

## Presidential Commission on the Supreme Court of the United States

### *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*

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Co-Chair Rodriguez, Co-Chair Bauer, and members of the Commission, thank you for inviting me to testify. You have asked for my opinion about the causes of the current public debate over reforming the Supreme Court of the United States, the competing arguments for and against reform at this time, and how the commission should evaluate those arguments.

The cause of the current public debate over reforming the Supreme Court is longstanding: **Americans rightfully hold democracy as our highest political ideal, yet the Supreme Court is an antidemocratic institution.** The primary source of concern is *judicial review*, or the power of the Court to decline to enforce a federal law when a majority of the justices disagree with a majority of Congress about the law's constitutionality.

I will focus on two arguments for reforming the Supreme Court, both of which object to the antidemocratic nature of judicial review. **First, as a matter of historical practice, the Court has wielded an antidemocratic influence on American law, one that has undermined federal attempts to eliminate hierarchies of race, wealth, and status.** Second, as a matter of political theory, the Court's exercise of judicial review undermines the value that distinguishes democracy as an ideal form of government: its pursuit of political equality. Both arguments compete with counterarguments that judicial review is necessary to preserve the political equality of so-called discrete and insular minorities. But even accepting that the political equality of all Americans should be protected, the justification for judicial review is not persuasive as a matter of practice or theory.

I believe you should evaluate the proposals for reforming the Supreme Court by asking whether they will make the United States more democratic. That is, you should ask whether the reforms will extend or protect the political

equality of all Americans, so that each one of us possesses equal political and social standing to share in controlling our national community. You should advocate for reforms that will help bring democracy to our workplaces, our legislatures, and our fundamental law before we lose what democracy we have.

### **1. The cause of the current debate over reforming the Supreme Court**

Nearly two hundred years ago, when Alexis de Tocqueville described his observations of democracy in America, he observed that the United States had rejected monarchy but embraced aristocracy. “If you asked me where I place the American aristocracy, I would answer without hesitating,” he wrote: “The American aristocracy is at the lawyers’ bar and on the judges’ bench.”<sup>1</sup> Even in the 1830s, Tocqueville observed that American jurists considered themselves a “privileged class among intelligent people” by virtue of “[t]he special knowledge that jurists acquire while studying the law.”<sup>2</sup> When given the protection of “irremovability from office,” Tocqueville added, they held themselves in “an elevated position” and a “rank apart” from their peers.<sup>3</sup> American jurists thought of themselves as belonging to a “superior political class and the most intellectual portion of society.”<sup>4</sup> In the courtroom and outside of it, they held their own powers of political judgment above “a certain contempt for the judgment of the crowd.”<sup>5</sup>

For Tocqueville, this sense of aristocratic superiority was in tension with the rest of America’s democracy. Tocqueville admired democracy, which he defined by its pursuit of political equality.<sup>6</sup> When Tocqueville compared white American men to the subjects of European monarchies, he praised how the Americans treated one another as political equals, and how they organized their legislatures around the idea that each person should be equally qualified to make decisions.<sup>7</sup> Yet Tocqueville wrote that American

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<sup>1</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 439 (Eduardo Nolla ed., James T. Schleifer trans. 2012) (1835).

<sup>2</sup> *Id.* at 432.

<sup>3</sup> *Id.* at 439–40.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 432.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 4–33.

judges opposed these “democratic instincts” with “their own aristocratic tendencies.”<sup>8</sup> “Armed with the right of declaring laws unconstitutional, an American magistrate enters constantly into public affairs,” he wrote.<sup>9</sup>

“The more you think about what happens in the United States,” Tocqueville continued, “the more you feel persuaded that in this country the body of jurists forms the most powerful and, so to speak, the sole counterweight of democracy.”<sup>10</sup> Even though all literate Americans could read and understand their Constitution, American judges treated the document as inscrutable to all but themselves. Like “the priests of Egypt,” they considered themselves “the sole interpreter of an occult science.”<sup>11</sup> Even though American legislators were as capable as anyone else of evaluating which laws were consistent with constitutional values, American judges routinely translated political questions into judicial questions that they alone could answer.<sup>12</sup> By disguising their own values in the purposefully arcane language of constitutional law, judges acted as if their “superstitious respect for what is old,” their “natural love of forms,” and their “great distaste for the actions of the multitude” were mandated not by themselves, but by constitutional text.<sup>13</sup> Tocqueville could not help but conclude that “in a society where jurists occupy without dispute the elevated position that [they claim] belongs to them naturally, their spirit will be eminently conservative and will show itself to be antidemocratic.”<sup>14</sup>

Tocqueville was an early observer of the antidemocratic nature of *judicial review*, which I’ll define here as the power of a federal court to decline to enforce a federal law when a majority of the court disagrees with a majority of Congress about the law’s constitutionality. (As I’ll discuss later, the power of a federal court to *enforce* federal law is different and raises fewer objections from democracy, even when the result invalidates a state law.) But Tocqueville was hardly the last critic to question whether judicial review belongs in a democracy. In the decades since his observations, the

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<sup>8</sup> *Id.* at 439.

<sup>9</sup> *Id.* at 440.

<sup>10</sup> *Id.* at 439.

<sup>11</sup> *Id.* at 438.

<sup>12</sup> *Id.* at 440.

<sup>13</sup> *Id.* at 433, 439.

<sup>14</sup> *Id.* at 434.

Supreme Court has invalidated dozens of federal laws designed to expand political equality. These include:

- *Dred Scott*\* in 1857 (prohibiting Congress from banning the spread of slavery or extending citizenship rights to black people);
- *Cruikshank* in 1876, *Reese* in 1876, *Harris* in 1883, and *Giles*\* in 1903 (restricting Congress from protecting voting rights from lynch mobs and state disenfranchisement);
- *The Civil Rights Cases* in 1883 (restricting Congress from passing an antidiscrimination law);
- *Pollock* in 1895 (restricting Congress from taxing income or wealth);
- *Hammer*\* in 1918 and the *Child Labor Tax Case* in 1922 (prohibiting Congress from banning child labor);
- *Myers* in 1926, *Chadha* in 1983, and *Zivotofsky* in 2015 (restricting Congress from regulating or supervising the president);
- *Buckley v. Valeo* in 1976 and *Citizens United* in 2010 (restricting Congress from regulating campaign financing);
- *Adarand* in 1995 (restricting Congress from enacting race-conscious remedies for racial discrimination);
- *City of Boerne* in 1997 and *Garrett* in 2001 (restricting Congress from interpreting the Constitution to protect more civil rights than the Supreme Court is willing to protect);
- *Lopez* in 1995, *Printz* in 1997, and *Morrison* in 2000 (restricting Congress from protecting the safety and civil rights of citizens);
- *NFIB* in 2012 (restricting Congress from inducing states to expand health insurance coverage); and
- *Shelby County* in 2013 (restricting Congress from protecting voting rights from discriminatory or disenfranchising state laws).

All but the starred decisions continue to restrict Congress’s constitutional power. Along with other exercises of judicial review, they have led modern observers to join Tocqueville in questioning whether judicial review serves political equality or whether it compromises it. The problem posed by judicial review is distinct from whether constitutional limits should be enforced; in each of the above cases, the president and majorities of Congress believed that their laws were constitutional. Instead, the problem posed by judicial review is whether the constitutional interpretation held by a majority of Supreme Court justices should be “superior” to the interpretations held by majorities of the other branches.<sup>15</sup>

## 2. Two arguments for reform

The problem of judicial review takes two forms: a historical problem and a theoretical problem.

### *a. History*

To illustrate the historical problem posed by judicial review, consider the Supreme Court’s relationship to America’s racial caste system. In one of the first cases to invalidate a major federal law, the Supreme Court held in the 1857 *Dred Scott* decision that the Constitution forbade Congress from restricting the spread of slavery—nor could Congress give black people rights of citizenship.<sup>16</sup> The reaction to the decision was so harsh that it helped precipitate the Civil War. In his inaugural address four years later, President Abraham Lincoln rejected the idea that the Court’s interpretation of the Constitution was superior to that of Congress. “If the policy of the Government upon vital questions . . . is to be irrevocably fixed by decisions of the Supreme Court,” Lincoln said, “the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.”<sup>17</sup>

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<sup>15</sup> Cf. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

<sup>16</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>17</sup> 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3210 (James D. Richardson ed. 1897).

Congress followed Lincoln’s example by repudiating the Court within a year of Lincoln’s speech. In 1862, Congress passed a law abolishing slavery west of the Mississippi—precisely what the Court said Congress could not do.<sup>18</sup> Congress later extended citizenship to black people—even though the Court said that such an extension was constitutionally impossible.<sup>19</sup> To ensure that the Court would never again interfere with its own interpretation of the Constitution, Congress also proposed the Fourteenth Amendment, which gave it the power to protect the civil rights of all Americans. By 1875, Congress passed laws to bring lynch mobs to justice, to protect the right of black men to vote, and even to ban racial discrimination in public places like hotels and train cars.<sup>20</sup>

Yet rather than learn humility from *Dred Scott*, the Supreme Court “deprived [this] enforcement legislation of nearly all its strength” in what W.E.B. Du Bois later called a “counter-revolution of property.”<sup>21</sup> Most notably, in the 1883 *Civil Rights Cases*, the Supreme Court interpreted the constitutional amendments written by Congress and concluded that none of them empowered Congress to pass its antidiscrimination law. When Congress defended its antidiscrimination law as a logical response to its abolition of slavery, the Court replied that Congress was “running the slavery argument into the ground.”<sup>22</sup> And when Congress added that an antidiscrimination law was necessary to protect all citizens in their civil and legal rights, the Court held that Congress was unfairly treating black people as “the special favorite of the laws.”<sup>23</sup>

Southern states responded to these cases predictably. Even though black residents represented the majority of many southern states, white vigilantes violently intimidated black voters away from the polls.<sup>24</sup> Once in control of state legislatures, these same white residents purged black voters from the

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<sup>18</sup> An Act to Secure Freedom to All Persons Within the Territories of the United States, ch. 112, 12 Stat. 432 (1862).

<sup>19</sup> Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

<sup>20</sup> See, e.g., Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

<sup>21</sup> W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 690 (1935).

<sup>22</sup> The Civil Rights Cases, 109 U.S. 3, 25 (1883).

<sup>23</sup> *Id.* at 25.

<sup>24</sup> ERIC FONER, THE SECOND FOUNDING 143–46 (2019).

rolls.<sup>25</sup> They also enacted segregation laws to codify their racial hierarchy.<sup>26</sup> And when black residents invoked federal laws to challenge these actions, the Supreme Court dismissed the black residents' concerns. For example, when white participants in Louisiana massacred dozens of black voters, the Court held that Congress had no power to punish lynch mobs.<sup>27</sup> When Alabama adopted its 1901 constitution explicitly "to establish white supremacy in this State," the Court held that the federal government was powerless to respond if "the great mass of the white population intends to keep the blacks from voting."<sup>28</sup> And when Louisiana required black residents to ride "equal but separate" train cars, the Court upheld the state's law in 1896's *Plessy v. Ferguson*.<sup>29</sup>

This is a sorry legacy, one that might be better known today if not for the decision most often invoked in defense of judicial review: 1954's *Brown v. Board of Education*.<sup>30</sup> After a generational change among Supreme Court personnel, *Brown* overruled *Plessy* and declared that racial segregation was "inherently unequal."<sup>31</sup> Since the 1950s, most American law professors have argued that *Brown* shows why the "counter-majoritarian difficulty" of judicial review is an essential feature of modern democracy.<sup>32</sup> Absent judicial review, the argument goes, nothing would have stopped legislatures from entrenching America's racial caste system permanently.

But *Brown* is not an example of the Supreme Court disagreeing with Congress about the constitutionality of a federal law. To the contrary: the *Brown* Court enforced the Ku Klux Klan Act of 1871, one of the federal laws the Supreme Court had earlier gutted, but which nominally prohibited

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<sup>25</sup> Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 303-04 (2000).

<sup>26</sup> STEVE LUXENBERG, SEPARATE 471-90 (2019).

<sup>27</sup> *United States v. Cruikshank*, 92 U.S. 542 (1876).

<sup>28</sup> *Giles v. Harris*, 189 U.S. 475, 488 (1903); see also *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (quoting the president of the convention).

<sup>29</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>30</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>31</sup> *Id.* at 495.

<sup>32</sup> ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962); Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

southern states from discriminating against black people.<sup>33</sup> (In a companion decision, *Bolling v. Sharpe*, the Court also ended segregation in the District of Columbia, but such segregation had not been the product of any congressional statute.<sup>34</sup>)

What *Brown* actually illustrates is how federal legislation has successfully expanded American democracy when the Supreme Court has stopped interfering with Congress. As Michael Klarman has observed, southern schools remained almost as racially segregated in 1964 as they had been ten years earlier, when *Brown* was decided.<sup>35</sup> Formal segregation drew to a close in the South only after Congress enacted the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>36</sup> Yet both federal laws stood in the face of earlier Supreme Court precedents that restricted Congress's power to protect civil rights and voting rights.<sup>37</sup> Because the Supreme Court continued to hold itself as the supreme interpreter of the Constitution, it had to give Congress permission to evade the Court's own bad precedents before Congress could codify multiracial democracy.

Yet while the Supreme Court allowed Congress's civil and voting rights acts to stand, it has abandoned its deferential posture since President Richard Nixon appointed four justices in the early 1970s. Just as the *Civil Rights Cases* invalidated the first federal antidiscrimination law in 1883, the Court prohibited Congress from enacting race-conscious remedies to racial discrimination in 1995.<sup>38</sup> Indeed, the Court has since emphasized that the *Civil Rights Cases* remain good law, and therefore Congress has little power to interpret the scope of the Constitution to be more protective of civil rights than the Court's restrictive interpretations.<sup>39</sup> In 2013's *Shelby*

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<sup>33</sup> Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13; see *United States v. Harris*, 106 U.S. 629 (1883) (invalidating part of the Act).

<sup>34</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>35</sup> Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994).

<sup>36</sup> OWEN THOMPSON, *SCHOOL DESEGREGATION AND BLACK TEACHER EMPLOYMENT* 1, 2 (2019).

<sup>37</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 333 (1966) (citing *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959); *Heart of Atl. Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (citing the *Civil Rights Cases*, 109 U.S. 3 (1883)).

<sup>38</sup> *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

<sup>39</sup> *City of Boerne v. Flores*, 521 U.S. 507, 524–25 (1997).

*County* decision, the Court applied this logic to invalidate a key section of the Voting Rights Act of 1965—the law that had finally enfranchised most of America’s adult population for the first time.<sup>40</sup> And in *Citizens United* and related cases, the Court invalidated decades-old federal laws designed to prevent the wealthy from dominating national elections.<sup>41</sup>

As modern-day Tocquevilles have evaluated this history, it is understandable why some have reached the conclusion that judicial review of federal legislation is in dire need of restriction.<sup>42</sup> Indeed, once *Brown* and other cases enforcing federal law are removed from the equation, it is not clear whether there exists a strong historical counterargument demonstrating why judicial review is necessary.

As alluded to above, the general argument for judicial review is that the intervention of federal courts may be necessary to protect political minorities from a dysfunctional political process (such as the system of racial apartheid that characterized the South between the *Civil Rights Cases* in 1883 and the decisions upholding the Civil Rights Act and Voting Rights Act almost a century later). Because the Supreme Court is insulated from partisan politics, the argument goes, the Court is in a strong institutional position to police “prejudice against discrete and insular minorities . . . , which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>43</sup> This argument is strengthened, at least in theory, by the prospect that Congress might act rashly during wars and other national emergencies. Federal courts might

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<sup>40</sup> *Shelby County v. Holder*, 570 U.S. 529, 550–51 (2013); see Ellen D. Katz, *Dismissing Deterrence*, 127 HARV. L. REV. F. 248, 249 (2014) (“Immobilized by *Shelby County*, preclearance had been vulnerable to attack since 1997 when the Supreme Court decided *City of Boerne v. Flores*. That decision and its progeny demanded a far tighter connection between constitutional violations and congressionally crafted remedies than prior precedent had required.”)

<sup>41</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010); see *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>42</sup> See, e.g., Adrienne Stone, *Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law*, 60 U. TORONTO L. REV. 109 (2010); RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* (2007); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); GIRARDEAU SPANN, *RACE AGAINST THE COURT* (1994).

<sup>43</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

therefore ensure that Congress respects the same rights that it would be trusted to observe in peacetime.

Yet if you look at the history of the judicial review of federal legislation, the principal “minority” most often protected by the Court is the wealthy.<sup>44</sup> In contrast with electoral politics—where all citizens are formally equal in their possession of a single vote—wealthy litigants can muster the skills, time, money, influence, and capacity to challenge the same piece of legislation over and over again in court.<sup>45</sup> For example, in 1895’s *Pollock v. Farmers’ Loan and Trust Co.*, the Court held after a series of challenges that Congress had no power to enact an income tax because such a tax would violate “one of the bulwarks of private rights and private property.”<sup>46</sup> This decision remains a constitutional barrier to a twenty-first century wealth tax—not because such a wealth tax is good or bad policy, but because the late-nineteenth century Supreme Court disagreed with Congress about the tax’s constitutionality.<sup>47</sup>

By contrast, in cases in which Congress has harmed racial, religious, or ideological minorities, the Court has almost exclusively adopted a posture of deference. There is no question that Congress has adopted horrific legislation over the past 250 years. But there are few examples of the Supreme Court intervening in a timely fashion, as widespread popular prejudices against minorities are likely to be shared by a significant proportion of judges as well.<sup>48</sup> For example, the Court has been silent at best when Congress and the president have violently dispossessed Native tribes,<sup>49</sup> excluded Chinese immigrants,<sup>50</sup> persecuted political dissidents,<sup>51</sup> withheld civil rights from U.S. citizens in territories,<sup>52</sup> and banned Muslim

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<sup>44</sup> BELLAMY, *supra* note 42, at 40–44.

<sup>45</sup> *Id.*

<sup>46</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 583 (1895).

<sup>47</sup> See Daniel Hemel & Rebecca Kysar, *The Big Problem with Wealth Taxes*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/opinion/wealth-tax-constitution.html>.

<sup>48</sup> BELLAMY, *supra* note 42, at 40–46.

<sup>49</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

<sup>50</sup> *Chinese Exclusion Case*, 130 U.S. 581 (1889).

<sup>51</sup> *Dennis v. United States*, 341 U.S. 494 (1951); *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>52</sup> *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

refugees.<sup>53</sup> Far from policing Congress during wartime emergencies, the Court has also allowed the federal government to round up whichever ethnic or religious groups they think are suspicious.<sup>54</sup>

When these false negatives are compared with the false positives of cases like *Dred Scott* and *Shelby County*, it becomes pretty evident that the Court is, at best, unreliable at protecting politically marginalized groups.<sup>55</sup> The best examples of judicial review working as anticipated by its proponents—true positives—are cases such as the 2013 *Windsor* decision that invalidated the Defense of Marriage Act of 1996,<sup>56</sup> the 2008 *Boumediene* decision that guaranteed minimal due process protections for Guantanamo detainees,<sup>57</sup> and decisions in the 1970s that prohibited Congress from “protecting” women by engaging in sex discrimination.<sup>58</sup>

Comparing the United States with other established democracies also demonstrates that judicial review is not a necessary feature of modern democracy. Many countries with strong traditions of protecting civil rights—from the common-law United Kingdom and New Zealand to the civil-law Netherlands and Switzerland—do not permit courts to invalidate national legislation.<sup>59</sup> These departures from the U.S. model have not resulted in societal collapse or widespread rights violations. To the contrary: the quality of debate in these nations’ legislatures “make nonsense of the claim that legislators are incapable of addressing such issues responsibly,” just as their legalization of rights like abortion and same-sex marriage “cast doubt on the familiar proposition that popular majorities will not uphold the rights of minorities.”<sup>60</sup> By contrast, judicial

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<sup>53</sup> *Trump v. Hawaii*, 139 S. Ct. 2392 (2018).

<sup>54</sup> *Korematsu v. United States*, 323 U.S. 214 (1944); *see also* *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

<sup>55</sup> BELLAMY, *supra* note 42, at 250–58.

<sup>56</sup> *United States v. Windsor*, 570 U.S. 744 (2013).

<sup>57</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>58</sup> *E.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

<sup>59</sup> A DIFFERENT DEMOCRACY: AMERICAN GOVERNMENT IN A THIRTY-ONE-COUNTRY PERSPECTIVE 296 (Steven L. Taylor, Matthew S. Shugart, Arend Lijphart & Bernard Grofman eds. 2014).

<sup>60</sup> Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1349–50 (2006); *see* Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1426–32 (2009).

review in the United States directly contributed to the rise of Jim Crow—a point that cannot be emphasized enough.

*b. Theory*

Everything so far represents a historical case against judicial review. But as Tocqueville observed even before this history began, judicial review is also antidemocratic as a matter of theory.

What has long characterized democracy as a distinct form of government is its pursuit of political equality.<sup>61</sup> From classical Athens through the American Revolution, a democracy has been understood as a community of political equals.<sup>62</sup> In an ideal democracy, each and every member of the community, or *demos*, is treated as if they are equally qualified to make decisions about how the community will exercise its power, or *kratos*.<sup>63</sup> Indeed, the etymology of the term *demos* refers not only to the community as a whole, but also more particularly to the members of the community who are the most likely to be marginalized because of their lack of status, wealth, or education.<sup>64</sup>

In the eighteenth century, the pursuit of political equality formed the basis for the Declaration of Independence’s argument that “all men are created equal.” Such an argument rejects the alternative premise that some people are born to rule. In the nineteenth century, the pursuit of political equality formed the basis for Abraham Lincoln’s argument that the United States is a “government of the people, by the people, for the people.” Such an argument rejects the alternative premise that government should be the responsibility of Platonic guardians who claim superiority by virtue of their race, education, or expertise. In the twentieth century, the pursuit of political equality formed the basis for Barbara Jordan’s argument that the Constitution’s “We, the People” includes black women like her.<sup>65</sup> Such an argument rejects the alternative premise that political authority is legitimate even if it excludes the participation of entire classes of people.

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<sup>61</sup> See ALBERT WEALE, *DEMOCRACY* 50, 62 (2d ed. 2007).

<sup>62</sup> See Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty*, 41 *POLITICAL THEORY* 441, 458 (2013).

<sup>63</sup> See ROBERT A. DAHL, *ON DEMOCRACY* 37 (2020).

<sup>64</sup> PAUL CARTLEDGE, *DEMOCRACY* 3 (2016).

<sup>65</sup> MARY BETH ROGERS, *BARBARA JORDAN*, at ix–x (2011).

And in the twenty-first century, the pursuit of political equality forms the basis for familiar democratic procedures such as popular voting, majority rule, elections, sortition, rotation in office, and deliberation. All of these methods of resolving disagreement treat all participants as equals, in contrast with hierarchical methods of resolving disagreement that privilege some people more than others.<sup>66</sup>

The democratic conception of political equality is a relational theory of equality. In the words of philosopher Elizabeth Anderson, “democratic equality regards two people as equal when each accepts the obligation to justify their actions by principles acceptable to the other, and in which they take mutual consultation, reciprocation, and recognition for granted.”<sup>67</sup>

This idea gains its shape when it is contrasted with communities built around social hierarchies, like aristocracies or monarchies. Democratic advocates of political equality critique hierarchies of authority in which occupants of higher rank exercise arbitrary and unaccountable power over their inferiors.<sup>68</sup> They critique hierarchies of esteem in which occupants of higher rank extract tokens of deferential honor from those of lower rank, such as bowing, scraping, and other rituals of self-abasement.<sup>69</sup> And they critique hierarchies of standing, in which the interests of those of higher rank count in the eyes of others, whereas the interest of inferiors do not.<sup>70</sup>

The political theorist Danielle Allen has interpreted the Declaration of Independence to make five distinct arguments about why the political equality of democracy is intrinsically and instrumentally preferable to institutions built around social hierarchy.<sup>71</sup> First, political equality recognizes the profound lack of freedom someone experiences when they’re subject to the *domination* of a superior in a hierarchy. Second, it recognizes the *moral entitlement* of all people, no matter how wealthy or educated, to make political judgments. Third, it recognizes that the *collective supply of knowledge* in a community is improved when everyone contributes. Fourth,

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<sup>66</sup> See Albert Weale, *Three Types of Majority Rule*, 90 POLITICAL Q. 62, 65–66 (2019); WEALE, *supra* note 61, at 51–63; CARTLEDGE, *supra* note 64, at 309–11.

<sup>67</sup> Elizabeth Anderson, *What Is the Point of Equality*, 109 ETHICS 287, 313–14 (1999).

<sup>68</sup> ELIZABETH ANDERSON, PRIVATE GOVERNMENT 3–4 (2017).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> DANIELLE ALLEN, OUR DECLARATION 268–69 (2014).

it recognizes that only relationships characterized by *reciprocity* can secure the conditions in which no one dominates anyone else. And fifth, it recognizes that such relationships are themselves secure only when *everyone can participate* in creating their community together.<sup>72</sup> All five of these arguments for political equality challenge the legitimacy of judicial review.

*i. Freedom as nondomination.* — Consider first the Supreme Court’s *domination* of the American public, starting with our national legislature. Domination refers to the arbitrary power one person possesses over another’s choices—as when an employer has uncontrolled discretion to discipline a worker for expressing a political opinion.<sup>73</sup> Advocates of democracy recognize that people who are dominated are not free in the sense that they cannot enact their own choices. To employ a metaphor used by the political theorist Phillip Pettit, the rider of a horse dominates the horse by controlling it with a bridle.<sup>74</sup> Even when the rider gives the horse “free rein” and allows the horse to go where it pleases, the horse is not actually free. Instead, the rider remains in control at all times by wielding the “reserve power” to rein in the horse.<sup>75</sup>

Applying this metaphor to judicial review, the Court’s relationship to Congress is not that of an umpire overseeing a batter, but of a rider overseeing a horse. Most of the time, the Court gives Congress free rein to act as it pleases. But the Court remains in the saddle, ready to pull on the reins when Congress moves to disrupt hierarchies of wealth or status. Either way, as Abraham Lincoln feared, “the policy of the Government upon vital questions” is fixed not by any democratic process or even by the Constitution, but by “the decisions of the Supreme Court.” Even when the Court is permissive, Congress can make no law without the Court’s permission.

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<sup>72</sup> *Id.*; Danielle Allen, *A New Theory of Justice: Difference Without Domination*, in DIFFERENCE WITHOUT DOMINATION 27, 38–42 (Danielle Allen & Rohini Somanathan eds., 2020).

<sup>73</sup> PHILLIP PETTIT, JUST FREEDOM 1–5 (2014).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

Since *Marbury v. Madison*, judges engaged in judicial review typically respond that they are merely interpreting the Constitution, not enforcing their own will. But this response “beg[s] the question-in-chief, which [is] not whether an act repugnant to the Constitution [sh]ould stand, but who should be empowered to decide that the act is repugnant.”<sup>76</sup> Put in an extreme form, the question presented by judicial review is what should happen when the president, over five hundred members of Congress, and four justices of the Supreme Court interpret the Constitution to permit a particular law, yet five justices of the Court disagree and think the law is unconstitutional. This was the scenario in 2013, when the Supreme Court voted 5–4 to invalidate the Voting Rights Act of 1965—decades after an earlier Court first ratified it, and seven years after Congress and the president nearly unanimously reauthorized it.

Resolving this interpretive disagreement between the five justices and everyone else does not depend on what the Constitution actually says; all five hundred-plus people involved in the matter take an oath to support the Constitution.<sup>77</sup> Nor can the disagreement be resolved by allowing everyone to follow their own interpretation; we all expect presidents, federal officials, and state officials to comply with federal law regardless of whether they personally believe the law is constitutional.<sup>78</sup> Rather, resolving the disagreement depends on whether the will of the five justices should prevail over the will of their federal colleagues. That the five justices do prevail is evidence of domination: they hold the reins of power.<sup>79</sup>

What makes the Court’s domination arbitrary is that the justices themselves are unbridled. Federal laws stand and fall on the votes of nine unaccountable lawyers, all of whom are appointed for life because of their educational backgrounds and relationship to the governing elite. Where federal juries are disciplined by the democratic procedures of sortition and

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<sup>76</sup> BICKEL, *supra* note 32, at 3

<sup>77</sup> See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1393 (2006).

<sup>78</sup> See LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 63–91 (2012).

<sup>79</sup> Cf. *TransUnion LLC v. Ramirez*, 594 U.S. \_\_\_\_ (2021) (Thomas, J., dissenting) (slip op. at 18–19) (“Ultimately, the majority seems to pose to the reader a single rhetorical question: Who could possibly think that [what happened in this case is constitutional]? The answer is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court.”).

rotation in office, no similar procedure requires the justices to think of themselves as political equals with everyone else.<sup>80</sup> And while later generations of Supreme Court justices can revisit and overrule any of their precedents by a 5–4 vote, Congress has the formal power to overrule exercises of judicial review only if two-thirds of both houses and three-quarters of the fifty states approve a constitutional amendment.<sup>81</sup> This is a stacked deck.<sup>82</sup>

What this means for those of us not in Congress is that the political choices available to us as a country depend not on our collective will, but on the will of people who hold their offices until they resign or die. This is precisely what the Declaration of Independence protested. As absurd as it was then for a continent to be perpetually governed by an island, it is equally absurd now for a nation of 300 million to be perpetually governed by five Harvard and Yale alumni. As we debate new legislation to expand the franchise and protect the right to vote, the threat of judicial invalidation has forced our elected representatives to lower their expectations about how democratic our nation can become. At the same time, the knowledge that the Court will step in encourages legislators to feel no responsibility for evaluating the constitutionality of their proposals on their own merits.<sup>83</sup> In this respect, judicial review makes each of us less than equal and, therefore, less than free.

*ii. Moral and epistemic equality.* — This relates to the second and third arguments: judicial review violates the premise that we are all *morally entitled* to make political judgments and that we should all be able to contribute to our *collective supply of knowledge*. In a community of political equals, every person is presumed to be the best judge of their own happiness.<sup>84</sup> Being subjected to an unwanted guardianship—having someone else make decisions for you—reflects a disastrous loss of moral

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<sup>80</sup> See Waldron, *supra* note 77, at 1394–95.

<sup>81</sup> Incredibly, despite the difficulty of this strategy, it has been successful at least five times. The Eleventh Amendment, the Fourteenth Amendment, the Sixteenth Amendment, the Twenty-Fourth Amendment, and the Twenty-Sixth Amendment all overruled Supreme Court precedents.

<sup>82</sup> See Waldron, *supra* note 77, at 1394.

<sup>83</sup> See BELLAMY, *supra* note 42, at 45.

<sup>84</sup> See DAHL, *supra* note 63, at 69–80.

standing.<sup>85</sup> Because governments are essential for securing our happiness, it follows that we should presume that each of us is the best judge of how government affects our lives. Being subjected to rule by Platonic guardians implies that we lack the moral capacity to evaluate the ethical judgments involved in governance.<sup>86</sup>

This is not to reject the need for expertise. Even a community of political equals needs experts to provide advice about community decisions. As Plato argued in the *Republic*, passengers rely on the expertise of captains to navigate their vessels, while patients rely on the expertise of physicians to advise them on their health.<sup>87</sup> But such expertise is no replacement for what John Dewey called the “immense intelligence” of the public: “The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied.”<sup>88</sup> Or, to appropriate Plato’s metaphor, “When I charter a vessel or buy passage on one, I leave it to the captain, the expert, to navigate it— but *I* decide where I want to go, not the captain.”<sup>89</sup>

Moreover, the democratic ideal of political equality recognizes that expertise can mean little when it comes to ethical judgments about justice or how to make tradeoffs between competing normative values. As Elizabeth Anderson has written, expertise at resolving ethical or normative questions “must be demonstrated to the satisfaction of those who offer their support: they must be persuaded by arguments and evidence, not bullied into submission by those who claim epistemic superiority as a birthright.”<sup>90</sup> The same is true for people who claim expertise by virtue of their race, their gender, their profession, or their educational background. It is a category error to ascribe cognitive authority to someone merely because of their dominant social status as opposed to the content of their contributions.<sup>91</sup>

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<sup>85</sup> See Thomas Christiano, *The Authority of Democracy*, 12 J. POLITICAL PHILOSOPHY 266, 273 (2004).

<sup>86</sup> See DAHL, *supra* note 63, at 69–71; Allen, *supra* note 72, at 38–42.

<sup>87</sup> THE REPUBLIC OF PLATO \*341b, 488–89 (Allan Bloom trans. 2d ed. 1968).

<sup>88</sup> JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 223–24, 233 (Melvin L. Rogers ed. 2016).

<sup>89</sup> CARTLEDGE, *supra* note 58, at 308 (quoting Moses Finley).

<sup>90</sup> Elizabeth Anderson, *The Democratic University: The Role of Justice in the Production of Knowledge*, 12 SOCIAL PHILOSOPHY AND POLICY 186, 204–05 (1995).

<sup>91</sup> *Id.*

The “We, the People,” that begins the Constitution recognizes the validity of this epistemic equality. All of us, as a people, are capable of evaluating the document and contributing to our collective knowledge about how to advance the priorities named in the preamble.<sup>92</sup> We can assess for ourselves not only whether a wealth tax, a healthcare law, a carbon tax, or any other legislation is compatible with the rest of the Constitution, but also, more importantly, whether such legislation is just or needed.

So when the Supreme Court claims to be the supreme interpreter of the Constitution, the implication is there is something about the justices that make their interpretive or ethical judgment superior to that of everyone else. This implication is difficult to justify.

One candidate for the justices’ interpretive superiority is their appointment by nationally elected officials: the president and a majority of the Senate. The democratic representation underlying this appointment procedure can, indeed, help explain why the Supreme Court’s interpretation of the law should be superior to contrary interpretations by state and local officials who represent smaller constituencies. But as Jeremy Waldron has observed, this argument from democracy cannot explain why the justices’ interpretation of the law should be superior to the interpretation of the same elected officials who appointed them. “The system of legislative elections is not perfect either, but it is evidently superior as a matter of democracy and democratic values to the indirect and limited basis of democratic legitimacy for the judiciary.”<sup>93</sup>

A second candidate for the justices’ interpretive superiority is their method of reasoning. Some advocates for judicial review contrast legislators who care only about reelection with courts that compose uniquely appropriate “forums of principle.”<sup>94</sup> The idea is that written briefs, adversarial argument, secretive deliberation, highly educated law clerks, and no political accountability allows the justices to resolve fraught interpretive questions *correctly*, even when their interpretations are politically unpopular.

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<sup>92</sup> See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004).

<sup>93</sup> Waldron, *supra* note 77, at 1391.

<sup>94</sup> *Id.* at 1385.

But as the brief historical discussion earlier suggests, there is little empirical reason to believe there is anything intrinsically correct about the Supreme Court’s constitutional interpretations. After all, this method of reasoning produced decisions that denied the citizenship of black people, prohibited the abolition of racial discrimination, and held that the exigencies of war permitted the forced relocation of Japanese Americans. More to the point, what these precedents reveal is that constitutional interpretation is often impossible to distinguish from the ethical and political judgments that democracies otherwise resolve through democratic procedures. There is no expertise on the planet that can “correctly” determine whether the phrase “due process of law” prohibits federal affirmative action programs. Resolving that question requires the same tradeoffs between competing normative principles that we make when we decide whether to go to war or to fund the services necessary for reproductive justice. Yet as Tocqueville wrote nearly two centuries ago, “There is hardly any political question in the United States that sooner or later does not turn into a judicial question.”<sup>95</sup> Rather than offer a superior method for resolving these political questions, judicial review merely offers an inegalitarian one—and one that we currently cannot avoid.<sup>96</sup>

A final candidate for the justices’ interpretive superiority is their professional backgrounds. For the past hundred years, nearly every new justice has gone to law school. Most recent justices have gone either to Harvard or Yale. Most new justices have also previously clerked on the Supreme Court, after which they generally spent most of their working lives in the federal government or as law professors. New appointments are generally praised for their brilliance, their credentials, their professionalism, and their collegiality. They are also implicitly commended for their ideological allegiance to the party that is appointing them.

As helpful as all of these characteristics may be for predicting whether someone will give good legal advice, this exclusively accessible form of merit is inconsistent with democratic decisionmaking—particularly when it determines who has the controlling vote on what the Constitution permits us all to do. To the extent constitutional interpretation reflects the same

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<sup>95</sup> TOCQUEVILLE, *supra* note 1, at 441.

<sup>96</sup> BELLAMY, *supra* note 42, at 223–41.

sort of political judgments that all of us are morally entitled to make, then giving nine people the exclusive and perpetual power to make these judgments is a form of Platonic guardianship. Yet nothing about a Harvard education transforms someone with bad judgment into someone with good judgment. Nor does expertise in this respect translate into superior, more just, or more accurate interpretations of the Constitution.

*iii. Reciprocity and universal participation.* — Finally, judicial review also undermines the democratic premise that political equality is best secured through relationships of *reciprocity* and *universal participation*. A longstanding question of democratic theory—the “miracle of democracy”—is why the losers of elections accept the results.<sup>97</sup> Advocates of political equality provide a persuasive answer: political equals treat one another as equals because they recognize that any departure from equal treatment will result in a reciprocally negative response in turn.<sup>98</sup> In other words, someone who loses a vote today will peacefully adhere to the result if they think they will have an opportunity in the future to become part of a winning coalition. Reciprocally, someone who wins a vote today will decline to dominate political minorities if they think they might one day be on the receiving end of similar treatment. This idea of reciprocity treats democracy as a self-regulating and peaceful alternative to revolution.<sup>99</sup> Majorities respect minority rights based on how they expect the minority will respond. And as John Dewey put the point, “The ballot is, as often said, a substitute for bullets. But what is more significant is that counting of heads compels prior recourse to methods of discussion, consultation and persuasion, while the essence of appeal to force is to cut short resort to such methods.”<sup>100</sup>

This idea of reciprocity also partially explains the value of cultivating in all members of a community an understanding that each has an equal ownership share in existing political institutions.<sup>101</sup> To the extent that

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<sup>97</sup> ADAM PRZEWORSKI, WHY BOTHER WITH ELECTIONS 113–22 (2018).

<sup>98</sup> *Id.*; Saffron & Urbinati, *supra* note 62, at 459–61.

<sup>99</sup> See Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in THE DEMOCRACY SOURCEBOOK 13 (Robert Dahl, Ian Shapiro & Jose Antonio Cheibub eds. 2003); Nadia Urbinati, *Competing for Liberty: The Republican Critique of Democracy*, 106 AM. POL. SCI. REV. 607, 617–19 (2012).

<sup>100</sup> DEWEY, *supra* note 88, at 224.

<sup>101</sup> Allen, *supra* note 72, at 38–42.

individuals or groups of people are permanently excluded from exercising political power, there are no relationships of reciprocity between the rulers and the ruled.<sup>102</sup> Not only does such an inequitable relationship mean that the rulers are unlikely to take excluded people's interests into account, but it also compromises the authority of democratic decisionmaking, giving excluded people the moral claim to either resist or demand the right to participate. As Tocqueville observed, this process can turn into a positive feedback loop: as the franchise expands to include more people, it becomes more difficult to justify disenfranchising anyone.<sup>103</sup> But it can also lead to democratic collapse if majorities perpetually fail to exercise restraint or if too many people feel perpetually excluded from decisionmaking.<sup>104</sup>

As discussed above, judicial review is often defended as necessary to preserve these relationships of reciprocity and to ensure that the political equality of minorities is respected.<sup>105</sup> In the words of Justice Robert Jackson in 1943, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts."<sup>106</sup> Other scholars have joined him in embracing the "counter-majoritarian difficulty" of judicial review.<sup>107</sup> This perspective concedes that judicial review is antidemocratic, yet it also treats judicial review as necessary for democracy to function properly.

There are two problems and one irony with this perspective. First, as a matter of historical practice, there is little evidence that the Supreme Court's review of federal legislation has been necessary for democracy to properly function. In the face of democratic breakdown in 1857, *Dred Scott* provided a catalyst. As America reconstructed a multiracial democracy after the Civil War, the *Civil Rights Cases* in 1883 gutted it. And after a federal statute codified multiracial democracy in 1965, *Shelby County* undermined it. These and other decisions reveal that any antidemocratic pathologies

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<sup>102</sup> IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 92–93 (2011).

<sup>103</sup> Saffron & Urbinati, *supra* note 62, at 458.

<sup>104</sup> STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 8–9 (2018).

<sup>105</sup> See generally, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

<sup>106</sup> West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

<sup>107</sup> BICKEL, *supra* note 32, at 111–98.

that sweep the country are also likely to sweep the judiciary.<sup>108</sup> Indeed, in other countries in which democracies have been tempted by tyranny, judiciaries have tended to be either enthusiastic about the new development or unable to withstand sustained popular and governmental pressure.<sup>109</sup>

This leads to a second problem: there is also little evidence that the Supreme Court is so insulated from the political process that it can function as a neutral arbiter between political majorities and political minorities. As Derrick Bell and Girardeau Spann have observed, Supreme Court justices have never been selected for their political neutrality; they are selected precisely because of their ideological compatibility with the dominant party. “They are appointed by the most majoritarian official in the government and confirmed by the upper house of the legislature after public hearings in which their political preferences are thoroughly explored. . . . Only mainstream political preferences will survive the appointment and confirmation process.”<sup>110</sup> Even though this appointment process is not *democratic*, it is also not *counter-majoritarian*. Rather, it reflects what Spann calls “veiled majoritarianism.”<sup>111</sup> “Supreme Court justices are socialized by the same majority that determines their fitness for judicial office,” Spann writes. The “formal safeguards of life tenure and salary protection, which are designed to insulate the judiciary from external political pressures, are not designed to guard against the majoritarianism inherent in a judge’s own assimilation of dominant social values.”<sup>112</sup>

This idea of veiled majoritarianism helps explain why the same Supreme Court that upheld the summary deportation of Chinese immigrants also struck down the federal income tax, or why the Court that tolerated state segregation laws nevertheless opposed state labor laws.<sup>113</sup> As Jeremy Waldron has written, “Everything depends on whether judicial majorities are infected with the same prejudice as legislative majorities. . . . A practice

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<sup>108</sup> BELLAMY, *supra* note 42, at 38–46, 229–41 .

<sup>109</sup> *Id.*

<sup>110</sup> SPANN, *supra* note 42, at 21.

<sup>111</sup> *Id.* at 2.

<sup>112</sup> *Id.* at 19–20.

<sup>113</sup> See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”); BELLAMY, *supra* note 42, at 107–19.

of judicial review cannot do anything for the rights of the minority if there is no support at all in the society for minority rights.”<sup>114</sup> To the extent supporters of judicial review assume that “there will be some support for minority rights in a society, . . . [and] it will be found among elites if it is found anywhere,” this aristocratic assumption does not further explain why support will always be concentrated among federal judges and not federal politicians.<sup>115</sup> “On the contrary, elective institutions may be better at protecting minority rights because electoral arrangements will provide a way of channeling popular support for minority rights into the legislature, whereas there are no such channels into the judiciary.”<sup>116</sup> Indeed, precisely because of their elite status, federal judges may be more likely than legislatures to protect politically *powerful* minorities—such as the wealthy—from the sort of redistributive legislation that the Supreme Court invalidated during the *Lochner* Era.<sup>117</sup>

Finally, there is an important irony to Justice Jackson’s famous defense of judicial review. He made his defense in a case that *enforced* a statute passed by Congress, the Ku Klux Klan Act of 1871. As discussed above, the Supreme Court invalidated much of this statute in the 1880s, yet it allowed an important section of the statute to survive through the present. This section, now known as 42 U.S.C. § 1983, prohibits state officials from violating federal law or the Constitution, and it remains the basis for the vast majority of federal decisions that review state laws. In this respect, many of the most famous examples of “judicial review,” from *Brown v. Board* to *Roe v. Wade*, are interpretations of the Ku Klux Klan Act, and are formally indistinguishable from cases in which federal courts interpret and enforce other federal statutes. No counter-majoritarian difficulty or theory of judicial review is necessary to explain why a federal court should enforce a federal statute when the court and Congress *agree* about the statute’s constitutionality. Indeed, if Congress does not like how the Supreme Court is enforcing 42 U.S.C. § 1983 with respect to state actors (for example, if Congress does not agree with the Supreme Court that certain state actors

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<sup>114</sup> Waldron, *supra* note 77, at 1404–05.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> BELLAMY, *supra* note 42, at 38–46, 229–41 .

should receive qualified immunity from damages), Congress can amend the law.<sup>118</sup>

### 3. Evaluating proposals for reform

In practice and in theory, the power of federal courts to decline to enforce federal law has been inconsistent with the democratic ideal of political equality. Although the Supreme Court is hardly the only American institution that has departed from this ideal, the pursuit of political equality demands reform that will make all these institutions more democratic, from our courts to our workplaces, our legislatures, and our fundamental law. In the two centuries since Tocqueville described *Democracy in America*, most of American society has unquestionably become more democratic. It is time to make our courts more democratic too.

Eliminating the power of courts to decline to enforce federal law would be a major step toward bringing federal courts in line with the demands of political equality. Yet so would even more modest proposals, like prohibiting federal courts from declining to apply federal laws absent consensus or a supermajority vote. As Sam Moyn and Ryan Doerfler have argued, proposals to disempower the federal courts would help “democratize” the judiciary and bring the United States in line with other modern democracies around the world.<sup>119</sup>

Although disempowering the federal courts is the most democratic type of reform, there are also ways to reform the appointment of Supreme Court justices so that they no longer represent such stark departures from the ideal of political equality.<sup>120</sup> In the democratic system of classical Athens,

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<sup>118</sup> See Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1 (1974) (observing that the Supreme Court at one time adopted the attitude that its constitutional interpretations were a matter of common law that could be revised afterward by Congress); *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (adopting a similar attitude with respect to certain regulations).

<sup>119</sup> Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. (forthcoming 2021).

<sup>120</sup> *But see* BELLAMY, *supra* note 42, at 247–49 (warning that focusing on democratizing the Supreme Court’s membership “grants the justice of democratic procedures, but raises the issue of why we should unnecessarily duplicate the task of choosing legislators”).

the supreme court consisted of six thousand ordinary citizens chosen by sortition, or lot, on an annual basis to hear decisions in smaller panels.<sup>121</sup> Indeed, in the democratic system of early America, juries chosen by sortition resolved far more constitutional questions than they do today.<sup>122</sup> These systems reflect how democratic procedures of sortition, rotation in office, and universal eligibility could take the edge off some of the tension between judicial review and political equality. For example, Daniel Epps and Ganesh Sitaraman have applied some of these democratic principles in their proposal to create a “Supreme Court Lottery” that randomly allots federal judges to temporary panels.<sup>123</sup>

In short, as you consider reforms, I urge you advocate for those that will help make America more democratic. The ideal of democracy requires you to ask whether the reforms will extend or protect the political equality of all Americans, so that each one of us possesses equal political and social standing to share in controlling our national community. Democracy is being threatened at home and abroad. This commission should demand that we live up to our democratic ideals.

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<sup>121</sup> CARTLEDGE, *supra* note 64, at 86–87.

<sup>122</sup> See JAMAL GREENE, *HOW RIGHTS WENT WRONG* 12 (2021).

<sup>123</sup> Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 *YALE L.J.* 148, 181 (2019)