Constitutional Rorschach Test

Legal Ideology and the Role of Federal Courts in Social System Legitimation

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Abstract

Originalism and living constitutionalism, and their constituent variations, are often characterized as opposing methodologies. However, while theoretical development and scholarly discussion tend to amplify their perceived differences, few academics approach interpretive methodology from a critical perspective to examine its role in the larger social system. This project addresses five distinct elements and effects of the law and legal system through a materialist lens: First, originalism and living constitutionalism have few differences, and those that exist are largely superficial. This hegemony of legal thought, buttressed by strong formalist undertones, functions to neutralize radical legal thought and bend alien interpretation towards established legal norms. Second, federal courts in the United States enjoy judicial supremacy. Because of their structural composition, federal courts, when exercising strong judicial review, inevitably encounter the counter-majoritarian difficulty. Consequently, they are presumptively democratically illegitimate and must seek to legitimate themselves. Third the law, legal system, and accompanying procedures function to legitimate the existing social system and capitalist relations of production, reinforcing the status quo of property, labor relations, and the legitimacy of the state. Fourth, the current legal system is experiencing a legitimation crisis—people are questioning the legitimacy of courts, especially at the federal level. Among the plausible causes, the increased activity of courts adjudicating social issues may be the primary factor precipitated by the reemergence of natural law philosophy. Finally, I make a normative assessment as to how courts can reclaim legitimacy by withdrawing from social jurisprudence and likewise refrain from disrupting the existing relations of production. This arrangement respects the American constitutional system and allows legislative bodies to craft policies that are better tailored and suited to society's needs that can implement sweeping systematic changes beyond that which a court can address in a given case.

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Introduction

Law permeates society in a way few other institutions can parallel. The ubiquity of law is not only measured by its quantity, but also its pervasiveness in American culture. Law and legal procedures form the primary means by which citizens form governments; parliamentary procedure and rules regulate legislative bodies in the crafting of laws, which in turn regulate the function and actions of state actors and governmental bodies, agencies, and departments. Criminal law governs conduct that the state has deemed outside the permissible range of conduct. The law of contract regulates private legal obligations such as commerce, ownership of property, and terms of employment. The judicial process is the means by which parties resolve any disputes that arise from the above conditions, whether through litigation, criminal trial, or administrative process, and appears in a vast array of venues, each of which has its own internal adjudicatory rules and procedures.[1] Needless to say, the law, both generally and specifically, serves multiple purposes. Capitalism similarly envelopes society, with antecedents that stretch back centuries and which speak to both a specific economic organization and a system of law that enables such an arrangement.[2] Concisely put, the law and judicial apparatus actively legitimize the capitalist social system and maintain conditions which allow it to prosper.

This thesis analyzes the dialectical relationship between the operation of the capitalist social system and corresponding relations of production and the federal judicial apparatus as a constituent system. Five primary sections comprise this analysis: First, within the federal judicial system, two principal methodologies have emerged in interpreting the Constitution. Originalism and living constitutionalism take facially distinctive approaches in weighing which variables are

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[1] *See* William Baude, "Adjudication outside Article III," *Harvard Law Review* 133, no. 4 (March 2020): 1511-81.
[2] *See* Michael E. Tigar and Madeline R. Levy, *Law and the Rise of Capitalism*, 2nd ed. (New York: Monthly Review Press, 2000).

important in the adjudicative process when deciding important principles of constitutional law. Despite their apparent differences, which the legal academy has amplified, these methodologies are remarkably similar. Both interpretive methodologies employ strong formalist tendencies that treat the law and the legal process as an independently operating system removed from the material society in which it originated. This formalist trend has the effect of creating a hegemonic legal ideology that severely limits the acceptable range of legal judgements judges can make while simultaneously fitting well within the prevailing capitalist social hegemony.

Second, the relationship between courts and democracy, and how one conceptualizes these institutions, fundamentally guides the manner and degree to which the judicial apparatus must seek to legitimize itself and its ability to legitimize the social system. While the framers created the Constitution within the capitalist material reality, one cannot discount their exquisite articulation of fundamental principles of liberty and representative government, especially when analyzing the nature of courts that function within that constitutional system. Indeed, the courts occupy a peculiar position in the constitutional system, one that exemplifies the tension between democratic rule and individual liberty. Early in American legal history, federal courts ensconced the notion of judicial supremacy into constitutional law when it comes to interpreting the Constitution through the practice of judicial review. But this practice is inherently undemocratic; so why do citizens tolerate it? While scholars fiercely debate the degree to which judicial supremacy accurately describes the situation in United States, opponents, on both descriptive and normative grounds, of judicial supremacy nonetheless fail in arguing for a better alternative arrangement—namely a form of departmentalism or popular constitutionalism that restricts courts' ability to invalidate legislation. But this fails to account for a dualist conception of American lawmaking. The reason judicial review is not only descriptively constitutional, but

normatively valuable, has to do with the American democratic constitutional tradition. When approaching American democracy from this collective view, it emerges that judicial review, while not fully reconcilable with democratic government, comports with the constitutional principle of liberalism. But this begs the question of if Americans take democracy seriously (or seriously enough). For this reason, courts are presumptively democratically illegitimate and need to continuously legitimate themselves in the constitutional system in order to properly legitimate the social system.

Third, the judicial apparatus—the system of legal procedures, judgements, and jurisprudence effectuated by courts—serves a dual legitimation function. The judiciary occupies a curious place in the political system. Much of what courts and judges do is inherently counter-majoritarian: Federal judges themselves are politically insulated, they often rule in favor of criminal defendants or other individuals society disfavors, and judicial review necessarily overturns decisions made by popularly elected officials. Such a system that regularly contravenes popular opinion demands a comprehensive system of legitimation. The process of legal adjudication, with its public procedures, tiers of review, and written opinions, functions to rationalize this undemocratic institution. In turn, a successfully legitimized judicial apparatus, by interpreting the laws and Constitution, coordinating conflicting interests, and adjudicating disputes, allows the capitalist social system to continue to operate with as few contradictions and crises as possible.

Fourth, the federal courts, especially the Supreme Court, are experiencing a legitimation crisis. Federal courts, beginning in the 1960s, have continuously engaged in social jurisprudence—that is, constructing a body of jurisprudence concerning questions of morality, sexuality, and ethics. Delving into these philosophical questions has enflamed cultural disputes

that have consequently thrown into question federal courts' legitimacy. Borrowing heavily from Jürgen Habermas's *Legitimation Crisis*, I analyze the phenomenon of legitimation and rationality crises as applied to the judicial system. Because of the increase in social jurisprudence in recent decades, federal courts have experienced a significant withdrawal of popular legitimacy which as a result endangers the entire capitalist social system due to the lack of a sufficiently legitimate dispute and contradiction resolution apparatus.

Finally, having established the nature and function of the judicial system in the capitalist system and identified existential problems that have arisen, I offer a normative assessment for the federal judiciary to avert its impending collapse. The question of which method of constitutional interpretation is best will inevitably continue well into the future. Regardless of which method judges adhere to, federal courts should focus on distancing themselves from social jurisprudence to abate the immediate crisis of legitimacy. Additionally, while recognizing that the contemporary judicial apparatus functions to legitimate, and therefore perpetuate, the capitalist system and relations of production, judges, in developing a collective body of jurisprudence, should restrain themselves from challenging this underlying material system. The judicial apparatus was designed to function within the capitalist hegemonic system. Whatever changes ought to be made, nonetheless, cannot emerge from courts in the current constitutional arrangement. Systematic change must come from the democratic, popularly elected bodies of government, namely Congress and the President—or more directly, the People. These bodies not only possess a greater capacity to execute desirable change in the relations of production, but their decisions and policies will inevitably derive more popular legitimacy than if a number of unelected, life tenured judges were to pronounce them.

This thesis is an admittedly broad undertaking—an omnibus of critical legal theory, of sorts. Ultimately, I hope to coherently synthesize many of these perspectives and apply their collective insight to the judicial system. A historical-material study of the federal judiciary is vital in better understanding the ways in which law and the judiciary work to entrench a particular social arrangement, and further, how that arrangement is perpetuated and what threats may arise. Additionally, recognizing that the social system has inherent value by protecting a political arrangement that allows democratic participation and which the People can fundamentally alter to achieve substantive social good is vital in order to posit what action is needed to develop a social system that disavows systematic exploitation in favor of better providing for its members.

I. Originalism and Living Constitutionalism: Judicial Methodology as Ideological Steering

Contemporary jurisprudence in the American federal courts has revealed a striking bifurcation in mainstream judicial methodology. Originalism and living constitutionalism have, broadly speaking, become the dominant modes of judicial interpretation. Notwithstanding the perceived dichotomy between originalism and living constitutionalism and their various strains, substantive differences between the two theories of interpretation are few and those that exist are fleetingly small. A survey of scholarship shows significant superficial differences between originalism and living constitutionalism, and perhaps even greater diversity within a respective methodology itself. But when applied in practice, the opinions and dispositions of cases in federal courts do not reflect any meaningful differences. This can be attributed to several plausible rationales, but two stand out as not only plausible, but even probable. First, the law that courts interpret and expound is crafted by a specific class for a specific purpose: The bourgeoisie disproportionally impacts the creation and maintenance of the law and state apparatus which envelope the judicial system. Second, the hegemony of bourgeois ideology steers all foreign ideologies towards itself, both neutralizing any radical arguments and mitigating any adverse effects to the bourgeois system.

At the outset of this preliminary survey of methodology, it seems prudent to specify, or at the very least discuss, some of the jurisprudential parlance to avoid unnecessary conflation. In terms of originalism, a significant factor that proponents have raised, and indeed that opponents have equally raised, though in rebuttal, is the function of "constraint" and how originalist methodology emphasizes predictability through constraint. Professor William Baude conceptualizes constraint in originalist theory in two ways: external, a quasi-form of "judg[ing] the judge" whereby outside observers can evaluate a judge's work with the goal of ensuring that

they deploy methodology correctly and in good faith, and internal, where the methodology being faithfully deployed by the willing judge "will help him to decide the case by telling how to get to the answer."[3] This thesis concerns almost exclusively the latter of these formulations of constraint. Policing the judiciary and judging the judge are not of proximate concern here. Rather, primary attention is paid to the internal constrain that originalism—and perhaps even living constitutionalism—impose on individual jurists during their own deliberations. By investigating this angle of constraint, I hope to elucidate the connection between this internal methodological approach and its contribution to regulating a larger legal ideology and hegemony.

Additionally, by deploying originalism and living constitutionalism in this thesis, I do not mean to discount the profound intricacies that each of these theories includes. Throughout, I discuss these methodologies broadly while simultaneously trying to emphasize some general commonalities that appear throughout different strains of originalism and living constitutionalism, respectively. One needs only casually inspect contemporary legal scholarship to identify wide varieties of both theories.[4] The distinctiveness of these individual approaches, though, is not principally important to this thesis. This argument operates on the premise that these constituent methodologies possess sufficient commonalities with each other to render them operatively identical for purposes of a systematic analysis. Any differences between these theories—for example, between Original Public Meaning Originalism and Original Framers' Intent Originalism,[5] which are largely normative concerns as opposed to descriptive distinctions, but nonetheless heavily influence legal scholarship—do not meaningfully alter the inherent

[3] *See* William Baude, "Originalism as a Constraint on Judges," *University of Chicago Law Review* 84 (2017): 2220.
[4] Lawrence B. Solum, "Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate," *Northwestern University Law Review* 113, no. 6 (2019): 1254, 1261.
[5] Randy E. Barnett, "The Gravitational Force of Originalism," *Fordham Law Review* 82, no. 2 (2013): 412-5.

substance of originalism as a methodology that would disrupt its ideological steering function or its system legitimating function.

Tailoring this thesis to the above parameters will hopefully lend greater clarity to its overarching argument. Nonetheless, in order to develop a theory of interpretive methodology from which to extrapolate systematic consequences, one must first scrutinize law through a purely legal lens.

A. Formalist Methodology

To its credit, originalism has become the benchmark for legal interpretation against which all other methodologies are measured. While various explanations may explain this, the way in which originalists lay claim to history and tradition contribute greatly to justifying originalist methodology. Its proponents contend that originalism "[has] served as the dominant method[] for interpreting legal texts for most of our history[.]"[6] Broadly defined, originalism as seen today seeks "to recover the public meaning of the constitutional text at the time each provision was framed and ratified[.]"[7] Moreover, originalists ground this methodological goal in two primary interpretive pillars: the Fixation Thesis and Constraint Principle. The Fixation Thesis stipulates that the meaning of the Constitution was fixed at the time of the adoption of each respective provision, while the Constraint Principle affirms that constitutional adjudication should be constrained by that original meaning.[8] But perhaps the true power of originalism is not necessarily its intellectual stature, but rather its ubiquity in jurisprudence. Professor Baude, upon surveying American jurisprudence, argues that originalism has common threads throughout

[6] Neil M. Gorsuch, *A Republic, If You Can Keep It* (New York: Crown Forum, 2019), 10.
[7] Solum, "Originalism versus," 12541.
[8] Ibid, at 1266.

United States history.[9] Admittedly, Baude takes a more inclusive view of originalism than some, arguing that originalism well understood should not entirely discount precedent nor foreclose the possibility of some evolution of the meaning of vague clauses in the Constitution. Nonetheless, he argues that originalism is in fact American law in a sense. With this being the case, the intellectual gravity of originalism cannot be understated. Professor Adrian Vermeule recently wrote "[o]ne often hears the catchphrase "[w]e are all originalists now."[10] Justice Elena Kagan echoed this sentiment when she said "we're all textualists now" in reference to her former colleague Justice Antonin Scalia.[11] While textualism is not originalism—and the two should not be doctrinally conflated—the two methodologies often overlap in important ways, particularly in terms of close adherence to the text. Through this idea by Justice Kagan, who herself does not subscribe to originalism as steadfastly as some of her colleagues, one can see that originalist methodology has an important impact beyond those judges who explicitly utilize it. Originalism, then, has changed the jurisprudential landscape with its heightened emphasis on original meaning and made text, history, and tradition fundamental elements to consider in the adjudicative process.

Living constitutionalism has, for better or worse, largely enjoyed a significantly more amorphous existence than originalism. Indeed, living constitutionalism and its antecedents are "often described simply in opposition to originalism."[12] While some elements of living constitutionalist interpretation are not new in the sense that they largely emerge out of the

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[9] *See* William Baude, "Is Originalism Our Law?," *Columbia Law Review* 115, no. 8 (2015): 2349-408.
[10] Adrian Vermeule, "Beyond Originalism," The Atlantic, last modified March 31, 2020, accessed April 7, 2020, https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.
[11] Diarmuid F. O'Scannlain, "'We Are All Textualists Now': The Legacy of Justice Antonin Scalia," *St. John's Law Review* 91, no. 2 (Summer 2017): 304
[12] Nelson Tebbe and Robert L. Tsai, "Constitutional Borrowing," *Michigan Law Review* 108, no. 4 (February 2010): 514 n. 240.

tradition of legal pragmatism, intellectual development and theorization of the methodology are of a relatively recent vintage.[13] The notion of a "living" Constitution appears well before proper legal scholarship on the term, but only to the extent that earlier commentary described inherently value-based terms. This is to say, the notion of a living constitution concerned the role of the Constitution and citizens' interactions with it, not solely the interactions of courts or judges.[14] The appropriation of the living constitution concept by legal scholars institutionalized these value-based judgments and applied them to the mechanics of legal adjudication. While the etymology of the term "living constitutionalism" may be clouded in some obscurities, the overarching principles of any strain of living constitutionalist interpretation have emerged with semantic, if not substantive, clarity. Fundamentally, "[a] living Constitution is one that evolves, changes over time, and adapts to new circumstances, without being formally amended."[15] For judicial interpretation, this means that a judge in attempting to discern meaning from a legal provision may consider more factors to weigh in reaching a judgment. Previous precedent on the issue, the purpose of the provision, and the consequences of a judgment one way or the other may now become relevant to a judge's analysis, factors originalists generally avoid. This common law approach allows for a certain degree of innovation and adaptation while still retaining constitutional integrity.[16] While originalism purports to be exclusively positivist with its being rigidly tethered to the written Constitution and its original understanding, and descriptive in articulating what the law *is*, living constitutionalism simultaneously maintains positive tendencies, as the Constitution is not superfluous to an evolving interpretation, and

[13] Solum, "Originalism versus," 1255-62.
[14] Ibid.
[15] David Strauss, "The Living Constitution," The University of Chicago Law School, last modified September 27, 2010, accessed November 14, 2019, https://www.law.uchicago.edu/news/living-constitution.
[16] David A. Strauss, "Common Law Constitutional Interpretation," *The University of Chicago Law Review* 63, no. 3 (Summer 1996): 887-8.

normative properties, allowing for the consideration of factors such as impact and precedent.[17] Living constitutionalism, then, is a permissive theory insofar as it allows these additional supplements in judicial interpretation.

Originalist jurists have continually strived to differentiate originalism from other judicial methodologies. Indeed, defenders of originalism have attempted to paint originalism as the theory that objectively defines American law and its "official story"[18] in original legal meaning and intervening practice.[19] Randy Barnett recently wrote, in response to an admittedly extreme view of conservative jurisprudence, that originalism is the only way to ensure intolerant and authoritarian tendencies do not become entrenched through various versions of living constitutionalism.[20] Originalism, then, not only remains loyal to the Constitution in a descriptive sense, but normatively its results conform to general notions of freedom and liberty. Proponents of living constitutionalism, alternatively, have attempted to associate originalism with the very same criticisms that originalists offer in rebuttal to living constitutionalism—primarily that it is impractical and endlessly malleable to arbitrary political preferences. Notably, detractors question the validity of relying on legal judgements and codes written centuries ago. James Madison famously wrote "the earth belongs… to the living."[21] But steadfast adherence to originalism necessarily usurps the ability for jurists to develop a body of law for the current time.

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[17] William Baude, Adam S. Chilton, and Anup Malani, "A Call for Developing a Field of Positive Legal Methodology," *The University of Chicago Law Review* 84, no. 1 (Winter 2017): 2, discussing the properties of legal positivism.
[18] Stephen E. Sachs, "Originalism as a Theory of Legal Change," *Harvard Journal of Law and Public Policy* 38, no. 3 (2015): 870.
[19] *See, e.g.*, William Baude and Stephen E. Sachs, "Grounding Originalism," *Northwestern University Law Review* 113 (2019): 1455-92; William Baude, "Is Originalism Our Law?," *Columbia Law Review* 115, no. 8 (2015): 2349-408.
[20] Randy E. Barnett, "Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution," editorial, The Atlantic, last modified April 3, 2020, accessed April 8, 2020, https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/.
[21] David A. Strauss, *The Living Constitution* (New York: Oxford University Press, 2010), 24.

If the Constitution's meaning cannot deviate from the way people received it in 1789, then its meaning cannot adapt to our own world that differs radically in type and degree. Translating a more than two century-old document with its original meaning and trying to administer it today inevitably ties Americans to an imperfect and deficient application.[22] Moreover, living constitutionalists claim that originalism requires lawyers and judges to act as amateur historians to discover often elusive or inconclusive original meanings.[23] Originalists respond that the general terms included in the Constitution allow for sufficient room to maneuver and apply original provisions, and even original meanings, to contemporary circumstances.[24] Nonetheless, this inevitable indeterminacy requires judges to fill the gaps in history and tradition with something else; and this, coupled with studies indicating originalism often appeals to persons with specific ideological dispositions, [25] inferring that originalist judges arrive at results because of personal policy preferences—a likewise traditional critique of living constitutionalism by originalists—only further undermines originalism.[26] Should one need an example, look no further than recent gun-rights decisions.[27] So even if all judges adopt originalist methodology, that in itself would not resolve the case.[28]

Notwithstanding the differences in theory and methodology that the academy has sought to highlight, and which I have recounted in part, originalism and living constitutionalism have fewer functional differences that it may seem. The examples are copious, but the government's

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[22] Ibid., 21-25.
[23] Strauss, *The Living*, 18-21; *See also, generally,* Charles A. Miller, *Supreme Court and the Uses of History* (Cambridge, MA: Belknap Press, 1969).
[24] William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (May 1976): 694.
[25] *See* Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere, "Profiling Originalism," *Columbia Law Review* 111, no. 2 (March 2011): 356-418.
[26] Gorsuch, *A Republic*, 108-11.
[27] *See* District of Columbia v. Heller, 554 U.S. 570 (June 26, 2008); McDonald v. City of Chicago, 561 U.S. 742 (June 28, 2010).
[28] Frank H. Easterbrook, foreword to *Reading Law: The Interpretation of Legal Texts*, by Antonin Scalia and Bryan A. Garner (St. Paul, MN: Thomson/West, 2012), xxv.

eminent domain power stands out as particularly illuminating. The caselaw in this line of jurisprudence underscores the underlying uniformity between the competing methodologies that animates many areas of the law. This analysis does not necessitate in-depth interrogation of the particulars of each case; instead, a discussion of a common thread throughout these cases suffices to explain their importance. Beginning with *Chicago B. & Q. R. Co. v. Chicago*,[29] through cases like *Berman v. Parker*[30] and *Hawaii Housing Authority v. Midkiff*,[31] the Court ruled unanimously, uniting originalists and living constitutionalists in a common rationale despite competing methodologies, to uphold extraordinary applications of eminent domain. Even in more recent and politically salient cases like *Kelo v. City of New London*[32] and *Knick v. Township of Scott*,[33] the issues that divided the Court resulted from fundamentally less significant questions than those that touch upon the material base of society and the underlying relations of production. Indeed, in these cases the disagreements arose exclusively out of legally formalistic questions. In *Kelo*, none of the opinions challenged the status quo of any material relation beyond whether the government may appropriate property for a fleetingly narrow set of cases, which the Court had previously upheld and again did so in this case.[34] In *Knick*, the case was even more formalistic about when a claim was ripe to bring to federal court and when/if that claim must be exhausted in state court first.[35] The question presented did not even allege an illegal government taking of property, instead presupposing that the state possesses that power legitimately.[36] So just from the brief analysis of this line of cases, two results emerge: First, the

[29] *See* Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226 (Mar. 1, 1897).
[30] *See* Berman v. Parker, 348 U.S. 26 (Nov. 26, 1954).
[31] *See* Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (May 30, 1984).
[32] *See* Kelo v. City of New London, 545 U.S. 469 (June 23, 2005).
[33] *See* Knick v. Township of Scott, 588 U.S. ___ (June 21, 2019).
[34] *See* Kelo v. City of New London, 545 U.S. 469, 483-90 (June 23, 2005).
[35] Knick v. Township of Scott, 588 U.S. ___ (June 21, 2019) (slip opinion at 1-2).
[36] Ibid, (opinion of Kagan, J., dissenting at 1).

differences between originalism and living constitutionalism do not manifest all the time, even in cases about a particularly controversial question such as the eminent domain power. And second, even when differences do emerge, they are exceedingly superficial, revolving around narrow questions of procedure and do not expose any significant distinction between methodologies or divergence from established legal norms. Nonetheless, the competing schools of legal thought serve a purpose in the larger function of the law and judicial process.

B. Methodology as Ideology

These increasingly nuanced cases result from the pervasiveness of legal formalism and the divorce of the judicial apparatus from society. Timasheff tells us that "[l]aw is a cultural force."[37] But modern jurisprudence has strayed from such an understanding and has largely adopted a view that the legal system has its own, freestanding, formal logic that, while informed by, is not affected by the society in which it originated.[38] Justice Neil Gorsuch recently wrote that "political creed, social science theory, or any other consideration extrinsic to the law" is not a sound base upon which to establish legal judgements.[39] Justice Stephen Breyer has likewise signaled that the law discounts such extraneous factors from legal analysis and decision-making, at least to some degree.[40] The rise in such formalism, both explicit and implicit, has the effect of removing law, the judicial apparatus, and the legal process from society at large. Indeed, formalists maintain that the admittedly favorable normative value of impartiality of the law necessitates this removal, leaving judges to rely solely on the internal logic of judicial decision-making to dispense justice and follow the impersonal and neutral rules set forth in legal codes.

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[37] N. S. Timasheff, "What Is 'Sociology of Law'?," *American Journal of Sociology* 43, no. 2 (September 1937): 225.
[38] Hugh Collins, *Marxism and Law* (Oxford, England: Oxford University Press, 1982), 135-6.
[39] Gorsuch, *A Republic*, 10.
[40] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage, 2006), 8-9.

The debate about how this internal logic should operate, though, brings about the dueling methodologies of originalism and living constitutionalism. Both methodologies employ formalism even as they may also fall victim to some or all of the foregoing criticisms. But coincidence cannot explain such pervasive jurisprudential formalism. Rather, it plays an important part in establishing legitimacy and stability in the legal system. Moreover, formalism unites otherwise diverging judicial methodologies in a way that reinforces the prevailing ideological hegemony of legal thought.

Fundamentally, law functions to preserve the existing relations of production in capitalist society. In order for the law to maintain the material status quo, the law as an institution must itself be maintained. Thus, law necessitates a hegemony of legal thought to maintain legitimacy. Judicial methodologies fulfill this role. Even though originalism and living constitutionalism present as opposing methodologies, and while superficial differences may emerge during particular litigation, they both employ demonstrable formalism. Because formalism has the effect of divorcing the judicial process from its material base, it significantly reduces the potential challenges or disruptions to the relations of production that may arise from the adjudicative process. Prevailing judicial methodology, then, acts as an ideological steering mechanism to neutralize insurgency.

In order to fully realize Timasheff's conception of law as a cultural force, theorists must first fully expound the ideological backdrop upon which law is constructed and the hegemonic system within which it operates. In order to understand this relationship, one must first turn to broader theories of ideology and hegemony. Antonio Gramsci's writings provide the base of this theorization that rejects an instrumentalist view of ideology in favor of the recognition that it

forms "an organic part of a social totality."[41] Ideology, then, is a system of ideas, a complex and imperfect translation of the social world.[42] An explicit characteristic of Gramsci's theory of ideology is its complexity; he recognizes that a system of ideas may be composed of "different parts and several elements."[43] The complexity of ideology reflects the complexity of the social system because it must account for the varying and conflicting elements that bourgeois society attempts to reconcile. The implicit nature of ideology, then, is that it represents the world imperfectly, either through its inherent incompleteness or internal inconsistency. Gramsci articulates this when he writes about ideologies in relation "to their standing in the world of production, or because of their position in the disjoined world of common sense[.]"[44] Mental heuristics and unprincipled shortcuts may account for singular parts of the capitalist social system, but no single theory can unite these disjointed and disparate explanations. This causes incomplete perceptions of the world that do not account for material reality because bourgeois ideology applies a pseudo-logical gloss to the contradictions in the social system. The discrepancies between theoretical ideology and practical ideology only further exacerbate inconsistencies. The implementation and practice of an ideology can differ from its intellectual conception. This explains why people can act, either knowingly or unknowingly, counter to an ideology they formally embrace. This is the basis for dual or false consciousness, where superficial ideas and principles cloud the material reality that lies beneath. People may proclaim fidelity to equity and human rights, while simultaneously submitting to or propagating a social system that unrepentantly exploits working people. While ideology is not inherently capitalist, prevailing ideology today emerges clearly out of the capitalist relations of production. Indeed,

[41] Michele Filippini, *Using Gramsci: A New Approach*, trans. Patrick J. Barr (London, U.K.: Pluto Press, 2017), 5.
[42] Ibid, 9.
[43] Ibid.
[44] Ibid.

ideology today has reached the critical mass to achieve hegemony, the centralization and institutionalization of ideology. Ideological hegemony functions to "express[] the socio-political capacity of a ruling class to construct a system of legitimization in which individual actions are framed within those preordained forms of conduct permitted by the political powers that be."[45] This principle need only be applied to a jurisprudential analysis to reveal that the function of judicial methodology parallels that of ideological hegemony.

The law is a powerful ideological force—one that conditions universal systematic hegemony. But while ideology and hegemony can encompass entire social systems, they also exist within each respective constituent institution that composes the system. Thus arise legal ideology and legal hegemony. Originalism and living constitutionalism function as competing ideologies within the American judicial system. But as discussed previously, these ideologies do not substantively differ. The delta between these methodologies only consists of the superficial differences that arise from formalist jurisprudential disputes. Indeed, both originalism and living constitutionalism constitute the prevailing legal hegemony of formalism that constrains the permissible outcomes of adjudication. As judicial methodologies, originalism and living constitutionalism rely on the perception of good-faith legitimacy,[46] that their respective proponents all start their legal analysis at the same point—a constitutional "common ground."[47] Primarily, this takes the form of the text of the Constitution.[48] And as the text of the Constitution serves to "narrow[] the range of disagreement" between contrasting legal propositions,[49] judicial methodology further narrows permissible judgements as a result of applying methodology to the

[45] Ibid, 18.
[46] Tara Leigh Grove, "The Supreme Court's Legitimacy Crisis," review of *Law and Legitimacy in the Supreme Court*, by Richard H. Fallon, Jr., *Harvard Law Review* 132, no. 8 (June 2019): 2244.
[47] Strauss, *The Living*, 104.
[48] Ibid.
[49] Ibid.

text. The adjudicative process must be constrained in this way because litigation necessarily involves opposing interests that can implicate and attempt to destabilize foundational organizing principles of the capitalist social system. For this reason, the judicial apparatus must materialize to supplement the various forms of codified law.[50] Interpretation within the confined space of originalism and living constitutionalism—more broadly, formalism—ensures that radical theories of law cannot ground themselves within mainstream jurisprudence, thereby preserving the ideological hegemony necessary to promulgate the transcendent social system. The explicit text of the Constitution serving as "common ground" ties methodologies together by establishing a least common denominator. In a common ground approach, methodologies anchor themselves to the Constitution, itself a constraining entity that explicitly removes various exigencies from the legally permissible realm of judgements.[51] Nonetheless, few clauses in the Constitution are themselves completely determinative, and many others allow for several plausible readings. Interpretation, then, fills the admittedly small space between determinacy and plausibility, making so much of the written Constitution only tangentially authoritative.[52]

While unique questions of law and jurisprudence inevitably arise, the methodological hegemony that originalism and living constitutionalism generate rarely, if ever, permits decisions that substantively alter the material relations of production. So, while the federal courts do not uniformly agree on questions of law, that does not signal fundamental disagreement or skepticism of the underlying relations of production. Indeed, federal courts do not even address

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[50] Evgeny B. Pashukanis, *Law and Marxism: A General Theory*, trans. Barbara Einhorn (London, U.K.: Ink Links, 1978), 81.

[51] For instance, no one can credibly question the duration of terms for Senators, Representatives, or the President, as these questions are conclusively decided within the Constitution. No interpretation is required; the text itself is determinative.

[52] Andrew B. Coan, "The Irrelevance of Writtenness in Constitutional Interpretation," *University of Pennsylvania Law Review* 158, no. 4 (March 2010): 1028-9.

such foundational questions—they presuppose such arrangements. Operating on the premise of the current social system, current interpretive methodology can steer foreign ideologies and interdict legal arguments that challenge prevailing assumptions.

II. Courts and American Democracy

Thus far, I have argued that judicial methodology fosters the prevailing legal-ideological hegemony. But while courts regularly utilize methodology and expound legal judgements, how do they interact with other actors and principles in the American constitutional system? When the framers crafted the Constitution, they did so upon the backdrop of capitalism. But while the courts ultimately play a consequential role in legitimating the capitalist system, they principally occupy a position inside the American constitutional system. Federal courts early in American history established the principle of judicial supremacy through the use of judicial review. This section examines that practice in conjunction with democratic rule. Judicial review is undeniably undemocratic, but this historical practice elucidates the tension between two normatively desirable principles: democratic government and personal liberty. Notwithstanding the important counter-majoritarian role courts play in upholding individual rights via judicial review, they must continuously win democratic legitimacy themselves in order to both fulfill a desirable protective function and to legitimate the social system.

In material reality, law is legitimate because power reinforces actionable sanctions against those who defy it.[53] Democracy, though, complicates what might otherwise be a straightforward analysis of power. While the social system may distribute power asymmetrically in American society, it does not favor the proprietors of capital absolutely. American democracy, at the very least, mitigates a monopoly on power by capital through its disbursal which both constrains the state and enables citizens to democratically effectuate policy and change.

But as a preliminary matter, the foregoing claim that law and the judicial apparatus legitimate and perpetuate the capitalist socio-economic system begs the question of why this

[53] Collins, *Marxism and Law*, 29, (talking about the "brute force" employed should formal legality fail).

discussion is necessary. Or even further, if the social system exercises law as simply an exhibition of raw political power, what relevance do democratic considerations even have? This section gives me the opportunity to distinguish my position from a purely reductionist approach that these questions allude to, and to narrow what I otherwise believe to be a generally applicable theory to the specific historical, political, and material realities of the United States. I submit that considerations on democracy are not superfluous to this thesis because the conditions subject to examination—courts, judicial methodology, judicial review, representative democracy, constitutional government—have a distinctively probative effect on the capitalist system and its interaction with government and law in the United States. Regardless of what Marx and Engels said about "the common interests of the entire proletariat,"[54] they also wisely acknowledged that "[t]he proletariat of each country must, of course, first of all settle matters with its own bourgeoisie."[55] While capitalism may form a common thread throughout contemporary societies and may speak to a common experience, it is not itself sufficiently dispositive to generate a universal model of intra-system functions. The pluralism of legal systems, historical experiences, and political arrangements demand that one supplement general social theories with more particular considerations of the specific system. No less is true in the case of the United States.

To begin considering the courts' role in interpreting law in relation to American democracy, one must first suppose that law itself is legitimate. While one can take various approaches in defining law and its legitimacy, this thesis utilizes an Austinian positivist approach that grounds both law and legitimacy in observable social facts—the operative fact being the power of a sovereign to issue commands.[56] Law that appears in the United States, then, is

[54] Karl Marx and Friedrich Engels, *The Communist Manifesto* (London, U.K.: Arcturus Publishing, 2019), 66.
[55] Ibid, 58.
[56] Brian Bix, "John Austin," The Stanford Encyclopedia of Philosophy, last modified April 3, 2019, accessed April 15, 2020, https://plato.stanford.edu/entries/austin-john/.

legitimate because there exist material conditions of power that enable a body to issue generally applicable rules with the actionable threat of sanctions should an individual violate those rules.[57] Concisely, descriptively existent power authorizes law, making it legitimate. This legitimacy inevitably extends to courts since legitimate law can confer authority to other bodies.[58] Courts inextricably rely on the conferral of power by rules emanating from legitimate law "and the right of those elevated to authority under such rules to issue commands."[59] For this reason, law and courts originate out of materially exercisable power. One cannot, I think, genuinely presuppose the existence of courts; but one can presuppose the descriptive social fact of power, enabling the formation of law and the authorization of a judicial apparatus. Some jurists go even further. Carl Schmitt famously contended in his defense of the Nazi regime in Germany that considerations of legality and authority conferral inhibit and constrain the state in exercising its sovereign political power, though this view succumbs to its own hyper-abstraction.[60] Regardless, both legal positivists and natural law theorists have largely eschewed this notion of power being determinative, with perhaps H. L. A. Hart and Hans Kelsen the two most prominent detractors.[61] Inevitably, I cannot do either of these theorists' arguments justice within the confines of this thesis. Nonetheless, briefly examining Kelsen's position will shed light on the immediately relevant propositions. Kelsen retains a positivist approach, but simply grounds his derivation of legal authority in a different place than Austin. He postulates the existence of the "basic norm"

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[57] Ibid.
[58] Andrei Marmor, "The Pure Theory of Law," The Stanford Encyclopedia of Philosophy, last modified January 4, 2016, accessed April 16, 2020, https://plato.stanford.edu/entries/lawphil-theory/.
[59] Max Weber, *The Theory of Social and Economic Organization*, trans. A. M. Henderson and Talcott Parsons (New York: Free Press, 1968), 328.
[60] Charles E. Frye, "Carl Schmitt's Concept of the Political," *The Journal of Politics* 28, no. 4 (November 1966): 822-6; *see also* Carl Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge, MA: MIT Press, 1985), 43.
[61] *See* H. L. A. Hart, "Positivism and the Separation of Laws and Morals," *Harvard Law Review* 71, no. 4 (February 1958); Marmor, "The Pure," The Stanford Encyclopedia of Philosophy.

which marks the beginning of legal authority and the point from which legal bodies can grant varying degrees of lesser authority.[62] Moreover, Kelsen maintains that any other theory not premised on the existence of a fundamental norm violates Hume's Law.[63] This argument fails on two fronts: First, the frankly obscure notion of a basic norm is a presupposition that, while creating a logically coherent train of thought, fails to root itself in something more definite than an irreducible metaphysical conjecture. The materially social fact of power seems a much sounder principle from which to derive authority-conferring norms. Second, the modest introduction of the normative presupposition that "legal legitimacy ought to reflect descriptive material reality," with power dynamics being that reality, completes the logical argument while simultaneously avoiding any contravention of Hume's Law. No longer would one derive an ought from an is, but rather an ought from an ought. This is no more abstract than Kelsen's basic norm, but arguably more concrete.

While legal legitimacy may originate from material social power, the United States Constitution overtly attenuates power to a democratic system that significantly dilutes it. Indeed, the Constitution explicitly rejects Schmitt's authoritarian conception of sovereign political power as controlling in favor of a system that constrains power by diving it and locating it in different institutions. So, while courts may be legally legitimate as a descriptive material matter, that legitimacy does not necessarily translate to the political condition of the American constitutional system. The underlying conditions of power in the relations of production must also grapple with this constitutional system in which courts play a major role, pointedly elucidating significant tension between two fundamental constitutional principles. While the United States enjoys a

[62] Marmor, "The Pure," The Stanford Encyclopedia of Philosophy.
[63] Ibid.

system of representative democracy, elected bodies do not have absolute power. Indeed, the Bill of Rights establishes significant restrictions on the powers of legislatures in what laws they can enact with regard to individual rights. The Constitution, in this sense, counters itself with the principle of democracy and the limitations of classical liberalism.[64] The legislative bodies in the United States exercise the democratic prescriptions in the Constitution, and the courts, with increasing regularity it seems, effectuate its liberty-guarding commands through judicial review. The invalidation of laws by non-democratically elected federal judges inevitably encounters what Alexander Bickel called the "counter-majoritarian difficulty."[65] Article II provides that the President shall nominate judges to the federal judiciary with the advice and consent of the Senate.[66] Article III provides that federal judges "shall hold their Offices during good Behaviour [*sic*]."[67] These structural designs have the effect of removing federal judges from direct political influence, intending to ensure stability in the judicial process and avoid arbitrary or capricious judgements based on political sentiment or favor.[68] Insulating the federal judiciary from political attitudes in this way necessarily eliminates direct popular accountability. Federal judges are not chosen popularly, but rather from within the political system itself, and they cannot be removed expect via the extraordinary process of impeachment. While this constitutionally mandated autonomy lends some legitimacy in the sense that judgements do not appear overtly politically motivated, it also begs the question as to why judges, who are non-democratically chosen and enjoy life tenure, should have the ability to preside over the judicial process, issue binding

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[64] *See* John Stuart Mill, "On Liberty," in *On Liberty, Utilitarianism, and Other Essays*, ed. Mark Philp and Frederick Rosen (New York: Oxford University Press, 2015).
[65] Alexander M. Bickel, *The Least Dangerous Branch* (New Haven, CT: Yale University Press, 1986), 16, https://www.jstor.org/stable/j.ctt1nqbmb.
[66] U.S. Const. art. II § 2, cl. 2.
[67] U.S. Const. art. III § 1.
[68] Alexander Hamilton, "No. 78," in *The Federalist*, by Alexander Hamilton, James Madison, and John Jay (New York: Barnes & Noble, 2006), 429-31.

judgements, and, crucially, invalidate democratically made decisions. Because of this structure of federal courts, their ability to invalidate laws makes them counter-majoritarian.

Though the Supreme Court ensconced the practice of judicial review into the constitutional fabric early in American history,[69] it has not gone unchallenged. Theorists have posited that "[i]f we take democracy seriously, our theory of adjudication will rest *primary* responsibility for recognizing most new rights with legislators rather than judges."[70] Legislators can read the Constitution just as judges can and likewise they can extrapolate principles of individual liberty while simultaneously exercising democratic principles of majoritarian rule. Representatives could conceivably balance these two constitutional themes and not run into the counter-majoritarian difficulty. Courts and legislatures, though, are composed very differently with fundamentally different attitudes. Ronald Dworkin noted that the former must rest its decisions on a rights-based approach while the latter approaches its job attempting to achieve collective goals.[71] Nonetheless, in a system of strong judicial review, as exists in the United States, while acting with the intention of protecting individual liberty, judges are often settling critical matters of policy that otherwise would be left to political bodies.[72] Furthermore, courts may act preemptively, making decisions on rights that disqualify certain policies before legislatures can even act. In this way, judicial review countermands and displaces American's

[69] *See* Marbury v. Madison, 5 U.S. 137 (Feb. 24, 1803).
[70] Amy Gutmann, "The Rule of Rights or the Right to Rule?," *Nomos* 28 (1986): 170, (emphasis in original).
[71] Ibid, 167, "(In Ronald Dworkin's language, adjudication is 'rights based,' while legislation is 'goal-based.')."
[72] Jeremy Waldron, "Judicial Review and Judicial Supremacy" (unpublished manuscript, New York University School of Law, New York, November 2014), 13, accessed April 14, 2020, https://dx.doi.org/10.2139/ssrn.2510550.

ability to govern themselves absolutely.[73] Mark Tushnet rightly asks "[h]ow can a people be regarded as self-governing" under such an arrangement?[74]

The notion of strong judicial review in the United States speaks to prevailing attitudes about constitutional meaning and who ultimately gets to decide what the Constitution means. The genesis of the tension between liberalism and democracy lies in who exercises the powers that effectuate those principles. Namely, the practice of strong judicial review—broadly, the ability for courts to decide the definitive meaning of constitutional provisions and refuse to apply laws that contravene that interpretation—which courts have developed has consolidated the constitutional attitude of judicial supremacy, which itself can take many forms.[75] Fundamentally though, in the United States, federal courts often have the last word as to constitutional meaning. The effect of this form of judicial review is to "[reinterpret] liberal democracy to mean that legislatures have the right to rule only when they rule justly."[76] The Constitution imposes no explicit command to that effect; one can only characterize such a principle as judicially created. Nonetheless there are those that see even strong judicial review as acquiescing to political inclinations. Certainly, judicial supremacy of the kind seen in the United States creates overt political ramifications. Tocqueville observed early in American society that "Americans have recognized in judges the right to found their rulings on the *Constitution* rather than on the *laws*. In other words, they have permitted them not to apply laws that might appear to them

[73] Ibid; Stephen Gardbaum, "What Is Judicial Supremacy?," in *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor (Elgar Publishing, 2018), 12, accessed April 14, 2020, https://ssrn.com/abstract=2835682; Mark Tushnet, "Forms of Judicial Review as Expressions of Constitutional Patriotism," *Law and Philosophy* 22, no. 3/4 (July 2003): 353-4.
[74] Tushnet, "Forms of Judicial," 355.
[75] Gardbaum, "What Is Judicial," 3-24.
[76] Gutmann, "The Rule," 169.

unconstitutional."[77] Judicial review implicitly, if not explicitly, "entails sanctioning the imposition of the judicial sense of justice (right or wrong) on the rest of us," a power traditionally thought left to the legislature insofar as the People's representatives have the exclusive power to make laws other than the People themselves.[78] Moreover, it requires that "courts [be] the most powerful or consequential branch of government on constitutional issues and are able to impose their will on other recalcitrant political actors and institutions, either in particular instances or generally."[79] But some scholars see the democratic relationship with the judiciary, even accepting judicial supremacy, as reactive, rather than preemptive. Keith Whittington articulates a position that federal courts, and specifically the Supreme Court, interact continuously with the prevailing political realities of the time. While rejecting a purely political explanation for judicial acquiescence that a "rational" court would act "strategically" to avoid any political confrontations with the other branches,[80] he suggests that "[t]he Court cannot expect to violate the basic constitutional assumptions of its contemporaries and be influential. Within those boundaries, however, the Court can have substantial autonomy in developing the implication of the constitutional regime."[81] Scott Lemieux goes even further, maintaining that, after a survey of Supreme Court cases that lead to invalidated legislation, "'[j]udicial supremacy' is simply inadequate to describe how judicial power functions in practice."[82]

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[77] Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago, IL: University of Chicago Press, 2000), 95; Gardbaum, "What Is Judicial," 17.
[78] Gutmann, "The Rule," 169. This undemocratic pitfall remains the same even if judges were to adopt more "restrained" methodologies like originalism since some form of "original meaning" trumps democratic will of they are opposed.
[79] Gardbaum, "What Is Judicial," 15.
[80] Keith E. Whittington, "The Political Foundations of Judicial Supremacy," in *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change*, ed. Sotirios A. Barber and Robert P. George (Princeton, NJ: Princeton University Press, 2001), 262.
[81] Ibid, 292.
[82] Scott E. Lemieux, "Judicial Supremacy, Judicial Power, and the Finality of Constitutional Rulings," *Perspectives on Politics* 15, no. 4 (December 2017): 1076.

These theories challenge the prevailing notion of judicial supremacy in the United States in varying degrees. Whittington takes a moderate and permissive approach insofar as political conditions may play a role in exercising judicial review, while the Supreme Court nonetheless largely retains judicial supremacy. Lemieux more categorically asserts that judicial supremacy simply does not describe the substantive interactions between the Supreme Court and the political branches. While Whittington's view is more sympathetic than Lemieux's and closer to actually describing the American judicial system, both of these qualified views of judicial supremacy fail. Perhaps the most direct evidence that courts hold a power close to absolute judicial supremacy is the political branches' reactions to courts when they exercise judicial review and the actions they take to manipulate the composition of courts. Politicians have always vied for the ability to nominate and confirm judges to federal courts because they recognize that the judiciary possesses the decisional supremacy to make determinative judgments about the Constitution and those interpretations bind political actors. A Democratic-Republican Congress impeached Justice Samuel Chase in 1805 due to his clear favoritism of Federalist initiatives, undoubtedly with the goal of replacing him with a Jefferson appointee who would rule equally reliably for the new administration.[83] Despite an overwhelmingly Democratic-Republican controlled Senate, Chase was acquitted,[84] but the importance of an attempt to influence the Supreme Court in this way cannot be underestimated, especially following so closely after *Marbury v. Madison*.

Thomas Jefferson famously recounted after Chase's trial that "impeachment will not be tried again" against a Supreme Court Justice, and as much has held true in American history

[83] Peter Irons, *A People's History of the Supreme Court: The Men and Women Whose Cases and Decisions Have Shaped Our Constitution* (New York: Penguin Group, 2006), 109-10.
[84] Ibid.

since.[85] Nonetheless, Congress has repeatedly used its legislative power to manipulate the federal courts. The Reconstruction Congress, filled overwhelmingly with Radical Republicans, famously reduced the size of the Supreme Court by two seats to deny Andrew Johnson any opportunity to nominate more conservative judges to fill vacancies, only to increase the number of seats to nine during the Grant Administration.[86] And in reaction to a notoriously activist conservative Court, Franklin Roosevelt unveiled a plan to pack the Supreme Court in early 1937 to make it more conducive to his revolutionary New Deal programs. The proposal ultimately became unnecessary after Justice Owen Roberts performed what has come to be known as, despite chronological discrepancies, "the switch in time that saved nine" in *West Coast Hotel Co. v. Parrish*, ending the reign of the conservative Four Horsemen.[87] President Richard Nixon purportedly bullied Abe Fortas, a noted progressive justice, off the Court in his attempt to revolutionize the judiciary and mitigate or reverse many of the landmark decisions of the preceding Warren Court.[88] But recent years have seen a virtual crescendo of constitutional hardball from the political branches. During the Obama administration, Senate Democrats eliminated the filibuster for federal judge nominees for the district courts and courts of appeals in order to confirm more liberal judges, only for Senate Republicans to follow four years later by deploying the so-called "nuclear option" to allow for a simple majority vote to reach cloture for Supreme Court nominees.[89] As a result, the Senate confirmed Neil Gorsuch to a seat on the Supreme Court that had purposely been held vacant for over a year by Republicans who refused to even hold a hearing for Obama nominee

[85] Ibid, 110.
[86] Whittington, "The Political," 289.
[87] Irons, *A People's*, 316-7, 23.
[88] Whittington, "The Political," 289.
[89] Daniel Epps and Ganesh Sitaraman, "How to Save the Supreme Court," *The Yale Law Journal* 129, no. 1 (2019): 157.

Merrick Garland.[90] And most recently, Senate Republicans fast-tracked the confirmation of Trump nominee Brett Kavanaugh, despite alarming reports of sexual misconduct.[91]

These historical examples demonstrate that the political branches see the federal courts as an institution of paramount importance in the constitutional system. Federal courts are so consequential because they possess judicial supremacy over the political branches, and all the historical evidence indicates that politicians acknowledge this. Otherwise, why would politicians go to such extraordinary lengths? The fact that federal courts can exercise judicial review and undermine political initiatives through binding legal judgements makes extreme political maneuvering worthwhile for politicians. Within the American constitutional system, and by the implicit admission of the political branches themselves, federal courts enjoy judicial supremacy, despite these arguments to the contrary. At the very least, even if the Supreme Court does not exercise a definite say as to how law applies to *all* cases in the United States, or if the Court makes a particularly dubious ruling, the ultimate power of judicial supremacy to interpret the Constitution and apply laws in accordance with that interpretation remains in the federal courts which have considerable discretion in applying decisions from higher courts of appeals.[92] Moreover, in rebuttal to Whittington's and Lemieux's arguments, two possibilities remain in addition to the convincing historical evidence. First, just because a court interprets a law or the Constitution in a way that aligns with prevailing political desires does not mean that the Court would not have reached that result notwithstanding the political environment. Second, and relatedly, a decision that aligns with prevailing political desires may also be demanded by the law itself, whether by the plain text or any combination of interpretive methods discussed at

[90] Ibid, 150, 156.
[91] Ibid, 150.
[92] *See* Richard M. Re, "Narrowing Supreme Court Precedent from Below," *Georgetown Law Journal* 104, no. 4 (April 2016).

length above. While these arguments may not be dispositive, the historical rationale points to at least an inter-branch recognition and acceptance of judicial supremacy which indicates that politics does not unequivocally determine judicial decision-making.

Thus far, a theoretical and historical investigation has revealed two vital observations for the current argument: First, the rights-based practice of judicial review by courts is inherently at tension with the goal-based practice of democratically enacting policy by legislatures. Second, the judicial review exercised by federal courts constitutes judicial supremacy that both defines constitutional meaning and binds political bodies. But while this type of judicial review and judicial supremacy conflicts with general democratic principles, the liberalism contained in the Constitution counsels in favor of a rights-based approach to protect individual liberty against majoritarian rule. Some academics have attempted to reconcile these two principles embodied in the Constitution and have constructed rather persuasive theories to explain and harmonize democracy with liberalism. Bruce Ackerman describes a dualist approach to interpreting the Constitution. Through a constitutional dualist perspective, the creation of law in the United States takes a bifurcated character. Ordinary law, that made by legislatures, comprises a type of law that originates in and emerges from the political system through delegates or representatives. But another type of lawmaking exists, higher lawmaking, that of revolutionary moments of popular acclamation and constitutional engagement by citizens to democratically alter the constitutional fabric and enact law truly in the name of the People.[93] Such moments of "constitutional politics" manifest sparingly—Ackerman identifies three such instances: the Founding, Reconstruction, and the New Deal. The Founding constituted the first act of

[93] Bruce Ackerman, "Constitutional Politics/Constitutional Law," *The Yale Law Journal* 99, no. 3 (December 1989): 464; Bruce Ackerman, "The Oliver Wendell Holmes Lectures: The Living Constitution," *Harvard Law Review* 120, no. 7 (May 2007): 1743.

insurgency, with the framers "designing a higher lawmaking procedure that was plainly illegal under the Articles of Confederation,"[94] but which nonetheless eloquently articulated integral governing principles of democracy and liberty. Reconstruction acted as the corollary to the Founding, entrenching new aspirations of equality and freedom in the Thirteenth, Fourteenth and Fifteenth Amendments that radically altered eighteenth century attitudes of slavery, federalism, and national citizenship.[95] And in response to unprecedent national conditions, the New Deal thrust American constitutionalism into the modern world, foregoing formal amendment while nonetheless enacting sweeping transformations at least as revolutionary as the People did during Reconstruction two generations prior.[96] These moments in American history form the People's higher lawmaking power, one that engrains popularly affirmed values into American constitutional tradition both formally, through written amendment, and substantively, through extraordinary popular engagement.

The Bill of Rights, the Fourteenth Amendment, and other provisions of the Constitution, are the product of these constitutional moments of higher lawmaking—democratic lawmaking. In such cases, the People have entrenched these democratic decisions into America's higher law to bind all government. In this respect, when courts exercise judicial review, they are "discharging a critical dualistic function."[97] By invalidating a law that in the dualistic perspective does not speak for the People, courts preserve America's higher law from subordinate encroachments on the People's true democratic decisions, whether made in 1791 or 1941. Judicial supremacy interprets the words and rights that the People democratically fashioned into

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[94] Bruce Ackerman, "The Storrs Lectures: Discovering the Constitution," *The Yale Law Journal* 93, no. 6 (May 1984): 1058.
[95] Ackerman, "Constitutional Politics/Constitutional," 459-60.
[96] Ibid, 460; *see* Harvey J. Kaye, *The Fight for the Four Freedoms: What Made FDR and the Greatest Generation Truly Great* (New York: Simon & Schuster, 2014).
[97] Ackerman, "The Storrs," 1050.

the Constitution and "placed 'beyond the reach of majority ('political') decision.'"[98] In this sense, judicial review respects the "democratic pedigree" of constitutional moments and merely enforces the changes popularly made to the Constitution.[99] While judicial review may reserve vast power to an undemocratic body, in practice it preserves and sustains democratically made choices. However, all scholars do not share such a democratic interpretation of judicial review. Alexander Bickel provided a realist interpretation of judicial review that cuts through any notion that it preserves democratic decisions:

> The root difficulty is that judicial review is a counter-majoritarian force in our system. There are various ways of sliding over this ineluctable reality. Marshall did so when he spoke of enforcing, in behalf of "the people," the limits that they have ordained for the institutions of a limited government… But the word "people" so used is an abstraction. Not necessarily a meaningless or a pernicious one by any means; always charged with emotion, but nonrepresentational—an abstraction obscuring the reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. It is an altogether different kettle of fish, and it is the reason the charge can be made that judicial review is undemocratic.[100]

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[98] Tushnet, "Forms of Judicial," 357, (internal citation omitted).
[99] Lawrence B. Solum, "The Constraint Principle: Original Meaning and Constitutional Practice" (unpublished manuscript, Georgetown University Law Center, Washington, D.C., March 24, 2017), 73, accessed April 8, 2020, https://dx.doi.org/10.2139/ssrn.2940215.
[100] Bickel, *The Least,* 16-7.

For Bickel, interpretations like Ackerman's simply attempt to disguise a blatantly undemocratic declaration as something that upholds a decision that a current majority wishes to overturn. Indeed, this interpretation of judicial review makes sense. If the people have the power to ordain certain values as especially protected, they undoubtedly reserve the power to reverse that decision in favor of one that more aptly conduces to current attitudes. While followers of Ackerman may rebut that Bickel's view is plainly monist and does not take into account the intricacy of higher lawmaking versus normal political lawmaking,[101] they cannot deny that judicial review, even to preserve past higher lawmaking, denies current majorities the ability to unrestrictedly govern democratically according to their own values and beliefs. In this way, despite interpreting past moments of constitutional politics as true democratic decisions that Americans have ensconced into constitutional fabric, judicial review remains presumptively undemocratic because it inhibits *current* majorities from ruling themselves in the way they see most fit.

Scholars have adopted these criticisms and have proffered various solutions, from trying to limit and therefore save judicial review, to altogether rejecting its validity. Aside from John Marshall pronouncing judicial review as an implicit characteristic of the American constitutional design,[102] John Hart Ely notably posited a theory of judicial review that emphasized judicial intervention to promote the proper functioning of democracy; beyond that, courts should largely interpret the Constitution deferentially in favor of the political branches.[103] But even beyond rethinking judicial review, arguments against its retention altogether continue to fail. Many normative theories against judicial review advocate some version of popular constitutionalism

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[101] Ackerman, "Constitutional Politics/Constitutional Law," 463-5.
[102] *See* Marbury v. Madison, 5 U.S. 137 (Feb. 24, 1803).
[103] Gerald T. Dunne, "The Straight and Narrow Path," review of *Democracy and Distrust: A Theory of Judicial Review*, by John Hart Ely, *Michigan Law Review* 80, no. 4 (March 1982): 653.

where the citizenry actively involves itself in political affairs and holds deep respect for individual liberty. Jeremy Waldron presents such an argument that generally characterizes the numerous other refutations of judicial supremacy and judicial review. He predicates his argument on four primary premises related to these notions that are worth recounting here at length:

> We are to imagine a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.[104]

Presumably, if a society does not conform all four of these premises, Waldron's argument against judicial review does not apply. In the United States, serious questions persist about how representative legislatures are and if universal suffrage has substantively been realized.[105] Likewise, the current political climate induces considerable skepticism when contemplating if

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[104] Jeremy Waldron, "The Core of the Case against Judicial Review," *The Yale Law Journal* 115, no. 6 (April 2006): 1360.

[105] *See, e.g.,* Shelby County v. Holder, 570 U.S. 529 (June 25, 2013) (opinion of Ginsburg, J., dissenting); Rucho v. Common Cause, 588 U.S. ___ (June 27, 2019) (opinion of Kagan, J., dissenting); Republican National Committee v. Democratic National Committee, 589 U.S. ___ (Apr. 6, 2020) (opinion of Ginsburg, J., dissenting); *see e.g.*, Danielle Root and Aadam Barclay, *Voter Suppression during the 2018 Midterm Elections: A Comprehensive Survey of Voter Suppression and Other Election Day Problems*, 3-14, November 20, 2018, accessed April 18, 2020, https://cdn.americanprogress.org/content/uploads/2018/11/19130033/2018VoterSuppression.pdf.

most members and most officials have "a commitment… to the idea of individual and minority rights" and if "persisting, substantial, and good faith disagreement about rights" takes place.[106] Nonetheless, colorable rebuttals to Waldron's premises exist and largely suffice in rejecting his criticism as they do not apply to the United States. By this line of though, conditions suitable for discarding judicial review and judicial supremacy do not subsist in the United States, requiring retention of these practices.

The foregoing analysis has answered five important questions and additionally has illuminated an important conclusion. First, law is legitimate because it arises from material relations of power that exist in the capitalist system. Nonetheless, the Constitution as a political overlay sculpts how those power relations manifest within the specific political and legal arrangement in the United States. Second, the American constitutional system embraces two prevailing characteristics, democracy and liberalism, that are at tension with each other, precipitating serious skepticism of judicial review. Third, courts in the United States possess ultimate judicial supremacy through the practice of strong judicial review, allowing courts to authoritatively interpret the Constitution and bind political bodies by those interpretations. Despite claims that the prevailing political environment influences judicial power to varying degrees, historical evidence from inter-branch dynamics evinces that the political branches recognize the judiciary as possessing constitutional decisional supremacy to expound the meaning of the Constitution. Fourth, despite a democratic interpretation of history and a distinction between normal and higher lawmaking, judicial review continues to be presumptively undemocratic as it limits current majorities' power to enact legislation. Fifth, while criticisms of

[106] Tom Ginsburg, Aziz Z. Huq, and Mila Versteeg, "The Coming Demise of Liberal Constitutionalism?," *University of Chicago Law Review* 85, no. 2 (March 2018): 241; Nancy Bermeo, "On Democratic Backsliding," *Journal of Democracy* 27, no. 1 (January 2016): 5, (defining democratic backslide).

judicial review endure, they presuppose conditions that do not exist in the United States and therefore cannot apply to the American constitutional system. The aggregate of these findings leads to the following conclusion: Because of the promises of individual liberty inscribed in the Constitution, and because principle critiques of judicial review cannot account for the current political and constitutional realties of the United States, federal courts are required to exercise judicial review to restrain political majorities from violating individual rights. Moreover, because judicial review remains presumptively undemocratic, courts must continuously legitimate themselves in order to operate within the democratic confines of American constitutionalism while simultaneously vindicating the conflicting principles of classical liberalism.

III. The Judicial Apparatus as a Self- and System-Legitimating Institution

Having established that federal courts exercising judicial review conflict with democratic principles and are therefore presumptively illegitimate, courts need to affirmatively signal that they perform a legitimate societal function. Position inside a hegemonic system does not *ipso facto* endow legitimacy. Indeed, the judicial apparatus seems a particularly difficult system to legitimize due to the counter-majoritarian difficulty. This section analyzes just how the judicial apparatus achieves legitimacy—so much so that the public trusts it more than the other branches of government[107]—and how the judicial system, in turn, legitimates the overarching capitalist social system.

Some of the elements or procedures analyzed in this section may appear largely symbolic or mere formalisms in relation to the substance of the adjudicative process. Nonetheless, symbolism plays an integral part in unifying a hegemonic whole, and these nuances warrant critical investigation as their aggregate functions to legitimate the judicial apparatus and the social system itself. The first part of this section focuses on the judicial procedures and practices that function to legitimate courts in the American constitutional system. The second part, operating on the premise that these procedures adequately legitimate courts to the extent that they can operate as designed, explores how a properly functioning judicial apparatus resolves disputes within the capitalist system and therefore coordinates constituent elements of that system to avoid legitimation crises. Fundamentally, courts are designed for this steering purpose

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[107] Lydia Saad, "Supreme Court Enjoys Majority Approval at Start of New Term," Gallup, last modified October 2, 2019, accessed April 10, 2020, https://news.gallup.com/poll/267158/supreme-court-enjoys-majority-approval-start-new-term.aspx; *c.f.* Gallup, "Congress and the Public," Gallup, last modified March 13, 2020, accessed April 10, 2020, https://news.gallup.com/poll/1600/congress-public.aspx; Gallup, "Presidential Approval Ratings -- Donald Trump," Gallup, last modified March 22, 2020, accessed April 10, 2020, https://news.gallup.com/poll/203198/presidential-approval-ratings-donald-trump.aspx.

and operate within systematic and constitutional limits to maintain existing material relations of production and avoid systematic conflicts that endanger capitalist interests.

A. Intra-System Judicial Legitimation

Max Weber wrote in *The Theory of Social and Economic Organization* that "[t]he validity of… claims to legitimacy may be based on… [r]ational grounds—resting on a belief in the 'legality' of patterns of normative rules and the right of those elevated to authority under such rules to issue commands."[108] The collective "patterns of normative rules" and "commands" issued by "those elevated to authority" comprise the judicial apparatus, and its "legality" arises from the practice of predictable and public legal proceedings. In this way, the judicial apparatus maintains legitimacy through its own "rational" function, whether with internal formalist rationality or in conforming to rational societal expectations. This latter rational function, an outward-facing rationality has the purpose of legitimating courts to individuals in society. Tocqueville theorized that in the United States the "judicial power" has three primary characteristics: First, it serves as an "arbiter" between people when disputes arise.[109] Second, the "judicial power is to pronounce on particular cases and not on general principles."[110] Third, the judicial power "is to be able to act only when it is appealed to."[111] Broadly speaking, the judicial apparatus still largely conforms to Tocqueville's characteristics and has developed more comprehensive procedures since Jacksonian American that lend themselves to each of these categories. Tocqueville's observations indicate that judicial legitimation practices have roots in the early practices of the United States, implying that social legitimation is not a new

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[108] Max Weber, *The Theory of Social and Economic Organization*, trans. A. M. Henderson and Talcott Parsons (New York: Free Press, 1968), 328.
[109] Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago, IL: University of Chicago Press, 2000), 94.
[110] Ibid.
[111] Ibid.

phenomenon. This being true, the organic society that Tocqueville observed has become largely systematized and refined to reinforce its own legitimacy and that of the system within which it operates.

A preliminary survey of the judicial apparatus clearly demonstrates the important role that procedures have in conveying legitimacy. While endowing legitimacy to a presumptively illegitimate system, these procedures simultaneously play a fundamental role in the actual process of adjudication and delivering justice. In painting a picture of systematic legitimation, I do not mean to discount the importance of the judicial system and its associated practices in upholding the principles of classical liberalism and vindicating individual rights. That said, the entire judicial apparatus is premised on demonstrating to individuals living in the United States that courts and the government operate legitimately. Indeed, the fundamental notion of due process operates to ensure that the government follows the correct and legitimate procedures before depriving someone of "life, liberty, or property."[112] To avoid an unnecessarily lengthy elaboration of all the procedures that courts utilize to achieve legitimacy, the follow analysis focuses on some of the more notable: the right to a jury of one's peers during criminal trial and the right to a jury in federal civil trials, the right of the accused to retain counsel, the ability to appeal judgments to higher courts, and the collaborative process of submission of briefs and practice of oral arguments. Additionally, I close with a discussion of what I call the role of judging, which includes the impersonality judges assume when adjudicating, the practice of conferring with clerks and other judges sitting on panels in courts of appeals, and the issuing of written opinions.

[112] U.S. Const. amend. V; U.S. Const. amend. XIV § 1.

"Providing an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[113] In criminal trials, the government seeks to sanction an alleged offender either by revoking her liberty in some fashion or by imposing some pecuniary penalty. But for hundreds of years, the law has recognized that arbitrary or whimsical deprivations at the hands of the government offend the ideas of individual liberty and limited government.[114] Therefore, this necessitates the "further protection" of an impartial jury of one's peers in order for the government to impose such penalties on an individual.[115] A legitimation function plainly arises from the criminal jury: By imposing a requirement that a jury find guilt, the government cannot act without permission from a group of citizens. Criminal deprivations licensed by juries appear more legitimate because regular persons have permitted the government to act. This mechanism for *allowing* deprivations by the legal system "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power… found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."[116] Because courts can impose sentence only if a jury finds guilt, such a deprivation becomes legitimate due to community participation and ultimate authorization of punishment. The civil jury requirement in the federal system operates in largely the same way. In federal civil actions, a jury retains its power to make factual determinations and thereby authorize enforcement of penalties under the civil code.[117] So just as during a criminal

[113] Duncan v. Louisiana, 391 U.S. 145, 156 (May 20, 1968).
[114] Ibid, 151-2.
[115] Ibid, 156.
[116] Ibid.
[117] Margaret L. Moses, "What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence," *George Washington Law Review* 68 (2000): 200.

trial, a civil jury permits the court to sanction a party depending on its findings, thus legitimating the deprivation because citizens themselves delivered and authorized it.

While a criminal defendant has the right to a trial by jury, she also has a right to effective counsel during those proceedings. The Supreme Court made it clear in the first half of the 20th century that "the right to the aid of counsel is of [a] fundamental character."[118] The modern legal system utilizes many complex procedures and immense legal machinery to operate the courts. With labyrinthine combinations of motions, waivers, filing deadlines, and more, "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."[119] The retention of counsel serves to give defendants a legitimate opportunity to avail themselves of the preordained procedures to stop the government from imposing a penalty. A trial without defense counsel would openly demonstrate the actual power asymmetry at work. "Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime."[120] Because of this fact, the government must likewise permit a defendant to retain counsel, or otherwise provide effective counsel, in order to legitimate a trial and any resulting penalties, as a defendant left to her own devices has minimal chance of prevailing, for she is not learned in legal procedure or argument. The judicial apparatus must give individuals a meaningful chance to rebut claims of criminality for risk of otherwise permitting a system that provides no meaningful chance for intelligent refutation.

[118] Powell v. Alabama, 287 U.S. 45, 68 (Nov. 7, 1932), though that fundamental character was not universally realized until 1963.
[119] Strickland v. Washington, 466 U.S. 668, 685 (May 14, 1984) (internal citation omitted).
[120] Gideon v. Wainwright, 372 U.S. 335, 344 (Mar. 18, 1963).

These foregoing protections apply to trials, the first instance of attempting to settle a legal dispute. But courts, like the judges that comprise them, are fallible. Josh Blackman recently acknowledged that district courts—those that conduct trials—inevitably face constraints that appellate courts rarely do. He writes that for district court judges, "it is impractical to spend months pondering over deep legal questions. Some matters must be resolved as soon as possible. And that urgency, invariably, leads to errors. For that reason, appellate courts perform an important function."[121] In the federal courts, the right to direct appeal in both civil and criminal cases is guaranteed.[122] The losing party in the district court can appeal the judgement to higher courts of appeals on questions of law and some limited questions of fact. The role of appeals is twofold: First, as Blackman acknowledged, courts of first instance can make mistakes, often concerning the complexities of law and legal doctrine. On appeal, those judgments can pass through an additional round of deliberation by panels of judges, usually three, who have more time and can closely parse and explicate legal principles. Through this process, judges can ensure that judgements are reasoned and reasonable as they relate to the law, and that any penalties levied conform to the necessary procedures. Second, appeals also fulfill the important remedial task in social systems to correct challenges that endanger capital. In reviewing questions of law, judges invariably utilize the above analyzed interpretive methodologies that largely restrict the possible legal outcomes. In this sense, appellate review provides an additional opportunity for the judicial apparatus to ameliorate judgements that threaten capitalist interests.

Relatedly, judges rarely make decisions without informed briefing from the parties to a suit. In the appellate courts, and to a lesser degree in the trial courts, adjudication takes on a

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[121] Josh Blackman, "Courts Should Not Decide Issues That Are Not There," *The Volokh Conspiracy* (blog), entry posted April 12, 2020, accessed April 19, 2020, https://reason.com/2020/04/12/courts-should-not-decide-issues-that-are-not-there/.

[122] Cassandra Burke Robertson, "The Right to Appeal," *North Carolina Law Review* 91 (2013): 1222.

collaborative character. In the trial courts, the lawyers primarily address their arguments to the jury—assuming they have not chosen to conduct a bench trial—with no substantive interaction between jurors and counsel. But in the courts of appeals, judges often interact with advocates to better understand the legal principles implicated in an appeal and reach the best reasoned outcome. Attorneys for the parties in an appellate case will submit written arguments to the court for the judges to read and consider. Additionally, cases not summarily disposed[123] are scheduled for oral argument in which advocates and judges can directly consider the questions that the judges have. This distinctively collaborative approach to appellate dispute resolution imparts a great deal of legitimacy to legal judgements. Not only does appellate review offer an additional chance for review of possibly erroneous decisions from the district court as discussed above, but the substantive structure allows more time for judges to consider legal principles and ultimately enter more legally sounds judgements. A judgement that has passed through two tiers of review and has a thoughtful written opinion justifying its result through legal analysis signals to the public that these decisions are not simply arbitrary whims, but rather, after informed and adversarial briefing, they comport with the established legal norms of the social system.

Finally, the role of judges, their behaviors, and practices all supplement the public proceedings and endow vital legitimacy to the adjudicative process and legal apparatus. As previously established, federal judges enjoy life tenure and are not democratically chosen so as to avoid the perception of pervasive political considerations in the judiciary. Fundamentally, the politically insulated federal judge is charged with assuming a certain impersonality that defines the objectivity of the law. When federal judges take the oath of office, they affirm "[to] administer justice without respect to persons, and do equal right to the poor and to the rich, and

[123] Often done because the issue raised is not meritorious or existing law clearly controls the outcome.

that [they] will faithfully and impartially discharge and perform all the duties incumbent upon [them].”[124] Federal judges conform to the Weberian definition of “official” because they “occup[y] and ‘office’… [and are] subject to an impersonal order to which [their] actions are oriented.”[125] In this way, judges act as agents for the impersonal and impartial body of law. They speak not for themselves or their own personal notions of justice, but rather for the judicial apparatus which functions according to previously ascertained rules and which, when in need of new rules to adapt to new circumstances, reasons by analogy and according to established bounds of conduct, whether in the form of the Constitution, statutes, or common law. Moreover, this impersonal agency characteristic is the reason federal judges where black robes—they speak for the law and shed their personal prejudices and inclinations before ascending to the bench and presiding over the court.

While judges speak for the impersonal figure of the law, they invariably have to make their own decisions about what the law demands. Parsing the intricacies of legal doctrine, applying contrasting considerations of judicial methodology, and analogizing to similar fact patterns requires careful concentration and dedication. Additionally, differing minds can illuminate different and more convincing arguments. For this reason, judges on both the district courts and courts of appeals employ the assistance of law clerks to help manage these difficult analyses. Law clerks can conduct more research, raise relevant theories, and help develop sound legal arguments that supplement the work done by the judge herself. The ultimate goal, as always, is to arrive at the correct jurisprudential result and meet the expectations that the law demands. Furthermore, judges on courts of appeals confer together, generally on panels of three

[124] 28 U.S.C. § 453 (Dec. 1, 1990).
[125] Weber, *The Theory*, 330.

in the circuit courts, and the full court of nine justices on the Supreme Court. This again constitutes part of the collaborative nature of decision-making that many courts utilize. While each judge makes her own decisions about each case, the ability for judges to conference and, at minimum, present their way of thinking about the case and interact with opposing thoughts functions to both build consensus among judges and to arrive at the best legal judgment. Perhaps more importantly for legitimation purposes though, the perception by people that appellate judges work collectively and collaboratively to come to the most reasonable conclusion required by the law endows legitimacy to an otherwise fairly opaque dispute resolution system. Demonstrating good-faith action on the part of judges through these procedures enables courts to pronounce authoritative and binding rulings which the public and government actors respect as supreme.

All of these aforementioned proceedings, practices, and norms culminate in the release of judgements which courts normally communicate through written opinions. In many ways, written opinions serve as the courts ultimate attempt to achieve legitimacy. The public cannot see or participate in conferences or discussions with clerks, or even oral arguments to an extent. People largely have to trust in courts to regularly conduct these private conventions in good faith. But opinions are categorically different. One may say they are one of the few parts of the judicial apparatus *meant* for public consumption. Judges plainly explain their reasons for arriving at a particular judgement and have the opportunity to publicly engage with opposing arguments so that people can gauge for themselves which position is more convincing. Additionally, in the vast majority of cases, a single judge will speak for the majority of the court and deliver a controlling majority opinion that a number of her colleagues will have joined. This practice is remarkably better than others, particularly that of issuing seriatim opinions, because it provides

more clarity to litigants as to what the law requires or permits—lawyers no longer have to parse opinions from each judge to piece together common and controlling elements—and it demonstrates to the public that the law is sufficiently convincing as to this question that this particular judgment is required. Agreement is vital in maintaining a hegemonic order and sustaining a social system. In this way, written opinions go a long way in legitimating courts and their reasoned judgements about questions of law.

The aggregate of these procedures and norms that judges practice in their judicial capacity serves to effectively legitimate the judicial apparatus despite the counter-majoritarian difficulty presented in Part II. While one finds procedural guarantees in the Constitution that are meant to ensure that deprivations at the hands of the government are both correct and in accordance with individual rights, they equally serve to show the people that the government has a *legitimate reason* beyond simple accusation do deprive someone of life, liberty, or property. Claims of malfeasance are vetted through these procedures and many others to establish veracity and apply legal principles to the underlying facts. Ultimately, the power of the judicial apparatus has to justify its actions to observers when imposing a sanction against an individual or enforcing an obligation. The judicial process serves to demonstrate that the powerful institutions have done their homework. These outward-looking methods to achieve legitimation serve as proof to the people that comprise the socio-economic system that presumptively undemocratic courts are functioning properly—namely, to ensure that democratically enacted laws are upheld and that disputes are resolved efficiently and according to previously ascertained rules. While enforcing judgments and exercising judicial supremacy, the courts need this legitimacy to sustain themselves so that they can effectuate their larger coordination role of resolving disputes between other constituent systematic entities.

B. Systematic Legitimation by the Judicial Apparatus

The judicial apparatus has the dual function of operating as a part of the American constitutional system and as a vital coordinating component of the capitalist socio-economic system. I argue that by exercising judicial supremacy, adjudicating disputes arising under law generally, whether civil or criminal, and largely upholding the status quo of legality, the courts ensure systematic stability, perpetuating state control of the political and legal systems while allowing capitalism to flourish. As discussed above, the hegemonic nature of judicial methodology has a strong gravitational force that bends insurgent ideologies towards it, either mitigating the substantive effects of alien jurisprudence or engulfing and neutralizing it entirely. So, by its simple operation, the judicial apparatus upholds a conducive environment in which the capitalist system enjoys decisive insulation.

Jürgen Habermas postulates that in a system not undergoing a crisis, the state apparatus "secures the general conditions of production (in the sense of the prerequisites for the continued existence of the reproduction process)[.]"[126] The judicial apparatus plays a vital role in securing these conditions, especially in adjudicating deviant behavior. Hugh Collins explores the instrumental nature of law in this way: Fundamentally, law functions to coerce people into accepting, knowingly or unknowingly, and protecting the capitalist relations of production. Two versions of the instrumentalist theory exist, weak and strong, but both presuppose that the law, shaped by capitalist interests, works to reinforce the prevailing relations of production because they generally accord with capitalist interests.[127] Moreover, building on the writings of Lenin, Marxist thinkers refined early theories about the function of law to accommodate its instrumental

[126] Jürgen Habermas, *Legitimation Crisis*, trans. Thomas McCarthy (Boston, MA: Beacon Press, 1975), 36.
[127] Collins, *Marxism and Law*, 29.

role. As Collins puts it, "[i]nstead of laws being described as a reflection of the mode of production, they were explained as creations of the state apparatus to further the ends of the ruling class."[128] This conforms closely to Habermas's position that the state uses its power to establish stable conditions for the reproduction process. But laws themselves serve little good if there is no way of enforcing them. Thus, the state established courts as one means of enforcing laws that provide conditions conducive to capitalism, and, in this sense, courts function most efficiently when they remain confined to the limited role of administering rules of structural organization and adjudicating disputes between instruments of capital. Beyond this, courts risk deviating from their systematic purpose.

Federal courts accomplish legitimation in various ways while occupying their unique position as a primary actor in the American constitutional system and as an administrative actor in the material social system. Courts can fulfill these roles simultaneously, and many decisions made by courts as part of their constitutional duties work to preserve the capitalist relations of production. Primarily, this happens through decisions that protect the power of the state. While courts uphold the ability of the state to impose duties on persons and entities, they also must police the frontiers of government power delineated in the Constitution. By vindicating the constitutional design in this way, federal courts ensure the efficient functioning of the state, thereby facilitating the continued operation of the entire social system.

The government's eminent domain power seems an apt place to start. I discussed this power above to demonstrate the substantive similarities between interpretive methodologies, even in politically contentious cases. Likewise, though, the eminent domain power serves well as

[128] Collins, *Marxism and Law*, 27.

an example of how federal courts, specifically the Supreme Court, have sustained broad governmental power. Throughout the 20th century, the Supreme Court has upheld the government's power to commandeer private property so long as it pays just compensation to the proprietor. The Fifth Amendment, in relevant part, provides that "private property [shall not] be taken *for public use*, without just compensation."[129] Even while the Court maintains that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation,"[130] it has upheld such transfers on no fewer than three occasions. In *Berman v. Parker*, the court upheld a taking by the District of Columbia which then gave the taken property directly to a private developer with the hope of spurring economic growth and community revitalization.[131] The Court goes on to say that it "do[es] not sit to determine whether a particular housing project is or is not desirable… It is within the power of the legislature to determine that the community should be beautiful as well as healthy… If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."[132] The Court refused to construe the public use requirement literally, unleashing a broad power enabling government to largely bypass substantive public use and instead substitute it for some prospect of abstract public benefit. *Berman* forms the genesis of this incredibly deferential standard that so long as the government rationalizes its taking with some tangential public use of property, which the Court equated with public benefit, courts will not supersede that legislative determination.

Continuing its disingenuous interpretation of Public Use Clause, the Court repeated its submission to the political branches in upholding the State of Hawaii's "taking, with just

[129] U.S. Const. amend. V, (emphasis added).
[130] Kelo v. City of New London, 545 U.S. 469, 477 (June 23, 2005).
[131] Berman v. Parker, 348 U.S. 26, 28 (Nov. 26, 1954).
[132] Ibid, 33.

compensation, title in real property from lessors and transferring it to lessees" in *Hawaii Housing Authority v. Midkiff*.[133] While doubling down in dicta on its assertion "that the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party,"[134] it simultaneously permits Hawaii to take property from private owners and give it to private individuals. While the public may benefit from less concentration in land ownership, as the State's argued, that does not mean the public gains some "use" from this property which is still privately owned and not open to public use. To analogize, I benefit from people receiving vaccines to fight contagious diseases, but this does not mean I *use* those people. Herd immunity confers a general societal benefit, one not dissimilar from the benefit in *Midkiff*. Nonetheless, the property granted to lessees is not used by the public any more than the people are used in the inoculation example. The Court's assertions and its actions simply do not coincide, notwithstanding the fact that both *Berman* and *Midkiff* were decided unanimously. The willful conflation of "use" with "benefit" signals the Court's inclination to uphold governmental power in this area which it has carried to even further lengths in recent years.

The year 2005 brough about only "the latest in a string of [Supreme Court] cases construing the Public Use Clause to be a virtual nullity."[135] In *Kelo v. City of New London*, the Court held true to its precedent in eminent domain cases and permitted a taking pursuant to a city development plan that "was 'projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city[.]'"[136] The pinnacle of this economic

[133] Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 231-2 (May 30, 1984).
[134] Ibid, 245.
[135] Kelo v. City of New London, 545 U.S. 469, 506 (June 23, 2005) (opinion of Thomas, J., dissenting).
[136] Ibid, 472, (internal citation omitted).

revitalization would be a new $300 million research facility owned by Pfizer Corporation.[137] Again steamrolling its prior assertions that the state cannot use takings to benefit purely private ends, the Court upheld this development plan as a constitutionally permissible exercise of the Connecticut's eminent domain power. *Kelo,* in many ways, embodies the culmination of over 50 years of textually erroneous constitutional jurisprudence, yet equally signals federal courts' eagerness to not only uphold, but affirmatively enable governmental power, so much so that they will unrepentantly bend constitutional text to accomplish this goal. Licensing the government in this way empowers it to more aggressively and decisively implement Habermas's contention of securing the general conditions conducive to the reproduction process.

While federal courts have acceded to exertions of governmental power generally, they equally regulate the radical deployment of governmental power prohibited by the Constitution. As shown above, the Constitution is vulnerable to surreptitious judicial modifications. But while the Court has diverged from the Public Use Clause's plain meaning, it has interpreted limits on federal power more strictly. Two cases exemplify this trend addressing distinct areas of constitutional law: *Youngstown Sheet & Tube Co. v. Sawyer* draws clear lines as to the use of unilateral executive power, even during emergencies, and *United States v. Lopez* marks a sharp limitation of Congress' power to regulate noncommercial conduct via the Commerce Clause.

Youngstown Sheet & Tube Co. v. Sawyer concerned the direct seizure of private property by the executive branch. In 1952 at the height of the Korean War, President Truman, in response to a general strike by steel mill workers, ordered the Secretary of Labor to seize the mills effected and ensure their continued operation so as to provide necessary supplies to troops in

[137] Ibid, 473.

combat.[138] After an expedited appellate schedule, Justice Black wrote for the majority and said "[the Court] cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production."[139] The Court disavowed the broad and effectively limitless contention of executive power made by the government which, in this specific circumstance, would have led to government seizure of steel mills during a perceived emergency, but would have been much more dangerous as a looming precedent. If the Court had not invalidated this unilateral executive action, it would have opened the door for the President to appropriate private property whenever she declares the national interest depends on it. This is not the condition-securing role of the administrative state that Habermas theorizes; rather, such action constitutes direct intervention into the reproduction process and sanctity of private capital. Because the Constitution does not permit such intrusions, the Court struck down the order and enshrined protection of private property from arbitrary executive action into constitutional law.

In *United States v. Lopez*, the Court faced the question of whether Congress, consistent with its powers under the Commerce Clause and Necessary and Proper Clause, can regulate the carrying of firearms within a school zone.[140] Rather intuitively, the Court rejected the government's assertion that such conduct constitutes behavior that substantially or indirectly affects inter-state commerce.[141] The legitimating function here is similar to that in *Youngstown*: accepting Congress' assertion that guns in school zones satisfies the requirements of the Commerce Clause amplifies federal legislative power well beyond both its constitutional limitations and its role to establish conducive conditions for the capitalist relations of production.

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[138] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582-3 (June 2, 1952).
[139] Ibid, 587.
[140] United States v. Lopez, 514 U.S. 549, 551 (Apr. 26, 1995).
[141] Ibid.

Allowing Congress such extensive latitude in regulating what can only be described as noneconomic behavior, begs the question as to what other constitutional limitations Congress can overcome when actually regulating commerce. Moreover, from a capitalist perspective, Congress is much better off simply regulating commerce in a way that promotes efficiency, not policing the criminal decisions of individuals carrying firearms. By diverging from earlier, more permissive construction of the Commerce Clause power, the Court reigned in legislative power that exceeded constitutional allocation and distracted from the administrative coordination role required by the social system.

All of these cases beg the question: Is maintaining a social system necessarily the same as legitimating it? At the very least, the above analysis shows that courts perpetuate the capitalist system which can itself serve as a form of legitimation: I argue that by preserving the legal status quo, as is its province, the judicial apparatus preserves the alienation inherent in the capitalist hegemony, thereby legitimating the entire social system through the false consciousness of individuals. This is possible because individuals, prior any judicial intervention, become socialized in the capitalist social system. That, so to speak, forms their default perception of reality. Marx famously posited that "social being determines consciousness,"[142] and as part of a particular social system, individuals form a consciousness that accepts their material existence. Just as legal ideology forms a hegemonic structure with delineated bounds of acceptable outcomes and rationales, the hegemony of the capitalist system and experiences within that system socializes people to accept bourgeois ideology. In Gramscian terms, "[t]here are then many different types of ideological articulation within capitalism itself, and they operate as

[142] Shlomo Avineri, *The Social and Political Though of Karl Marx* (New York: Cambridge University Press, 1968), 76.

factors *legitimizing* the capitalist order[.]"[143] In this sense, the judicial apparatus need only maintain the existing legal forces to meet people's expectations for what the social system will produce. These expectations are predicated on the output that a social system produces. The output "consists of sovereignly executed administrative decisions,"[144] in this case, judgments and legal decisions made by courts in accordance with law. Therefore, so long as courts continue issuing decisions consistent with expectations from individuals socialized in the capitalist system—essentially upholding the status quo—they fulfill their role in legitimizing the social system.

In these ways, the judicial apparatus intelligently utilizes public procedures and practices to establish legitimacy for itself in the face of the counter-majoritarian difficulty. With this legitimacy, it functions to maintain the essential conditions of the capitalist relations of production by adjudicating disputes to coordinate conflicting interests in the constitutional and social systems. As noted above, federal courts occupy a peculiar position as both social system legitimators and constitutional system adjudicators. But in the cases reviewed, and in many others, the courts dispense with their dual charge simultaneously. By resolving cases that arise from disputes in the American constitutional system, federal courts maintain the status quo in the social system, giving it stability and allowing it to continue to secure material conditions conducive to the production process. Legal stability goes a long way in promoting overall social system stability because it maintains the hegemony of the state, perpetuating socialization inside the capitalist ideology and thereby legitimating the social system through the false consciousness of its inhabitants. But in a system "full of irreconcilable antagonisms,"[145] coordinated systematic

[143] Filippini, *Using Gramsci*, 13, (emphasis added).
[144] Habermas, *Legitimation Crisis*, 46.
[145] Avineri, *The Social*, 22.

legitimation can only be sustained for so long before crises emerge. Indeed, as I argue in the following Part, federal courts have generated many of the conditions that have led to a withdrawal of loyalty from the judicial apparatus and consequentially the social system. By inserting themselves into debates over social values, morality, and ethics, the federal courts have precipitated both legitimation and rationality crises that, if not addressed quickly and directly, have the ability to destabilize the entire social system.

IV. Social Jurisprudence, Rationality Deviation, and Legitimation Shortcoming

In a social system as complex as that in the United States, constant legitimation quickly becomes an elaborate balancing act to sustain what is seemingly an impossibly delicate organism. This system incorporates the vast collection of social, political, legal, and economic entities that manifest in society. With such a diverse array of constituent elements, conflicts and contradictions inevitably arise that threaten the material relations of production. In *Legitimation Crisis*, Jürgen Habermas succinctly explains this phenomenon of conflicts or crises and how the capitalist system reacts to counter them. This section borrows heavily from his theoretical framework and tailors it to analyze the judicial system particularly and how growing trends of dangerous jurisprudential activity have precipitated full scale rationality and legitimation crises. In the interwoven fabric of the social system, such crises cannot be compartmentalized, especially when they originate in and emerge from such a systematically essential entity as the judicial apparatus. The current systematic legitimation crisis can be attributed to a rise in social jurisprudence from federal courts, related at least in part to the proclivity of natural law theories. Because federal courts were not designed to function in this social capacity, their continued intervention in this area deviates from rational expectations, creating a cascading legitimation crisis. The following analysis takes these arguments in the order that they appear:

I begin with a brief discussion of what I mean by discussing natural law. In modern jurisprudence, two schools of natural law have emerged, largely in rebuttal to each other. First, there exists that of the classical liberal breed. Perhaps most closely linked to Enlightenment thinkers like Locke and Montesquieu, this liberal natural law emphasizes individual autonomy and certain fundamental rights that the government cannot legally regulate regardless of how it does so. In respect to the moral values that social jurisprudence inevitably addresses, the majority

articulated its notion of classical liberal natural law in *Planned Parenthood v. Casey* when it says "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[146] Such a jurisprudence, for better or worse, inevitably breeds pluralism in terms of morality, ethics, and normative human values. Second, and less explicit in federal jurisprudence, is the natural law of thinkers like Thomas Aquinas, and more recently John Finnis and Robert P. George. Aquinas says that "natural law follows on human nature,"[147] meaning that there exist natural human predispositions that in themselves form a body of basic law. John Finnis specifies Aquinas's proposition, claiming that "'natural law' (in the context of ethics, politics, law and jurisprudence) simply means the set of true propositions identifying basic human goods, general requirements of right choosing, and the specific moral norms deducible from those requirements as they bear on particular basic goods."[148] In this sense, natural law encapsulates a body of irreducibly objective human goods that have value for their own sake and not simply as instrumentalities for any range of ulterior motives.[149] These two conceptions of natural law thought have arisen with greater proclivity in areas of hotly debated social and cultural issues in the last 50 years. Both of these theories of natural law, though, remain conspicuously absent from the text of the Constitution, indicating that judges, in order to apply these concepts, need to utilize some inferential or suggestive readings of the text. Nonetheless, the federal courts' willingness to wade into these social thickets has enflamed social divisions and, however well-intentioned, produced a rationality crisis. The following analysis looks at cases where natural law values guided the Supreme Court's majority and, in a more subtle way, dissent.

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[146] Planned Parenthood v. Casey, 505 U.S. 833, 851 (June 29, 1992).
[147] Thomas Aquinas, *Selected Writings*, ed. Ralph McInerny (New York: Penguin Group, 1998), 643.
[148] John Finnis, "The 'Natural Law Tradition,'" *Journal of Legal Education* 36, no. 4: 492.
[149] Robert P. George, *In Defense of Natural Law* (New York: Oxford University Press, 1999), 20-1.

Roe v. Wade, decided in 1973, in many ways marked a watershed moment in social jurisprudence. In years leading up to the *Roe* decision, the Court had signaled its inclination towards a liberal reading of the Due Process Clause and what it meant for social liberty and substantive due process doctrine. Those cases, *Griswold v. Connecticut* and *Eisenstadt v. Baird*, largely concerned the states' failure to "show that the law serves any 'subordinating [state] interest which is compelling' or that it is 'necessary… to the accomplishment of a permissible state policy.'"[150] These rulings indicate a clearly liberal attitude towards government regulation of certain intimate affairs, but do not squarely address the fundamental ethical and moral questions involved in *Roe*. In the *Roe* case—which presented the question as to whether States can constitutionally regulate abortion, and if so, to what extent—the State of Texas argued in its merits brief that "the fetus is human from the time of conception, and so interruption of pregnancy cannot be justified from the time of fertilization. It most certainly seems logical that from the stage of differentiation, after which neither twinning nor re-combination will occur, the fetus implanted in the uterine wall deserves respect as a human life."[151] This view of human life accords to the natural law view of Aquinas, that life itself encompasses a basic human good and that fetuses "possess[] inherent human dignity and should be accorded full moral respect."[152] While the State advanced this proposition in defense of its abortion laws, the Court declined to adopt it, instead opting for a line of reasoning that struck down Texas's restriction and was in keeping with earlier, classically liberal decisions emphasizing personal autonomy from

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[150] Griswold v. Connecticut, 381 U.S. 479, 497-8 (June 7, 1965) (alteration in original); *see also*, Eisenstadt v. Baird, 405 U.S. 438, 443 (Mar. 22, 1972), "We agree that the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims of §§ 21 and 21A [of Massachusetts law]."

[151] Brief for Appellee, *Roe v. Wade*, No. 70-18, *30 (U.S. S. Ct. filed Oct 19, 1971) (available on Lexis at 1971 U.S. S. Ct. Briefs 20).

[152] Robert P. George and Christopher Tollefsen, *Embryo: A Defense of Human Life* (New York: Doubleday, 2008), 115.

government regulation. Writing for the Court, Justice Harry Blackmun, while declining to extend the Fourteenth Amendment's definition of "person" to fetuses,[153] explains "[the] right of privacy… is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[154] The Court, at least preliminarily, upholds the classical liberal value of personal autonomy from government interference in certain private spheres that the Constitution purportedly protects. But the majority goes on to demonstrate the tension between natural law theories when it divines differing legal standards depending on the trimestral development of the fetus. Indeed, the majority concedes the position that following the conclusion of the first trimester, the state may regulate abortion to protect the safety of the mother, and after the conclusion of the second trimester, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[155] This conclusion protecting state power to intervene directly conflicts with its previous holding that a woman's right to terminate her pregnancy is constitutionally protected. The Court unconvincingly tries to walk the line between liberalism and the basic human good of life, and, consequentially, inserts itself into a hotly contested culture war only to provide no clear legal guidance. Nor did the Court avail itself of the opportunity to correct its constitutional faux pas made in *Roe* in 1992 when it decided *Casey*, which is quoted above as articulating a liberal position of natural law while only discarding the trimester-based approach in favor of the undue burden test before fetal viability.[156] This new standard neither lends more legal clarity nor substantively alters *Roe*'s jumble of unfulfilled liberal assertions. These abortion cases are likely

[153] Roe v. Wade, 410 U.S. 113, 157-8 (Jan. 22, 1973).
[154] Ibid, 153.
[155] Ibid, 164-5.
[156] Planned Parenthood v. Casey, 505 U.S. 833, 846 (June 29, 1992).

the most incongruous decisions when it comes to natural law's role in social jurisprudence. But they are by no means the only ones to unnecessarily wade into culture wars.

Euthanasia and the right to assisted suicide, or more directly, the right to die, have also been addressed by federal courts which, for the sake of clarity, but again at the demise of judicial legitimation, have ostensibly settled the facial *constitutional* legal dispute. In *Cruzan v. Director of the Missouri Department of Health*, the Court faced the question of whether the Due Process Clause of the Fourteenth Amendment requires a state to cease providing life-sustaining medical care to an incapacitated person upon request from her guardian absent clear and convincing evidence of that person's desire to do so in such circumstances.[157] The Court refused to interpret the Constitution to make such affirmative demands on a state, but avoided the question of a constitutional right to die because Cruzan herself was "not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right."[158] Interestingly, Neil M. Gorsuch observed in his discussion of the history of the *Glucksberg* litigation, which I examine below, that the lower courts interpreted the approach in *Cruzan* to diverge from that undertaken in *Casey*. Though *Cruzan* was decided two years prior, it relies heavily on a historical investigation of the common law in relation to bodily decisions, an undertaking vastly different from the probing philosophical rationale of the *Casey* decision.[159] The result of *Cruzan*, though, comports well with principles of personal autonomy because it demands that the individual affirmatively make decisions about an asserted right and did not allow others to substitute their judgment for hers. Lower courts eagerly adopted this principle in

[157] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (June 25, 1990).
[158] Ibid, 280.
[159] Neil M. Gorsuch, "The Right to Receive Assistance in Suicide and Euthanasia, with Particular Reference to the Law of the United States" (DPhil diss., University of Oxford, 2004), 20, accessed March 25, 2020, https://ora.ox.ac.uk/objects/uuid:688e5b8c-bb06-4d86-abe0-440a7666ffc1.

the *Glucksberg* case.[160] So, already one can see that federal courts cannot even agree on a common constitutional *approach* to questions of social jurisprudence, causing disparate results in lower federal courts.

The Court did not wait long to examine more directly the question of assisted suicide. *Vacco v. Quill* and *Washington v. Glucksberg* presented two differing questions about how to think about euthanasia and assisted suicide in light of the Court's previous holdings of substantive rights under the Constitution. *Quill* concerned a challenge to New York's law that banned assisted suicide but permitted a mentally competent person to refuse life-sustaining medical care on the grounds that such a law violates the Equal Protection Clause. Plaintiffs' argument maintains that since removing life-sustaining medical care and assisted suicide are functionally equivalent, New York law treats equally situated persons differently.[161] The majority rejected this contention after examining the historical record and concluded that New York's interests in preserving life and preventing suicide are sufficient to pass constitutional muster. The Court simultaneously handed down its decision in *Glucksberg*, which presented a similar, though distinct, question of whether Washington's prohibition on assisted suicide violated the Due Process Clause. As in *Quill*, the Court reject this challenge after a long historical investigation of the right to assisted suicide and euthanasia.[162] In doing so, the majority emphasized the importance of looking to history, tradition, and practice to identify substantive rights, at least partially disavowing the inquiry into "'abstract' notions of personal autonomy" implied in *Cruzan* and utilized in *Casey*.[163] Additionally, the Court explains that the state "has an 'unqualified interest in the preservation of human life.' The State's prohibition on assisted

[160] Ibid, 37-8.
[161] Vacco v. Quill, 521 U.S. 793, 798 (June 26, 1997).
[162] Washington v. Glucksberg, 521 U.S. 702, 728 (June 26, 1997).
[163] Gorsuch, "The Right," 47.

suicide, like all homicide laws, both reflects and advances its commitment to this interest."[164] Here the Court openly sanctions a natural law view conducive to the basic human good of life and the state's legitimate interest in pursuing that end. So taken in context, the decisions in *Quill* and *Glucksberg* are difficult to reconcile with *Cruzan* and *Casey* in their dissimilar approaches to questions of substantive rights and natural law. *Casey*, and to a lesser extent *Cruzan*, stand for the proposition that the Constitution protects fundamental exercises of personal autonomy, utilizing a more reflective and philosophical approach to the legal question to reveal the classical liberal notions of natural law to arrive at the correct answer. But when juxtaposed with the *Quill* and *Glucksberg* cases, which emphasize American history and tradition in evaluating substantive rights, *Casey*'s entire holding and rationale are thrown into doubt because of the inconsistency of the Court's methodology. To an outside observer, these contrasting approaches do not harmonize easily.

More recent years have brought more cases of federal courts injecting themselves into cultural debates about morals and social values. LGBTQ+ rights as of late have engulfed American society and divisions have only been inflamed by judicial intervention. The Court began in 1986 by narrowly upholding the constitutionality of laws criminalizing sodomy in *Bowers v. Hardwick.*[165] An analysis of that case is not even needed because the Court quickly reversed course in 2003 in *Lawrence v. Texas*. Here, the Court rejected its earlier holding by adopting a conception of liberty much like that in *Casey*, which it directly invoked in various parts,[166] affirming that "[t]he State cannot demean [petitioners'] existence or control their destiny

[164] Washington v. Glucksberg, 521 U.S. 702, 728 (June 26, 1997) (quoting *Cruzan* 497 U.S. at 282).
[165] *See* Bowers v. Hardwick, 478 U.S. 186 (June 30, 1986).
[166] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573-4 (June 26, 2003), "In *Planned Parenthood of Southeastern Pa. v. Casey*, the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The Casey decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to

by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[167] Palpable undertones of classical liberalism permeate through these lines and others. Here, the Court recognizes another substantive right to private sexual relations free from government interference, similar to the sentiment in *Casey* but admittedly delivered with less rhetorical flair and no blatant metaphysical contemplations. While *Lawrence* is in keeping with *Casey*, and implicitly rejects the methodology of *Glucksberg*, it is important to impress upon the reader that the reasoning in *Casey*, *Lawrence*, and others in this line of cases, express *protections* from government action in the form of fundamental, substantive rights under the Due Process Clause. This fact becomes a pertinent element of litigation that follows on the heels of *Lawrence* and embraces its logic in relation to LGBTQ+ rights.

In *United States v. Windsor*, the Supreme Court grappled with the question of if the Defense of Marriage Act's (DOMA) section defining marriage as a union between one man and one woman for purposes of federal law deprives same-sex couples married under state law of equal protection.[168] The majority struck down the relevant portion of DOMA, finding it contrary to the Fifth Amendment and to principles of federalism, saying "[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens."[169] For this reason, the Court pronounces that the federal government cannot define marriage for purposes of federal law as the Constitution implicitly leaves such definitions to the states.

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marriage, procreation, contraception, family relationships, child rearing, and education." (internal citation omitted); The Court also invokes *Romer v. Evans*, 517 U.S. 620 (May 20, 1996), to arrive at its decision. That case, while pertinent to LGBTQ+ jurisprudence, is not given treatment here as its holding on equal protection grounds is not pertinent to the Court's development of substantive rights under the Due Process Clause.

[167] Lawrence v. Texas, 539 U.S. 558, 578 (June 26, 2003).

[168] United States v. Windsor, 570 U.S. 744, 749-52 (June 26, 2013).

[169] Ibid, 766.

Regardless of the questionable validity of that decision, this case is of immediate importance not for the majority opinion, but for Justice Alito's dissent. In prophetic fashion, Alito undertakes an analysis, similar to the majorities in *Quill* and *Glucksberg*, of the history of marriage and finds that the Constitution does not guarantee a right to marriage.[170] Because of this, it is left to legislative bodies to define marriage as they see best.[171] Moreover, Justice Alito voices certain basic good natural law tendencies. Though his opinion is undoubtably fair-minded and considerate of both positions, he includes parts such as "[t]he family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects."[172] This in itself does not overtly apply a basic human good framework of natural law, but his position clearly rejects the classical liberal natural law that the majority utilizes. Moreover, Alito's dissent tracks with philosophical arguments some scholars have made about the value of what they call "conjugal" marriage and the state's interest in regulating relationships in certain ways.[173] In this way, Alito anticipates future litigation at the Supreme Court by laying out his position early and articulately. *Obergefell v. Hodges* in 2015 gave him the opportunity to write again—once more in dissent.

In the *Obergefell* case, the Court squarely addressed whether same-sex couples have a constitutional right to marry—or more accurately, does the Constitution require states to recognize same-sex marriages regardless of their own definitions of marriage? The Court answered in the affirmative, writing "[t]he four principles and traditions to be discussed

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[170] Ibid, 808-10.
[171] Ibid, 815-6.
[172] Ibid, 809.
[173] *See* Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (New York: Encounter Books, 2012), 15-21.

demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[174] To its credit, the majority does analyze the history and tradition of marriage at some length, though it reengages in more philosophical considerations of classical liberal autonomy, refusing to conform to a single methodological approach to social jurisprudential questions.[175] While the majority again divined a new substantive "right," the dissents more aptly, I submit, illuminated the legal principles involved. In perhaps one of the most persuasive and intellectually unassailable dissents in the Supreme Court's history, Chief Justice John Roberts dismantles the majority's clandestine shift in jurisprudence that conflates protection and entitlement. Plainly put, Roberts writes "[t]he fundamental right to marry does not include a right to make a State change its definition of marriage."[176] What Roberts keenly observes is the majority's willingness to invert the constitutional *protections* under the Due Process Clause recognized in cases like *Lawrence* and *Casey*, and turn them into positive entitlements that force states to recognize a same-sex union as a marriage. Because states grant certain privileges to individuals in various relationships, the states can define those relationships as they please, the argument goes. But the majority's logic "convert[s] the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."[177] Moreover, countering the Court's contention that laws prohibiting interracial marriage, which are facially unconstitutional, do not differ from laws prohibiting same-sex marriage, Roberts writes "[r]emoving racial barriers to marriage… did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of 'marriage' discussed in every one of these cases 'presumed a relationship involving opposite-sex

[174] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (June 26, 2015).
[175] Ibid, 2606-7.
[176] Ibid, 2611.
[177] Ibid, 2620.

partners.'"[178] The Court's assertion of a constitutional right to same-sex marriage, then, is not only contrary to the basic human goods conception of natural law discussed above in Justice Alito's dissent, but conflicts with its own jurisprudential roots by pivoting from protection to entitlement, from shield to sword.

The *Obergefell* case seems an appropriate place to conclude this survey of recent social jurisprudence. In so many ways, *Obergefell* embodies the constant and evolving contradictions of federal courts' social jurisprudence guided by two divergent conceptions of natural law. The outcome of these competing theories in practice is an expansive body of constitutionally suspect jurisprudence that does not even follow any internally consistent methodology or logic. The criticisms of social jurisprudence rival the number of cases the Court has decided on the topic. With abortion, the Court pronounces doctrine that its judgements do not live up to; in terms of euthanasia and assisted suicide, the justices cannot decide on a common methodological approach, much less give lower courts any guidance; and with LGBTQ+ rights and gay marriage, the Court slyly parlayed its classical liberal jurisprudence championing freedom from government interference during intimate acts into an order affirmatively commanding states to recognize a union that they do not necessarily want to. The aggregate of this jurisprudential gobbledygook, unsurprisingly, dissolves judicial legitimacy.

The process by which judicial legitimation fails follows rather intuitively from the preceding analysis. It has been previously established that federal courts function largely to coordinate and legitimate the various elements of the social system, as well as resolve disputes arising in the American constitutional system. Arguably, federal courts should not decide many

[178] Ibid, 2619.

of these questions at all, much less in the way they have.[179] Because federal courts, and especially the Supreme Court, have so eagerly taken up the opportunity to opine on issues of fundamental social values, morality, and ethics, they have deviated from their proper position in the social system and have produced results that appear foreign to observers. Indeed, in the wake of *Obergefell*, some officials refused to adhere to the decision.[180] One can only imagine that many more rejected the Court's decision to involve itself in such a hotly debated issue of public policy. Such reactions—puzzlement over or repudiation of the Court's involvement—constitute a rationality crisis. The Supreme Court has issued a judgment that does not conform to prevailing conceptions of federal courts' proper role in the social system. When the courts do not produce their intended effect, individuals begin to withdraw loyalty from the institution. I submit the social system is experiencing such a crisis now: a largescale withdrawal of legitimacy precipitated by a rationality deviation tied to the incessant entanglement in and production of social jurisprudence.

Such an emergency for the judiciary inevitably entangles the entire social system. As discussed at length above, the judicial apparatus, despite the counter-majoritarian difficulty, occupies a vital position in legitimating, resolving disputes and conflicts, and coordinating the efficient operation of the social system. With a judicial apparatus unable to legitimate itself, it cannot conceivably legitimate and coordinate the social system as intended. While courts inevitably continue to operate and resolve what disputes and conflicts they can, the power to legitimate is increasingly reduced from the withdrawal of loyalty and legitimacy. Therefore, the

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[179] *See, e.g.,* Lawrence v. Texas, 539 U.S. 558, 586 (June 26, 2003) (opinion of Scalia, J., dissenting); Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (June 26, 2015) (opinion of Scalia, J., dissenting).

[180] *See, e.g.,* Jonathan Stempel, "Kentucky clerk who refused same-sex marriage licenses can be sued," *Reuters*, August 23, 2019, accessed April 25, 2020, https://www.reuters.com/article/us-usa-kentucky-weddings/kentucky-clerk-who-refused-same-sex-marriage-licenses-can-be-sued-idUSKCN1VD284.

social system must seek to compensate for the lack of legitimation in order to protect the material relations of production and the reproduction process. This compensation can come from any number of places depending on the specific social system, though all solutions reside within the administrative bureaucracy. Nonetheless, while the social system scrambles to legitimate and preserve itself, it cannot help but produce undesirable side effects. The administrative re-legitimation efforts necessitate "[r]e-coupling the economic system to the political—which in a way repoliticizes the relations of production."[181] In order to effectively compensate for the loss of the judicial apparatus and avert imminent collapse, the social system must mobilize massive amounts of political capital to reinforce the steering mechanism and bourgeois ideology.[182] But by repoliticizing the relations of production and transferring political capital, gaps unavoidably appear, and soon basic premises of the bourgeois social system can be credibly challenged. Socialization becomes less effective, destabilizing the identity of the social system and highlighting its contradictions. Indeed, I submit that the social system is seeing such challenges now in the form of populist political movements in the United States. To put it plainly, in the wake of systematic compensation efforts, everything is up for grabs.

In such a state, the social system becomes increasingly unstable and uncoordinated. Without an effective conflict resolution system, the social system must maneuver around contradictions and inconsistencies that normally would be left to judicial resolution. An incapacitated judicial apparatus strikes at the very foundation of the bourgeois social system—no longer can constituent elements operate inside a cohesive organism without the fear of encountering unreconciled conflicts. Judicial legitimation crises, if left unresolved, will

[181] Habermas, *Legitimation Crisis*, 36.
[182] Ibid.

eventually lead to the structural collapse of the entire social system. The foregoing analysis shows that courts operating outside their designed capacity instigate rationality deviations that can lead to systematic delegitimization. In the current case, social jurisprudence has proved a particularly potent toxin for the judicial apparatus. By its own failure to provide a coherent and rational logic for its actions and judgments, the judicial apparatus has thrown its own system and that of the social organism into mortal danger. Such an exigency requires immediate recourse. The final section briefly addresses what I see as the most promising way to reestablish legitimation, and moreover, why legitimation and the health of the social system should be reestablished at all.

V. Legitimation Restoration, Structural Change, and the Function of Courts

Reestablishing rationality and legitimation to a social system in crisis requires extraordinary action. Because the current crisis has arisen out of judicial action, the judicial apparatus must respond and correct its behavior in order to salvage the social system. This is primarily achieved by removing federal courts from adjudicating social issues. But why should residents of a social system that perpetuates the unequal and exploitative capitalist relations of production want to save the system at all? I submit that the answer lies in the unique experience of American constitutionalism. The United States possesses such a strong political tradition that unites its citizens through fidelity to the Constitution. Perhaps a reason why Americans idolize the framers, to the extent that some willfully base entire jurisprudential methodologies off of their thought, is because they so revere their creation. Although the Constitution inherently embraces and protects the conditions for capitalism, in the end, one cannot reduce American constitutionalism to the sheer product of the ongoing march of the bourgeois social system. The Constitution itself lays out fundamental rights and liberties of persons, even while it insulates the capitalist relations of production. Contrary to some radical assertions, disposing with the Constitution on account of these flaws is ultimately not a feasible response, neither practically nor idealistically.

Social jurisprudence, as shown above, lies at the heart of judicial delegitimation and the consequent social system instability. To remedy the ensuing peril, federal courts must begin the process of extricating themselves from issues of social and moral salience. They must return to their legitimation function of coordinating the elements of the social system, resolving disputes arising in the reproduction process, and policing the frontiers of government power. This is the proper province of the federal courts, and such a social détente will produce the systematic

outputs (legal judgements) that accord more closely with societal expectations. This recalibration of judicial activity abates further deterioration caused by a rationality crisis. Once the federal courts return to a less exuberant comportment, legitimation can recommence for both the judicial apparatus and the social system.

Unfortunately, while the remedy to the legitimation crisis is clear, effectuating such comprehensive change may itself impose its own problems. Some elements of federal social jurisprudence originated decades ago and have become deeply ingrained in the constitutional fabric of the Unites States. These precedents will prove particularly difficult to mitigate. Abortion presents just such a demanding challenge. The Supreme Court decided *Roe v. Wade* in 1973, altered but reaffirmed its central holding in *Planned Parenthood v. Casey* in 1992, and has continually addressed questions about abortion access, both directly and indirectly, since.[183] While federal courts should not continue divining new substantive rights, they cannot simply overturn or refuse to apply those rights already pronounced. Cases like *Roe*, *Casey*, and *Obergefell* present such fundamental alterations to the constitutional tradition—notwithstanding the rights they recognized were accomplished through judicial fiat—that they cannot credibly be discarded. Not only do reliance interest counsel against undoing these watershed decisions, but the interests of stability and of a rationally operating judicial apparatus advise against further extraordinary decisions. So, while federal courts must remove themselves from social jurisprudence to the greatest extent possible, they cannot abdicate their adjudicatory role of recognizing already-existing rights.

[183] *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914 (June 29, 2001); Gonzales v. Carhart, 550 U.S. 124 (Apr. 18, 2007); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (June 27, 2016).

Moreover, federal courts not only must refrain from undoing prior decisions and respect precedents recognizing substantive rights, but they will need to continue to grapple with those decisions going forward. While one should always hesitate before attempting to describe a world that does not yet exist, certain characteristics of judicial adjudication with respect to precedent are inevitable. In future decisions, courts must develop a uniform jurisprudential methodology when approaching social issues and other tangential questions. The confusion between the contrasting methodologies of cases like *Casey* and *Glucksberg* necessitates a development of consistent steps to take when analyzing the circumscribed set of cases where social issues arise. Lower courts will receive better guidance and be more able to address cases that will inevitably appear on their dockets. This will allow them to avoid unnecessary rationality deviations because they will follow the preordained methods which, ideally, will inhibit incursions into additional social spheres. Likewise, federal courts, including the Supreme Court, should refrain from narrowing precedent in a way that encroaches on previously recognized rights. This is because judges who disagree with decisions can, over time, wear away at precedent with judgments that continuously narrow the reach of substantive rights. Such narrowing can effectively become nullification, a change in the constitutional fabric, which, for the same reasons as recognizing new substantive rights, can precipitate rationality and legitimation crises. Essentially, the federal courts must reverse course in engaging in *new* social jurisprudence, not revoke that which has already been pronounced and become part of the American constitutional system. Courts face an admittedly difficult task, demanding that they find a delicate jurisprudential equilibrium. Nonetheless, in the aftermath of such profound jurisprudential insurgency, the judicial apparatus must undertake substantial changes.

Adopting this judicial posture also properly conforms to the American constitutional system. Likewise, the systematic stability that judicial modesty advances is necessary for the constitutional system to function. The Constitution proscribes certain fundamental limits on federal courts which contemporaneous accounts from the framers confirm. Article III imposes an actual case or controversy requirement on litigation in order for federal courts to have jurisdiction.[184] Moreover, Congress determines federal courts' jurisdiction, including appellate jurisdiction for the Supreme Court which makes up the majority of its docket. These structural limitations indicate that the federal courts are designed to play a limited role in the constitutional system. The framers did not endow them with expansive powers to take on initiatives or cases *sua sponte* like the political branches, nor can they even determine what cases they can and cannot hear. These restrictions relegate the courts to a small, circumscribed role of adjudicating disputes—not making sweeping determinations of social policy that at best have only fleetingly tenuous connections to the Constitution. Judicial abstention from social jurisprudence promotes and respects these constitutional aims and allows the political branches to fill in the gaps that the People did not address in the Constitution.

This design also respects America's constitutional history. Like Bruce Ackerman elaborates at length, the truly revolutionary moments in constitutional history take place through popular participation and higher law making. The American People are perfectly capable of changing the Constitution—indeed, during the New Deal, they did not even need to formally amend the Constitution to drastically alter the constitutional fabric and change the trajectory of the Nation. Additionally, because the Constitution does not equip federal courts with legislative power, it can only accomplish so much during the adjudicative process. Interpretive

[184] U.S. Const. art. II § 2.

methodology, as discussed above, neutralizes legal arguments foreign to the established legal hegemony. So, while systematically revolutionary arguments that perhaps have the potential to alter the material relations of production do arise, they could never surface in a contemporary legal judgement. Furthermore, even if such arguments did have the legal might to break through the legal hegemony, the courts, even possessing judicial supremacy, could never implement such an extraordinary judgment because it lacks both the bureaucratic power to do so and because such a decision would immediately provoke a rationality crisis caused by judicial fiat. The legislature, with its full array of policy making power, can inevitably craft better, more comprehensive laws and policies that more accurately reflect the people's wishes. Courts are already counter-majoritarian; what can be left to the political branches ought to be left to the political branches. None of this democratic policymaking can happen without judicial abstention that stabilizes the social system and allows its constituents to make changes from within. The Constitution entrusts and empowers the People to undertake those changes and amendments. For this reason, the social system must be preserved to continue the democratic legacy of the American constitutional system.

Conclusion

This thesis has at length analyzed the function of federal courts in relation to the capitalist social system. From this analysis, five primary conclusions have emerged: First, originalism and living constitutionalism functionally have very few differences, and what differences arise are largely superficial to the underlying relations of production. These interpretive methodologies act as an ideological hegemon that neutralizes insurgent legal ideology, protecting the social system. Second, because of the counter-majoritarian difficulty and despite democratic interpretations of American constitutional history, federal courts exercising judicial supremacy remain presumptively undemocratic because they restrain contemporary majorities by invoking judicial review. As a result, federal courts must continuously seek to legitimate themselves in the American constitutional system to fulfill their systematic legitimation role. Third, the judicial apparatus utilizes a variety of public and private procedures and practices to achieve legitimacy for itself. With this legitimacy, the judicial apparatus legitimates the social system by resolving disputes and helping to establish the conditions necessary for the capitalist relations of production. Fourth, because of decades of conflicting social jurisprudence, federal courts have alienated their social output, precipitating a rationality crisis that withdraws legitimacy from the judicial system and incapacitates it, leaving the social system without a formal mechanism to resolve disputes and contradictions. Consequently, the social system must mobilize other forces to attempt to legitimize itself which in turn cause systematic side effects that destabilize and imperil the entire social system. Finally, to resolve this legitimation crisis, federal courts must correct their behavior and withdrawn from new social jurisprudence. This way, the judicial apparatus can ameliorate its rationality deviation and restore legitimation to the judicial system and the social system as a whole. This is desirable because the social system provides stability

for the American People to act democratically to rectify the inequity and exploitation of capitalism more comprehensively than federal courts ever could.

These conclusions, I hope, illuminate the descriptive societal situation in which Americans find themselves today, and will provide at least one perspective on what steps must be taken next. The fragility of the social system in the United States cannot be underestimated. Nonetheless, that social system has grown around the American constitutional tradition just as much as it has around the capitalist relations of production. For this reason, the courts must act to preserve the social system and thereby preserve the constitutional system that unites people as Americans and empowers them to seek lasting change. Moreover, the People, enabled by the prophetic principles contained in the Constitution, must not fail to act to make America more democratic, strive for moments of popular political engagement and higher law making, and ultimately form for themselves a society that lives up to its principles.

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