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What Does the Supreme Court Do?

Samuel Issacharoff

I. Introduction

To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system. For it is also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy.

Beginning with the failed confirmation proceedings for Robert Bork in 1986, the Supreme Court has served as a galvanizing issue in national American politics. For advocates, fundraisers, candidates, and much of the punditry, the United States is only one appointment away from Armageddon, whether defined by abortion, the death penalty, same sex rights, church/state relations, or just about any hot-button issue of our time. Nor is this particularly new. As far back as Tocqueville’s wide-eyed travels in America, one of the defining features of the new world was the centrality of judicial oversight: “There is hardly any political question in the United States that sooner or later does not turn into a judicial question.”

And so follows the commonplace observation that the Supreme Court is in turn just another political body, a claim often accepted by the general public, and rehearsed at times by America’s most-cited judge, veteran

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1 Reiss Professor of Constitutional Law, New York University School of Law. James Brennan, Daniel Loehr, and Whitney White provided indispensable research assistance.


4 See Pew Research Ctr., Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction 3, 5–6, 12 (2015), http://www.peoplepress.org/files/2015/07/07-29-2015-Supreme-Court-release.pdf (finding 70% of the public believes the Supreme Court Justices “are often influenced by their own political views” and that 24% think the Justices “generally put their political views aside”); James L. Gibson & Gregory A. Caldeira, Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?, 45 LAW & SOC’Y REV. 195, 207–08 (2011).

Court journalists,\textsuperscript{6} and elected politicians of all stripes.\textsuperscript{7} To the more cynical commentators, the Court is composed of politicians in robes who, under the guise of deciding cases, “legislate from the bench” as unelected, life-tenured partisans.\textsuperscript{8} These criticisms proliferate whenever the Court acts in the most politically controversial cases, where the Justices are described as “eager” to dictate their own policy preferences as law.\textsuperscript{9}

II. The Political Cases.

With every 5-4 opinion on a controversial topic, the claims of a politicized judiciary increase. And much as the Justices may try to claim that they are truly judges,\textsuperscript{10} the sneaking popular suspicion is that they are just lying in wait for the next chance to override the political branches. For some critics, the claim that judges are just ideological preference satisfiers don’t think it’s a real court. I think of it as basically…it’s like a House of Lords. It’s a quasi-political body. President, Senate, House of Representatives, Supreme Court. It’s very political.” (quoting Richard Posner) (ellipsis in original)).


\textsuperscript{7} See Jonathan Keim, What GOP Contenders Want for the Supreme Court, NAT’L REV.: BENCH MEMOS (June 26, 2015, 6:53 PM), http://www.nationalreview.com/bench-memos/420416/what-gop-contenders-want-supreme-court-jonathan-keim (“[W]e will need a conservative president who will appoint men and women to the Court who will faithfully interpret the Constitution and laws of our land without injecting their own political agendas.” (quoting Governor Scott Walker) (emphasis added)).


\textsuperscript{9} See Rachel DiCarlo Currie, The Supreme Court Shouldn’t Be So Important, INDEP. WOMEN’S FORUM (Sept. 27, 2016), http://iwf.org/blog/2801549/The-Supreme-Court-Shouldn’t-Be-So-Important; see also sources cited supra note 8 (responding to developments in the Affordable Care Act cases).

masquerading in robes is a bit too cynically harsh. Rather than being self-activating, a softer critique would have judges as beholden not simply to their own preferences but as well to other masters in some alchemists’ mix of popular opinion, congressional preference, the health of the national economy, and even the backgrounds of their law clerks.

In its distilled form, known in political science as the “attitudinal model,” the argument is that a Supreme Court Justice is an ill-disguised ideological warrior for whom “judicial ideology is all that matters.” Bluntly put,

[B]ecause legal rules governing decision making (e.g., precedent, plain meaning) in the cases that come to the Court do not limit discretion; because the justices need not respond to public opinion, Congress, or the President; and because the Supreme Court is the court of last resort, the justices, unlike their lower court colleagues, may freely implement their personal policy preferences as the attitudinal model specifies.

Wow. If true, my work as a teacher and scholar of law, not to mention my appearances in court, are but a frightful illusion. What a colossal waste of time it must be to write and teach on constitutional law, as if any of it made a difference. Undoubtedly there are those, including I fear myself, who have little aptitude for anything else. But why in the world would any

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serious academic institution permit the teaching of constitutional law or pretend that advocacy and the rule of legal institutions matter at all?

It is of course possible that, like practitioners of phrenology, law professors suffer the curse of bounded horizons, unable to see the bigger picture of what actually affects the vitality of an organism. This invites a simple empirical question about how we know that law does not operate to constrain decisionmaking relative to naked partisan preference. There have been many critiques of the empirical foundations of the attitudinal claim, as well summarized by Judge Harry Edwards and Professor Michael Livermore. 17 But here I focus on one particular problem with the judges-as-politicians hypothesis: how robust an account it gives of what the Supreme Court actually does.

To start, let’s examine the empirical foundation for the claimed determinative political account of the work of the Supreme Court. The most significant of the attitudinal models excludes from consideration any decision where the Justices are unanimous, thereby only examining cases of division rather than agreement. 18 For someone looking in from the outside, this appears methodologically akin to proving that cats like to swim by looking only at alley cats caught in sudden downpours. The more interesting question is to ask how likely are the Justices to divide, how significant are their divisions, and how central are the cases to the functioning of the Supreme Court as a judicial institution.

Just an examination of the vote tallies over time shows how big a swath of the Court’s activity is discarded as not relevant to a rigorous empirical account of the Court as an institution. The Table shows what has to be removed from consideration:

17 Edwards & Livermore, supra note 15. Among the problems are: the simplistic binary coding of liberal versus conservative case outcomes, id. at 1909; the range and inadequacy of proxies used to categorize judges into the same ideological binary, id. at 1918–20; the exclusion of unpublished studies from analysis, id. at 1923; the inability to account for case dispositions beyond “affirmed” and “reversed,” id. at 1924; the subjectivity inherent in coding a case as liberal/conservative using only one issue in each case, id. at 1925; and the statistical equality of broad, sweeping decisions and narrow decisions on procedural issues, id. at 1926.

Simply put, in searching for the telltale 5-4 ideological split, the attitudinal analysis has to exclude between 36 and 66 percent of cases over this period because those cases are decided unanimously. Given that the pure form of ideological split occurs in between 5 and 20 percent of the cases, that is a lot of chaff for the precious wheat. When strong attitudinal models are tested without excluding unanimous cases—even when tested on just a single legal issue—ideology does not exhibit its claimed explanatory power.\textsuperscript{20} Such unanimity is a difficult phenomenon to explain away with a behavioral model that claims only political ideology matters.\textsuperscript{21} Any case where Justices disagree with the resulting policy, but reach the same legal conclusion anyway, is damning.\textsuperscript{22} Also, the theory that Justice Alito’s “conservative” ideology and Justice Ginsburg’s “liberal” ideology prefer the same policy

\begin{table}[h]
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\begin{tabular}{|c|c|c|c|c|}
\hline
\textbf{Figure 1. Supreme Court Decisions by Voting Pattern}\textsuperscript{19} & \textbf{1.} & \textbf{Supreme Court Decisions} & \textbf{by Voting} \\
\hline
\textbf{OT 2015} & 44\% & 51\% & 5\% \\
\textbf{OT 2014} & 40\% & 34\% & 16\% & 8\% \\
\textbf{OT 2013} & 66\% & 20\% & 8\% & 6\% \\
\textbf{OT 2012} & 49\% & 22\% & 20\% & 9\% \\
\textbf{OT 2011} & 45\% & 35\% & 13\% & 9\% \\
\textbf{OT 2010} & 46\% & 34\% & 18\% & 2\% \\
\textbf{OT 2009} & 43\% & 38\% & 13\% & 6\% \\
\textbf{OT 2008} & 36\% & 35\% & 29\% & 9\% \\
\hline
\end{tabular}
\textsuperscript{19} Adapted from Kedar S. Bhatia, Stat Pack for October Term 2015, SCOTUSBLOG 20, 22 (June 29, 2016), \texttt{http://www.scotusblog.com/wp-content/uploads/2016/06/SB_stat_pack_OT15.pdf}. For these statistics, “unanimous” means all the Justices agreed in judgment, regardless of whether the reasoning was fully joined. \textit{Id.} at 19. Note also that decisions with less than a full Court were always categorized as if they had a nine Justice vote. \textit{Id.} at 5. For example, in OT 2015, \textit{Fisher v. University of Texas (Fisher II)}, 136 S. Ct. 2198 (2016) (4-3), is treated as an ideological 5-4 decision even though it was decided without Justice Scalia or Justice Kagan. \textit{Id.} at 5, 22.

\textsuperscript{20} SEGAL & SPAETH, THE SUPREME COURT AND THE ATTITUDBNAL MODEL REVISITED, supra note 16, at 324–26 (measuring the performance of the attitudinal model in search-and-seizure cases and finding 71% accuracy in “predicting” the justices’ votes).


\textsuperscript{22} See Gerhardt, supra note 15, at 1743 n.32 (collecting high-profile examples of such cases).
outcome 66% of the time\textsuperscript{23} does not pass the smell test, unless one thinks that 66% of the lower court decisions that the Court reviews are either to the political left of Ginsburg or to the political right of Alito.\textsuperscript{24}

Even this examination of the decided cases understates the amount of accord among not only the Justices but the most knowledgeable consumers of judicial decisionmaking: the lawyers who have to decide whether to seek Supreme Court review in any particular case. To understand what the Court principally does, it turns out to be helpful to consider what the Court says it does: namely, resolving circuit splits and correcting grave legal errors.\textsuperscript{25} As the top of the federal judiciary, the Supreme Court is responsible for providing guidance for lower courts to follow. If circuit conflicts or clear legal errors go unaddressed, then one of the goals of a legal system—to function as a consistent, predictable system for organizing \textit{ex ante} behavior\textsuperscript{26}—suffers. This result is generally frowned upon by judges, regardless of political ideology.\textsuperscript{27}

The Courts of Appeals terminate almost 60,000 cases per year.\textsuperscript{28} Around 4,600 of those terminations are appealed to the Supreme Court\textsuperscript{29} as part of the 7,000–8,000 total petitions for writ of certiorari the Court receives every year.

\begin{itemize}
\item \textsuperscript{24} Which is not likely. See Roy & Songer, supra note 18, at 361–63.
\item \textsuperscript{25} See SUP. CT. R. 10 (“Considerations Governing Review of Certiorari”).
\item \textsuperscript{26} Cf. Brian Leiter, \textit{Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature}, 66 HASTINGS L.J. 1601, 1615 (2015) (“[W]e need courts to provide authoritative resolutions of disputes that are left unsettled by the existing sources of law.”).
\item \textsuperscript{27} See Pauline T. Kim, \textit{Beyond Principal-Agent Theories: Law and the Judicial Hierarchy}, 105 NW. U. L. REV. 535, 572 (2011) (“[J]udges share a common goal—the production of a (relatively) coherent body of rules that can govern primary behavior in the real world and is viewed as authoritative.”); cf. Kevin T. McGuire et al., \textit{Measuring Policy Content on the U.S. Supreme Court}, 71 J. POL. 1305, 1306 (2009) (“justices of all ideological stripes want to resolve conflict and address major policy questions.”).
\end{itemize}
term. The Court denies an overwhelming majority of these petitions, deciding only 70–90 cases per term, of which are appeals from circuit courts. Even with thousands of such petitions to review when setting the Court’s docket, the typical Term has less than ten dissents from denial of certiorari. And when it comes to deciding the cases the Court does hear, only 22% of the Court’s decisions feature the iconic 5-4 ideological split, while the Court’s unanimity rate hovers around 30–40%. This gives a strong boost to the Court’s stated goals of clarifying the law and resolving splits among the courts of appeals.

At this point a qualitative example might best illustrate the Court’s quotidian mission. Consider the first case Justice Neil Gorsuch sat for on the Court, following a nasty partisan confirmation fight: Perry v. Merit Systems.
Protection Board.\textsuperscript{37} In \textit{Perry}, the Court finally settled the landmark issue: “Is a Merit Systems Protection Board decision disposing of an employment discrimination case on jurisdictional grounds subject to judicial review in district court or in the U.S. Court of Appeals for the Federal Circuit?”\textsuperscript{38} The political implications of either answer are far from salient. As Justice Kagan noted (to laughter), the consequences of overturning the case’s relevant line of precedent dating back to 1983 “would be a kind of revolution . . . to the extent that you can have a revolution in this kind of case.”\textsuperscript{39} \textit{Perry} was also not a facile, pleasant distraction for the Court. The statutory scheme at issue was, at least to Justice Alito, “unbelievably complicated.”\textsuperscript{40} So complicated in fact, that he asked: “Who wrote this statute? Somebody who . . . takes pleasure out of pulling the wings off flies?”\textsuperscript{41}

Instead of a unanimous decision, Justice Gorsuch, joined by Justice Thomas, dissented and insisted that the Federal Circuit was the correct answer.\textsuperscript{42} If one assumes that Justices Gorsuch and Thomas are the two most conservative Justices,\textsuperscript{43} then this decision provides statistical support to the attitudinal model’s claims of political motivation.\textsuperscript{44} But using this division of the Court as support for the claims of the attitudinal model shows the model’s inability to address the strength, significance, and source of the Court’s divisions—the stuff of which legal academics concern themselves.

One could of course strain to read into the division in \textit{Perry} the ideological markers for other fights. There is a divide over the Court’s

\textsuperscript{37} 137 S. Ct. 1975 (2017) (7-2).
\textsuperscript{40} \textit{Id.} at 42:23–:24.
\textsuperscript{41} \textit{Id.} at 43:11–:16.
\textsuperscript{42} \textit{Perry}, 137 S. Ct. at 1988 (Gorsuch, J., dissenting).
\textsuperscript{44} \textit{See} Ruger, Kim, Martin & Quinn, \textit{supra} note 15, at 1157–58.
ability to fix legislative error or to be a participant in a joint effort to smooth the workings of government. Of course it might be “naïve[]” to think that methods of statutory interpretation are politically neutral. But it is hard to imagine the campaign fundraising missives that warn that we are only one vote away from overturning Perry, in any direction that might interest anyone with a claim on a normal life.

45 Compare Perry, 137 S. Ct. at 1988 (Gorsuch, J., dissenting) (“Perry asks us to tweak a congressional statute—just a little—so that it might (he says) work a bit more efficiently.”) with 137 S. Ct. at 1988 (majority opinion) (“Perry asks us not to ‘tweak’ the statute but to read it sensibly.” (citation omitted)). Justice Gorsuch, however, did not concede any point about his interpretation having worse results. See 137 S. Ct. at 1991 (Gorsuch, J., dissenting).

III. The Ideological Cases.

While the frequency or centrality of the ideological 5-4 cases is overestimated in both the public mind and some of the political science literature, this does not mean these cases do not occur. Clearly politics and ideology do have a place in Supreme Court decisionmaking. There are some questions where the law truly runs out, and a Justice’s ideological preference well predicts the outcomes reached.

Even here, two cautions. The first is that the existence of questions that challenge the boundaries of legal principles is not, in my view, an indictment of law or the judicial function. We long ago abandoned the 19th century view of judging as merely the discovery of eternal truths. Law is a complicated regulatory undertaking over dynamic societies. Law does not well anticipate all developments. As I have noted previously, the Constitution allows the federal government the power to create an army and a navy, and has different constitutional requirements for the budgeting of each. What about the air force? Does the textual silence mean that there cannot be a federal air force? Or does it require a teleological (and useless) inquiry into whether the fact of moving through air as a medium renders flight sufficiently fluid as to be an application of a navy? Or does the flight of a cannon ball anticipate the modern fighter jet? Absurd inquiries.

Where law does run out, the judiciary becomes a crystallized form of the politics of a prior generation. Law is an essentially conservative enterprise and the existence of courts with lifetime tenure is a constitutional commitment to the past being a check on excessive partisan exuberance of the present. That the judges do frequently divide along the lines of their partisan priors when confronting the questions at the boundaries of possible legal resolution should not be surprising. Nor should it serve as an indictment of the judicial process.

Second, where law does encounter politics, the law may frame the debate without resolving it. Allow me three brief illustrations.

A. Abortion.

Few issues attract attention to the Supreme Court like abortion. When asked about the Court during the presidential campaign, candidate Trump quickly promised to use his Court appointment power to overturn Roe v. Wade; Secretary Clinton vowed to protect Roe in the same fashion. While

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48 See Aaron Blake, The Final Trump-Clinton Debate Transcript, Annotated, WASH. POST: THE FIX (Oct. 19, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/ (transcribing the candidates’ statements on the Court and Roe); see also Jacob Sullum, Neither Trump Nor Clinton Understands What the
the White House’s view of abortion can vary dramatically between administrations, the Court’s approach has proved less volatile. The undue burden standard of the compromise opinion in Planned Parenthood v. Casey, which allows restrictions so long as they are not deemed to close to an outright ban on abortions, has provided an essentially stable legal doctrine in the area for over 25 years, if not without constant contestation.

Stability in the legal doctrine, however, has not ensured a uniform, nationwide ability to have an abortion. States have continued to pass abortion restrictions since Roe, with a new wave of restrictions enacted after 2010. The number of “middle-ground” states on abortion regulation is dwindling, and now a majority of reproductive-age women live in states hostile to abortion. Seven states have just one abortion clinic, and one state, Kentucky, could soon have no operating abortion clinic. The result is a landscape not so different from the pre-Roe world: a woman seeking an abortion today might need to escape her own state’s restrictions by going to Illinois or New York. This limited influence of the Court’s abortion decisions has led to Justice Ginsburg, in a symposium at Columbia Law School, to remark that Roe “moved too far too fast” and question whether “things might have turned out differently if the court had been more restrained.”

B. Death Penalty.

Supreme Court Is Supposed to Do, REASON: HIT & RUN (Oct. 20, 2016, 6:30 AM), http://reason.com/blog/2016/10/20/neither-trump-nor-clinton-understands-wh (expressing dismay at the candidates’ rhetoric about the Court’s function, starting with Roe).

50 See CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN 21ST CENTURY AMERICA (2017).


The death penalty is another contentious issue where familiar ideological divides persist on the Court.\(^5\) However, since *Gregg v. Georgia* in 1976,\(^5\) the Court has been involved in deciding the details of the death penalty’s procedural requirements rather than (to the chagrin of Justice Breyer) its compatibility with the Eighth Amendment.\(^5\) The result has been a finely granulated procedural tinkering with executions.\(^5\) Yet, even in the absence of any movement thus far toward an abolitionist the Court, the death penalty has been on the decline for want of political support rather than judicial command.

Figure 2. Executions from 1995–2014?\(^9\)

\(^5\) See Adam Feldman, *A Matter of Life and Death*, EMPIRICAL SCOTUS (July 30, 2017), https://empiricalsotus.com/2017/07/30/life-and-death/ (“The justices have been pretty consistent across the board in the Courts’ merits capital punishment decisions. . . . four justices regularly vote in favor of the death penalty and four vote against it.”).


In fact, every aspect of the death penalty is on the decline.\textsuperscript{60} The number of death sentences per year has dropped dramatically, to the point where “[t]he number of new death sentences were imposed in the past decade than in the decade preceding the Supreme Court’s invalidation of capital punishment in 1972.”\textsuperscript{61} In 2016, the number of executions in the United States fell to a 25-year low.\textsuperscript{62} And support for the death penalty is at its lowest point in 40

\textsuperscript{60} See Josh Sanburn, \textit{Death Penalty Slowly Fading Away Across the U.S.}, \textit{TIME} (Dec. 20, 2016), \url{http://time.com/4607300/death-penalty-2016-record-low-executions/} (“Last year we saw generational lows in new death sentences, executions, and measured support for the death penalty in public opinion polls . . . . Everything dropped more this year.” (quoting Robert Dunham, executive director of the Death Penalty Information Center)).

\textsuperscript{61} \textit{Death Penalty Info. Ctr., The Death Penalty in 2016: Year End Report} 1, 3–5.

In light of these statistics, Justice Ginsburg, in another public appearance, said that the future of capital punishment might be an end through attrition.\textsuperscript{64}

\textbf{C. Marriage Equality.}

Despite its clear 5-4 ideological split, \textit{Obergefell v. Hodges}\textsuperscript{65} has been the most successful of the Court’s recent decisions on controversial issues. With one decision, same-sex marriage became legal throughout the country, and that decision is “overwhelmingly enforced.”\textsuperscript{66} Even the office of the most prominent denier of same-sex marriage licenses, Kentucky’s Kim Davis, has issued such licenses after a change to the state’s marriage license form.\textsuperscript{67} While this may seem like a prime example of the Supreme Court’s importance in ideological controversies, the impact becomes less pronounced when looking at the support that existed before.

Figure 3. Legal Status & Public Opinion\textsuperscript{68}


\textsuperscript{65} 135 S. Ct. 2584 (2015) (5-4).

\textsuperscript{66} Chris Johnson, \textit{One Year After Marriage Ruling, Pockets of Defiance Remain}, Washington Blade (June 22, 2016, 3:00 PM), \url{http://www.washingtonblade.com/2016/06/22/one-year-after-supreme-court-ruling-pockets-of-marriage-inequality-remain/}.


\textsuperscript{68} Adapted from \textit{Marriage}, GALLUP, \url{http://www.gallup.com/poll/117328/marriage.aspx} (last visited May 30, 2017); \textit{Same-Sex Marriage, State by State}, PEW RES. CTR. (Jun. 26, 2015), \url{http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/}. 
As Figure 3 illustrates, marriage equality had been gaining nationwide public support, even a majority, before Obergefell. Outside the judiciary, a “national consensus on marriage equality” is thought to be forming. While there will no doubt always be outliers, the trend is unmistakable, and speaks to a more complicated interaction between the Court and social controversies than might be captured in just a catalogue of 5-4 decisions.

IV. Courts in the Executive Era

The foregoing should not be taken for an argument that the Supreme Court is not a centrally important institution in the United States. Nor is it a claim that the Court does not decide highly freighted political cases, or that the politics of the Justices do not influence the resolution of those cases. Rather, the data on what the Court actually does suggest that the Court’s influence is not best captured by unifocal attention to the 5-4 decisions rendered on ideologically-freighted issues. One can push even further and say that the high visibility of the Court’s opinions on the big ticket social impact cases may lead to an overestimation of the degree of autonomy the Court has in commanding how the society will move in these domains.

A more nuanced picture of the Court emerges from an assessment of the institutional cases in which the Court confronts increasing assertions of executive power. One of the hallmarks of modern democracies around the world is the diminished role of the legislative branches and the ascendancy of administrative and decretal authority from the executive. The
dysfunctionality of the U.S. Congress is unfortunately frequently on exhibit. Congress produces less legislation, whether measured by session\textsuperscript{69} or over the first 100 days period,\textsuperscript{70} than at any point in recent history. The Trump administration’s current dearth of major legislative accomplishments continues this trend.\textsuperscript{71} Meanwhile, executive agencies have managed to promulgate “reams of regulations”\textsuperscript{72} and greatly outpace Congress’s productivity.\textsuperscript{73} More concerning than comparative productivity, though, is whether Congress can feasibly express disapproval of the executive with the little legislation it can pass.

The diminished legislative branch is by no means a phenomenon limited to the U.S. When the legislative branch is inactive, two tendencies emerge. The first is that the executive fills the void, oftentimes confusing legislative rejection and legislative inaction as equal invitations to expansive executive authority. The second is that legislative inaction puts pressure on the judiciary as a brake on increased executive unilateral claims of authority.

A non-U.S. example well highlights the pattern. Brexit was an effort by a weak prime minister to circumvent parliamentary inaction by an ultimately failed appeal to the referendum process. After David Cameron resigned, Prime Minister Theresa May attempted to trigger Article 50\textsuperscript{74} and withdraw from the EU treaties without any parliamentary say. The UK Supreme Court, having only recently been created to replace the House of Lords as the UK’s


\textsuperscript{70} See Julia Azari, A President’s First 100 Days Really Do Matter, FIVETHIRTEIGHT (Jan. 17, 2017), https://fivethirtyeight.com/features/a-presidents-first-100-days-really-do-matter (citing John Frendreis et al., Predicting Legislative Output in the First One-Hundred Days, 1897-1995, 54 POL. RES. Q. 853 (2001)).


\textsuperscript{73} See INS v. Chadha, 462 U.S. 919, 985-86 (1983) (White, J., dissenting) (“For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”).

court of last resort,\textsuperscript{75} denied the executive the unilateral power to trigger Article 50.\textsuperscript{76} In the words of the UK Court majority:

The question is whether that domestic starting point, introduced by Parliament, can be set aside, or could have been intended to be set aside, by a decision of the UK executive without express Parliamentary authorisation. We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue.\textsuperscript{77}

The past twenty years have shown the importance of this same checking function of the U.S. courts on many of the critical issues of the day. While the cases often present questions of protecting deeply embedded individual rights, the role of the court is structural, serving to force executive assertions of authority back into the political give and take with Congress. Beginning with the repeated confrontations with the second Bush administration over Guantanamo and the treatment of terrorism detainees, through the Obama use of executive authority on environmental and immigration issues, and continuing to the present in the conflicts with the Trump administration over restrictions on immigration, all involve the courts assuming the primary role of constraints on the executive.

Any examination of the Court’s treatment of executive power takes as its point of departure the \textit{Steel Seizure} framework laid out by Justice Jackson’s concurrence in \textit{Youngstown Sheet and Tube Co. v. Sawyer}.\textsuperscript{78} In \textit{Youngstown}, President Truman sought to use his wartime emergency powers to seize the steel industry, ensuring continued steel production during the Korean War. Justice Jackson addressed the question of presidential authority not in terms of formal constitutional roles, but as part of dynamic assessment of the degree of agreement among the political branches.\textsuperscript{79} In confronting the issues of the day, the President’s powers are most expansive when Congress has expressed approval of the President’s power in an area, most uncertain when

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\begin{itemize}
\item\textsuperscript{76} R v. Secretary of State for Exiting the European Union [2017] UKSC 5.
\item\textsuperscript{77} Id.
\item\textsuperscript{78} 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).
\item\textsuperscript{79} See id. at 635 (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”).
\end{itemize}
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Congress has not acted, and most limited when Congress has prohibited the President’s action.80

Thus, starting with the first Guantanamo cases—*Hamdi v. Rumsfeld*81 and *Hamdan v. Rumsfeld*82—the Court focused on the approval or disapproval expressed by Congress, the core concept of *Youngstown*. In *Hamdi*, the Court addressed the executive branch’s power to suspend habeas corpus for “enemy combatants” by looking to whether Congress, through its authorization of armed intervention83 in fact granted such power to the executive.84 In *Hamdan*, the Court began by carefully parsing the language of the Detainee Treatment Act85 and reiterated that “[i]f the President has exceeded [statutory] limits, this becomes a case of conflict between Presidential and congressional action.”86

As was evident in the UK in confronting the process to engage Brexit, the institutional role of the Court is highlighted by the fact that the American Congress is at present a very weak institution. If nature abhors a vacuum, politics well follows the need to fill the void. Seemingly inescapably, when presented with an ineffective legislature, the executive will seek to expand and fill the power vacuum through administrative actions and executive decrees.

As of this writing, the Trump administration has had less success with any form of legislative initiative and has relied even more heavily on executive decrees to advance its political agenda. With Congress thus far unable to pass any significant changes to health care, taxes, infrastructure investment, immigration, environmental law, consumer protection or any other of its claimed priorities, government by executive decree becomes the inescapable temptation, exaggerated perhaps by the “rule-by-tweet” proclivities of the current President. Not surprisingly, efforts to bypass or disregard legislation and separation of powers leads to litigation. And it is here that the role of the Court as a guardian of the institutional foundations of American democracy becomes critical.

Thus far, the most important judicial confrontation with the Trump administration has come in the area of immigration and the attempts of the executive to unilaterally impose a travel ban on designated categories of

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80 See id. at 635–38.
84 Cf. 542 U.S. at 536 (plurality opinion) (“Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. . . . [U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance.”).
86 548 U.S. at 639.
foreigners, including visa holders. With Congress passive, the Trump administration has claimed a free hand in this domain by arguing that its decisions in the immigration context are not subject to review by the judiciary. In one of the challenges to the entry ban, the Ninth Circuit held “[t]here is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.”

The Fourth Circuit similarly found the executive’s assertion of nonreviewability a “dangerous idea” that threatened the proper functioning of the branches.

As these cases make their way to the Supreme Court, much is at stake, as was the case in the UK in the Brexit context. The Court’s treatment of claims of unchecked executive power is both important and contentious. In order to maintain the constitutional constraints necessary for democratic governance, the Court of the executive era must be willing to check the executive’s ambition with something other than Congress’s ambition. As Justice Jackson so presciently wrote:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

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88 Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir.) (per curiam), reh’g denied, 858 F.3d 1168 (9th Cir. 2017) (citing Boumediene v. Bush, 553 U.S. 723, 765 (2008)).
89 See Int’l Refugee Assistance Project v. Trump, 857 F.3d 554, 587 (4th Cir.), cert. granted, 137 S. Ct. 2080 (2017) (“Behind the casual assertion of consular nonreviewability lies a dangerous idea—that this Court lacks the authority to review high-level government policy of the sort here. Although the Supreme Court has certainly encouraged deference in our review of immigration matters that implicate national security interests it has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake.”).
90 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).