supreme Court decisions with which he disagrees," were "extreme."<sup>232</sup>

This relationship between the Federalist Society and the government allowed the young organization quickly to assume an important place in the conservative infrastructure, including creating a pipeline for important jobs.<sup>233</sup> Ann Southworth, who devoted a book to the organization, writes, "[t]he Federalist Society pursues its integrating mission indirectly, by sponsoring conferences, generating publications, convening practice groups, promoting lawyers' involvement in public affairs, and facilitating appointments of judges and government officials."<sup>234</sup> Using these methods, the Federalist Society "facilitat[es] opportunities for members to put their shared legal principles into practice as 'citizen-lawyers.'"<sup>235</sup>

Southworth adroitly observes that the Federalist Society—and the legal Right, generally—have "sacrificed philosophical coherence to achieve political objectives."<sup>236</sup> And those political objectives are what matter. "They believe that the text of the Constitution strictly limits what Congress and judges can do," says Samuel Issacharoff, a professor at New York University School of Law.<sup>237</sup>

So they embrace a whole series of doctrines that say Congress can't do anything unless it's specifically authorized in the Constitution. And then administrative agencies can't do anything unless Congress has specifically authorized it by law. For decades, judges thought it was permissible to fill in the gaps left by the ambiguities in the Constitution and laws. But the current conservatives have an activist agenda to peel back the power of government.<sup>238</sup>

<sup>229</sup> *Id.* at 111.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*; MICHAEL AVERY & DANIELLE MCLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* 8 (2013).

<sup>232</sup> FREDRICKSON, *supra* note 91, at 111.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 112 (emphasis omitted); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 134 (2008).

<sup>235</sup> HOLLIS-BRUSKY, *supra* note 226, at 3.

<sup>236</sup> SOUTHWORTH, *supra* note 234, at 133.

<sup>237</sup> Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, *NEW YORKER: ANNALS L.* (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/9VUG-DFH7>].

<sup>238</sup> *Id.*

Steven Calabresi, Federalist Society founder and law professor, confesses as much with no shame, lauding the consequences of applying an originalist frame to contemporary cases.

The country would be better off with more federalism and more decentralization . . . with a president who had more power to manage the bureaucracy . . . if we did not abort a million babies a year as we have done since 1973 . . . if students could pray and read the Bible in public school and if the Ten Commandments could be posted in public places . . . if citizens could engage in core political speech by contributing whatever they wanted to contribute to candidates for public office . . . if we could grow wheat on our own farms without federal intrusion . . . if criminals never got out of jail because of the idiocy of the exclusionary rule . . . if our homes could not be seized by developers acting in cahoots with state and local government . . . [and] if state governments could not pass laws impairing the obligations of contracts.<sup>239</sup>

This statement of what originalism could achieve is truly radical: it would undo the New Deal (wage and hour laws, anti-child labor provisions), environmental protections, the right to choose, and most federal regulations providing important limits on corporate malfeasance—not to mention radically reinterpret the First Amendment’s ban on the establishment of a preferred religion. It would return us to the eighteenth century. But in the context of democracy, there is another insidious strain, one recognized in Chief Justice John Roberts’s *Shelby County* opinion establishing the doctrine of “equal sovereignty [of] the [s]tates.”<sup>240</sup> This concept would see the United States as unable to address voting problems that may be more prevalent in one state or another, as if we were still following the Articles of Confederation rather than taking part in a national government.

In her 2015 book examining the rise of the Federalist Society, scholar Amanda Hollis-Brusky agrees that theory is not everything: “To have a serious and lasting influence on the direction of constitutional law and jurisprudence—a constitutional revolution—you need to appoint the *right* cast of characters.”<sup>241</sup> You also need to police those characters’ work once appointed.<sup>242</sup> “The Federalist Society recognizes that judges are a critical audience for its work”;<sup>243</sup> “its white papers and events are directions on how to apply the law and it critiques opinions it believes deviate from the orthodoxy.”<sup>244</sup> “To be doubly sure the judges are hearing the right message, conservative organizations have provided judges with seminars and training programs in luxurious resorts—junktets of

<sup>239</sup> AVERY & MCLAUGHLIN, *supra* note 231, at 2, 10.

<sup>240</sup> *Shelby County v. Holder*, 570 U.S. 529, 535, 540, 542, 544 (2013) (internal quotations and emphasis omitted).

<sup>241</sup> FREDRICKSON, *supra* note 91, at 118; *see also* HOLLIS-BRUSKY, *supra* note 226, at 155.

<sup>242</sup> FREDRICKSON, *supra* note 91, at 118; *see also* HOLLIS-BRUSKY, *supra* note 226, at 155.

<sup>243</sup> FREDRICKSON, *supra* note 91, at 118; *see also* HOLLIS-BRUSKY, *supra* note 226, at 4, 5, 7, 147, 150, 152.

<sup>244</sup> FREDRICKSON, *supra* note 91, at 118; *see also* HOLLIS-BRUSKY, *supra* note 226, at 9, 72, 123–24, 133, 155, 157.

jurisprudence—where they learn why class actions should be limited and environmental regulations should be subjected to tough scrutiny.”<sup>245</sup> “Republican appointees dominate these events, making what Senator Sheldon Whitehouse called a ‘sort of right wing judicial jamboree and team-building exercise.’”<sup>246</sup> “Wined and dined by groups that have cases in their courts, the judges learn their dinner mates’ preferred outcome while being given a specific understanding of the factual and legal context of the cases.”<sup>247</sup> “Whitehouse quotes a newspaper editorial that rightly condemned these all-expenses-paid trips as ‘popular free vacations for judges, a cross between Maoist cultural reeducation camps and Club Med.’”<sup>248</sup> “These judges are instructed toward ‘unabashed activism’ and told that ‘the Reagan revolution will come to nothing’ if the judges don’t uphold a ‘libertarian Constitution.’”<sup>249</sup>

“Judges can also send direct messages in these informal settings about what cases they would like to see—and indirect messages in the opinions they write.”<sup>250</sup> “In 2009, Chief Justice [John] Roberts famously requested a challenge to the [VRA] in *Northwest Austin Municipal Util. Dist. No. One v. Holder*,<sup>251</sup> signaling that in a subsequent case the court would find the VRA unconstitutional.”<sup>252</sup> “[F]our years later, *Shelby County v. Holder* was the result.”<sup>253</sup> Similarly, Justice Samuel Alito made it clear in his writing in *Knox v. Service Employees International Union*<sup>254</sup> that the precedent *Abood v. Detroit Board of Education*<sup>255</sup>

which supported the right of public employees to organize and receive fair-share fees for collective bargaining costs from nonmembers, deeply offended him. He again critiqued *Abood* in *Harris v. Quinn* two years later, calling it “questionable on several grounds.” With the four other conservative justices, he conveyed that the court would like to overturn *Abood* in the future. Alito’s request was hardly subtle, and lawyers were ready with the case *Friedrichs v. California Teachers Association* (2016). *Friedrichs* almost brought an end to this important regime for working people, but we were spared at the last minute by the death of Antonin Scalia, which meant the decision was split 4–4. In 2018, with Justice Neil Gorsuch replacing Scalia on the bench, a new case presenting the same issue came before the court.<sup>256</sup>

<sup>245</sup> FREDRICKSON, *supra* note 91, at 118.

<sup>246</sup> *Id.* at 118–19; SENATOR SHELDON WHITEHOUSE & MELANIE WACHTELL STINNETT, CAPTURED: THE CORPORATE INFILTRATION OF AMERICAN DEMOCRACY 75 (2017).

<sup>247</sup> FREDRICKSON, *supra* note 91, at 119.

<sup>248</sup> *Id.*; WHITEHOUSE & STINNETT, *supra* note 246, at 75.

<sup>249</sup> FREDRICKSON, *supra* note 91, at 119; WHITEHOUSE & STINNETT, *supra* note 246, at 73–74.

<sup>250</sup> FREDRICKSON, *supra* note 91, at 119.

<sup>251</sup> *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009).

<sup>252</sup> FREDRICKSON, *supra* note 91, at 119.

<sup>253</sup> *Id.*

<sup>254</sup> *See generally* *Knox v. Serv. Emps. Int’l Union, Loc. 1000*, 567 U.S. 298 (2012).

<sup>255</sup> *See generally* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

<sup>256</sup> FREDRICKSON, *supra* note 91, at 119–20.



The Right won with *Janus*,<sup>257</sup> and now it “plans to decimate public employee unions, a critical protector of working people in the last sector where unions have any power.”<sup>258</sup>

The Right has also been adept at creating a self-perpetuating network, with judges promoted by the Federalist Society choosing law clerks and mentoring young lawyers who come out of its chapters. It is no secret that the judges who are moved forward by the Federalist Society or who are active in the group prefer law clerks who have been part of the organization. Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit—until he was forced to resign due to allegations of sexual harassment in December 2017—was quite forthright in saying that he looked for the Federalist Society on student resumes because it “tells me you’re of a particular philosophy, and I tend to give an edge to people I agree with philosophically.” (He also said, famously, in a response to a comment that Barbie dolls give girls a distorted body image, that “the only thing wrong that I saw when I held Barbie is when I lift her skirt there is nothing underneath.” This might explain why he had to resign.)<sup>259</sup>

Trump took this effort to a new level. Trump may have lost in 2020, but his judges are still with us. And he confirmed many of them. In fact, he has had a historic impact on the makeup of the federal judiciary.<sup>260</sup> After winning the presidency, he appointed just over 30 percent of the federal appeals court judges, fifty-four in total,<sup>261</sup> and more than one in four of the district court judges, 174 in total.<sup>262</sup> And more than any prior president, he served the wishes of those who wanted to take over the judiciary and undercut the democratic structure of American government. At the 2018 Federalist Society gala, former Senator Orrin Hatch, a Republican from Utah, stoked the crowd, saying: “Some have accused President Trump of outsourcing his judicial selection process to the Federalist Society. I say, ‘Damn right!’”<sup>263</sup> The year before, at the 2017 gala, White House Counsel Don McGahn, who oversaw the Administration’s effort to remake the judiciary, joked that it was “completely false” that the White House had “outsourced” picking federal judges to the group.<sup>264</sup> There was no need, he said. “I’ve

<sup>257</sup> See generally *Janus v. Am. Fed’n State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

<sup>258</sup> FREDRICKSON, *supra* note 91, at 119–120.

<sup>259</sup> *Id.* at 120.

<sup>260</sup> See *Federal Judges Nominated by Donald Trump*, BALLOTPEDIA, [https://ballotpedia.org/Federal\\_judges\\_nominated\\_by\\_Donald\\_Trump](https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump) [<https://perma.cc/XV9V-S5UB>].

<sup>261</sup> See *id.*; see also *United States Court of Appeals*, BALLOTPEDIA, [https://ballotpedia.org/United\\_States\\_Court\\_of\\_Appeals](https://ballotpedia.org/United_States_Court_of_Appeals) [<https://perma.cc/U33G-NH5Z>].

<sup>262</sup> See *Federal Judges Nominated by Donald Trump*, *supra* note 260; see also *United States District Court*, BALLOTPEDIA, [https://ballotpedia.org/United\\_States\\_District\\_Court](https://ballotpedia.org/United_States_District_Court) [<https://perma.cc/3HPF-G8US>].

<sup>263</sup> David Lat, *A Look Inside the Conservative Judge-Making Machine*, ABOVE L. (Nov. 16, 2018, 2:59 PM), <https://abovethelaw.com/2018/11/a-look-inside-the-conservative-judge-making-machine> [<https://perma.cc/V5T3-4JJZ>].

<sup>264</sup> Sheldon Whitehouse, *The Third Federalist Society*, SHELDON WHITEHOUSE: U.S. SENATOR FOR R.I. (Mar. 27, 2019), <https://www.whitehouse.senate.gov/news/speeches/the-third-federalist-society> [<https://perma.cc/UUF6-RNWX>].

been a member of the Federalist Society since law school. Still am.”<sup>265</sup> He added: “So, frankly, it seems like it’s been in-sourced.”<sup>266</sup> With the advice and counsel of the right wing legal movement, including Leonard Leo from the Federalist Society, Trump’s administration made filling judicial vacancies a priority, front-loading circuit courts as a strategy to control outcomes more efficiently.<sup>267</sup> Assisting the White House, Mitch McConnell ensured that Trump was able to outdo all his predecessors. What allowed this success was a well-developed pipeline and the systematic and unrelenting blockade by McConnell against Obama’s efforts to fill vacancies during his presidency. The resulting surfeit of vacant seats and the ready list of names allowed Trump to move fast and to fill a record number of judgeships. While many people may be familiar with McConnell’s obstruction of Merrick Garland to fill Scalia’s seat after his death, McConnell had blocked lower court judges the entire time he was majority leader during Obama’s presidency, leaving an incredible 106 vacancies at the end of the president’s second term.<sup>268</sup>

Many theorists of democracy focus on the importance of the constitutional protections. Indeed, many commentators in the United States context have argued that weaknesses in our Constitution are at least partly at fault for our failures of democracy. But others are more cynical about pure theory or paper rights as an answer to creeping authoritarianism. Thus, Hungarian András Sajó suggests that often a constitution does not need much changing to enable a democracy to flounder imperceptibly; the Hungarians enacted a new constitution but most of Prime Minister Orbán’s “power perpetuating measures could have been achieved without it.”<sup>269</sup> Sajó argues that “[n]o law will constrain power where it is that particular power that writes the law.”<sup>270</sup> Illiberalism and a sub rosa undermining of democracy happen, he argues, because leaders are able to exercise political power that is not subject to legal constraints, such as bending or ignoring norms that other leaders had followed.<sup>271</sup> In fact, such abuses “are *enabled* by the constitutional silence” regarding these practices—in other words, a “lack of limitation.”<sup>272</sup> What does matter, Sajó says, is personnel: “What tilted the [Hungarian] regime towards illiberalism was the change in” who was in control “of the existing institutions” and the bureaucracy below those leaders.<sup>273</sup> Change in who runs

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> See FREDRICKSON, *supra* note 91, at 123–25.

<sup>268</sup> *Id.* at 129; see also Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What Has He Done with Them?*, BROOKINGS (June 4, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump> [<https://perma.cc/U45S-C852>].

<sup>269</sup> András Sajó, *The Constitution of Illiberal Democracy as a Theory About Society*, 208 POLISH SOC. REV. 395, 398 (2019).

<sup>270</sup> *Id.*

<sup>271</sup> See *id.* at 397–99.

<sup>272</sup> *Id.* at 398.

<sup>273</sup> *Id.*

the public administration, he says, “seems to be the gold standard of illiberal regime building; in fact, it is perhaps the essence of the grabbing of state power in electorally induced ‘revolutions,’” where “institutional change is primarily a pretext” to allow a new group to take over the reins.<sup>274</sup> “Once loyalists are in place it makes little difference that the institutions had most, or all[,] standard guarantees of independence because these institutions are at the mercy of the legislative supermajority” or a super powerful executive.<sup>275</sup>

The Right has recognized the courts as key to turning our democracy into a plutocracy; to reducing important government protections for the environment; to eliminating the separation of church and state; to making reproductive health care inaccessible for many women; to destroying the rights of working people to band together for fair wages; and to making the criminal justice system yet more racially biased and unaccountable. Of greatest significance for our democracy, the Right has pursued a strategy to use the courts to short circuit the democratic process. In case after case, the Supreme Court has dismantled the electoral system, enabling corruption and intimidation to defeat democratic principles. The Court chose the president in *Bush v. Gore*,<sup>276</sup> enabled plutocrats and corporations to use enormous wealth to buy and control elections in *Citizens United*,<sup>277</sup> dismantled the VRA in *Shelby County*,<sup>278</sup> and enabled partisan gerrymandering in *Rucho*,<sup>279</sup> among many others. In a democracy, the rules are supposed to ensure fair participation in the electoral process.<sup>280</sup> But the Right has understood that rules can be manipulated to allow it to win more easily—that is especially true when the “umpires” are on your side.

#### IV. REFORMING THE SYSTEM

As mentioned, there are myriad ways courts can serve as handmaidens to illiberal democracy. For example, they support the consolidation of power by the executive, suppression of opposition groups, unfair changes to election rules,

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 399.

<sup>276</sup> *Bush v. Gore*, 531 U.S. 98, 103, 111 (2000).

<sup>277</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 318–19 (2010).

<sup>278</sup> *See Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013).

<sup>279</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–08 (2019).

<sup>280</sup> In *Rucho*, one can see a comparison to courts in illiberal democracies that have limited their jurisdiction in order to allow antidemocratic policies to remain unchallenged. *Id.* The Turkish Constitutional Court (TCC), has also played a role in court complicity by limiting its own jurisdiction. In 2016, the TCC “chose . . . a ‘hands-off’ approach concerning state of emergency decrees . . . dismiss[ing] its [own] longstanding jurisdiction.” Maria Haimerl, *The Turkish Constitutional Court Under the Amended Turkish Constitution*, VERFASSUNGSBLOG (Jan. 27, 2017), <https://verfassungsblog.de/the-turkish-constitutional-court-under-the-amended-turkish-constitution/> [<https://perma.cc/84Z7-B9L4>]. Under this new order, the authority to declare a state of emergency will belong only to the president, thus obstructing the TCC’s ability to check emergency decrees in the long term and giving the executive almost discretionary power in times of emergency. *Id.*

limits on minority rights, and on and so on. And in each country where this happens, courts play a similar role but in a way that is culturally, historically, and politically adapted to the particular social context. Certainly, in the United States, the Supreme Court's increasing use of its shadow docket to decide critically important cases with precedential impact plays a role in undermining our democracy. But as discussed above, the shadow docket is merely another aspect of the Supreme Court's antidemocratic orientation—a symptom but not the malady itself.

Obviously, if the shadow docket were the only manifestation of the United States Supreme Court's antidemocratic orientation, changing that aspect of its practice would help. Undoubtedly, *Purcell* should be reconsidered. Through a series of orders that either offer no reasoning or simply rely on *Purcell* and its progeny, the Court has effectively displaced a long line of prior precedents that recognized the judiciary's obligation to enforce the Constitution and voting rights laws, while also placing limits on the scope of remedies consistent with long-standing equitable principles. Reconsidering the *Purcell* principle would not mean courts would grant injunctive relief across the board. Rather, in line with *Reynolds* and other cases, the court would consider longstanding equitable principles which require consideration of the likelihood of success on the merits; the balance of hardships; and the public interest, including the interest in the orderly administration of the election. As *Reynolds* laid out,

In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.<sup>281</sup>

But as I have argued, the Supreme Court's abuse of its shadow docket is merely a symptom of the illness that is afflicting our democracy; even were the Court to abandon the questionable practice, the Court's malignant impact on democracy would remain unchecked. For example, earlier this summer, in *Dobbs v. Jackson Women's Health Organization*, a majority of the Justices overturned *Roe v. Wade* and gave states the ability to ban or strictly limit access to reproductive rights.<sup>282</sup> The radical Supreme Court that overturned *Roe* had already allowed a system of bounty hunting to impede women's access to abortion in Texas and thwarted myriad efforts to control the COVID pandemic through state and local regulation—not to mention undermined voting rights and efforts to control dark money in our political system. And in many—if not most of these cases—the outcome was six to three. As Justice Sonia Sotomayor has said, the Court is

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<sup>281</sup> *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

<sup>282</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

drenched in the “stench” of politics,<sup>283</sup> both in how its members have been selected and the rulings it issues.<sup>284</sup>

For a democracy truly to work, the judiciary must play a role in its proper functioning. For example, a system of checks and balances serves to ensure the judiciary does not overstep its role by countermanding the political branches unless there is a threat to democracy. That is, the judiciary should only step in when the political branches are seeking to deny democratic rights to minority or disfavored groups or use the political processes to deny fair and free elections. A Court in a democratic society must also not be so out of step with the people as to thwart popular will, unless the popular will denies others a chance to participate themselves in that democracy.

One reason our Court is now so out of alignment with the current day is because Republican presidents have appointed fifteen of the last nineteen justices and six of the current nine justices.<sup>285</sup> These appointments occurred even though for sixteen of the last twenty-eight years, Democrats were in the White House, and in six out of the last seven elections, the Democratic candidate won more votes.<sup>286</sup> President Trump, for example, appointed three justices in his single four-year term; his immediate Democratic predecessors, Presidents Obama, Clinton, and Carter, made a total of only four appointments in a combined twenty years in office.<sup>287</sup> Indeed, we now see the effect of this misalignment—the Supreme Court has been engaged recently in a radical effort to reverse longstanding precedents favored by a large segment of the public, such as on reproductive rights, guns, and regulation.

The fact that the Court fails to reflect the majority of Americans’ views becomes even more significant when considered in tandem with another problematic aspect of the United States Constitution—the highly undemocratic Senate. In the Senate, each state, from North Dakota to California, has two senators. Population shifts are making the big states even bigger,<sup>288</sup> resulting in even greater lack of representation for the citizens of large states (who also tend to be

<sup>283</sup> Ed Pilkington, *The ‘Stench’ of Politicization: Sonia Sotomayor’s Supreme Court Warning*, GUARDIAN (Dec. 4, 2021, 2:00 AM), <https://www.theguardian.com/us-news/2021/dec/04/us-supreme-court-sonia-sotomayor-abortion> [<https://perma.cc/G4ZU-HY7Y>].

<sup>284</sup> *See id.*

<sup>285</sup> *See Justices 1789 to Present*, SUP. CT. U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [<https://perma.cc/9DQ3-ETZN>].

<sup>286</sup> *See id.*; *see also US Presidents & Party Affiliation*, ELECTION LAB, [https://electionlab.org/presidents\\_list.pdf](https://electionlab.org/presidents_list.pdf) [<https://perma.cc/WH56-HRBP>].

<sup>287</sup> *See Justices 1789 to Present*, *supra* note 285.

<sup>288</sup> *See* Joanna Biernacka-Lievstro & Alexandre Fall, *A Third of States Lost Population in 2021*, PEW CHARITABLE TRS. (May 12, 2022), <https://www.pewtrusts.org/en/research-and-analysis/articles/2022/04/25/a-third-of-states-lost-population-in-2021> [<https://perma.cc/GW8B-5V68>]; *see also* Harry Stevens & Nick Kirkpatrick, *How America’s ‘Places To Be’ Have Shifted Over the Past 100 Years*, WASH. POST (May 12, 2021), <https://www.washingtonpost.com/nation/interactive/2021/census-population-changes/> [<https://perma.cc/5WYB-8UGQ>].

much more diverse demographically and more liberal than those of small states).<sup>289</sup> That means, the choice of judges is very much in the hands of the whitest and most rural Americans. And the Electoral College, another malign aspect of the Constitution, also gives those states extra weight in selecting the president, with the risk that candidates who do not secure the popular vote will nonetheless win the presidency and therefore the opportunity to appoint justices to the Court.

That is why I believe deeply that Americans must reform the Supreme Court and, most importantly, add justices who can mitigate this antidemocratic turn. For eight months, I served on the Presidential Commission on the Supreme Court, where we heard testimony, engaged in deep analysis of proposals to change the court, argued among ourselves, and ultimately produced a lengthy and dense report.<sup>290</sup> By the time our work was over, I had come to agree with those who advocated for a larger Court. Initially skeptical, I was persuaded that we face a fraught future without this reform. While I remain a fan of term limits for justices as well, that reform will not have an impact soon enough to prevent constitutional tyranny by the Court.

Changing the number of justices could have the most impact on the current Court's decisions and is designed to countermand an illegitimate antidemocratic supermajority. Congress on several occasions in the country's first century altered the size of the Court, starting in 1789 when Congress created a six-person Court.<sup>291</sup> Soon after, in 1801, Congress reduced the size of the Court to five justices.<sup>292</sup> Other changes to the Court's size happened episodically in the nineteenth century. The Court was profoundly mistrusted by antislavery members of Congress after its 1857 decision in *Dred Scott v. Sanford*,<sup>293</sup> which held that African Americans were not "citizens" and that Congress could not prohibit slavery in the territories.<sup>294</sup> As a result, during the Civil War, the Republican Congress in 1863 added a tenth seat to the Supreme Court, enabling President Abraham Lincoln to appoint a pro-Union, antislavery justice.<sup>295</sup> Similarly, after Lincoln's assassination, Congress reduced the size of the Court out of concern with President

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<sup>289</sup> See *2020 Census: Racial and Ethnic Diversity Index by State*, U.S. CENSUS BUREAU, <https://www.census.gov/library/visualizations/2021/dec/racial-and-ethnic-diversity-in-dex.html> [<https://perma.cc/W69S-GJQX>]; see also *Political Ideology by State*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/compare/political-ideology/by/state> [<https://perma.cc/T5BA-LBBG>].

<sup>290</sup> See generally PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT (Dec. 2021).

<sup>291</sup> NCC Staff, *supra* note 221.

<sup>292</sup> *Id.*

<sup>293</sup> See Alix Oswald, *The Reaction to the Dred Scott Decision*, 4 VOCES NOVAE 169, 187, 192–93 (2018).

<sup>294</sup> *Id.* at 172; see also *Scott v. Sandford*, 60 U.S. 393, 404, 420, 494 (1857).

<sup>295</sup> See Timothy Huebner, *The First Court-Packing Plan*, SCOTUSBLOG (July 3, 2013, 1:37 PM), <https://www.scotusblog.com/2013/07/the-first-court-packing-plan/> [<https://perma.cc/B34U-G39C>].

Andrew Johnson's sympathies for the South.<sup>296</sup> Congress restored the number of justices on the Court to nine after the election of Republican and former Union Army general President Ulysses S. Grant.<sup>297</sup>

President Franklin Roosevelt threatened to expand the Court as a response to a series of their decisions in 1935 and 1936, invalidating major New Deal legislation enacted by Congress and championed by Roosevelt, as well as myriad state labor and social welfare laws, all directed at bringing the nation out of the economic and social calamity of the Great Depression.<sup>298</sup> He threatened to appoint an additional justice for each justice over seventy years of age (who did not retire within six months)—for a possible total of fifteen members.<sup>299</sup> When the Court changed course and began to uphold his legislation, he abandoned the plan.<sup>300</sup>

Many currently in favor of Court expansion are motivated by the outrageous behavior of the Republicans in the Senate who refused to consider President Obama's nomination of Judge Merrick Garland to the Supreme Court. Additional motivations for many who support Court expansion include Senate Republicans' problematic confirmation process for each of the three Justices nominated by President Trump—and the effect those norm violations may have on both the health of the democratic process and the scope of bedrock constitutional rights.<sup>301</sup> It is imperative to address the ruptures to the norms but also to stop the Court on its path to an extreme antidemocratic agenda. In recent years, the Court took a sledgehammer to the VRA and other anchors of democracy by affirming state laws and practices that restrict voting and disenfranchise certain constituencies, such as people of color, the poor, and the young. Its decisions have empowered partisans on the Right, allowing them to entrench power despite popular opposition.

<sup>296</sup> See *id.*; see also Cydney Grannan, *Why Are There Nine Justices on the U.S. Supreme Court?*, BRITANNICA, <https://www.britannica.com/story/why-are-there-nine-justices-on-the-us-supreme-court> [https://perma.cc/4RLY-W9TL].

<sup>297</sup> See NCC Staff, *supra* note 221.

<sup>298</sup> See NCC Staff, *How FDR Lost His Brief War on the Supreme Court*, NAT'L CONST. CTR. (Feb. 5, 2022), <https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2> [https://perma.cc/VHV7-PHBB].

<sup>299</sup> See *id.*; see also *BRIA 10 4 a FDR Tries to "Pack" the Supreme Court*, CONST. RTS. FOUND., <https://www.crf-usa.org/bill-of-rights-in-action/bria-10-4-a-fdr-tries-to-pack-the-supreme-court.html> [https://perma.cc/Q3YC-PDMZ].

<sup>300</sup> See NCC Staff, *supra* note 221.

<sup>301</sup> See Liz Mineo, *Do Justices Really Set Aside Personal Beliefs? Nope, Legal Scholar Says*, HARV. GAZETTE (Oct. 15, 2020), <https://news.harvard.edu/gazette/story/2020/10/legal-scholar-warns-of-potential-supreme-court-changes/> [https://perma.cc/X3KE-S8UD]; see also Kermit Roosevelt III, *I Spent 7 Months Studying Supreme Court Reform. We Need to Pack the Court Now*, TIME (Dec. 10, 2021, 7:00 AM), <https://time.com/6127193/supreme-court-reform-expansion/> [https://perma.cc/DHM7-89J9] (arguing for court expansion given Senate Republicans' decision to not consider Merrick Garland's nomination, the capacity of a president elected without a majority popular vote to nominate justices with the confirmation of senators who represent a minority of Americans and Supreme Court acquiescence to anti-democratic measures).

Moreover, an expansion would potentially help make the Court reflective of the American people and thus be seen as more legitimate. With a larger number of justices, hopefully, at least some of the new justices would include those with experience in different sectors of the legal community or even the public sphere more generally. It also might include individuals of diverse religious, socioeconomic, racial, geographical, or other demographic backgrounds.

Another proposal for reforming the Supreme Court I support is nonrenewable limited terms, or “term limits,” for Supreme Court justices. It is anomalous to have the highest court in a nation dominated by a group that can determine the nation’s future for a generation or more. Thus, term limits would help ensure the Court would not get too out of step with society and curb the significant powers of any individual justice. Plus, a change in personnel would bring in new perspectives and legal thinking.

United States Supreme Court justices have always had life tenure, but this system is almost nonexistent in American state courts and internationally. For example, the United States is the only major constitutional democracy in the world that has neither a retirement age nor a fixed term of years for its high court justices.<sup>302</sup> A regularized appointment process, giving each president two appointments, for instance, for justices who would serve for eighteen years or fewer, would address these arbitrary consequences of life tenure by making judicial appointments more predictable and the composition of the Supreme Court more rationally related to the outcome of democratic elections over time. Right now, the nine Justices are unaccountable to the American public and sit for a generation or more—something that is untenable in a democracy. While life tenure is problematic generally, it has grown worse over time as justices live longer and are appointed younger. Up until the late 1960s, the average term of service was around fifteen years.<sup>303</sup> By contrast, the average tenure of the justices who have left the Supreme Court since 1970 has been roughly twenty-six years.<sup>304</sup>

An issue with term limits is that the Senate confirmation process is broken; it would be difficult to ensure that each president’s two nominees are considered and confirmed without disabling the filibuster and other means of Senate obstruction. I have written at length about how to reform the Senate, so I will not do so again here.<sup>305</sup> But simply abolishing the filibuster will not ensure that the

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<sup>302</sup> Ed Maixner, *US Deserves a 21st Century Supreme Court*, HILL (Dec. 24, 2021, 1:00 PM), <https://thehill.com/opinion/judiciary/587070-us-deserves-a-21st-century-supreme-court/> [<https://perma.cc/77GQ-2MPU>].

<sup>303</sup> Linda Greenhouse, *How Long Is Too Long for the Court’s Justices?*, N.Y. TIMES (Jan. 16, 2005), <https://www.nytimes.com/2005/01/16/weekinreview/how-long-is-too-long-for-the-courts-justices.html> [<https://perma.cc/MS7D-FCEG>].

<sup>304</sup> S.M., *Why Supreme Court Justices Serve Such Long Terms*, ECONOMIST (July 4, 2018), <https://www.economist.com/the-economist-explains/2018/07/04/why-supreme-court-justices-serve-such-long-terms> [<https://perma.cc/3USC-CZ52>].

<sup>305</sup> See, e.g., Holly Rosenkrantz, *The Senate Filibuster: Does It Impede Democracy?*, 31 CQ RESEARCHER 1, 8–9, 15–16 (2021) (including a written argument by Professor Caroline



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Senate would not readopt it or use another means of obstruction. That means there is likely something more profound that will need to change in the Senate's structure, most likely requiring some constitutional amendment.

#### CONCLUSION

The shadow docket is deeply troubling. But as I argue, our concern should be directed at the true sickness of our democracy, not at this mere symptom. As I mentioned at the outset, I am deeply worried about the challenges facing the United States in the present moment and believe the Supreme Court itself has exacerbated our difficulties. It is critical for American democracy that we review the role of the Court and adopt reforms that will restore a proper balance between the governing branches and a greater power to the people to determine their future. In terms of immediate impact, adding justices to the Supreme Court would be the most effective in curbing its extreme right wing ideology. The United States is the world's longest lasting democracy. Will it last?

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Fredrickson in favor of abolishing the filibuster on the grounds that the filibuster is undemocratic).

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