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Luke G. Cleland

COMMENT

JOHN ROBERTS AND OWEN ROBERTS: ECHOES OF THE SWITCH IN TIME IN THE CHIEF JUSTICE'S JURISPRUDENCE

LUKE G. CLELAND*

* Candidate for Juris Doctorate, St. Mary's University School of Law 2023. I would like to express my heartfelt gratitude to my Comment Editor, Ben Cantu Jr., for his tireless advice and mentorship. I must also thank my parents, Michelle and Jeff, for their unwavering support. I am more grateful than you will ever know. Finally, I must thank Nelly, my partner, for putting up with so many late nights. I am eternally grateful to have you by my side.

I. INTRODUCTION

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution."[1]

The "switch in time that saved nine" is widely understood as a pivotal moment in our nation's history that fundamentally altered the relationship between government and the individual.[2] Put briefly, President Franklin Roosevelt attempted to stave off the Great Depression by implementing broad-sweeping economic regulations known as the New Deal.[3] These progressive reformations placed the Supreme Court at loggerheads with the President, Congress, and the public.[4] Tensions only increased after the Court held several key provisions of the New Deal unconstitutional.[5] In response, President Roosevelt initiated a Court-packing campaign that pressured the Supreme Court into uprooting long-established precedents on economic substantive due process[6] and interstate commerce.[7] More specifically, Justice Owen Roberts, amidst the maelstrom of political pressure, flipped his vote and licensed the broad expansion of

1. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 620 (1994).

3. *The Great Depression and the New Deal*, NAT'L ARCHIVES, https://www.archives.gov/seattle/exhibit/picturing-the-century/great-depression.html [https://perma.cc/Z9VJ-5HNW].

4. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 83–84 (Sheldon Meyer ed., 1995) (explaining how Roosevelt, his allies in government, and the liberal movement were concerned about how their agenda "would result in a confrontation with the Court," which Roosevelt considered to be "heavily Republican").

5. *See* Russell Fowler, *Black Monday and the Court-Packing Plan*, 57 TENN. B.J. 48, 48–49 (2021) ("In one day, the Supreme Court struck down three central features of the New Deal."); *see also* A.L.A. Schechter Poultry Corp. v. United States (*Sick Chicken Case*), 295 U.S. 495, 551 (1935) (invalidating indirect regulation of interstate commerce); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601–02 (1935) (prohibiting mortgagor relief proscribed by the Frazier-Lemke Act as violative of the Takings Clause); Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935) (limiting the power of the President to remove officers appointed to the Executive Branch).

6. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 397–99 (1937) (upholding a minimum wage law which permitted the government to intervene in private employment contracts, thereby leaving economic substantive due process in the dustbin of history).

7. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (expanding congressional power under the Commerce Clause to include activities that have "a close and substantial relation to interstate commerce"); *see also* Edward L. Carter & Edward E. Adams, *Justice Owen J. Roberts on 1937*, 15 GREEN BAG 2D 375, 383 (2012) ("The implication here seems to be that [Justice Owen] Roberts, and perhaps [Chief Justice] Hughes (who had his own 'switch' moment in *Jones & Laughlin*), had been influenced by popular events leading up to and following FDR's court-packing scheme, if not by the scheme itself.").

federal powers needed to implement Roosevelt's ambitious New Deal.[8] Despite the switch in time's indelible impact on federal powers and casebooks, to what extent are its effects still felt today?

This Comment argues that the actual or perceived effectiveness[9] of President Roosevelt's strategy gave future politicians a powerful tool to cudgel an uncooperative judiciary into submission. Although implemented with varying levels of success, political pressure is now a mainstream tactic used against the Court.[10] Over the last decade, the Roberts Court has received its fair share of political attacks, public scorn, and fierce criticism, yet the outcry has reached a fevered pitch in the last few years.[11] Operating in the shadow of the switch in time, Chief Justice John Roberts has responded similarly to his predecessor Justice Owen Roberts and avoided institutional crises by releasing carefully timed and calculated opinions.[12] Viewed through this lens, the Chief Justice's recent decisions crystalize, as he regularly maneuvers around politically charged issues to protect the Court and its reputation.[13]

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8. *See* Fowler, *supra* note 5, at 50 (summarizing the background of Justice Owen Roberts's vote-flipping and its influence on the trajectory of constitutional law).

9. Some argue Justice Owen Roberts did not switch his vote because of the Court-packing plan, since he reached his decision in *Parrish* before President Roosevelt proposed his Court-packing plan. LEUCHTENBURG, *supra* note 4, at 142–43. Alternatively, he may have been persuaded by other reasons, such as public outrage, the landslide reelection of President Roosevelt, or pressure from Chief Justice Hughes. *Id.* In any event, these arguments have no impact on the veracity of this Comment. Perception becomes political reality, and perceived effectiveness impacts judicial decision-making and incentivizes similar conduct by future politicians.

10. *See* Stuart Taylor Jr., *Meese Says Rulings by U.S. High Court Don't Establish Law*, N.Y. TIMES (Oct. 23, 1986), https://www.nytimes.com/1986/10/23/us/meese-says-rulings-by-us-high-court-don-t-establish-law.html [https://perma.cc/9QFA-BQ9T] (documenting Attorney General Edwin Meese's contention that adverse Supreme Court decisions were illegitimate and non-binding); James E. Clayton, *The* Miranda *Decision: Criminal Wrongs, Citizen Rights*, WASH. POST (Aug. 7, 1983), https://www.washingtonpost.com/archive/entertainment/books/1983/08/07/the-miranda-decision-criminal-wrongs-citizen-rights/9955124b-20b8-4ac6-8b82-3652b79a04e8 [https://perma.cc/AWW8-UYBP] (recounting President Richard Nixon's attacks on the Warren Court).

11. *See, e.g.*, Nina Totenberg, *Supreme Court Weighs Abortion Case; Schumer Remarks Draw Rebuke from Roberts*, NPR (Mar. 4, 2020, 7:10 PM), https://www.npr.org/2020/03/04/812222034/supreme-court-weighs-abortion-case-schumer-remarks-draw-rebuke-from-roberts [https://perma.cc/9QYM-U8K6] (documenting then-Senate Minority Leader Chuck Schumer's protest of the Supreme Court and Chief Justice John Roberts's response).

12. JOAN BISKUPIC, THE CHIEF 10, 221 (2019) (foreshadowing Chief Justice John Roberts's calculated *Sibelius* opinion, Biskupic argues "Roberts has at times set aside his ideological and political interests on behalf of his commitments to the Court's institutional reputation and his own public image").

13. *Id.* at 10.

Our time's most important constitutional questions are not decided by an independent judiciary calling balls and strikes.[14] Instead, many controversial decisions are forged by the echoes of the switch in time and subsequent attacks on the bench. To unpack the topic, Part II briefly examines the history of political attacks on the Court, focusing on the switch in time. Part III utilizes a "Fragility Framework" to expose the judiciary's structural susceptibility to political pressure and categorizes likely defensive responses. With the history and framework established, Part IV turns to the present day and analyzes several of Chief Justice Roberts's most controversial and seemingly inexplicable opinions. Although enigmatic at first blush, his opinions in *National Federation of Independent Business v. Sebelius*,[15] *Fulton v. City of Philadelphia*,[16] and *California v. Texas*[17] have a clear through-line: they protect the Court during times of intense pressure from the public, its politicians, or both. Lastly, Part V concludes with a discussion of the Court's emerging docket and weighs the likely direction of politically charged lines of jurisprudence.

II. HISTORY OF INTERBRANCH CONFLICT

"We have been relegated to the horse-and-buggy definition of interstate commerce."[18]

A critical cornerstone of the United States political system is the separation of powers doctrine, which prevents the coalescence of power by dividing the government into three branches, each holding distinct but overlapping roles.[19] This doctrine invariably creates interbranch squabbles, as each branch jealously guards its existing power and expands its influence

14. Chief Justice John Roberts is extremely fond of using baseball metaphors to describe the judiciary's role. He first used them in his interview with President George W. Bush. *Id.* at 155. Later, he used them in his confirmation hearing. *Id.* at 161 ("Judges are like umpires. Umpires don't make the rules, they apply them." (internal quotation marks omitted)).

15. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

16. Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

17. California v. Texas, 141 S. Ct. 2104 (2021).

18. LEUCHTENBURG, *supra* note 4, at 90 (internal quotation marks omitted).

19. *See* Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 21–25 (1990) (discussing Montesquieu's influence on the American Constitution through his writings on separation of powers). *See generally* U.S. CONST. art. I (prescribing the powers of the Legislature); *id.* art. II (introducing the powers of the Executive); *id.* art. III (outlining the powers of the Judicial Branch).

by encroaching into the domain of other departments.[20] As a result, skirmishes between the branches are far too extensive for comprehensive review within the parameters of this Comment. Therefore, the following discussion is limited to the most meaningful examples.

A. *Before the Switch*

Conflict arose almost immediately after the founding of the United States. In *Marbury v. Madison*,[21] the Court settled a controversy between the Republicans and the Federalists.[22] In a masterclass on stratagem, Chief Justice John Marshall, a Federalist, sided with his Republican opponents on the merits while simultaneously solidifying the power of the federal judiciary to review the constitutionality of laws.[23] Notably, the Court's decision was likely influenced by the genuine possibility that President Jefferson would ignore any adverse decision, thereby causing permanent damage to the status of the judiciary by undermining the finality of its judgments and degrading its public image.[24] Thus, there is a clear precedent of the Court modifying its behavior to protect the bench from political attacks.

Conversely, monstrous judicial decisions may illicit political reactions with dramatic consequences, such as civil war.[25] In *Dred Scott*[26]—a long since repudiated case—Chief Justice Taney invalidated the Missouri Compromise of 1820, holding any congressional prohibition of slavery

20. Orrin G. Hatch, *Avoidance of Constitutional Conflicts*, 48 U. PITT. L. REV. 1025, 1027–28 (1987); *see* THE FEDERALIST No. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961) (arguing each branch protects itself from the "encroachments of the others").

21. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

22. *See generally* Theodore B. Olson, *Remembering* Marbury v. Madison, 7 GREEN BAG 2D 35, 35–36 (2003) (describing the political influences on the *Marbury* decision).

23. *Marbury*, 5 U.S. at 178–80 (avoiding direct conflict with President Jefferson by holding the Judiciary Act of 1789 unconstitutional insofar as it granted the Supreme Court original jurisdiction over a case outside the ambit of Article III). For further discussion on the political pressures facing the Court, see Olson, *supra* note 22, at 41–42 (providing general background information on *Marbury*).

24. Olson, *supra* note 22, at 41 ("If the Court ordered Madison to deliver Marbury's commission, and Jefferson ordered Madison not to comply, as was widely expected, the Court had no power to enforce its order and would suffer irreparable injury to its status."); *cf.* LEUCHTENBURG, *supra* note 4, at 143 (documenting the Supreme Court's public ridicule in the aftermath of the switch in time).

25. *Cf.* Daniel A. Farber, *A Fatal Loss of Balance:* Dred Scott *Revisited*, 39 PEPP. L. REV. 13, 42 (2011) ("Most northerners found the [*Dred Scott*] decision shocking and immoral. Republicans attacked it with great effect in the political campaigns of 1857–1860. It doubtless helped Lincoln win the presidential election in 1860. That in turn led South Carolina and eventually ten other states to abandon the United States and try to form their own country. That led to civil war.").

26. Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

encroached on the property interests of slave owners vis-à-vis the Due Process Clause of the Fifth Amendment.[27] This unconscionable decision was the final blow needed to stoke a simmering conflict into outright war.[28] Within a month, *Dred Scott* received an infamous rebuke from Abraham Lincoln, who attacked the opinion's factual basis and legal reasoning.[29] Shortly thereafter, the conflict concluded in civil war, where the North ultimately prevailed, and slavery was eradicated by the Reconstruction Amendments.[30]

While these were the most consequential conflicts in early American history, the power struggle was far from over. The time-honored tradition resumed with zeal in the first half of the twentieth century.

B. *The Switch in Time that Saved Nine*

The switch in time was a pivotal moment in American history because unlike in *Marbury*, where the judiciary was ostensibly victorious,[31] or in *Dred Scott*, where the Court's ruling was technically binding until the Constitution was amended,[32] the switch in time showed a vulnerable Supreme Court radically modifying its jurisprudence in response to political attacks.[33] Further, the switch permanently altered the trajectory of constitutional law

27. *Id.* at 450–52 (holding Congress is effectively forbidden by the Due Process Clause from passing any law that encroaches on citizens' property rights, including their property interests in slaves).

28. *See, e.g.*, Farber, *supra* note 25, at 44 ("At best *Dred Scott* was a symptom of the polarization that was soon to lead the country into civil war. But worse than that, it may actually have contributed to the march toward war by undermining popular sovereignty as a compromise and pushing Republicans to more extreme positions.").

29. Abraham Lincoln, Speech on the *Dred Scott* Decision at Springfield, Illinois (June 26, 1857), *in* ABRAHAM LINCOLN'S SPEECHES 60, 60–71 (L. E. Chittenden ed., 1895).

30. *See generally* U.S. CONST. amends. XIII, XIV, XV (abolishing slavery, guaranteeing equal rights, and granting voting rights after the Civil War).

31. *See* Akram Faizer, *Chief Justice John "Marshall" Roberts—How the Chief Justice's Majority Opinion Upholding the Federal Patient Protection and Affordable Care Act of 2010 Evokes Chief Justice Marshall's Decision in* Marbury v. Madison, 11 U. N.H. L. REV. 1, 2 (2013) (contending Chief Justice Marshall defeated President Jefferson by forcing his acquiescence to a decision that created judicial review).

32. *See* Robert A. Burt, *Overruling* Dred Scott*: The Case for Same-Sex Marriage*, 17 WIDENER L.J. 73, 73 (2007) (explaining how the amendments were not only necessary to "overrule the specific substantive rulings in the *Dred Scott* case," but were also "aimed . . . at overruling the Supreme Court's underlying rationale for adopting these specific rules about slavery and black citizenship").

33. LEUCHTENBURG, *supra* note 4, at 216 ("In the spring of 1937, though, in the midst of the controversy over President Roosevelt's Court packing message, the Court began to execute an astonishing about-face.").

and fundamentally changed the relationship between the judiciary and the political branches of government.[34]

The switch's history began decades earlier with Franklin Roosevelt's distant cousin, President Theodore Roosevelt.[35] Progressives, like Theodore, relentlessly attacked the Court's conservative jurisprudence, stirring up public outrage and calls for judicial reformation.[36] By the 1920s, the acrimony grew, as progressives increasingly believed Republicans controlled the Supreme Court and used their power to spoil social and economic reformations necessary in an industrialized nation.[37] The pressure for change increased over the following decade, particularly as the Great Depression crippled the American economy.[38] Accordingly, Franklin Roosevelt's ascendency as a progressive reformer led much of the public to conclude that a "[Roosevelt] presidency would result in a confrontation with the Court."[39]

Once President Roosevelt took office, the Court assuaged public fears with its decisions in *Home Building & Loan Ass'n v. Blaisdell*[40] and *Nebbia v. New York*,[41] which gave great deference to the government's role in

34. After its flip, the Supreme Court left congressional use of the Commerce Clause unchecked for nearly sixty years. MICHAEL S. ARIENS, AMERICAN CONSTITUTIONAL LAW AND HISTORY 139 (2d ed. 2016).

35. LEUCHTENBURG, *supra* note 4, at 83.

36. *Id.* Importantly, President Theodore Roosevelt attacked the Court's *Lochner* era decisions, which derived economic liberties, like the right to contract, from the Due Process Clause of the Fourteenth Amendment. *See* NCC Staff, *The President v. the Courts*, NAT'L CONST. CTR.: CONST. DAILY (Feb 13, 2017), https://constitutioncenter.org/blog/the-president-v-the-courts [https://perma.cc/E4PA-TCNQ] (retelling the turbulent history between President Theodore Roosevelt and the Supreme Court). The *Lochner* era philosophy was the same jurisprudential thinking that haunted President Franklin Roosevelt's New Deal legislation and led to the switch in time. *Compare* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 610–11 (1936) (relying on economic substantive due process to invalidate a minimum wage law before the switch in time), *with* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392–93 (1937) (signifying the beginning of the switch in time by upholding a minimum wage law which limited the freedom to contract).

37. LEUCHTENBURG, *supra* note 4, at 83.

38. *See President Franklin Delano Roosevelt and the New Deal*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/franklin-delano-roosevelt-and-the-new-deal [https://perma.cc/5W9G-6FW3] ("Based on the assumption that the power of the federal government was needed to get the country out of the depression, the first days of Roosevelt's [A]dministration saw the passage of banking reform laws, emergency relief programs, work relief programs, and agricultural programs.").

39. LEUCHTENBURG, *supra* note 4, at 83.

40. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

41. Nebbia v. New York, 291 U.S. 502 (1934).

promoting the general welfare and acting during national emergencies.[42] Unfortunately, the optimistic forecast was short-lived.

The Supreme Court's first ruling on the New Deal invalidated provisions of the National Industrial Recovery Act, leaving the remainder of Roosevelt's legislative agenda in question.[43] Over the next year, the Court's rulings exacerbated this uncertainty.[44] In some cases, the government prevailed, while the Court invalidated crucial portions of the New Deal in others.[45] Nevertheless, the paradigm shifted on Black Monday.[46]

On May 27, 1935, the Court released three 9–0 decisions that "invalidated the National Industrial Recovery Act and the Frazier-Lemke Act on mortgage moratoria and . . . circumscribed the President's power to remove members of independent regulatory commissions."[47] These decisions sent a jolt through the Roosevelt Administration and prompted the infamous "horse-and-buggy" conference, where President Roosevelt repeatedly attacked the Court's antiquated interpretation of the Constitution.[48] These unanimous rebukes forced Roosevelt to consider drastic solutions, including

42. *See id.* at 524 (asserting the "[C]ourt from the early days affirmed that the power to promote the general welfare is inherent in government"); *Blaisdell*, 290 U.S. at 442 (acknowledging the Court's decisions had manifested "a growing appreciation of public needs and . . . finding ground for a rational compromise between individual rights and public welfare"); LEUCHTENBURG, *supra* note 4, at 84 (describing the *Blaisdell* and *Nebbia* decisions as particularly heartening to Roosevelt and his New Deal agenda); John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV 205, 214–15 (2018) ("FDR hoped that the Court would grant the political branches more constitutional leeway to respond to the national crisis of the Great Depression.").

43. LEUCHTENBURG, *supra* note 4, at 85–86; *see* Panama Refin. Co. v. Ryan, 293 U.S. 388, 433 (1935) (invalidating a provision of the National Industrial Recovery Act as an unconstitutional delegation of congressional power).

44. *See* LEUCHTENBURG, *supra* note 4, at 86–89 (explaining the increasing concern among New Dealers arising out of the *Gold Clause Cases* through the *Rail Pension* decision).

45. *Compare* Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240, 316 (1935) (upholding New Deal legislation regulating the monetary system), *with* R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 362 (1935) (invalidating a New Deal retirement and pension plan for common carriers because "[t]he act [was] not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution").

46. LEUCHTENBURG, *supra* note 4, at 89.

47. *Id.*

48. *Id.* at 90.

Court-packing[49] and amending the Constitution.[50] In the following year, the Supreme Court's attacks continued, ensuring a showdown.[51]

The Court struck its final blow in *Morehead v. New York ex rel. Tipaldo*,[52] which virtually outlawed minimum wage laws because "[t]he right to make contracts about one's affairs is a part of the liberty protected by the [D]ue [P]rocess [C]lause."[53] The backlash was instantaneous, but with the election of 1936 looming, President Roosevelt refused to respond.[54] The public lashing he received from his earlier horse-and-buggy conference was sufficient to dissuade him from making the Supreme Court a campaign issue.[55] This decision proved wise, as he "rolled up the greatest victory in the history of two-party competition," placing the Supreme Court in peril.[56] The Court faced a terrifyingly vengeful president whose reelection mandated policies diametrically opposed to its recent rulings.[57]

Wasting no time, President Roosevelt devoted his attention to solving the Court problem.[58] In particular, he tasked his Attorney General,

49. Interestingly, while the number of justices serving on the Court is determined by Congress, *see* U.S. CONST. art. III, §§ 1–2 (revealing no firm number of justices and, therefore, leaving it to Congress), its composition is rarely altered for political purposes. *See generally* Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747 (2020) (documenting all congressionally authorized changes to the composition of the Court but concluding the modifications were rarely motivated by politics).

50. The Roosevelt Administration discussed several possible constitutional amendments, including one granting Congress the power to veto the Court by repassing previously invalidated legislation. LEUCHTENBURG, *supra* note 4, at 95.

51. *See* United States v. Butler, 297 U.S. 1, 77–78 (1936) (invalidating provisions in the Agricultural Adjustment Act as violative of the Taxing Clause); *see also* LEUCHTENBURG, *supra* note 4, at 98 ("Roosevelt was indicating privately that he was getting set for a faceoff with the Court.").

52. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

53. *Id.* at 610 (citing Adkins v. Child.'s Hosp., 261 U.S. 525, 545–46 (1923)); *see* LEUCHTENBURG, *supra* note 4, at 105 ("For critics of the Supreme Court, *Tipaldo* was the last straw.").

54. LEUCHTENBURG, *supra* note 4, at 107 ("In the 1936 campaign, Roosevelt maintained a studied silence on the [Court-packing] question despite counsel from different sides that he urge action to alter the federal judiciary or that he assure the country that he would not pack the Court.").

55. *Id.* at 106 (arguing Roosevelt remained mostly silent "to remove the Court issue from the campaign").

56. *Id.* at 108.

57. *See id.* at 109 ("[I]t should be noted, the Court, by such decision as that in the *Humphrey* case, had wounded his self-esteem, and by other acts had convinced him that it was personally hostile to him. He sought a way not merely to liberalize the Court but to *chastise the Justices for past misdeeds*." (emphasis added)).

58. *Id.* at 114.

Homer Cummings, with vetting potential paths forward.[59] Cummings brought the total weight of his office to bear and, after much back-and-forth, proposed a Court-packing solution to the President.[60] At its core, his plan advanced:

> (1) that when a judge of a federal court who had served ten years did not resign or retire within six months after his seventieth birthday, a President might name another judge as coadjutor; (2) that the Supreme Court should not have more than six added Justices, nor any lower-court bench more than two additions, nor the total federal judiciary more than fifty; (3) that lower-court judges might be assigned to exceptionally busy courts; and (4) that the lower courts should be supervised by the Supreme Court through a proctor.[61]

President Roosevelt readily embraced this proposal and charged his Administration with developing a public relations campaign to sell the plan to Congress and the public.[62] He reasoned they would more readily accept Court-packing if it were framed as a practical reform to lighten the aging Justices' workload rather than a bald attempt to liberalize the Court.[63] As the plan fell into place, Roosevelt prepared to drop the bombshell.[64]

On February 5, 1937, less than a month into his second term, President Roosevelt sent a special message to Congress, finally announcing his plan to the public.[65] Despite disguising the proposal as a judicial reformation, it was met with "an intensity of response unmatched by any legislative controversy of th[e] [twentieth] century."[66] Luckily for Roosevelt,

59. *See id.* at 114 (recalling President Roosevelt's immediate post-election request to Cummings for a progress report on the Supreme Court problem); *see also* NCC Staff, *How FDR Lost His Brief War on the Supreme Court*, NAT'L CONST. CTR.: CONST. DAILY (Feb 5, 2021), https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2 [https://perma.cc/9E5V-LYGZ] ("After his re-election, Roosevelt developed his plan to reform the [C]ourt in secrecy, working with his attorney general, Homer Cummings, on a way to ensure the [C]ourt would rule favorably about upcoming cases on Social Security and the National Labor Relations Act.").

60. LEUCHTENBURG, *supra* note 4, at 122.

61. *Id.* at 124.

62. *See id.* at 124–25, 127 (summarizing the proposal, drafting, and messaging campaign designed to get the plan "accepted as a project for judicial reform rather than being viewed simply as a stratagem to pack the Court").

63. *See id.* at 125 ("Instead of concentrating on the desirability of a more liberal court, both documents would stress the incapacity of aged judges and the need for additional appointments to get the Court abreast of its work.").

64. *Id.* at 133.

65. *Id.*

66. *Id.* at 134.

his landslide victory yielded substantial majorities in Congress, making the plan's passage likely, notwithstanding Democratic defectors.[67] Consequently, allies, critics, and even opponents believed Roosevelt's plan was inevitable.[68] Yet the Court "had some big surprises in store."[69]

The primary justification for Roosevelt's plan was the Supreme Court's repeated attacks on the New Deal, which impaired legislative responsiveness to the Great Depression.[70] In other words, support for his plan was contingent on the Court's continuing antagonistic decisions. If the Court flipped, giving the New Deal its stamp of approval, support for the scheme would crumble.[71] After all, why fundamentally restructure a submissive judiciary?[72]

The Court was sharply divided between two ideological cabals, giving Justice Owen Roberts the unique ability to undermine Roosevelt's plan.[73] On the conservative side, the "Four Horsemen," Justices McReynolds, Van Devanter, Butler, and Sutherland, consistently opposed the New Deal and unsurprisingly gave no ground.[74] On the progressive side, the "Three Musketeers," Justices Cardozo, Brandeis, and Stone, reliably supported Roosevelt's initiatives.[75] This split left Chief Justice Hughes and Justice Roberts in the middle, routinely casting the decisive votes.[76]

67. *Id.* at 135.

68. *See id.* at 142 (recounting how even "the sta[u]nchest foes of the President's [p]lan" believed Roosevelt had the votes to prevail).

69. *Id.*

70. *E.g.*, Fowler, *supra* note 5, at 49 (explaining how "Roosevelt [was] determined to act" after the court "struck down so many laws").

71. LEUCHTENBURG, *supra* note 4, at 143 (illustrating how a flip by the Supreme Court, as seen in *Parrish*, would "erase[] the most important justification for the [Court-packing] bill").

72. *Id.*

73. *E.g.*, William E. Leuchtenburg, *Charles Evans Hughes: The Center Holds*, 83 N.C. L. REV. 1187, 1188–89 (2005) (identifying the ideological leanings of the Justices from the 1920s through the switch in time, particularly as they aligned in predictable voting blocs, with exception to Justice Owen Roberts because "[n]o one could say with confidence where he would wind up").

74. *See* William G. Ross, *When Did the "Switch in Time" Actually Occur?: Re-discovering the Supreme Court's "Forgotten" Decisions of 1936–1937*, 37 ARIZ. ST. L.J. 1153, 1159 (2005) (claiming the Four Horsemen were "deeply conservative" and ideologically opposed to "regulatory legislation," like the New Deal). The horsemen's opposition for the New Deal lasted long after the switch in time. For example, Justice McReynolds, one of the remaining horsemen, dissented 119 times from 1937 to 1941. LEUCHTENBURG, *supra* note 4, at 155.

75. *E.g.*, Leuchtenburg, *supra* note 73, at 1188–89 (identifying the ideologically progressive Justices).

76. In some cases, Roberts and Hughes joined the Three Musketeers. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Nebbia v. New York, 291 U.S. 502 (1934); Norman v. Balt. &

However, Hughes leaned progressive, particularly on economic issues, like the right to contract, so if any Justice was to flip, it had to be Roberts.[77]

In *West Coast Hotel Co. v. Parrish*,[78] Roberts flipped, casting the decisive vote upholding a minimum wage law, which overturned the *Tipaldo* case from just ten months earlier.[79] The significance of his decision cannot be overstated. Roberts "eliminat[ed] the critical need for recasting the membership of the bench," taking the first significant step to undermine Roosevelt's plan.[80] Further, his switch was "enduring" and transcended any particular constitutional issue.[81] Two weeks after *Parrish*, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[82] Justice Roberts again joined Chief Justice Hughes and the Three Musketeers, radically expanding the government's power to regulate interstate commerce.[83] Between *Parrish* and *Jones & Laughlin*, the Court fundamentally reinterpreted the constitutional provisions that traditionally obstructed the New Deal.[84]

The following month, the Court upheld Roosevelt's signature piece of legislation, the Social Security Act, solidifying a permanent switch in its

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Ohio R.R. Co., 294 U.S. 240 (1935). In other instances, they joined the Four Horsemen. United States v. Butler, 297 U.S. 1 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936). Importantly, however, Roberts and Hughes sometimes split, with Roberts joining the Four Horsemen and Hughes aligning with the Three Musketeers. R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

77. *See* Leuchtenburg, *supra* note 73, at 1188–89 (arguing Chief Justice Hughes's progressive tendencies and influence made the Four Horsemen an unsavory alliance); *see also Tipaldo*, 298 U.S. at 628 (Hughes, C.J., dissenting) (reaffirming, based on his understanding, that the right to contract is "qualified and not an absolute right").

78. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

79. *See* Leuchtenburg, *supra* note 73, at 1198 (emphasizing the rapid flip between the Court's invalidation of a minimum wage law in *Tipaldo* and approval of a similar law in *Parrish*).

80. LEUCHTENBURG, *supra* note 4, at 143; *see* ARIENS, *supra* note 34, at 119 ("The Court's decision[] in *West Coast Hotel* [*Co.*] *v. Parrish* . . . removed much of Roosevelt's case for reorganizing the federal judiciary.").

81. Leuchtenburg, *supra* note 73, at 1198.

82. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

83. *Compare* Carter v. Carter Coal Co., 298 U.S. 238, 298–99 (1936) (drawing a bright-line distinction between manufacturing and commerce for the purpose of regulation under the Commerce Clause), *with Jones & Laughlin*, 301 U.S. at 37–38 (concluding intrastate activities—including manufacturing—may be regulated when they have a "close and substantial relation to interstate commerce").

84. The Court's primary rationale for invalidating much of the New Deal centered on a broad interpretation of economic substantive due process and a narrow interpretation of the Commerce Clause. For an illustrative example of the Court using these interpretations to invalidate federal legislation, see generally R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act by broadly interpreting the Due Process Clause and narrowly construing the Commerce Clause).

jurisprudence.[85] From this point forward, "the Supreme Court upheld every New Deal statute that came before it," leaving the efficacy of Roosevelt's Court-packing plan without question.[86] Although Congress ultimately shot the bill down—primarily due to Roberts's switch—Roosevelt accomplished his purpose by pressuring the Court into submission.[87]

Additionally, the switch in time set a game-changing precedent. When the Court refuses to cooperate with majoritarian demands, the political branches may use coercion to get their way. Chief Justice John Marshall's oft-quoted axiom that it is for the judiciary "to say what the law is" is not precisely correct.[88] It is up to the bench, so long as its decisions properly align with the opinions of politicians and the public. If the Court aggressively repudiates the will of the people or their political representatives, recompense may be lurking around the corner in the form of a Court-packing plan masquerading as a judicial reformation.

It was no longer feasible to brashly defy the will of the coordinate branches. Instead, the Supreme Court entered an era of judicial restraint,[89] punctuated by great deference to representation reinforcement.[90] While this move did not eliminate interbranch controversy, it relegated the federal judiciary to a smaller and more exacting role.[91] When the Supreme Court pushed its boundaries in future conflicts, the political branches were armed with a new set of tools.

85. In rapid succession, the Court upheld the constitutionality of several sections of the Social Security Act, collectively known as the *Social Security Cases*. Carmichael v. S. Coal & Coke Co., 301 U.S. 495 (1937); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

86. LEUCHTENBURG, *supra* note 4, at 220.

87. *See, e.g.*, LEUCHTENBURG, *supra* note 4, at 142–54 (describing the multifactorial challenge the Court-packing plan faced in Congress, including the Court's flip, the abrupt departure of Vice President Garner, and the untimely death of Senate Majority Leader Robinson).

88. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

89. The post-switch Court adopted judicial restraint regarding federal powers but simultaneously emphasized "active judicial protection of civil rights and civil liberties." Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 246 (2019).

90. *See* ARIENS, *supra* note 34, at 119–20 (positing the switch in time "was later interpreted as a victory for representative democracy and a defeat of judicial activism").

91. *See* Balkin, *supra* note 89, at 245–46 (2019) (discussing how the early version of the "living constitutionalism" theory, which emphasized judicial restraint, arose out of Roosevelt's New Deal agenda).

C. *After the Switch*

In the decades following the switch, political pressure against the judiciary reappeared with regularity.[92] Politicians recognized that attacking the Court could influence its decisions and serve as a winning campaign strategy.[93] This methodology gained traction by the second half of the twentieth century.

In the 1960s, the Supreme Court radically reshaped the criminal justice system, reinterpreting the Constitution to grant broad rights to the criminally accused.[94] In *Gideon v. Wainwright*,[95] the Court incorporated the Sixth Amendment's guarantee of appointed counsel in criminal proceedings, radically improving the quality of criminal representation.[96] The judicial revolution continued in *Miranda v. Arizona*,[97] which birthed the right to "be informed in clear and unequivocal terms [of] the right to remain silent."[98] These landmark decisions dramatically benefitted the prospects of accused criminals but opened the door to attacks from politicians who saw the Court as soft on crime.[99]

During the presidential election of 1968, Richard Nixon seized on this opportunity—bolstered by increasing political violence[100]—by making the Supreme Court a central pillar of his campaign.[101] Notably, Nixon's tactic was successful, as he won the election of 1968 and nominated four conservative Justices who "played a crucial role in shaping constitutional

92. *See* Thomas L. Cooper, *Attacks on Judicial Independence: The PBA Response*, 72 PA. BAR ASS'N Q. 60, 61–63 (2001) (arguing prominent politicians have posed an increasingly dangerous threat to the independence of the judiciary).

93. *E.g.*, Clayton, *supra* note 10 (describing how Richard Nixon argued the Supreme Court was "too soft on crime" to win the 1968 election (internal quotation marks omitted)).

94. Nina Totenberg, *Earl Warren's Legacy*, NPR (June 30, 2008, 4:00 PM), https://www.npr.org/templates/story/story.php?storyId=92043809 [https://perma.cc/MA9K-7ZM9].

95. Gideon v. Wainwright, 372 U.S. 335 (1963).

96. *Id.* at 344–45.

97. Miranda v. Arizona, 384 U.S. 436 (1966).

98. *Id.* at 467–68.

99. *See* Clayton, *supra* note 10 ("The Supreme Court, [Barry Goldwater] and many others contended, was coddling criminals and giving them too many rights.").

100. Matthew Dallek, *Was 1968 America's Bloodiest Year in Politics?*, HIST. (Jan. 31, 2019), https://www.history.com/news/1968-political-violence [https://perma.cc/HMV9-ZFYQ].

101. *See* Clayton, *supra* note 10 ("Richard Nixon campaigned hard against the Court in 1968 and promised to nominate only justices who would reverse a judicial philosophy he regarded as 'too soft on crime.'").

doctrines that continue to have significance almost fifty years later."[102] Shortly thereafter, President Ronald Reagan picked up the mantle.

Reagan took the diplomatic approach of using his Attorney General, Edwin Meese, to attack the legitimacy of Supreme Court rulings. Similar to Nixon, Meese publicly rebuked landmark decisions—like *Miranda*—that expanded the rights of the criminally accused.[103] To him, the Supreme Court was overstepping its bounds by defying the will of the people to impose "its own policy preferences."[104]

Further, Attorney General Meese argued Congress should ignore the Court's decisions outright and continue passing legislation contrary to its edicts.[105] Meese was transparently threatening the Court's institutional legitimacy, forcing it to choose between comporting with his jurisprudential philosophy or risking outright obsolescence.[106] Rather than submitting to the attacks, multiple Justices struck back.[107] Notably, then-Associate Justice Rehnquist—an ideological ally of Meese and a Nixon appointee—responded by alluding to the switch in time, seemingly warning Reagan and Meese that they were entering dangerous waters and "should tone down their criticisms of the Court."[108]

The attacks by Meese and the response from Rehnquist are significant for two reasons. First, the Executive Branch openly and brazenly threatened to ignore the decisions of the Supreme Court. Second, even half a century

102. Earl M. Maltz, *The 2016 Election and the Future of Constitutional Law: The Lessons of 1968*, 43 HASTINGS CONST. L. Q. 735, 736 (2016).

103. *See* Philip Shenon, *Meese Seen as Ready to Challenge Rule on Telling Suspects of Rights*, N.Y. TIMES (Jan. 22, 1987), https://www.nytimes.com/1987/01/22/us/meese-seen-as-ready-to-challenge-rule-on-telling-suspects-of-rights.html [https://perma.cc/55QD-WNAB] ("The interesting question is not whether [*Miranda*] should go, but how we should facilitate its demise . . . ." (internal quotation marks omitted)).

104. *See* Taylor, *supra* note 10 (documenting Meese's criticisms of the Court, including his belief that it "read[] its own policy preferences into the Constitution").

105. *Id.*

106. The judiciary's power rests on respect from citizens, which command respect from their politicians. If public confidence deteriorates, either organically or as a result of political pressure—like Meese's public statements—the political branches may feel empowered to ignore judicial opinions, thereby relegating the judiciary to obsolescence. *Cf.* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority . . . ultimately rests on sustained public confidence in its moral sanction.").

107. Stuart Taylor Jr., *Justice Stevens, in Rare Criticism, Disputes Meese on Constitution*, N.Y. TIMES (Oct. 26, 1985), https://www.nytimes.com/1985/10/26/us/justice-stevens-in-rare-criticism-disputes-meese-on-constitution.html [https://perma.cc/AB8J-TQSF].

108. *Id.*

later, the switch in time weighed powerfully on the minds of those who comprised our highest Court.[109]

Taken as a whole, the history of interbranch conflict makes several facts clear. Since the American founding, the coordinate branches of government have used political pressure to influence the federal judiciary.[110] The tension peaked during the switch in time, which established the efficacy of political attacks insofar as the Court buckled under duress.[111] In the following decades, politicians like Nixon and Reagan used the tools of the switch with mixed results, but they certainly confirmed political attacks were here to stay.[112] So, how will the Supreme Court respond to political pressure in the modern era?

The answer lies in a basic understanding of the federal judiciary's structural disadvantages compared to the Executive and Legislative Branches.[113] Therefore, the following discussion uses a structural framework to contextualize interbranch conflict and pinpoints defensive tactics used to ward off aggressive political challenges.

III. THE FRAGILITY FRAMEWORK

"The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever."[114]

109. *See id.* (questioning whether Justice Rehnquist, in the portion of a speech he gave where he analyzed the defeat of Roosevelt's Court-packing plan, attempted to send a message to conservatives who criticized the Court).

110. *See* Olson, *supra* note 22, at 41–42 (describing political pressure's significant influence on *Marbury v. Madison*). Further, political pressure has continued to the present day and is discussed later in this Comment. *See infra* Part IV (arguing several landmark decisions were influenced by political pressure).

111. *See, e.g.*, Carter & Adams, *supra* note 7, at 383 (contending Justice Owen Roberts's flip was induced by several factors, including Roosevelt's Court-packing plan and public pressure).

112. *E.g.*, Totenberg, *supra* note 11 (detailing a recent attack on the Supreme Court by then-Senate Minority Leader Chuck Schumer).

113. The Founders were aware of the judiciary's structurally fragile position. Alexander Hamilton argued it was the "weakest" branch of government because it lacked the power of sword or purse, and it "is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches." THE FEDERALIST No. 78, *supra* note 1, at 464–65. For a deeper analysis of the federal judiciary's position relative to its coequal branches, see generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (Yale Univ. Press, 2d ed. 1986) (exploring how the seemingly superior power of judicial review is wielded by the "least dangerous branch" of government).

114. THE FEDERALIST No. 78, *supra* note 1, at 464.

The judiciary occupies a unique position within the government. On one hand, it possesses the near untethered power of judicial review, granting the authority to strike down unconstitutional government actions.[115] On the other hand, it lacks the power to enforce its decisions.[116] While the Executive Branch "holds the sword," and the Legislature "commands the purse," the judiciary has only its "judgment" and "depend[s] upon the aid of the executive" for enforcement of its edicts.[117] If the political branches ignored judicial pronouncements, judicial opinions would be utterly meaningless. Thus, the bench relies "on sustained public confidence and consequent respect from the political branches.[118] The Court must, therefore, respond to the political climate underlying controversial cases at bar, as any tactical misstep could ultimately spell its undoing.[119]

How then is the Supreme Court to handle controversial cases where the desirable result, from its perspective, is at odds with the stronger branches of government or the people themselves? Grappling with these competing influences, the Court uses defensive tactics, such as flip-flopping on well-settled legal precedents, sidestepping the merits of cases, or releasing carefully calculated opinions.

A. *The Flip-Flop*

In perhaps the most prototypical defensive tactic, the Supreme Court could buckle under pressure and avoid crises by switching the jurisprudential thinking that spawned the controversy in the first place.[120] However, this crude method of relieving pressure undermines public confidence in the independence of the federal judiciary and gives the

115. *See id.* at 466 (explaining the Constitution is a "fundamental law" and must be construed by the federal judiciary); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (acknowledging the federal judiciary's power to interpret the Constitution through judicial review).

116. THE FEDERALIST No. 78, *supra* note 1, at 464.

117. *Id.*

118. Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

119. In *Baker*, Justice Frankfurter recognized that tackling inherently political questions could impair the Court's ability to rule in future cases, and he appeared keenly aware of the unique risk the judiciary faces when it addresses issues with strong public and political sentiments. *Id.* at 267–68.

120. The clearest example of the flip-flop is the switch in time. *See supra* Section II.B (describing Justice Owen Roberts's flip on economic substantive due process and the Commerce Clause). *Compare* Carter v. Carter Coal Co., 298 U.S. 238, 298–99 (1936) (holding Congress exceeded its authority under the Commerce Clause), *and* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 610–11 (1936) (invalidating a minimum wage law), *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37–38 (1937) (licensing broad congressional use of the Commerce Clause), *and* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 396–97 (1937) (upholding a minimum wage law).

unseemly appearance of a nakedly political Court.[121] Further, as seen in *Parrish*, a strident flip-flop undermines stare decisis by suggesting well-settled precedent may be uprooted at a moment's notice, provided the attendant political pressure is sufficient to justify jurisprudential vacillation.[122] In *Parrish*, Roosevelt's impending Court-packing plan outweighed the aforementioned consequences, yet it took decades of "revisionist history" to successfully rehabilitate the Supreme Court's independent, apolitical image.[123] Thus, extreme tactics, like the Flip-Flop, are largely relegated to history, as the consequences usually outweigh any prospective benefit. The Court has since opted for subtler and less drastic measures.

B. *The Justiciability Approach*

When the Supreme Court faces a dangerous political climate, it may refuse to hear controversial cases altogether or toss them on procedural grounds rather than ruling on the merits. A particularly clever tactic is to deny certiorari.[124] By refusing to hear politically problematic cases, the Court avoids controversies before they arise.[125] Notably, as a matter of longstanding procedure, the Supreme Court follows the Rule of Four, which allows "four of the nine Justices to commit the Court to review a case."[126] In other words, it gives the minority the power to control the Court's docket by forcing an unwilling majority to rule on cases they wished to avoid.[127]

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121. *E.g.*, LEUCHTENBURG, *supra* note 4, at 143 (recounting the public ridicule proceeding Justice Owen Roberts's flip).

122. *Compare Tipaldo*, 298 U.S. at 610–11 (invalidating a minimum wage law), *with Parrish*, 300 U.S. at 392–93 (upholding a minimum wage law less than a year later).

123. *See* Ariens, *supra* note 2, at 623–25 (contrasting Justice Felix Frankfurter's public and private statements in the years after the switch in time, demonstrating his efforts to modify the historical record to rehabilitate the Supreme Court's damaged reputation).

124. *See* Benjamin Johnson, *The Supreme Court's Political Docket: How Ideology and the Chief Justice Control the Court's Agenda and Shape Law*, 50 CONN. L. REV. 581, 609–10 (2018) ("By choosing what issues it will place on its docket, [the Court] directly affects the political agenda for the nation. Equally important, by choosing which questions to avoid, the Court can sidestep landmines that might threaten its standing." (footnote omitted)); *see also* Debra Cassens Weiss, *Justice Ginsburg*: Roe v. Wade *Decision Came Too Soon*, ABA J. (Feb. 13, 2012, 12:29 PM), https://www.abajournal.com/news/article/justice_ginsburg_roe_v._wade_decision_came_too_soon [https://perma.cc/6PPB-QSWN] (implying the Court should wait to decide some issues, like abortion, based on political considerations).

125. *See* Ilya Shapiro, *The Roberts Court*, 2020 CATO SUP. CT. REV. ix, xi–xii (contending Chief Justice Roberts responded to "polarization and toxic public discourse" by leading an internal campaign to convince other Justices to deny certiorari).

126. Johnson, *supra* note 124, at 593.

127. *Id.*

However, even when cases are foisted on the Court by the minority, the majority may sidestep the merits by deeming them non-justiciable. This venture is assisted by the test of standing,[128] which is easily manipulated to reach a preferred outcome.[129] It is well established that ideology influences the determination of justiciability insofar as justices manipulate the facts or law to make cases justiciable or non-justiciable, depending on their preexisting political predilections.[130] Thus, it is but a slight step in logic to conclude that justices may manipulate justiciability to dodge cases that could wreak irreparable damage to the federal judiciary.[131] In short, even when forced to rule on cases, the Supreme Court may rely on the nebulous doctrine of justiciability to dodge politically treacherous issues.

Further, the Justiciability Approach to controversy, like denying certiorari, leaves the legal questions unaddressed, allowing the Court to later rectify its abdication. Political pressure and public opinion tend to wax and wane, meaning decisions once verboten may become uncontroversial with

128. The modern law of standing harkens back to the *Valley Forge* test. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (establishing the "irreducible minimum" requirements of standing). For a deeper analysis of standing, see Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (setting forth the black-letter law of standing).

129. *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1098–99 (2015) (arguing the elements of standing are "amorphous" and may be influenced by justices' ideology through the concept of "motivated reasoning"); *see also* Flast v. Cohen, 392 U.S. 83, 98 (1968) ("Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability.").

130. *E.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1786 (1999) ("Judges regularly manipulate the doctrine[] [of standing] and rely on selective citation of precedents to further their own political preferences."). *But see* Heather Elliott, *Does the Supreme Court Ignore Standing Problems to Reach the Merits? Evidence (or Lack Thereof) from the Roberts Court*, 23 WM. & MARY BILL RTS. J. 189, 207 (2014) (concluding there is no evidence that the Roberts Court manipulates standing to reach the merits of non-justiciable cases).

131. *See infra* Section IV.C (arguing *California v. Texas* was held non-justiciable to avoid a politically dangerous issue at a time of intense public and political pressure); *see also* Shapiro, *supra* note 125, at xi–xii (intimating Roberts led the charge to toss a politically charged case as moot to avoid controversy). The question of whether the Court manipulates justiciability to dodge the merits of cases remains a matter of widespread debate among legal scholars but is yet to gain significant empirical support. *See, e.g.*, Elliott, *supra* note 130, at 207 ("There remains the question of whether there are numerous cases where the Court appears to have ducked the merits by dismissing for lack of standing . . . .").

time.[132] Therefore, the Court may temporarily avoid a threatening case, awaiting fairer weather or a friendlier political administration.

In sum, when the Supreme Court faces dangerous attacks from the public or politicians, it may refuse to grant certiorari or dodge the controversy by manipulating the shadowy doctrine of justiciability. Under either approach, the Court gives itself another bite at the apple, as it could later decide to grant certiorari or find a similar case justiciable despite its previous decision, provided the political climate improved sufficiently to justify a different ruling. Importantly, even if the Court grants certiorari and reaches the merits of a controversy, it possesses one final defensive tool.

C. *The Balancing Act*

In perhaps the most tactful and nuanced of the defensive machinations, the Court may release calculated opinions that strike a balance between protecting the federal judiciary from outside threats and furthering the Court's interests.[133] Similarly, it may identify places of agreement among the justices to reach a consensus, thereby avoiding the specter of political partisanship.[134] Both tactics achieve a similar result insofar as they detach the Court from politics and reach moderate solutions to controversial cases, minimizing the risk of political attack.

While the Balancing Act may ease pressure and establish the Court's apolitical bona fides, it creates inconsistent decisions that defy public expectations. Early in Chief Justice John Roberts's tenure, legal prognosticators believed Roberts—based on his staunch conservative

132. *See* Obergefell v. Hodges, 576 U.S. 644, 693 (2015) (Roberts, C.J., dissenting) (arguing public opinion on marriage equality was "shift[ing] rapidly," making the once contentious topic anodyne); *cf.* Weiss, *supra* note 124 (recounting Justice Ginsburg's belief that *Roe* was decided too soon because public opinion had not yet shifted in favor of abortion rights).

133. *See infra* Section IV.A (contending *Sebelius* was induced by the political climate, which compelled Chief Justice Roberts to employ the Balancing Act); *see also* Shapiro, *supra* note 125, at xiii ("All of these rulings show that Chief Justice Roberts is acting politically, not in the partisan sense or even to curry favor with the progressives who control elite institutions, but in thinking about how . . . best to position his beloved Court."); BISKUPIC, *supra* note 12, at 10 (reporting Chief Justice Roberts, when deciding *Sebelius*, flipped back and forth until he struck a balance by upholding the individual mandate of the Affordable Care Act under the Taxing Clause while invalidating the Medicaid expansion as violative of the Spending Clause).

134. *See infra* Section IV.B (arguing *Fulton* was a compromise solution generated by the toxic political climate that placed the Court in peril); *see also* Shapiro, *supra* note 125, at xi ("Roberts has gone out of his way not to rock the boat, to maintain the status quo, and to try to extricate the Court from the larger political narrative.").

roots—would vote to overturn *Roe v. Wade*[135] if given the opportunity.[136] Roberts quickly lent support to their estimation by casting the decisive vote upholding the Partial-Birth Abortion Ban Act of 2003 (Act).[137]

In a hotly contested 5–4 decision, Chief Justice Roberts and his conservative counterparts, Justices Kennedy, Scalia, Thomas, and Alito, shot down a facial challenge to the Act.[138] Relying heavily on *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[139] the slim majority contended:

> Where [the State] has a rational basis to act, and it does not impose an undue burden, [it] may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession . . . to promote respect for life, including life of the unborn.[140]

The Court believed the Act furthered the stated interest by proscribing abortion procedures that bore a "disturbing similarity to the killing of a newborn infant."[141] Further, the majority held the Act—in promoting the governmental interest—placed no undue burden on abortion rights because several existing medical techniques accomplished the same end.[142] In other words, the woman's right to have an abortion does not grant her physician an "unfettered choice" regarding which medical procedure to perform.[143] Consequently, this ruling expanded congressional power to regulate abortions, eroding the foundation of *Roe* and its progeny.

From 2007 to 2016, the political climate surrounding the Supreme Court changed, aided by an increasing perception of political partisanship spurred by the Republican's treatment of Merrick Garland in the aftermath of Justice

135. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

136. *E.g.*, Rachel Warren, Comment, *Pro [Whose?] Choice: How the Growing Recognition of a Fetus' Right to Life Takes the Constitutionality out of* Roe, 13 CHAP. L. REV. 221, 240–41 (2009) (arguing Roberts's appointment as Chief Justice made the Court "one vote shy of completely overturning [*Roe*]").

137. Gonzales v. Carhart, 550 U.S. 124, 168 (2007); *see* 18 U.S.C. § 1531 (outlawing intact dilation and extraction procedures).

138. *Gonzales*, 550 U.S. at 133.

139. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

140. *Gonzales*, 550 U.S. at 158.

141. *Id.* (quoting Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(L), 117 Stat. 1206 (codified as amended at 18 U.S.C. § 1531)) (internal quotation marks omitted).

142. *Id.* at 163–64.

143. *Id.* at 163.

Antonin Scalia's death.[144] The Republican-controlled Senate refused to vote on President Obama's appointment of Garland, arguing the victor of the 2016 election should select Scalia's replacement.[145] By blocking Garland's appointment, Republicans ensured the eventual nomination of a conservative Justice to replace Scalia but left the Court with eight Justices for an extended duration. Between Justice Scalia's death and President Donald Trump's appointment of Neil Gorsuch, the Court agreed to hear another contentious abortion controversy.

In *Whole Woman's Health v. Hellerstedt*,[146] the liberal-leaning Justices, joined by Justice Kennedy, held the Texas law unconstitutional because the admitting privileges requirement did not further its purported health-related benefits and placed an undue burden on abortion rights by shuttering half of Texas's abortion clinics.[147] Notably, Chief Justice Roberts joined the dissent, reaffirming his anti-abortion position.[148]

The dissenting Justices argued Whole Woman's Health was barred from litigating the case under the doctrine of claim preclusion, as the petitioners brought "the very claim that they unsuccessfully pressed in [an] earlier case."[149] Even if the Court correctly reached the merits, the dissent argued the law did not create an undue burden because the closure of abortion clinics had several causes and the aggregate clinic capacity remained unaffected.[150] Lastly, they argued the legislation's broad severability clause saved the law by permitting excision of impermissible intrusions in localities where the law created an undue burden.[151] In the dissent's view, by not

144. *See* Stephen M. Feldman, *Court-Packing Time? Supreme Court Legitimacy and Positivity Theory*, 68 BUFF. L. REV. 1519, 1522 (2020) (arguing the "Merrick Garland debacle" made the Supreme Court even more conservative than it already was, justifying Roosevelt-style Court-packing).

145. Karoun Demirjian, *Republicans Refuse to Budge Following Garland Nomination to Supreme Court*, WASH. POST (Mar. 16, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/03/16/republicans-refuse-to-budge-following-garland-nomination-to-supreme-court [https://perma.cc/M97Z-GE5R].

146. Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

147. *Id.* at 610–14.

148. *Id.* at 644 (Alito, J., dissenting).

149. *Id.* at 644–45.

150. *See id.* at 671–72 (concluding the collapse of abortion clinics was caused by other factors, like declining demand, yet the overall clinic capacity remained stable through the closures, meaning the law did not create an undue burden).

151. *Id.* at 678–79.

considering the severability clause and holding the entire law unconstitutional, the Court impermissibly "carpet-bomb[ed] state laws."[152]

If *Gonzales* and *Hellerstedt* were weathervanes, one would anticipate continued attacks on abortion over Roberts's tenure, especially if the slim conservative majority grew.[153] However, this assumption was wrong. By 2020, Roberts pivoted.

Notably, the political pressure on the Court increased after *Hellerstedt* and reached a high watermark in 2020, particularly regarding abortion issues.[154] In 2018, Justice Kennedy, a moderate conservative, retired from the Court and was replaced by Brett Kavanaugh, a staunch conservative, placing abortion rights in jeopardy.[155] When the Supreme Court held oral arguments for yet another abortion case, politicians and activists—including then-Senate Minority Leader Chuck Schumer—protested outside the Marble Palace, stating, "You have unleashed the whirlwind[,] and you will pay the price. You won't know what hit you if you go forward with these awful decisions."[156] Schumer's brazen political attack raised alarm bells and prompted a rebuke from Chief Justice Roberts, who called Schumer's attack "threatening" and "dangerous."[157] Yet, in the face of this attack, Roberts flinched.

In *June Medical Services L.L.C. v. Russo*,[158] the Court faced a question "substantially identical" to *Hellerstedt*.[159] The Louisiana law required physicians to have admitting privileges at a hospital within thirty miles of their abortion facility.[160] As Chief Justice Roberts dissented in *Hellerstedt*—

152. *Id.* at 682.

153. *E.g.*, Warren, *supra* note 136, at 241 (contending *Gonzales* was a sign of things to come).

154. *See, e.g.*, Totenberg, *supra* note 11 (documenting the 2020 protests of the Supreme Court).

155. *See* Scott Bomboy, *Trump Nominates Kavanaugh as Justice Kennedy's Replacement*, NAT'L CONST. CTR.: CONST. DAILY (July 9, 2018), https://constitutioncenter.org/blog/trump-nominates-kavanaugh-as-justice-kennedys-replacement [https://perma.cc/AZC5-NNBG] (reporting on the retirement of Justice Kennedy and appointment of his replacement, Brett Kavanaugh); Joanna L. Grossman, *Women Are (Allegedly) People, Too*, 114 NW. U. L. REV. ONLINE 149, 153–54 (2019) ("Today, constitutional abortion rights hang by a thread, as newly appointed Justices Neil Gorsuch and Brett Kavanaugh portend a stark rightward shift.").

156. Totenberg, *supra* note 11 (internal quotation marks omitted).

157. *Id.*

158. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

159. *See id.* at 2113 (first citing Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2299–300 (2016), *abrogated by Dobbs*, 142 S. Ct. 2228; and then citing June Med. Servs. L.L.C. v. Kliebert, 250 F. Supp. 3d 27, 53 (M.D. La. 2017)) (arguing the challenged Louisiana law was virtually identical to the Texas law that was held unconstitutional in *Hellerstedt*).

160. *Id.* (quoting LA. STAT. ANN. § 40:1061.10(A)(2)(a) (2016)).

only stymied by the now-retired Justice Kennedy—one would anticipate him joining his conservative colleagues in overturning the Court's previous decision, saving the Louisiana law. Yet, Roberts chose a different path.

Facing a contentious political question in an election year, with active protests and political threats from a high-ranking Democrat, Chief Justice Roberts concurred in the judgment of the Court's ideological liberals, holding the Louisiana law unconstitutional.[161] Rather than a flip-flop, which requires the uprooting of precedent, Roberts based his decision on stare decisis, arguing the Court's decision in *Hellerstedt* bound him to hold the law unconstitutional.[162] His argument is persuasive, but his sudden adherence to stare decisis is inexplicable.[163] In *Janus v. AFSCME, Council 31*,[164] Roberts joined the Court's overturning of *Abood v. Detroit Board of Education*,[165] which had stood for over forty years.[166] The contrasting versions of the Chief Justice are difficult to explain away. In *Janus*, Roberts joined the Court's evisceration of precedent, as stare decisis is "not an inexorable command."[167] In *Russo*, Roberts, a stickler for consistency, paid lip service to that rule but ultimately bowed to precedent.[168] His reliance on stare decisis appears to be a thinly veiled attempt to avoid political controversy.

Roberts's abortion saga perfectly illustrates the Balancing Act and how its implementation yields inconsistency. When Chief Justice Roberts first tackled abortion, his conservative roots shone through, yet he wavered when faced with political attacks. Roberts took the middle lane by neither siding with conservatives nor liberals. He chose to follow precedent rather than modify or uproot it. Further, Roberts's defensive maneuvering had merit, as he avoided crisis by placating his political and ideological opposition. After all, "[w]hy change the Court now that you ha[ve] the kind

161. *Id.* at 2133 (Roberts, C.J., concurring).

162. *Id.* at 2141–42.

163. *See, e.g.*, Janus v. *AFSCME*, Council 31, 138 S. Ct. 2448, 2487–88 (2018) (Kagan, J., dissenting) (criticizing the Court, including Chief Justice Roberts, for overturning a forty-year-old precedent).

164. Janus v. *AFSCME*, Council 31, 138 S. Ct. 2448 (2018).

165. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. 2448.

166. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

167. *Id.* at 2478 (majority opinion) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)) (internal quotation marks omitted).

168. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020)) (citing *Janus*, 138 S. Ct. at 2448), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

of decisions you desired?"[169] While this example is illustrative, Roberts has routinely utilized defensive tactics throughout his reign as Chief Justice.

IV. THE JOHN ROBERTS ERA

"Yet Roberts has at times set aside his ideological and political interests on behalf of his commitments to the Court's institutional reputation and his own public image."[170]

The Roberts Court frequently addresses hazardous political issues that prompt blowback from politicians and the public.[171] Concerned with protecting the federal judiciary and his reputation from danger, Chief Justice Roberts regularly weighs the political ramifications of his opinions, allowing his judgment to shift based on the anticipated consequences of his decisions.[172] When the pressure ratchets up, or the issue is inherently controversial, Roberts implements defensive tactics—such as the Balancing Act or the Justiciability Approach—to quash impending threats.[173]

A. National Federation of Independent Business v. Sebelius

Early in Roberts's tenure as Chief Justice, the Supreme Court released several controversial decisions, including *Citizens United v. FEC*,[174] which received tremendous backlash from those who "bemoaned what they perceived to be the Court's partisan use of judicial activism to move the country in a rightward political direction."[175] When the Court agreed to settle a circuit split on the Patient Protection and Affordable Care Act (ACA)[176]—the central legislative achievement of the Obama Administration—the outcome appeared preordained.[177] The Court's slim

169. *Cf.* LEUCHTENBURG, *supra* note 4, at 143 (referencing the switch in time's impact on the Court-packing plan, which bears great similarity to Roberts's pivot on abortion).

170. BISKUPIC, *supra* note 12, at 10.

171. *See, e.g.*, *supra* Section III.C (documenting Roberts's abortion saga and the blowback from politicians and activists).

172. *See* Faizer, *supra* note 31, at 10 (recognizing the political calculus underlying Roberts's opinion in *Sebelius*); *see also* BISKUPIC, *supra* note 12, at 10 ("Yet Roberts has at times set aside his ideological and political interests on behalf of his commitments to the Court's institutional reputation and his own public image.").

173. *See infra* Section IV.A–C (arguing several of Roberts's decisions were induced by the political climate surrounding the controversy rather than his authentic legal judgment).

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

175. Faizer, *supra* note 31, at 7.

176. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 540–41 (2012).

177. BISKUPIC, *supra* note 12, at 225.

conservative majority was poised to strike down the ACA under the Commerce Clause, drawing parallels to the switch in time.[178] However, would Chief Justice John Roberts run the same risk as Justice Owen Roberts by invalidating the crowning achievement of a Democratic Administration, or would he learn from history and take a different path?[179]

In *Sebelius*, Chief Justice Roberts, writing for the Court, answered two central questions.[180] First, whether the individual mandate exceeded the Commerce Clause by compelling citizens to purchase health insurance or face a penalty.[181] Second, whether the Medicaid expansion was beyond the scope of the Spending Clause.[182] The answer to the first question hinged on whether the power to regulate interstate commerce included the power to regulate inactivity.[183] A conservative at heart, Roberts felt an expansion of the Commerce Clause to include inactivity was a bridge too far, granting the federal government limitless ability to regulate the "individual from cradle to grave."[184] Unfortunately for Roberts, he could not invalidate the individual mandate without dooming the ACA.[185]

Through the "guaranteed-issue and community-rating provisions," the ACA "prohibit[ed] insurance companies from denying coverage" to patients with preexisting conditions, which dramatically increased the price of health insurance.[186] To offset these additional costs, the individual mandate compelled everyone—including the young and healthy—to purchase health insurance.[187] Consequently, if the Court invalidated the individual mandate, it would "trigger an adverse-selection death spiral in the health-insurance

178. In both cases, the Court maintained a slim conservative majority that appeared ready to invalidate progressive legislative achievements. If Chief Justice Roberts took the same path as Justice Owen Roberts by recklessly invalidating federal legislation, he risked facing similar consequences. *See* BISKUPIC, *supra* note 12, at 227–29 (connecting the challenge of the ACA to the switch in time); *see also supra* Section II.B (characterizing Justice Owen Roberts's flip-flop as a response to Roosevelt's Court-packing plan, which was instituted because of the Court's flagrant invalidation of New Deal legislation).

179. *See supra* Section III.B–C (discussing defensive tactics available when the Court faces political danger).

180. *Sebelius*, 567 U.S. at 530–31.

181. *Id.* at 547.

182. *Id.* at 575.

183. *See id.* at 552 ("The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.").

184. *Id.* at 557.

185. *See id.* at 548 (explaining how the individual mandate made the ACA viable by offsetting the cost of other provisions).

186. *Id.* (internal quotation marks omitted).

187. *Id.*

market" by removing its primary source of funding.[188] Without a profit motive, insurers would withdraw, causing the system to collapse.[189]

Thus, Chief Justice Roberts faced a near-impossible obstacle. On one hand, his conservative ideology called for eliminating the individual mandate to prevent an unwieldy expansion of federal power.[190] On the other hand, invalidating the Obama Administration's prized legislation risked sparking conflict reminiscent of the switch in time.[191] Roberts solved his dilemma by creating "an ingenious means of both strengthening the Court's institutional prestige and furthering his jurisprudential goals."[192]

Roberts checked the government's power by invalidating the individual mandate under the Commerce Clause but sustained the provision as a tax.[193] Despite the statute's clear language "command[ing] individuals to purchase insurance," Roberts reasoned that when "a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."[194] Because it was "fairly possible" to read the individual mandate as a tax, Roberts believed he had a "duty . . . to save the Act."[195] While the individual mandate fell short under the Commerce Clause, it effortlessly passed muster as a tax.[196]

Roberts's tactical genius cannot be overstated. By invalidating the provision under the Commerce Clause, he satiated the conservative desire to narrowly circumscribe federal power while giving his ideological opposition a surface-level victory.[197] The Commerce Clause is far more

188. *Id.* at 619 (Ginsburg, J., dissenting).

189. *See id.* (discussing the cataclysmic effects of eliminating the individual mandate).

190. *See id.* at 558 (majority opinion) (implying the government's interpretation of the Commerce Clause permits compelled purchase of broccoli, notwithstanding the government's refutation).

191. *See* Faizer, *supra* note 31, at 10 (explaining how the Court's controversial decisions and plummeting approval rating risked "an election campaign that attacked the Court's legitimacy"); *see also* BISKUPIC, *supra* note 12, at 231 (recalling Solicitor General Verrilli's references during his oral argument in *Sebelius* to the *Lochner* era decisions precipitating the switch in time).

192. Faizer, *supra* note 31, at 10.

193. *Sebelius*, 567 U.S. at 562, 574.

194. *Id.* at 562.

195. *Id.* at 562–63.

196. *See id.* at 572–74 (holding the individual mandate was not so punitive as to exceed the scope of the Taxing Clause).

197. *See* Faizer, *supra* note 31, at 13–14 ("First, it allowed the Chief Justice to avoid a direct confrontation with the Obama Administration and ensure that the Court's legitimacy would not be at issue in the forthcoming Presidential election. Second, and more importantly, it enabled Chief Justice Roberts to obtain the Obama Administration's acquiescence in a decision that greatly narrows the federal government's legislative power.").

potent than the Taxing Clause, as it grants Congress the ability to "simply command individuals to do as it directs."[198] If they fail to comply, they "may be subjected to criminal sanctions."[199] In contrast, the taxing power has significant limitations and may only create modest incentives rather than an unrestrained proscription of conduct.[200] Thus, Roberts lost the battle but won the constitutional war.

The second question was whether the "Medicaid expansion exceed[ed] Congress's authority under the Spending Clause."[201] The expansion gave states a simple choice: either accept additional requirements that relax the qualification standards or lose all Medicaid funding.[202] While the federal government may condition grants on compliance with its policies, the state must have "a legitimate choice whether to accept the federal conditions."[203] When "persuasion gives way to coercion," the government has exceeded its authority.[204] Roberts called the expansion "a gun to the head," giving states "no real option but to acquiesce."[205] Thus, the Medicaid expansion was an unconstitutional exercise of the Spending Clause.

Once again, Roberts snatched victory from the jaws of defeat. While he could not invalidate the ACA without risking institutional danger, he successfully limited the federal government's power by circumscribing its authority under the Taxing Clause.

Sebelius illustrates the Balancing Act perfectly. Roberts saw danger on the horizon, as the invalidation of the ACA would be viewed as the last straw in a litany of controversial decisions. Instead of provoking trouble, Roberts pivoted to a moderate position, giving his opponents a hollow victory while furthering his jurisprudential goals.

B. Fulton v. City of Philadelphia

While Roberts's opinion in *Sebelius* temporarily relieved the pressure, the Supreme Court's increasingly partisan composition ensured these gains

198. *Sebelius*, 567 U.S. at 573.

199. *Id.*

200. *See id.* at 572–74 (describing the limitations on the Taxing Clause and contrasting it with the extraordinary breadth of the Commerce Clause).

201. *Id.* at 575.

202. *Id.*

203. *Id.* at 578.

204. *See id.* at 585 (describing the hazy line between acceptable incentives and coercion).

205. *Id.* at 581–82.

would not last.[206] By 2020, the Court faced public protests, threats from political leadership, and discussions of Court-packing to solve the conservative monopoly.[207] Surprisingly, Court-packing became a mainstream position during the 2020 election, supported by Elizabeth Warren and Kamala Harris.[208] Although Joe Biden, who publicly opposed Court-packing,[209] ultimately won the election, he created the Presidential Commission on the Supreme Court (Commission) to evaluate reform options.[210] The protests, political pressure, Court-packing discussion, and establishment of the Commission combined to create a uniquely high-pressure environment, forcing the Court to consider its opinions carefully. Would Roberts confirm the speculation of partisanship by rendering controversial decisions, or would he shield the Court from outside pressure by implementing defensive tactics?

In *Fulton*, the Court answered whether denying same-sex couples the opportunity to foster children due to religious convictions is protected by the Free Exercise Clause of the First Amendment.[211] The controversy arose when Catholic Social Services (CSS), a religious foster care group, refused to certify same-sex couples as prospective foster parents.[212] In response, the City of Philadelphia declined to renew its contract unless CSS agreed to modify its practices.[213] CSS filed suit, alleging the City's actions impermissibly burdened its rights under the Free Exercise Clause.[214] The parties' arguments revolved around whether the City's prohibition of "discrimination on the basis of sexual orientation" was "neutral and

206. *E.g.*, Feldman, *supra* note 144, at 1522 (contending the appointment of Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett altered the partisan composition of the Court to such an extent that Court-packing is necessary).

207. *See* Totenberg, *supra* note 11 (reporting on the abortion-rights protests, which were punctuated by tacit threats from then-Senate Minority Leader Chuck Schumer); *see also* Feldman, *supra* note 144, at 1523 ("Numerous Democrats, both moderate and more progressive, have expressed support for court-packing.").

208. Feldman, *supra* note 144, at 1523–24; *see also Would You Support Adding Justices to 'Pack' the Supreme Court?*, WASH. POST, https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/supreme-court-packing [https://perma.cc/QPN3-634E] (documenting candidates' public positions on Court-packing during the 2020 election).

209. Sarah Mucha & Devan Cole, *Biden Says He's 'Not a Fan' of Court-Packing and That He Doesn't Want to Make the Election About the Issue*, CNN (Oct. 14, 2020), https://www.cnn.com/2020/10/13/politics/joe-biden-court-packing-not-a-fan/index.html [https://perma.cc/YH9M-37W2].

210. Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021).

211. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874 (2021).

212. *Id.*

213. *Id.*

214. *Id.* at 1876.

generally applicable" under *Employment Division v. Smith*.[215] Traditional logic suggested that the 6–3 conservative Court would overturn *Smith* at the expense of conflicting civil liberties.[216] Yet, Roberts broke with expectations once again.

Beneath the weight of coalescing political forces, Chief Justice Roberts refused to answer the question, arguing the City's conduct was not generally applicable, giving no need to "revisit that decision."[217] Because Philadelphia had a policy of offering "individual exemptions, made available . . . at the 'sole discretion' of the Commissioner," the City's conduct must survive strict scrutiny.[218] As the City could not offer a compelling reason for "denying an exception to CSS," its conduct violated the Free Exercise Clause.[219]

Roberts gained unanimous support for this result, giving the appearance of apolitical judging. Yet, he only garnered unanimity because his opinion was extraordinarily narrow and inoffensive to both ideological wings of the Court.[220] Employing the Balancing Act, Roberts reached a moderate conclusion that neither overturned *Smith*, which would have lost the liberal Justices, nor allowed the City's conduct to continue, which would have lost the conservatives.[221] In so doing, Roberts tactically avoided a controversial decision on a divisive political issue during a time of intense outside pressure.

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215. *Fulton*, 141 S. Ct. at 1876 (citing Emp. Div. v. Smith, 494 U.S. 872, 879 (1990)).

216. *E.g.*, Arthur S. Leonard, Note, *Law & Society Notes*, 2020 LGBT L. NOTES 29, 30 ("Since the four most conservative members of the Court have already signaled their interest in possibly overruling [*Smith*], the addition of [Justice Amy Coney] Barrett may tip the balance and reopen the possibility of broad constitutional exemptions from complying with general laws on religious grounds.").

217. *See Fulton*, 141 S. Ct. at 1877 (2021) (arguing a decision on *Smith* was unnecessary because the City "burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable" (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993))).

218. *Id.* at 1878 (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

219. *Id.* at 1882.

220. *See, e.g.*, Matt Urban, Comment, *Lost in the Minefield:* Fulton's *Missed Opportunity to Strengthen* Smith *and the Separation of Church and State*, 53 U. PAC. L. REV. 207, 224, 230 (2021) (arguing Chief Justice Roberts avoided dissent by creating a middle-of-the-road solution).

221. *See, e.g.*, *id.* at 224 ("Finding a unanimous decision on narrow grounds denied religious liberty advocates the broad triumph they envisioned, but anti-discrimination advocates were also denied a dissent to religious liberty's limited victory.").

C. California v. Texas

On the same day as *Fulton*, the Court answered a similarly controversial question.[222] In *California v. Texas*, several States challenged the constitutionality of the ACA, contending its "minimum essential coverage provision [was] unconstitutional."[223] The provision required individuals to purchase baseline coverage, yet it lacked teeth, as the Trump Administration "zeroed out" the penalty for noncompliance.[224] Taking a similar tack as the National Federation of Independent Business did in *Sebelius*, Texas argued Congress exceeded its authority under the Commerce and Taxing Clauses.[225] Although their arguments proved successful in the lower courts, the 7–2 majority—joined by Chief Justice Roberts—refused to reach the merits of the case.[226]

Employing the Justiciability Approach, the Court concluded the States lacked standing to file suit, overturning the lower courts without reaching a controversial conclusion.[227] The majority reasoned that statutes without enforcement mechanisms could not cause injury because the afflicted individuals may avoid damages by refusing to comply with the law.[228] In other words, the "injury [was] not 'fairly traceable' to any 'allegedly unlawful conduct.'"[229] Without a causal connection, the plaintiffs lacked standing to sue.[230]

In his dissenting opinion, Justice Alito correctly exposed the Court's inconsistent application of standing, which appears extraordinarily selective.[231] In some cases, standing is an insurmountable obstacle,[232] while it is no issue in other, factually similar circumstances.[233]

222. Kevin R. Eberle, *A Review of Significant Supreme Court Decisions of the 2020–2021 Term*, 33 S.C. LAW. 46, 47 (2021) (calling *California v. Texas* one "of the most highly political cases of the term").

223. California v. Texas, 141 S. Ct. 2104, 2119 (2021).

224. *Id.* at 2114 (citing 26 U.S.C. § 5000A(g)).

225. *Id.* at 2112 (citing U.S. CONST. art. I, § 8).

226. *See id.* at 2113 ("We proceed no further than standing.").

227. *Id.* at 2120.

228. *Id.* at 2114.

229. *Id.* (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

230. *Id.*

231. *See id.* at 2124 (Alito, J., dissenting) (arguing the Court's application of standing changes depending on the case at bar).

232. *See id.* at 2130 ("The Court's primary argument rests on a patent distortion of the traceability prong of our established test for standing.").

233. *See id.* at 2124 (citing Dep't of Com. v. New York, 139 S. Ct. 2551, 2565–66 (2019)) (contending standing is not an obstacle when the Court addresses some issues).

In a stroke of ingenuity, the Roberts Court overturned the lower courts—thereby quashing the political pressure—while leaving the possibility of future adjudication. Because the constitutional question was left unanswered, a more favorable political climate could easily change the Court's calculation.

V. CONCLUSION

"The Court's authority . . . ultimately rests on sustained public confidence in its moral sanction."[234]

The Roberts Court continues to withstand unprecedented pressure from politicians and the public.[235] Historically, Roberts has responded by employing defensive tactics, including the Balancing Act and the Justiciability Approach, to avoid controversy and quash impending danger.[236] While the threat remains high, Roberts will likely continue these efforts.[237] Undoubtedly, the Court will reach the merits of some controversial cases, but Roberts will attempt to steer it towards moderation and reliance on precedent.[238] However, the changing composition of the Court may militate against defensive machinations, spoiling Roberts's herculean efforts.

When the Court is ideologically split, as it was in *Sebelius*, the efforts of one justice are sufficient to dictate the direction of the Court.[239] However, when one side of the ideological spectrum maintains a stranglehold, multiple justices must cooperate to influence its decisions.[240] With the addition of

234. Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

235. *See* Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021) (evaluating options for Supreme Court reformation in the wake of Justice Barrett's appointment); *see also* Feldman, *supra* note 144, at 1522 (contending Court-packing is necessary to reform the Supreme Court's ideological imbalance).

236. *See supra* Part IV.B–C (arguing *Fulton* and *California v. Texas* were examples of the Balancing Act and the Justiciability Approach).

237. *See supra* Part III.B (contending the Court may deny certiorari or toss on grounds of justiciability when ruling on controversial issues in times of intense pressure).

238. *See supra* Part III.C (claiming the Court may reach moderate solutions to polarizing issues to relieve pressure).

239. *E.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 529–30 (2012) (creating a coalition with the liberal-leaning Justices, Roberts unilaterally shifted the outcome of the case).

240. If the Court has more than five ideologically conservative justices, one defection cannot create a majority. For an example where Roberts defected from the conservative majority but

Amy Coney Barrett in 2020, the Court's conservative majority grew to six, meaning at least two conservatives must deviate to successfully implement defensive maneuvers. The evidence supporting Roberts's ability to cobble together a majority is mixed.

In some instances, he successfully persuaded multiple conservatives to join his cause, while in others, the staunch conservative bloc refused to give ground, forcing Roberts to dissent. For example, Roberts gained unanimous approval, albeit with several concurring opinions, for his decision in *Fulton*.[241] Additionally, in *California v. Texas*, Roberts joined multiple conservatives, including Justices Barrett and Kavanaugh, in dodging the constitutional challenge to the ACA.[242] While these cases indicate compromise is possible, there are also examples where Chief Justice Roberts was the lone dissenting conservative.

In *Whole Woman's Health v. Jackson*,[243] the Court denied injunctive relief to abortion providers challenging the constitutionality of a Texas law banning abortions after a fetal heartbeat is detected.[244] Roberts, joined by Justices Breyer and Kagan, filed a dissenting opinion, contending injunctive relief should have been granted to "preserve the status quo ante" while the lower courts resolved the issues.[245] Notably, Roberts was the sole dissenting conservative, indicating he could not persuade a single ideological ally to join his cause.[246]

The mixed bag of decisions evinces substantial unpredictability in important lines of jurisprudence. And new decisions increase the

dissented, see Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting) (joining Justices Breyer and Kagan in dissent).

241. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (reaching a decision without dissenting opinions); *see also* Urban, *supra* note 220, at 224 (contending Chief Justice Roberts strategically achieved unanimity in *Fulton*).

242. California v. Texas, 141 S. Ct. 2104, 2111–12 (2021).

243. Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021).

244. *See id.* at 2495 (refusing to grant injunctive relief because the case "present[ed] complex and novel antecedent procedural questions on which [Whole Woman's Health] ha[d] not carried [its] burden"); *see also* TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) ("[A] physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat . . . or failed to perform a test to detect a fetal heartbeat.").

245. *Jackson*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting).

246. *E.g.*, Adam Liptak, *Supreme Court Allows Challenge to Texas Abortion Law but Leaves It in Effect*, N.Y. TIMES (Dec. 10, 2021), https://www.nytimes.com/2021/12/10/us/politics/texas-abortion-supreme-court.html [https://perma.cc/HJX8-4UQX] ("The [C]ourt's earlier encounter with the law left the [J]ustices bitterly divided along the same basic fault line . . . with Chief Justice Roberts joining the [C]ourt's three more liberal members in dissent.").

weightiness of this uncertainty. Recently, the Court decided *Dobbs v. Jackson Women's Health Org.*,[247] which overruled *Roe* and *Casey*,[248] eviscerating abortion rights by undermining the philosophical underpinnings of substantive due process.[249] Notably, Chief Justice Roberts concurred in the judgment of the Court, arguing for "a more measured course" that would merely abandon "the viability line established by *Roe* and *Casey*."[250] Roberts's opinion is consistent with his historical approach, as he attempted to avoid political danger by steering the Court toward moderation. While his efforts were ineffective here, the fruitfulness of his ongoing stratagem is a question for future historians and legal scholars.

247. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

248. *Id.* at 2242.

249. *See* Matthew A. Seligman, *Court Packing, Senate Stonewalling, and the Constitutional Politics of Judicial Appointments Reform*, 54 ARIZ. ST. L.J. 585, 589 (2022) ("And reproductive rights may be only the beginning."); *cf. Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

250. *Dobbs*, 142 S. Ct. at 2310 (Roberts, C.J., concurring in the judgment).