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The Guardians of Judicial Independence

The US Supreme Court rules on some of the most important issues in American politics. Naturally, these decisions strike a nerve with many Americans. In the wake of the 2015 landmark ruling *Obergefell v. Hodges*, in which the Supreme Court ruled that the Constitution guarantees a right to marry for same-sex couples, Republican Governor Bobby Jindal of Louisiana argued that “The Supreme Court is completely out of control, making laws on their own If we want to save some money, let’s just get rid of the Court.”¹ Senate Majority Leader Mitch McConnell (R-KY) stated that the “American people, through the democratic process, should be able to determine the meaning of this bedrock institution [marriage] in our society.”² And Republican Senator Ted Cruz of Texas, nearly the 2016 Republican nominee for president, proposed constitutional amendments to overturn federal court rulings legalizing gay marriage and to strip the federal courts of their ability to hear same-sex marriage cases.³

Citizens United v. FEC has engendered the same level of vitriol from Democrats and liberals. In this 2010 case, the Court ruled that corporations

¹ Hensch, Mark (June 26, 2015). “Jindal: ‘Let’s just get rid of the Court.’” *The Hill*. <https://thehill.com/blogs/ballot-box/presidential-races/246301-jindal-lets-just-get-rid-of-the-court>.

² Mitch McConnell Senate Website (June 26, 2015). “McConnell on the Supreme Court’s Marriage Ruling.” www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=2A454FAD-3CEE-41BD-A824-87BA6C64805F.

³ Senator Cruz proposed these amendments before the Supreme Court’s landmark *Obergefell* ruling but after several Courts of Appeals had ruled that the Constitution guarantees the right to marry by same-sex couples. Senator Cruz perhaps saw the writing on the wall that the US Supreme Court would follow suit.

have constitutional free speech rights to spend unlimited amounts of money in elections to help candidates win.⁴ Senator Russ Feingold of Wisconsin did not mince words in describing it as “one of the most lawless decisions in the history of the country” that will “set a dangerous new precedent for our democracy.”⁵ Democratic senator and 2016 presidential hopeful Bernie Sanders stated that he would “not nominate any man or woman to the Supreme Court unless that individual is loud and clear in saying he or she will vote to overturn *Citizens United* and do that as quickly as possible.”⁶ Former senator, secretary of state, and 2016 Democratic nominee for president Hillary Clinton also called for a litmus test on choosing a nominee who would overturn the ruling and pledged to “fight for a constitutional amendment that overturns it.”⁷ And former president Barack Obama, in an unprecedented move, criticized the Court’s ruling in his 2010 State of the Union speech while five out of the nine justices sat in the front row. “With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests . . . And I urge Democrats and Republicans to pass a bill that helps to correct some of these problems.”⁸ Senate Democrats eventually proposed a constitutional amendment to overturn the ruling.

In both cases, politicians are discussing measures to subvert the Court’s authority, often accompanied by harshly critical language that calls the legitimacy of the Court’s decision-making into question. Importantly, however, politicians in these examples are motivated primarily by *policy*

⁴ The ruling also applied to unions, but liberals are most upset with the aspect of the ruling related to corporations.

⁵ Prupis, Nadia (February 22, 2011). “Russ Feingold’s PAC, Progressives United, working for campaign reform.” *Truthout*. <https://truthout.org/articles/russ-feingolds-pac-progressives-united-working-for-campaign-reform-2/>.

⁶ Sutherland, Paige (December 4, 2015). “If elected, here’s how Bernie Sanders would choose his Supreme Court nominees.” *New Hampshire Public Radio*. www.nhpr.org/post/if-elected-heres-how-bernie-sanders-would-choose-his-supreme-court-nominees#stream/0.

⁷ Levinthal, Dave (April 7, 2016). “How ‘Citizens United’ is helping Hillary Clinton’s White House bid.” *NBC News*. www.nbcnews.com/news/us-news/how-citizens-united-helping-clinton-win-white-house-551226.

⁸ CNN State of the Union Coverage (January 28, 2010). “Transcript: Obama’s first State of the Union speech.” *CNN Politics*. www.cnn.com/2010/POLITICS/01/27/sotu.transcript/index.html. Also notable in this event was the response by Justice Alito, who was among the justices present at the address. In response to President Obama’s remarks, Justice Alito shook his head and appeared to say, “Not true.” Kady II, Martin (January 27, 2010). “Justice Alito mouths ‘not true.’” *Politico Now Blog*. www.politico.com/blogs/politico-now/2010/01/justice-alito-mouths-not-true-024608.

disagreement with the Court's decisions. These are not principled objections to the Court's institutional role in American politics or style of decision-making as a general matter. Rather, such attacks on the Court emerge in response to rulings that conflict with preferences over policy or narrow partisan and electoral interests. Indeed, note how these same politicians react when they *agree* with a Supreme Court ruling. In a one-eighty from his *Obergefell* criticism, Governor Bobby Jindal praised the Court's *Citizens United* ruling, saying that "any kind of attempts to limit our First Amendment speech rights doesn't work and isn't effective."⁹ Claiming that "some in this country have been deprived of full participation in the political process," Senator Mitch McConnell argued that in the ruling "the Supreme Court took an important step in the direction of restoring the First Amendment rights of these groups by ruling that the Constitution protects their right to express themselves about political candidates and issues up until Election Day."¹⁰ Senator Ted Cruz has both praised the ruling and heavily criticized Democrats for proposing amendments to overturn *Citizens United* and "repeal the free speech protections of the First Amendment."¹¹

We see a similar about-face in reactions toward the Court among Democrats in light of pleasing decisions. In praise of the Court's *Obergefell* ruling, Senator Sanders stated, "Today the Supreme Court fulfilled the words engraved upon its building: 'Equal justice under law.'"¹² Secretary Clinton followed suit, arguing that the "U.S. Supreme Court's ruling on marriage equality represents America at its best: just, fair and moving toward equality."¹³ Like his fellow Democrats, President Obama invoked values of equality, stating that "the Supreme Court recognized that the Constitution guarantees marriage equality. In doing so, they've reaffirmed that all Americans are entitled to the equal protection of the law."¹⁴

⁹ Ta, Linh (October 12, 2015). "Jindal: I support Citizens United ruling." *Des Moines Register*. www.desmoinesregister.com/story/news/elections/presidential/candidates/2015/10/12/jindal-support-citizens-united-ruling/73840666/.

¹⁰ Politico Staff (January 21, 2010). "Pols weigh in on Citizens United decision." *Politico*. www.politico.com/story/2010/01/pols-weigh-in-on-citizens-united-decision-031798.

¹¹ Ted Cruz Senate Website (accessed March 31, 2018). "United Liberty: Ted Cruz blasts Senate Democrats for trying to repeal the free speech protections of the First Amendment." www.cruz.senate.gov/?p=news&cid=1351.

¹² Bernie Sanders Twitter Page. <https://twitter.com/sensanders/status/614439399238057984>.

¹³ Hillary Clinton for President Twitter Page. <https://twitter.com/ImwithHer2016/status/747052188715868160>.

¹⁴ Washington Post Staff (June 26, 2015). "Transcript: Obama's remarks on Supreme Court ruling on same-sex marriage." *Washington Post*. www.washingtonpost.com/news/post-nat

These examples seem to suggest that the *process* by which a ruling is reached matters little to attitudes toward the Court. Rather, concerns about the justices being politically or ideologically motivated (e.g., “activist” or ignoring precedent) are not consistently applied across decisions. Such concerns seem to (conveniently) arise in cases where decisions are disagreeable, and then only as a way of justifying attacks on the Court. As Peter Irons explains, “Cynics, including myself, know that a so-called judicial activist is any judge or justice who votes to strike down a law we support, or uphold one we oppose.”¹⁵ *Citizens United* and *Obergefell* were arguably similar in terms of the degree to which they were decided in a political or ideological manner, but politicians only emphasize these characteristics of rulings when they disagree with them. When they agree with a ruling, they invoke positive procedural aspects, such as the Court properly interpreting the Constitution and adhering to precedent, and core American values of fairness, justice, and equality. It seems that policy agreement with the Court is the key driver of attacks on the Court’s authority. Procedural aspects of a decision enter only as a way of *rationalizing* ideologically driven assessments.

In these examples, politicians are reacting to single disliked decisions and mostly call for measures to limit the Court’s power within a narrow issue area, for example, through a constitutional amendment that would overturn the decision. Sometimes, however, the Court threatens partisan and ideological interests in a more general and enduring way. In such cases, partisan actors may seek to reduce the Court’s independence in an equally enduring fashion. The most famous example occurred during President Franklin D. Roosevelt’s second term in office. The Supreme Court had recently struck down several pieces of legislation in the president’s New Deal program and seemed, as a general matter, hostile to the emerging liberalism of the Democratic Party. In response, the president proposed a bill that would add a justice to the Court for every sitting justice who failed to retire at the age of seventy – thus, its historical legacy as FDR’s “Court-packing plan.”

We need only look to the last few years to find similar examples of broad attacks on the Court’s institutional integrity and independence from partisan politics. In February 2016, Justice Antonin Scalia passed away unexpectedly, giving President Obama the opportunity to create the first liberal majority on

ion/wp/2015/06/26/transcript-obamas-remarks-on-supreme-court-ruling-on-same-sex-marriage/?utm_term=.09e075902cf9.

¹⁵ Irons, Peter (February 4, 2019). “Has the Supreme Court lost its legitimacy?” *NBC News*. www.nbcnews.com/think/opinion/has-supreme-court-lost-its-legitimacy-ncna966211.

the Supreme Court since the Warren era of the 1960s. Just an hour after Justice Scalia's death was announced, Republican Majority Leader Mitch McConnell vowed to block any Obama nomination until after the 2016 presidential election, arguing that Americans should have a say in who fills the empty seat.¹⁶ In spite of this, President Obama nominated Judge Merrick Garland to fill Scalia's seat. Norms against politicizing the Supreme Court suggest that Garland would be given a fair hearing in the Senate and a timely vote, but his qualifications, experience, and purported penchant for moderation were not enough to offset Senate Republicans' determination to prevent a liberal, Democratic majority on the Court. In the end, McConnell's gamble paid off handsomely for conservative interests: Donald Trump won the presidency, and the Republican-controlled Senate confirmed a reliable conservative in Neil Gorsuch in April 2017.

As if such drama and conflict were not enough, Justice Anthony Kennedy retired in 2018, leaving another seat to be filled by President Trump and a Republican Senate. Like the Garland saga, the ideological stakes could not have been higher, but this time President Trump, via his nomination of Judge Brett Kavanaugh, would have a chance to create the first reliable *conservative majority* on the Court in the modern era. Justice Kennedy, a center-right justice during his career, had been a crucial swing vote who frequently bolstered liberal interests, especially on hot-button culture war issues like gay rights in which he authored the majority opinion in *Obergefell v. Hodges* legalizing same-sex marriage in every state. Democrats, in turn, tried to use McConnell's 2016 reasoning to argue for a hiatus on determining Justice Kennedy's replacement until after the 2018 midterms: Americans should have a say in the composition of the Senate that ultimately confirms the next justice. Republicans, in control of the Senate, rejected such delay tactics as inappropriate, and the ultimate appointment of Kavanaugh – after perhaps the most contentious nomination battle in memory – now leaves the Court poised to move legal policy in the conservative direction for the foreseeable future. Indeed, there is worry on the left that abortion rights – and other issues important to liberal causes – are directly threatened by Kavanaugh's replacement of Kennedy.¹⁷

¹⁶ Everett, Burgess, and Glenn Thrush (February 13, 2016). "McConnell throws down the gauntlet: No Scalia replacement under Obama." *Politico*. www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248.

¹⁷ However, Kavanaugh's appointment also permits the possibility that Chief Justice John Roberts may assume a "swing vote" role, akin to that of Kennedy, in order to moderate the Court (e.g., Mark and Zilis 2018).

In response to this process, prominent liberal commentators have publicly called for attacks on the Court’s institutional integrity to mitigate the expected consequences of a conservative majority on the Court. Major left-leaning media outlets have published editorials supporting fundamental institutional changes to the Court – such as Court-packing and ending life tenure – that would have the effect of diluting the power of the sitting conservative justices and redirecting the long-term ideological path of the Court.¹⁸ For example, writing in the context of the heated Kavanaugh hearings, liberal commentator David Leonhardt endorsed a constitutional amendment that would limit justices’ terms to eighteen years and give each four-year presidential term two guaranteed appointments to the Court.¹⁹ Leonhardt argues that the current system is too contentious and heated and “does not respect the will of the people” but that his favored proposal would make the Court “more consistent with democratic principles.”²⁰ Like attacks on single decisions, calls for fundamental institutional changes seem to arise primarily in response to (long-term) policy disagreement with the Court, but they are *rationalized* in terms of widely accepted democratic values.

Thus, for both the left and the right, actions that threaten the Court’s power have become fair game. It is not our place to evaluate each proposal for its desirability – perhaps there are changes in this vein that would indeed improve the functioning of the American government and move us closer to our shared ideals. We take no positions on these normative issues. But our book’s theory and empirical findings – focusing on when and why the public supports such attacks on the Court – have important implications for the extent of the Court’s legitimacy and ultimately its independence and power in the political system. In this sense, our work can inform debates over possible changes to the Court and its role in American politics.

¹⁸ For links and useful discussions of these proposals, see Matthews, Dylan (October 5, 2018). “Court-packing, Democrats’ nuclear option for the Supreme Court, explained.” *Vox*. www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court; Segall, Eric (December 4, 2018). “Yes, it’s time to reform the Supreme Court – but not for the wrong reasons.” *Salon*. www.salon.com/2018/12/04/its-time-to-reform-the-supreme-court-but-not-for-the-wrong-reasons/.

¹⁹ Leonhardt, David (September 18, 2018). “The Supreme Court needs term limits.” *The New York Times*. www.nytimes.com/2018/09/18/opinion/columnists/brett-kavanaugh-supreme-court-term-limits.html.

²⁰ And indeed, this proposal would likely bind the Court’s decision-making more tightly to the ebbs and flows of public opinion (McGuire and Stimson 2004; Stimson, Mackuen, and Erikson 1995).

CURBING THE COURT

In the examples of the last several pages, politicians are talking about *curbing the Court*: reducing its power and independence in the US system of government and attacking its authority to render final judgments on law and constitutional meaning. We adapt Staton's (2010, 8–9) conceptualization of *independence* and *power* and the subtle distinction between them (see also Hall 2011; Nagel 1975). Judicial independence means that a court can rule free from coercion by other political actors – the decision reached reflects its sincere policy preferences. Judicial power means that a court “can cause by its actions the outcome that it prefers” (Staton 2010, 9). That is, a causal relationship exists between a court's sincere policy preferences and the policy that it ultimately obtains. Independence and power mean that the Court does what it wants and gets what it wants, respectively, even when other important actors have conflicting preferences. For courts in democratic systems, we can thus distinguish between the ruling and implementation stages of policymaking. At the ruling stage, a court that is free from external political influence (i.e., independent) decides the case according to its sincere preferences. But while independence is a necessary condition for judicial power – to get what it wants a court must rule how it wants – it is not a sufficient condition. Power is only realized when a court *induces compliance* and the decision is followed as the court prefers (e.g., Hall 2011; Staton 2010). A powerful Court is both “autonomous and it is obeyed” (Staton 2010, 9).

Public support for Court-curbing forms the core outcome of interest throughout our book. We think of curbing actions as falling into one of two categories.²¹ *Narrowly targeted* (or *narrow*) Court-curbing seeks to mitigate the consequences of a small number of (perhaps only one) disliked decisions within a circumscribed issue area – marriage or campaign finance, for example. This includes the types of actions highlighted in the first few pages of this chapter, such as reducing a ruling's impact through legislative means, imposing “litmus tests” on the issue for new nominees, overturning the ruling through a constitutional amendment, failing to comply with the ruling's prescriptions, or removing the Court's jurisdiction in the specific policy area. *Broadly targeted* (or *broad*) Court-curbing, by contrast, seeks to alter the institution in a more enduring way. This

²¹ Court-curbing also has a rich history of inquiry in the institutions and judicial decision-making literature, particularly related to conflicts between Congress and the Court (e.g., Clark 2011; Murphy 1962; Nagel 1965; Pritchett 1961; Rogers 2001; Rosenberg 1992; Stumpf 1965). The discussions in that literature connect to the Court's legitimacy as well.

includes the kinds of proposals discussed in the previous section, such as sharply restricting the tenure of justices, making it easier to overturn rulings through the imposition of congressional or public veto points, or removing the Court's power of judicial review altogether.

Court-curbing is a clear, direct threat to judicial power as it reduces the ability of the justices to get the policies they want, for example, by removing judicial review or overturning or refusing to comply with a ruling. Consistent with formal work in political science (e.g., Carrubba and Zorn 2010; Vanberg 2001), we argue that Court-curbing is also an *indirect* threat to judicial power through its effect on judicial independence. This is because threats of Court-curbing alter the behavior of strategic justices who wish to avoid confrontations with other branches and with the public. That is, the Court may choose a policy other than its sincere preference – say, one closer to the legislature's ideal point – to ensure compliance, avoid legislative overrides, or to defuse an attack on its broader powers.²² In this way, judicial constraint is often unseen because it manifests as a reduction in autonomy rather than a reduction in formal powers. This can lead to erroneous perceptions of the Court's independence and power; while the justices rule and those rulings are obeyed, their decisions are at least partly endogenous to the preferences of other actors.

Given this conceptual framework, public support for both forms of Court-curbing implies low support for judicial power and independence. It indicates a preference for making the Court more accountable to the preferences of the public and elected officials, whereas opposition to curbing implies a preference for a robust, independent role for the Court as a powerful policymaker whose rulings should be faithfully implemented. Throughout the book, we will use both terms – *judicial power* and *independence* – with the aforementioned definitions in mind.

Both broad and narrow Court-curbing also have important implications for our understanding of the Supreme Court's *institutional legitimacy*, which we define as perceived rightful authority to render rulings for the nation (see Caldeira and Gibson 1992; Gibson and Nelson 2014; Tyler 2006a) and a belief that the Court is “appropriate, proper, and just” (Tyler 2006a, 375). Legitimacy implies principled (sometimes called “diffuse”) support for the Court, as opposed to instrumental support in which

²² Some have argued that Chief Justice John Roberts did just this when he “flipped” his position on the Affordable Care Act in *National Federation of Independent Business v. Sebelius*.

judicial power is simply a means to a policy or partisan end. We discuss these implications in greater detail in this chapter and throughout the book. At this point, we make it clear that we treat “support for Court-curbing” and “institutional legitimacy” as related, but distinct, concepts.

THE RECEIVED WISDOM

How are politicians, journalists, and activists able to get away with shattering norms involving the judiciary and attacking the Court’s power? How, for example, was Mitch McConnell able to successfully block the legitimate nomination of a Supreme Court justice in 2016? How are calls for Court-packing now acceptable lines of discussion in mainstream political outlets?

All of this is surprising considering prominent theories in political science and the legal academy. Indeed, a conventional wisdom argues that citizens are guardians of judicial independence: elites who are dependent on public support refrain from curbing the Court because they fear reprisal from their constituents (e.g., Carrubba 2009; Friedman 2009; Nelson and Uribe-McGuire 2017; Staton 2010; Stephenson 2004; Vanberg 2005). This strong public support for the Court is thought to be rooted in core democratic values (e.g., Gibson 2007; Gibson and Nelson 2015b), perceptions of procedural fairness (e.g., Tyler and Rasinski 1991), and long-term socialization to the deliberative, principled, and symbolic aspects of the Court (e.g., Gibson and Caldeira 2009a, 2011; Gibson, Lodge, and Woodson 2014). Citizens are willing to punish elite actors for attacks on the Court – even favored ones, such as co-partisans – because they care about the institution for its own sake, not simply for the policies it produces. In this way, the public serves as a key veto point or “pivotal player” (Krehbiel 1998; Tsebelis 2002) that makes Court-curbing a costly endeavor. So long as elected politicians are aware of the public’s orientation toward the Court, they will resist pushing too hard to implement curbing measures.

We think an emerging literature on public support for Court-curbing – as well as casual observation – calls the received wisdom into question. The purpose of this book is to present an alternative view. We argue that citizens are willing to curb the Court in response to discontent with its decision-making. In our view, citizens are often an important force *constraining* the discretion of the Court and binding it more closely to the majoritarian institutions of American political life. We argue that this is especially true in times of high partisan polarization at both the elite and

mass levels (e.g., Armaly 2018; Clark and Kastellec 2015). While some (e.g., Gibson 2007) have argued that the Court has escaped the problems seen in other institutions due to polarization (e.g., Congress, see Hetherington and Rudolph 2015), we believe there are both theoretical and empirical reasons to think otherwise – that intense partisanship directly threatens the power of the Court relative to other actors in the political system.

We will develop our claims in greater depth throughout the book. In the remainder of this chapter, we expand our summary of the received wisdom on public opinion and judicial independence. We then summarize our own contributions and provide an outline of what is to come. Finally, we provide a brief discussion of what is at stake in this debate.

The Electoral Connection and Judicial Independence

It is often claimed that the Court is weak relative to the executive and legislative branches of American government. While Article III of the Constitution vests the broad “judicial power of the United States” in the US Supreme Court, it does not confer specific powers to the Court like Articles I and II do for the other branches. Even if one subscribes to the scholarly view that the Court’s power of judicial review is implied in Article III (e.g., Friedman 2005; Kramer 2004; Treanor 2005),²³ the Constitution does not specify parameters for using or enforcing that power.

Moreover, the debate over implied powers masks the more important question of whether the Supreme Court’s rulings vis-à-vis the invocation of judicial review are afforded *judicial supremacy* – authority as the final and binding word on constitutional meaning for everyone in the country (see Friedman 1998, 2005). And that logic applies to the Court’s other rulings as well, including statutory interpretation. Indeed, the Supreme Court faces a rather unique situation as it seeks to make policy. In *Federalist* 78, Hamilton famously argued that the judiciary is the “least dangerous” branch. While the Court has the power to pass judgment on the law and the Constitution, it has only weak powers of *enforcement* –

²³ This argument by legal scholars largely supplants a more traditional story that Chief Justice John Marshall, in the Court’s famous *Marbury v. Madison* (1803) ruling, “created” judicial review (e.g., Friedman 2005). After all, seven years prior to *Marbury*, the Court, in *Hylton v. U.S.* (1796), employed judicial review to uphold a federal law. *Marbury* was the first case in which the Court struck down a federal law as unconstitutional.