THE COURT AND THE CONSTITUTION

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Americans do not want the Supreme Court to be just another political institution. This is apparent in the lukewarm response to even modest proposals to change the structure of the Court, such as limiting the terms of its justices or changing its size. The partisan overlay of this reaction is obvious, but the purpose of this Essay is to highlight an additional barrier to change: the dominance of originalist rhetoric in American constitutional discourse. The rhetoric of originalism has successfully tapped into many Americans' deeply held expectations about the role of the Court and the Constitution as a unique and law-based actor. In doing so, it has crowded out alternative and more realistic stories of the value the Supreme Court actually adds to our system of self-government, making it difficult for proposals to change the Court to get traction in the public imagination. But the Constitution itself positions the Court within our system of checks and balances, not outside it. Reminding Americans of the ways the Constitution balances judicial independence and judicial accountability to constrain judicial overreach enables Supreme Court-reform advocates to reclaim the narrative—and, perhaps, the initiative—in the ongoing American debate about the Court and Constitution's role in our system of self-government.

INTRODUCTION

At a 2022 speech at the New York University School of Law, Justice Sonia Sotomayor was asked to reflect on the state of judicial

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independence in America.[1] Over the course of her remarks, she said something extraordinary. In our constitutional republic, she said, all three branches of government are limited in the power they can lawfully exercise. The Supreme Court, she went on, is the branch "charged with monitoring those limits for both the other two branches of government and even for ourselves."[2]

"*Even for ourselves*"? With that one phrase, Justice Sotomayor amplified a view of the relationship of the Supreme Court to the rest of our system of government that likely would have astounded our Founders. The Constitution puts the Supreme Court firmly *within* our system of checks and balances, not outside of it. It has the authority to check the executive and legislative branches, but those branches were given explicit, clear, textual mechanisms to check the Court's power in turn. The Constitution itself, in other words, stands in stark contrast to the vision of a judicial power as necessarily severed from any form of democratic accountability. Justice Sotomayor's vision of a purely self-policing Supreme Court also is not an accurate portrayal of our own history, especially as evidenced by the practices of the founding generation. The mechanisms the elected branches have used to check the power of the Supreme Court have varied over time, but they have never been forsaken or abandoned.

Why, then, do today's conversations about restructuring the Court seem so fraught? The partisan overlay is obvious. The Republican Party has successfully entrenched presumptively friendly justices on the Supreme Court and does not want to forego that advantage by restructuring the Court, while the Democratic Party is eager for change precisely to nullify that advantage.[3] The purpose of this Essay, however, is to highlight a different barrier. For decades, public discourse about the role of the Court and the Constitution has been dominated by the false promises of originalist rhetoric. That rhetoric has been so successful because it taps into Americans' deeply held expectations about the role of the Court and the Constitution as a unique and law-based actor in our system of self-government. Until Supreme Court-reform advocates can connect to those expectations in a similarly meaningful way, reform efforts will likely continue to be seen as inappropriately political and fail to gain traction.

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1. Sonia Sotomayor, *Reflections About Judicial Independence*, 97 N.Y.U. L. REV. 875, 878 (2022).

2. *Id.* at 883.

3. *See* Giulia Carbonaro, *Can Democrats Expand the Supreme Court and How Likely Is It?*, NEWSWEEK (June 29, 2022, 10:01 AM), https://www.newsweek.com/can-democrats-expand-supreme-court-how-likely-it-1720256 [https://perma.cc/RV8P-CG8P].

I. THE FOUNDERS' SUPREME COURT

There is some debate about whether the Founders intended federal courts to exercise what we have come to know as U.S.-style judicial review—the power to declare actions of the other branches of the federal government unconstitutional and therefore void.[4] The Constitution does not explicitly give courts this power, which instead is usually traced to the Supreme Court's decision in *Marbury v. Madison*.[5] The English courts familiar to the Founders had long practiced "judicial review," but in the British system that is traditionally understood as the power to declare actions of the executive *ultra vires*—contrary to the intent of Parliament.[6] Because Parliament was considered supreme, judicial review functioned very differently in the British system.[7] Early state courts in the U.S. appear to have practiced judicial review as we now know it, although infrequently.[8] It also seems clear that many (even if not all) of the authors and advocates of the original Constitution anticipated that federal judges would be tasked with determining the meaning of the Constitution, even if it was less clear what the effect of their conclusions would be.[9] The most commonly cited support for this original understanding comes from Alexander Hamilton's statement, that "the interpretation of the laws is the proper and peculiar province of the courts" and that the courts, therefore, must "ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body."[10]

The Founders also, however, understood that the Supreme Court would be part of the same robust system of checks and balances that distinctively characterizes the U.S. constitutional system.[11] This is evident both in the constitutional text and in the practices of the founding generation. Textually, Article III of the U.S. Constitution establishes the

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4. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179–80 (1803); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810).

5. *See Marbury*, 5 U.S. (1 Cranch) at 179–80.

6. *See* Paul Craig, Ultra Vires *and the Foundations of Judicial Review*, 57 CAMBRIDGE L.J. 63, 64–65 (1998).

7. *Id.* at 64, 78.

8. P. Allan Dionisopoulos & Paul Peterson, *Rediscovering the American Origins of Judicial Review: A Rebuttal to the Views Stated by Currie and Other Scholars*, 18 J. MARSHALL L. REV. 49, 55 (1984).

9. *Id.* at 56–58.

10. THE FEDERALIST NO. 78, at 391, 394 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning . . . .").

11. *Id.* ("It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, *to keep the latter within the limits assigned to their authority*.") (emphasis added).

federal judiciary. It vests "the judicial power of the United States" in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[12] It goes on to state that federal judges "shall hold their offices during good behavior," and that they cannot have their compensation reduced "during their continuance in office."[13] The second section establishes the jurisdiction of the federal courts, granting them power to hear cases "arising under" the Constitution, federal statutes and treaties, and disputes between individuals from different states.[14] Finally, it grants to the Supreme Court the jurisdiction to hear appeals from cases involving these issues but also grants to Congress the power to make exceptions to the Supreme Court's appellate jurisdiction.[15]

The process through which federal judges are selected and removed is located in Article II, which sets out the president's power. Under the process laid out there, the president has the power to "nominate, and by and with the advice and consent of the Senate" appoint judges of the Supreme Court and "other officers of the United States,"[16] which has been read to include lower federal court judges.[17] The power to remove federal judges, in turn, is found in Article I, which gives Congress the power to impeach, try, and remove federal officers, including federal judges.[18] The only other time the Supreme Court is mentioned in the Constitution is in Article I,[19] which instructs the Chief Justice of the Supreme Court to preside when the President of the United States is tried in the Senate as part of the impeachment process.[20]

As these provisions demonstrate, the constitutional text contemplates a careful balance of judicial independence and judicial accountability. Federal judges hold their positions during "good behavior," and cannot have their salaries reduced while in office.[21] But this independence is countered by three specific checking provisions: (1) Congress has the power to structure the federal courts and make exceptions to their jurisdiction;[22] (2) Congress can remove judges and

12. U.S. CONST. art. III, § 1.
13. *Id.*
14. *Id.* § 2.
15. *Id.*
16. *See, e.g.*, *Judgeship Appointments by President*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president [https://perma.cc/KM93-WC8D] (last visited Mar. 5, 2023).
17. U.S. CONST. art. II, § 2.
18. *Id.* art. I, § 3; *id.* art. II, § 4.
19. *Id.* art. II, §§ 1–2.
20. *Id.* art. I, § 3.
21. *Id.* art. III, § 1.
22. *Id.* art. I, § 3.

justices through the impeachment process;[23] and, most obviously, (3) judges and justices can only take their seats in the first instance after being nominated by the president and confirmed by the Senate.[24]

As with much of our Constitution, these provisions are thin on details. Thankfully, the First Congress quickly filled in the blanks. Their example shows just how well the founding generation understood—and freely used—their power to check the Court. The Judiciary Act of 1789 structured the federal courts, including the Supreme Court.[25] The Act created thirteen judicial districts and a six-member Supreme Court.[26] It authorized the Supreme Court to hear appeals involving some federal questions (questions arising under the Constitution, federal statutes, or treaties) and appeals between citizens of different states (diversity jurisdiction).[27] Diversity jurisdiction, however, was only given in cases where the value of the disputed claim was over a certain dollar amount—thereby showing Congress's first use of the "exceptions" power by not granting the courts appellate jurisdiction over the full range of cases authorized in Article III.[28]

The Senate also immediately used its advice and consent power to shape the ideological direction of the Supreme Court. As our first president, George Washington nominated all the initial judges and justices to populate the brand-new courts.[29] Congress confirmed most of his nominees, but when he nominated John Rutledge in 1795 to serve as the Supreme Court's second Chief Justice, the Senate revolted.[30] Rutledge had been a vocal opponent of the treaty John Jay had negotiated with the British to resolve some issues lingering after the Revolutionary War.[31] The Jay Treaty had become entangled in the growing battles between the Federalists and Thomas Jefferson's emerging Democratic Republicans. Senators in the Federalist-dominated Senate supported the

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23 *Id.* art. II, § 4.

24. *Id.* § 2.

25. An Act to Establish the Judicial Courts of the United States [hereinafter Judiciary Act of 1789], Pub. L. No. 1-20, ch. 20, § 9, 1 Stat. 73, 76–77 (1789).

26. *Id.* §§ 1–2, at 1 Stat. 73; *see also* PAUL M. COLLINS & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 18 (2013).

27. Judiciary Act of 1789, ch. 20, §§ 9, 11, 13, at 1 Stat. 76–78, 81 (1789).

28. *Id.* § 11, at 1 Stat. 78.

29. *Supreme Court Nominations (1789–Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/4Y5X-X5D7] (last visited Mar. 5, 2023).

30. Rutledge had been seated through a recess appointment, so his confirmation hearing took place while he was already on the bench. COLLINS & RINGHAND, *supra* note 26, at 31–32.

31. *Uproar over Senate Approval of Jay Treaty*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/treaties/jay-treaty-approval.htm [https://perma.cc/KF9E-VAUL] (last visited Mar. 5, 2023).

treaty; some even considered opposition to the Jay Treaty an act of sedition.[32] Acting accordingly, they rejected Rutledge's nomination, making him the first of many Supreme Court nominees the Senate would decline to confirm.[33] Later senates were just as aggressive in using their power to influence the composition of the Supreme Court. Washington's immediate successor, John Adams, succeeded in filling the one vacancy that arose during his single term in office, but subsequent presidents—including early officeholders, such as James Madison and John Quincy Adams—had nominees rejected by the Senate.[34]

The founding generation also used its checking power to alter the structure of the federal courts, including the Supreme Court. For the first decade after the Constitution was adopted, the Federalists—the party of Washington and Adams—controlled both the presidency and Congress.[35] That ended when Jefferson's party swept the elections of 1800.[36] In response, the outgoing Federalist Congress tried to prevent Jefferson from appointing any new Supreme Court justices by using its lame-duck session to reduce the number of Supreme Court seats, effective at the next vacancy.[37] They also increased the number of lower federal court judges and promptly filled these new seats themselves rather than wait for the new administration to be sworn in.[38] The Jeffersonians understood this for exactly what it was: an effort by a defeated political party to entrench its waning power in the judicial branch. So, when Jefferson and members of the new Congress took their seats, they immediately restored the cancelled Supreme Court seat, eliminated the new lower court judgeships the Federalists had created, and impeached (but failed to

32. *See id.*

33. In the first half of our history, the Senate rejected approximately twenty Supreme Court nominees—far more than the six that have been rejected in the second half. *See* COLLINS & RINGHAND, *supra* note 26, at 31–32, 50.

34. *Id.* at 50.

35. *See Federalist Party*, BRITANNICA, https://www.britannica.com/topic/Federalist-Party [https://perma.cc/7QGY-XLHL] (Feb. 18, 2023).

36. *Id.*; *United States Presidential Election of 1800*, BRITANNICA (July 19, 2017), https://www.britannica.com/event/United-States-presidential-election-of-1800 [https://perma.cc/PQ34-CFKU].

37. An Act to Provide for the More Convenient Organization of the Courts of the United States [hereinafter Judiciary Act of 1801], Pub. L. No. 6-4, ch. 4, § 3, 2 Stat. 89, 89 (1801). This law was nicknamed the "Midnight Judges Act." *See generally Judiciary Act of 1801*, BRITANNICA (Feb. 19, 2018), https://www.britannica.com/topic/Judiciary-Act-of-1801 [https://perma.cc/7DHH-GDHW].

38. Judiciary Act of 1801, § 3, at 2 Stat. 89.

convict) Federalist Chief Justice Samuel Chase for suggesting that their retaliatory actions might themselves be unconstitutional.[39]

As this brief history shows, by 1802, the earliest leaders of our nation—many of whom actively participated in drafting and advocating for the Constitution—did the following: (1) structured the federal courts through a federal statute; (2) restricted the jurisdiction of those courts to cover less than that authorized by the Constitution; (3) restructured those courts, including by creating and then eliminating entire judicial districts; (4) enacted three different statutes setting and then changing the number of justices on the Supreme Court; (5) refused to confirm a president's Supreme Court nominee; and (6) impeached a Chief Justice of the United States for his position on a leading constitutional issue of the time.[40] These are not the actions of individuals who believe that any effort by the political branches to check the power of the judicial branch is an existential threat to judicial independence. How, then, did we get from the founding generation's active oversight of the federal judiciary to Justice Sotomayor's assertion that the Supreme Court, uniquely among our branches of government, should be checked only by itself?

Undoubtedly, there are many reasons, including the relatively low-level of partisan rancor in the immediate aftermath of World War II, the increasing de facto willingness of the elected branches to allow the Supreme Court to resolve closely contested political issues, and the astuteness of the Court itself in modulating its decisions to accommodate elites on both sides of the political aisle. It also may simply be too soon for decisive action to germinate. After all, in the decades after the Civil War, the Court struck down progressive state legislation for decades before its attack on Franklin Roosevelt's federal agenda finally landed it in the sights of national reformers.[41] But an additional reason, the one this Essay examines, is the way "originalism" as a method of ascertaining constitutional meaning has dominated public discussion of the role of the Court and the Constitution in our system of self-government and how, in doing so, it has muddled our collective ability to think clearly about how to balance judicial independence and judicial accountability. The goal of this Essay is to reclaim that story from the false promises of originalism

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39. COLLINS & RINGHAND, *supra* note 26, at 19.

40. *See* Judiciary Act of 1789, at 1 Stat. 73; Judiciary Act of 1801, at 2 Stat. 89; COLLINS & RINGHAND, *supra* note 26, at 19.

41. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York labor law regulating work hours); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) (striking down a Colorado law attempting to prevent the monopolization of the dairy industry); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (striking down a Tennessee law fixing gas prices within the state to combat the monopolization of the oil industry).

by situating consideration of Supreme Court reform firmly within our legitimating narratives of the Court and the Constitution.

II. ORIGINALISM AND CONSTITUTIONAL RHETORIC

In the United States, conflict about the role of the Supreme Court tends to revolve around two perceived problems: (1) judicial review's non-democratic nature and (2) the indeterminacy of much constitutional text.[42] The first is perceived as a problem because judicial review permits unelected, life-tenured judges to invalidate laws enacted by the elected branches of government.[43] The second is troubling because of fears that judges charged with giving specific content to abstractly worded text may act with unconstrained discretion when doing so. These two problems are obviously related. We worry about judicial discretion because of democratic self-government; we do not want unelected judges imposing rules on the rest of us if those rules consist of nothing other than the judges' "personal opinions." Thus, constitutional indeterminacy (and the judicial discretion that rides in tandem with it) would be less troubling in a system without judicial review, and judicial review would be less troubling (and significantly easier) in a system without constitutional indeterminacy.

This conflict between democratic self-government and judicial review has been part of our constitutional system, at least as long as *Marbury* has been on the books, and judges and scholars have proposed different ways of dealing with it. Some focus on the first part of the problem, by encouraging courts to simply engage in less judicial review by exercising the "passive virtue" of deferring to elected decision-makers

42. CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960). Howard Fineman called this "The American Argument in Law." HOWARD FINEMAN, THE THIRTEEN AMERICAN ARGUMENTS: ENDURING DEBATES THAT DEFINE AND INSPIRE OUR COUNTRY 112 (2008). Note, though, that most nations do not share this obsession, even though many apex courts today exercise relatively strong powers of judicial review. This may be because few, perhaps none, of these nations have the distinctly American combination of robust judicial review, judicial life tenure, and a very old constitution. *See* Kim Lane Scheppele, Professor of Socio. & Int'l Affs., Princeton Univ., Testimony at the Presidential Commission on the Supreme Court of the United States, Public Meeting 36–97 (June 30, 2021) (transcript available at https://www.whitehouse.gov/wp-content/uploads/2021/09/Transcript-PCSCOTUS-06-30-21.pdf [https://perma.cc/3ZQE-WHT3]); Kim Lane Scheppele, Professor of Socio. & Int'l Affs., Princeton Univ., *The U.S. Supreme Court in Global Comparison*, Written Testimony for the Presidential Commission of the Supreme Court of the United States, Public Meeting (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppele-Written-Testimony.pdf [https://perma.cc/4R6Z-PJAT].

43. Scheppele Written Testimony, *supra* note 42.

in most cases,[44] or exercising their review power only in certain cases, such as those involving access to the political process or "discrete and insular" minorities.[45] But most focus on the second part of the problem, arguing that judicial discretion can be constrained through the adoption of a particular method of constitutional interpretation. For the past fifty years, the interpretive methodology that has dominated public discourse in this space has been "originalism"—the promise that judicial discretion can be constrained and that even robust judicial review can be reconciled with democratic self-government if Supreme Court justices simply apply the Constitution's words as they would have been understood when ratified.[46]

The story of how originalism came to dominate conversations about the role of the Supreme Court and the Constitution has been told many times. Most commentators trace the emergence of contemporary originalism to a speech delivered by Attorney General Edwin Meese in 1985 to the American Bar Association.[47] Frustrated by what he and others in the Reagan Administration saw as the activist decisions of the Warren and Burger Courts, Meese denounced the liberal justices' method of deciding cases. "It seems fair to conclude," he said, "that far too many of the Court's opinions were, on the whole, more policy choices than articulations of constitutional principle."[48] They represented, Meese continued, not the "text and intention" of the Constitution, but instead "reveal[ed] a greater allegiance to what the Court thinks constitutes sound public policy."[49] A better constitutional jurisprudence, he said, would be one of "Original Intention."[50] A jurisprudence based on the original intentions of the Constitution's framers would avoid the taint of "ideological prediction" and prevent the Constitution from being weakened by being "viewed as only what the judges say it is."[51]

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44. *See, e.g.*, James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). *See generally* BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT (2022).

45. *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4 (1938).

46. Edwin Meese, Att'y Gen., Speech to the American Bar Association (July 9, 1985) (transcript available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf [https://perma.cc/K4ED-VT26]).

47. *Id.*

48. *Id.* at 6.

49. *Id.*

50. *Id.* at 7.

51. *Id.*

Originalism thus began its modern incarnation as a theory of judicial constraint.[52] Interpreting the Constitution in accordance with the author's original intentions, so the argument went, would constrain judicial discretion and thereby avoid imposing the justices' personal policy preferences in lieu of law. Structured this way, originalism "solved" the tension between self-government and judicial review by reducing constitutional indeterminacy. By promising that there was a fixed and findable meaning to vague-seeming constitutional text, original-intent originalism purported to constrain judicial discretion well enough to entrust the power of judicial review to unelected judges. This was especially true when coupled, as it originally was, with judicial deference to legislative judgment in unclear cases.[53]

This early version of modern originalism thus worked primarily on the judicial restraint portion of the problem, which enabled it to appeal to a population saturated with rhetoric about the "activism" of the Warren Court.[54] But it struggled on the self-government front. As critics were quick to point out, no one ever voted on the Constitution's authors' original understandings.[55] Critics also noted the impossibility of attributing a common understanding to a text written by a committee,[56] and the paradox of using the Framers' intentions to define a document whose authors had famously refused to publicly release a record of their deliberations.[57] Recognizing the power of these critiques, originalism's proponents therefore quickly pivoted away from the Framers' subjective intentions and toward what came to be called the "original public meaning" of the text.

This move had several advantages. The original public meaning of the text, as opposed to what its authors thought it meant, could claim at least initial (if limited) democratic legitimacy. The public text is what the people participating in the ratification conventions voted on, so their understanding of what the text likely meant—the original public meaning—could lay claim to a form of democratic validity that the secret intentions of the Framers could not. The move to original public meaning

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52. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 13 (2009) (arguing that the purpose of Meese's argument was to "promote [to the public] the view that originalism is the only way to control activist judges").

53. *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (arguing that originalism will keep judges out of most controversies).

54. Meese, *supra* note 46.

55. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–18 (1980).

56. *Id.* at 214–15.

57. Upon release, the authors manipulated it. *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015).

also soothed the problem of ascertaining a single intent from multiple adopters. While the subjective understandings of individuals remain forever varied and unknowable, the most likely common understanding of a public text is, in theory, a knowable thing.[58] Public meaning originalism thus held the potential to solve both the democracy problem and the constitutional indeterminacy problem, by directing judges acting in good faith to ask what seems like an answerable question: what would the people who ratified this text have thought it meant?[59]

This version of originalism as an objective, neutral constraint on judicial discretion is likely the way most Americans view the doctrine today. Academic originalists, however, were forced into murkier territory when a second generation of critics articulated several concerns about the purported ability of original public meaning to uniquely constrain judicial discretion or lay special claim to democratic legitimacy. Generally speaking, these challenges fell into three camps: (1) the appropriate level of generality at which the original public meaning of text should be ascertained; (2) what to do with remaining ambiguity after the original public meaning is found; and (3) how to reconcile original public meaning with other rule of law values.[60]

The question of the appropriate level of generality at which to pin the original public meaning was one of the first issues to arise. The difficulty was determining the level of generality at which we should be defining the public's original understanding of the relevant text. Is it the originally understood meaning of the words themselves, or the specific way the ratifiers expected the words to be applied? This distinction can have real bite. Imagine the difference between what the word "commerce" meant in 1787 and the particular practices eighteenth-century Americans expected the word to apply to.[61] Or how people would have defined words like "liberty" when the Fourteenth Amendment was adopted, compared to the people and circumstances they expected that liberty to protect. Because it was the words (rather than their specific

58. Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1688 (2012) (explaining that original public meaning "by hypothesis, always has an answer, even if arriving at that answer requires the exercise of judgment"); *see also* Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609–10 (2004).

59. Greene, *supra* note 52, at 2 ("For the first quarter-century, originalism has been the idiom of judicial restraint in the United States. Originalism's proponents defend it as uniquely appropriate to judging in a constitutional democracy because, unlike its competitors, originalism offers articulable and transparent criteria for discerning the meaning of ambiguous constitutional texts.").

60. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980) (itemizing the groups of critiques); *see also* ERIC J. SEGALL, ORIGINALISM AS FAITH 56–121 (2018).

61. *See, e.g.*, Ronald Dworkin, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 115, 120–22 (1997) (revised ed. 2018).

intended applications) that were ratified, many academic originalists today accept that it is the common meaning of the text itself that determines constitutional meaning.[62] What this means in practice, though, is that many difficult constitutional questions must, even to originalists, be resolved at a fairly high level of generality—a type of "text and principles" approach advocated for by theorists and jurists across the political and constitutional spectrums. Reliance on the original public meaning of the text to define constitutional provisions thus eliminates much of the constraint promised by original meaning originalism.[63]

The second challenge to original public meaning originalism involved its inability to deal with the stubborn indeterminacy of even good-faith efforts to ascertain the original public meaning of constitutional text and apply that meaning to contemporary disputes. Unsurprisingly, our ability to find the most likely publicly understood meaning of words as heard by men living more than two centuries ago in thirteen different states, with pre-industrial means of communication and in a world which was in almost every way unimaginably different from our own, is limited. Which means that choosing one meaning over another often requires the exercise of judgment, not the application of settled historical facts. This necessity once again erases the claimed advantage of originalism in reducing judicial discretion, returning judging as it does to a pluralistic practice in which all the common modalities of judicial reasoning—text, history, doctrine, structure, prudence, and ethics[64]—must be taken into account in each case.

The third challenge involved the necessity, recognized by almost all proponents of originalism, of reconciling originalism with other rule of law values, most notably, respect for precedent. When Justice Antonin Scalia called himself a "faint-hearted originalist," this is what he was referring to.[65] Sometimes, imposing by judicial fiat a judge's own understanding of the original public meaning of constitutional text can

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62. *Id.*

63. This result could be avoided by arguing that original public meaning should, after all, be defined by original expected applications, *regardless* of the level of generality the ratifying public would have understood the text to embody. However, doing so shifts the interpretive task from a principled one grounded in finding the best public understanding of the words actually used to a pragmatic one focused on constraining judicial power. The later goal may be desirable, but originalism so understood has no inherent claim to constrain judicial discretion better than other interpretive methodologies and, as many have pointed out, may in fact impose less constraint by masking its exercise.

64. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

65. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

disrupt settled expectations and wreak havoc on the law's ability to perform one of its core tasks in a free society of allowing individuals to plan their lives without concern that the entire legal landscape on which they relied on will suddenly be undone. The hubris of as few as five justices dismantling in a single swoop the reasoned judgment of prior courts in the name of imposing their singular understanding of the "true" meaning of the Constitution can be breathtaking. Even Scalia (revered by self-proclaimed originalists), understood that sometimes original public meaning must give way to precedent and long-settled practices.[66]

This concession is wise, but as with responses to the first two criticisms, it once again deflates claims that originalist justices are uniquely constrained in how they make decisions. An interpretive model that permits justices to respect or disregard precedent based on their subjective determinations of how important different reliance interests are simply relocates the act of discretion to a different part of the judicial analysis. The opportunity this presents to impose a justice's "personal preferences" in lieu of law is exemplified by the cursory analysis on this point provided by Justice Samuel Alito's majority opinion in *Dobbs v. Jackson Women's Health Organization*.[67] His opinion mused that property and contractual interests were presumptively important enough to consider protecting, but the expectations of generations of American women that they would be able to plan for their own futures without enduring an unwanted pregnancy does not even present a close call.[68]

All three of these critiques—about the correct level of generality, what to do with lingering indeterminacy, and how to balance other rule of law values—were, like those made against the original intent originalists, taken seriously by originalist scholars. The result was that the claims made by many of today's academic originalists tend to be more modest than those of their predecessors. Rather than claim that originalist methodology can itself eliminate the need for judicial discretion, many academic originalists have embraced a distinction between what they identify as constitutional *interpretation* and constitutional *construction*. Academic originalists have devoted forests of words to this distinction, but in a nutshell, constitutional interpretation is the task of finding the original public meaning of the constitutional text, whereas constitutional construction is the task of giving legal meaning to that text.[69] The size of the "construction zone" depends on the extent to which the originalist believes the original public meaning is indeterminate in practice.

66. *Id.*

67. 142 S. Ct. 2228 (2022).

68. *Id.* at 2276.

69. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 453 (2013).

Ascertaining legal meaning within that zone is, by definition, not determined by the original public meaning itself but depends on other values (jurisprudential or otherwise) held by the person tasked with construing.[70] The flexibility inherent in this is why we can say, with Jack Balkin, Justice Elena Kagan, and others, that we are "all originalists now."[71]

But the "we" is elusive here. "We" the academy are not "We the People," and neither group is "we" the self-proclaimed originalist justices sitting on the U.S. Supreme Court. Academic originalists may understand their debate to be one about the semantic meaning of "interpretation" versus "construction,"[72] the distinction between the original public meaning of the text and the ratifiers specific expectations about how it would be applied, and whether moral philosophy, deference to legislative judgments, or classic libertarianism should govern decision-making in the construction zone. But those debates are not what makes "originalism" salient to the public, nor do they appear to drive how "originalist" justices decide cases.[73] The theoretical moves within academic originalism have largely drained the approach of any claim to uniquely constrain judicial discretion in most cases, but it is originalism as constraint that continues to dominate public discussion regarding the role of the Supreme Court and the Constitution in our system of self-government.[74] Originalism as rhetoric thus leverages a virtue that originalism as a theory of interpretation has long-since been forced to abandon.

III. ORIGINALISM AS RHETORIC

It is not surprising that originalism as rhetoric, especially when decoupled from actual cases, has been so successful in dominating public discourse about the Court and the Constitution. In addition to the well-documented history of originalism as a carefully deployed political movement,[75] originalist rhetoric is extremely appealing, precisely

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70. *Id.* at 457–58.

71. *E.g.*, *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010).

72. *E.g.*, Solum, *supra* note 69, at 457–58.

73. *See, e.g.*, Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 971–80 (2009).

74. Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 658–59, 708–12 (2009).

75. *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways to Resistance*, 101 TEX. L. REV. (forthcoming 2023) (manuscript at 22–41),

because it seems to reconcile the twin difficulties of judicial review: the tension between constitutional indeterminacy and democratic self-government. In originalist rhetoric, self-government is preserved because "we the people" (or at least a subset thereof) embraced the Constitution as law through ratification and subsequent amendment, and judicial discretion is constrained because the meaning of the ratified text is fixed and findable through originalist interpretive methods. Originalism thus provides a simple, straightforward narrative that fulfills our expectations about the role of judicial review in our system of self-government.

A great deal of thinking has gone into figuring out just what those expectations are. Richard Fallon formulated a nuanced story of what makes constitutional law in general—and Supreme Court lawmaking in particular—appear legitimate.[76] The Constitution, Fallon argues, draws its legitimacy from sociological acceptance.[77] The legitimacy of the Constitution as law, in other words, rests on a political (rather than legal) fact: the Constitution is our foundational law because we accept it as such.[78] Once a fundamental legal norm like the Constitution is legitimated by this type of sociological acceptance, it in turn creates legal norms that help to legitimate the decisions promulgated under it.[79] The legitimacy of individual decisions of the Supreme Court in implementing the Constitution, therefore, are measured in part against the standards we as a society have articulated and accepted as the legally acceptable standards by which the Constitution is to be interpreted.[80] In the U.S., those

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179622; Robert Post & Reva B. Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 546–61 (2006); Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. 198 (2017).

76. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1802–41 (2005).

77. The written constitution probably could not enjoy the broad sociological acceptance it does if it in fact conformed to the conventional narrative of constitutional determinacy. As Fallon writes, "[o]nly because the Constitution can mean so many things to so many people does it enjoy widespread sociological acceptance." *Id.* at 1793.

78. *Id.* at 1805; RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 122 (2001); *see also* Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Insight of Paul Mishkin*, 95 CAL. L. REV. 1473, 1507 (2007) ("The legitimation of the legal system, like the legitimation of any government institution, 'is constituted by its collective acceptance,' and this acceptance depends upon public perception . . . . This is all so clear that we might pose the opposite inquiry: . . . why should it matter whether the opinion is inconsistent with professional reason?") (cleaned up) (citing JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 117 (1995)); Tom R. Tyler, *Procedural Justices, Legitimacy, and the Effective Rule of Law*, *in* 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 283, 307 (Michael Tonry ed., 2003); Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300, 309 (1968).

79. Fallon, *supra* note 76, at 1806.

80. FALLON, *supra* note 80, at 45–47.

standards are grounded in a belief that the work of the Court is *different* from that of other political actors.[81] This creates what Jamal Greene has called a "market" in interpretive theories.[82] We want the Supreme Court to fulfill a different function than other governmental actors, and we want a theory of interpretation that explains how they do so.[83]

Originalist rhetoric does this extremely well. By connecting the dots between originalist rhetoric and rule of law values, an analysis by Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere illustrates how. Greene, Persily, and Ansolabehere devised a series of models testing the appeal of originalist rhetoric and hypothesizing its causes.[84] They articulated three distinct hypotheses that could underlie originalism's broad appeal: (1) whether originalism aligns with respondents' preferences for rule of law; (2) whether originalism is associated with respondents' preferred political outcomes or ideologies; and (3) whether originalism is affiliated with respondents' cultural values, such as adherence to traditional hierarchies.[85]

Unsurprisingly, they found support for all three hypotheses.[86] The most interesting findings for current purposes, though, are those regarding originalism and rule of law values (what the co-authors called the "legal" hypothesis). In their study, fifty-four percent of respondents who deemed it "very" or "somewhat" important for judges to "strictly follow the law" also identified themselves as originalists.[87] In contrast, eighty-four percent of respondents who deemed this "not very important" or "not important at all," identified as non-originalists.[88] What is striking about this is how much those who do not identify as originalist have ceded the language of "law" to those who do. To put it slightly differently,

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81. James L. Gibson & Gregory A. Caldeira, Supreme Court Nominations, Legitimacy Theory, and the American Public: A Dynamic Test of the Theory of Positivity Bias 6 (July 18, 2007) (unpublished manuscript), https://dx.doi.org/10.2139/ssrn.998283.

82. Greene, *supra* note 74, at 702–04.

83. *See* Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, 26–28 (Jack M. Balkin & Reva B. Siegel eds., 2009) ("Americans want their Constitution to have the authority of law, and they understand law to be distinct from politics.").

84. Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 359 (2011).

85. *Id.* at 358–59.

86. *Id.* at 359–61.

87. *Id.* at 389.

88. *Id.*

these results indicate that for a large number of Americans, to believe judges should follow the law is to be an originalist.[89]

This overstates the case a bit. As Greene and his co-authors take pains to point out, their data show that a majority of Americans are constitutional pluralists—few of those who identify as originalists believe the intentions of the Framers should be the *sole* deciding factor in constitutional cases.[90] Empathy for people, respect for precedent, and protection of the powerless were also positive judicial values for many respondents.[91] Additionally, as a self-proclaimed originalist Supreme Court majority increasingly issues substantively unpopular high-profile opinions, public enthusiasm for originalism may be ebbing.[92] Yet, the extent to which "originalism" appears associated with the rule of law is notable. As Greene, Persily, and Ansolabehere put it, "originalism is salient within the public mind not simply as a political commodity or partisan slogan, but also as a legal argument and as a culturally embedded meme."[93] It is originalism as rhetoric, not as the actual practice of constitutional decision-making, that has caught America's fancy.[94]

Originalism as rhetoric has stymied discussions of structural reform of the Supreme Court. Originalist rhetoric has been so successful because it works within public expectations about the Court as a legal institution. Much of the discussion advocating for changing the Court, in contrast, has been grounded in arguments that are easily caricatured as extra-legal: *e.g.*, the partisan tactics that deprived Merrick Garland of his seat while allowing Amy Coney Barrett hers; the unfairness of the happenstance and manipulation that have allowed Republican presidents to make a disproportionate number of Supreme Court appointments relative to their success in winning the popular vote in presidential elections; and dismay about the substantive decisions being issued by the current Court.[95] To a

89. *See id.* at 388–91 (finding that "almost every respondent expressed *some* support for originalism" when asked whether it was important for judges to "[u]phold the values of those who wrote our constitution 200 years ago").

90. *Id.* at 365–70.

91. *Id.* at 365–66.

92. Kristen Bialik, *Growing Share of Americans Say Supreme Court Should Base Its Rulings on What Constitution Means Today*, PEW RSCH. CTR. (May 11, 2018), https://www.pewresearch.org/fact-tank/2018/05/11/growing-share-of-americans-say-supreme-court-should-base-its-rulings-on-what-constitution-means-today [https://perma.cc/2KBV-XGPU] (showing a decline in respondents who say that the Court should interpret the Constitution based on what it "meant as originally written").

93. Greene, Persily & Ansolabehere, *supra* note 84, at 360.

94. Jamal Greene, *Constitutional Rhetoric*, 50 VAL. U. L. REV. 519, 519–21 (2016) (distinguishing between how a judge decides a case and how she communicates that decision).

95. *See, e.g.*, Michael W. McConnell, Professor, Stanford L. Sch., *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, Written

nation awash in originalist rhetoric, all of this sounds like politics, not law.[96]

This is unfortunate and unnecessary. How, then, can the rhetoric of reform better tap into a law-based narrative about the Supreme Court and the Constitution? The remainder of this Essay sketches some preliminary thoughts about possible paths.

IV. A NARRATIVE OF REFORM

Greene once again provides a map, this time for reform. He argues that originalism as rhetoric is successful in the interpretive market because it engages in a particular type of constitutional storytelling.[97] In reconciling strong judicial review with democratic self-government, originalism as rhetoric positions itself firmly within America's own idea of itself—our shared origin stories that explain who we think we are as a nation.[98] It draws on the authority of what Greene calls "heroic historical figures"—the men of the founding generation.[99] By wrapping the choices made by today's judges in the mystique of Founding Fathers like Washington, Madison, and Hamilton, originalist rhetoric both borrows their presumptive wisdom and connects our story to theirs in an act of community building through storytelling.[100] Like most successful reform

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Testimony for the Presidential Commission on the Supreme Court of the United States, Public Meeting 1–2 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf [https://perma.cc/8955-YQZN] [hereinafter McConnell Written Testimony]; Daniel Epps, Professor of L., Wash. Univ. St. Louis, *Court Expansion and Other Changes to the Court's Composition*, Written Testimony for the Presidential Commission on the Supreme Court of the United States, Public Meeting 3–5 (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Epps-Testimony.pdf [https://perma.cc/PYH3-54UR]; Michael J. Klarman, Professor, Harvard L. Sch., *Court Expansion and Other Changes to the Court's Composition*, Written Testimony for the Presidential Commission on the Supreme Court of the United States, Public Meeting 1–2, (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Klarman-Testimony.pdf [https://perma.cc/9WAV-FVHN]; *see also* Neil Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71 (2022).

96. Or sour grapes. Memorandum from John G. Roberts & Deborah K. Owen to Fred Fielding, White House Couns. (Sept. 13, 1985) (on file with the National Archives and Records Administration).

97. Greene, *supra* note 52, at 84.

98. *Id.* (citing Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 706–07 (2005)).

99. Greene, *supra* note 58, at 1701.

100. Greene illustrates this point by noting that citations to the famous Founders bear disproportionate weight in the rhetoric of originalism, despite the obvious fact that their understanding of the original public meaning of words would have no more significance than that of anyone else of the era. *Id.* at 1689–91. It also explains why the occasional effort to use sources more aligned with the theory—such as Justice Scalia's

movements in America, then, originalism as rhetoric does not fight the Constitution—it leans into it.[101]

To gain traction in the public debate about restructuring the Court, advocates of change should do the same by positioning their arguments firmly inside our legal and constitutional traditions. There are at least three ways this could be done, each of which both accurately describes the benefits of Supreme Court reform and has deep roots in our narratives about the role of the Court and the Constitution in our system of democratic self-government. First, changing the structure of the Supreme Court, most notably by adopting limited terms for justices, has a greater capacity than originalism to constrain judicial discretion. Second, readjusting the current balance of judicial independence and judicial accountability respects the Framers' commitment to the separation of powers, which they saw as a core purpose of their constitutional design. Third, embracing the promise of our constitutional text and tweaking our governing structures through modest experimentation taps the aspirational aspects of "American exceptionalism" so prominent in our very oldest national narratives.

A. Constraining Judicial Discretion

The rhetorical appeal of originalism demonstrates Americans' desire to preserve the rule of law by constraining judicial discretion. Originalism has not delivered on this promise, but structural reforms, particularly limited judicial terms, could do better. The mechanics of how limited terms might be implemented have been discussed elsewhere and are not rehashed here.[102] Instead, this Section elaborates on how limited terms can constrain judicial discretion by using the regular confirmation hearings that would be part and parcel of such a system to help ensure that the judicial choices made by justices do not, in the long run, construe the Constitution in ways unacceptable to the American people.

The Senate Judiciary Committee hearings facilitate this process. They are the mechanism through which nominees are called upon to explain, in public and under oath, their constitutional understandings. Over time, constitutional constructions that were controversial when first

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references to eighteenth-century dictionaries—seem to engender more ridicule than respect.

101. *See* JENNIFER RATNER-ROSENHAGEN, THE IDEAS THAT MADE AMERICA: A BRIEF HISTORY 5–6 (2019) ("The vibrancy of American thought lies in the movement of ideas [like democracy, equality, and freedom] as they have been enlisted to mean different things to different people throughout the American past.").

102. For an overview of limited judicial terms, see PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., TERM LIMITS (2021), https://www.whitehouse.gov/wp-content/uploads/2021/10/TERM-LIMITS.pdf [https://perma.cc/J2XC-U3MU].

made by the Court are accepted or rejected as part of our constitutional consensus. When this happens, adherence to that consensus becomes, effectively, a condition of confirmation.[103] In this way, regular confirmation hearings ensure that the Court rarely strays too far from Americans' entrenched constitutional understandings. Right now, however, Supreme Court vacancies are rare and unpredictable. In this context, it is hardly surprising that every confirmation becomes an extremely partisan trial by ordeal; everyone knows they are important but no one knows when the next one will appear.

Limiting the terms of Supreme Court justices would change that. Fixed eighteen-year terms would give each elected president two seats to fill, with a midterm election in between. This predictability would bring down the temperature of the confirmation process by reducing the consequences of filling any single seat, while keeping the Court as a whole well within our system of checks and balances by ensuring that the composition of the Court retains an indirect but regular connection to the electoral choices of the American people. Unlike rhetorical originalism, this way of thinking about judicial constraint recognizes that the classic tools of pluralistic legal reasoning—arguments from text, history, doctrine, structure, prudence, and ethics—are legitimate ways of ascertaining constitutional meaning *even though* they cannot completely eliminate judicial discretion.[104] Rather than elide that fact, the regular confirmation hearings provided by limited judicial terms render it less troublesome, because the discretion necessarily exercised by the justices is channeled on a regularly cycling basis through the democratically-credentialed confirmation process.

Regular confirmation hearings also would provide senators with the opportunity to expand public understanding of how the Court can function as a unique and law-based institution despite the fact that difficult constitutional questions rarely have single correct answers. The hearings provide a high-profile platform to talk about how traditional modes of interpretation constrain judicial discretion without the false promises of originalist rhetoric. Judges and justices throughout our history have relied on traditional modes of legal reasoning in deciding constitutional cases, and there is nothing remotely lawless about them continuing to do so. Senators also could use the hearings to push nominees on the disconnect between originalist rhetoric and the practices of the Court's purportedly originalist justices, as a way to demonstrate

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103. *See* COLLINS & RINGHAND, *supra* note 26, at 160–95.

104. Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1758–62 (1994). Of the pluralists, Bobbitt was perhaps most explicit about this. *See* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1770, 1788–94 (1997).

the inability of the theory to constrain judicial discretion—and thereby check judicial power—in real cases.

Unfortunately, senators rarely seem to embrace these opportunities, opting instead to present what can seem like purely results-oriented critiques of individual decisions.[105] Given the gap between the popularity of originalism as rhetoric and the results actually reached by the Court's self-identified originalist justices, this strategy is not surprising. But it sometimes seems as if progressive senators, like the survey respondents discussed by Greene, Persily, and Ansolabehere, have ceded the terrain of *legal* argumentation to their constitutional opponents. The more frequent confirmation hearings necessitated by limited judicial terms would allow senators regular opportunities to give full voice to non-originalist yet law-based understandings of the role of the Court and the Constitution in our system of self-government. Doing so repeatedly over time would help illustrate to the American public how legal reasoning routinely uses cases to build out doctrine in sensible and coherent ways.[106]

The effectiveness of confirmations-as-constraint can be demonstrated by imagining the effect eighteen-year terms would have had on the composition of the current court if implemented three decades ago. Assume a system in which vacancies occur every two years, in the first and third year of a presidential term. Assume also that justices seated before the reform took effect were replaced every two years in order of seniority. Here is what the composition of the Court would have looked

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105. One notable example of this results-oriented criticism came during Justice Neil Gorsuch's confirmation hearings, when former Senator Al Franken sharply criticized Justice Gorsuch over a Tenth Circuit dissent where Justice Gorsuch said he would have found in favor of a truck company that fired a driver when the driver abandoned his unheated vehicle in sub-freezing temperatures over finding for the driver. *Transam Trucking, Inc. v. Admin. Rev. Bd., U.S. Dep't of Lab.*, 833 F.3d 1206, 1215–17 (10th Cir. 2016) (Gorsuch, J., dissenting). Senator Franken stated: "It is absurd to say this company is in its rights to fire [the driver] because he made the choice of possibly dying from freezing to death or causing other people to die possibly by driving an unsafe vehicle. That is absurd. Now I had a career in identifying absurdity. And I know it when I see it, and it makes me—you know it makes me question your judgment." *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 170 (2017) (statement of Sen. Al Franken, S. Comm. on the Judiciary). Similarly, the phrase "little guy" was used a shocking fifty-seven times during Justice Gorsuch's confirmation hearings.

106. Supreme Court vacancies historically have occurred every three to four years. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 787–88 (2006). President Jimmy Carter was the first president to serve a full term and not get to make a nomination. Other presidents have had their nominees rejected and have been unable to fill a seat while in office, but that is less troubling from a confirmations-based perspective. David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1502 & n.56, 1503–04 (1992).

like under this system if implemented in 1992 ("MR" and "MD" stand for Moderate Republican and Moderate Democrat, in recognition of the effect of Senate control on presidential choices and with apologies for using party labels as a shortcut for judicial ideology):

Justice[107]	Retirement	President (appointment)	Senate[108]	Ideology of Replacement
White	1993	Clinton 1	D	D
Blackmun	1995	Clinton 2	D	D
Rehnquist	1997	Clinton 3	R	MD
Stevens	1999	Clinton 4	R	MD
O'Connor	2001	G.W. Bush 1	D	MR
Scalia	2003	G.W. Bush 2	R	R
Kennedy	2005	G.W. Bush 3	R	R
Souter	2007	G.W. Bush 4	D	MR
Thomas	2009	Obama 1	D	D
Clinton 1	2011	Obama 2	D	D
Clinton 2	2013	Obama 3	D	D
Clinton 3	2015	Obama 4	R	MD
Clinton 4	2017	Trump 1	R	R
G.W. Bush 1	2019	Trump 2	R	R
G.W. Bush 2	2021	Biden 1	D	D

As illustrated above, with regular eighteen-year terms, the composition of the Court would be very different than it is currently. Rather than a six-justice conservative majority with Chief Justice Roberts or Justice Kavanaugh sitting as the median justice, we would have a Court comprised of four strongly liberal justices, three strongly conservative justices, a moderately conservative justice, and a moderately liberal justice. A Court so comprised might well find common ground on many issues. It also would be more consistent with rule of law values by being less likely to make radical changes in the law just because a new justice has taken a seat. More fundamentally, a Court like this would almost certainly construe the Constitution in a more constrained way than does the current Court.

B. Appealing to Separation of Powers

The Framers, seeped in the political philosophies of Locke and Montesquieu, saw the separation of power as the key to preventing tyranny. Americans ever since have paid homage to the idea that checks and balances are essential to preserving republican liberty. In relation to

107. *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/GS5R-K5DF] (last visited Mar. 6, 2023).

108. *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/K7PD-C5TG] (last visited Mar. 6, 2023).

the judiciary, this principle is baked into the constitutional cake. The Supreme Court is given sufficient independence to perform its duty of "checking" the powers of the elected branches, but the text of the Constitution also gives the elected branches ample tools to ensure that the power of the Court can be checked as well. This is most visible in the appointments process. By design, the Constitution places responsibility for deciding who sits on the Supreme Court fully within the political branches.[109] As Supreme Court-reform advocates have noted, happenstance and manipulation have skewed that political accountability. Extracting these complaints from the din of partisan politics and entrenching them instead within the Founders' insistence on separation of powers allows Supreme Court-reform advocates to remind Americans of the importance of their duty to maintain the carefully balanced system of government established in the Constitution itself.

The composition of the Court has never perfectly tracked election cycles, but there is little historical precedent for having the appointments power so effectively severed, over a period of decades, from the ebb and flow of electoral politics in the way we are seeing today. In the past, justices sat for an average of sixteen years—fewer than they would serve under most limited term proposals.[110] Today, the average tenure of a Supreme Court justice is twenty-seven years.[111] The longest serving sitting justice, Justice Thomas, has served for more than three decades. Worse, the justices themselves have contributed to this manipulation by choosing their own successors through strategic retirements.[112] Strategic retirements are not unusual but have become notably more common in recent decades. Justice John Paul Stevens and Justice David Souter were the two most recent justices to resign during the term of a president of a

109. FINEMAN, *supra* note 42, at 112 ("Here is the nub of the American Argument in law: We were the first nation in the world to declare that we would be ruled by words—the words of the Constitution. Yet it is precisely *because* the law is so crucial in our scheme that we refuse to set judges and courts above politics.").

110. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., WRITTEN TESTIMONY OF GABE ROTH (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Roth-Testimony.pdf [https://perma.cc/UWS7-LKQQ].

111. *Id.*

112. *See* Kayla M. Joyce, The Retirement Strategy of Supreme Court Justices: An Economic Approach (Apr. 25, 2017) (B.A. thesis, University of Connecticut) (on file with OpenCommons@UConn). Concerns about strategic retirements and their impact on the Court's legitimacy were voiced throughout testimony received by the Presidential Commission on the Supreme Court of the United States. *See, e.g.*, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., WRITTEN TESTIMONY OF AHKIL AMAR (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Amar-Testimony.pdf [https://perma.cc/X3HJ-RSLE]; PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., WRITTEN TESTIMONY OF VICKI C. JACKSON (July 16, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf [https://perma.cc/62CL-HADY]; McConnell Written Testimony, *supra* note 95, at 5–6.

different party than the president who appointed them (both were appointed by Republicans and resigned under Democrats) but these hardly represent non-strategic retirements, given that both of these justices were firmly within the Court's liberal bloc at the time of their resignations.[113] Excluding them, the most recent justice to voluntarily leave the Court during the presidency of an opposing president was Harry Blackmun, who was appointed by Republican Richard Nixon and resigned in 1994 under Democrat Bill Clinton.[114] Every justice since then has either died in office (leaving them with no choice) or resigned under an ideologically friendly administration.

This smacks of oligarchy, not republicanism. The Supreme Court is not the House of Lords, and the justices are not nobles who can bequeath their seats to their chosen successors to ensure that their own ideological preferences remain entrenched on the bench. Yet, by doing just that, the justices have removed one of the most important constitutional checks on their own power: the ability of the elected branches, over time, to shape the composition and direction of the Court. As it currently operates, the Court has slipped the bounds of the careful system of checks and balances designed by the Framers. This creates a constitutional problem, but it is also one we have the constitutional tools to remedy: the power of Congress to structurally change the composition of the Court. In such circumstances, these tools are not only constitutionally acceptable, they are constitutionally essential.

C. Embracing American Exceptionalism

American exceptionalism is older than America. John Winthrop's "shining city on a hill" spoke to the image Puritan pilgrims had of themselves, as forging not just a new nation but one chosen by God to be an example to all of humanity of how to fulfill mankind's spiritual, moral and political obligations here on earth.[115] This idea has been used for many purposes,[116] but includes within it the notion that Americans are uniquely able and particularly obligated to strive to *do better*: to constantly re-invent ourselves in order to become more fair, more brave, and more exceptional.[117] Throughout American history, advocates of

113. *See Justices 1789 to Present*, *supra* note 107.

114. *See id.*

115. JOHN WINTHROP, A MODEL OF CHRISTIAN CHARITY (1630), *reprinted in* 9 OLD SOUTH LEAFLETS 201–22, NO. 207 at 7–22 (S.E. Morison ed., 1916).

116. *See* David A. Bell, *American Exceptionalism*, *in* MYTH AMERICA: HISTORIANS TAKE ON THE BIGGEST LEGENDS AND LIES ABOUT OUR PAST 13, 13 (Keven M. Kruse & Julian E. Zelizer eds., 2022).

117. *See* DEBORAH L. MADSEN, AMERICAN EXCEPTIONALISM 1–2 (1998).

change have used this idea to challenge existing customs and entrenched practices to make more room for more people to enjoy the American promise of equality and freedom for all.[118] Supreme Court-reform advocates should do the same by reminding the American people that aspects of American exceptionalism have long been part of our constitutional (as well as our political) rhetoric.

Drawing on examples from cases involving race, freedom of speech, and voting rights, Lucy Williams has demonstrated how Supreme Court justices use the competing normative values embedded in ideas about American exceptionalism in constitutional cases.[119] In decisions upholding contested uses of governmental power, she argues, justices have relied on what she calls "accomplished" exceptionalism, by which she means a view of American greatness as backward-looking and self-celebratory—greatness as an accomplished fact.[120] Williams contrasts this with "aspirational exceptionalism," which, in her use, is more self-critical and forward-looking, viewing American greatness as contingent—a work-in-progress.[121] Aspirational exceptionalism, she posits, is more frequently used by justices upholding claims of individual rights against governmental overreach.

Part of the appeal of rhetorical originalism is the ease with which it slides into William's description of accomplished exceptionalism: the greatness of America was established at the Founding and is fixed in the Constitution, and therefore the job of a "good" judge today is merely to faithfully find, apply, and preserve that fixed meaning.[122] But as Williams's work demonstrates, the idea of American exceptionalism also contains the counter-narrative of aspirational exceptionalism.[123] Successful social movements throughout our history have used aspirational exceptionalism to argue within, rather than outside, the Constitution. They have used the rhetoric of free speech, equal rights,

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118. Langston Hughes captures this sentiment beautifully in *Let America Be America Again*, which includes the lines:

> O, let America be America again—
>
> The land that never has been yet—
>
> And yet must be—the land where *every* man is free.

LANGSTON HUGHES, *Let America Be America Again*, reprinted *in* THE COLLECTED POEMS OF LANGSTON HUGHES 189, 189–91 (Arnold Rampersad ed. & David Roessel assoc. ed., 1995).

119. Lucy Williams, *American Exceptionalism As/In Constitutional Interpretation*, 57 GA. L. REV. (forthcoming 2023) (on file with author).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

and liberty to show the capacity of the document to expand our political community and allow those originally excluded to enjoy its benefits.

It is this aspirational exceptionalism that Supreme Court-reform advocates can harness in two distinct ways. First, aspirational exceptionalism provides a narrative of the role of courts and the Constitution that is consistent with the idea of constitutional interpretation and judicial review as a legal project—of the Constitution as law. When the Supreme Court applies the Constitution to legal disputes, it uses traditional modes of legal analysis—the same tools courts routinely use when resolving other legal disputes. But as discussed above, in hard cases those legal tools frequently leave lingering indeterminacy behind. They do not conclusively answer the constitutional question presented. Rhetorical originalism, relying as it does on the idea of American greatness as fixed and findable, ignores this reality. But aspirational exceptionalism can and should embrace it. Legal indeterminacy creates the space for justices to be faithful to aspirational exceptionalism by leaning into their duty to apply the broad terms of the Constitution fairly to each generation of Americans.

Second, advocates of structural reform can remind their fellow citizens that our Founders did not just create a text; they created a tradition of democratic self-government. The Constitution is not only (or even primarily) a charter of rights. It is a template for government by the people. That is us. We are the people. In that sense, America is always aspirational—it is designed to be a work-in-progress, and the work is ours. Like the Founders, we should not alter our government without sober consideration, but we betray their legacy when we stagnate under the fear of change. Modestly altering the composition of the Court to restore a better balance of judicial independence and judicial accountability honors the respect the Founders showed future generations by entrusting us to govern ourselves.

CONCLUSION

The American people do not want the Supreme Court to be "just" another political institution. Originalist rhetoric has exploited that fact to create an appealing, if fundamentally flawed, narrative of how the Court and its justices should function. That rhetoric has crowded out alternative and more realistic stories of the value the Supreme Court actually adds to our system of self-government, which makes it difficult for proposals to change the Court to get traction in the public imagination. But the Constitution itself positions the Court as within our system of checks and balances, not outside it. Reminding Americans of the ways the Constitution balances judicial independence and judicial accountability to constrain judicial overreach, maintains the separation of powers, and

empowers each generation of Americans to make the Constitution its own, will enable Supreme Court-reform advocates to reclaim the narrative—and, perhaps, the initiative—in the ongoing American debate about the role of the Court and the Constitution in our system of self-government.