

# “Ethics and Recusal Reform” Is the Spin; Politicizing the Courts Is the Plan

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## KEY TAKEAWAYS

Both institutional and decisional independence are necessary for the judicial branch to function as it was designed.

Threats to the Supreme Court’s independence include court-packing, attacks on the Court and individual Justices, and unnecessary intrusive “reforms.”

The separation of powers and judicial independence should be principles to embrace, not obstacles to be avoided in the search for power.

On March 4, 2020, as the Supreme Court heard arguments in an abortion case, Senate Majority Leader Charles Schumer (D-NY) stood in front of the Court’s building and shouted this warning:

I want to tell you [Justice] Gorsuch, I want to tell you [Justice] Kavanaugh, you have unleashed the whirlwind and you will pay the price. You won’t know what hit you if you go forward with these awful decisions.<sup>1</sup>

The whirlwind swept in on May 2, 2022. *Politico* reported that, based on a leaked draft opinion in *Dobbs v. Jackson Women’s Health Organization*,<sup>2</sup> the Supreme Court would overrule *Roe v. Wade*<sup>3</sup> and *Planned Parenthood v. Casey*,<sup>4</sup> which had created a constitutional right to abortion. On the

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Senate floor the next morning, Schumer denounced the “Republican-appointed Justices’ reported votes to overturn *Roe v. Wade*” as “an abomination.”<sup>5</sup>

Schumer’s 2020 threat—and the unprecedented disclosure of a draft opinion in a pending case—are part of a broader campaign to force the judiciary in general, and the Supreme Court in particular, to address issues and decide cases that advance certain political interests. This campaign fosters an inherently political view of the courts, tries to change the judiciary’s institutional structure, threatens the Supreme Court and individual Justices, calls for unnecessary “reforms,” and even demands that certain Justices unlikely to vote in a favorable way be removed from certain cases or from the Supreme Court altogether.

This *Legal Memorandum* examines the campaign for politicizing the courts by, as James Madison counseled, first “recurring to principles”<sup>6</sup> about the kind of judiciary that our liberty requires.

## Principles and Powers

The Declaration of Independence identifies as a “self-evident” truth that government exists to secure inalienable rights such as life, liberty, and the pursuit of happiness, deriving the power to do so from the “consent of the governed.” To that end, the Declaration explains, the people have the right to organize government powers on a foundation of key principles.

America’s Founders believed that the reward of “ordered liberty” was worth the risks they faced in designing such a system of limited government. “If angels were to govern men,” wrote James Madison, “neither external nor internal controls on government would be necessary.”<sup>7</sup> The difficulty of maintaining these controls might have been one motivation why, when asked about the system of government he had helped establish, Benjamin Franklin replied that it was “a republic, if you can keep it.”<sup>8</sup> President Andrew Jackson expressed the same sentiment in his farewell address on March 4, 1837: “But you must remember, my fellow-citizens, that eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing.”<sup>9</sup>

Those controls on government include the separation of powers into three branches with checks and balances between them, in which the legislative branch “necessarily predominates”<sup>10</sup> and the judiciary is the “weakest” and “least dangerous branch.”<sup>11</sup> Justice Antonin Scalia wrote that America’s Founders “viewed the principle of separation of powers as

the absolutely central guarantee of a just government.”<sup>12</sup> He echoed James Madison, who wrote in *The Federalist* No. 47 that “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.”<sup>13</sup> The Massachusetts Constitution affirms that the separation of powers is the difference between a “government of laws” and one “of men.”<sup>14</sup> By design, the judicial branch has a more limited role than the other two; its only power is to exercise “judgment” to “say what the law is”<sup>15</sup> and apply it to settle legal “Cases” and “Controversies.”<sup>16</sup> That role, in this system, means that the “complete independence of the courts” is “peculiarly essential.”<sup>17</sup>

## Judicial Independence

In addition to the overall separation of powers, the Founders saw judicial independence as critical to the liberty that the system of government they designed was to promote. Attempts to manipulate the judiciary were among the “injuries and usurpations” by the King of Great Britain that justified the United States declaring independence in 1776.<sup>18</sup> “He has made Judges dependent on his Will alone,” the Declaration asserts, “for the tenure of their offices, and the amount and payment of their salaries.” Judicial independence has also been called “the most essential characteristics of a free society,”<sup>19</sup> the “backbone of the American democracy,”<sup>20</sup> and one of the “crown jewels” of our system of government.<sup>21</sup>

The Constitution addressed King George III’s specific threats by providing that federal judges serve “during good Behaviour”<sup>22</sup> and that Congress may not diminish judicial compensation.<sup>23</sup> These steps protect elements of the judiciary’s basic *institutional independence*. As the judiciary has become more powerful than it was designed to be, however, threats to its independence go beyond the institutional to what is often referred to as *decisional independence*.<sup>24</sup> These include attempts to sway—or even coerce—the Supreme Court to address certain issues or decide certain cases in particular ways and to demonize or delegitimize politically unfavorable decisions and the Justices responsible for them. These efforts prioritize the *outcomes* of judicial decisions and the political interests those decisions may further rather than the *process* followed to reach results.

## Political Agendas vs. Liberty

With its controls, limitations, and roles, our system of government is designed to frustrate those for whom power is more important than liberty.

For them, the separation of powers and judicial independence are restraints to overcome rather than fundamental principles to be embraced.

Today, we see an aggressive campaign by political interests whose agenda requires imposition by a powerful judiciary because that agenda remains unpopular in legislatures. This campaign promotes the view that the judiciary is simply another political branch, with judges empowered to interpret and apply the law in any manner they choose in order to advance their preferred political interests. These left-wing advocates denounce unfavorable decisions as necessarily “partisan,” demonize individual judges or Justices deemed less likely to promote their favored interests, and even attempt to intimidate the Supreme Court itself into changing its decisions.

This strategy is having an impact. Recent polls, for example, find that more than 60 percent of Americans believe that the Supreme Court decides cases primarily by politics rather than law,<sup>25</sup> while overall approval of the Supreme Court is at its lowest level in decades.<sup>26</sup> In addition, a growing percentage believe that the Supreme Court, in fact, should base its rulings on “what the Constitution means in current times.”<sup>27</sup>

## Threats to Judicial Independence

The separation of powers and judicial independence are fundamental principles for limiting government power which, in turn, is necessary for the liberty we have long enjoyed. Prioritizing the power to impose a political agenda, however, views those principles as obstacles to be avoided by utilizing different strategies.

**Leaking the Draft *Dobbs* Opinion.** *Dobbs v. Jackson Women’s Health Organization*,<sup>28</sup> argued on December 1, 2021, challenges the constitutionality of Mississippi’s ban on most abortions after 15 weeks of pregnancy.<sup>29</sup> The Supreme Court has decided more than two dozen abortion cases since creating the right to abortion in *Roe*, and has reaffirmed at least some aspect of that precedent three times.<sup>30</sup> *Dobbs* is significant because it directly conflicts with *Roe*’s “central holding”<sup>31</sup> that states may not ban abortion before “viability,” or about 24 weeks. This case, therefore, invites the Court to reexamine whether *Roe* should remain a valid precedent, and the draft *Dobbs* opinion indicates that the answer is no.

The *Politico* article accompanying the draft opinion’s release reported that at least four Justices—Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—were joining Alito in overruling *Roe* and *Casey*, a 1992 decision that modified *Roe*. The draft opinion in *Dobbs* explained how *Roe* was “egregiously wrong from the start”<sup>32</sup> and why several

considerations “weigh strongly in favor of overruling *Roe* and *Casey*.”<sup>33</sup> The unprecedented breach of judicial independence by leaking an entire draft opinion is unprecedented and ominous.

In January 1973, *Time* magazine reported that “the Supreme Court has decided to strike down nearly every anti-abortion law in the land. Such laws, a majority of the Justices believe, represent an unconstitutional invasion of privacy that interferes with a woman’s right to control her own body.”<sup>34</sup> That report, however, was not supposed to be a scoop; a Supreme Court clerk informed the reporter “on the condition that he only publish his article after the ruling was made public.”<sup>35</sup> *Time* just jumped the gun.

Leaking an actual draft opinion months before the opinion-writing process is completed and the decision is made public is a different matter and likely had multiple objectives. First, it appears aimed at actually influencing the decision itself. One liberal commentator insists that “the only [theory] that makes sense is that it came from somebody who was afraid that this majority might not hold.”<sup>36</sup> Others posit that the leak came from someone who wanted to prevent this majority from holding by a barrage of public criticism, upheaval, and even violence. The significance of, and likely reaction to, such a direct and forceful opinion, however, was obvious when Justices joined it. That decision will likely not be shaken by witnessing, a little early, some of the public reaction that would inevitably result.

The second objective is more political. Abortion advocates have warned for decades that the Supreme Court might overrule *Roe* and urged that abortion be used as a political litmus test for political candidates. A hypothetical is one thing; reality is another. Especially in a congressional election year when partisan control of both the Senate and House of Representatives could change, evidence that the Supreme Court will actually give responsibility for abortion policy back to the people and their elected representatives can have a real political impact.

Abortion advocates in Congress have shown that they understand this. Last September, for example, the House narrowly passed H.R. 3755, the Women’s Health Protection Act. This legislation purports to protect the right to abortion legislatively should the Supreme Court withdraw constitutional protection for that right.<sup>37</sup> In February 2022, the Senate fell 14 votes short of the 60 needed to consider that legislation. Only nine days after the *Dobbs* draft opinion leaked, the Senate voted again—with the same result—on S. 4132, a nearly identical bill.<sup>38</sup> Schumer clearly hoped that this would help stir up the “whirlwind” that he had threatened in 2020 on the Supreme Court steps. To that end, Schumer quickly scheduled a vote on allowing Senate consideration of S. 4132, the Women’s Health Protection

Act of 2022, which abortion advocates claim will legislatively protect abortion rights if *Roe v. Wade* is overruled.

**Court-Packing, Chapter 1.** While the Constitution created the Supreme Court, it gave Congress legislative authority to create “inferior” courts,<sup>39</sup> and Congress can determine the number of positions on any federal court. Congress has, for example, changed the size of the Supreme Court several times since 1789, settling on the nine seats that we see today in 1869.<sup>40</sup> “Court-packing” refers to Congress creating additional unnecessary Supreme Court seats that can be quickly filled with Justices likely to decide certain cases involving particular issues in a politically favorable way. In other words, court-packing seeks to change the Court’s *decisions* rather than meet its *needs*.

The first attempt at court-packing was short-lived. President John Adams and the Federalists lost the election of 1800 and, before leaving office the next March, quickly passed the Judiciary Act of 1801. It created new lower court positions and prospectively reduced the Supreme Court from six to five seats by providing that the next vacancy remain unfilled. A year later, as President Thomas Jefferson and the Democratic–Republican congressional majority discussed legislation to repeal the Judiciary Act, Representative John Bacon of Massachusetts proposed going a step further by adding two or three more Supreme Court seats. Both sides soundly rejected the idea because, as Senator Williams Wells, a Federalist from Delaware, put it, the plan would “destroy the independence of the judges.”<sup>41</sup>

**Court-Packing, Chapter 2.** The second chapter in the court-packing story is more familiar and began with the 1932 election of President Franklin D. Roosevelt. During his first term, the Supreme Court declared unconstitutional several significant federal laws enacted to address the Great Depression.<sup>42</sup> In May 1935, four days after the Court unanimously struck down the National Industrial Recovery Act, Roosevelt held a press conference in which he criticized the Court for refusing to interpret the Constitution “in the light of present-day civilization.” He wanted the Court to “create or enlarge constitutional power” so that Congress could achieve its legislative objectives.<sup>43</sup> The political ends, in other words, would justify the creative judicial means.

The 1936 election delivered a landslide re-election for Roosevelt and overwhelming Democratic majorities in both the House of Representatives and Senate.<sup>44</sup> With that political strength, and the country in deep economic crisis, Roosevelt decided that if the Supreme Court would not reinterpret the Constitution to expand federal power, he would create a Supreme Court that would. He proposed a plan that included adding up to six more Supreme Court seats.<sup>45</sup>

In June 1937, however, the Senate Judiciary Committee, which had a 14–4 Democratic majority, opposed Roosevelt’s bill for the same reason that both parties had done so in 1802. The committee report identified what everyone understood to be the objective of court-packing as “neutralizing the views of some” justices by “overwhelm[ing] them with new members.”<sup>46</sup> Court-packing would deliberately make institutional changes in order to achieve decisional changes.

The Judiciary Committee recommended rejecting the bill because it would “undermine the independence of the courts”<sup>47</sup> and “expand political control over the judicial department.”<sup>48</sup> The report stated this principle in practical terms. “Even if every charge brought against the so-called ‘reactionary’ members of this Court be true,” the report said, judicial independence “is immeasurably more important...than the immediate adoption of any legislation however beneficial.”<sup>49</sup>

As an aside, Roosevelt did not have to wait long to chart a new course for the Supreme Court through the ordinary appointment process. In less than six years, he replaced eight of the nine Supreme Court Justices appointed by previous Presidents. These included Justices, dubbed the “Four Horsemen,”<sup>50</sup> who most consistently resisted changing the Constitution’s meaning to facilitate Roosevelt’s expansive federal economic agenda. Significantly, six of those eight nominees were confirmed without even a recorded vote. This confirmation success suggests that while Roosevelt’s *objective* of changing the Court’s interpretive approach was popular, his proposed *means* of achieving it, by undermining the Supreme Court’s independence, was not.

**Court-Packing, Chapter 3.** Unfortunately, those chapters did not close the book on court-packing. The vigilance needed to keep the republic designed by the Founders requires a commitment to that design, including the separation of powers and judicial independence. Renewed calls for court-packing, however, show that this commitment is not universal. To that end, as Roosevelt advocated in 1937, Members of Congress have recently introduced legislation to add four seats to the Supreme Court.<sup>51</sup>

**Similarities.** The court-packing schemes promoted in 1937 and today have three similarities and two differences. The first similarity is the most obvious. Court-packing has a single purpose, to change the Supreme Court in order to change its decisions on certain priority issues. Second, Roosevelt framed the problem as a Supreme Court that refused to interpret the Constitution “in light of present-day civilization,” the same view that, according to the polls cited above, a majority of Americans now appear to hold. Third, today as in 1937, even if the public believes that the Supreme

Court should adjust its approach to constitutional interpretation, most Americans still oppose doing so by changing the Supreme Court as an institution. A February 1937 Gallup poll showed that Americans were evenly divided on Roosevelt's plan,<sup>52</sup> and opinion trended against it thereafter.<sup>53</sup> Contemporary polls also show opposition to court-packing rising from 54 percent in September 2020<sup>54</sup> to 66 percent in November 2021.<sup>55</sup>

**Differences.** One difference between previous and current court-packing schemes is the support of the President. Roosevelt himself initiated the 1937 legislation and publicly campaigned for it.<sup>56</sup> President Joe Biden, however, opposed court-packing as a Senator, calling it a “terrible, terrible mistake” and a “bonehead idea.”<sup>57</sup> He also rejected court-packing during most of the 2020 presidential campaign—even saying that it would make the Court lose “any credibility.”<sup>58</sup> And the Supreme Court Commission that he appointed last year, while including a few members who had publicly called for court-packing, not only failed to endorse court-packing, but in its hearings and final report actually highlighted various arguments *against* it.<sup>59</sup>

A second difference is the involvement of outside organizations. The American Bar Association (ABA) led a high-profile national campaign against Roosevelt's court-packing plan and appointed a special committee to present its views to the Senate Judiciary Committee. Sylvester C. Smith, chairman of the ABA special committee, presented the results of its polling of lawyers in every state: 86 percent of ABA members<sup>60</sup> and 77 percent of nonmembers<sup>61</sup> opposed Roosevelt's court-packing scheme. The primary objection, Smith explained, was that it “violates of necessity the spirit of judicial independence, the basis of our Constitution.”<sup>62</sup>

Today, however, the ABA has taken no position on court-packing. This silence contrasts sharply not only with the ABA's 1937 opposition, but with its strong defense of judicial independence since then. Six decades after helping to defeat Roosevelt's court-packing plan, for example, the ABA created the Commission on Separation of Powers and Judicial Independence. Its July 1997 report reflected, if anything, a greater sensitivity to new developments that, in the commission's view, might undermine judicial independence, such as “increasingly strident political criticism of particular judicial decisions and activities.”<sup>63</sup>

While the ABA has been silent, a coalition of left-wing groups has been calling for packing the Supreme Court so that it will produce more favorable decisions on a host of issues. These include union organizing, voting rights, abortion, LGBTQ rights, climate change, health care, and the Second Amendment.<sup>64</sup> In other words, they want to expand the Supreme Court for the very reason that Congress and the American people rejected doing so

in the past: to remove judicial independence as an obstacle to a judicially imposed political agenda.

**Threatening the Supreme Court.** Roosevelt’s advocacy for a different interpretive approach by the Supreme Court came in reaction to decisions that had already been made. Today, advocates are threatening to pack the Supreme Court if it does not decide *pending* cases to their liking.

In August 2019, for example, five Democratic Senators filed a friend-of-the-court brief in a case that, in its current form, challenges New York’s requirement that law-abiding citizens have “proper cause” to carry a firearm outside the home without a license.<sup>65</sup> The Senators’ brief closed with these ominous words:

The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be “restructured in order to reduce the influence of politics.” Particularly on the urgent issue of gun control, a nation desperately needs it to heal.<sup>66</sup>

This statement reflects the current campaign against judicial independence in two ways. First, it implies that unfavorable decisions necessarily result from “the influence of politics.” The possibility that an impartial interpretation and application of the Second Amendment would lead to an unfavorable outcome simply does not exist.

Second, these Senators claim that the public “knows” this but neither offer evidence nor even say what they mean by this statement. This framing appears aimed at tapping into a view that this campaign to undermine judicial independence deliberately promotes, that the Supreme Court and, by extension, other courts decide cases based on politics rather than the law.

Third, this brief, like the campaign it represents, cloaks its threat as a more innocuous call for “restructuring,” as if its authors seek simply to rearrange what exists rather than create something entirely new. If they really thought that court-packing would “heal” the Supreme Court, however, these Senators would have co-sponsored the Judiciary Act of 2021, the current bill that would add four seats to the Supreme Court. None of them has done so.

**Threatening Supreme Court Justices.** According to the American Bar Association, judicial independence “means that judges are not subject to pressure and influence and are free to make impartial decisions based solely on fact and law.”<sup>67</sup> The ABA commission’s 1997 report warned about “highly critical remarks by the...then Majority Leader of a particular decision.”<sup>68</sup> As noted above, current Majority Leader Schumer took to the Supreme Court

steps 23 years later with an even more direct threat to Justices whom he identified by name.

The spin following Senator Schumer's threat was more than a little strained. His spokesman claimed, for example, that by referring to "Gorsuch" and "Kavanaugh," and by using "you" seven times in two sentences, Senator Schumer was really speaking to Republican Senators about the election that was, at the time, still eight months away.<sup>69</sup> The media were not fooled, reporting that Schumer's threat was directed squarely at "President Donald Trump's court appointees."<sup>70</sup> The next day, then-Majority Leader Mitch McConnell (R-KY) stated the obvious:

There is nothing to call this except a threat, and there is absolutely no question to whom...it was directed. Contrary to what the Democratic leader has since tried to claim, he very, very clearly was not addressing Republican lawmakers or anyone else. He literally directed the statement to the Justices by name.<sup>71</sup>

The 1997 ABA commission's report appears prescient in another way, warning that "strident criticism" might be followed by calls for certain judges to resign or be impeached.<sup>72</sup> In March 2022, Representative Alexandria Ocasio-Cortez (D-NY) demanded that Justice Clarence Thomas resign from the Supreme Court or face impeachment for declining to make a blanket recusal commitment from any case related to the 2020 election or the events of January 6, 2021.<sup>73</sup> Similar demands escalated with news media reports that the justice's wife, Virginia "Ginni" Thomas, had exchanged text messages with then-White House Chief of Staff Mark Meadows regarding efforts to resist accepting the 2020 election results.<sup>74</sup>

Justice Thomas had declined to recuse himself from a case titled *Trump v. Thompson*.<sup>75</sup> Former President Donald Trump sought to assert executive privilege to prevent disclosure by the Archivist of the United States of certain presidential records to the House committee investigating the events of January 6, 2021. Thomas was the lone dissent from the Supreme Court's 8-1 decision refusing to put that disclosure on hold while its underlying legality was litigated.<sup>76</sup> Ginni Thomas was not involved in that case, and the legal issues concerning executive privilege had nothing to do with her. Her text messages did not mention the Supreme Court in general or Justice Thomas in particular.<sup>77</sup> The federal judicial recusal statute<sup>78</sup> makes clear that judges recuse themselves from individual "proceedings," not general subject matter—and none of the statutory criteria applied to this case. Justice Thomas had no reason not to do his judicial duty as he would in any other case.<sup>79</sup>

Any mention of impeachment is even more reckless. A legitimate and reasonable decision whether to recuse from a particular case means the Justice is doing his sworn duty—the opposite of anything for which he could be impeached. Similarly, a spouse’s views or activities that are entirely divorced from any specific case not only do not require recusal, but they hardly support a claim that a Justice has committed “Treason, Bribery, or other high Crimes and Misdemeanors,” the Constitution’s sole impeachment standard.<sup>80</sup> Ocasio-Cortez no doubt would prefer that Thomas was not on the Supreme Court, but her demand, while perhaps serving purely political purposes, is completely unconnected to the Constitution that she has sworn to support and defend.

**Calls for Court “Reform.”** Eighty-five years ago, Attorney General Homer Cummings testified before the Senate Judiciary Committee in favor of Roosevelt’s court-packing plan. He said:

The question of judicial reform is not a new one. Eminent judges, lawyers, statesmen, and publicists over periods of many years have complained of the defects of our judicial system and have sought to find remedies.<sup>81</sup>

Court reform ideas or proposals come from many sources and take many forms.<sup>82</sup> Framing policy or institutional change in terms of “reform” implies that a problem already exists that needs a solution. Sometimes, however, “reform” turns out to be cover for the same objective as court-packing: manipulating the courts to achieve more favorable decisions. In 1997, the ABA warned about this as well, its report listing increasing calls for “congressional micro-management of the judiciary” as a potential threat to judicial independence.<sup>83</sup>

This kind of campaign is underway today. The Judiciary Accountability Act,<sup>84</sup> for example, would create a commission within the judicial branch to monitor such things as “employee metrics and demographics” and the “workplace climate and culture in the judicial branch.” The President alone would choose three of the commission’s 16 members, and they would choose four others. The judiciary, however, would not appoint a single commission member without the approval of, or consultation with, both the legislative and executive branches.

On April 27, 2021, the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet held a hearing titled “Building Confidence in the Supreme Court Through Ethics and Recusal Reforms.”<sup>85</sup> The title implied that “confidence” in the Supreme Court has already been destroyed and that its restoration requires such “reforms.” This campaign takes

advantage of the fact that the public knows little about our system of government in general, and about the judiciary in particular. The latest annual survey by the Annenberg Public Policy Center, for example, showed:

- Only a bare majority of Americans could name the three branches of government;
- One-third knew the length of House and Senate members' terms;
- Nearly one-fifth could not name a single right protected by the First Amendment; and
- Nearly one-fifth believed that Supreme Court decisions decided by a 5–4 margin are sent to Congress “for reconsideration.”<sup>86</sup>

A public that knows little, or misunderstands a lot, about how the judiciary works and the specific role it plays in our system of government will be open to rhetoric suggesting that unfavorable Supreme Court decisions come from “unethical” justices. In other words, it is too easy to foster the belief, sure to destroy the “perceived legitimacy of the courts,”<sup>87</sup> that they are “composed of unelected judges free to write their policy views into law.”<sup>88</sup>

## Conclusion

Judicial independence is more important, and the explicit and subtle threats to it are more troubling, than ever. Undermining judicial independence would disable this feature of our system of government that is so vital to its purpose of securing inalienable rights. Court-packing, threatening the Supreme Court, attempting to demonize individual Justices, and other strategies reject—and may permanently destroy—what the Founders knew was “peculiarly essential” to this system of government that has provided unparalleled liberty.

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## Endnotes

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4. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
5. CONG. REC., May 3, 2022, at S2253.
6. THE FEDERALIST No. 39 (James Madison).
7. THE FEDERALIST No. 51 (James Madison).
8. See also NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019).
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30. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416,420 (1983) (6–3 vote to “reaffirm *Roe v. Wade*.”); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747,759 (1986) (5–4 vote to reaffirm “the general principles laid down in *Roe* and *Akron*.”); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (5–4 vote to reaffirm the “essence” of *Roe*.).

31. *Casey*, 505 U.S. at 845.
32. *Dobbs*, draft opinion, at 6.
33. *Id.* at 39.
34. *The Sexes: Abortion on Demand*, TIME (Jan. 29, 1973), at 46, <http://content.time.com/time/subscriber/article/0,33009,903771-1,00.html>.
35. Meilan Sally, *In 1973, a Leak at the Supreme Court Broke News of an Imminent Ruling on Roe v. Wade*, SMITHSONIAN MAG., May 4, 2022, <https://www.smithsonianmag.com/smart-news/the-original-roe-v-wade-ruling-was-leaked-to-the-press-too-180980016/>.
36. See Brad Dress, *NPR Reporter Says “Leading Theory” on SCOTUS Leak Is Conservative Clerk*, THE HILL (May 8, 2022), <https://thehill.com/policy/healthcare/3481235-npr-reporter-says-leading-theory-on-scotus-leak-is-conservative-clerk/>.
37. See Thomas Jipping, *Democrats Push Radical Abortion Bill Far More Expansive Than Roe*, DAILY SIGNAL, May 9, 2022, <https://www.dailysignal.com/2022/05/09/democrats-push-radical-abortion-bill-far-more-expansive-than-roe>.
38. Women’s Health Protection Act of 2022, S. 4132, 117th Cong. (2022).
39. U.S. CONST., art. III, § 1, cl. 2. See David Engdahl, *Inferior Courts*, HERITAGE GUIDE TO THE CONSTITUTION, <https://www.heritage.org/constitution/#!/articles/1/essays/47/inferior-courts>.
40. See Administrative Office of the U.S. Courts, *Authorized Judgeships*, <https://www.uscourts.gov/sites/default/files/allauth.pdf>.
41. See Thomas Jipping and David Bainbridge, *Strike 3: Why Biden Commission Should Reject Court Packing*, DAILY SIGNAL (June 29, 2021), <https://www.dailysignal.com/2021/06/29/strike-three-why-the-biden-commission-should-reject-court-packing/>.
42. These include *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (provision of the National Industrial Recovery Act); *Railroad Retirement Bd. v. Alton Railway Co.*, 295 U.S. 330 (1935) (Railroad Pension Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (National Industrial Recovery Act); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (Frazier–Lemke Act); *United States v. Butler*, 297 U.S. 1 (1936) (provision of the Agricultural Adjustment Act); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (Bituminous Coal Conservation Act).
43. White House, Press Conference 209, transcript at 2 (Mar. 31, 1935), [http://www.fdrlibrary.marist.edu/\\_resources/images/pc/pc0022.pdf](http://www.fdrlibrary.marist.edu/_resources/images/pc/pc0022.pdf).
44. During the 74th Congress, Democrats controlled at least 71 of the 96 Senate seats, more than the two-thirds threshold required by Senate rules at the time to invoke cloture or end debate.
45. See Thomas Jipping, *“Whatever Means Necessary”: Weaponizing the Judicial Confirmation Process*, HERITAGE FOUND. LEGAL MEMORANDUM No. 266, June 11, 2020, at 7–9, [https://www.heritage.org/sites/default/files/2020-06/LM266\\_0.pdf](https://www.heritage.org/sites/default/files/2020-06/LM266_0.pdf).
46. *Id.* at 14.
47. *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong., Report No. 711 (1937), at 1.
48. *Id.*
49. *Id.* at 8.
50. These were Justices Willis Van Devanter, appointed in 1911 by President William Howard Taft; James McReynolds, appointed in 1914 by President Woodrow Wilson; George Sutherland, appointed in 1922 by President Warren G. Harding; and Pierce Butler, appointed in 1923 by Harding.
51. H.R. 2584 and S. 1141, the Judiciary Act of 2021, were both introduced on April 15, 2021.
52. See Gregory A. Caldeira, *FDR’s Court-Packing Plan in the Court of Public Opinion*, Appendix I (Aug. 4, 2004), available at <http://epstein.wustl.edu/research/courses/LAPSCaldeira.pdf> (last accessed June 11, 2020).
53. *Id.* at Appendix III.
54. See *Sept. 21–24, 2020, Washington Post–ABC News Poll*, WASH. POST (Sep. 27, 2020), <https://wapo.st/3CdDBqE>.
55. See James Freeman, *Mason–Dixon Poll: Americans Still Don’t Like Court-Packing*, WALL STREET J. (Nov. 10, 2021), <https://www.wsj.com/articles/mason-dixon-poll-americans-still-dont-like-court-packing-11636576314>.
56. Thomas Jipping, *Court Reform Commissions, Past and Present*, HERITAGE FOUND. LEGAL MEMORANDUM No. 287, July 15, 2021, at 8.
57. See Thomas Barrabi, *Flashback: That Time Biden Called Court-Packing a “Bonehead Idea,”* FOX NEWS (Apr. 14, 2021), <https://www.foxnews.com/politics/flashback-biden-called-court-packing-a-bonehead-idea-in-1983>.
58. *The October Democratic Debate Transcript*, WASH. POST (Oct. 16, 2019), <https://www.washingtonpost.com/politics/2019/10/15/october-democratic-debate-transcript/>. Biden’s position became murkier during the campaign’s final month, with him alternately saying that he was “not a fan of court-packing” and that “you will know my opinion on court-packing the minute the election is over.”
59. Presidential Commission on the Supreme Court of the United States, Final Report, December 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>. John Malcolm, Director of the Heritage Foundation’s Edwin Meese III Center for Legal and Judicial Studies, testified before the commission on July 20, 2021. His prepared statement can be found at <https://www.whitehouse.gov/wp-content/uploads/2021/07/Malcolm-Testimony.pdf>.
60. *Reorganization of the Federal Judiciary*, *supra* note 51, at 1459.

61. *Id.* at 1460.
62. *Id.* at 1461.
63. *An Independent Judiciary*, *supra* note 27, at ii. *But see* Pat McGuigan, *The Right of the People to Critique Judicial Rulings: Implications for Citizen Activism*, 22 OKLA. CITY U. L. REV. 1223 (1997).
64. Press Release, Take Back the Court *et al.*, Reform the Supreme Court to Rebuild America, <https://bit.ly/3ttcCn2>.
65. *See New York Rifle & Pistol Association, Inc. v. Bruen*, SCOTUS BLOG, <https://www.scotusblog.com/case-files/cases/new-york-state-rifle-pistol-association-inc-v-bruen/>.
66. Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kirsten Gillibrand as Amicus Curiae in Support of Respondents in *New York State Rifle & Pistol Assoc., Inc. v. City of New York*, No. 18–280 (2019), at 18.
67. American Bar Association, *Rule of the Law and the Courts* (Aug. 22, 2019), <https://bit.ly/3rQJyWE>.
68. *An Independent Judiciary*, *supra* note 27, at i.
69. *See* Zack Budryk, *Schumer's Office Says He Was Referencing Justices Paying "Political Price,"* THE HILL (Mar. 4, 2020), <https://thehill.com/homenews/senate/486029-schumers-office-says-he-was-referencing-justices-paying-political-price/>.
70. *See, e.g.*, Pete Williams, *In Rare Rebuke, Chief Justice Roberts Slams Schumer for "Threatening" Comments*, NBC NEWS, March 4, 2020, <https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-schumer-threatening-comments-n1150036>.
71. CONG. REC., Mar. 5, 2020, at S1509. Chief Justice John Roberts responded: "Justices know that criticism comes with the territory, but threatening statements of this sort from the highest levels of government are not only inappropriate, they are dangerous." OFF. OF PUB. INFO., STATEMENT FROM CHIEF JUSTICE JOHN G. ROBERTS, JR., Mar. 4, 2020, at <https://www.scotusblog.com/wp-content/uploads/2020/03/CJ-Statement-re-Schumer-remarks.pdf>.
72. *An Independence Judiciary*, *supra* note 27, at i–ii.
73. *See* John Kruzell, *Ocasio-Cortez to Clarence Thomas: Resign or Face Impeachment*, THE HILL (Mar. 29, 2022), <https://thehill.com/homenews/house/600145-ocasio-cortez-to-clarence-thomas-resign-or-face-impeachment/>.
74. *See* Bob Woodward and Robert Costa, *Virginia Thomas Urged White House Chief to Pursue Unrelenting Efforts to Overturn the 2020 Election, Texts Show*, WASH. POST, Mar. 24, 2022, <https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/>.
75. *Trump v. Thompson*, 20 F. 4th 10 (CADC 2021).
76. *Trump v. Thompson*, No. 21A272 (January 19, 2022), [https://www.supremecourt.gov/opinions/21pdf/21a272\\_9p6b.pdf](https://www.supremecourt.gov/opinions/21pdf/21a272_9p6b.pdf).
77. *See* Analisa Novak, *Why Ginni Thomas' Texts with Mark Meadows Could Be "A Tricky Area" for Congressional Investigators*, CBS NEWS (Mar. 25, 2022), <https://www.cbsnews.com/news/ginni-thomas-mark-meadows-text-messages/>.
78. *See* 28 U.S.C. § 455.
79. The Committee for Justice hosted a panel discussion on this topic on April 25, 2022, which included John Malcolm of The Heritage Foundation. The video of that discussion can be accessed at <https://www.youtube.com/watch?v=VG1zdCWqfP0>.
80. U.S. Const., art. II, § 4. *See* Stephen B. Presser, *Standards for Impeachment*, HERITAGE GUIDE TO THE CONSTITUTION, <https://www.heritage.org/constitution/#/articles/2/essays/100/standards-for-impeachment>.
81. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906) in 14 AM. LAW. 445 (1996), <https://law.unl.edu/RoscoePound.pdf>.
82. *See generally* Jipping, *supra* note 60.
83. *An Independent Judiciary*, *supra* note 27, at ii.
84. This bill, S. 2553 and H.R. 4827, was introduced in the Senate and House on July 29, 2021. Heritage scholar Sarah Parshall Perry testified on the bill before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet on March 17, 2022. Video of the hearing, witness statements, and materials submitted for the record can be found at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4883>. This material includes the statement submitted by the author from which this *Legal Memorandum* is adapted.
85. Video of the hearing, witness statements, and other material submitted for the hearing record can be found at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4921>.
86. Annenberg Public Policy Center, *Americans' Civic Knowledge Increases During a Stress-Filled Year* (Sept.14, 2021), <https://www.annenbergpublicpolicycenter.org/2021-annenberg-constitution-day-civics-survey/>.
87. Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 626 (1999).
88. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286–87 (1990).