Supplemental Notes to Lecture 15: Nine Is (Not) Enough: Part II

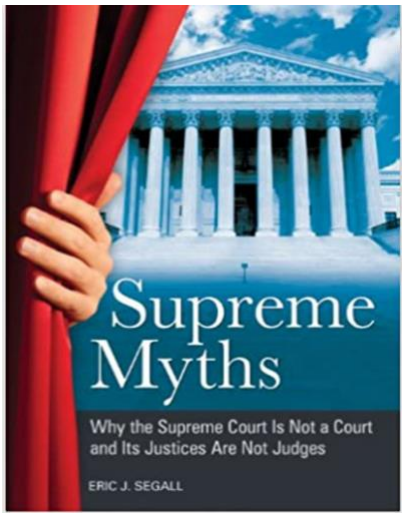
I. Judicial Review and Ideology

A Supreme Court that consistently and dogmatically thwarts the popular will[1] arguably endangers its own legitimacy, creating political instability and setting the stage for the emergence of things like FDR's Court-packing plan, which perhaps was only ever intended as a threat, since, if actually carried out, it could have eroded public support not only for the Court but also for the entire Federal Government.

[1] FDR's landslide victory enabled him to invoke the "popular will" in ways that clearly elude the Biden Administration and those Congressional Democrats who currently are in favor of expanding the Court.

Confronted with FDR's plan to expand the court, Chief Justice Charles Hughes may have convinced[2] Justice Owen Roberts to save the Court by adopting a wholly new attitude toward New Deal legislation. And we are indeed focusing here on *a change in attitude*, since, between *Tipaldo* and *West Coast Hotel*, nothing about the text of the Constitution, the history of court precedents, or established forms of legal reasoning had changed. Put another way, the five justices ruling against a minimum wage law in *Tipaldo* and the four justices ruling for it ultimately reached their decisions primarily on the basis of their respective *value judgments*.

"Justices' personal beliefs and political attitudes also matter in their decision-making," our text concedes on page 470. Georgia State Law Professor Eric Segall goes further in his influential book, *Supreme Myths: Why the Supreme Court Is Not A Court and Its Justices Are Not Judges*.



Segall argues that the role "personal beliefs and political attitudes" play in judicial decision-making represents not an exception but the norm, which is why Roberts's reversal in *West Coast Hotel* is so revelatory. It brings to light and exposes what the arcane language of Supreme Court opinions often conceals: namely, that the "court's decisions are [routinely] based on the justices' personal and controversial value judgements. [Which is why] SCOTUS frequently reverses itself

[2] In the summer of 1936, shortly after the Court issued its widely criticized *Tipaldo* ruling, Chief Justice Hughes paid an overnight visit to Justice Roberts on his estate in southeastern Pennsylvania. As recounted by Jeff Shesol in *Supreme Power*, during that visit, Roberts and Hughes "were in near constant conversation . . .[a]bout what, none but the two men would ever know."

on important constitutional law issues for no other reason than the composition of the court changes."

Such reversals also happen, as we've seen, when a single judge, like Owen Roberts, changes his attitude. *To the degree that he did so under pressure, the independence of the Court was weakened*; however, by upholding New Deal legislation and states' ability to enact economic regulations, the Court *preserved* its institutional integrity and arguably reestablished the system of checks and balances that had been disrupted by the over-extension of the Lochner era, whose continuance proved untenable in the midst of the Great Depression.

Addressing the issue of court-packing from a perspective diametrically opposed to that of Segall, Columbia Law Professor Philip Hamburger argues in a *Wall Street Journal* Op-Ed from April of 2021that "jurists have a duty to exercise their own independent judgment to say what the law is. They therefore cannot refrain from *holding an unconstitutional act void in* response to their anxieties for the fate of the court . . . Even if they could save their institution by doing such things, *what is the point of saving the court at the cost of the law*? And in what sense would the court be saved? There is little value in a court that has been corrupted by fear. Only by standing on their office of independent judgment can judges preserve their reputation for integrity. This is the only way to preserve the ideal and the reality of an independent bench" (emphasis added).

Note that Hamburger assumes that there are objective criteria available for determining whether federal laws are unconstitutional, and that the willingness of Supreme Court justices to make such "independent" judgements is the only thing preventing American democracy from devolving into a state of lawlessness. However, Hamburger's argument is greatly weakened if we regard Supreme Court rulings from Segall's perspective: i.e., as ideological value-judgements that endow the court with a "veto power," which is then used to nullify laws crafted by elective leaders supposedly accountable to voters.

Hamburger's cites Justice Roberts's decisive swing vote in the case of *NFIB v. Sebelius*, (which, in 2012 upheld the Affordable Care Act) as an example of what happens when justices (or a

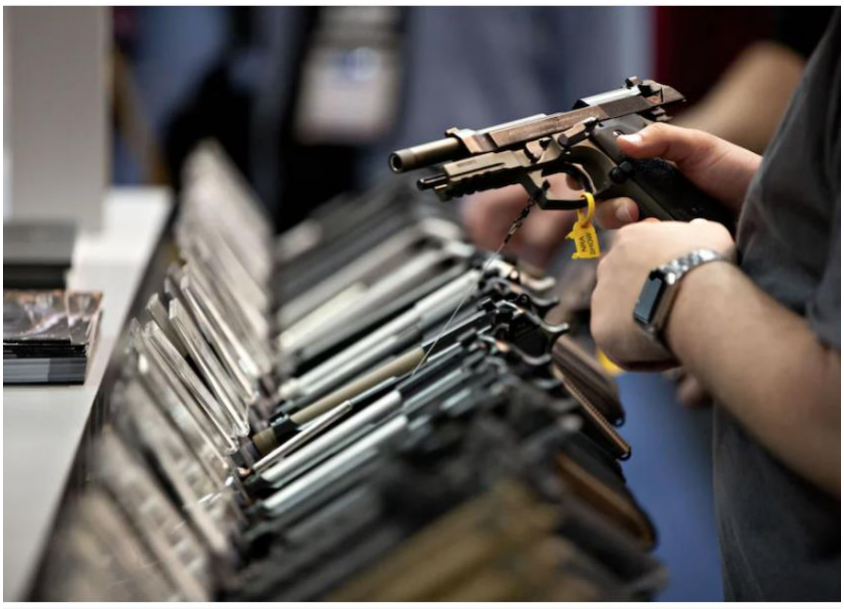
single justice) is intimidated into voting in favor of what he describes as an "unconstitutional statute."

But calling the Affordable Care Act unconstitutional is an ideological assertion. In his majority opinion, Roberts in fact acknowledges the court's "reticence to invalidate the acts of the nation's elected leaders," which supports Segall's argument to the extent that showing such deference to elected leaders is in keeping with the need for the Supreme Court to restrict itself to ruling on matters that clearly violate constitutional principles; ideological disputes (like the debate over the Affordable Care Act) that cannot be resolved by appealing to the US Constitution should be handled by democratically elected officials.

Such a restricted conception of the Supreme Court's jurisdiction was articulated by Alexander Hamilton, in Federalist # 78. Though Segall has written a book attacking the concept of "originalism," he in this instance attempts to strengthen his argument for jurisdiction stripping by citing Hamilton as an authoritative source that supports his position.

According to Hamilton, the Supreme Court's power of judicial review (discussed on page 450 of our text) was to be used sparingly—in cases where there was an "irreconcilable variance" between a statute and the Constitution. Well, what counts as an "irreconcilable variance" between the Constitution and a Congressional statute? Hamilton gives the example of a bill of attainder or ex post facto law, both of which are explicitly prohibited by Article 1, Section 9, Clause 3 of the Constitution. Well, what about the second amendment and gun rights? Do gun control laws present us with an "irreconcilable variance" between the Constitution (the "right of people to keep and bear arms," as stated in the Second Amendment) and a statute (e.g., a New York law that only grants licenses to carry concealed handguns to those who have shown a "proper cause")?

Supreme Court justices sounded suspicious of New York's gun law. Here's what might come next.



The NRA has argued that the Supreme Court's upcoming decision in the case of *New York State Rifle and Pistol Association v. Bruen* should be a foregone conclusion, given that the New York

law presents us with an "irreconcilable variance" between the Constitutional "right to bear arms" and a statute that infringes upon that right. Many proponents of gun control, however, argue that there is no "irreconcilable variance" at issue, since the Second Amendment's 18th century-preoccupation with state militias is far removed from incidents of gun violence in 2022. *We see here that even explicit phrases of the Constitution are open to interpretation, and the question of what amounts to an "irreconcilable variance" between a law and the US Constitution can itself ultimately be an ideological one*, which takes us back to our closing reflection in Lecture 15: should the determination of gun laws be a matter left to the Supreme Court or to elective officials?

II. "Court of Partisans"

Some have argued that the Biden Administration created a Presidential Commission on the Supreme Court in order to prevent rather than initiate the process of enacting fundamental reforms. That is, creating a commission is a good way to draw attention to an issue, acknowledge its seriousness, and then do nothing about it.

"The Commission to study court reform isn't designed to offer solutions," Elie Mystal argues in the *Nation* —it's designed to be an excuse to do nothing."

Viewed in a more favorable light, the Commission's report, published in December of 2021, has set the stage for a public discussion. Employing an admirably disinterested tone, the Presidential

Commission on the Supreme Court succinctly summarizes the debate over court-packing as follows:

"Supporters contend that Court expansion is necessary to address serious violations of norms governing the confirmation process and troubling developments in the Supreme Court's jurisprudence that they see as undermining the democratic system.

"Opponents contend that expanding—or 'packing'—the Court would significantly diminish its independence and legitimacy and establish a dangerous precedent that could be used by any future political force as a means of pressuring or intimidating the Court."

What, then, are the allegedly "serious violations of norms governing the confirmation process" that have precipitated a fresh consideration of the value of court-expansion?

As stated in Lecture 15, at issue is the Republican Senate's refusal to grant President Obama's 2016 nominee to the Supreme Court (the current US Attorney General, Merrick Garland) a confirmation hearing, on the grounds that Obama nominated Garland in an election year (in March of 2016, following the death of Justice Scalia.)

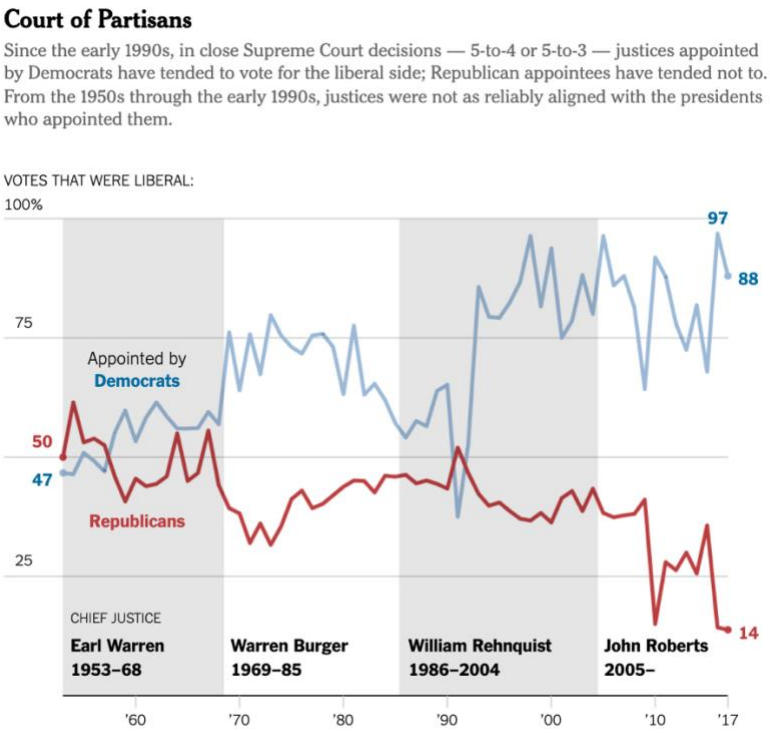
Would the Republican Senate have done the same if it were Ruth Bader Ginsburg who had died in 2016, and not Scalia? Perhaps not, for had that been the case, Garland's confirmation would have left the ideological make-up of the Court unchanged; as it was, replacing Scalia with Garland would have transformed the 5-4 conservative majority on the court into a 5-4 liberal majority—evidently a scenario deemed unacceptable by Senate Republicans, led by Mitch McConnell, who claimed there was a precedent for not confirming US Supreme Court justices during an election year. "Since the 1880s, no Senate has confirmed *an opposite-party* president's Supreme Court nominee in a presidential election year," he declared. (In 2020, the Republican senate quickly confirmed a *Republican* president's nominee less than two months before the election).

With regard to McConnell's claim that the blocking of Garland and speedy confirmation of Barrett adheres to precedent, we should take a quick look at the historical record. There we will discover that, first of all, there have not been many confirmations in a presidential year since 1900 because during that entire period there were only 7 vacancies to fill. In every such instance except one, the President and Senate Majority belonged to the same party. The one exception occurred in 1988, when a Democratic Senate confirmed Anthony Kennedy, appointed by President Regan—though, strictly speaking, McConnel's statement is still accurate, since Reagan appointed Kennedy in late November of 1987; the plot thickens, however, since the Kennedy nomination marked Reagan's third attempt to fill the seat vacated by Justice Lewis Powell's retirement.)[3]

[3] We should note here that Senator Warren, in justifying her support for Markey's court-expansion plan, claims that "it was McConnell, along with Donald Trump, who used two stolen seats to pack the court." But Warren can't have it both ways. McConnell can be criticized for hypocrisy, but there is nothing illegitimate about filling a Supreme Court vacancy in an election year. In that respect, McConnell can be accused of "stealing" one seat (the one that would have been filled by Garland) but not two.

But by focusing on such details surrounding the nomination of Supreme Court justices, we overlook a much more important historical phenomenon: namely, the nomination and confirmation process has only become polarized and politicized in the last couple of decades. For example, Justices Scalia and Kennedy were confirmed by votes of *98-0 and 97-0* respectively, and while many regarded Kennedy as a moderate, it was universally recognized that Scalia was a staunch conservative. Indeed, especially prior to 1990, it was common for members of both parties to vote for US Supreme Court nominees—to a great extent precisely because it was in some *cases difficult to predict how those justices would actually rule once seated on the bench*, an unfathomable occasion for uncertainty today. Consider, for instance, how the Democrats' recent court-packing plan blithely assumes that adding four seats to the court will enable a Democratic Senate to duly confirm four Supreme Court justices who will then rule in favor of so-called Democratic Party legislative priorities. As Eric Posner of the University of Chicago and Lee Epstein of Washington University document in a 2018 opinion piece published in the *New York Times*:

> The court has recently entered a new era of partisan division. If you look at close cases . . . going back to the 1950s to illustrate this division, you will see that the percentage of votes cast in the liberal direction by justices who were appointed by Democratic presidents has skyrocketed. And the same trajectory applies on the other side: The percentage of votes cast in the conservative direction by justices who were appointed by Republican presidents has also shot up. The trend is extreme—and alarming. In the 1950s and 1960s, the ideological biases of Republican appointees and Democratic appointees were relatively modest. The gap between them has steadily grown, *but even as late as the early 1990s, it was possible for justices to vote in ideologically unpredictable ways.* (Emphasis added)



Does the current "politicized" relationship between the Supreme Court and the other two branches of government have any sort of precedent in US history? Epstein and Posner note that while "it is hard to think of any historical precursors, . . . the most famous period of ideological division on the court was in the 1930s, when it repeatedly struck down [New Deal] . . . legislation."

With that, we return once more to FDR's Court-pacing plan, which took aim at the conservative ideologues that formed a majority on the Court until 1937. However, even with this example, we can see how unique the present situation is. That is, among the "four horsemen" referred to in Lectures 14 and 15, one was appointed by a Democratic president (Woodrow Wilson), and the other was a Democrat appointed by a Republican president. Moreover, of the three liberal justices who voted in favor of New Deal legislation, two were appointed by conservative Republican presidents (Coolidge and Hoover).

Quiz Question 5: According to Alexander Hamilton, when should the Supreme Court exercise the power of Judicial Review?

Quiz Question 6: How does the Presidential Commission on the Supreme Court of the United States summarize contemporary opposition to court-packing?

Quiz Question 7: Were you surprised that only three Republican senators voted to confirm Ketanji Brown Jackson to the US Supreme Court? Briefly explain why or why not.

Quiz Question 8: What color is our cat, Marlow?