# THOMAS M. COOLEY BOOK PRIZE & SYMPOSIUM

## Practice-Based Constitutional Law in an Era of Polarized Politics

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ABSTRACT

*We might reasonably think that both descriptive and normative legitimacy for a court that interprets a constitution and rules on the validity of deeply controversial issues of public policy are rooted in such neutral factors as whether judges are acting in good faith and constructing arguments using recognized legal modalities. Unfortunately, in a highly polarized, partisan environment, such efforts at neutral decisionmaking are likely to be dismissed by partisan opponents, and judicial decisions are likely to be evaluated by the cruder metric of substantive alignment with the observer's own policy preferences. In an era of polarized politics, even judges deliberating in good faith may come to be perceived as illegitimate if they reach the "wrong" conclusions about high-profile, contentious constitutional issues.*

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### INTRODUCTION

Judicial legitimacy is not easy to maintain. Professor Richard Fallon's *Law and Legitimacy in the Supreme Court* takes that challenge seriously. It explores the conceptual underpinnings of the Court's work as it interprets the law and resolves hard constitutional disputes. The book tries not only to make sense of what the Court does but also to offer guidance for what the Court should do. To Fallon's great credit, his thinking about what guidance to offer the Justices takes

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into account not only our normative concerns about how morally and politically difficult issues should be resolved but also our institutional concerns with how to maintain the political legitimacy of the institutions that try to grapple with these contentious issues. In this essay, I first lay out Fallon's understanding of a "practice-based constitutional law" and its relationship to problems of moral and sociological legitimacy. I then consider the particular challenges for such a judicial practice in our current political environment of deep political disagreement.

## I. PRACTICE-BASED CONSTITUTIONAL LAW

Fallon's account of constitutional law builds intriguingly on a broader philosophy of law that bridges descriptive and normative concerns and unpacks the challenges of maintaining legitimacy in a constitutional order. The project takes seriously the challenge of how to distinguish between judicial decisions that we think are incorrect and yet authoritative and those that we think are not just wrong but illegitimate. It likewise attempts to situate the Court within a decisionmaking framework that is simultaneously positive and normative, which is both legal and value-laden. The Justices must exercise a constrained discretion, but even their discretionary choices are subject to evaluation on the basis of norms and standards. It is worth laying some of this conceptual apparatus on the table.

There are three distinct senses of legitimacy that are relevant for understanding constitutional law. Sociological legitimacy is a factual feature of the world. It is concerned with the "prevailing public attitudes toward government, institutions, or decisions" and how people operating within a given political and legal system descriptively think about or respond to political actions.[1] In the context of a de facto legal system that is functioning and exercising governing authority over a group of individuals within its territory, sociological legitimacy adheres when those individuals subject to that legal regime believe that the legal system deserves respect and provides reasons other than self-interest for obedience to its dictates.[2] Legitimacy in this sense involves the "widespread belief . . . that an order is obligatory or exemplary" and additionally "is a reason for action."[3]

The idea of moral legitimacy appeals not to descriptive facts about the world as it is but to normative claims about how the world should be organized. Moral legitimacy is not concerned with what government officials or the average citizen believes but rather is concerned with what they ought to believe. Moral legitimacy asks whether people ought to obey the law and "whether governmental officials are morally justified in coercing compliance."[4] Fallon argues that government officials have a moral obligation both to satisfy some minimum condition of justice in order to be "good enough to deserve support or respect" and to

1. RICHARD H. FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018).
2. *See id*. at 23.
3. Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 382 (1983).
4. FALLON, supra note 1, at 23.

strive to move the regime closer to an ideal of justice, while recognizing that in practice the state is always likely to fall short of the ideal.[5]

In addition, Fallon argues that particular judicial decisions should be measured against a standard of legal legitimacy. The legal system as a whole rests atop an assessment of its moral legitimacy.[6] Within that legal system, however, individual decisions should not generally be assessed directly against a standard of moral legitimacy. Rather, we should ask whether a given decision is consistent with existing "constitutional and legal norms."[7] In the ordinary course of business, judges ought to be interpreting and applying the legal rules, including the Constitution, that are part of a morally legitimate legal system. Those individual decisions claim legitimacy because of their relationship to that overall legal system rather than because they are independently capable of meeting the requirements of a theory of justice. Judges, in the first instance, should be asking what the law is, not what is just.

Evaluating whether judges are behaving in a legitimate fashion ultimately requires taking into account multiple considerations. We must ask whether judges "stay within the bounds of law," "exhibit good or at least reasonable practical and moral judgment," and advance arguments "in good faith."[8] Put somewhat differently,

> claims of judicial illegitimacy suggest that a court (1) decided a case or issue that it had no lawful power to decide; (2) rested its decision on considerations that it had no lawful authority to take into account or could not reasonably believe that it had lawful authority to consider; or (3) displayed such egregiously bad judgment that its ruling amounted to an abuse of authority, not a mere error in its exercise.[9]

Reasonable disagreement is endemic to constitutional law. Claims of judicial illegitimacy cannot rest on simple disagreement with what a court has done. Courts can be wrong without being illegitimate. Moreover, we must accept the fact that we are not all likely to agree when a court is wrong. We should expect that the courts will sometimes, perhaps oftentimes, get the law wrong, from our own perspective. Illegitimacy starts to creep in when courts err in ways "that we should not have to expect" and ultimately, if repeated, "perhaps ought not tolerate."[10]

This all might be relatively straightforward in the bulk of the cases resolved by the courts, but for at least an important subset of constitutional cases decided by the U.S. Supreme Court, traditional sources of legal meaning will be insufficient

5. *Id*. at 28, 35.
6. *Id*. at 35.
7. *Id*.
8. *Id*. at11.
9. *Id*. at 40.
10. *Id*. at 39.

to resolve the controversy. In such cases, the Court has a "Janus-faced" responsibility. It "has a backward-looking obligation to obey and enforce the Constitution in resolving current-day disputes."[11] But it also has a "forward-looking" obligation to consider "substantive justice and procedural fairness," so as to "produce more or less normatively desirable outcomes for the future."[12] We might think that this two-step responsibility of the Court mirrors the two-stage process of constitutional elaboration captured by the interpretation-construction distinction, where construction involves the exercise of "partly independent normative judgment about how best to render determinate what the language [of the constitutional text] left uncertain."[13] (We might quibble over whether the process of construction should necessarily be thought of as a "judicial function" that the "Justices must exercise," but we will come back to that.)[14]

If judicial legitimacy hinges on the court restricting itself to deciding issues it has the "lawful power to decide" and making use of considerations that it has the "lawful authority to take into account," then that obviously raises the question of what types of considerations a court has lawful authority to take into account.[15] On this front, Fallon is among a group of theorists sometimes characterized as constitutional pluralists. This group of theorists, in the words of Stephen Griffin, "hold that there are multiple legitimate methods of interpreting the Constitution."[16] Pluralist theories of constitutional interpretation gain particular traction along a "descriptive-explanatory" dimension in that they can credibly claim to describe and explain "the actual process of constitutional interpretation."[17] Philip Bobbitt famously constructed a "typology of the kinds of arguments one finds in judicial opinions, in hearings, and in briefs," contending that this typology formed a kind of "legal grammar that we all share."[18] While various academic theorists might prefer to elevate a single type of constitutional argument to a place of priority, the judicial practice has generally been characterized by a myriad of different types of legal arguments. Notably, however, this typology of the "legitimate methods of constitutional interpretation" is both variegated and bounded.[19] Our legal grammar recognizes several different constitutional "modalities," but it also excludes some kinds of claims as outside the bounds of proper legal argumentation.[20] Some kinds of considerations are not among those that an American court has the "lawful authority to take into account" when seeking to determine what the Constitution requires.[21]

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11. *Id*. at 44.
12. *Id*. at 82, 44.
13. *Id*. at 43.
14. *Id*.
15. *Id*. at 40.
16. Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753 (1994).
17. *Id*. at 1756.
18. PHILIP BOBBITT, CONSTITUTIONAL FATE 6 (1982).
19. Griffin, *supra* note 16, at 1753.
20. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11 (1991).
21. FALLON, *supra* note 1, at 40.

Fallon here uses the notion of a practice-based theory of constitutional law to bridge the gap between the descriptive and normative dimensions of the pluralist accounts of American constitutional discourse. Pointing to H.L.A. Hart's positivist theory of jurisprudence, Fallon emphasizes that "foundations of our constitutional order lie in sociological phenomena of acceptance."[22] The law simply is what government officials accept as that which provides a reason for action and ground for criticism.[23] The legal system in this sense has sociological legitimacy in that it provides independent reasons for action, and consequently, it is adherence to law in this sense that provides legal legitimacy for judges. We accept judicial decisions as legally appropriate so long as they operate within the terms of the conventional legal grammar, but we find them illegitimate to the extent that they attempt to rely on a different set of argumentative modalities.

Fallon argues that constitutional jurisprudence is a "practice," in that it is an example of an activity that is "constituted by the convergent or overlapping understandings, expectations, and intentions of multiple participants."[24] More particularly, American constitutional law is "constituted by the shared understandings, expectations, and intentions of those who accept the constitutional order and participate in constitutional argument and adjudicative practice."[25] As John Rawls defined it, a "practice" is a distinctive "form of activity specified by a system of rules" that give the "activity its structure."[26] Rules provide the essential "stage-setting" for a practice, for they make actions meaningful within the confines of the practice.[27] John Searle characterized such "stage-setting" rules as "constitutive," in that they "constitute (and also regulate) forms of activity whose existence is logically dependent on the rules."[28] Rules of practice provide a framework within which a set of meaningful actions can take place. Like Bobbitt's "legal grammar," the rules of practice constitute the activity that we recognize as constitutional adjudication.

Notably, Fallon identifies a set of "practice-based rules" that characterize what the Justices "do from a sense of obligation" when engaging in constitutional adjudication.[29] These practice-based rules are distinct from the available modalities of legitimate constitutional argumentation. They might be characterized as more foundational than constitutional discourse itself, or at least more foundational to the practice of constitutional adjudication in American courts. These rules include such items as acknowledgment of the "paramount authority of the Constitution," maintenance of "reasonable stability in constitutional doctrine,"

22. *Id*. at 87.
23. *Id*. at 86 (characterizing H.L.A. HART, THE CONCEPT OF LAW (2nd ed., 1994)).
24. FALLON, *supra* note 1, at 88.
25. *Id*.
26. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 n.1 (1955).
27. *Id*. at 23.
28. John R. Searle, *How to Derive "Ought" from "Is*," 73 PHIL. REV. 43, 55 (1964).
29. *Id*. at 97.

and the resolution of constitutional indeterminacies by reference to "both backward- and forward-looking legitimacy concerns."[30]

## II. POLARIZED POLITICS AND PRACTICE-BASED CONSTITUTIONAL LAW

Politics is, in part, about worldbuilding. We collectively construct our understanding of how the world works, what ails us, and what remedies might be available. We collectively construct our sense of identity and our sense of belonging. We build narratives about our history and our future. We argue over our ideals, aspirations and values.

Judges are participants in that process of worldbuilding, but they are also affected by the worldbuilding efforts of others. Robert Cover emphasized the extent to which the formal construction of a normative universe through law creates both opportunities and challenges for judges. As he noted, "no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[31] The "creation of legal meaning," what Cover dubbed "jurisgenesis," is a collective, cultural and political process, and not a narrowly legal one.[32] Judges might be able to marshal the power of the state to support their claims, but there is only so much they can do to control the development of legal meaning. There is "a radical dichotomy between the social organization of law as power and the organization of law as meaning."[33] The social force of legal meaning is "radically uncontrolled" in that the patterns of meaning that give authoritative force to the law are contested across the societal landscape.[34]

That process of jurisgenesis can have radically destabilizing effects. The normative foundations of the law can shift under the Justices' feet. What once was accepted as both true and right might come to be rejected as fundamentally unjust and illegitimate. The politics surrounding the Court is in part a politics aimed at shifting the terms of constitutional debate.

Jack Balkin has emphasized that the lesson of constitutional historicism is that the extent to which particular constitutional claims seem reasonable or unreasonable depends on a broader social, political and cultural context that gives life to those claims. What is reasonable "depends on the practice of persuasion in public life, the institutions of public thought and expression, and the gradual development of public values and public opinions."[35] Constitutional ideas that once seemed off the wall can be put on the table through "acts of persuasion, norm contestation, and social movement activism."[36]

Balkin's historicist constitution shares a core feature with Fallon's view of constitutional law as a social practice. They both emphasize that constitutional

30. *Id*. at 99, 101.
31. ROBERT COVER, NARRATIVE, VIOLENCE, AND THE LAW 95–96 (1st ed. 1993).
32. *Id*. at 103.
33. *Id*. at 112.
34. *Id*. at 111.
35. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 12 (2011).
36. *Id*. at 12.

interpretation is less of a "decision procedure" than "a common language that allows people with very different views to reason together."[37] The Constitution maintains its relevance and legitimacy to the extent that it can serve as "a common platform for arguing."[38] Such a constitution is less about *telling* us what to do than about providing the means by which we can *argue* about what to do.

It is important to note that *successful* constitutions provide a common platform for arguing. A successful constitution is one that can serve as a bridge between the contesting sides across a political chasm. To serve as a bridge across political divides it must be "ours," but for it to be normatively compelling each side must also be able to understand it to be "theirs." For there to be a common constitutional project, "people on different sides of the constitutional disputes . . . must be able to express their values and ideals in terms of the Constitution's text and principles."[39]

This, of course, raises the specter of constitutional failure. As Mark Brandon notes in his study of the American secession crisis, "a constitution 'succeeds' as long as it *maintains* order or *sustains* conversation."[40] It fails, however, if the common conversation cannot be sustained. Constitutional failure, in this sense, might arise because some refuse to engage in the constitutional game at all and prefer to exert power unconstrained by any concern with constitutional niceties. It might arise because some decide that they simply cannot see themselves in the text and principles of this constitution. If the values and aspirations that animate the political community cannot be expressed through the terms of the constitution, then the constitution is likely to lose legitimacy and authoritative force. Politics will become unmoored from the constitution.

It is also possible that the shared constitutional project might fail because there is not enough held in common to continue. A shared constitutional text might paper over differences that are so severe that the different members of the community no longer recognize themselves as engaged in a shared constitutional conversation. If a constitution provides both "a language of criticism and a language of justification," then the criticisms must sting and the justifications must not ring hollow.[41] The worry is that we might all be able to use the common materials found in the Constitution to construct elaborate political projects filled with meaning but that there are few points of contact between those projects. We might seem to speak the same language, but we talk past each other rather than with each other.

It was once possible in the United States to find a substantial number of liberal Republicans and conservative Democrats, and as a consequence, the parties were internally fragmented along ideological lines. The parties were by necessity big-

37. JACK M. BALKIN, LIVING ORIGINALISM 136 (2011).
38. *Id*. at 134.
39. *Id*.
40. MARK E. BRANDON, FREE IN THE WORLD 141 (1998).
41. BALKIN, *supra* note 37, at 136.

tent coalitions that made a range of appeals to draw in politicians, interests, activists and voters who held some things in common but disagreed about a great deal. On given policy issues, bipartisan coalitions were both possible and desirable. Congress organized itself along party lines for some purposes, but individual members of Congress frequently reached across the partisan aisle to seek allies to advance their favored policies. That is much less true today.

There is little question that our contemporary politics is polarized.[42] The lingering questions are really about why and how badly American politics is polarized. Disagreements in American politics are now largely organized along the divide between the two major political parties. Members of Congress less and less often find points of shared interest with their colleagues who hail from the other party.[43] They vote with their partisan allies and rarely have reason to vote with their partisan foes. Issue positions are increasingly aligned, such that knowing the party label for a member of Congress is enough to allow one reliably to predict that member's stance on a host of controversial but seemingly unrelated policies. Voters have sorted themselves into ideologically coherent coalitions.[44] Voters, like politicians and activists, select policy positions as a package rather than a la carte. Voters might not like to identify with either political party, but they tend to reliably support one party or the other.[45] Relatively few politicians are ideological mavericks; relatively few voters are swing voters.[46] Politicians and activists might be more extreme in their policy positions than most voters, but they can still count on their more moderate constituents to have a greater affinity with the elites of their own party than the elites of the opposition party.[47] Those who pay attention to, engage in, and succeed in politics do not display ideologically muddled commitments. They understand the party line, and they mean to toe it.[48]

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42. *See, e.g.*, NOLAN MCCARTY, POLARIZATION (2019).

43. SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS (2008).

44. MATTHEW LEVENDUSKY, THE PARTISAN SORT (2009); ALAN ABRAMOWITZ, THE DISAPPEARING CENTER (2010).

45. Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35 (2000); John Richard Petrocik, *Measuring Party Support: Leaners are not Independents*, 28 ELECTORAL STUD. 562 (2009); Alan I. Abramowitz & Steven W. Webster, *Negative Partisanship: Why Americans Dislike Parties but Behave Like Rabid Partisans*, 39 ADV. POL. PSYCH. 119 (2018).

46. ALAN ABRAMOWITZ, THE DISAPPEARING CENTER 84 (2010); Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 AM. J. POL. SCI. 365 (2017).

47. Geoffrey C. Layman et al., *Activists and Conflict Extension in American Party Politics*, 104 AM. POL. SCI. REV. 324 (2010); Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics* 10 PERSP. POL. 571 (2012); Danielle M. Thomsen, *Ideological Moderates Won't Run: How Party Fit Matters for Partisan Polarization in Congress*, 76 J. POL. 786 (2014).

48. Delia Baldassarri & Andrew Gelman, *Partisans without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOC. 408 (2008); Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. POL. 1 (2009); Robert N. Lupton et al., *Political Sophistication and the Dimensionality of Elite and Mass Attitudes, 1980–2004*, 77 J. POL. 368 (2015); Joshua P. Darr & Johanna L. Dunaway, *Resurgent Mass Partisanship Revisited: The Role of Media Choice in Clarifying Elite Ideology*, 46 AM. POL. RES. 943 (2018).

The polarization is not limited to the electoral arena. Our judges and our constitutional discourse are similarly polarized. This should come as no surprise given the close connection between American constitutional politics and American politics broadly. Constitutional issues can be sorted and packaged into ideological units as readily as other policy issues. The political parties offer competing constitutional positions to the electorate, and as with other issues, the parties have found it in their interest to stake out constitutional positions that emphasize the contrasts with their partisan foes. The constitutional issues resolved by judges generally cut along, rather than across, conventional party lines.[49]

Federal judges might not stand for election, but they are selected through a political appointment process that keeps them tethered to partisan political forces. Presidents nominate and senators confirm their political allies to the bench, not their political antagonists.[50] To the extent that the two political parties are ideologically homogeneous, drawing judges from the ranks of those party members will recreate partisan polarization on the bench. To the extent that judges are drawn from the politically active elite, they will tend to reflect the ideological extremity and reliability that is characteristic of political elites. Judges, like everyone else, will find themselves most often in agreement with their fellow partisans, and they will often find themselves at loggerheads with their colleagues of a different partisan persuasion.

What does this mean for our shared practice of constitutional law? Nothing good, I suspect. At one level, political polarization, even about constitutional issues, might not matter much. What Fallon calls his "relatively architectonic rules of constitutional practice that constitute law binding in the Supreme Court" are fairly insulated from ordinary politics.[51] Even in a polarized political environment, judges are likely to accept the "paramount authority of the Constitution," to prefer legal stability, and to strive to resolve cases with reference to "both backward- and forward-looking legitimacy concerns."[52] Although American politics is quite polarized—and there are surprisingly mainstream forces advocating for significant constitutional reform—there does not appear to be a significant movement to simply reject the paramount authority of the Constitution (though calls for Court-packing to create a politically pliant judiciary is not far removed from calls to simply ignore politically inconvenient constitutional rules). Everyone prefers to continue to govern by reference to this document, though they might have a long list of changes that they might like to make to that document.

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49. NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP (2019); THOMAS M. KECK, JUDICIAL POLITICS IN POLARIZED TIMES (2014); Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661 (2013); H.W. Perry, Jr. & Lucas A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMM. 641 (2009).

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

51. FALLON, *supra* note 1, at 98.

52. *Id*. at 98, 101.

At a less abstract plane, political polarization might have substantial consequences for the shared practice of constitutional law. Recall that Fallon believes that claims that the courts were behaving illegitimately would gain more traction if observers believed that judges were deciding cases they should not be deciding, were acting on inappropriate considerations, or were displaying egregiously bad judgment.[53] This is much more slippery language and entails a set of concerns that are much harder to disentangle for ordinary political disagreements.

At a relatively sophisticated level, political debate about constitutional matters is in part a debate about what should count as inappropriate considerations for judicial decisionmaking. Political debates might also shape the constitutional grammar itself. What, if any, weight should considerations of stare decisis or moral values or historical practice have when considering the constitutionality of a governmental action? Is a Holmesian appeal to the organic development of the Constitution an appropriate move in the constitutional game? Is a Kennedy-esque call to look to foreign precedents when interpreting the American constitutional text an abuse of the judicial role? Is a stubborn unwillingness to look beyond the original meaning of a constitutional provision judicial malpractice?

Political debates also shape what substantive constitutional claims should be regarded as unreasonable and off-the-wall. Perhaps some off-the-wall legal conclusions can be marked up as simply erroneous, but depending on their significance and frequency they might instead be held up as beyond the pale. It is possible that partisan critics might think that an argument that they find incredible is nonetheless offered in good faith, but that position seems increasingly difficult to sustain in the current political environment. It is all too easy to think that when your ideological opponents are making arguments that you find to be outlandish that you will conclude that they are no longer attempting to be good-faith constitutional interpreters. Fallon tries to caution us to resist such a rush to judgment. In particular, he urges us to trust that our opponents are acting in good faith if they are at least being "methodologically consistent" (though he notably rephrases that language to the more uncertain language of adhering "consistently to reasonable positions"—what are we to do with a Justice who consistently adheres to an unreasonable position?).[54]

It seems likely that the average citizen is not overly concerned with the details of constitutional argumentation and is much more concerned with the bottom line of whether a court supports the citizen's own policy preferences. The average American does not have much direct exposure to judicial opinions and has limited information on which to base an evaluation of the legitimacy of what a court has done.[55] Although courts have a well of support on which to draw, the average

53. *Id*. at 40.

54. *Id*. at 131.

55. Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 L. & SOC. REV. 357 (1968); THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 124–125 (2009).

citizen seems to assess political actions, including judicial actions, primarily in substantive rather than in process terms.[56] On low salience issues that a voter does not care about, he or she might be willing to give the Justices the benefit of the doubt if experts say that the Justices had good reasons for doing what they did. On highly salient issues, however, it is not clear that the average citizen will be swayed very much by arguments that the Justices were acting in good faith or making reasonable legal arguments. If the Justices are coming to the wrong conclusions from the perspective of an individual citizen, they will be judged harshly as a result.

The courts might normally withstand that sort of crudely substantive evaluation of their work, but a highly polarized political environment will put them under greater pressure. If the courts stick to resolving low salience cases and issues, then even voters who are inclined to be critical might be willing to give them a pass. If the courts wade into political thickets, however, voters are likely to score the courts' performance in much the same way that they score the performance of other governmental institutions. In a less polarized environment, voters keeping a running tally of the work of the courts can expect that they will win some and lose some. In a highly polarized environment, however, there will be fewer cross-cutting issues. Some citizens will see the courts as consistently friendly and rendering favorable decisions, but other citizens will see themselves as consistently on the losing side of cases before the courts.

The U.S. Supreme Court has been highly polarized for years, but it has not been terribly consistent. Justice Anthony Kennedy's long reign as a genuine swing Justice between two evenly divided judicial coalitions might have delayed the reckoning. Kennedy's inconstancy meant that Justice Ruth Bader Ginsburg found herself in the Court's majority nearly as often as Antonin Scalia.[57] With Kennedy's departure, however, judicial polarization might finally be married to a stable judicial majority—and as a consequence, a persistent set of ideological losers. If Justice Sonia Sotomayor almost always finds herself in the role of a dissenter in the most consequential constitutional cases, that part of the country that is in sympathy with her positions will likewise feel themselves on the outside looking in. Whether or not Justice Brett Kavanaugh is acting in good faith in rendering decisions that the political left finds substantively unreasonable is not likely to matter very much for their perception of how legitimate his actions are.

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56. Anke Grosskopf & Jeffrey J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633 (1998); Robert H. Durr et al., *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768 (2000); VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS (2003); Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184 (2013); Tom S. Clark & Jonathan P. Kastellec, *Source Cues and Public Support for the Supreme Court*, 43 AM. POL. RES. 504 (2015); Dino P. Christenson & David M. Glick, *Reassessing the Supreme Court: How Decisions and Negativity Bias Affect Legitimacy*, 72 POL. RES. Q. 637 (2019).

57. Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2241 (2014).

Political polarization has not been unusual in American history. It might, in fact, be the normal state of political affairs. The politics of the mid-twentieth century—with its ideologically heterogeneous political parties and professionally objective media—might be the exception rather than the rule of American democratic politics. What might be unusual about our recent political environment is not the polarization but the gridlock. In the past, one political coalition has been reasonably successful in banishing its opponents to the political wilderness and forcing them to yield to the dominant party's political values and preferences. The Jeffersonians destroyed the Federalists. The Jacksonians kept the Whigs on the political margins. The Republicans drove the Democrats into attempted secession and then kept them in a defensive crouch for decades. The Democrats turned the tables during the Great Depression and forced the old conservatives into political exile. The Federalists, the Whigs, the Democrats, and the conservative Republicans all thought their opponents were engaged in an illegitimate destruction of the constitutional order they held dear. What distinguished those political parties from the Democrats and Republicans of today was not the depth of their hatred of their partisan opponents but their impotence to do anything about it.

The immediate strategic question for the Court is whether it needs concern itself with its ideological foes. Populists could, and did, scream about the Court being illegitimate.[58] That would have become a significant problem if William Jennings Bryan had managed to assemble a winning political coalition rather than becoming a perennial presidential loser. It was a nontrivial problem for the courts even so, but it helps if your ideological allies are winning elections rather than losing them. If Republicans continue to win electoral victories, the still-narrow conservative majority on the Roberts Court will be joined by reinforcements and will be able to count on support in the political branches. If not, then an aggressive conservative majority on the Court might find itself in political hot water and emboldening the growing chorus of activists and politicians on the left who are calling for Court-packing.

Fallon advises that the Justices ponder the virtues of judicial restraint. He sees an unhealthy trend line in declining public confidence in the Supreme Court and suggests that more deference toward elected officials might bolster judicial legitimacy.[59] He would, however, carve out exceptions for low-salience cases that probably do not test the Court's political capital in any case and for cases of "genuine moral urgency" when political capital should probably be spent regardless of the risks.[60] He posits that the Justices might still offer a "sober second thought" regarding legislative decisions, but that they should do so from the standpoint of "relatively mainstream values."[61]

58. WILLIAM G. ROSS, A MUTED FURY (2014).
59. FALLON, *supra* note 1, at 157–161.
60. *Id*. at 162, 164.
61. *Id*. at 165–166.

There is much to appreciate about these suggestions. We live not only in a politically polarized world but in a world shaped by legal realism and moral contestation. I have argued before that in such a situation we would be risking a great deal by bulldozing ahead as if there were no important and persistent political disagreements. We could embark on "the long and difficult task of reconstructing the legalized Constitution" in which judicial decisions were understood to be more a matter of legal judgment than political choice.[62] The originalist project represents one effort to fulfill that task, but there is no doubt that we remain a long way from achieving the kind of intellectual and political transformation that push the political aspect of constitutional adjudication into the background in high-profile cases. The Justices will continue to act in what Jeremy Waldron has called the "circumstances of politics" in which we act collectively despite our deep disagreements about what actions might be appropriate.[63] We might therefore instead embrace "a sharp reduction in judicial power, recognizing the troubling nature of judicial review beyond the bounds of the legalized Constitution."[64]

I am not optimistic that there is a "sober second thought" exception to be found.[65] The Court has never behaved in that way. The Court has, in fact, generally reflected "mainstream values." It does so because the Court reflects the politics of its time.[66] Those mainstream values, however, are often controversial. They are controversial in hindsight and they are often deeply contested within their own times. The Court is rarely called upon to strike down a statute in the name of consensus values because legislatures rarely pass statutes that violate consensus values. The Court is often called upon to strike down laws in the name of politically influential but controversial values. Even when the Court acts with a sense of "moral urgency," much of the country will think the Justices are mistaken and should have kept their moral judgments to themselves.

The question is really whether the Justices think such interventions are worth it and whether they are politically sustainable. It sometimes requires a bit of time to figure that out. From the perspective of 1897, the Court's decisions in the mid-1890's—which included some of the most controversial rulings the Court had ever issued—looked politically prescient. From the perspective of 1937, the Court's decisions of the mid-1930's looked politically rash. You've got to keep your head on a swivel.

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62. Keith E. Whittington, *The Death of the Legalized Constitution and the Specter of Judicial Review, in* COURTS AND THE CULTURE WARS 40 (2002) [hereinafter Whittington, *Death of the Legalized Constitution*].

63. JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

64. Whittington, *Death of the Legalized Constitution*, *supra* note 62, at 40.

65. Keith E. Whittington, *Sober Second Thoughts: Evaluating the History of Horizontal Judicial Review by the U.S. Supreme Court*, 2 CONST. STUD. 97 (2017).

66. KEITH E. WHITTINGTON, REPUGNANT LAWS (2019).