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Recommended Citation

Jed H. Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court* , *in* 37 Georgia Law Review 893 (2003).
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A SIX-THREE RULE: REVIVING CONSENSUS AND DEFERENCE ON THE SUPREME COURT

*Jed Handelsman Shugerman**

Over the past eight years, the Rehnquist Court has waged an activist revolution that is unprecedented both in scope and in conflict. Before 1995, the Supreme Court struck down acts of Congress 134 times.[1] Since 1995, the Court has struck down thirty-three more (one-quarter of the pre-1995 total).[2] The number of five-four decisions is even more startling. Before the Rehnquist Court, the Court had a bare majority in just twenty-two of its decisions overturning acts of Congress.[3] Since 1995, it split five to four in fifteen such cases, almost seventy percent of the pre-1995 total.[4] Although few of the five-four decisions before 1995 are considered major precedents, at least five or six of the recent opinions are very significant.[5] Eleven of those fifteen bare majority decisions featured the same five conservatives.[6] They have struck down acts of

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[1] *See infra* APPENDIX.

[2] *See infra* APPENDIX.

[3] *See infra* APPENDIX.

[4] *See infra* APPENDIX.

[5] These transformative decisions include the Court's rulings striking down congressional legislation with the doctrine of state sovereign immunity under the Eleventh Amendment. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); Bd. of Trs. v. Garrett, 531 U.S. 356, 363 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000); Alden v. Maine, 527 U.S. 706, 760 (1999); Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996); *see also* United States v. Morrison, 529 U.S. 598, 602 (2000) (interpreting Commerce Clause narrowly); Printz v. United States, 521 U.S. 898, 935 (1997) (interpreting Tenth Amendment expansively); United States v. Lopez, 514 U.S. 549, 568 (1995) (interpreting Commerce Clause narrowly). A restrictive interpretation of Congress's power to enforce equal protection through Section Five of the Fourteenth Amendment is also illustrated in *Garrett*, 531 U.S. at 374, *Morrison*, 529 U.S. at 619-27, and *Kimel*, 528 U.S. at 67.

[6] The five are Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Kennedy, and Justice Thomas, who voted together in the eight cases cited *supra* in note 5,

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Congress that kept guns away from schools[7] and coordinated the enforcement of national gun laws,[8] as well as laws that have combatted gender-motivated violence[9] and discrimination.[10] But this five-Justice activism can go both ways politically. While the conservatives currently have the upper hand against Congress, the liberals also have cobbled together five-vote coalitions to strike down federal pornography laws[11] and limitations on legal services for the poor.[12]

There is no quick fix for this breakdown of judicial consensus and deference to Congress. However, one option is to establish the following rule: The Supreme Court may not declare an act of Congress unconstitutional without a two-thirds majority. The Supreme Court itself could establish this rule internally, just as it has created its nonmajority rules for granting certiorari and holds,[13] or one Justice who would otherwise be the fifth vote could adopt the rule on his or her own. But if the Court fails to adopt such a rule, and if the "Faction of Five" continues to undermine Congress's authority, Congress arguably has the power to enact such a rule under the Exceptions and Regulations Clause in Article III of the Constitution.[14]

The power of judicial review itself is not the problem. Judicial review is a vital institution because the courts play a necessary role in enforcing the Constitution and checking democracy's excesses. The quandary is the use—and misuse—of judicial review, when the Court abandons a tradition of deference to Congress and invalidates Congress's laws despite the dissent of four Justices. Despite the widespread agreement that Congress's decisions warrant deference

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and in E. Enters. v. Aptel, 527 U.S. 498 (1998); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); and Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

[7] *Lopez*, 514 U.S. at 568.

[8] *Printz*, 521 U.S. at 935.

[9] *Morrison*, 529 U.S. at 602.

[10] *Garrett*, 531 U.S. at 356; *Kimel*, 528 U.S. at 67.

[11] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); United States v. Playboy Entm't Group, 529 U.S. 803, 811 (2000); Reno v. ACLU, 521 U.S. 844, 849 (1997); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 733 (1996).

[12] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 537 (2001).

[13] *See infra* notes 343-60 and accompanying text.

[14] U.S. CONST. art. III, § 2, cl. 2.

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because it is a coequal branch that represents the popular will, the Justices have not granted Congress deference except in dicta.[15] Considering the unprecedented rate of invalidated federal legislation, the practice of each individual Justice applying his or her own standard of deference simply is not working. It is time for a new approach, *i.e.*, a voting mechanism that institutionalizes deference to Congress. Just as the criminal jury's unanimity voting rule supplements the individualized "reasonable doubt" determination, a six-three voting rule would appropriately supplement the Justices' individualized determination of deference to Congress. If the goal of judicial review is to guard against government abuses, there also must be safeguards against the Court's abuse of its final and supreme power over the law. This Article presents the six-three rule as a concrete solution and as a thought experiment. In almost every era of judicial activism, Congress has debated Supreme Court voting rules.[16] But Congress has not touched the matter for two decades, and for even longer the legal academy has not advocated any such proposals.[17] At the very least, this Article seeks to provoke a debate about the role of the Supreme Court and the power of Congress to check the Court. But perhaps this debate actually may lead to concrete reform, either by the Justices themselves or by an act of Congress.

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[15] *See infra* notes 65-66 and accompanying text. The Rehnquist Court opinions mention the principle of deference in dicta, but they have not followed through with deference. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 627 (1999); City of Boerne v. Flores, 521 U.S. 507, 536 (1997); United States v. Lopez, 514 U.S. 549, 567 (1995); *id.* at 573 (Kennedy, J., concurring).

[16] *See infra* notes 576-623 and accompanying text.

[17] *See infra* note 597 and accompanying text. The last congressional proposal was in 1981, and the last time Congress extensively debated such proposals was in 1923 and again in 1936-1937. Max Boot, a Wall Street Journal editorial writer, proposed a two-thirds rule for the Supreme Court to invalidate a state law, but only in passing in several paragraphs. MAX BOOT, OUT OF ORDER 206-08 (1998). Earlier in 2002, Evan Caminker presented an excellent paper at an Indiana Law School symposium discussing a Supreme Court voting rule for invalidating acts of Congress on federalism grounds. Evan Caminker, *Institutionalizing Deference to Congress Through a Supreme Court Voting Rule*, 78 IND. L.J. (forthcoming 2003). We independently began our projects on supermajority voting rules on the Supreme Court, but upon discovering that the other was working on a similar idea (thanks to Prof. Judith Resnik for making the connection), we exchanged ideas and collaborated on the list of Supreme Court decisions invalidating federal statutes, see *infra* APPENDIX, and for a list of voting rule proposals in Congress, see *infra* notes 576, 579, 587, 588, 589, 592, 594, 597.

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Part I of this Article traces the institutional value of deference to Congress and of voting by consensus throughout the history of the Supreme Court, from John Marshall to the present.[18] Even the most activist Courts demonstrated a commitment to consensus and caution against striking down acts of Congress by bare majorities. The Marshall Court and the Taft Court clearly committed themselves to consensus and unanimity. This Article also finds that the activist Reconstruction Court, the Lochner Court, the Hughes Court, and the Warren Court reflected in their voting patterns, and often in anecdotes from controversial cases, a surprising value of consensus, particularly when reviewing acts of Congress. This tradition eroded most notably in the Burger Court, as five liberal Justices struck down state laws at a record pace, but it still rarely voided federal laws by such narrow votes. Just as a bare majority of the Rehnquist Court in its Eleventh Amendment decisions has elevated a common law of institutional practices above the literal text of the Constitution, similarly it should honor the Supreme Court's practice of consensus over two centuries as a type of common law rule or court tradition.[19]

Part II supports this voting rule with deliberative democratic theory, epistemology, and constitutional values.[20] The Supreme Court derives its legitimacy from a combination of its expertise, its indirect representation of the people, the force of its reasoning, the power of precedent, and the necessity of checks and balances. While

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[18] *See infra* notes 28-267 and accompanying text.

[19] Although the Burger Court generally pursued broad coalitions in controversial cases and avoided five-four votes in striking down congressional acts, it marked the clearest departure from the tradition of consensus, as a bare majority of five liberal Justices struck down a record number of state laws. The Burger Court's narrow liberal majority has been replaced by the Rehnquist Court's five-vote conservative majority, which is even less concerned with norms of consensus and compromise. This rapid transition illustrates how a one-vote majority rule is unstable, and how it is a problem for both the left and the right. In general, judicial review of Congress has been overwhelmingly conservative through the history of the Court. The Court was particularly conservative from Reconstruction through the mid-1930s, striking down congressional acts that protected civil rights, voting rights, workers, economic regulation, and other progressive interests. *See infra* notes 258-66 and accompanying text. The only period when the Court struck down conservative federal legislation was during the Warren Court, and, to a much lesser extent, the Burger Court. The Rehnquist Court's conservative judicial review is therefore more consistent with the Court's history.

[20] *See infra* notes 268-342 and accompanying text.

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one might suggest that a voting rule might detract from these values, this proposed two-thirds rule actually bolsters each of these core principles. Because bare majority votes are too random to warrant the stamp of the experts' approval, and because the Court's representativeness is so imperfect, a consensus rule minimizes the problem of, and more importantly, the appearance of, arbitrariness. In terms of the force of reason, a two-thirds rule promotes democracy's values of dialogue, consensus, reason, and legitimacy. The Constitution's structure of checks and balances and the Article V amendment process point to a two-thirds rule as symmetrical and appropriate for constitutional politics. Finally, such a rule promotes the stability of precedent. Because of their instability and perceived illegitimacy, five-four decisions may be short-lived victories, and in the past, they have triggered political backlashes.[21]

This Article discusses the mechanics of the rule in Part III, drawing from the experiences of the supreme courts of Ohio, Nebraska, North Dakota, and South Carolina. Interviews with some of the judges on those courts indicate that their courts abide by the rule in good faith and do not subvert it. Just as the United States Supreme Court has created its own nonmajority rules for granting holds and certiorari, it could create this consensus rule in a similar way. A self-created guideline could be flexible, so that the Court could tailor it to foster more dialogue and to create exceptions when judicial review is most necessary and least challenged by the countermajoritarian difficulty. If the Supreme Court refuses to adopt this rule on its own, Part IV argues that Congress has the power to create the rule.[22] The Constitution grants Congress the power to make "exceptions and regulations" for the Supreme Court's jurisdiction. Although the Court's precedents leave this question relatively open, the academic community raises more challenges to such a proposal, but Congress could reduce the power of these objections with a neutral rule that would only go into effect a few years after its passage.

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[21] For example, the Supreme Court's controversial five-four decision in the late 1960s and early 1970s produced a backlash propelling President Nixon to victory, and thus led to erosion of those decisions and nominations of Justices opposed to the Warren Court's agenda. *See infra* notes 324-26, 597 and accompanying text.

[22] *See infra* notes 437-575 and accompanying text.

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In every era of judicial activism in American history, members of Congress have proposed consensus voting rules to limit the Court, and Part V briefly surveys these proposals during the 1820s, Reconstruction, the Progressive Era and the 1920s, the New Deal, the Warren Court, and the Burger Court.[23] None of these reforms passed, but they seem to have succeeded in a different way. Congress's debating their proposals correlated to the Court accommodating the other branches soon thereafter. This Part focuses on the Progressive Era and the 1920s in order to trace the pattern between these proposals and the Court's subsequent restraint. As Congress and presidential candidates debated radical judicial reform proposals, moderate Progressives pushed through revised legislation that answered the Supreme Court's constitutional concerns. The Court then upheld many of these compromise statutes, suggesting that even if radical reform proposals have little chance of passage, they create a debate that may lead the Court to be more conciliatory and enable moderates to push through their programs.

This Article suggests a similar strategy today.[24] A six-three proposal stands no chance of passing both houses of Congress and winning the President's signature, and even then the Supreme Court might strike it down, perhaps with poetic justice by a vote of five-to-four. However, the country would benefit from a debate about the Rehnquist Court's activism and about the need to revive deference and consensus on the Court. In tandem with this more confrontational debate, Congress should follow the Progressives' strategy of dialogue and legislative revision.

Before launching into the argument, I offer two observations. First, this article has two perspectives–indeed, two voices–that sometimes appear to conflict. One voice is that of "good governance," objectively advocating for a procedural reform, regardless of the substantive results. This is the voice of Parts II, III, and IV, as well as most of Part I. The other voice is that of "legal strategy," challenging the Rehnquist Court's jurisprudence and advocating proposals to effect substantive legal changes. That is the voice of

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[23] *See infra* notes 576-639 and accompanying text.

[24] *See infra* notes 624-39 and accompanying text.

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Part V and portions of Part I. These perspectives may seem in tension at times, but this Article is guided by the general principle of restoring deference to legislatures. When addressing this problem in the abstract, I adopt the "good governance" perspective, and when addressing the particular problems in this moment in our history, I adopt a more political and legal strategic perspective.

Second, I recognize that the term "judicial activism" is loaded and has multiple meanings. Judicial activism is commonly understood as exercising judicial power without legal legitimacy, either by "strik[ing] down the actions of other branches of government,"[25] freely "reject[ing] its own precedents,"[26] or generally "legislating from the bench."[27] I argue that the Rehnquist Court has been activist in each sense, because in striking down so many acts of Congress, it has abandoned its institutional precedent of consensus, and it has substituted its own policy preferences for Congress's.

I. A HISTORY OF CONSENSUS AND JUDICIAL RESTRAINT

A. THE ELEVENTH AMENDMENT AND THE GENERATION OF COMMON LAW RULES

Perhaps the best place to begin is with the constitutional approach in the most definitive and most numerous cases of the Rehnquist Court's activism, the Eleventh Amendment state sovereign immunity decisions. These decisions account for seven of the fifteen bare-majority decisions overturning congressional acts in the last eight years.[28]

Neither the text of the Eleventh Amendment nor the text of Article III explicitly bars an individual from suing one's own state under federal law.[29] Instead, the Rehnquist Court has cited common

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[25] Cass R. Sunstein, *A Hand in the Matter*, LEGAL AFFAIRS, Mar.-Apr. 2003, at 31.

[26] *Id.*

[27] Orin S. Kerr, *Upholding the Law*, LEGAL AFFAIRS, Mar.-Apr. 2003, at 26.

[28] Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1868 (2002); Bd. of Trs. v. Garrett, 531 U.S. 356, 363 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000); Alden v. Maine, 527 U.S. 706, 760 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Fund, 527 U.S. 666, 691 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999), Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996).

[29] *See* U.S. CONST. art III, § 2; U.S. CONST. amend. XI. The text of the Eleventh

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law practices, institutional history, and precedent to extend sovereign immunity to broad new levels. These decisions rely heavily on Justice Iredell's lone dissent in *Chisholm v. Georgia*[30] in 1793, which framed the text of the Eleventh Amendment that was adopted two years later.[31] Justice Iredell recognized not an explicit constitutional command, but a common law practice of sovereign immunity by the English common law and by the states and Congress at the time of the Founding.[32] Following Iredell's dissent, the Eleventh Amendment still failed to prohibit specifically such suits against one's own state.[33] Building on the same arguments offered by Justice Iredell, the Eleventh Amendment decisions return to the role of the English common law, the sovereign immunity rules adopted by the states after the Revolution, and Hamilton's *Federalist* No. 81.[34] From *Hans v. Louisiana*[35] in 1890 to the recent decisions since 1996, the Supreme Court's federalists have continued to emphasize not the text of the Eleventh Amendment, but "the principle embodied in the Eleventh Amendment."[36] In addition to relying on *Hans* as precedent, a narrow majority of the Court relies on the historical practices of government institutions, including how the states and Congress approached sovereign immunity in the late eighteenth century.[37] Justice Kennedy, writing for the Court, conceded that "Eleventh Amendment immunity" is a "misnomer," because sovereign immunity's foundation is more in "the Constitution's structure, its history, and the authoritative interpretations by this Court."[38] As Justice Scalia wrote, "[T]he Eleventh Amendment was important not merely for what it said but for what it reflected:

Amendment reads, "The judicial power of United States shall not be construed to extend to suits in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[30] 2 U.S. (2 Dall.) 419, 429-49 (1793) (Iredell, J., dissenting).

[31] *See* U.S. CONST. amend. XI.

[32] 2 U.S. (2 Dall.) at 434-35 (Iredell, J., dissenting).

[33] *See* U.S. CONST. amend. XI.

[34] THE FEDERALIST No. 81 (Alexander Hamilton); *see also* Hans v. Louisiana, 134 U.S. 1 (1890) (holding that state must consent to jurisdiction before citizen may sue).

[35] 134 U.S. 1 (1890).

[36] Pennsylvania v. Union Gas Co., 491 U.S. 1, 42 (1989) (Scalia, J., dissenting).

[37] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 712-27 (1999); Seminole Tribe v. Florida, 517 U.S. 44, 70-73 (1996).

[38] *Alden*, 527 U.S. at 712-13.

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a consensus that the doctrine of sovereign immunity . . . was part of the understood background against which the Constitution was adopted."[39]

Such extratextual/nontextual interpretation is surprising from conservative jurists who generally have called for stricter construction of the text, and the dissenters in these cases have consistently pointed out the problems in their nontextualism.[40] Given how much these five Justices value, the historical practices of institutions, and how they turn these practices into constitutional common law, they ought to consider how their own voting practices dramatically depart from two centuries of the Supreme Court's institutional history of consensus. The history of the Supreme Court suggests that there is a common law rule that weighs heavily against the Court striking down acts of Congress by a one-vote majority.

B. THE DOCTRINES OF DEFERENCE AND CLEAR MISTAKE

From the beginning, American judges cautioned against striking down a legislative act unless they reached a level of certainty about the act's unconstitutionality. They recognized that this power was an extraordinary judicial action in a democratic society, and it was one that needed to overcome a heavy burden. In 1796, Justice Samuel Chase wrote, "I am free to declare, that I will never exercise [the power to void an act of Congress] *but in a very clear case*."[41] Justice William Paterson followed this reasoning in an 1800 opinion, stating that in order to strike down a legislative act, there must be "a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication."[42] In *Fletcher v. Peck*,[43] Chief Justice Marshall offered the same principle:

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[39] *Union Gas*, 491 U.S. at 31-32 (Scalia, J., dissenting).

[40] *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting); *Alden*, 527 U.S. at 793 n.29 (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 83-84 (Stevens, J., dissenting); *id.* at 109-16 (Souter, J., dissenting).

[41] Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (emphasis in original); *see also* Calder v. Bull, 3 U.S. 386, 395 (1798).

[42] Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800).

[43] 10 U.S. (6 Cranch) 87 (1810).

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> The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case . . . [t]he opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.[44]

He later wrote that the "magnitude" of this question required "cautious circumspection," and "that, in no doubtful case, would [the Supreme Court] pronounce a legislative act to be contrary to the constitution."[45] In *Ogden v. Saunders*,[46] Justice Bushrod Washington similarly remarked that the Court should hold all laws valid "until its violation of the constitution is proved beyond all reasonable doubt."[47] He matter-of-factly stated that "[t]his has always been the language of this Court . . . and I know that it expresses the honest sentiments of each and every member of this bench."[48]

The Supreme Court adhered to these principles of deference after the Civil War.[49] Of the statements to this effect, perhaps the strongest is Chief Justice Waite's:

> [T]his declaration [that a congressional act is unconstitutional] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.[50]

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[44] *Id.* at 128.

[45] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 625 (1819).

[46] 25 U.S. (12 Wheat.) 213 (1827).

[47] *Id.* at 270.

[48] *Id.*

[49] *See* Knox v. Lee, 79 U.S. (12 Wall.) 457, 531 (1872) (referring to *Fletcher v. Peck* and noting that acts of Congress should not be overturned without evidence of clear violation of Constitution).

[50] Union Pac. R.R. Co. v. United States, 99 U.S. 700, 718 (1878) (Sinking Fund Cases).

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Numerous state courts adopted the same rule or similar deference rules, that the unconstitutionality must be "plain and clear,"[51] and "so manifest as to leave no room for reasonable doubt."[52] One legal scholar in the 1920s placed the number of judicial references to this rule in the thousands.[53] Surveying these judicial decisions, James Thayer famously explained his rule of deference: the Court should intervene only when the Justices decide that there has been a "clear mistake."[54]

Times have changed, and theories of judicial review have evolved.[55] In a world after *Brown v. Board of Education*[56] and the Court's role in the civil rights revolution, these nostrums about permissive judicial deference to legislatures feel a little outdated, but still we face the basic problem of judicial supremacy and the "countermajoritarian difficulty." A constitutional democracy bases its legitimacy ultimately on popular sovereignty, but seeks to balance popular sovereignty with the values of legality and justice. Such a democracy empowers a judiciary to be the guardian of legality and justice. Judicial review of legislation protects individual rights, minority interests, and the constitutional structure against government excess and majoritarian abuse. This understanding of the courts' role in democracy conceives of judicial review as a last line of defense to be used carefully. The Court is an interpreter of law, not a maker of law, and thus judges must be

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[51] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140 (1893) (discussing *Kemper v. Hawkins*, 1793 Virginia case).

[52] *Id.* (quoting *Commonwealth v. Smith*, 1811 Pennsylvania case). In his influential *The Origin and Scope of American Doctrine of Constitutional Law*, James Bradley Thayer cited about a dozen more state cases adopting the "reasonable doubt" standard for judicial review. *Id.* at 140-43. One example is a statement by Lemuel Shaw, the legendary Chief Justice of the Massachusetts Supreme Court, who declared in 1834, "[T]o repeat what has been so often suggested by courts of justice, that . . . courts will . . . never declare a statute void, unless the nullity and invalidity . . . are placed . . . beyond reasonable doubt." *In re* Wellington, 33 Mass. (16 Pick.) 87, 95 (1834).

[53] Robert Eugene Cushman, *Constitutional Decisions by a Bare Majority of the Court*, 19 MICH. L. REV. 771, 776 (1921).

[54] Thayer, *supra* note 51, at 140; *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 354 n.12 (1936) (Brandeis, J., concurring) (relying on James Thayer's "clear mistake rule"); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 35 (2d ed. 1962).

[55] *See* Caminker, *supra* note 17.

[56] 349 U.S. 294 (1955).

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especially cautious about crossing that fine line. Alexander Bickel[57] and John Hart Ely[58] have articulated more modern guidelines for balancing the countermajoritarian difficulty against the Court's role as defender of liberty and equality. The very recent surge in invalidating acts of Congress offends both the nineteenth century sensibility and the late-twentieth century sensibility about deference to Congress.

Evan Caminker calls the "clear mistake rule" an "atomistic" norm, an individualized evaluation of burdens.[59] A second method of placing burdens is, in Caminker's terms, a "voting protocol," which raises a collective bar of voting margin to reach a certain result.[60] Over time, the judge-by-judge deference evaluation has eroded to a point where it now has uncertain meaning, if any. It is time to bolster these norms with the collective approach of voting rules. A parallel example is the criminal jury, which combines individualized burden-evaluation with a supermajority rule. Each juror must be certain of guilt beyond a reasonable doubt, and then the jurors together must vote unanimously (or almost unanimously in some states) in order to convict. One of the main reasons for these burdens is that our society would much prefer to acquit the guilty than convict the innocent.[61] Other scholars, especially Richard Primus, have offered additional explanations about the jury voting rule, including the importance of dialogue and deliberation in the discovery of facts and the development of norms.[62] These ideas are elaborated upon below.[63] The stakes of judicial review of legislation are not as high as the stakes in a conviction, so a unanimity rule for the Court is unreasonable, as well as impractical. But the parallel is that both actions are extraordinary actions that

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[57] BICKEL, *supra* note 54.

[58] JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 260-415 (1980).

[59] Caminker, *supra* note 17.

[60] *Id.*

[61] Another reason for unanimity is tradition, because it was the practice of English common law in the middle ages.

[62] Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1445-54 (1997).

[63] *See infra* notes 275-76 and accompanying text.

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should be pursued with caution and only with a greater degree of certainty.

Over the last two centuries, various commentators have picked up on this issue and have suggested that narrowly divided decisions are inconsistent with the "clear mistake rule."[64] One might dismiss this critique by saying that a five-four decision may simply mean that while five Justices found the law unconstitutional beyond a reasonable doubt, four Justices applied the same deference rule, and may have felt that the law was unconstitutional, but did not have the same certainty. However, it is no longer clear that the Justices give such respect to Congress's decisions. In many of the recent five-four decisions, the Rehnquist Court has referred to the principle of judicial deference to Congress, but the results of these cases reveal that these words were only weak dicta.[65] Justice Breyer chided the Court for this lip-service in his dissent in *Garrett*:

> The Court's more recent cases have professed to follow the longstanding principle of deference to Congress. And even today, the Court purports to apply, not to depart from, these standards. But the Court's analysis and ultimate conclusion deprive its declarations of practical significance. The Court "sounds the word of promise to the ear but breaks it to the hope."[66]

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[64] C.W. COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 169 (1912); FRANK GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 352 (1911); Cushman, *supra* note 53, at 783-84 (citing SIMEON BALDWIN, THE AMERICAN JUDICIARY 103 (1905)); W.F. Dodd, *The Growth of Judicial Power*, 24 POL. SCI. Q. 193, 194-95 (1909).

[65] *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) (stating that "Congress's § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment," but rather, Congress can prohibit "somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text"); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 627 (1999) ("Congress must have wide latitude"); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (noting that Congress's "conclusions are entitled to much deference"); United States v. Lopez, 514 U.S. 549, 567 (1995) (striking down Gun-Free School Zones Act of 1990 despite fact that "prior cases [gave] great deference to congressional action"); *id.* at 573 (Kennedy, J., concurring) ("The deference given to Congress has since been confirmed.").

[66] Bd. of Trs. v. Garrett, 531 U.S. 356, 386-87 (2001) (Breyer, J., dissenting) (citations omitted).

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So many narrow decisions overturning Congress reveal the weakness of this commitment and the problem with individualized judgments of deference.

Additionally, if courts are truly serious about according such deference to Congress on an individual basis, then they should be serious about deference collectively. The clear mistake rule is sensible because courts institutionally are less representative than Congress, and thus an institutional rule—a voting rule—is reasonable in addition to an individualized rule. The doctrine of clear mistake also seeks to increase the reliability, and the appearance of reliability, of its decisions. A voting rule would do just that.

For most of its history, the Supreme Court appears to have observed the importance of consensus and bolstered this individualized norm with an informal collective approach. Until 1995, the Court very rarely struck down acts of Congress with a one-vote majority. The next section discusses these overall numbers and their meaning as an institutional norm.[67] The following sections go into a little more detail as to different eras of the Court, and find more evidence of a conscious effort to avoid such split decisions.[68]

C. NUMBERS AND NORMS

The explosion of five-to-four decisions invalidating acts of Congress stems from the confluence of the following two broader Supreme Court trends: a dramatic increase in five-four decisions generally, and an even more sudden increase in striking down acts of Congress. Robert Riggs's study of the Supreme Court's five-four decisions shows that the Court had remarkably few dissents and even fewer five-four decisions from the Founding through the mid-twentieth century.[69] Starting in the early 1940s, dissents leaped in number, along with the number of five-four decisions.[70] The number of dissents have continued rising since then.[71] The rate of five-four

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[67] *See infra* APPENDIX.

[68] *See infra* notes 91-267 and accompanying text.

[69] Robert Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667, 673 (1993).

[70] *Id.* at 673-703.

[71] *Id.* at 674-80.

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decisions stayed level until around 1970, and increased since then.[72] Riggs's charts suggest three phases of five-four voting in the twentieth century. The period from 1900 to 1940 was consistent with the nineteenth century's lack of dissent, with five-four votes occurring in less than ten percent of all decisions.[73] The period from 1940 to 1970 (*i.e.*, from Franklin Roosevelt's appointments through the Warren Court) witnessed a rise in five-four splits to approximately twenty percent of all opinions.[74] From the Burger Court to the Rehnquist Court, the rate rose to thirty and then an astounding forty percent.[75] But even as the number of five-four votes increased, the Court still rarely overturned acts of Congress by one-vote majorities until very recently. The Appendix at the end of this Article shows the number of decisions invalidating acts of Congress, along with the number of bare majority decisions among them listed with an asterisk.[76]

The Court invalidated federal laws only twice before the Civil War (*Marbury v. Madison* and *Dred Scott*).[77] The first series of decisions against acts of Congress occurred during Reconstruction, when the Congressional Republicans clashed with a more conservative Court.[78] The Court overturned other Reconstruction civil rights laws in the 1870s and 1880s,[79] and then overturned Progressive and New Deal legislation from 1895 to 1936.[80] From Reconstruction through World War I, the Court overturned federal statutes about once a year, with a five-four vote about once a decade.[81] From World War I through the New Deal "switch in time" in 1937, the Court invalidated acts of Congress a little less than twice a year, and by

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[72] *Id.* at 674.
[73] *Id.* at 674, 682, 711-14.
[74] *Id.* at 674, 711-14.
[75] *Id.*
[76] *See infra* APPENDIX.
[77] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 519-30 (1856) (finding Missouri Compromise Act unconstitutional); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803) (finding unconstitutional act of Congress giving court authority to issue writs of mandamus to officer).
[78] *See infra* APPENDIX.
[79] *See infra* APPENDIX.
[80] *See infra* APPENDIX.
[81] *See infra* APPENDIX.

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a one-vote majority seven times in about twenty years, which was the high watermark of bare-majoritarianism at that point.[82]

While dissent increased in the 1940s, the Court invalidated few acts of Congress,[83] because a Democratic Court trained in judicial restraint found little controversy with a Democratic Congress. The Warren Court began with a similar approach, overturning few federal laws.[84] But beginning in the late 1950s, the Warren Court returned to a level of activism against Congress similar to the first one-third of the twentieth century, and the Burger Court acted similarly.[85] The Warren Court and the Burger Court reached about the same mark of five-four decisions against Congress as occurred in the 1920s and 1930s, approximately one every three years.[86] The Appendix shows a dramatic rise in decisions against federal laws from 1990 to the present, and an explosion of decisions by a one-vote majority, particularly after 1995.[87] The number of these decisions over the last eight years is completely unprecedented, with a rate of about five decisions overturning congressional acts each year, and by a five-four decision about twice a year.[88] This is six times the rate of the 1920s and 1930s and of the Warren and Burger Courts.[89]

Of course, it is difficult to define a "norm." The statistics are glaring, but they don't quite establish a norm by themselves. Most norms in the judiciary are, at some point, recognized explicitly in legal opinions (*e.g.*, the norms of stare decisis, adherence to precedent, the role of dicta and dissents, modes of constitutional and statutory interpretation, and techniques of legal reasoning). In terms of the tradition of consensus, this norm is unstated. There seem to be no court opinions touting the importance of voting consensus, no dissenting opinions calling for such a rule, and no potential fifth vote saying that he or she would have voted with the majority, but for the norm of consensus. There is no smoking gun.

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[82] *See infra* APPENDIX.
[83] *See infra* APPENDIX.
[84] *See infra* APPENDIX.
[85] *See infra* APPENDIX.
[86] *See infra* APPENDIX.
[87] *See infra* APPENDIX.
[88] *See infra* APPENDIX.
[89] *See infra* APPENDIX.

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The lack of a phenomenon does not mean that a norm against that phenomenon exists. However, the small number of five-four opinions striking down acts of Congress before 1995 is more than just a coincidence. The Justices consciously avoided split decisions in several of their most controversial decisions, including some of their decisions overturning congressional legislation. The next sections briefly examine the Court over its history from John Marshall to Warren Burger and offer evidence from voting patterns and specific cases to suggest that the Justices consciously avoided one-vote majorities.[90] The norm of consensus is not a "strong norm" that is explicitly stated and cited, such as the principle of stare decisis. But this history of consensus, established by iteration, practice, and tradition for two hundred years, is also not a "weak norm" that should be easily ignored.

D. THE FIRST CONGRESS AND THE MARSHALL COURT

In the early republic, Congress and the Supreme Court established a norm of consensus, which helped create a foundation for judicial review. Article III of the Constitution does not specify how many Justices sit on the Supreme Court,[91] so in bringing Article III into reality, the first Congress created one Chief Justice and five associate Justices, obviously an even number of Justices.[92] Whereas the Constitution created a provision for breaking ties in the Senate,[93] and established an odd number of representatives in the House,[94] neither the Constitution nor the Judiciary Act designed a

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[90] *See infra* notes 91-267 and accompanying text. Of course, Chief Justice Warren famously cobbled together a unanimous decision in *Brown* and in subsequent desegregation decisions, and Justice Blackmun pursued a broader majority in *Roe*, achieving a seven-two vote. *See infra* notes 193-97, 229-30. In the Warren Court's "Red Monday," a series of decisions against McCarthyite "domestic-security" laws in 1957, the Justices switched from six-three votes upholding those laws to six-three, seven-two, and even nine-zero votes against the laws. *See infra* notes 217-21. In another example, Chief Justice William Howard Taft "massed" the Court in broader coalitions in several controversial decisions. *See infra* notes 154-77 and accompanying text.

[91] *See* U.S. CONST. art. III.

[92] The Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (1789).

[93] U.S. CONST. art. I, § 3, cl. 4.

[94] U.S. CONST. art. I, § 2, cl. 3. The tradition of odd-number apportionment in the House has continued since the Founding. U.S. Census Bureau, *Congressional Apportionment-Historical Perspective*, *available at* http://www.census.gov/population/www/censusdata/

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Court to operate by a one-vote majority. When all six Justices voted, only a four-to-two decision constituted a majority. Given the direct question about a law's constitutionality, which is essentially a "yes" or "no" decision, pluralities would be very rare. Of course, an absence of one Justice permitted a three-to-two vote to be a majority, but by design, most decisions would depend on a two-thirds majority. One might reply that Congress chose six Justices to correspond to the six regional Circuits at the time, but there is no reason Congress could not have created a seventh Circuit or assigned six Circuits to six Associates, leaving the Chief Justice without an assignment. Thus, the first Congress created a structural, if not explicit and not universal, consensus rule. It is also important to note that the Judiciary Act of 1789 defined a quorum as four Justices,[95] which was an exercise of congressional power, rather than an internal Court rule. Such a regulation suggests that Congress has considerable power over the Court's decisionmaking procedures. In the 1820s, proponents of a voting rule pointed to the First Congress's choice of six Justices as an implied supermajority rule.[96]

Chief Justice Marshall carried this rule into practice, even when the Court had an odd number of Justices. It is now a cliché that John Marshall transformed the Supreme Court from "the least dangerous" branch, in the words of Alexander Hamilton,[97] to the constitutional "first among equals." Of all the Articles establishing government powers, the Constitution is most ambiguous about the powers of the Supreme Court, and it never explicitly grants the Supreme Court the power of judicial review.[98] Scholars generally describe the early Supreme Court as remarkably unimportant and feeble, focusing on the number of leading statesmen who refused nominations to the Court.[99]

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apportionment/history.html (last updated Dec. 1, 2000).

[95] The Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (1789).

[96] Congressman Trimble of Kentucky, supporting a supermajority rule in a House debate on May 3, 1824, drew on the example of the Judiciary Act's six Justices. 8 ABRIDGMENT OF THE DEBATES OF CONGRESS 54 (1857).

[97] THE FEDERALIST No. 78 (Alexander Hamilton).

[98] *See* U.S. CONST. art. III.

[99] Bernard Schwartz observed that "the outstanding aspect of the Court's work during its first decade was its relative unimportance." BERNARD SCHWARTZ, A HISTORY OF THE

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It is important not to exaggerate the Supreme Court's irrelevance before Marshall;[100] it often deferred to the other branches during his tenure and afterward. Nevertheless, John Marshall transformed the Supreme Court into a potent branch of government. One key to the Court's transformation was its emphasis on unanimity and speaking with one voice.[101] Chief Justice Marshall's Supreme Court discarded the fractured process of reading decisions seriatim, justice-by-justice, and in its place, he inaugurated a powerful

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SUPREME COURT 33 (1993). In their definitive work on the early Supreme Court, George Haskins and Herbert Johnson conclude that the Court was a "relatively feeble institution during the 1790s, too unimportant to interest the talents of two men who declined President Adams' offer of the position of Chief Justice." GEORGE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 7 (1981). William Cushing refused the offer of elevation from Associate to Chief Justice, and Charles C. Pinckney, Edward Rutledge, Alexander Hamilton, and Patrick Henry declined nominations to the Court. John Jay resigned from the Court to become Governor of New York, and he turned down reappointment. John Rutledge stepped down from the Court to become chief justice of South Carolina's highest court. SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 3 (Scott Douglas Gerber ed., 1998). In these early years, the Supreme Court offered some hints at its power of judicial review, but it did not follow through by striking down any legislation, including the most constitutionally questionable Alien and Sedition Acts, ch. 74, 1 Stat. 596 (1798) (expired). This failure made the Court a particular target of the Jeffersonians, from the Virginia and Kentucky Resolutions to their victory in 1800. The passage of the Eleventh Amendment so soon after *Chisolm v. Georgia*, 2 U.S. 419 (1793), demonstrated that Congress and the states could rapidly respond to check the Court's power. Along with questions about the Court's doctrinal and political power, it also lacked leadership, collaboration, and the procedural tools for persuasion and authority.

[100] SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL, *supra* note 99, at 2-4.

[101] *See* R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 151 (2001). As Kent Newmyer concludes in his recent biography on Marshall, the early Court used its unity of voice to establish itself as a legal institution protected from political attack. *Id.* at 209. Marshall changed the Court's delivery of decisions from a seriatim reading of each Justice's opinion to one opinion of the Court, most often read by the Justice with seniority—usually Marshall himself. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 186, 191 (1991). If Justices had dissented or concurred in the opinion in conference, they could decline to announce their separate opinion, and they often did, giving an impression of a more unified bench. *Id.* at 187-88. Only thirty-two dissents were filed out of 305 cases between 1816 and 1823. *Id.* at 188 n.135. Some historians contend that Marshall used this system of seniority and opinions of the Court to impose his views on the other Justices. For example, G. Edward White suggests that this process limited collaboration on opinions and merely created an illusion that the Court was speaking with one voice. *Id.* at 189-194. This interpretation points to only an appearance of harmony and consensus, but nevertheless, if Marshall dominated the opinion-drafting and delivery, the dissenting Justices still acquiesced to his influence. They were free to write dissents and reject Marshall's system, but they opted not to. This decision suggests that these other Justices also valued the role of consensus in bolstering their own power as an institution.

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tradition of unanimous decisions, giving the Court one powerful and persuasive voice.[102] The unanimous opinion in *Marbury v. Madison*[103] established the significant connection between judicial review and Court unity. Of the eighteen decisions striking down state laws, the Court ruled unanimously twelve times, and with only one dissent four times.[104] The two other decisions had three dissents, but these cases happened late in Marshall's tenure on the Court.[105]

The story of the Supreme Court's unanimity under Chief Justice Marshall began as much as a survival strategy as a source of strength. This story is discussed elsewhere in much more detail,[106] but the basic facts are as follows. In 1801, after losing the 1800 campaign, President Adams and the Federalists created a new circuit court system and appointed last-minute nominees to these courts and to other federal positions.[107] These "Midnight Judges" outraged the Jeffersonian Republicans, and when they took over Congress in 1801, they repealed the Federalists' Judiciary Act of 1801 and began a series of attacks on the federal courts.[108] Congress reinstated the old system, in which the Supreme Court Justices rode the circuits themselves.[109] Chief Justice Marshall and Justice Samuel Chase believed that Congress had violated Article III by stripping federal judges of their offices.[110] However, they could not persuade the other Justices to boycott their circuits, and as a result,

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[102] WHITE, *supra* note 101, at 186-89.

[103] 5 U.S. (1 Cranch) 137 (1803).

[104] THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2035-38 (Johnny H. Killian & George A. Costello eds., 1996).

[105] *See id.* at 2037 (citing Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), and Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830)).

[106] *See generally* Jed Handelsman Shugerman, *Marbury and Judicial Deference: The Shadow of* Whittington v. Polk *and the Maryland Judiciary*, 5 U. PA. J. CONST. L. 58 (2002).

[107] Judiciary Act of 1801, ch. 4, 2 Stat. 89 (1801).

[108] Shugerman, *supra* note 106, at 77-79.

[109] *See* Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 [hereinafter "Repeal Act"]; Act of Apr. 29, 1802, ch. 31, 2 Stat. 156.

[110] Letter from Justice Samuel Chase to Justice William Paterson (Apr. 6, 1802) (on file with New York Public Library); Letter from John Marshall to William Paterson (Apr. 6, 1802), *in* 6 PAPERS OF JOHN MARSHALL 105 (Charles Hobson ed., 1990); Letter from John Marshall to William Cushing (Apr. 19, 1802), *in* 6 PAPERS OF JOHN MARSHALL 108; Letter from John Marshall to William Paterson (Apr. 19, 1802), *in* 6 PAPERS OF JOHN MARSHALL 108-09; Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *in* HASKINS & JOHNSON, *supra* note 99, at 174-75.

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they acquiesced and decided to act in unison in riding circuit. In *Stuart v. Laird*,[111] a unanimous opinion written by Justice William Paterson, the Court sustained the constitutionality of the Republican Circuit Court Act of 1802.[112] One week earlier, the Court had ruled unanimously in *Marbury v. Madison*,[113] with the opinion for the Court written by Chief Justice Marshall. But *Marbury* did not actually confront Jefferson and the Republicans on any controversial issue, and it was the only decision by the Supreme Court overturning an act of Congress until *Dred Scott* fifty-four years later. The Marshall Court expanded its powers in other ways and its method continued to be an amazing degree of consensus.

The Court established judicial review on a pillar of wily strategy in *Marbury*, but also on a pillar of deference to legislatures and political majorities, and another pillar of unanimity and consensus. As noted above in Part I.B,[114] Marshall established the following important rule of deference in 1810: When the Court considers a conflict between legislation and the Constitution, it should reconcile them if possible, unless "[t]he opposition between the constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other."[115]

While little evidence remains of the behind-the-scenes negotiations of the Marshall Court, Donald Roper offers strong evidence that the Marshall Court pursued consensus through difficult compromises. When the Court divided on a legal question, the Justices sometimes negotiated a final decision they all could join.[116] Roper closely examines *Sturges v. Crowninshield*,[117] a unanimous opinion delivered by Marshall, and *Ogden v. Saunders*,[118] a four-three decision on a similar issue eight years later, with Marshall in dissent. Because there were so few concurrences and dissents in this period, it is very difficult to trace individual Justices' legal

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[111] 5 U.S. (1 Cranch) 299 (1803).
[112] *Id.* at 308-09.
[113] 5 U.S. (1 Cranch) 137 (1803).
[114] *See supra* notes 43-44 and accompanying text.
[115] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810).
[116] Donald M. Roper, *Judicial Unanimity and the Marshall Court—A Road to Reappraisal*, 9 AM. J. LEG. HIST. 118 (1965).
[117] 17 U.S. (4 Wheat.) 122 (1819).
[118] 25 U.S. (12 Wheat.) 213 (1827).

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views and to discern divisions among the Justices. *Ogden* is one of the rare cases in the Marshall Court with dissent, and it was the only constitutional case in which Chief Justice Marshall dissented in his thirty-four years on the bench. That one dissent illuminates the process of compromise.[119]

In *Sturges*, Marshall's opinion for the Court, ostensibly supported by all of the Justices, struck down New York's insolvency law of 1811 for its retroactive application, which violated the constitutional prohibition on laws impairing "obligation of contracts."[120] Whereas Marshall usually used dicta to justify greater national power over the states, in *Sturges* he did the opposite. While one might have read *Sturges* to prohibit all state bankruptcy laws, whether prospective or retrospective, Marshall prevented such an inference by going beyond the particular case. His opinion declared in dicta that such bankruptcy laws were valid enactments of concurrent state power.[121] In *Ogden* eight years later, a majority of four Justices adhered to Marshall's dicta in *Sturges*—but three Justices, including Marshall, dissented.[122] The majority upheld this bankruptcy law because it performed prospectively.[123] Marshall's dissent rejected such laws as a violation of Article I, Section 10 of the Constitution,[124] regardless of how they went into effect, and he repudiated his own reasoning in *Sturges*. He condemned the state legislatures for enacting debtor relief laws "to such an excess . . . as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man."[125]

Roper explains this reversal by suggesting that in 1819 Marshall compromised on his opposition to all state bankruptcy laws in order to keep Justices Livingston and Johnson on board a unanimous Court.[126] However, compromise failed in *Ogden*, and Marshall broke away to dissent and voiced his true opinion.[127] Roper concludes that

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[119] Roper, *supra* note 116, at 127.
[120] *Sturges*, 17 U.S. at 206.
[121] *Id.* at 191.
[122] *See* Roper, *supra* note 116, at 125.
[123] *Id.*
[124] *See* U.S. CONST. art. I, § 10.
[125] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 355 (1827) (Marshall, C.J., dissenting).
[126] *See* Roper, *supra* note 116, at 125-28.
[127] *See Ogden*, 25 U.S. at 354-55.

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Sturges "serves as a valid indication of the extent to which the Chief Justice and his associates were willing to go to maintain unanimity."[128] One could point to *Ogden* as a counterexample of dissensus, but *Ogden* is a very rare exception to the Marshall Court's consensus norm. In the Marshall Court's thirty-five years, it never struck down a federal or state law by a one-vote majority, and in fact, there was never such a decision with two dissenters, and there was a lone dissent in just four of these decisions.[129] *Ogden* is the only decision upholding a state or federal law by a one-vote majority.[130] In only fourteen cases of any kind did the Marshall Court rule with a majority of one.[131] If there had been more dissents like the one in *Ogden*, we could discern more individual leanings and more evidence of compromise, but perhaps the lack of dissents is sufficiently strong evidence of compromise.

E. RECONSTRUCTING CONSENSUS: FROM THE CIVIL WAR THROUGH THE *LOCHNER* COURT

After *Marbury*, the next decision striking down an act of Congress was *Dred Scott v. Sandford*,[132] fifty-four years later. In addition to denying citizenship to all those of African descent, the Court invalidated the Missouri Compromise that prohibited slavery in the northern territories, and helped precipitate the Civil War. Amazingly, this decision was seven to two, demonstrating that while the Court did adhere to the tradition of consensus, such a tradition does not necessarily produce just results or national harmony.

After the Civil War, the Supreme Court became much more activist, striking down unprecedented numbers of federal and state laws. After eighty years with only two acts of Congress voided, the Supreme Court from 1865 to 1910 struck down federal laws almost

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[128] Roper, *supra* note 116, at 126.

[129] *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827) (Thompson, J., dissenting); Osborne v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 871 (1824) (Johnson, J., dissenting); Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 713 (1819) (Duvall, J., dissenting); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 143 (1810) (Johnson, J., dissenting).

[130] Note, *Judgments of the Supreme Court Rendered by a Majority of One*, 24 GEO. L.J. 984, 987-1002 (1936).

[131] *Id.*

[132] 60 U.S. (19 How.) 393 (1857).

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once a year.[133] Over the same period, the Supreme Court invalidated state laws roughly four times a year on average, up from a pace of about once every two years before the Civil War.[134] From 1910 to 1936, that pace increased to an average of more than ten per year.[135] But, even during this transformation into an interventionist judiciary, one-vote majorities remained extremely rare.[136] In the three decades after the Civil War, the Court invalidated federal laws by a bare majority only twice, and both times, the Court quickly reversed itself. In 1867, the Court invalidated as applied test oaths for loyalty to the federal government.[137] Republicans feared that the Court would continue to undermine their Reconstruction measures, and perhaps even strike down the Reconstruction Acts entirely.[138] The House Judiciary Committee proposed a statute requiring a two-thirds vote of the Supreme Court to invalidate an act of Congress,[139] and then a similar provision was offered as an amendment to a Senate bill.[140] The bill to create a two-thirds rule passed the House by a vote of 116 to 39.[141] The Senate delayed action on the bill, and then ignored it after *Ex parte McCardle*[142] and *Texas v. White*[143] left the Reconstruction Acts standing and eased Republican concerns about the Court.[144]

The second case to be decided by one vote struck down the statute creating greenbacks,[145] but this four-three decision was reversed just one year later.[146] These cases reflect the weakness and instability of such narrow majorities. The Court did not use a bare majority to

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[133] *See infra* APPENDIX.

[134] THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2041-65 (Johnny H. Killian & George A. Costello eds., 1996).

[135] *Id.* at 2063-2117.

[136] *Id.*

[137] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 381 (1867).

[138] 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 466 (1932).

[139] CONG. GLOBE, 40th Cong., 2d Sess. 478 (1868).

[140] *Id.* at 503-04.

[141] 2 WARREN, *supra* note 138, at 467.

[142] 74 U.S. (7 Wall.) 506 (1868).

[143] 74 U.S. (7 Wall.) 700 (1868).

[144] 2 WARREN, *supra* note 138, at 472-73; Maurice Culp, *A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States*, 4 IND. L.J. 386, 395 (1929).

[145] Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 610-26 (1870).

[146] Knox v. Lee, 79 U.S. (12 Wall.) 457, 553-54 (1871) ("Legal Tender Cases").

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void a congressional act again until 1895, even as it bulldozed through a variety of Reconstruction statutes, like the Civil Rights Act of 1873.[147] Even at the height of the *Lochner* Court's laissez-faire activism, it voted five-four only six times in its twenty-six invalidations of federal laws.[148]

One might wonder if this infrequency of five-four decisions is not because of any norm against such votes, but rather, because these Courts were not divided into blocs of five and four. It is certainly hard to measure how a Court is divided by anything other than its decisions. However, in terms of the *Lochner* Court, the *Lochner v. New York*[149] decision itself illustrates that the Court split along five to four lines on the greatest constitutional questions of the time. A survey of the five-four decisions between 1900 and 1910 suggests a left-to-moderate bloc of Justices Holmes, Harlan, and Day; a right bloc of Peckham, Brown, Fuller, and Brewer; and two swing votes, White and McKenna.[150] This division was a recipe for five-four voting, but intriguingly, the Court struck down federal legislation with bare majorities. From 1895, when the Court decided *Pollock v. Farmers' Loan and Trust Co.*[151] by a five-four vote, to the beginning of World War I, the Court voted five to four in 104 cases.[152] Fifteen times it struck down state laws five to four, but only three times did it strike down federal laws by such a narrow vote.[153] Even though the *Lochner* Court was very narrowly divided, the Justices avoided such a narrow division when reviewing federal statutes.

F. THE TAFT COURT

Robert Post's study of the Taft Court reveals a growing emphasis on consensus-building and cooperation.[154] He concludes that there

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[147] *See* The Civil Rights Cases, 109 U.S. 3 (1883).
[148] *See infra* APPENDIX.
[149] 198 U.S. 45 (1905) (striking down labor legislation limiting maximum weekly hours for bakers).
[150] *See infra* APPENDIX (listing specifically *Fairbank* (1901), *Lochner* (1905), and *Employers' Liability Cases* (1908)).
[151] 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895) (striking down income tax).
[152] *See infra* APPENDIX.
[153] Note, *Judgments of the Supreme Court*, *supra* note 130, at 987-1000.
[154] *See generally* Robert Post, *The Supreme Court Opinion as Institutional Practice:*

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was both a "norm of consensus" and a "norm of acquiescence," with acquiescence sometimes prevailing.[155] Post first notes that there were strong pressures against dissenting opinions at this time. Canon 19 of the American Bar Association's 1924 Canons of Judicial Ethics urged judges of courts of last resort to restrain themselves from dissenting "to promote solidarity of conclusion and the consequent influence of judicial decision."[156]

Both the majority and the dissenters of the Taft Court reflected this norm by seeking consensus. Whereas the Rehnquist Court voted unanimously in twenty-seven percent of cases during the 1993-98 terms, the Taft Court voted unanimously in eighty-four percent of its cases from 1921 to 1928.[157] One might wonder if the Court's mandatory docket in the early 1920s produced fewer contested and controversial cases than today's discretionary docket, but Post finds no difference in dissenting between mandatory and discretionary cases.[158] Taft disapproved of dissenting as a "form of egotism" that "only weaken[s] the prestige of the Court."[159] To minimize dissent, Taft tried "to promote teamwork by the Court so as to give weight and solidarity to its opinions."[160] As one biographer noted, Taft believed that, in order to fulfill the Court's duty to clarify the law, the Chief Justice needed to "round up a convincing majority."[161]

Chief Justice Taft lobbied and maneuvered deftly to broaden coalitions in numerous cases. Early in his term, Taft cobbled together a unanimous Court to strike down the Future Trading Act as exceeding Congress's taxing and interstate commerce powers.[162]

Dissent, Legal Scholarship, and Decisionmaking in the Taft Court, 85 MINN. L. REV. 1267 (2001).

[155] *Id.* at 1344 (citing David O'Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions, in* SUPREME COURT DECISION-MAKING 111 (Cornell W. Clayton & Howard Gillman eds., 1999)).

[156] Post, *supra* note 154, at 1284 (citing ABA CANONS OF JUDICIAL Ethics, Canon 19 (1924)).

[157] *Id.* at 1309.

[158] *Id.* at 1328-31.

[159] *Id.* at 1311.

[160] *Id.* (citing Draft of a Tribute to Edward Douglas White (May 1921)).

[161] ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 212 (1964).

[162] Hill v. Wallace, 259 U.S. 44, 68 (1922). Justice Brandeis added a concurrence, the only opinion other than the Chief Justice's opinion for the Court. *See id.* at 72 (Brandeis, J., concurring). The effort at unanimity is discussed in Post, *supra* note 154, at 1312 n.144

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Seven of the twelve Taft Court decisions striking down acts of Congress were either unanimous or had one dissent, while only one was decided by a bare majority.[163] Taft often used his power to assign the writing of majority opinions as a tool to achieve unanimity.[164] In *United Mine Workers v. Coronado Coal*,[165] argued before Chief Justice Taft was nominated, the Justices initially voted eight to one in conference to hold a union liable for interfering with interstate commerce, with only Justice Brandeis dissenting.[166] When Chief Justice Taft joined the Court, he adopted Brandeis's conclusions that the union should not be liable, and Taft remarkably amassed unanimous support on the Court for his own opinion.[167] Taft attained unanimity with the same maneuver a year later in *Sonneborn Brothers v. Cureton*.[168] Initially, a majority of the Court sided with McReynolds over Brandeis in a Commerce Clause challenge to local taxation. But Taft adopted Brandeis's draft in his own opinion, and he successfully won over the rest of the Court, including McReynolds, who concurred with reservations.[169] One year later, when Holmes and Brandeis planned to dissent from another draft by McReynolds, Taft took over the opinion and removed the objectionable passages.[170] He won over Holmes and Brandeis, and at the same time persuaded McReynolds not to write a heated concurrence protesting the changes.[171] Taft congratulated himself on his ability to attain unanimity, "By writing it anew, I brought Brandeis and Holmes over."[172] Taft pulled together unanimous or near unanimous Courts in various other decisions.[173]

(citing David Joseph Danelski, The Chief Justice and the Supreme Court 188-89 (1961) (unpublished Ph.D. dissertation, University of Chicago).

[163] *See infra* APPENDIX; *see also* Adkins v. Children's Hosp., 261 U.S. 525 (1923).

[164] *See* MASON, *supra* note 161, at 210-11.

[165] 259 U.S. 344 (1922).

[166] ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK 97-99 (1957).

[167] *Id.*

[168] 262 U.S. 506 (1923). Taft wrote the unanimous opinion, and McReynolds concurred. *See id.* at 521 (McReynolds, J., concurring).

[169] BICKEL, *supra* note 166, at 113-16.

[170] *See* R.R. Comm'n v. S. Pac. Co., 264 U.S. 331 (1924).

[171] BICKEL, *supra* note 166, at 209-10; MASON, *supra* note 161, at 211.

[172] Letter from William Howard Taft to Helen Taft (Apr. 3, 1924), *cited* in MASON, *supra* note 161, at 212.

[173] *See, e.g.*, FTC v. Claire Furnace Co., 274 U.S. 160 (1927); Opelika v. Opelika Sewer Co.,

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In *Wisconsin v. Illinois*,[174] Taft spent a full summer drafting an opinion favoring a broad theory of commerce power that he "fervently supported."[175] However, to preserve a unified and cohesive Court, he made "a real sacrifice of [his] personal preference" reasoning that "it is the duty of us all to control our personal preferences to the main object of the Court."[176] Robert Post concludes, "[Taft] was willing to go to extraordinary lengths to modify his own opinions to reach out to others."[177]

G. THE NEW DEAL, THE SWITCH IN TIME, AND A NEW ERA OF DISSENT

In the legendary clash between Franklin Roosevelt's New Deal and the Supreme Court in 1935 and 1936, the major decisions were either unanimous,[178] eight to one,[179] or six to three.[180] Then-Senator Hugo Black's claimed that "120 million Americans are ruled by five men,"[181] but to the contrary, the Court struck down federal laws with five-four votes only twice out of eleven such cases, and only one was among the more significant of those eleven decisions.[182]

The Hughes Court was more accurately the Hughes-Roberts Court, for Hughes and Roberts were the swing bloc between Stone, Cardozo, and Brandeis on the left, and Van Devanter, Butler, Sutherland, and McReynolds on the right. From 1931 to 1935,

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265 U.S. 215 (1924) (Justice Holmes writing unanimous decision; Chief Justice Taft helped preserve unanimity); Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921). These cases are cited in Post, *supra* note 154, at 1312.

[174] 278 U.S. 367 (1927).

[175] Post, *supra* note 154, at 1312.

[176] *Id.* (citing 1929 letter from Taft to Butler).

[177] *Id.*

[178] *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[179] *See* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

[180] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936).

[181] ARTHUR M. SCHLESINGER, THE AGE OF ROOSEVELT, THE POLITICS OF UPHEAVAL 408 (1960).

[182] *See* Ashton v. Cameron County Dist., 298 U.S. 513 (1936); R.R. Ret. Bd. v. Alton R.R., 295 U.S. 330 (1935). *Railroad Retirement Board*, the more significant of the two decisions, struck down a New Deal compulsory retirement law, which was an important reform in opening up the employment market to younger workers. *Ashton* a municipal debt case, was not as controversial as the other cases listed above (*Schechter*, *Panama Refining*, *Louisville Bank*, *Butler*, or *Carter*).

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Hughes and Roberts leaned right but maintained their independence. When the Court clashed head-on with the New Deal in 1935 and 1936, Roberts "was closely aligned with the conservative bloc," while Hughes moved more slightly to the right.[183] This positioning created the six-three decisions in *United States v. Butler*[184] and *Carter v. Carter Coal Co.*[185]

The political scientist Glendon Schubert called this bloc the "Hughberts" for their partnership which was consistent with a game-theory strategy to increase their power on the Court.[186] When possible, they formed a five-four coalition with the left, but when that option failed, they then turned to the right.[187] It is important to note that their five-four alignment on the left upheld acts of Congress, while their six-three alignment on the right struck down acts of Congress. Then, in the midst of the Court-packing debate, this swing voting stopped. While Roberts is more famous for being the "switch in time," both Roberts and Hughes shifted together to uphold the New Deal five-four.[188]

When Chief Justice Harlan Fiske Stone replaced Hughes in 1941, the rate of dissent skyrocketed, and the number of five-four decisions reached new levels. Part of this phenomenon can be linked to Chief Justices' leadership styles and cultural change.[189] From the 1940s to today, dissent has steadily increased.

H. THE WARREN COURT'S ACTIVIST CONSENSUS

The conventional wisdom about the Warren Court is that it was sharply divided, often controlled by five liberals who disregarded the

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[183] STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 254 (1978); Russell W. Galloway, Jr., *The Court That Challenged the New Deal*, 24 SANTA CLARA L. REV. 65, 86 (1984).

[184] 297 U.S. 1 (1936).

[185] 298 U.S. 238 (1936).

[186] GLENDON A. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 192-210 (1959); *see also* Russell W. Galloway, Jr., *The Roosevelt Court: The Liberals Conquer (1937-1941) and Divide*, 23 SANTA CLARA L. REV. 491, 494-96 (1983) (examining and comparing voting data of 1935 and 1936 terms).

[187] *See* SCHUBERT, *supra* note 186, at 196.

[188] GLENDON SCHUBERT, CONSTITUTIONAL POLITICS 168-71 (1960).

[189] Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court*, 21 HOFSTRA L. REV. 667, 682 (1993).

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dissenters. This perception certainly has some basis in reality. To Court observers, the Warren Court Justices fit into left and right blocs of five and four relatively cleanly. From 1956 to 1962, the Court had a natural bloc of four liberal votes (Warren, Black, Douglas, and Brennan) and five moderates and conservatives.[190] From 1962 to 1969, the liberals gained their fifth vote, first with Arthur Goldberg and then Abe Fortas. As Justice Black became more conservative, Thurgood Marshall replaced Clark, and the Court retained its reliable five-vote liberal majority.

But while academics have emphasized this "Fifth Vote," even as titles for chapter headings[191] and in articles,[192] the remarkable feature of the Warren Court's voting pattern is how rarely it voted five to four in prominent cases, despite its natural five-four split. The most significant Warren Court decisions, the desegregation decisions, were consistently unanimous. Most famous was Chief Justice Earl Warren's tireless pursuit of unanimity in *Brown v. Board of Education I*[193] and *Brown v. Board of Education II*,[194] a success of Chief Justice lobbying that has now reached mythic status. As Warren recounted in his memoirs, "[W]hen the word 'unanimously' was spoken, a wave of emotion swept the room; no words or intentional movement, yet a distinct emotional manifestation that defies description."[195] While unanimity bolstered the power of *Brown I*, it may have undercut the efforts at desegregation in *Brown II*, when the Justices favoring immediate desegregation, Douglas and Black, yielded to the gradualists. The result was the language "all deliberate speed,"[196] meaning more deliberation than speed in practice, and there was no dissent or concurrence from Douglas or Black to take issue with this formula for delay, or to

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[190] The five moderates and conservatives were Justices Frankfurter, Clark, Reed, Burton, and Harlan. Whittaker, a moderate, replaced Reed in 1957, and Stewart, a moderate, replaced Burton in 1958.

[191] *See, e.g.*, LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 209 (2000) (entitling prologue to section on 1962-68 Court "The Fifth Vote").

[192] *See, e.g.*, Edward V. Heck, *Changing Voting Patterns in the Warren and Burger Courts*, *in* JUDICIAL CONFLICT AND CONSENSUS (Sheldon Goldman & Charles Lamb eds., 1986).

[193] 347 U.S. 483 (1954).

[194] 349 U.S. 294 (1955).

[195] EARL WARREN, THE MEMOIRS OF EARL WARREN 3 (1977).

[196] *Brown II*, 349 U.S. at 301.

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provide more of a time table. While unanimity was a mixed bag in *Brown II*, it carried forward a tradition of unanimity in all of the major desegregation cases, which lasted into the early Burger Court.[197]

Consensus extended beyond desegregation to all major areas of law. While reading Lucas Powe's remarkably thorough *The Warren Court and American Politics*,[198] I compiled a rough list of the Court's major decisions, as Powe recounts them. Considering how historians have focused on the Warren Court's "Fifth Vote," one might have expected five-four votes in many of the Court's controversial cases.[199] Of the 113 significant and controversial Warren Court decisions I counted, only seventeen were decided by one vote (fifteen percent).[200] Of those decisions, the criminal procedure cases were most controversial, such as *Miranda v. Arizona*[201] and *Mapp v. Ohio*.[202] But many other landmark criminal procedure cases won wider majorities, such as the unanimous *Gideon v. Wainwright*,[203] as well as *Massiah*,[204] *Katz*,[205] and the *Wade-Gilbert-Stovall* trilogy.[206] The Court formed broad majorities for its church-state decisions,[207] its privacy decisions,[208] and its free speech decisions.[209]

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[197] *See* United States v. Bd. of Educ., 395 U.S. 225 (1969); Monroe v. Bd. of Comm'rs, 391 U.S. 450 (1968); Green v. Sch. Bd., 391 U.S. 430 (1968); Rogers v. Paul, 382 U.S. 198 (1965); Goss v. Bd. of Educ., 373 U.S. 683 (1963); Cooper v. Aaron, 358 U.S. 1 (1958); Bolling v. Sharpe, 347 U.S. 497 (1954).

[198] *See generally* POWE, *supra* note 191.

[199] *See supra* notes 191-92 and accompanying text.

[200] The list of 113 decisions is not limited to cases reviewing legislation. The seventeen one-vote majority decisions were as follows: *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *United States v. Brown*, 381 U.S. 437 (1965); *Hamm v. Rock Hill*, 379 U.S. 306 (1964); *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gibson v. Fla. Legislative Investigating Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Kent v. Dulles*, 357 U.S. 116 (1958); *Trop v. Dulles*, 356 U.S. 86 (1958); *Perez v. Brownell*, 356 U.S. 44 (1958); *Griffin v. Illinois*, 351 U.S. 12 (1956).

[201] 384 U.S. at 436.

[202] 367 U.S. at 643.

[203] 372 U.S. 335 (1963).

[204] *See* Massiah v. United States, 377 U.S. 201 (1964) (6-3 decision).

[205] *See* Katz v. United States, 389 U.S. 347 (1967) (7-1 decision).

[206] *See* Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

[207] *See* Sherbert v. Verner, 374 U.S. 398 (1963); Sch. Dist. v. Schempp, 374 U.S. 203

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The Warren Court was unanimous in other major cases, particularly ones dealing with race.[210]

The Warren Court's review of anti-Communist legislation demonstrates not only a value of consensus, but also an aversion to bare majorities, particularly in striking down acts of Congress. In almost twenty cases between 1954 and 1958, the Justices shifted from enforcing these laws to limiting them, and back to enforcing them, while voting five to four only twice. In the 1954 Term, Warren's first term, a six-vote or seven-vote majority supported anti-Communism measures, and the Court rejected three constitutional challenges to federal loyalty-security measures.[211] Only Black and Douglas had argued for striking down these laws.[212] The next year, the coalition shifted suddenly to a consensus on the left, voting six to three in favor of civil liberties in three cases[213] and five to four in another.[214] Then Brennan replaced Sherman Minton in the 1956 Term, which on loyalty-security issues, created a left bloc of Douglas, Black, Warren, and Brennan on civil liberties and anti-Communism. While some historians have noted the search for the

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(1963); Torcaso v. Watkins, 367 U.S. 488 (1961).

[208] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[209] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); Tinker v. Sch. Dist., 393 U.S. 503 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[210] *See* Loving v. Virginia, 388 U.S. 1 (1967); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Watson v. Memphis, 373 U.S. 526 (1963); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[211] *See* Peters v. Hobby, 349 U.S. 331 (1955) (overturning finding of disloyalty by Loyalty Review Board because it exceeded procedures mandated by Executive Order, but rejecting constitutional challenge by seven-two vote); Galvan v. Press, 347 U.S. 522 (1954) (rejecting challenge to International Security Act of 1950); Barsky v. Bd. of Regents, 347 U.S. 442 (1954) (affirming New York's suspension of doctor's license and rejecting challenge to constitutionality of House Un-American Activities Committee). In *Barsky*, Justices Douglas and Black dissented on First Amendment grounds against New York's action. *Barsky*, 347 U.S. at 474 (Douglas, J., dissenting). Frankfurter dissented on due process grounds less forcefully. *Id.* at 469 (Frankfurter, J., dissenting).

[212] See *Peters*, 349 U.S. at 350-52 (Black, J., and Douglas, J., concurring); *Galvan*, 347 U.S. at 532-34 (Black, J., and Douglas, J., dissenting); *Barsky*, 347 U.S. at 474 (Black, J., and Douglas, J., dissenting).

[213] *See generally* Cole v. Young, 351 U.S. 536 (1956); Communist Party v. Subversive Activities Control Bd., 351 U.S. 115 (1956); Pennsylvania v. Nelson, 350 U.S. 497 (1956). This new coalition formed when Chief Justice Warren and Justices Burton and Harlan shifted to the left in *Cole* and *Communist Party*, and when Warren and Harlan shifted to the left in *Nelson*.

[214] *See also* Slochower v. Bd. of Educ., 350 U.S. 551 (1956).

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fifth vote,[215] the liberals won at least six votes for their civil liberties decisions by early 1957.[216]

Then the Court handed down four liberal bombshells against loyalty-security programs on June 17, 1957, called "Red Monday" by conservatives. The votes were "overwhelming" in that one was unanimous, two had a solo dissent by Clark, and one had two dissents, by Clark and Burton.[217] While these decisions were earth-shaking, the Justices carefully avoided striking down the state and congressional acts in question.[218] In *Yates v. United States*,[219] Justice Harlan strictly limited the Smith Act, rendering the federal anti-Communism law virtually useless, but left it standing.[220] Chief Justice Warren wrote two decisions that spent "a lot of time flirting with the holding" that legislative investigations like those of the House Un-American Activities Committee violated the First Amendment, but opted instead for much narrower rulings.[221] If the majorities had been less committed to holding such a broad coalition together, perhaps five Justices would have written a more forceful decision invalidating these laws, or a smaller group might have written a concurrence suggesting that result. Instead, the Warren Court opted for unanimity or consensus.

After Red Monday, Congress pressed a full attack against the Court's jurisdiction and its decisions.[222] The most threatening proposals failed narrowly, but they succeeded in pushing the Court into retreat.[223] Justice Frankfurter, along with the other centrists, abandoned the four liberals and adhered to judicial restraint for the rest of his tenure.[224] The Court offered major peace offerings to

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[215] *See, e.g.*, POWE, *supra* note 191, at 89.

[216] *See* Jencks v. United States, 353 U.S. 657 (1957) (8-1 decision); Konigsburg v. State Bar, 353 U.S. 252 (1957) (5-3 decision); Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957) (8-0 decision); Mesarosh v. United States, 352 U.S. 1 (1956) (5-3 decision).

[217] POWE, *supra* note 191, at 93. The decisions were *Service v. Dulles*, 354 U.S. 363 (1957); *Yates v. United States*, 354 U.S. 298 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Watkins v. United States*, 354 U.S. 178 (1957).

[218] *See* POWE, *supra* note 191, at 94-97.

[219] 354 U.S. 298 (1957).

[220] *Id.* at 310; *see also* POWE, *supra* note 191, at 95.

[221] POWE, *supra* note 191, at 96.

[222] *Id.* at 127-34; C. HERMAN PRITCHETT, CONGRESS VS. THE SUPREME COURT: 1957-1960 (1973).

[223] POWE, *supra* note 191, at 135-56.

[224] *Id.* at 141-42.

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Congress and the public with five-four votes for judicial restraint in 1958.[225] The liberals won just one five-four decision for civil liberties against anti-Communism,[226] but generally, this voting split was a hallmark of judicial restraint during this period of the Warren Court, and it was a voting pattern that was surprisingly rare in most Warren Court decisions. In activism and controversy, Earl Warren shepherded the Court into broad majorities.

I. THE BURGER COURT AND INCREASING DISSENSUS

The Burger Court in many cases carried on the tradition of consensus. In particular, the Burger Court Justices worked relentlessly to preserve the tradition of unanimous rulings in desegregation cases.[227] They also pursued consensus in other controversial cases. In *Clay v. United States*, which reviewed Muhammad Ali's conviction for refusing to serve in Vietnam, the Justices abandoned a divided opinion on a general legal question, and instead found common ground on a more technical matter.[228] In *Roe v. Wade*,[229] Justice Blackmun reworked his opinion, even though he was assured a five-vote majority, because he wanted Chief Justice Burger and Justice Stewart to concur and broaden the voting margin—and he succeeded.[230] During Watergate, one of Richard Nixon's lawyers said that the President would obey "a definitive decision" by the Court, implying that Nixon might not

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[225] *See* Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Bd. of Educ., 357 U.S. 399 (1958). Another retreat was *Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958), a seven-two vote.

[226] *See* Kent v. Dulles, 357 U.S. 116, 129 (1958) (interpreting 1856 Act of Congress as not giving Secretary of State "unbridled discretion" to grant or withhold passports). In *Kent* Justice Frankfurter joined the majority. A five-four majority also invalidated one federal law on civil liberties grounds, but it was not directly connected to anti-Communism. *See* Trop v. Dulles, 356 U.S. 86, 104 (1958) (invalidating federal law that stripped citizenship from those who were court-martialed for desertion).

[227] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 42-56, 103-12 (1979). *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Alexander v. Sch. Bd., 396 U.S. 19 (1969).

[228] Clay v. United States, 403 U.S. 698, 704-05 (1971); *see also* WOODWARD & ARMSTRONG, *supra* note 227, at 136-39 (describing Justices' justification for *Clay* decision).

[229] 410 U.S. 113 (1973).

[230] WOODWARD & ARMSTRONG, *supra* note 227, at 229-40.

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obey a less-than-definitive decision.[231] The Justices made sure that *United States v. Nixon*[232] was unanimous.

Despite this commitment to consensus in controversial cases, the norm against five-four votes eroded more and more, especially in the Burger Court's rising number of cases invalidating state laws. The Warren Court had struck down state laws about ten times a year, and with a five-four vote only nine times in sixteen years, a pace consistent with the rest of the twentieth century.[233] By contrast, the Burger Court struck down state laws about seventeen times a year, and by a five-four vote twenty-five times in seventeen years, which were both unprecedented levels of activism against legislation.[234] A survey of the voting patterns in these cases illustrates that a five-vote liberal-moderate bloc anchored by Justices William Brennan and Thurgood Marshall was almost entirely responsible for this number of bare majority decisions.[235] Of the twenty-five cases, only three did not include Marshall or Brennan, two of which were moderately conservative decisions,[236] and the other seemed politically neutral.[237] The liberal decisions included the invalidation of the death penalty in *Furman v. Georgia*,[238] other death penalty rulings,[239] an abortion ruling,[240] school busing,[241] controversial

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[231] POWE, *supra* note 191, at 45.

[232] 418 U.S. 683 (1974); *see* WOODWARD & ARMSTRONG, *supra* note 227, at 285-347.

[233] THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2137-66 (Johnny H. Killian & George A. Costello eds., 1996).

[234] *Id.* at 2166-2209.

[235] *See infra* notes 238-46 and accompanying text.

[236] *See* Offshore Logistics v. Tallentire, 477 U.S. 207 (1986) (limiting state tort liability). The majority in *Offshore Logistics* was Chief Justice Burger and Justices Rehnquist, White, Blackmun, and O'Connor. One might also include a campaign finance case. *See First Nat'l Bank v. Belotti*, 435 U.S. 765, 795 (1978) (invalidating state law providing for criminal penalties for banks and corporations that made expenditures or contributions to influence non-business related referenda). The majority in *Belotti* was Chief Justice Burger and Justices Powell, Stewart, Blackmun, and Stevens.

[237] *See* Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (holding that high state tax on insurance violated equal protection). The majority in *Ward* included Chief Justice Burger and Justices Powell, White, Blackmun, and Stevens.

[238] 408 U.S. 238 (1972).

[239] *See* Enmund v. Florida, 458 U.S. 782 (1982); Roberts v. Louisiana, 431 U.S. 633 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976).

[240] *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

[241] *See* Washington v. Sch. Dist., 458 U.S. 457 (1982).

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church-state decisions,[242] other First Amendment decisions,[243] due process limitations on punishing students[244] and terminating parental rights,[245] and equal protection limitations on sex discrimination and other kinds of discrimination.[246] Perhaps more than any other bloc of five, the Burger Court liberals are responsible for the decline of consensus that led to the current problem. The bloc of five liberals undermined the value of consensus, and undoubtedly frustrated the conservative dissenters. But as we know, five-four majorities can quickly reverse sides, and after Presidents Reagan and Bush replaced the liberals, the conservatives have turned the tables.

J. THE REHNQUIST COURT'S COUNTERREVOLUTION

Once the balance of power shifted back to the right, the Rehnquist Court shifted the target of the attack from state laws to federal laws. Of its fifteen invalidations of federal statutes by a five-four vote since 1995, twelve are conservative, and eleven have the same majority of Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, and Thomas.[247] One might think that the sudden increase in invalidating federal law is just the product of this historical moment. For almost sixty years, the federal government has passed more and more legislation pushing the envelope of the Commerce Clause, the Fourteenth Amendment, and state sovereignty, and the Court offered very little resistance, if any, to this legislative agenda. Over that period, the Democrats usually

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[242] *See* Larson v. Valente, 456 U.S. 228 (1982); Stone v. Graham, 449 U.S. 39 (1980); Wolman v. Walter, 433 U.S. 229 (1977).

[243] Other First Amendment cases include *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (regarding associational rights); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (regarding free speech); and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (regarding free press and libel). A political representation case was also decided by a 5-4 vote. *See* Karcher v. Daggett, 462 U.S. 725 (1983).

[244] *See* Goss v. Lopez, 419 U.S. 565 (1975).

[245] *See* Santosky v. Kramer, 455 U.S. 745 (1982).

[246] *See* Plyler v. Doe, 457 U.S. 202 (1982) (regarding equal protection); Caban v. Mohammed, 441 U.S. 380 (1979) (regarding sex discrimination); Nyquist v. Mauclet, 432 U.S. 1 (1977) (regarding aliens); Trimble v. Gordon, 430 U.S. 762 (1977) (regarding illegitimacy).

[247] See *supra* notes 5-6 listing the eleven cases. The twelfth conservative decision is *Thompson v. W. Stater Med. Ctr.*, 535 U.S. 357 (2002), in which Justice Souter voted with the conservatives and Chief Justice Rehnquist voted with the liberals.

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controlled Congress. Once the Court turned to the right (particularly with a commitment to states' rights), a long list of statutes passed by Democratic Congresses were vulnerable to a challenge for the first time.

There is a lot of truth to this perspective. However, the Rehnquist Court has been invalidating laws passed with broad bipartisan support, such as the left-leaning Americans with Disabilities Act[248] and Violence Against Women Act (VAWA),[249] and the right-leaning Communications Decency Act[250] and Child Pornography Prevention Act.[251] The dissenters in both *Morrison* and *Garrett* noted how broadly state governments supported the legislation that the Court had struck down in their name. The National Association of Attorneys General unanimously supported VAWA's civil remedy, and attorneys general from thirty-eight states urged Congress to pass the measure. The recent judicial activism is more than just a short-term historical correction. It is an aggressive pattern of bloc voting against popular legislation that is only gaining steam.

Intriguingly, the conservative majority of the Rehnquist Court also has criticized the weakness and arbitrariness of five-four decisions. In 1987, a left-leaning five to four split voted in *Booth v. Maryland*[252] to bar the use of victim impact statements.[253] Just four years later, when the Court's composition shifted to the right, the Court overruled *Booth* in *Payne v. Tennessee*.[254] Chief Justice Rehnquist wrote for the Court that decisions "decided by the narrowest of margins" are entitled to the least weight of stare decisis, and he downgraded their weight as precedent.[255] In the midst of the Court's federalist revolution, the liberal dissenters have recently invoked *Payne* and similarly discounted the recent

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[248] Bd. of Trs. v. Garrett, 531 U.S. 356 (2001).
[249] United States v. Morrison, 529 U.S. 598 (2000).
[250] Reno v. ACLU, 521 U.S. 844 (1997).
[251] Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002).
[252] 482 U.S. 496 (1987).
[253] *Id.*
[254] 501 U.S. 808 (1991).
[255] *Id.* at 829.

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sovereign immunity decisions.[256] In *Kimel v. Florida Board of Regents*, Justice Stevens wrote for the four-Justice minority:

> Despite my respect for stare decisis, I am unwilling to accept Seminole Tribe as controlling precedent. . . . [B]y its own repeated overruling of earlier precedent, the majority has itself discounted the importance of stare decisis in this area of the law. The kind of judicial activism manifested in cases like *Seminole Tribe*, *Alden v. Maine*, *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, and *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.* represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.[257]

Justice Stevens's dissent in *Kimel* rightly criticizes the majority for their abuse of judicial review and the resulting instability in the law. It is now time for the dissenters to take another step and call for more concrete rules to reduce these abuses.

Finally, this recent phase of judicial activism returns to a familiar pattern. From *Dred Scott* to the present, judicial review of Congress has generally served reactionary ends. The only true exception is the Warren Court and the early Burger Court. In the nineteenth century, the Court overturned federal laws restricting slavery,[258] protecting Blacks' civil rights and voting rights,[259] and punishing lynching.[260] The Court in the first decades of the twentieth century struck down federal laws protecting union leaders from reprisal firings,[261] restricting child labor,[262] establishing

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[256] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 98 (2000) (Stevens, J., dissenting).

[257] *Id.* at 97-99 (Stevens, J., dissenting) (citations omitted).

[258] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[259] *See* The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Cruikshank, 97 U.S. 542 (1876); United States v. Reese, 92 U.S. 214 (1876).

[260] *See* United States v. Harris, 106 U.S. 629 (1882).

[261] *See* Adair v. United States, 208 U.S. 161 (1908).

[262] *See* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1908).

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minimum wage for female workers,[263] as well as protecting the rights of blacks and minorities.[264] Around the same time, the Court also invalidated a variety of progressive federal tax laws.[265] Then the Court blocked Franklin Roosevelt's New Deal legislation in 1935 and 1936.[266] Despite this reactionary history, liberals have romanticized judicial review because of the Warren Court and a handful of early Burger Court decisions.[267] Those two decades were arguably the only period in our history when the Court was more liberal than the other branches of government. However, most of the Warren Court's celebrated liberal decisions were not checks against Congress and national laws, but were either overturning illiberal state laws, or were challenges, not to legislatures at all, but rather to the police. Now, conservative judicial review of Congress has returned in full force.

II. DIALOGUE, REASON, AND LEGITIMACY

One might protest that this preoccupation with head-counting and voting rules misses the essence of judging. A skeptical reader might point to the various sources of the judiciary's legitimacy and suggest that this voting rule ignores those foundations, and even undercuts them. First, one might argue, the validity of the Court's decision relies upon the cogency of its reasoning and upon its persuasiveness, not the voting margin. Second, the Court's decisions are the products of expertise, and they at least indirectly represent the public through the confirmation process. A majority of the Court is, in a way, a majority of the experts in the field, and a majority of the judges as chosen by the people's representatives

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[263] *See* Adkins v. Children's Hosp., 261 U.S. 525 (1923).

[264] *See* Butts v. Merchants & Miners Transp., 230 U.S. 126 (1913); Hodges v. United States, 203 U.S. 1 (1906); James v. Bowman, 190 U.S. 127 (1903); Baldwin v. Franks, 120 U.S. 678 (1887).

[265] *See* Heiner v. Donnan, 285 U.S. 312 (1932); Untermyer v. Anderson, 276 U.S. 440 (1928); Nichols v. Coolidge, 274 U.S. 531 (1927); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

[266] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Schechter Poultry v. United States, 295 U.S. 495 (1935); R.R. Ret. Bd. v. Alton R.R., 295 U.S. 330 (1935).

[267] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Roe v. Wade, 410 U.S. 113 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

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over time, and thus, a majority is a legitimate stamp of expertise without being entirely antidemocratic. Third, the Court fulfills a crucial structural check against the other branches and against majoritarian excesses, and a voting rule should not weaken this role. But in fact, a two-thirds rule actually bolsters these underlying values of expertise, representativeness, reason, public persuasion, and structuralism. It reduces the arbitrariness—both real and perceived—of the Court's decisions, and increases the reliability and stability of those decisions. In establishing the theoretical basis for a supermajority Court rule, this Part embraces the values of deliberation, democracy, reliability, and judicial integrity.

A. EXPERTISE, REPRESENTATIVENESS, AND ARBITRARINESS

Deliberative democratic theory offers several justifications for consensus rules, and several are epistemological. While this school of thought emphasizes the idea of discourse,[268] one argument is more statistical than philosophical. The idea is simply that two heads are better than one. Assume that an individual is more likely to make a right decision than a wrong one, but, of course, that individual is still prone to error. Then, on average, when more individuals are involved with the decision, and when a wider margin of those individuals reach that decision, it is more likely to be correct. This perspective applies alike to observations of concrete facts, to moral principles, to perceptions of public opinion, and to interpreting legal texts.

This consensus theory of truth is central to the ideas of the Classical Pragmatic philosophers,[269] and continues as a foundation of modern deliberative theorists, such as Jurgen Habermas and Benjamin Barber.[270] Applying these ideas to constitutional systems, Carlos Santiago Nino turned to these "epistemic values" in criticizing judicial review of democratic legislation in general.[271]

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[268] *See infra* notes 285-310 and accompanying text.

[269] JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 122-23 (1920) (citing Charles Saunders Pierce).

[270] BENJAMIN BARBER, STRONG DEMOCRACY 166-67 (1984); THOMAS MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS 293, 303 (1978).

[271] CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 129 (1996).

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Nino posits that "[f]actual observation and the use of rules of inference are the product of widespread capabilities, and most people do not make the same mistake."[272] Aggregation, with or without discussion between individuals, reduces mistakes because the probability of error is reduced. Judicial review is prone to error, Nino contends, because the number of judges is relatively small, and when they are so removed from the democratic process, they are less connected to democracy's "epistemic" advantages.[273]

One problem with this theory of aggregation is that size can work against other values of consensus. Millions of voters, as opposed to nine voters, might increase the probability of correctness in a purely statistical sense, but they cannot engage in any meaningful dialogue or engage the legal tradition as well as the Court can. If we value robust debate and reason in law,[274] we should not strip the Court of its power of judicial review. Instead, we can balance the epistemic values of aggregation with the role of debate in smaller bodies by adopting consensus voting rules within those bodies. In a particularly intelligent article applying deliberative theory, Richard Primus builds on these ideas to justify the jury unanimity rule for criminal trials.[275] Unanimity forces a jury to deliberate longer and reach firm conclusions about facts and applying the law in order to convict or acquit. Because our society strongly prefers to free the guilty rather than to convict the innocent, most jurisdictions are willing to allow mistrials when a jury cannot achieve a unanimous guilty verdict.

The proposal for a Supreme Court consensus rule adopts a similar approach to overturning congressional legislation. One might object that the two-thirds rule actually increases the likelihood of error. Four justices can block five justices from invalidating the law, and statistically, four are more likely to be wrong than five. However, the jury example is a good parallel. Because we are especially wary of juries convicting the innocent, we tolerate some increased chance for errors that free the guilty. The

[272] *Id.* at 129-34.
[273] *Id.* at 129.
[274] *See infra* notes 285-315 and accompanying text.
[275] Primus, *supra* note 62. Primus provides an excellent survey of deliberative democratic theory, which was extremely helpful in writing this Article.

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Article V amendment process is another good example. Because we believe that constitutional lawmaking should surpass a higher threshold, we tolerate a minority of Congress or of the states blocking a constitutional amendment. Additionally, we should be cautious about courts invalidating the decisions of a democratic legislature and thus, we should tolerate an increased risk of errors for upholding those democratic decisions. Certainty is more crucial when the Court rejects the majority will. Returning to Nino's point about "epistemic values," legislation is the product of a democratic process and its aggregative advantages, and thus it should be granted some degree of deference.[276] The four justices may be a minority of the Court, but their version of legal truth is supported by the other branches and is more likely to correspond with the public's version of the truth, as represented in Congress.

But, the skeptic might reply, the Supreme Court has epistemic legitimacy above and beyond the public due to its expertise in constitutional law. This expertise is not entirely removed from the public, because the Justices are chosen by the people's elected representatives. Furthermore, one might argue that the Supreme Court has a special kind of representation, namely representing different majorities over time. I will respond to each objection in turn.

First, expertise is reliable only when there is a consensus among the experts. A bare majority of experts is not at all convincing. If four out of five experts agree that Brand X is the best toothpaste, this consensus establishes a degree of reliability. But if five out of nine experts agree that Law X is unconstitutional, one cannot conclude that the experts have spoken one way or the other. With five-four decisions, there is some sense of randomness that the decision came out one way and not the other.

The rules for expert testimony have been consistent with this thinking. For most of the past century, the test for admitting scientific expert testimony was "general acceptance."[277] Now, the test is "reliability," for which "general acceptance" remains one of

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[276] *See* NINO, *supra* note 271.

[277] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

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several factors.[278] It is odd that the Supreme Court asks more of expert witnesses than of themselves as Justices. These values of reliability and general acceptance, when applied to the Supreme Court, support a norm of consensus, particularly in controversial cases against a democratic majority.

Second, one might suggest that the Court is not just a panel of experts, because it is indirectly representative of the public. Legislation may be the product of one legislative majority at one time in the past, but a current majority seeking to repeal that law may be thwarted by a minority through a presidential veto, a filibuster in the Senate, a stubborn committee chairperson, or a similar mechanism. One can also make the argument that the Court represents various political majorities over time, from various generations. Each Justice represents a snapshot of political consensus by the President and the Senate at the time of his or her confirmation. Those intergenerational representatives convene on the Court to add another dimension of democratic representation.[279] It is not enough to win a legislative majority in Time X. A constitutional democracy requires that legislation must reconcile itself with the past and the future.[280]

I endorse this view of the Supreme Court as representing a multigenerational democracy extended over time. However, even if we can find a representational role for the Court, we still should not excuse the use of bare majorities to exercise that role. The confirmation process is quite unpredictable and easily manipulated. The pattern of retirements is, at best, arbitrary, and at worst, politicized and partisan. The Justices themselves control the timing

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[278] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993). In *Daubert*, the Court concluded that *Frye*'s requirement for general acceptance was too rigid, considering the liberalizing thrust of the Federal Rules of Evidence. *Id.* at 588. *Daubert* did not dismiss the importance of general acceptance for expert testimony; it simply shifted more power to the judge to review scientific conclusions for reliability, even if those conclusions conflicted with the scientific community. Nevertheless, scientific method remained a constraint against junk science. *Id.* at 590. There is no similarly objective set of criteria to guard against junk constitutional law.

[279] For other perspectives on intergenerational synthesis, see generally 1 BRUCE ACKERMAN, WE THE PEOPLE (1991).

[280] For more on constitutional democracy as democracy over time, see generally JED RUBENFELD, FREEDOM AND TIME (2001). For more on the role of the Supreme Court as visionary of the future, see generally BICKEL, *supra* note 54.

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of new openings, and they often wait to step down until a President from their own party is in office and until the Senate is relatively sympathetic.[281] The confirmation process also cannot guarantee that a nominee will follow through on expectations, or even on his or her own promises.[282] Thus, the small number of Justices, plus the manipulation of retirements and the mystery of the nominees' true leanings, make the composition of the Court somewhat arbitrary. A two-thirds rule helps assure more reliability that the Justices' decisions reflect widely shared values. A guiding vision for our society is that democracy "is an empire of laws and not of men."[283] In the context of the courts, Oliver Wendell Holmes understood this principle to require standards external to judges, as institutional rules that cabin the judge's discretion as the interpreter of law.[284] A supermajority rule would establish an appropriate external standard circumscribing the judge's role and would send a message about deference to legislatures. When one vote is the difference in a decision, the result from the Supreme

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[281] While President Carter appointed no Justices in four years, and President Clinton appointed none in his last six years, President Nixon was able to appoint four in his first term, and Presidents Ronald Reagan and George H.W. Bush appointed five Justices and a Chief Justice in their twelve years. Carter happened to be President at a time just after the New Deal Democrats had retired, but just before the 1950s-60s liberals were ready to retire. That timing allowed Republican presidents to replace the liberals. Furthermore, the Justices themselves control when they retire and which Presidents get to appoint new Justices. During Clinton's first term, two moderate Justices, White and Blackmun, stepped down, but the older Justices appointed by Nixon, Ford, and Reagan would not retire. Even though the Democrats have controlled the White House as much as the Republicans over the last twenty-five years, Republican Presidents appointed seven of the nine current Justices. Unless one party controls the Presidency for a long period of time, as the Democrats did from 1932 to 1952, it cannot be sure to mold a Court in its own image.

[282] President Eisenhower expected to be appointing moderate conservatives with Justice Warren and Justice Brennan, but they turned out to be two of the most liberal Justices of the twentieth century. Chief Justice Rehnquist and Justices O'Connor and Kennedy were expected to promote judicial restraint, but instead they have produced arguably the most activist record in the history of the Court. Presidents Ronald Reagan and George H.W. Bush expected Justices O'Connor, Kennedy, and Souter to overturn *Roe v. Wade*, but surprisingly they upheld it in 1991 in *Casey v. Planned Parenthood*, 505 U.S. 833, 846 (1994). Now, each new nominee tends to circumvent his or her way around all such controversial questions, claiming to have no opinions about divisive constitutional matters.

[283] James Harrington, *The Commonwealth of Oceana*, *in* THE POLITICAL WORKS OF JAMES HARRINGTON 155, 170 (J.G.A. Pocock ed., 1977).

[284] OLIVER WENDELL HOLMES, THE COMMON LAW 41, 44 (1881); *see also* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).

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Court is, at the risk of hyperbole, more an empire of men and less an empire of law.

B. CONSENSUS, DIALOGUE, AND REASON

In addition to the argument that aggregation reduces the probability of error, deliberative democracy offers a much more robust response that active participation, extended debate, and consensus produce the best reasoning. In contemporary legal theory, consensus and dialogue are two touchstones of legitimacy, and they create the basis of deliberative democracy. The first general purpose of consensus in democracy is an extension of the "aggregative" advantages of discovering truth, described in the section above. But dialogue and consensus do not only discover truth, they also create values, and they discover facts more accurately.[285] This argument goes beyond statistical advantages of aggregation and probability; it embraces the importance of debate and exchange. Many deliberative democracy theorists, beginning with Classical Pragmatists like John Dewey and Charles Sanders Pierce, suggest that knowledge is created collectively, rather than perceived from the outside.[286] Reasoning alone, no one individual can create political judgment, or even acquire knowledge of the world. Through social interaction and discourse, individuals come together to discover facts and generate norms.[287] This connection between dialogue and knowledge forms a foundation for Jurgen Habermas's political theory.[288] As Thomas McCarthy explains Habermas's belief in consensus and dialogue, "[C]laims to truth and rightness, if radically challenged, can be redeemed only through argumentative discourse leading to rationally motivated consensus."[289] Our reasoning becomes clearer and truer when challenged by the goal of consensus, and through debate, we create norms, such as norms of legal rights and constitutional meaning.

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[285] *See* Primus, *supra* note 62, at 1446-48.

[286] DEWEY, *supra* note 269, at 122-23.

[287] BARBER, *supra* note 270, at 166-67; MCCARTHY, *supra* note 270, at 293.

[288] MCCARTHY, *supra* note 270, at 293.

[289] *Id.* at 325; *see also id.* at 303 (stating that truth is "the promise of attaining a rational consensus").

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The norms created by a bare majority of Justices are less reliable and less legitimate than those created by a broader consensus.

A second purpose of consensus is to achieve two democratic ideals, namely the consent of the governed and full public participation. Consent and participation mitigate the problem of coercing individuals to obey a majority. Habermas seeks to liberate the decisionmaking process from all coercing, so that "no force except that of the better argument is exercised."[290] Decisions would be democratically legitimate if they "would meet with the unforced agreement of all those involved, if they could participate, as free and equal, in discursive will-formation."[291] Such a debate in Habermas's terms is an "ideal speech situation" in which all participate equally and all engage each other openly.[292] While this vision is certainly impractical, even impossible, it is an important aspiration, and the practical goal is for a society to institutionalize discourse as much as possible.[293] Discourse serves, in part, to ensure full and active participation, and thus to fulfill the ideal of democracy and republicanism. In Habermas's ideal society, everyone must be allowed to demand justifications for all claims, but more importantly, everyone must be able to "question and (if necessary) to modify" the conceptual framework.[294] It is not enough that everyone simply arrives at the same conclusion; the key is the process of dialogue and engagement itself.[295] The source of legitimacy is not "the prior convergence of settled ethical convictions," but procedures that promote deliberation, compromise, and cooperation.[296] Consensus rules force participants to continue their debates long after a debate resulting in a majority rule would

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[290] JURGEN HABERMAS, LEGITIMATION CRISIS 108 (Thomas McCarthy trans., 1975).

[291] JURGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 186 (Thomas McCarthy trans., 1979).

[292] JURGEN HABERMAS, BETWEEN FACTS AND NORMS 322-23 (William Rehg trans., 1996); 1 JURGEN HABERMAS, THEORY OF COMMUNICATIVE ACTION: REASON AND RATIONALIZATION IN SOCIETY 1-7 (Thomas McCarthy trans., 1984); HABERMAS, LEGITIMATION CRISIS, *supra* note 290, at 110; *see also* MCCARTHY, *supra* note 270, at 322-25 (1978) (explaining speech situations).

[293] *See* MCCARTHY, *supra* note 270, at 292.

[294] *Id.* at 305.

[295] HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 292, at 296-97.

[296] *Id.* at 278; *see also id.* at 282-83 (discussing compromise).

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have ended, so that these discussions are more dynamic and produce more robust deliberation.

The same principles animate the other theories of deliberative democracy. John Rawls finds political legitimacy in an "overlapping consensus" that embraces a reasonable degree of pluralism.[297] In his book *Political Liberalism*, consensus is more than an abstract democratic ideal; it is a key to social unity and stability.[298] Bruce Ackerman invites "people to pierce their substantive disagreements and achieve a deeper unity—in the fact that they are all seeking to define themselves through a common process of dialogue."[299] Dialogue is the core value, the means to justice, and the source of legitimacy in Ackerman's liberal state. Benjamin Barber rejects simple majoritarianism and believes that the voting process is only meaningful when it follows serious deliberation.[300] He embraces "consociational" decisionmaking, which replaces "the fractiousness of majority decision" through dialogue, mutualism, and amicable bargaining.[301] For Barber, debate is not only part of the democratic process; it is "the essence of democracy."[302]

Each of these theorists, more or less explicitly, is reacting to the thinness of simple majority rule. The benchmark of fifty-percent-plus-one prevails for three reasons. First, it is the only threshold that guarantees that more individuals agree with a decision than disagree. Any higher burden actually empowers a minority to block the majority, and thus it would lead to minority rule—a generally undemocratic power that is appropriate only in special circumstances. In a related second point, any benchmark other than fifty-percent-plus-one or one hundred percent is an arbitrary mathematical choice. Two-thirds, three-fifths, and three-quarters are simple round fractions, but such choices are just as arbitrary as, say, fifty-eight percent or ninety-one percent. Thirdly, rule by a bare majority is often more practical than consensus rules, especially for larger institutions like Congress and for a nation of a

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[297] JOHN RAWLS, POLITICAL LIBERALISM 133-72 (1993).
[298] *Id.* at 134, 141, 149.
[299] BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 359 (1980).
[300] BARBER, *supra* note 270, at 198.
[301] *Id.* at 199.
[302] Primus, *supra* note 62, at 1446.

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quarter-billion people sprawled over a continent. But what about smaller institutions designed to rule by reason, argument, and persuasion?

Frank Michelman seized on this distinction in his influential *Harvard Law Review* foreword, *Traces of Self-Government*.[303] He looked back to the civic republican vision of government, in which citizens governed themselves not just through voting, but also through debate and a sense of community. In the civic republican tradition, reason is the product of active debate, and legitimate lawmaking depends upon "dialogic self-government" with robust participation.[304] While popular dialogic self-government is unrealistic in the other branches of government, the Supreme Court, with its cozier size and its emphasis on reasoning and persuasion, provides the remaining traces of republican self-government.[305] Thus it has a responsibility to represent the community and to create a common narrative through dialogue.[306] Accordingly, the Court's legitimacy depends on its power of reason through mediation, reconciliation, and dialogue.[307] Building on Ronald Dworkin's work, Michelman suggests that the Court has a responsibility to weave a narrative of and for the whole community. Michelman praises Justice O'Connor's approach in a First Amendment case, in which she discarded bright-line rules for balancing tests, because balancing tests created more opportunity for debate between the Justices and more consideration of the community's needs.[308] In a later article, Michelman explains that in the deliberative medium, "all participants remain open to the

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[303] Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

[304] *Id.* at 60.

[305] *See id.* at 65 ("The Court at the last appears not as *representative* of the People's declared will but as [a] *representation* and trace of the People's absent self-government.").

[306] *Id.* at 66, 68, 72. Michelman builds on Ronald Dworkin's *Law's Empire*, which presents an image of law as the narrative of the whole community.

[307] *Id.* at 32, 74.

[308] *See* Goldman v. Weinberger, 475 U.S. 503, 528 (1986) (O'Connor, J., dissenting); *see also* Michelman, *supra* note 303, at 33-36. At the same time, Michelman criticizes the majority's reliance of military deference. Dialogic self-government for Michelman means that courts should defer to no other institutions. However, if one values self-government itself, one should at least accord some respect to Congress. While Michelman seems to dismiss Congress's ability to represent dialogic self-government, in many ways Congress offers a form of dialogue and self-government better than the Court's version.

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possibility of persuasion by others," and "a vote, if any vote is taken, represents a pooling of judgments."[309] Consensus is the goal; voting is merely a tool. Why not create a form of voting that focuses more on that goal?

C. THE SUPREME COURT AND PUBLIC REASON

Truth-seeking is not only important to the Court's internal dialogue, it also plays a crucial role in the dialogue between the Court and the other branches, and between the Court and the public. The Court represents "public reason" and engages in debate about values in a way that other branches of government do not. While congressional and presidential candidates often campaign on ideas and give speeches supporting or opposing legislation, the Court's actions always feature reason and debate as the core of its functioning and as part of its direct power. The deliberative democracy theorists, including Rawls, Michelman, Ackerman, and Barber,[310] emphasize this role for the Court. For Rawls, "public reason is the reason the Supreme Court,"[311] but its public reason is "vital" only when the Court acts authoritatively and when the Justices themselves do not become part of the controversy.[312] Michelman similarly proposes that judges represent public reason to the community,[313] and single authorship promotes this role. Ackerman takes this role to another level, suggesting that the Supreme Court's decisions can break through the malaise of normal lawmaking.[314] A controversial constitutional ruling can trigger robust civic participation and debate about national values, which can produce constitutional higher lawmaking.

The Court best represents public reason and most effectively engages the public in a debate when it speaks with a relatively unified voice. When a decision has broad support from the Justices,

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[309] Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 293 (1989).
[310] BARBER, *supra* note 270, at 166-67.
[311] RAWLS, *supra* note 297, at 10, 235.
[312] *Id.* at 237.
[313] Michelman, *supra* note 303, at 66, 72-73.
[314] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE 266-94 (1991).

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it is the voice of reason from the Court, and the public and the legal community are more likely to engage the opinion's reasoning and debate its merits. The product is a robust public discourse with the law and reasoning centerstage. Dissent can contribute to public debate, but one-vote majorities shift attention away from the decision and toward the divided vote.

The mechanics of a six-three rule could foster an intriguing debate, rising above the potential confusion of the rule. Imagine that five Justices use an interpretive technique, such as narrow statutory interpretation or a clear statement rule, to limit the application of a statute, but they are unable to strike down the statute entirely. Some parties may find that the result in a particular case may be the same with or without the rule. The Court, however, must explain the result in its opinion, discussing why the rule exists and enunciating the values of democratic self-governance and judicial restraint. One important message the Court could deliver is that the public plays a vital role in interpreting the Constitution, a valuable lesson both to the public and to the Court.

But when the Court votes so narrowly, the public debate shifts to more negative questions. The spotlight sweeps towards the Justices, and the opinions get upstaged. The Court becomes more fractious and more inefficient, and with too many dissents and concurrences, the Court's precise holding and reasoning are obscured. In the words of one historian, "[a]t such times, concurring and dissenting behavior tends to escalate, and often the result is public criticism."[315] The division distracts the public from the reasoning. Rather than the Court speaking with the prestige and authority of a continuous institution, a five-four decision focuses more attention on the predispositions of the individual Justices, and it feeds the cynicism of the legal realist. The Court appears less objective and less above the political fray. When the legal community and the general public perceive that the law is being

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[315] David J. Danelski, *Causes and Consequences of Conflict and its Resolution in the Supreme Court*, *in* JUDICIAL CONFLICT AND CONSENSUS 34 (Sheldon Goldman & Charles M. Lamb eds., 1986) (citing ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 607-12 (1956)).

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shaped more by narrow head-counts and factional voting than by reason, discourse, and consensus, the Supreme Court's decisions earn less respect and long-term legitimacy. As a result, the Court undercuts its role of engaging the public in a debate about ideas.

D. COUNTERARGUMENTS ABOUT CONSENSUS

At this point, the reader is likely entertaining a variety of questions and concerns about the rule, particularly in terms of dialogue. First, why are five-to-four votes actually a problem, rather than a sign of robust judicial debate? Dissenting opinions contribute substantially to the process of judging by alerting the Court and the public to certain questions, clarifying issues, and raising alternatives that a future Court might adopt.[316] Robust dissent should be encouraged, and, in fact, a consensus voting rule does not stifle dissent. It simply flips which side controls the decision. Instead of four Justices dissenting from striking down a law, the Court has five Justices effectively dissenting from upholding a law. A six-three rule still allows dissenters to clarify issues, raise alternatives and voice their opinion, but it also creates a check against division getting out of hand in some of the most difficult cases.

A second objection is that the source of a decision's legitimacy is its reasoning, not the margin of its vote. Whereas head-counting and voting rules make sense in legislatures, one might argue that law should be based solely upon the most persuasive argument. The bottom line, though, is that currently, five votes determine the law, and there is no objective measure of each opinion's reasoning, no "legal-ometer." If voting determines the law, then the focus should be on voting. The question of which decision was most reasonable can be left to public debate and to future Justices who encounter these precedents.

A third objection asks, "Might a voting rule lead to less coherent opinions?" If a five-vote majority has to win a sixth vote, it will probably have to water down its reasoning or insert new language into the original opinion. When the Burger Court struggled to write

[316] *Id.*

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a unanimous opinion in *Swann v. Charlotte-Mecklenburg Board of Education*[317] about desegregation and busing in 1971, the result was a cut-and-paste job of Justice Stewart's pro-busing draft, Justice Brennan's even more pro-busing notes, and Chief Justice Burger's anti-busing draft.[318] The result was an incoherent opinion that confused the lower courts and legal observers.[319] However, the six-three rule does not create as much of a mess as negotiations of unanimity, and it is only marginally more difficult than cobbling together five votes, which produces its share of confusion already. Collaboration with a sixth Justice might in some cases improve a the reasoning of a decision, and any decrease in clarity comes with the benefits of compromise and reconciliation.

A fourth objection inquires, "Would this rule really promote dialogue within the Court?" The rule would only have an effect on dialogue when the Court is split five-four, and a larger majority still would get its way. Furthermore, if the current rule allows a five-vote majority to ignore the concerns of the four dissenters, a two-thirds rule still would allow four Justices to block the five, without ever really engaging in debate? First of all, five-four votes are a particularly significant problem, so it is acceptable that a voting rule might target them but not other votes. While six-three votes do not represent unity, they represent a degree of consensus, and it is less critical for a voting rule to extend debate in those cases. But in a five-four split, when the lack of consensus is more glaring, debate should be extended, and if the Court cannot reach broader agreement, then Congress's will should stand. Additionally, a six-three rule promotes dialogue expressively by sending a message about the importance of consensus, which can permeate the Court's deliberations in general. The rule itself has an expressive function, setting a norm that extends beyond the cases it governs. The rule sends a message about the importance of consensus.

The following additional point is crucial: Obstruction does not serve the interest of the minority. First, the bloc of four is likely to

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[317] 402 U.S. 1 (1971).

[318] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 130-45 (1979).

[319] *Id.*

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be a minority in other types of cases. They may be able to obstruct the bloc of five in cases challenging federal laws, but in other aspects of those cases, such as statutory interpretation, remedies, and the wording of the decisions, they are still a minority. Even if four Justices can keep a law on the books, five Justices can still interpret the legislation very narrowly. A two-thirds rule gives them a little leverage in working out the opinion, but if they abuse that power, the majority still has the power to retaliate in other ways, both in the case at bar and in others. Unlike a jury, the Supreme Court Justices are in a constant dialogue and must continue negotiating with each other for years afterward. Obstructionism by a faction of five is more of a problem, because the same five Justices have the upper hand in every aspect of every case. By giving the four Justices one weapon against the many weapons of the five, both the majority bloc and the minority bloc will have incentives to compromise.

A fifth objection broadens the notion of consensus supporting legislation. To the argument that the goal of democracy is consensus, one might reply that a bare majority of the Court enforces this goal by striking down legislation. If five Justices find a law unconstitutional, then that law has not achieved a consensus. In several aspects of our Constitution, a minority is able to block a majority. For example, a minority of Congress or a minority of states can block a constitutional amendment.[320] Perhaps this example is critical, because when it comes to constitutional politics, one should expect more than just bare majorities. To borrow from Bruce Ackerman again, when engaging in "higher lawmaking," the rules of normal everyday politics and its tolerance for simple majorities are inappropriate.[321] The public should aspire to a broader and deeper consensus from the polity when drafting or amending the Constitution, and the Supreme Court should aspire to consensus when interpreting it against democratic majorities. The ideal of consensus and discourse may be impractical, but it is an

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[320] *See* U.S. CONST. art. V.

[321] 2 BRUCE ACKERMAN, WE THE PEOPLE 3-31 (1998); 1 BRUCE ACKERMAN, WE THE PEOPLE 266-94 (1991).

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alternative vision that guides a more open and consensual vision for our political institutions.

In answering this challenge, it is important to return to two previous issues. The first is the established principle of deference to Congress, which grants Congress's decisions more respect, because it represents popular sovereignty (unlike the Court). This rule recognizes that Congress is better at pursuing and reflecting a national consensus. The second is the question regarding when consensus rules are practical and beneficial, and when majority rule is better. When consensus is impractical and unlikely to foster a debate with some resolution, institutions should adopt majority rule. Michelman and Primus understood that in legislatures, dialogue norms and consensus rules are less appropriate given their size and functions, but such rules are appropriate in judicial institutions of courts and juries.[322] It is less reasonable to expect a nation the size of the United States to achieve consensus in order to make its laws, but it is not unreasonable to hold courts to such an ideal.

Finally, a sixth objection is that judicial activism has not delegitimized the Court; it has, if anything, increased the Court's prestige. Some suggest that the Court enjoys much higher public approval ratings than other institutions, like Congress, the President, and the media, because the public identifies the Court with such publicly-celebrated decisions as desegregation, free speech, and abortion rights. However, none of the celebrated decisions in these areas were five to four. In fact, it is difficult to name one activist five-four decision in the Court's history that bolstered the Court's prestige more than it created a political backlash. While liberals embraced *Miranda*,[323] *Mapp*,[324] and *Furman*,[325] voters responded less favorably at the time. Richard

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[322] *See* Primus, *supra* note 62, at 1439 ("If majority rule is legitimate only as the best practical alternative to unanimity, then unanimity might be the proper rule in situations where it was not impractical.").

[323] Miranda v. Arizona, 384 U.S. 436 (1966). While *Miranda* has popular support today, it provoked an angry political response in the late 1960s, including legislation attempting to override the *Miranda* warning. *See* Dickerson v. United States, 530 U.S. 428, 435-37 (2000) (providing brief history of *Miranda*).

[324] Mapp v. Ohio, 367 U.S. 643 (1961).

[325] Furman v. Georgia, 408 U.S. 238 (1972).

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Nixon ran against the Warren Court and its criminal procedure rulings with a law-and-order campaign, and the Court shifted steadily to the right over the following two decades. Five-four decisions can backfire against the winners all too easily.

E. THE STRUCTURE OF CHECKS AND BALANCES

The Constitution does not explicitly grant the judiciary the power to nullify acts of Congress. The judiciary has rightly established that power by implication, but the judiciary should not take advantage of the Constitution's ambiguity about judicial review to expand the power as widely as it wants. The Justices should look to the structure of the Constitution to find some guidance about how judicial review most appropriately fits into the overall framework. This idea builds on Charles Black's *Structure and Relationship in Constitutional Law*,[326] in which Black argues that when the Constitution's text does not clearly solve a constitutional question, the structure and relationship between the federal branches and between the federal and state governments can be a more helpful guide.[327]

In many places, the Constitution carefully balances the branches of government through supermajorities and consensus. To pass legislation, Congress must either win presidential approval or override a veto with two-thirds supermajorities in both houses.[328] To nominate Justices, the President must win the consent of the Senate, and to impeach Justices, the Senate must convict with a two-thirds vote.[329] The Article V amendment process is perhaps the most relevant example of consensus. When making constitutional law that will constrain the power of future popular majorities, the Constitution demands supermajorities both in depth (two-thirds of Congress) and in breadth (three-quarters of the states).[330]

Compare the power of judicial review to these checks and balances. Whereas the other constitutional checks rely upon either

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[326] CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).
[327] *See generally id.*
[328] U.S. CONST. art I, § 7, cl. 2.
[329] U.S. CONST. art. I § 3, cl. 5; U.S. CONST. art. II, § 2, cl. 2.
[330] *See* U.S. CONST. art. V.

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supermajorities or consensus between two branches, the Court can unilaterally block legislation adopted by both the legislative and executive branch, and currently it can do so by a bare majority. On top of that problem, the Court is also making constitutional law that will block future legislative and executive branch judgments. Only a future Court or a constitutional amendment can check this power.

There are many interpretations of the Constitution's structure of checks and balances, but three are especially pertinent here. The first is that the Constitution's structure places a heavy burden against legislation, because the Framers preferred to have too few laws rather than too many. This built-in libertarian structure means that checks and balances are essentially obstacles to legislation, and judicial review is the last defense. Five-four decisions are perfectly consistent with this purpose. A second interpretation is that the checks and balances are created to insure that all legislation is supported by a majority of the public. The Framers chose not to represent a public majority in any one way, but chose several different models of representation through the Presidency, the House, the Senate, and the state governments through federalism. In this model of checks and balances, the Supreme Court is one additional model of representation, as a way of representing majorities over time, as mentioned previously in Part II.A.[331] The Constitution demands that legislation pass through these hoops as a way of guaranteeing that it has majority support in at least one of the various ways of understanding majorities, and this structure tolerates false negatives. According to this second perspective, five-four decisions voiding acts of Congress are also acceptable.

These two interpretations have some problems. First, they grant extraordinary power of judicial supremacy over the legislative process, inconsistent with the judicial review doctrines of deference and "clear mistake," which are discussed in Part I.B.[332] If the Constitution has such an antilegislative bias, then the Courts should not defer to Congress at all, but should remain as vigilant and independent as possible. If the Court plays an equally repre-

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[331] *See supra* notes 268-83 and accompanying text.

[332] *See supra* notes 41-68 and accompanying text.

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sentative role, then why should the Court defer to another branch's interpretation of the majority will? These two perspectives rely on the Court's ability to represent aspects of the general will, but the Court is too unrepresentative to have this unchecked role, because vacancies are either arbitrary or easily manipulated, and because the confirmation process is so flawed. One should not rely heavily upon the Court's representativeness of the majority will to legitimate its power.

These two perspectives are valuable, but they are neither compelling enough to justify narrow Court majorities nor do they overcome the significance of consensus in the Constitution's checks and balances. A third perspective is that the Constitution gives Congress the primary legislative power, and then uses structures of consensus and supermajorities between branches to balance its power. Thus, in order to retain the symmetry of this balance, the Court should follow a two-thirds rule when it checks the power of Congress and the Presidency. This model of constitutional symmetry explains why the appropriate consensus rule is six votes out of nine, rather than seven or more. A two-thirds vote parallels Congress's consensus rule in checking the President (overriding a veto) and checking the Court (voting for an Article V constitutional amendment).[333] Seven out of nine Justices would be similar to the states' ratification of an amendment by a three-quarters vote, but Congress bears a closer relationship with the Supreme Court as a national federal branch, and its voting is a slightly better model.

F. THE STABILITY OF PRECEDENT

Finally, five-four decisions are too unstable to create reliable constitutional law. The Supreme Court itself has demonstrated that these opinions enjoy lesser precedential value. Of the forty-nine decisions overturned between 1958 and 1980, twenty-one of them were decided by a five-vote majority.[334] Eight of those cases were

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[333] *See* U.S. CONST. art. I, § 7, cl. 2; U.S. CONST. art. V.

[334] David J. Danelski, *Causes and Consequences of Conflict and its Resolution in the Supreme Court*, *in* JUDICIAL CONFLICT AND CONSENSUS 21, 39-42 (Sheldon Goldman & Charles Lamb eds., 1986).

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overturned fewer than ten years later.[335] The Reconstruction Era cases and the New Deal switch-in-time also demonstrate the fragile and fleeting nature of one-vote majorities, because the Court quickly reversed itself in two years or fewer in each confrontation.[336] As noted in Part I on the Rehnquist Court,[337] Chief Justice Rehnquist, writing for a majority of the Court overturning a past five-four decision, concluded that decisions "decided by the narrowest of margins" are entitled to the least weight of stare decisis.[338] Nine years later, Justice Stevens criticized the conservative majority of five for destabilizing so much constitutional law by overturning so many precedents, and refused to grant their sovereign immunity decisions the weight of stare decisis.[339]

The Rehnquist Court itself recognizes the problematic nature of narrow decisions, so much so that it has rendered these decisions even more unreliable by reducing their precedential value. Then why does it continue to rely so heavily on five-four votes in some of its most controversial decisions? One would imagine that this reasoning applies to conservative decisions as well as liberal ones like *Booth v. Maryland*.[340] The conservative value of stability and precedent also militates against five-four opinions. One might reply that a six-three rule is no more stable than a five-four rule, because in either case, the change of one vote changes the outcome (*i.e.*, a six-three majority invalidating a statute becomes a five-four vote unable to invalidate the statute). But under *Payne v. Tennessee*, a six-three decision has more protection of stare decisis than a five-four decision, and that rule should make the reversal of six-three precedents somewhat more difficult.[341] Additionally, under a six-three rule, the five Justices retain other ways of weakening or narrowing the statute, while the current rule gives no power to the four dissenters. Thus, the six-three rule provides more middle

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[335] *Id.*

[336] *See supra* notes 137-46, 178-89 and accompanying text.

[337] *See supra* notes 252-55.

[338] Payne v. Tennessee, 501 U.S. 808, 828-29 (1991).

[339] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 97-99 (2000) (Stevens, J., dissenting); *see also supra* notes 256-57 and accompanying text.

[340] 482 U.S. 496 (1987).

[341] 501 U.S. at 828-29.

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ground between majority and minority, which balances the scales and creates more stability.

When the Court overextends its power to invalidate legislation, the respect for judicial review and the Court itself erodes, and it endangers its authority to intervene when particularly necessary.[342] Over two centuries, the Supreme Court overcame many constitutional and political disadvantages to establish its prestige and legitimacy, due in part to a commitment to consensus and compromise. The current Court is eroding this commitment, but a supermajority rule would reaffirm the values of democracy, discourse, reliability, and judicial integrity.

III. MECHANICS

A. CREATING AN INTERNAL NONMAJORITY RULE: GRANTING CERTIORARI AND HOLDS

Ideally, the Supreme Court could adopt the supermajority rule on their own and enforce it themselves, in the same way the Justices created other procedural rules, such as granting certiorari and holds. The Court has enforced those voting rules with some flexibility, and they are good models for a supermajority rule. As this Part explains, a two-thirds rule may be particularly appropriate in some cases and less appropriate in others. If the Court or an individual Justice adopts the supermajority rule independently, this also may lead to the recognition of some narrow substantive exceptions. This flexibility is the distinct advantage of a self-enforced rule; a congressional statute would face constitutional problems if it were to direct the Court substantively.[343]

The rules for granting certiorari developed gradually and internally. The Justices first revealed to the public the Court's "Rule of Four" for granting certiorari during the congressional hearings on the proposed Judiciary Act of 1925.[344] The Act soon

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[342] In his book rejecting the Supreme Court's power to invalidate legislation, Mark Tushnet wrote that five-vote majorities are unstable and random. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 29 (1999).

[343] *See infra* notes 489-91, 524-27, 544-62 and accompanying text.

[344] Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136

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transformed the Court's docket and workload by converting much of its mandatory jurisdiction into discretionary jurisdiction. Justice Van Devanter told the House Judiciary Committee that the Court always granted certiorari when four Justices vote to hear the case, "and sometimes when as many as three think that way."[345] Chief Justice Hughes described a similar degree of flexibility regarding the rule in 1937 during the Court-packing crisis,[346] but over time, the Court has solidified the Rule of Four. The criteria for granting certiorari always were unclear, even after the Court offered some general guidelines in Supreme Court Rule 17.[347]

The practice for "holding" a case, deferring a petition for certiorari as the Court hears a case raising a similar legal question, was even more opaque and secret than the rules for certiorari. Though it was clear that the Court had an institutional practice of deferring certiorari petitions, the Justices had never discussed the "hold" policy until 1986.[348] One year later, the Court revealed that "three votes suffice to hold a case."[349] The Justices could adopt a six-three rule for overturning acts of Congress as an unwritten behind-the-scenes goal of reaching consensus, just as it initially developed the Rule of Four and the hold rule, or it could formulate an explicit rule with general guidelines, just as it now has a Supreme Court Rule for granting certiorari.[350]

Of course, there are loopholes in both of these nonmajority rules, because ultimately a majority of five controls major aspects of the case, such as granting stays. For example, after oral argument, the same five Justices voting against granting certiorari can still vote to dismiss the case by ruling that certiorari was improvidently granted (known as "DIG"). Even if four Justices vote to hear a case,

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U. PA. L. REV. 1067, 1069-70 (1988).

[345] *Id.* at 1070 (citing *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearings on H.R. 8206 Before the House Comm. on the Judiciary*, 68th Cong. 8 (1924)).

[346] Revesz & Karlan, *supra* note 344, at 1070-71 (citing *Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary*, 75th Cong. pt. 490 (1937) (letter of Chief Justice Hughes read by Sen. Wheeler)).

[347] *Id.* at 1072-73 (citing SUP. CT. R. 17).

[348] *See* Straight v. Wainwright, 476 U.S. 1132, 1135 (1986) (Brennan, J., dissenting) (discussing holds); Revesz & Karlan, *supra* note 344, at 1111.

[349] Watson v. Butler, 483 U.S. 1037, 1038 (1987) (Brennan, J., dissenting).

[350] *See* SUP. CT. R. 17.

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the issues may become moot before oral argument unless five Justices issue a stay, which is particularly important in death row appeals. Confronting these opportunities to subvert the Rule of Four, the Court developed norms to protect it. In response to dismissals for improvident granting of certiorari, Justice Harlan proposed a rule that only significant intervening factors can lead to such a vote.[351] Justice Stevens suggested that five Justices could overrule the Rule of Four for the sake of judicial restraint and caution against premature intervention in constitutional controversies (values quite consistent with a two-thirds rule).[352] In response to the problem of needing five votes to grant stays, the Court developed a duty to preserve jurisdiction.[353] Thus, the Rule of Four is a good example of the Court closing loopholes with additional guidelines.

The hold rule can be more problematic. For example, in 1986, the Court granted certiorari in one death penalty case,[354] and then following oral argument in this case, four Justices granted a hold for a very similar death penalty case.[355] However, by a vote of five to four, the Court refused to grant a stay of execution in the case they were holding.[356] Justice Powell, concurring in the denial of the stay, refused to extend the duty to preserve jurisdiction from cases that have been granted certiorari to cases that have been held.[357] In this case, the Court rejected the norms that would have protected the spirit of the rule.[358]

A six-three rule faces a similar challenge. While four Justices can block the explicit invalidation of a federal law, the other five

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[351] Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 560-62 (1957) (Harlan, J., concurring in part, dissenting in part); *see also* Triangle Improvement Council v. Ritchie, 402 U.S. 497, 497-502 (1971) (Harlan, J., concurring in part, dissenting in part).

[352] New York v. Uplinger, 467 U.S. 246, 250-51 (1984) (Stevens, J., concurring).

[353] Darden v. Wainwright, 473 U.S. 927, 927-28 (1985) (Powell, J., concurring); Revesz & Karlan, *supra* note 344, at 1074-82.

[354] *See* Darden v. Wainwright, 477 U.S. 168 (1986).

[355] *See* Straight v. Wainwright, 476 U.S. 1132 (1986).

[356] *Id.* at 1132.

[357] *Id.* at 1132-33 (Powell, J., concurring).

[358] In their analysis of this problem, Richard Revesz and Pamela Karlan argue that the Justices should grant stays more liberally to preserve jurisdiction and promote equity for the fair treatment of all cases. Revesz & Karlan, *supra* note 344.

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Justices still can interpret that law so narrowly,[359] or require such clear statements from Congress,[360] that the law becomes irrelevent and unenforceable. The Rule of Four model suggests that the Court can create guidelines to limit the ability of five Justices to undermine the rule. But at the same time, both the Rule of Four and the hold examples also illustrate that five Justices can reduce the effectiveness of these minority rules when they feel that the minority is abusing their power. Closing this loophole is discussed in the section below.

B. CLOSING THE LOOPHOLES: THE EXPERIENCE OF THE STATE COURT SUPERMAJORITY RULES

Several states have adopted supermajority rules for invalidating legislation, and they demonstrate both the technical difficulties of the rules and the ways judges can fix some of the problems with these rules. Since 1918, North Dakota's constitution has required the concurrence of four out of five Justices to nullify legislation,[361] and since 1920, Nebraska's constitution has required five out of seven.[362] From 1912 to 1968, Ohio's constitution barred the supreme court from striking down a law if more than one Justice did not concur.[363] South Carolina's constitution provides a supermajority rule with the following twist: if the Justices cannot resolve a constitutional question unanimously, all of the circuit judges join the Justices to create a superconstitutional court to decide the case by a simple majority.[364] As an international example, Costa Rica's

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[359] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 299-315 (2001) (narrowly interpreting Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and requiring clear statement of Congressional intent).

[360] *See, e.g.*, Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002); Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999); *see also* Judith Resnik, *Federal Law Can't Help You*, 78 IND. L. REV. (forthcoming 2003).

[361] N.D. CONST. art. IV, § 88 (repealed and reenacted as N.D. CONST. art. VI, § 4).

[362] NEB. CONST. art. V, § 2.

[363] OHIO CONST. art. IV, § 2 (repealed 1968).

[364] *See* S.C. CODE ANN. § 14-3-370 (Law. Co-op. 1976):

> Whenever, upon the hearing of any cause or question before the Supreme Court in the exercise of its original or appellate jurisdiction, (a) it shall appear to the Justices thereof, or any three of them, that there is involved a question of constitutional law or of conflict between the Constitution and laws of this State and of the United States or between the duties and

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constitution required a two-thirds vote to strike down a legislative act until 1989.[365]

1. North Dakota and Nebraska: "No Problem." One of the greatest flaws in supermajority rules is that, while a minority can block a majority from striking down the law, the majority retains the power to eviscerate the law through other interpretive means. I interviewed a few Justices of the North Dakota and Nebraska Supreme Courts, and they confidently stated that their fellow justices abide by the rule in good faith and do not undermine the laws in question in other ways. Chief Justice Vandewelle, who has served on the North Dakota Supreme Court for twenty-three years, said, "[T]hat kind of evasion has not happened here. We go by an up-or-down vote. . . . But a majority of three still controls the [final disposition of] the case [beyond the question of a law's constitutionality]."[366] Both Chief Justice Vandewelle and Justice William Neumann commented that rule has very rarely come up, which makes it difficult to reach any solid conclusions about the rule.[367] Their comments confirm one scholar's study that the rule has "created almost no controversy."[368] John Entin found that the rule affected about six cases since 1918, and that each time, the Justices accepted the rule without protest.[369]

In Nebraska, the rule enabled three Justices to block invalidations of statutes in four decisions between 1968 and 1971, but only

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> obligations of her citizens under the same, upon the determination of which the entire court is not agreed or (b) the justices of said court, or any two of them, desire it, on any cause or question so before said Court, the Chief Justice, or in his absence the presiding associate justice, shall call to the assistance of the Supreme Court all the judges of the circuit courts, except that when the matter to be submitted is involved in an appeal from a circuit court, the circuit judge who tried the case shall not sit.

Id.

[365] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA art. X (amended 1989); *see also* Robert S. Barker, *Judicial Review in Costa Rica: Evolution and Recent Developments*, 7 SW. J.L. & TRADE AM. 267, 275 (2000).

[366] Telephone interview with Chief Justice Gerald Vandewelle, North Dakota Supreme Court (July 3, 2002).

[367] *Id.*; E-mail from Justice William Neumann, North Dakota Supreme Court, to author.

[368] *See* Jonathan L. Entin, *Judicial Supermajorities and the Validity of Statutes: How* Mapp *Became a Fourth Amendment Landmark Instead of a First Amendment Footnote*, 52 CASE W. RES. L. REV. 441, 468 n.195 (2001) (finding rule affected about six cases since 1918, and that Justices accepted rule without protest).

[369] *Id.* at 468.

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once more since then.[370] Nebraska Justice John Wright, who has served on the Supreme Court since 1994, did not see any sign that the majority considered evading the rule then or any other time, stating, "I have no problem with the rule. We just go by the rule in the Constitution, and we don't argue about it."[371] He also commented that the rule "doesn't create any discord," but it also does not have much of an effect on promoting dialogue within the Nebraska Supreme Court, perhaps because the court is already "a good collegial court anyway, the best I've been a part of."[372] Collegial courts have little need for rules for fostering dialogue and consensus, because those values tend to emerge more naturally.

2. Ohio: Confusion by Design. Ohio's rule had a more turbulent track record than the rules in Nebraska and North Dakota. In 1912, Ohio amended its constitution to create a supermajority rule, providing, "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."[373] The court quickly recognized how the rule expressed the Court's duty to tread cautiously when reviewing statutes. In one of the early cases affected by the amendment, Chief Justice Hugh Nichols wrote that the new rule "reminded [us] that [the power of judicial review] should be exercised with the greatest possible care and reserve."[374] In 1930, Ohio plaintiffs challenged the rule's constitutionality under federal due process, but the supreme court rejected this argument unanimously.[375] The supermajority rule thwarted a bare majority of judges several times in the rule's fifty-six-year life.[376] It even

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[370] *Id.* at 468-69.

[371] Telephone interview with Justice John Wright, North Dakota Supreme Court (July 2, 2002).

[372] *Id.*

[373] OHIO CONST. art. IV, § 2 (repealed 1968).

[374] State *ex rel.* Turner v. U.S. Fid. & Guar. Co., 117 N.E. 232, 234 (Ohio 1917).

[375] *See* Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74 (1930), *aff'g* 166 N.E. 407 (Ohio 1929).

[376] *See* State v. Mapp, 166 N.E.2d 387 (Ohio 1960); R.K.O. Radio Pictures, Inc. v. Dept. of Educ., 122 N.E.2d 769 (Ohio 1954); State *ex rel.* English v. Indus. Comm., 115 N.E.2d 395 (Ohio 1953), *aff'd on reh'g*, 117 N.E.2d 22 (Ohio 1954); Univ. of Cincinnati v. Bd. of Tax Appeals, 91 N.E.2d 502 (Ohio 1950); State v. Chester, 42 N.E.2d 993 (Ohio 1942); Meyers v. Copelan, 160 N.E. 855 (Ohio 1927); State *ex rel.* Jones v. Zangerle, 159 N.E. 564 (Ohio 1927);

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played a role leading to the Supreme Court's landmark exclusionary rule decision *Mapp v. Ohio*,[377] because the rule prevented the Ohio Supreme Court from overturning Mapp's conviction on the separate issue of whether an obscenity law was constitutional.[378]

a. Reviewing Lower Courts. Along with its success as an obstacle against invalidating legislation, the Ohio rule created many problems, some avoidable, some inevitable. The design of the amendment was deeply flawed, because if a court of appeals upheld the law, the supermajority rule applied, but if a court of appeals voided the law, a bare majority of four could affirm the lower court decision.[379] Sometimes the circuit courts conflicted on ruling whether a law was constitutional, so that the Ohio Supreme Court's resolution of the issue turned on which circuit court decision it reviewed, and it could wait until a circuit court struck down the law so that it could affirm that decision by a simple majority.[380] Nichols's replacement, Chief Justice Marshall, condemned the constitution's supermajority provision as destroying "the most important function of courts of last resort," namely reconciling conflicting lower court rulings.[381] A supermajority rule for the United States Supreme Court should not create this absurd discrepancy. Regardless of how lower courts resolved the matter of the law's constitutionality, two-thirds of the Justices must concur in any holding that a law is void. The Supreme Court also may defer to lower court decisions by denying petitions for certiorari. However, the same four Justices seeking to reverse that court could grant certiorari and then uphold the law with those same four votes.

Fullwood v. City of Canton, 158 N.E. 171 (Ohio 1927); State *ex rel.* Williams v. Indus. Comm'n, 156 N.E. 101 (Ohio 1927); City of East Cleveland v. Bd. of Educ., 148 N.E. 350 (Ohio 1925); DeWitt v. State *ex rel.* Crabbe, 141 N.E. 551 (Ohio 1923); Baker v. City of Akron, 121 N.E. 646 (Ohio 1918).

[377] 367 U.S. 643 (1961).

[378] *See* Entin, *supra* note 368, at 441 (giving overview of *Mapp*).

[379] *Id.* at 455.

[380] *Id.* at 456-57. In 1925, the Ohio Supreme Court failed to strike down a law that required municipalities to provide free water to public schools, because the lower court had upheld the law and the supermajority rule applied. *City of East Cleveland*, 148 N.E. at 350. Three years later, a lower court rejected the law, and the Ohio Supreme Court affirmed that decision five-to-two. Bd. of Educ. v. City of Columbus, 160 N.E. 902, 903 (Ohio 1928).

[381] *City of Columbus*, 160 N.E. at 903.

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b. Less Than a Full Bench. Ohio's rule created further difficulties when Justices recused themselves or were absent. The court interpreted the rule to count Justices not participating as not concurring in the result, so that the absence of more than one Justice for any reason foreclosed any constitutional challenge to a statute.[382] In 1944, the voters approved an amendment permitting the Court to designate a court of appeals judge in place of the nonparticipating Justice.[383] This solution is less appropriate for a United States Supreme Court supermajority rule, because the Chief Justice designating a lower court judge to sit on the Court is unprecedented, and it would undoubtedly create more controversy than it would solve. A better solution is to require two-thirds of the Justices hearing the case, not of the full bench. If eight Justices are present, the rule would still require the concurrence of six Justices, but if seven Justices are present, a vote of five-two would pass the two-thirds requirement. However, if three Justices are absent, four out of six sitting Justices should not suffice, because a minority of the full bench should not be able to strike down statutes. So the rule might be stated as follows: "The Supreme Court may invalidate an act of Congress only with the concurrence of at least two-thirds of the voting Justices, and with at least a majority of the total number of Justices on the Court."

c. Local Laws and Administrative Regulations. A third problem emerged from Ohio's experience. Did the supermajority rule apply to municipal ordinances and other local laws? The Ohio Supreme Court split on this question confusingly in the 1920s,[384] before it eventually ruled unanimously that the rule did not apply.[385] While the proposed rule for the United States Supreme Court can clearly state that it applies to acts of Congress (excluding state laws, local ordinances, and administrative regulations), what happens when the Court reviews state legislation that is directly linked to federal statutes permitting such legislation? For example, in *Saenz*

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[382] Entin, *supra* note 368, at 457-58.

[383] *Id.* at 461; *see also* OHIO CONST. art. IV, § 2 (repealed 1968).

[384] Entin, *supra* note 368, at 457. The Court split in *Fullwood v. City of Canton*, 158 N.E. 171 (Ohio 1927), and in *Meyers v. Copelan*, 160 N.E. 855 (Ohio 1927).

[385] Vill. of Brewster v. Hill, 191 N.E. 366, 367 (Ohio 1934).

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v. Roe,[386] the Court reviewed a state welfare law adjusting benefits based on how long the recipient has resided in the state.[387] The Court voided the law because it reduced benefits for recent arrivals, impermissibly infringing the Fourteenth Amendment fundamental right to travel.[388] Making matters slightly more complicated, this welfare rule had been expressly designed and permitted by Congress's welfare reform statutes.[389] The language of the majority opinion clearly suggested that the federal law was unconstitutional, in addition to the state law it was directly reviewing.[390] In *Saenz*, seven Justices voted with the majority,[391] but under a two-thirds rule regime, what if it was only a five-member majority? The five Justices still could void the state welfare law, but they could only comment on the federal law's constitutionality in dicta. As long as the federal law permitted states to act unconstitutionally, the Court could invalidate each state law, while leaving the federal law on the books in name alone. But if Congress directly implemented the policy, then the Court majority could void that statute only with a sixth vote.

A similar situation applies to administrative regulations, *i.e.*, what if an act of Congress directly empowers an agency to implement a policy? For example, in *Adarand Constructors v. Pena*,[392] five Justices applied strict scrutiny to federal affirmative action programs, and remanded the case rather than actually voiding the Department of Transportation regulation.[393] The Department of Transportation guidelines for minority-owned businesses were closely linked to federal statutes mandating affirmative action programs.[394] The proposed consensus rule would not spare administrative regulations from five-four majorities, even if they were directly mandated by Congress. The decisions of administrative agencies do not have nearly the same democratic imprimatur that

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[386] 526 U.S. 489 (1999).
[387] *Id.* at 492.
[388] *Id.* at 511.
[389] *Id.* at 495.
[390] *Id.* at 498-500.
[391] *Id.* at 491.
[392] 515 U.S. 200 (1995).
[393] *Id.* at 200.
[394] *Id.* at 238.

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Congress does, and judicial review of agencies is even more justified than review of legislatures. The administrators in the Department of Transportation are not as accountable to the public, and their deliberations are not as open. If Congress would like the consensus rule to protect affirmative action and other policies that have come under judicial fire, it would have to draft those policies itself through the full and open legislative process, rather than pass those controversial decisions over to bureaucrats.

d. Voting on Applying the Rule. More confusion can arise from the threshold question of when the supermajority rule applies. The Ohio Supreme Court sometimes had a narrow majority for striking down a statute, and another majority holding that the supermajority rule did not apply in that case, but less than a majority of justices adopted both rulings together.[395] Did the supermajority rule create two separate steps of a ruling, or one unified ruling? Could one majority decide against applying the rule, and another then invalidate a statute? Or did one majority have to hold both that the rule did not apply and that the statute was unconstitutional? In *Fullwood v. City of Canton,*[396] the court faced this dilemma, but instead of resolving it, they gave up and upheld the law.[397]

A United States Supreme Court rule would face the same problem. As long as the rule clearly adopts one approach or the other, it will resolve this confusion. But the most sensible answer is to require a majority to hold that the rule does not apply and that the law is unconstitutional. A patchwork of separate majorities creates more confusion and a more peculiar result. If a Justice is the deciding vote for invalidating a law, it is certainly preferable that he or she should also believe that the Court has the power to do so. The point of a consensus rule is to reduce the number of five-to-four decisions, so the higher threshold makes more sense.

e. Evasion. John Entin's study found a final, and perhaps the largest, problem with the supermajority rule—evasion of the legislation by other judicial means.[398] In *Patten v. Aluminum*

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[395] Entin, *supra* note 368, at 457.
[396] 158 N.E. 171 (Ohio 1927).
[397] *Id.* at 171-72.
[398] Entin, *supra* note 368, at 454.

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Castings Co.,[399] a five-vote majority avoided using the words "unconstitutional," but ruled that the statute created a tort that was not a "lawful requirement" because it was impermissibly vague.[400] The majority retains the power to use other interpretive tricks to undercut a statute. Here, the Ohio Supreme Court required magic words from the legislature in order for the law not to be impermissib ly vague.[401] The five United States Supreme Court Justices have acted similarly in immigration cases;[402] in Eleventh Amendment jurisprudence, requiring a clear statement of intent to abrogate sovereign immunity;[403] and in equity cases, requiring incredibly clear statements of remedies available to plaintiffs.[404] Courts also could circumvent supermajority rules with such narrow statutory interpretation that the law means nothing in practice.

On the one hand, these evasions could make a mockery of the consensus rule. However, these evasions also allow Congress to respond by giving clear statements that would prevent the Court from evading their meaning with narrow interpretations. If the Court is able to declare those laws unconstitutional, Congress cannot reply. Thus, a five-member majority on the Court still could challenge Congress's intent and commitment to the statutes, while fostering dialogue between the branches, and giving Congress the last word.

These tactics encourage more balance within the Court as well. A supermajority rule carries a risk of letting a minority of four obstruct a majority without engaging in dialogue. Given the problems created by five-four decisions, such obstruction may be necessary, but it does not encourage debate. Because five Justices have other tools to reduce the applicability of a law, such alterna-

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[399] 136 N.E. 426 (Ohio 1922).

[400] *Id.* at 428; *see also* Entin, *supra* note 368, at 454-55; *id.* at 462-63 (indicating Ohio Supreme Court also pulled sleight-of-hand in invalidating legislative appropriations in *Grandle v. Rhodes*, 139 N.E.2d 328 (1956), *rev'd per curiam on reh'g*, 140 N.E.2d 897 (Ohio 1957)).

[401] *Patten*, 136 N.E. at 428.

[402] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 299-315 (2001).

[403] *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 76-77 (2000); Seminole Tribe v. Florida, 517 U.S. 44, 56-57 (1996).

[404] *See, e.g.*, Great-West Life & Annuity Ins. Co. v. Knudson, 122 S. Ct. 708, 717 (2002); Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 327 (1999). *See generally* Judith Resnik, *Federal Law Can't Help You*, 78 IND. L. REV. (forthcoming 2003).

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tives can give a four Justice bloc more incentive to compromise and reach consensus. Ultimately, the goal of the consensus rule is to reduce bloc voting in general by creating more incentives for dialogue and compromise. Justice Wright of the Nebraska Supreme Court criticized bloc voting and bare majorities in general, because they escalate a cycle of factionalization, stating "When a court has a certain voting bloc that always controls the decisions, they tend to dismiss the minority after a while, and there is much less debate and much less collegiality. . . . A chief justice's job is to avoid that [factionalization]."[405]

C. THE VALIDATING PURPOSE OF JUDICIAL REVIEW

Charles Black offers a very intriguing argument about the larger significance of judicial review:

> [A] government cannot attain and hold a satisfactorily definite attribution of legitimacy if its actions . . . are not . . . received as authorized. . . . [O]ne indispensable ingredient in the original and continuing legitimation of a government must be its possession and use of some means for bringing about a consensus on the legitimacy of important governmental measures.[406]

In an open and popular democracy, the actions of government are held to higher standards of legitimacy. For Black, the Supreme Court validates the government's actions as legal. If five Justices find a federal law unconstitutional, and yet the law stays on the books and the government enforces it, the law may lose its legitimacy and validity in the community. This problem is the mirror image of the Court invalidating statutes by a bare majority. Either way, bare majorities raise problems of legitimacy.

First, the notion of dialogue assures the Court some influence over Congress. While Black intended for the Court's validating

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[405] Telephone Interview with Justice John F. Wright, Nebraska Supreme Court (July 2, 2002).

[406] CHARLES BLACK, THE PEOPLE AND THE COURT 37-38 (1960).

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purpose to have legal consequences, the Court perhaps can use legitimacy as a more political than legal tool in such cases. Five Justices may vote to invalidate a federal law, and while that law still stands, the Court has signaled to Congress and the public its opposition. Such a five-four decision creates an advisory opinion to Congress that lacks binding force, but has moral and political force. Although the Supreme Court as a rule avoids making advisory opinions by using doctrines such as standing and ripeness, this rule opens up a space without the problems that plague the standard advisory opinion. There is an actual controversy in question that has ripe issues and parties with standing. Thus, the Court can foster dialogue and advise Congress without directly undermining Congress's power and without conflicting with Article III's "case and controversy" requirement. Hopefully, if the Court and Congress have a more solid relationship, Congress will address the constitutional problem. This advisory opinion also serves as a warning shot for future legislation and litigation, signaling that the Court is poised to strike down such laws, and allows the four dissenters time to see how Congress responds. The Court also signals the issues to the public, and perhaps empowers popular constitutionalism. The Court engages Congress and the public in debate, rather than simply invalidating a statute and moving on to the next case on the docket. As we have seen, the force of stare decisis reduces the role of popular impact on constitutional law, and when the Court is so narrowly divided, the public should be more involved and the questions should not be answered so quickly. An advisory opinion leaves the matter open to debate for the next election and the next Court.

Finally, Black emphasizes the value of consensus.[407] In his framework, consensus is interbranch and structural, because the Court and Congress must uphold the law to validate it. This is perhaps too formal a view of consensus. A broader sense of democratic consensus suggests that the Court should defer to the political branches. And an internal sense of judicial consensus suggests that the Court itself must value consensus in order to guarantee the validity and legitimacy of its own decisions. Black is

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[407] *Id.*

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correct in placing importance on validation, but validation should approach the goal of consensus in a more robust sense.

D. A FRAMEWORK FOR A CONSENSUS RULE

A lot of ink has been spilled about what constitutional questions the Court should consider, and which ones it should not adjudicate at all. This proposed voting rule borrows from these theories to consider when judicial review is most appropriate and most necessary to justify bare majorities.

1. Congressional Versus State Legislation. Why should the Court differentiate its rules for state laws and for federal laws? Reasonable people can disagree about this distinction, but there are several explanations for why federal laws deserve slightly more protection than state laws. One reason is that, in our constitutional system, Congress is a coequal branch with the Supreme Court, even if the Supreme Court in interpreting the Constitution is the "first among equals," and, in its finality, the last among equals. Congress's supreme national authority shares the same textual basis with the Supreme Court's power of judicial review, the Supremacy Clause of Article VI, which provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the judges in every state shall be bound thereby."[408] The Constitution recognizes that federal statutes take precedence over state statutes as the law of the land, and the Supreme Court should take the Supremacy Clause's hierarchy into account. Justice Holmes declared that reviewing acts of Congress is the "gravest and most delicate duty that this Court is called on to perform."[409]

Madison's theory in *Federalist* No. 10 applies here, as well.[410] A larger republic balances factions against each other so that no one faction gains the power to oppress others.[411] Congress is more likely to balance factions, and its legislation is more likely to reflect

[408] U.S. CONST. art. VI.
[409] Blodgett v. Holden, 275 U.S. 142, 148 (1927).
[410] *See* THE FEDERALIST NO. 10 (James Madison).
[411] *See id.*

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compromise and consensus than state legislation. Our national experience suggests that states often need to be kept in check because of local factions. Slavery, segregation, and civil rights are several examples of Congress setting limits on state and regional factional tyranny. Congress has sometimes supported factional oppression—the McCarthy era is one powerful example, and Congress's compromises over slavery are another—but on the whole, Congress has made fewer egregious mistakes than the states. Whatever one's political perspective, it is difficult to place Congress's efforts to regulate violence against women,[412] gun ownership,[413] discrimination against the disabled,[414] pornography,[415] and publicly funded attorneys[416] in the category of factional tyranny.

Additionally, more national media attention focuses on congressional legislation. The "Fourth Estate" serves as a better watchdog on a national scale, where it is more experienced and established, and in general, more attuned to civil rights and civil liberties. Lobbyists for civil rights and civil liberties groups also are generally better organized on a national level. National groups engage in national fundraising, with the biggest donations in cosmopolitan areas and areas with more of an interest in national affairs. These public interest lobbies are more likely to have more power in the halls of Congress than in the state legislatures.

Oliver Wendell Holmes, attempting to defuse a constitutional crisis in his own time, wrote, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[417] This Article does not seek an end to the Court's power to declare acts of Congress void. It simply agrees with Holmes that there is a difference between Congress's legislation and state legislation, and that difference demands deference.

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[412] United States v. Morrison, 529 U.S. 598 (2000).

[413] Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995).

[414] Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

[415] United States v. Playboy Entm't Group, 529 U.S. 803 (2000); Denver Area Educ. Telecomm. Con. v. FCC, 518 U.S. 727 (1996).

[416] Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

[417] OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).

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The structure of checks and balances suggests a two-thirds majority rule for overturning congressional legislation, but only a majority vote for overturning state legislation. The Constitution carefully balances the branches of government through supermajorities and consensus. To pass legislation, Congress must either win presidential approval or override a veto with two-thirds supermajorities in both houses.[418] To nominate Justices, the President must win the consent of the Senate,[419] and to impeach Justices, the Senate must convict with a two-thirds vote.[420] To amend the Constitution, two-thirds of each house of Congress and three-quarters of the states must approve.[421] Thus, federal legislation and federal justices must win the support of two branches, and one branch can check another only with supermajority voting. There is no similar protection for state legislation. Congress can simply override or preempt state law. Of course, it needs either the President's signature or a two-thirds majority,[422] but these are the same rules for all legislation. The Constitution provides no extra hurdle for the federal government to supersede state law. To the contrary, the Supremacy Clause clarifies this power.[423]

2. The Advantage of a Court-Made Rule: Tailoring Exceptions. This Article first argues that the Court should adopt its own internal supermajority rule, but failing that, Congress should enact such a rule as a statute under Article III's Exceptions and Regulations Clause.[424] As Part IV will explain, to avoid constitutional objections, this statutory power should be used in a neutral and broad way, and it should avoid imposing rules of decision.[425] But absent a statute, the Justices are free to tailor their own rule. I suggest a few Court-made guidelines for allowing five-four decisions.

a. A Balanced Approach. Thayer's "clear mistake" rule may be too stringent for modern sensibilities,[426] but the Court can weigh

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[418] U.S. CONST. art. I, § 7, cl. 2.
[419] U.S. CONST. art. II, § 2, cl. 2.
[420] U.S. CONST. art. II, § 4.
[421] U.S. CONST. art. V.
[422] U.S. CONST. art. I, § 7, cl. 2.
[423] U.S. CONST. art. VI, § 1, cl. 2.
[424] *See* U.S. CONST. art. III, § 2, cl. 2.
[425] *See infra* notes 544-55 and accompanying text.
[426] *See supra* notes 51-54 and accompanying text.

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deference in other ways. The Justices should grant a strong presumption that federal legislation is constitutional, and five Justices could only invalidate the law if they all agreed that it grievously and irreparably infringed constitutional rights or provisions. In one of the landmark state decisions on judicial review that influenced *Marbury v. Madison*,[427] the high court of Maryland warned that the judiciary should not intervene every time a legislative act violated the Constitution, because such aggressive judicial review "subverts the government and reduces the people to a state of nature, and therefore cannot be the proper mode of redress to remedy the evils resulting from an act passed in violation of the constitution."[428] The Maryland court suggested that the courts should weigh the interests on each side and then decide if its power is properly used case by case.[429] The Marshall Court followed this thinking in practice by not recognizing a remedy for Marbury's right.[430]

Today's Justices, on the left and the right, demonstrate too little attention to balancing their use of judicial review according to the rights involved. In my judgment, none of the recent five-four decisions, whether on the left or right, would survive this balancing rule, and few of the five-four decisions of the past would stand.

b. Federalism Cases. A two-thirds rule is most appropriate for federalism and separation of powers claims, because the other branches of the federal government had an opportunity to defend those interests. Herbert Wechsler[431] and Jesse Choper[432] have

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[427] 5 U.S. (1 Cranch) 137 (1803).

[428] Whittington v. Polk, 1 H. & J. 236, 243 (Md. 1802); *see generally* Shugerman, *supra* note 106.

[429] *Id.* at 244-45.

[430] *Marbury*, 5 U.S. at 137.

[431] For most of the past century, many constitutional scholars have argued that the Court should not invest its energy in defending federalism and states' rights. In one of the most notable arguments, Herbert Wechsler argued in 1954 that federalism concerns were adequately protected by different state-based mechanisms in the Framers' constitutional design of the national government. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). He emphasized the role played by the states in the Electoral College, the House of Representatives, and particularly in the Senate. *See id.* While some of Wechsler's points are overstated, such as the degree to which each Representative identifies with state interests over other interests his emphasis on the Senate remains salient. The Framers tipped the balance of the Senate strongly in favor of state interests over

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presented the best critiques of judicial protection of federalism values, and the Supreme Court briefly adopted these arguments.[433] The structure of Congress—particularly the Senate and its filibuster rule—allows the states an opportunity to defend their own interests.

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majoritarianism, and today, fifty senators from the twenty-five smallest states, constituting 16% of the population, can create a majority. Forty senators representing just 10% of the population can filibuster most legislation. Once the senate passes the bill, the legislation has passed a tremendous states' interest hurdle. Given the number of obstacles in the legislative process, Wechsler is not surprised that national legislation "has thus always been regarded as exceptional . . . an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, *supra*, at 544. Wechsler cites a letter from Madison in 1830 that lists the three sources for defending the "rights and powers of the states," as follows: first, the members of Congress are accountable to the voters in each state; second, the President is accountable to the voters in each state; and third, the power of impeachment. *Id.* at 558-59 (citing 9 WRITINGS OF JAMES MADISON 383, 395-96 (1910)). Madison did not mention judicial enforcement. Wechsler concludes that "[t]he prime function envisaged for judicial review—in relation to federalism—was the maintenance of national supremacy against nullification or usurpation by the individual states, the national government having no part in their composition or their councils." Wechsler, *supra*, at 559.

[432] JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980). Choper's thesis for federalism argues:

> The federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates "states rights" should be treated as non-justiciable, final resolution being relegated to the political *branches—i.e.*, Congress and the President.

Id. at 175. Choper termed this his "Federalism Proposal." *Id.* Choper highlighted a variety of other obstacles to legislation, including various congressional committees and powerful committee chairs, and the conference committees, each offering new chances for representatives to defend state interests. Larry Kramer refuted many of these arguments and countered that many Representatives and Senators have split allegiances between preserving state sovereignty and increasing federal power, in addition to national party politics. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994). Nevertheless, the Senate provides ample opportunities for voters from the smaller states to defend their interests, and to punish their Senators if they stray too far toward national politics.

[433] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 & n.11 (1985). In *Garcia*, the Supreme Court adopted Choper's perspective on judicial review. *Id.* After citing Choper's book, Justice Blackmun wrote:

> In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Id. at 552. However, the Court did not abide by Justice Blackmun's deferential vision of judicial federalism for very long.

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Senators from the twenty smallest states, representing just ten percent of the national population, may filibuster any bill. Powerful chairs of congressional committees hold the power to block legislation that might encroach on state and local interests. Of course, federalism serves to protect not only smaller states, but the sovereignty of governments of large and small states. Federal officials often have very different interests from state governments. Nevertheless, state officials have much more access and influence in the federal legislative process than ordinary citizens, so the Court generally should be more reserved about intervening in those cases than when the public's rights are infringed.

c. *The Politically Disempowered.* The democratic institutions in the United States Constitution serve to protect state interests, although to what degree is debatable. But these democratic institutions do not necessarily protect democratic values on their own. Majority rule can threaten the participation of minorities in the democratic process. Hence, majoritarianism can threaten democracy. The judiciary, the branch most insulated from popular control, can protect democracy against majoritarian threats, and thus the Supreme Court overcomes the countermajoritarian difficulty by serving as a guardian of democracy. This is the key insight of John Hart Ely in *Democracy and Distrust*.[434] If the Court

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[434] JOHN HART ELY, DEMOCRACY AND DISTRUST 173-77 (1980). Ely takes his readers on a tour of the Constitution to find its fundamental values upholding the democratic process and political participation. *Id.* The Constitution of 1787 sets up a framework for democracy, and the Bill of Rights enshrines the values of political participation and processual protections against majoritarian oppression. *Id.* The Thirteenth and Fourteenth Amendments extend citizenship, inclusion, and equal participation, and the most common feature of the post-Bill of Rights amendments are the extensions of voting rights. *Id.* From this survey, Ely observes that the core value of the Constitution is processualism—the openness and inclusiveness of the democratic process—and it is the Court's duty to protect democracy from itself. *Id.* Ely relies in part on the famous Footnote Four of *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938), in which Justice Harlan Fiske Stone reserves heightened judicial scrutiny for specifically enumerated rights, the political process, and the participation of minorities, particularly of racial minorities and "discrete and insular minorities." ELY, *supra*, at 75-76. Justice Goldberg expanded on the third paragraph of the footnote, suggesting stricter scrutiny of legislative acts "that adversely affect those who are not represented in the legislature." *See* CHOPER, *supra* note 432, at 70; *see also* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24-26 (1960). Meiklejohn's vision of free speech, using the town-meeting metaphor, emphasizes politics, equality, and state regulation to promote debate, emphasizing "a group of free and equal men, cooperating in a common enterprise, and using for that enterprise responsible and

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is responsible for guarding the rights of politically weak minorities against a majority, a consensus rule is not as important in such cases. With a self-imposed consensus rule, the Court could create an exception for protecting the disenfranchised from abusive majoritarianism.

d. "Refined Consensus". Another possible exception that the Justices themselves might carve out is the vindication of personal liberties when they are severely threatened by majoritarian abuse. Again, the Court's role is most justifiable in defending individual rights against democratic excesses. As Akhil Amar argues, the Bill of Rights originally defended the rights of democratic majorities against government excesses and tyranny, but many of these rights were transformed by Civil War, Reconstruction, and the Fourteenth Amendment.[435] Amar's method of "refined incorporation" asks "whether the provision guarantees a privilege or immunity of the *individual citizens* rather than a right of *states* or the *public* at large."[436] Parallel to Amar's theory of "refined incorporation," these same personal rights should be "incorporated" against Congress through the Fourteenth Amendment as a method of "refined consensus," to create an exception to a supermajority rule. In tandem with a balancing question asking how severely a statute infringes on these rights, this exception to a consensus rule would preserve the power of judicial review for the most necessary and appropriate cases.

How is this rule not just a selectively liberal façade for elevating the rights of minorities and the disenfranchised, and of individual rights, above federalism and other conservative constitutional values? First, personal liberties cut in various political directions,

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regulated discussion." *Id.* at 25. In his reification of processual values, Ely overlooks the many substantive values enumerated and embraced in the Constitution, and too easily dismisses the notion that participation and inclusiveness are also substantive values. Nevertheless, Ely's theory about protecting political participation stands as a powerful vision for the appropriate use of judicial intervention. The significance of substantive rights will be discussed below. *See infra* notes 435-36 and accompanying text.

[435] AKHIL REED AMAR, THE BILL OF RIGHTS xiii-xv, 215-94 (1998). Through the Fourteenth Amendment, these rights become "less majoritarian and populist, and more libertarian," and they take shape as "liberal civil rights—'privileges or immunities' of the individuals—rather than republican political 'rights of the people.'" *Id.* at xiv-xv.

[436] *Id.* at xiv.

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and often protect conservative interests (*e.g.*, commercial speech, campaign spending, gun ownership, property rights and takings). Second, many Establishment Clause challenges should not be interpreted as "personal liberty" cases, because the general public good, rather than individual rights, are at stake in such challenges, such as cases contesting voucher programs or state-funded tutors in religious schools. While school prayer may infringe on personal liberties, school vouchers and other forms of public aid to religious institutions raise more concern with respect to public rights than with private individual rights, and should be struck down only by Court supermajorities. Similarly, the Court should defer to Congress on remedies (for example, a tort remedy replacing *Mapp*'s exclusionary rule).

The liberals and conservatives could engage each other to define the contours of an internal rule. Of course, most of the Justices might reject many of these suggested guidelines and suggest other exceptions, but they still would need to assemble a five-vote majority agreeing on the same exception. Such luxuries of crafting exceptions are for the Court. If the Justices decline to adopt this rule, and if Congress tackles the question, its Article III powers are more limited, and it must formulate a more neutral and broad rule for the reasons discussed in the next Part.

IV. REGULATION BY CONGRESS

If the Court refuses to adopt its own supermajority rule and continues to strike down acts of Congress by narrow votes, Congress has the power to intervene. Pursuant to Article III of the Constitution, Congress could require that only a two-thirds majority of the Supreme Court can strike down its laws.[437] The Constitution gives the Supreme Court jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[438] While there is good reason to be skeptical about Congress's power to control the Court's decisionmaking process, the Supreme Court has recognized extremely broad congressional powers under this clause from its

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[437] *See* U.S. CONST. art. III, § 2, cl. 2.
[438] *Id.*

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inception.[439] I reject the argument offered by some scholars that this clause grants Congress plenary power over the Court,[440] and I accept the more moderate position that the clause grants powers limited by a textual reading of "exception" and "regulation" and limited by other constitutional provisions.[441]

Only once has the Court struck down a statute passed under the Exceptions and Regulations Clause, and this enigmatic case, *United States v. Klein*[442]—or more precisely, the academic interpretations of this case—present the biggest obstacle to this six-three proposal. This Article engages *Klein* and the academic literature in order to tailor a rule to pass constitutional muster.[443] Most importantly, the statute must not use procedure as a guise for partisan or unconstitutional ends. An exemption from this rule for all current litigation, plus delayed implementation of this rule, would deflect the concern that the rule was tailored to manipulate certain judicial results. If the rule took effect only after the next presidential election and after the next Supreme Court confirmation, the rule would have as much of a chance of constraining liberal decisions as it would for conservative decisions, precisely because the current Court is divided five-four on so many issues across the political spectrum.

A. "EXCEPTIONS" AND "REGULATIONS": THE TEXT AND THE PRECEDENTS

Does Congress have the power to require a two-thirds majority vote for invalidating one of its own acts? An analysis of the Constitution's text and case law reveal that this question is open. If such a law were tailored to avoid certain problems on which the academics have focused, a six-three statute arguably would be constitutional.

The Constitution gives the Supreme Court jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[444] The usage of such words at the time of the Constitutional Convention points to broad but limited powers. "Exception"

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[439] *See infra* notes 456-98 and accompanying text.
[440] *See infra* notes 513-18.
[441] *See infra* notes 501-12, 519-22.
[442] 80 U.S. 128 (1872).
[443] *See infra* notes 501-27 and accompanying text.
[444] U.S. CONST. art. III, § 2, cl. 2.

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presumes the continuing existence of a general rule.[445] Similarly, "regulation" connotes adjustment, but not radical change.[446] In one of the most important works on this area of constitutional law, written in the midst of the jurisdiction-stripping fight in the late 1950s, Leonard Ratner concludes that these terms do not give Congress plenary power over the Supreme Court.[447] He writes, "[I]n a legal context an exception cannot destroy the essential characteristics of the subject to which it applies."[448] He further observes from the definitions of the word "regulate" that regulations "usually specify conditions for engaging in certain conduct and sometimes forbid a particular act" and would not grant the Supreme Court the power to exclude entire categories of rights or constitutional claims.[449] Nevertheless, this observation still permits a statutory voting rule for the Supreme Court. As we shall see, academics worry about Congress abusing its power by directing decisions,[450] and indeed, Congress ought not "direct" certain substantive results with disregard for the "judicial Power."[451] But the definitions of regulation suggest that Congress may "direct" and impose "methods" for how the Court may exercise its judicial Power. Webster's definition, "to adjust by . . . established mode," suggests a value of historical common practice, which again supports consensus.[452]

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[445] Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 168-69 (1960).

[446] *Id.* at 170. The following are definitions of "regulate" in late eighteenth and early nineteenth century dictionaries: "to adjust or to direct according to rule," *id.* (quoting JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775)); "a putting or setting things in order or to rights," Ratner, *supra* note 445, at 170 (quoting THOMAS DYCHE, NEW GENERAL ENGLISH DICTIONARY (1781)); "to adjust by rule or method, to methodise, to dispose in order, to direct," Ratner, *supra* note 445, at 170 (quoting PERRY, ENGLISH DICTIONARY (1805)). And the most renowned lexicographer, Noah Webster, defined "regulate" as "1. To adjust by rule, method, or established mode, as to regulate weights and measures . . . . 2. To put in good order; as to regulate the disordered state of a nation or its finances. 3. To subject to rules or restrictions, as to regulate trade." Ratner, *supra* note 445, at 170 (quoting NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

[447] Ratner, *supra* note 445, at 172.

[448] *Id.* at 170.

[449] *Id.* at 171.

[450] *See infra* notes 489-91, 524-27, 544-62 and accompanying text.

[451] U.S. CONST. art. III, § 2.

[452] Ratner, *supra* note 445, at 170 (quoting NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

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Precedent further suggests that a voting rule would be constitutional. The Constitutional Convention considered the following amendment to Article III that would have given Congress plenary power over the Supreme Court's jurisdiction: "In all the other cases before mentioned the judicial power shall be exercised in such a manner as the legislature shall direct."[453] This wording was rejected, and thus plenary power was rejected. However, it is very significant to note that in rejecting plenary power, the Convention did not clarify the clause to reduce Congress's power, but retained this open-ended language of "exceptions" and "regulations."[454] When confronted by questions about this power, the Convention still chose broad terms, if not the broadest powers.[455]

Based on this clause, Congress has created the Enabling Acts that codified the rules of evidence and civil and criminal procedure for the federal courts. While the Supreme Court has never recognized Congress's power to block constitutional claims entirely, it has granted Congress expansive powers over timing, mode, and other procedures of review. In *Wiscart v. D'Auchy*,[456] Chief Justice Oliver Ellsworth wrote, "If Congress has provided no rule to regulate our proceedings, we cannot expect an appellate jurisdiction; and if the rule is provided, we cannot depart from it."[457] Ellsworth had served on the Constitutional Convention's Committee on Detail, which drafted the Exceptions Clause. Justice James Wilson, who also served on the committee, and Justice William Paterson, a Convention delegate from New Jersey and a drafter of the 1789 Judiciary Act, concurred in the same opinion. Thus, *Wiscart* illuminates the original meaning of the Regulations and Exceptions Clause quite powerfully. A few years later, Justice Samuel Chase wrote that "the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to [C]ongress. If [C]ongress has given the power to this court, we possess it, not otherwise."[458]

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[453] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 425, 431 (1911).
[454] U.S. CONST. art. III, § 2.
[455] Ratner, *supra* note 445, at 173.
[456] 3 U.S. (3 Dall.) 321 (1796).
[457] *Id.* at 327.
[458] Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 10 n.1 (1799).

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Chief Justice Marshall was consistent with Ellsworth's ceding the power to Congress to break constitutional silence and direct jurisdiction. In *United States v. More*[459] and *Durousseau v. United States*,[460] Marshall wrote that Congress bound the Court's jurisdiction with implicit as well as explicit exceptions, and he recognized broad congressional powers to limit the Supreme Court's jurisdiction.[461] In *Cohens v. Virginia*,[462] he recognized broad congressional power to regulate the Court, as long as the regulations are consistent with the "spirit and true meaning of the constitution."[463] The Taney Court adhered to this interpretation in *Barry v. Mercein*,[464] finding, "By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law proscribes."[465]

The 1860s repeat and even extend this commentary. In 1865, the Court again announced Congress's power over appellate jurisdiction,[466] and in 1868, Chief Justice Salmon Chase offered the broadest language yet in *Ex parte McCardle*.[467] A year earlier, Congress had permitted appeals to the Supreme Court from a circuit court's denial of habeas corpus.[468] Before this statute, prisoners relied upon original writs of habeas corpus as provided by Section 14 of the Judiciary Act of 1789.[469] McCardle, being held for interfering with Union administration in the defeated Confederate

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459 7 U.S. (3 Cranch) 159 (1805).

460 10 U.S. (6 Cranch) 307 (1810).

461 *Durousseau*, 10 U.S. at 313; *More*, 7 U.S. at 171.

462 19 U.S. (6 Wheat.) 264 (1821).

463 *Id.* at 379-80.

464 46 U.S. (5 How.) 103 (1847).

465 *Id.* at 119.

466 *See* Daniels v. R.R. Co., 70 U.S. (3 Wall.) 250, 254 (1865):

> But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.

Id.

467 74 U.S. (7 Wall.) 506 (1868).

468 *Id.* at 507.

469 *Id.*

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states, used this right of appeal to challenge the constitutionality of the Reconstruction Acts.[470] The Supreme Court denied the government's motion to dismiss, and Congress responded by repealing the 1867 Act's appeals provision.[471] Chase deferred to Congress's interference with pending litigation, explaining:

> [T]he power to make exceptions to the appellate jurisdiction of this court is given by express words.... Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.[472]

Those who argue for Congress's broad powers have relied too much on *McCardle*.[473] The Court may have granted Congress the power to make this one exception, but it explicitly retained its essential judicial power over the case through the direct writs of habeas corpus from the Judiciary Act of 1789.[474] A few months later, the Court followed through on this promise, reviewing a direct habeas petition in *Ex parte Yerger*,[475] and then continued to limit the exceptions and regulations clause two years later. *United States v. Klein*[476] is the Supreme Court's sole decision overturning a statute enacted under the Regulations and Exceptions Clause. A Civil War statute authorized the Court of Claims to return captured property to owners who had been loyal to the Union or had been pardoned by the President.[477] After receiving a pardon that noted his support for the Confederacy, Klein sought his property, and the Court of Claims

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[470] *Id.*

[471] *Id.* at 508.

[472] *Id.* at 514.

[473] As Henry Hart commented in his famous Dialogue, "You read the *McCardle* case for all it may be worth rather than the least it has to be worth, don't you?" Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953).

[474] *McCardle*, 74 U.S. at 515.

[475] 75 U.S. (8 Wall.) 85, 85 (1868).

[476] 80 U.S. (13 Wall.) 128 (1872).

[477] *Id.* at 130-31.

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returned it to him.[478] While the government appealed this ruling, Congress withdrew jurisdiction from the Supreme Court and the Court of Claims for all such cases, including Klein's, and legislated that all such pardons should be interpreted as evidence of disloyalty, not absolution for disloyalty.[479]

In *Klein*, the Court struck down this federal statute (incidentally, by a seven-to-two vote).[480] Chief Justice Chase's opinion for the Court focused on the separation of powers problem, beginning with Congress treading on the President's pardon powers.[481] On this point, Chase criticized Congress's withholding appellate jurisdiction "as a means to an end."[482] Congress chose a seemingly permitted "exception" as a backdoor for unconstitutionally subverting the executive's power. Chase then turned to the intrusion on the judiciary, finding that "Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power."[483] Congress had used jurisdictional means for an unconstitutional end against the Judiciary as well, but the Court was not very precise about what aspect of the legislation was unconstitutional. In *Klein*'s strongest passages limiting Congress's power, it regularly refers to prescribing rules for pending cases, but it also mixes in suggestions about prescribing rules of decision:

> [T]he denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. . . .
>
> The court is required to ascertain the existence of certain facts [about the pardon] and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judg-

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[478] *Id.* at 132.
[479] *Id.* at 132-34.
[480] *Id.* at 148.
[481] *Id.* at 147.
[482] *Id.* at 145.
[483] *Id.* at 147.

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> ment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?[484]

Klein goes in several different directions, and it is not entirely clear what its core reasoning is. On a narrower level, the Court was limiting Congress's power over pending cases, particularly when the government is a party, and the Congress directs a self-dealing interpretation of the key facts in the middle of litigation. This rule should not be controversial. *Klein* also restricts Congress's power to dictate the interpretation of specific facts, but this rule was ambiguous then and has been undercut by a recent Supreme Court decision that permitted Congress to establish self-dealing facts in the middle of litigation. In 1992, *Robertson v. Seattle Audubon Society*[485] permitted, during litigation challenging Bureau of Land Management actions, a statutory amendment stating, "Congress hereby determines and directs that [the Bureau's actions satisfied] the statutory requirements that are the basis [for the lawsuit]."[486] The Court unanimously held that Congress had not directed a specific application or interpretation of existing law, but merely amended the statute.[487] This decision is perplexing, and in my opinion, wrong, because Congress had interfered with pending litigation in the same factual, legally interpretive and self-dealing way as it did in *Klein*. But this decision suggests that the Court now reads *Klein* very narrowly, and much more narrowly than legal academics.[488]

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[484] *Id.* at 146.
[485] 503 U.S. 429 (1992).
[486] *Id.* at 434-35.
[487] *Id.* at 441.
[488] *See infra* notes 523-27.

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Nevertheless, consider the broadest reading of *Klein*, even if the Court apparently does not. *Klein* might stand for the rule that Congress cannot interfere with the rules of decision once the Supreme Court has jurisdiction. Henry Hart interprets *Klein* this way, arguing, "[I]f Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it."[489] Leonard Ratner similarly suggests:

> In *Klein*, Congress attempted to dictate the result in a case which involved the government as a party. But the constitutional principle there asserted would preclude any congressional attempt to control the decision in a particular case through the guise of a jurisdictional limitation; nor may Congress by denying jurisdiction in a given case prevent the Court from considering the validity of that denial.[490]

If these rules are applied carefully, they make a lot of sense. Congress should not usurp the Court's judicial power by directing certain substantive results, and it should not misuse its power over jurisdiction to manipulate the results. However, if this rule is applied more broadly to bar Congressional regulation of any aspect of the decisionmaking process, it goes too far.[491] In order to give *Klein* meaning—more life than the Supreme Court grants it, but without turning it into a Frankenstein of judicial independence—perhaps the best reading of *Klein* is a prohibition against Congress dictating specific results or interpretations of laws and facts.

Just as Henry Hart warns against reading *McCardle* for all it may be worth, we ought to be wary of reading *Klein* for all it may be worth. The Court diminished *Klein*'s impact long before *Robertson*

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[489] Hart, *supra* note 473, at 1373.
[490] Ratner, *supra* note 445, at 181.
[491] Gary Lawson has suggested a rule of "decisional independence," but this principle would sweep away most of Congress's rules for judicial procedures, discussed below. *See infra* note 544 and accompanying text. *See generally* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENTARY 191 (2001).

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in 1992, and in fact it returned to the dicta of deference to Congress in jurisdictional matters soon after *Klein*. In 1881, Chief Justice Waite wrote:

> [W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. What those [appellate] powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.[492]

The Court reaffirmed this doctrine in the 1890s. In 1892, the Court observed that "[t]he appellate jurisdiction of this court rests wholly on the acts of Congress."[493] One year later, the Court reiterated that "[t]his court, therefore, as it has always held, can exercise no appellate jurisdiction, except in cases, and in the manner and form, defined and prescribed by Congress."[494] These concessions of power to Congress continued in the twentieth century,[495] and even the

[492] The "Francis Wright," 105 U.S. 381, 385 (1881).

[493] United States v. Sanges, 144 U.S. 310, 319 (1892); *see also* Cross v. United States, 145 U.S. 571, 576 (1892) (denying writ of error due to lack of jurisdiction); *Ex parte* Bigelow, 113 U.S. 328, 329 (1885) (denying writ of habeas corpus for lack of jurisdiction).

[494] Am. Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co., 148 U.S. 372, 378 (1893).

[495] *United States v. Bitty* allowed Congress's wisdom and the rest of the Constitution to be the measure of its power, declaring, "What such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution." 208 U.S. 393, 399-400 (1908). This passage confirms the external limits theory, apparently to the exclusion of limitations imposed by Article III itself. In a pair of dissenting opinions in the 1940s, two Justices recognized remarkably extensive powers. Justice Rutledge wrote that "Congress has plenary power to confer or withhold appellate jurisdiction." Yakus v. United States, 321 U.S. 414, 472-73 (1944) (Rutledge, J., dissenting). Justice Frankfurter went about as far when he stated, "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*." Nat'l Ins. Co. v. Tidewater Co., 337 U.S. 582, 655 (1949)

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activist Warren Court adopted this deferential view.[496] More recently, Chief Justice Rehnquist wrote for the Court in *Webster v. Doe*[497] that Congress can preclude review of constitutional claims against federal agencies entirely.[498] If Congress can prevent the courts from reviewing constitutional questions altogether (and indeed, I think this idea goes too far), surely Congress can set some limited voting procedures on these questions.

B. THE ACADEMICS' INTERPRETATIONS

A survey of the Supreme Court's decisions shows few clear rules obstructing the path of a six-three rule. But while the Supreme Court has interpreted Article III to impose few restraints on Congress's power, the Court has failed to resolve this issue because so few measures have been passed as "regulations of" or "exception to" the federal courts' jurisdiction.[499] The stiffest resistance to Congress's power comes from the academic quarters, which have attempted to fill in the ambiguities and silences of the case law. In this survey of academic arguments, I will also address some of the

(Frankfurter, J., dissenting); *see also* Luckenbach S.S. Co. v. United States, 272 U.S. 533, 536 (1926) (discussing Article III power of Congress to prescribe appellate jurisdiction). Though these statements appeared in dissents (except for *Luckenbach*), they do not deviate too far from the Supreme Court's case law on this question.

[496] In his majority opinion in *Glidden Co. v. Zdanok*, Justice Harlan cited *The Federalist* for this proposition:

> For as Hamilton assured those of his contemporaries who were concerned about the reach of power that might be vested in a federal judiciary, 'it ought to be recollected that the national legislature will have ample authority to make such *exceptions*, and to prescribe such regulations as will be calculated to obviate or remove [any] . . . inconveniences.

Glidden Co. v. Zdanok, 370 U.S. 530, 567-68 (1962) (quoting THE FEDERALIST NO. 80 (Alexander Hamilton)). Dissenting in *Glidden*, Justice William Douglas doubted Justice Harlan's position on Congress's power and on *McCardle*, *Glidden Co.*, 370 U.S. at 606 n.11 (Douglas, J., dissenting), but a few years later Douglas resolved his doubts, finding, "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of Section 2, Article III." Flast v. Cohen, 392 U.S. 83, 109 (1968) (Douglas, J., concurring).

[497] 486 U.S. 592 (1988).

[498] *Id.* at 603.

[499] Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897 (1984).

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arguments raised by congressional opponents of the 1868 and 1923 proposals.[500]

1. Overview of the Debate: Essential Functions. Perhaps the most cited interpretation of the Exceptions and Regulations Clause is Henry Hart and his "essential functions" rule, which reads, "The measure [of the limits of open 'regulations and exceptions'] is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the Constitutional plan."[501] Hart's timing was remarkable, because his "essential functions" thesis appeared in 1953, just a year before *Brown v. Board of Education*[502] unleashed a firestorm concerning judicial powers, and a few years before a full assault on the Court's jurisdiction after "Red Monday" and the striking down of anti-Communist legislation.[503] Since Hart's article, academic debate about this power has most often been triggered by proposals in Congress to exercise this power, and it always revolves around the "essential functions" thesis.

During the "Red Monday" aftermath, Leonard Ratner defined the federal courts' essential function as the pursuit of uniformity of legal interpretation and supremacy of federal law.[504] Ratner returned to this argument during the most recent jurisdiction fight in Congress, in the late 1970s and early 1980s, over several proposals from the right to restrict federal jurisdiction over abortion, school busing, and school prayer.[505] In a 1981 symposium dealing with these jurisdiction-stripping measures, Ratner expounded upon the "essential functions" concept by explaining the exceptions and regulations clause as a "check, but not [a] checkmate . . . . The clause authorizes Congress to provide orderly procedures for invoking that jurisdiction and to adjust, without stultifying, it from time to time in response to social needs and political attitudes."[506] While Ratner dismissed the notion that Article III gave Congress

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[500] *See infra* notes 533-43, 563-71 and accompanying text.

[501] Hart, *supra* note 473, at 1365.

[502] 349 U.S. 294 (1955).

[503] *See supra* notes 217-21.

[504] Ratner, *supra* note 445, at 161.

[505] *See generally* EDWARD KEYNES, THE COURT VS. CONGRESS: PRAYER, BUSING AND ABORTION (1989) (examining authority of Congress to curb federal courts' jurisdiction).

[506] Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 938 (1982).

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plenary power, he recognized that "[t]he exceptions and regulations clause permits Congress to check the Court by specifying procedures."[507] Around the same time, Lawrence Sager published a *Harvard Law Review* foreword on this debate, concluding that three rules limited Congress's power.[508] First, Congress could not dismantle the judicial framework, and it must preserve the courts' essential function.[509] Second, in an interpretation of *United States v. Klein*,[510] the regulation or exception must not be a means to a substantive unconstitutional end.[511] Third, Congress must leave some other forum for adjudicating the claims.[512]

In the 1981 symposium, Martin Redish rejected the "essential functions" thesis, and chided Hart's article by quoting it, "[W]hose Constitution are you talking about—Utopia's or ours?"[513] Redish argued that Article III gave Congress plenary power, subject only to other constitutional limits outside Article III.[514] Even on the question of external restraints, Redish found few clear limits.[515] A few years later, Gerald Gunther reached similar conclusions about the search for internal Article III limits.[516] Such limits, he contends, are not in the text nor in the Supreme Court precedents, and were undermined by Congressional practice.[517] To those who argue that the value of separation of powers creates an "essential functions" limit, Gunther replied with the mechanics of checks and balances that would allow some way for Congress to check the Court's functions, even its essential ones.[518]

The "essential functions" rule, while it may not be in the text of Article III, is still an acceptable interpretation of the overall

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[507] *Id.* at 957.

[508] Lawrence Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 42 (1981).

[509] *Id.*

[510] 80 U.S. (13 Wall.) 128 (1872).

[511] *Id.*

[512] *Id.*

[513] Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 907 (1982) (citing Hart, *supra* note 473, at 1372).

[514] *Id.* at 902.

[515] *Id.* at 927.

[516] Gunther, *supra* note 499, at 903, 905-06.

[517] *Id.*

[518] *Id.* at 906-08.

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language and design of Article III. It brings into form the structure and language of Article III, and it is a reasonable interpretation of the "judicial power" being vested in the Supreme Court. But a six-three rule would not diminish the "essential functions" of the Supreme Court. This voting rule proposal does not undermine the Supreme Court's basic roles, by any definition of "destroy" or "essential." The rule alters the procedural scheme and shifts the balance of power, without destroying the power itself. As Leonard Ratner explains, the role of Exceptions and Regulations Clause is "to check, not checkmate."[519] A six-three rule is precisely that. It is a check on striking down acts of Congress, but the Court retains the power of judicial review in a formal and a practical sense. Consistent with Lawrence Sager's guidelines,[520] the rule does not dismantle the judicial framework or endanger the courts' essential functions, and it leaves an adequate forum for these challenges (the Supreme Court itself along with the lower courts).

Ratner defines the essential function of the Court as the preservation of uniformity of legal interpretation and supremacy of federal law.[521] A six-three rule still retains the supremacy of federal law, simply giving more deference to federal statutes when they conflict with the Court's interpretation of the Constitution. It does not shift more weight to state legislation or to state courts, which is Ratner's concern. One might have concerns about uniformity, because there may be some confusion about what constitutes a binding precedent. What kind of precedent is a five-vote opinion that argues for invalidating federal law but is nonbinding because of the voting rule? This problem is less a question of uniformity than interpretation, and such decisions ought to be interpreted somewhat like plurality opinions because they are nonbinding precedents, although their reasoning can be influential. This point is elaborated above in a discussion of Charles Black's "validation" argument.[522]

However, what if Congress required a unanimous vote, or no more than one dissent, for striking down federal laws? In terms of

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[519] Ratner, *supra* note 506, at 938.
[520] *See supra* notes 508-12 and accompanying text.
[521] Ratner, *supra* note 445, at 161.
[522] *See supra* notes 406-07 and accompanying text.

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"essential functions," this difference in degree becomes a difference in kind with such a burdensome rule. Judicial review would remain a power only in theory but not in practice, except in only the clearest cases of legislative intrusions. An overly burdensome degree of consensus effectively would be a checkmate against the essential power. The goal of my proposal is balance, not the destruction of the judiciary. If Congress ever reached a point of conflict with the Court that it could pass such a statute requiring unanimity, it would signify that the relationship between the branches had degenerated into interbranch warfare, and the polity would be facing a much bigger crisis than the meaning of Article III and Supreme Court procedure. Any attempt to restrict the Court's power to unanimity or all-but-one-vote should be presumed to have an unconstitutional substantive end.

2. The Klein *Problem. Klein* can be interpreted to mean many things. The Supreme Court has desiccated it, and some academics have inflated it. The *Klein* Court itself seemed to create an ambiguous rule prohibiting Congress from using procedural means for unconstitutional ends,[523] and this rule makes constitutional common sense, even as it needs some explication. Above, I suggested an additional reading of *Klein* that prohibits directing a specific result in a case.[524] In other words, Congress should not be able to tell the Court exactly how to rule and for whom, because that infringes on the judicial power. Gerald Gunther similarly interprets *Klein* in that Congress "cannot allow a federal court jurisdiction but dictate the outcomes of cases, or require a court to decide cases in disregard of the Constitution. That is a significant limitation."[525] Sager suggests that *Klein* is about Congress's motive, and "legislative bad faith is a constitutionally impermissible motive."[526]

In the abstract, a six-three rule does not direct a result, because it applies across the board to any act of Congress, and while it creates a procedure that makes certain results easier to attain, it does not mandate such rulings. If Congress imposed a

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[523] United States v. Klein, 80 U.S. 128, 145, 148 (1872).
[524] *See supra* notes 489-92 and accompanying text.
[525] Gunther, *supra* note 499, at 910.
[526] Sager, *supra* note 508, at 71.

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supermajority rule only for certain kinds of constitutional challenges, *e.g.*, federalism or substantive due process, such a substantive direction would create a *Klein* problem, but a general supermajority rule would not. The Justices retain their independent judgment of the law and facts, and they are free to interpret the Constitution as they see fit. The rule preserves the individual decisionmaking process and alters only the collective voting rule. As a general rule of procedure, this requirement applies across the political spectrum and does not favor specific outcomes, except a general outcome of greater deference to Congress. Even that outcome is still in the hands of the Justices and their own negotiations.

However, this proposal is not floating in the abstract; it is located in a very fixed period of time, in which we know the leanings and the voting patterns of each Justice. It would be dangerous to allow Congress to tailor voting rules around specific legislative agendas and predictable voting patterns of the Justices. For example, one might object that the six-three rule, if enacted and enforced now, would in effect dictate a specific result in all Eleventh Amendment cases, given the common knowledge that the current Court consistently divides on the Eleventh Amendment five to four.[527] Instead of the five conservatives prevailing, we know that the four liberals would gain the upper hand. This problem is more or less true for any controversial matter over which the Court is closely divided. A skeptic could object that this proposal allows Congress to use procedural regulation as a bad faith guise for a substantive end.

One solution to this problem of bad faith is to delay the rule's enforcement. One formula could make the rule effective only after the next congressional election and a new Supreme Court appointment (the appointment could happen before or after the election). The Congress passing the rule has much less of a sense of the following two key issues: what controversial legislation will be on the agenda in such a future Congress and how the Justices will divide on that agenda. The confirmation process for a new Supreme Court appointment also would offer a public forum for these questions and a chance for the Senate to focus on issues that closely

[527] *See supra* notes 28-40 and accompanying text.

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divide the Court. In addition, all current litigation ought to be exempted from the rule, considering that it takes several years for a constitutional challenge to move from District Court to the Supreme Court. Changing the rules in the middle of litigation is another *Klein* problem. With these rules in place, Congress would vote on the rule not knowing how either Congress or the Court will look when the rule will be enforced, or how the rule will benefit any political agenda. Perhaps most importantly, delay allows the public to respond to the proposal in at least one more election and to change the composition of Congress, the Presidency, and perhaps the Court (indirectly) in the interim. In 2003, the interpretation of the Eleventh Amendment may seem like a target of this six-three proposal, but in just a couple of years, the current activist interpretation of the Eleventh Amendment may gain a sixth vote or lose its fifth vote, while a contested liberal doctrine on the First Amendment or criminal procedure may hang precariously on a five-vote majority.

3. External Limits. Academics generally agree that Congress's power over jurisdiction must be consistent with the Constitution's "external limits," which are constraints set not by Article III itself, but by other provisions like the Bill of Rights and the Fourteenth Amendment.[528] The issues of the jurisdiction-stripping debate in the early 1980s raised these concerns very clearly.[529] The effort to restrict federal courts from ruling on abortion, school prayer, and desegregation clashed with these "external" constitutional values in an obvious way.[530] By contrast, it is very difficult to make a due process or equal protection argument against a six to three rule. First, the rule does not target specific rights or constitutional provisions, but applies to the interpretation of the Constitution in general. More importantly, the rule still permits a full hearing on constitutional challenges to acts of Congress and the judicial power to remedy unconstitutional provisions. Thus, the rule does not deny due process to raise constitutional arguments from any part of the Constitution.

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[528] *See supra* notes 501, 512, 519-22.
[529] *See* KEYNES, *supra* note 505.
[530] *Id.*

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However, the opponents of previous measures creating Supreme Court voting rules in 1868 and 1923 suggested a different kind of external limit, a constitutional default rule of majority voting.[531] Their argument was that the Constitution enshrined the common law rule of majority rule in each multimember body, unless the Constitution specified a different rule or the body itself agreed to a different rule, such as the Senate itself creating rules of cloture and filibuster. Some of these arguments are actually based on an interpretation of the term "judicial Power" in Article III,[532] and as such, the common law argument is not truly external to Article III.[533] When opponents raised this argument in 1868, the proponents of the rule rightly responded that Congress has the power to alter the common law, and they pointed out that the first Congress, filled with the Framers of the Constitution, set some decision rules by defining a quorum for the Supreme Court in the Judiciary Act of 1789.[534] Some of these opponents then rejected Congress's power to set quorum rules, thus setting their common law principle in conflict with the practice of Congress and making their principle prove too much. Recently, one scholar raised this issue in a footnote, but he relied on one source that focused solely on legislatures and default majority rule, and offered no support that a constitutionalized default voting rule ever applied to courts.[535]

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[531] *See supra* notes 139-44 and accompanying text.

[532] *See* U.S. CONST. art. III, § 1.

[533] Congressmen George Woodward in 1868, Congressional Globe 485 (Jan. 13, 1868), and Charles Warren in 1923 made this textual link. CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE COURT 214 (1935).

[534] The Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (1789).

[535] Michael Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1591 n.154 (2000). Paulsen raised the argument about a majority-vote default rule in a footnote:

> A supermajority voting rule [for the Supreme Court] probably violates the default rule implicit throughout the Constitution for aggregating the views of multi-member bodies: majority rule. Each house of Congress may, by rule, alter this default rule for its own deliberations. . . . But no such power is granted to Congress with respect to the voting rule for multi-member courts, and denying the decision of a majority of judges on a multi-member court the status of a judgment of the court, contrary to the court's own view of the matter, might well violate the prohibition against legislative alteration of final judgments of courts.

Id. (citations omitted). Unfortunately, the one source that Paulsen cites for this point focuses entirely on legislative bodies and suggests no implied rule for courts. *Id.*; *see also* John O.

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4. "Judicial Power" and Jurisdiction. The structure and wording of Article III seem to present a significant problem for Congress's power to impose a supermajority rule. Article III, Section 1 states, "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[536] Section 2 also begins with the phrase "judicial Power."[537] But the second clause of Section 2 about exceptions and regulations is placed in the context of jurisdiction, rather than judicial power, "In all the other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[538] Arguing against Senator Borah's 1923 proposal, Charles Warren suggested that the Constitution granted Congress the power to make "regulations" and "exceptions" only for appellate jurisdiction, and did not extend this power to the other parts of Article III that discussed "judicial Power."[539] Once the Court had jurisdiction to review a statute's constitutionality, a supermajority rule would limit the Court's judicial power to decide the constitutional question, not its jurisdiction, and thus the rule would exceed the power granted to Congress in Article III. This is certainly an intriguing textual argument and a major problem for the six-three rule.

However, there are several answers to this challenge. First, it is not clear that "jurisdiction" and "judicial Power" stand for two different concepts. Article III does not imply that these phrases apply differently. An equally plausible reading is that "judicial

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McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 485 (1995) (explaining how United States Constitution authorizes either house of Congress to create three-fifths voting rule). In their article, McGinnis and Rappaport point out that Congress has the power to define its own voting rules, a point that emphasizes Congress's power, rather than the power of each body to set its own rules. *Id.* Furthermore, they explain their rule as common law practice, which opens up the same power of Congress to alter the common law, including the common law of procedures for other bodies. *Id.* at 485, 491 n.40. This power is clear when the Supreme Court sets the number for a quorum for the Court.

[536] U.S. CONST. art. III, § 1.

[537] U.S. CONST. art. II, § 2, cl. 1.

[538] U.S. CONST. art. III, § 2, cl. 2.

[539] CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 214 (1935).

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Power" simply distinguishes Article III from Article I's legislative power and Article II's executive power, rather than a term creating a meaningful distinction within Article III between judicial power and jurisdiction. The term is a broad category and does not signify specific kinds of powers. The textual argument defines jurisdiction too narrowly in order to distinguish between "judicial power" and "jurisdiction." These two terms are too closely related to carry the weight of such a distinction. *Black's Law Dictionary* defines "jurisdiction" broadly as "[t]he powers of courts to inquire into facts, apply the law, make decisions, and declare judgments,"[540] and less broadly as the "[p]ower and authority of a court to hear and determine a judicial proceeding; and power to render particular judgment in question."[541] A six-three rule would regulate "the power to render a particular judgment," fitting squarely within this definition. In contrast to Charles Warren's argument, none of the definitions of jurisdiction specifies "the power to hear a case" to the exclusion of the "power to decide a case," and most of the definitions in some way specify the power to decide. A two-thirds rule does not affect the power to hear, but it is jurisdictional in its regulation of the power to decide whether the statute is constitutional. Perhaps a way to understand the rule as jurisdictional is to understand jurisdiction as multifaceted, question by question. The Supreme Court retains its jurisdiction over other questions in the case, but it gains jurisdiction to invalidate an Act of Congress only with the support of a certain number of Justices.

Second, even if the Exceptions and Regulations clause is limited to jurisdiction, a supermajority rule is essentially a quorum-like jurisdiction rule for a particular aspect of the case. Setting a quorum, according to Warren, is part of regulating jurisdiction, as a threshold question about whether the Court has the power under certain circumstances to hear a case.[542] Once it has a quorum, it has jurisdiction, and then the Court is free to exercise its judicial power. Then the Court's power in the case is beyond the "regulations" and

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[540] BLACK'S LAW DICTIONARY 853 (6th ed. 1990) (citing Police Comm'r v. Mun. Court, 374 N.E.2d 272, 285 (Mass. 1978)).

[541] BLACK'S LAW DICTIONARY 853 (6th ed. 1990) (citing *In re* Estate of De Camillis, 322 N.Y.S.2d 551, 556 (N.Y. Sur. Ct. 1971)).

[542] WARREN, *supra* note 539, at 213-14.

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"exceptions" power of Congress.[543] If the Court loses its quorum at any point during deliberation, the Court loses jurisdiction over the entire case. One might argue that the quorum rule is unlike a supermajority rule, because the quorum rule serves a gatekeeping function for the entire case. While in contrast, the proposed six-three rule applies to a particular aspect of the case, not the entire case, and thus applies to the Court's power to decide that question, rather than the Court's jurisdiction over the case.

However, jurisdiction also can apply to aspects of a case, rather than the entire case. Consider a contract case with six claims. The Court might rule that it does not have jurisdiction over one claim because the plaintiffs do not have standing to raise it, over a second because it is unripe, over a third because it is moot, over a fourth because of res judicata, and over a fifth because of the statute of limitations. But even though the Court does not have jurisdiction over five aspects of the case, it still has jurisdiction over the sixth claim. Now consider a case governed by a congressional statute. A party can make several claims, including a claim that the statute is unconstitutional. A supermajority rule might state, "In order to retain jurisdiction to invalidate a statute, six Justices must concur in its invalidation." Thus, the rule would establish jurisdictional limits for a particular aspect of the case, while preserving jurisdiction for other apsects, such as the interpretation and the application of that statute. In contrast to Warren's assertion, Congress can regulate the Court's jurisdiction over part of a case, and a supermajority rule can be understood to regulate the Court's jurisdiction to strike down a statute.

5. Separation of Powers and Decisional Independence. "Judicial power" may embrace a larger principle than jurisdiction, according to Gary Lawson. He argues that "judicial Power" means that the courts must have "decisional independence."[544] Such a rule would prohibit anything like a six-three rule. However, this decisional independence rule goes much, much further than that, as Lawson

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[543] *Id.*

[544] Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENTARY 191, 206 (2001).

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recognizes and supports.[545] The Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence direct the courts' decisionmaking in countless ways, and often direct the interpretation of law in very concrete ways. For example, Congress has legislated many rules for standard of proof. Federal Rule of Civil Procedure 52(a) mandates that federal appeals courts must defer to findings of fact by district courts unless those findings are "clearly erroneous."[546] The Administrative Procedure Act's section 706 and other statutes governing review of agency decisions create similar rules about findings of fact.[547]

One should not conclude that there is only a fact-law distinction operating here. Congress also promulgates standards of proof for legal interpretation in the Freedom of Information Act[548] and rules for disqualifying individual federal judges.[549] A wave of judicial reforms passed in the mid-1990s—the Antiterrorism and Effective Death Penalty Act's section 2254(d),[550] the Illegal Immigration Reform and Immigrant Responsibility Act,[551] and the Prison Litigation Reform Act[552]—impose standards of proof for both law and fact. Reviewing the Prison Litigation Reform Act, Judge Easterbrook of the Seventh Circuit argued, "[I]f the process of adjudication *really* is independent of legislative control, all procedural rules predating the Rules Enabling Act of 1936—and all statutes overriding rules promulgated by judges under that law—must be unconstitutional too."[553] Gary Lawson, in arguing for a broad principle of decisional independence, calls into question all of these rules.[554] This principle would invalidate the six-three proposal in this article, but it would also take down AEDPA, IRRIRA, and PLRA with it (perhaps not such an undesirable result) and it would call into question elements of the Federal Rules of

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[545] *See id.* at 214-26.
[546] FED. R. CIV. P. 52(a).
[547] *See, e.g.*, Administrative Procedure Act § 706, 5 U.S.C. § 706(2)(f) (2000).
[548] 5 U.S.C. § 552 (2000).
[549] 28 U.S.C. § 144 (2000).
[550] 28 U.S.C. § 2254(d) (2000).
[551] 8 U.S.C. § 1229(a) (2000).
[552] 18 U.S.C. § 3626 (2000).
[553] French v. Duckworth, 178 F.3d 437, 450 (7th Cir. 1999) (Easterbrook, J., dissenting).
[554] *See* Lawson, *supra* note 544, at 220-22.

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Evidence and Civil Procedure. Even if judges designed the rules of evidence and procedure through Enabling Acts, they were able to impose these rules on the rest of the judiciary through the power of Congress. However, if Congress indeed has such broad powers over the decisionmaking process, and if these laws do not violate the "judicial Power" of Article III, then the six-three rule is also constitutional. Just as Congress has used its power to regulate and make exceptions for appellate jurisdiction, so too has it regulated and made exceptions to the "judicial Power," if such a distinction can be drawn.

In fact, the six-three rule may be less intrusive than the other rules because it permits each Justice to decide the law using his or her independent judgment, unlike the other laws that dictate a rule of judgment. A six-three rule would only affect the balance of power of those independent judgments. While this may sound like an all-too-fine distinction, this rule regulates the Court's procedures, not the Justices' legal judgment and decisional independence.

"Decisional independence" links with broader questions about the separation of powers. The Court's jurisprudence on separation of powers raises some additional challenges to a supermajority rule. In particular, the Court has professed a particular concern about "encroachment and aggrandizement [which] has . . . aroused [its] vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.' "[555] The Court has struggled to define what constitutes impermissible encroachment. In *Mistretta*, the Court stated that it would "strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."[556] Perhaps its broadest and most vigilant standard appeared in the midst of the Court's clash with the New Deal, when it guaranteed that one branch would be "entirely free from the control or coercive influence, direct or indirect, of either of

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[555] Mistretta v. United States, 488 U.S. 361, 382 (1989) (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

[556] *Mistretta*, 488 U.S. at 382.

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the others."[557] Since then, the standard has been somewhat more flexible, focusing on whether a provision "prevents [a Branch] from accomplishing its constitutionally assigned functions,"[558] creates a danger of usurpation of another branch's functions,[559] or "impermissibly threatens the institutional integrity of the Judicial Branch."[560]

A six-three rule does not prevent the Court from accomplishing its constitutional functions, nor does it usurp the Court's power to rule on a statute's constitutionality. The Court retains the power to invalidate legislation; the rule just makes it slightly harder to do so. It would be shrill hyperbole to suggest that this rule threatens the institutional integrity, authority, or independence of the judiciary. It would be a similar exaggeration to argue that the rule allows Congress to control or coerce the Court. These arguments would be out of step with the Court's "pragmatic, flexible approach" to separation of powers questions, which focuses on the "proper balance between coordinate branches."[561] A six-three rule is meant to achieve balance, especially given the current imbalance of judicial supremacy. Aggrandizement is in the eye of the beholder, or in the eye of the aggrandizer and the aggrandizee. I suggest that it is the Supreme Court that has aggrandized itself and encroached upon the power of Congress over the past decade. Through the Exceptions and Regulations clause, the Constitution provides a mechanism for checking this "hydraulic pressure" of the Court to exceed the outer limits of its power.[562] If the Court has the immensely powerful weapons of judicial review and finality, Congress must have its own checks against the threat of judicial aggrandizement. There is something peculiar and even ironic about the Court invalidating a statute seeking to rein in the Court, on the grounds that the measure "aggrandizes" Congress at the expense of the Court. Obviously, any check by one branch against another can be said to aggrandize one branch and to encroach upon the other. The

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[557] Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).
[558] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).
[559] Morrison v. Olson, 487 U.S. 654, 694 (1988).
[560] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).
[561] *Nixon*, 433 U.S. at 442-43.
[562] *See* U.S. CONST. art. III, § 2, cl. 2.

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question is whether a six-three rule fundamentally threatens the Court's authority or independence. The answer is no.

6. A Minority Rule. When reformers proposed a two-thirds rule in the 1820s, 1860s, and 1920s, the most common argument from the opposition was that it was absurd in a democracy to let a minority prevail over a majority.[563] This was one of Charles Warren's central themes of his argument against Senator Borah's proposal.[564] Warren makes the following very astute point: when one party appeals to a federal statute, and the other party appeals to the text of the Constitution against that statute, why should the statute prevail over the Constitution?[565] Warren rejects the notion that any arguments should be disadvantaged, but certainly a constitutional argument should not suffer the disadvantage. To develop Warren's point slightly further, the Constitution is the supreme law of the land, created by broad and deep support of the people, while a statute has less claim to a popular mandate. The Constitution is designed to limit legislation, but the six-three rule is legislation designed to limit the Constitution.

Such an argument raises a valid concern, but it ignores the real problem. First of all, equilibrium between parties is a key to fairness, and the courts should be able to rule by a one-vote majority in other cases, or perhaps follow an even-handed consensus rule. However, a constitutional challenge to federal law is a different matter altogether. Opponents who argue that a minority should not overrule the majority overlook that this is exactly what happens with judicial review. Indeed, an unelected branch of judges overrules the popular will, or at least two branches of government. But perhaps, as Warren might agree, the Constitution is a more solid, enduring, and reliable reflection of the popular will. That may be true, but five Justices' interpretation of the Constitution is neither solid, enduring, nor reliable as representative of the popular will, either at one moment or over time.[566] Five Justices often have struck down acts of Congress not because they explicitly

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[563] *See* WARREN, *supra* note 539, at 203.

[564] *See id.*

[565] *Id.* at 210-11.

[566] *See supra* notes 269-342 and accompanying text.

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contradicted the Constitution, but because their interpretations of constitutional texts—often ranging far from the text itself—conflicted with the statute.

Warren offers an important cautionary note about preserving the Constitution's force, but if the goal is balancing justice and popular sovereignty and attaining constitutional reliability, then the Court should have a broader consensus for its interpretations when confronting an act of Congress. As the deference principles of John Marshall,[567] James Thayer,[568] Alexander Bickel,[569] and John Hart Ely[570] suggest, when a party argues to the Court that a federal law is unconstitutional, she is more or less taking on the national community, and such an argument should have to overcome a heavy burden. This six-three proposal does not abandon the right to challenge such laws, but rather, makes it explicit that the Court should tread more carefully in this territory. In 1824, Daniel Webster worried that the rule gave one party a distinct advantage by having to win fewer votes.[571] However, the same argument applies to Webster's concern. That party has an advantage because Congress has spoken on the question, and has legislated that advantage. In many kinds of cases, one party must face additional presumption and burdens of proof, and such inequalities between parties are considered a necessary ingredient to an efficient legal system.

7. Dialogue. Finally, Barry Friedman has criticized the idea that Congress and the Court exist in sharp tension.[572] He rejects both the "strong" and the "weak" models of congressional control, and he finds in Article III enough textual support to uphold the Supreme Court's "judicial Power" and Congress's power to regulate appellate jurisdiction.[573] Friedman embraces the ambiguities of Article III to

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[567] *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat). 213 (1827); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

[568] *See* Thayer, *supra* note 51.

[569] *See* BICKEL, *supra* note 54.

[570] *See* ELY, *supra* note 58.

[571] 8 ABRIDGEMENT OF THE DEBATES OF CONGRESS 75 (May 16, 1824).

[572] *See generally* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990).

[573] *Id.* at 48.

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create a flexible process of debate between Congress, the Court, and most importantly the public:[574]

> What distinguishes the dialogic approach to federal jurisdiction is that it does not endeavor to assign control to one branch. Rather, responsibility is shared . . . . Permitting Congress to control federal jurisdiction threatens constitutional liberty. Leaving the matter uncertain promotes it—as well as a vigorous discussion of the appropriate exercise of that jurisdiction.[575]

I do not agree with Friedman's agnosticism about these questions, because surely there must be some guidelines and limitations for the jurisdiction dialogue. However, I embrace this vision for dialogue. At the same time, dialogue must be mutual. The Supreme Court has been rejecting dialogue, and it may continue to do so. If Congress has no power to check the Court directly, there is only a Supreme Court monologue. In order to foster dialogue, the branches must be able to check each other and stand at least on remotely equal ground. With the threat to enact a six-three rule, Congress might finally get the Court to listen and compromise.

V. THE DIALOGUE STRATEGY

A. A PATTERN OF DEFERENCE

There have been dozens of congressional proposals for supermajority voting rules from the 1820s to the early 1980s, and only one has passed a house of Congress. Despite this failure rate, these proposals reveal a striking pattern: whenever Congress has seriously questioned the Court's power of judicial review and debated concrete proposals to check that power, the Justices soon after have shifted to a more restrained stance towards legislation. I do not necessarily suggest that this pattern is directly causational,

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[574] *See id.* at 48-49 (stating that uncertainty in Constitution is resolved through elaborate dialogue between branches).

[575] *Id.* at 61.

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but I do contend that with these proposals, members of Congress have signaled to the Court that the public was uneasy about the Court's usurping their power. Even if the Justices were most directly affected by the public's change in mood, these proposals at least played a role in reflecting this popular hostility, and thus these proposals are perhaps best understood as expressive public statements, if not as practical policies. They may not win enough votes, but they play a role in pushing a debate forward and pulling the Court more into dialogue with other branches and the public.

This pattern held in the 1820s, when the Marshall Court's decisions striking down state legislation in matters of commerce, contracts, and property provoked a backlash. From 1823 to 1829, Congress debated at least eight supermajority proposals and several other voting rules.[576] The debates were most extensive in 1824 and 1825. None of these proposals moved along the legislative process at all, but the Marshall Court generally became more cautious and backed down from enforcing property rights and the Contract Clause after 1827, and never again ruled in favor of an individual's property rights claim against state legislation.[577]

In 1868, Republicans feared that the Court would continue to undermine and even dismantle Reconstruction, especially after *Ex parte Garland*[578] struck down a Reconstruction test oath statute by a five-four vote. Congress debated several voting rules that required either a two-thirds vote or a unanimous vote to strike down acts of Congress.[579] Congressman John Bingham, drafter of the Fourteenth Amendment, cited the "horrid blasphemy" of *Dred Scott*[580] as a

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[576] *See, e.g.*, 42 ANNALS OF CONG. 365 (1825); 8 ABRIDGEMENT OF THE DEBATES OF CONGRESS 54-55, 75 (1824); 42 ANNALS OF CONG. 326 (1823); 41 ANNALS OF CONG. 23 (1823); WARREN, *supra* note 539, at 219-20; Caminker, *supra* note 17.

[577] HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835, at 187 (1997); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 672-73 (1988).

[578] 71 U.S. (4 Wall.) 333 (1866).

[579] *See, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 478 (1868) (proposing statute in House of Representatives requiring two-thirds vote of Supreme Court to invalidate act of Congress); CONG. GLOBE, 40th Cong., 2d Sess. 478 (1868) (proposing statute in House of Representatives requiring unanimity of full bench to strike down any state or federal law); CONG. GLOBE, 40th Cong., 2d. Sess. 503 (1868) (proposing statute in Senate requiring two-thirds vote of Supreme Court to invalidate act of Congress).

[580] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

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reason to adopt a supermajority rule.[581] A House bill to create a two-thirds rule passed by a vote of 116 to 39,[582] but the Senate delayed action on the bill. In the meantime, the Supreme Court backed down from confrontations with Congress over the Reconstruction Acts in *Ex parte McCardle* and *Texas v. White*.[583] With their concerns eased, the Republicans abandoned their threatened voting rules.[584]

In the Populist and early Progressive Eras, reformers reacting to *Lochner v. New York*[585] and other laissez-faire decisions in federal courts concentrated mostly on proposed constitutional amendments creating an elective judiciary, popular referenda to overturn judicial decisions, or congressional override of judicial decisions.[586] However, proposed statutes and constitutional amendments to create voting rules surfaced then, too,[587] and took center stage after World War I.[588] The most famous of these proposals was a seven-of-nine rule proposed by Senator William Borah of Idaho in 1923,[589] which generated more debate than any of the others, in part because Borah was a potential presidential candidate. Although none of these proposals moved very far along the legislative process, the Supreme Court did not void another federal statute by a bare majority from 1923 to 1935, while it upheld seven federal statutes

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[581] CONG. GLOBE, 40th Cong., 2d Sess. 483 (1868).

[582] 2 CHARLES WARREN, A HISTORY OF THE SUPREME COURT 467 (1926); Maurice S. Culp, *A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States*, 4 IND. L.J. 386, 395 (1929).

[583] *See supra* notes 142-43 and accompanying text.

[584] 2 WARREN, *supra* note 582, at 472-74.

[585] 198 U.S. 45 (1905).

[586] *See generally* WILLIAM G. ROSS, A MUTED FURY (1994). The most frequent topic of proposed amendments in 1907 and 1912 was the creation of an elective federal judiciary, and Congress often debated this reform in earlier years as well. JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-1995, at 371 (1996); *see also* ROSS, *supra*, at 94-95 (describing proposed amendments that would have "mandated popular election of judges and prescribed limited terms").

[587] *See* S.J. Res. 6, 63d Cong. (1913); S. 3222, 62d Cong. (1911); S. 3179, 54th Cong. (1896); *see also* Caminker, *supra* note 17.

[588] *See* H.R. 721, 68th Cong. (1923); H.R. 697, 68th Cong. (1923); S. 1197, 68th Cong. (1923); H.R.J. Res. 436, 67th Cong. (1923); S. 4483, 67th Cong. (1923); H.R. 9755, 67th Cong. (1922); H.R.J. Res. 16, 66th Cong. (1919); H.R. 12415, 65th Cong. (1918); *see also* Caminker, *supra* note 17.

[589] *See* S. 1197, 68th Cong. (1923); S. 4483, 67th Cong. (1923).

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by five-four votes in this time.[590] But in 1935 and 1936, the Supreme Court issued two of their decisions invalidating parts of the New Deal with five-four votes.[591] Again, members of Congress proposed many supermajority voting statutes[592] (in addition to Roosevelt's court-packing plan), and again the Supreme Court backed down, as these challenges to the Court's power arguably influenced the moderate justices, Chief Justice Charles Evans Hughes and Justice Owen Roberts.

As discussed above in Part I.H, the Warren Court provoked a series of attacks and reform proposals in striking down state and federal anti-Communist legislation in the late 1950s.[593] Most of the reforms debated in Congress targeted particular areas of law and were "jurisdiction-stripping" measures. At the same time, in 1958 and 1959, the anti-Court representatives also proposed voting rules protecting only state laws, and their proposals probably reflected opposition to the Court's desegregation decisions, as well.[594] While the Justices did not reverse their unanimous attack on segregation, they did slow down their assault after 1958.[595] More obvious was the Court's shift on domestic security and anti-Communism cases, as Justice Frankfurter and the moderate Justices switched back to upholding these statutes.[596]

There was a lull in the voting rule debate until 1968 and 1969, a period when the Warren Court was under political fire. President

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[590] Perry v. United States, 294 U.S. 330, 330 (1935); Nortz v. United States, 294 U.S. 317, 317 (1935); Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240, 241 (1935); Burnet v. Wells, 289 U.S. 670, 670 (1933); Casey v. United States, 276 U.S. 413, 413 (1928); Lambert v. Yellowley, 272 U.S. 581, 582 (1926); Marr v. United States, 268 U.S. 536, 537 (1925).

[591] *See* Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U.S. 513 (1936); R.R. Ret. Bd. v. Alton R.R., 295 U.S. 330 (1935).

[592] *See* S.J. Res. 98, 75th Cong. (1937); S. 1098, 75th Cong. (1937); S. 437, 75th Cong. (1937); H.R. 10196, 74th Cong. (1936); S. 3912, 74th Cong. (1936); H.R.J. Res. 462, 74th Cong. (1936); S. 3739, 74th Cong. (1936); S.J. Res. 149, 74th Cong. (1936); S.J. Res. 100, 74th Cong. (1935); H.R. 8168, 74th Cong. (1935); H.R.J. Res. 287, 74th Cong. (1935); H.R. 8123, 74th Cong. (1935); H.R. 8100, 74th Cong. (1935); H.R. 7997, 74th Cong. (1935); H.R. 8054, 74th Cong. (1935); H.R.J. Res. 277, 74th Cong. (1935); H.R.J. Res. 296, 74th Cong. (1935); *see also* Caminker, *supra* note 17.

[593] *See supra* notes 217-25 and accompanying text.

[594] *See* H.R. 4565, 86th Cong. (1959); H.R. 13857, 85th Cong. (1958).

[595] *See* LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS 179 (2000) ("Stalemate as a description of the Court's work for 1958-1962 applies best to civil rights.").

[596] *See supra* notes 223-26 and accompanying text.

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Nixon successfully campaigned against the Supreme Court's criminal procedure and race cases in 1968 and began to turn the Court to the right soon after. The voting proposals of 1968 and 1969 probably had little effect on the Justices, but they were indicative of a broader and more powerful political sentiment against the Court that helped fuel Nixon's victories. There were scattered proposals in the 1970s, as conservatives rejected the Court's abortion, busing, and church-state decisions, and the last proposal appeared in 1981.[597] Over these years, the Court exercised more and more restraint as it became more conservative. Now that the Court has come full circle, history suggests that it is time to return to these questions about the use of judicial review through the vehicle of a debate about voting rules.

There are several means of channeling the public's frustrations with the Supreme Court into concrete terms, *e.g.*, confirmation battles, calls for impeachment, and other reforms, such as shorter terms, recall of decisions, and even judicial elections. Supermajority proposals should be understood as an expressive tool to get the Court's attention, to fire a warning shot across the bow. Because the supermajority rule is wiser and more justifiable than most other threats, the voting rule proposals are a better choice to express this frustration, because they are more credible. But these proposals must be reflective of public discontent in order to be effective, or even to emerge at all. In each of the periods discussed in this Section, a large segment of the public rejected the legitimacy of the Court's interventions, and that outrage led to reform proposals. Today, congressional leaders must try to tap into whatever public frustrations are stirring below the surface. If they are unable to spark a debate about these reforms and the Court's power, that silence speaks louder than the debate would. A continuing silence

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[597] *See* H.R. 5182, 97th Cong. (1981); H.R. 4109, 96th Cong. (1979); H.R.J. Res. 84, 94th Cong. (1975); H.R.J. Res. 323, 93d Cong. (1973); H.R.J. Res. 293, 92d Cong. (1971); H.R.J. Res. 758, 91st Cong. (1969); H.R.J. Res. 700, 91st Cong. (1969); H.R.J. Res. 557, 91st Cong. (1969); H.R.J. Res. 193, 91st Cong. (1969); H.R.J. Res. 94, 91st Cong. (1969); H.R.J. Res. 1469, 90th Cong. (1968); H.R.J. Res. 1369, 90th Cong. (1968); H.R.J. Res. 1172, 90th Cong. (1968); H.R.J. Res. 1149, 90th Cong. (1968); H.R. 11007, 90th Cong. (1967); *see also* Caminker, *supra* note 17.

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about five-four voting only gives the Court carte blanche to keep going down its activist path.

B. THE PROGRESSIVE ERA: REVISE AND RESUBMIT

If these proposals cannot win, could there be more productive means of curbing the Court's power that actually have a real chance to succeed? The Progressive Era suggests that radicals and moderates, each following their own separate strategies, together can shift the course of the judiciary and successfully win approval for more of their legislative agenda. While radical Progressives threatened major changes to the judiciary's power, the moderates followed more conventional and incremental steps to persuade the Court, such as the following: (1) revising the invalidated statutes to gain judicial approval, and (2) providing more information to the courts about the need for such legislation. Progressives also pushed for more sympathetic judicial nominees and campaigned on these constitutional issues.

First, Progressives revised the legislation that the Court had struck down, fixing the constitutional problems and seeking the Court's approval of the rewritten laws. This process treated the adverse Supreme Court decisions as "revise and resubmit" letters, taking the opinions not as rejections but as invitations for a new draft. With calls for radical reform in the background, but with pragmatists taking the reins in Congress and the White House, this incremental strategy prevailed from 1906 to the middle of World War I. In his survey of congressional responses to Supreme Court decisions, Richard Paschal found that before the twentieth century, Congress passed laws to overturn or modify a Court decision only nine times.[598] Beginning in 1906, there was a sudden increase in legislative attempts at revision. From 1906 to 1922, Congress passed twelve laws overturning or modifying Court decisions.[599] The

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[598] *See* Richard A. Paschal, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. 143, 217-19 (1991) (providing appendix of statutes which have overturned or modified Supreme Court decisions).

[599] *Id.*

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Court did not invalidate any of these changes from 1906 through the end of World War I.[600]

The Supreme Court often accepted their revisions, resulting in a compromise between laissez-faire constitutionalism and progressive regulation. The Court invalidated some measures, but generally accepted Congress's revisions and resubmissions. Although five Justices in *Lochner* had signaled a due process right for laborers to contract for their own work hours in 1905,[601] the Court upheld an eight-hour workday law for government employees in 1907,[602] and for female employees of private firms in 1908.[603] At the same time, the Court invalidated several other labor regulations in 1908[604] and issued some of its most controversial probusiness decisions in 1911.[605] Nevertheless, Progressives continued a process of redrafting, repassage, and often judicial acceptance. After initial setbacks, they won judicial approval of food and drug regulation,[606] transpor-

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[600] *Id.*

[601] Lochner v. New York, 198 U.S. 45, 64 (1905).

[602] Ellis v. United States, 206 U.S. 246, 255-56 (1907).

[603] Muller v. Oregon, 208 U.S. 412, 423 (1908).

[604] Loewe v. Lawlor, 208 U.S. 274, 308 (1908); Adair v. United States, 208 U.S. 161, 180 (1908); Employers' Liability Cases, 207 U.S. 463, 501 (1908).

[605] *See* United States v. Am. Tobacco Co., 221 U.S. 106, 184 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[606] After a twenty-five year struggle, Congress passed the Pure Food and Drug Act in 1906, a major advance in the regulation of commerce. Pub. L. No. 59-384, ch. 3915, § 8, 34 Stat. 768 (1906). At the time, most states set standards for food and drug quality, but there was no uniformity, and the states were powerless over goods shipped interstate, which were the constitutional domain of Congress and not of the states. Most manufacturers fought the legislation, joined by Southern Democrats who argued more generally that Congress lacked "police powers" to regulate for public health and safety, because that power was reserved to the states, and the Constitution made no mention of it for the federal government. Rejecting this argument, the Court upheld the Pure Food and Drug Act unanimously in 1911. Hipolite Egg Co. v. United States, 220 U.S. 45 (1911). This decision permitted Congress to legislate for an "ulterior" police purpose of health, safety, and morality, as long as the legislation fit another constitutional power, such as the regulation of interstate commerce. *Id.* at 57-58. This doctrine would become increasingly important in the New Deal and the Civil Rights Act of 1964. The Court upheld the Pure Food and Drug Act again in 1913, ruling against a stricter state regulation for labeling that created more inconveniences beyond the federal law. McDermott v. Wisconsin, 228 U.S. 115, 128 (1913).

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tation rate regulation,[607] alcohol regulation,[608] workplace accident tort compensation,[609] and other labor legislation.[610]

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[607] In the Hepburn Act, ch. 3591, 34 Stat. 584 (1906), and the Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910), Congress responded to the Supreme Court's decision in *I.C.C. v. Cincinnati, New Orleans & Texas Pacific Railway Co.*, 167 U.S. 479, 494-95 (1897) (Maximum Rate Case), that Congress had to speak very clearly to establish a special power to set rates the for transport of goods. This revision was one of the first successful attempts of the Progressive Era to maneuver around an adverse Supreme Court decision, and the Court upheld the change in 1910. I.C.C. v. Chicago, Rock Island & Pac. Ry., 218 U.S. 88, 102 (1910). That same year, Congress replied to *I.C.C. v. Alabama Midland*, 168 U.S. 144 (1897), by clarifying its prohibition against long-haul and short-haul rate discrimination in the Mann-Elkins Act of 1910, and the Court also upheld this revision. Intermountain Rate Cases, 234 U.S. 476, 476 (1914).

[608] A trio of 1898 cases limited the states' power to regulate the transportation and sale of alcohol. Vance v. W.A. Vandercook Co., 170 U.S. 438, 439 (1898); Rhodes v. Iowa, 170 U.S. 412, 412 (1898); Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465, 465 (1888). Initially, the prohibition supporters passed a moderate bill in 1909 that simply addressed abuses of the right to import alcohol in dry states. In a more direct reversal, the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) resolved the dormant commerce clause problem. The Court upheld the Webb-Kenyon Act's provisions on this matter. Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 332 (1917).

[609] In the *Employers' Liability Cases*, 207 U.S. 463, 468 (1908), the Court invalidated a federal statute abolishing the fellow-servant rule in tort law. This rule had required an injured employee to demonstrate in court that his injury was not the result of the negligence of a fellow employee, and it had been a major obstacle for laborers' recovery for on-the-job accidents. Justice Fuller's majority opinion explained that Congress had exceeded its power under the Interstate Commerce Clause, but he hinted that Congress could re-enact such a change if it was limited to employees in interstate transportation during the accident. *Id.* at 500-02. Congress did so in the very same year. Act of Apr. 22, 1908, ch. 149, 35 Stat. 65. The Court approved in 1912. Second Employers' Liability Cases, 223 U.S. 1, 53 (1912). Considering the number of work accidents on the railways and on transportation in general, this compromise was a significant, albeit incomplete, reform for labor.

[610] In 1908, *Loewe v. Lawlor*, or the *Danbury Hatters Case*, 208 U.S. 274 (1908), ruled that a labor union's organization of a consumer boycott of hat manufacturers was a "restraint of trade" in violation of the Sherman Antitrust Act of 1890. *Id.* at 292. The Court ruled that producers were not the only ones who might interfere with trade by manipulating supply; consumers could interfere with trade by manipulating demand. Congress had intended this Act to apply against corporate and industrial monopolies, but an antilabor federal judiciary manipulated the law against organized labor activism. *See id.* at 301 (stating that "act made no distinction between classes"). Attempting to reverse this decision, Progressives and labor advocates in Congress successfully passed the Clayton Act of 1914, which exempted organized labor from antitrust laws. Clayton Act, ch. 323, §§ 6, 20, 38 Stat. 730, 731, 738 (1914) (codified as amended at 15 U.S.C. § 18 (2000)). The Clayton Act also limited the Court's antilabor ruling in *Debs* by erecting a series of procedural requirements for issuing injunctions. *Id.* §§ 17-19, 38 Stat. at 737-38. But the Clayton Act also serves as a bellwether of the Court's later conservative turn that rejected further dialogue. During and after World War I, the Court still interpreted the Clayton Act in a manner hostile to labor and relatively permissive of industry.

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In a choice between enacting broad, effective social legislation that would be struck down, or narrow, piecemeal legislation that would be upheld, many Progressives chose the latter. This strategy succeeded for about a decade, then met with greater judicial hostility for about two decades as the electorate became more conservative. Calls for institutional reform of the judiciary echoed all along the way and played a role in moderating the Court in the 1900s and early 1910s, and again in the 1920s and 1930s, and facilitated the process of dialogue and revision.

Progressives also responded to the Supreme Court's resistance with a program of "judicial education," to inform the federal judges about the realities of working conditions and poverty in America and the need for social welfare legislation. Conservative judges and justices had rejected progressive legislation as unjustified by the facts. Progressive lawyers turned to the Brandeis Brief, the method pioneered by progressive lawyer and future Justice Louis Brandeis.[611] Brandeis used statistics and social science to inform the Court of laborers' day-to-day challenges, and the Court responded favorably. In *Lochner*, the Supreme Court struck down a state's maximum hours labor law for bakers, not because the state could never exercise such power, but rather, as they concluded, the working conditions of the bakers did not justify the law as necessary for their health and welfare.[612] The facts of working conditions hung over this case and other labor cases, but without social science data, these questions were not satisfactorily answered.

Three years after *Lochner*, the Supreme Court reviewed Oregon's ten-hour maximum workday for women in *Muller v. Oregon*.[613] Arguing that the law was necessary to protect the health and safety of female workers, Louis Brandeis's brief relied on over one hundred pages of statistics about work hours, working conditions, and women's health.[614] The brief also ventured into comparative empirical social science by surveying the results of American and

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[611] *See generally* Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461 (1916). *See also* Muller v. Oregon, 208 U.S. 412 (1908).

[612] Lochner v. New York, 198 U.S. 45, 57 (1905).

[613] 208 U.S. 412 (1908).

[614] *Id.* at 419.

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European workplace legislation.[615] Writing for a unanimous Court upholding the law, Justice David Brewer quickly and approvingly addressed Brandeis's social science.[616] He then cited from Brandeis's brief the nineteen state laws, the laws of seven European nations that similarly regulated women's working hours, and the ninety expert reports concluding that "long hours of labor are dangerous for women, primarily because of their special physical organization."[617] Based substantially on this material, Brewer accepted the necessity of regulating women's workday.

Brandeis's *Muller* brief may have been deeply flawed as social science, but this innovative method of advocacy changed litigation thereafter.[618] As one of Brandeis's biographers commented, the brief served notice to lawyers that they "could no longer evade their responsibilities of instructing and advising the courts on the relevant facts."[619] Picking up from Brandeis's lead, other academics and lawyers hailed this strategy as a solution to an out-of-touch judiciary.[620] Several academics called for developing a "system of

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[615] *Id.*

[616] *Id.*

[617] *Id.* at 419 n.1.

> Justice Brewer quoted one report as representative of the conclusion: "The reasons for the reduction of the working day to ten hours—(a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home—are all so important and so far reaching that the need for such reduction need hardly be discussed."

Id. (quoting report by inspector in Hanover, Germany, provided in Brandeis's brief).

[618] Owen Fiss wrote of the Brandeis Brief:

> For one thing, Brandeis's brief was anything but a scientific tour de force. Mainly a collection of statutes, statistics, and opinions, it was at best a compilation, but closer to a hodgepodge. Moreover, a similar presentation of facts was before the Court in *Lochner*, or easily available to it; these facts were present in Harlan's dissent, and in a concurring opinion of the New York court below . . . . Finally, it is hard to imagine Brewer, or any of the other stalwarts of the Fuller Court, moved by such a showing.

OWEN M. FISS, THE TROUBLED BEGINNINGS OF THE MODERN STATE 1888-1910, at 175-76 (1993). Fiss suggests that Brewer's citation of Brandeis's brief, which led to celebration of Brandeis's technique, was "intended not as an expression of admiration or as an acknowledgment of an influence, but rather as a distancing technique." *Id.* at 176. Brewer included with his citation of the brief a warning about valuing shifts in public opinion over the " 'unchanging form' " of a written constitution, and he cited the brief not as social science, but as evidence of " 'a widespread belief.' " *Id.* (quoting *Muller*, 208 U.S. at 420).

[619] MELVIN UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 53 (1981).

[620] Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV.

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social statistics" specifically for use in court.[621] The Supreme Court often accepted and even embraced social science evidence in the years after *Muller*.[622] This fact-oriented evidence also swayed some state courts, especially in New York.[623]

C. LESSONS FOR 2003

In the early twentieth century, a combination of more radical threats to judicial power worked in tandem with more incrementalist efforts to lead to some compromise between the Supreme Court and the elected branches. The radical reforms served as background that made the moderates' revisions more palatable. In the early twenty-first century, the same approach makes sense. The debate should begin now on drastic reforms, but the Court's critics also should give the Justices an opportunity to reach a middle ground.

Legislative revision and interbranch dialogue is the appropriate first step, and it is particularly suited to the legislation that the Supreme Court has recently invalidated. The process of revising and re-enacting regulation of Internet pornography is well underway. The Supreme Court struck down the Communications Decency Act of 1996.[624] In 1998, Congress responded by drafting less ambiguous and constitutionally problematic legislation with the Child Online Protection Act,[625] which withstood a challenge in

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489, 510 (1912); Theodore Schroeder, *Social Justice and the Courts*, 22 YALE L.J. 19, 26 (1912).

[621] *See, e.g.*, EDWARD A. ROSS, THE SOCIAL TREND 166, 168 (1922); John G. Palfrey, *The Constitution and the Courts*, 26 HARV. L. REV. 507 (1913). *See generally* Walter F. Willcox, *The Need of Social Statistics as an Aid to the Courts*, 47 AM. L. REV. 259 (1913).

[622] David Ziskind, *The Use of Economic Data in Labor Cases*, 6 U. CHI. L. REV. 607, 649-50 (1939); *see also* JOHN W. JOHNSON, AMERICAN LEGAL CULTURE, 1908-1940, at 36-37 (1981) (describing how Brandeis Brief became model for appellate argument); PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 87-98 (1972) (examining legacy of Brandeis Brief).

[623] After New York's highest court struck down a statute prohibiting night work by women in 1907, People v. Williams, 81 N.E. 778, 779 (N.Y. 1907), it upheld a similar law in 1915, People v. Charles Schweinler Press, 108 N.E. 639, 643-44 (N.Y. 1915), when lawyers offered much more thorough analysis of the law's effects, and the court noted the significance of this new data.

[624] Reno v. ACLU, 521 U.S. 844, 849 (1997).

[625] 47 U.S.C. § 231 (2000).

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Ashcroft v. American Civil Liberties Union, but the Court signaled in that decision that the Act might not survive a future challenge.[626]

The Court's decisions limiting Congress's Fourteenth Amendment powers are a particularly ripe area for revision and judicial education, to borrow from the Progressive's strategy at the beginning of the twentieth century. The "congruence and proportionality" test for Congress's power to enforce the Fourteenth Amendment by "appropriate legislation" is anything but a bright-line rule. In fact, the doctrine invites revision, tailoring, and better information. *City of Boerne v. Flores*,[627] the decision establishing the "congruence and proportionality" test,[628] serves as one starting point for revision and education. The Supreme Court ruled that the Religious Freedom Restoration Act overstepped Congress's power to enact remedial legislation for enforcing the Fourteenth Amendment, to grant religious exemptions from general laws.[629] Six Justices agreed that the legislation swept too broadly and did not focus on any history of discrimination that would justify such a remedial measure.[630]

Congress should not accept this ruling as the final word on this issue, precisely because of the congruence and proportionality test. To achieve congruence, Congress should engage in broad fact-finding about discrimination against religious groups across the spectrum, from Native Americans to Muslims, from Catholics and Jews to branches of Protestantism; and across history, from the colonial era to the present. This effort would be a step of revision and a step of educating the judiciary. To tailor the law to proportionality, Congress could require the individual seeking the exemption to demonstrate some history of discrimination against his or her religious group, in the local community or state for local or state regulations, or in the nation for federal law.

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[626] 122 S. Ct. 1700, 1713 (2002).
[627] 521 U.S. 507 (1997).
[628] *Id.* at 520.
[629] *Id.* at 532.
[630] *Id.*

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United States v. Morrison[631] and *Board of Trustees v. Garrett*[632] provide more opportunities for dialogue. Congress has been considering a new version of the Violence Against Women Act (VAWA) to link more solidly with its Article I power to regulate interstate commerce.[633] This bill requires a plaintiff to link the act of violence with a jurisdictional element, *e.g.*, the defendant's interstate travel, a weapon's interstate travel, or some economic aspect of the crime itself.[634] This bill also should engage the congruence and proportionality question, which the *Morrison* dissenters unfortunately ducked. Although the original VAWA and the Americans with Disabilities Act offered a substantial amount of evidence of state complicity in gender violence and the failure to punish it[635] and of state discrimination against the disabled,[636] respectively, Congress can improve its fact-finding even more to establish congruence. Increased quantity and quality of the evidence might win over a swing vote, such as Justice O'Connor or Justice Kennedy. In terms of proportionality, the revised legislation could require the plaintiff to demonstrate a pattern of complicity in gender-based violence or discrimination by their state or local government.

On the other side of the political spectrum, Congress can respond to the Supreme Court's decision in *Dickerson v. United States*, which invalidated a 1968 law that attempted to reverse *Miranda v. Arizona*.[637] In *Dickerson*, the Court tried to resolve some of the ambiguity about whether *Miranda* warnings were constitutionally required or were a nonconstitutional judicial policy or prophylactic rule, but the Court still did not place *Miranda* on completely clear footing. Furthermore, *Miranda* itself offered Congress the option of creating its own protections for Fifth Amendment rights to replace *Miranda* warnings, as long as those measures reached at least the

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631 529 U.S. 598 (2000).
632 531 U.S. 356 (2001).
633 A Bill to Restore the Federal Civil Remedy for Crimes of Violence Motivated by Gender, H.R. 429, 107th Cong. (2001).
634 *Id.* § 2.
635 *See Morrison*, 529 U.S. at 664-66 (Breyer, J., dissenting).
636 *See Garrett*, 531 U.S. at 390-424 (Breyer, J., dissenting).
637 Dickerson v. United States, 530 U.S. 428, 432 (2000).

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same level of protection.[638] If a majority of Congress still seeks alternatives to *Miranda*, they should seize the Supreme Court's offer of dialogue thirty-six years ago, and offer a new scheme for protecting the Fifth Amendment.[639]

From 1906 to 1916, the effort at revision and the debates about judicial reform together notified the Justices that the public was distressed by the Court's aggressive role. Currently, the rarity of legislative revision and the lack of any debate about judicial reform, if anything, tell the Court that the public and the political leadership are complacent about the Court's decisions. If today's progressives hope to revive their legislative agenda and sway the Court, they should vocally question the Court's use of judicial review and consider seemingly radical changes to the judiciary. A debate about a supermajority rule is a good vehicle for change, and if the Court refuses to yield at all, a supermajority rule is also a desirable and constitutional solution.

Hopefully, the Supreme Court and Congress can engage in a balanced dialogue about the meaning of the Constitution and respect each other's judgment. The swing votes of a divided Court can signal to Congress what steps it can take to resolve its constitutional problems, and they should give Congress some assurance that these guidelines are a good faith attempt at encouraging better legislation. Congress can then commit itself to revising the faulty legislation so that it passes constitutional muster the next time around, and if Congress has acted in good faith, the Court's swing votes should defer.

VI. CONCLUSION

The Supreme Court for two centuries established its power of judicial review upon an institution of consensus and compromise, internally and with Congress. And for two centuries, the Supreme

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[638] Miranda v. Arizona, 384 U.S. 436, 490 (1966).

[639] Akhil Amar's proposals in his book, THE CONSTITUTION AND CRIMINAL PROCEDURE 46-48 (1994), are worthwhile as experiments in a few jurisdictions, but Congress should not discard *Miranda* warnings altogether, considering how it benefits both the suspect (as a warning informing him of his rights) and the police (as a bright-line rule for establishing informed consent).

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Court has recognized broad, but not limitless, congressional powers to make exceptions and regulations for the exercise of judicial power. This proposal for a two-thirds rule addresses the increasing problem of five-four votes against Congress. I have attempted to tailor this rule to follow the constitutional guidelines established by the Supreme Court and suggested by federal courts scholars.

Hopefully, the Supreme Court and Congress together will render this proposal unnecessary by engaging in dialogue and compromise. However, even if five Justices continue striking down federal laws, this proposal does not stand a chance of passing either House of Congress or of receiving the President's signature, and even if it did, the odds are that the Supreme Court would strike it down (perhaps by a five-four vote). The bottom line is that a debate about such a proposal has tremendous expressive value, regardless of the outcome, just as the importance of a two-thirds rule would be its expressive value more than its mechanical application. Both the debate and the rule send an important message about the role of the judiciary and about deference to Congress. In every period of judicial activism, proposals for judicial reform and voting rules have been a constructive vehicle for debate and criticism of the Supreme Court. It is time to take that vehicle for a ride once again.

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APPENDIX

COURT DECISIONS OVERTURNING CONGRESSIONAL ACTS

TOTAL: 167 invalidations of federal laws
From 1789 to 1995 (206 years): 134 decisions overturning acts of Congress, 22 by a bare majority
From 1995 to 2002 (7 years): 33 decisions overturning acts of Congress, 15 by a bare majority

Asterisk before case name = one-vote majority

MARSHALL COURT 1801-1835

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (6-0).

TANEY COURT 1836-1864

2. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (7-2).

CHASE COURT 1864-1873

9 Decisions in 9 Years; 2 decided by one vote.

3. Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865) (dismissed without opinion).
4. * *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867) (5-4).
5. Reichart v. Felps, 73 U.S. (6 Wall.) 160 (1868) (9-0).
6. The Alicia, 74 U.S. (7 Wall.) 571 (1869) (9-0).
7. * Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870) (5-3), *overruled by* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871) (Legal Tender Cases).
8. The Justices v. Murray, 76 U.S. (9 Wall.) 274 (1870) (9-0).
9. United States v. DeWitt, 76 U.S. (9 Wall.) 41 (1870) (9-0).
10. The Collector v. Day, 78 U.S. 113 (11 Wall.) (1870) (8-1).
11. United States v. Klein, 80 U.S. (13 Wall.) 128 (1873) (7-2).

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WAITE COURT 1874-1888

9 Decisions in 6 years; None decided by one vote.

12. United States v. Reese, 92 U.S. 214 (1876) (7-2).
13. United States v. Cruikshank, 92 U.S. 542 (1876) (8-1).
14. United States v. Fox, 95 U.S. 670 (1878) (9-0).
15. The Trade-Mark Cases, 100 U.S. 82 (1879) (9-0).
16. United States v. Harris, 106 U.S. 629 (1883) (8-1) .
17. The Civil Rights Cases, 109 U.S. 3 (1883) (8-1).
18. Boyd v. United States, 116 U.S. 616 (1886) (7-2).
19. Baldwin v. Franks, 120 U.S. 678 (1887) (7-2).
20. Callan v. Wilson, 127 U.S. 540 (1888) (9-0).

FULLER COURT 1888-1910

14 Decisions in 22 years; 3 decided by one vote.

21. Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) (9-0).
22. * Pollock v. Farmers Loan and Trust Co., 158 U.S. 601 (1895) (5-4).
23. Wong Wing v. United States,163 U.S. 228 (1896) (7-1).
24. Kirby v. United States, 174 U.S. 47 (1899) (6-2).
25. Jones v. Meehan, 175 U.S. 1 (1899) (9-0).
26. * Fairbank v. United States, 181 U.S. 283 (1901) (5-4).
27. James v. Bowman, 190 U.S. 127 (1903) (6-2).
28. *In re* Heff, 197 U.S. 488 (1905) (8-1).
29. Rassmussen v. United States, 197 U.S. 516 (1905) (7-2).
30. Hodges v. United States, 203 U.S. 1 (1906) (7-2).
31. Adair v. United States, 208 U.S. 161 (1908) (6-2).
32. * Employers' Liability Cases, 207 U.S. 463 (1908) (5-4).
33. United States v. Evans, 213 U.S. 297 (1909) (9-0).
34. Keller v. United States, 213 U.S. 138 (1909) (6-3).

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WHITE COURT 1911-1921

12 Decisions in 10 years; 3 decided by one vote.

35. Muskrat v. United States, 219 U.S. 346 (1911) (9-0).
36. Coyle v. Oklahoma, 221 U.S. 559 (1911) (7-2).
37. Choate v. Trapp, 224 U.S. 665 (1912) (9-0).
38. Butts v. Merchants & Miners Trans., 230 U.S. 126 (1913) (9-0).
39. United States v. Hvoslef, 237 U.S. 1 (1915) (8-0).
40. Thames & Mersey Ins. Co. v. United States, 237 U.S. 19 (1915) (8-0).
41. * Hammer v. Dagenhart, 247 U.S. 251 (1918) (5-4).
42. * Eisner v. Macomber, 252 U.S. 189 (1920) (5-4).
43. * Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) (5-4).
44. Evans v. Gore, 253 U.S. 245 (1920) (7-2).
45. Newberry v. United States, 256 U.S. 232 (1921) (8-1).
46. United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921); Weeds, Inc. v. United States, 255 U.S. 109 (1921) (6-2).

TAFT COURT 1921-1929

13 Decisions in 9 years; 1 decided by one vote.

47. United States v. Moreland, 258 U.S. 433 (1922) (5-3).
48. Hill v. Wallace, 259 U.S. 44 (1922) (9-0).
49. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (8-1).
50. Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923) (9-0).
51. A.G. Spalding & Bros. v. Edwards 262 U.S. 66 (1923) (9-0).
52. * Adkins v. Children's Hospital, 261 U.S. 525 (1923) (5-3).[640]
53. Washington v. W.C. Dawson & Co., Indus. Accident Comm'n v. Rolph, 264 U.S. 219 (1924) (8-1).
54. Miles v. Graham, 268 U.S. 501 (1925) (8-1).
55. Myers v. United States, 272 U.S. 52 (1926) (6-3).
56. Trusler v. Crooks, 269 U.S. 475 (1926) (9-0).
57. Nichols v. Coolidge, 274 U.S. 531 (1927) (9-0).
58. Nat'l Life Ins. Co. v. United States, 277 U.S. 508 (1928) (6-3).
59. Untermyer v. Anderson, 276 U.S. 440 (1928) (6-3).

[640] Justice Brandeis did not vote in this case, but he certainly would have dissented.

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HUGHES COURT 1929-1941

16 Decisions in 13 years; 3 decided by one vote.

60. Indian Motorcycle Co. v. U.S., 283 U.S. 570 (1931) (7-2).
61. Heiner v. Donnan, 285 U.S. 312 (1932) (6-2).
62. * Burnet v. Coronado Oil & Gas, 285 U.S. 393 (1932) (5-4).
63. Booth v. United States, 291 U.S. 339 (1934) (9-0).
64. Lynch v. United States, 292 U.S. 571 (1934) (9-0).
65. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (8-1).
66. Perry v. United States, 294 U.S. 330 (1935) (9-0 on constitutionality of gold clause abrogation).
67. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (9-0).
68. United States v. Constantine, 296 U.S. 287 (1935) (6-3 on liquor tax).
69. * Railroad Retirement Board v. Alton R.R., 295 U.S. 330 (1935) (5-4).
70. Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315 (1935) (9-0).
71. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) (9-0).
72. United States v. Butler, 297 U.S. 1 (1936) (6-3).
73. Rickert Rice Mills, Inc. v. Fontenot, 297 U.S. 110 (1936) (9-0).
74. Carter v. Carter Coal Co., 298 U.S. 238 (1936) (6-3).
75. * Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U.S. 513 (1936) (5-4).

STONE COURT 1941-1946

76. Tot v. United States, 319 U.S. 463 (1943) (6-2).
77. United States v. Lovett, 328 U.S. 303 (1946) (6-2).

VINSON COURT 1946-1954

78. United States v. Cardiff, 344 U.S. 174 (1952) (7-2).

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WARREN COURT 1954-1969

21 Decisions in 16 years; 6 decided by one vote.

79. Bolling v. Sharpe, 347 U.S. 497 (1954) (9-0).
80. U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (6-3).
81. Reid v. Covert, 354 U.S. 1 (1957) (6-2).
82. * Trop v. Dulles, 356 U.S. 86 (1958) (5-4).
83. * Perez v. Brownell, 356 U.S. 44 (1958) (5-4).
84. * McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960) (5-4); Grisham v. Hagan, 361 U.S. 278 (1960) (5-4); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (7-2).[641]
85. * Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (5-4).
86. Aptheker v. Secretary of State, 378 U.S. 500 (1964) (6-3).
87. Schneider v. Rusk, 377 U.S. 163 (1964) (5-3).[642]
88. Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965) (8-0).
89. United States v. Romano, 382 U.S. 136 (1965) (9-0).
90. * United States v. Brown, 381 U.S. 437 (1965) (5-4).
91. Lamont v. Postmaster General, 381 U.S. 301 (1965) (9-0).
92. United States v. Robel, 389 U.S. 258 (1967) (6-2).
93. * Afroyim v. Rusk, 387 U.S. 253 (1967) (5-4).
94. United States v. Jackson, 390 U.S. 570 (1968) (7-2).
95. Marchetti v. U.S., 390 U.S. 39 (1968); Grosso v. U.S., 390 U.S. 62 (1968) (7-1).
96. Haynes v. U.S., 390 U.S. 85 (1968) (8-1).
97. Leary v. U.S., 395 U.S. 6 (1969) (9-0).
98. Shapiro v. Thompson, 394 U.S. 618 (1969) (6-3).
99. O'Callahan v. Parker, 395 U.S. 258 (1969) (6-3).

BURGER COURT 1969-1986

28 Decisions in 17 years; 6 decided by one vote.

100. * Oregon v. Mitchell, 400 U.S. 112 (1970) (5-4).

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[641] These three cases were described by the Court as "companion" cases on essentially one question, and though they were issued as separate opinions, these decisions followed the same arguments closely, and therefore I count them as one decision. The cases involved the same issues and the same concurrence/dissent by Whittaker and Stewart in two of the cases.

[642] Brennan would have been the sixth vote for the decision.

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101. Turner v. United States, 396 U.S. 398 (1970) (7-2).
102. Schacht v. United States, 398 U.S. 58 (1970) (9-0).
103. Blount v. Rizzi, 400 U.S. 410 (1971) (9-0).
104. * United States v. U.S. Coin & Currency, 401 U.S. 715 (1971) (5-4).
105. Tilton v. Richardson, 403 U.S. 672 (1971) (8-1).
106. Chief of Capitol Police v. Jeannette Rankin Brigade, 409 U.S. 972 (1972) (9-0).
107. Richardson v. Davis, 409 U.S. 1069 (1972) (9-0).
108. Frontiero v. Richardson, 411 U.S. 677 (1973) (8-1) (4-4 on level of scrutiny).
109. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (7-2).
110. * Dept. of Agriculture v. Murry, 413 U.S. 508 (1973) (5-4).
111. Jiminez v. Weinberger, 417 U.S. 628 (1974) (8-1).
112. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (8-0).
113. Buckley v. Valeo, 424 U.S. 1 (1976) (6-2) (campaign finance).
114. * Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (5-4), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
115. * Califano v. Goldfarb, 430 U.S. 199 (1977); Califano v. Silbowitz, 430 U.S. 924 (1977); R.R. Ret. Bd. v. Kalina, 431 U.S. 909 (1977) (5-4).
116. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (5-3).[643]
117. Califano v. Westcott, 443 U.S. 76 (1979) (9-0).
118. United States v. Will, 449 U.S. 200 (1980) (9-0).
119. R.R. Labor Executives Ass'n v. Gibbons, 455 U.S. 457 (1982) (9-0).
120. N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (6-3).
121. United States v. Grace, 461 U.S. 171 (1983) (7-2).
122. Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983) (8-0).
123. INS v. Chadha, 462 U.S. 919 (1983) (6-2). Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983) (7-1). United States Senate v. FTC, 463 U.S. 1216 (1983) (7-1).

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[643] Justice Brennan would have been the sixth vote for the majority.

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124. * FCC v. League of Women Voters, 468 U.S. 364 (1984) (5-4).
125. Regan v. Time, Inc., 468 U.S. 641 (1984) (8-1).
126. FEC v. National Conservative PAC, 470 U.S. 480 (1985) (7-2).
127. Bowsher v. Synar, 478 U.S. 714 (1986) (7-2).

REHNQUIST COURT

40 Decisions in 17 years; 18 by one vote.
Since 1995: 33 Decisions in 8 years; 15 by one vote.

128. * FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) (5-4).
129. Hodel v. Irving, 481 U.S. 704 (1987) (9-0).
130. * Boos v. Barry, 485 U.S. 312 (1988) (5-3).[644]
131. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (9-0).
132. * United States v. Eichman, 496 U.S. 310 (1990) (5-4).
133. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) (6-3).
134. New York v. United States, 505 U.S. 144 (1992) (6-3).

1995-2002: THE REHNQUIST COUNTERREVOLUTION

135. United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) (6-3).
136. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (7-2).
137. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (9-0).
138. * United States v. Lopez, 514 U.S. 549 (1995) (5-4).
139. * Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (5-4).
140. United States v. IBM Corp., 517 U.S. 843 (1996) (6-2).
141. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (7-2).
142. * Denver Area Educ. Telecomms. Consorium v. FCC, 518 U.S. 727 (1996) (5-4 on one holding, 6-3 on another).
143. Babbitt v. Youpee, 519 U.S. 234 (1997) (8-1).
144. City of Boerne v. Flores, 521 U.S. 507 (1997) (6-3).
145. Reno v. ACLU, 521 U.S. 844 (1997) (7-2).
146. * Printz v. United States, 521 U.S. 898 (1997) (5-4).

[644] Justice Kennedy took no part and probably would have dissented.

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147. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998).
148. United States v. United States Shoe Corp., 523 U.S. 360 (1998) (9-0).
149. Clinton v. City of New York, 524 U.S. 417 (1998) (6-3).
150. * E. Enters. v. Apfel, 524 U.S. 498 (1998) (5-4).
151. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) (9-0).
152. Saenz v. Roe, 526 U.S. 489 (1999) (7-2).
153. * Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (5-4).
154. * Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (5-4).
155. * Alden v. Maine, 527 U.S. 706 (1999) (5-4).
156. * Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (5-4).
157. * United States v. Morrison, 529 U.S. 598 (2000) (5-4).
158. * United States v. Playboy Entm't Group, 529 U.S. 803 (2000) (5-4).
159. Dickerson v. United States, 530 U.S. 428 (2000) (7-2).
160. * Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (5-4).
161. * Legal Serv. Corp. v. Velazquez, 531 U.S. 533 (2001) (5-4).
162. United States v. Hatter, 532 U.S. 557 (2001) (7-0).
163. Bartnicki v. Vopper, 532 U.S. 514 (2001) (6-3).
164. United States v. United Foods, Inc., 533 U.S. 405 (2001) (6-3).
165. Ashcroft v. Free Speech Coalition, 122 S. Ct 1389 (2002) (6-3/7-2).
166. * Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) (5-4).
167. * Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002) (5-4).

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