FOREWORD II: TO REFORM THE COURT, WE HAVE TO RECOGNIZE IT ISN'T ONE

ERIC J. SEGALL*

> *The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please.*
>
> Thomas Jefferson[1]

INTRODUCTION

Before we can resolve a difficult and complex problem, we first must identify the issue succinctly and accurately. The Supreme Court of the United States is a broken and dangerous institution due to a perfect storm of factors that make it a unique hybrid, political-legal body which exercises far too much power and influence over our country and may well be the most powerful judicial institution in world history. The questions raised by this Symposium are whether it is desirable or possible to reform the Supreme Court, and if so, how. To help put that topic into perspective, this Essay sets forth where I think we should start with these complicated and controversial questions.

The Supreme Court does not act like a court of law, and its justices do not decide cases like judges.[2] The institution has a long tradition of not taking prior law seriously enough to justify the label "court." Therefore, we need to stop thinking of this institution as a court of law and decide what kind of supreme veto council, if any, is consistent with our system of separation of powers, checks and balances, and

---

* Eric J. Segall, Ashe Family Chair Professor of Law, Georgia State University College of Law. Thanks to my co-host Bruce Ledewitz and the *Wisconsin Law Review* for putting on such an important and timely Symposium.

1. 12 THOMAS JEFFERSON, *To Judge Spencer Roane* (Sept. 6, 1819), *in* WORKS OF THOMAS JEFFERSON 135, 137 (Paul Leicester Ford ed., 1905).

2. ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012).

https://doi.org/10.59015/wlr.YOJP9793

representative constitutional democracy. If we do not want a supreme veto council that acts according to the ideological preferences of its members, we need strong reforms to transform this institution into a legitimate court of law.

We hold on to so many myths about the Court (including that it is a court) because legal academics, the justices, and members of Congress have no incentive to speak honestly about the Court. For example, if the Supreme Court is not really a court, as I suggest, constitutional law professors may not be the most qualified "experts" to suggest what results the Court should reach when deciding constitutional cases. For most law professors, the myth that the Court is a court helps protect their intellectual turf.

Furthermore, the justices have no incentive to be transparent about what they really do because, if they are not judges, and the decisions they reach are not legal ones, they would have much explaining to do to justify their authority. The justices speak in a highly technical language of text, history, and precedent, but their decisions are generated by values, politics, and far-reaching institutional concerns.[3] Transparency, a core requirement for judging pursuant to the rule of law, is not a strength of the United States Supreme Court.[4]

This critique of the Court goes back over two centuries. Even before the Constitution was ratified by the states, the writer using the pen name Brutus explained why giving Supreme Court justices life tenure and the power to veto laws were dangerous ideas. He wrote:

> There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[5]

Alexander Hamilton, the Founding Father who wrote the most about judicial review, responded to these serious concerns in Federalist No. 78, saying that the soon-to-be justices had neither "purse nor sword," and their power would depend on the people's trust.[6] He also said that the Court would not declare laws unconstitutional unless there was an "irreconcilable variance" between a statute and the Constitution or if a

---

3. *See id.* at 3–5.

4. *See* Rebecca Frank Dallet & Matt Woleske, *State Shadow Dockets*, 2022 WIS. L. REV. 1063, 1067–68.

5. Brutus, *No. XV*, N.Y.J. (Mar. 20, 1788).

6. THE FEDERALIST No. 78 (Alexander Hamilton) (Jacob E.E. Cooke ed., 2010).

law violated the "manifest tenor" of the Constitution.[7] Hamilton, like most of the Founders, believed judicial review to be a tool for judges to employ modestly, infrequently, and only upon a strong showing by the plaintiff of clear constitutional error.[8]

From a 2023 perspective, Brutus was right and Hamilton was wrong. There has never been any court in the history of the world whose justices have life tenure, must interpret a centuries old and virtually unamendable constitution with hopelessly vague aspirations, and all against the backdrop of almost two hundred years of aggressive judicial review. That kind of power cannot be cabined by pre-existing theoretical commitments such as originalism, textualism, or even respect for prior case law. Brutus expected the Court to enlarge its power to the detriment of the country over time[9] and that is exactly what has happened.

The problems raised by the mistaken view that the Supreme Court is a real court of law extend to our broken confirmation process. Supreme Court nominees avoid answering tough questions about their politics and values at confirmation hearings by claiming that, as potential judges, they cannot comment on cases or issues that may come before them.[10] This unwillingness to discuss genuine issues might be the correct posture for real judges who take prior law seriously, but it is not an appropriate response for government officials who resolve major policy issues based on their ideological and value preferences.

Before turning to the evidence supporting my thesis that the Court is not a court, I want to be clear about what I am not saying. First, although over the course of American history the justices have consistently imposed their personal values on the American people, that does not mean the Court has always voted in a partisan manner. The almost complete linkage between partisan voting patterns and the justices' ideologies we see today is relatively new.[11] The GOP has made good on its promise to make sure there are "No more Souters."[12]

Second, I am not claiming the justices are just legislators in disguise. The justices do not have to run for re-election, and that matters in ways both good and bad. On the one hand, the justices can make decisions without fear of losing their jobs, which is a positive thing. On the other

---

7. *Id.* at 524–25.

8. *See* Eric Segall, *Judicial Engagement, New Originalism and the Fortieth Anniversary of Government by Judiciary*, 86 FORDHAM L. REV. 47, 53–54 (2018).

9. Brutus, *supra* note 5.

10. Tom Lininger, *On Dworkin and Borkin'*, 105 MICH. L. REV. 1315, 1324–26 (2007).

11. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 303–05 (2017).

12. Jeffrey Rosen, Opinion, *The Stealth Justice*, N.Y. TIMES (May 1, 2009), https://www.nytimes.com/2009/05/02/opinion/02rosen.html.

hand, they lack any accountability to the American people. Fixed terms and/or retirement ages would offer all the independence the judges need.

In theory at least, the Court must wait for cases and controversies before it can act. Therefore, there are limitations on what policy questions the Court may decide as opposed to legislators who can focus on the issues they deem important. Of course, the justices, in a non-judge-like manner, have on occasion flagged issues for parties to bring to the Court.[13]

Third, again in theory, the Court explains its decisions in writing which is not a requirement for legislators.[14] The problem, however, is that the justices often phrase their opinions in misleading legal jargon that does not truly reveal the preferences underlying their judgments. And those rulings, as discussed below, are rarely persuasively justified by the normal tools of constitutional interpretation that judges should employ such as text, history, and precedent.

I. THE RATIONALE FOR JUDICIAL REVIEW AND WHY IT DOES NOT SUPPORT THE COURT'S LONG HISTORY OF OVERREACHING

The most common and persuasive justification for judicial review, and the one articulated by Alexander Hamilton in Federalist No. 78,[15] and by Chief Justice John Marshall in *Marbury v. Madison*,[16] is that the Constitution represents the fundamental law of the land and is designed to limit government in the name of "We the People."[17] Under this system of limited government, as opposed to legislative or executive sovereignty, judges function as agents of the people enforcing constitutional commands.[18] Judges are not supposed to overturn laws based on their policy preferences but only if the decisions of other public officials violate the Constitution.[19]

The problem is that this agency theory of judicial review has never accurately described how the Supreme Court decides cases.[20] Most Supreme Court decisions invalidating the decisions of other political

13. *See* Jenny Hunter, *A Brief History of Sam Alito Hating Public-Sector Unions*, BALLS & STRIKES (Sept. 21, 2021), https://ballsandstrikes.org/scotus/a-brief-history-of-sam-alito-hating-unions/ [https://perma.cc/2JUX-UGQJ] ("Although none of the parties in *Knox* challenged *Abood*, in his majority opinion, Alito broadcast his desire to overrule that 40-year-old decision.").

14. *But see* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023).

15. Hamilton, *supra* note 6, at 525.

16. 5 U.S. 137, 177–78 (1803).

17. *Id.*; Hamilton, *supra* note 6, at 525; *see* SEGALL, *supra* note 2, at 5.

18. *See* SEGALL, *supra* note 2, at 5–6.

19. *See id.* at 6.

20. *See id.*

actors (state and federal) are based on ideology, politics, and values—not text, history, or precedent. The reasons are obvious: most litigated constitutional text is vague and imprecise, and the history behind that text is often controverted or simply irrelevant to the problem at hand. Moreover, the Supreme Court is not bound by its prior decisions and reverses itself in major cases on a regular basis.[21]

Other judges, of course, face cases where the binding legal text is vague, the facts are truly in dispute, and the applicable history is unhelpful, incomplete, or even contradictory. In those circumstances, judges must, of necessity, fill in the gaps of the law or make their best guess as to the facts. But even then, judges are under a general obligation to examine the past (both the law and facts) in good faith to arrive at the best decision for the future. Supreme Court justices, however, who serve for life and whose decisions are effectively unreviewable, often make all-things-considered decisions regarding many of our country's most difficult issues, regardless of what prior law has to say about the case at hand. The justices also often make up false narratives and distort factual records to achieve the results they prefer.[22]

The result is a long history of country-defining (or redefining) Supreme Court decisions based on ideology and values. A comprehensive list of such cases would be much too long for this Essay but below are representative and important examples of judicial overreaching with serious consequences for the American people.

In 1857, the Court said Congress could not end slavery in the territories despite Congress' express power in Article IV of the Constitution to make all rules and regulations for the territories.[23] The Court reached this result despite finding it had no jurisdiction over the case,[24] which is something real courts and real judges should not do.

In 1883, the Court did not allow Congress to prohibit racial discrimination in places of public accommodations, leading to almost a century of Jim Crow and racial segregation.[25] Between 1900 and 1935, the Court struck down numerous state and federal laws regulating the economy and the workplace despite little support from text or history.[26] More recently, the Court has tried to settle our national debates over abortion, guns, campaign finance reform, LGBTQ+ rights, and

---

21. *See infra* notes 33–45 and accompanying text.

22. *See* Yvette Borja, *The Supreme Court's Hottest New Trend Is "Just Making Shit Up,"* BALLS & STRIKES (June 27, 2022), https://ballsandstrikes.org/scotus/kennedy-v-bremerton-opinion-recap [https://perma.cc/8KKQ-TPUH].

23. *Scott v. Sandford*, 60 U.S. 393, 450 (1857).

24. *Id.* at 453.

25. *Civil Rights Cases*, 109 U.S. 3, 23–25 (1883).

26. *Lochner v. New York*, 198 U.S. 45, 56–58 (1905); *Adair v. United States*, 208 U.S 161, 179–80 (1907); *Adkins v. Children's Hosp.*, 261 U.S. 525, 559–62 (1923).

affirmative action quite unsuccessfully as those issues have haunted the lower courts and our elections for over fifty years.[27] In just the last few terms, the Court strongly weaponized the Free Exercise Clause, the Second Amendment, and its own made-up major questions doctrine limiting how Congress may delegate authority to the President.[28]

The Court's overreaching interference in our elections in harmful ways is worth emphasizing. The justices have struck down reasonable efforts to address past voter discrimination by declaring a key section of the Voting Rights Act unconstitutional,[29] and narrowly interpreting the remaining part of that important law.[30] At the same time, the conservative justices have rejected numerous state and federal laws designed to lessen the oversized influence that corporations and the wealthy have on our elections.[31] Most of these decisions are devoid of serious analysis of constitutional text or history and represent the highly contestable value choice that elections are like markets and should be mostly deregulated.

The Supreme Court is not a real court because it does not take prior law minimally seriously, and we need to stop thinking about it as if it were a real court. If the Court were to announce tomorrow that it will from now on examine prior law but not be bound by it, and that it will in the future make all-things-considered decisions as to what the justices think is best for this country regardless of precedent, we would take that announcement as a concession that the Court is not a court of law. But that is exactly how the Court operates.

One recent piece of evidence for this proposition is *Dobbs*' footnote forty-eight which is about two-and-a-half pages single spaced.[32] Justice Alito called this footnote a partial list of important cases where the Court overturned itself.[33] This list shows that in virtually every area of litigated constitutional law, the Court has gone back and forth, often reversing prior landmark cases only because the membership on the Court changed.

---

27. *See* Holly Honderich & Anthony Zurcher, *Key Cases to Watch as US Supreme Court Returns*, BBC NEWS (Oct. 4, 2022), https://www.bbc.com/news/world-us-canada-63122074 [https://perma.cc/23MV-H3HT].

28. *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022); *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022).

29. *Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013).

30. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse than People Think*, ATLANTIC (July 8, 2021), https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330 [https://perma.cc/9KYW-VCCZ].

31. *See* LAWRENCE NORDEN, DOUGLAS KEITH & BRENT FERGUSON, FIVE TO FOUR (2016), https://www.brennancenter.org/our-work/research-reports/five-four [https://perma.cc/MUT5-UANC].

32. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2263 n.48 (2022).

33. *Id.* at 2263 & n.48.

These cases include the following (please remember this is a partial list):

- First, the Court held (by summary affirmance) that there was no right to same sex-marriage; now there is such a right.[34]
- First, the Court held there was a fundamental right to abortion; then it was a protected right; now there is no right to an abortion.[35]
- First, the Court held formal legal segregation under law did not violate the Constitution; now it does.[36]
- First, the Court held that private consensual sexual relations between two people of the same sex was not protected by the Constitution; now it is.[37]
- First, the Court held that most government aid to religious schools violated the Establishment Clause; then the Court held that such aid was constitutional; and now such aid is constitutionally *required* under the Free Exercise Clause if government aid is provided to secular private schools.[38]
- First, the Court held that Eleventh Amendment immunity could be abrogated by Congress under its Commerce Clause authority; now Congress lacks that power.[39]
- First, the Court held Congress could require the states to implement its federal enumerated powers; then the Court held Congress could not do so; then the Court held Congress could do so; and now Congress again cannot do so unless the law applies to both the public and private sectors or, oddly, if the law applies to state judges.[40] The back and forth surrounding this doctrine is a total embarrassment for the Court.

---

34. *United States v. Windsor*, 570 U.S. 744, 775 (2013); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

35. *Roe v. Wade*, 410 U.S. 113, 166 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992); *Dobbs*, 142 S. Ct. at 2284.

36. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896); *Brown v. Bd. of Educ.* 347 U.S. 483, 495 (1954).

37. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

38. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971); *Agostini v. Felton*, 521 U.S. 203, 234–35, 237 (1997); *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022).

39. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989); *Seminole Tribe of Fla. v. Florida.*, 517 U.S. 44, 76 (1996).

40. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 854–55 (1976); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Printz v. United States*, 521 U.S. 898, 906 n.1, 932 n.17, 935 (1997).

- First, the Court held that most gender distinctions were constitutional under a rational basis test; now most gender classifications are unconstitutional under a standard close to strict scrutiny.[41]
- First, the Court held that indigents charged with crimes under state law had no right to a government funded attorney; now there is such a right.[42]
- First, the Court held that paper money was not legal tender for prior debts; a year and two new justices later, paper money was proper legal tender.[43] These cases are discussed in more detail below.
- First, the Court held that Congress could not regulate child labor under the commerce clause; now it can.[44]
- First, the Court held the Second Amendment only applied to militia type weapons; now it applies to all arms in common use.[45]

This list could go on and on, which is exactly the point. The justices only care about precedent when they decide they care about precedent, and that is not how courts should behave. Changing justices often results in changing law, and then like cases are not treated alike.

The Court also does not care about constitutional text. In most cases, the litigated provision will be too hopelessly imprecise to generate persuasive or even helpful answers. That imprecision is not the justices' fault. But even when that is not true, the Court does not take text seriously.

I have previously detailed how the Supreme Court does not use text in constructing constitutional doctrines.[46] For now, it is enough to note that in the text of the Constitution there is no federal equal protection clause, no dormant commerce clause, no anti-commandeering clause, no text barring states from being sued by their own citizens, no right to travel, use contraception, raise one's children as they see fit, send children to private school, or refuse unwarranted medical treatment. Yet,

---

41. *Bradwell v. State*, 83 U.S. 130, 141–42 (1873); *United States v. Virginia*, 518 U.S. 515, 557–58 (1996).

42. *Betts v. Brady*, 316 U.S. 455, 473 (1942); *Gideon v. Wainright*, 372 U.S. 335, 345 (1963).

43. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 626 (1869); *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 552 (1871).

44. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918); *United States v. Darby*, 312 U.S. 100, 125–26 (1941).

45. *United States v. Miller*, 307 U.S. 174, 178 (1939); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

46. *See* Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176 (2016).

the Court has announced all the above and much more that is not in the Constitution's text, leading important and influential scholars such as Laurence Tribe and Akhil Amar to write books called *The Invisible Constitution* and *America's Unwritten Constitution*.[47]

The Court simply does not take text, history, and prior case law seriously enough to justify the label "court," and it has consistently reversed itself on major issues for no other reason than the people on the Court changed. This back and forth is not a new problem and neither are the problems such changes generate. The justices have been the focal point of major national controversies for a long time.

After the Civil War, the Court had to decide one of the most important and difficult economic issues this country has ever faced. To fight the Confederacy, Congress, for the first time, issued paper money and made it legal tender for the repayment of debts.[48] The Constitution, however, only refers to "Coin."[49]

In 1870, in *Hepburn v. Griswold*,[50] the justices voted five-to-three (there were only eight justices at the time) that Congress lacked authority to require creditors to accept "greenbacks" rather than gold or silver coins.[51] The decision pleased well-heeled Democrats, who represented the creditor class, while angering the Republican Party and President Ulysses S. Grant, who sided more with the debtor class.[52]

Just one year later, after one justice retired and Congress added a new seat, the three dissenters in *Hepburn*[53] joined the two new justices appointed by Grant and overruled the prior decision.[54] The dissenters argued that nothing about the facts or the law had changed, and they were correct.[55] This reversal was based on nothing more and nothing less than a change in the Court's personnel, prompting the *New York World* newspaper to complain that the new "decision provokes the indignant contempt of thinking men. It is generally regarded not as the solemn adjudication of an upright and impartial tribunal, but as a base compliance with Executive instructions by creatures of the President

---

47. *See* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008); AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012).

48. *Legal Tender Act Passed to Help Finance the Civil War*, HIST., https://www.history.com/this-day-in-history/legal-tender-act-passed (Feb. 23, 2021).

49. U.S. CONST. art. I, § 8.

50. 75 U.S. (8 Wall.) 603 (1869).

51. *See* 75 U.S. at 603, 610, 612, 625.

52. *See* Leon Sachs, *Stare Decisis and the Legal Tender Cases*, 20 VA. L. REV. 856, 861–62, 864–67, 872–73 (1934).

53. 75 U.S. at 626 (Miller, J., dissenting).

54. *See Knox v. Lee*, 79 U.S. (12 Wall.) 457, 553 (1870).

55. *See id.* at 587, 600 (Clifford, J., dissenting).

placed upon the Bench to carry out his instructions."[56] Those words might apply equally to former President Donald Trump's promise to overrule the Court's abortion cases which is exactly what happened.[57]

As *Dobbs*' footnote forty-eight shows, the Supreme Court has acted like it did in the *Legal Tender Cases* repeatedly whenever the people on the Court change enough to alter the direction of the law.[58] Prior law simply does not constrain the Supreme Court enough to justify calling or treating this institution as a court.

One objection to this argument is that my critique focuses only on the few important constitutional law cases the justices decide every year which constitute only a small part of their docket. But it is those very cases—affirmative action, free speech, freedom of religion, equal protection, federalism, and separation of powers—that have the greatest implications for the American people and which help define who we are as a country. Those are the cases that matter the most and the ones that so obviously demonstrate the Court does not take prior law even minimally seriously. Moreover, the justices know that if they decided twenty or thirty front-page constitutional law cases every term, the American people would see this institution for what it really is—a political veto council that only uses prior law as an after-the-fact rationalization for decisions reached on other grounds.

Another common objection to my thesis is that there is a difference between arguing that the Supreme Court is a bad court and saying that it is not a court at all. But my critique goes beyond how the justices have operated throughout American history. My critique is centered on the very nature of the institution that makes it nearly impossible for the people who serve on it to act like real judges. The structure of the United States Supreme Court breaks one of the golden rules of well-functioning democracies: never give a government official who wields great power a job for life.[59] In the case of the justices, that job description leads the people who serve on the Court to believe that their views of what the law ought to be, and what the law is, are the same.

The conservatives on the Court believe strongly and have held that the Constitution says nothing about abortion and, thus, that issue should

---

56. *See* Sidney Ratner, *Was the Supreme Court Packed by President Grant?*, 50 POL. SCI. Q. 343, 347–48 (1935).

57. Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn* Roe v. Wade *Abortion Case*, CNBC, https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html [https://perma.cc/YTU8-XXU5] (Oct. 19, 2016, 10:00 PM); *see Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

58. *See supra* text accompanying notes 50–55; *see also Dobbs*, 142 S. Ct. at 2264 n.48.

59. *See, e.g.*, Michael Smart & Daniel M. Sturm, *Term Limits and Electoral Accountability*, 107 J. PUB. ECON. 93 (2013).

be left entirely to the states;[60] the Constitution prohibits virtually all governmental affirmative action programs and therefore that issue cannot be left to the states;[61] and the First Amendment to the United States Constitution does not prohibit explicitly sectarian religious displays on government property.[62] The Court's liberals argue that the Constitution protects a woman's right to terminate her pregnancy despite conflicting state laws;[63] that governmental affirmative action programs are constitutional;[64] and that most religious symbols on governmental property violate the First Amendment.[65] When reaching these differing conclusions, the justices look at and try to understand the same text, history and precedent but end up reaching vastly different conclusions.

The explanation for this pattern, which reproduces itself in most contested corners of constitutional law, is not that one side has better legal, analytical, or historical skills than the other side but that the two sides start from differing life experiences, values, and politics. The text is too imprecise, the history too unclear, and the tug of precedent much too minimal to transform these broad policy issues into discreet legal questions. In short, they are not the types of problems unelected, life-tenured judges should resolve.

II. IMPLICATIONS AND PROPOSALS

If I am right that the Supreme Court is not a court and its justices are not judges, several important implications follow. First, we need to end life tenure which is dangerous enough for any government official, but especially for the people who serve on the Supreme Court who wield great power and have so much discretion. Life tenure is simply a gateway drug to the justices not caring about prior law.

Second, the nomination process, which Justice Elena Kagan called a "vapid and hollow charade," when she was a law professor,[66] needs to be revamped so that the potential justices reveal their current policy preferences. I am not even sure it would be improper for them to make commitments, like all politicians, and then if they break those promises without good reason, as many politicians do, they will be held accountable at least in the court of public opinion. The nominee's

60. *See Dobbs*, 142 S. Ct. at 2253–57.

61. *See Fisher v. Univ. of Tex. at Austin,* 579 U.S. 365, 399 (2016) (Alito, J., dissenting).

62. *See Town of Greece v. Galloway*, 572 U.S. 565, 569–70 (2014).

63. *See Dobbs*, 142 S. Ct. at 2317 (Breyer, Sotomayor & Kagan, JJ., dissenting).

64. *See Fisher*, 579 U.S. at 380–81, 383, 388.

65. *See Galloway*, 572 U.S. 615–18 (Kagan, J., dissenting).

66. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 941 (1995).

political party might be harmed as well by broken promises. In any event, no formal confirmation process might well be better than the one we currently use where the potential justices refuse to say anything important.[67]

Third, and most importantly, the justification for giving judges the power to strike down laws is that as a country we need government officials to enforce constitutional commands.[68] The problem is that many demands that get litigated are the hopelessly imprecise ones, like equal protection, due process, free speech, etc., that are more like aspirations than rules in most cases. There is simply no good reason to assign to nine elite lawyers sitting in Washington, D.C. the final decision on hugely important and contested policy questions such as abortion, affirmative action, gun reform, campaign finance reform, and the proper relationship between Congress and the president, along with an infinite number of other issues.

If the Justices continue their almost two-hundred-year pattern of invalidating laws and the decisions of other more accountable officials when text and history are unclear, Congress should, consistent with Article III, strip the federal courts of jurisdiction when Congress thinks its legislation is being reversed by federal judges for no good reason. Similarly, the president should consider ignoring the Court's dictates if the president feels text and history do not support them and the Court's ruling will have seriously negative consequences. Although the rule of law does not require the type of aggressive judicial review practiced by our highest court for centuries, the rule of law is offended by the constant overruling and marginalizing of the Court's past decisions by people who do not think precedent is important. If the Court's prior cases do not get respect from the Court itself, neither Congress nor the president should give those cases the full force of law.

Virtually all judges perform their tasks supervised by higher judges (vertical precedent), legislators (who can overturn statutory questions), and the People (elected state judges and state constitutional amendment procedures only requiring a majority vote). But the justices who sit on the Supreme Court of the United States are not under any supervision when they decide constitutional cases. Despite what they write in their opinions, the justices do not sincerely wrestle with the past, explain their decisions with transparency,[69] nor are they supervised by higher judges, a legislature, or the People (except for the difficult and rarely used super

67. *See* DENIS STEVEN RUTKUS, CONG. RSCH. SERV., R41300, QUESTIONING SUPREME COURT NOMINEES ABOUT THEIR VIEWS ON LEGAL OR CONSTITUTIONAL ISSUES: A RECURRING ISSUE 6 (2010).

68. *See* RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW 198 (2004).

69. Dallet & Woleske, *supra* note 4, at 1066–67.

majoritarian constitutional amendment process). In short, the Supreme Court is a policy making institution influencing and often resolving important moral questions without any check other than their own sense of what the American people and the elected branches will accept. This situation would have appalled the Founding Fathers, and more importantly, it should seriously disturb the American people today. The Court is an institution that is governed by the rule of the People, not the rule of law.

CONCLUSION

This wonderful Symposium has provided a frank, open, and civil discussion about whether we should reform the U.S. Supreme Court, and, if so, how. The contributions are important, varied, and reflect a host of different views on the topic. I do not think, however, real progress can be made until the legal academy, state and federal politicians, and the media finally and truly accept that the Supreme Court of the United States is not a court of law, and its justices are not judges.

* * *