
SAVING JUDICIAL INDEPENDENCE FROM THE NIHILISM OF
COURT-PACKING

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I. INTRODUCTION

A funny thing happened on the way to President Donald Trump's attack on the independence of the Board of Governors of the Federal Reserve System—it did not succeed.¹ President Trump told the Board to cut interest rates, publicly ruminated about firing the Chair, Jerome Powell, nominated close political allies to the Board—and none of it, or not much of it, happened.¹

This failure of a challenge to the independence of a powerful government institution stands in sharp contrast to the likely success of similar ongoing efforts to undermine the independence of the federal courts, in general, and the Supreme Court, in particular.² This paper first describes and then analyzes these likely different outcomes for the Federal Reserve and the federal courts.

I conclude that independence follows ontology. When an institution is charged with regulating, or otherwise dealing with, real things, then independence from the whims of politics makes sense.³ Expertise might be needed in that context.⁴ But, in contrast, when an institution is simply expressing differences of opinion, independence is an affront to democracy.

¹ John Cassidy, *The High-Stakes Battle Between Donald Trump and the Federal Reserve*, NEW YORKER (Apr. 8, 2019), <https://www.newyorker.com/news/our-columnists/the-high-stakes-battle-between-donald-trump-and-the-fed> (noting that after Trump's attack on the Federal Reserve, people formerly employed there still believed it was an independent institution).

¹ *Id.*

² See Robert Barnes, *Chief Justice Tries to Assure the Supreme Court Is Apolitical, But Term's Biggest Cases Present Partisan Challenges*, WASH. POST (June 16, 2019, 8:59 AM), https://www.washingtonpost.com/politics/courts_law/chief-justice-assures-the-supreme-court-is-apolitical-hes-facing-his-next-big-test/2019/06/16/8603bac6-8def-11e9-8f69-a2795fca3343_story.html.

³ I do not mean that everyone would agree that in such a situation, policy independence is desirable; I only mean that independence in such a situation could be reasonable. See, e.g., Susan E. Dudley, *Make 'Independent' Regulatory Agencies More Accountable to the Public*, FORBES (May 9, 2017, 7:00 AM), <https://www.forbes.com/sites/susandudley/2017/05/09/make-independent-regulatory-agencies-more-accountable-to-the-public/#60fc5a177d63>.

⁴ See generally Peter Shane, *Donald Trump and the War Against Independent Agencies*, WASH. MONTHLY (Nov. 25, 2016), <https://washingtonmonthly.com/2016/11/25/donald-trump-and-the-war-against-independent-agencies/>.

Americans once believed that the rule of law described the pursuit of something real: justice. The Bible, which is the foundational source of our tradition, teaches, "Justice, justice shall you pursue."⁵ Economics, on the other hand, was thought to reflect merely the clash of differing systems, such as capitalism versus socialism.⁶ The latter disagreement was obviously something to be settled by vote; the former, something to be overseen and protected by courts.

But now, Americans are more apt to think of capitalist economics as expressing the laws of the universe and of law as founded on nothing more than human choice.⁷ That is why threats to the independence of the Federal Reserve, today, provoke genuine anxiety in society, whereas changing legal direction is viewed as merely a political decision.⁸ Even law professors, perhaps especially law professors, can thus contemplate political interference with the courts as just another strategic move in an ongoing struggle over power.⁹

The only way to restore a commitment to the independence of the federal courts is to reassess the objectivity of justice. The enforcement of the rule of law must once again be thought of as something akin to the discovery of truth. And truth must be thought of as something enduring. I admit that this renaissance seems unlikely to occur. At the end of this paper, I will come back to the question of renewal and its prospects. But change certainly cannot occur until the source of the threat to judicial independence is understood.

I begin in Part I with the attack on the independence of the Federal Reserve and the reasons for its failure. In Part II, I look at the attack on the independence of the federal courts and its seeming success. Only then do I turn in Parts III and IV, to Nihilism, Judicial Independence, the Rule of Law, and Preventing Court-Packing. Given nihilism as our fundamental commitment, and given Court-packing as

⁵ *Deuteronomy* 16:20.

⁶ See generally Gary Dorrien, *The Birth of Social Democracy*, COMMONWEAL (Apr. 8, 2019), <https://www.commonwealmagazine.org/birth-social-democracy>.

⁷ See generally Stephen M. Feldman, *Nothing New Under the Sun: The Law-Politics Dynamic in Supreme Court Decision Making*, 44 PEPP. L. REV. 43, 44 (2017) (noting Donald Trump denounced a lower court "so-called judge").

⁸ See *id.* (stating both law and politics shape legal interpretation and adjudication).

⁹ Matthew Roza, *The Supreme Court Now Works for the Republican Party ... and This Harvard Law Professor Agrees*, SALON (Oct. 7, 2018, 5:00 PM), <https://www.salon.com/2018/10/07/exclusive-salon-talks-with-harvard-law-professor-laurence-tribe-on-how-scotus-works-for-the-gop/>.

a real possibility, judicial independence will be hard to save.¹⁰ Yet, change is possible. Constitutional democracy can still be salvaged.

II. LESSONS FROM THE "FAILURE" OF THE ATTACK ON THE INDEPENDENCE OF THE FEDERAL RESERVE

The Federal Reserve Bank, established in 1913,¹¹ is a strange establishment. Institutionally, it is almost parallel to the rest of the federal government.¹² Its policy-making status is aptly described as a "uniquely independent government agency" and its budgetary status as "off-off budget."¹³ Its seven-member Board of Governors, headed by a Chair, serve staggered 14-year terms.¹⁴ Although the members are appointed by the President and confirmed by the Senate, these staggered and long terms limit multiple appointments by one President.¹⁵ In addition, Board members are removable only "for cause."¹⁶ The Federal Reserve receives no appropriations from Congress.¹⁷ Obviously, this structure is capable of generating policies of which other actors in the federal government disapprove.

Here is how the Board of Governors described the independent role of the Federal Reserve in a 2017 press release:

The Federal Reserve, like many other central banks, is an independent government agency but also one that is ultimately accountable to the public and the Congress. . . .

¹⁰ Cf. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL STREET J. (Sept. 27, 2006, 12:01 AM), <https://www.wsj.com/articles/SB115931733674775033> (noting these are difficult and challenging times).

¹¹ Federal Reserve Act of 1913, Pub. L. No. 63–43, 38 Stat. 251 (codified as amended at 12 U.S.C. § 343 (2012)).

¹² See Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REG. 257, 274–75 (2015) (noting the uniqueness of the Federal Reserve's funding structure).

¹³ Cheryl D. Block, *Measuring the True Cost of Government Bailout*, 88 WASH. U. L. REV. 149, 172 (2010).

¹⁴ *The Structure and Functions of the Federal Reserve System*, FED. RES. EDUC., <https://www.federalreserveeducation.org/about-the-fed/structure-and-functions> (last visited Nov. 23, 2019) [hereinafter *Federal Reserve System*].

¹⁵ *Id.*

¹⁶ 12 U.S.C. § 242 (2012) (the "for cause" language applies to the members of the Board of Governors, not to the Chair); see Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1176 n.65 (2013).

¹⁷ *Federal Reserve System*, *supra* note 15.

The Federal Reserve does not receive funding through the congressional budgetary process. The Fed's income comes primarily from the interest on government securities that it has acquired through open market operations. After paying its expenses, the Federal Reserve turns the rest of its earnings over to the U.S. Treasury.

The Congress established maximum employment and stable prices as the key macroeconomic objectives for the Federal Reserve in its conduct of monetary policy. The Congress also structured the Federal Reserve to ensure that its monetary policy decisions focus on achieving these long-run goals and do not become subject to political pressures that could lead to undesirable outcomes. So, members of the Board of Governors are appointed for staggered 14-year terms and the Board chair is appointed for a four-year term. Elected officials and members of the Administration are not allowed to serve on the Board.¹⁸

This statement reveals a deep antipathy toward politics. The phrase "political pressures that could lead to undesirable outcomes," for example, is what some would refer to as democracy. Generally, in our system, it is thought that basic policy should be driven in some sense by "political pressure." That is, the preference of the people, even though that can lead to "undesirable outcomes."

Granted, even in a democracy, one does not vote on all matters. For example, and relevant to the topic at hand, the Constitution commits the protection of rights and the fundamental structure of government to politically insulated courts.

The Federal Reserve, however, is functioning in almost the opposite context. Its role involves making policy on matters that otherwise are considered absolutely appropriate for democratic resolution—how the economy should be run.¹⁹ Basically, the Federal Reserve is responsible for national monetary policy.²⁰ Its statutory mandate is to pursue three goals: "maximum employment, stable prices, and moderate long-term interest rates."²¹ In other words, the tradeoff, if there is one, is between inflation and employment. Certainly, this seems like something over which the voters should have some say.

¹⁸ *What Does It Mean That the Federal Reserve Is "Independent in the Government"?* BD. GOVERNORS, FED. RESERVE SYS., (Jan. 10, 2017), https://www.federalreserve.gov/faqs/about_12799.htm.

¹⁹ See *Federal Reserve System*, *supra* note 15.

²⁰ *Id.*

²¹ 12 U.S.C. § 225a (2000).

The anti-democratic role of the Federal Reserve is often masked.²² Voters generally do not understand that a recession, like the one in 1981–82, might be intentionally caused by the use of interest rate policy.²³ At that time, President Ronald Reagan certainly did not explain to the people that a recession was necessary to end inflation and ensure long-term prosperity.²⁴ The recession was treated instead as an Act of God—remote and unexplainable.²⁵ Thus, the people had no direct say in matters that affected them. They might have chosen to live with the inflation.

When the role of the Federal Reserve becomes more visible, as it did during the bailouts and policies that responded to the Great Recession of 2008, the lack of democratic oversight can become more controversial.²⁶ There certainly has been criticism of those policies.²⁷ But, usually, public criticism of the Federal Reserve is muted because policy choices are not clearly explained to the public.

The justification of this independent role for the Federal Reserve is not that its effect on the economy is only modest.²⁸ It is considered a very powerful actor in economic matters.²⁹ This may not be entirely accurate. For all the claims of the authority of the Federal Reserve to achieve stable prices and sustainable economic growth, its actual policy tools are surprisingly modest. The Bank indirectly manages supply and demand for money and credit by purchasing and selling

²² See Sarah A. Binder, *The Federal Reserve as a "Political" Institution*, AM. ACAD. ARTS & SCIS. (2016), <https://www.amacad.org/news/federal-reserve-political-institution> (noting the Fed's placement within the political sphere alters our conceptions of it).

²³ See Josh Bivens, *What Should We Know About the Next Recession?*, ECON. POL'Y INST. 1, 5–6 (2019), <https://www.epi.org/files/pdf/165688.pdf> (stating there could be a recession because of the excessive interest rate increases in recent years).

²⁴ David Hoffman, *'Stay the Course' on Economy, Reagan Urges*, WASH. POST (Oct. 14, 1982), <https://www.washingtonpost.com/archive/politics/1982/10/14/stay-the-course-on-economy-reagan-urges/e21e4b9d-658f-4610-bb72-f4274b3376f6/>.

²⁵ See *id.*

²⁶ 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>.

²⁷ *Id.*

²⁸ Dan Blystone, *Why Is the Federal Reserve Independent?*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/041515/why-federal-reserve-independent.asp> (last updated Oct. 15, 2018).

²⁹ Kristina Zucchi, *The Federal Reserve System Affects You More Than You Might Think*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/090514/federal-reserve-system-affects-you-more-you-might-think.asp> (last updated June 25, 2019).

U.S. Treasury securities, by altering the cash reserve amounts required to be maintained by member banks, and by setting the discount rate at which it extends short-term credit to member banks.³⁰ These tools enable the Federal Reserve to loosen and tighten interest rates in the national economy, at least in the short-term, and thereby to some extent manage the overall level of economic activity.³¹

Nevertheless, to the extent the Federal Reserve really does manage the economy, independence from democratic influence requires some special justification. The justification is that monetary policy is a matter of technical expertise, requiring a long-term focus and politicians, playing to the voters, would undermine prosperity by their lack of expertise and their short-term mindset.³² In other words, democracy here would be bad for business.

This paper is not about the persuasiveness of this justification of policy independence. Rather, my subject is the defense itself and the degree of consensus, especially elite consensus, that supports it.

I cannot help but point out, however, that this same justification would support an independent agency to make national carbon policy for the age of climate change. In fact, in the context of climate change, the expertise and long-term perspective that are needed are even greater—as are the stakes of failure.³³ A changed climate has much worse consequences than inflation and recession. Yet, no one would advocate a climate change agency as independent as is the Federal Reserve.³⁴

³⁰ Block, *supra* note 14, at 173.

³¹ The emphasis here must be on the words "to some extent." The Federal Reserve cannot actually change the underlying macroeconomic conditions that affect the economy generally. It manages symptoms more or less well, "not the underlying disease." See Steven L. Schwarcz, *Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown*, 93 MINN. L. REV. 373, 373–74 (2008).

³² *Why Is It Important to Separate Federal Reserve Monetary Policy Decisions From Political Influence?*, BD. GOVERNORS, FED. RES. SYS., <https://www.federalreserve.gov/faqs/why-is-it-important-to-separate-federal-Reserve-monetary-policy-decisions-from-political-influence.htm> (last updated Mar. 1, 2017).

³³ See, e.g., *Effects of Global Warming*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.com/environment/global-warming/global-warming-effects/> (last visited Nov. 23, 2019); *What is Climate Change?*, BBC NEWS (Dec. 3, 2018), <https://www.bbc.com/news/science-environment-24021772>.

³⁴ Of course, invisible administrative action is shaping climate policy, but the independence that provides is not defended on the merits. See David Roberts, *This Federal Agency Is Quietly, Profoundly Shaping Climate Policy*, VOX (May 22, 2019, 10:00 AM),

The Federal Reserve is not absolutely independent, of course.³⁵ There is some degree of oversight.³⁶ In terms of Congressional influence over Federal Reserve policy, the Federal Reserve Reform Act of 1977 "increased congressional oversight" by requiring semiannual reports by the Board of Governors to both the House and Senate and providing Senate confirmation of the Chair and vice-Chair.³⁷ But, given the budgetary independence of the Federal Reserve, this oversight has not amounted to much congressional control over policy.

In terms of Presidential influence, the institutional structure of limited opportunities for Presidential appointment to the Board of Governors and an almost unreachable standard of cause for removal of the members would seem likely to ensure the policy independence of the Federal Reserve.³⁸ In addition, the Federal Reserve has been known to "play the branches off of one another" in order to avoid effective oversight by either one.³⁹

Nevertheless, stories of Presidential influence on Federal Reserve policy are common. Norbert Michel writes that there are "countless examples of U.S. Presidents pressuring the Fed" and he notes, in particular, President Dwight Eisenhower's successful effort to convince Chair William Martin to increase the money supply, President Richard Nixon's taped mockery of the notion of Federal Reserve independence, and President Jimmy Carter's removal of Chair William over his lack of cooperation.⁴⁰ Mark Thoma adds to this listing Chair Martin's actual admission to a journalist that he "gave in to" President Lyndon

<https://www.vox.com/energy-and-environment/2019/5/22/18631994/climate-change-renewable-energy-ferc> (noting the Federal Energy Regulatory Commission "has a clear mandate to take climate effects into account").

³⁵ Norbert Michel, *The Fed Has Not Been Independent – Perhaps It Should be Restructured*, FORBES (Mar. 19, 2019, 11:03 AM), <https://www.forbes.com/sites/norbertmichel/2019/03/19/the-fed-has-not-been-independent-perhaps-it-should-be-restructured/#1768cf017888>.

³⁶ *Id.* (noting the Fed is a creature of Congress).

³⁷ Joy Zhu, *Federal Reserve Reform Act of 1977*, FED. RES. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/fed_reform_act_of_1977.

³⁸ *Who Are the Members of the Federal Reserve Board, and How Are They Selected?*, BD. GOVERNORS, FED. RES. SYS., https://www.federalreserve.gov/faqs/about_12591.htm (last updated Apr. 3, 2019).

³⁹ Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1837 (2012).

⁴⁰ Michel, *supra* note 36.

Johnson's urging to expand the money supply to accommodate Vietnam War spending.⁴¹

Thoma notes, however, that, beginning with Paul Volcker as Chair in 1979, the practice of Federal Reserve independence has in fact been respected.⁴² It is this current level of independence that confronted President Donald Trump in his recent efforts to influence the Federal Reserve. Those efforts, and their effect, are the subject here.

In a sense, the latest episode of attempted Presidential influence over Federal Reserve policy, by President Trump, is merely an example of a common and traditional theme. Like Presidents before him, President Trump wanted a more accommodationist monetary policy from the Federal Reserve—in order to spur economic growth—than the Federal Reserve was willing to execute.⁴³ The immediate matter in controversy was rising interest rates.⁴⁴

The background of this latest episode of attempted Presidential influence was the extraordinary effort put forth to combat the Great Recession of 2008. In December 2008, the Federal Reserve lowered interest rates "virtually to zero."⁴⁵ Additionally, the Federal Reserve adopted other expansionist policies, including purchasing bonds and loans of all sorts in order to add liquidity to revive credit markets that, at the time, were "frozen."⁴⁶ At the time, President-elect Barack Obama was already planning to go to Congress for additional spending to add fiscal support to the monetary policies of the Federal Reserve.⁴⁷

As if to foreshadow what occurred later, at that moment of economic crisis in December 2008, it was noted that the expansionist consensus between the President and the Federal Reserve would not

⁴¹ Mark Thoma, *Federal Reserve Independence: The Never-Ending Story*, MILKEN INST. REV. (Oct. 20, 2017), <https://www.milkenreview.org/articles/federal-reserve-independence>.

⁴² *Id.*

⁴³ Martin Crutsinger, *Trump Can Rail Against Powell, but He Can't Fire Him*, AP NEWS (Nov. 28, 2018), <https://www.apnews.com/847dlf81a7d04cec841d35ee26a42a2d>.

⁴⁴ Toluse Olorunnipa, *Trump Hated Low Interest Rates. Then He Became President*, BLOOMBERG (Nov. 2, 2017, 4:00 AM), <https://www.bloomberg.com/news/articles/2017-11-02/trump-hated-low-interest-rates-then-he-became-president>.

⁴⁵ Edmund L. Andrews & Jackie Calmes, *Fed Cuts Key Rate to a Record Low*, N.Y. TIMES (Dec. 16, 2008), <https://www.nytimes.com/2008/12/17/business/economy/17fed.html>.

⁴⁶ *Id.*

⁴⁷ *Id.*

last.⁴⁸ Eventually, the Federal Reserve would begin raising interest rates again and, impliedly, the President might not agree with that policy.⁴⁹

The Great Recession proved even more serious and disruptive than feared; the predicted clash took eight years, a new President, and a new Chair, to arrive. Nevertheless, that clash is exactly what happened.

In the years that followed the 2008 Recession, the Federal Reserve kept interest rates near zero through 2015.⁵⁰ In addition, during much of that time, the Federal Reserve utilized forward policy guidance so that investment decisions could be planned in relative confidence that the Federal Reserve would not suddenly change course and begin raising interest rates.⁵¹ Plus, the Federal Reserve engaged in large-scale asset purchases—the so-called quantitative easing—in order to lower longer term interest rates.⁵²

But by October 2015, the Federal Reserve began to warn that the economy had recovered sufficiently that interest rates could begin to rise.⁵³ That gradual rise in the Federal Funds Rate began in December 2015 at 0.5%, and gradually rose to 1.5% in December 2017.⁵⁴

The gradual rise in interest rates accelerated in 2018, after Jerome Powell was nominated by President Trump and confirmed by

⁴⁸ *Id.*

⁴⁹ *Id.* ("For the moment, Mr. Obama and Mr. Bernanke appear to be on the same page, though that could abruptly change if the economy starts to revive. Fed officials have already assumed that Congress will pass a major spending program to stimulate the economy, and they are counting on it to contribute to economic growth next year. In more normal times, the Fed might easily start raising interest rates in reaction to a huge new spending program, out of concern about rising inflation.")

⁵⁰ Kimberly Amadeo, *Current Federal Reserve Interest Rates and Why They Change*, BALANCE, <https://www.thebalance.com/current-federal-reserve-interest-rates-3305694> (last updated Oct. 30, 2019).

⁵¹ John C. Williams, *The Federal Reserve's Unconventional Policies*, FRBSF ECON. LETTER 1, 2–3 (2012), <https://www.frbsf.org/economic-research/files/el2012-34.pdf>.

⁵² *Id.*

⁵³ Binyamin Appelbaum, *Fed Keeps Interest Rates Near Zero, but Says Economic Indicators Remain Strong*, N.Y. TIMES (Oct. 28, 2015), <https://www.nytimes.com/2015/10/29/business/economy/fed-interest-rates.html>.

⁵⁴ See Kimberly Amadeo, *Fed Funds Rate History with Its Highs, Lows, and Charts*, BALANCE, <https://www.thebalance.com/fed-funds-rate-history-highs-lows-3306135> (last updated Oct. 31, 2019).

the Senate to become the Chairman of the Board of Governors.⁵⁵ The rate in December 2018 hit 2.5% and Powell indicated that two more interest rate hikes could be expected in 2019.⁵⁶

Then, on January 30, 2019, in what seemed a dramatic change, Powell announced that the rise in interest rates would pause.⁵⁷ By June 2019, there was expectation of interest rate cuts.⁵⁸

What happened? On one interpretation, the Federal Reserve simply responded to changing economic conditions; the stock market dropped dramatically in December 2018, and potential weakness in the real economy also became apparent.⁵⁹ By June, the prospects for further international trade tensions and weakening job creation suggested that the economy might need lower interest rates in order to maintain its growth momentum.⁶⁰

If this reading is accurate, the dramatic change in Federal Reserve policy perhaps demonstrated poor decision-making in 2018 by the Federal Reserve, but it did not suggest any change in Federal Reserve independence. However, nothing in Donald Trump's Presidency is ordinary. By another reading, the Federal Reserve caved in to President Trump's continual criticisms.

⁵⁵ Amadeo, *supra* note 51; Bd. of Governors of the Fed. Reserve Sys., *Jerome H. Powell*, FED. RES. HIST., https://www.federalreservehistory.org/people/jerome_h_powell (last visited Nov. 23, 2019).

⁵⁶ See, e.g., Nick Timiraos, *Fed Signals Hold on Rate Increases*, WALL STREET J. (Jan. 30, 2019, 7:19 PM), https://www.wsj.com/articles/fed-leaves-rates-unchanged-signals-pause-on-future-increases-11548874931?mod=article_inline; Craig Torres, *Powell Discovers Juggling Three Fed Communication Tools is Hard*, BLOOMBERG (Dec. 21, 2018, 12:47 AM), <https://www.bloomberg.com/news/articles/2018-12-20/powell-discovers-juggling-three-fed-communication-tools-is-hard>.

⁵⁷ *Fed Announces Rate Decision and Holds Press Conference—Live Analysis*, WALL STREET J. (Jan. 30, 2019, 3:35 PM), <https://www.wsj.com/livecoverage/federal-reserve-january-meeting-2019>.

⁵⁸ Jeff Cox, *Some Fed Officials Believe the Case for a Rate Cut Is Strengthening*, CNBC (June 19, 2019, 4:53 PM), <https://www.cnbc.com/2019/06/19/powell-some-fed-officials-believe-the-case-for-more-accomodative-policy-has-strengthened.html>.

⁵⁹ Gina Heeb, *Stocks Slide, Remain on Track for Their Worst December Since the Great Depression*, MKTS. INSIDER (Dec. 28, 2018, 10:27 AM), <https://markets.businessinsider.com/news/stocks/stock-market-news-fighting-prevent-worst-december-since-great-depression-2018-12-1027835946>.

⁶⁰ Lucia Mutikani, *Weak U.S. Employment Report Raises Red Flag on Economy*, REUTERS (June 7, 2019, 12:13 AM), <https://www.reuters.com/article/us-usa-economy/weak-u-s-employment-report-raises-red-flag-on-economy-idUSKCNIT8086>.

President Trump has been at odds with the actions of the Federal Reserve for quite some time. Ironically, during his Presidential campaign, then-candidate Trump criticized Chair Janet Yellen for keeping interest rates too low and creating a "false stock market."⁶¹ At that time, he said the Federal Reserve was not sufficiently independent of President Barack Obama's wishes.⁶²

Not surprisingly, Trump's criticism of low interest rates transformed once he became President.⁶³ Once his own Federal Reserve Chair was installed, President Trump became increasingly critical of rate hikes. In November 2018, Martin Crutsinger wrote for the AP that "no president has ever been anywhere as openly critical of the Fed as Trump."⁶⁴ And President Trump's criticisms only increased in intensity after that.

Following the June 2018 announcement of a quarter point rise in interest rate, with two more to follow,⁶⁵ President Trump indicated on July 19, 2018, that while he did not agree with these actions, he would not interfere: "I'm not thrilled . . . [b]ut at the same time I'm letting them do what they feel is best."⁶⁶ By August 20, the criticism for raising rates had become more pointed, with a promise of continued Presidential criticism.⁶⁷ In November, Trump blamed Federal Reserve policy for the decision by GM to close plants and cut jobs.⁶⁸

⁶¹ Matthew J. Belvedere, *TRUMP: Janet Yellen Should be 'Ashamed' of What She's Doing to the Country*, CNBC (Sept. 12, 2016, 11:18 AM), <https://www.cnbc.com/2016/09/12/trump-says-fed-chief-yellen-should-be-ashamed.html>.

⁶² *Id.*

⁶³ Olorunnipa, *supra* note 45.

⁶⁴ Crutsinger, *supra* note 44.

⁶⁵ Heather Long, *Federal Reserve Bumps Up Interest Rate, Signals Two More Hikes Likely in 2018*, WASH. POST (June 13, 2018, 3:02 PM), https://www.washingtonpost.com/news/wonk/wp/2018/06/13/federal-reserve-bumps-up-interest-rate-signals-two-more-hikes-likely-in-2018/?noredirect=on&utm_term=.7ce0efdefd2b.

⁶⁶ Jeff Cox, *Trump Lays into the Federal Reserve, Says He's 'Not Thrilled' About Interest Rate Hikes*, CNBC (July 20, 2018, 6:31 PM), <https://www.cnbc.com/2018/07/19/trump-lays-into-the-fed-says-hes-not-thrilled-about-interest-rate.html>.

⁶⁷ Liz Moyer, *Trump Says We Will Keep Criticizing Fed if It Continues to Raise Interest Rates*, CNBC (Aug. 20, 2018, 6:24 PM), <https://www.cnbc.com/2018/08/20/trump-criticizes-powell-and-fed-says-fed-should-do-whats-good-for-the-country-reuters.html>.

⁶⁸ Crutsinger, *supra* note 44.

Then, in December 2018, after the rate hike and the announcement of future hikes for 2019, the stock market fell precipitously,⁶⁹ in part because the Federal Reserve appeared determined to proceed with interest rate hikes, no matter the underlying economic conditions.⁷⁰ President Trump "raged" about the hikes and Federal Reserve officials moved to reassure markets that rate policy would be sensitive to changing economic conditions.⁷¹ By January 2019, the Federal Reserve had announced a pause in hikes altogether.⁷² At that point, it could not easily be determined how much influence President Trump's criticisms had and how much the change in Federal Reserve policy had to do with other factors.

But, then, President Trump went further in trying to influence Federal Reserve policy and these later efforts plainly did not succeed.⁷³ He announced on March 22, 2019, that he would nominate Stephen Moore to the Board of Governors⁷⁴ and said on April 4, 2019, that he would like to also nominate Herman Cain.⁷⁵ Both men were more noted for their political roles than for their economic expertise.⁷⁶ During this same period, President Trump called for the Federal Reserve to cut interest rates by 1% and to reengage in quantitative

⁶⁹ Thomas Franck, *Dow Dives 350 points, Closes at New Low for the Year After Fed Hikes Rates*, CNBC (Dec. 20, 2018, 12:49 PM), <https://www.cnbc.com/2018/12/19/stock-markets-dow-futures-edge-higher-federal-reserve-rate-decision.html>.

⁷⁰ Josh Barro, *Donald Trump Has Failed to Take Control of the Federal Reserve*, N.Y. MAG. (May 2, 2019), <http://nymag.com/intelligencer/2019/05/trump-has-failed-to-take-control-of-the-federal-reserve.html>.

⁷¹ *Id.*

⁷² Victoria Guida, *Fed Signals Pause in Rate Hikes, Sends Stocks Soaring*, POLITICO (Jan. 30, 2019, 5:55 PM), <https://www.politico.com/story/2019/01/30/fed-interest-rate-unchanged-1131714>.

⁷³ Barro, *supra* note 71 (this is what Barro described as "Trump has pushed his luck").

⁷⁴ Jennifer Jacobs et al., *Trump to Nominate Federal Reserve Board Critic Stephen Moore for a Seat on the Board*, FORTUNE (Mar. 22, 2019), <http://fortune.com/2019/03/22/trump-nominate-federal-reserve-board-stephen-moore/>.

⁷⁵ Alan Rappeport et al., *Trump Says He Wants Herman Cain, Former Pizza Executive, for Fed Board*, N.Y. TIMES (Apr. 4, 2019), <https://www.nytimes.com/2019/04/04/business/herman-cain-federal-reserve.html?module=inline>.

⁷⁶ See Patti Domm, *Herman Cain and Stephen Moore are the Beginning of Trump's 'Politicization' of the Fed: Barclays*, CNBC (Apr. 6, 2019, 12:52 PM), <https://www.cnbc.com/2019/04/06/trump-fed-picks-stephen-moore-herman-cain-will-politicize-central-bank.html>.

easing.⁷⁷ Earlier, in December 2018, reports surfaced that President Trump was asking aides if he had the legal authority to remove Chairman Powell over policy disagreements.⁷⁸

It can be said of these later actions that seemingly nothing came of them. Moore and Cain withdrew their candidacies under political fire, primarily over concerns about their past conduct with women.⁷⁹ The Federal Reserve is not considering a return to quantitative easing and, although there may yet be a rate cut, nothing like the suggested 1% is being contemplated.⁸⁰ Finally, President Trump later denied that he had ever considered firing Powell.⁸¹

Why did President Trump's attempts to control Federal Reserve policy have so little effect? It is only fair to the President to acknowledge that whatever the reasons are, it is not that the President was altogether wrong in his criticisms. In fact, given what happened in December 2018, one would have to say that the Federal Reserve would have adopted more expansionist policies, akin to those President Trump was proposing, if the Board of Governors had known what the future economic trends would turn out to be.

I think it is likely that the fundamental reason was not the weakness of nominees or the extreme nature of President Trump's suggestions, or even his lack of authority to fire the Chair—if that is even the case⁸²—that limited the effect of President Trump's efforts. Fundamentally, the elite opinion—in the Senate, economics, and in

⁷⁷ Jeff Cox, *Trump Calls on Fed to Cut Rates by 1% and Urges More Quantitative Easing*, CNBC (Apr. 30, 2019, 3:03 PM), <https://www.cnbc.com/2019/04/30/trump-calls-on-fed-to-cut-rates-by-1percent-and-urges-more-quantitative-easing.html>.

⁷⁸ Kevin Liptak, *Trump Asking Advisers if He Can Legally Fire Fed Chief*, CNN (Dec. 22, 2018, 6:42 PM), <https://www-m.cnn.com/2018/12/22/politics/trump-jerome-powell-fire-interest-rate-hike/index.html?r=https%3A%2F%2Fwww.google.com%2F>.

⁷⁹ Victoria Guida, *Trump Fed Pick Stephen Moore Withdraws Amid GOP Opposition*, POLITICO (May 2, 2019, 4:24 PM), <https://www.politico.com/story/2019/05/02/trump-says-stephen-moore-is-withdrawing-from-consideration-for-fed-1298561>.

⁸⁰ Patti Domm, *Federal Reserve Fends Off Efforts to Be Politicized by President Trump*, For Now, CNBC (May 2, 2019, 6:34 PM), <https://www.cnbc.com/2019/05/02/federal-reserve-fends-off-efforts-to-be-politicized-by-president-trump-for-now.html>.

⁸¹ See Martin Pengelly, *Trump Denies 'Ever Threatening to Demote' Fed Chairman Jerome Powell*, GUARDIAN (June 23, 2019), <https://www.theguardian.com/business/2019/jun/23/fed-chairman-jerome-powell-trump>.

⁸² See David C. Stockdale, *The Federal Reserve System and the Formation of Monetary Policy*, 45 U. CIN. L. REV. 70, 75 (1976) (indicating the lack of authority in a President to remove the Chair at will is by no means obvious).

business—strongly favored the policy independence of the Federal Reserve.⁸³

In the general context of President Trump's attacks, there certainly were specific criticisms of President Trump's push for lower rates and of the qualifications and character of these particular nominees, but even these criticisms tended to include arguments urging the need for independence of the Federal Reserve in general.⁸⁴ Although there was some of the same support for the President's efforts that were expressed in the context of judicial independence, most notably White House economic advisor Larry Kudlow's statement that "The President has every right in the world to nominate people who share his economic philosophy,"⁸⁵ overwhelmingly, opinion in Washington favored a Federal Reserve independent of political influence.⁸⁶ And that is why President Trump failed even to convince his own Party to support him.⁸⁷

In other words, the support for independence of the Federal Reserve was not personal, nor political, but mainly institutional. It is believed that the Federal Reserve deals with real forces that require technical skills to manage.⁸⁸ Politicians lack these skills. They also lack the long-term perspective to properly approach the difficult tradeoffs that must be considered. Also, voters, who will inevitably influence

⁸³ So much so that if that independence were really threatened, markets would fall. See Steve Goldstein, *Here's Where the Market Is, and Isn't, Pricing in a Loss of Fed Independence*, MKT. WATCH (Apr. 16, 2019, 6:14 PM), <https://www.marketwatch.com/story/the-market-isnt-pricing-in-an-erosion-of-fed-independence-or-is-it-2019-04-16>.

⁸⁴ See, e.g., Cassidy, *supra* note 1.

⁸⁵ *Id.*

⁸⁶ See, e.g., Mark Thoma, *Why the Federal Reserve Needs to Be Independent*, CBS NEWS (Nov. 12, 2009, 8:42 AM), <https://www.cbsnews.com/news/why-the-federal-reserve-needs-to-be-independent/>.

⁸⁷ See, e.g., Damian Paletta et al., *Four Senate Republicans Signal Opposition to Trump's Plan to Put Herman Cain on Federal Reserve Board, All but Sinking Nomination*, WASH. POST (Apr. 11, 2019, 9:16 PM), https://www.washingtonpost.com/powerpost/pelosi-slams-trumps-fed-picks-as-totally-unsuited-unqualified/2019/04/11/8dfebc5c-5c5e-11e9-842d-7d3ed7eb3957_story.html.

⁸⁸ See, e.g., Sheila Tschinkel, *The Federal Reserve Needs to Remain Independent of the Whims of Politicians*, CONVERSATION (July 23, 2018, 6:23 AM), <http://theconversation.com/the-federal-reserve-needs-to-remain-independent-of-the-whims-of-politicians-100367>.

politicians in policy disputes, have no understanding of what is needed.⁸⁹

What is most surprising about this consensus is that in American history, economics was considered to be the eminent policy choice. This was, after all, the point that Justice Oliver Wendell Holmes was making in his famous *Lochner* dissent.⁹⁰ But now, for most Americans, despite the so-called socialist moment in the Democratic Party, "it is easier to imagine the end to the world than an end to capitalism," in the formulation quoted by Mark Fisher in the 2009 book, *Capitalist Realism*.⁹¹ If this is so, support for the independence of the Federal Reserve is easy to understand. Just as we would not vote on the best trajectory of a spaceship to Mars, we should not vote on the best way to deal with the natural force of the market. Thus, independence follows from the real quality of economics. Independence follows ontology.

In contrast, we can now well imagine differing conceptions of justice and law. That is the reason that support for the independence of the courts now lags so far behind support for the independence of the Federal Reserve.

III. LESSONS FROM THE "SUCCESS" OF THE ATTACK ON THE INDEPENDENCE OF THE FEDERAL COURTS

If the Federal Reserve is a relatively recent strange institution, the federal courts have always occupied a controversial position in the government. Federal judges are appointed for life; they can only be removed by the process of impeachment in the House and removal by a 2/3 vote in the Senate.⁹² Further, the salaries of federal judges

⁸⁹ For an example of this kind of thinking about Federal Reserve independence, see Bruce Bartlett, *Trump Puts Fed Independence at Risk with Cain and Moore Picks, but It will Survive*, USA TODAY (Apr. 8, 2019, 6:00 AM), <https://www.usatoday.com/story/opinion/2019/04/08/donald-trump-herman-cain-stephen-moore-federal-reserve-column/3390267002/>. Bartlett has a few snide, partisan asides, but his basic support for Federal Reserve independence was reflected across the aisle.

⁹⁰ *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁹¹ MARK FISHER, *CAPITALIST REALISM: IS THERE NO ALTERNATIVE?* (2009) (Fisher attributes the quote to Fredric Jameson and Slavoj Žižek).

⁹² *Impeachment of Federal Judges*, CONST. L. REP., <https://constitutionallawreporter.com/article-03-section-01/impeachment-of-federal-judges/> (last visited Nov. 23, 2019).

cannot be reduced.⁹³ The federal courts can be influenced only indirectly; for example, by highly controversial exercises of congressional control over jurisdiction.⁹⁴

In other words, the independence of the federal courts in general, and the Supreme Court in particular, has been extremely well protected, both in conception and in practice. The federal courts have always been an exception to democratic norms, culminating in the well-known democratic dilemma popularized by Alex Bickel.⁹⁵

The justification for this judicial independence is familiar to every law student—courts are independent of political influence so that the United States remains "a government of laws and not of men," in the famous phrase by Chief Justice John Marshall in *Marbury v. Madison*.⁹⁶ Federal judges are meant to decide cases by reference to the law and not to what some politician or office holder wants. We therefore describe the result of judicial independence as the rule of law.⁹⁷

What I am calling here the "success" of attacks on independence of the federal courts is not that this structure has changed, which of course it has not, or even that judicial decisions have been altered, which they have not, or at least not yet. Rather, what has changed is the assumption that there is something objectively discoverable that we can term "the law"—in other words, that some judicial decisions are right, or at least more right, while others are wrong, or at least more wrong. If, instead, everything now depends on which President appoints which Judge or Justice, there can be no rule of law for judicial independence to protect.

To see what I mean, we need to look more closely at the two recent attacks on judicial independence: one by President Trump and one by Democratic Party Presidential candidates who are currently calling for Court-packing.

⁹³ U.S. CONST. art. III, § 1.

⁹⁴ See generally Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (explaining the classic formulation of the issue).

⁹⁵ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–20 (1962).

⁹⁶ 5 U.S. (1 Cranch) 137, 165 (1803). See also THE FEDERALIST NO. 78 (Alexander Hamilton).

⁹⁷ David Boies, *Judicial Independence and the Rule of Law*, 22 WASH. U. J. L. & POL'Y 57 (2006).

The first instance was the criticism by President Trump that culminated in the notorious Obama Judge/Trump Judge exchange between the President and Chief Justice John Roberts.⁹⁸ The episode began with a November 19, 2018, decision by District Judge Jon Tigar that temporarily stayed a Presidential proclamation prohibiting migrants from applying for asylum if they made the request at someplace other than a legal entry point.⁹⁹

Judge Tigar's decision infuriated President Trump, who not only attacked the Judge as "an Obama Judge," but critiqued the Ninth Circuit as a whole: "That's not law. Every case that gets filed in the Ninth Circuit we get beaten."¹⁰⁰ This particular Presidential attack on a Federal District Judge got the attention of Chief Justice Roberts, who issued a pointed statement to the Associated Press:

We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. . . . That independent judiciary is something we should all be thankful for.¹⁰¹

That response by the Chief Justice led in turn to this Presidential rejoinder:

Sorry Chief Justice John Roberts, but you do indeed have "Obama Judges," and they have a much different point of view than the people who are charged with the safety of our country. It would be great if the 9th Circuit was indeed an "independent judiciary," but if it is, why...are so many opposing view (on Border and Safety) cases filed there, and why are a vast number of those cases overturned.¹⁰²

It is important to note that, in his tweets, President Trump did not appear to be attacking "Obama judges" for being partisan. These judges just have a "different point of view" on the interpretation of

⁹⁸ William Cummings, *US Does Have "Obama Judges": Trump Responds to Supreme Court Justice John Roberts' Rebuke*, USA TODAY (Nov. 21, 2018, 6:37 PM), <https://www.usatoday.com/story/news/politics/2018/11/21/john-roberts-trumpstatement/2080266002/>.

⁹⁹ *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018); Miriam Jordan, *Federal Judge Blocks Trump's Proclamation Targeting Some Asylum Seekers*, N.Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/judge-denies-trump-asylum-policy.html?module=inline>.

¹⁰⁰ *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUST. (June 5, 2017), <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts>.

¹⁰¹ Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, AP NEWS (Nov. 21, 2018), <https://www.apnews.com/c4b34f9639e141069c08cfe1e3deb6b84>.

¹⁰² Donald Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 12:51 PM), <https://twitter.com/realdonaldtrump/status/1065346909362143232>.

the law. These judges are wrong on what other courts and the Supreme Court say the law is, which makes them incompetent—that is why they are ultimately reversed—but not partisan. President Trump was not claiming that the judges rule the way they do because a Republican administration is issuing the regulations.

Thus, this attack on the judiciary was, in part, similar to the attack on the Federal Reserve referenced above. President Trump was claiming, in both instances, that the policies being furthered were a professional mistake—the Federal Reserve should have known that lower interest rates were needed and the Ninth Circuit judges should have known that their decisions would be reversed.

But there is a sense in which the attack on the judiciary was different because the President was claiming that these judicial errors were willful. In President Trump's view, the Federal Reserve made an honest mistake, later corrected, about interest rates.¹⁰³ In contrast, the President was claiming that the Ninth Circuit continually makes the same mistakes, knowing the decisions will be reversed, because the Obama judges disagree with what the Supreme Court and how other courts interpret and apply the law. It is an honest disagreement, but not one that a lower court is supposed to perpetuate with a higher court.

This claim about differing views on the law, is what Randy Barnett, the nation's leading conservative constitutional theorist, was supporting when he tweeted a defense of President Trump on the day of the Roberts response: "If you don't think presidents of each party (try to) select judges with differing judicial philosophies, you haven't been paying attention. Roosevelt surely did. And he wasn't the first nor the last. The argumentation on this one is truly bizarre."¹⁰⁴

¹⁰³ See Doina Chiacu & Jennifer Ablan, *Trump Says U.S. Federal Reserve Too Proud to Admit Mistake*; REUTERS (Aug. 7, 2019, 9:03 AM), <https://www.reuters.com/article/us-usa-fed-trump/trump-says-federal-reserve-too-proud-to-admit-mistakes-idUSKCNIUXIHH>.

¹⁰⁴ See Bruce Ledewitz, *The Obama Judge and the Foundations of the Rule of Law*, JURIST (Dec. 2, 2018, 6:21 PM), <https://www.jurist.org/commentary/2018/12/the-obama-judge-and-the-foundations-of-the-rule-of-law/>. The reader may feel that I make too much of what is, after all, a tweet: a medium of spontaneous and half-formed thought. But I am looking at a cultural phenomenon, not an argument. The fact that people agreed instinctively with President Trump's position is what is important. Although the tweet was deleted, Barnette does not deny writing it.

This response is similar to the aforementioned statement by Larry Kudlow referencing nominees to the Federal Reserve—that the President is entitled to nominees "who share his economic philosophy."¹⁰⁵

A moment's reflection, however, suggests that the notion of philosophical difference makes little sense in the context of Judge Tigar's decision. Unlike the choice between high and low interest rates in the pursuit of sustainable economic growth, which could reflect differing economic approaches, it is not clear what philosophical or jurisprudential position President Trump was promoting in his criticism of Judge Tigar. Judge Tigar ruled that the proclamation in question violated the Immigration and Naturalization Act and that there were serious questions about whether the notice-and-comment provisions of the Administrative Procedures Act had to have been complied with.¹⁰⁶ On its face, this same decision could have been issued by any District Judge, unless one assumes that Judge Tigar is partisan, and thus ruled the way he did simply because the President was Donald Trump, this appears to be an ordinary legal issue and not in any way a philosophical or political one.

In fact, Judge Tigar's decision seems broadly similar to a decision in February 2018, by Senior Federal District Court Judge Sam Cummings, an appointee of President Ronald Reagan—that a criminal history 'guidance document' issued during the Obama Administration by the Equal Employment Opportunity Commission was unenforceable because it had not complied with the same notice-and-comment provisions of the Administrative Procedures Act.¹⁰⁷ Yet, Judge Cummings's decision was heralded by John-Michael Seibler of the Heritage Foundation as vindicating the Rule of Law.¹⁰⁸ Seibler presumably shares the same judicial philosophy that Randy Barnett does. Thus, these decisions are not obviously matters of differing philosophy.

¹⁰⁵ Doina Chiacu & Howard Schneider, *Cain, Moore Nominations for Federal Reserve Seats on Track: Kudlow*, REUTERS (Apr. 7, 2019, 9:32 AM), <https://www.reuters.com/article/us-usa-fed/cain-moore-nominations-for-federal-reserve-seats-on-track-kudlow-idUSKCNIRJ0EX>.

¹⁰⁶ *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 843–44 (N.D. Cal. 2018).

¹⁰⁷ See *Texas v. EEOC*, No. 5:13-C-255-C, 2018 U.S. Dist. LEXIS 30558, *7–8 (N.D. Tex. Feb. 1, 2018).

¹⁰⁸ John-Michael Seibler, *Court Ruling Rebukes Obama-Era Practice That Flouted Rule of Law*, HERITAGE FOUND. (Feb. 27, 2018), <https://www.heritage.org/courts/commentary/court-ruling-rebukes-obama-era-practice-flouted-rule-law>.

Of course, every President prefers judicial rulings emphasizing the prerogatives of the President. But Presidential prerogative by itself is not what is usually meant by a judicial philosophy.

All of this suggests that Chief Justice Roberts was right to argue that Judge Tigar's ruling had nothing whatsoever to do with the political or jurisprudential positions of the President who appointed him.¹⁰⁹ If Judge Tigar was agreeing with anyone, he was agreeing with Judge Cummings. He was not performing as an "Obama Judge."

Yet, as I have pointed out elsewhere, there was very little support for Chief Justice Roberts, despite the strength of his position.¹¹⁰ It was only months later, in June 2019, that Timothy Egan, a New York Times columnist, wrote that President Trump's referencing "Obama judges" and Mexican judges,¹¹¹ was "dangerous stuff."¹¹² No comparable criticism was rendered at the time President Trump launched his attack. Even Egan did not note, and perhaps did not realize, that when he complained that President Trump does not exhibit respect for the federal courts, no one else was exhibiting respect for the independence of the federal courts, either.

That is, in part, what I mean by the "success" of the attack on the independence of the federal courts. Chief Justice Roberts failed to change the perception that there are indeed Obama and Trump judges.¹¹³ He failed to persuade the public, and certainly failed to persuade elite legal opinion, that judges rule in cases based on the law. Instead, people generally agreed with President Trump's position that "Obama judges" rule one way and Trump judges rule another.¹¹⁴

It is especially noteworthy that, in his tweets, President Trump was also not claiming that "his" judges just follow the law and that

¹⁰⁹ Ledewitz, *supra* note 105.

¹¹⁰ *Id.*

¹¹¹ President Trump had done that years before in reference to Judge Curiel. See Z. Bryon Wolf, *Trump's Attacks on Judge Curiel Are Still Jarring to Read*, CNN (Feb. 27, 2018, 8:24 PM), <https://www.cnn.com/2018/02/27/politics/judge-curiel-trump-border-wall/index.html>.

¹¹² Timothy Egan, *Trump Destroys American Greatness from Within*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/2019/06/07/opinion/trump-july-4.html>.

¹¹³ Adam Liptak, *John Roberts, Leader of Supreme Court's Conservative Majority, Fights Perception That It Is Partisan*, N.Y. TIMES (Dec. 23, 2018), <https://www.nytimes.com/2018/12/23/us/politics/chief-justice-john-roberts-supreme-court.html>.

¹¹⁴ See, e.g., *id.*

"Obama judges" bend and manipulate the law. He seemed to be conceding that all judges rule in accordance with their personal orientation. But, if the outcome of legal issues generally depends on who appointed the judge, in the sense that Presidents appoint persons reflecting a certain viewpoint, what does judicial independence amount to? The point of independence is to prevent political influence. If the American people believe that the political influence is already internalized—that there are, in effect, "sides" in courts, just as there are in Congress—a structure of independence is irrelevant. At that point, why not just let the politicians who do the appointing make the decisions directly?

Republicans, who are desperately trying to confirm as many federal judges as possible before the election of 2020—their own version of court-packing—certainly believe that "their" judges will rule "their" way.¹¹⁵ Senate Majority Leader Mitch McConnell makes no secret of this. He said as much at the 2018 Federalist Society National Lawyers Convention:

The closest thing we can do to have a permanent impact is to confirm judges and transform the judiciary. [A]nd we are going to keep on doing it for as long as we can. (Standing Ovation)¹¹⁶

Those words, "permanent impact," tell us all we need to know about the expectations concerning "Trump judges." Everyone in the room listening to McConnell expected a certain pattern of voting from the judges placed on the federal courts, until their death or retirement from the bench.

The reader should remember that this pattern of voting has nothing to do with President Trump personally or even with his political agenda. As mentioned above, even President Trump understands that there are larger issues here than loyalty to him personally. Rather, the commitment is thought to be a matter of jurisprudential orientation.

Democrats equally reject the idea of independent federal judges. Senate Minority Leader Chuck Schumer's response essentially agreed

¹¹⁵ Sam Berger, *Conservatives are Already Packing the Courts. Democrats Must Respond to the Power Grab*, USA TODAY (May 7, 2019, 10:42 AM), <https://www.usatoday.com/story/opinion/2019/05/07/conservatives-packing-courts-democrats-must-respond-column/3564022002/>.

¹¹⁶ Ledewitz, *supra* note 105.

with President Trump and, while purporting to support an independent judiciary, actually referred, without intended irony, to the Chief Justice as a "Republican[.]"¹¹⁷

In fact, the Democrats have their own plan for destroying judicial independence. Ten of the leading Democratic candidates for the Presidential nomination have called for, or are open to the idea of, Court-packing—adding more Justices to the Supreme Court beyond the current number of nine Justices, which is only set by statute—while eleven have either criticized or expressed reservations about the idea.¹¹⁸ The Court-packing proposal is made with the expectation that the current Supreme Court will eventually render decisions that outrage the Left. Since it is widely believed that the Republicans stole the Justice Neil Gorsuch seat by refusing to even hold a hearing on the nomination of Judge Merrick Garland, these Presidential candidates argue that adding Justices just means righting a wrong.¹¹⁹

While this division among the Presidential candidates sounds like the Democrats are split on the issue, the opposition to the idea of Court-packing is much weaker than is the support. The test of real opposition to Court-packing will come when the Supreme Court actually rules 5-4 in a case important to activist Democrats, such as overruling *Roe*.¹²⁰ Obviously, adding Justices because one does not like the way the Court majority is voting weakens, if it does not destroy,

¹¹⁷ Lukas Mikelionis, *Eager to Slam Trump, Schumer Contradicts Himself in Support of Chief Justice Roberts, Critics Say*, FOX NEWS (Nov. 24, 2018), <https://www.foxnews.com/politics/schumer-praises-justice-roberts-for-standing-up-to-trump-obama-judges-comment-slams-roberts-for-partisan-decisions>.

¹¹⁸ This is the summary in the Washington Free Beacon of interviews of the candidates on the issue conducted by the New York Times. David Rutz, *NYT: Ten Democratic Candidates Open to Packing Supreme Court*, WASH. FREE BEACON (June 19, 2019, 3:05 PM), <https://freebeacon.com/politics/ten-democratic-candidate-say-theyre-open-to-packing-supreme-court/>; see also Alexander Burns et al., *Meet the Candidates: 14. 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 Nov. 23, 2019). The leading Democratic candidate, Joe Biden, did not participate in the video interviews. See Alexander Burns et al., *Meet the Candidates: 18 Questions. 21 Democrats. Here's What They Said*, N.Y. TIMES, <https://www.nytimes.com/interactive/2019/us/politics/2020-candidate-interviews.html?action=click&module=Top%20Stories&pgtype=Homepage> (last visited Nov. 23, 2019).

¹¹⁹ Joan Biskupic, *Democrats Look at Packing the Supreme Court to Pack the Vote*, CNN (May 31, 2019, 6:04 AM), <https://www.cnn.com/2019/05/31/politics/democrats-supreme-court-packing-politics/index.html>.

¹²⁰ See *Roe v. Wade*, 410 U.S. 113 (1973).

judicial independence. This is especially clear since the Republicans can always add even more Justices to the Supreme Court once they regain power.

The larger point remains the same as it is with Senator McConnell. You would not bother to pack the Supreme Court with appointees of your own unless you expected them to vote in a certain way most of the time, for at least a long time. Otherwise, Court-packing would not be worth it.

So, the Democrats must also believe that there are Obama judges—or whoever will nominate Judges based on the next Presidential election winner—who will vote differently from all those judges that McConnell is busy packing to the bench. Judicial independence is not so much destroyed in this context as it is rendered irrelevant.

The prospect of Court-packing urged by Democratic Presidential candidates has gone largely unchallenged by the legal academy.¹²¹ Only a few nationally-regarded legal academics have criticized the idea.¹²² The American Association of Law Schools is not holding an emergency session at its January 2020 meeting to discuss and head it off.¹²³

¹²¹ An earlier Republican oriented plan to expand the judiciary generally, in part to undo the Obama legacy, did draw criticism, notably from Richard Primus on the Harvard Law Review blog. See Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/>. See generally Ilya Somin, *The Case Against Court-Packing*, WASH. POST: VOLOKH CONSPIRACY (Nov. 27, 2017, 10:30 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/27/the-case-against-court-packing/?utm_term=.6e0986cc22e5.

¹²² The current plans have been criticized by Larry Tribe, in addition to Professor Primus and Ilya Somin. Ilya Somin, *Dangers of Growing Support for Court-Packing*, REASON: VOLOKH CONSPIRACY (Mar. 20, 2019, 10:53 PM), <https://reason.com/2019/03/20/dangers-of-growing-support-for-court-pac/>.

¹²³ The extreme partisanship, hopefully unconscious, but who knows, of the AALS governing elite must be especially galling to conservatives. The theme of the 2020 meeting is "Pillars of Democracy: Law, Representation, and Knowledge." See *Pillars of Democracy: Law, Representation, and Knowledge*, ASS'N AM. L. SCH., <https://amaals.org/theme/> (last visited Nov. 23, 2019). The theme description page points to two threats to judicial independence: "personal attacks on judges, along with increased violence against certain minorities . . ." *Id.* Guess who is responsible for that? Yet, there is no mention of Democratic Presidential candidate proposals of Court-packing. Do these people listen to themselves? Aren't they embarrassed by their obvious political bias?

There is no national defense of the rule of law; there is mostly silence.

In other words, unlike the example above of the reaction to Presidential criticism of the Federal Reserve, mainstream and establishment legal voices, on both the Left and the Right, have not rallied to defend the independence of the courts. Why this difference?

One way to think about the difference is in terms of truth—that is, finding correct answers to problems or issues. It is thought that economic decisions should not depend on a certain viewpoint by the appointing power because some economic viewpoints are wrong and lead to bad outcomes. That is why the Federal Reserve must be independent. But in the case of legal decisions, by this prevailing view, no decision is right or wrong and so decisions should, and do, reflect the position of the appointing person. I will return to this theme in the next section.

But there is a more immediate and destructive assumption behind Court-packing. Even if judicial decision cannot be thought right or wrong in some absolute sense, they might still be considered more or less right or wrong by other standards. So, why wouldn't judges, in particular Supreme Court Justices, come to their own, politically un-dependable, conclusions about legal issues? Why would Court-packing work in the sense of consistently producing politically desirable results? Why wouldn't Justices change their minds once they are on the Court?

Surely the Republicans should know better than to rely on Justices voting in a certain way. They put Harry Blackmun, Sandra Day O'Connor, David Souter and Anthony Kennedy on the Supreme Court.¹²⁴ Those four Justices cast numerous votes that current Republicans criticize.¹²⁵ Why won't the same thing happen with these recently appointed judges and Justices in the future?

¹²⁴ See *Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 23, 2019); see also *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 23, 2019). And I am not even noting that Justice Stevens was nominated by Gerald Ford and Justice Brennan by Dwight Eisenhower.

¹²⁵ Specifically, regarding abortion cases, Justice Blackmun wrote *Roe*, 410 U.S. at 113, and Justices O'Connor, Kennedy, and Souter wrote the lead opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

Similarly, what is to prevent a Justice appointed by Democrats to the Supreme Court from concluding that *Roe* was a mistake and that the abortion issue would be better left to the States? Or, if that example seems too unlikely, what is to prevent such a Justice from reinforcing the decision in *Citizens United*?¹²⁶ After all, the outcome of the original campaign finance case, *Buckley v. Valeo*,¹²⁷ certainly was supported by liberals on the Court. Only Justice Byron White dissented on the basic conclusion that Congress' lacked the power to curb campaign spending.¹²⁸

In a recent podcast debate concerning the stakes of the 2020 Presidential election, Professor Bruce Ackerman criticized "secret" interviews of potential Supreme Court nominees by the Federalist Society.¹²⁹ Are those interviews the reason that the Right is so confident it will get what it wants from these judges in the future? If so, perhaps the Democrats are dreaming that they will be able to do the same thing by conducting their own interviews.

But what would you ask a potential judicial nominee in such an interview? No one knows what legal issues will come up in the future, even in the near future. Anyway, why wouldn't the potential nominees give the same pablum for answers that nominees do at Senate Judiciary Committee hearings (i.e., "Senator I will follow the law."). If the nominees did not answer in that manner during an interview, wouldn't the questioners be running the risk of a subpoena to testify before the Senate if the candidate became a judicial nominee?

At least a Federalist Society representative could, theoretically, ask whether potential nominees will practice originalism—or presumably would already know that they will. But this presents a real problem. A lot of law that the Right likes has nothing to do with

¹²⁶ *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹²⁷ 424 U.S. 1 (1976).

¹²⁸ Justice Stevens did not participate. *Id.* at 144.

¹²⁹ See *The Constitutional Stakes of the 2020 Election*, NAT'L CONST. CTR. (June 6, 2019), <https://constitutioncenter.org/debate/podcasts/the-constitutional-stakes-of-the-2020-election>.

Just to be clear, I don't have the slightest idea whether such interviews were held. I am writing here about the theoretical problems in conducting such interviews.

originalism—most free speech law, for example.¹³⁰ A more specific example of the irrelevance of originalism comes from *Trinity Lutheran Church*,¹³¹ in which the Free Exercise Clause was held, by conservative Justices, to require government funding of secular Church activities.¹³² Whatever one thinks of that outcome, the decision had nothing—nothing—to do with any original understanding of the Free Exercise Clause.¹³³ Yet no one on the Right wants to overrule *Trinity Lutheran Church*.

Of course, the Left does not even have a constitutional theory.¹³⁴ So, any interviewers would have to ask a series of questions about a series of potential cases. It is hard to imagine any potential Supreme Court nominee answering such questions.

What exactly is going on? How is it that, in the words of the late singer/poet Leonard Cohen, "everybody knows"¹³⁵ how these potential Justices and judges will vote far into the future when no one can possibly actually know that? Even people who oppose Court-packing assume that it could be successful in the sense of changing judicial outcomes.¹³⁶

My admittedly provisional answer is that there now is, in fact, loyalty among judicial nominees. But, it is not loyalty to a particular politician; it is loyalty to the political Party coalition that put the judge or Justice on the bench. That is what seems to me to explain the otherwise inexplicable result by originalists in *Trinity Lutheran Church*. Religious believers put President Trump in the White House.

¹³⁰ See, e.g., Bruce Ledewitz, *Has Nihilism Politicized the Supreme Court Nomination Process?*, 32 *BYU J. PUB. L.* 1, 21 (2017) (discussing *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)).

¹³¹ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

¹³² The activity in the case was repaving a Church playground. *Id.* at 2017.

¹³³ See Bruce Ledewitz, *'Trinity' Case Marks Death of Originalism*, *PHILA. INQUIRER* (July 7, 2017, 3:01 AM), https://www.inquirer.com/philly/opinion/commentary/20170707__Trinity__case_marks_end_of_originalism.html.

¹³⁴ See Louis Michael Seiman, *Can Constitutionalism be Leftist?*, 26 *QUINNIPIAC L. REV.* 557, 557–58 (2008).

¹³⁵ Leonard Cohen, *Everybody Knows (Live in Dublin)*, *YOUTUBE* (Nov. 12, 2014), <https://www.youtube.com/watch?v=8IfmiKnZi3E>.

¹³⁶ See Josh Blackman, *Don't Try to Expand the Number of Supreme Court Justices*, *NAT'L REV.* (July 5, 2018, 2:15 PM), <https://www.nationalreview.com/2018/07/supreme-court-nominee-court-packing-not-feasible/> (illustrating the immense—and negative—changes that would arise from court-packing).

They are a key component of the coalition that must be protected. Thus, the decision protected them.

Similarly, I believe loyalty to the Party coalition explains the result in *Heller*, the second amendment case, at least as well as does reliance on the contestable historical evidence in the case.¹³⁷ Gun rights activists are an important part of the Republican Party coalition.¹³⁸ In parallel, judges put on the bench by Democrats in the near future would know better than to rule against abortion or gay rights. Even though he was called a "moderate,"¹³⁹ no one had any doubt about how Merrick Garland would have voted on these matters.

If all this sounds somehow corrupt, that is not my meaning. Rather, just as we have had "movement lawyers" for years—I was one, for example, litigating death penalty cases—we now have "movement judges." The real change is just that the two-Party coalitions are now so very well defined and the voters so predictable in their votes. The judges are just doing the same thing as the rest of us—thinking, consciously or unconsciously, in terms of "their side."

To illustrate the difference between coalition loyalty and corruption, contrast *Bush v. Gore*,¹⁴⁰ with its purely partisan reasoning so extreme that no one wanted to take personal responsibility for the decision or see it ever applied again—not that the willingness of liberals on the Supreme Court to see a southern State Supreme Court change the outcome of a Presidential election looked any better—with the gerrymander decision in *Rucho v. Common Cause*.¹⁴¹ Unlike in *Bush*, Chief Justice Roberts's holding that gerrymandering presents a political question is not doctrinally indefensible. Rather, *Rucho* is an example of a partisan lineup of Justices rendering a total partisan

¹³⁷ *District of Columbia v. Heller*, 554 U.S. 570 (2008). I agree with Saul Cornell that in the *Heller* opinion, "evidence is selectively gathered and interpreted to produce a preordained conclusion." See Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same As the Old Boss"*, 56 UCLA L. REV. 1095, 1098 (2009).

¹³⁸ See, e.g., Patrick J. Charles, *The Second Amendment in the Twenty-First Century: What Hath Heller Wrought?*, 23 WM. & MARY BILL RTS. J. 1143, 1156–57 (2015) ("[T]he evidence that the Republican party has become intertwined with gun advocacy groups is overwhelming.").

¹³⁹ Noah Feldman, *Obama Makes a Smart Bet for the Supreme Court*, BLOOMBERG (Mar. 16, 2016, 11:40 AM), <https://www.bloomberg.com/opinion/articles/2016-03-16/merrick-garland-s-supreme-court-nomination-is-a-smart-bet>.

¹⁴⁰ 531 U.S. 98 (2000).

¹⁴¹ 139 S. Ct. 2484 (2019).

victory to one side in a time of hyper-partisanship and genuine danger to democracy.¹⁴² It is hard to believe that the lineup and decision would have been the same had the gerrymandering shoe genuinely been on the other foot.¹⁴³ As it is, Republicans overwhelmingly perpetrate gerrymanders, not because they are more partisan, but because Democratic voters tend to clump geographically.¹⁴⁴

Unfortunately, judges and Justices are not actually doing the same thing that the rest of us are doing. Judges are supposed to be devoted to something objective: the rule of law.¹⁴⁵ There is supposed to be something objective in the law itself. Votes on the Supreme Court and lower courts should not generally line up in predictably partisan directions.¹⁴⁶ To the extent that they do, the rule of law is already destroyed.

Even if there is something to my observation about movement judging, I admit that it is an exaggeration. There are plenty of instances in which federal judges vote in ways that frustrate the coalition that put them on the bench.¹⁴⁷ I just mean that the tendency

¹⁴² See generally Bruce Ledewitz, *SCOTUS Gerrymandering Case: Roberts Didn't Defend Constitutional Democracy*, PA. CAPITAL-STAR (July 2, 2019), <https://www.penncapital-star.com/commentary/scotus-gerrymandering-case-roberts-didnt-defend-constitutional-democracy-bruce-ledewitz/> (stating that the fundamental disagreement in *Rucho* was politically existential).

¹⁴³ Of course, this goes for the four-Justice dissent as well. It is just this kind of perceived partisanship that leads Zachary Price to propose that the Justices think about the partisan implications of their decisions before rendering them. See Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1280–81 (2019).

¹⁴⁴ See, e.g., Issie Lapowsky, *Is the US Leaning Red or Blue? It all Depends on Your Map*, WIRED (July 26, 2018, 11:33 AM), <https://www.wired.com/story/is-us-leaning-red-or-blue-election-maps/>.

¹⁴⁵ See *Overview – Rule of Law*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> (last visited Nov. 23, 2019).

¹⁴⁶ Moments like the great opinion by Justice Scalia, joined by Justice Stevens, in *Hamdi* should be the norm. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–79 (2004) (Scalia, J., dissenting). There were no Obama or Trump judges in that opinion.

¹⁴⁷ See, e.g., Somin, *supra* note 123 (“[T]he recent Ninth Circuit decision against the administration’s efforts to severely restrict migrants’ opportunities to apply for asylum (authored by prominent conservative judge Jay Bybee), and a variety of decisions on such important issues as DACA, the administration’s family-separation policy (struck down by a Republican-appointed judge who ordered the administration to reunite the separated children with their families), and freedom of speech.”).

toward coalition loyalty is present and is stronger, much stronger, than it has ever been in the past.

This tendency to movement judging is the source of Judge Harvie Wilkinson's great lament. As he wrote ten years ago, anticipating this moment, "[i]t may no longer be possible to judge a Supreme Court ruling by anything other than result."¹⁴⁸

What is the point of judicial independence in a world like that? The reader should also remember that even if the argument made here about movement judging is totally inaccurate, the popular reaction to the attacks on judicial independence demonstrate that large segments of the public believe it.¹⁴⁹ So, even if judges in fact change utterly upon donning the robes, and even if they feel that they have the right and the duty to change their views because of what their understanding of the law becomes, no one will believe them when they say these things—just as no one believed Chief Justice Roberts when he defended judicial independence.¹⁵⁰ That is the really troubling success of the attack on the independence of the federal courts.

How did we come to this awful moment? If the independence of the Federal Reserve is respected because economic forces are real and there would be consequences from professionally incompetent decisions, it follows that the independence of the federal courts is not respected because the opposite is true. The decisions of the courts are viewed as just matters of opinion.¹⁵¹ There is no sense in which they can be said to be right or wrong other than in preferred result, as Judge Wilkinson observed.¹⁵² And those results merely reflect shifting political power. There is no overall trend in history that reflects truth.¹⁵³

¹⁴⁸ J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 257 (2009).

¹⁴⁹ Boies, *supra* note 98, at 58 (stating that the principle of judicial independence is particularly under attack today).

¹⁵⁰ Liptak, *supra* note 114.

¹⁵¹ See, e.g., Linda Greenhouse, *The Supreme Court, the Census Case and the Truth*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/opinion/supreme-court-census-trump.html>.

¹⁵² Wilkinson, *supra* note 149.

¹⁵³ Bruce Ledewitz, *Justice Harlan's Law and Democracy*, 20 J. L. & POLS. 373, 457 (2004).

We have strayed a long way from the view of Justice John Harlan that judicial judgment would be subject to historical forces.¹⁵⁴ Harlan thought that decisions that stray from the national consensus would not long survive.¹⁵⁵ We have strayed a long way from the view of Charles Black that justice is real.¹⁵⁶ And, maybe worst of all, we have strayed a long way from the commitment of Martin Luther King, Jr., that justice will not forever be denied.¹⁵⁷

These men would consider the Supreme Court also to be dealing with real forces and also to be subject to consequences when the Court "gets it wrong." In their world, there had to be judicial independence so that the courts could "get it right." We no longer live in that world. We live in a world of nihilism, materialism and relativism. We must now consider what that world proclaims and what those implications are for judicial independence and the rule of law.

IV. NIHILISM, JUDICIAL INDEPENDENCE AND THE RULE OF LAW

*[T]he arc of the moral universe is long, but it bends toward justice.—Dr. Martin Luther King, Jr.*¹⁵⁸

*I am at the end of my career. Everyone dies, and I...don't believe in the Homeric idea that...immortality comes by...having odes sung about you over the centuries.—Attorney General William Barr*¹⁵⁹

By nihilism, I mean both the view that values are merely subjective constructs—that one cannot gain real knowledge about right and wrong, for example—and the corresponding position that history cannot be said to have a direction toward the manifestation of any

¹⁵⁴ *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("[T]radition is a living thing.").

¹⁵⁵ Ledewitz, *supra* note 154, at 374, 456.

¹⁵⁶ CHARLES L. BLACK, JR., *THE HUMANE IMAGINATION* 37 (1986) ("[T]he widespread modern view that only delusion beckons when we conceive of 'justice' as having anything remotely like the objective reality which invests the positive institutions of law. We have no warrant, say the followers of this view, for supposing that there exists any 'justice' which can be 'discovered'; 'justice' is merely a name for our own reactions.").

¹⁵⁷ See MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.*, (James M. Washington ed., 1986).

¹⁵⁸ *Id.* at 252.

¹⁵⁹ Julio Rosas, *William Barr Responds to Critics of His Reputation: 'Everyone Dies'*, WASH. EXAMINER (May 31, 2019, 9:15 AM), <https://www.washingtonexaminer.com/news/william-barr-responds-to-critics-of-his-reputation-everyone-dies>.

value, whether truth, beauty, goodness, or justice. This position is the repudiation of the quotation above from Dr. King.

American public life, in general, and law, in particular, have become saturated with nihilism in both these senses.¹⁶⁰ The success of the attack on judicial independence and the decline in public understanding of, and support for, the rule of law, roots in this nihilism.¹⁶¹

The result of this trend is the fatalism and pessimism of William Barr, above.¹⁶² Although this clear expression came as something of a shock—people do not regularly invoke and dismiss Homer in American public life—there was no strong public repudiation of his words.¹⁶³ It is often said that this is an age of pessimism.¹⁶⁴ The clearest confirmation of that statement is that a person of importance in public life—the U.S. Attorney General—can say openly that he does not care what future generations will say about him. He seems to mean that the whole notion of honor is empty; that history will be just as partisan and biased as is the current moment and that the truth will not out.¹⁶⁵

¹⁶⁰ See, e.g., Chris Bodenner, *The U.S. Has Fallen into a State of Political Nihilism*, ATLANTIC (Dec. 12, 2016, 12:00 PM), <https://www.theatlantic.com/notes/2016/12/state-of-utter-political-nihilism/510314/>.

¹⁶¹ John Yoo & Robert Delahunty, *The Foolish Court-Packing Craze*, NAT'L REV. (July 19, 2018, 6:30 AM), <https://www.nationalreview.com/2018/07/court-packing-ideas-threaten-judicial-independence/>. John Yoo perfectly illustrates the nihilism he claims to denounce. He was only too happy to encourage Senate Republicans to stonewall Judge Merrick Garland. See John Yoo, *GOP Right to Delay Filling of Supreme Court Seat*, REC. SEARCHLIGHT (Mar. 18, 2016, 6:47 PM), <https://www.redding.com/story/opinion/columnists/2016/03/18/yoo-gop-right-to-delay-filling-of-supreme-court-seat/93707152/>. Yoo was not too worried about the rule of law then or destroying the Court's perceived impartiality.

¹⁶² See Rosas, *supra* note 160.

¹⁶³ Other criticisms were leveled, of course.

¹⁶⁴ Roger Cohen, *Richard Holbrooke and a Certain Idea of America*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/opinion/richard-holbrooke.html>.

¹⁶⁵ To be fair, Keith Burris, in the Post-Gazette, offered a different interpretation of Barr's position. See Keith C. Burris, *Indifference*, PITT. POST-GAZETTE (June 9, 2019, 12:00 AM), <https://www.post-gazette.com/opinion/keith-c-burris/2019/06/09/William-Barr-Terry-Sanford/stories/201906090084>. He wrote that Barr is a man without ambition for glory, even ambition to be vindicated by history, trying to do the right thing. *Id.* He pointed out that Terry Sanford had said much the same thing as did Barr when Sanford was asked about an unlikely Senate race later in his life—which he surprisingly won: we die; people forget us; the point is to do the right thing here and now. *Id.* It would be nice to think that Burris is right about what Barr meant. But even Burris noted that history does, "almost always," vindicate the honorable and misunderstood. *Id.* Undoubtedly, Sanford did

All this will destroy the rule of law and therefore the need for, and point of, judicial independence. As the conservative thinker Harry Jaffa noted, the rule of law and judicial independence depend on truth and its power and will not survive skepticism.¹⁶⁶

This moment has been coming for awhile. The beginning of our nihilism was visible in an earlier challenge to judicial independence that came in the run-up to the abortion decision in *Planned Parenthood v. Casey*.¹⁶⁷

Modern American constitutional law is essentially a dialogue between *Brown* and *Roe*.¹⁶⁸ Everyone agrees that *Brown* is the highpoint of judicial review, and opinions split regarding whether *Roe* is the continuation and culmination of *Brown*, or its repudiation.¹⁶⁹ Both sides in the abortion controversy claim that they are protecting the vulnerable, just as *Brown* was doing.¹⁷⁰

Thus, it is not surprising that the most recent prior attack on judicial independence in 1992 was, as is the current controversy, really about the future of *Roe*.¹⁷¹ Currently, President Trump was elected by voters who were hoping that control of the Supreme Court by his nominees would lead to the overruling of *Roe* and the driving force behind the momentum of Court-packing by the Democrats is the assumption that this will, in fact, happen.¹⁷² Similarly, in 1992, it was the hope that twelve years of Republican Presidential rule would

have that hope, even though vindication did not drive his actions. Why would the Attorney General be indifferent to that?

¹⁶⁶ Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115, 158 (2016).

¹⁶⁷ 505 U.S. 833, 870 (1992). See generally Ledewitz, *supra* note 167.

¹⁶⁸ See Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1559–60 (2004).

¹⁶⁹ *Id.* at 1537, 1568.

¹⁷⁰ *Id.* at 1561.

¹⁷¹ See David Von Drehle, *Attacking Roe v. Wade Means Going Through Planned Parenthood v. Casey, Too*, CHI. TRIB. (July 4, 2018, 1:50 PM), <https://www.chicagotribune.com/opinion/commentary/ct-supreme-court-roe-wade-casey-20180704-story.html>.

¹⁷² Anna North, *Alabama Republicans Want to Overturn Roe v. Wade. Their Strategy Could Backfire*, VOX (May 15, 2019, 4:00 PM), <https://www.vox.com/identities/2019/5/15/18624810/alabama-abortion-ban-supreme-court-exceptions-senate>.

finally lead to *Roe's* demise.¹⁷³ Those hopes were dashed in the *Casey*¹⁷⁴ decision upholding *Roe*,¹⁷⁵ at least in part.

In his partial dissent in *Casey*, Justice Antonin Scalia considered the intense political pressure that was being brought to bear on the Court—the letters, the marches, the speeches, etc. Apparently, all of the Justices were concerned about this pressure and were worried about its implications for judicial independence and the rule of law. Justice Scalia was concerned as well, and, in his typical fashion, he both cut to the heart of the matter and offered much deeper insight than did any other member of the Court into what was happening.

Here is a portion of what Justice Scalia wrote:

In truth, I am as distressed as the Court is...about the "political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the fact of this distressing phenomenon, and more attention to the cause of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," which turns out to be nothing but philosophical predilection and moral intuition.

What makes all this relevant to the bothersome application of "political pressure" against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making value judgments; ...then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the "liberties"

¹⁷³ Andrew Rosenthal, *The 1992 Campaign: Republicans; President and G.O.P. Take Aim at Abortion on Roe Anniversary*, N.Y. TIMES (Jan. 23, 1992), <https://www.ny-times.com/1992/01/23/us/1992-campaign-republicans-president-gop-take-aim-abortion-roe-anniversary.html>.

¹⁷⁴ 505 U.S. 833, 846 (1992).

¹⁷⁵ 410 U.S. 113, 152–53 (1973).

protected by the Constitution are, as the Court says, undefined and unbounded, then the people should demonstrate, to protest that we do not implement their values instead of ours. Not only that, but confirmation hearings for new Justices should deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. Justice Blackmun not only regards this prospect with equanimity, he solicits it.¹⁷⁶

Justice Scalia grounded the ideal of judicial independence in the idea of an objective law that could be studied as a fact. This is not far from how economic policy is perceived. Justice Scalia would not be surprised that the independence of the Federal Reserve is protected.

But, as we have seen, the current view is that law, in contrast, is simply a power struggle between opposing value choices—judicial philosophies, as Randy Barnett named them above. This means that no judge deserves independence. Barnett's position is not that of Justice Scalia, but the position that Justice Scalia attributed to Justice Blackmun—that the Senate should base its confirmation of a nominee on its agreement with the nominee's judicial philosophy.¹⁷⁷

Barnett and other conservatives do agree with Justice Scalia about how judges should decide constitutional cases.¹⁷⁸ But, for Justice Scalia—as is made clear in the quote above—that way of deciding cases was simply law. In contrast, coming to value judgments was not law. That is why he decided matters the way he did. Justice Scalia would never have agreed that he was just practicing a different judicial philosophy. Scalia thought he was speaking for the truth of things.¹⁷⁹

There is a subtle, but crucial, distinction between Justice Scalia's claim to be speaking for law and the current acceptance of differing judicial philosophies as grounding outcomes. Justice Scalia had gone part of the way down the road of nihilism in his assumption above

¹⁷⁶ *Casey*, 505 U.S. at 999–1001 (Scalia, J., dissenting in part) (italics in the original).

¹⁷⁷ *Id.*

¹⁷⁸ See Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 72 U. COLO. L. REV. 1275, 1277 (2002).

¹⁷⁹ See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (Amy Gutmann ed., 1997).

that values were nothing more than subjective expressions. But he still thought there was an essence of law. The current expression of the acceptability of Trump judges and Obama judges—remember, by both sides—has gone the rest of the way to nihilism, by viewing differences between judges as an irresolvable clash between differing judicial philosophies.¹⁸⁰ President Trump is entitled to his judicial nominees and some future liberal Democratic President with a majority in the Senate will be entitled to hers. There is nothing more to be said.

What has been lost is the foundation of rationality that can then lead to persuasion.¹⁸¹ It used to be assumed that Justices on the Supreme Court could talk to each other and sometimes persuade one another.¹⁸² For that matter, even reflection has been lost. It used to be thought that Justices would sometimes change their minds about things.¹⁸³

Can Justice Scalia really have been so jaded that he did not believe there was such a thing as "reasoned judgment?"¹⁸⁴ I hope he only meant that the liberals on the Court were actually not engaging

¹⁸⁰ I am speaking here of the attack on judicial independence. Plenty of people, including Randy Barnett, also say that their understanding of law is objectively true, that is, normatively binding. See Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 417–18 (2013). Barnett has also offered a perfectly clear, if-then, understanding of natural law, given the nature of human beings and the nature of the universe. See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE & THE RULE OF LAW*, 4–12 (2d ed. 2014). It would be absurd to call someone who sounds so much like C.S. Lewis a nihilist. And this is no doubt true of many people. But this does not prevent their expression of cultural nihilism. There are not Obama judges and Trump judges if justice is real. And if justice is real, there is a gravitational force, in history, toward it, just as Dr. King insisted. See *infra* text accompanying notes 197–98.

¹⁸¹ Herbert E. Meyer, *The Lost Art of Political Persuasion*, *RICOCHET* (Sept. 23, 2014), <https://ricochet.com/224095/archives/lost-art-political-persuasion/>.

¹⁸² Wei Lien Dang, *Do Supreme Court Justices Ever Change Their Mind on a Case Between the Initial Vote and a Decision's Publication?* *FORBES* (Apr. 2, 2012, 2:28 PM), <https://www.forbes.com/sites/quora/2012/04/02/do-supreme-court-justices-ever-change-their-mind-on-a-case-between-the-initial-vote-and-a-decisions-publication/#13230b1a16ed>.

¹⁸³ Reportedly, for example, Justice Harlan originally called the Cohen draft case a "pewee." Christopher M. Fairman, *Fuck 30* (Ohio State Univ. Mortiz Coll. of Law, Pub. Law and Legal Theory Working Paper Series, No. 59, 2006), <https://ssrn.com/abstract=896790> (citing BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 147–54 (Avon Books 1981) (1979)).

¹⁸⁴ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J., dissenting in part).

in reasoned judgment and that is why he put the words "reasoned judgment" in quotation marks.

But what are we then to make of his denigration of "philosophical predilection and moral intuition?"¹⁸⁵ If Justice Scalia only meant that judges were bad at philosophy or that only the voters could be trusted to arrive at the truth of things, then he could be considered a champion of democracy but not an enemy of truth. That is how Michael McConnell viewed him.¹⁸⁶

Unfortunately, Justice Scalia seems to me to have meant that there is no truth in such matters and we instead leave things to the voters to decide as a matter of power. I doubt Justice Scalia really believed that, but he found himself mouthing cultural nihilism. If he had admitted that philosophical predilection and moral intuition could sometimes be right, he would have to have admitted that, at least occasionally, Justices would have to stand for just such judgments. *Brown*,¹⁸⁷ and even obviously *Bolling v. Sharpe*,¹⁸⁸ were nothing more than philosophical predilection and moral intuition.¹⁸⁹ And there is nothing wrong with that.

We have now brought Justice Scalia to a logical conclusion. Justice Scalia retained a role for the rule of law based on the fact/value distinction that judges decide based on objective facts, while voters decide on subjective values. But, as the philosopher Hilary Putnam has pointed out, facts depend on values.¹⁹⁰ If values are just subjective, then so too are facts. Or perhaps I should better say, there

¹⁸⁵ *Id.*

¹⁸⁶ Michael W. McConnell, *Antonin Scalia Was Democracy's Legal Champion*, WALL STREET J. (Feb. 14, 2016, 3:46 PM), <http://www.wsj.com/articles/antonin-scalia-was-democracys-legal-champion-1455482790>.

¹⁸⁷ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954).

¹⁸⁸ 347 U.S. 497, 500 (1954).

¹⁸⁹ In *Bolling*, Chief Justice Warren famously based his conclusion that the federal government could not practice racial discrimination in its public schools on the judgment that it would be "unthinkable" if the States were forbidden from doing so, but the federal government was not. *Id.* Michael McConnell valiantly tried to show that the result in *Brown* might not violate the tenets of originalism, but even he never claimed that the result in *Bolling* could be so justified. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 950 (1995). Yet no originalist ever dares to say that the result in *Bolling* was wrong.

¹⁹⁰ See HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* 1 (2002).

are no facts.¹⁹¹ Thus, voters should just vote on everything, either directly or indirectly, by putting their representatives in Congress and *on the courts*.¹⁹² That is all such judges should be—representatives: Obama judges or Trump judges.¹⁹³ There should be no judicial independence in this world. Judicial independence only makes sense in a world of truth.

With this positivistic understanding, and nihilistic devotion to power, people should be expected to do just what they are now doing. The Republicans should squeeze as many judges as they can get away with onto the federal courts. They should freeze out a Merrick Garland.¹⁹⁴ There are no norms deserving of respect that counsel any restraint. The Democrats, in the meantime, powerless to stop this power play, are right to be planning a power play of their own once they achieve political power. The fact that Court-packing will destroy the rule of law is irrelevant because there is no rule of law.

This is also why both sides assume that, once confirmed, "their" Justices will continue to vote in predictable ways.¹⁹⁵ There is nothing to learn in law and legal issues that could cause a change of mind. Why, after all, should subjective preferences change?

This is the current assault on truth. The assault on truth in history merely logically follows. Dr. King, as quoted above, thought that there was a discernible structure to history, which he called the

¹⁹¹ See MAURICE BLONDEL, *ACTION: ESSAY ON A CRITIQUE OF LIFE AND A SCIENCE OF PRACTICE* 38 (Olivia Blanchette trans., Univ. Notre Dame Press ed., 2007) ("What is even a simple fact? . . . [E]very fact is already a complex fiction, an organic integration, a mental construction, almost the conclusion of a reasoning process, an action of spirit.").

¹⁹² Salvatore Babones, *A Practical Plan for Supreme Court Elections*, NAT'L INTEREST (Oct. 5, 2018), <https://nationalinterest.org/feature/practical-plan-supreme-court-elections-32817>.

¹⁹³ Marc A. Thiessen, *We Do Have Obama Judges and Trump Judges*, AP NEWS (Nov. 27, 2018), <https://www.apnews.com/b585522fc36340d4aa237ce24ad2afa3>.

¹⁹⁴ See Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> (noting Garland was nominated to fill the 2016 Supreme Court vacancy).

¹⁹⁵ Adam Liptak, *The Polarized Court*, N.Y. TIMES (May 10, 2014), <https://www.ny-times.com/2014/05/11/upshot/the-polarized-court.html>.

arc of the moral universe.¹⁹⁶ Because he thought justice, like truth, had power, he assumed and observed, the bend toward justice over time.¹⁹⁷

If William Barr agreed with Dr. King, he might have claimed that he was doing the right thing and that history would hopefully come to see that. Barr seems to assume, instead, that history has no shape—it signifies nothing.¹⁹⁸

This assumption about history is why our judicial politics are so inflamed. No one in public life today expresses the view that since she is speaking the truth, her position will be vindicated over time. We do not believe that "the other side" will eventually come to see the truth of our position.¹⁹⁹ We do not trust judges from the other side to eventually come to a just decision. Instead, we think that our opponents are incorrigible; they will not change their minds, no matter how much evidence we present (of course, they view us in the same way). Thus, unless we capture the Court, or the next election, or, God forbid, the army, all is lost. This kind of thinking eventually leads to the death of democracy.²⁰⁰

This is our current, sorry state. We are on the verge, if we have not already succumbed, to destroying the constitutional tradition. And this is true of both sides because their common assumptions are inconsistent with the foundations of the rule of law and, thus, with the need for judicial independence.

In such a situation, what is the responsibility of the legal academy? What should law professors be doing and saying?

¹⁹⁶ Mychal Denzel Smith, *The Truth About 'The Arc of the Moral Universe'*, HUFFINGTON POST (Jan. 18, 2018, 5:49 AM), https://www.huffpost.com/entry/opinion-smith-obama-king_n_5a5903e0e4b04f3c55a252a4.

¹⁹⁷ *Id.*

¹⁹⁸ John Wagner, *Everyone Dies: Barr Says He's Unconcerned About the Toll His Job Is Taking on His Reputation*, WASH. POST (May 31, 2019, 9:43 PM), https://www.washingtonpost.com/politics/everyone-dies-barr-says-hes-unconcerned-about-the-toll-his-job-is-taking-on-his-reputation/2019/05/31/3f907cd8-83a3-11e9-bce7-40b4105f7ca0_story.html.

¹⁹⁹ See Julie Beck, *This Article Won't Change Your Mind: The Facts on Why Facts Alone Can't Fight False Beliefs*, ATLANTIC (Mar. 13, 2017), <https://www.theatlantic.com/science/archive/2017/03/this-article-wont-change-your-mind/519093/>.

²⁰⁰ See BENJAMIN CARTER HETT, *THE DEATH OF DEMOCRACY*, 133 (2018).

V. HOW DO YOU PREVENT COURT-PACKING?

*Don't you believe we are all responsible for the absence of values? And that if all of us who come from Nietzscheism, from nihilism, or from historical realism said in public that we were wrong and that there are moral values and that in the future we shall do the necessary to establish and illustrate them, don't you believe that would be the beginning of a hope?*²⁰¹

*[War] is instinctive. But the instinct can be fought. We're human beings with the blood of a million savage years on our hands! But we can stop it. We can admit that we're killers. . . but we're not going to kill today. That's all it takes! Knowing that we're not going to kill - today?*²⁰²

Our constitutional tradition lies in tatters all around us.²⁰³ Court-packing is not the cause, but only the last symptom.²⁰⁴ Preventing Court-packing is therefore not a cure, though it is a necessary first step toward recovery.²⁰⁵ Once Court-packing happens, there will be no going back.²⁰⁶ If you want to get out of a hole, the first thing to do is to stop digging.

The advantage of a crisis, though, is that it can concentrate the mind. If the legal academy in general, and teachers of constitutional law in particular, can come to see Court-packing as a threat, preventing it will not be difficult. In fact, preventing Court-packing is the simplest thing in the world. In the words of Captain Kirk, you just don't pack the Court—today.²⁰⁷

²⁰¹ Claire Messud, *Camus & Algeria: The Moral Question*, N.Y. REV. BOOKS (Nov. 7, 2013), <https://www.nybooks.com/articles/2013/11/07/camus-and-algeria-moral-question/> (quoting ALBERT CAMUS, *NOTEBOOKS*, 1935–1951). Camus came to believe that the answer to that question is yes. This is a quote from Camus' *Notebooks*, which I found in a 2013 essay by Claire Messud in the New York Review of Books. Camus was at a gathering with Koestler, Sartre, Malraux and Manes Sperber, when he said this.

²⁰² *Star Trek: A Taste of Armageddon* (CBS television broadcast Feb. 23, 1967) (Captain Kirk speaking).

²⁰³ Kurt Bardella, *Trump's Subpoena Obstruction Has Fractured the Constitution's System of Checks and Balances*, NBC NEWS, <https://www.nbcnews.com/think/opinion/trump-s-subpoena-obstruction-has-fractured-constitution-s-system-checks-ncna1002101> (last updated May 6, 2019, 10:50 AM).

²⁰⁴ Somin, *supra* note 123.

²⁰⁵ *See id.*

²⁰⁶ *Id.*

²⁰⁷ *Star Trek: A Taste of Armageddon*, *supra* note 203.

No one is actually going to pack the Supreme Court without the support of at least some academic constitutional authorities. Actually passing legislation is different from making a pitch for Court-packing on the campaign trail hoping to differentiate yourself from the other Democratic Presidential candidates. So, even if the conditions after the 2020 election call for Court-packing in the view of many Democrats—that is, *Roe*²⁰⁸ and *Obergefell*²⁰⁹ are overruled, a Democrat is elected President and Democrats control Congress—the legal academy will have the power to stop Court-packing by testifying before Congress and unanimously saying "no."

But, timing is important. Court-packing will gain a great deal of momentum if the proposal is allowed to go through the entire primary season without significant principled challenge. So, Court-packing should be challenged now before it gains momentum.²¹⁰ While it is true that Court-packing will not ultimately pass without some law professor support, if there were strong opposition now, from even a small number of law professors, it might be possible to keep Court-packing from even being proposed.²¹¹

So, the first thing for law professors to do is to express opposition to Court-packing publicly, right now.

As to who these law professors should be, they should at least include some teachers of constitutional law; but, really, anyone who teaches law will be helpful. Ideologically, these law professors have to be associated with the Democratic Party coalition or neutral. Any law professor who supported the treatment of Merrick Garland will have no credibility on the Court-packing issue.²¹²

But, will this happen? Will liberal law professors challenge the progressive wing of the Democratic Party? There is reason to hope so. There are already a few voices in the academy opposing Court-packing.²¹³ Additionally, law professors and law schools have mostly remained protective of, and sensitive to, free speech—certainly to a

²⁰⁸ *Roe v. Wade*, 410 U.S. 113, 165 (1973).

²⁰⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

²¹⁰ Somin, *supra* note 123.

²¹¹ *See id.*

²¹² *Cf. Yoo*, *supra* note 162.

²¹³ *See* Somin, *supra* note 123.

greater extent than have other centers of American higher education—in opposition to some progressive critics.²¹⁴

On the other hand, the absence of objection, by all but a handful of law professors, to Court-packing proposals until now, especially on the Left, does not inspire confidence. The silence of the AALS even to address the issue, let alone to condemn the concept, is concerning.²¹⁵

There remains a more serious problem than a possible lack of fortitude among law professors. What would an opponent of Court-packing actually say to defeat it? An opponent would have to articulate what is wrong with Court-packing. Can law professors today defend judicial independence coherently?

It is not enough to defeat Court-packing merely to claim that it is pointless because the Republicans will do the same thing when they regain power. After all, maybe they will never regain power. Or, even if they do, at least a new majority on the Court will have done good things in the interim. Aren't eight years of justice better than none? No purely pragmatic argument will do.

You cannot explain opposition to Court-packing without defending judicial independence. You cannot defend judicial independence without embracing the rule of law. You cannot embrace the rule of law without a commitment to truth. Unfortunately, there is no greater commitment to truth among law professors than among any other elite group in America.²¹⁶ In other words, nihilism would have to be addressed and defeated in order to speak out against Court-packing. Are secular liberals ready to do that?²¹⁷

In a recent book review in the *New York Times*, Jonathan Rauch reminds readers of the politics of meaning speech given by

²¹⁴ See Heather Gerken, *Dean of Yale Law School: Campus Free Speech Is Not Up for Debate*, TIME (July 13, 2017), <https://time.com/4856225/law-school-free-speech/>.

²¹⁵ Cf. Kyle Graham, *A Moment in the Times: Law Professors and the Court-Packing Plan*, 52 J. LEGAL EDUC. 151, 159 (2002).

²¹⁶ See Phillip E. Johnson, *Nihilism and the End of Law*, FIRST THINGS (Mar. 1993), <https://www.firstthings.com/article/1993/03/002-nihilism-and-the-end-of-law>.

²¹⁷ Ledewitz, *supra* note 131, at 5.

Hillary Clinton in April 1993.²¹⁸ No one was in a mood to listen then, writes Rauch, but "they are listening now" to the need for meaning in human life in a culture that has left its older religious story behind and has not been able to craft a new narrative in its place.²¹⁹ We are left instead with the materialism that announces "The Universe Doesn't Care About Your Purpose"²²⁰ as if the absence of a personal God who loves us like a father means that the natural order is indifferent or even hostile to us. We don't yet have a vocabulary that allows us to see that, to paraphrase Carl Sagan, we are the way the universe cares about purpose.²²¹

The main reason that law professors are not opposing Court-packing is that we are not yet ready to confront our own nihilism.²²² I hope the threat of Court-packing will force law professors to come to a new understanding and defense of the rule of law and judicial independence. I hope this crisis forces the sort of reckoning with nihilism that Camus was proposing above.

I have said nothing here about "the other side." Republicans have engaged in their own reprehensible tactics in order to dominate the federal courts. Conservative law professors were very slow to defend Merrick Garland and few demanded hearings on his nomination.²²³ They have mostly remained silent about political gerrymandering and in other ways have been just as partisan as liberal law professors have been.

But, whatever one thinks of these tactics, none of their actions have been, or will be, fatal to constitutional democracy. Overturning

²¹⁸ Jonathan Rauch, *Why Are We Feeling So Bad When Life Is So Good? Two Books Want Us to Accentuate the Positive*, N.Y. TIMES (Apr. 2, 2019), <https://www.nytimes.com/2019/04/02/books/review/ben-shapiro-the-right-size-of-history-michael-a-cohen-michael-zenko-clear-and-present-safety.html>.

²¹⁹ *Id.*

²²⁰ Joseph P. Carter, *The Universe Doesn't Care About Your Purpose*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/opinion/the-universe-doesnt-care-about-your-purpose.html>.

²²¹ Jonathan Cott, *The Cosmos: An Interview with Carl Sagan*, ROLLING STONE (Dec. 25, 1980, 12:00 PM), <https://www.rollingstone.com/culture/culture-features/the-cosmos-an-interview-with-carl-sagan-236668/>.

²²² See David Margolick, *The Trouble with America's Law Schools*, N.Y. TIMES (May 22, 1983), <https://www.nytimes.com/1983/05/22/magazine/the-trouble-with-america-s-law-schools.html>.

²²³ John Yoo is a perfect example of such tactics. See *supra* note 162.

Roe and *Obergefell* just returns these issues to democratic politics, where defenders of abortion rights and same-sex marriage will fare extremely well—especially once pro-life legislators have to actually live with the results of their moral posturing. A new Lochnerism that tries to overturn the minimum wage or finds efforts to curb climate change to be beyond the reach of the Commerce Clause, will quickly collapse in the face of the will of Congress and the People. Errors by the Supreme Court are rarely fatal by themselves.

But destroying the Supreme Court as an independent institution where efforts to undermine fundamental rights can at least be slowed down, where the People can at least be reminded of the requirements of freedom and where politicians at least have to explain themselves and their policies, cannot be undone.²²⁴ Once the Court as we now know it is gone, it is gone. That is why Court-packing is more of a threat to the constitutional order than anything else that has been, or might be, done.²²⁵

That is why law professors must now speak out against Court-packing. And that is why we must earnestly consider why we oppose it. Only the right kind of opposition to Court-packing can defeat it.

VI. CONCLUSION

Denouncing Court-packing as a threat to judicial independence is not sufficient. For, while Court-packing is surely that, judicial independence itself must also be defended.²²⁶ Americans have no trouble understanding the need for the independence of the Federal Reserve. So, there must be some reason why the independence of the federal courts, and of the Supreme Court in particular, has proved to be so vulnerable today.

The reason is nihilism. The Federal Reserve tries to promote stable prosperity. That concept can be understood within materialistic

²²⁴ See Jennifer Rubin, *Why Court-Packing Is a Really Bad Idea*, WASH. POST (Mar. 19, 2019, 12:45 PM), <https://www.washingtonpost.com/opinions/2019/03/19/why-court-packing-is-really-bad-idea/> (noting once court packing starts it may never stop).

²²⁵ See *id.*

²²⁶ See Justin Lo, *Chief Justice Roberts Right to Defend Independence of the Judiciary*, HILL (Dec. 22, 2018, 2:00 PM), <https://thehill.com/opinion/judiciary/422521-chief-justice-roberts-right-to-defend-independence-of-the-judiciary> (stating the duty to defend the independence of the judiciary derives from the Constitution).

assumptions. Therefore, some degree of independence for the Federal Reserve is widely felt to be needed.

In contrast, what do the federal courts, and the Supreme Court in particular, promote? Justice, of course, within the context of the Constitution and the Rule of Law. If you believe that these norms are also objective, to some extent at least, you can justify, and indeed require, some level of judicial independence.

But, if the assumptions of materialism are the limit of the real, then the notion of justice through law within the Constitution is meaningless. Given those assumptions, justice is just a fig leaf for someone's will to power.

Therefore, a credible defense of judicial independence must begin with an understanding of the universe that is not purely materialistic. We must again be able to think of justice as real. Only then will we be able to permanently defeat Court-packing. Only then will judicial independence be grounded and protected.