Legitimizing the 'Illegitimate': How the Supreme Court Can Restore its Legitimacy in the Public Eye

Mo Kahn*

Introduction

Over the course of the 2020 presidential campaign, particularly after the passing of Justice Ruth Bader Ginsberg, the term "court-packing" became a household phrase and a talking point amongst Republicans and Democrats alike. While Republican senators jumped on the threats of their Democratic counterparts to "pack the court,"[1] Democrats, in turn, charged the Republican-controlled Senate of "court-packing"—in reference to the swift confirmation process of Justice Amy Coney Barrett.[2] Yet Justice Barrett's confirmation was not the lone transgression in the eyes of the Democratic party. It came on the heels of Justice Neil Gorsuch's appointment to fill the late Justice Antonin Scalia's vacant seat—a seat that many considered to be stolen from Judge Merrick Garland of the Court of Appeals for the D.C. Circuit—and Justice Brett Kavanaugh's contentious confirmation, amid the accusations of sexual misconduct by Dr. Christine Blasey Ford.[3] These contentious moments of constitutional hardball[4] provided the backdrop for the alleged illegitimacy of today's Supreme Court.

But can a court, even one made up of politically driven nominations, be considered illegitimate if its rulings are inconsistent with the partisan tilt of its justices? A study conducted by Brandon Bartels and Christopher Johnston found that while the Court has held a conservative majority since the late 1960s, the tilt of the Court's decisions has been, at most, center-right with an overall liberal tilt for

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1. Official Statement, Senate Majority Leader Mitch McConnell, McConnell on "Court-Packing" Threats: Democrats Abuse Language to Set Up Abuse of Power (Oct. 14, 2020) (on file with author).

2. Tyler Olsen, *Dems Turn Around Accusation, Say GOP is Court-Packing: Here's what that Phrase Actually Means*, Fox News (Oct. 12, 2020), https://www.foxnews.com/politics/experts-push-back-biden-democrats-republicans-court-packing [https://perma.cc/N42K-KE5K].

3. Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, Wash. Post (Sept. 16, 2018), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html [https://perma.cc/RD5T-KN2T].

4. *See* Mark Tushnet, *Constitutional Hardball*, 37 J. Marshall L. Rev. 523 (2004).

what they deem "salient decisions."[5] This Note examines the features of the Court that uphold its legitimacy. I contend that the Court does not lack legitimacy but rather gives off the perception of illegitimacy by way of the justices embroiling themselves in political controversy either actively or passively. The consequence of this is an American public that has begun to question the legitimacy of the Supreme Court, not so much on a legal level, but on a sociological one.[6] The Court is not broken beyond repair as some members of Congress or the media may believe.[7] The Court is quite salvageable, even in its current composition, but it will require a commitment by its justices to stay out of the limelight, avoid political discourse, and adhere to the proper role of the Court: to exercise its duty of judicial review by interpreting the Constitution without regard for the views or potential backlash of the political branches or the public at large.

Part I of this Note will introduce the notion of legitimacy of the Supreme Court and discuss the factors that support the Court's legitimacy. Part II will expound on these factors and introduce the idea of 'platonic legitimacy.' This section will discuss the Court's proper role as an institution strictly bound to the Constitution without regard for the will of the political branches, and how the Court fulfills its duty to the American people by exercising this restraint. Part III will discuss contemporary notions of the Court's role and will explain how 'platonic legitimacy' reconciles some contemporary criticisms of the Court. Finally, Part IV will introduce factors that detract from the Court's legitimacy and propose efforts to mitigate or eliminate those elements' influence on the Court's operation. This Note will consider the Court's interaction with the public and other political branches, as well as how the Court's response and acquiescence to these pressures necessarily detracts from its legitimacy.

I. WHAT CONSTITUTES LEGITIMACY

Recently, much ink has been spilled over the issue of the "illegitimacy" of the current Court with some proposing that the Court must undergo radical change to repair this defect. It is important, therefore, to understand the origins of the Court's legitimacy and the factors that make up and enhance the legitimacy of our judicial branch.

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5. Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 186 (2013). The study analyzed the percentage of liberal-leaning decisions in every supreme court term since 1953 and determined salience based upon whether or not the decision appeared on the front page of the New York Times the next morning.

6. *See* RICHARD H. FALLON JR., LAW & LEGITIMACY OF THE SUPREME COURT (1952).

7. Alex Swoyer, *Alexandria Ocasio-Cortez Backs Court-Packing, Says Court Shouldn't Overturn Laws Backed by Advocates*, WASH. TIMES (Apr. 15, 2021) https://www.washingtontimes.com/news/2021/apr/15/alexandria-ocasio-cortez-backs-court-packing-says-/ [https://perma.cc/FTV8-977C].

A. FALLON'S CONCEPTIONS OF SUPREME COURT LEGITIMACY

In his book *Law and Legitimacy in the Supreme Court*, Richard Fallon posits that the Supreme Court's legitimacy is derived from three distinct sources: (1) legal legitimacy, (2) moral legitimacy, and (3) sociological legitimacy.[8] To Fallon, legal legitimacy is exercised when a justice applies his or her preferred approach to constitutional interpretation "consistently across cases, with candor and in good faith."[9] Moral legitimacy exists when the laws that the Court defends are morally sound and valid (this is something the Court struggled with throughout the nineteenth and twentieth centuries in realizing equality under the law for women and African Americans).[10] Finally, sociological legitimacy refers to the way the public perceives the Court and is particularly at issue in politically charged moments.[11] Tara Leigh Grove—in summarizing Fallon's book—paints the 'legitimacy dilemma' of today's Court as a struggle between its legal legitimacy on the one hand, and its sociological legitimacy on the other.[12]

Grove highlights Fallon's examination of Justice John Roberts' "switch" from a no-vote on the Affordable Care Act to a yes-vote on the Act—in order to preserve the Court's institutional legitimacy—as underscoring the legitimacy dilemma of the Court.[13] Roberts' chief concern in his judicial philosophy is to ensure that his decisions enhance, rather than detract from, the institutional legitimacy of the Court.[14] Fallon sees Roberts' change in vote as exemplary of the struggle between maintaining legal legitimacy and maintaining sociological legitimacy. When a justice "switches," Fallon contends, he or she necessarily sacrifices the Court's legal legitimacy for the preservation of its sociological legitimacy, which Fallon indicates is an unworthy trade-off.[15]

A deeper understanding of Fallon's conception of 'legal legitimacy' is that it functions not only as strict adherence to one's own methodology of constitutional interpretation but provides an alternative avenue to achieving sociological legitimacy. Focusing on Fallon's chief factor, 'internal consistency,' highlights the underpinnings of Fallon's ideal constitutional philosophy: that the exercise of consistency in one's method of constitutional interpretation, coupled with "candor" and "good faith," enables a justice to maintain a level of legitimacy in the

8. *See* Fallon, *supra* note 6.
9. *Id*. at 129–32.
10. *Id*. at 21, 24.
11. *Id*. at 21
12. *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019).
13. *Id*. at 2254–55.
14. *See* Jefferey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, ATLANTIC ONLINE (July 13, 2020), https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/ [https://perma.cc/8BLQ-4GS8].
15. *Id*. at 2269–72.

eyes of the public, even when the public vehemently disagrees with the social outcome of the case.[16] This is why Fallon views the "switch" as an unwarranted sacrifice of legal legitimacy.[17] Fallon's 'dilemma' and his unspoken view of which form of legitimacy should yield to the others illuminates the proper role for the justices of the Supreme Court and provides a window into how to solve the "legitimacy dilemma" of the current Court.

B. LEGITIMACY OF PRESTIGE

The first order of legitimacy for the Court comes from Article III's grant, which vests the judicial power in "one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish"[18]—recognizing the third branch of our federal system. The language of "One *Supreme* Court" (emphasis added) and the Framers' conception of the judicial branch as a trickle-down system—starting with a single Supreme Court and leaving room for the establishment of additional lower courts as Congress would deem necessary—highlights their intention to impart a level of prestige to the judiciary, which they viewed as a necessary ingredient to the Court's legitimacy. Further lending credence to the Court's stature and legitimacy is the extension of its jurisdiction over "all cases in law and equity, arising under [the] Constitution, the laws of the United States and treaties made… under their authority."[19] The jurisdiction of the judiciary as a whole (including the lower courts) is not limited; it encompasses any case or controversy over any alleged violation of a federal statute or the Constitution.[20] The Framers understood that for the Court to properly exercise its role in constitutional interpretation and legal reasoning, and to do so in an independent fashion that would be recognized by the public, its ability to hear cases could not simply be cherry-picked based on the issues deemed salient to lawmakers in the founding era, but rather must be available to any case or controversy of American law. They recognized that a Court with limited ability to settle constitutional disputes on only pre-selected subject matter not only displays a serious lack of confidence in the Court's ability to properly adjudicate those matters but it, in turn, hinders the legitimacy of such a Court. The Framers therefore enshrined the Court's legitimacy in Article III via a broad grant to the judiciary as an uninhibited law-interpreting institution; one vested with

16. *See* Fallon, *supra* note 6, at 146.

17. *Id.* at 2272.

18. U.S. CONST. art. III, § 1.

19. *Id.*

20. Of course, the Supreme Court exercises appellate jurisdiction on nearly all of its cases so it usually will not hear a claim over a seemingly innocuous federal statute, but the Court does retain jurisdiction over *any* subject matter, provided it chooses to exercise that power. *See About the Supreme Court*, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about [https://perma.cc/3H4T-EEAH] (last visited Mar. 20, 2022).

authority to analyze all facets of the Constitution and to adjudicate all controversies arising therefrom.[21]

C. LEGITIMACY OF INDEPENDENCE

Another factor which lends to the Court's legitimacy is the independence of the judiciary from the other two branches of the federal government and from political discourse as a whole. The Court is designed to be removed from the political branches and to be able to exercise independence in its decisions. Federalist 78 goes into detail about the independence of the judiciary and the importance of preserving this essential feature of the judicial branch.[22] The Framers understood that an impartial and autonomous Court is the only institution that could maintain its legitimacy as a body uniquely situated for constitutional interpretation without raising concerns of partisan bias. Article III of the Constitution contains no hint of judicial restraint in the face of adverse public perception, it simply states that "The judicial Power shall extend to *all* cases (emphasis added), in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."[23] That power, as *Marbury* underlined, is the power to exercise independent judicial oversight of the legislative and executive branches without regard for political or societal backlash. *Marbury* highlights the irrationality of a scenario where the Court would be fearful of overturning a legislative act:

> It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed as pleasure.[24]

The Framers' motivation in conceptualizing the judiciary, as well as the picture that Marshall paints in *Marbury*, can be found in Federalist 78. Federalist 78 is best known for Alexander Hamilton's declaration that the Court is, by nature, the weakest of the three federal branches because it carries neither the power of the sword nor the power of the purse.[25] However, Hamilton continues to warn of a stronger judiciary that has no barriers between itself and the other two branches:

> For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers. . .. that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its

21. While the Framers' conceptions of the judicial branch extend to the lower courts as well, the focus of this note is specifically on the Supreme Court.

22. THE FEDERALIST NO. 78 (Alexander Hamilton), https://avalon.law.yale.edu/18th_century/fed78.asp [https://perma.cc/BG3A-VUF2].

23. U.S. CONST. art. III § 1

24. Marbury v. Madison, 5 U.S. 137, 178 (1803).

25. Hamilton, *supra* note 22.

> union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.[26]

Hamilton's fear that the Court will be influenced by either the executive or legislative branch is applicable to less formal political institutions as well; namely, the prevailing views of media elites and the public at large. For a Court that bends to the political will of the majority is no longer serving its function as a check on governance by majority or so-called mob rule. The most indispensable feature of the Constitution is the fact that it is not a pure majoritarian institution of government but rather a representative democracy that incorporates several safeguards to inhibit a populist majority from obtaining absolute power. Indeed, Hamilton goes on to validate the counter-majoritarian dilemma and to lend credence to the Court's ability, and duty, to invalidate laws in conflict with the Constitution:

> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.[27]

Under Hamilton's framework, the Court's responsibility to the people is a byproduct of its responsibility to uphold the Constitution—the people's document.[28] Hamilton's vision of the Court's role not only provides a framework for understanding the relationship of the judiciary vis-à-vis the other branches, but it reveals the recipe for a Court to go awry of its Constitutional grant—a recipe that has been slow cooking for the past eighty-four years.[29] The independence of the judiciary is paramount to preserving its legitimacy as a co-equal branch of government, for a judiciary too weak to invalidate acts of the other two branches is simply a trojan horse, co-opted by another branch of government in an exercise that is repugnant to the structural system of checks and balances.

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26. *Id.*
27. *Id.*
28. *Id.*
29. Since Justice Owen Roberts' 'switch in time that saved the nine.'

D. LEGITIMACY OF EXPERTISE

Finally, the Court also derives legitimacy from strictly following its grant under Article III and *Marbury* to "say what the law is."[30] Although this phrase has been repurposed as an advocation for judicial supremacy,[31] it's power lies in its simplest form; plainly, that the Court's job and it's area of expertise is to interpret the law and the Constitution and to invalidate any law that is in conflict with "the *supreme* law of the land."[32] The message of *Marbury* then is clear: that the Constitution is supreme to all acts of the legislature and that the job of the Court as experts in that arena is simply to interpret the law and determine if it is in accord with the Constitution. Marshall understood that in the event of a statute in conflict with the Constitution—even a very popular statute—"the very essence of judicial duty"[33] is to decide the case in conformance with the Constitution and to disregard the statute, because the Constitution is "superior to any ordinary act of the legislature"[34]—inherently superior to something that, by representation, is supported by the majority of American citizens.

This is not to suggest that just because the justices are the "experts," that they represent the only body of government that can express a constitutional interpretation; President Andrew Jackson's famous veto message clearly militates against that notion.[35] In his message upon vetoing the re-authorization of the charter for the Bank of the United States, Jackson took aim at Chief Justice Marshall's broad reading of the necessary and proper clause[36] in *McCulloch v. Maryland*,[37] writing that "there is nothing in [the Bank's] legitimate functions which makes it necessary or proper. . . ."[38] He asserted that "the Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution."[39] Since Jackson felt, under his own Constitutional interpretation, that the act which re-authorized the Bank's charter (and the original charter of the bank for that matter) had no basis in Article I of the Constitution and could not be exercised under any

30. *Marbury*, 5 U.S. at 177.

31. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (holding that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system").

32. *Marbury*, 5 U.S. at 180 (emphasis in original).

33. *Id*. at 178.

34. *Id.*

35. Official Statement, President Andrew Jackson, Andrew Jackson's Veto Message Against Re-chartering the Bank of the United States, ¶ 9 (1832), https://www.americanyawp.com/reader/democracy-in-america/andrew-jacksons-veto-message-against-re-chartering-the-bank-of-the-united-states-1832/ [https://perma.cc/8MP4-CWQM].

36. U.S. CONST. art. I § 8

37. McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (holding that if the ends are legitimate, the necessary and proper clause grants the legislature the constitutional power to make any law that is within the letter and spirit of the Constitution).

38. Jackson, *supra* note 35.

39. *Id*. at ¶ 8

of Congress' enumerated powers, he exercised his duty of Constitutional decision-making under the "Presentment Clause"[40] and vetoed the bill. But while Jackson's veto is a strong example of departmentalism—the idea that each branch of government is entitled to its own Constitutional interpretation—it does not detract from the legitimacy of the Court as a constitutional interpreter; it merely invokes departmentalism to offer an understanding of the constitutional mindset behind the decision-making of the other branches.

Jackson's message does not suggest that the President nor Congress can simply ignore the ruling of the Court or refuse to execute the law as it is interpreted (as William Baude argues, the President has a duty to obey the judgements of the Supreme Court and can only challenge them if he (or she) believes that the court lacked jurisdiction on a particular matter).[41] Jackson's veto plainly acknowledges the authority of the Supreme Court and the *McCulloch* decision, and in fact legitimizes it by exemplifying the constitutional process for the executive to serve as a check on the judiciary. Jackson's message also underscores the role of each federal branch in our system of checks and balances, namely, that each branch has the power and duty to check the remaining two. Thus, when the President finds that an act of Congress is repugnant to the Constitution, it is the President's right to veto such an act in preservation of the Constitution. Similarly, a Congress that finds that the President or the courts are acting in violation of a Constitutional right or principle has the duty to enact legislation to counter that abuse.

The Court, meanwhile, as an expert body of Constitutional interpreters, has a unique role in checking federal and state abuses of power and unconstitutional legislation. While the Court is not the *exclusive* constitutional interpreter, the Court does have a certain finality to its decisions—its orders are resolute. The Framers understood the importance of a judiciary that could protect the rights of those whose views or interests are not in line with the executive or legislative branch. They therefore vested the Court with the power to overturn Presidential and Congressional acts that conflict with the Constitution and to serve as the last line of defense for the minority party. It is this crucial role in our democracy that allows this unelected "counter-majoritarian"[42] body to remain a legitimate force in our Republic.

But, while the Court enjoys a level of expertise and professional acumen in interpreting the Constitution and statutory construction, the Court's opinions on hot button political disputes and salient social issues fall into neither the purview nor the realm of expertise of the Court. In that regard, the Court holds no advantage of aptitude or proficiency over the public and it should not be their prerogative to assess such concerns. The Court should therefore stick to the sphere of

40. U.S. CONST. art. I § 7

41. *See* William Baude, *The Judgement Power*, 96 GEO. L. J. 1807 (2008).

42. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1986).

Constitutional interpretation where they retain a level of expertise far greater than that of the general public.

Supreme Court justices have extensive legal backgrounds and nearly all of the justices have clerked for a prior justice at the outset of their legal career. Of the current court, all but one of the justices served as a federal appellate judge; the lone exception, Justice Elena Kagan, served as solicitor general for the United States, arguing dozens of cases before the Court, prior to her appointment to the Court in 2009.[43] When it comes to social issues, particularly polarizing ones, the Court claims no such expertise. While the late Justice Ruth Bader Ginsburg served as director of the Women's Rights Project of the ACLU and current Justice Clarence Thomas served as chair of the Equal Employment Opportunity Commission for eight years, they are outliers from the rest of the pack. Typically, Supreme Court justices have not served in the field of civil rights and liberties, but rather in government, private practice, academia, or on the lower courts for the bulk of their careers. Why, then, should nine unelected justices exercise value judgements on areas in which they hold no advantage over the rest of the population? Opening up the Court to such considerations necessarily weakens the legitimacy of the Court as an expert body of constitutional interpretation and casts the Court on a plane in which they carry no extra weight over that of the general public. It is essential then, to the Court's legitimacy, that it exercises its adjudicatory authority only with regard to its area of expertise and does not attempt to incorporate social or societal considerations into its decisions.

II. PLATONIC LEGITIMACY

The tripartite model of legitimacy through prestige, independence, and expertise in which the Court's focus is strictly on constitutional interpretation and in which the barriers between the Court and political discourse are elevated, can be referred to as platonic legitimacy. The term is derived from the colloquial term "platonic relationship" in which two entities enjoy a common bond and favorable regard for one another, but ultimately there is no romantic element to the relationship.

We can view the relationship between the Court and politics (referring to the political will of the executive and legislative branches and the political will of the majority) in largely the same way. The two entities necessarily enjoy a certain bond—appointment by the executive, confirmation by the Senate, and the fact that the justices surely have their own political viewpoints—but the relationship cannot take on the form of a "romantic" one, in which the Court's work becomes motivated, at least in part, by the forecasted political result of a given position. As

43. Even Justice Kagan was appointed to the U.S. Court of Appeals for the D.C. Circuit, but her appointment expired without a vote. *See* Adam Liptak, *Rare Breed Now: A Justice Who Wasn't a Judge*, N.Y. TIMES (Apr. 30, 2010), https://www.nytimes.com/2010/05/01/us/politics/01kagan.html [https://perma.cc/T64V-6PVB].

a legal institution, the Court cannot engage with the political branches like an old married couple, bickering back and forth over their gripes with one another. Ultimately, when the Court has decided that its interpretation of the Constitution forbids a certain act of the executive or the legislative branches, it cannot let the overarching political sentiment invade its sworn duty.

While the Framers' understood that the appointment of the justices by the President with the advice and consent of the Senate would lend itself to justices whose modes of constitutional interpretation were more in line with the appointing party, they envisioned that life tenure would render justices more amenable to buck the will of their appointee and his party.[44] The relationship then, must exhibit barriers between the Court and the legislative and executive branches of the Federal Government as well as the will of the majority; it is when these barriers break down that the justices become mere 'politicians in robes.'[45]

While this principle is enshrined in Federalist 78, in which Hamilton declares that the power of the people is embedded in the judiciary via Article III of the 'people's document'—the document that was formed *by* the people and *for* the people—it has been directly cited by centrist justices of the Court itself.[46] In *Planned Parenthood of Se. Pennsylvania v. Casey*, Justice O'Connor asserted that overturning *Roe* on the basis of its unpopularity would undermine the legitimacy of the Court: "To overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[47] O'Connor proceeds to describe the Court in the same manner in which Hamilton described it in Federalist 78, namely, that the Court is the vehicle of the people with which to exhibit the rights and values that they inscribed in our Constitution.[48] She exclaims: "If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals."[49]

But platonic legitimacy is not only expressed in statements from the founding era and from contemporary justices; there are also rational bases for supporting these barriers between the Court and the political forces. Our justice system is built upon impartiality and ensuring that the rights of the parties to a case are scrupulously protected throughout the proceedings. In jury trials, members of the jury are instructed not to discuss the case upon which they are ultimately going to render judgement with anyone outside of their fellow jurors; juries can even be

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44. As a side note, an alternative process for the installment of Supreme Court justices by election would fare no better; it would lead to campaigns, attempts at public appeasement and would only amount to further partisanship in the judiciary.

45. *See* Danieli Evans, *Are Judges Simply 'Politicians in Robes'?* CONSTITUTION CENTER, (May 5, 2015), https://constitutioncenter.org/blog/are-judges-simply-politicians-in-robes [https://perma.cc/G8T8-FCUC].

46. *See* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 867 (1992) (O'Connor, J.).

47. *Id.*

48. Hamilton, *supra* note 22.

49. *Planned Parenthood*, 505 U.S. at 868.

sequestered if a judge determines that exposure to outside forces such as media or public sentiment may have the effect of influencing a jurors decision. Why then should we not hold judges and justices to the same standard? A neutral arbiter is expected to assess the relevant arguments advanced by either side of a controversy and adjudicate that dispute on the merits of those arguments.

The very first canon of the *ABA Model Code of Judicial Conduct* instructs that "a judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[50] This canon accounts for the reality that a judge will almost certainly have some political affiliation and hold some strong political views prior to their appointment, but directs that a judge sideline those viewpoints to avoid even the appearance of impropriety which could undermine faith in our judicial system. That is the essence of platonic legitimacy. Swiftly after the appointment and confirmation process, a judge must divorce him or herself from the political affiliations and social considerations that he or she may have exhibited over the course of attaining this position and proceed with a commitment to impartiality and a strict focus on interpreting the law. Only then can a court carry itself with the confidence of an unbiased body, not swayed by influential voices advocating for a result based solely on a political consideration. Only when a court imposes barriers between itself and the political branches can true legitimacy prevail.

III. PLATONIC LEGITIMACY AMID CONTEMPORARY THEORIES OF THE COURT

The theory of platonic legitimacy also serves to resolve some of the criticisms of the Court that have been espoused by legal scholars throughout the twentieth and twenty-first centuries.

Several competing views consider what the court's current role in our democracy looks like. Alexander Bickel seeks to reconcile the Court's "counter-majoritarian difficulty" with an independent sense of legitimacy that supersedes what he perceives as a flaw in the Court's construction.[51] As Kenneth Ward attempts to clarify, Bickel doesn't question the overall legitimacy of the Court, he merely highlights the counter-majoritarian dilemma, which he believes necessitates a separate source of legitimacy, so that the Court may counteract this aura of illegitimacy.[52] Ward explains that Bickel attributes the Court's legitimacy to its contribution toward a legitimate government, which balances "(1) private interests, *and* (emphasis in original) (2) the interest citizens share in assigning principles priority over their private interests."[53] In plain terms, this refers to the overall

50. MODEL CODE OF JUD. CONDUCT § 1 (AM. BAR ASS'N 2020).

51. *See* Bickel, *supra* note 42.

52. Kenneth Ward, *Alexander Bickel's Theory of Judicial Review Reconsidered*, 28 ARIZ. ST. L.J. 893 (1996).

53. *Id*. at 894

legitimacy that the Court, as an institution, derives from the American people, regardless of whether they disagree about individual case outcomes.[54]

But Bickel's counter-majoritarian difficulty does not describe a flaw in the system. Rather, it is the central indispensable feature of the system. For the independence of the judiciary from the political branches—those branches which *are* majoritarian—is an embodiment of the people's will to explicitly carve out a role for a non-majoritarian body to preserve, protect and uphold the constitutional rights that they deemed sacred. In forming our Republic, the people sought to make certain rights majority-proof, and thus established the Court as a check on majoritarian abuses of these rights and liberties.

In his book *Democracy and Distrust*, John Hart Ely takes issue with Bickel's theory because he sees it as inviting the Court to supplant the values of the American majority with those of the justices (which Bickel validates)—as long as the Court adheres to some level of 'principle' in coming to its conclusions.[55] Instead, Ely contends that the Court's role is to protect the rights of discrete and insular minorities as well as rights that are not explicitly mentioned in the Constitution.[56] Ely's criticism is consistent with the platonic legitimacy of the Court. The judicial branch is ill-equipped to make value judgements on behalf of the American people; that role remains with the elected officials who represent the ideas and values of their constituents. But Ely's theory does little to account for the inherent values that are recorded in the Constitution—the values upon which the people established the judicial branch as a safeguard against majority erosion. The Court's role then is not to protect the rights of insular and discrete minorities disassociated from politics, it is to protect the essential rights and liberties of *all* citizens from a populist majority seeking to subvert those inherent rights.

Robert Dahl's theory that the Court reflects the dominant views of lawmaking majorities[57] and Barry Friedman's theory of popular constitutionalism[58] both run counter to the platonic legitimacy of the Court. Dahl sees the Court's role as upholding the value of the majority party, asserting that when the party in power is:

> [U]nstable with respect to certain key policies . . .the Court can intervene . . . and may even succeed in establishing policy. Probably in such cases it can succeed only if its action conforms to and reinforces a widespread set of explicit or implicit norms held by the political leadership . . . .[59]

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54. *Id*. at 895.

55. JOHN HART ELY, 58 (1980).

56. *Id*. at 87.

57. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,* 6 J. PUB. L. 279 (1957).

58. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE (2009).

59. Dahl, *supra* note 57, at 294.

Under Dahl's view, the Court mirrors the policy preferences of the President and of popular politicians of the time. This purported role of the Court runs in direct opposition to the Hamiltonian view of Federalist 78 upon which the Court's (platonic) legitimacy is predicated.[60] Dahl's theory suggests that the Court's role is to prop up the majority when they are disorganized or to sanction a law that does not conform with the Constitution—provided it was supported by the legislature; *Marbury* directly addressed such a notion and disposed of it.[61] How can a court remain a safeguard for the fundamental rights that the people chose to inscribe into the Constitution if it undermines those rights in order to assist the majority in carrying out its will? Dahl's theory tosses out the Court's legitimacy in favor of an unwarranted deference to the political branches.

Barry Friedman's theory likewise inhibits the legitimacy of the Court by distilling Constitutional interpretation down into a form of social compromise. Friedman contends that the bedrock of our democracy is a government that seeks to "hear and integrate the voices of many different constituencies," that the Constitution is flexible enough to incorporate the interpretations of ever–changing electorates, and that the Court—in its exercise of judicial review—highlights the appropriate lines of interpretation that are consistent with the popular constituency of the time.[62] Such an approach leads to a Court that operates almost exclusively outside its area of expertise. Reducing the Court to an arbiter and mediator of popular viewpoints necessarily undercuts the legitimacy of the Court by tailoring its job to a form of adjudication in which the justices hold no additional skill or advantage over the general public.

IV. DETRACTORS FROM LEGITIMACY: THE COURT IN THE PUBLIC EYE

A. THE COURT RESPONDING TO POLITICAL WILL

History has shown that justices will sometimes bend to the political will of the other branches of the Federal Government. Justice Owen Roberts famously switched his stance on the new-deal era legislation after FDR's "threat" to pack the Court, in what has been dubbed "the switch in time that saved the nine."[63] While historians disagree as to whether the threat of court-packing was the *true* impetus of Roberts' switch,[64] the switch

60. Hamilton, *supra* note 22.

61. Marbury v. Madison, 5 U.S. 137, 177 (1803).

62. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 578, 629 (1993).

63. *See* Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010). https://law.stanford.edu/publications/did-a-switch-in-time-save-nine/ [https://perma.cc/69J7-4JPB].

64. *See* Barry Friedman, *The Will of the People* 229 (2009) (noting that "More than half a century [after the *West Coast Hotel* decision] scholars still are arguing" over the cause of Roberts' 'switch); *see also* Barry Cushman, *Inside the 'Constitutional Revolution' of 1937*, 2016 SUP. CT. REV. 367, 373–74 (2016) (arguing that Roberts' had already agreed to overrule *Adkins* but since there was no majority to do so in *Tipaldo*, he voted

nonetheless represents a justice's response to the political tides of the time and a dilution of the Court's legitimacy.

The first term of President Franklin D. Roosevelt coincided with the great depression, low wages, mass unemployment and American citizens struggling to put bread on the table. In response, FDR and the Democrat-controlled legislature enacted laws to help combat the depression, and, in so doing, redefined the relationship between the Federal government and the American people. Of these notable legislative acts was the National Industrial Recovery Act of 1933 (NIRA), which sought to set standards for "fair competition" including minimum age requirements, production quotas and limits, and price caps, etc.; the Act was accompanied by the creation of the National Recovery Administration by Executive Order.

On May 27, 1935, the Court struck a blow to the heart of the New Deal program in *A.L.A Shechter Poultry Corporation v. United States*, which invalidated the minimum wage requirements of the NIRA.[65] *Shechter*, the so-called "sick chicken case,"[66] involved a kosher poultry plant that was indicted for eighteen different violations of the NIRA, notably the minimum age and maximum hour requirements of the Act.[67] In a unanimous decision, the Court ruled that Section 3 of the Act—which attempted to grant the Secretary of Labor the power to establish rules and procedures with no pre-established standard—was an unconstitutional delegation of legislative power and thus was void.[68] Additionally, the Court limited the scope of Congress's "commerce power," ruling that intrastate activity that only indirectly effects interstate commerce is beyond the scope of the "commerce power."[69]

The Court's decision in *Shechter Poultry* exemplifies the Court performing its prescribed checking function and invalidating a law that it perceived to violate the structural limitations of Article I.[70] *Shechter Poultry* marked the beginning of a public feud between Roosevelt and the Court, with Roosevelt criticizing the decision and exclaiming that "we have been relegated to the horse-and-buggy definition of interstate commerce."[71]

Another blow to the New Deal legislation came in 1936 in *Carter v. Carter Coal Co.*, where the Court struck down the minimum wage and maximum hours

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with the majority).

65. A.L.A. Shechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

66. *Id.* at 528. One of the allegations of notoriety against the plant was the violation of the prohibition on selling diseased chickens. This led to *Shechter* earning the nickname "The Sick Chicken Case."

67. *Shechter*, 295 U.S. at 524.

68. *Id.* at 550.

69. Here, the activities of Shechter Poultry were entirely intrastate.

70. U.S. CONST. art. I § 8.

71. Official Statement, Franklin D. Roosevelt, Statement on the decision in *Shechter Poultry* (May 27, 1935), https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3450 [https://perma.cc/92LA-AHME].

provisions under the National Bituminous Coal Conservation Act of 1935 as exceeding the commerce power.[72] The Court distinguished between "commerce" and "production," finding that Congress was without authorization, pursuant to the Commerce Clause, to regulate the modes of production of goods via a tax refund. Thus the Act, with its minimum wage, maximum hour and "fair practices" requirements, could not stand.[73]

Shechter Poultry and *Carter Coal* are only two in a line of many cases, dubbed the "*Lochner* era cases"[74] which consistently invalidated administrative and regulatory legislation. The general public sentiment was overtly opposed to the stonewalling of the Supreme Court after the *Tipaldo* case, which invalidated a New York state law that set minimum wage standards for workers based upon the class of service rendered, constituted yet another blow to Roosevelt's agenda at the hands of the Court.[75] 334 out of 344 newspaper editorial articles came out in opposition to the Court's decision.[76] As such, Roosevelt's patience with the Supreme Court wore thin after the election of 1936, leading him to deliver his famous "Fireside Chat" on March 9, 1937 and announce his plan to "pack the court."[77] After the fireside chat, the attitude of the Court shifted, as demonstrated by the switch by Justice Owen Roberts (although the "Four Horsemen"[78] still continued to vote against the New Deal legislation)[79]. On March 29, 1937, the Court decided *West Coast Hotel v. Parrish*,[80] upholding a Washington state minimum wage requirement and overruling *Adkins v. Children's Hospital of D.C.*—which previously invalidated a New York minimum wage requirement for women.[81] Roberts had already secretly expressed a desire to overturn *Adkins* at the time of the *Tipaldo* decision,[82] but ultimately did so now (when his vote would secure the overruling of *Adkins*). Several days later, in *NLRB v. Jones* & Laughlin Steel, the Court voted to uphold the National Labor Relations Act and its protections for unionizing employees, holding that intrastate activities that have such a close and substantial relationship to interstate commerce that their

72. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

73. *Id.* at 318–19.

74. The *Lochner* era refers to the period from the early 1900s until 1937. It begins from around the time of *Lochner v. New York*, 198 U.S. 45 (1905) (in which the Court invalidated a New York maximum hour law as a violation of the Fourteenth Amendment). This period represents an era of the Supreme Court invalidating numerous state regulatory laws which were said to have inhibited the free market.

75. Morehead v. New York ex. rel. Tipaldo, 298 U.S. 587 (1936).

76. Cushman, *supra* note 64, at 376.

77. Fireside Chat, Franklin D. Roosevelt, Fireside Chat on the Plan for the Reorganization of the Judiciary (March 29, 1937), https://millercenter.org/the-presidency/presidential-speeches/march-9-1937-fireside-chat-9-court-packing [https://perma.cc/8DCF-KZQ4].

78. The "Four Horsemen" was the nickname given to Justices George Sutherland, Pierce Butler, James McReynolds, and Willis Van Devanter in reference to the Four Horsemen of the Apocalypse.

79. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

80. *Id.*

81. Adkins v. Children's Hospital of D.C., 261 U.S. 525 (1923).

82. *See* Cushman, *supra* note 64.

control is essential to protect that Commerce from burdens are within the commerce power.[83]

These Court decisions, upholding key features of Roosevelt's New Deal agenda, came as a result of Owen Roberts abandoning the "four horsemen" and switching his vote in response to the pressure of the political branches, particularly the executive branch.[84] Roberts' acquiescence to Roosevelt undermined the legitimacy of the Court as it served as a form of allegiance between the Court and the will of the executive and disrupted the platonic legitimacy of the Court. It seems highly unlikely that Justice Roberts had an epiphany overnight as to the meaning of the Commerce Power that so rapidly changed from its interpretation in *Shechter* and *Carter*. Rather, Roberts' submission to Roosevelt's court-packing threat highlights the specific abuse that Hamilton warned of in Federalist 78 and shifted the Court from the least dangerous branch—one that serves as merely a check on executive and legislative abuses of power—to an institution that served as an arm of the majority party to ensure that the party agenda could pass uninhibited.

B. THE COURT RESPONDING TO PUBLIC PERCEPTION

The justices' responses to popular public sentiment likewise detracts from the Court's legitimacy. The most recent example of this is Chief Justice John Roberts' switch in *NFIB v. Sebelius*.[85] In the wake of the passage of the Affordable Care Act, many Republican lawmakers criticized the Act as unconstitutional and beyond the legislative grant of Article I Section 8's enumerated congressional powers.[86] Some would later go to great lengths in an attempt to filibuster funding for the bill.[87] Two years later, the law was challenged by the National Federation of Independent Business and twenty-six states sued the federal government over the Act. After oral arguments in the case, President Obama held a press conference urging the Court to exercise judicial restraint:

> I just remind conservative commentators that for years we have heard the biggest problem on the bench was judicial activism or a lack of judicial restraint. That an unelected group of people would somehow overturn a duly constituted and passed law. Well, this is a good example, and I am pretty confident that this Court will recognize that and not take that step. . . . As I said, we are confident this will be over—this will be upheld. I am confident this will be upheld because it should be upheld. And again,

83. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

84. *See* Fireside Chat, Franklin D. Roosevelt, *supra* note 77.

85. National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

86. *See* U.S. CONST. art. I § 8.

87. *See* Megan Fitzpatrick, *Why Ted Cruz Read Green Eggs and Ham in the U.S.* Senate, (Sept. 25, 2013), https://www.cbc.ca/news/world/why-ted-cruz-read-green-eggs-and-ham-in-the-u-s-senate-1.1867499 [https://perma.cc/PC57-P3MJ].

> that is not just my opinion. That is the opinion of a whole lot of constitutional law professors and academics and judges and lawyers who have examined this law, even if they're not particularly sympathetic to this piece of legislation or my presidency."[88]

In response, the Fifth Circuit ordered the Federal Government to issue a declaration letter, which would declare that the Court has the power of judicial review and specifically address President Obama's public comments.[89] The government complied, but in a small act of defiance, it also indicated that the Court should exercise deference to the elected officials who passed the law.[90] Public polling between the time the oral arguments were heard and the time when the decision was released revealed that only forty-four percent of the public approved of the Court's job, a drop of over twenty points since the late 1980s.[91]

Justice Roberts, a man who has continuously described his role as Chief Justice as one of upholding the institutional legitimacy of the Supreme Court,[92] was likely attentive to this shift in public perception. Roberts' position is that upholding the Court's legitimacy involves making it clear that "[w]e're not politicians; we're judges, we're a court, and we're going to work real[ly] hard to be a court—partly because we don't like people thinking we're not."[93] But that philosophy doesn't warrant an abandonment of one's method of constitutional interpretation and a switch in one's vote, simply to signal to the public that the justices are bucking the position of the party who appointed them.

Yet, when the Court ultimately voted on the constitutionality of the Act, Roberts sided with his more liberal colleagues in upholding the law on the basis of the Taxing power.[94] Soon after, it was reported that the Chief Justice had originally intended to vote to strike down the ACA, but subsequently switched his vote in consideration of the societal ramifications of striking down the signature legislative achievement of an opposing party's president.[95] While the press applauded Roberts for "saving the Court from

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88. Andrew Cohen, *For Barack Obama, Law Professor, the Time to Lecture Is Now*, ATLANTIC ONLINE (Apr. 4, 2012), https://www.theatlantic.com/politics/archive/2012/04/for-barack-obama-law-professor-the-time-to-lecture-is-now/255396/ [https://perma.cc/S2PR-LTGQ].

89. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION 10 (2017).

90. Letter from Attorney General Eric Holder to Judges Smith, Garza, and Southwick, at 1–3 (Apr. 5, 2012), https://legaltimes.typepad.com/files/doj_letter_smith.pdf [https://perma.cc/234F-RXYC].

91. Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in Poll*, N.Y. TIMES (June 8, 2012), at A1.

92. *See* Rosen, *supra* note 14.

93. Jeffrey Rosen, *Roberts's Rules*, ATLANTIC, Jan./Feb. 2007, at 111.

94. *See National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (Roberts, J.).

95. Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012), https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/ [https://perma.cc/D65X-XJNS].

the stench of extreme partisanship,"[96] his switch was, to the contrary, emblematic of judicial partisanship. Roberts' failure to divorce politics from his constitutional assessment of the Act *decreases*, not enhances, the legitimacy of the Court. The media's praise just serves to underscore their role in perpetuating the politicization of the judiciary.

Roberts' public "institutionalist" position on the Supreme Court and constitutional interpretation has chipped away at the barriers of separation that the Court has traditionally enjoyed. These barriers are implicit in the Constitution's provision of lifetime tenure for good behavior for the justices, which serves to preserve the independence of the judiciary as a bulwark against unconstitutional overreach by the political branches. Yet, Justice Roberts' philosophy has skirted this mandate and risks painting the Court as another political branch of government that makes calculated political decisions. It should come as no shock then, that politicians came to view the Court this way as well.

In March 2020, at a pro-abortion rally, then Senate Minority Leader Chuck Schumer unleashed his fury at the prospect of the Court upholding a restrictive Louisiana abortion law: "I want to tell you, Justice Kavanaugh and Justice Gorsuch, you have unleashed a whirlwind, and you will pay the price.[97] You won't know what hit you if you go forward with these awful decisions."[98] Chief Justice Roberts publicly admonished the Senator, noting that "statements of this sort from the highest levels of government are not only inappropriate, they are dangerous."[99] He finished by adding that "all members of the Court will continue to do their job, without fear or fervor, from whatever quarter."[100] Perhaps the Senate Minority leader's comments awoke the Chief Justice to the reality of the beast that he cultivated and a change in his judicial philosophy is on the horizon—only time will tell.

In October 2021, ahead of the new term that would see the Court decide the constitutionality of the controversial Texas abortion law, Justice Sotomayor told a group of law students that "there is going to be a lot of disappointment in the law . . ." and encouraged the students to "go out there

96. Linda Greenhouse, *A Justice in Chief*, N.Y. TIMES OPINIONATOR (June 28, 2012), https://opinionator.blogs.nytimes.com/2012/06/28/a-justice-in-chief/ [https://perma.cc/J676-F3H3].

97. *See* Ian Millhiser, *The Controversy over Chuck Schumer's Attack on Gorsuch and Kavanaugh, Explained*, VOX (Mar. 5, 2020), https://www.vox.com/2020/3/5/21165479/chuck-schumer-neil-gorsuch-brett-kavanaugh-supreme-court-whirlwind-threat [https://perma.cc/NSQ5-NC87].

98. *Id.*

99. *See* Jan Wolfe & Lawrence Hurley, *U.S. Chief Justice Slams Schumer for 'Dangerous' Comment on Justices in Abortion Case*, REUTERS (Mar. 4, 2020), https://www.reuters.com/article/us-usa-court-abortion-scene/u-s-chief-justice-slams-schumer-for-dangerous-comment-on-justices-in-abortion-case-idUSKBN20R2KX [https://perma.cc/5UY4-54SG].

100. *See id.*

and be lobbying forces in changing laws that you don't like."[101] The Justice continued, admitting that her comments were unusual and borderline inappropriate: "I am pointing out to that when I shouldn't because they tell me I shouldn't, but my point is that there are going to be a lot of things you don't like" that the public can change.[102] While Sotomayor's comments were certainly not egregious in any way, they were emblematic of the intimate relationship that the justices have to politics and their personal perspective on salient social issues. The justice's comments were exemplary of the eroded barriers between the Court and the realm of politics.

C. THE INFLUENCE OF THE ELITES

Neal Devins and Lawrence Baum have modified Barry Friedman's view of the Court as tracking popular opinion over time. Devins and Baum assert that while the Court's decisions are in line with the prevailing popular opinion of the country, what they are really doing is responding to the wills of the elites. Devins and Baum posit that the views that the public espouses (and the Court's perception of the temperature of the public on particular issues) are framed by societal elites, who learn about the Supreme Court's cases through media elites as well as from others in the sphere of higher education.[103] Lending credence to Devins' and Baum's approach is the fact that the justices' perception of public opinion is largely shaped by the dozens of amicus curiae that they consume, which are, of course, written by legal elites.[104] In further support, Devins and Baum conducted a study on salient social issue cases between 1964 and 2008, which demonstrated that the views of the Court match the opinions of those with post-graduate degrees on average over fifty-three percent of the time, while only aligning with the opinions of the 'less educated' on average approximately thirty-three percent of the time.[105]

Devins and Baum suggest not only that the Court's assessment of public will is based upon a reading of the tea leaves of our society's elite class, but that the Justices themselves (and undoubtedly their opinions) are influenced by this powerful social force that imparts a particular ideology upon the bench. To this effect, famed economist Thomas Sowell coined the term "the [G]reenhouse effect" to explain what he perceived as the influence of the liberal-leaning news media on the justices; the term was a reference to

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101. *See* Ariane de Vogue, *Justice Sonia Sotomayor: 'There's Going to be a Lot of Disappointment in the Law, a Huge Amount,*' CNN (Oct. 7, 2021), https://www.cnn.com/2021/09/29/politics/sonia-sotomayor/index.html [https://perma.cc/ZK63-DA6Q].

102. *See id.*

103. Lawrence Baum & Neal Devins, *Why the Supreme Court Cares about Elites, Not the American People*, 98 GEO. L.J. 1515 (2010).

104. *Id.* at 1566–67.

105. *See id.* at 1570–72.

Linda Greenhouse, a long-time, prominent Supreme Court reporter for the New York Times who he believed had attempted to use her reporting to push the justices in a liberal direction.[106] Sowell is not the lone conservative in history to express concern about the influence of the liberal-leaning media and liberal-leaning legal scholarship on the justices. In fact, even before Sowell came up with the "greenhouse effect" President Nixon had hypothesized the same and reached the conclusion that Justice Potter Stewart had been "overwhelmed by the Washington-Georgetown social set," prompting concern over the fates of his own appointees in this regard.[107]

Whether or not Sowell is right about the influence of the elites being largely liberal leaning, the outside influence by media and legal elites threatens the legitimacy of the Court by placing the powerful influence of media personalities and legal scholars before the sightlines of the justices. These efforts of influence place a burden on the justices to ignore—aside from consideration of their legitimate constitutional arguments—the chatter of cable news, the op-eds by legal elites and the lobbying endeavors of interested parties. Ultimately, however, it is the job of the Court to rise above these forces, to withstand the pressure of these persuasions, and to rule on the strict constitutionality of the case or controversy before the bench.

CONCLUSION

The legitimacy of our nation's highest court is in jeopardy, not because of the hardball tactics used by the Republican-controlled Senate in the confirmation hearings (or lack thereof) of the last four appointments to the Court, but because of the moments of platonic illegitimacy that have breached the barrier between the judiciary and the political branches. The cries of illegitimacy and threats to pack the Court emanating from some on the left are premature. Platonic legitimacy recognizes that the appointment of justices is a political process and that presidents will select those who they believe will follow in their preferred constitutional approach. What matters, however, is the behavior of the justices after they are confirmed. It may well be that in due course, those justices who were swiftly and strategically confirmed by the Republican senate—to ensure a conservative majority on the Supreme Court—will skirt their mandate of strict constitutional interpretation and engage in politically-driven decision making. For now, however, these justices (perhaps knowing the controversial nature of their

106. *Id.* at 274; *see also* Laurence Silberman, Circuit Judge, Speech Delivered to the Federalist Society (June 14, 1992), *in Attacking Activism, Judge Names Names*, LEGAL TIMES (June 22, 1992) at 14.

107. *See* JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT, 171 (2001).

confirmation process) have stayed quiet and have shown little indication of being influenced by political actors and societal considerations.

If the Court is to retain its legitimacy, it must reinstitute the barrier between itself and the political realm, and the justices must stay out of the limelight and avoid the sort of relationship with the political branches that has allowed them to be drawn out by political actors. For many, the Court is just a repository where various politicians in robes go to finish their careers, but perhaps a return to the Court's initial power of purely independent judicial review will restore the public confidence in the Court as a branch committed to upholding the essential values enshrined in our Constitution.