Illustrations by Pep Montserrat

[Essay]

Courting Disaster

by Ian MacDougall

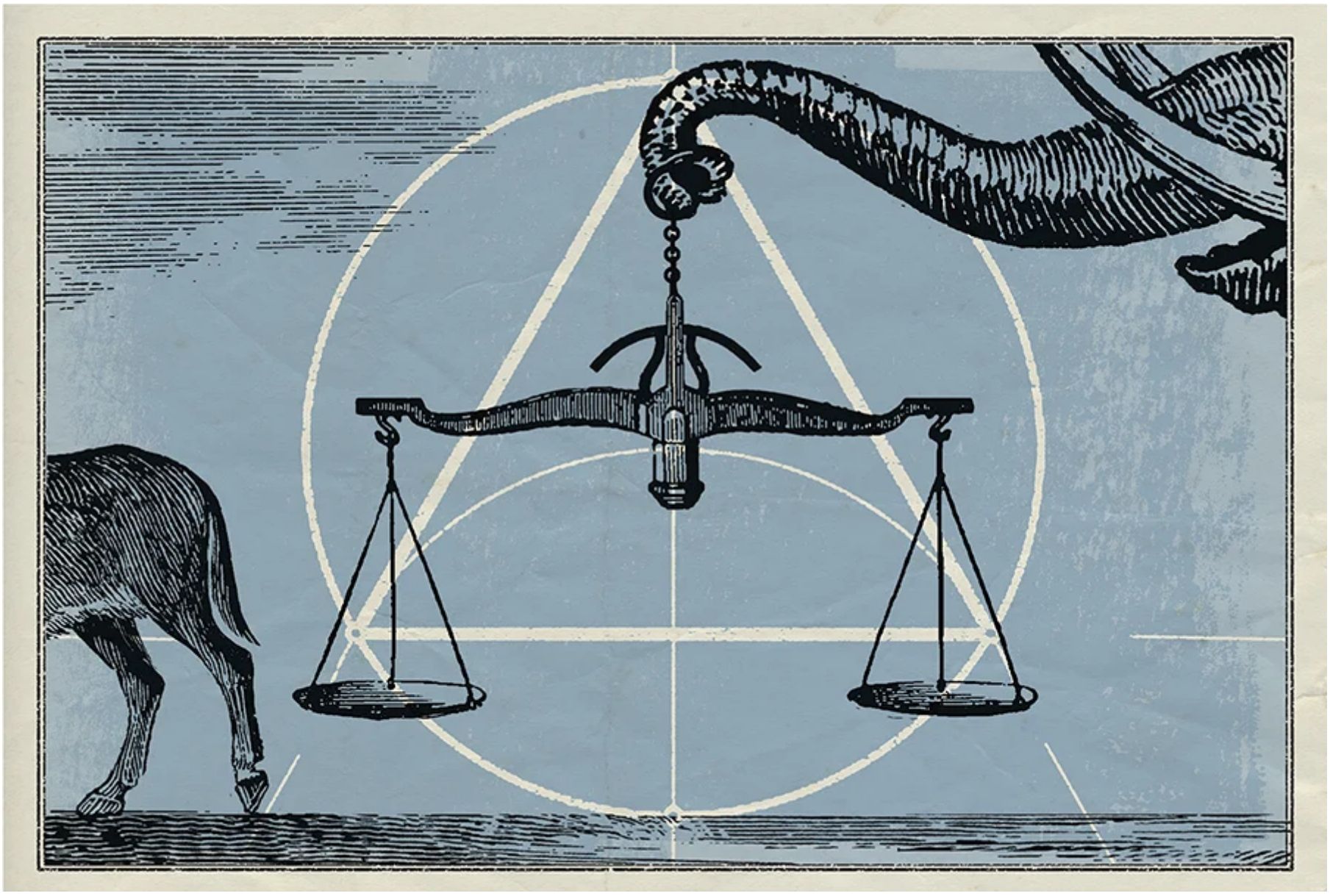
Why liberals should give up on the judiciary

The story liberals tell themselves goes something like this: Once, the black-cassocked sages of the Supreme Court summoned forth the true spirit of the Constitution. Their rulings vastly enlarged the civil rights of marginalized Americans, sparing the nation the worst designs of Dixiecratic hatemongers, puritanical moralists, fascistic police chiefs, and venal industrialists. The court struck down Jim Crow laws, expanded the franchise, and erected guardrails to constrain the punitive machinery of the state. Its major cases became metonyms for enlightenment and virtue: *Brown* v. *Board of Education*, *Gideon* v. *Wainwright*, *Roe* v. *Wade*. Throughout the land, upstanding citizens beheld the court's beneficence and rejoiced.

But nemesis haunts every heroic age and, by and by, this good court would succumb to the corrupting influence of lesser men. The hatemongers, moralists, police chiefs, and industrialists formed a sinister cabal, conspiring to subvert the work of the wise jurists who dared oppose them. The cabalists concocted a legal philosophy hostile to progressive readings of the Constitution, which they named originalism. They formed a cult around this philosophy, the better to indoctrinate others into its mysteries. The cabal found its standard-bearer in Ronald Reagan, who installed its champions—Antonin Scalia, Robert Bork, William Rehnquist—in positions of power. Soon, these originalists set about corroding the constitutional edifice the good court had built to protect the vulnerable from the tyranny of the majority. Thus was a new court born—a bad court.

Time bred impatience, and to hasten the end stage of its scheme, the cabal resorted to dirty tricks, stealing seats on the court and filling them with its most devout loyalists. The plan worked faster than many expected. *Roe* is gone. The Second Amendment is ascendant. The barrier between church and state grows thinner by the year. At risk this fall: affirmative action, the administrative state, voting rights. Darkness looms. To purify the court, the good court's disciples tell themselves, they need to expose the fraud of originalism, to devise rival philosophies, to outmuscle and undermine the cabalists. The high court, made good again, will then resume the righteous work of its fabled forebears.

This story gets told because it offers a straightforward lesson for liberals at a moment when little else seems simple: if Democrats could only reclaim the judiciary, it would rescue them from a political sphere that increasingly seems to have gone off the rails. There's comfort in talk of restoration, of a halcyon era recovered. But this is the wrong lesson. The good court of the postwar period was an aberration. The court has rarely been friendly to progressive ideals, and what it giveth, it can taketh away. From the perspective of those on the left, it may be that the better path leads not back to a midcentury constitutionalism presided over by the second coming of Earl Warren, but toward less constitutionalism altogether. The law won't save liberals from politics. But politics, if resuscitated and revived, might save them from the law—and achieve more than even the most progressive Supreme Court ever could.



Law is a conservative profession by nature. It attracts rule followers. Its practitioners tend to come from the moneyed classes, and then cater to their interests. The courts, too, tilt in this direction. They're principally backward-looking, with the authority to maintain the status quo or restore the status quo ante. Federal courts are generally given the prerogative to curtail government programs but not to create or expand them. Likewise, judges often block regulatory action but rarely order it. This asymmetry lends itself to libertarian outcomes more naturally than progressive ones.

Given this structural and sociological bias, it's not surprising that for most of American history the courts have been aligned with political conservatives and capital—the elites, who had the most to lose from popular democratic rule. Before the Civil War, the court was a key ally to the slave-holding oligarchy in the South. We're taught that *Dred Scott* was singularly evil, but it was far from unique. In the 1842 case *Prigg* v. *Pennsylvania*, for example, the court held that the Constitution's fugitive slave clause forbade free states from interfering with the work of slave catchers, functionally legalizing the kidnapping of black Americans whether or not they were fugitives or had ever been enslaved to begin with.

This pro-slavery sentiment translated, after the war, into opposition to Reconstruction. The court repeatedly targeted postbellum civil rights laws, paving the way for Jim Crow. Justices interpreted the Constitution to authorize segregation, disenfranchisement, and lynch mobs; meanwhile taxes on the wealthy were regarded as a grave affront to its hallowed precepts. So too were minimum-wage and maximum-hour laws, banking regulations, limits on child labor, restrictions on monopoly power, and pretty much anything benefiting unions, all of which the court struck down between the end of the nineteenth century and 1937. This period is known as the Lochner era, after a 1905 case in which the court held that a New York law capping the working hours of bakers violated the due process rights of bakery owners. For the Lochner Court, congressional regulatory power was narrow, and the due process clause protected above all else the freedom of contract—which often meant protecting the freedom of business owners to exploit their workers. Only when

Franklin D. Roosevelt moved to pack the court, in 1937, did Owen Roberts, the court's swing justice, abandon the so-called four horsemen of the conservative bloc. Precisely how much Roosevelt's court-packing plan motivated his change of heart is a matter of contention, but its effect was unmistakable: Lochner-era jurisprudence had come to an end.

The resounding success of the New Deal led to years of Democratic political hegemony; even the Republican Dwight D. Eisenhower governed in the New Deal mold. By the time Eisenhower appointed Earl Warren as chief justice, the Supreme Court was full of ex–New Dealers. Under Warren, the court would go on to become the most progressive in history. It would fundamentally alter the way liberals viewed the judiciary, which went from a persistent antagonist to a steadfast ally over a span of only sixteen years. Presiding over what's often called the rights revolution, the court ordered schools desegregated, enlarged protections for unpopular speech, expanded procedural protections for criminal defendants, and turned back efforts to disenfranchise black voters.

Older New Dealers, however, remained leery of the judiciary. They still bore battle scars from their own struggle against the courts. The rights revolution, they feared, risked backfiring. The court's liberal bent was hardly guaranteed to last; the Warren Court marked a rare, if not unique, departure from the long-running contest for constitutional primacy between progressive politics and conservative legalism. Abraham Lincoln, the Reconstruction Congress, and Progressive Era reformers had all resisted an institutional arrangement known as judicial supremacy, which holds that the Supreme Court is the final arbiter of the Constitution's meaning, with its interpretations binding not only state officials but the coordinate branches of the federal government. But for a younger generation of liberals, the Warren Court was regarded as a testament to law's progressive potential. The Democratic coalition was still dependent on white Southerners, but the court was not. The justices could impose moral order on the South's unreconstructed politics of hate. Better still, they spoke in the exalted grammar of constitutional jurisprudence, their righteous philosophies of equality, fairness, and due process untainted by political vulgarity. No longer just another branch of government, the courts became, in the liberal worldview, what the great legal theorist and Warren Court admirer Ronald Dworkin would call "the forum of principle."

When Southern governments moved to nullify the court's desegregation rulings, liberals embraced the justices' assertion of judicial supremacy. Given what was at stake, who could blame them? As the rights revolution rolled on, the proposition appeared all the more attractive. Demographic shifts in the legal profession added to the appeal of a constitutional order run by lawyers. In private practice, former New Dealers had dislodged the profession's patrician old guard. The Warren Court and a growing network of public-interest legal organizations, such as the Southern Poverty Law Center and the Environmental Defense Fund, drew a new generation of left-wingers to the bar. Law, that stodgy footman of capital, became a noble vocation in the liberal imagination. Mr. Tulkinghorn gave way to Atticus Finch.

The rights revolution strained the New Deal coalition while deferring its inevitable fracture. The Democratic Party's Southern bloc raged against desegregation; religious constituencies resented limits on school prayer. In the mid-Sixties, Democrats at last moved to enact major civil-rights legislation, splintering the party. Various social, political, and economic forces in the following decade finally broke the New Deal order for good, just as a new conservative coalition was emerging, a ragbag of libertarians, business executives, neocons, law-and-order traditionalists, evangelicals, Southern racists, and Northern Catholics. Their grievances varied, but most were united by a shared animus for the Warren Court. Their common refrain was "judicial activism": unelected liberal judges imposing their policy preferences on the nation in the guise of law. It wasn't an entirely unfair characterization. The Warren Court didn't shy away from politically sensitive issues—the rights revolution got its name for a reason—and the justices sometimes let their prose get the better of them. A frequent target of conservative mockery, for example, is this bit of metaphysics from the 1965 case *Griswold* v. *Connecticut*: "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

In the Seventies, the country was in a populist, libertarian mood and receptive to anti-institutional grandstanding. Liberals had forgotten to worry about the judiciary, and those on the right were coming to realize that retaking the high court was—with few exceptions—the only way to undo the constitutional rulings they loathed. The Warren Court, as one scholar has put it, would prove to be "not just the most liberal Supreme Court in American history, but arguably the only liberal Supreme Court in American history."

The next chief justice, the Richard Nixon appointee Warren Burger, was a conservative, but the court retained a liberal cast through the Seventies. Among the Burger Court's decisions was *Roe* v. *Wade*. Abortion was a divisive issue within the nascent GOP coalition, but in time, conservative activists, strategists, and politicians grasped the value of *Roe* as a

byword for one thing that unified them: hatred of the progressive judiciary. *Roe* was tethered to the right to privacy drawn out of the penumbras and emanations in *Griswold*, and by the early Eighties, Reagan, the Great Communicator, had developed a messaging strategy that, as the legal historian Mary Ziegler writes, "framed *Roe* as the kind of judicial activism that all conservatives denounced—activism that had produced bad Supreme Court decisions on everything from protecting criminal defendants to banning school prayer." The burgeoning Federalist Society, meanwhile, supplied the right with two things it had been missing since the legal profession's elite precincts turned toward the Democratic Party: a forum for cultivating conservative legal theories, and a social network for identifying right-wing legal talent, whom the group's leaders helped elevate to the judiciary. The Federalist Society's leadership would gain a remarkable degree of influence over Republican judicial nominations.

The right's unity of purpose proved formidable, and the court it built—under Rehnquist and John Roberts—pursued a retrogressive conservative jurisprudence. It scaled back the rights established by the Warren Court while adopting an expansive view of those it preferred: gun rights, religious liberty, the freedom of corporations and the rich to buy political influence. It revived Lochner-esque doctrines to limit congressional power, curb government regulation, and rescind labor protections. Still, right-wingers were frustrated by the slow pace of retrenchment and the occasional liberal wins in high-profile cases involving abortion, LGBT rights, affirmative action, and the like. Instead of "a fearless originalist constitutionalism," as the conservative legal scholar Randy Barnett has put it, they got a "tinkering-at-the-margin" approach, a court chipping away at midcentury decisions but declining to strike at their core.

As the Supreme Court reverted to the right, Democrats mustered some resistance—here a Borking, there a Clarence Thomas hearing. But they had committed themselves to traditionally conservative positions that left them slow to react. Liberal reverence for the Warren Court, while a sympathetic perspective as a historical matter, had compelled them to defend judicial supremacy and to adopt an institutionalist view of judges as experts engaged in a technical craft transcendent of politics. Reinforcing this last stance was another factor: Bill Clinton and the New Democrats' embrace of the Reaganite neoliberal order, a politics of technocratic supremacy with a libertarian bent, of which judicial supremacy is one strain. Elite liberal lawyers didn't mind; this state of affairs only strengthened their role in matters of politics and policy.

Bush v. *Gore* finally shook the legal left awake. Maybe the courts weren't a forum of principle after all. Democrats began to turn the GOP's favorite pejorative against the Rehnquist and Roberts Courts, accusing them of judicial activism. The charge was fitting. The reasoning of their conservative majorities was no less creative than the Warren Court's—the invention of an individual right to own a gun, for instance. But aside from name-calling, liberals in the legal field struggled to react to what was essentially a political problem. It wasn't until Mitch McConnell stonewalled Merrick Garland's appointment to the Supreme Court that Democratic Party operatives recognized the damage an arch-conservative judiciary could do to progressive priorities, effective governance, and the democratic process itself. They responded in two ways. First, as Donald Trump stacked the courts with rock-ribbed conservatives, they prodded Democratic senators—and, later, presidential candidates—to begin prioritizing the appointment of progressive judges. Second, they called on Democrats to expand the Supreme Court—a direct and proportional response to McConnell's maneuvers.

The first message broke through: starting early in Biden's term, the White House and Senate Democrats moved quickly to nominate and confirm judges with distinctly left-leaning legal views. Republican obstruction has slowed the pace lately, but that has only prompted progressives to renew pressure on Democrats. In response to calls for court-packing, the Biden Administration assembled a blue-ribbon panel on court reform. Even progressive scholars called on to testify expressed discomfort with the idea of expanding the court—a favorite tactic of budding autocrats. But they proposed other reforms. Several suggested statutory term limits, which enjoy the support of prominent liberals and conservatives alike. Others envisioned Congress mandating an explicit partisan balance among the justices, or redesigning the high court to resemble the appeals courts, with subsets of justices hearing cases in smaller panels. Many versions of this latter idea imagine no permanent justices at all; randomly selected appellate judges would sit on the high court either for a fixed term or to hear a discrete set of cases.

Such personnel-oriented reforms are durable and relatively popular, even if, like all court-reform proposals, they face considerable headwinds for the foreseeable future. But they misdiagnose the deeper problem the court poses for the left, or any group whose policy agenda—unlike the present-day GOP's—depends on enacting federal legislation. With judicial supremacy uncontested, the Supreme Court has installed itself at the apex of national politics. The justices hold an absolute veto on almost any government action. They endorse and demote individual rights at will, picking political

winners and losers along the way. After all, American constitutional rights are "trumps," as Dworkin put it, that defeat most, if not all, competing claims of interest. Who controls the court matters, but more important still is what the court controls. And for decades now, it has controlled far too much.

Objections to judicial supremacy from both the left and the right are most often articulated in terms of its undemocratic character, what the constitutional theorist Alexander Bickel called the "counter-majoritarian difficulty." The basic critique is compelling: core political rights and even the most popular laws exist at the mercy of five unelected justices insulated from accountability by life tenure and a salary that can't be docked. Still, questions of institutional legitimacy, political theory, and democratic process raised by this critique can feel overly abstract. They come into sharper relief, however, when inquiry shifts from the identity of constitutional decision-makers to the language of constitutional decision-making.

In a now-canonical 1982 monograph, *Constitutional Fate*, the legal scholar Philip Bobbitt catalogued the six forms of argument that the legal community deems legitimate means of interpreting the Constitution—textual and historical arguments, for instance. This constrained idiom facilitates the work of constitutional law in the courtroom; it ensures that lawyers and judges are speaking roughly the same language. But where law and politics intersect, it creates an awkward disjuncture.

When most people debate politics and policy, they speak in an entirely different register. Lawmakers advance bills by talking up their popularity. Editorialists push policy by pointing to empirical studies on welfare effects. Evangelical preachers invoke scripture. Labor leaders appeal to solidarity. Activists cite political morality. Ordinary citizens, mad about something they saw on television, make emotional pleas to friends and relatives to vote for their preferred

candidate. But what matters in the op-ed pages, on the House floor, in the pews, on the picket line, in the streets, and in the voting booth—all of that is lost when matters of public concern arrive at the courthouse steps, as they so often do these days. Politics submits to constitutional law on a procrustean bed.

Forbidden political arguments do make it into court, however, and in a paper published last year, the legal scholars David E. Pozen and Adam Samaha typologize how they have been deployed in Supreme Court opinions. Most often, the justices repackage sincere political claims as objects of mockery and scorn. They renounce their own reliance on them to underscore the strictly legal nature of their reasoning. They denounce one another for improperly straying into political arguments or, worse, smuggling them into court as legal reasoning.

Consider the recent gun-rights case *New York State Rifle & Pistol Association* v. *Bruen.* In the narrowest sense, *Bruen* overturned New York's concealed-carry permitting law. But it also recast Second Amendment doctrine as an exercise in historical analogy, limiting government discretion to regulate firearms. In dissent, the three liberal justices recited a long list of gun-violence statistics to illustrate the broader danger of the majority's doctrinal rewrite. Samuel Alito, in a sneering concurrence, played dumb. What did national statistics have to do with a New York law? His answer: "The real thrust of today's dissent is that guns are bad."

There's value in preserving a distinct legal grammar. A shared professional language fosters institutional coherence; rhetorical constraints and the illusion of a strict law-politics divide promote rule-of-law norms to some extent. But the costs are significant when constitutional law pushes too far into the domain of politics. Today, many of our most pressing political concerns are ultimately resolved in the bloodless vernacular of constitutional law, which rejects the stuff that matters to ordinary people in favor of legal fictions and artifice—hypotheticals, formalistic doctrinal tests, analogies, slippery slopes. Abortion access? Substantive due process and the scope of the word "liberty." The Voting Rights Act, reauthorized in 2006 by a near-unanimous vote after extensive fact-finding and deliberation? Neutered by the ethereal "principle that all States enjoy equal sovereignty." Climate change regulation, public health protections, even a functioning administrative state? A new and open-ended theory called the "major questions doctrine." Meanwhile, Roberts blithely dismisses sophisticated statistical models of partisan gerrymandering as "sociological gobbledygook."

Unlike the courts, Congress is free to debate matters of public concern in a language that speaks to what people in a pluralistic democracy actually care about: moral and ethical concerns, costs and benefits, good-faith disagreements over competing values and interests, a citizenry's fears and hopes and experiences. As the legal philosopher Jeremy Waldron notes, these "are the issues that are given the most time in the legislative debates and the least time in the judicial deliberations." Judicial deliberations, furthermore, are oriented toward picking a winner and a loser on the limited basis of the arguments and evidence developed by the litigants before the court, generally with thirty minutes for each side to air its case. Congress, by contrast, can hold wide-ranging hearings, issue subpoenas, survey and even commission empirical research, weigh fiscal trade-offs, consider constituent popularity, balance different values and interests, horse trade, negotiate, and forge compromises. The present pathologies of our politics distort and impede the legislative function. But that's no argument in favor of constitutionalism; it's an argument for devoting more energy to a renewal of politics.

In fact, constitutionalism is itself part of the problem. "Judicial supremacy facilitates distortions in representation and accountability," the political scientist Keith E. Whittington writes. "It lets politicians off the hook and encourages a political sensibility of avoiding constitutional responsibilities." Lawmakers, for example, often gesture to Second Amendment case law to justify inaction on gun control, even though the cases themselves explicitly leave avenues of regulation open. To be fair, experience has counseled caution. Major federal legislation, no matter how secure under current doctrine, will see Federalist Society types cook up some convenient, Lochner-like limits on congressional power, which five justices will probably embrace. That's why Reaganite libertarians have come to love the court. For them, personnel is policy. Popular legislation—labor laws, welfare statutes, voter protections, corporate regulation—is hard to repeal. But the justices don't have to run for reelection. Democratic process ends up a white-shoe parlor game.

The fix for an excess of constitutionalism commends itself: less constitutionalism. The political conditions necessary for that solution, however, are likely a ways off. There's a rough cycle to the fights between progressive politics and conservative legalism. The court asserts itself, typically on behalf of elite interests, when, as today, government is weak and popular sentiment divided. Once consensus reemerges, and the court is perceived to stand in its way, political actors start to campaign against the court. Only when politicians have sufficient public support do they remind the judiciary why Alexander Hamilton called it the "least dangerous" branch.

This isn't a risk-free proposition. Some might raise the specter of the political philosopher Judith Shklar's "liberalism of fear": judicial supremacy as a check against the bad things an unrestrained state can do. But the courts won't stop an able autocrat. In countries that have recently slid toward authoritarianism, judiciaries either have learned to love the tyrant or have been crushed by him. When constitutionalism thwarts effective governance, moreover, it supplies the ideal conditions for populist authoritarians to rise. The greater risk today isn't that Congress will occasionally pass bills that many of us won't like. It's that five well-to-do lawyers will prevent Congress from responding to the country's needs.

Others may wonder who, if not the Supreme Court, will articulate and secure minoritarian rights against the tyranny of the majority. The courts, in truth, recognize relatively few rights; most of those we enjoy derive not from the Constitution but from federal statute. To name just a few: voting rights; labor rights; disability rights; rights against discrimination in employment, housing, and public accommodations. As the legal scholar Jamal Greene argues in *How Rights Went Wrong*, Congress has the institutional capacity to weigh and reconcile various values and interests, not only to pick which interests get to trump all others. When it comes to statutory rights, the court's primary role since the Eighties has been to undermine them by curtailing, and at times usurping, congressional power. Rights in peer countries where the courts can't overturn national legislation have fared no worse than ours.

Lawyers fret that reform will erode the court's legitimacy by creating the impression that it's an organ of partisan politics. But asking the court to resolve hotly contested moral, social, and political questions is itself a threat to the court's legitimacy, a point Scalia was fond of making. It's those cases that cause the justices to look partisan. And, to most Americans, they do. Recent polls have found that about two-thirds of respondents, including a substantial proportion of Republicans, believe that the court's decisions reflect the justices' political views more than they do the law. That impression is likely to spread; this past term, the court's partisan divide was sharper than it has been in decades. The institutional risk for the court is that the political branches will ignore its edicts. The court's only real power is uploading PDFs of its decisions to its website, and there exists a tradition, called departmentalism, that several presidents have invoked to minimize the court's authority. After campaigning against the *Dred Scott* decision, for example, Lincoln held that the Supreme Court's readings of the Constitution bound only the parties before it, not the other branches, which could adopt different interpretations to guide their own work. In defiance of *Dred Scott*'s ban, Lincoln's government began issuing passports to black Americans.

Departmentalism tends to have a short shelf life, given its unstable dynamics. Congress, which controls the judiciary's size, budget, duties, and jurisdiction, is better placed to rein in the court. These tools were put to use by Thomas Jefferson's Democratic-Republicans and their rival Federalists, as they vied for political dominance; Jacksonian Democrats used them similarly to consolidate control of the courts. In the 1860s, Congress expanded, shrank, and re-expanded the Supreme Court, and restricted its jurisdiction, to prevent interference from its Southern-friendly bloc. Progressive Era reformers in the Senate tried to limit the Lochner Court's power to strike down statutes by, among other means, curbing its jurisdiction and imposing supermajority voting requirements on the justices. They failed, but before the court-packing plan, their inheritors in the New Deal Congress used these powers to restrict federal jurisdiction over certain economic matters. Court reform as a political tool is hardly unprecedented.

Biden's blue-ribbon panel was widely seen as a repudiation of progressive calls for court-packing, such panels being, in Washington, where ideas go to die. But the report it issued late last year makes for a useful compendium of court-reform history—a primer and menu of options for future reformers. Say, as seems probable, they face the same problem as the New Dealers: a court overeager to strike down popular federal laws. Minimizing judicial review of federal statutes is among the easier cases to make, since national legislation bears the imprimatur of both coordinate federal branches. Congress could, for example, strip the court's appellate jurisdiction over constitutional challenges to federal statutes. It could impose supermajority or unanimous voting requirements to strike down federal law. It could deprive the justices of the power to select the cases they hear. It could slash the court's staffing budget—the law clerks do much of the hard work in chambers—to reduce the number of cases the court can decide or simply to signal congressional displeasure. There are colorable constitutional objections to each of these proposals. But, "disappointing as it may be to legal experts," the Yale legal historian Samuel Moyn told Biden's panel, when reformist moments arrive, the rules and language of politics, not constitutional law, tend to govern the debate.

Polling trends offer a glimmer of hope for progressives anxious to see the debate begin in earnest. Public approval of the Supreme Court is in serious decline, and a study published this summer in *Proceedings of the National Academy of Sciences* shows that, since 2020, the high court has moved far to the right of the average citizen. But fights with the courts are

politically costly, and political capital is in short supply for Democrats these days. Historically, court reform has been a generational project.

No reform, however, can get under way until progressives relearn the lesson they forgot decades ago: Constitutionalism won't redeem a dysfunctional politics. To the contrary, a functioning politics, actively engaged with the material concerns of the populace, is a precondition for taming the courts; without it, bringing them to heel is of limited value. "Law reflects but in no sense determines the moral worth of a society," the scholar Grant Gilmore argues at the conclusion of *The Ages of American Law*, his classic survey of American legal history. The worse a society's politics, he claims, the more it will lean on the law to resolve deep-seated disagreements, which tends to deepen them further still. "In heaven there will be no law, and the lion shall lie down with the lamb," Gilmore writes. "In hell there will be nothing but law, and due process will be meticulously observed."

Ian MacDougall's most recent article for *Harper's Magazine*, "A Firm Hand," appeared in the January 2022 issue.

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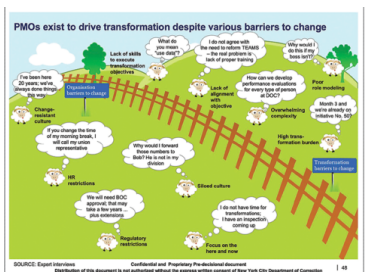

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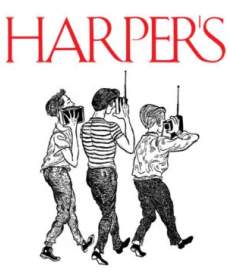

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