COMPARING THE COURT AND THE FED: DEMOCRATIC DILEMMAS OF ELITE INSTITUTIONS

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The Supreme Court and the Federal Reserve, twin pillars of the liberal market order, have never been systematically compared. Yet, as elite institutions in a democratic political world, they face parallel problems in carrying out the similar functions of maintaining the precommitments to a stable rule of law and the stable value of money, respectively. Both face a countermajoritarian difficulty of, on occasion, justifying their decisions to go against popular will. In response, both tie themselves to rules in order to cabin their own discretion and to prevent epistemic mistakes common in small groups of insulated decisions makers. Yet as a descriptive matter, in emergencies both transcend rules to keep the republic steady.

The comparison illuminates parallel dilemmas sometimes recognized in the context of one institution yet denied or ignored in the other. For instance, commentators appreciate the epistemic difficulty of small-group decision-making as a major problem for the Federal Reserve ("the Fed"), while this is not often seen as an issue for the Supreme Court. Moreover, the Fed admits it acts differently based on its own evaluation of an emergency, but the Court often does not acknowledge altering its jurisprudence in an emergency. Yet decisions like Bush v. Gore *and* Wickard v. Filburn *are best explained as rooted in emergency judgments similar to the Fed's. Assuming the Court continues to deploy what is effectively an emergency jurisprudence, more transparent acknowledgment of the decisiveness of such emergent circumstances would make it easier for the Court, like the Fed, to unwind from its prior judgments in nonemergent circumstances.*

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In addition, the parallel independence of these entities is not only necessary for their purposes but each also faces similar perils in a time of polarization as we are currently experiencing. Today, the central bank is considering whether it should engage in new forms of activism to address such problems as climate change and inequality. The Supreme Court's history shows the substantial risk that such activism will undermine the diffuse support among elites. That loss of support leads to political movements—like court packing or favoring structural change for the Fed—that make it more difficult for such institutions to preserve their independence and sustain their precommitments.

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INTRODUCTION

The Supreme Court and the Federal Reserve are the most powerful institutions in the United States, which are substantially unaccountable to the public. Their independent and elite nature is directly connected to their ability to perform their essential functions as the twin pillars of the liberal market order. Both institutions serve to protect precommitments—the Court to preserving the Constitution and the rule of law and the Fed to maintaining sound money.[1] At least when there is some professional consensus around legal and monetary theory, independent elites are more likely than popular representatives to defend these core principles when political passions run high.[2]

While a journalist once labeled the Federal Reserve as the "Supreme Court of Finance,"[3] the Court and the Fed have never been systematically compared. But both exhibit strong similarities in the functions they play, the dilemmas they face, and the dangers that contemporary ideological polarization poses to their independence.

The elitism and insularity of both the Court and the Fed underscore their common problem: how to perform these potentially unpopular tasks in a democratic society and how to make sure they stick to their assigned roles rather than usurp democratic decision making more generally. That problem is made acute by the fact that their decisions are not easily reviewable. The Federal Reserve is not subject to effective judicial review in its central operations.[4] The

1. *See* Colleen Baker, *The Federal Reserve as Last Resort*, 46 U. MICH. J.L. REFORM 69, 69, 71–72 (2012) (stating that the purpose of the Federal Reserve "is to conduct monetary policy" in order to safeguard against financial risk); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 690 (1984) (stating that the role of the Supreme Court is "to define and vindicate the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union").

2. *See* Robert Barnes, *Rebuking Trump's Criticism of "Obama Judge," Chief Justice Roberts Defends Judiciary as "Independent"*, WASH. POST (Nov. 21, 2018), https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html; Donna Borak, *Jerome Powell Takes Stand for Fed Independence Against "Short-Term Political Interests"*, CNN BUS. (June 25, 2019, 7:56 PM), https://www.cnn.com/2019/06/25/economy/jerome-powell-fed-independence/index.html.

3. *See, e.g.*, THOMAS WILSON, THE POWER "TO COIN" MONEY: THE EXERCISE OF MONETARY POWERS BY THE CONGRESS 233 (1992).

4. *See* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 478 (2009) (discussing that the Federal Reserve is unique among agencies in its insulation from practical judicial review).

Supreme Court has generally been the final word on interpreting the law.[5]

This Article explores these many parallels and shows that a study of one can help illuminate the other, providing new insights into how their actions can be both explained and justified. First, it helps shed light on a key issue of constitutional theory: the "countermajoritarian difficulty."[6] That problem is defined as occurring whenever the Court acts inconsistently with popular will as when it strikes down a democratically enacted statute.[7]

Comparing the Fed to the Court dissolves part of the perceived difficulty, resolves what remains into two components, and reflects on common solutions and their limitations. Once one recognizes the similar functions of the judiciary and the Federal Reserve in protecting certain core precommitments that sustain the liberal market order (to the Constitution for the Supreme Court, to a sound currency and financial system for the Fed), it becomes clearer that the Court, no less than the Fed, should not defer to the sentiments of the public or their representatives in carrying out these responsibilities. Routine deference to democratic majorities would undermine the basic premises that give rise to both institutions.[8] In the case of the Court, it would erode the rule of law. In the case of the Fed, it would debase the soundness of money. The rule of law and sound money work in tandem to sustain a commercial republic.[9]

Yet, justifying disregard for contemporary democratic sentiment is not the same as justifying unlimited discretion for elites. The public rightly fears that elites may use this discretion to impose their own values or manipulate policy for ends in ways not needed to fulfill their core functions.

Comparing the Court and the Fed highlights that these risks are of two different kinds. Both the Court and the Fed create the risk of what might be termed "value imposition"—when elites override popular opinion to impose their own values rather than simply

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5. *See* Cooper v. Aaron, 358 U.S. 1, 9–10 (1958).

6. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–36, 354 (1998).

7. *See id.* (describing countermajoritarian as "shorthand for the problem of reconciling judicial review with popular governance in a democratic society").

8. *See id.* at 344 n.27 (noting that "the Framers constructed much of the Constitution in a countermajoritarian manner, as they were distrustful of majoritarian politics").

9. *See, e.g.*, LUDWIG VON MISES, THE THEORY OF MONEY AND CREDIT 414 (J.E. Batson trans., 2009) ("Ideologically [sound money] belongs in the same class with political constitutions and bills of rights. The demand for constitutional guarantees and for bills of rights was a reaction against arbitrary rule and the non-observance of old customs by kings.").

enforce precommitments.[10] But that risk is more recognized in discussions of the Supreme Court.[11] The Court and the Fed also create the risk of what may be called "epistemic failure" when their insularity and small number of decision makers limit their ability to assess good future consequences for society. That risk is more recognized in discussions of the Fed.[12]

Second, the comparison sheds light on the kind of rules that both institutions impose on themselves to cabin one or the other component problems of the countermajoritarian difficulty. For instance, the Federal Reserve has over time deployed a variety of rules, all rooted in the professional craft of economists, that help avoid the suspicion that it is manipulating the money supply in its own interests or the electoral interests of the President.[13] The targeting rule helps avoid the suspicion that it is using the money supply to advance the fortunes of the President before an election or creditors over debtors or vice versa.[14] But, the Fed has still been criticized for the many discretionary judgments it must make to target inflation, on grounds that these decisions require an epistemic foresight that a small group of decision makers does not have.[15] Some have therefore proposed that the Fed use more rigid rules, like the so-called Taylor Rule,[16] that regulate the money supply by drawing on economic factors themselves.[17] These factors would anchor the Fed's decisions not in their own evaluations but in the millions of decisions made in the economic marketplace. Thus, the thinking goes that the problem of epistemic foresight created by insular elite institutions calls for a particular type of rules—those that restrict the exercise of discretion in applying the rules.

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10. *See* G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 556 (2002).

11. *See* Erwin Chemerinsky, *Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 64 (1989) (arguing that criticism of the Court was dominated by those arguing that the Court was engaging in value impositions on topics such as school prayer, abortion, etc.).

12. *See* Timothy A. Canova, *The Role of Central Banks in Global Austerity,* 22 IND. J. GLOB. LEGAL STUD. 665, 693–94 (2015).

13. *See Review of Monetary Policy Strategy, Tools, and Communications*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/monetarypolicy/review-of-monetary-policy-strategy-tools-and-communications-statement-on-longer-run-goals-monetary-policy-strategy.htm (last visited Mar. 28, 2022).

14. *See id.*

15. *See infra* Subpart III.A.3.

16. *See generally* Pier Francesco Asso et al., *The Taylor Rule and the Practice of Central Banking* 1 (The Fed. Rsrv. Bank of Kan. City Econ. Rsch. Dep't, Working Paper No. 10-05, 2010) (discussing the general concepts of the Taylor Rule).

17. *See infra* notes 189–93 and accompanying text.

Similarly, the Supreme Court can choose a variety of rules to constrain value imposition. For instance, the Court may follow its own precedent. But precedents themselves do not necessarily constrain the other component of the countermajoritarian difficulty—the problem of epistemic failure—because precedents are just the past decisions of a small number of Justices, often the same ones called on to render the present decision.[18] In contrast, the original meaning of the Constitution reflects the sentiments of a supermajoritarian consensus, anchoring the constraining rule in decisions of the many.[19] Thus, it can be argued that a rule rooted in original meaning, if followed honestly, is more likely to prevent problems of epistemic failure than a rule of always following precedent.

However, the social stabilizing function of the Court—a function that is also underscored by comparing it to the Fed's more overt purpose of maintaining financial stability[20]—creates yet another complication for the rules chosen by the Court. It shows why following original meaning cannot be the sole rule for the Court even in ordinary times. Constantly overruling precedent in favor of original meaning—even if original meaning provides a rule of guidance would undermine the reliance and predictability that promotes social welfare, including economic growth.[21] Rules such as the principle of *stare decisis* enable the Court to stabilize the law much as the Fed creates a more predictable financial environment by sustaining sound money.[22]

Third, the comparison highlights how the Court and the Fed act in emergencies as opposed to in ordinary times. The Fed is transparent in saying that it does not act through its ordinary rules

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18. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 33–34, 187, 189–90 (2013).

19. *See id.* at 33–34, 38.

20. *See* FED. RSRV. SYS., THE FED EXPLAINED: WHAT THE CENTRAL BANK DOES 47 (11th ed., 2021) ("The Federal Reserve was created in 1913 to promote greater financial stability and help avoid banking panics, such as those that had plunged the country into deep economic contractions in the late nineteenth and early twentieth centuries.").

21. *See* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 13 (2011) ("[C]ourts should preserve atextual doctrines . . . because they represent 'structural decision[s] on which other doctrines and institutions depend,' and overruling them would undermine 'stability in the structure of government.'" (quoting Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 430–33 (1988)).

22. *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 2–3 (2001) (discussing the high standard required to overrule a previously decided precedent).

in extraordinary circumstances.[23] In times of financial crisis it determines the existence of an emergency and takes extraordinary action to keep the economy moving, as when it has engaged in quantitative easing—the massive buying of bonds to provide ballast to stimulate the economy and help the nation exit the recession.[24]

The Court is often not so transparent. It generally does not admit that it is engaging in an emergency jurisprudence and, indeed, at times it has expressly denied that it should behave differently in emergencies.[25] To be sure, it may factor in the emergency justifications offered by other branches of government into its own doctrines, such as when it evaluates whether the government has a compelling interest to satisfy strict scrutiny.[26] But it does not often admit that it is changing its own previous framework because of its own perception of an emergency.[27]

Nevertheless, a comparison with the Fed shows that the deployment of emergency jurisprudence similar in spirit to emergency monetary policy may be the best explanation for significant decisions as disparate as *Bush v. Gore*[28] and *Wickard v. Filburn*.[29] While both the Court and the Fed act according to rules in ordinary times, in extraordinary times, they both appear to believe that they have the epistemic ability to recognize relatively obvious problems and both transcend rules to defend what they believe to be their core functions, that of protecting the constitutional order and the economy, respectively. Assuming it deploys what is in effect and emergency jurisprudence, the Court might consider similar transparency as the practice of the Fed shows that such transparency

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23. The Federal Reserve Act itself allows for this type of different behavior in extraordinary circumstances. *See* 12 U.S.C. § 461(b)(2)(A)(ii), (b)(3) (permitting reserve requirements above the limit of 14 percent "upon a finding by at least 5 members of the [Federal Reserve] Board that extraordinary circumstances require such action").

24. *See* Anna-Louise Jackson & Benjamin Curry, *Quantitative Easing Explained*, FORBES ADVISOR (Feb. 23, 2021, 10:07 AM), https://www.forbes.com/advisor/investing/quantitative-easing-qe/ (explaining that a central bank like the Federal Reserve uses quantitative easing to "purchase[] securities in an attempt to reduce interest rates, increase the supply of money and drive more lending to consumers and businesses").

25. *See, e.g., Ex parte* Milligan, 71 U.S. 2, 120–21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.").

26. *See* Korematsu v. United States, 323 U.S. 215, 216, 218 (1944) (holding that forced relocation of Japanese Americans in internment camps was constitutional, and that strict scrutiny was satisfied because it was during World War II), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

27. *See* Trump, 138 S. Ct., at 2423 (abrogating *Korematsu v. United States*).

28. 531 U.S. 98 (2000).

29. 317 U.S. 111 (1942).

helps it jettison frameworks tailored for an emergency when the emergency dissipates.

Finally, comparing the Fed to the Court also highlights that the independence of both institutions ultimately depends on diffuse support of the elites that surround them. While the Supreme Court Justices are protected by life tenure and salary guarantees, the number of members of the Supreme Court and the scope of its jurisdiction can be changed by mere statute.[30] Similarly, while the Fed's Regional Bank Presidents are appointed by independent boards of Directors, and the Governors of the Federal Reserve Board have fourteen-year terms,[31] the composition of the Fed's leadership is wholly a creature of statute, able to be remade by Congress at any time.[32] And Federal Reserve Governors regularly resign long before their fourteen-year term is up, allowing for rapid replacement by a single President.[33] What preserves the stability of both institutions is that their surrounding professional elites oppose wholesale assaults on their independence and have the political power to protect them.

But elite polarization can threaten such barriers against structural change and the institutions can themselves become a source of polarization by trying to do too much too fast.[34] Here, the history of the Supreme Court offers a warning to the contemporary Fed. When the Court has moved beyond its role of preserving the rule of law and tried to effect social transformation, as with its decisions

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30. *See* Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2748–49, 2790 (2020) (arguing that although it would amount to "Constitutional hardball" to change the number of Justices on the Supreme Court, it is a power of the legislature to do so).

31. *Structure of the Federal Reserve System*, BD. OF GOVERNORS FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/structure-federal-reserve-banks.htm (last visited Feb. 3, 2022) ("Presidents are nominated by a Bank's Class B and C directors and approved by the Board of Governors for five-year terms."); *id.* ("Each member of the Board of Governors is appointed for a 14-year term . . . .").

32. *See* 12 U.S.C. § 241 (discussing the appointment and number of the Board of Governors of the Federal Reserve System).

33. *See* David D. Jones, On the Political Insularity of the Federal Reserve Board of Governors 4, 8 (July 1, 2010) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636017 (showing that the median term of a governor since 1936 is 5.5 years).

34. *See, e.g.*, Sarah A. Binder, *The Federal Reserve as a "Political" Institution*, BULL. AM. ACAD. ARTS & SCI., Spring 2016, 47, 47 (arguing that "the tense relationship between Congress and the Federal Reserve in the wake of the most recent global financial crisis reminds us that the Fed is inevitably a *political* institution"); *see also* Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 262 (illustrating the polarizing effect of the Supreme Court in recent years).

against national legislation in the New Deal[35] or in *Roe v. Wade*,[36] it has often created a backlash.[37] Currently, the Fed is considering undertaking new roles in such divisive issues as climate change and inequality.[38] The experience of the Supreme Court suggests that those controversial initiatives are likely to exacerbate an already nascent polarization.

Part I of this Article shows that the Supreme Court and the Federal Reserve have similarities both in their place in political theory and in their historical origins. Both institutions reflect the traces of "the mixed regime" in our constitutional system. In classical political philosophy, pure regimes, like democracy or oligarchy, were contrasted with mixed regimes that combined different groups in governance, such as patricians and plebes in Rome or lords and commoners in England. Mixed regimes were thought to create a more balanced, stable, and flourishing social order.[39] In the early republic, both the federal judiciary and the Bank of the United States—the precursor to the Federal Reserve—were often seen by supporters and opponents alike as redoubts of a more aristocratic element and are still seen as elites.[40]

But the aristocratic element reflected in the power of the Court and the Fed works differently from that in classical times and that difference gives rise to some of their parallel dilemmas. First, the elite of today is not the aristocracy of old—based on landed wealth or titles of nobility—but instead is an aristocracy of intellect—those professionals that by dint of their ability and education occupy the

35. Jeffrey Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L.J. 1, 8 (2007) (arguing that the Court "provokes intense national backlashes when it makes decisions that national majorities intensely oppose"); *see also* Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 376, 396 (1992).

36. 410 U.S. 113 (1973).

37. *See* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373 (2007).

38. *See* Christopher Rugaber, *Powell Defends Fed's Consideration of Climate Change Risks*, ASSOCIATED PRESS (Apr. 14, 2021), https://apnews.com/article/climate-climate-change-jerome-powell-63b95c7276e2db7346f52eb90bca94b6 ("Over the past year, the Fed has taken steps to incorporate the risks from climate change into its oversight of the financial system."); *see also* Jeanna Smialek, *Powell Defends Federal Reserve's Attention to Inequality*, BOS. GLOBE (Apr. 14, 2021, 6:32 PM), https://www.bostonglobe.com/2021/04/14/business/powell-defends-federal-reserves-attention-inequality/.

39. *See* Ethan J. Leib, *Towards a Practice of Deliberative Democracy: A Proposal for a Popular Branch*, 33 RUTGERS L.J. 359, 400 (2002) (discussing characteristics of a mixed regime).

40. *See* John O. McGinnis, *The Court, the Fed, and Our Mixed Regime* 5–8 (Nw. Univ. Pritzker Sch. Of L. Pub. L. & Legal Theory Series, Paper No. 19-15, 2019).

commanding heights of our society and economy.[41] And this professional intellectual elite is divided roughly into two groups—those who are good at using words, like lawyers, and those who are good at deploying numbers, like economists. These talents correspond to law and finance respectively and thus to the Supreme Court and the Federal Reserve.[42] As a result, the elite is not expected to operate by the unbounded imposition of values but is to be constrained by the practices of their professional craft.

Part II of the Article describes why independent courts and central banks staffed by elites are essential to the flourishing of modern market states. These states require a rule of law to permit individuals and enterprises to plan for the future.[43] They depend on sound money for similar reasons: to invest and plan, entrepreneurs need to avoid the uncertainty of unexpected inflation and have confidence that the lending system will not seize up in a financial crisis.[44] Their independence is justified by the same problem—what economists would call time inconsistency and what is more popularly understood as the tendency of the polity to make a rash decision at one time that will be regretted later.[45] At times the people and their political representatives may breach the rule of law or create a financially unsustainable boom to enjoy benefits now even at the expense of long-term costs.[46] It is the Court and the Fed's insulation from popular control and claim to wisdom within their professional fields—the modern aristocratic form of excellence—that enables them to protect the rule of a law and a sound financial system. A new form of the old mixed regime turns out to be well-suited to the modern market state.

Part III shows that independence permits the exercise of discretion of the elite few largely unchecked by the democratic many. But that discretion creates tensions with the notion of popular

41. *See id.* at 7.

42. *See* Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661, 664 (2013) ("Justices tend to act on elite values because Justices are almost always selected from the most affluent and highly educated stratum of Americans."); H.W. Perry, Jr., *The Elitification of the U.S. Supreme Court and Appellate Lawyering*, 72 S.C. L. REV. 245, 288 (2020) ("[A]ll Justices come from the most elite law schools, and most have spent their careers relatively isolated as federal judges."); William Hayes, Note, *Insider Interest, Not Industry Influence: The Practice of Federal Reserve Bank Presidential Appointments*, 2019 COLUM. BUS. L. REV. 1123, 1167 (2019) (stating that "economists dominate among Reserve Bank Presidents"); Justin Fox, *How Economics PhDs Took Over the Federal Reserve*, HARV. BUS. REV. (Feb. 3, 2014), https://hbr.org/2014/02/how-economics-phds-took-over-the-federal-reserve.

43. *See infra* note 80 and accompanying text.

44. *See infra* notes 123–30 and accompanying text.

45. *See infra* notes 136–40 and accompanying text.

46. *See infra* notes 138–40 and accompanying text.

democratic control,[47] the reality that large groups may make better nontechnical decisions than small ones,[48] and the need for stability in both law and money.[49] Both the Court and the Fed try to address these problems by binding themselves to rules in ordinary times. But both relax these rules in emergencies.[50]

Part IV contrasts the formal independence of the Court and the Fed with the more robust effective independence they get from the elites that surround these institutions. The legal protections for both are more porous than commonly thought even as they are more powerful than the protections for other institutions like other administrative agencies.[51] Crucial to their independence from popular assaults is the power of the intellectual elites that surround them, again recalling the traces of mixed regime as part of their nature.

Part V shows that polarization among elites poses a danger to the stability that both institutions provide. The institutions themselves make decisions that may exacerbate or tamp down on polarization. When the Supreme Court has made decisions that attempt persistent social transformation, it has increased polarization.[52] Today, the Federal Reserve faces questions about whether it should use its power to address issues divergent from its core mission and as disparate as climate change and social inequality.[53] Recently, scholars of the Fed have vigorously debated whether this extension is a good idea.[54] The history of the institution closest to the Fed in design and purpose, the Court, suggests that such an expansion of role is likely to lead to polarization. The result would likely be the appointment of Governors with more extreme views, which would further abet polarization.

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47. *See infra* notes 158–60 and accompanying text.

48. *See infra* notes 184–85 and accompanying text.

49. *See infra* notes 202–04 and accompanying text.

50. *See infra* Subpart III.B.2

51. The protections afforded to the Court and the Fed seem solid. However, several holes exist within these protections, such as Congress's statutory power over the Court and the short-term limits placed on the board members of the Fed. *See infra* notes 271, 276, and accompanying text.

52. *See infra* Subpart V.A.

53. *See infra* notes 399–400 and accompanying text.

54. *Compare* Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism*, *Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636, 639–43 (2021) (favoring such activism at the Fed), *with* Christina Parajon Skinner, *Central Bank Activism*, 71 DUKE L.J. 247, 247–58 (2021) (opposing such activism).

I. THE COURT AND THE FED AS COMPONENTS OF A MIXED REGIME

A. Origins of the Mixed Regime

The mixed regime contrasts with regimes of a single ruling principle, such as monarchy or rule by the one, aristocracy or rule by the few, and democracy or rule by the many.[55] The problem for pure regimes is that they were thought to degenerate: monarchy into tyranny, aristocracy into oligarchy, and democracy into mob rule.[56] Mixed regimes, in contrast, consisted of some mixture of these elements, although not necessarily all of them.[57] A regime balanced between aristocracy and democracy was thought to prevent either the few or the many from controlling, in turn lessening faction.[58] As a result, the mixed regime would be more stable and more enduring.[59] Each form of governance was also thought to contribute distinctive qualities to the polity: for instance, "the aristocracy [brought] wisdom, while democracy brought honesty and goodness."[60] At the time of the United States's founding, the British Constitution was conceived as a mixed regime.[61]

Two differences of emphasis distinguish the mixed regime from the modern separation of powers to which the mixed regime bears a family resemblance.[62] First, while the modern separation of powers

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55. 3 POLYBIUS, THE HISTORIES 297, 299 (Jeffrey Henderson et al. eds., W.R. Paton trans., Harvard Univ. Press 2011) (1923).

56. *See id.* at 301.

57. Henry Lord Brougham, *Political Philosophy*, *in* 1 HISTORICAL AND PHILOSOPHICAL ESSAYS 276, 334 (M.C.M. Simpson ed., Adamant Media Corp., 2005) (1865) ("A mixed government may combine only the monarchical and democratic elements, or only the monarchical and aristocratic, or only the aristocratic and democratic, or may unite all three.").

58. *See* ARISTOTLE, POLITICS: A NEW TRANSLATION 99–100 (C.D.C. Reeve trans., Hackett Publ'g Co., Inc. 2017).

59. *See* Leib, *supra* note 39, at 400 (discussing characteristics of the mixed regime). In fact, Aristotle thought the best of imperfect regimes was one which combined aristocracy and democracy. *See* Ryan Balot, *The "Mixed Regime" in Aristotle's Politics*, *in* ARISTOTLE'S POLITICS: A CRITICAL GUIDE 103, 110, 111, 115 (Thornton Lockwood & Thananssis Samaras eds., 2021); *see also* Carnes Lord, *Aristotle*, *in* HISTORY OF POLITICAL PHILOSOPHY 118, 144–45 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987) (discussing Aristotle's understanding of the mixed regime).

60. Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 58 n.31 (2003).

61. *See* St. George Tucker, *Appendix* to 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1, 56 (St. George Tucker ed., The Lawbook Exch., Ltd. 1996) (1803). The Monarch represented the One, the House of Lords the Few, and the Commons the Many. *See* Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 532 (2012) (collecting evidence for the English view of their Constitution).

62. For a contrast between the idea of separation of powers and the mixed regime, see Martin Diamond, *The Separation of Powers and the Mixed Regime*,

focused on protecting the rights of the individual and also preventing excessive concentration of power,[63] the mixed regime focused on promoting the flourishing of the polity.[64] To be sure, in modern context, the mixed regime's goal of stability might well have the secondary effect of promoting individual rights, but it is the polity that is the primary concern of the mixed regime. Second, the separation of powers does not turn on the contributions of different social groups, as does the mixed regime, but solely on the different functions of different parts of the government.[65]

B. The Mixed Regime for the Court and the Bank in the Early American Polity

The influence of the aristocratic element of a mixed regime remains an important if subtle strand in America's founding.[66] For instance, the authors of *The Federalist* were concerned with providing "auxiliary precautions" that avoid overreliance on popular wisdom.[67] They saw the "learned professions" as having "talents" that would lend more to the confidence of the entire community than other groups.[68] These professions, of which lawyers were the most prominent at the time, would be likely to use their abilities to decide issues in a more "impartial" manner.[69] This analysis nods to the professions' role as an aristocratic, balancing element for democracy, albeit in form suitable to the New World rather than the old.

Most importantly, for the relevance of mixed regime theory to courts, the federal judiciary was expressly recognized to be a redoubt of the learned few. Alexander Hamilton consciously uses that image in the defense of judicial review in *Federalist 78*:

> To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents

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PUBLIUS, Summer 1978, at 33, *reprinted in* AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT: ESSAYS BY MARTIN DIAMOND 58, 61 (William A. Schambra ed., 1992).

63. MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 52–53 (Yale Univ. Press 1982).

64. *See* Balot, *supra* note 59, at 103.

65. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 602–04 (1969) (stating that Americans had divested "various parts of the government of their social constituents," such as aristocracy and monarchy).

66. For a discussion of other traces of the mixed regime in the Constitution, see PAUL EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION 22–23, 112–14 (1968).

67. THE FEDERALIST NO. 51, at 294 (James Madison).

68. *See* THE FEDERALIST NO. 35, *supra* note 67, at 186 (Alexander Hamilton) ("With regard to the learned professions, . . . they truly form no distinct interest in society . . . and according to their situations and talents, will be indiscriminately the objects of the confidence and choice of each other and of other parts of the community.").

69. *Id.* at 187.

> which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that *there can be but few men* in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be *still smaller of those who unite the requisite integrity with the requisite knowledge*.[70]

Note that the few here are members of a profession chosen for intellectual attainment. And they preserve what modern theorists understand as precommitments to the rule of law[71] by their attachment to rules and precedent.

Alexis de Tocqueville, the great observer of the practice as well as the theory of early American governance, possessed a similar view of the sociological position of lawyers in the American regime. He expressly compared their centrality to the aristocracy in Europe.[72] They are a "privileged class among [persons of] intelligence" that ensures "their separate rank within society."[73] They look down on "passion" and have a certain "scorn" for the "multitude."[74] Their dispassion, together with their attachment to precedent and traditional forms, made them a bulwark of the republic against democratic excess.[75]

The Bank of the United States ("the Bank") also had an element of a mixed regime. The Bank had very important public responsibilities, acting as the nation's fiscal agent, helping in the collection of taxes, and providing loans to the government and paying the government's debts.[76] It had proto-central bank functions, stabilizing the money supply and being a source of credit in difficult times.[77] But it was also emphatically a creature of the few, not the many. Eighty percent of its shareholders were private, with the

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70. THE FEDERALIST NO. 78, *supra* note 67, at 455 (Alexander Hamilton) (emphasis added).

71. *See infra* note 161 and accompanying text.

72. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 255 (Harvey C. Mansfield & Delba Winthrop eds. & trans, Paperback ed. 2002).

73. *Id.* at 252.

74. *Id.*

75. *See id.* at 254–55.

76. *See generally* ALEXANDER HAMILTON, REPORT ON A NATIONAL BANK (1790), *reprinted in* 1 AMERICAN STATE PAPERS: FINANCE 67 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832), http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=009/llsp009.db&Page=67 (describing the national bank's functions).

77. *See* EDWARD S. KAPLAN, THE BANK OF THE UNITED STATES AND THE AMERICAN ECONOMY 27–29 (1999).

public relegated to only 20 percent control.[78] Despite its public functions, a private board of professional directors controlled its operations.[79] They remained "singularly independent of Treasury dictation."[80]

The power of both the Court and the Bank was controversial, in no small part because of the view that they would be controlled by the few. Thomas Jefferson, for instance, opposed the Bank[81] and judicial review alike,[82] warning that because of such institutions the government was moving toward "a single and splendid government of an [a]ristocracy."[83] Andrew Jackson, another Democrat who shared Jefferson's implacable opposition to the Bank and to elites, vetoed the Bank's reauthorization in 1835.[84] But even at these early stages, support of the Bank by elites often limited the actions opposition parties would take. For example, despite having the opportunity, Jefferson's political party, the Democratic-Republicans, never attempted to repeal the charter of the First Bank of the United States, and instead even expanded bank credit.[85] Economic elites, like merchants and state bankers, became major proponents of rechartering the Bank because it ensured access to credit and prevented a risk of contraction in credit if state banks were forced to liquidate.[86]

After Jackson's veto, for much of the nineteenth century, the United States had nothing resembling a central bank.[87] But in 1913 Woodrow Wilson promoted and signed the Federal Reserve Act, which

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78. *See* B. H. Beckhart, *Outline of Banking History: From the First Bank of the United States Through the Panic of 1907*, 99 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 1 n.4 (1922).

79. *See* KAPLAN, *supra* note 77, at 26.

80. James O. Wettereau, *New Light on the First Bank of the United States*, 61 PA. MAG. HIST. & BIOGRAPHY 263, 272 (1937).

81. *See* THOMAS JEFFERSON, OPINION OF THOMAS JEFFERSON, SECRETARY OF STATE, ON THE SAME SUBJECT (1791), *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 91, 91–94 (M. St. Clair Clarke & D. A. Hall eds., 1832).

82. HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 335 (4th ed. 1980) ("To Jefferson, the doctrine of judicial review, with its inherent possibilities of leading to judicial *supremacy*, was both elitist and antidemocratic . . . .").

83. Letter from Thomas Jefferson to William Branch Giles (Dec. 26, 1825), https://founders.archives.gov/documents/Jefferson/98-01-02-5771.

84. *See* Andrew Jackson, Veto Message (July 10, 1832), *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, pt. 1, at 1139, 1139 (James D. Richardson ed., 1897).

85. MURRAY N. ROTHBARD, A HISTORY OF MONEY AND BANKING IN THE UNITED STATES: THE COLONIAL ERA TO WORLD WAR II 70–71 (Joseph T. Salerno ed., 2002).

86. *See id.* at 71–72.

87. *See id.* at 93 (discussing how President Jackson "disestablish[ed] the Bank of the United States as a central bank" and instead, "placed [the public Treasury deposits] in a number of state banks . . . throughout the country").

created twelve regional federal banks with a public agency, the Federal Reserve, as "its capstone."[88] Its avowed purpose was to bring stability to the bank system, sustain the money supply, and generate economic growth.[89] Wilson was a Democrat like Jefferson and Jackson, but he believed in an elite, expert science of administration.[90] He had expressly praised Hamilton over Jefferson[91] and lauded the Bank of the United States as the precursor to the Federal Reserve.[92]

C. The Intellectual Professional Aristocracy in a "Classless" Society

Thus, early in American history, the federal courts and precursors to a formal central bank reflected the structure of the mixed regime. While the United States has no aristocracy designated by law, it still bears some traces of a mixed regime, because an elite group wields power through these two institutions, which are substantially insulated from popular control.

The closest equivalent of the aristocracy today is the intellectual-professional elite.[93] They can be defined as those professionals who because of their education and talent are most adept at making sophisticated claims about the nature of social reality—either through argument about principles or through modeling of social life.[94] What they have in common are advanced degrees from the best schools in the nation and entry into professions, like law, economics, or parts of the academy, where they can use their skills to influence social life and government institutions.

These professional elites dominate the Supreme Court and the Federal Reserve, not only in their membership, but among their staff

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88. *See* ROGER LOWENSTEIN, AMERICA'S BANK: THE EPIC STRUGGLE TO CREATE THE FEDERAL RESERVE 228, 251 (2015). Wilson himself called the Federal Reserve a capstone. *Id.* at 182.

89. *See id.* at 258.

90. *See* Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887), *reprinted in* WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS 231, 234 (Ronald J. Pestritto ed., 2005) ("[T]here should be a science of administration which shall seek to straighten the paths of government . . . .").

91. *See* Woodrow Wilson, *A Calendar of Great Americans*, FORUM, Feb. 1894, at 715, *reprinted in* WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS, *supra* note 90, at 81, 82, 85. To be sure, the Federal Reserve has evolved since 1913. Important legal features guaranteeing the independence of its members were added in 1935. *See Banking Act of 1935*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/banking-act-of-1935. They are discussed below. *See infra* Subpart IV.B.

92. 4 WOODROW WILSON, A HISTORY OF THE AMERICAN PEOPLE 47 (1902).

93. *See* John O. McGinnis, *Foreign to Our Constitution*, 100 NW. L. REV. 303, 326 (2006) (defining the cognitive elite).

94. *Id.* ("Those with the strongest intellectual endowments and best education dominate our professions and particularly what might be called the symbolic class—those who make their living by the manipulation of symbols.").

and those who follow them closely and analyze their operations.[95] The Supreme Court is also composed of a professional intellectual elite—so much so that is has been criticized for this feature.[96] It remains a bastion of the best credentialed and accomplished of lawyers—who themselves represent a group far above average in educational achievement and intellectual attainment. In the October 2021 Term, eight of the nine members of the Supreme Court attended Harvard or Yale Law School, two of the three leading laws schools in the country.[97] Their college educations were also elite. Three attended Princeton, and one each attended Harvard, Stanford, Yale, Columbia, Rhodes College and the College of the Holy Cross.[98] They surround themselves with law clerks with similar pedigrees. For instance, sixty percent of clerks hired for the Court's October 2019 Term went to the three leading law schools, and all but two went to one of the 14 most highly ranked schools according to *The U.S. News and World Report*.[99] Those commenting on the Court most frequently are law professors, the majority of whom come from the same elite institutions as the clerks.[100]

Like members of the Supreme Court, the members of the Federal Reserve are largely members of the professional intellectual elite. Of the six current members, two graduated from top law schools, Chair Jerome Powell from Georgetown where he was Editor-in-Chief of the *Georgetown Law Review* and Vice Chair Randal Quarles from Yale.[101]

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95. In contrast, as discussed below, the general public has little understanding of what these institutions do and does not exert substantial influence on their courts. *See infra* notes 267–70 and accompanying text.

96. *See, e.g.*, Robert Lowry Clinton, *Elitism and Judicial Supremacy*, PUB. DISCOURSE (Oct. 8, 2010), https://www.thepublicdiscourse.com/2010/10/1742/.

97. Natasha Bach, *One Thing Trump Nominee Brett Kavanaugh Won't Change Is the Supreme Court's Harvard-Yale Monopoly*, FORTUNE (July 10, 2018, 5:26 AM), https://fortune.com/2018/07/10/brett-kavanaugh-scotus-supreme-court-justice-ivy-league/.

98. *See Biographies of the Justices*, SCOTUSBLOG, https://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices/ (last visited Feb. 3, 2022).

99. Ten went to Yale, nine to Harvard, four to the University of Chicago, three to Stanford, three to Berkeley, two to Columbia, two to Notre Dame and one each from Cornell, Duke, Michigan, New York University and Virginia. David Lat, *Supreme Court Clerk Hiring Watch: The Return of the Tiger Cub*, ABOVE L. (June 18, 2019, 6:18 PM), https://abovethelaw.com/2019/06/supreme-court-clerk-hiring-watch-the-return-of-the-tiger-cub/. Of course, they were not just any student from those schools, but some of the very top students in their classes.

100. *See Where Current Law Faculty Went to Law School*, BRIAN LEITER'S L. SCH. RANKINGS (Mar. 17, 2009), http://www.leiterrankings.com/jobs/2009job_teaching.shtml. According to Leiter, as of 2008, Harvard had 993 law professor graduates, Yale 712, and Columbia had 308. *Id.*

101. *Board Members: Jerome H. Powell, Chair*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/bios/board/powell.htm

Two Vice Chairs, Richard Clarida and Lael Brainard, have doctorates in economics from Harvard.[102] All but one have had distinguished careers in finance and/or been professors at leading institutions, like Columbia or MIT.[103] The other, a Ph.D. economist, spent a dozen years at the Federal Reserve Bank of St. Louis.[104] The presidents of the twelve regional Federal Reserve Banks, who play an essential role in controlling the Fed's most important function,[105] are also well credentialed. Seven out of twelve have doctorates in economics, often from top programs like Stanford, Princeton, or Carnegie Mellon.[106] Three who do not have doctorates have advanced degrees in business or law from Harvard or the University of Pennsylvania.[107]

Of course, there are other parts of governmental bureaucracy from the Solicitor General's Office to the parts of the State Department that are also distinguished by a staff with a relatively similar elite pedigree. What is different about the Court and the Federal Reserve is that these officeholders have strong tenure protections and their functions require them to operate to pursue objectives that may conflict with the current wishes of the people.

The professional intellectual elite today differs from the aristocracy of old in that the latter inherited their position and wealth

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(last visited Feb. 3, 2022); *Randal K. Quarles*, FEDERAL RESERVE HISTORY, https://www.federalreservehistory.org/people/randal-k-quarles (last visited Feb. 3, 2022).

102. *Board Members: Richard H. Clarida, Vice Chair*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., 3 (last visited Nov. 19, 2021); *Board Members: Lael Brainard*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/bios/board/brainard.htm (last visited Feb. 3, 2022).

103. *See supra* notes 101–102 and accompanying text. The other member, Michelle Bowman, while a lawyer, has a somewhat less distinguished educational background. *See Board Members: Michelle W. Bowman*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/bios/board/bowman.htm (last visited Feb. 3, 2022). This may be the exception that proves the rule, because her seat on the board is set aside to represent "community banks," a distinctly non-elite set of institutions. Neil Haggerty, *Bowman Confirmed as Fed Board's Community Bank Representative*, AM. BANKER (Nov. 15, 2018, 3:40 PM), https://www.americanbanker.com/news/bowman-confirmed-to-federal-reserve-board-of-governors.

104. *Board Members: Christopher J. Waller*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/bios/board/waller.htm (last visited Feb. 3, 2022).

105. *See infra* notes 288–90 and accompanying text.

106. *See Federal Reserve Banks*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/federal-reserve-system.htm (last visited Feb. 3, 2022).

107. *See id.* Esther George, President of the Kansas City Reserve Bank, has an MBA from the University of Missouri-Kansas City. *Esther L. George*, EWING MARION KAUFFMAN FOUNDATION, https://www.kauffman.org/people/esther-l-george/ (last visited Feb. 3, 2022).

and has status recognized by law from birth.[108] Moreover, the elite must exercise their functions in a society deemed democratic. The next two Parts compare the functions of the Court and the Fed in more detail and explore the dilemmas that America's more encompassing democracy poses for the modern elites that dominate them.

II. MODERN CAPITALISM'S DEMAND FOR A STABLE RULE OF LAW AND CURRENCY

Most modern capitalist societies, including the United States, have both independent constitutional courts and independent central banks—and for very similar reasons.[109] Confidence in the security of long term property rights gives people incentives to invest and innovate, planning for the future.[110] Confidence that property will not be expropriated and that contracts will be enforced gives people incentives to trade.[111] A rule of law that enforces such basic economic rights promotes economic prosperity.[112]

While it might seem that our modern post-New Deal Court is largely focused on questions of civil rights, not economic rights, economic issues remain salient.[113] Many statutes, like the

108. But even that difference can be exaggerated. Except for dynastic fortunes, the way the upper middle class preserves the status of the next generation is through education. *See* John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission,* 86 MICH. L. REV. 722, 733 (1988). They not only pay for private colleges, but relentlessly invest in children though private schools or by moving to expensive suburban school districts. *Id.* at 733–34. To be sure, it is far from a closed and stable class, but neither was the aristocracy of old. New talents entered and old lines went extinct.

109. Bojan Bugaric, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 GERMAN L.J. 390, 390–95 (2019) (discussing independent central courts and independent central banks are forces to counter populism).

110. *See Order in the Jungle*, THE ECONOMIST (Mar. 13, 2008), https://www.economist.com/briefing/2008/03/13/order-in-the-jungle (stating that "stable, predictable laws encourage investment and growth"); *see also* Kerry Lynn Macintosh, *How to Encourage Global Electronic Commerce: The Case for Private Currencies on the Internet*, 11 HARV. J.L. & TECH. 733, 744 (1998) ("A stable currency would provide more stable business conditions.").

111. *See, e.g.*, Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 490–91 (1996).

112. *See* Stephan Haggard & Lydia Tiede, *The Rule of Law and Economic Growth: Where Are We?*, 39 WORLD DEV. 673, 673 (2011) (summarizing empirical analyses of the relationship between the rule of law and economic growth).

113. *See* Lee Epstein et al., *When it Comes to Business, the Right and Left Sides of the Court Agree*, 54 WASH. U. J.L. & POL. 33, 37 (2017) (finding that twenty-five percent of all cases decided between 1946 and 2015 directly concerned business).

bankruptcy code[114] and ERISA,[115] concern economic rights, and the Takings Clause[116] and Contract Clause[117] remain litigated constitutional provisions.[118] Moreover, the structure of the Constitution generates growth as well. Bicameralism and presentment slow down federal legislation allowing for private economic planning.[119] Federalism permits jurisdictional competition among the states and that competition has been thought to be useful to economic success.[120] And, even civil rights are crucial to prosperity. The First Amendment, for instance, has prevented religious strife from becoming a costly drag on economic growth.[121] It has also fostered innovation by protecting the marketplace of ideas.[122]

A sound money supply is also thought to be an essential ingredient for prosperity. That supply must remain elastic enough to grow to meet the needs of an expanding economy, but one that also preserves relatively stable prices.[123] Unexpected inflation creates uncertainty.[124] Businesses must continually markup products.[125] Savers demand new interest-bearing investments.[126] Resources are

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114. *See generally* 11 U.S.C § 101–112.

115. *See generally* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1101–1461.

116. U.S. CONST. amend. V.

117. *Id*. at art. I, § 10, cl. 1.

118. *See, e.g.*, Knick v. Twp. of Scott, Pa., 139 S. Ct. 2162, 2167 (2019) (involving the Takings Clause); Sveen v. Melin, 138 S. Ct. 1815, 1818 (2018) (involving the Contracts Clause).

119. *See* Jacob E. Gerson & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 550–51 (2007) (discussing the characteristics of bicameralism and presentment).

120. *See* Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 3 (1995).

121. *See* Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 29 (1987) (stating that the First Amendment "reduce[s] the amount of religious strife in this country.").

122. *Id.* (stating that the First Amendment "promote[s] scientific and technical progress by protecting the marketplace in ideas.").

123. *See* Sean Ross, *How Does Price Elasticity Affect Supply?*, INVESTOPEDIA (May 11, 2021), https://www.investopedia.com/ask/answers/040615/how-does-price-elasticity-affect-supply.asp.

124. *See* Laurence Ball, *Why Does High Inflation Raise Inflation Uncertainty?* 1, 13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 3224, 1990).

125. See *Markup*, INC., https://www.inc.com/encyclopedia/markup.html (last visited Feb. 3, 2022) (describing markup as an amount by which merchants need to increase their price over costs). Inflation changes costs and forces changes in markups.

126. *See* Kacie Goff, *Money Market Funds: Advantages and Disadvantages*, NEXTADVISOR (July 27, 2021), https://time.com/nextadvisor/banking/mma/money-market-account-advantages-and-disadvantages/.

misallocated because tax systems are rarely fully indexed,[127] and the aggregate costs of these misallocations can be substantial.[128] Further, hyperinflation upends the social and civic order no less than lawlessness. In both Weimar Germany and contemporary Venezuela, the failure of monetary stability put civil society under substantial pressure and undermined democracy itself.[129] While other factors contributed, the collapse of the German currency in 1931 facilitated rampant unemployment of over 30 percent, and the unemployed in turn provided ripe recruits for radical paramilitary groups challenging the Weimar government.[130]

The rule of law and elastic, but stable, money both require institutions independent from popular control to protect them.[131] The need for independence is justified in the same way. Economists, for instance, have referred to the "time inconsistency of preferences" as justifying both institutions.[132] People want satisfaction now even if this indulgence would sacrifice so much satisfaction in the future as to leave them generally worse off. Thus, time inconsistency justifies an independent judiciary in preventing even a democratic government from reneging on rule of law commitments.[133] Debtors, for instance, may want to get the state to invade the rights of creditors at time one even if that may prevent them from getting credit at time two.[134] But the judiciary, following the "strict rules," as Hamilton

127. *See* MARC LABONTE, CONG. RSCH. SERV., RL30344, INFLATION: CAUSES, COSTS, AND CURRENT STATUS 6 (2011).

128. *Id.* at 6–7.

129. Thomas Ferguson & Peter Temin, *Made in Germany: The German Currency Crisis of July 1931* 1–3 (Mass. Inst. of Tech. Dep't of Econ. Working Paper Series, Working Paper 01-07, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=260993 (discussing that the German currency crisis led to political turmoil); René Antonio Mayorga, *Outsiders and Neopopulism: The Road to Plebiscitary Democracy*, *in* THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES 132, 144 (Scott Mainwaring et al. eds., 2006) (noting that the Venezuela currency crisis was the turning point for its democracy, leading to an end to "the economic stability and prosperity generate by the recent economy").

130. Ferguson & Temin, *supra* note 129, at 9.

131. *See* Steven A. Ramirez, *The Emergence of Law and Macroeconomics: From Stability to Growth to Human Development*, 83 L. & CONTEMP. PROBS. 219, 233 (2020).

132. It has also been suggested that politicians might similarly have independent banks and independent judiciary to assure interest groups that the deals they make for them will not be unraveled by politically driven inflation or changes in law. *See* Geoffrey P. Miller, *An Interest-Group Theory of Central Bank Independence*, 27 J. LEGAL STUD. 433, 451–52 (1998). This theory does not explain fully why a country may establish such independent entities in the first place or why they can survive populist political entrepreneurs. *Id.* at 452. The power of elites in a mixed regime helps do both.

133. *See* Haggard & Tiede, *supra* note 112, at 674.

134. *See id.*

noted, of the legal craft, are able to put aside these popular pressures and preserve the consistency of rules over time.[135]

Similarly, time inconsistency has been used to justify the independence of central banks.[136] People may want an inflationary boom (and the elected politicians who would facilitate it) because it provides instant gratification but it will likely lead to an unpleasant bust in the future.[137] An independent central bank avoids the cycle of boom and bust.[138] The Federal Reserve, for instance, through the Federal Open Market Committee, tries to promote sustainable economic growth through managing the money supply in a prudent manner.[139] Because banks themselves create money by lending, the Federal Reserve must oversee the financial system, preventing excessive speculation and acting in crises as the lender of last resort to prevent the system from seizing up.[140]

Commentators rely on the same vivid analogies to dramatize the precommitments of both institutions. Jon Elster argued that a constitutional structure with judicial review was needed to prevent the people in a populist moment from destroying the prudent constraints on their own power.[141] Elster appealed to the famous incident from the *Odyssey* where Ulysses orders his men to tie him down so he will not throw himself into the ocean at the suggestion of

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135. *See supra* notes 66–75 and accompanying text.

136. *See* Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REG. 257, 263 (2015) (noting time inconsistency reflects that "our short-term interests in inflation-based prosperity are in tension with long-term interests in avoiding the economic devastation that this inflation brings"); *see also* SYLVESTER C.W. EIJFFINGER & JAKOB DE HAAN, THE POLITICAL ECONOMY OF CENTRAL-BANK INDEPENDENCE 1 (1995).

137. *The Central Banker as God*, ECONOMIST, Nov. 14, 1998, at 26.

138. *Id.* ("Politicians may be tempted to engineer a boom ahead of an electron, knowing that inflation will take off only after the votes have been counted. . . . If, instead, independent central banks are put in control of interest rates, inflation can be defeated at a smaller cost in lost output and jobs.").

139. Discussing the technical methods by which the Fed tries to achieve this goal is beyond the scope of this Article, but the most important method is buying and selling bonds from member banks. Buying bonds puts more money in the hands of member banks, increasing the money supply. Selling bonds takes money away, reducing the money supply. *See* ANDREW B. ABEL ET AL., MACROECONOMICS 543–46 (6th ed. 2008). For a general discussion of Federal Reserve monetary policy tools, see MARC LABONTE, CONG. RSCH. SERV., RL30354, MONETARY POLICY AND THE FEDERAL RESERVE: CURRENT POLICY AND CONDITIONS (2010). For discussion of the composition of the Federal Open Market Committee, see *infra* notes 288–90 and accompanying text.

140. *See* Dan Awrey, *The Puzzling Divergence of the Lender of Last Resort Regimes in the US and UK*, 45 J. CORP. L. 597, 604–12 (2019) (describing theories behind the lender of last resort regimes).

141. *See* Jon Elster, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT AND CONSTRAINTS 88–174 (2000).

the Sirens' beguiling songs.[142] And if the constitutional framework is to be protected from buckling under the heat of ordinary politics, the Court must be independent of the people who can veer toward imprudence. As Justice David Brewer once said, his job was to protect "Phillip Sober [from] Phillip Drunk."[143]

Similarly, academics have used the Ulysses metaphor to justify the Fed's independence.[144] Again, the metaphor of sobriety versus drunkenness dramatizes the problem. The Federal Reserve Chair William Martin famously said that it was his job to take away the punch bowl before the party got going.[145] The reason that the Fed can accomplish this job is that elite professionals on the Fed, being focused on the long term, are not as likely subject to popular passion as the people or their representatives.

Professor Peter Conti-Brown has qualified the full extent of the Ulysses-Sirens analogy as applied to the Fed.[146] He notes that sometimes politicians and the public call for the punch bowl to be taken away, fearing higher inflation.[147] That observation is accurate but does not diminish the justification of the Ulysses-Sirens model of independence for the Fed, as a comparison with the Supreme Court shows. Once one determines that the public may trample on rights that need independent protection, it is not much of an argument against the kind of judicial independence needed to enforce the Constitution that the public may sometimes want these provisions enforced. The Court will need to interpret the same provisions, whatever the public's unpredictable moods, and try to accurately

142. *See id.*

143. David J. Brewer, *An Independent Judiciary as the Salvation of the Nation*, *reprinted in* 11 THE ANNALS OF AMERICA 423, 428 (1968).

144. *See* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 3 (2016).

145. William McChesney Martin, Jr., Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Address Before the New York Group of the Investment Bankers Association of America 12 (Oct. 19, 1955), https://fraser.stlouisfed.org/title/statements-speeches-william-mcchesney-martin-jr-448/address-new-york-group-investment-bankers-association-america-7800.

146. *See* CONTI-BROWN, *supra* note 144, at 145–46.

147. *See id.* Conti-Brown also correctly notes that the Fed has some functions, like banking supervision, that cannot be easily fitted into the precommitment model. *See, e.g.*, *id.* at 163–66. The Federal Reserve's subsidiary, non-precommitment functions do not distinguish it from the Supreme Court which also has functions that do not fit into the precommitment model. Under the Rules Enabling Act, 28 U.S.C. § 2072, for instance, Congress has delegated the Court the authority to change the federal rules of civil procedure—a substantial power that cannot be easily squared with its core focus of legal interpretation. *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1335 (2006). This Article's focus here is on the core functions of the Court and Fed—their responsibility for legal interpretation and monetary policy respectively.

reflect the constitutional framework that reflects the long-term public interest.[148] Similarly, the Federal Reserve will attempt to manage the money supply and influence interest rates, and one cannot predict in advance where the public will be trying to push them.[149]

Moreover, public choice undermines the simple story that it is only passionate majorities that may distort the long-term benefits of public decision making. Sometimes concentrated minority interests may be powerful in the democratic political process.[150] Thus, over-enforcement of rights and over-tightening of the money supply might also be the result of political pressure from powerful minorities. For instance, the Tea Party in part reflected the power of older voters who wanted to preserve their fixed-income savings against the risk of inflation.[151] Without Fed independence, their influence might have resulted in excessive monetary tightening, exacerbating the Great Recession.[152]

Understanding the functional similarity of the justifications of the independence between the Supreme Court and the Federal Reserve helps illuminate why the perspective of the mixed regime expands that of the separation of powers in evaluating these institutions. The Fed's primary function is not to advance individual rights through checks and balances and prevent concentrations of power but to safeguard economic growth of the polity[153]—the kind of diffuse political goal sought by the classic mixed regime. Economic growth, for instance, helps make the nation more secure by providing more resources for defense.[154] Indeed, the original central bank, the

148. *See* NEAL DEVINS & LAWRENCE BAUM: THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 37 (2019).

149. *See* Scott A. Wolla, *Independence, Accountability, and the Federal Reserve System*, PAGE ONE ECON., May 2020, at 1, 1–2. (highlighting the unpopularity of former Federal Reserve Chairman Paul Volcker, and how the independence of the Federal Reserve allowed Volcker to take unpopular but necessary steps).

150. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 5–64 (1971) ("The greater effectiveness of relatively small groups—the 'privileged' and 'intermediate' groups—is evident from observation and experience as well as from theory.").

151. *See* Neil H. Buchanan & Michael C. Dorf, *Don't End or Audit the Fed: Central Bank Independence in an Age of Austerity*, 102 CORNELL L. REV. 1, 3–4, 35–40 (2016).

152. *Cf.* DIANE WHITMORE SCHANZENBACH ET AL., NINE FACTS ABOUT THE GREAT RECESSION AND TOOLS FOR FIGHTING THE NEXT DOWNTURN 4–5 (2016) (stating that lower rates encourage investment from business, leading to higher employment).

153. The Fed's congressional mandate is for "maximum employment, stable prices, and moderate long-term interest rates." 12 U.S.C. § 225a (2019); *see also infra* note 189 and accompanying text.

154. Sheila R. Ronis, *Preface* to ECONOMIC SECURITY: NEGLECTED DIMENSION OF NATIONAL SECURITY?, at vii, vii–viii (Sheila R. Ronis ed., 2011).

Bank of England, is credited with helping Great Britain win wars against continental powers by allowing it to borrow more effectively and thus concentrate its resources in times of crisis.[155] The Federal Reserve advances, in mixed regime terms, the flourishing of the polity, particularly vis-a-vis other polities. But if the rule of law advances economic growth, as discussed above, the Court also has a function that goes beyond the traditional separation of powers emphasis on protecting individual rights and avoid tyranny.

The Court and the Fed also have a function that the mixed regime sometimes historically had, that of making the polity act by reasoned and virtuous rule-following rather than passion because of the addition of the aristocratic element.[156] It is true that both institutions check other institutions in government.[157] But they do more than that. By empowering institutions that respond to an intellectual elite, our modern mixed regime purports to place to the claims of reason rather than naked preference at the center of the regime, bringing a form of aristocratic excellence to create stability and human flourishing.

III. THE PARALLEL DILEMMAS OF THE COURT AND THE FED

The Court and the Fed have parallel dilemmas created by an unelected elite carrying out core functions of state popularly considered democratic. In the Supreme Court context, the basic dilemma has been called the "counter-majoritarian difficulty."[158] The problem lies in the question of the democratic legitimacy of an

155. *See* NIALL FERGUSON, THE CASH NEXUS: MONEY AND POWER IN THE MODERN WORLD, 1700-2000 15–16 (2001).

156. *See* Scott D. Gerber, *The Court, the Constitution, and the History of Ideas*, 61 VAND. L. REV 1067, 1091–92 (2008) (discussing how aristocracy can bring more virtue to the polity in mixed regimes).

157. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012) ("In this case we must again determine whether the Constitution grants Congress the powers it now asserts . . . ."); Robert L. Hetzel & Ralph F. Leach, *The Treasury-Fed Accord: A New Narrative Account*, 87 ECON. Q. 33, 40–41 (2001) (discussing the tension between the Federal Reserve and the U.S. Treasury as both had conflicting goals on monetary policy after World War II and the start of the Korean War); *see also* Press Release, Allan Sproul, President, Fed. Rsrv. Bank of New York City, Joint Announcement by the Secretary of the Treasury and the Chairman of the Board of Governors, and of the Federal Open Market Committee, of the Federal Reserve System (Mar. 5, 1951), https://fraser.stlouisfed.org/title/federal-reserve-bank-new-york-circulars-466/3665-joint-announcement-secretary-treasury-chairman-board-governors-federal-open-market-committee-federal-reserve-system-11144 (announcing that the Federal Reserve and the U.S. Treasury had reached a "full accord" regarding monetary policies regarding financing of U.S. Government).

158. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986) ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

institution that periodically overturns the judgments of representatives elected by the people.[159] The Federal Reserve faces a similar problem (though it lacks such a pithy label to describe it) because its decisions on the money supply directly affect the entire economy and yet often do not comport with the wishes of the democratically elected politicians, including the President.[160]

The comparison between the Court and the Fed helps unpack the complex nature of the countermajoritarian difficulty. Stated in its crudest form, it is not a difficulty at all because of the functions of the Court and the Fed described in Part II. Both institutions have an obligation to use the skills of their elite profession to enforce precommitments of the liberal market order—the Court to the Constitution and the Fed to sound monetary policy.[161] The harder question, however, is how both institutions can ensure that they are merely enforcing precommitment and not exercising discretion to advance their own values and preferences. The Supreme Court has often been criticized as imposing values that diverge from the American people but that are not reflected in the Constitution.[162] A similar criticism could be made of the Federal Reserve Governors and Bank Presidents who are cut from the same elite cloth.[163] Indeed, they have been criticized for reflecting the values of bankers, who are creditors, not debtors[164] and thus may be more prone to reining in inflation than is warranted by the public interests.

The solution of both institutions is to bind themselves to rules that nevertheless permit them to carry out their core functions. But in choosing the content of the rules, both institutions face yet another difficulty. A small group of people often lack the information to predict how their discretionary decision will affect the long-term

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159. *See* Friedman, *supra* note 6, at 339. It does not follow that every decision overturning legislation necessarily occasions a countermajoritarian difficulty. For instance, when the Court strikes down legislation on separation of power grounds, it is often choosing between two democratic representatives of the people—Congress and the President. *See* Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1383 (1998). But it is clear when the Court strikes down federal or state legislation on grounds of conflict with constitutional rights it is acting against the people's representatives. And it is in rights issues where elites are likely to have values that most diverge from the general public. *See* DEVINS & BAUM, *supra* note 148, at 50–53.

160. *See infra* note 172 and accompanying text.

161. *See* Estreicher & Sexton, *supra* note 1, at 690.

162. *See supra* note 159 and accompanying text.

163. *See* Hayes, *supra* note 42, at 1167; *see also* Fox, *supra* note 42.

164. *See* Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 349 (2013) (arguing that the regulators such as the Federal Reserve all have close ties to industry players, resulting in deals being struck that more often than not favor industry at the expense of the average American).

health of the nation.[165] That critique is often made of the Fed[166] but can also be lodged against the Supreme Court. This Part considers how these three separate aspects of the countermajoritarian difficulty—the concern about disagreement with the political branches, the concern about avoiding value imposition, and the concern to avoid epistemic error—similarly affect the behavior of both institutions.

For both the Court and the Fed, rule-following has yet another advantage. Both have, as a core function, preservation of stability to help generate prosperity. But discretionary decisions make it harder for private actors to plan.[167] Yet, despite all the advantages of curbing discretion through rules, both the Court and the Federal Reserve sometimes act outside the bounds of the previous rules.[168] With the Federal Reserve, that departure from ordinary rules happens in crisis situations, like the Great Recession or the COVID-19 crisis.[169] The Supreme Court generally disclaims any emergency powers,[170] but considering the Court in comparison with the Federal Reserve helps understand better some Supreme Court decisions also driven by emergent circumstances.

A. Unpacking the Countermajoritarian Difficulty with the Court/Fed Comparison

1. The Problem of Disagreement with the Political Branches.

The most pressing political problem for both institutions is how to square elite discretion with the proclaimed democratic nature of American society. The Court does strike down legislation passed by majorities of democratically elected legislatures of both the state and federal governments, much to the dismay of politicians and portions of the public.[171] Politicians have railed against the Fed's lack of

165. *See infra* notes 183–85 and accompanying text.

166. *See infra* note 187 and accompanying text.

167. MARC LABONTE, CONG. RSCH. SERV., RL31056, ECONOMICS OF FEDERAL RESERVE INDEPENDENCE 10 (2007) ("The need to out-guess the Fed, however, does not so much result from Fed secrecy as much as from the use of discretion in monetary policymaking.").

168. *See infra* notes 203, 206–11 and accompanying text.

169. *See infra* notes 210–11 and accompanying text.

170. *See, e.g.*, *Ex parte* Milligan, 71 U.S. 2, 120–21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.").

171. For a recent comprehensive list, see Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Federal Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 PEPP. L. REV. 847, 943–70 (2010).

accountability to democratic institutions.[172] And its decisions can obviously harm individuals without their having a substantial chance to correct the decisions democratically.[173] High interest rates and other methods of Federal Reserve tightening can adversely affect those who need credit.[174] Low interest rates, in contrast, can make it hard for savers and retired people who depend on them.[175]

The most obvious solution for tempering the countermajoritarian difficulty is for the Court and the Fed to defer to the political branches. Judicial deference is, in fact, the best-known answer to the countermajoritarian difficulty.[176] As the Fed is not a judicial institution, there is no similar legal doctrine, but it can choose to be influenced by the views of the political branches, whether expressed by the executive branch or at the periodic congressional hearings at which the Fed Chair appears.

But understanding that the Court and the Fed are designed to protect precommitments, however, casts doubt on the appropriateness of deference, making these institutions' defiance of majorities seem more like a feature than a bug. If the people can be overcome by passion (or "drunk" in the words of Justice Brewer), we need some wiser element to keep the regime sober and reasoned.[177] Precommitments need to be enforced and both institutions are in a position to do so, in part because they reflect the elite professional values that surround the institutions.

2. The Problem of Value Imposition

But even if one decides that deference is incompatible with the institution's function, there remains the question of how to make sure that these elites remain faithful to enforcing the precommitments. The issue is not one of the appropriate degree of deference to

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172. Members of both parties complain. *See* CONTI-BROWN, *supra* note 144, at 146, 201–03 (talking of opposition of Democrat Wright Patman and Republican Ron Paul).

173. LABONTE, *supra* note 167, at 11.

174. *See* Christina D. Romer & David H. Romer, *Credit Channel or Credit Actions?: An Interpretation of the Postwar Transmission Mechanism*, *in* CHANGING CAPITAL MARKETS: IMPLICATIONS FOR MONETARY POLICY 71, 71–72 (1993) ("[T]ightening of policy leads to increases in the overall level of interest rates. When prevailing interest rates rise, borrowers may choose to borrow less, and lenders may choose to ration funds to certain types of borrowers.").

175. *See* Lukasz A. Drozd, *The Policy Perils of Low Interest Rates*, 3 ECON. INSIGHTS, no. 1, 2018, at 1, 2, 7 (2018) (discussing how savers are harmed by low interest rates).

176. *See, e.g.*, Eric Ghosh, *Deliberative Democracy and the Countermajoritarian Difficulty*: *Considering Constitutional Juries*, 30 OXFORD J. LEGAL STUD. 327, 353 (2010) ("If the main difficulty with judicial review is that judges are exercising significant power but are insufficiently reliable in reaching sound decisions, this problem may be alleviated by deference.").

177. *See supra* notes 141–43 and accompanying text.

majoritarian institutions or popular sentiment. Instead, the fear is that the Court and the Fed may use their insulated authority to replace, modify, or interpret precommitments to reflect their own values.[178] To prevent this, institutions must guard against their own elite biases.

The solution in both institutions is to try to tie themselves to rules at least in ordinary times. Rule-following makes it less likely that the Supreme Court will deploy its discretion to impose its own values, or that the Fed will manipulate the money supply to help its preferred candidate. Elites generally have somewhat different values from non-elites.[179] And there have been studies that the elite nature of the legal audience affects the behavior of Supreme Court Justices.[180] Some have tried to argue that the Court actually reflects the sentiment of the majority,[181] but recent research has confirmed what one would expect of an aristocratic element of the government—that it far more faithfully represents the views of the elite.[182] There have not been similar studies of the Federal Reserve, but many have accused it of sharing bankers' values that prioritize preserving the value of money over employment or of wanting to manipulate the currency to favor their preferred political candidates.[183] A solution in each case is for the institution to follow rules, or at least to proclaim it does so, because that limits the discretion to pursue its values.

3. The Problem of Epistemic Judgment of the Few

Traditionally the aristocratic element had been defined by the fact they are few and elite in number. And certainly, the Supreme Court and the Federal Reserve are notable for their relatively few

178. *See What's So Great About Constitutionalism*, Michael J. Klarman, 93 NW. L. REV. 145, 146 (1998) (seeing the elite attachments of Justices as eroding democracy); Timothy A. Canova, *Law and Globalization: The Role of Central Banks in Global Austerity*, Ind. J. Global Legal Stud. 665, 668 (2015) (fearing that Federal Reserve intensified austerity for large vulnerable segments of the population, while propping up and subsidizing elite private financial interests).

179. *See, e.g.,* Richard S. Randall, *Erotica and Community Standards: The Conflict of Elite and Democratic Values*, *in* CIVIL LIBERTIES: POLICY AND POLICY MAKING 169, 169 (Stephen L. Wasby ed., 1976) (discussing sharp disagreement between cosmopolitan and popular values on obscenity).

180. *See* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People,* 98 GEO. L.J. 1515, 1537–39 (2010).

181. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14–15 (2009).

182. *See* Baum & Devins, *supra* note 180, at 1546–51.

183. *See, e.g.*, IRWIN L. MORRIS, CONGRESS, THE PRESIDENT, AND THE FEDERAL RESERVE: THE POLITICS OF AMERICAN MONETARY POLICY-MAKING 23–24 (2000) ("For proponents of the pressure-group theory, the policy preferences of elected officials—most often the president—dominate Fed policy-making.").

decision makers, drawn from a very narrow sector of the society.[184] But there is substantial evidence that policymaking is generally improved by the broader participation of many.[185] The notion that the many may be better rulers than even the virtuous few goes as far back as Aristotle, when he considered the relative benefits of democracy and oligarchy.[186]

One interesting difference between critics of the discretion of the Court and the Fed has been that Supreme Court critics have largely focused on the anomaly of nine Justices imposing their values on society.[187] But more prominent in the criticism of the Fed has been that its discretionary decision making makes mistakes because it cannot generally predict the long-term future because of the "infinite regress of interacting beliefs and actions" that shape financial markets.[188] The market represents information collected from thousands of decisions. By trying to steer the market, the Fed simply creates distortions.[189]

The response to the epistemic problem is for the Fed to bind itself to simple rules anchored in the decisions of the many, reducing its discretionary evaluations.[190] The most prominent example for the Fed is the Taylor Rule.[191] Simply stated, the rule says that when

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184. *See* Baum & Devins, *supra* note 180, at 1537; *see also* Mark A. Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373, 410–11 (2000).

185. For a good defense of the democracy over oligarchy on epistemic grounds, see Hélène Landemore, *Democratic Reason: The Mechanisms of Collective Intelligence in Politics*, *in* COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 251, 282 (Hélène Landemore & Jon Elster eds., 2012), which states: "[T]he good thing about democracy is that it naturally economizes on individual intelligence, while maximizing through sheer numbers the key factor of cognitive diversity."

186. *See* ARISTOTLE, *supra* note 58, at 66–67. For discussion of Aristotle's anticipation of Condorcet Jury Theorem, see Fred Miller, *Aristotle's Political Theory*, STANFORD ENCYC. OF PHIL., (Nov. 7, 2017), https://plato.stanford.edu/entries/aristotle-politics/?mod=article_inline.

187. *See, e.g.*, George C. Christie, *Private: The Conflict Between Freedom of Speech and Other Rights and Values*, AM. CONST. SOC'Y (Apr. 28, 2011), https://www.acslaw.org/expertforum/the-conflict-between-freedom-of-speech-and-other-rights-and-values; Michael Marshall, *Supreme Court Has Been Contributing to Social Decay, Jones Argues*, UNIV. OF VA. SCH. OF L. (Jan. 30, 2003), https://www.law.virginia.edu/news/2003_spr/judge_jones.htm.

188. *See, e.g.*, ALEX J. POLLOCK, FINANCE AND PHILOSOPHY: WHY WE'RE ALWAYS SURPRISED 8 (2018); *see also* MERVYN KING, THE END OF ALCHEMY: MONEY, BANKING, AND THE FUTURE OF THE GLOBAL ECONOMY 304 (describing "radical uncertainty" faced by central banks).

189. *See* KING, *supra* note 188, at 304–05.

190. By statute the Fed is required to pursue economic growth, price stability, and low unemployment. *See* 12 U.S.C. § 225a. But these objectives by themselves are too broad to create anything resembling a rule. And they may conflict.

191. *See* Asso et al., *supra* note 16, at 1 (stating the original Taylor Rule as "r = p + 1/2y + 1/2(p-2) + 2, where y represents the percent deviation of real GDP from trend and p represents the rate of inflation over the previous four quarters.

inflation exceeds the desired inflation or the increase in the gross domestic product ("GDP") exceeds its long-term trend, the Fed should raise the interest rate, thus slowing the economy.[192] Conversely, if inflation is lower than its desired rate and the gross domestic product falls below its long-term trend, the Fed should lower its rate.[193] This rule would thus build on the market, not fine tune it and introduce distortions. To be sure, the Fed would have to determine what the correct measures of GDP and inflation are, but these are technocratic judgments, not policy-laden ones.[194]

One result of comparing the Supreme Court to the Fed is to apply this criticism about the capacity of the few to exercise discretion to the Court as well. That is, one might question the institutional capacity of the Court to engage in discretionary judicial updating to predict the long-term constitutional needs of the republic. Constitutional provisions are adopted by consensus after substantial deliberation.[195] These provisions help temper epistemic problems

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With inflation on its assumed target of two percent and real GDP growing on its trend path of roughly two percent per year (so that y=0), the real ex post interest rate (r-p) would also equal two").

192. *See* Ana Swanson, *What the US Could Gain and Lose from Monetary Policy Rules*, FORBES, (Aug. 25, 2014, 2:38PM), https://www.forbes.com/sites/anaswanson/2014/08/25/the-advantages-and-disadvantages-of-rule-based-monetary-policy/#19719a164c2c.

193. *See id.*

194. The Fed has faced a similar kind of criticism when it makes discretionary decisions to bailout financial institutions. *See, e.g.*, Gretchen Morgenson, Opinion, *Rescue Me: A Fed Bailout Crosses a Line*, N.Y. TIMES (Mar. 16, 2008), https://www.nytimes.com/2008/03/16/business/16gret.html. It may be thought to lack the knowledge and legitimacy to pick and choose as to who to bail out. The recently enacted Dodd-Frank Act makes clear that the Fed is to act by rule in this respect—to offer only broad-based financial aid rather than to pick and choose institutions to help. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1101(a)(6)(b)(iii), 124 Stat. 1376, 2114 (2010) (codified as amended at 12 U.S.C. § 343) (amending previous language by removing "individual, partnership, or corporation" and replacing with "broad-based eligibility").

195. *See generally* MCGINNIS & RAPPAPORT, *supra* note 18, at 62–80 (discussing the process of creating, adopting, and amending provisions in the Constitution). If they need to be changed, they can be changed through the amendment process which also requires substantial consensus. *See* U.S. CONST. art. V. It might be argued that even the epistemic value of the Constitution's democratic consensus is undermined by its age. But the strong supermajoritarian consensus required by the original Constitution and its subsequent amendments militates against discounting its power because these requirements screen out provisions that will become outdated. *See* MCGINNIS & RAPPAPORT, *supra* note 18, at 81–99 (arguing that the common understanding that the Constitution is outdated is mistaken).

because many minds from across the nation pass on their wisdom.[196] But the Supreme Court consists only of nine Justices, drawn from a narrow class of society, who live in one city.[197]

This concern puts pressure on the judiciary to follow the original rules laid down by the Constitution itself as it was made by consensus, although, as discussed below, the stabilizing function of the Court requires respect for precedent as well.[198] Aristocratic reason in the context of law consists, as Hamilton suggested, of the wisdom in determining the application of the rules, not in making them up.[199] Thus, the epistemic aspect of the countermajoritarian difficulty, one that is common in criticisms of the Fed but not the Supreme Court, is an important additional argument for following the original meaning of rules that reflect a consensus of the many.[200]

B. Ordinary Times versus Emergencies

1. Adherence to Rules in Ordinary Times

One of the current functions of both the Court and the Fed is to protect stability in the interest of private economic planning.[201] But discretionary action would not seem to advance stability in the context of law and central banking. It is hard to predict the exercise of discretion, and predictability is part of the essence of what the rule of law and price stability provide.[202]

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196. *See* MCGINNIS & RAPPAPORT, *supra* note 18, at 48–54 ("[T]he nature of democracy generally forces democratic representatives to favor the interests of their constituents over their own assessments of the public interest.").

197. *Id.* at 86 ("Supreme Court decisions need not reflect a consensus. The decisions are made by a small number of officials (nine judges) who are relatively homogenous (elite lawyers who lived around Washington, DC) and are not accountable to the public (having life tenure).").

198. The degree to which constitutional interpretation can be the result of formal rules is a matter of debate both between originalists and their critics and among originalists. For a discussion by a non-originalist of the degree to which interpretation is plausibly guided by originalist rules, see Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1641 (2016) (arguing that originalism can be applied to the rules in the constitution, but not the standards). For a defense of the view that once originalism is accepted it can provide comprehensive rules for interpretation, see John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751–52 (2009).

199. *See* THE FEDERALIST NO. 78, at 430 (Alexander Hamilton) (Willy Book Co. 1901).

200. Of course, there are many other arguments for originalism. *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 246–47 (2009) (describing arguments from coherence and determinacy).

201. *See Review of Monetary Policy Strategy, Tools, and Communications*, *supra* note 13.

202. *See* LABONTE, *supra* note 167, at 10.

For the Fed, the answer once again may lie in the same kind of rules that curb its discretion and prevent epistemic mistakes. These make it easier for businesses to predict what the Fed will do at any particular time.[203] But the interest in stability does not simply reinforce the case for the Court's following the original rules laid down by the Constitution. The problem here is that the Court has decided a vast number of cases, and not all of them are consistent with its original rules or any other rule-like jurisprudence.[204] If the Court now conformed constitutional law purely to reflect originalism or some other rule-like jurisprudence, it would likely create instability. Thus, understanding the function of the Court suggests that Hamilton himself focused on the fact that the few capable of being jurists would recognize that they would be tied down by precedent.[205]

Therefore, comparing the judiciary with the Federal Reserve suggests that even in ordinary times, the rule following of the Supreme Court will require tradeoffs between two entirely different kinds of rules—one designed to protect stability and another designed to protect against epistemic error.[206]

2. Extraordinary Actions in Emergencies

But neither institution's attachment to rules of whatever kind can be understood by considering its behavior only in ordinary times. The Federal Reserve's willingness to depart from its ordinary course is more obvious. Indeed, its leaders are now transparent about their willingness to take extraordinary actions in extraordinary times.[207] They acknowledge that ordinary principles and rules may be wise guides for ordinary times, but they are inadequate for a crisis.[208] That

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203. *See id*.

204. *See, e.g.*, Carpenter v. U.S., 138 S. Ct. 2206, 2235 (2018) (extending an individual's Fourth Amendment protections to some third-party information pertaining to that individual); McDonald v. City of Chi., 561 U.S. 742, 809–11 (2010) (Thomas, J., concurring) (challenging the Court's supplanting of the Privileges and Immunities Clause with substantive due process).

205. *See* THE FEDERALIST NO. 78, *supra* note 199, at 433–34 (Alexander Hamilton).

206. *See generally* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009) (discussing tradeoffs). Justice Clarence Thomas's recent argument in *Gamble v. United States*, 139 S. Ct. 1960, 1981–89 (2019) (Thomas, J., concurring), to the contrary is neither consistent with the respect for precedent manifested at the Founding and praised by Hamilton as constitutive of the judicial power and a constraint on judges. *See* THE FEDERALIST NO. 78, *supra* note 199, at 434 (Alexander Hamilton).

207. One of the few law articles to talk about the Federal Reserve's relation to the political regime argues that it assumes almost dictatorial powers in a crisis. *See* Sanford Levinson & Jack M. Balking, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1834–35, 1840 (2010).

208. *See, e.g.*, SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 372 (2012) ("'Modern monetary policy-making puts a

was the lesson of the Federal Reserve's failure to take extraordinary action to increase the money supply and prop up banks in the 1920s.[209] The failure made the Great Depression worse than it need have been.[210]

Thus, in the Great Recession, beginning in 2008, the Federal Reserve took extraordinary actions, from dropping its discount rate to zero, to bailing out distressed banks, to buying trillions of dollars of securities—so-called quantitative easing—to increase the money supply and more generally to preserve financial stability.[211] Similarly, in the Covid-19 crisis the Federal Reserve engaged in more quantitative easing.[212] One way of understanding this willingness is to note that the financial problem in an emergency may be more obvious than in ordinary times and the danger of following a rule not aimed at the emergency is more dangerous. The tradeoff between rule following and taking more discretionary action tailored to the time thus changes.

The Court is often much less transparent about its deployments of its own emergency jurisprudence. Indeed, it has expressly disclaimed at various times that it acts differently in an emergency.[213] Of course, sometimes it references the emergency declarations of other branches as factual inputs in the application of its established ordinary rules, such as strict scrutiny.[214] But unlike the Fed, the Court does not admit that is tailoring a wholly new set of rules for the crisis.

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lot of weight on rules, but there is no rule book for an economic crisis' . . . ." (quoting Edmund L. Andrews, *Fed Chief Shifts Path, Inventing Policy in Crisis*, N.Y. Times (Mar. 16, 2008), https://www.nytimes.com/2008/03/16/business/16bernanke.html)).

209. Gary Richardson, *The Great Depression*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-depression (detailing the mistakes of the Federal Reserve in the 1920s).

210. *See id.*

211. *See* Matthew Yglesias, *The Fed and the 2008 Financial Crisis*, VOX (May 13, 2015, 12:20 PM), https://www.vox.com/2014/6/20/18079946/fed-vs-crisis.

212. *See* Jeffrey Cheng et al., *What's the Fed Doing in Response to the Covid-19 Crisis? What More Could It Do?,* BROOKINGS (Dec. 17, 2021), https://www.brookings.edu/research/fed-response-to-covid19/.

213. *See, e.g.*, *Ex parte* Milligan, 71 U.S. 2, 120–21 (1866) (stating that the Constitution works "equally in war and in peace," protecting "all classes of men, at all times, and under all circumstances").

214. The most notorious example of such overt reliance for these purposes is *Korematsu v. United States*, 323 U.S. 214, 220 (1944), which expressly relied on the government's invocation of an emergency. But the use of an emergency declaration for satisfying strict scrutiny can be more subtle. Some Justices have suggested that it might negate the invidious purpose that the government would otherwise have in segregating prisoners by race. *See* Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, Harlan & Stewart, JJ., concurring) (indicating in dictum that such an order would be permissible under strict scrutiny).

Nevertheless, some famous decisions are best explained as a suspension of its ordinary rules to address what it perceives as an emergency. *Bush v. Gore* is the best recent example.[215] There, the Court held that the Florida Supreme Court violated the Equal Protection Clause in fashioning rules for the vote recount in the pivotal State of Florida in the 2000 election.[216] The opinion's equal protection analysis has been widely criticized.[217] But the opinion has also been defended on pragmatic, discretionary grounds, as necessary to prevent the constitutional crisis that might have occurred had Congress had to decide between competing slates of delegates.[218] The opinion does have one intentional indication that it was an extraordinary one—addressed to an emergency that the Court recognized. The opinion explicitly states that it should not serve as precedent for other cases.[219] On its face, that statement conflicts with a rule-oriented Court in which the role of precedent is to offer a method for resolution of other cases.[220]

Another famous case that may be reconsidered as an example of unacknowledged emergency jurisprudence is *Wickard v. Filburn*.[221] There, the Court upheld the application of a statute that prevented a farmer from using his own grain to feed himself and his animals.[222] This decision represented the farthest reach of the Commerce Clause that the Court had ever blessed, suggesting that it was necessary and proper to regulate commerce among the several states even to control household production of a small farmer.[223] One way of understanding *Wickard* is that it is an emergency case. It occurred not only in the wake of the Great Depression but at the beginning of World War II.[224]

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215. *See, e. g.,* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

216. *See id.* at 105–07.

217. *See, e.g.*, Laurence Tribe, Bush v. Gore *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 222–25 (2001) (dismissing the equal protection analysis as unprincipled).

218. Richard A. Posner, Bush v. Gore *as Pragmatic Adjudication, in* A BADLY FLAWED ELECTION: DEBATING *BUSH V. GORE,* THE SUPREME COURT, AND AMERICAN DEMOCRACY 187, 201, 206–08 (Ronald Dworkin ed., 2002) (offering a pragmatist argument for deciding the case on the grounds that the Court wanted to avoid a constitutional crisis).

219. *Bush*, 531 U.S. at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

220. *See* Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 369–72 (2007) (describing the functions of stare decisis as constraining "a judge's choices . . . by prior cases").

221. *See generally* Wickard v. Filburn, 317 U.S. 111 (1942).

222. *See id.* at 128.

223. *See id.* at 128–29.

224. *See* JoEllen Lind, "*Procedural Swift": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 727 n.45 (2004) (suggesting that World War II propelled this expansion of the Commerce Clause).

In those circumstances, the Court itself recognized a societal emergency and was not going to set aside the federal government's plenary authority to regulate a wartime economy, particularly one that was obviously in dire straits.[225] But that decision has proved of doubtful soundness as a long-term rule, because it seemed to provide Congress an enduring plenary power over anything affecting economic activity, which in fact encompasses all activities, rather than an enumerated power limited to the regulation of Commerce.[226]

Home Building & Loan Ass'n v. Blaisdell[227] provides a somewhat more ambiguous example because the Court there *did* reference the economic emergency of the Great Depression that prompted the State of Minnesota to suspend foreclosure laws.[228] But in upholding that law against a challenge based on the Contract Clause, the Court only briefly referred to the emergency in the analytic portion of its opinions.[229] Nevertheless, it also went out of its way to suggest that the fundamental constitutional law was not modified by the emergency.[230] As a result, the case became precedent for a more enduringly permissive reading of the Contract Clause in which states were given more freedom to modify existing contracts even in more ordinary times.[231]

One advantage of the Court's increased transparency about its willingness to change its jurisprudence in emergency situations, like the Fed, is that it would make it easier not to follow those cases in

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225. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 420, 426 (1934) (recognizing an emergency and emphasizing that "the war power of the Federal Government . . . is a power given to meet that emergency" in order "to wage war successfully").

226. *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 804 (1995) (calling *Wickard* an atrocity because it largely eliminated the Court's role in policing the limits of the Commerce Clause); Brief for Constitutional Law Scholars as Amici Curiae Supporting Respondents at 12–14, Ashcroft v. Raich, 542 U.S. 936 (2004) (No. 03-1454) (explaining that because virtually any conceivable activity in the aggregate affects interstate commerce, *Wickard*'s aggregation analysis has the potential to remove all limits on Congress's authority).

227. 290 U.S. 398 (1934).

228. *Id.* at 420 (referring to the "economic emergency which the legislature had found to exist").

229. *See id.* at 444.

230. *Id.* at 425 ("Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency.").

231. Douglas W. Kmeic & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 534, 545–46 (1987) (suggesting that after *Blaisdell*, the Contract Clause became a practical nullity outside cases where a state was itself a party to the contract).

more ordinary times, just as the Fed goes back to its ordinary rules and in fact unwinds its extraordinary actions. Thus, the Court could have decided *Wickard* in favor of the government. But by emphasizing the extraordinary emergency circumstances of war and depression, the Court more easily permitted the Commerce Clause to snap back and become, in ordinary times, a constraining enumerated power.[232] By being more explicit that *Blaisdell* was limited only to emergency situations, the Court could have permitted the Contract Clause to retain more of its force.

It is true that in *Bush v. Gore*, the Court expressly stated that its decision should not be regarded as a general precedent.[233] Perhaps that was an implicit acknowledgement of its emergency circumstance. But such is the power of precedent in our hierarchical judicial system that the case continues to be cited by lower courts[234] and has led to confusion in election law.[235] If the Court had been clearer that its analysis reflected an emergency situation, it would not as likely be followed in quotidian election cases.

So far, this analysis has shown how the emergency perspective on the Fed can also help explain the Court's behavior in some important emergencies that appear to threaten the stability of the republic. This analysis has also provided a recommendation for improving the Court's response for the long term. But it might also be seen as a justification as well as a useful explanation for the Court as for the Fed. In emergencies, the Fed acts because the dangers of failing to act outweigh those of following its ordinary rules and the problems are sufficiently obvious as to overcome the barriers to epistemic judgment.[236] That kind of analysis could be applied to

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232. *See Blaisdell*, 290 U.S. at 426 (concluding that "[w]hile emergency does not create power, emergency may furnish the occasion for the exercise of power" and thus implying that Congress' power may seem more expansive and the Commerce Clause less constraining in extraordinary times because "the particular exercise of [them] [is] in response to particular conditions").

233. *See* Bush v. Gore, 531 U.S. 98, 109 (2000) (limiting its holding to "present circumstances").

234. *See, e.g.*, Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 GEO. WASH. L. REV. 1865, 1878–98 (2013) (showing how lower courts have relied on *Bush v. Gore* to evaluate and at times invalidate voting statutes).

235. *See, e.g.*, Spencer Overton, *Rules, Standards, and* Bush v. Gore*: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65, 65–66 (2003) (stating that the Supreme Court in *Bush v. Gore* "failed to provide a clear test to be used in considering other claims").

236. *See* 12 U.S.C. § 461(b)(3) (granting the Fed in "extraordinary circumstances" the authority to "impose . . . reserve requirements outside the limitations . . . prescribed by paragraph (2)"); *see also* Baker, *supra* note 1, at 85–86 (describing the Fed as a "lender of last resort" for "a bank run or panic . . . [that] suddenly requires additional emergency 'funding liquidity'" to prevent "broader economic collapse").

justify the Court's departures from rules in times of emergencies. In short, for both the Supreme Court and the Fed, their core functions of protecting rights and monetary stability may be endangered if society is permitted to fall into the disorder that adherence to ordinary rules would permit.

This kind of justification provides both balm and pain for both opponents of formalism in constitutional law and its defenders. For opponents, the positive is that emergency times justify departures from strict rule following, whether defined as following the original meaning or precedent. But it cannot be used as a justification for not following rules in more ordinary times. For formalists, this view has the reverse effect. It provides a limited justification of rule following, but permits an exception for emergencies, the definition of which is of course open to debate.

For constitutional theory, this kind of justification suggests that constitutional law moves by jumps in social crisis and then should return to traditional methods. Its course is indeed punctuated, not smooth. But, unlike Bruce Ackerman's own punctuated theory of constitutional law, that of constitutional moments,[237] these decisions do not justify permanent change outside of Article V. Nor do they necessarily require endorsement of the people through successive elections; they are made on the judicial branch's own initiative.[238]

The justification suggested here is based on the principle that a non-democratic component of a mixed regime can legitimately act to stabilize a republic. Justified legal changes outside of the amendment

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237. *See* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1055–56 (1984).

238. Under Ackerman's theory, a consistent shift in constitutional thinking across all three branches—even if inconsistent with the text of the Constitution—becomes valid because broad acceptance reveals that the new principle is "ratified by the people" despite not always following the Article V amendment process. *Id.* However, research has shown that most Americans have, at most, cursory knowledge of the Supreme Court, let alone its decisions. *See* Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 617–28 (2003) (analyzing Ackerman's argument that voters implicitly endorsed the New Deal and arguing that the voters did not endorse the almost unlimited power the Supreme Court permitted the federal government to have for dealing with the economic crisis). Therefore, implicit ratification by the people is an unsupported justification enduring constitutional change. Ackerman's theory also runs contrary to rational ignorance theory. *See* Ilya Somin, *Rational Ignorance and Public Choice*, *in* 2 THE OXFORD HANDBOOK OF PUBLIC CHOICE 573, 573–74 (Roger D. Congleton et al. eds. 2019) (explaining how negligible individual incentives make voter ignorance about political issues rational, even for altruistic individuals). Even if Ackerman's popular ratification theory was correct, he fails to explain how his alternative theory improves on the popular ratification process of the Article V amendment process. Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 766–67 (1992) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991)).

process are brought on by the Supreme Court, but only in response to a perceived emergency and lasting only so long as the emergency continues. The punctuated but recoiling nature of this kind of change in the Court would have a similar character to the emergency interventions of the Fed, the other institution most responsible for preserving the liberal market order.[239]

IV. THE "INDEPENDENCE" OF THE COURT AND THE FED

Both the Supreme Court and the Federal Reserve enjoy substantial—indeed extraordinary—independence in law compared to the most other important political institutions in our government. But these protections nevertheless remain porous, and a determined and sustained democratic majority could overcome them. What effectively guarantees independence is the power of the elites that surround them, underscoring their place as the aristocratic element of the mixed regime. As a result, the greatest danger to their independence comes when elites become polarized, as is occurring today.[240]

A. The Independence of the Supreme Court

The legal guarantees for the Supreme Court appear the stronger of the two institutions. First, they derive from the Constitution, not simply from statute, and thus are much harder to repeal.[241] Second, the terms of the members of the Court are longer than those at the Fed.[242] The Constitution gives the Justices tenure during "good behavior," a phrase generally thought to give them life tenure.[243] The Justices can be impeached by the House of Representatives and then convicted by the Senate for "high Crimes and Misdemeanors."[244] But

239. To be sure, social movements press for changes, but it is the elite that decides to make these changes in what they regard as emergency.

240. *See* Levi Boxell et al., *Cross-Country Trends in Affective Polarization* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26669, 2021), https://www.nber.org/system/files/working_papers/w26669/w26669.pdf (indicating that "polarization has risen substantially in the US in recent decades").

241. *See* U.S. CONST. art. III, § 1 (establishing the "judicial Power of the United States"); *see also* U.S. CONST. art. V (setting up the process for amending the Constitution).

242. *See* 12 U.S.C. § 241 (establishing "terms of fourteen years" for members of the Board of Governors of the Fed).

243. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."); *see* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y. 769, 784 (2006) (stating that it is well-established that the good behavior clause grants life tenure). For a dissenting view, see Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 74 (2006).

244. *See* U.S. CONST. art. II, § 4.

only one Justice, Justice Samuel Chase, has been impeached and that was long ago.[245] After what he regarded as the debacle of failing to convict Justice Chase in the Senate, Thomas Jefferson correctly predicted that impeachment for Justices was just "a scarecrow."[246]

But while individual Justices are secure, it does not follow that the independence of the Supreme Court is guaranteed, if by independence we mean decisions independent of democratic sentiment. A President can appoint new Justices to the Court upon the death or retirement of incumbents and thus change the direction of the Court.[247] And yet, given the length of the Justices' terms and the rotation of Presidents and parties in office, it is difficult for some political movements to transform the Court. [248]

Moreover, the power of elites makes that transformation particularly difficult when the elites are relatively united. This barrier has been clear from the early Republic. The Democratic-Republicans made appointment after appointment to the Supreme Court but it did not much change the direction of the Court from the Federalist path set by John Marshall.[249] The question of the constitutionality of the Bank of the United States was as divisive in its day as abortion rights are in ours, as sharply separating the Federalists and Democratic-Republicans then as the constitutionality of abortion separates the Republican Party from the Democratic Party today.[250] Yet, despite five appointments by the Democratic-Republicans to a seven-member Court, *McCulloch v. Maryland*[251] proved a unanimous decision upholding the Bank's

245. *See* 2 SAMUEL H. SMITH & THOMAS LLOYD, TRIAL OF SAMUEL CHASE, AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, IMPEACHED BY THE HOUSE OF REPRESENTATIVES, FOR HIGH CRIMES AND MISDEMEANORS, BEFORE THE SENATE OF THE UNITED STATES 5–8 (1805).

246. 12 THOMAS JEFFERSON, *To Judge Spencer Roane: Letters of Hampden—Encroachments of National Government—Right of Decision as to Constitutionality*, *in* THE WORKS OF THOMAS JEFFERSON 135, 137 (Paul Leicester Ford ed., 1905).

247. *See* U.S. CONST. art. II, § 2, cl. 2.

248. *Cf.* James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1096 (2004) (discussing "the randomness of the distribution of those Supreme Court appointments among presidents").

249. *See* J. Michael Vernon, *The Contracts Clause and the Court: A View of Precedent and Practice in Constitutional Adjudication*, 54 TUL. L. REV. 117, 132 (1979) (viewing the Supreme Court under Chief Justice Marshall as essentially Federalist, only fundamentally changed by Taney and the Jacksonians).

250. On this fundamental division, see generally Janet A. Riesman, *Money, Credit, and Federalist Political Economy*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 128 (Richard Beeman et al. eds., 1987).

251. 17 U.S. 316 (1819).

constitutionality.[252] One important reason was that the elite bar was Federalist leaning.[253]

Richard Nixon campaigned against the activist Warren Court and promised to appoint Justices who reflected his views of "strict construction."[254] But famously, the Burger Court was the "Counter-Revolution that Wasn't," failing to deliver the kind of change that Nixon wanted.[255] Nor did the appointments to the Court by President Ronald Reagan and his successor, President George H. W. Bush, change the fundamental precedents of the Warren and New Deal Courts or shift the Court aggressively to the right.[256]

The rapid transformation of the Court was blocked by several factors. First, the Justices had grown up against a consensus that had not sharply dissented from the judicial methods that the Warren Court employed. For instance, Republican appointee Justice John Paul Stevens noted that his law professors emphasized what was important were the facts of the cases.[257] With that background, he was hardly likely to engage in a spring cleaning of Supreme Court doctrine, let alone be amenable to a jurisprudential revolution.

And when Ronald Reagan nominated Robert Bork—a nomination that might have threatened fundamental change at the Court—the organized bar and law professors were leaders in the effort to derail his nomination.[258] The American Bar Association, the leading

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252. *Id.* at 424 ("[I]t is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.").

253. *See* Robert W. Gordon, *The Citizen Lawyer—A Brief History of a Myth with Some Basis in Reality*, 50 WM. & MARY. L. REV. 1169, 1188 (2009) (suggesting the elite lawyers had interest in the national market).

254. *See* Stanley Kutler*, Why Nixon Matters,* REUTERS (Aug. 7, 2014, 5:15 PM), https://www.reuters.com/article/idUS403712082520140807; *see also* Robert Pratt, *Simple Justice Denied: The Supreme Court's Retreat from School Desegregation in Richmond, Virginia*, 24 RUTGERS L.J. 709, 724 (1993).

255. *See generally* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983) (detailing how despite the fact that the Burger Court consisted of a majority of Justices appointed by Nixon and Ford, the Court still failed to fulfill Nixon's strict construction agenda).

256. For instance, *Roe v. Wade*, 410 U.S. 113 (1973), was modified in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), but the core of the right to abortion remained. *U.S. v. Lopez*, 514 U.S. 549 (1995), for the first time struck down a statute as beyond Congress's power under the Commerce Clause. But this victory of confining Congress's power, like others in favor of federalism during this period, was narrow and largely symbolic. *See* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 101–02 (2001).

257. *See* JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 53–54 (2019).

258. *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States Before the Comm. on*

establishment legal organization, rated nominees to the Court, and four of its members called him professionally unqualified[259]—an act very damaging to his confirmation.[260] The American Bar Association made the damning evaluation although Bork had been a professor at Yale Law School, one of the leading authorities in the nation on antitrust law, and a former Solicitor General of the United States.[261] One thousand nine hundred and twenty-five law professors—a large percentage of all law professors at the time—signed a letter opposing his nomination.[262]

The aristocratic or elite element has continuing influence even once the Justices get into office. The clerks that surround the Justices, the press that dominate coverage of the Court, and the academics that comment on the Court, together exert a powerful influence.[263] From 1968 to 1991 all the Justices who were appointed by Republican Presidents except William Rehnquist, Antonin Scalia, and Clarence Thomas moved left during their tenure.[264] Some of these moves were dramatic. Harry Blackmun, by political science scores, began as one of the most conservative Justices on the Court and ended as one of the most liberal.[265] The legal academy and the

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the Judiciary, 100 Cong. 3995, 4002, 4135, 4140, 4596, 4597, 4640, 4797 (1987) (providing statements from various law professors and legal organization leaders against the nomination of Bork).

259. *See The ABA and Judge Bork*, WASH. POST https://www.washingtonpost.com/archive/opinions/1987/09/11/the-aba-and-judge-bork/6e9ef694-cbc8-4098-9ab7-055d0e158683/?utm_term=.2ec760167396 (last visited Feb. 3, 2022).

260. Kenneth B. Noble, *Hatch Assails A.B.A. over Vote on Bork*, N.Y. TIMES (Sept. 11, 1987), https://www.nytimes.com/1987/09/11/us/hatch-assails-aba-over-vote-on-bork.html ("The number of dissenters on the A.B.A. panel was highly unusual. Judge Bork's opponents say the dissent will provide ammunition for them in the confirmation hearings.").

261. *See The ABA and Judge Bork*, *supra* note 259 (listing Bork's credentials as "a professor at Yale Law School, the solicitor general of the United States and . . . a judge of the U.S. Court of Appeals"); *see also* Sandeep Vaheesan, *How Robert Bork Fathered the New Gilded Age*, PROMARKET (Sept. 5, 2019), https://promarket.org/2019/09/05/how-robert-bork-fathered-the-new-gilded-age/ (noting that Bork "in his positions as a law professor and a judge, played a critical role in recreating the antitrust law of the original Gilded Age").

262. NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 144 (1998). Approximately one hundred law professors signed a letter in support—a ratio of approximately 18-1 of law professors in opposition. *Id.*

263. *See* Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 628–30 (2000) (suggesting that groups such as editorialists and academics influence the reputation that judges seek to maximize).

264. *See* DEVINS & BAUM, *supra* note 148, at 93.

265. *See id.*; *see also* David G. Savage, *Blackmun, Author of* Roe vs. Wade*, Dies*, L.A. TIMES (Mar. 5, 1999, 12:00 AM), https://www.latimes.com/archives/la-xpm-1999-mar-05-mn-14327-story.html ("Blackmun's [twenty-four]-year career

press that passed on their reputation were very much on the left.[266] The professional bar also leaned to the moderate left,[267] and played a part not only in creating the current along which Justices could drift, but as discussed above, intervened in the appointment process. The influence of those outside the Court shows that it is a mistake to think of the aristocratic element of the mixed regime as being constituted only by the officeholders themselves. The Justices are part of a larger—albeit narrow—community, and that community as a whole constitutes the aristocratic element of the regime.

Another factor that gives the intellectual elite influence over the Court is the relative lack of knowledge and interest of the people at large. Neal Devins and Larry Baum have surveyed the studies of people's knowledge of the Supreme Court.[268] It is very thin. As they put it, "far more people can name two of the Seven Dwarfs than two of the Justices."[269] And the public does not know much about Supreme Court decisions—even important ones and those that have gotten front page coverage.[270] Moreover, given the complex issues and legal language of opinions,[271] it is not surprising that people do not have strong views about them. It is hard for the people to have day-to-day influence over an institution of which they have little knowledge and whose output is opaque to them.

The legislative power over the Supreme Court is even greater than the President's power of appointment. The number of Supreme Court Justices is not fixed by the Constitution, but instead set by statute.[272] Yet, despite sometimes virulent popular criticism of the Court, the President and Congress—even when controlled by the same party—have refrained from transforming the Court by

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on the Supreme Court saw one of the most remarkable transformations in the [C]ourt's history. Appointed in 1970 as a law-and-order conservative by President Nixon, he retired in 1994 as the [C]ourt's last true liberal—a champion of women's rights, an advocate of gay rights and an outspoken opponent of capital punishment.").

266. *See* Adam Bonica et al., *The Legal Academy's Ideological Uniformity*, 47 J. LEGAL STUD. 1, 28, 32 (2018) (showing the pervasive left-liberalism of law professors); *see also* Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 383 (2014) (providing ideological measures for different professions, including journalists).

267. *See* Bonica, *supra* note 266, at 383 (measuring the ideology of lawyers).

268. *See* DEVINS & BAUM, *supra* note 148, at 29.

269. *Id.*

270. *See id.* at 30.

271. *See* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 503 (2013) (arguing that most opinions are written in technical language and do not have the public as a primary audience).

272. 28 U.S.C. § 1 ("The Supreme Court . . . shall consist of a Chief Justice . . . and eight associate [J]ustices . . . .").

expanding the number of Justices.[273] Here again, the elite profession that surrounds the Court plays a protective role.

The most famous court packing proposal illustrates that what protects the independence of the Court from popular control is ultimately what the elite is most interested in, and influential with: the Court. When Franklin Roosevelt tried to pack the Court at a time when he had huge Democratic majorities in Congress,[274] he faced a storm of criticism led by lawyers, particularly elite lawyers.[275] Even if some members of the elite were unsympathetic to particular decisions of the Court, they saw that the court packing precedent would weaken the Court as an institution and thus the place where they had special influence over the political life of the nation.[276] As the next Part discusses, change at the Court is likely to occur only when the elite splinters so fundamentally that it no longer is unified in protecting the Court's independence.

B. The Independence of the Federal Reserve

The independence of the Federal Reserve depends on the influence of the elite that surrounds it as well. It too has protections for independence that would otherwise be porous to popular influence. On paper, the independence of the Federal Reserve is somewhat weaker than the Supreme Court. Like the Justices,

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273. Another way the legislature can contain the Court is by curbing its jurisdiction. *See* U.S. Const. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the [S]upreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."). But campaigns to curb the Court's jurisdiction also often founder on elite opposition. *See* William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 598 (2002).

274. MARIO R. DINUNZIO, THE GREAT DEPRESSION AND NEW DEAL: DOCUMENTS DECODED 262 (2014) ("Roosevelt proposed that the president be empowered to add one new member to the Court for every [J]ustice who, on reaching the age of seventy and six months, chose not to retire.").

275. *See* S. REP. NO. 85-1586, at 16 (1958) ("The deans of most American law schools, the house of delegates of the American Bar Association . . . and many outstanding lawyers have voiced strong opposition to this provision . . . ."); Kyle Graham, *A Moment in* The Times: *Law Professors and the Court-Packing Plan*, 52 J. LEGAL EDUC. 151, 158 (2002) ("Other teachers at Harvard and faculty at the University of Chicago and Northwestern also issued joint statements to the press denouncing the plan."); *Chicagoans Rally for Court Defense*, N.Y. TIMES (Mar. 22, 1937), https://timesmachine.nytimes.com/timesmachine/1937/03/22/.html. New York University School of Law Dean Frank Sommer testified that packing the Court for the purpose of altering its decisions "while conforming to the letter, would violate the spirit of the Constitution." *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the Comm. on the Judiciary*, 75th Cong. 1009–11 (1937) (statement of Frank H. Sommer, Dean, New York University School of Law).

276. *See Chicagoans Rally for Court Defense*, *supra* note 275.

members of the Federal Reserve are selected by the President, but unlike the Justices, they do not have life tenure, but only fourteen-year terms.[277] And they can be removed for cause,[278] although no member has ever been so removed.[279] In practice, the protections against rapid replacement are even weaker. In part because of the lucrative outside options for an ex-Federal Reserve Board Member, almost no one stays fourteen years.[280] Two-term Presidents can regularly be in a position to appoint the entire membership, in contrast to their more limited opportunities for appointment at the Supreme Court.[281] Presidents, like Donald Trump, have been able to do the same even during a single term in office. [282]

But appearances are again somewhat deceiving. First, it is difficult to put those outside the financial mainstream on the Fed Board, as Donald Trump found out when his idea of putting Herman Cain and Steven Moore on the board imploded even before their nominations.[283] The appointment of the Chair of the Fed, the most important position, is also constrained by financial elites and the

277. The seven members of the Board of Governors of the Federal Reserve are nominated by the President and confirmed by the U.S. Senate. *See* 12 U.S.C. § 241; *see also Who Are the Members of the Federal Reserve Board, and How Are They Selected?*, BD. OF GOVERNORS OF THE FED. RES. SYS., www.federalreserve.gov/faqs/about_12591.htm (last visited Feb. 3, 2022). The full term of a governor is fourteen years, and appointments are staggered so that one term expires every two years. 12 U.S.C. § 242.

278. 12 U.S.C. § 242. Chairs and Vice Chairs do not enjoy explicit for-cause protection against removal. *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1176 (2013).

279. *Does the President Have Legal Authority to Fire the Fed Chair?*, PBS (Dec. 25, 2018, 6:50 PM), https://www.pbs.org/newshour/show/does-the-president-have-legal-authority-to-fire-the-fed-chair ("No president has ever tried to remove a member of the Federal Reserve's board, let alone a chairman, for any reason at any time.").

280. *See* William R. Keech & Irwin L. Morris, *Appointments, Presidential Power and the Federal Reserve*, 19 J. MACROECONOMICS 253, 255 (1997); *see also* Paul D. Mueller, *Public and Private Institutions in the Federal Reserve*, J. PRIV. ENTER., Fall 2016, at 49, 55.

281. Under the principle of staggered terms, Presidents should be able to appoint one governor every other year. However, every President except Kennedy has exceeded this rate, and the trend of early turnover has increased in recent times. *See* Mueller, *supra* note 280, at 55 (noting a trend toward shorter terms).

282.*See* Paula Moran, *Who Is on the Federal Reserve Board?*, FRONTLINE (July 13, 2021), https://www.pbs.org/wgbh/frontline/article/who-is-on-the-federal-reserve-board/ (showing that there are a majority of Trump appointees on the Board).

283. *See* Sylvan Lane, *Trump Aide: White House Interviewing Candidates to Replace Moore, Cain for Fed*, HILL (Apr. 16, 2019, 1:16 PM), https://thehill.com/policy/finance/439129-kudlow-white-house-interviewing-candidates-to-replace-moore-cain-for-fed-picks.

market itself.[284] Fed Chairs are very frequently reappointed by Presidents of the opposite party that first appointed them.[285] Continuity of Federal Reserve policy and retention of a known quantity are thought to be good for markets.[286] Presidents have an interest in keeping investors happy and the economy humming. As James Carville said: "I used to think that if there was reincarnation, I wanted to come back as the president or the pope or as a .400 baseball hitter. But now I would like to come back as the bond market. You can intimidate everybody."[287] President Clinton, a Democrat concerned about the reaction of markets, thus reappointed Alan Greenspan, a former disciple of Ayn Rand, who was no Democrat's idea of an ideal economist. [288]

Moreover, the Fed's most important job is setting monetary policy and that is done by the Federal Open Market Committee. [289] While all seven members of the Federal Reserve sit on this committee, so do five of the twelve Regional Federal Bank Presidents, four in rotation and one always the President of the New York Federal Reserve.[290] Thus, the Fed Presidents are by statute a very substantial minority of the Federal Open Market Committee. In recent administrations

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284. *See* Conti-Brown, *supra* note 136, at 290–91 (noting, as proof of market pressures, that Reagan reappointed Carter appointee Paul Volcker and Clinton reappointed libertarian Alan Greenspan).

285. In the last half of the twentieth century until the current time, William McChesney Martin, Paul Volcker, Alan Greenspan and Ben Bernanke were all reappointed by Presidents of the opposite party from which they received their initial appointment. *See Board of Governors Members, 1914-Present*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/bios/board/boardmembership.htm (last visited Feb. 3, 2022). These chairs held office sixty-two of the last seventy-nine years. *Id*.

286. *See* FED. RSRV. SYS., *supra* note 20, at 57–58, 63 (discussing the Federal Reserve's long-held policy of continually monitoring banks and financial institutions to proactively prevent market risks and fluctuations).

287. David Wessel & Thomas T. Vogel, Jr., *Market Watcher: Arcane World of Bonds Is Guide and Beacon to a Populist President—Rally Is Seen as Endorsement of Policy—and It Helps Economy as Rates Fall—But It Could Be Fickle Friend*, WALL ST. J., Feb. 25, 1993, at A1.

288. *See* Nell Henderson, *Chairman Moved a Nation Long Career Produced Many Victories*, WASH. POST (Jan. 27, 2006), https://www.washingtonpost.com/archive/business/2006/01/27/chairman-moved-a-nation-span-classbankheadlong-career-produced-many-victoriesspan/9f13e903-b574-48b3-9d48-4b0070581e4f; *see also* Dave Burdick, *Greenspan Shrugged? How Did Ayn Rand Influence Greenspan's Policy*, HUFFPOST (May 25, 2011), https://www.huffpost.com/entry/greenspan-shrugged-how-di_n_137465.

289. *Open Market Operations*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/monetarypolicy/openmarket.htm (last visited Nov. 21, 2021).

290. 12 U.S.C. § 263(a). The President of the New York Fed has been a member of the Committee since 1942. *See* Federal Reserve Act, Pub. L. No. 77-656, 56 Stat. 647, 647–48 (codified as amended at 12 U.S.C. § 263(a)).

they have often become a majority because of the vacancies in Federal Reserve membership.[291]

The significance of the Reserve Bank Presidents' power is that they are appointed in a way that entrenches the direct influence of a particular professional elite. The twelve Reserve Bank Presidents are not appointed directly by the President of the United States, but by the twelve Boards of Directors of the Reserve Banks, Boards that consist of members appointed themselves by either the Federal Reserve or by private member banks.[292] Perhaps not surprisingly, Reserve Bank Presidents have often been previously Federal Reserve economists: nine of the current twelve have now had that experience.[293] Nor can they be removed directly by the President of

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291. *See* Conti-Brown, *supra* note 136, at 304 (calculating that during the Obama administration, Federal Reserve Board members were on average only forty-two percent of the seats). As of July 5, 2021, Federal Reserve Board Members occupied only about fifty-five percent of the seats on the Federal Open Market Committee. *See Federal Open Market Committee,* BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/monetarypolicy/fomc.htm (last visited Feb. 3, 2022). But during the Trump Administration, on average, as of June 1, 2020, Federal Reserve Board Members occupied only thirty-three percent of the seats on the Federal Open Market Committee. *Id.*[https://web.archive.org/web/20200606053237/https://www.federalreserve.gov/monetarypolicy/fomc.htm] (last updated Apr. 29, 2020).

292. For a full description of the process, see Conti-Brown, *supra* note 136, at 300–01.

293. *See Office of the President*, FED. RSRV. BANK OF BOS., https://www.bostonfed.org/people/bank/ken-montgomery.aspx (last visited Feb. 3, 2022) ("Prior to joining the Boston Fed in 2011, [Kenneth] Montgomery was executive vice president and Federal Reserve System chief technology officer based out of the Federal Reserve Bank of Richmond."); *Federal Reserve Bank of New York*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/federal-reserve-system-new-york.htm (last visited Feb. 3, 2022) ("[John C.] Williams was previously the president and chief executive officer of the 12th District, Federal Reserve Bank of San Francisco."); *Federal Reserve Bank of Cleveland*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/federal-reserve-system-cleveland.htm (last visited Feb. 3, 2022) ("Prior to being named president . . . of the Federal Reserve Bank of Cleveland, [Loretta J.] Mester had been executive vice president and director of research at the Federal Reserve Bank of Philadelphia . . . ."); *Federal Reserve Bank of Atlanta*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/federal-reserve-system-atlanta.htm (last visited Feb. 3, 2022) ("From 1995 to 2001, [Raphael W.] Bostic worked at the Board of Governors of the Federal Reserve System in the Division of Research and Statistics . . . ."); *Federal Reserve Bank of Chicago*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/federal-reserve-system-chicago.htm (last visited Feb. 3, 2022) ("Before becoming president, [Charles L.] Evans was director of research and a senior vice president at the Federal Reserve Bank of Chicago."); *Federal Reserve Bank of St. Louis*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/federal-reserve-system-

the United States.[294] Thus, the Reserve Bank Presidents pose a significant constraint on the exercise of political power over the Fed. They appear to be a paradigm example of a self-perpetuating aristocratic element in a regime. This mechanism could be changed by Congress, but it has endured for decades despite concerns about its constitutionality.[295]

Unlike Supreme Court clerks, the key staff at the Federal Reserve also stay around for a long time.[296] They exercise substantial, and often unaccountable, power.[297] The General Counsel, for instance, makes key legal calls that lead to momentous decisions like that to reject Lehman's application for a bailout in the 2008 financial crisis.[298]

The public does not know much more about the Federal Reserve and its work than it does about the Supreme Court.[299] There is some dispute about how easily people can identify the Fed Chair. In a survey of the public only 24 percent could pick out Janet Yellen's name as the Chair of the Federal Reserve during her period as Chair.[300] And that performance is much worse than it sounds, because those surveyed chose from a list of four, making their

st-louis.htm (last visited Feb. 3, 2022) ("Prior to becoming president, [James] Bullard was vice president and deputy director of research for monetary analysis at the Federal Reserve Bank of St. Louis."); *Federal Reserve Bank of Kansas City*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/federal-reserve-system-kansas-city.htm (last visited Feb. 3, 2022) ("[Esther] George joined the Federal Reserve Bank of Kansas City in 1982 and served much of her career in the Division of Superviison and Risk Management."); *Meredith N. Black*, FED. RSRV. BANK OF DALL., https://www.dallasfed.org/fed/bios/black.aspx (last visited Feb. 3, 2022) ("[Meredith N. Black] has served as first vice president and chief operating officer [of the Federal Reserve Bank of Dallas] since 2016."); *Federal Reserve Bank of San Francisco*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/aboutthefed/federal-reserve-system-san-francisco.htm (last visited Feb. 3, 2022) ("Prior to her appointment as president, [Mary C.] Daly served as the Bank's executive vice president and director of research.").

294. *See* Conti-Brown, *supra* note 136, at 302.

295. CONTI-BROWN, *supra* note 144, at 103–04 (questioning the constitutionality of arrangement between the Federal Reserve System and the Federal Reserve Banks).

296. *See id.* at 86–87.

297. *See id.* at 86–90.

298. *Id.* at 84–85 (noting that the Lehman decision was merely "a legal decision made by Fed Lawyers").

299. *See* Seth Motel, *Who's in Charge of the Fed? Don't Bank on the Public Knowing the Answer*, PEW RSCH. CTR. (Oct. 6, 2014), https://www.pewresearch.org/fact-tank/2014/10/06/whos-in-charge-of-the-fed-dont-bank-on-public-knowing-the-answer.

300. *Id.*

identification no better than could be achieved by guessing.[301] A slightly more recent survey suggested that 70 percent could identify Jerome Powell as Chair, although again that number has to be qualified, as participants guessed among three possibilities.[302] Moreover, that survey was done by the so-called Mechanical Turk—which requires volunteers on Amazon—a group which skews more highly educated then the general public.[303]

When policy rather than personality is surveyed, public ignorance is even clearer. Only 44 percent of a Mechanical Turk survey could pick out the inflation target of the Fed as two percent.[304] The public appears to know very little about the mechanics of macroeconomic policy.[305] Less than a quarter correctly answered multiple-choice questions about the effect of interest rates on short-term prices and only about a third knew of their long-term effects.[306] Moreover, there was little correlation between accuracy in answers to these questions, again suggesting that many correct answers reflected guesswork rather than understanding.[307] As with the Supreme Court, it is unlikely that the public will exert much direct influence on the day-to-day decision-making of the Federal Reserve.

One important difference between the Supreme Court and the Federal Reserve might be thought to be that administration officials,

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301. Participants of the survey were given the options of "Janet Yellen," "John Roberts," "Sonia Sotomayor," and "Alan Greenspan." *See id.*

302. Carola Binder, *Presidential Antagonism and Central Bank Credibility*, 33 ECON. & POL. 244, 250 (2021).

303. *See* PAUL HITLIN, RESEARCH IN THE CROWDSOURCING AGE, A CASE STUDY: HOW SCHOLARS, COMPANIES AND WORKERS ARE USING MECHANICAL TURK, A "GIG ECONOMY" PLATFORM, FOR TASKS COMPUTERS CAN'T HANDLE 6, 22 (2016), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2016/07/PI_2016.07.11_Mechanical-Turk_FINAL.pdf. The finding on Yellen is also more in keeping with the general literature about the public's knowledge of the identity of political figures. *See, e.g.*, ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 17–20, 22 (2d ed. 2016). For instance, in 2010 only 28 percent of Americans could identify John Roberts as the Chief Justice of the United States, and more than sixty percent could not identify Harry Reid as the Senate Majority Leader despite his role in enacting the health care and stimulus bills. *Id*. at 32–33.

304. *See* Carola Binder*, Coronavirus Fear and Macroeconomic Expectations*, 102 REV. ECON. STAT. 721, 727 (2020) (noting that "[t]he share who knew that the Fed's inflation target is 2% increased to 44%, versus 32% in 2019 . . . and 26% in 2017").

305. The best published study of public knowledge of macroeconomics mechanics comes from the U.K. *See generally* Adriel Jost, *Is Monetary Policy Too Complex for the Public: Evidence from the UK* (Swiss Nat'l Bank Working Papers, Paper No. 15 2017), https://www.snb.ch/n/mmr/reference/working_paper_2017_15/source/working_paper_2017_15.n.pdf (discussing monetary policy and the role of a central bank in the context of U.K.).

306. *See id*. at 6–7.

307. *See id*. at 7.

including the President himself, sometimes jawbone the Federal Reserve. President Donald Trump is only the latest in a long line of Presidents who tried to get the Federal Reserve to take actions he would prefer, in this case lowering interest rates.[308] And Treasury Secretaries meet regularly with the Fed Chair to coordinate policy, particularly as it relates to international finance.[309]

But the difference in executive efforts at influence over the Court and the Fed should not be exaggerated. Presidents criticize the Court and try to influence it prospectively. President Barack Obama denounced the Court's ruling in *Citizens United v. FEC*[310] in the State of the Union, attacking the Justices' ruling in their presence.[311] George W. Bush criticized *Boumediene v. Bush*,[312] which gave habeas rights to non-citizens at Guantanamo Bay.[313] And Presidents try to influence the Court politically before it even makes important decisions. For instance, President Obama dismissed constitutional opposition to the Affordable Care Act as frivolous while the case was pending before the Court.[314]

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308. *See* Jeanna Smialek, *Fed, Pressed by Trump to Cut Rates, Faces Fire No Matter What It Does*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/09/business/fed-reserve-jerome-powell-trump.html. President Lyndon Johnson and Richard Nixon in private both tried to bully their respective Fed Chairs. CONTI-BROWN, *supra* note 144, at 49, 193–95.

309. Indeed, Congress has required coordination on some matters. *See* 12 U.S.C. § 5373(c) ("The Board of Governors and the Secretary shall consult with their foreign counterparts and through appropriate multilateral organizations to encourage comprehensive and robust prudential supervision and regulation for all highly leveraged and interconnected financial companies.").

310. 558 U.S. 310 (2010).

311. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 75, 81 (Jan. 27, 2010), https://www.govinfo.gov/content/pkg/PPP-2010-book1/xml/PPP-2010-book1-doc-pg75.xml ("[L]ast week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.").

312. 553 U.S. 723 (2008).

313. The President's News Conference with Prime Minister Silvio Berlusconi of Italy in Rome, 1 PUB. PAPERS 795, 797 (June 12, 2008), https://www.govinfo.gov/content/pkg/PPP-2008-book1/pdf/PPP-2008-book1-doc-pg795.pdf ("It's a deeply divided Court, and I strongly agree with those who dissented that. And their dissent was based upon their serious concerns about U.S. national security.").

314. The President's News Conference in Krün,1 PUB. PAPERS 673, 679 (June 8, 2015), https://www.govinfo.gov/content/pkg/PPP-2015-book1/xml/PPP-2015-book1-doc-pg673.xml ("[T]his should be an easy case. Frankly, it probably shouldn't even have been taken up. . . . [Overruling the tax credits is] not something that should be done based on a twisted interpretation of four words in—as we were reminded repeatedly—a couple-thousand-page piece of legislation.").

Moreover, the Solicitor General of the United States appears in every case in which the United States is a party.[315] Even beyond those many cases, the Court itself solicits the Solicitor General's view in many other cases.[316] The Court grants the Solicitor General time to argue as an amicus far more than any other legal actor.[317] Executive branch influence is sufficiently substantial that the Solicitor General has been called the "Tenth Justice."[318] But it is still fair to call the Court independent at least in day-to-day decision-making because it has the ability to ignore the executive should it so choose.[319] And the Federal Reserve has that ability as well, even if it is somewhat less independent than the Court.

Certainly, the Federal Reserve stands out from other agencies of the administrative state in its independence and in the influence of its surrounding intellectual elite. Other agencies do not have the ballast provided by voting members on their most important matters who are completely outside of the control of the President.[320] Moreover, as we have seen, Fed Chairs mostly get reappointed by a successor President.[321] The President can also fire at will the heads of most agencies and departments and substantially influence their most important decisions through the Office of Management and Budget's regulatory review process.[322] Even the so-called independent regulatory agencies, like the Securities and Exchange Commission—whose heads have removal protection—have also been found to follow the administration policy of the elected President.[323]

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315. *See* Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1326–27 (2010).

316. *See* Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859, 859–61 (2013) (detailing extensive and well-established practice of requests).

317. Cordray & Cordray, *supra* note 315, at 1331 ("[A]lthough the Court rarely grants an amicus's request to participate in oral argument, it routinely permits the Solicitor General to do so.").

318. LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 3 (1987).

319. *See The Court and Constitutional Interpretation*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/constitutional.aspx (last visited Feb. 3, 2022).

320. Tim Stretton, *Independence of the Federal Reserve*, POGO (Oct. 16, 2019), https://www.pogo.org/analysis/2019/10/independence-of-the-federal-reserve/.

321. MARC LABONTE & JENNIFER TEEFY, CONG. RSCH. SERV., IN10796, FEDERAL RESERVE: BACKGROUND AND REAPPOINTMENT OF PREVIOUS CHAIRS 1–2 (2017), https://www.everycrsreport.com/reports/IN10796.html.

322. *See* Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2032–33 (2015).

323. *See* Brian V. Breheny, et al., *Priorities to Shift for Biden's SEC*, SKADDEN (Jan. 26, 2021), https://www.skadden.com/en/insights/publications/2021/01/2021-insights/regulatory/priorities-to-shift-for-bidens-sec (discussing potential changes to SEC enforcement priorities under the Biden Administration and

And while Congress can powerfully influence these agencies through the appropriation process,[324] the Fed effectively funds itself, an authority that even the Supreme Court does not enjoy.[325]

V. IDEOLOGICAL CHANGE AND THE POLARIZATION OF ELITES

This Part describes how a split among elites can lead to the polarization of the elites surrounding both the Court and the Fed.[326] Such polarization may lead to the loss of independence at the Supreme Court and the Fed, propelling the political branches to make rapid changes in the composition—and thus the direction—of both institutions. Given that, as described above,[327] the citizenry in general is largely ignorant of the work of both the Court and the Fed, it is dissatisfaction among a substantial portion of the elite that creates a likely catalyst for such transformations.

Injecting irreconcilable differences in ideology into the operations of the daily work of the Court and the Fed will undermine the benefits of the control of legal interpretation and monetary policy by a mixed regime.[328] One of the main functions of our mixed regime is to bring stability by adhering to precommitments to the rule of law and to the value of money that might otherwise be threatened by the shifting winds of democratic politics.[329] But if the elites themselves

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noting that a number of senior SEC leaders stepped down before Biden took office).

324. *See* CURTIS W. COPELAND, CONG. RSCH. SERV., RL34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATION RESTRICTIONS 27–28 (2008), https://sgp.fas.org/crs/misc/RL34354.pdf (discussing the effect of restrictions caused by the appropriation process).

325. *See* Conti-Brown, *supra* note 136, at 261, 273–75 (discussing the Fed's unique ability to fund itself).

326. John O. McGinnis & Michael B. Rappaport, *Presidential Polarization* 8–10 (Nw. Pub. L. Rsch. Paper, Paper No. 21-05, 2021), https://ssrn.com/abstract=3788215 ("At its simplest, [polarization] measures the distance in the policy space between people on political issues."). Polarization in the context of the Court or the Fed thus means a large difference in perspective on what the Court and Fed should be doing. Polarization may also create an "uncompromising mindset," in which each side distrusts the other. *Id.* at 9. "This state of affairs moves beyond substantive policy disagreements into identity politics or tribalism." *Id.*

327. *See supra* notes 299–303 and accompanying text.

328. *See* Kevin K. Banda & John Cluverius, *Elite Polarization, Party Extremity, and Affective Polarization*, 56 ELECTORAL STUD. 90, 90 (2018) ("[L]evels of affective polarization among partisans increase as elites in the U.S. Congress become more polarized."); *see also* Joshua Robison & Kevin J. Mullinix, *Elite Polarization and Public Opinion: How Polarization Is Communicated and Its Effects*, 33 POL. COMMC'N 261, 262 (2016).

329. *See supra* note 161 and accompanying text; *see also* Stretton, *supra* note 320 ("By granting the Fed independence, Congress has helped ensure that the Fed can effectively pursue its statutory goals based on objective analysis and data, and not political considerations.").

are divided, sudden shifts in the Court and the Fed may create instability instead. The institutions themselves can make this result more likely by engaging in an agenda that splits elites. The Supreme Court has done so before both in striking down New Deal legislation[330] and in the social activism of the 1960s and 1970s.[331] The consequences of the latter era are still with us in the polarization occurring around originalism.[332] The Court's history thus offers a warning to the Fed, where there is currently a lively debate among scholars about whether it should intervene in such controversial matters as climate change and economic inequality.

A. Ideological Polarization Surrounding the Court

An advantage of seeing the Supreme Court and the Fed through the prism of the mixed regime is that it recognizes that fundamental change comes to these institutions when the relevant elites transform their ideological perspectives. The rise of originalism provides an example of this method of transformation.[333] The push for originalism came from a combination of an elite political movement at the Meese Justice Department,[334] a social movement of elite lawyers at the Federalist Society,[335] and, finally, a broad intellectual movement by academic lawyers at law schools.[336]

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330. *See* William E. Leuchtenburg, *When Franklin Roosevelt Clashed with The Supreme Court—and Lost: Buoyed by His Reelection but Dismayed by Rulings of the Justices who Stopped His New Deal Programs, a President Overreaches*, SMITHSONIAN MAG. (May 2005), https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/ (discussing the clash between President Roosevelt and the Supreme Court, and the support and opposition to the President's court-packing plan).

331. Francisco Valdes, "*We are Now of the View": Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL L. REV. 1407, 1423–26 (2005).

332. *See* Mark Joseph Stern, *The Conservative Movement's Favorite Legal Theory Is Rooted in* Racism, SLATE (Apr. 6, 2021, 3:25 PM), https://slate.com/news-and-politics/2021/04/originalism-racist-roots-brown-segregation.html (discussing the allegedly racist roots of originalism).

333. *See* Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH, L. REV. 877, 883–84 (2013) (discussing how the change of interpretive theory drive changes in "open-ended constitutional principles").

334. *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONSERVATIVE CONTROL OF THE LAW 141–42, 145 (2010).

335. *See* John O. McGinnis & Michael B. Rappaport, *An Originalist Future*, ENGAGE, Feb. 2014, at 34, 34 (advocating the originalism approach of constitutional interpretation); *see also* RALPH G. NEAS, THE FEDERALIST SOCIETY: FROM OBSCURITY TO POWER, THE RIGHT-WING LAWYERS WHO ARE SHAPING THE BUSH ADMINISTRATION'S DECISIONS ON LEGAL POLICIES AND JUDICIAL NOMINATIONS 2–4 (2001), https://files.pfaw.org/uploads/2017/01/federalist-society-report.pdf.

336. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–13 (1999); Martin S. Flaherty, *The Better Angels of Self-Government*, 71 FORDHAM L. REV. 1773, 1774 (2003).

Similarly, the progressive constitutional theories of the New Deal were ushered in by a cadre of elite lawyers who poured into public service effectuating a "'reformist' political ideology."[337] The ideal of a scientific government staffed by educated elites was a core tenet of the Progressive Movement, which in the preceding decades had helped generate momentum for the New Deal.[338] And while the Supreme Court resisted at first, retirements and deaths eventually allowed Roosevelt to appoint nine new Justices to the Court.[339]

The history of the Court also shows that elite institutions can themselves accelerate elite polarization by making decisions that reflect a consensus of the professions that surround them. Both in the New Deal and in contemporary times, the loss of diffuse elite support for the Court was preceded by controversial decisions that split elites.[340]

The evidence for contemporary intensifying polarization on the issue of the federal judiciary is overwhelming. As Professors Neal Devins and Larry Baum show, judges today are chosen from competing networks of conservative and liberal elites.[341] Legal elites once tilted to the moderate liberal side of the political spectrum.[342] But the conservative reaction to the activism of the Warren Court prompted movements, like the Federalist Society, to create a conservative network of their own.[343] The elites can become more polarized than the electorate itself.[344]

The consequence is that confirmation votes of the recent Supreme Court Justices show a decreasing willingness of Senators to vote for candidates of the opposite party. In 1990, David Souter, the nominee of Republican George H. W. Bush, was confirmed 90-9 in a

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337. G. Edward White, *Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930s*, 39 ARK. L. REV. 631, 632 (1986).

338. James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, SOC. PHIL. & POL'Y, Summer 2012, at 255, 266, 281.

339. Victor N. Baltera, Book Note, 94 MASS. L. REV. 113, 113 (2012) (reviewing NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010)).

340. *See* DEVINS & BAUM, *supra* note 148, at 45–52.

341. *See id.* at 13, 116–18 ("[P]residents increasingly chose nominees who did adhere strongly to their parties' dominant ideology tendency."); *see also* Mark L. Movsesian, *Law, Religion, and the Covid Crisis*, 37 J.L. & RELIGION (forthcoming 2022) (manuscript at 15–16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3936855.

342. DEVINS & BAUM, *supra* note 148, at 13.

343. *See id.* at 81–83, 117–18.

344. *See id.* at 112; *see also* Movsesian, *supra* note 341, at 15–16 ("Legal elites today are as divided as the rest of the country, if not more, and competing progressive and conservative networks exist to help identify the right people to fill vacancies on the bench.").

democratically controlled Senate,[345] despite the fact that he was replacing a liberal lion of the Court, William Brennan. To be sure, in 1991, Clarence Thomas was confirmed only 52-48,[346] but that close vote followed allegations of sexual harassment by Anita Hill.[347] President Bill Clinton's nominees were approved overwhelmingly, Ruth Bader Ginsburg by 96-3 in 1993[348] and Stephen Breyer by 87-9 in 1994.[349] Opposition substantially increased when President George W. Bush's nominees, John Roberts, was confirmed 78-22 as Chief Justice in 2005[350] and mounted still further to Samuel Alito, another Bush nominee, who was confirmed 58-42, receiving only 4 votes from Democratic Senators[351] and only after a filibuster attempt.[352] Even Clarence Thomas received eleven votes from Democratic Senators. [353]

Since then, no nominee has gotten even the support that Justice Thomas did from the party in opposition to the nominating President. Sonia Sotomayor, nominated by Barack Obama, was confirmed 68-31 with only 9 Republican votes.[354] Elena Kagan, another Obama nominee, was confirmed 63-37 with five Republican votes.[355] And Trump's nominees received even less support. Neil Gorsuch was confirmed 54-45 with the support of only three Democratic Senators.[356] The Republicans resorted to a so-called nuclear option to overcome a filibuster that would have prevented his nomination.[357] Brett Kavanaugh was confirmed with only one Democratic Senator in his corner.[358] To be sure, there had been allegations of sexual harassment against Kavanaugh,[359] but even before those allegations

345. 136 CONG. REC. 26,996–97 (1990).

346. 137 CONG. REC. 26,354 (1991).

347. Erwin Chemerinsky, *October Tragedy*, 65 S. CAL. L. REV. 1497, 1497 (1992).

348. 139 CONG. REC. 18,414 (1993).

349. 140 CONG. REC. 18,703–04 (1994).

350. 151 CONG. REC. 21,648 (2005).

351. 152 CONG. REC. 361 (2006).

352. David D. Kirkpatrick, *Kerry Urges Alito Filibuster, but His Reception Is Cool*, N.Y. TIMES, Jan. 27, 2006, at A14.

353. *See* 137 CONG. REC. 26354 (1991).

354. 155 CONG. REC. 20,877 (2009).

355. 156 CONG. REC. 15,242–43 (2010).

356. 163 CONG. REC. S2442–43 (daily ed. Apr. 7, 2017).

357. *See* 163 CONG. REC. S2389–90 (daily ed. Apr. 6, 2017) (statements of Sen. Mitch McConnell and Sen. John Cornyn) (outlining decision to eliminate filibuster for Supreme Court nominees). Harry Reid had already gotten rid of the filibuster for lower court nominees. *See* Mahita Gajanan, *Why Republicans Are Suddenly Thanking Harry Reid for a 2013 Tweet About Filibuster Reform*, TIME (June 28, 2018, 2:37 PM), https://time.com/5324365/harry-reid-filibuster-reform-supreme-court/.

358. *See* 164 CONG. REC. S6697 (daily ed. Oct. 5, 2018).

359. Terry Gross, *Reporters Dig into Justice Kavanaugh's Past, Allegations of Misconduct Against Him*, NPR (Sept. 16, 2019, 3:29 PM), https://www.npr.org/

broke, it was clear he had little support among Democratic ranks.[360] Amy Coney Barrett was confirmed on a vote of 52-48 with all Democrats opposed.[361]

Polarization is evident from the increasing contentiousness of circuit court and district court nominees as well. In the George W. Bush administration filibusters by Democrats became common until the so-called Gang of 14[362] agreement in which a bipartisan group of Senators pledged to vote against filibusters in all but "extraordinary circumstances."[363] That agreement frayed over time, and Republicans filibustered President Barack Obama's nominees until the so-called nuclear option ended filibusters at the lower court level.[364] But while President Donald Trump's lower court nominees could thus be confirmed by majority vote, they have encountered an unprecedented number of negative votes from the opposition party, despite receiving American Bar Association ratings approximately the same as previous Presidents' nominees.[365]

As important as the increase in polarization over specific nominations is the dissolution of established norms under the pressure of increased polarization. Already discussed above are the rise of the use of filibusters by the minority party to block

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2019/09/16/761191576/reporters-dig-into-justice-kavanaughs-past-allegations-of-misconduct-against-him.

360. *See* Carl Hulse, *Democrats Sow Disorder in the Senate over Kavanagh and the Court*, N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/us/politics/supreme-court-kavanaugh-senate.html.

361. Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html.

362. Lanny Davis, Opinion, *Time for Another "Gang of 14" Agreement*, HILL (Apr. 21, 2010, 11:17 PM), https://thehill.com/opinion/columnists/lanny-davis/93661-time-for-another-gang-of-14-agreement.

363. *See id.* ("The agreement of the Gang of 14 was based on a simple principle of trust: Each was free to filibuster, and thus to deny an up-or-down vote on a judicial nominee, only in 'extraordinary circumstances'—and each was free to define what that meant and each trusted one another to use good faith in determining that definition.").

364. Tom McCarthy, *Senate Approves Change to Filibuster Rule after Repeated Republican Blocks*, GUARDIAN (Nov. 21, 2013, 1:35 PM), https://www.theguardian.com/world/2013/nov/21/harry-reid-senate-rules-republican-filibusters-nominations ("By 52 votes to 48, senators approved along partisan lines a measure that would ban the use of the filibuster to prevent nominees from being confirmed.").

365. *See* THOMAS JIPPING, JUDICIAL APPOINTMENTS DURING THE 115TH CONGRESS 8–10 (2019), https://www.heritage.org/sites/default/files/2019-05/LM-244_0.pdf ("65.3 percent of Bush nominees and 68.4 percent of Trump nominees received a rating of 'well qualified' from the American Bar Association. . . . [However, democratic senators] opposed fewer than 3 percent of Bush's nominees and have opposed 59 percent of Trump's nominees.").

nominations and the nuclear option to eliminate the filibusters.[366] Another example is the decision of the Republican Majority Leader of the Senate to deny a hearing to Merrick Garland, on the theory that it was a Presidential election year.[367] To be sure, there is a substantial argument that the Democrats would have done the same had roles been reversed, but that counterfactual, if accurate, only confirms that norms are disappearing at the hands of both parties.[368]

Finally, both academics and 2020 Democratic presidential candidates have recently considered their own Supreme Court reform schemes that resemble court packing.[369] President Joseph Biden has appointed a Commission which is considering such plans among proposals for court reform.[370] The revival of court packing as a serious political proposal infringes on norms more than FDR's plan.[371] The stinging defeat of that plan, as described above,[372] is, after all, part of American history, contributing powerfully to norms protecting the Court, but now the norm reinforced by that historical event are breaking down.

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366. *See supra* notes 362–64 and accompanying text.

367. Gregor Aisch et al., *Scalia's Supreme Court Seat Has Been Vacant for More than 400 Days*, N.Y. TIMES (Mar. 20, 2017), http://www.nytimes.com/interactive/2016/02/15/us/supreme-court-nominations-election-year-scalia.html.

368. *See* Julie Hirshfeld Davis, *Joe Biden Argued for Delaying Supreme Court Picks in 1992*, N.Y. TIMES (Feb. 22, 2016), https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html (noting that in 1992, former Vice President Biden had argued that President George Bush should delay nominating a Supreme Court Justice until after the presidential election was over).

369. For instance, candidates Sen. Kamala Harris, Sen. Elizabeth Warren and Mayor Pete Buttigieg had all considered or were open to such plans. *See Are You Open to Expanding the Size of the Supreme Court?*, N.Y. TIMES, https://www.nytimes.com/interactive/2019/us/politics/supreme-court-democratic-candidates.html (last visited Feb. 3, 2022). For an example of the academic approach to court packing, see Ian Ayers & John Fabian Witt, Opinion, *Democrats Need a Plan B for the Supreme Court. Here's One Option.,* WASH. POST (July 27, 2018), https://www.washingtonpost.com/opinions/democrats-need-a-plan-b-for-the-supreme-court-heres-one-option/2018/07/27/4c77fd4e-91a6-11e8-b769-e3fff17f0689_story.html.

370. Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 14, 2021).

371. *See* John Pudner, Opinion, *House Democrats' Supreme Court Packing Bill Much Worse than Roosevelt's 1937 Attempt*, WASH. TIMES (Apr. 21, 2021), https://www.washingtontimes.com/news/2021/apr/21/house-democrats-supreme-court-packing-bill-much-wo/ (arguing that "the current [court-packing] attempt in Congress is much more absurd" than Roosevelt's attempt "after his reelection in 1936").

372. *See supra* notes 274–76 and accompanying text.

It is very likely that court packing, if successful, would lead to fundamental instability in the Court as an institution.[373] Assuming that under a period of Democratic unified government, as we have now, Congress and the President were to expand the Court to assure a majority appointed by Democratic majority, one can expect that Republicans will do the same when they next get unified control.[374] And this is likely to continue. Indeed, one study has already modeled the likely result as having twenty-three Justices within fifty years and thirty-nine Justices within 100 years.[375] Beyond the instability in precedents created by constantly changing partisan-created majorities, this scenario would almost certainly change the self-conception of Justices. They would no longer be working in an institution with a small number of decision makers who can discuss matters around a table. They would start to resemble a legislature with consistently partisan voting blocks.[376] While the Court has never been free from partisan influence, this change would undermine the Court's function of putting rule of law commitments beyond popular distortion,[377] because it would make professional craft values less salient.

The current polarization now reflects fundamental disagreement over originalism, the theory of constitutional interpretation advocated by conservative elites in response to a previous period of Supreme Court activism.[378] For instance, Senators who opposed

373. *See* Ryan Owens, Opinion, *State AGs Are Right: Court Packing Is Wrong*, REALCLEARPOLITICS (Mar. 12, 2021), https://www.realclearpolitics.com/articles/2021/03/12/state_ags_are_right_court_packing_is_wrong__145389.html.

374. *See* Ruth Marcus, Opinion, *I Feel Democrats' Fury over the Supreme Court. Adding Justices Is the Wrong Fix.*, WASH. POST (Apr. 15, 2021, 5:05 PM), https://www.washingtonpost.com/opinions/2021/04/15/expand-supreme-court-bill-democrats-wrong-fix/ (noting the very high likelihood of "subsequent waves of retaliation" when the Republicans have a congressional majority).

375. Adam Chilton et al., The Endgame of Court-Packing 1–2 (May 3, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835502.

376. *See* Chris Talgo, Opinion, *Packing the Supreme Court Could Portend the End of the Republic*, HILL (Oct. 14, 2020, 6:00 PM), https://thehill.com/opinion/judiciary/521026-packing-the-supreme-court-could-portend-the-end-of-the-republic (noting that court-packing would transform the Supreme Court into "an extension of [the executive and legislative] branches by sanctioning any and all laws passed by Congress").

377. Mary Ziegler, Opinion, *A Dangerous Moment for the Court*, ATLANTIC (Sept. 21, 2020), https://www.theatlantic.com/ideas/archive/2020/09/dangerous-court-legitimacy/616418/ (noting that "[m]any already view the Court as a partisan institution" but arguing that court-packing would "completely undermine" the Court's ability to serve as "an impartial defender . . . of democracy in the United States").

378. *See infra* notes 378–79 and accompanying text.

Justice Barrett consistently cited her originalism as the reason.[379] Criticism became virulent—a sign of intense polarization. For instance, Senator Edward Markey of Massachusetts stated boldly, "Originalism is racist. Originalism is sexist. Originalism is homophobic."[380]

The story of what led to this contemporary polarization is a complex one. But there is little doubt that the Supreme Court itself contributed. The Warren Court engaged in such a wide range of activism that it created a political backlash.[381] Conservative intellectuals then launched a fundamental critique of its lawfulness, offering originalism as a way to require the Court to enforce only democratically ratified rules.[382] *Roe v. Wade* made the backlash against the Court even more intense.[383] Even many supporters of abortions rights, including the late Justice Ginsburg, concede as much.[384]

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379. *See, e.g.*, 166 CONG. REC. S6461 (daily ed. Oct. 25, 2020) (statement of Sen. Patrick Leahy) ("I've never seen a self-described originalist so hesitant to merely restate the plain text of our Constitution and laws."); 166 CONG. REC. S6484 (daily ed. Oct. 25, 2020) (statement of Sen. Michael Bennet) ("And we see it in Judge Barrett's adherence to originalism, the spurious legal doctrine that has been knocking around in the Federalist Society and other circles of far-right lawyers since the 1970s."); 166 CONG. REC. S6478–79 (daily ed. Oct. 25, 2020) (statement of Sen. Mazie Hirono) ("Because Judge Barrett calls herself an originalist and shares Justice Scalia's judicial philosophy, his decisions provide a preview of how she would have ruled in those cases."); 166 CONG. REC. S6479–82 (daily ed. Oct. 25, 2020) (statement of Sen. Jack Reed) ("And with Judge Barrett's fascination with the exact meaning of the original writers of the Constitution, I wonder what their thoughts were about nuclear energy, satellites in space, a U.S. Air Force, which was not specifically authorized in the Constitution."); 166 CONG. REC. S6565 (daily ed. Oct. 25, 2020) (statement of Sen. Ron Wyden) ("[A]ll of [the originalism approach] is contrary to what Justice Ginsburg spent her career fighting for. It is exactly what the big rush to fill the Ginsburg seat is all about . . . ."); 166 CONG. REC. S6571 (daily ed. Oct. 25, 2020) (statement of Sen. Edward Markey) ("Amy Coney Barrett and her originalism will always have us looking backwards—and backwards is clearly the direction in which this Nation should not be going.").

380. 166 CONG. REC. S6571 (daily ed. Oct. 25, 2020).

381. *See supra* notes 341–44 and accompanying text.

382. *See* André LeDuc, *Originalism's Claims and Their Implications*, 70 ARK. L. REV. 1007, 1015–16 (2018) (describing the intellectuals' reaction to the Warren Court).

383. Post & Siegel, *supra* note 37, at 373–74.

384. *See* Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1531–32 (2012) (describing the Court's decision in *Roe v. Wade* as an attempt to "trump the democratic process by employing the guise of counter-majoritarian constitutional analysis for what in reality was nothing more than ideological preferences"); *see also* Olivia B. Waxman, *Ruth Bader Ginsburg Wishes This Case Had Legalized*

As described above, originalism was a response to these developments.[385] But originalism, in turn, was seen as a threat to established precedents.[386] The appointment of adherents of this theory to the Court has thus led to strong opposition among the left-liberal legal establishment,[387] paving the way for a court packing effort to prevent the threat of change that it was perceived to create.[388] The Court itself catalyzed the developments that have led to a situation where its own independence is endangered.

B. Ideological Polarization Surrounding the Fed

This history of the Supreme Court thus provides an essential but neglected perspective on the question of central bank activism—a matter that is just beginning to be debated at the Fed. For instance, the Federal Reserve has recently joined a consortium of central banks that would discuss how to combat climate change.[389] The President of the Federal Reserve Bank of San Francisco has suggested that the Bank policies try to address inequality.[390] One reason proffered for doing so is gridlock: other institutions are not rising to the challenge.[391] Another may be that, in the long term, these problems can endanger the economy.[392]

Abortion Instead of Roe v. Wade, TIME (Aug. 2, 2018, 11:00 AM), https://time.com/5354490/ruth-bader-ginsburg-roe-v-wade/.

385. *See supra* notes 381–84 and accompanying text.

386. *See* Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1335 (2008) (describing originalism as "a tool for disrupting the status quo").

387. *See* Ananya Venkatraman, *Originalism, The Supreme Court, and Reform*, BERKELEY POL. REV. (May 3, 2021), https://bpr.berkeley.edu/2021/05/03/originalism-the-supreme-court-and-reform/.

388. *See id.*

389. Press Release, Fed. Rsrv. Bd., Federal Reserve Board Announces It Has Formally Joined the Network of Central Banks and Supervisors for Greening the Financial System, or NGFS, as a Member (Dec. 15, 2020), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20201215a.htm.

390. Mary C. Daly, President and Chief Exec. Officer, Fed. Rsrv. Bank of S.F., Speech at the University of California, Irvine Virtual Event: Is the Federal Reserve Contributing to Economic Inequality? 2, 8–10 (Oct. 13, 2020), https://www.frbsf.org/our-district/files/201013-UC-Irvine-Address-FINAL-10-13.pdf.

391. *See* Jeff Cox, *The Fed Is Set to Take on a New Challenge: Climate Change*, CNBC (Nov. 13, 2020, 1:36 PM), https://www.cnbc.com/2020/11/12/the-fed-is-set-to-take-on-a-new-challenge-climate-change.html (quoting a leader of a sustainability non-profit organization as hoping other regulators follow the lead of the Fed in taking on climate change).

392. *See* Victoria Guida, *An Activist Central Bank? Dems Push the Fed to Fight Racial Inequality*, POLITICO (Aug. 29, 2020, 7:00 AM), https://www.politico.com/news/2020/08/29/federal-reserve-race-economic-activism-404560; *see also* BD. OF GOVERNORS OF THE FED. RSRV. SYS., FINANCIAL STABILITY REPORT 58–59 (2020), https://www.federalreserve.gov/publications/

Scholars are vigorously debating whether a turn to central bank activism is a good idea. Those in favor suggest that the Federal Reserve's "ethos of technocratic pragmatism"—its careful commitment to apolitical values of evidence and professional craft—will allow it to develop the expertise that will maintain its long run legitimacy and independence even while molding its actions to address ideologically fraught issues.[393] Those more skeptical of central bank activism worry that central bank activism may erode its legitimacy and undermine its independence.[394]

The lessons from the Supreme Court provide important evidence that the critics of central bank activism are likely right to worry. Some economists have already denounced this development, arguing that mission creep will erode the Fed's focus and allow it to engage in regulatory subterfuge under the cover of its traditional bank regulatory and monetary policy.[395] Thus it is likely to lead to the fundamental ideological split among economic elites that may undermine the institution. Those who dislike its decisions in unfamiliar areas are likely to be able to use the elitism of the Fed to rally against it.[396] Already Republicans have warned the Fed against engaging in regulation of banks to favor lending to "green" friendly industries over those that are not green friendly.[397] The pragmatism of the Fed will not protect it against such charges.[398] Certainly, the

files/financial-stability-report-20201109.pdf (explaining that climate change may pose financial stability risks).

393. *See, e.g.*, Conti-Brown & Wishnick, *supra* note 54, at 643–45.

394. *See, e.g.*, Skinner, *supra* note 54, at 247–58.

395. *See, e.g.*, Alexander William Salter & Daniel J. Smith, Opinion, *End the Fed's Mission Creep*, WALL ST. J. (Mar. 25, 2021, 6:14 PM), https://www.wsj.com/articles/end-the-feds-mission-creep-11616710463 (arguing that the Fed is "pushing for major changes in policy areas that have nothing to do with money or financial markets").

396. *See* Fox, *supra* note 42 (noting that the Fed is "the nation's largest employer of PhD economists, with more than 200 at the Federal Reserve Board in Washington and what is likely a similar number . . . scattered among the 12 regional Federal Reserve Banks").

397. Zachary Warmbrodt, *Republicans Warn Powell About Fed Plans for Climate Regulation*, POLITICO (Dec. 10, 2020, 9:14 AM), https://www.politico.com/news/2020/12/10/republicans-federal-reserve-climate-regulation-444194 ("47 GOP lawmakers discouraged the central bank from imposing stress tests on lenders to measure their vulnerability to climate change—a move that they said could spur banks to cut ties with the oil and gas and coal industries.").

398. Professors Binder and Skinner provide an important reason for the vulnerability of the Fed to attacks. Those with less education are more suspicious of the Fed. Thus, elites opposing activism can turn to a reservoir of populist distrust as a way of attacking the Fed. *See* Carola Conces Binder & Christina Parajon Skinner, Laboratories of Central Banking 45–46 (Nov. 8, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956845.

legal expertise of the Supreme Court has not succeeded in doing so.[399] Indeed, expertise, while undoubtedly necessary, may fuel charges of elitism and insularity that aid in a populist backlash.

Moreover, the Fed's decisions to intervene in economic emergencies are not good precedent for these more ideologically based interventions. Those interventions were expressly designed to end when the business cycle recovers.[400] But issues of climate change and inequality are far more enduring and more likely to give rise to backlash,[401] unless the action is clearly authorized by the political branches.

The backlash against the Court illustrates the mechanisms that discontent will take—more contentious and partisan confirmation fights and pushes by interest groups to appoint more Federal Reserve Governors with a comprehensive ideology more to their liking. That development would undermine the very ethos of "technocratic pragmatism" that defenders of central bank activism suggest should assuage fears about increasing its activism in new areas.[402]

Proposals for such activism may be a particularly fast acting accelerant because there are already indications that a fundamental ideological split on monetary theory may be developing. For instance, a new theory of finance on the left, Modern Monetary Theory ("MMT"), while not a theory of central banking per se, suggests that the economy should be governed by federal government fiscal decisions, not by actions of the Federal Reserve.[403] The Federal Reserve under this view should be willing to print as much money as necessary to support government borrowing.[404] MMT expressly suggests that the traditional Federal Reserve concern with inflation is largely baseless.[405]

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399. *See* Baum & Devins, *supra* note 180, at 1516 (arguing that the Supreme Court seeks mainly to protect the interests of the elite groups, which the Justices are a part of, rather than the rights of all Americans).

400. *See supra* notes 207–12 and accompanying text.

401. *See* Salter & Smith, *supra* note 395 (arguing that "Congress should restrict the Fed's regulatory powers and refocus it on monetary policy" and prevent it from "pushing for major changes in policy areas"); *see also* Warmbrodt, *supra* note 397.

402. *See* Conti-Brown & Wishnick, *supra* note 54, at 643–45.

403. James Mackintosh, *What Modern Monetary Theory Gets Right and Wrong*, WALL ST. J. (Apr. 2, 2019, 12:01 AM), https://www.wsj.com/articles/what-modern-monetary-theory-gets-right-and-wrong-11554177661 ("Instead of leaving macroeconomic management to the interest-rate-setting committee of the Federal Reserve, MMTers believe it is best handled by government spending and taxation.").

404. *See* Nicole Gelinas, *When in Doubt, Print Money: Advocates of Modern Monetary Theory Want Us to Believe that Debt Doesn't Matter and that Government Can Spend Endlessly*, CITY J. (Summer 2019), https://www.city-journal.org/modern-money-theory.

405. *See id.*

Like elite lawyers, elite economists have partisan leanings.[406] If the Federal Reserve become more polarized, Presidents are likely to nominate more ideologically extreme candidates. And these candidates, even if highly credentialed, will create more political pushback.

While the confirmations to the Fed are not nearly as contentious—yet—as those to the Supreme Court, they have been moving in that direction. Nominations in the past were routinely confirmed by voice vote.[407] But two candidates that President Trump nominated—candidates that were themselves less mainstream than traditional ones—were withdrawn after intense opposition.[408] And of the two last candidates Trump did nominate, one, Judy Shelton, was filibustered and thus her nomination died on the Senate floor.[409] The other, Chris Waller, was confirmed by a single vote, 48-47.[410] The new opposition to Fed nominees is not limited to Trump's appointments, but on smaller scale began under Trump's predecessor, Barack Obama. In 2011, a Republican Senate refused to even vote on

406. *See* Zubin Jelveh et al., *Economists Aren't as Nonpartisan as We Think*, FIVETHIRTYEIGHT (Dec. 8, 2014, 7:53 AM), https://fivethirtyeight.com/features/economists-arent-as-nonpartisan-as-we-think/ (describing and demonstrating through empirical data the partisan leanings of economists).

407. During Senate confirmation, a President's nominee to chair the Federal Reserve has traditionally faced little opposition. *See Factbox: History of Senate Votes for Fed Chairman*, REUTERS (Jan. 25, 2010, 6:22 PM), https://www.reuters.com/article/us-usa-fed-senate-sb/factbox-history-of-senate-votes-for-fed-chairman-idUSTRE60O5X320100125 (showing that until the second term vote for Ben Bernacke in 2010, Fed Chairman had generally been confirmed either without opposition or on voice vote). Relatively few senators voted against even the two nominees who faced opposition. *Id.* Sixteen voted against Paul Volcker in 1983; seven voted against Alan Greenspan in 1996; and four voted against Greenspan in 2000. *Id*.

408. *See* PN2543, 115th Cong. (2018) (nominating Jean Nellie Liang for Board of Governors of the Fed but the nomination was returned to President on Jan. 3, 2019); PN 1279, 115th Cong. (2017) (nominating Marvin Goodfriend for Board of Governors of the Fed but the nomination was returned to President on Jan. 3, 2018). Goodfriend was nominated for a second time in 2018, but the nomination was returned on Jan. 3, 2019. PN1348, 115th Cong. (2018). These were not the nominees who were regarded as unqualified and never nominated. *See supra* note 283 and accompanying text.

409. *See* Andrew Taylor & Christopher Rugaber, *Controversial Fed Nominee Judy Shelton Stalls in Senate Test Vote*, BOS. GLOBE (Nov. 17, 2002, 3:40 PM), https://www.bostonglobe.com/2020/11/17/nation/controversial-fed-nominee-judy-shelton-stalls-senate-test-vote/.

410. Rachel Siegel, *Senate Confirms Christopher Waller to the Fed Board as Judy Shelton's Path Narrows*, WASH. POST (Dec. 3, 2020, 1:49 PM), https://www.washingtonpost.com/business/2020/12/03/chris-waller-fed-shelton/.

President Obama's nomination of Peter Diamond, a Nobel Prize winner in economics.[411]

As this Article goes to press, there are indications that polarization over nominations to the Federal Reserve is worsening in part because the Fed is expanding its mandate to include regulation that bears on more controversial matters, like climate change. For instance, Republican Senators on the Senate Banking Committee refused to show up to provide a quorum for President Biden's five nominees to the Federal Reserve.[412] They objected in particular to two nominees they accused of injecting considerations of climate change and race into the Fed's purview.[413] These hardball tactics recall those that are now common in fights over appointments to the judiciary.[414] The political polarization that has beset the Supreme Court now appears to be coming to the Federal Reserve. To be sure, the presence of the Presidents of Federal Reserve Banks provide ballast against polarization because of their likely adherence to professional craft, but the method of appointment can be changed by Congress as certainly as can be the number of Justices on the Court.[415] There have been bills introduced in Congress to deprive Federal Reserve Presidents of a vote on monetary policy.[416] Like court packing, enactment of such ideas would make the institution's policies less stable over time. They would remove the professional equilibrium that makes it harder for Presidents to vary monetary policy by virtue of ideology.

C. Dangers of Modern Elite Polarization for the Mixed Regime

Beyond the danger of polarization driven by decisions of the Court and the Fed themselves, the modern elite may itself pose a danger to stability because it tends to be self-polarizing. The intellectual professional elite has advantages over aristocracies of old

411. *See* Adam Clark Estes, *Peter Diamond Withdraws Fed Nomination Over GOP Block: The Nobel Prize Winning Economist Takes Issues with Sen. Richard Shelby*, ATLANTIC (June 6, 2011), https://www.theatlantic.com/politics/archive/2011/06/peter-diamond-withdraws-nomination/351449/.

412. Andrew Ackerman & Nick Timaraos, *Senate Republicans Set to Stall Key Vote on Biden's Fed Nominees*, WALL ST. J. (Feb. 16, 2022), https://www.wsj.com/articles/senate-republicans-set-to-stall-key-vote-on-bidens-fed-nominees-11644949966.

413. *Id.* (discussing the nominations of Sarah Bloom Raskin and Lisa Cook).

414. *See supra* notes 345–65 and accompanying text.

415. The membership of the Fed is wholly a creature of statute, able to be remade by Congress at any time. *See* 12 U.S.C. § 241.

416. *See, e.g.*, Peter Schroeder, *Rep. Frank Looks to Overhaul the Fed*, HILL (Sept. 12, 2011, 6:48 PM), https://thehill.com/policy/finance/180951-frank-looks-to-overhaul-the-federal-reserve (describing former Representative Barney Frank's bill to remove Federal Bank Presidents from the FOMC that sets monetary policy).

in being chosen on the basis of talent, not birth—here, talent at the law and economic decisions that the Court and Fed make.

But the cognition that is the basis of their power also carries peculiar risks of polarization. Intellectuals are naturally attracted to comprehensive worldviews that can conflict.[417] And recent trends may accentuate such polarization. First, religious belief, particularly among elites, has declined.[418] Loss of religious belief may cause political disagreements to become more factionalized and divisive.[419] Individuals replace religion with other totalizing social frameworks—such as political ideology—to satisfy what may be a deep-seated need to find meaning in a chaotic world.[420] Second, the rise of social networks makes it easier for likeminded people to reinforce their beliefs.[421] Third, while Tocqueville thought that elite groups like lawyers had an interest in maintaining the established order,[422] innovative ideas, including those for legal and economic change, today bring rapid attention and renown.[423]

Thus, there is reason to expect that both the Supreme Court and the Federal Reserve may become greater sources of social contention than in decades past. When elites are unified, these institutions serve well as "auxiliary precautions" in Madison's words against the disorder that overreliance on fickle popular control of government may bring to a commercial republic.[424] But in our era of elite polarization the institutions may themselves become the very sources of the instability that they seek to temper. Thus, these more general trends as well as the specific past lessons from the Court may call for

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417. S*ee* MORRIS P. FIORINA ET AL., CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA 170 (2006) (arguing that "the culture war is an elite phenomenon").

418. *See, e.g.*, Elaine Howard Ecklund et al., *Secularization and Religious Change Among Elite Scientists,* 86 SOC. FORCE 1805, 1818 (2008) (noting that "religious affiliation rates among elite scientists were lower in 2005 than in 1969").

419. *See* Peter Beinart, *Breaking Faith: The Culture War over Religious Morality Has Faded; in Its Place is Something Much Worse*, ATLANTIC (April 2017), https://www.theatlantic.com/magazine/archive/2017/04/breaking-faith/517785/ ("[S]ecularization isn't easing political conflict. It's making American politics even more convulsive and zero-sum.").

420. *See* JONATHAN SACKS, THE GREAT PARTNERSHIP: SCIENCE, RELIGION, AND THE SEARCH FOR MEANING 25 (2011) (stating that humans seek meaning through religion or other belief systems, because humans "are meaning-seeking animals").

421. *See* Tucker Evans & Feng Fu, *Opinion Formation on Dynamic Networks: Identifying Conditions for the Emergence of Partisan Echo Chambers*, ROYAL SOC'Y OPEN SCI. 1–2 (Oct. 24, 2018), https://royalsocietypublishing.org/doi/pdf/10.1098/rsos.181122.

422. *See supra* notes 72–75 and accompanying text.

423. *See* Jeffrey W. Stempel, *Legal Ethics and Law Reform Advocacy*, 10 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 244, 246–48 (2020).

424. *See supra* note 67 and accompanying text.

ever-greater institutional prudence and moderation from those who lead these twin pillars of the modern liberal market order.

CONCLUSION

Despite the assumption that the United States operates on purely democratic principles, it has traces of a mixed regime with an important aristocratic element, albeit an aristocracy suited to the modern world. The most important functions of a modern market society, protecting the rule of law and stable money, are exercised by elite dominated institutions that require political independence to carry out the precommitments to these values. The uneasy position of elite institutions in an order considered essentially democratic encourages them to follow rules in ordinary times. But in emergencies, they are willing to act beyond rules to defend what they believe are their core precommitments. Ultimately, the success of this kind of regime depends on the willingness of the aristocratic element to defend those institutions even when it disagrees with their decisions. The increasing polarization of elites thus may threaten the ability of both the Court and the Federal Reserve to carry out the functions for which these elites were thought necessary.