BALLER JUDGES

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INTRODUCTION

We've been told, time and time again, to think of judges as umpires. Often we're told this by judges themselves, including none other than Chief Justice John Roberts.[1] Whether said disingenuously, aspirationally, or in all gosh-golly sincerity, judges like to be viewed as impartial officiants, not combatants, in contests implicating everything from war powers to riparian rights. And their view has more or less been endorsed,

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1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States). Versions of this characterization of judges as playing a rather straightforward and ministerial role in the adjudication of justice predate the game of baseball. *See, e.g.*, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, Chief Justice John Marshall stated:

> Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

Id. at 866.

for reasons principled and strategic, by influential circles of lawyers, policymakers, and journalists.[2]

Now we're confronted with a new, seemingly more honest, and decidedly just as important analogy: judges as managers. As Andrew Coan tells us in his illuminating and trenchantly argued book, *Rationing the Constitution*, judges must manage court dockets, dispensing—quite literally, rationing—justice mindful of the reality that juridical resources are in short supply.[3] Though not (yet) as politically or culturally salient, Coan's judges-as-managers analogy seems entirely more accurate and useful.

The umpire and manager analogies surely complement one another. Umpire judges, such as they exist, must invariably do some docket-management work. And manager judges must, at the end of the day, still resolve disputes. But there are also ways in which umpire judges and manager judges may clash with one another. Consider, for instance, a baseball umpire mindful of the fact that ballfield resources are scarce. She must be especially attentive on days when storm clouds loom or when a single diamond must accommodate multiple games, tightly scheduled one after the next. That umpire, understandably sensitive to the pressures to finish the game quickly, may feel compelled to call the game in a different way. That different way may be ostensibly fair, but have (foreseeably) disparate effects on the two teams. An ump may expand the strike zone—again equally, for both teams—to quicken the pace of play. But a light-hitting ballclub that wins by grinding out walks will be disadvantaged relative to a free-swinging team whose batters take their cuts regardless of whether the umpire has a big or small strike zone.

Bringing this discussion back to the courts, certain types or classes of litigants—such as discrete and insular minorities or, perhaps, all plaintiffs—are more dependent on the courts than others. Thus they may be asymmetrically disadvantaged by decent, fair, and principled judges who nonetheless feel compelled to conserve judicial resources.

With due respect to both John Roberts and Andrew Coan, I'm not sure we want members of the Supreme Court or those sitting on the federal appellate courts[4] to think of themselves primarily or even substantially as

2. Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1710 (2007) (noting "the metaphor has become accepted as a kind of shorthand for judicial 'best practices'"); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMM. 701, 724 (2007) (emphasizing the "mythical" nature of claims that judges are just like umpires and suggesting that comparisons of that sort "appeal to important symbolic commitments").

3. ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 19–23 (2019).

4. Coan focuses squarely on the Supreme Court, though on occasion he seems to comment on the federal judiciary writ large. *See id.* at 1–4.

umpires or as managers, let alone as both.[5] They shouldn't style themselves umpires because, quite frankly, umpire-judging is often impossible in any case involving anything more than fact or credibility adjudication.[6] For that reason, the label is misleading, if not deceptive[7]—prompting one federal district judge to call Roberts's umpire claim "a masterpiece of disingenuousness."[8] What's more, umpire-judging may well be normatively and constitutionally problematic in ways I will consider below.

Likewise, while the descriptive label of manager judges may well be more compelling, perhaps judges shouldn't so readily take it upon themselves to be managers, seemingly necessarily distracted and possibly demeaned as they worry whether the courts will, in essence, have enough Cabbage Patch dolls to get through the Christmas frenzy.[9] As reasonable and responsible as it is to try to ameliorate the problem of judicial backlogs and insufficient resources, perhaps manager judges are not only letting Congress of the hook, but also compromising their own independence in the process.

So, what should judges be?[10] Given these concerns with the umpire and manager models, it may make sense to consider, and rigorously

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5. For purposes of this Essay, I do not consider the role of state appellate court judges, whose responsibilities vary from state to state and who, to the extent they're subject to reelection, gubernatorial review, or recall, may have political obligations potentially quite different from one another (and certainly different from their federal counterparts). *See, e.g.*, JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 1–7, 13 (2012). In addition, I understand the work of federal district court judges to be materially different from the work of federal appellate court judges. For that reason, I leave federal district court judges to the side, too. I do so notwithstanding judges like Myron Thompson, Carlton Reeves, Shira Scheindlin, and Jack Weinstein and showing themselves to be every bit the baller in the ways I describe in this Essay. That leaves us with federal appellate court judges and, of course, U.S. Supreme Court justices.

6. *See* Siegel, *supra* note 2, at 705, 712.

7. *See* McKee, *supra* note 2.

8. Lynn Adelman, *The Roberts Court's Assault on Democracy*, HARV. L. & POL'Y REV. (forthcoming 2020); McKee, *supra* note 2; Dahlia Lithwick, *Former Judge Resigns From the Supreme Court Bar*, SLATE (Mar. 13, 2020, 3:22 PM), https://slate.com/news-and-politics/2020/03/judge-james-dannenberg-supreme-court-bar-roberts-letter.html [https://perma.cc/4TTX-A6QE] (reporting on letter submitted by former Hawaii state court judge resigning from the Supreme Court bar, questioning Chief Justice Roberts's principles and commitments, and disputing Roberts's self-description as an umpire calling balls and strikes).

9. If mentioning Cabbage Patch Kids betrays how old I am, so be it. Ever-so-slightly younger colleagues who read an earlier draft of this Essay urged Hatchimals or Tickle-Me-Elmo. While I am duly impressed by their youth-flexing, I'm sticking with my vintage reference. It's the baller thing to do.

10. To be clear, I do not read Coan to be making a strong normative claim. But I nonetheless focus on the *should* question precisely because Coan's descriptive account of judges as managers is reasonably compelling and persuasive.

scrutinize, a third model: judges as ballers—contestants, competitors, and intellectual partisans in the collective project of constitutional governance.[11]

I fully concede that baller judges may be an unpopular and infelicitous formulation. I also recognize and take quite seriously claims, particularly at this challenging, politically polarized moment, that unelected, life-tenured judges already wield too much influence—and are already too partisan. There is a fine, hard-to-police line between good-faith judicial balling and bad-faith judicial balling, the latter of which may reflect judicial recklessness, intellectual preening, or political hackery. (Yet before conceding too much ground, it is worth underscoring that there surely are iffy manager and umpire judges too, not to mention deluded or duplicitous ones whose managing and umpiring just so happen to produce results that invariably align with their politically partisan policy preferences.)

For these reasons, this Article does not endorse judicial balling. It does, however, shine light on an undeniable phenomenon; explain why judicial balling deserves greater study, and possibly respect, as both a descriptive and normative project; and offer some suggested best practices for extant and prospective baller judges.

I. WHAT DOES IT MEAN TO BE A BALLER JUDGE?

First, a baller judge understands that the task of a modern appellate jurist includes furnishing and defending legal and normative reasoning that connects particular disputes to the larger world of law, morality, and political economy.[12] Laying bare such reasoning—that is, explaining one's positions on matters of substance and methodology—may well go above and beyond what is minimally required to dispose of a case.[13] But that's precisely the point: the baller judge doesn't think of her cases as needing to be disposed of. Rather, the cases are occasions—opportunities, really—for shaping, revising, challenging, and ultimately defending first-order principles. By treating cases in this manner, baller judges spark thinking about constitutional values—and thinking about where and when the law coheres and where it breaks down, perhaps along politically partisan lines.

Baller judges thus do not hide the ball or paper over inconsistencies. This sets them apart from self-styled umpire judges who make a big show

11. *Cf.* Siegel, *supra* note 2, at 712 ("The umpire analogy . . . erases the reality that the Court legitimates itself . . . by functioning as an engaged participant in the constitutional culture of the nation . . . .").

12. I understand judicial ballers as very much in keeping with Neil Siegel's model of judges as bold and willing (and able) to articulate fundamental social values. *See id.* at 705–12.

13. Given my skepticism that appellate judges can *just* call balls and strikes, I may at times find it useful to conflate judicial umpiring with judicial minimalism.

of avoiding discussions of unsettled first-order principles; downplay the novelty of questions, the frailty of supposedly settled reasoning, and the relevance of other, conflicting understandings; and at times pretend that normatively or doctrinally contestable conclusions are self-evident, that tendentious historical accounts are known to every schoolboy and girl, and that anecdotal understandings or suppositions are scientific truths.

Obviously, judges have reasons for claiming hard cases are easy ones. We often speak, and speak reverently, about the seamlessness of the law, the constancy of courts over time and across personnel. We seek to overcome or alleviate the counter majoritarian difficulty—or simply preempt claims that judges are "legislating from the bench"—in part by insisting the courts aren't really doing anything different or controversial.

But there are deeper reasons at play as well. Hard cases require hard thinking. And hard thinking requires judges to grapple with big, philosophical ideas, to acknowledge the weaknesses of their positions, and the incompleteness of their conclusions. Reticence here goes beyond claims of constancy and bespeaks fears from the bench and bar that philosophical engagement is unhelpfully academic and unbecoming of serious, right thinking lawyers. In this context, too, John Roberts plays a central role. After all, it was he who garnered national attention for suggesting that legal scholarship is, at best, a sideshow:

> Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.[14]

Roberts is hardly alone. Judge Dennis Jacobs, for one, has been even less sparing. While serving as chief of the Second Circuit, Jacobs (seemingly) boasted: "I haven't opened up a law review in years. No one speaks of them. No one relies on them."[15]

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14. *A Conversation with Chief Justice Roberts*, C-SPAN (June 25, 2011), available at www.c-span.org/video/?300203-1/conversation-chief-justice-roberts (quotation beginning at 30:48).

15. Adam Liptak, *When Rendering Decisions, Judges are Finding Law Reviews Irrelevant*, N.Y. TIMES (Mar. 19, 2007), https://www.nytimes.com/2007/03/19/us/19bar.html [https://perma.cc/A9GM-BWCW] (quoting Judge Jacobs); *see also* Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 415–16 (2012). Another former chief judge, D.C. Circuit Judge Harry Edwards, has been a prodigious producer of anti-scholarship scholarship—notwithstanding his pre-judicial career as a distinguished professor at the University of Michigan and Harvard Law School. *See* Ronald K.L. Collins, *On Legal Scholarship: Questions for Judge Harry T. Edwards*, 65 J. LEGAL EDUC. 637, 638, 642 (2006). For broader trends, see Liptak, *supra*.

The culture that breeds, and enforces, such thinking—and that then shapes or reinforces legal education, Big Law practice, Justice Department norms, and ultimately the selection of judges—runs the risk of engendering self-fulfilling prophesies: Those considered properly trained and dispositionally suited for the bench and elite appellate practice may lack familiarity, let alone fluidity, with scholarly ideas.[16] Consider former Solicitor General Seth Waxman, one of the deans of the Supreme Court bar, who remarked that "[o]nly a true naïf would blunder to mention [a law review article] at oral argument."[17] Absent such deep philosophical engagement, we're often left to conclude that the courts either resolve a case rightly or wrongly based primarily on whether the judgment matches our normative or policy priors. That is to say, the courts may not do enough to persuade us, or unsettle us, unless they're situating given controversies within broader commitments that sound in principles of fairness, equality, efficiency, democracy, and/or liberty.[18] To do this interpretative and expository work, one cannot be *just* an umpire. She must not only pick a side but choose a team—playing offense and defense by advancing certain positions and undercutting contrary ones, preferably over a long and consistent career.[19]

Second, lest one think otherwise, a judicial baller isn't, or at least doesn't have to be, anything akin to Ronald Dworkin's Judge Hercules.[20] She may be a Hercules. But she also may be an originalist, pragmatist, or, gasp, a crit. She may even be what we call a conventionally modest, self-described common law judge, who nonetheless is every bit a baller provided she doesn't ignore tensions or nuances in the law—and takes care to explain the continuing correctness of the common law, describe the rationale for reaffirming or deviating from settled practice, and disclose her predictive algorithm, thereby guiding others struggling to preempt,

16. Fortunately, that's not always the case. *See, e.g.*, Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in 18th Century Bulgaria*, 18 GREEN BAG 2d 251 (2015).

17. Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), https://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html [https://perma.cc/F4FU-JEEV] (quoting a 2002 statement by Seth Waxman).

18. The "us" here is of course a bit tricky. It is, at the very least, those who pay attention to what matters the Court weighs in on. It may well be the case that baller judges are able to expand the size of the "us" pool, if they are indeed endeavoring to be persuasive, taking pains to put disputes into broader political, legal, economic, and cultural contexts, and self-consciously aiming to reach wider or at least different audiences. *See infra* notes 21–22 and accompanying text.

19. Note too that baller judging may change how we think about judicial nominations and confirmations. A focus on legal philosophy, rather than on specific (results-driven) cases, could yield far more informative, educational, and principled colloquies.

20. RONALD DWORKIN, LAW'S EMPIRE 239, 411 (1986).

defuse, or resolve legal conflicts and controversies of their own. In short, baller judges may be Daryl Strawberrys—but they also may be Tim Teufels and Mookie Wilsons.

Third, a judicial baller doesn't engage only with litigants but also with other judges, legislators, executive officials, public intellectuals, and lay folk, too. Her audience is, quite consciously and intentionally, the entire panoply of citizen stakeholders,[21] some of whom—perhaps many of whom—may well be presently alienated from an often all-too-opaque and abstruse judicial system. Indeed, as much as those within elite legal circles may find baller judging unsettlingly brazen or self-indulgent, it may be helpful to ponder and possibly survey how many people outside those elite circles find present-day, self-avowed umpire judges delphic, patronizing, and strident. Baller judges thus need to be somewhat charismatic, if not in person then at least on paper. They also need to engage the public directly—and in a fashion that makes clear to audiences that they too—that is, members of the public—are central participants in the collective enterprise of self-governance.[22] And by speaking to them using value-inflected language and reasoning, the judges may well elevate public constitutional debate (certainly beyond what we find today on cable TV and social media) and perhaps set a different, and higher, bar for what it takes to be nominated and confirmed as a federal judge.

Lastly, a judicial baller doesn't disregard the case or controversy standing requirement, a loadstar of modern Article III litigation and adjudication.[23] Baller judges, no less than umpire or manager judges, must assuredly await a real or imminent legal conflict. Ballers differ, however, once they establish that that the plaintiff has suffered an injury, caused by the defendant. When proceeding to the merits, the baller judge has license to engage in what we in polite company are taught to frown upon: *dicta*. Discussions disparaged as dicta give meaning, direction, and jurisprudential ammunition (or admonition) to those considering novel

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21. I use the term citizen inclusively to include members of a political community, regardless of their particular legal designations within that community.

22. I would be hesitant to equate folksiness with jurisprudential accessibility. On the folksiness front, we have Justice Thomas RVing in Walmart parking lots; Justice Sotomayor appearing on Sesame Street and sitting with the Yankee Stadium Bleacher Creatures; and Justice Gorsuch surprising people at an airport bookstore, offering an impromptu signing session. *See* A Republic, If You Can Keep it (available now) (@GorsuchBook), TWITTER (Sept. 12, 2019, 10:21 PM), https://twitter.com/GorsuchBook/status/1172349658829643777?s=20 [https://perma.cc/BZ6R-4MBK]. But folksiness gets one only so far, as does pop culture iconography such as that surrounding Justice Ginsburg, known to her fans as the *Notorious R.B.G*. Folksy or culturally relevant justices may be effective champions, conveyors, and popularizers of important jurisprudential commitments—but by no means is that necessarily the case.

23. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

policy initiatives or operating protocols. After all, what's technically required to minimally decide a case may be lacking in content and barren of context, thus raising questions of substance about what any particular, perhaps quite parochial, skirmish means to (and about) our constitutional republic; questions of credibility regarding how and why the court came to the judgment it rendered; and, ironically enough to the judges-as-managers crowd, questions of effective management as judges and litigants may otherwise lack the contextual cues to avoid additional litigation down the road.

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If none of what I'm suggesting seems novel, let alone radical, that's because it isn't intended to be novel or radical. We surely have judges who are already ballers. But like anything else—including, again, good and bad umps as well as good and bad managers—there are good and bad ballers. Bad ballers are ungenerous to those with whom they disagree, preferring snark to nuance. They compare resumes, not arguments. And, most importantly, they are political rather than jurisprudential partisans. These judges obscure the distinctiveness of law vis-à-vis politics and validate the worst fears of court critics already inclined to label every decision of consequence one of raw political will. Indeed, in a court of law as much as on a basketball court, one sure-fire way to distinguish a true baller from a bad baller is that only the former can go right or left depending on the circumstances.[24] The latter, by contrast, puts her head down and insistently pushes in only one direction, situational cues be damned. [25]

II. JUDICIAL BALLING IN OUR CONSTITUTIONAL ECOSYSTEM

In this part, I consider how baller judges may function within the broad network of political, legal, and cultural actors and institutions. I begin by locating baller judges within the federal judicial system. Next, I examine baller judges and how they affect and are affected by the federal separation of powers. Last, I take account of baller judges vis-à-vis party politics.

A. Baller Judges and the Judicial System: An Intra-Branch Inquiry

Big, bold judging can be resource conserving, albeit in different ways from those associated with, say, the more intuitive managerial approaches Coan describes. Big, bold judging starts conversations the courts deem necessary, structures and refines conversations already brewing, and signals to wider audiences the types of arguments some judges are interested in hearing; the kinds of evidentiary documentation—doctrinal,

24. *See infra* Part III.

25. *See infra* note 90 and accompanying text.

psychological, sociological, historical, or scientific—some judges deem valuable; and the conditions precedent to rendering a decision. Among umpire judges and proponents of judicial minimalism, those discussions may seem premature, impertinent, and distracting. Yet it is hard to deny that those discussions may contain quite meaningful signals to various constitutional stakeholders in and out of government, specifying what work parties need to do to prevail in the courts—and what work should be directed elsewhere, to, say, the states, Congress, or the market. Such signals may help save litigants time and money; it is even possible that those same signals will help with the ever-pressing problem of docket management.

To be sure, a baller-dominated panel may present strong opinions on multiple sides of any serious controversy. And thus, there will be sharp clashes.[26] Those internecine battles may well confuse the aforementioned stakeholders. Whose signals should they follow? Should they focus on text or legislative history? Should they galvanize grassroots organizers or seek certiorari? But over the long haul, even these clashes are instructive, making clear to lower court judges, presidents, legislators, litigants, and the like what's at stake, what arguments and data should be attended to, and what types of judges—holding what types of judicial philosophies—we want added to the bench when vacancies arise.

Additionally, big, bold judging draws in, rather than repels, academics. As noted above, prominent self-styled umpire judges have a way of disparaging academics—and their work—as irrelevant.[27] Such disparagement may well have the effect of pushing academics further and further away from juriscentric scholarship. That is to say, in a world in which judges profess not to take academic work seriously, there is less of an incentive for legal scholars to spend their time trying to engage the courts. By contrast, baller judges are apt to excite academics and bring them back into the fold. This too saves and streamlines judicial resources (and sharpens doctrinal and philosophical insights), as ideas can be tested, refined, and expanded upon by those with the time and inclination to do deep and, with any luck, illuminating, doctrinal, empirical, or theoretical dives.

In short, baller judges may not be the best at conserving judicial resources in the most literal sense. But they may be fairly good at *optimizing* those resources, aiming to better serve the interests of justice, democratic legitimacy, and constitutional fidelity by structuring legal

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26. These need not fall along politically partisan lines. *See* Ronald J. Krotoszynski, Jr., *"History Belongs to the Winners": The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995 (2006); NOAH FELDMAN, THE SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010) (describing heated battles and rivalries among four prominent FDR-appointed justices).

27. *See supra* notes 14–17 and accompanying text.

debates, by placing those debates in broader political, economic, and social scientific contexts, and by deputizing and mobilizing non-judicial resources to enrich the enterprise.

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One might go further to suggest optimizing is a more honest undertaking than at least some versions of rationing. With apologies for oversimplifying things, some judges may not want to admit that they and their colleagues don't have time to adjudicate every dispute that is brought to their attention. So, these judges erect all sorts of ostensibly neutral barriers, and do so in a manner that conceals the substantive import and quite possibly political valence of this or that gatekeeping choice. When it comes to optimizing, baller judges are sending the converse message. They're being transparent, candid perhaps to a fault; they are making clear what are the important legal battle lines—to focus (rather than divert) attention. This is a different approach to triage, telegraphing their agenda through the exposition of big ideas and enlisting the public both to engage with the judges' big ideas and to pressure Congress to better fund the resource-strapped judiciary.

Optimizing may also be fairer than umpiring. Recall that balling may require going beyond simple dispute resolution. I argued above that transcending minimalist dispute adjudication may be a good idea as a matter of interpretive exegesis and court legitimation.[28] It may in fact be more than that. Transcending minimalist dispute resolution may be absolutely necessary as part of our undeniably hydraulic juridical system.

Consider the following. Courts hew to the case or controversy requirement, vigorously even militantly policing their own behavior lest they stray too far from their Article III comfort zone.[29] But over the past several decades, they've tightened the reins, as evidenced not only by the adoption of more parsimonious standing rules but also by more stringent pleading requirements and more fulsome endorsements of alternative dispute resolution venues such as private arbitration, settlements, and plea bargains.[30] Additionally, for years now appellate courts have increased their number of unpublished decisions—that is, nonprecedential, "often

28. *See* Siegel, *supra* note 2, at 712 (noting that "the Court legitimates itself in history in significant part by functioning as an engaged participant in the constitutional culture of the nation, a culture in which competing visions of social order compete for popular allegiance").

29. *See supra* note 23 and accompanying text.

30. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (applying heightened pleading standards across the federal docket); *Wal-mart v. Dukes*, 564 U.S. 338 (2011) (limiting class action suits seeking monetary damages); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528–30 (2019) (limiting court control or supervision over arbitration decisions); *Hollingsworth v. Perry,* 133 S. Ct. 2652, 2661–62 (2013) (interpreting standing narrowly); *Summers v. Earth Island Inst*., 555 U.S. 488 (2009) (raising the bar on what plaintiffs must allege to establish they have standing to sue).

short, perfunctory, unsigned opinions drafted for the benefit of the parties, not the public"[31]—by leaps and bounds, largely in response to a perceived "crisis of [caseload] volume."[32] The Supreme Court now takes roughly half the number of cases it used to take as recently as the 1980s,[33] notwithstanding the ever-advancing sophistication of computers and digital databases to facilitate research and writing and the increase in the allotted number of clerks assigned to each judge and justice.[34] All of this means that there is what some might deem an artificially or unnaturally low number of non-precedent-setting public law decisions rendered every year. This may be prudent, as a matter of docket management. But regardless how we spin it, the end result is that judges have relatively fewer bites of the jurisprudential apple. With fewer bites, perhaps they ought to take bigger bites.

Indeed, with the docket so extensively culled and curated, those circuit cases selected for publication (and certainly those disputes that garner the Supreme Court's attention) are often important for reasons above and beyond the specific case or controversy. After all, the Supremes and their clerks pore over thousands and thousands of cert petitions the way college admissions officers or reality TV producers dig through thousands of applications or headshots. Yes, you the successful candidate are interesting and deserving. But, more accurately, you embody the type of candidacy that will make certain types of contributions and exhibit certain characteristics that, when combined with others, will round out a matriculating class, TV ensemble cast, or judicial docket. Those docket-worthy cases are, or reasonably may be seen as, meditations on larger legal tensions—and thus opportunities to elaborate on those tensions, which may sound in procedure, methodology, democratic theory or the like.

After all, those bringing and those selecting said cases are all engaged in a bit of a fiction. The disputes, especially those that the Supreme Court considers sufficiently good vehicles, are rarely serendipitous and ordinary but rather manufactured and invariably massaged and manicured. The cases do center on a real controversy per the Court's standing rules, but they also often are consequential in ways far broader than their effect on the litigating parties. By selecting those cases (over others)—and by explicitly shying away from cert petitions seeking or even crying out for

31. Merritt E. McAlister, *"Downright Indifference:" Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 535 (2020).

32. Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1112 n.9 (2011).

33. Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES (Sept. 28, 2009), https://www.nytimes.com/2009/09/29/us/29bar.html [https://perma.cc/T6KY-PX8N].

34. *See* JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 15–18 (2018).

"error correction"—the Justices are already playing along. But if they're *just umpiring*, then they're playing along only to an odd extent. That partial playing along just doesn't make sense intrinsically, let alone when it comes to questions of wise judicial management when so many humdrum disputes (over which judges may well referee) are diverted, settled, or summarily decided.

B. Baller Judges and Departmentalism: An Inter-Branch Inquiry

Consider too the role of baller judges with respect to the other branches of government. Any such inquiry must at the very least touch upon questions of constitutional departmentalism. Departmentalism is usually understood to mean that each of the three branches of the federal government has a right and duty to interpret the Constitution for itself, and that no one branch's interpretation is necessarily controlling on the other two branches.[35]

Departmentalism today is motivated in large part by a sense that the popular branches have had much to say about constitutional interpretation and exposition—yet they've been silenced by the courts. Whether proponents of this understanding are correct in their diagnosis of the relative power asymmetries among the constitutional branches vis-à-vis constitutional interpretative authority, let alone correct in gauging the intensity or impact of any such asymmetry, is, for present purposes, of little consequence. What's important is that contemporary departmentalism seems alive and well.[36]

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35. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 105–10, 135–36 (2004); Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 489 (2018); Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713 (2017).

36. I am, no doubt, presenting a relatively restrained version of departmentalism. I do so principally because it strikes me that this milder rendering has, at least for the present moment, greater real-world traction and salience than does a stronger formulation of departmentalism. After all, efforts by Executive Branch officials to, say, defy judicial decisions (or deny their applicability) remain few and far between. *See, e.g.*, *Baez-Sanchez v. Barr*, 947 F.3d 1033 (7th Cir., Jan. 23, 2020) (describing the Attorney General's defiance of a court order—on the grounds that the court order is deemed "incorrect"—as "beggar[ing] belief" and insisting that Executive Branch officials "are free to maintain, in some other case, that our decision is mistaken . . . [but] are not free to disregard our mandate in the very case making the decision"); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993) (remarking on the "widespread agreement that the executive has a legal duty to enforce valid final judgments rendered by courts, regardless of whether the executive agrees with the legal analysis that forms the basis for the judgment"). *But see* Fallon, *supra* note 35 (emphasizing the long history of U.S. presidents defying court orders in ways that do not necessarily threaten the rule of law).

Indeed, based on what's been going on in recent years, the executive branch in particular has shown itself to be a major force in the promulgation of constitutional law and constitutional norms. Take, for example, the George W. Bush administration's authoritative memos on enemy combatant detention and interrogation;[37] the Obama legal team's constitutional defense of the drone program—a defense set out principally via a series of high-profile public speeches;[38] and Donald Trump's combative tweets on presidential powers, due process, and emoluments, coupled with his Justice Department's outright rewriting of Article II.[39] Note too, the extensive use of signing statements to flag what any number of recent presidents deem unconstitutional. Lastly, consider the recent upswing in Justice Department refusals to defend federal legislation in court.[40] As a result of these fairly high-profile interventions—about which courts have had relatively little to say—the Commander-in-Chief has increasingly become the Jurisprude-in-Chief. One may hazard a guess that more folks recall the callous scribblings then-Defense Secretary Donald Rumsfeld affixed to draft copies of torture memos ("I stand for 8-10 hours a day") and the wild, blustery, and occasionally ALL CAPPS constitutional law lessons Trump serves up in rambling 280-character

37. Bonnie Goldstein, *The Torture Memo*, SLATE (Apr. 2, 2008), https://slate.com/news-and-politics/2008/04/the-bush-administration-throws-the-long-ball-for-torture-2.html [https://perma.cc/23EH-H5DV].

38. *See, e.g.*, Ari Shapiro, *U.S. Drone Strikes are Justified, Legal Adviser Says*, NPR (Mar. 26, 2010), https://www.npr.org/templates/story/story.php?storyId=125206000 [https://perma.cc/WE3V-HCGU]; *Obama's Speech on Drone Policy*, N.Y. TIMES (May 23, 2013), https://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html [https://perma.cc/MU98-9PVA]; Robert Chesney, *Text of the Attorney General's National Security Speech*, LAWFARE (Mar. 5, 2012), https://www.lawfareblog.com/text-attorney-generals-national-security-speech [https://perma.cc/9FL5-M2US]. *See generally* Kenneth Anderson, *Obama Administration Senior Speeches on Targeted Killings Plus . . . A Blog Post*, LAWFARE (Apr. 17, 2012, 1:05 PM), https://www.lawfareblog.com/obama-administration-senior-speeches-targeted-killing-plus-blog-post [https://perma.cc/U23M-LPZM] (noting the significance of "a collection of speeches from the past two years by the Obama administration[] . . . on targeted killing and . . . drone programs").

39. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 19, 2020, 7:16 PM), https://twitter.com/realDonaldTrump/status/1219066007731310593 [https://perma.cc/YY9N-P9KF]; Justin Florence & Ben Berwick, *Constitutional Limits on White House Interference in Specific Enforcement Matters*, LAWFARE (Mar. 9, 2019, 7:00 AM), https://www.lawfareblog.com/constitutional-limits-white-house-interference-specific-enforcement-matters [https://perma.cc/78PS-X6KJ].

40. Carrie Johnson, *Congress Clashes With Justice Department Over Its Decision Not To Defend Laws*, NPR (June 7, 2019), https://www.npr.org/2019/06/07/730722220/congress-clashes-with-justice-department-over-its-decisions-not-to-defend-laws [https://perma.cc/BVS5-LKK6].

morsels than to the reasoning underlying the holdings in *Hamdan v. Rumsfeld*,[41] *United States v. Texas*,[42] or *United States v. Nixon*.[43]

Further to this point, Trump's 73.5 million Twitter followers, not to mention Mitch McConnell's 1.3 million, Adam Schiff's 2 million, and Alexandria Ocasio-Cortez's 6.4 million followers, have constitutional classrooms far broader and in some respects more influential than those of the justices.[44] These politicians' pithy, at times excellent but quite often batty or misleading, "lessons" are especially important to the millions otherwise loosely, if not poorly, schooled in the principles undergirding liberal democracy, the rule of law, and the American constitutional system.[45] These lessons may help explain executive and legislative branch legal interpretations;[46] shape and marshal support for or against judicial nominees who hold particular philosophies; and possibly even affect how courts decide cases (especially those courts that follow, and try to remain faithful to, the nation's prevailing cultural and political commitments).[47]

Given the robustness of contemporary constitutional departmentalism—so much so that claims that we're (still) a juriscentric country often ring hollow, more academic myth than practical reality—judges may need to step up their game, too. Indeed, if anything, manager judges and umpire judges run the risk of falling further behind because of the greater, more frequent, and more popular outlets available to legislators, presidents, and high-ranking executive officials to weigh in on questions of constitutional magnitude, because of the judicial rationing

41. 548 U.S. 557 (2006).

42. 136 S. Ct. 2271 (2016).

43. 418 U.S. 683 (1974).

44. *See* Donald Trump (@realDonaldTrump), TWITTER, https://twitter.com/realDonaldTrump [https://perma.cc/YLY8-P9CW]; Mitch McConnell (@senatemajldr), TWITTER, https://twitter.com/senatemajldr [https://perma.cc/47MY-2ZTQ]; Adam Schiff (@RepAdamSchiff), TWITTER, https://twitter.com/RepAdamSchiff [https://perma.cc/5F4M-Z4GP]; Alexandria Ocasio-Cortez (@AOC), TWITTER, https://twitter.com/AOC [https://perma.cc/A7QR-3RXK]. To provide additional perspective, approximately twenty percent of all U.S. adults follow Trump on Twitter; by contrast, only fourteen percent of *likely voters*—presumably a more discerning subset of adults—can even name Chief Justice Roberts or Justice Thomas. *See* Ed Kilgore, *Most Americans Can't Name a Supreme Court Justice*, N.Y. MAG. (Sept. 5, 2018), https://nymag.com/intelligencer/2018/09/most-americans-cant-name-a-supreme-court-justice.html [https://perma.cc/WVR4-AP38].

45. Matthew Shaw, *Civil Illiteracy in America*, HARV. POL. REV. (May 25, 2017), https://harvardpolitics.com/culture/civic-illiteracy-in-america/ [https://perma.cc/RFR2-JHNV].

46. *Id.*

47. MICHAEL J. KLARMAN, BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT (2007) (arguing that the Supreme Court pays attention to election results); JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011) (describing courts' responsiveness to powerful social movements).

techniques that foreclose or divert public adjudication, and because of the norms and expectations associated with what passes for umpire judging.

These disruptions to the judge-dominated model of constitutional discourse that seemingly prevailed throughout, say, the Warren, Burger, and a good deal of the Rehnquist Court eras, are a potential problem for those who believe in juriscentricism, thinking that the courts are best positioned to expound on the Constitution and constitutional values.[48] These disruptions are arguably even a problem for those who believe in departmentalism—and understand departmentalism to requires a weighty Article III anchor, namely one that isn't readily (and at times willingly) dislodged by presidents quick to formulate and amplify their own constitutional interpretations.[49]

All of this is to say that manager judges and umpire judges may impoverish our constitutional discourse, and may do so along problematic dimensions. After all, judges usually have greater expertise than those in the political branches when it comes to constitutional analysis.[50] Judges also are typically less encumbered by various institutional biases. Judges ought not, for instance, have an institutional interest in the outcome of given cases, in the reasoning used, or the methodology applied. Yet of course executive officials and legislators do. It is only natural for a president and her legal eagles to embrace very strident positions vis-à-vis executive power—and for agency heads to interpret their charges very broadly.[51] Likewise it is to be expected that legislators will view their subpoena and contempt powers expansively, and their authority over the regulation of interstate commerce and civil rights enforcement capaciously.

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48. *See, e.g.*, Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 (2004) (noting that "some forms of judicial finality are essential to the rule of law"); *see generally* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

49. *Cf.* JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY (1987); John J. DiIulio, Jr., *The Hyper-Rhetorical Presidency*, 19 CRIT. REV 315 (2007).

50. *See* David Shribman, *Souter's Progress: How Nominee Won in His Classic Clash with Capital's Culture*, WALL STREET J., Oct. 3, 1990, at A1 (describing then-Senate Judiciary Chair Joe Biden assuring then-Judge David Souter, on the eve of the latter's Supreme Court confirmation hearing, not to get nervous because "nobody on the committee would know more about law than Mr. Souter himself"). This may not be true anymore, as at least one of the two parties races to appoint ever-younger, less experienced judges. *See* Nathan R. Hardy & Richard L. Jolly, *Trump has Packed the Courts with Right-Wing Ideologues. Democrats, What's Your Plan?*, L.A. TIMES (Dec. 18, 2019), https://www.latimes.com/opinion/story/2019-12-18/donald-trump-judges-federal-courts-conservatives [https://perma.cc/EVQ9-9R5N] ("Trump's judicial picks are not only young and conservative, but a disproportionate number of them are also inexperienced or worse.").

51. *See* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010).

Not having as much skin in the game as presidents, agency heads, and members of Congress, however, doesn't translate into judges having to act the part of umpires, managers, or minimalists. It just means that judges aren't saddled with the same professional conflicts of interest. If anything, that independence and the associated credibility that comes from their being disinterested might reasonably embolden judges to be more than just umpires or managers.

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Perhaps a discussion of departmentalism and baller judges invites worries that baller judges will expand standing and correspondingly narrow such doctrines as *Chevron* to maximize opportunities to promote their constitutional ideas. That surely could be a concern, as these are contexts where judges have an institutional interest in deciding disputes in a particular way. At the risk of being completely glib, I will simply note that it is not necessarily the case that a more constitutionally adventurous judiciary will be especially hostile to doctrines that, say, vest interpretative primacy in agencies or tighten the injury-in-fact requirements. Championing *Chevron* and suffocating standing were, after all, signature moves of the Babe Ruth of baller judges—namely, Antonin Scalia.[52]

C. Baller Judges and Judicial Balance: An Inter-party Inquiry

Today's baller judges skew conservative. Think about the judges who advance ideas beyond what's in the jurisprudential mainstream, who routinely call for doctrines to be revisited, and who advocate for new and very different methodological approaches. The names that come to mind are Justices Thomas and Gorsuch—and until quite recently Justice Scalia and Judge Rogers Brown, too. Of course, in different eras, names like Brennan and Douglas, like Skelly Wright and Bazelon, or like Reinhardt suggested a very different ideological orientation.[53] But it is not clear that the orientation of ballers will necessarily balance out over time, at least not so long as Republican presidents continue to appoint younger movement conservatives, while Democratic presidents appoint relatively older, more staid jurists.[54] Strident judges are not necessarily baller judges

52. Whatever else one might say or think of Justice Scalia, he was a baller. *See, e.g.*, *How Antonin Scalia Changed America*, POLITICO (Feb. 14, 2016), https://www.politico.com/magazine/story/2016/02/antonin-scalia-how-he-changed-america-213631 [https://perma.cc/NZV2-D8YD] ("By sheer force of intellect and personality, Scalia helped to move the court from a somewhat sloppy, results-oriented, center-left institution to a more intellectually rigorous center-right court that forefronts text and history over other modes of interpretation.") (quoting Michael W. McConnell).

53. They seemingly skew male, too, but perhaps that's an oversight on my part.

54. Rebecca R. Ruiz, et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html?referringSource=articleShare [https://perma.cc/8URB-77JE];

and moderate judges—moderate at least by today's standards—aren't invariably non-ballers. (Posner and Kozinski come to mind.) But there is some overlap. And so long as Democratic presidents pass over left-liberal lawyers from the academy, from public-interest organizations, and public defender's offices in favor of career prosecutors and law firm partners, this imbalance will remain, if not become more pronounced.[55]

A case in point can be gleaned from the instant battles over the constitutionality of the federal administrative state. There was for the better part of seventy years little doubt surrounding the constitutionality of federal agencies, nor of their general powers. Yet in the 2000s, Justice Thomas and Judge Rogers Brown of the D.C. Circuit emerged as lonely but forceful critics of the administrative state and administrative power. The "anti-administrativist"[56] critiques intensified in the 2010s, with Chief Justice Roberts and Justice Gorsuch questioning and thus endeavoring to unsettle doctrines that had long been understood as firmly entrenched.[57] In arguing for the curtailment if not outright dismantling of the administrative state, these judges buttress their claims by citing leading movement academics like Philip Hamburger[58] and polemical, nonacademic historians such as Amity Shlaes.[59] And by citing Hamburger and Shlaes, the judges are doing more than simply attempting to fortify their own opinions. The judges are also boosting the standing of those authors. In effect, each time

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Micah Schwartzman, *Not Getting any Younger: President Obama's Penchant for Older Judges Scuttled Goodwin Liu*, SLATE (May 26, 2011), https://slate.com/news-and-politics/2011/05/president-obama-s-penchant-for-older-judges-scuttled-goodwin-liu.html [https://perma.cc/4D77-RDAY]; David Fontana & Micah Schwartzman, *Old World*, NEW REPUBLIC (July 16, 2009), https://newrepublic.com/article/62573/old-world [https://perma.cc/GV6E-2KKN]; Hardy & Jolly, *supra* note 50.

55. Brian Fallon & Christopher Kang, *No More Corporate Lawyers on the Federal Bench*, THE ATLANTIC (Aug. 21, 2019), https://www.theatlantic.com/ideas/archive/2019/08/no-more-corporate-judges/596383/ [https://perma.cc/8SKK-9P4A].

56. Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017).

57. *See* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 56–57 (2017) (describing conservative legal push to destabilize, decenter, and possibly overturn modern administrative law jurisprudence).

58. *Id.* at 56. Hamburger is not only a professor at Columbia Law but also the president of the New Civil Liberties Alliance, a litigation and advocacy organization dedicated to challenging the constitutionality of the administrative state. *See The New Civil Liberties Alliance: Mission*, https://nclalegal.org/about/ [https://perma.cc/5XK7-Z5D3].

59. Mark Tushnet, *Epistemic Closure and the Schechter Case* 1 (Harv. Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 19-42), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436689; Calvin Terbeek, *Originalist Scholarship and Conservative Politics*, THE NEW RAMBLER (Oct. 9, 2019), https://newramblerreview.com/book-reviews/law/originalist-scholarship-and-conservative-politics [https://perma.cc/GX7Q-KUZU] (describing Justice Gorsuch as "both an entrepreneur and a consumer of the conservative knowledge structure and its outputs").

they cite to outside authority, they give those outside authorities greater influence and credibility, making them all the more useful as authorities to cite in the next round of litigation (and as effective allies who can influence constitutional discourse in non-litigation settings).

There has been no correspondingly forceful defense, let alone affirmative theory, of the administrative state propounded by federal judges. Centrist and center-left judges may be holding the line, relying not without justification on the strength of the existing caselaw and the practical realities that dismantling the administrative state would be nothing short of devastating for our economy, not to mention our health, safety, and welfare. But while these judges have so far ensured that federal agencies live on for another day, they've done little to excite anybody as to the constitutional importance of administrative governance, let alone win over those who are genuinely on the fence. This matters not just in the judicial trenches but also in the arena of politics, particularly with respect to the vetting of judicial nominees.[60]

We encounter a similar asymmetry in the battles over the Affordable Care Act. Those insisting the federal law was unconstitutional were willing to embrace and amplify what Jack Balkin calls "off the wall" positions on the fringes of the constitutional cultural wars.[61] There has not been anything like a left-liberal counterpunch, a polar opposite "off the wall" claim such as one insisting that the Constitution assures one or more positive welfarist rights.[62]

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60. Left-of-center interest groups insist judicial nominees are committed to the protection of reproductive autonomy. *See* Max Greenwood, *2020 Democrats Break Political Taboos by Endorsing Litmus Tests*, THE HILL (May 22, 2019, 6:00 AM), https://thehill.com/homenews/campaign/444914-2020-dems-break-political-taboos-by-endorsing-litmus-tests [https://perma.cc/W8G4-34SU]. But rarely, if ever, are left-of-center nominees' theories of regulation and administrative governance queried. Conservative judicial nominees, by contrast, are expected to have strong and well-developed views on abortion *and* the administrative state. *See* Dan Diamond, Roe v. Wade *is Officially in Trouble*, POLITICO (Jun. 28, 2018), https://www.politico.com/newsletters/politico-pulse/2018/06/28/roe-v-wade-is-officially-in-trouble-266288 [https://perma.cc/93NR-N6PR]; Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking "the Administrative State*," N.Y. TIMES (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html [https://perma.cc/SJF3-7YBF].

61. BALKIN, *supra* note 47, at 179–82; Jack M. Balkin, *From Off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/ [https://perma.cc/7ZSA-NM9Q].

62. The Court rejected such claims in *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970) and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Still, scholars continue to press various claims. *E.g.*, Peter B. Edelman, *The Next Century of our Constitution: Rethinking our Duty to the Poor*, 39 HASTINGS L.J. 1, 3 (1987); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001); Jon D. Michaels, *To Promote the General Welfare, The Republican Imperative to Enhance Citizenship Welfare Rights*, 111 YALE L.J. 1457 (2002);

Indeed, perhaps it is time to put to rest fears (or hopes) of the so-called Greenhouse effect. Recall the popular trope of conservative justices arriving in Washington and moderating their positions, ostensibly to garner praise and esteem from the then-doyenne of the Supreme Court press corps—Linda Greenhouse—and generally be welcomed into Georgetown society. Even indulging the claim that pressure of that sort ever existed, it is most certainly a thing of the past. Conservatives brought onto the Court today are likely to already have deep ties to conservative communities inside and outside the Beltway and are treated as royalty in any number of conservative venues.[63] The famed Federalist Society and any number of think tanks such as Heritage, Hoover, and AEI, do plenty to sustain their fellow-traveler judges, not to mention wine-and-dine them and sponsor their educational junkets.[64]

If anything, we may be more likely to encounter a *reverse* Greenhouse effect: it would be an outspoken left-liberal jurist today who may be without obvious comfort zones, as the DC legal community becomes increasingly corporatist in outlook, as interpretive approaches such as originalism and methodologies such as law and economics enter—and sometime dominate—the academic and professional mainstream, and as some once-prized left-liberal approaches (such as critical studies) are exiled to far-flung pockets of the legal community. It is perhaps most revealing that someone like the current Chief, a staunch jurisprudential conservative by any reasonable reckoning, is treated with suspicion within conservative circles for occasionally deviating from the movement's orthodoxy.[65]

Put more starkly, we may reasonably expect movement left-liberals and movement conservatives to be more inclined to be ballers. But because we presently have a good number of movement conservative judges and

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Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993).

63. Zoe Tillman, *Justice Brett Kavanaugh Got a Rousing Standing Ovation at this Year's Federalist Society Convention*, BUZZFEED (Nov. 15, 2018), https://www.buzzfeednews.com/article/zoetillman/brett-kavanaugh-standing-ovation-federalist-society [https://perma.cc/ED2T-3C9E]; Josh Gerstein, *Gorsuch Takes Victory Lap at Federalist Dinner*, POLITICO (Nov. 16, 2017), https://www.politico.com/story/2017/11/16/neil-gorsuch-federalist-society-speech-scotus-246538 [https://perma.cc/745N-6HXS].

64. *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2012).

65. Senator Ted Cruz has called Roberts a "mistake." David G. Savage, *Chief Justice Roberts' Record Isn't Conservative Enough for Some Activists*, L.A. TIMES (Sept. 25, 2015), https://www.latimes.com/nation/la-na-roberts-conservative-backlash-20150924-story.html [https://perma.cc/MH9X-2DJG]. In defending President Trump's nomination of Brett Kavanaugh, influential conservative activist Matt Schlapp provided assurances to the conservative rank-and-file that "Kavanaugh is not another Roberts; he's another Scalia, Alito, or Gorsuch." RUTH MARCUS, SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER 72 (2019) (quoting Schlapp).

very few movement left-liberal judges, judicial balling is a lopsided affair. One response to this lopsidedness is to work to encourage both parties to appoint more moderates to the federal courts. But it would be hard to imagine conservative presidents and senators, who have had such brilliant success pushing the courts to the right (especially at a moment when demography is not on their side), agreeing to chart a course Democrats have by-and-large been following for decades. Assuming that parity is something to prize, there is a case to be made to encourage more left-liberal balling. Hence we'd have ballers on both sides of the jurisprudential spectrum offering vibrant but clashing visions of constitutional meaning and possibility. Again, that's just less likely to occur when Democrats nominate lawyers who have spent their entire careers playing it safe, eschewing academically adventurous writing and/or working for white shoe firms that juggle hundreds of major, *and easily offended*, corporate clients.[66]

To be clear, balling—at least good balling—ought not be equated with incivility, poor craftsmanship, or partisan monkey business. Balling can be done thoughtfully and generously—and, in any event, the model of umpire judging (to the extent it properly characterizes many sitting judges' self-perception and self-presentation) is hardly helping improve judicial civility or dispel fears of political partisanship from the bench today.

III. A HOW-TO-BE A JUDICIAL BALLER GUIDE.

The above discussions explain how baller judges fit within and among the constellation of constitutional offices and institutions. Given the high risk of bad-faith or reckless judicial balling, it behooves us to consider some qualities and characteristics we may want to encourage.

Show us your signature move. Kareem had his skyhook. Beckham bent his corner kicks. Simone Biles has *two* moves named after her. Judges ought to tell us the methodology they employ, so we can understand it, see how the judges ply their trade—consistently or otherwise—and debate whether we want new appointees to emulate or disavow a particular move or approach. The judge's move may be originalism, pragmatism, or even an articulated jurisprudence of empathy.[67] Some judges explain their moves well. With others, it is very hard to tell what methodology they're employing—and what enduring commitments command their fidelity. Those latter judges may please us just fine when they adjudicate a dispute

66. *See* Fallon & Kang, *supra* note 55; Daniel Marans, *Progressive Group Urges Democrats Not to Name Corporate Lawyers to Federal Bench*, HUFFPOST (Aug. 21, 2019, 5:30 AM), https://www.huffpost.com/entry/demand-justice-no-corporate-judges-2020_n_5d5b28fce4b05f62fbd40b10 [https://perma.cc/J8P2-26ZY].

67. Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012).

in ways that comport with our normative priors. But they're not necessarily advancing the project of constitutional governance or doing much to elevate or legitimate the work of an unelected judiciary regularly and perhaps justifiably accused of playing politics.

A signature move ought not be showy, gratuitous, or self-indulgent. Nor ought it be whimsical or capricious. That's the work of faux ballers. Empty paeans to the Founders,[68] to baseball,[69] or to our supposed national ethos[70] don't signify much other than, perhaps, that the relevant legal conclusion is on otherwise shaky grounds.[71]

Follow the DiMaggio Maxim. When asked why, during the proverbial dog days of summer, he didn't ever just go through the motions, Joe DiMaggio reportedly said: "There is always some kid who may be seeing me for the first or last time, I owe him my best."[72] While kids are far less likely to idolize judges than centerfielders, the sentiment still holds: Even in cases relatively unexciting to judges, the judges owe it to the litigants, to the bar, to lay observers, and to posterity to do the hard labor of, indeed, making clear how these cases fit within their broader substantive and methodological commitments. The DiMaggio Maxim also requires that judges are active and engaged during oral arguments. It may be perfectly rational for judges to multitask from the bench, limit the number of questions they pose to counsel, and even pass snarky notes to colleagues—just as it would have made sense for Joltin' Joe to dog it now and again.[73] But at a time when the judiciary is under considerable scrutiny

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68. *See, e.g.*, *United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of a rehearing en banc), *rev'd on other grounds*, 136 S. Ct. 1113 (2016).

69. *E.g.*, *Flood v. Kuhn*, 407 U.S. 258, 261–64 (1972).

70. *Van Orden v. Perry*, 545 U.S. 677, 688–89 (2005) ("[A]cknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. . . . [A] large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress's Jefferson Building since 1897."); Anita S. Krishnakumar, *The Hidden Legacy of* Holy Trinity Church*: The Unique National Institution Canon*, 51 WM. & MARY L. REV. 1053, 1064 (2009) ("Justice Rehnquist [in *Texas v. Johnson*] marshaled poetry, song, and historic incidents to argue that the American flag is 'the visible symbol embodying our Nation' and that a Texas statute prohibiting flag burning could not violate the First Amendment.").

71. Carefully contextualizing such national commitments may, however, be more valuable, suggestive of a coherent methodology. *See, e.g.*, Krishnakumar, *supra* note 70, at 1057 (describing a "national institution" canon); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018).

72. *Joe DiMaggio Quotes*, BASEBALL ALMANAC, https://www.baseball-almanac.com/quotes/quodimg.shtml[https://perma.cc/Z378-MZF6].

73. With respect to Justice Thomas, a baller judge in most respects, his approach to oral arguments leaves much to be desired. It seems as if the justice, who speaking only once or twice a decade during oral arguments, is squandering many, many opportunities to better, more fully, or simply differently articulate a constitutional vision. Laura Wagner, *Clarence Thomas Asks 1st Question from Supreme Court Bench in 10 Years*, NPR (Feb.

and when judges are perceived (rightly or wrongly) as raw political actors, showing up for arguments and showing why their questions are so different, more nuanced, and more probing than anything we could expect from a distracted senator at a committee meeting (asking witnesses staff-scripted questions) may go a long way in dispelling some of the illegitimacy concerns.

To be clear, DiMaggio's best didn't involve his drawing needless attention to himself. Crowds turned out to watch DiMaggio lead the Yankees, not diminish his teammates nor disparage their opponents. So as important as it is for judges to stake out new and untested constitutional positions, they need to do so in a thoughtful fashion. Being a judicial bigshot should, one hopes, have a disciplining effect on that judge. She ought to use her position *and privilege* wisely and responsibly—and refrain from, for instance, trafficking in half-baked theories[74] or discounting the potentially deleterious real-world effects of a given constitutional vision.[75]

Oh, and be like Ernie Banks, too. Not to be overshadowed by the Yankee Clipper, Mr. Cub had a famous saying of his own. Banks said: "It's a great day for a ball game. Let's play two."[76] He wasn't thinking about ticket sales or TV ratings, two reasons why no one schedules doubleheaders anymore. He also wasn't thinking about the wear-and-tear on a bullpen, no doubt another argument against playing two. That is to say, he wasn't thinking like a manager.

Baller judges should feel like Banks: It's a great day for big legal questions, let's address them head-on. Given such thinking, concerns about judicial resources should seem secondary at best. It's up to the coaches and front office to figure out how to field and finance a team. And it's up to Congress to do the same with the federal judiciary.

29, 2016), https://www.npr.org/sections/thetwo-way/2016/02/29/468576931/clarence-thomas-asks-1st-question-from-supreme-court-bench-in-10-years [https://perma.cc/V9YP-3B3K].

74. *Texas v. United States*, 945 F.3d 355, 370 n.3 (5th Cir. 2020); *see also* Mark Joseph Stern, *This One Footnote Proves the Latest Obamacare Ruling is Pure Partisan Hackery*, SLATE (Dec. 20, 2019), https://slate.com/news-and-politics/2019/12/fifth-circuit-obamacare-footnote-fraud.html [https://perma.cc/3Z8F-WP7M].

75. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 398–479 (2010) (Stevens, J., concurring in part and dissenting in part). *See generally* Robert Reich, *Trump is the Natural Consequence of our Anti-Democracy Decade*, GUARDIAN (Dec. 9, 2019), https://www.theguardian.com/commentisfree/2019/dec/08/donald-trump-citizens-united-anti-democracy-decade [https://perma.cc/W88E-CKMY].

76. *Ernie Banks Quotes*, BASEBALL ALMANAC, https://www.baseball-almanac.com/quotes/quobank.shtml [https://perma.cc/8ZKY-XRJP].

Post-Game Interview (emphasis on *post*). A true baller doesn't talk about the game beforehand. In sports, that's prime bulletin board material.[77] And in law, it bespeaks a closed, perhaps prejudicial, mind.

By contrast, baller athletes may, after the contest, help clarify what happened at particular junctures—and what those events suggest about future competitions. The same is true for judges. Writing about cases after the fact, elaborating on jurisprudential moves (not interpersonal squabbles), and even conceding there were some moments (or cases) judges wish they had back,[78] only help elucidate the law and its underpinnings—and again further distinguishes judges who are especially thoughtful and self-aware.

Community Outreach. This goes hand-in-hand with post-game interviews. Not everyone stays up after a sporting event to watch a postgame show (or read the recap in the next day's sports page). The same is true in law, as few may actually read the opinion or dig into the judge's scholarship. Thus, it is incumbent on baller judges to do community outreach, at law schools, high schools, and the like, to discuss law, their particular vision or the law, and the role of courts in our constitutional republic.

Think again about where Americans currently learn about the law. They're learning from Donald Trump's mercurial, if not manic, social-media missives and from members of Congress speaking in clumsy or specious soundbites that go viral. We need constitutional moralists challenging and discomforting audiences (think Thurgood Marshall);[79] we need constitutional pedants (think Scalia); constitutional public intellectuals (think Bork and Posner); and, possibly, constitutional populists (think Sotomayor and Gorsuch).[80] Outreach is about teaching—

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77. *E.g.*, Tyler Sullivan, *Titans Find Bulletin Board Material to Fuel Upset of Patriots: 'Revenge Tour Ended Early*,*'* CBS SPORTS (Jan. 5, 2020), https://www.cbssports.com/nfl/news/titans-find-bulletin-board-material-to-fuel-upset-of-patriots-revenge-tour-ended-early/ [https://perma.cc/W9TJ-AEP4].

78. Judges who confess error or acknowledge that their thinking has evolved over time may well be doing valuable work in showing how complicated constitutional jurisprudence is—and how important new ideas, new empirical findings, and possibly new experiences and interactions are to the project of constitutional governance. *See, e.g.*, Andrew Cohen, *Why Don't Supreme Court Justices Ever Change Their Minds in Favor of the Death Penalty*, THE ATLANTIC (Dec. 10, 2013), https://www.theatlantic.com/national/archive/2013/12/why-dont-supreme-court-justices-ever-change-their-minds-in-em-favor-em-of-the-death-penalty/282100/ [https://perma.cc/VX36-XUUU]; Adam Liptak, *Exhibit A for a Major Shift: Justices' Gay Clerks*, N.Y. TIMES (Jun. 8, 2013), https://www.nytimes.com/2013/06/09/us/exhibit-a-for-a-major-shift-justices-gay-clerks.html [https://perma.cc/U4LX-ULHE].

79. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution* (May 6, 1987), http://thurgoodmarshall.com/the-bicentennial-speech/ [https://perma.cc/B9GX-5TZU].

80. *See, e.g.*, David Fontana, *The People's Justice?*, 123 YALE L.J.F. 447, 447–48 (2014); Kathryn Krawczyk, *Supreme Court Justice Neil Gorsuch Went on Fox News to*

and branding one's jurisprudence. And it is about better legitimating the work of courts, understanding the judiciary, and underscoring the relevance of the rule of law.

Cheer on the JV. It's always special when someone like Stephon Marbury returns to Coney Island, or when LeBron shows up at an AAU game. Their presence shines light on local contests and brings attention to the players. Many judges are quite good at this already. They are devoted, enthusiastic participants in moot courts around the country. Some are also quite committed to academic discourse, speaking at schools, at conferences, and the like. Others, however, are not.

First, judges may want to, in today's parlance, *influence the influencers*—those who are dissecting, critiquing, and celebrating courts and constitutional jurisprudence.

Second, judges may want to identify with, reference, and help elevate academic work. Again, some judges do this exceedingly well. Conservative judges and professors have, for sure, forged a tight network centered around such organizations as the Federalist Society. Center-left judges are in many respects less closely tethered, notwithstanding the left-liberal orientation of most law faculties. Perhaps this distance is reasonable and prudent, given center-left judges' sensitivity to the cultural suspicion surrounding left-liberal academics. But if my arm-chair diagnosis is right, decisions to remain aloof from left-liberal academics (and their writing) serves principally to validate and deepen the broader public's cultural suspicion. Indeed, reading the opinions of center-left judges may intensify the claims that left-liberal academics are, sure enough, far outside the jurisprudential mainstream—precisely because the judges often steer clear of incorporating big, splashy academic ideas. By contrast, conservatively minded academics, however marginalized in their own buildings, are often (and understandably) viewed as squarely within the jurisprudential mainstream, as evidenced by their regular appearances alongside of judges and by their work being recognized in the pages of the federal reporters and U.S. Reports.[81]

Thus, as already suggested above, judges who give credibility and exposure to left-liberal academics do more to legitimate left-liberal jurisprudence, signaling that those academic views are to be taken seriously and are indeed within the mainstream. Embracing or even

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Promote His New Book—And to Echo the 'War on Christmas' Myth, THE WEEK (Dec. 17, 2019), https://theweek.com/speedreads/884884/supreme-court-justice-neil-gorsuch-went-fox-news-promote-book--echo-war-christmas-myth [https://perma.cc/A6PM-22DK].

81. *See* Richard Wolf, *Supreme Court Justice Brett Kavanaugh Gets Hero's Welcome from Conservative Federalist Society*, USA TODAY (Nov. 14, 2019, 7:54 PM), https://www.usatoday.com/story/news/politics/2019/11/14/brett-kavanaugh-supreme-court-justice-federalist-society/4195854002/ [https://perma.cc/UW7U-ZX4N]; James C. Phillips, *Why are There so Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses*, 39 HARV. J.L. PUB. POL'Y 153 (2016).

acknowledging left-liberal positions advanced by academics stretches the jurisprudential Overton window and assigns credibility to those academics. Both the jurisprudence-stretching and credibility-extending benefits of partnering with the academy are important. With respect to the stretching argument, if the judges don't go as far as the academic theories may be pushing them (but nevertheless give those theories due consideration in, say, a concurring opinion), the positions the judges ultimately take are, almost by definition, not extreme—thanks to the daylight that remains between the judges and the professors. Further down the line, academics who are treated as serious jurisprudes can also be treated as serious candidates for judicial nominations, adding not only depth to the judicial candidates' pool but also breadth, as they may be differently, if not better, positioned to advance big, bold ideas than are, again, assistant U.S. attorneys and corporate partners who today constitute much, if not all, of the pool of "confirmable" Democratic nominees.[82]

Third, judges may want the opportunity to try out new ideas. Innovative ideas, like innovative plays or moves in athletic competitions, are frequently worked out some distance from the bright lights of Madison Square Garden or One First Street. So even if there is no big plan or agenda associated with coming out to support the JV and even if there are no attendant strategic or tactical benefits, there is always the possibility a judge learns something new. Even more likely, the judge may hear something provocative that changes or expands the way she's been thinking about a given question of legal consequence.

Gym Rats. Ballers are entirely, singularly devoted to perfecting their craft. That's one reason why those athletes who indulge in too many distractions are vilified by fans and teammates alike. (RIP Shaq's musical/acting careers). There is often a lot of chatter about appointing politicians to the bench.[83] But though appointments of this sort have some merit, we may wonder whether legislators-turned-judges or governors-turned-judges will further weaken the jurisprudential heft of the court, undermine claims that jurists offer unique skills and perspectives, and intensify gripes that judging is nothing more than politics by other means.

Career politicians have spent decades performing any number of important public services. But in the course of mastering agricultural policy, foreign affairs, or the art of fundraising, or in the course of governing a state or running a vast federal agency, there is only so much time they can spend on serious legal questions. We want and need juriscentric monsters who live and breathe this stuff—not second-career

82. *See* Fallon & Kang, *supra* note 55.

83. *See, e.g.*, Kristoffer Shields, *Governors on the Supreme Court*, RUTGERS: EAGLETON INST. OF POL. (Feb. 22, 2016, 11:58 AM), https://governors.rutgers.edu/2016/02/governors-on-the-supreme-court/ [https://perma.cc/W36L-WKTP].

legislators who may have reason to identify too closely with those institutions that had heretofore been their professional (and perhaps psychological) home. After all, distinctive and powerful constitutional visions are unlikely to be cultivated overnight. We have some examples to the contrary, of course, but Hugo Blacks don't exactly grow on trees.

No Dirty Stuff. Ballers need to keep it clean. They can't be whiners or cheats. They need to play the game "the right way." That phrase, however tired, conveys something important, particularly when concerns about blind partisanship, incivility, harassment, and self-dealing are as salient as they are today.

Judicial ballers need to be mindful of this imperative. They should be mindful when tempted to speak or write with derision—and refrain from being personal or demeaning when describing colleagues[84] and, even more importantly, when describing the parties before them.[85] They also should be mindful when they appear too chummy (let alone receive gifts) from corporate executives[86] or high-level government officials. Whether it is Fred Vinson playing poker with Harry Truman, Abe Fortas sitting in on LBJ's White House staff meetings, or Antonin Scalia in a duck blind with Dick Cheney, the appearance, let alone the reality, of coziness is problematic.[87] Last, they need to treat subordinates respectfully. The president may think that "when you're a star . . . you can do anything,"[88]

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84. *See, e.g.*, TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 43 (2001) (describing how the demeaning and dismissive treatment of Justice O'Connor by Justice Scalia "completely alienated" O'Connor and "lost her forever").

85. Elie Mystal, *This Trump Judge Tormented a Trans Woman—Because He Could*, NATION (Jan. 31, 2020), https://www.thenation.com/article/society/trump-judge-duncan-trans/ [https://perma.cc/U7LA-XGCM]; Douglas R. Richmond, *Bullies on the Bench*, 37 LA. L. REV. 325 (2012); *Gibson v. Collier*, 902 F.3d 212, 217 n.2 (5th Cir. 2019) (seemingly gratuitously refusing to refer to a transgendered person by her preferred pronoun); *United States v. Varner*, 948 F.3d 250, 254–58 (5th Cir. 2020) (similar).

86. Steve Benen, *Clarence Thomas' Abe Fortas Problem*, WASH. MONTHLY (June 20, 2011), https://washingtonmonthly.com/2011/06/20/clarence-thomas-abe-fortas-problem/ [https://perma.cc/CLR7-E588]; David G. Savage & Richard A. Serrano, *Justice Thomas Reports Wealth of Gifts*, L.A. TIMES (Dec. 31, 2004, 12:00 AM), https://www.latimes.com/archives/la-xpm-2004-dec-31-na-gifts31-story.html [https://perma.cc/B3SQ-MVGR].

87. ROBERT J. DONOVAN, TUMULTUOUS YEARS: THE PRESIDENCY OF HARRY S TRUMAN 1949-1953, at 386 (1982); Andrew Glass, *Senate Spikes Abe Fortas' Supreme Court Nomination*, *Oct. 1, 1968*, POLITICO (Oct. 1, 2015, 12:04 AM), https://www.politico.com/story/2015/10/senate-spikes-fortas-supreme-court-nomination-oct-1-1968-214129 [https://perma.cc/ADT6-KAYN]; David G. Savage, *Trip with Cheney Puts Ethics Spotlight on Scalia*, L.A. TIMES (Jan. 17, 2004, 12:00 AM), https://www.latimes.com/archives/la-xpm-2004-jan-17-na-ducks17-story.html [https://perma.cc/UFP8-GV5B].

88. *See* Libby Nelson, *"Grab 'em by the pussy": How Trump Talked About Women in Private is Horrifying*, VOX (Oct. 7, 2016),

Perhaps some baller judges have harbored similar beliefs. But, as brave women have made abundantly clear, efforts to demean, belittle, or harass (let alone assault) are entirely unacceptable, no matter how much game judges may think they have.[89]

CONCLUSION

Again, baller judges, even those on their best behavior, are not necessarily model jurists.[90] But if nothing else, ballers demand our

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https://www.vox.com/2016/10/7/13205842/trump-secret-recording-women [https://perma.cc/S6VH-PVW7].

89. *See* Maura Dolan, *9th Circuit Judge Alex Kozinski Steps Down after Accusations of Sexual Misconduct*, L.A. TIMES (Dec. 18, 2017), https://www.latimes.com/politics/la-pol-ca-judge-alex-kozinski-20171218-story.html [https://perma.cc/VNX7-DXKZ] (noting "at least 15 women accused [Kozinski] of inappropriate behavior, from showing them pornography to improperly touching them"); Catie Edmondson, *Former Clerk Alleges Sexual Harassment by Appellate Judge*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/judge-reinhardt-sexual-harassment.html [https://perma.cc/S3YZ-FD5X] (describing testimony by former law clerk to Stephen Reinhardt that the judge "routinely and frequently" sexually harassed her and other female clerks").

90. As this Article was going to print, Judge Justin Walker granted a TRO against the City of Louisville "from . . . requiring compliance with any prohibition on drive-in [Easter] church services." *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249 (Apr. 11, 2020). The judge issued this TRO while government officials across the United States were scrambling to limit the spread of the deadly Covid-19 virus. *E.g.*, Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/YC9W-AKNY]. Walker's accompanying opinion is a veritable blooper reel of bad balling: Overheated rhetoric, factual distortions, offensive and inapposite historical comparisons, and, seemingly, judicial notice of the Christian gospels. The opinion is laced with what the judge no doubt thinks passes for erudition, as evidenced by multiple allusions to The Passion as well as citations to *Smithsonian Magazine*, the *Jewish Virtual Library*, *Christianity Today*, and *The Book of Exodus*, not to mention an obligatory reference to Orwell's *1984*. *On Fire Christian Ctr.*, 2020 WL 1820249.

Rather than curating a docket, *see supra* Section II.A, Walker is manufacturing a holy war. It isn't at all apparent that the mayor of Louisville was, in the court's words, "criminaliz[ing] the communal celebration of Easter." *Id.* According to the mayor, his office twice tried to contact the court, hoping to "present evidence that would have demonstrated there has been no legal enforcement mechanism communicated." Matthew Glowicki, *Easter Eve Turns Contentious as Kentucky Leaders Take Heat for Church-Related Precautions*, COURIER J. (Apr. 11, 2020), https://www.courier-journal.com/story/news/2020/04/11/kentucky-ag-beshear-plan-record-license-plates-arbitrary/2975828001/ [https://perma.cc/K5L4-VLVS]. Evidently untroubled by the apparent nonjusticiability of the alleged dispute, Walker plunged forward. *See* Josh Blackman, *Courts Should Not Decide Issues that Are Not There*, REASON (Apr. 12, 2020, 2:35 PM), https://reason.com/2020/04/12/courts-should-not-decide-issues-that-are-not-there/ [https://perma.cc/53AG-T89P]. He plunged forward with a mostly ginned-up claim against the city, expressed shock that the claim he himself ginned-up is true, and then situated the city's purported War on Easter within a long history of state-sponsored or state-

attention, study, and, at times, praise. Baller judges need to be put in conversation with their more familiar but often no-less-controversial colleagues, notable among them umpire judges and manager judges. They also need to be understood within the broader, highly dynamic ecosystem of constitutional and institutional actors whose actions and commitments may render baller judges more or less necessary and appropriate.

tolerated forms of religious persecution. *On Fire Christian Center*, 2020 WL 1820249. *Cf.* Mark Joseph Stern, *The Trump Bench: Justin Walker*, SLATE (Apr. 13, 2020), https://slate.com/news-and-politics/2020/04/trump-bench-justin-walker.html [https://perma.cc/KF2L-LUXW].

If nothing else, Walker signaled he wants to a baller. Dropping any pretense of umpiring, Walker declared "[m]y role as a judge is to explain, to teach, and perhaps, at least on occasion, to persuade." *On Fire Christian Center*, 2020 WL 1820249. Teaching and persuading has, as this Article suggests, its virtues. A good baller opinion would give us a clearer picture of the author's jurisprudence—of special importance given the fact that President Trump recently nominated Walker to the D.C. Circuit. But this isn't such an opinion. It comes across as intemperate, uncharitable, belligerent, tendentious, and politically partisan. It rambles on about Senator Robert Byrd's stint as a Klansman, Harvard's admissions policy, and beer. *On Fire Christian Center*, 2020 WL 1820249. In short, the opinion is unpersuasive not because the church's claim is frivolous—*see* Blackman, *supra*; Stern, *supra*—but rather because the judge isn't doing careful or thoughtful legal analysis. Walker isn't playing ball. He's dog-whistling.