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Title

Anti-Oligarchy, Anti-Authoritarianism, The Constitution, and the Court

Permalink

<https://escholarship.org/uc/item/8n16p3dt>

Journal

UCLA Law Review, 72(2026)

Authors

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Publication Date

2026

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U.C.L.A. Law Review

Anti-Oligarchy, Anti-Authoritarianism, The Constitution, and the Court

Joseph Fishkin & William E. Forbath

ABSTRACT

In the 1930s, like today, our nation faced a crisis of oligarchy: too much wealth and political power concentrated in too few hands. Like today's liberals and progressives, the New Dealers aimed to enact social and economic reforms that would ensure a much broader distribution of wealth and power, but they faced a hostile, right-wing Supreme Court that would certainly thwart such reforms. Thus, like liberals and progressives today, New Dealers proposed various measures aimed at curbing judicial review to safeguard the legislative reforms they saw as essential to making democracy work. Yet at the same time they hoped to preserve the Court's power—which they hoped the Court would exercise—to defend civil liberties, protect vulnerable minorities against state violence, and safeguard the rule of law in a moment of rising authoritarianism.

This Article argues that this New Deal moment contains significant lessons for liberals and progressives today, who are once again arguing for curbing the power of a hostile, right-wing Supreme Court—while at the same time continuing to hope and demand that that same Court use its authority to thwart some of the government's more extreme violations of the rule of law. Liberals and progressives must respond to the present crisis, but must also think about what kind of constitutional order, with what kind of Supreme Court and federal judiciary, exercising what kinds of power, we hope to build. This Article surveys the various answers in present-day debates, from abolishing judicial review, in part or whole, to reforming selection procedures to “balance” the Court. We argue, drawing on the work of the New Dealers, for a more flexible and pragmatic approach that takes the Court seriously as a political body—one that can sometimes be persuaded to back off through political confrontation. The present Supreme Court has done much—from eviscerating campaign finance and anticorruption law to attacking the administrative state—to lay the groundwork for oligarchic rule. The solution, we argue, is not to eliminate the Court's power of judicial review or to pursue technocratic reforms that aim to put the Court above politics. Instead, liberals and progressives should lay the political groundwork now for confronting the Court through constitutional politics.



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The United States is in the thick of a crisis of oligarchy. Too much wealth and too much economic and political power are concentrated in too few hands. Just how far the oligarchs will succeed in remaking American government in authoritarian form is history not yet written. But the United States today seems clearly to be descending into an oligarchic form of government.¹

As we explored in a recent book,² there is a rich American tradition of constitutional thought and argument built on recognizing the dangers posed by oligarchy and its incompatibility with democracy and republican self-rule. We have this tradition because Americans have seen this problem before. Indeed, it is disconcerting how much the present crisis of concentrated economic and political power has in common with earlier, similar crises, particularly the one that unfolded in the 1930s.

One of the many things these two periods have in common is the peculiar dilemma that the role of the federal courts created for liberals and progressives during the New Deal, and again today. Like liberals and progressives today, the New Dealers and their allies on the left faced a hostile judiciary firmly committed to thwarting the core reforms they thought essential to making American democracy work. Because of this, the New Dealers assailed the Supreme Court, campaigned politically against it, and proposed various ways to curb its power. And yet, at the same time—again like their counterparts today—the New Dealers and their allies on the left hoped they could count on the federal courts for help in defending democracy against the forces of authoritarianism, fascism, and white supremacy.³

The present Supreme Court, further right ideologically than any Court since the 1930s, has been extraordinarily willing to allow the Trump administration to amass power. And yet, even now, it is possible that some of the actions of this administration may be so lawless that not only the lower federal courts, but even the present Supreme Court, may well block them.⁴ Opponents of such lawlessness

1. For a recent exploration of the concentrated wealth and political corruption now at the center of American government, see Timothy Noah, *How the Billionaires Took Over*, THE NEW REPUBLIC (June 19, 2025), <https://newrepublic.com/article/196176/trump-billionaires-america-wealth-inequality> [<https://perma.cc/QHS6-N6A5>].

2. JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (2022).

3. See *infra* Part III.

4. Consider, for instance, the Trump administration's bids to undermine birthright citizenship, to dismantle programs for which Congress duly appropriated funds, and to declare that the United States faces an "invasion" where none exists for the purpose of enabling various emergency powers. Such actions seem likely to provoke even a judiciary relatively friendly to this administration. See, e.g., Mattathias Schwartz, *Why Federal Courts May Be the Last Bulwark Against Trump*, N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/09/us/trump-federal-courts-lawsuits.html>; Chris

have every reason to hope the Court will hold that some things are beyond the pale. Over the longer arc of the present crisis, however, the Supreme Court has done an enormous amount to lay the groundwork for oligarchic rule—from eviscerating campaign finance and anticorruption law to attacking the administrative state.⁵ These and other reactionary projects of the present Court have done such lasting damage to the long-run prospects of democracy in the United States that it is unsettling for liberals to hope nonetheless that the Court may intervene to block some of the most lawless actions of the Trump administration. But that is exactly where we are.

This seemingly paradoxical combination would have been quite familiar to our forebears working in the anti-oligarchy tradition a century ago. They, too, simultaneously recognized the Court as a source of constitutional danger, proposed measures to curb the Court's power, and yet also hoped the Court would nonetheless use some of that power to defend civil liberties, protect vulnerable minorities against the worst kinds of state violence, and generally safeguard the rule of law.

Perhaps most disconcerting of all is an element that was not present in the 1930s: Today the loudest calls for political pushback against the federal courts are coming from the Trumpist right.⁶ In the 1930s, it was the New Dealers who were

Megerian & Lindsay Whitehurst, *As Trump Pushes the Limits of Presidential Power, the Courts Push Back*, ASSOCIATED PRESS, Feb. 6, 2025, <https://apnews.com/article/donald-trump-constitution-courts-lawsuits-796543ab4a3d5589f47fd66fd9d6bfef> [<https://perma.cc/5XQ6-YHPX>].

5. See, e.g., *Snyder v. United States*, 603 U.S. 1 (2024) (eviscerating bribery law); *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (striking down independent expenditures by corporations and greatly narrowing the concept of “corruption” that Congress may constitutionally attempt to regulate); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (ending judicial review of partisan gerrymandering); *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (striking down the EPA’s Clean Power Plan, promulgated under Clean Air Act on basis of new “Major Questions Doctrine” barring agencies from promulgating new regulatory initiatives that address major problems unless authorizing statute explicitly confers power to address the specific problem at hand). See generally FISHKIN & FORBATH, *supra* note 2, at 433–82. The United States is not the only place where courts have played a role in undermining important pillars of democratic government. See David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313 (2019–2020).
6. See, e.g., Michael Gold, *House Votes to Curb National Injunctions, Targeting Judges Who Thwart Trump*, N.Y. TIMES (Apr. 9, 2025), <https://www.nytimes.com/2025/04/09/us/politics/house-vote-federal-judges-trump.html> (discussing one of several legislative proposals to reduce the power of the federal courts to rein in Trump administration actions); Jenna Greene, *How an Obscure Budget Provision Could Upend Judges’ Contempt Power*, REUTERS (May 29, 2025), <https://www.reuters.com/legal/government/column-how-an-obscure-budget-provision-could-upend-judges-contempt-power-2025-05-29> [<https://perma.cc/84HF-LGK5>]; see also Megan Messerly & Kyle Cheney, *Trump Calls for Impeachment of Judge Who Tried to Halt Deportations*, POLITICO (Mar. 18, 2025),

calling for reining in the power of the Supreme Court, with the goal of ensuring the survival of the landmark legislation the nation needed, in their view, to build a democratic political economy for their time. Progressives in recent years have made similar arguments, and indeed those arguments are a big part of the subject of this Symposium. But today it is President Trump and his allies who are most aggressively assailing the courts, and sometimes proposing to constrict their power, as a way to facilitate an authoritarian consolidation of presidential power.

Here there are some distinctions to be made. Some of the lines of attack on judges by Trump and his allies, such as proposals to impeach judges who rule unfavorably—and especially toying with inciting violence against judges—ought to be rejected by our entire legal and political system, unambiguously and regardless of purpose or goal, as these tactics are incompatible with the rule of law. Outright defiance of court orders is unacceptable for the same reason, outside of very extreme circumstances.⁷ But when it comes to court-curbing proposals that operate *within* the democratic system, some of which we will discuss at the end of this Article, these proposals in themselves are not illegitimate. The so-called political branches are entitled to use their available checks to balance a highly political Court. Indeed, there are times when the political branches have a duty to do this. The problem with the versions of these proposals now emanating from the Trumpist right is not that they aim to take power away from the courts, but rather, that they aim to do so for fundamentally antidemocratic reasons. That is, the problem is not using checks and balances to restrain the courts, but rather, *why* this faction is proposing to use such tools, and what they aim to do when less restrained by courts.

When the dust clears from all the destruction wrought by the present administration, we will most likely still have a vastly powerful Supreme Court that is using its power to thwart almost any serious effort to build a democratic rather than oligarchic political economy. And yet, progressives today need the courts as an important bulwark against authoritarian consolidation. This combination creates significant difficulties—difficulties familiar from the 1930s.

<https://www.politico.com/news/2025/03/18/trump-impeachment-judge-deportations-00235173> [<https://perma.cc/6LGP-H6ZH>].

7. The extreme circumstances would almost certainly involve a truly lawless court order. Outside of that extreme scenario, when the government is a party to a case it must obey the rulings of any court hearing that case, as to the controversy at issue in that case, because to do otherwise undermines foundational elements of the rule of law. For a rich discussion of the many-sided meaning of the rule of law, its relationship to democratic theory, and its bearings on present politics, see Jedediah Britton-Purdy, *A Democratic Rule of Law* (Duke L. Sch. Pub. L. & Legal Theory Working Paper No. 67/2024, 2024), <https://ssrn.com/abstract=5052568> [<http://dx.doi.org/10.2139/ssrn.5052568>].

One striking and forgotten thing about the '30s is this: The left in that era—both in the legal academy and in the political arena—approached the question of judicial power and the future of judicial review differently from those on the left today who decry judicial review itself as antidemocratic. They abhorred what the Supreme Court and the federal judiciary were doing to reforms they prized. But they saw courts and the uses of judicial power in the round, in a more deeply pragmatic and political fashion, one that rejected not only the myth of judicial neutrality but also the categorical view of judicial review as inherently antidemocratic. As we are saddled once again with a deeply reactionary Supreme Court in the thick of a crisis of concentrated economic and political power, where oligarchy threatens democracy, it is worth asking what we can learn from the 1930s and earlier rounds of this same conflict that is relevant to today's constitutional politics.

PART I

Throughout the nineteenth and early twentieth centuries, reformers assailed economic inequality and social and political domination—first on the part of plantation- and slave-holding oligarchs, and then on the part of the financial and industrial oligarchs of the Gilded Age. To combat them, reform-minded presidents, lawmakers, parties, and social movements fashioned, updated, and refashioned a tradition of constitutional arguments we have called the “democracy of opportunity” tradition. The story of this tradition is the subject of our book, *The Anti-Oligarchy Constitution*.⁸ The tradition changed as the nation's economy changed. To disrupt an oligarchy of industrial robber barons and financial despots, one needed different measures from the ones required to uproot a plantation-based oligarchy of quasi-feudal despots who enslaved their workforce.

But the basic precepts remained constant. You had to enact measures that broke up extreme concentrations of wealth and the economic and political power such wealth created. You needed to build a political economy that reliably produced a wide-open middle class, inclusive across racial lines and broad enough to provide everyone with a decent livelihood and a real measure of material security and independence. In this tradition, thwarting the power of oligarchs at the top was a constitutional essential. So was building and maintaining a broad and racially inclusive middle class, without which the

8. FISHKIN & FORBATH, *supra* note 2.

nation's republican form of government lacked a social foundation, and the liberal promise of equal opportunity rang hollow.

Thus, in this tradition, reconstructing the defeated South after the Civil War required more than enshrining civil and political rights for Black people. The entire social fabric of the Southern states had to change; there is no such thing as a free republic composed of overlords and serfs.⁹ And so the great Radical Republican Congressman Thaddeus Stevens and his allies championed the breakup and redistribution of the big plantations of the South to the people who worked the land.¹⁰

Decades later, in the face of a new oligarchy of politically connected plutocrats ruling over an impoverished industrial working class, Franklin Roosevelt and the New Dealers adapted the same insight: You cannot have a free republic composed of overlords and wage slaves, either. And so, the New Dealers championed bank reform, national labor standards, social insurance, and laws safeguarding union organizing and collective bargaining across the industrial landscape.¹¹ It was not enough for working-class Americans to have the ballot. There could be no durable political democracy—no durable republican form of government in industrial America—without social and economic democracy. That was the New Dealers' account of constitutional political economy. We borrow from Roosevelt the phrase "democracy of opportunity" that we use to describe this anti-oligarchy tradition in American constitutional argument.¹²

The New Dealers had a number of important insights worth recalling today. Like us, they confronted a world where economic pain and material insecurity had undermined people's faith in democratic government in capitalist nations across Europe, and frightened business elites were striking their own new deals with "fascism" and "gangster rule." This time around, American business elites are striking deals with the authoritarian, gangster-like figures atop our own executive branch to a much greater extent than are the business elites of most of Europe. This is happening because the authoritarian far right now has a level of power in the United States that the New Dealers urgently sought to prevent in

9. See *Reconstruction; Hon. Thaddeus Stevens on the Great Topic of the Hour. An Address Delivered to the Citizens of Lancaster*, Sept. 6, 1865, N.Y. TIMES (Sept. 10, 1865), <https://www.nytimes.com/1865/09/10/archives/reconstruction-hon-thaddeus-stevens-on-the-great-topic-of-the-hour.html>.

10. *Id.*

11. See FISHKIN & FORBATH, *supra* note 2, at 251–55.

12. See *id.*; Franklin D. Roosevelt, Acceptance Speech for the Renomination for the Presidency, Philadelphia, Pa. (June 27, 1936), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/acceptance-speech-for-the-renomination-for-the-presidency-philadelphia-pa> [<https://perma.cc/DK2F-PPWQ>].

their time. In the 1930s and '40s, although the far right had some highly placed champions, it never came close to controlling the federal government. Even so, New Dealers warned the nation against heeding our homegrown fascists and authoritarians, who were telling anxious Americans that the dictators abroad were right: Old republican constitutions like ours, with their quaint reliance on democratically elected legislatures and the liberal rule of law, were simply not up to the task of solving the toughest problems of the day. For that, those voices argued, a nation needed a strong man in command, with a band of authoritarians behind him, to take over and run the state.¹³ Rhetorically and substantively, in a variety of ways the far-right voices from the 1930s and '40s anticipated the Trump administration.

The basic constitutional challenge, as the New Dealers understood it, was to come up with the outlines of a political economy that built new forms of economic governance on an unshakeable commitment to liberal democracy. "The great adventure," as one leading New Deal lawyer told Congress in 1933, "... lies in this effort to find a democratic ... solution of the problem that has produced dictatorships in at least three great nations since the World War."¹⁴

For his part, President Roosevelt warned Americans that behind the would-be fascist strong man always stood the economic royalists "who want ... economic and social control to remain in a few hands. They say in their hearts: 'If constitutional democracy continues to threaten our control why should we be against a plutocratic dictatorship if that would perpetuate our control?'"¹⁵

Breaking up the concentrated political and economic power of these "royalists" was always going to involve a confrontation with the branch of government most firmly in their corner: the federal courts. Thus, even Roosevelt's perennial Socialist Party rival, Norman Thomas, came to the president's defense when it came to Roosevelt's court-packing plan.¹⁶ But, as Thomas explained in a

13. See generally IRA KATZNELSON, *FEAR ITSELF* (2013) (describing the American far right and fascist movements of the 1930s, their arguments about the outdatedness and incapacities of liberal democratic government, and their case for an authoritarian regime in America); ALAN BRINKLEY, *VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, & THE GREAT DEPRESSION* (1983) (same).

14. *Business Warned to Aid Recovery Program, or Face Dictatorship*, ROCKY MOUNTAIN NEWS (July 7, 1933), <https://www.coloradohistoricnewspapers.org/?a=d&d=RMD19330707-01.2.14&srpos=1&e=-----en-20--1--img-txIN%7CtCO%7CtTA-Business+Warned+to+Aid+Recovery+Program%2C+or+Face+Dictatorship> [https://perma.cc/4HW8-DDFE].

15. Franklin D. Roosevelt, *Address on Constitution Day, Washington, D.C.* (Sept. 17, 1937), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/node/208747> [https://perma.cc/3RBD-6CCG].

16. Roosevelt put forward his court-packing proposal in the wake of his sweeping 1936 electoral victory. It aimed to add a sufficient number of pro-New Deal justices to the Supreme Court to

widely broadcast radio address, curbing the Court had to be done with great care. It was essential to preserve “the right of the Court to defend civil liberty, a function which we wish it would exercise more vigorously and competently.”¹⁷ At the same time, it was equally essential to ensure that Congress and state legislatures could undertake major economic reforms “without danger of judicial veto.”¹⁸ “[A] democracy impotent to act [on such reform] because it is paralyzed by a judicial oligarchy” was “more likely to invite a strong man to step in as Dictator.”¹⁹

Active in the civil liberties arena, Thomas was one of several notables—“eminent lawyers and a few laymen”—appointed by the American Civil Liberties Union (ACLU)’s national board to hammer out a position for the organization to adopt regarding the many court-curbing bills under consideration in Congress.²⁰ They wrote and deliberated at length about how best to undo the judicial veto on social and economic reform, without injuring the judiciary’s capacity to protect civil liberties and racial minorities. And they could not agree. In the midst of their deliberations, FDR set out his court-packing plan, and the ACLU’s advisors also could not agree on its likely impact “on the protection of civil liberties by the court.”²¹

Much like today (at least until very recently), the most enthusiastic voices for court-curbing in the 1930s arose from the left.²² Left of Norman Thomas was

curb the Court’s attacks on regulatory and redistributive legislation and ensure that no longer would it strike down key social and economic reforms. See LAURA KALMAN, *FDR’S GAMBIT: THE COURT PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM* (2022) for a superb recent account. Court-curbing, it’s worth noting, was far from the most important constitutional change needed to equip government to overcome the nation’s gross inequalities and broken economic order, in Norman Thomas’s and the Socialist Party’s view. That was amending Article V to make the Constitution itself more changeable, remove the inevitable peril of “deadlocks” imposed by our antique constitutional structures, and overcome the “sheer paralysis of government [which] invites Fascism.” TALKS: SPECIAL SUPREME COURT EDITION COVERING BROADCASTS OVER THE COLUMBIA NETWORK IN FEBRUARY AND MARCH, 1937, at 162–63 (Edward R. Murrow ed., 1937) [hereinafter TALKS: SPECIAL SUPREME COURT EDITION COVERING BROADCASTS].

17. TALKS: SPECIAL SUPREME COURT EDITION COVERING BROADCASTS, *supra* note 16, at 162–63.

18. *Id.*

19. *Id.* at 161–63. Best, in Thomas’s view, would have been a “carefully framed amendment positively conferring on Congress” the power to regulate national economic life, along with “concurrent though subordinate power [to do so] for state legislatures.” *Id.* at 162. But FDR having brought forward his plan, Thomas endorsed it, observing that the kind of justices that the president would appoint would implement the kinds of doctrinal changes the nation needed.

20. *Statement of the Board of Directors on the Proposed Reforms in the Personnel and Powers of the United States Supreme Court*, in ACLU Recs., *The Roger Baldwin Years 1917–1950*, (on file with Seeley G. Mudd Manuscript Lib., Princeton Univ., reel 143, vol. 978). We are indebted to Laura Weinrib for sharing this document from the ACLU archives.

21. *Id.*

22. See generally KALMAN, *FDR’S GAMBIT*, *supra* note 16.

a fellow Socialist, the brilliant constitutional scholar and attorney Louis Boudin. Boudin dubbed himself “one of the most extreme [Court] ‘curbers.’”²³ Even so, Boudin was at pains to underscore that “the Supreme Court . . . should not, be deprived of the right to declare unconstitutional such actions of the state governments, including state legislatures,” that so often violate the rights of Black people and other vulnerable minorities.²⁴ Boudin—and Roosevelt, Boudin argued—aimed to curb the Court’s power as a “super-legislature” yet preserve the “function of the Supreme Court as the highest court of justice”: The Court must continue to hand down—and amplify—decisions like “the Scottsboro case,”²⁵ where constitutional enforcement addressed the conduct of police, criminal courts, and executive actors.²⁶

PART II

After the 1937 “switch in time,” court-curbing fell off FDR’s agenda. The laissez-faire vision of constitutional political economy of the *Lochner* era retreated from the judiciary and became the conservatives’ “Constitution in Exile.”²⁷ The business elite never accepted the supposed New Deal settlement and never viewed the new labor rights enshrined in the Wagner Act²⁸ as anything but counterfeit.²⁹ Their Republican allies in Congress remained determined to repeal or sharply amend the Act to cut down labor’s new power.

Likewise, the Southern Democrats or Dixiecrats grew ever more hostile toward the New Deal as the administration instituted new programs to assist Black sharecroppers and reform the South’s caste-ridden labor market. A new, anti-New Deal conservative coalition emerged in Congress, joining Dixiecrats with conservative pro-business Republicans. As the Dixiecrats turned more resolutely against the New Deal, the president turned against them, staging his

23. Louis B. Boudin, *The Supreme Court and Civil Rights*, 1 SCI. & SOC’Y 273, 275 (1937).

24. *See id.*

25. *Powell v. Alabama*, 287 U.S. 45 (1932).

26. *Id.* at 274–76. Boudin argued that it was the Court’s own jurisprudence that was preventing it from undertaking the necessary protection of individual rights: The Court needed to reverse its disastrous decisions refusing to incorporate the Bill of Rights against the states. *Id.* And of course, while the Warren Court never reversed the nineteenth century decisions that strangled the Privileges or Immunities Clause in its infancy, it nevertheless reincorporated much of the Bill of Rights into the Fourteenth Amendment via due process.

27. The article first coining the phrase and associating it with conservative efforts to keep alive the pre-New Deal, *Lochnerian* order was Douglas H. Ginsburg, *Delegation Running Riot*, REGUL., No. 1, 1995, at 83, 84 (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)).

28. *National Labor Relations*, 29 U.S.C. §§ 151–66 (Suppl. 2 1934).

29. FISHKIN & FORBATH, *supra* note 2, at 326–29, 338.

own march through Georgia and other Southern states during the 1938 Democratic primaries, campaigning against the most reactionary Southern lawmakers. The Jim Crow system in the South, Roosevelt declared, was America's "Fascist System."³⁰ Fighting Jim Crow became a feature of fighting Fascism for New Deal liberals, well before the dawn of Cold War anticommunism that would help underwrite *Brown v. Board of Education*.³¹

Then, as World War II opened new avenues of state-building and economic governance, New Deal lawmakers and administrators pressed ahead with measures aimed at completing construction of a more inclusive social democratic political economy.³²

In his 1944 State of the Union address, Roosevelt looked back at the new social and economic rights, the new kinds of social provision and new forms of labor empowerment and economic governance the New Deal had wrought, and at the work that remained.³³ The 1944 State of the Union made plain the principles of a postwar constitutional political economy that Roosevelt saw as worth fighting for. The postwar period, he insisted, must not bring a return to outworn, pre-New Deal notions of the rights of persons and property and the duties of government, here or abroad. "In the first World War," the president reminded Americans, "we came closer [than ever before] to national unity" via a strong government role in making the industrial economy work for all. But armistice and peace brought a "rightist reaction" and a rollback to the old laissez-faire.³⁴

If "such reaction should develop" again, Roosevelt warned, "if history were to repeat itself and we were to return to the so-called 'normalcy' of the 1920s—then it

30. Franklin D. Roosevelt, *Address at Gainesville, Georgia*, AM. PRESIDENCY PROJECT (March 23, 1938), <https://www.presidency.ucsb.edu/node/209547> [<https://perma.cc/8DKS-VCWR>].

31. *See id.*; 347 U.S. 483 (1954).

32. New Deal state-builders were alive to the unsettling resemblances between the expansive Executive authority they were lodging in new administrative agencies, and the legal and institutional arrangements that their counterparts among elite administrative lawyers in fascist Europe were fashioning and defending in the service of fascist rule. Noah Rosenblum has chronicled how key architects of 1940s administrative procedure in the U.S. (including the 1946 Administrative Procedure Act) developed a self-consciously "antifascist" constitutional outlook to avert the fascist "personalization" of Executive administrative power on the American scene—an outlook that aimed to build separation of powers and democratic, antiauthoritarian constitutional precepts into the institutional arrangements of the new U.S. administrative order. *See* Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022).

33. *See* Franklin D. Roosevelt, *State of the Union Message to Congress* (Jan. 11, 1944), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/state-the-union-message-congress> [<https://perma.cc/ZHG8-EUR5>].

34. *Id.*

is certain that even though we shall have conquered our enemies on the battlefields abroad, we shall have yielded to the spirit of Fascism here at home.”³⁵ Unregulated financial markets, misguided notions of the rights of capitalist property, and other outworn political-economic arrangements during the 1920s had ended in economic disaster on a global scale, Roosevelt said. And such disaster can cause people to embrace fascism. In contrast, embracing government’s inescapable responsibility for the way our political economy distributed risks and rewards, power and opportunity, security and insecurity, had restored people’s faith in constitutional democracy.

This new understanding was forged in constitutional politics and reinforced by a chastened post-1937 Supreme Court. This was a Court no longer quite so inclined to arrogate power to itself to enforce old conceptions of property and contract to thwart government interventions to build a democratic political economy.

In 1944, it would have been surprising and mysterious to learn that the Supreme Court would—within just a few decades—once again come to occupy a position of incredible power at the center of American political life. And yet that is what happened. Without any joint plan, liberals and conservatives clashed and collaborated over the course of the twentieth and early twenty-first centuries to produce the most powerful and power-hungry court we’ve ever seen—and one of the most reactionary.³⁶ It was, ironically, the *liberals’* decades-long love affair with the Court that cemented judicial supremacy in elite and popular consciousness, in ways that conservatives could never have accomplished alone.

PART III

Today, the Court occupies a position of power as central to American life as the *Lochner* Court before it, and it is exercising this power across more domains. Like the *Lochner* Court, today’s Court embraces an oligarchy-friendly form of market fundamentalism, along with a thin, formalist account of racial equality and a hostility to Black voting rights.³⁷ If anything, on the latter front, the present Court has been more aggressive than the *Lochner* Court—not only upholding racist

35. *Id.*

36. See FISHKIN & FORBATH, *supra* note 2, at 354–63.

37. See *id.* at 453–86; see also Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1 (2023).

measures but actually striking down or gutting voting rights laws and other statutes and policies aimed at racial inclusion.³⁸

The story of how we got here begins with the central limitation of the New Deal: its rotten Dixiecrat core. Because of the central role of Southern white politicians in the New Deal coalition, the New Deal's great achievements became a kind of affirmative action program for white America: a wide-open mass middle class that largely excluded Black people. This set the stage for the distinctive mid-twentieth century brand of legal liberalism. Mid-twentieth century legal liberals embraced the promise of racial inclusion that the New Deal had largely abandoned (over the vehement objections of left-leaning New Dealers). At the same time, these legal liberals championed a remarkable resurrection of judicial activism, as the Court carved out a different kind of active role for itself in American political life, as a defender of civil liberties and civil rights.

The Court's decisions in those years—centrally *Brown* and the desegregation cases that followed, but also its decisions on school prayer, on criminal procedure, and on one-person-one-vote, which transformed Southern politics—drew a storm of conservative attacks which often took the form of court-curbing proposals from the right.³⁹ Billboards on Southern highways read “Impeach Earl Warren.”

This right-wing clamor to rein in the Court produced a backlash of its own, turning liberals and progressives into staunch defenders of judicial supremacy. Liberals learned to love the high Court, and they anathematized anyone who dared challenge the Court's final and unassailable authority over the Constitution. If you were against white supremacy, you had to be in favor of judicial supremacy.⁴⁰

This new court-centered brand of liberalism was nothing progressives or New Deal liberals could have imagined; it encouraged a new generation of progressive reformers fighting for racial minorities, women, consumers, and the

38. In this way, the present Court looks backward not so much to the *Lochner* era—which upheld racial segregation in cases like *Plessy v. Ferguson*, 163 U.S. 537 (1896) and refused to enforce statutes protecting Black voting rights, as in *Giles v. Harris*, 189 U.S. 475 (1903)—but instead, to the end of Reconstruction, when a very racially reactionary Supreme Court struck down or limited a number of landmark statutes passed by Congress. Compare *Shelby County v. Holder*, 570 U.S. 529 (2013) (eviscerating Section 5 of the Voting Rights Act), *Brnovich v. DNC*, 594 U.S. 647 (2021) (eviscerating Section 2 of the Voting Rights Act, at least in vote denial cases); *Parents Involved in Community Schools v. Seattle*, 551 U.S. 701 (2007) (eviscerating K-12 voluntary school integration measures); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (eviscerating voluntary affirmative action to integrate higher education), with *United States v. Cruikshank*, 92 U.S. 542 (1875), and *The Civil Rights Cases*, 109 U.S. 3 (1883) (eviscerating major Reconstruction-era enforcement statutes by imposing a state action limit on the Fourteenth Amendment).

39. See 102 CONG. REC. 4459–61 (1956); FISHKIN & FORBATH, *supra* note 2, at 354–63.

40. Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1055 (2014).

environment to embrace individual-rights claims aimed at courts, strong judicial oversight of public authorities and private companies, and legalistic, procedural conceptions of fairness and equality—all views that earlier generations of progressives had shunned. But there was a logic to liberals' turn toward the courts. In the mid-twentieth century, with the Dixiecrats still in control of key veto points in Congress, the federal courts were the least paralyzed branch when it came to racial justice. And so, the courts became the first movers on civil rights.

There is also another, subtler reason for the mid-twentieth century liberal love affair with judicial supremacy. At that particular moment, liberals had largely lost their forebears' focus on building a democratic political economy with an empowered labor movement and a mass middle class that included blue-collar workers. That goal seemed largely complete. (Those on the left who insisted there was more to do on the class front were ruthlessly shoved out of mainstream reform in this era of Cold War anticommunism.⁴¹) From the perspective of a Cold War liberal after World War II, what remained was the important inclusionary work of opening up job opportunities to women and racial minorities. The nation's class problems seemed in the past. A mass middle class and an empowered labor movement were (quite wrongly) viewed as permanent *faits accomplis*. The economic order, so liberals thought, was now best left to economic experts—just as the constitutional order was best left to judicial experts. If the remaining work of mainstream liberal reformers was to open the doors of economic opportunity to groups who had previously been excluded, then the Supreme Court and the federal courts were among the heroes of the story, not the villains. And so judicial supremacy became liberal common sense. Liberals came to idealize the courts and imagine them as acting above politics.

Conservatives in these decades never agreed with liberals about judicial supremacy, and they never forgot political economy. The right built up its "Constitution in Exile," keeping the dream alive of reviving a Lochnerian constitutional political economy. Even as they were taking over the Supreme Court, conservatives continued attacking the Court as a bulwark of liberalism. This message expanded beyond busing and school prayer and criminal procedure to embrace what began to amount to an entire party agenda. Attacking the Court was about attacking affirmative action and abortion—and also dismantling social insurance programs like Medicaid and deconstructing the administrative state.⁴²

Now that the Court has shifted so dramatically to the right that it is durably conservative, the conservative legal and policy elite have

41. See FISHKIN & FORBATH, *supra* note 2, at 373–74.

42. See *id.* at 456–61.

unsurprisingly lost interest in disempowering the Court or challenging its supremacy. To Chief Justice John Roberts and the conservative majority on the Court, the value of judicial supremacy has never been more obvious. Conservative elites have continued to work the refs, defining almost any unfavorable ruling as liberal apostasy on the part of their handpicked justices; the more Trumpist among them have even demanded the resignations of the justices who occasionally rule against the Trump administration.⁴³ But the last thing these elites want to do is disempower the courts as an institution.

What is more surprising is that so many liberals, too, remain so firmly attached to judicial supremacy and autonomy. In the short run, perhaps this makes sense: As we noted at the outset, the present Trump administration is behaving so lawlessly that it seems inevitable that it will test and cross the lines that even a highly sympathetic Supreme Court is drawing. And the Trump administration's transparently bad faith attacks on the integrity of the courts inevitably inspire a reaction in the opposite direction. But over the longer run, liberal reactions to the present Court have been surprisingly tame. Liberals have steadfastly picked apart the reasoning in cases like *Dobbs*⁴⁴ and in novel doctrines like the Major Questions Doctrine. They offer plenty of criticisms, particularly on the subject of overturning precedents. But, over the past few decades, as the Court was embarking on its decades-long neo-Lochnerian, anti-redistributive, antiregulatory constitutional enterprise, liberals did not challenge the Court's claim on having the final, authoritative word, and most are still not challenging it.⁴⁵

43. E.g., Ann E. Marimow, *Justice Amy Coney Barrett Ignites Anger on the Right After Ruling Against Trump*, WASH. POST, Mar. 6, 2025; Josh Blackman, *See, I Told You So*, REASON.COM: THE VOLOKH CONSPIRACY (Mar. 5, 2025, at 5:40 PM), <https://reason.com/volokh/2025/03/05/see-i-told-you-so> [<https://perma.cc/M8HM-F3S5>] (criticizing both Barrett and Roberts for ruling against Trump); Ryan Tarinelli, *Senate Panel Sets Up Hearing on Impeachments of Rogue Judges*, ROLL CALL (Dec. 2, 2025), <https://rollcall.com/2025/12/02/senate-panel-sets-up-hearing-on-impeachments-of-rogue-judges> [<https://perma.cc/85NE-KHMA>]. For an account of the Republican politicians caught in the middle, see Alexander Bolton, *GOP Lawmakers Conflicted Over Trump's Clash With Judiciary*, THE HILL, Mar. 19, 2025, <https://thehill.com/homenews/senate/5201879-trump-federal-judiciary-battle> [<https://perma.cc/JDB5-QK8T>].

44. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

45. For a thoughtful and representative time capsule of liberal opinion in recent decades, see GOODWIN LIU, PAMELA S. KARLAN, & CHRISTOPHER H. SCHROEDER, *KEEPING FAITH WITH THE CONSTITUTION* (2009). The authors of this manifesto, which was published by the American Constitution Society, describe a process of constitutional interpretation that "includes both judicial interpretation and transformations in constitutional understanding pressed by political leaders and ordinary citizens throughout our history." *Id.* at 1. But nowhere in the book do the authors discuss court-packing (other than briefly as a historical event) or any other potential direct, present-day political challenge to the Court's authority. The authors write that "the judiciary's unique (though not exclusive) competence and authority to interpret the

The Republican bait-and-switch of Senator Mitch McConnell's refusal to allow a hearing for President Obama's Supreme Court nominee Merrick Garland on grounds that it was the 2016 election year, only to rush through a far-right justice to replace Justice Ginsburg days before the 2020 election, produced a groundswell of progressive demands that Joe Biden use his Democratic majority in Congress to right the Republican wrong by adding new—liberal—justices to the right-wing McConnell/Trump Court. Wisely or not—we think not—President Biden responded to this controversial notion with the time-honored alternative of a presidential commission to study the problem. The Biden Commission on Court Reform did what reform commissions often do; it quieted the issue.

With no actual court reform in the offing, the moment did not call forth any wholesale shift among liberals toward defending political pushback against a reactionary Court and its claims to authority. Instead, the Court held firm. And with some notable exceptions to which we'll return, most of the liberal and progressive legal commentariat, including those called to testify before the Biden Commission, held firm as well to the taken-for-granted-ness of the Supreme Court's final, authoritative word on constitutional matters.

And yet there were signs that decades of conservative dominance on the Supreme Court had gradually but unmistakably cooled liberal and progressive constitutional thinkers' love affair with judicial supremacy. By the early twenty-first century, mainstream liberal and progressive constitutional scholars and public intellectuals had stepped back from the fierce defenses of the Court's sweeping finality and independence their teachers had mounted in the 1960s and '70s. This shift went only so far. Scholars began to study and often approve of some of the ways constitutional politics outside the courts, particularly through social movements, may influence the decisions of the justices.⁴⁶ They did not, however,

Constitution have become widely accepted 'as a permanent and indispensable feature of our constitutional system.'" *Id.* at 22 (quoting *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)).

46. Many scholarly projects of this period focused on the ways social movements changed constitutional law by changing public opinion in ways that ultimately led to changes in court-made constitutional law. The central paradigm in this genre of scholarship is the NAACP's legal-and-political campaign against Jim Crow; scholars have examined other movements that have changed constitutional law through related strategies such as the women's movement, LGBT rights movements, and even the gun rights movement. For a few now-classic examples from this vast body of work, see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008); WILLIAM ESKRIDGE, *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA* (2008); SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2014).

with rare exceptions, advocate a constitutional politics of attacking the courts and challenging their preeminence in constitutional interpretation.⁴⁷

This hardly seems likely to change in the next several years, with the judiciary the only branch of government in a position to put up significant resistance to the present administration. Almost no matter how bad things get at the Court, no matter how many times it disappoints, the hope that the judiciary will defend at least *some* constitutional guardrails seems to dampen any politics of direct challenge to the Court's autonomy and preeminence. However, that powerful force keeping liberals in line behind the Court will last only as long as the present lawless administration. Meanwhile, the force pressing the other way—the late Roberts Court's turn toward harder-edged partisan constitutional politics, as exemplified by *Dobbs*—is accelerating. Now, one can imagine a fundamental, tectonic shift in the liberal and progressive understanding of the relationship between politics and the courts, as well as the relationship between politics and economics.

PART IV

Today, liberals and progressives are shut out of power in Washington. But time out of power is time for thinking broadly about what kind of constitutional order the nation ought to build. Mainstream liberals and progressives today have increasingly left behind the view, so common twenty years ago, that the nation's class problems are in the past. That alone is a source of some hope. The need to redistribute both economic and political power away from the few and toward the many is now obvious. The oligarchs are in command.

There are good reasons to expect that future liberals and progressives may also be ready to rethink their longstanding pattern of excessive deference to the courts. When New Dealers fought the nation's last great battle against a prior pro-plutocrat, anti-redistributive Supreme Court, they found themselves in the grip of a real dilemma. They saw the need to curb that Supreme Court, but were ambivalent because they saw, correctly, that in a deeply malapportioned, unequal, Jim Crow American political system, they might also need the courts when it came to civil liberties and civil rights.

47. See LIU ET AL., *supra* note 45, at 1; see also Robert Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004) (arguing that popular constitutionalism is compatible with judicial supremacy). Post and Siegel were arguing against Larry Kramer's then-lonely outlier of an argument for a form of popular constitutionalism that challenges judicial supremacy. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

The continuing ambivalence of some liberals today about orienting liberal politics against a hostile Court—and especially, about attacking judicial supremacy—comes from a similar place. But circumstances are different today in several relevant ways that make it a better time to begin to think about measures for curbing or confronting the Court. Today, the political party opposing oligarchy is not also at the same time the party of the “solid South” and white supremacy. The political descendants of the latter voters are no longer Democrats; the Democratic Party is no longer divided against itself in this crucial way. Meanwhile, we have a massive body of statutory civil rights law that did not exist in the 1930s. These laws require judicial enforcement, but they do not require the courts to move first or to be particularly bold. And so, the time is right for liberals and progressives alike to begin to think about what kind of Supreme Court and federal judiciary we hope to build in the future.

Behind the various debates about potential court reforms is a larger normative question: What are courts for in the future we hope to build? What vision of the role of courts—and of the Supreme Court—ought to animate progressive reform? We see at least three answers. Each has a history.

The first is an abolitionist vision: Abolish judicial review of the constitutionality of statutes, either *in toto* or specifically with respect to federal legislation.⁴⁸ On this view, judicial review has no place in progressive democracy.

This was the view of many progressive and socialist reformers in the early twentieth century. Yes, workers, women, and minorities have rights, and vulnerable people generally have rights, but the way to protect these rights is through well-crafted rights-bearing statutes, along with well-designed modern administrative agencies with much better forms of factfinding, lay participation, and enforcement powers. Courts have a role to play, but only as a backstop, to ensure that statutory rights are, indeed, protected. There is no call, on this view, for a federal judicial power to strike down federal or state laws as unconstitutional. Today, constitutional scholar and historian Aziz Rana has done much to retrieve and call for a contemporary revival of the early twentieth-century Socialist Party’s

48. C-SPAN, *Presidential Commission on the Supreme Court Public Meeting, Panel 1*, at 09:53–15:05 (C-SPAN, June 30, 2021), <https://www.c-span.org/program/public-affairs-event/presidential-commission-on-the-supreme-court-public-meeting-panel1/595586> (on file with the *UCLA Law Review*); Ryan Cooper, *The Case Against Judicial Review*, AM. PROSPECT (July 11, 2022), <https://prospect.org/justice/the-case-against-judicial-review> [<https://perma.cc/KWX6-72HK>]; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

vision of constitutional reform, including its call for abolishing judicial review *in toto*.⁴⁹

A more qualified version of this argument that runs through Reconstruction-era liberalism would abolish judicial review of *federal* laws. At the national level, there is no warrant for judicial review of Congressional statutes, so this argument goes; that practice has always done far more harm than good to core liberal constitutional commitments. Those commitments are instead best enforced via political safeguards and legislative and administrative constitutionalism. But this version of the argument would retain judicial review of *state* laws, on the grounds that states will always remain more open to hostile takeover by various kinds of majoritarian and other tyrannies. Federal courts, with all their accumulated authority, should be there to strike down abusive state measures. This was roughly Justice Holmes's view, and like the full-blown abolitionist outlook, it too has academic champions today.⁵⁰

The second view takes the opposite position: The problem is not judicial review and the power of the Supreme Court. The problem is the substantive vision that animates the current Court. This means the problem is one of personnel. This view was central to mainstream liberal thought during the Court's long march to the right from the 1970s through the present. The view was, more or less, that the Warren Court was good, and that a powerful Supreme Court with more liberal justices remains the best outcome overall. To achieve this goal might involve packing the Court. Advocates of this view may have fallen out of love with *this* Court but not with *the* Court; following in the footsteps of Owen Fiss and Ken Karst and others,⁵¹ they imagine a better future with a better Court, more liberal and just as powerful.

A distinctive variant of this view that has emerged in recent years among some liberal reformers posits that the goal is not even a liberal Court, but a balanced Court, one that reflects the country.⁵² The objective here is not the

49. Aziz Rana, *Who Owns the Constitution?*, JACOBIN (Oct. 15, 2020), <https://jacobin.com/2020/10/us-constitution-law-supreme-court-socialism> [https://perma.cc/8NKS-936C]; AZIZ RANA, *THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM* 127–66 (2024).

50. See, e.g., Nikolas Bowie, *Written Statement to the Presidential Commission on the Supreme Court of the United States* (June 30, 2021) (Harv. Pub. L., Working Paper No. 25-18), <https://ssrn.com/abstract=5168441>; Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021).

51. E.g., OWEN FISS, *THE LAW AS IT COULD BE* (2003); Kenneth L. Karst, *An Expanding Role for the Judiciary: A Report on a Constitutional Controversy*, 26 AM. J. COMP. L. SUP. 339 (1978).

52. See, e.g., Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J. F. 821, 846–50 (2021); Daniel Epps & Ganesh Sitaraman, *How to Save the*

Warren Court but rather something like the Court of Sandra Day O'Connor: a Court that was, whatever else its faults, relatively close to American public opinion on the most consequential matters. This variant, too, imagines that the future reform project is not about disempowering the courts, but rather changing their composition, in this case to make the courts and especially the Supreme Court more balanced.

Finally, there is a third approach to the courts that is more political and pragmatic than either of the first two. This approach, which we have advocated, envisions a restrained role for judicial review and a greatly enlarged role for legislative and administrative constitutionalism.⁵³ But the goal is not to abolish judicial review (of either state or federal legislation). The end goal is not even *necessarily* to carry out a threat of court-packing, although from the perspective of this third approach, the threat itself is essential—and in the case of a Court that is otherwise immovable, the threat would need to be carried out.

This approach begins with the insight that the Court is not above politics, but instead is a player—sometimes hostile, sometimes friendly—in the political arena. The goal is not to reform our way to some better judicial referee calling the balls and strikes of politics in a fairer way. It is, instead, to engage in constitutional politics against the Court, and build strong political majorities aimed at changing the most damaging parts of the Court's jurisprudence. The best model here is FDR's approach to the Court. Through politics, it is possible to push back with force against the Court, especially when the Court is engaged in jurisprudential projects that may represent the views of a right-wing political vanguard but are profoundly unpopular. Indeed, part of the work here is *making* those projects profoundly unpopular.

This approach contemplates electing a progressive Congress and president who are willing to use politics to push hard against a hostile, reactionary Court. There are a variety of tactics that may be of use to the elected branches. When the Supreme Court is recalcitrant enough, the checks and balances available include jurisdiction-stripping—and techniques we have discussed elsewhere such as jurisdiction-delaying—as well as changes in personnel. The specific tactics are perhaps less important than the overall strategy: to confront the Court through

Supreme Court, 129 YALE L.J. 148, 193 (2019); see also Doerfler & Moyn, *supra* note 50 (collecting and describing such “balancing” reform proposals).

53. We are far from alone in this respect. See, e.g., John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002); Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 CALIF. L. REV. 1755 (2018).

politics and attempt to convince it to back off, and indeed ultimately to change its politics.

There is a certain uncomfortable degree of overlap between these tactics and some of the tools the Trump administration and its congressional allies have proposed to use against courts for their own purposes. This overlap is only partial. As we noted at the start of this Article, there are tactics today that the Trumpist right is teasing or testing that are utterly incompatible with the rule of law, the most obvious being threats of violence against judges.⁵⁴ Proposing to impeach judges simply because they ruled for one's opponent is likewise out of bounds in a society with the rule of law: It yields too much chaos and too little judicial independence. But then there are other proposals on the right that appear much more similar to—and in some cases probably borrowed from—the progressive court-curbing proposals of recent decades. Those progressive proposals themselves borrowed from earlier rounds of right-wing court-curbing proposals from the Warren Court era, including jurisdiction-stripping.

There is nothing inherently “out of bounds” about proposals to use other branches’ constitutional powers to check or counterbalance the power of Article III courts. The Trump administration’s reasons for pursuing these tactics are less principled and more solipsistic than those of some previous generations of court critics. Opponents of the Warren Court were more focused on major jurisprudential disagreements, not whether their leader lost a case. The same is true of the progressive opponents of the Supreme Court’s subsequent long march to the right. But these differences are important. The problem with the current far-right efforts to curb the federal courts—apart from when they descend into violent intimidation—is not about the tactics. It is about the substantive goal. It is flagrantly incompatible with the rule of law to set the goal that your leader, or your party, must always win.

Progressives and liberals should understand the stakes and the purpose of their own potential versions of these interventions quite differently. The end goal is not to win every case, nor is it to build a progressive Court, exactly—nor even a Court that reads all of our values into the Constitution. Instead, it is a Court that backs off from close judicial review of major policy areas that are central to building a democratic political economy, particularly questions of the redistribution of wealth and power, opportunity and risk. It is a court that genuinely allows representative government to function in these areas, and

54. Derek Hawkins, *Fake Pizza Orders Sent to Judges Seen as Threat to Judicial Safety*, WASH. POST, May 11, 2025 (“In recent weeks, orders have been placed in the name of U.S. District Judge Esther Salas’s son, Daniel Anderl, who was fatally shot at the family home in New Jersey in 2020 by an attorney who posed as a delivery person.”).

adequately enforces the resulting laws. At the same time, it is also a Court that exercises judicial review in a robust and aggressive way to preserve the rule of law. It is a Court that is fully capable of responding with force to the authoritarian or fascist proposals of the present and the future.

It is certainly not true that *only* the Court can save us from such proposals. There are many starring and supporting roles available in this drama, including for elected leaders at all levels. Part of what the courts can do is empower those other officials to do their jobs. But given the tendency of authoritarians to insist on shredding basic norms of the rule of law, the courts have a particularly straightforward and helpful role to play in stopping those efforts. Liberals and progressives ought to be able to embrace that pivotally important role for courts while at the same time recognizing the courts, in many spheres, as the political adversaries they are—adversaries who can only be confronted through lawmaking and politics.