JUDICIAL INSTITUTIONALISM

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The idea of institutionalism figures prominently in today's debates about the role of federal courts in American democracy. For example, Chief Justice Roberts is often described as an institutionalist who seeks to preserve the Supreme Court's power or reputation. But what exactly is institutionalism, and should judges be institutionalists? Although institutionalism is invoked in public disputes over the future of the federal judiciary, it is much less frequently theorized in depth.

This Article offers an extended analysis and defense of judicial institutionalism. It conceptualizes institutionalism as an approach to judging that meaningfully takes into account two interests of the judiciary: legitimacy—understood as public confidence in the courts—and the efficient administration of the court system. Institutionalism bolsters the enforceability of court decisions and helps to prevent a situation in which one side of salient cultural debates is a "permanent loser" in the judicial process. Institutionalist judges do not flout the law; instead, institutionalism properly shapes their view of what the law requires.

The Article offers several practical options for implementing institutionalism in the real world. These options cover such areas as the certiorari process, equitable remedies, unpublished opinions, justiciability, stare decisis, and the "merits" of a case. The Article also responds to several objections to institutionalism, such as the critique that the federal courts ought to be disempowered and that judges are not competent to assess effects on the institution. In particular, the Article addresses

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the concern that institutionalist judges improperly engage in deception about the basis for their decisions. In response, the Article argues that complete transparency in judging is not required and may not even be expected by the public.

In sum, the Article lays the conceptual groundwork for an institutionalist approach—at a time when the acceptance or rejection of institutionalism will have a major impact on many areas of law and the federal courts' trajectory.

INTRODUCTION

The idea of "institutionalism" features prominently in current debates about the role of the federal courts in American democracy. Perhaps most notably, Chief Justice John Roberts is frequently described as an "institutionalist" who seeks to be

a "custodian of the court's prestige and authority."[1] His vote to uphold the constitutionality of the Affordable Care Act in 2012,[2] and his effort to find a compromise in the *Dobbs* abortion decision,[3] are prime examples. The idea of institutionalism, however, extends beyond the judicial philosophy of Chief Justice Roberts. Many federal judges take actions in deciding cases that appear to stem from a concern for the court's institutional interests. These actions include adhering to precedent the judge believes is incorrect and writing a narrow opinion that is less likely to prompt public backlash.

Institutionalism is often connected to a judge's concern about public perceptions of a decision. In this form, institutionalism is controversial. It is criticized as unprincipled,[4] self-aggrandizing,[5] self-defeating,[6] and contrary to the legitimate role of federal judges in a constitutional democracy.[7] Some

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1 Adam Liptak, *June 24, 2022: The Day Chief Justice Roberts Lost His Court*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/abortion-supreme-court-roberts.html [https://perma.cc/LY7V-AJMJ] (arguing that post-*Dobbs*, the Chief Justice "may have a hard time protecting the institutional values he prizes"); Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, THE ATLANTIC (July 13, 2020), https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053 [https://perma.cc/F2WM-2MWR] (Chief Justice Roberts "said he would try to persuade his colleagues to put institutional legitimacy first by encouraging them to converge around narrow, bipartisan decisions to avoid 5-4 partisan splits.").

2 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). For references to Chief Justice Roberts's institutionalism in *Sebelius*, see Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 84–85 (2012); David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 765 (2021).

3 *See* Liptak, *supra* note 1 (claiming that Roberts "tried for seven months to persuade a single colleague to join his incremental approach" in *Dobbs*, but "failed utterly").

4 Ilya Shapiro, *John Roberts Outsmarts Himself Yet Again*, CATO INST. (June 29, 2020), https://www.cato.org/blog/john-roberts-outsmarts-himself-yet-again [https://perma.cc/VM5W-W6PW].

5 *See* Eric J. Segall, *Chief Justice John Roberts: Institutionalist or Hubris-in-Chief?*, 78 WASH. & LEE L. REV. ONLINE 107, 126 (2021); *see also* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 636 (2023) (critiquing the federal judiciary for "systematically empowering its own institution at the expense of others").

6 Varad Mehta & Adrian Vermeule, *John Roberts's Self-Defeating Attempt to Make the Court Appear Nonpolitical*, WASH. POST (Dec. 17, 2020), https://www.washingtonpost.com/outlook/john-roberts-self-defeating-attempt-to-make-the-court-appear-nonpolitical/2020/12/17/d3d1df5a-3fd5-11eb-9453-fc36ba051781_story.html [https://perma.cc/6TR8-N89Q].

7 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("But whether it would 'subvert the Court's legitimacy' or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening.").

critics may view institutionalism as an approach holding back the proper application of neutral legal principles.[8] Other critics may see institutionalism as an effort to legitimize courts that no longer deserve respect.[9] Yet the idea that judges should be concerned with the future of judicial institutions when making decisions seems to hold some sway, at least over the judicial imagination.[10]

The theory and practice of judicial institutionalism are especially important issues in today's legal and political climate. The Supreme Court has recently undergone changes in its makeup, and controversy has swirled around proposals to alter the Court's structure and jurisdiction.[11] Presidents Trump and Biden have each added numerous judges to the federal Courts of Appeals. All these judges face the question of how much they will seek to move the law in the direction of their preferred philosophy. They also confront the issue of whether and how to consider possible damage to the federal judiciary stemming from their decisions. Judicial acceptance or rejection of institutionalist approaches will thus affect highly salient areas of doctrine, from equal protection law to the Second Amendment to the power of administrative agencies.

This Article analyzes and defends the idea of judicial institutionalism. Although institutionalism is invoked in the media to explain court rulings,[12] it is much less frequently theorized in depth.[13] The Article provides a comprehensive examination

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8 *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1919 (2020) (Thomas, J., concurring in the judgment in part and dissenting in part) ("Today's decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision.").

9 *See, e.g.*, Samuel Moyn, *The Court Is Not Your Friend*, DISSENT (Winter 2020), https://www.dissentmagazine.org/article/the-court-is-not-your-friend [https://perma.cc/GZG3-LKYY] ("Progressives have little to lose and much to gain by leaving juristocracy to the enemies of democracy.").

10 *See* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1115–20 (1995) (identifying Supreme Court opinions expressing a concern with public perception of a decision); Dion Farganis, *Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy*, 65 POL. RSCH. Q. 206, 213 (2012) ("[S]ince the Court's 1954 decision in *Brown*, in fact, the justices have made seventy-one such references to the Court's institutional legitimacy . . . .").

11 *See* Ellena Erskine, *Presidential Court Commission Approves Final Report, Identifying Disagreement on Expansion*, SCOTUSBLOG (Dec. 8, 2021), https://www.scotusblog.com/2021/12/presidential-court-commission-approves-final-report-identifying-disagreement-on-expansion [https://perma.cc/G7U2-JRYR].

12 *See, e.g.*, sources cited *supra* note 1.

13 There are a few recent treatments of institutionalism. *See* Noah C. Chauvin, *Justice Kavanaugh's Institutionalism*, U. ST. THOMAS J.L. & PUB. POL'Y (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4354600 [https://

of the concept of institutionalism and a sustained justification for this approach. The Article engages with work on legitimacy[14] and public perceptions of court rulings,[15] but it adds to that literature in several ways. First, the Article brings together theoretical reflection on the legal validity of institutionalism and practically oriented analysis of doctrinal settings in which institutionalism has a role to play.[16] Second, the Article highlights the federal courts' interest in efficient administration as an institutional value—unlike prevailing analyses of judicial legitimacy, which do not focus on resource constraints and managerial imperatives.[17] Third, the Article makes a provocative argument about judicial transparency: that transparency about promoting institutional interests is not required and may not even be expected by the public.[18] Fourth, the Article

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perma.cc/PJN9-YE6T]; Rick Joslyn, Note, *For the Right Reasons: The Rules of the Game for Institutionalists*, 54 CONN. L. REV. 1027 (2022). Unlike Chauvin, I do not focus on Justice Kavanaugh's jurisprudence, and unlike Joslyn, I do not treat institutionalism as an "extralegal consideration[]." *Id.* at 1057. Another piece examines the "institutionalist turn" in copyright law, which is not the focus of this Article. *See* Shyamkrishna Balganesh, *The Institutionalist Turn in Copyright*, 2021 SUP. CT. REV. 417, 419 (2022).

14 *See, e.g.*, RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018); Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (reviewing *id.*); Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353 (2020); Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL'Y 287, 329–42 (2020); Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011 (2007). There is a political science literature on legitimacy as well. *See, e.g.*, Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184 (2013); James L. Gibson, *Losing Legitimacy: The Challenges of the* Dobbs *Ruling to Conventional Legitimacy Theory*, 68 AM. J. POL. SCI. 1041 (2024). Neil S. Siegel's work on judicial statesmanship thoughtfully addresses the relationship among legitimacy, social solidarity, and judicial virtue. Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

15 *See, e.g.*, Hellman, *supra* note 10; Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007); Andrew B. Coan, *Well, Should They? A Response to* If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 213 (2007).

16 The Article thus responds to Gillian Metzger's recent call for analysis of "when public confidence is a legitimate consideration in judicial decision making," though she directs this call at Supreme Court Justices. Metzger, *supra* note 14, at 381.

17 For analyses of judicial resource constraints, see, for example, Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1 (2015); Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013). This Article brings together discussion of resource constraints and considerations of legitimacy.

18 *Cf., e.g.*, Hellman, *supra* note 10, at 1142–45 (advocating judicial candor). In addition, the Article puts considerably more emphasis on positive public

addresses institutionalism in light of very recent events, such as changes in the Supreme Court's makeup, a push for Supreme Court reform, and the *Dobbs* decision.

It is worth delineating the scope of the current analysis of institutionalism. This Article is concerned with institutionalism as practiced by judges, rather than by other legal actors or outside observers.[19] Further, "judicial institutionalism" will refer to an approach taken by judges in *ruling on cases*. Judges might also display institutionalism through, for instance, building collegiality in the court by holding social gatherings or enhancing the court's image by organizing "open days" for the public to learn about the judicial process. Those forms of judicial institutionalism are not the subjects of the current analysis. However, institutionalism as discussed here includes decisions about whether to review cases on the merits—such as the Supreme Court's certiorari determinations or courts' justiciability rulings—in addition to merits decisions themselves.

Additionally, the Article focuses on judicial institutionalism in American *federal* courts. Several of the considerations discussed here could apply to state or foreign judiciaries as well,[20] but other factors could apply to different degrees. For example, state common-law courts might have greater leeway to "make law" in an institutionalist direction than federal courts. The concentration on federal judges is meant to cabin the scope of the Article, as well as to respond to recent developments in the federal courts and debates about federal judicial authority.

The Article points to examples of institutionalism on the part of both Supreme Court Justices and lower federal court judges, though it concentrates to a greater extent on the Supreme Court. Much of the literature on institutional legitimacy focuses on the Supreme Court,[21] and Supreme Court Justices

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perceptions of the courts independent of the moral status of courts' decisions. *Cf.* FALLON, *supra* note 14, at 167–74 (emphasizing moral legitimacy as a critical feature of appropriate Supreme Court decision making); Grove, *supra* note 14, at 2259–63 (noting tension between judicial actions taken out of concern for public reputation, on the one hand, and legal or moral legitimacy, on the other).

19 For instance, the President might nominate judges with an eye toward institutional factors. Scholars might advance or critique proposals to alter the structure of the federal courts with institutional concerns in mind.

20 *See, e.g.*, Gabrielle Appleby & Erin F. Delaney, *Judicial Legitimacy and Federal Judicial Design: Managing Integrity and Autochthony*, 132 YALE L.J. 2419 (2023); G. Alexander Nunn, *Introduction: Perceived Legitimacy and the State Judiciary*, 70 VAND. L. REV. 1813 (2017); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

21 For treatments of institutional legitimacy and related concerns in the lower federal courts, see, for example, Tara Leigh Grove, Essay, *Sacrificing Legitimacy*

face distinctive institutionalist imperatives. Notably, their rulings are much more likely to attract public attention than those of federal appellate or district judges. Nonetheless, federal appellate and district judges also confront the question of whether they will promote the federal judiciary's institutional interests in their rulings. Institutional interests may vary based on the court at issue, and the analysis of institutionalism in this Article can help inform future in-depth discussions of institutionalism for a range of judges.[22]

The discussion of institutionalism here takes place against the background of the current historical moment, with its set of social and political conflicts and its controversies about the role of federal courts in American democracy. Although many features of institutionalism extend across time, the current moment may call for institutionalist strategies that would be out of place at a different juncture. The defense of institutionalism in this Article, however, is not tied to a specific set of political outcomes. Institutionalism can support both "conservative" and "liberal" results,[23] and many institutionalist tools—such as unpublished orders[24] and narrow holdings[25]—do not have a consistent political valence.

Part I of this Article analyzes institutionalism from a conceptual perspective. Institutionalism, on the account presented here, is centrally concerned with preserving the federal courts' *effective authority*. Effective authority encompasses two sets of interests: *legitimacy*, understood as public confidence in the courts; and *efficient administration*, understood as the smooth working of the court system given resource constraints. Most current discussions of institutional factors in judging focus solely on the former type of interest. This Article brings federal courts' interest in effective management into the conversation and highlights its normative significance. Thus, judicial

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in a Hierarchical Judiciary, 121 COLUM. L. REV. 1555 (2021); Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 874–79 (2022).

22 Although there has lately been much focus on Supreme Court ethics issues, this Article does not directly address them. The Article concentrates on factors entering into the adjudication of cases rather than on judicial governance (although there is overlap). Ethical requirements for Justices warrant a paper of their own; the framework laid out in this Article could inform such an exploration, but the Article does not tackle these issues itself.

23 For example, dismissing a challenge to a government program for lack of standing could benefit varying political interests depending on the party in power. *See infra* Part IV.B.1.

24 *See infra* Part IV.B.2.

25 *See infra* Part IV.C.

institutionalism is *an approach to deciding cases that meaningfully takes into account the aim of maintaining the courts' effective authority*.

Part II turns from conceptual analysis to a normative appraisal: should federal judges be institutionalists? My basic answer is "yes": institutionalism supports a well-functioning federal judicial system. Legitimacy bolsters the enforceability of judicial rulings and helps to ward off a perception that one side of salient cultural debates is a "permanent loser" in the courts. Efficient administration permits judges to resolve cases in a reasonably expeditious and well-considered manner. Thus, institutionalism is an important source of support for the federal courts' ability to deliver justice to the population at large. I address the objections that (1) institutionalism is unwarranted because the federal judiciary should have less power; and (2) even if it is worthwhile to shore up federal courts' effective authority, the federal courts themselves are not the proper body to undertake this task. These critiques do not provide sufficient reason to abandon institutionalism. The power of judicial review in the United States has become intertwined with the rule of law, and judges are often best placed to promote the public's trust in their own institution.

Part III examines the relationship between institutionalism and legal theory. Must institutionalists adopt a certain theory of constitutional or statutory interpretation? Institutionalism, I argue, supports the adoption of certain jurisprudential theories—notably, prudential ones that permit judges to consider the practical consequences of their rulings across a range of cases. But institutionalism is not necessarily at odds with more formalist theories such as originalism and textualism. There is a historical basis for promoting legitimacy and administrative efficiency in judicial rulings, and some versions of formalist theories endorse a zone of discretion within which judges can properly pursue institutionalist goals. More generally, Part III tackles the question of whether institutionalist interests are proper *legal* factors, as distinct from political imperatives that judges could justifiably pursue in extreme circumstances. I argue in favor of the former view; in other words, institutionalism appropriately shapes judges' understandings of what the law requires.

Part IV tackles the nuts-and-bolts issue of how, concretely, federal judges should take institutional interests into account. Questions of implementation are not treated as afterthoughts, but rather as central to the task of explicating and defending

the institutionalist project. Part IV therefore presents a menu of options, some of which will be more persuasive to various readers than others. The Part begins with relatively uncontroversial applications of institutionalism and proceeds to more contentious uses. First, I examine the idea that judges should act based on institutional considerations when, and only when, they are granted discretion by some other source of law. For example, perhaps Supreme Court Justices may be institutionalists when deciding whether to grant certiorari. This approach plausibly justifies institutionalism in several contexts, including not only the certiorari process but also decisions about the scope of a holding and the balance of factors for equitable remedies. Nonetheless, the question of when judges possess discretion is itself a subject of dispute. I argue that institutionalism should inform the resolution of this question. In so doing, I draw on examples from justiciability determinations and nonprecedential opinions.

Continuing with "takeaways" from an institutionalist approach, the Article turns to stare decisis. In addition to identifying institutionalist reasons for a robust doctrine of stare decisis, I argue that it can be institutionally beneficial for judges to greatly narrow a precedent rather than overruling it (so-called "stealth overruling"). I then consider the impact of institutionalism on the "merits" of legal issues.

Perhaps most controversially, I argue that judges can be justified in ruling one way on the merits for institutional reasons even when the balance of factors would otherwise point the other way. Part IV closes by addressing the question of institutionalism and transparency. Must judges admit to ruling based on institutional considerations? And would such an admission render institutionalism self-defeating because the public would lose respect for the courts? Transparency is a relevant interest, I contend, but not an overriding one. The public may not expect complete transparency, and transparency about judicial motivations is often elusive.

This Article's defense of institutionalism may strike some as cynical. In my view, institutionalism is a pervasive practice in the federal courts and in many other areas of life, from the corporate boardroom to university administration. Instead of demanding an untenable form of purity in decision making, we should turn our attention to the difficult task of informing decisionmakers' exercise of judgment about when to advance institutional interests—and, more broadly, how to contribute to a society that better instantiates justice and the rule of law.

I
JUDICIAL INSTITUTIONALISM: A CONCEPTUAL ANALYSIS

What is judicial institutionalism? There is no "correct" definition,[26] but here are some considerations that point the way toward a useful working understanding. At the outset, an institutionalist is committed to promoting the interests of the institution over and above the interests of its individual members. If Judge X said that she was deciding a case in a certain way to improve her own personal reputation, Judge X would not be acting institutionally. The leader of an organization (say, the Chief Justice) might have more incentive to be an institutionalist because he is more closely identified with the institution in the public mind than any other member. But a true institutionalist acts based on the interests of the institution as a whole.

Further, an institutionalist is committed to promoting the *long-term* interests of the institution.[27] If the dean of a law school announced that he was spending money to improve the school specifically for the period of his deanship—even though the school would be in worse financial shape afterward—the dean would not be acting institutionally. The institutionalist must see the institution as an entity that extends across time and that has some kind of stability independent of shifts in membership.

Individuals can belong to multiple institutions with overlapping interests. Federal judges are members of particular courts, of the federal judiciary, and of the American government. This Article treats the relevant institutional interests as those of the federal judiciary. Article III of the Constitution is a discrete part of the American constitutional structure, and the courts created or authorized by Article III constitute a normatively and legally salient unit that is capable of possessing its own long-term interests. There may be divergences among the interests of the Supreme Court and those of the lower federal courts. However, judges on all of these courts are part of the broader institution of the federal judiciary and, to the extent

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26 For example, institutionalism could be understood as a school of thought that focuses on how legal institutions shape legal practices and outcomes. *See, e.g.*, Mark A. Graber, *Institutionalism as Conclusion and Approach*, *in* RESEARCH METHODS IN CONSTITUTIONAL LAW: A HANDBOOK (David Law & Malcolm Langford eds., 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3157358 [https://perma.cc/9GUY-A3Z9]. This understanding of "institutionalism" may be related to the view that judges should take institutional factors into consideration when deciding cases, but it has a broader and different focus.

27 *See* Siegel, *supra* note 14, at 979 n.108 ("Statesmanship is concerned primarily with the long view—that is, with succeeding over the long run rather than achieving a quick but pyrrhic victory . . . .").

they are institutionalists, are committed to furthering the federal judiciary's long-term interests.

The question then arises: what are the long-term interests of the federal courts? Here there is a risk that institutionalism will become an empty vessel. One might take the position that the courts' institutional interest is for judges to adhere to the correct judicial philosophy—say, originalism. When judges are originalists, that is, they necessarily do what is best for the judicial institution. Yet the aim here is to devise an understanding of institutionalism that carries independent normative weight. In other words, institutionalism should be (at least potentially) part of a claim about what the correct judicial philosophy *is*. To be sure, one could still reject institutionalism. And one could still be an originalist, a common-law constitutionalist, and so on, for institutionalist reasons. The point is that discussions of institutionalism presume that judges could act based on distinctively institutionalist reasons. The task is to specify the content of these reasons.

Below I propose two institutional interests of the federal judiciary: *legitimacy* and *efficient administration*. Together these interests point to an overarching goal of the institutionalist: to preserve the federal courts' *effective authority*. The bulk of the argument as to *why* federal courts should give weight to these interests is in Parts II, III, and IV. The goal here is to define the terms of the normative debate more clearly.

A. Legitimacy

Today's discussions of institutionalism in federal judicial practice frequently emphasize the concept of legitimacy.[28] The institutionalist is concerned with the legitimacy of the Supreme Court or the federal courts more broadly.[29] A fruitful account of institutionalism in the current day should keep faith with the connection to legitimacy.

What is legitimacy, then? Legitimacy could be understood—drawing on Lawrence Solum's terminology—in either "positive" or "normative" terms.[30] Positive legitimacy depends on whether the public views the courts as legitimate; normative legitimacy depends on whether the courts adhere to a criterion for proper decision making that is independent of the public's beliefs.

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28 *E.g.*, Balganesh, *supra* note 13, at 437; Metzger, *supra* note 14.

29 Chauvin, *supra* note 13, at 4–7.

30 Solum, *supra* note 14, at 339.

The concept of legitimacy can be broken down further, and Richard Fallon's typology has been especially influential. Fallon distinguishes among three types of legitimacy: sociological legitimacy, moral legitimacy, and legal legitimacy.[31] "[S]ociological legitimacy depends wholly on facts about what people think, not an independent moral appraisal of how people ought to think."[32] For sociological legitimacy, the issue is: do people actually believe "that the law and formal legal authorities within a particular regime deserve respect or obedience?"[33] "The question of moral legitimacy," by contrast, is "whether, morally speaking, people ought to" respect and obey the Constitution and laws of the United States, "or whether governmental officials are morally justified in coercing compliance."[34] "[L]egal legitimacy," for its part, refers to the legitimacy of a judicial decision (or other governmental act) within the "legal system's internally recognized norms."[35] Applied to Supreme Court decisions, for example, the issue is "whether the Justices' decisions accord with or are permissible under constitutional and legal norms."[36]

Fallon's sociological legitimacy appears to be a form of "positive" legitimacy, in the sense that it depends on people's actual views rather than the justification for these views. Moral and legal legitimacy seem to be forms of "normative" legitimacy. Normativity is defined with respect to existing legal practices for legal legitimacy and with respect to independent moral principles for moral legitimacy.

The varieties of legitimacy may be different, but they are, in Fallon's words, "complexly interrelated."[37] In particular, sociological legitimacy is not just about public acquiescence or obedience. The term "legitimacy" implies that the public has certain normative views about an institution's exercise of power. Fallon thus characterizes sociological legitimacy in terms of "whether people . . . believe that the law or the constitution deserves to be respected or obeyed for *reasons that go beyond fear of adverse consequences*."[38] Government institutions might

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31 FALLON, *supra* note 14, at 20–46; *see also* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1802 (2005).

32 FALLON, *supra* note 14, at 23.

33 *Id.* at 22–23.

34 *Id.* at 23.

35 *Id.* at 35–36.

36 *Id.* at 35.

37 Fallon, *supra* note 31, at 1791.

38 FALLON, *supra* note 14, at 22 (emphasis added).

compel acceptance by brute force, but they do not thereby become legitimate, sociologically or otherwise.

Therefore, even sociological legitimacy—and positive legitimacy more generally—requires the public to adopt certain normative views. In the context of federal-court legitimacy, the public must see the federal courts as worth supporting, either because the courts serve a morally beneficial role or because they properly adhere to legal norms. The public may hold these views because they approve of the institution of the federal judiciary as a whole or because they approve of particular decisions. To be sure, perceived normative legitimacy differs from actual normative legitimacy. That is, the public may be mistaken that the federal courts' decisions rest on a solid moral or legal basis.

Perhaps, however, positive legitimacy requires some degree of actual normative legitimacy. That is, courts cannot long continue to be perceived as normatively legitimate if they fall far short of adherence to normatively acceptable principles. If "lack of candor seldom goes undetected for long,"[39] then "a substantial degree of normative legitimacy is required for positive legitimacy to persist in the long run."[40] One might also contend that it is morally wrong for judges to pretend to act in normatively legitimate ways when they are not so acting. The value of judicial candor is considered below;[41] the point here is to highlight ways in which positive and normative legitimacy are related.

This analysis points the way to two difficulties that courts may face in promoting positive legitimacy. One difficulty is what Tara Grove has described as the "Supreme Court's legitimacy dilemma"[42]: a commitment to positive legitimacy may compromise normative legitimacy. If concern for public opinion is not a legally or morally proper criterion for judicial decision-making, then judges face an "unappealing" choice between positive and normative legitimacy.[43] A second difficulty is that judges' pursuit of positive legitimacy may be, in Deborah Hellman's words, "self-defeating": if judges pay attention to public confidence in issuing rulings, and people are aware that judges behave in this way, then public confidence might wane.[44]

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39 David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987); *see* Metzger, *supra* note 14, at 381.

40 Solum, *supra* note 14, at 339.

41 *See infra* Part IV.F.

42 *See* Grove, *supra* note 14.

43 *Id.* at 2269.

44 Hellman, *supra* note 10, at 1146–47. One might question the extent to which people's awareness of judges' interest in boosting public confidence would

A response to both difficulties is that judges can *appear* and also *be* normatively legitimate.[45] Just as appearing not to be corrupt is compatible with not being corrupt, a concern for public confidence in the judiciary is compatible with a commitment to moral and legal legitimacy. Yet positive and normative legitimacy should not be collapsed into each other. Judges can confront a genuine choice between promoting a certain public perception and adhering to other appropriate criteria for decision making.

Given the complexity of legitimacy, how should this interest fit into an account of judicial institutionalism? This Article's approach will be as follows. Legitimacy, as an institutional interest of the federal judiciary, will be understood in its positive sense, along the lines of Fallon's sociological legitimacy. Legitimacy refers to the public's view that the federal judiciary's rulings warrant respect and compliance. I understand legitimacy in its positive sense because this version of the concept is the focus of much current argument over institutionalism: should judges factor in public reaction when deciding cases?

At the same time, an institutional interest in positive legitimacy has normative ramifications. As noted, the basis for public respect and compliance with court orders under the positive model is not fear of coercion, but the view that respect and compliance are warranted. Moreover, federal courts may well have a hard time maintaining positive legitimacy without a moral or legal basis for their rulings. But positive and normative legitimacy are conceptually distinct, and it is at least possible for the pursuit of positive legitimacy to conflict with the pursuit of its normative counterpart.

The bulk of the argument about why federal courts should treat the maintenance of positive legitimacy as an institutional interest is in Parts II, III, and IV. The basic point here is that institutionalism will be taken to include concern for the positive legitimacy of the federal judiciary.

B. Efficient Administration

A second institutional interest featuring in the current account of institutionalism is efficient administration—roughly, a concern for management-related imperatives such as resource constraints and productivity. In today's discussions

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actually lead to a decline in positive legitimacy. *See id.* at 1147; Metzger, *supra* note 14, at 380–81; *see also infra* Part IV.F.

45 *See* Hellman, *supra* note 10, at 1147 ("*being principled*" does not "preclude[] consideration of appearance").

of institutionalism, efficient administration is less frequently mentioned than legitimacy. But efficient administration is another factor that institutionally minded judges consider, and analyzing this factor helps to illuminate issues about judicial institutionalism more broadly.

The core intuition here is that the federal judiciary does not exist in the ether; it is a complex organization that requires attention to managerial matters. Judges manage litigation in a manner that responds to administrative factors such as caseload pressures, as Judith Resnik's article *Managerial Judges* pointed out.[46] The institutional interest in efficient administration requires attention to resource constraints. The federal judiciary, like any organization, is limited in its capacity by finances, physical space, personnel, and so on.[47] Resources need not be taken as fixed; for example, federal judges lobby for budgetary increases.[48] But resource constraints should not be treated as "practical" afterthoughts; they inform the judiciary's capacity to perform its allotted functions.

The interest in efficient administration plays a role in shaping legal doctrine.[49] Federal courts have acknowledged that they are deciding cases with a view toward preserving "scarce resources" or avoiding the "floodgates of litigation."[50] To take a few examples: the Supreme Court recently overruled a habeas corpus doctrine that (in theory) allowed new procedural rules to be applied retroactively on federal collateral review; in so doing, the Court pointed to the interest in not "needlessly expend[ing] the scarce resources of defense counsel, prosecutors, and courts."[51] The Court has justified the

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46 Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 395–402 (1982).

47 *See* Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 402, 402 n.1 (2013) (numerous judges and scholars highlighting caseload pressures on the federal courts).

48 *See, e.g.*, Video: *Supreme Court Budget Hearing*: *Hearing Before the Subcomm. on Fin. Servs. and Gen. Gov't of the H. Appropriations Comm.*, 116th Congress (2020).

49 *See* ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 19–31, 71 (2019) (arguing, for example, that the Supreme Court is reluctant to limit Congress's commerce power vigorously because doing so could spur a large influx of federal litigation); Huq, *supra* note 17, at 63–69 (contending that the federal courts' institutional interests shape their decision to "ration" remedies for constitutional violations).

50 Levy, *supra* note 17, at 1015–56; *see also* Toby J. Stern, Comment, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 383–86 (2003) (detailing the history of "floodgates" arguments).

51 Edwards v. Vannoy, 141 S. Ct. 1547, 1561 (2021).

doctrine of stare decisis partly based on "the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case."[52] It has described Article III standing doctrine as "ensur[ing], among other things, that the resources of the federal courts are devoted to disputes in which the parties have a concrete stake."[53] The breadth of statutory federal-question jurisdiction under 28 U.S.C. § 1331 is interpreted in light of the "concern over the 'increased volume of federal litigation'" that would result if "garden variety" state-law claims entered federal court.[54] The Court justified its decision to tighten pleading standards in *Bell Atlantic Corp. v. Twombly* partially due to the cost of discovery and the "increasing caseload of the federal courts."[55] And it permitted federal courts to adjudicate cases involving "pendent jurisdiction" over state-law claims based in part on "judicial economy" and "convenience."[56]

There may, however, be multiple types of efficient administration concerns.[57] In analyzing judicial claims regarding the floodgates of litigation, Levy distinguishes between "other-regarding floodgates arguments," on the one hand, and "court-centered" or "self-regarding" concerns, on the other.[58] Courts make other-regarding arguments, for example, when they state that opening the floodgates would contravene congressional intent or usurp the role of the state courts.[59] In Levy's view, because other-regarding arguments seek to "protect another

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52 Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

53 Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 170 (2000); *see also* Massachusetts v. Mellon, 262 U.S. 447, 487 (1923) (rejecting what has come to be called "taxpayer standing" on the ground that "[i]f one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same," with "attendant inconveniences"); Michael T. Morley, Spokeo*: The Quasi-Hohfeldian Plaintiff and the Nonfederal Federal Question*, 25 GEO. MASON L. REV. 577, 597 (2018) (portraying a Supreme Court case tightening standing requirements as "an act of judicial self-defense" designed to ease the burden of "chronically overcrowded dockets and incessant delays").

54 Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 318–19 (2005) (quoting Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 811–12 (1986)).

55 550 U.S. 544, 558 (2007) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)).

56 United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

57 For discussion of various understandings of efficiency in litigation, and critique of cost-focused views, see Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1823–25 (2015).

58 Levy, *supra* note 17, at 1058, 1064.

59 *Id.* at 1058–64.

government institution or dynamic [between the judiciary and] . . . that institution," these arguments have "a relatively stable normative footing."[60] Court-centered or self-regarding concerns, by contrast, involve "how federal courts themselves will be impacted by an increase in litigation."[61] According to Levy, self-regarding arguments stand on a much more tenuous footing, as "no evident principle exists to support the Court taking workload concerns into account when engaging in '[i]nterpretation of the law.'"[62]

Indeed, courts frequently justify doctrines that constrain access to the federal judiciary with reference to "other-regarding" concerns such as federalism and the separation of powers. For example, in justifying a jurisdictional doctrine that prevents federal courts from being inundated with "garden variety state tort law" claims,[63] the Supreme Court has cited the interest in preserving "the appropriate 'balance of federal and state judicial responsibilities.'"[64] In the Article III standing context, the Court has restricted access to the federal judiciary in accordance with "a single basic idea—the idea of separation of powers."[65] In the habeas corpus setting, courts frequently cast the desire to conserve federal-court resources as fulfillment of a congressional goal rather than a judicial one.[66]

When this Article refers to the interest in efficient administration, it will refer to concerns that are "court-centered" in the first instance. This type of interest is likely to be the most controversial and the most revealing with respect to the proper judicial role. True, the line between "court-centered" and "other-regarding" concerns may not be clear-cut. Even when judges seek to protect their own resources, they may act in service of a broader goal, such as avoiding delay or hearing

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60 *Id.* at 1058.

61 *Id.* at 1064.

62 *Id.* at 1072 (alteration in original) (quoting Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001)).

63 Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 318 (2005)).

64 Gunn v. Minton, 568 U.S. 251, 264 (2013) (quoting *Grable & Sons Metal Prods.*, 545 U.S. at 314).

65 TransUnion v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997)).

66 *See, e.g.*, Panetti v. Quarterman, 551 U.S. 930, 931 (2007) (referring to the interest in "promot[ing] judicial efficiency and conservation of judicial resources" as a purpose of the Antiterrorism and Effective Death Penalty Act) (alteration in original) (quoting Day v. McDonough, 547 U.S. 198, 205–06 (2006)).

more cases by meritorious litigants.[67] Nonetheless, the focus here will remain on the federal judiciary's *own* institutional interest in a well-organized and productive judiciary.

C. Effective Authority

The issues of legitimacy and efficient administration can be brought together under the heading of *effective authority*. This concept refers to the federal judiciary's capacity to wield power in an effectual way. Legitimacy is related to effective authority because public confidence in the courts (I will argue)[68] contributes to the enforceability and acceptance of court judgments. Efficient administration is related to effective authority because an appropriately managed institution is better able to achieve its aims.

Legitimacy and efficient administration are different concepts, and they do not necessarily support the same results. But legitimacy and efficient administration have certain commonalities.[69] Both concepts raise the questions of whether and to what extent federal judges, in deciding cases, can advance the judiciary's own institutional interests. Is it legally proper, or normatively advisable, for federal judges to adjudicate disputes in a way that preserves the judiciary's own reputation and advances its own managerial imperatives? At the same time, both legitimacy and efficient administration straddle the boundary between judicial self-interest and socially beneficial goals. Greater public confidence in the courts, and timely or well-considered resolution of legal disputes, benefit society at large.

Institutionalism does not require judges to treat effective authority as the only factor motivating their decisions, or as a trump card across the board. Yet effective authority should play a genuine role and, in some cases, a determinative role. For that reason, I understand judicial institutionalism as an approach to deciding cases that *meaningfully* takes into account the aim of maintaining the court's effective authority. Further, the claim here is not that legitimacy and efficient administration are the only institutional interests of the federal

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67 Judges might also have purely self-regarding goals, such as increasing leisure. *See* RICHARD A. POSNER, HOW JUDGES THINK 36 (2008). A personal interest in leisure is not institutionalist.

68 *See infra* Part II.A.

69 *See* Levy, *supra* note 17, at 1068 (Both "prudential cases . . . based on concerns about the Court's legitimacy" and "court-centered floodgates arguments" "involve the Court reaching a particular decision out of what is arguably institutional self-interest.").

judiciary.[70] The considerations discussed in this Article might be applied to other institutional interests as well.

As I explain below, there is evidence that federal judges sometimes rule on the basis of institutional interests, but there are also questions about the moral or legal validity of this practice.[71] The Article therefore turns to a normative justification for judicial institutionalism in Parts II and III, as well as a practically oriented account of institutionalist judging in Part IV. In this way, the Article fleshes out the meaning of, and basis for, institutionalism in the federal courts.

II
SHOULD FEDERAL JUDGES BE INSTITUTIONALISTS?

This Part makes the case that judicial institutionalism is a salutary philosophy, and that federal judges ought to be institutionalists. I first argue that institutionalism provides important support for a well-functioning federal judicial system. Then I address a couple of critiques: that institutionalism is unwarranted because the federal judiciary should be less powerful, and that federal judges should not be the ones promoting their institution's interests in legitimacy and efficient administration. Many of these issues are the subject of a vast literature, and the aim here is not to provide a comprehensive theory of American constitutionalism. Instead, the goal is to explicate a set of normative commitments in light of which the interests in legitimacy and efficient administration are valuable for federal judges to pursue.

A. Justifications for Institutionalism

Judicial institutionalism—an approach to deciding cases that meaningfully takes into account the interest in effective authority—is a necessary condition for a productively functioning federal judiciary.

Why? We can begin with the legitimacy interest, for which there are at least two justifications: (1) enforceability; and

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70 One might argue, for instance, that the federal judiciary has an institutional interest in maintaining its prestige, in order to attract highly qualified individuals to positions that pay government salaries. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 380 (7th ed. 2015) [hereinafter HART & WECHSLER]. Prestige may be related to legitimacy, but insofar as these are distinct concepts, I do not focus on whether judges should promote the judiciary's prestige in ruling on cases.

71 *See infra* notes 145–72 and accompanying text.

(2) the need to maintain the rule of law in a divided society. Beginning with enforceability, Alexander Hamilton famously wrote in the Federalist Papers:

> [t]he judiciary . . . has no influence over either the sword or the purse . . . . It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[72]

As the Supreme Court put it in 2015, "[t]he judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions."[73] "Government officials and the general public are more likely to comply if they view the Court as 'legitimate,'" as Grove writes.[74] It matters, in turn, that the courts' judgments are obeyed. For without the ability to compel obedience, the courts cannot do justice.[75]

Regardless of one's theory about what it means for the courts to "do justice," the enforceability of rulings is essential to pursuing this goal. One might argue that the specter of non-enforceability is a bogeyman, an extreme and unlikely possibility that should not guide judicial conduct. First, however, the prospect that court rulings would be disobeyed has not always been remote—as suggested by "massive resistance" to *Brown v. Board*[76] and President Andrew Jackson's defiance of the Supreme Court on the treatment of Native Americans in the 1830s.[77] We should not assume that our times are radically and permanently different, especially given the high level of political polarization and the presence of extremist violence.[78]

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72 THE FEDERALIST NO. 78, at 433, 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

73 Williams-Yulee v. Fla. Bar, 575 U.S. 433, 445–46 (2015).

74 Grove, *supra* note 14, at 2250.

75 *See* Metzger, *supra* note 14, at 377 (discussing "the importance of public acceptance of the Court to its ability to function effectively and 'surviv[e] as a viable institution'") (alteration in original) (quoting Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 213, 216–21 (1968)).

76 *See, e.g.*, MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 211 (2007).

77 *See* Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 879 (2003).

78 *See* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 488–505, 538–44 (2018) (arguing that compliance with federal-court orders should not be taken for granted); *see also, e.g.*, Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), https://www.

Second, popular disdain for the federal courts could realistically lead the political branches to withdraw support in consequential ways. The federal courts are, by constitutional design, importantly subject to congressional control. As a result of the "Madisonian Compromise," the very existence of the lower federal courts was left to Congress to decide.[79] Congress also has substantial control over the structure and docket of the U.S. Supreme Court, as the proliferation of proposals for court expansion and jurisdiction stripping would suggest.[80] To some, reforms disempowering the federal courts would be a positive step; I discuss that view below.[81] The point here is that politically significant backlash to federal-court rulings is scarcely outside the realm of possibility.

A third reason why the concern about enforceability is relevant is as follows. Legitimacy factors may be most potent in precisely the cases in which public defiance of, or pushback against, the courts is most likely. Perhaps courts need fear popular resistance only in a few cases. But these might be the cases in which an institutionalist concern with legitimacy could have the most effect.[82]

Fourth, the worry about enforceability of judicial rulings is not limited to the exact moment at which federal or state law enforcement officers refuse to act in accordance with a court decision. Reservoirs of public confidence in the courts fill up over time and must be maintained if widespread acceptance of court rulings is to last. Institutionalism may be particularly urgent for courts in "crisis" situations, such as a situation in which the

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nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html [https://perma.cc/H7UV-W2WN].

79 HART & WECHSLER, *supra* note 70, at 296.

80 For an overview of arguments for Supreme Court expansion, see PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 74–79 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/JDU2-VZCQ] [hereinafter S. CT. COMMISSION REPORT]. For an argument in favor of jurisdiction stripping, see, for example, CHRISTOPHER JON SPRIGMAN, JURISDICTION STRIPPING AS A TOOL FOR DEMOCRATIC REFORM OF THE SUPREME COURT: WRITTEN TESTIMONY FOR THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES (2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf [https://perma.cc/B2HH-DHZV] [hereinafter SPRIGMAN TESTIMONY].

81 *See infra* Part II.B.1

82 *See* Sunstein, *supra* note 15, at 182 (noting the position that "in unusual (but important) cases, judges are likely to have sufficient information to know whether outrage will exist and have significant effects, and in such cases they rightly hesitate before imposing their view on the nation" instead of seeking a narrow holding or a justiciability ruling).

executive openly threatens to disobey a court's ruling in a pending case. Yet institutionalism also aims to stave off such crisis situations by cultivating popular respect for the judiciary.

Fifth, judicial power does not depend simply on whether the bottom-line judgment of a judicial ruling will be obeyed. Court decisions are meant to guide conduct in multiple ways, including through their reasoning and the logical consequences of their explanations. If courts are no longer viewed as sources of legitimate authority, then their ability to guide citizens' conduct will be severely impaired.

Another justification for institutionalism, in addition to enforceability, relates to the maintenance of the rule of law in a divided society. Today—as at many points in American history—citizens are divided along lines of ideology, ethnicity, geography, and so on.[83] Part of the challenge of maintaining a functional political system is preserving (or instilling) the public perception that the legal system is not "stacked" against a subset of the population. A system in which some segments of society are "permanent losers"[84] in the federal courts carries serious risks for societal cohesion.

To prevent the "permanent losers" problem, judges ought to consider public reactions to their actions. In other words, they need to keep track of outcomes that are consistently tilted toward one side of the political or cultural spectrum. As Neil Siegel explains, "practitioners of judicial statesmanship do not regularly put all the legal and cultural weight of the [Supreme] Court behind one party to the fight."[85] Zachary Price argues that judges should engage in "symmetric constitutionalism," defined "as a conscious tilt towards outcomes, doctrines, and rationales that distribute constitutional law's benefits across major ideological divisions."[86] Judges need not keep a one-to-one tally, but—in my view—they should seek to avoid legal results that are perceived as persistently favoring one quarter and disfavoring another.[87]

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83 *See* Zachary S. Price, Essay, *Symmetric Constitutionalism: An Essay on* Masterpiece Cakeshop *and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1278–79 (2019).

84 William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1308 (2005). My particular use of "permanent losers" here is not meant to track Eskridge's.

85 Siegel, *supra* note 14, at 988.

86 Price, *supra* note 83, at 1280.

87 *See* Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 82 (2018) ("[C]onstitutional law should seek . . . to

Notably, judges need not pursue the goal of "no permanent losers" at all costs. For example, the moral and legal importance of racial integration means that judges need not deliver wins to both segregationists and integrationists. Put differently, some causes should be permanent losers. When it comes to many issues on which Americans are divided, however, a substantial degree of concern for public perception is beneficial if judges are to avoid appearing to be partisans of one ideological camp. Moreover, even if the downfall of a particular cause is salutary, broader social groups (such as "the right" and "the left") need not lose on every issue. Guarding against "permanent loser" status for many groups is a way for judges to promote the institutional interest in legitimacy.

The institutional interest in *efficient administration* also affects courts' ability to do justice. Like other organizations, the federal judiciary is subject to management-related imperatives. It must work with a limited pool of resources: personnel (judges, clerks, and other assistants), finances, and physical space. These are the tools it needs to pursue—in the words of the Federal Rules of Civil Procedure—"the just, speedy, and inexpensive determination of every action and proceeding."[88] Courts' decisions about doctrine affect the number of new claims and the complexity of the process by which existing claims are resolved. If every taxpayer had standing to challenge government action, there would likely be more federal lawsuits. If the standard for granting summary judgment were loosened, fewer cases would presumably proceed to resource-intensive trials.

The volume and complexity of lawsuits affects the administration of the federal courts. If federal judges have more suits, and more complex suits, they will have less time to spend on each case. This plausibly results in greater delegation of the judicial function to law clerks,[89] increased delay, or lowered quality of judicial deliberation. It is difficult to reach precise empirical conclusions about any of these effects, given the number of factors involved and the influence of normative considerations on the question of what constitutes good judicial deliberation.[90] And it is important to bear in mind that

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structure politics so that those within [the political] . . . community are able to see, hear, and speak to each other.").

88 FED. R. CIV. P. 1.

89 *See* Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 767–70 (1983).

90 *See* Coleman, *supra* note 57, at 1795–802.

narratives about caseloads and the cost of discovery may be fueled by an interest in keeping certain suits out of federal court.[91]

Even so, it is safe to say that attention to efficient administration aids the effective functioning of the federal courts. Federal judges need to distribute resources across a range of cases without delays that impede the smooth workings of the judicial system. Greater care in writing opinions benefits the judicial system by improving predictability and communication with the public. If judges (and their staff) are unable to take care, the likely result is increased confusion and misguided legal outcomes. Administrative issues therefore matter for judges' ability to do their jobs.

Thus, the smooth administration of justice is not just a "pragmatic" issue, to be left to bureaucrats. Instead, it is intimately related to the important substantive goal of ensuring that courts are reasonably responsive to citizens' concerns. Here, the interests of legitimacy and efficient administration overlap.

As with legitimacy, the institutional interest in efficient administration may be challenged on the basis that it assumes an unrealistic sort of emergency. If the federal courts were truly at risk of being overwhelmed with lawsuits to the point they could not function, perhaps (on this view) it would make sense for judges to consider the impact of doctrine on case management.[92] But most individual court rulings will not have that result. Indeed, there is evidence that case filings in federal courts have recently seen periods of flattening.[93] So why should administrative concerns loom large?

Like legitimacy, efficient administration requires consistent upkeep. Not every decision expanding justiciability, for example, will undermine the federal judiciary's capacity to function. But that does not mean efficient administration should be left slumbering, to be awakened only in cases of emergency. Consistent attention to efficient administration reduces the likelihood of drastic steps closing off access to the federal courts in response to an immediate stimulus. Further—again echoing

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91 *See* Alexander A. Reinert, *The Narrative of Costs, the Cost of Narrative*, 40 CARDOZO L. REV. 121, 127 (2018).

92 *See* Levy, *supra* note 17, at 1066.

93 *See* Judith Resnik, Introduction, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899, 1900 (2017); *see also* Stern, *supra* note 50, at 406–07 (arguing that it is not clear what constitutes a "flood" of litigation).

considerations discussed in the context of legitimacy—a concern with efficient management may be most influential exactly when a case poses a genuine threat to the federal courts' ability to decide cases in a timely and thought-out manner.

Again, the claim is not that judges must assign overriding force to the interest in efficient administration or legitimacy. Yet a meaningful role for these factors is a prerequisite for the federal court system's capacity to deliver justice.[94] I flesh out these points by considering key critiques of institutionalism.

B. Critiques of Institutionalism

This section addresses the objections that judicial institutionalism is misguided because (1) the federal courts should have less power, or (2) judges should not be the legal actors promoting institutionalism. In response to the first critique, the section outlines a defense of judicial review and an independent federal judiciary. In response to the second critique: federal judges should not be left out of the business of advancing legitimacy and efficient administration, as they are often well situated to promote these interests. Nonetheless, it is important to recognize the risks of encouraging federal judges to promote their own institution's effective authority.

1. *Disempowering the Federal Courts*

Why is it good for federal courts to have effective authority? For some, the federal judiciary should actually be weakened—either as a general point, or in light of recent political developments. Accordingly, several academics and practitioners have proposed reforms to "disempower" the Supreme Court or to defang judicial review.[95] The suggestion to eliminate or restrict judicial review could apply to the lower federal courts as well.

Arguments for disempowerment vary, but here is one reconstruction. The Supreme Court, or the federal courts more broadly, is an antidemocratic force in American politics. Judicial review, far from protecting minorities, "has undermined federal

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94 *See* Hellman, *supra* note 10, at 1135 ("If the Court loses power or effectiveness, its ability to achieve any other ends will diminish."); Metzger, *supra* note 14, at 377 ("[C]onstructing an effective government is also a constitutional goal.").

95 For an overview of these proposals, see S. Ct. Commission Report, *supra* note 80, at 20–21; *see also* Sprigman Testimony, *supra* note 80; Nikolas Bowie, The Contemporary Debate over Supreme Court Reform: Origins and Perspectives (2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf [https://perma.cc/6T5E-YVK2] [hereinafter Bowie Testimony].

attempts to eliminate hierarchies of race, wealth, and status."[96] Only periodically does the Court attempt to protect vulnerable groups, and some of its most well-known attempts—such as *Brown v. Board of Education*—succeeded only after congressional action.[97] More generally, judges' ideological views affect their jurisprudence, and it is antidemocratic to privilege these views above those of the people's representatives. Decisions about hot-button social and economic issues, as Christopher Sprigman puts it, are "fundamentally struggles about *values*," and they should be "made democratically" rather than "according to the preferences of five lawyers."[98] Additionally, the argument runs, "good behavior" tenure coupled with longer lifespans creates the possibility of a federal judiciary that is starkly out of line with the social and political mores of the country. This kind of "misalignment" risks being entrenched for decades to come.[99]

Although arguments in favor of disempowering the federal courts are not new,[100] they have gained renewed steam today.[101] Some argue that the makeup of the current Supreme Court came about through norm-breaking behavior on the part of the Republican Senate: refusing to hold hearings for President Obama's nominee, Merrick Garland; confirming President Trump's nominee, Amy Coney Barrett, shortly before the 2020 election; and confirming Brett Kavanaugh despite the contentious circumstances of his hearings.[102] Therefore, some might contend, promoting judicial institutionalism in order to preserve the federal judiciary's authority is a bad idea.

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96 BOWIE TESTIMONY, *supra* note 95, at 1.

97 *Id.* at 8; Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9–10 (1994).

98 SPRIGMAN TESTIMONY, *supra* note 80, at 6; *see also* Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy [https://perma.cc/2R8S-HAJH].

99 S. CT. COMMISSION REPORT, *supra* note 80, at 27; *see* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 182 (2019).

100 *See generally, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

101 *See President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WHITEHOUSE.GOV (July 29, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law [https://perma.cc/ZD7F-MVEP]; S. CT. COMMISSION REPORT, *supra* note 80, at 14–15.

102 *See* S. CT. COMMISSION REPORT, *supra* note 80, at 14–15; Jamelle Bouie, *Mad About Kavanaugh and Gorsuch? The Best Way to Get Even Is to Pack the Court*, N.Y. TIMES (Sept. 17, 2019), https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html [https://perma.cc/68AE-2QT2].

In response, this Article does not attempt to provide a full-fledged justification for judicial review or an analysis of the political dynamics affecting today's Supreme Court. The basic outlines of a response, however, are as follows. Human beings have great promise, but we are also flawed: prone to jealousy, often power-hungry, frequently blind to the needs of others. Powerful officials are no exception, and in fact they may be more susceptible to these flaws by virtue of the ambition that put them in office. As a result, power at the top should be limited. These observations support a political system in which officials are accountable to voters and in which power changes hands every few years. They also support checks and balances among government officials, so that "[a]mbition [is] made to counteract ambition."[103]

The institution of the independent judiciary, with the power of judicial review, is an important piece of the puzzle. First, the judiciary can interpret the law, particularly the Constitution, in ways that transcend more representative branches' immediate interest in the public needs (and politics) of the moment. Second, judicial review is a way—not the only one—to protect minorities whose interests are not well served by the political process. To lose the safeguard of the federal judiciary would be to neuter a potential source of protection for minorities' rights. This defense of judicial review is grounded in the desire to avoid particularly negative outcomes, rather than in a starry-eyed view of judges' capacity to improve society.[104]

Ultimately, judicial power is not viewed here as an end in itself. Rather, as Siegel indicates, the federal judiciary—particularly the Supreme Court—"performs vital functions in the U.S. constitutional system": it "brings uniformity to the interpretation of federal law," "settles interstate disputes," and "polices certain aspects of the constitutional relationship between Congress and the executive."[105] The end is not judicial power for its own sake, but judicial power as one check among others in the constitutional system.

These points favoring the maintenance of federal judicial power will elicit objections, such as the following ones. The "independent" federal judiciary is too politicized to provide a genuine safeguard. The Supreme Court does not actually

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103 *See* THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

104 *See* JUDITH N. SHKLAR, ORDINARY VICES 238 (1984) (supporting a "liberalism of fear" that "institutionalizes suspicion").

105 Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 80 (2022).

protect minorities. Even if judges properly provide their own interpretations of the Constitution, why should judges' interpretations be supreme over those of the other branches?[106] Does the judiciary help ambition counteract ambition when the nominees of one party have an entrenched majority? These objections raise serious issues—especially the concern about entrenchment, which highlights the difficulties with life tenure.

Nonetheless, the question whether a robust federal judiciary is ideal in the abstract differs from whether the judiciary should be disempowered today. "[T]he Supreme Court plays a significant role in the public imagination as a citadel of justice," as Daniel Epps and Ganesh Sitaraman remark.[107] They continue: "[f]or many Americans, given the Supreme Court's salience, faith in the Court may be deeply intertwined with feelings about the very idea of law."[108]

An astute student in my Federal Courts class once pointed out that the "rule of law" is not the "rule of courts." This is true, but courts are sufficiently associated with law in the United States that disempowering the former risks undermining the latter. To be sure, the American constitutional system could have been constructed in a way that gave federal judges much less authority. Yet it is difficult to unring the bell; members of the public have grown up with an understanding that the judiciary will serve as an authoritative arbiter of constitutional disputes. Before discarding that understanding, it seems advisable to consider what institutionalism has to offer in terms of encouraging judges to exercise authority effectively and responsibly.

2. *Guarding the Guardians*

Even if the institutional interests of the federal judiciary are worth promoting, why should federal judges be the ones promoting them? Perhaps Congress or the Executive Branch can instead look out for the legitimacy and efficient administration of the judiciary. For judges to further the interests of their own institution may be self-serving. And judges may not

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106 *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . ."). For critique of "juristocratic" understandings of the separation of powers, see Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022).

107 Epps & Sitaraman, *supra* note 99, at 167–68. Epps and Sitaraman favor significant reforms to the Supreme Court, but they offer their proposals as a way to "[save]" the Supreme Court. *Id.* at 166.

108 *Id.* at 168.

be well situated to determine how to advance these interests—particularly legitimacy, which depends on interpreting public opinion. Although these critiques should be taken seriously, they do not negate the value of institutionalism as an approach carried out by judges.

At the outset, the view that judges should be institutionalists does not imply that other legal or political actors should *not* be institutionalists. A judicial institutionalist can (and probably will) take the position that many actors ought to support the legitimacy and efficient administration of the federal judicial system: Congress, the President, administrative agencies, legal scholars, and possibly the public at large. One need not believe that judges have an exclusive duty to act with the institutional interests of the federal judiciary in mind.

At the same time, certain institutionalist goals are most suitably carried out by judges. Through their rulings, judges can prevent the development of "permanent losers" in the judicial system. Congress can pass statutes that ward off "permanent loser" status, but the judiciary's rulings will also contribute to perceptions of which groups are consistently coming out on top. When it comes to efficient administration, judges are close to the ground and well placed to understand the judiciary's managerial imperatives—the relevant bottlenecks, the usual course of litigation, the incentives that parties face. Court rules and statutes can shape these imperatives, but the judiciary has a useful perspective.[109]

More generally, judges should be institutionalists because that approach accords with certain judicial virtues. The relevant type of virtue has a kinship to German sociologist Max Weber's concept of the "ethic of responsibility" as opposed to the "ethic of ultimate ends."[110] In Weber's words, an adherent to the "ethic of ultimate ends" "does rightly and leaves the results with the Lord"—or, in (somewhat) more secular terms, does justice though the heavens may fall.[111] An adherent to the "ethic of responsibility," by contrast, must "give an account of

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109 *See* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 193 (2003) ("[T]rial judges need managerial skills that are not supplied by legal theory.").

110 MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY (H.H. Gerth & C. Wright Mills, eds., trans., Oxford University Press 1946) (1921) 25, http://fs2.american.edu/dfagel/www/class%20readings/weber/politicsasavocation.pdf [https://perma.cc/4Q4J-B9VN]. For discussion of the relationship between Weber's "ethic of responsibility" and judicial "statesmanship," see Siegel, *supra* note 14, at 997–98 (first quoting *id.* at 25).

111 WEBER, *supra* note 110, at 25.

the foreseeable results of one's action."[112] As Weber notes, "[t]his is not to say that an ethic of ultimate ends is identical with irresponsibility, or that an ethic of responsibility is identical with unprincipled opportunism."[113] Yet there is a difference between a person who focuses on doing the "right thing" regardless of the consequences and someone who assigns significant weight to the consequences in defining the "right thing." In politics, leaders must make challenging decisions and steer complex bureaucracies in a pressured environment.[114] A sober attention to the consequences is appropriate.

More controversially, the ethic of responsibility is also a valuable *judicial* virtue. It is true that judges are not politicians and should not be. There are a distinctive set of legal norms guiding the practice of judging that do not warrant nearly the same emphasis in political life. These norms include: emphasis on precedent, consideration of a rule's application at a future point in time, and focus on a decision's universalizability to parties and causes with a different ideological valence. Being socialized into the practice of law means imbibing these values, and these values properly cause judges to act differently from politicians in deliberating on a course of action.

Yet the ethic of responsibility is not one of the parts of political life that judges must eschew. The legal values just mentioned invite judges to attend to the practical consequences of a ruling. Judges must think ahead to scenarios that might implicate the rule they are announcing, and imagining these scenarios requires familiarity and concern with the "real world."[115] The interest in following precedent implies a commitment to legal continuity safeguarded by judges, and that commitment in turn suggests that judges play a role in maintaining societal stability.

A judge who embodies the ethic of responsibility will place substantial weight on legitimacy and efficient administration. To ignore legitimacy would be to invite the public's loss of faith

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112 *Id.*

113 *Id.*

114 *See* MARK PHILP, POLITICAL CONDUCT 81 (2007) (discussing Weber's ethic of responsibility in the context of political actors' behavior).

115 *See* Siegel, *supra* note 14, at 997 (Judges face the "'demand' . . . 'to make some forecast of the consequences of [their] action[s].") (alterations in original) (quoting FELIX FRANKFURTER, *The Judicial Process and the Supreme Court*, *in* OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1939–1956 39 (Philip Elman ed., 1956)); Solum, *supra* note 109, at 193–94 ("The practically wise judge has an intuitive sense as to how real-life lawyers and parties will react to judicial decisions.").

in the legal system, as well as to spur a clash between the judiciary and the branches of government controlled more directly by the public. To ignore efficient administration would be to neuter the federal judiciary's ability to deliver timely and considered rulings in a range of cases. A proponent of the ethic of responsibility would ordinarily seek to avoid these outcomes. There are, of course, other judicial virtues—such as temperament and courage[116]—and there may be clashes between virtues; for example, some might argue that institutionalism is at odds with the virtue of judicial courage. Nevertheless, a meaningful concern with institutional interests flows from the virtue embodied in the ethic of responsibility.

Thus far I have offered justifications for judges to be institutionalists. Yet there are limits to the defense. The notion that judges should protect their own institution raises real problems, two of which I consider here: the potentially self-serving nature of the endeavor, and the issue of judicial competence.

On the self-serving problem, it may seem perverse to encourage judges to rule in the service of their own legitimacy or with a view to satisfying their own managerial imperatives.[117] Justice Blackmun in 1992, for example, referred to "judicial overload" as an "inherently self-interested concern" that "has no appropriate role in interpreting the contours of a substantive constitutional right."[118] Federal judges, like all people, are flawed, with jealousies and blind spots. Judges may seek to minimize their own workload or to enhance their individual reputations at the expense of fairness to the parties or other important values.[119] Institutionalism might therefore aggrandize judges but serve no public aims.

The self-serving problem should not be overemphasized. As an initial matter, judicial self-interestedness may redound

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116 Solum, *supra* note 109, at 190–92. For discussion of adherence to the law of standing as a form of judicial virtue—including both "fortitude" and "patience"—see William Baude & Samuel L. Bray, Comment, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 188–89 (2023).

117 *See, e.g.*, Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 113–18 (2022) (critiquing the Supreme Court for consolidating power in itself at the expense of other branches of government and of the states, and to the detriment of individual rights).

118 Hudson v. McMillian, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring); *see* Levy, *supra* note 17, at 1064–65, 1072. In Justice Blackmun's view, however, judicial overload might be "an appropriate concern in determining whether statutory standing to sue should be conferred upon certain plaintiffs." *McMillian*, 503 U.S. at 15 (Blackmun, J., concurring).

119 POSNER, *supra* note 67, at 36 (judicial "utility function" includes leisure and individual reputation).

to the benefit of the institution. For instance, Richard Re argues that Justices' commitment to their own views of the law ("personal precedent") can bolster adherence to stare decisis on the part of the Court as a whole.[120] True, on some occasions judges' self-interested behavior will not serve the courts well. But the argument here is meant to support a form of judicial institutionalism that is aimed at promoting legitimacy and efficient administration. Rulings that advance only individual judges' interests, or even rulings that further a more general interest in (say) greater leisure for judges, do not qualify as institutionalist in the sense identified here.

To be sure, the institutionalist approach could be misused by judges inclined to pursue goods that do not actually redound to the benefit of the institution. Yet judges who call themselves originalists might advance their own ideological goals under the guise of reading history. The prospect of self-serving behavior does not undermine institutionalism any more than it does other judicial philosophies.

On the judicial competence problem, federal judges may not be especially good at predicting the public response to their rulings or gauging the impact of their rulings on efficiency. The floodgates of litigation, Toby Stern argues, "often . . . do not open when we are warned that they will."[121] When it comes to legitimacy, in particular, federal judges are not pollsters nor experts at reading the popular mood.[122] They may "exaggerate outrage or see it when it does not even exist," in Cass Sunstein's words, perhaps due to "the natural human tendency toward self-protection."[123] Crucially, different segments of the public will react in different ways to judicial rulings, and judges may focus unduly on the views of a minority, especially a minority with views close to their own.[124] In other words, judges' sympathy for certain segments of the public could cause them to engage in "motivated reasoning,"[125] so that judges (even

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120 Richard M. Re, Essay, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 828, 842–45 (2023).

121 Stern, *supra* note 50, at 403.

122 Sunstein, *supra* note 15, at 175–78; *see also* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 8 (1964) ("[I]t is easy to misjudge or distort the impact of a Court pronouncement, and guesses about that impact are treacherous sources of precepts for Court behavior.").

123 Sunstein, *supra* note 15, at 176.

124 *Id.* at 205.

125 *See* Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 JUDGMENT & DECISION MAKING 407, 408 (2013) ("Motivated reasoning refers to

unconsciously) assign too much weight to the segments of public opinion they support.

Judges may indeed make imperfect predictions. For example, some Justices appear to have overestimated the public backlash to *Bush v. Gore*.[126] Yet the argument from lack of competence only goes so far—even on the legitimacy front, where the challenge of reading public responses is particularly acute.

First, the prospect of public backlash or political reaction will be clear in some cases.[127] In fact, those may be the cases in which institutionalism is likely to be most needed. Chief Justice Marshall probably was correct to worry about political rejection of early Supreme Court decisions.[128] Or, to take an extreme example, a Supreme Court decision overruling *Brown v. Board of Education* today would cause public uproar. Second, while there are indeed multiple "publics," the public response need not be uniform to matter for the institutionalist. The institutionalist judge might be concerned about loss of confidence from a segment of the population. Third, existing legal standards require judges to consider appearances, such as standards involving corruption or its appearance.[129] This suggests at least some faith in judges to make judgments about public perceptions. Fourth, the concern about motivated reasoning could apply to many judicial philosophies.

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the tendency of people to conform assessments of information to some goal or end extrinsic to accuracy.").

126 *Compare, e.g.*, Bush v. Gore, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting) ("[I]n this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself."), *with* Megan Brenan, *Supreme Court Approval Highest Since 2009*, GALLUP (June 18, 2018), https://news.gallup.com/poll/237269/supreme-court-approval-highest-2009.aspx [https://perma.cc/7BUM-X79L] (showing only mild downturn in American public approval of the Supreme Court in 2001). Democrats' views of the Court soured in 2001, though they returned to their pre-2001 state by 2009. *Id.* Further, *Bush v. Gore* may have had a longer-term effect on public confidence in the Supreme Court, but that view is difficult to verify. For discussion of *Bush v. Gore* and public opinion, see Nathaniel Persily, *Foreword: The Legacy of* Bush v. Gore *in Public Opinion and American Law*, 23 ST. THOMAS L. REV. 325 (2011).

127 *See* Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 14 (2007).

128 *See infra* notes 149–52 and accompanying text.

129 *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 192 (2014) ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance."); Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446 (2015) ("[P]ublic perception of judicial integrity is 'a state interest of the highest order.'") (quoting Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 889 (2009)).

With respect to efficient administration, it is true that judges may not be able to predict fluctuations in caseload with exactitude.[130] Dire warnings about the "floodgates of litigation" may be overblown in some cases. Questions like "do changes in pleading standards lead to more dismissals?" are not simple to answer.[131] As with legitimacy, however, there will be straightforward cases. In the 1966 case *United Mine Workers v. Gibbs*, for instance, the Supreme Court upheld the constitutionality of "[p]endent jurisdiction" for state-law claims in federal courts.[132] That is, federal courts may hear state-law claims adequately related to federal claims. Justifying pendent jurisdiction, the Court cited "judicial economy, convenience, and fairness to litigants."[133] The *Gibbs* Court hardly seemed incompetent to make the assessment that pendent jurisdiction would advance "judicial economy" and "convenience." The argument that judges are bad at making efficiency-related decisions supports efforts to inform decision making with empirical data, rather than the conclusion that judges should never try. Nonetheless, the absence of clear empirical evidence at the time judges are making a decision is a feature of the social landscape that institutionalists must accept.

The fact that certain empirical facts cannot be ascertained in advance with a high degree of accuracy does not mean that judges should shut their eyes to the realistic impact of their rulings on legitimacy and efficient administration. After all, the original meaning of many constitutional terms may be extremely challenging to discover.[134] And identifying the correct "moral reading" of the Constitution[135] may be a highly complex enterprise. But proponents of originalism or moral reading theories do not generally take these difficulties to doom their enterprise. Similarly, judges' lack of access to detailed empirical data when making institutionalist decisions does not mean

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130 Stern, *supra* note 50, at 404.

131 *See* JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, FED. JUD. CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *Iqbal* 21 (2011) https://www.fjc.gov/content/motions-dismiss-failure-state-claim-after-iqbal-report-judicial-conference-advisory-0 [https://perma.cc/BVA7-YQHQ] ("Assessing changes in the outcomes of motions that are attributable to [Bell Atlantic v. Twombly, 550 U.S. 544 (2007)] and [Ashcroft v. Iqbal, 556 U.S. 662 (2009)] is complicated.").

132 United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

133 *Id.* at 726.

134 Primus, *supra* note 127, at 13–14.

135 RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (1996).

institutional considerations should be disregarded. Instead, judges can turn to heuristics and judgment, informed by analytic thinking about the benefits and drawbacks of institutionalist decision making.

Overall, the critique that institutionalism can be self-serving or overly reliant on elusive empirical data could properly inform one's assessment of which institutionalist possibilities are warranted in a particular circumstance. As Part IV documents, judges have a variety of practical options in terms of which institutionalist approaches to take. The best response to these criticisms of institutionalism is to remain cognizant of institutionalism's risks, rather than to jettison consideration of legitimacy and efficient administration.

III
INSTITUTIONALISM AND LEGAL THEORY

Federal judges, this Article argues, should take into account legitimacy and efficient administration when *deciding cases*. It would not be sufficient, that is, for judges to further institutional interests through non-case-related channels—by giving public talks that boost popular confidence in the courts, for example, or by structuring their chambers' internal workings in an efficient manner.

The focus on institutionalism as a factor in judicial rulings raises the question: is institutionalism lawless?[136] One of the main reasons that institutionalism sometimes gets a "bad rap" is that it seems to override the judge's best view of the law.[137] The portrayal is: Judge Institutionalist thinks the law requires X, but the public would react badly to X, or X would increase the managerial burden on the courts. Therefore, Judge Institutionalist rules Y instead of X. Under this scheme, institutionalism seems to be at odds with a commitment to law.

Institutionalism as a judicial philosophy, however, could also inform judges' views of what the law requires. In other words, institutional factors could help to constitute the "correct

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136 *See* Hellman, *supra* note 10, at 1130–38 (addressing the objection that the Supreme Court's concern about its image is not a "legal" consideration). For discussion of several answers to the question of which sources "are (descriptively and normatively) considered valid within the source-based enterprise of law," see Frederick Schauer, *Law's Boundaries*, 130 HARV. L. REV. 2434, 2456 (2017).

137 *See* Chauvin, *supra* note 13, at 1 (An "institutionalist" justice is often thought to be one "willing to decide cases in a manner inconsistent with his best and highest view of the law if doing so will help preserve the legitimacy of the Supreme Court.").

legal answer." Needless to say, theorists and judges have different views of how to arrive at the "correct legal answer."[138] It is beyond the scope of the paper to argue comprehensively for or against a legal theory such as originalism or common-law constitutionalism. Nonetheless, it is useful to explain the relationship between institutionalism and broader legal theories. To what extent are legitimacy and efficient administration proper *legal* factors? With which theories of constitutional and statutory interpretation is institutionalism compatible?

This Part begins by introducing distinctions to guide the discussion of institutionalism and legal theory. It then explains that institutionalism supports the adoption of certain theories of legal interpretation, notably ones that permit judges to consider the practical consequences of their rulings across a range of cases. At the same time, institutionalism in some forms is compatible with versions of formalist theories such as originalism and textualism.

A. Institutionalism, Law, and Discretion

In considering the relationship between institutionalism and legal theory, it is helpful to distinguish among several answers to the question of whether institutionalism ought to inform judicial rulings. First, and most restrictively, institutionalist concerns could be morally impermissible factors. Just as judges should not issue rulings based on racial biases, judges should not rule based on institutionalism.

Second, institutionalist factors could be legally impermissible but morally permissible (or even morally valuable) in particular circumstances. In general, that is, judges should rule solely on the basis of legally proper reasons. But in extenuating circumstances—if the correct legal answer would lead to social, economic, or moral disaster—judges could be justified in overriding the law in favor of moral concerns.[139] Institutionalism, on this account, is one such morally permissible but legally impermissible consideration.

Third, institutionalist factors could be legally acceptable. On this view, legitimacy and efficient administration are criteria

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138 *See* Hellman, *supra* note 10, at 1130.

139 Such situations bear some resemblance to the problem of "dirty hands," in which "a particular act of government . . . may be exactly the right thing to do in utilitarian terms and yet leave the man who does it guilty of a moral wrong." Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFFS. 160, 161 (1973). I thank Joshua Braver for discussion of this point.

internal to legal reasoning rather than criteria that depart from legal norms.[140] To say that judges ought meaningfully to account for legitimacy and efficient administration in ruling on cases is a legal argument, not simply a moral argument.

Fourth, institutionalist concerns could be legally valuable. This view is similar to the previous one in the sense that, when judges rule in accordance with institutionalist factors, they undertake a proper legal task. But here, more than being legally *permitted* to rule in an institutionalist direction, judges have normative reasons to do so. This does not mean institutionalist factors are always overriding. Yet these factors carry normative weight.

These four views of institutionalism in judicial decision making—impermissible, legally impermissible but morally permissible, legally acceptable, and legally valuable—fall along a spectrum of openness to judicial consideration of institutionalism.

The idea of discretion adds another layer of complexity.[141] One might take the view that institutionalism is a legally acceptable or legally valuable factor only within a zone of discretion set for judges by another legal body, like Congress.

For example, a Justice might take legitimacy into account when she votes on whether to grant certiorari, because the statutory scheme governing the Supreme Court now grants the Court a largely discretionary docket.[142] Once a case is accepted on the merits, however, the Justice might be unwilling to consider legitimacy. Such an approach must give some credence to institutionalism as a judicial philosophy. Institutionalism would not be off-limits in the way that racial biases would. But it would cabin institutionalism's impact if judges could rule in an institutionalist direction only when they inhabited an externally imposed zone of discretion.

An alternative perspective would be to take institutionalism into account when setting the bounds of the judicial zone of discretion. For instance, institutionalist considerations could provide reason to adopt a judicial philosophy that grants judges greater leeway in interpreting statutes. Part IV discusses the

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140 For discussion of the "internal aspect of rules," see H. L. A. HART, THE CONCEPT OF LAW 55–57 (2d ed. 1994).

141 For analysis of discretion in judicial decision-making, see Geoffrey C. Shaw, Essay, *H. L. A. Hart's Lost Essay:* Discretion *and the Legal Process School*, 127 HARV. L. REV. 666, 702–09 (2013).

142 *See* 28 U.S.C. § 1254. For further discussion of institutionalism in the certiorari process, see *infra* Part IV.A.1.

relationship between institutionalism and discretion in greater detail. The next task for now is to address the interplay between institutionalism and particular legal theories.

B. Institutionalism as Legally "In Bounds"

In light of the distinctions just made, how should one characterize the brand of institutionalism advocated here? The Article has argued that federal judges ought to be institutionalists, in the sense of ruling on cases in a way that meaningfully takes into account the interests in legitimacy and efficient administration. This argument implies that institutionalism is normatively valuable, thereby ruling out the view that institutionalism is morally impermissible.

Moreover, institutionalism is most compatible with the view that institutionalism is legally both permissible and valuable—not merely a morally acceptable departure from legality in extenuating circumstances. In other words, institutionalist concerns, in Richard Primus's language, should be deemed "constituent factor[s]" in legal analysis.[143] The earlier discussion contains one reason for the position that institutionalism is "internal" to law, namely, that institutionalist principles of legitimacy and efficient administration must be cultivated in nonextenuating circumstances if they are to be influential when the rubber hits the road.[144] Institutionalism should not be reserved for cases of moral emergency.

There are also other reasons for institutionalism to be viewed as within legal bounds. Excluding legitimacy and efficient administration from the orbit of proper *legal* factors could create a situation in which judges are regularly overriding the law in favor of extralegal moral principles. This could contribute to a public perception that judges are acting contrary to law and could degrade trust in the court system.

Above all, there is a meaningful difference between deciding a case on the ground that (say) the plaintiff is friends with the judge and deciding a case on the basis that a contrary decision would erode public confidence in the courts or make it more difficult for the courts to function. Treating effective authority as outside the bounds of legality tends to obscure that difference. Thus, an institutionalist perspective should treat effective authority as among the range of permissible legal factors.

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143 Primus, *supra* note 127, at 6.

144 *See supra* notes 82, 92–93 and accompanying text.

The arguments for institutionalism made earlier suggest that legitimacy and efficient administration are valuable in addition to being permissible.

Although it makes normative sense to include institutionalist considerations in the range of acceptable legal factors, it is important to grapple with the positive-law question of whether effective authority *is* such a factor.[145] One need not be a thoroughgoing legal positivist to recognize the difficulty of declaring that "the law permits (or requires) recourse to X" without grounding that assertion to some extent in existing legal understandings.

There is evidence that judges account for legitimacy and efficient administration in their rulings and deem themselves to engage in legal reasoning in doing so. Though the evidence is mixed rather than one-sided, institutionalist behavior seems sufficiently widespread to suggest that judges do not treat institutional factors as off limits.

To elaborate: when it comes to efficient administration, federal courts have often drawn explicitly on concerns related to resource constraints to justify their decisions (as earlier explained).[146] Sometimes, however, efficiency issues are recast in terms that may appear more "principled," like the separation of powers.[147] This judicial ambivalence is reflected in cases where judges insist that efficiency cannot trump the plain text of the statute or the Constitution—and yet take pains to explain why the result will not create the inefficiencies that some fear.[148] Efficient administration may have greater legal legitimacy in certain types of cases, such as civil procedure cases, in which courts are expected to take greater charge of their managerial imperatives. Ultimately, efficient administration seems to have a reasonable degree of legal legitimacy even if it also provokes discomfort.

There is also some positive-law evidence favoring legitimacy as a legal criterion, though the evidence is not uniform. At the outset, it seems intuitively plausible that federal judges consider public perceptions of the judiciary in deciding cases and have long done so. A prominent early example is *Marbury v. Madison* in 1803.[149] The Supreme Court (per Chief Justice Marshall)

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145 This is similar to the question of whether, in Fallon's terms, institutionalism has legal legitimacy. FALLON, *supra* note 14, at 35–36.

146 *See supra* notes 49–56, *infra* notes 201–06 and accompanying text.

147 *See supra* notes 61–66 and accompanying text.

148 *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 501 (2011).

149 5 U.S. (1 Cranch) 137 (1803).

declined to order Secretary of State Madison to deliver to Marbury a commission as a justice of the peace, on the ground that such an order would exceed the Court's authority under Article III.[150] Chief Justice Marshall thereby upheld the power of judicial review without running the risk of disobedience by the Secretary of State.[151] Chief Justice Marshall acted as a consummate institutionalist, taking into account the potential political reaction to the Court's ruling and deciding the case in a manner that would maintain the Court's authority.[152] Further examples of early judicial institutionalism are adduced below, in the discussion of originalism.[153] Today, too, commentators' characterizations of certain decisions or judges as concerned with institutional legitimacy seem to ring true, in the sense that they strike a chord among informed observers.[154]

Even if one takes the view that a genuine legal factor must be one that judges openly acknowledge, judges at times expressly reference legitimacy as a factor in the court's decision or (in dissent) as a factor the court should have weighed more heavily.[155] To take a few examples, the Supreme Court has justified stare decisis by appealing to "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."[156] In a 2011 case on Article III standing, the Court stated that "[f]ew exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with

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150 *Id.* at 147.

151 HART & WECHSLER, *supra* note 70, at 69.

152 On *Marbury* and "pragmatic" concerns, see Richard H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 16–20 (2003). In a more contemporary context, Z. Payvand Ahdout has argued that courts avoid compelling coordinate-branch officers to act partially in order to preserve judicial capital. Z. Payvand Ahdout, *Separation-of-Powers Avoidance*, 132 YALE L.J. 2360, 2402–04 (2023).

153 *See infra* notes 192–200 and accompanying text.

154 *See* sources cited *supra* note 1; *see also, e.g.*, A. E. Dick Howard, *Out of Infancy: The Roberts Court at Seven*, Essay, 98 VA. L. REV. BRIEF 76, 89–90 (2012) (asking, with respect to Chief Justice Roberts's vote to uphold the Affordable Care Act in *NFIB v. Sebelius*, "[m]ight it be that John Roberts was thinking about John Marshall, who carefully wrote *Marbury v. Madison* in such a way as to deny Marbury the writ he sought while at the same time establishing the Court's power of judicial review?").

155 *See* Hellman, *supra* note 10, at 1116–20.

156 Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

them."[157] That language was quoted in 2023 in a concurrence by Justice Gorsuch, joined by Justices Thomas and Barrett.[158]

An example that reveals concern with both legitimacy and efficient administration comes from the Supreme Court case *Shinseki v. Sanders* in 2009.[159] There, the Supreme Court rejected a Federal Circuit harmless-error rule that it deemed too friendly to appellate reversal.[160] The rule, the Court explained, "encourage[d] abuse of the judicial process and diminishe[d] the public's confidence in the fair and effective operation of the judicial system."[161]

In the 1989 abortion case *Webster v. Reproductive Health Services*—in which the Court upheld the constitutionality of certain abortion restrictions—Justice Scalia argued in a partial concurrence for a broader holding overruling *Roe v. Wade*.[162] Per Justice Scalia, a broader holding would be justified by "the fact that our retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court."[163] In corruption law, the Supreme Court has extolled "[t]he importance of public confidence in the integrity of judges," which "stems from the place of the judiciary in the government. . . . It follows that public perception of judicial integrity is 'a state interest of the highest order.'"[164] These statements come from different contexts, but they all suggest concern for public perception of the courts.

Nonetheless, the practice of considering public views has also received opprobrium in the law books. A notable example was in *Dobbs*, which overruled *Roe v. Wade* and *Planned Parenthood v. Casey*.[165] In *Casey*, the plurality (in a portion of the opinion joined by a majority of the Court) appealed at length to the Court's "legitimacy" as a basis for maintaining *Roe v. Wade*.[166]

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157 Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 145–46 (2011).

158 United States v. Texas, 143 S. Ct. 1964, 1985–86 (2023) (Gorsuch, J., concurring in judgment) (quoting *id.*).

159 556 U.S. 396 (2009).

160 *Id.* at 399.

161 *Id.* at 409 (citing Neder v. United States, 527 U.S. 1, 18 (1999)).

162 Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

163 *Id.* at 535.

164 Williams-Yulee v. Fla. Bar, 575 U.S. 433, 445–46 (2015) (quoting Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 889 (2009)).

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

166 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866–69 (1992); *see* Hellman, *supra* note 10, at 1116–18.

Interestingly, *Casey* presented its legitimacy-driven unwillingness to overrule *Roe* as a decision *not* to bow to popular pressure. "[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision," the *Casey* Court stated, "would subvert the Court's legitimacy beyond any serious question."[167] Yet Chief Justice Rehnquist, dissenting in relevant part, protested the Court's decision to invoke legitimacy at all: "[t]he Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution."[168]

When the Supreme Court overruled *Casey* in *Dobbs*, it criticized *Casey*'s analysis of legitimacy:

> The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work.[169]

The *Dobbs* Court's critique of "extraneous influences" gives voice to the intuition that a court too focused on public reaction is not carrying out legal work.

One might try to reconcile some judges' interest in maintaining public support with their condemnation of reliance on public perceptions. Perhaps the courts must decide cases in accordance with legal criteria that exclude legitimacy, but the legitimacy factor establishes a duty to explain the court's reasoning clearly to the public.[170] This attempted reconciliation, however, does not fully capture the emphasis that courts have placed on public confidence in the courts. Courts seem to have treated public confidence as a factor to be considered in making legal decisions, not just in explaining them.[171] Indeed, it is not clear that the *Dobbs* Court wholly rejected reliance on public

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167 *Casey*, 505 U.S. at 867.

168 *Id.* at 963 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

169 *Dobbs*, 142 S. Ct. at 2278.

170 *Id.*

171 *See supra* notes 156–64 and accompanying text.

reaction in assessing the merits of a case. After all, *Dobbs* reproved *Roe* and *Casey* for "enflam[ing] debate and deepen[ing] division."[172]

Thus, the positive-law evidence that legitimacy is a proper legal criterion points in different directions. This suggests there is room for judges to consider legitimacy and still "follow the law," but there may also be limitations on how far judges can go in this direction. Perhaps some might endorse a "middle ground": legitimacy is a more legally appropriate factor than the judge's personal relationship with the litigants, but less legally appropriate than the "textual canon" that the inclusion of certain items implies the exclusion of others.[173] Or the idea of discretion could come into play: within a zone of discretion, such as the Supreme Court's certiorari process or federal equity,[174] legitimacy properly informs federal judges' decision making, but not outside these zones.

In sum, there is a plausible positive-law basis for the view that legitimacy and efficient administration are within legal bounds. To be sure, countervailing evidence also exists. But institutionalist judging appears sufficiently common to raise the concern that treating institutionalism as extralegal would make a wide swath of judging "not according to law" and would itself diminish public confidence. On the institutionalist account presented here, then, legitimacy and efficient administration are legally acceptable factors. Because there are normative reasons for judges to consider these criteria in rendering judgment (discussed above),[175] institutionalism is legally valuable as well.

C. Institutionalism and Theories of Legal Interpretation

An institutionalist perspective supports approaches to judging that treat legitimacy and efficient administration as acceptable, and indeed valuable, legal considerations. Institutionalism is more clearly at home with prudential legal theories that permit or encourage judges to take the

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172 *Dobbs*, 142 S. Ct. at 2243. *Dobbs* referred to the inflammatory impact of *Roe* both in discussing stare decisis, *id.*, and in making the case that *Roe* was egregiously erroneous, *id.* at 2265.

173 For a classic statement of this principle, see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803).

174 *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) (describing a preliminary injunction as an exercise of equitable discretion).

175 *See supra* Parts II.A, II.B.

consequences of their rulings into account. Although institutionalism is a less obvious fit with formalist theories like originalism and textualism, versions of these theories can accommodate and even embrace institutionalism within zones of discretion.

"Prudential" theories that treat practical consequences as significant factors in judicial decision making are especially fertile ground for institutionalist goals. Philip Bobbitt, in his work on the modalities of constitutional interpretation, describes "[p]rudential argument" as "constitutional argument which is actuated by the political and economic circumstances surrounding the decision."[176] Public perceptions of legitimacy plausibly form part of the relevant "political and economic circumstances," and the impact on efficient administration is a quintessential practical consequence. Thus, prudential theories could readily treat both institutional interests as legally acceptable and valuable. This is true in statutory cases in addition to constitutional ones. If one believes that federal judges should partner with Congress by updating statutes[177] or applying statutes in the manner that works best in light of experience,[178] then the way is paved for consideration of both legitimacy and efficient administration.

Another legal theory congenial to institutionalism is common-law constitutionalism, or the view that judges should interpret the Constitution in the way that common-law judges operated.[179] As David Strauss observes, "the principles developed through the common-law method are not likely to stay out of line for long with views that are widely and durably held in the society."[180] At the same time, common-law constitutionalism allows judges to reject popular sentiments if they are convinced those sentiments are wrong.[181] Federal judges acting as common-law judges might also be authorized to take

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176 PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 61 (1982).

177 *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 (1987).

178 *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 352–57 (7th Cir. 2017) (en banc) (Posner, J., concurring) ("We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963–65), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.").

179 David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 888 (1996).

180 *Id.* at 929.

181 *Id.* at 930.

into account efficient administration, in the course of considering a proposed rule's workability and systemic impact.

As to purposivism in statutory interpretation, different versions of this theory are more and less harmonious with judicial institutionalism. Purposivism might be trained on Congress's actual intent in passing a statute rather than the values of legitimacy and efficient administration. However, if purposivists assume that the "legislature was made up of reasonable persons pursuing reasonable purposes reasonably," in the words of Henry Hart and Albert Sacks,[182] then the maintenance of effective authority could be the most reasonable outcome.

Institutionalism, therefore, supports adoption of prudential theories of constitutional and statutory interpretation, and it is also consonant with common-law constitutional interpretation and certain versions of statutory purposivism. For other legal theories, the relationship with institutionalism is more ambivalent.[183] The aim here is not to canvass legal theories comprehensively, but to provide a sense of how institutionalism would guide a choice of legal theory. And institutionalism points toward prudential approaches.

At the same time, formalist theories such as originalism and textualism are currently ascendant.[184] How does institutionalism relate to these theories? Both theories are internally complex,[185] but they can be understood as follows. Originalism is the theory that "the Constitution's meaning is its 'original

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182 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

183 For example, Dworkin's "moral reading" of the Constitution seems to operate fairly independently of institutional factors. DWORKIN, *supra* note 135, at 7, 10–11. "Popular constitutionalism" appears to permit judges to consider the people's views in interpreting constitutional law, but it may not require judges to shy away from deciding cases in a way that provokes popular anger. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007).

184 *See, e.g.*, Sw. Airlines Co. v. Sexton, 142 S. Ct. 1783, 1789 (2022) ("As always, we begin with the text."); Randy E. Barnett, *Ketanji Brown Jackson and the Triumph of Originalism*, WALL ST. J. (Mar. 24, 2022), https://www.wsj.com/articles/ketanji-brown-jackson-and-the-triumph-of-originalism-public-meaning-testimony-hearing-supreme-court-11648151063 [https://perma.cc/YL8W-B7Y7] ("Even a nominee chosen by a Democratic president and facing a Democratic Senate felt it was necessary to say that she would adhere to the original public meaning of the text.").

185 *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005). For an argument that textualism and originalism ought to be disentangled, see, for example, Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115 (2022).

public meaning'—defined, roughly, as the meaning that a reasonable and informed member of the public would have ascribed to it at the time of its promulgation."[186] Textualism is the view that words in statutes "should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'"[187]

At a high level, originalists and textualists might appeal to legitimacy. Deciding cases according to the meaning of the constitutional provision or statute at the time of enactment, one might argue, will ultimately enhance public perceptions of the federal courts as impartial arbiters.[188] But originalists and textualists do not usually appear to rely on public perception as a reason to adopt their judicial philosophies; rather, public confidence in the courts seems more of a bonus. Thus, even if public trust in the courts is treated as a reason to take an originalist or textualist approach in general,[189] these theories may not permit judges to consider legitimacy in particular cases. The type of institutionalism addressed in this Article treats legitimacy and efficient administration as meaningful factors in individual cases.[190] And that form of institutionalism might seem totally contrary to originalism and textualism.[191] If the original meaning or text says X is the law, the argument runs, then judges have no warrant to say that Y is the law out of concern for public reaction or resource constraints.

Yet a stark contrast between institutionalism (as here understood) and originalism or textualism is not a given. To begin with originalism: there is some basis in historical practice for judicial concern with legitimacy and resource constraints in deciding particular cases. As to legitimacy, here are some data points. In correspondence between President George Washington and the Supreme Court Justices in 1793, the Justices

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186 FALLON, *supra* note 14, at 47; *see also* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 498 (2013).

187 New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (alterations in original) (quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018)).

188 This view depends on an assessment of public opinion just as much as the institutionalist decision making discussed in Part I.

189 *See, e.g.*, Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 270 (2020) ("[A] judge should opt for formalistic textualism to help protect the legitimacy of the judiciary itself.").

190 For discussion of the distinction between "retail" and "wholesale" institutionalism, see *infra* Part IV.E.

191 *See, e.g.*, Hellman, *supra* note 10, at 1136 (noting conflict between "textual theor[ies] of constitutional interpretation" and "the Court's acting to preserve its own effectiveness").

famously declined to render what is now called an "advisory opinion" about the legal rights and obligations of the United States in the war between England and France.[192] The Justices explained that they were "judges of a court in the last resort,"[193] which suggests they wished to avoid the possibility of being overruled by the Executive Branch.[194] The Justices appear to have given voice to an institutional interest in maintaining the Court's authority as a respected arbiter of legal disputes. Similar logic had surfaced a year earlier in *Hayburn's Case*, in which the Justices held unconstitutional a statutory scheme that subjected judicial decisions to executive and legislative revision.[195]

In 1803, Chief Justice Marshall followed institutionalist logic in *Marbury*, as earlier discussed.[196] Approximately the same time that *Marbury* was decided, the Supreme Court also handed down *Stuart v. Laird*.[197] There, the Court upheld a congressional statute reorganizing the lower federal courts.[198] Michael Klarman suggests that although certain Justices harbored doubts about the statute's constitutionality, Chief Justice Marshall "and his brethren apparently calculated that to invalidate this statute was to guarantee Jeffersonian political retaliation against the Court."[199] The *Laird* opinion reasoned that "practice and acquiescence" in certain ways of organizing the judiciary had furnished a "practical exposition . . . too strong and obstinate to be shaken or controlled."[200]

Judicial concern with efficient administration is also longstanding.[201] A 1691 English court rejected a private suit against a defendant who built a bridge obstructing a public waterway, "chiefly to avoid multiplicity of actions"; for, the court reasoned, if the suit "may be brought by the plaintiff, it may be

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192 HART & WECHSLER, *supra* note 70, at 52.

193 *Id.* (quoting 15 THE PAPERS OF ALEXANDER HAMILTON 111 n.1 (H. Syrett ed. 1969)).

194 For other judicial statements of this principle, see Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.† (1792); Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113–14 (1948).

195 Hayburn's Case, 2 U.S. (2 Dall.) at 410 n.†.

196 *See supra* notes 149–52 and accompanying text.

197 5 U.S. (1 Cranch) 299 (1803).

198 For discussion, see Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1124 (2001).

199 *Id.* at 1124–25.

200 *Laird*, 5 U.S. (1 Cranch) at 309.

201 Levy, *supra* note 17, at 1008 n.1; Stern, *supra* note 50, at 383.

maintainable by every person passing that way."[202] Matthew Bacon's 1730 *New Abridgment of the Law* stated that "common nuisances against the public are only punishable by a public prosecution," and the party injured could not sue "as this would create a multiplicity of actions."[203] A 1792 English case indicated that "[i]f this action could be maintained, every Turnpike Act, Paving Act and Navigation Act, would give rise to an infinity of actions."[204] The Supreme Court of Pennsylvania in 1818 held that certain actions could be joined together to meet a jurisdictional amount in controversy, for when the plaintiff "thinks proper to join [disputes] . . . in one action, he should be encouraged in so doing, because it prevents multiplicity of suits."[205] Efficient administration seems to have been a basis for judicial decision making for a long time.[206]

An originalist might argue that historical practice is not sufficient; the question is instead whether institutionalism is (as William Baude and Stephen Sachs put it) the "official story" of the American legal system.[207] After all, judges can depart from the correct path.[208] Does "our legal system reflect[] a deep commitment" to institutionalism "publicly displayed in our legal practice"?[209] For efficient administration, courts' early public acknowledgment of concerns about resource constraints suggests that efficiency is part of the "official story" in the sense of the "public reasoning by which the Court purports to justify its actions."[210]

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202 Paine v. Partrich, (1691) 90 Eng. Rep. 715, 717 (KB); Carthew 191, 193. For further discussion of the "multiplicity of actions" reasoning, see Owen B. Smitherman, *History, Public Rights, and Article III Standing*, 47 HARV. J.L. & PUB. POL'Y 167, 193 (2024).

203 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 153 (London, A. Strahan. 6th ed. 1807) (1730).

204 The Governor & Co. of the Brit. Cast Plate Mfrs. v. Meredith, (1792) 100 Eng. Rep. 1306, 1307 (KB); 4 T.R. 794, 796.

205 Wurtz v. McFaddon, 4 Serg. & Rawle 78, 80 (Pa. 1818).

206 *See* Carolyn Shapiro, *Docket Control, Mandatory Jurisdiction, and the Supreme Court's Failure in* Rucho v. Common Cause, 2020 WIS. L. REV. 301, 304 (2022) (arguing that the Supreme Court in the 19th century adopted deferential standards of review for district-court decisions to manage caseload pressures).

207 William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1458–59 (2019); *see also* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2367 (2015).

208 Baude & Sachs, *supra* note 207, at 1468 ("[I]t's perfectly coherent to say (as we have) that while originalism is the official story of our legal system, many individual cases may turn out to be wrongly decided under that standard.").

209 *Id.* at 1458.

210 Baude, *supra* note 207, at 2387.

The case for "official story" status is harder to make with respect to legitimacy. Legitimacy issues are often not outwardly stated; for instance, Chief Justice Marshall in *Marbury* did not explicitly express the fear of executive disobedience. Further, critiques of institutionalism also have a strong pedigree. In the 1824 case *Osborn v. Bank of the United States*, Justice Johnson in dissent chastised the majority for satisfying the "public mind" instead of focusing on "legal correctness."[211] Chief Justice Marshall for the *Osborn* majority denied the charge, stating that "[c]ourts are the mere instruments of the law, and can will nothing."[212]

Nonetheless, longstanding institutionalist practices suggest that the relationship between originalism and institutionalism warrants further attention and historical research, rather than the assumption that the two approaches are incompatible. Judicial concern with legitimacy does not appear to have been morally impermissible, in the sense of an off-limits factor in judicial decision making. One might argue that legitimacy was a morally permissible but legally impermissible factor. Perhaps judges in unusual circumstances deemed themselves justified in overriding legal interests in favor of pressing moral concerns,[213] such as ensuring that the Supreme Court would be obeyed in the early years. The sphere for judicial consideration of legitimacy would then have been diminished.

Yet originalism is also compatible with the view that legitimacy—and efficient administration—are legally acceptable and even valuable factors within certain zones of discretion.[214] If Congress leaves it to the Supreme Court to decide when to grant certiorari, an originalist Justice may be able to consider legitimacy and efficient administration in determining whether to take a case.[215] Originalism could assign to judges' discretion choices about when to grant an equitable remedy, or how minimalist or maximalist an opinion to write. These

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211 22 U.S. (9 Wheat.) 738, 871–72 (1824) (Johnson, J., dissenting).

212 *Id.* at 866 (majority opinion).

213 *See* Baude, *supra* note 207, at 2395 ("[I]t is possible that a judge's duty to follow the law can be outweighed in some cases by more pressing moral concerns.").

214 *See* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 331 (2020) ("The law itself may confer judicial discretion.").

215 *See, e.g.*, Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief); Thomas P. Schmidt, *Orders Without Law*, 122 MICH. L. REV. 1003, 1029 n.145 (2024) (reviewing STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023)).

types of institutionalist decisions are explored in greater detail in Part IV. The point here is that originalism seems to leave room for legitimacy and efficient administration to be treated as legally permissible and even valuable factors.[216]

Textualism in statutory interpretation appears to leave little room for legitimacy or efficient administration, but a textualist judge need not ignore these factors entirely. On efficient administration, a textualist may hesitate before attributing to Congress the decision to pass a statute that would interfere with the orderly workings of the federal courts. Indeed, many textualist judges in habeas cases have appealed to the need to respect Congress's choice to limit habeas relief in the Antiterrorism and Effective Death Penalty Act.[217] It is harder to see how textualists could give legitimacy meaningful weight. Perhaps a public outcry in response to a court ruling suggests the court interpreted Congress's words incorrectly. But the views of the public at the time of the ruling might diverge from the views of elected representatives when the statute was enacted.

Still, there may be varieties of textualism that accommodate institutional interests to a greater degree—perhaps a "version of textualism" that, as Grove puts it, "authorizes interpreters to make sense of the statutory language by looking at social and policy context, normative values, and the practical consequences of a decision."[218]

In particular, a possible source of compatibility between textualism and judicial institutionalism—including the interest in legitimacy—is the idea of "substantive canons." As Justice Barrett has observed, "[s]ubstantive canons are rules of construction that advance values external to a statute"; "[t]hey stand in contrast to linguistic or descriptive canons, which are designed to reflect grammatical rules (such as the punctuation canon) or speech patterns (like the inclusion of some things implies the exclusion of others)."[219] One might argue that important constitutional or other legal values support

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216 Not all originalists have deemed appearances legally irrelevant. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (justifying a preference for clear rules rather than multifactor tests on the basis that "[w]hen a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*.").

217 *See, e.g.*, Jones v. Hendrix, 143 S. Ct. 1857, 1870 (2023).

218 Grove, *supra* note 189, at 286.

219 Biden v. Nebraska, 143 S. Ct. 2355, 2376–77, 2376 n.1 (2023) (Barrett, J., concurring) (citing Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 117 (2010)). The "[p]unctuation [c]anon" is the principle that

consideration of legitimacy or efficient administration. Thus, statutory text could be interpreted in a manner that promotes institutional interests. A textualist would be willing to take this step only in limited circumstances—for instance, if the text were ambiguous,[220] or if there were some textual indication that the statute left room for consideration of institutional factors.

The relationship between substantive canons and textualism is complex.[221] Though many such canons "have a long historical pedigree," "they instruct a court to adopt something other than the statute's most natural meaning"[222] and so are arguably "in significant tension with textualism."[223] To the extent textualists accept substantive canons, however, they should consider treating legitimacy and efficient administration as interests that courts could justifiably promote—especially given that these interests have longstanding roots in judicial practice.[224]

Overall, formalist theories can accommodate a degree of institutionalism. In general, formalist institutionalism is likely to have the most sway in defined areas of judicial discretion, and it is less probable for institutionalism to shape the bounds of judicial discretion. Institutionalism, therefore, provides some reason to choose other theories of constitutional or statutory interpretation, or at least more flexible versions of originalism and textualism. However, institutionalism is still able to speak to formalists.

"[p]unctuation is a permissible indicator of meaning." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 161 (2012).

220 *But see* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (arguing that "courts should reduce the number of canons of construction that depend on an initial finding of ambiguity" and instead "seek the *best reading* of the statute").

221 *See, e.g.*, Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 537–38 (2023); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1040 (2023); Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 886 (2017).

222 *Biden*, 143 S. Ct. at 2377 (Barrett, J., concurring).

223 *Id.* (quoting Barrett, *supra* note 219, at 123–24). Justice Barrett's concurrence focuses on "strong-form canon[s]," which "counsel[] a court to *strain* statutory text to advance a particular value." *Id.* at 2376 (citing Barrett, *supra* note 219, at 168).

224 Textualists might also account for legitimacy and efficient administration as part of the "absurdity canon," which (in John Manning's words) "rests on a judicial judgment that a particular statutory outcome, although prescribed by the text, would sharply contradict society's 'common sense' of morality, fairness, or some other deeply held value." John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2405–06 (2003). Yet the absurdity doctrine would justify resorting to institutionalism in only a small number of cases.

IV
Applying Judicial Institutionalism

This Part tackles the question of how judges should rule if they are institutionalists. It shows that institutionalism has a wide range of contemporary applications and thereby offers further justification and explication of the institutionalist model. The Part does not prescribe a single path for institutionally minded judging. It instead presents a menu of illustrative options. Some options will be more congenial to various readers than others, depending on a reader's judicial philosophy. Further, institutionalist judging depends on the contextually sensitive exercise of judgment, and it is not possible to provide a determinate answer in advance to the question of how an institutionalist judge would rule in each case.

The examples of institutionalism offered here are geared toward the current legal and political environment in the federal courts. Some institutionalist strategies cited here will be suited to all federal judges, whereas others will be more specific to the Supreme Court or to federal appellate or district courts. The implementation of institutionalism can vary across different levels of the federal judiciary. For example, lower-court judges face distinctive questions about how broadly or narrowly to read a higher court's precedent. This Part does not seek to provide a comprehensive analysis of institutionalist methodologies. But the complex interplay among institutionalist strategies at different levels of the federal judiciary is a promising avenue for future research.

The Part begins by examining the idea that judges should be institutionalists when, and only when, they are legally granted discretion. This idea plausibly justifies institutionalism in several contexts, including the certiorari process, the determination of a holding's scope, and the sphere of equitable remedies. Yet people will disagree on when judges properly have discretion—and institutionalism can also inform the decision as to when judges have discretion in the first place. I flesh out this argument by examining justiciability determinations, unpublished opinions, and stare decisis. Perhaps most controversially, the Part goes on to contend that judges can justifiably rule one way on the merits for institutional reasons even when the balance of factors would otherwise point in the other direction.

The Part next takes up a couple of global issues surrounding the application of institutionalism. First, I defend the practice of case-by-case, "retail" institutionalism against the suggestion that institutionalism should work only at the

"wholesale" level of choosing a judicial philosophy or formulating general legal doctrines.

Second, I address the relationship between institutionalism and transparency. It is sometimes charged that judges who publicize their consideration of institutional factors would lose public respect; therefore, institutionalism is either self-defeating or requires an unacceptable degree of deception. I question the assumption that the public expects full transparency and defend a degree of circumspection in judging.

A. Institutionalism and Discretion

One way to incorporate institutionalism in judicial decision making, as earlier noted, is for judges to rule based on institutional considerations only when they are granted discretion by some other source of law.[225] For example, Price's proposal for "symmetric constitutionalism" takes this form: "[i]nsofar as the governing legal materials of text, structure, precedent, and history leave room for judicial discretion, courts in a polarized period should lean towards outcomes, doctrines, and rationales that confer valuable protections across both sides of the Nation's major political divides . . . ."[226] This suggests that judges should take the public's views into account, but only when "governing legal materials . . . leave room for judicial discretion."[227]

An older example comes from an 1818 New York case on breach of the covenant of quiet enjoyment.[228] The New York court warned that if one party "could succeed, a flood-gate of litigation would be opened . . . . [T]his Court ought, if it can, consistently with law, to check the attempt in the bud."[229] This suggests that when a court faces a choice between two legally permissible options—each "consisten[t] with law"—the "flood-gate" concern cuts in favor of one. In other words, it is legally permissible and indeed valuable for efficient administration to guide judges' exercise of discretion, but only when the law gives judges that discretion.

If one accepts that judges can and should use their discretion to promote institutional interests, then institutionalism can be implemented in a variety of contexts and can have a wide-ranging impact. The following are some of these applications.

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225 *See supra* notes 141–42 and accompanying text.

226 Price, *supra* note 83, at 1274–75.

227 *Id.* at 1274.

228 Whitbeck v. Cook, 15 Johns. 483 (N.Y. Sup. Ct. 1818).

229 *Id.* at 491.

1. *Certiorari Jurisdiction*

Between the late 1800s and 1988, Congress passed several bills eliminating aspects of the Supreme Court's mandatory jurisdiction and expanding the Court's discretion over the cases it wished to hear.[230] Today, the vast majority of the Supreme Court's caseload comes from the discretionary certiorari process.[231] The Supreme Court's Rule 10 sets out "Considerations Governing Review on Certiorari," which include circuit splits and decisions on an "important question of federal law that has not been, but should be, settled by this Court."[232] Rule 10 emphasizes, however, that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion," and that the considerations mentioned in the Rule do not "contro[l]" or "fully measur[e] the Court's discretion."[233]

As now-Justice Amy Coney Barrett noted in law review articles, discretionary certiorari jurisdiction "permits the Court to pick and choose the questions it hears."[234] The Court's discretion in selecting questions to answer on the merits helps to "keep most challenges to precedent off the Court's agenda," for "[i]f a precedent is so deeply embedded that its overruling would cause chaos, no Justice will want to subject the precedent to scrutiny."[235] This view suggests that Justices can use their discretion in the certiorari process to promote institutionalist goals such as preserving precedent.

In fact, there is considerable reason to believe that the Justices sometimes deny certiorari out of a concern that putting a case on the merits docket would risk igniting public controversy. The Second Amendment furnishes an example. Between 2010, when the Supreme Court held that the Second Amendment individual right to bear arms applied to the states,[236] and 2021, when the Court granted review in *New York State Rifle & Pistol Association v. Bruen*, the Court denied or dismissed numerous petitions challenging state restrictions on firearms.[237]

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230 Shapiro, *supra* note 206, at 303–06.

231 *See* HART & WECHSLER, *supra* note 70, at 30.

232 SUP. CT. R. 10.

233 *Id.*

234 Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1731 (2013).

235 Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1929–30 (2017).

236 McDonald v. City of Chicago, 561 U.S. 742 (2010).

237 *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting) (recounting the history).

Justices who supported an expansion of Second Amendment rights lamented the Court's refusal to face the issue head-on,[238] intimating that the Court was responding to the fear of public backlash.[239]

The certiorari process, therefore, can function as a powerful engine of institutionalism. In fact, the denial of certiorari would have been an institutionalist way to resolve *Dobbs*.[240] The district court in *Dobbs* had enjoined the Mississippi law prohibiting abortions after 15 weeks (with limited exceptions), and the Fifth Circuit had affirmed based on the Supreme Court's controlling precedent in *Roe* and *Casey*.[241] From a legal perspective, there was no immediate need to reconsider decades-old precedent. One might argue that the Supreme Court could not hope to evade review of a state's challenge to *Roe* forever. At some point, a Court of Appeals would uphold a state law that conflicted with *Roe*. Or, more broadly, the Supreme Court as constituted in 2021 was on a collision course with *Roe* and had to resolve the issue at some point; why not in 2022?

As an initial matter, this Article advocates for lower-court judges, in addition to Supreme Court Justices, to take an institutionalist approach. If an appellate court, prior to *Dobbs*, had upheld a state law conflicting with *Roe*, those judges would not have been acting institutionally. More fundamentally, Supreme Court Justices—even those who disagreed with *Roe*—could have benefited from a delay in the reckoning with the abortion issue.[242] Overruling *Roe* so shortly after the change in personnel that took place after Justice Ginsburg's death likely encouraged the view that the political process drove the result in *Dobbs*. This impression was arguably compounded by Mississippi's litigation choices. Mississippi's petition for certiorari, filed before Justice Ginsburg's death, stated that "the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*."[243] The Court granted certiorari following

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238 Friedman v. City of Highland Park, 577 U.S. 1039, 1039 (2015) (Thomas, J., dissenting from denial of certiorari).

239 *See N.Y. State Rifle*, 140 S. Ct. at 1527.

240 *See* Schmidt, *supra* note 215, at 1030.

241 Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 268–69 (5th Cir. 2019), *rev'd and remanded*, 142 S. Ct. 2228 (2022).

242 *Cf.* Richard M. Re, *Should Gradualism Have Prevailed in* Dobbs*?*, *in* Roe v. Dobbs: The Past, Present, and Future of a Constitutional Right to Abortion 140, 141–45 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024) (arguing that the Supreme Court should have proceeded more gradually than it did in *Dobbs*).

243 Petition for Writ of Certiorari at 5, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) [hereinafter *Dobbs* Cert. Petition]; *see Dobbs*, 142 S. Ct. at 2313 (Roberts, C.J.,

Justice Ginsburg's death and Justice Barrett's confirmation.[244] Then, Mississippi argued that "*Roe* and *Casey* are . . . at odds with the straightforward, constitutionally grounded answer to the question presented."[245]

In this context, the risk that a decision to overrule *Roe* would be perceived as politically driven was high. The Court's timing exacerbated this perception, even if some political backlash was inevitable. The Supreme Court could have ameliorated the impact on its legitimacy—even if it could not have eliminated it—by denying certiorari in *Dobbs*.

Regardless of whether one agrees with my conclusions about *Dobbs*, the overall point is broader. The Justices' discretion over the certiorari docket can and should be employed to serve institutionalist goals of legitimacy and efficient administration. This is especially true for Justices who feel they cannot consider institutional factors if asked to decide a case on the merits.

2. *Minimalism*

Another institutionalist tool, which can be deployed by lower-court judges in addition to Supreme Court Justices,[246] is judicial minimalism. "[M]inimalism" here means "[d]ecisional minimalism," which Cass Sunstein defines as "saying no more than necessary to justify an outcome, and leaving as much as possible undecided."[247] Minimalism is a way for judges to exercise discretion because it counsels judges to select a narrower ruling when they have the option of ruling in different ways. One might take the view that "if it is not necessary to decide more, it is necessary not to decide more,"[248] meaning that judges lack discretion to depart from the narrowest possible ruling. But minimalism is not generally perceived to be

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concurring in the judgment). The certiorari petition added in a footnote that if the Court determined it could not "reconcile *Roe* and *Casey* with other precedents or scientific advancements," then the Court "should not retain erroneous precedent." *Dobbs* Cert. Petition, *supra*, at 5–6 n.1.

244 Dobbs v. Jackson Women's Health Organization, 141 S. Ct. 2619, 2619 (2021) (mem.) (order granting certiorari).

245 Brief for Petitioners at 1, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

246 *See generally* Schmidt, *supra* note 21.

247 Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996); *see also* Schmidt, *supra* note 21, at 839 (defining "[d]ecisional minimalism" as "the narrow and shallow disposition of cases").

248 PDK Lab'ys Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

mandatory, and judges are likely to disagree on whether it is indeed "necessary to decide more."[249]

Minimalism can promote legitimacy because judicial opinions that set out fewer propositions of law are less likely to stoke public distrust. This is especially true in morally fraught areas of law. As Sunstein puts it, "[c]ourts should try to economize on moral disagreement by refusing to challenge other people's deeply held moral commitments when it is not necessary for them to do so."[250] People with different moral commitments can agree with, or at least agree to live with, relatively narrow propositions of law.

For example, the Supreme Court in 2021 issued a fairly narrow holding in *Fulton v. City of Philadelphia*.[251] That case presented the question whether the City of Philadelphia violated the Free Exercise Clause by refusing to refer children to Catholic Social Services (CSS) upon discovering that CSS would not certify same-sex couples to be foster parents.[252] Every member of the Supreme Court agreed that Philadelphia had violated the Free Exercise Clause because it had a system of individual exemptions that it did not make available to CSS.[253] Six members of the Court declined to overrule *Employment Division v. Smith*, a 1990 precedent that made it harder to bring a Free Exercise claim.[254] Justice Barrett, concurring in *Fulton*, expressed doubt about *Smith*, but she also asked what might replace *Smith*, and she stated: "[w]e need not wrestle with these questions in this case, though, because the same standard applies regardless whether *Smith* stays or goes."[255]

Fulton provides an example of a minimalist ruling that advanced institutional interests. The nine Supreme Court Justices surely have different views about the scope of the Free Exercise Clause, and members of the American public have divergent opinions about the polarizing intersection of religion and antidiscrimination law. Yet the Court was able to coalesce on a holding that focused on the City policies in the particular case, and it declined to issue a broader ruling overruling an

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249 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 375 (2010) (Roberts, J., concurring) ("[W]e cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.").

250 Sunstein, *supra* note 247, at 8.

251 141 S. Ct. 1868 (2021).

252 *Id.* at 1874.

253 *Id.* at 1882.

254 *See id.* at 1876–77; *see also* Emp. Div. v. Smith, 494 U.S. 872 (1990).

255 *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).

important Free Exercise precedent (*Smith*). To be sure, the *Fulton* ruling supported an expanded understanding of the Free Exercise Clause, and it has real-world effects on conflicts between antidiscrimination law and religious liberty. In a time of intense cultural disputation over this type of conflict, however, the Court in *Fulton* avoided throwing a great deal of flames on the fire.

One might object that institutionalism actually supports more muscular judging, rather than minimalism.[256] On this account, judges improve perceptions of the courts when they clarify the law and pay attention to their role in guiding the conduct of other government officials, the public, and lower courts.[257] If judges are minimalists, by contrast, people might come to the view that judges lack the virtue of courage[258] and are unwilling to stand up for legal principles in the face of public opposition.[259]

To be sure, minimalism will not always be conducive to public trust in the courts. But minimalism is a valuable tool in the institutionalist's arsenal. Minimalist rulings, in deciding less, provide judges with more leeway to change course if the consequences for legitimacy or efficient administration are adverse. Moreover, minimalism is especially useful in a divided society. An act perceived by one person as judicial bravery can be perceived by another as egregious judicial overreach. An institutionalist approach may well give rise to weaker feelings on both ends of the political spectrum. A "milquetoast" equilibrium may be more conducive to broad-based public trust in the courts than a ruling that stokes passionately intense reactions. This is not a uniform rule, but it is a possibility that judges should weigh seriously.

Further, minimalism need not be deployed in every circumstance. The interest in crafting narrow rulings can be overridden by other moral or legal considerations, such as the

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256 *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 534–35 (1989) (Scalia, J., concurring in part) (arguing that the Court should "go beyond the most stingy possible holding today" to avoid "retaining control, through *Roe*, of . . . a political issue," a situation that "continuously distorts the public perception of the role of this Court").

257 For a critique of the Supreme Court for being overly minimalistic and insufficiently attentive to its guidance function, see Frederick Schauer, *Abandoning the Guidance Function:* Morse v Frederick, 2007 SUP. CT. REV. 205, 227–35.

258 *See* Solum, *supra* note 109, at 190.

259 *See* Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020 25, 33 (Jack M. Balkin & Reva B. Siegel eds., 2009); Schmidt, *supra* note 21, at 879.

function of the federal courts in declaring law and guiding conduct.[260] Indeed, minimalism when practiced by the Supreme Court may be in tension with efficient administration insofar as it results in increased lower-court litigation to clarify points that the Court left underspecified.[261] Overall, however, minimalism is a strategy that the institutionalist can pursue to bolster court legitimacy in a time of social conflict.

3. *Equitable Remedies*

Another area in which judges can use their discretion to promote institutionalist goals involves equitable remedies. Equity in general is sometimes understood as a "safety valve" that judges can employ when the otherwise-applicable legal rules create unjust results or permit parties to engage in opportunistic behavior.[262] Historically, equity provided an occasion for chancellors to exercise discretion to hear a grievance when the law provided no adequate remedy.[263] More recently, the Supreme Court has emphasized that "[a] preliminary injunction is an extraordinary remedy never awarded as of right," one that requires federal courts to "exercis[e] their sound discretion."[264] That discretion is guided by the following standard: "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[265]

The discretionary nature of these equitable remedies,[266] and the factors that courts are instructed to weigh, lend themselves to consideration of legitimacy and efficient administration.

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260 *See, e.g.*, Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1368–71 (1973); Schmidt, *supra* note 21, at 837–38.

261 *See* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 21–26, 40–59 (2009).

262 *See* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1080 (2021).

263 *See* Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1789 (2022).

264 Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) (citing Munaf v. Geren, 553 U.S. 674, 689–90 (2008)). The Supreme Court has also described issuance of a stay pending appeal as "left to the court's discretion." Nken v. Holder, 556 U.S. 418, 434 (2009).

265 *Winter*, 555 U.S. at 20.

266 The breadth of judicial discretion to expand equitable remedies has been the subject of dispute. *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308 (1999). Nonetheless, existing equitable remedies incorporate a degree of discretion.

The Supreme Court has urged "courts of equity" to "pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[267] The "public consequences," in my view, should include the public response to the injunction. In other words, a federal court ought to consider the possibility that an equitable remedy will breed public distrust of the judiciary. The interest in efficient administration could also be incorporated into the judicial calculation in equity. If the grant or denial of an equitable remedy would drain judicial resources, then that outcome would not be in the public interest.

An example implicating both legitimacy and efficiency interests comes from judicial decrees that require federal courts to exercise ongoing supervision over institutions such as school systems and prisons. These decrees are sometimes called "structural injunctions," especially when courts order changes to the internal organization of supervised institutions.[268] Although structural injunctions may be less common today, the Supreme Court has previously upheld remedial decrees mandating ongoing supervision of other institutions.[269] These remedies have been criticized for exceeding the bounds of federal judicial power.[270]

The interest in maintaining effective authority provides reason for courts to scrutinize the bounds of equitable relief. As Douglas Laycock notes, courts are often reluctant to grant "impractical decrees" because they want to protect "courts from dissipating their authority and resources in failed attempts to reach beyond their grasp."[271] The worry about dissipating authority sounds in legitimacy; courts are properly wary of taking on tasks implicating the politically contentious distribution of public money and personnel. The worry about judicial resources sounds in efficient administration; courts are appropriately cautious about the investment of their own resources that might accompany a restructuring mandate.

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267 *Winter*, 555 U.S. at 24.

268 *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 11 (1978) ("The constitutional wrong is the structure itself; the reorganization is designed to bring the structure within constitutional bounds . . . .").

269 *See, e.g.*, Brown v. Plata, 563 U.S. 493 (2011) (upholding remedial order requiring reduction of prison population in response to constitutional violations); Milliken v. Bradley, 418 U.S. 717, 753 (1974) (ordering "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools").

270 *Brown*, 563 U.S. at 555 (Scalia, J., dissenting).

271 Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 764 (1990).

This is not to say injunctions requiring continuing supervision should always be off the table. As noted throughout this Article, considerations of legitimacy and efficient administration can be outweighed. Further, there might be a legitimacy interest in issuing an injunction that can fully address the breadth of the constitutional violation. Otherwise, members of the public might conclude that the federal courts are powerless to enforce their decrees.[272] These are the types of context-sensitive factors that institutionalist judges need to weigh. But there are institutionalist reasons to be wary of judicial involvement in politically contentious and resource-intensive equitable remedies.

Another practical application of institutionalism in the realm of equitable discretion involves the Supreme Court's so-called "emergency" or "shadow" docket. Recently, commentators and Justices have drawn attention to applications for short-term relief from the Supreme Court.[273] The relief requested is usually a stay or injunction pending disposition of a writ of certiorari. Although requests for short-term relief are not new—for instance, individuals facing execution have long sought stays from the Court—the use of the emergency docket in high-profile and politically charged cases has engendered controversy.[274] Deciding cases on a short-time fuse, without the benefit of full briefing and oral argument, may surprise the public and contribute to the impression that Supreme Court Justices are not engaging in full deliberation.

Some Justices have sought to "lower the temperature" with respect to the emergency docket. In 2021, Justice Barrett (joined by Justice Kavanaugh) concurred in the denial of an application for injunctive relief in a case involving COVID vaccination.[275] She indicated that the applicant's "likel[ihood] [of] . . . success on the merits"—a criterion the Court uses to

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272 *See Milliken*, 418 U.S. at 738 ("[A]s with any equity case, the nature of the violation determines the scope of the remedy.") (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

273 *See, e.g.*, STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015); *see also* Merrill v. Milligan, 142 S. Ct. 879, 883 (2022) (Kagan, J., dissenting from grant of applications for stays) (criticizing "the scanty review this Court gives matters on its shadow docket").

274 *See* sources cited *supra* note 273.

275 Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief). For discussion, see Schmidt, *supra* note 215, at 1030.

determine whether to grant an injunction—encompasses "not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case."[276] Therefore, a Justice who did not believe certiorari should be granted, even if she disagreed with the ruling below, should not vote to grant an emergency injunction.

The approach of factoring in the likelihood of an eventual grant of certiorari when assessing a request for emergency relief is salutary from an institutionalist perspective. The Court need not risk a blow to its legitimacy through a ruling that appears to side with one segment of the population in a high-profile dispute, when the Court would not hear the case following briefing on the merits. Further, the Court might be able to disincentivize time-intensive applications for stays and injunctions if it signals that it is less likely to grant these applications.

Thus, the discretionary features of equitable remedies are promising areas for institutionalist judging. More generally, even those skeptical of judicial power to consider institutional factors in ruling on the merits should be willing to entertain the idea of deploying judicial discretion to advance institutionalism. As the next section explains, however, there will be disputes about when judges possess discretion.

B. The Range of Discretion

Thus far, this Part has described ways in which federal judges can exercise discretion allotted to them by other sources of law. But a more fulsome understanding of institutionalism will also guide judges' views about when they have discretion. This section illustrates such an understanding of institutionalism by focusing on two issues: justiciability and unpublished opinions in federal appellate courts.

1. *Justiciability*

Justiciability determinations are fertile ground for institutionalist judging.[277] Alexander Bickel cataloged several devices that courts could (and, in his view, should) use to relieve the political pressures involved in wielding the antimajoritarian

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276 *Does*, 142 S. Ct. at 18.

277 *See* Metzger, *supra* note 14, at 377 ("Concerns about workability, judicial capacity, and interbranch relations also lie at the core of many political question decisions and other justiciability doctrines.").

power of judicial review.[278] For Bickel, to employ these devices was to exhibit the "passive virtues."[279] Many of these devices involve justiciability.

For example, standing doctrine makes it more difficult for political disputes to become legal "cases." To Bickel, standing "creates a time lag between legislation and adjudication," thereby "cushion[ing] the clash between the Court and any given legislative majority and strengthen[ing] the Court's hand in gaining acceptance for its principles."[280] One might question the potency of the "time lag" in an era of pre-enforcement review—that is, when courts routinely review the legality of government action before it takes effect. But surely the possibility of dismissal for lack of standing can help lower the political stakes for the courts. Examples include a 2021 Supreme Court case dismissing a challenge to the Affordable Care Act for lack of standing,[281] and a 2020 Supreme Court case dismissing Texas's suit contesting presidential election results, again for lack of standing.[282] Standing can also be used to address extensive growth in caseload volume.[283]

Other justiciability doctrines that help to promote institutional interests are ripeness, mootness, and the political question doctrine. Ripeness delays or even eliminates cases that are contentious in the public sphere or that involve a clash between the courts and the political branches. For instance, the Supreme Court in December 2020 drew on both standing and ripeness to dismiss for lack of jurisdiction a challenge to a memorandum by President Trump on the apportionment of seats in the House of Representatives following the 2020 census.[284] According to the Court, it was uncertain whether the memorandum would affect state apportionment or funding, and so "judicial resolution of this dispute is premature."[285] The

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278 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 113–33 (1962).

279 Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). For criticism of Bickel's idea of the "passive virtues," see Gunther, *supra* note 122, at 25 ("[A] virulent variety of free-wheeling interventionism lies at the core of [Bickel's] . . . devices of restraint.").

280 BICKEL, *supra* note 278, at 116.

281 California v. Texas, 141 S. Ct. 2104, 2112 (2021).

282 Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (mem.).

283 *See supra* note 53 and accompanying text.

284 Trump v. New York, 141 S. Ct. 530, 536 (2020).

285 *Id.*

consequence of dismissing the challenge was to avoid resolving the issue, as President Biden rescinded President Trump's census policy on his first day in office, January 20, 2021.[286]

Mootness prevents courts from issuing apparently unnecessary rulings and so provides a way for courts to avoid controversy. For example, the Supreme Court in 2020 dismissed as moot a challenge to a New York City rule limiting the transport of firearms.[287] Justice Alito, in dissent, intimated that the Court had responded to public pressure. He noted that "[f]ive United States Senators" had "filed a brief insisting that the case be dismissed," lest the Court "face the possibility of legislative reprisal."[288] The Justices in the majority may not have been specifically worried about the Senators' brief. But it seems plausible that the Court was concerned about a merits decision on the hot-button political issue of firearms.

The political question doctrine is perhaps the justiciability doctrine most explicitly geared toward preventing the federal courts from being embroiled in controversies that could damage their legitimacy.[289] The Supreme Court has held that a case presents a nonjusticiable political question when "the question is entrusted to one of the political branches" or lacks "judicially discoverable and manageable standards."[290] To be sure, the Court has not treated a question as "political" in the technical sense whenever it involves an area of political controversy.[291]

Nonetheless, the political question doctrine in practice helps to extricate the federal courts from cases in which the public perception of the courts might be damaged. The doctrine emerges with particular regularity (at least in the lower courts)[292] in sensitive substantive areas, such as states' internal governance, foreign relations, and the President's military policies.[293] In the 2019 case *Rucho v. Common Cause*, the Court held that

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286 Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census, 86 Fed. Reg. 7015 (Jan. 25, 2021).

287 N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1527 (2020); *see also supra* notes 236–39 and accompanying text.

288 *N.Y. State Rifle*, 140 S. Ct. at 1528 (Alito, J., dissenting).

289 *See* Bickel, *supra* note 279, at 74–76.

290 Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

291 *See Baker*, 369 U.S. at 217 ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'").

292 *See* Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031, 1035 (2023) ("[T]he political question doctrine is more vibrant in the lower courts than in the Supreme Court.").

293 HART & WECHSLER, *supra* note 70, at 258–66.

partisan gerrymandering claims presented nonjusticiable political questions because there were no judicially manageable standards for adjudicating these claims.[294] The Court predicted deleterious consequences of a contrary ruling:

> The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives.[295]

The Court feared that political controversy would surround the federal courts every time the Justices were asked to resolve a partisan gerrymandering claim.

Several types of justiciability determinations, therefore, can be understood as mechanisms to promote the federal courts' legitimacy by extricating the courts from politically charged disputes.[296] Standing, mootness, and ripeness could also be viewed as means of promoting the judiciary's interest in efficient administration. The courts need not spend time and resources on disputes in which parties lack (or no longer possess) a "concrete" stake.[297]

Some might argue, however, that justiciability determinations should not be made with an eye toward institutional goals. Perhaps the question should simply be the formalist one of whether a particular exercise of jurisdiction falls within the Article III "judicial power." Those skeptical of the judicial power to exercise the "passive virtues" to avoid controversy may cite the Supreme Court's 1821 decision in *Cohens v. State of Virginia*:

> We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

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294 139 S. Ct. at 2506–07.

295 *Id.* at 2507.

296 For an argument that a clearly defined system of separation of powers enables the judiciary to use justiciability doctrines to limit its intervention, see Rivka Weill, *On the Nexus Between the Strength of the Separation of Powers and the Power of the Judiciary*, 31 WM. & MARY BILL RTS. J. 705, 752–73 (2023).

297 *See* Friends of the Earth, Inc. v. Laidlaw Env't Servs., 528 U.S. 167, 191–92 (2000) ("Standing doctrine ensures, among other things, that the resources of the federal courts are devoted to disputes in which the parties have a concrete stake," though scarcity of resources is more relevant for standing than mootness, as to "abandon[] . . . the case [at an advanced stage] may prove more wasteful than frugal"); Uzuegbunam v. Preczewski, 141 S. Ct. 792, 809 (2021) (Roberts, C.J., dissenting) (urging the Court not to "encourage litigants to fight over farthings" in a mootness case).

> Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.[298]

In fact, all of the justiciability doctrines just mentioned have versions that sound in formalism rather than discretion.[299] The Supreme Court recently characterized Article III injury in fact for standing purposes in terms of "whether plaintiffs have identified a close historical or common-law analogue for their asserted injury."[300] Legitimacy and resource constraints would seemingly not affect the historical inquiry. In addition, the Court has described both mootness[301] and ripeness[302] as stemming from the Article III "actual controversy" requirement, meaning that judges have less leeway to apply these doctrines "prudentially." As to the political question doctrine, Herbert Wechsler's "classical" position casts the doctrine as a matter of constitutional interpretation; the issue is whether the Constitution has allocated decision-making authority to a nonjudicial branch of government.[303] The political question doctrine, on this view, is totally "different from a broad [judicial] discretion to abstain or intervene."[304]

Despite moves toward formalism in justiciability, several of the doctrines retain a "prudential" element. Granted, the Supreme Court has recently sought to eliminate "prudential" standing doctrines—such as the question of whether the plaintiff is within the "zone of interests" that a statute was designed to protect—by assimilating these doctrines to other dimensions of a case, such as the presence of a cause of action.[305] Yet the Court officially continues to treat as "prudential" the rule that plaintiffs may not assert the rights of third parties,[306] giving federal courts greater discretion over whether plaintiffs may

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298 Cohens v. Virginia, 19 U.S. 264, 404 (1821).

299 For critique of the Supreme Court's constitutionalization of prudential limits on judicial power, see Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 877–90 (2017).

300 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021).

301 Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 160–61 (2016).

302 Trump v. New York, 141 S. Ct. 530, 535 (2020).

303 HART & WECHSLER, *supra* note 70, at 248; HERBERT WECHSLER, PRINCIPLES, POLITICS & FUNDAMENTAL LAW 11–14 (1961).

304 WECHSLER, *supra* note 303, at 14.

305 *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014).

306 *Id.*

assert such rights.[307] Mootness doctrine, too, continues to contain "prudential" aspects, such as an "exception" to mootness "for a controversy that is capable of repetition, yet evading review."[308] As for the political question doctrine, Bickel's "prudential" view continues to be an alternative to Wechsler's "classical" view.[309] For Bickel, the political question doctrine was "something greatly more flexible" than an ordinary act of constitutional interpretation, "something of prudence, not construction and not principle."[310]

The question remains, therefore, how federal courts should think about justiciability determinations. Are they susceptible to the exercise of judicial discretion?[311] The response depends on the aims for which discretion would be deployed. The Article has defended institutionalism as a normatively valuable way to maintain the effective authority of the federal courts. If this is correct, then federal courts should have sufficient discretion to promote institutional interests in deciding justiciability issues.

The animating intuition behind this view is based on Bickel: an emphasis on institutionalism in justiciability determinations allows courts to walk the line between "guiding principle" and "expedient compromise" in a manner that benefits society.[312] As Bickel wrote, "no society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways to muddle through."[313] Judges, for better or for worse, have a role to play in holding a complex and pluralistic society together, and justiciability is an important tool they can wield.

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307 *See* June Med. Servs. v. Russo, 140 S. Ct. 2103, 2118 (2020), *abrogated on other grounds by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

308 United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1540 (2018) (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016)); *see* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562 (2009).

309 HART & WECHSLER, *supra* note 70, at 248–49.

310 BICKEL, *supra* note 278, at 125–26.

311 A case that highlights the relationship between justiciability and institutionalism is Naim v. Naim, 350 U.S. 891 (1955) (per curiam); *see also* Naim v. Naim, 350 U.S. 985 (1956). There, the U.S. Supreme Court dismissed a challenge to Virginia's ban on interracial marriage despite having mandatory appellate jurisdiction, seemingly out of a concern that deciding the case on the merits would hinder the enforcement of Brown v. Board of Education, 347 U.S. 482 (1954). *See* Grove, *supra* note 14, at 2257–58; Siegel, *supra* note 14, at 993 n.183.

312 Bickel, *supra* note 279, at 49.

313 *Id.*

Zooming out, justiciability is an example of an area in which the nature and quantity of federal courts' discretion is contested. It will not suffice to say "judges can be institutionalists when they have discretion to do so," because the question is precisely when they have discretion. The suggestion here is that institutionalist goals properly guide the decision about when federal judges have discretion to decline to adjudicate a case on justiciability grounds.

The best institutionalist response will not always be to decline to adjudicate a case. If the executive branch formulates a policy that is widely viewed as significant overreach—for example, that invades privacy in a manner that is broadly seen as objectionable—hearing the case on the merits could inspire more public confidence than dismissing the case on justiciability grounds. An institutionalist approach allows judges greater leeway to take a justiciability "out" when doing so would advance the goals of legitimacy and efficient administration. The question of when exactly these goals would be advanced depends on the exercise of judgment and cannot necessarily be determined in advance. In many instances, however, declining to adjudicate a case on the merits will enable courts to avoid public opprobrium or to alleviate caseload concerns.

2. *Unpublished Opinions*

The docket of federal appellate courts, unlike that of the U.S. Supreme Court, is not discretionary. There is usually appeal as of right from federal district courts.[314] Nonetheless, federal appellate courts have adopted practices that give judges a substantial amount of control over their agendas.[315] One is the unpublished decision (also called a "summary order" or "memorandum disposition," depending on the circuit). In recent years, over 87% of federal appellate court decisions have been "unpublished."[316] Unpublished

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314 *About the U.S. Courts of Appeals*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals#:~:text=The%20Right%20to%20Appeal,of%20the%20trial%20court's%20actions [https://perma.cc/GY6P-FFNY].

315 Merritt E. McAlister, *Managing Out the Federal Appellate Judge*, 42 REV. LITIG. 165, 167 (2023).

316 *See id.* at 169, 169 n.20; Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 VAND. L. REV. 605, 608 (2020).

opinions may be cited by litigators;[317] courts usually do not treat them as binding precedent, though they have some persuasive force.[318]

Unpublished opinions are a mechanism for federal appellate court judges to promote institutionalist goals. The most commonly cited justification is efficient administration. In the 1960s the federal Judicial Conference was concerned about the cost of printing opinions;[319] in ensuing decades, the federal judiciary has focused on the difficulty of writing reasoned opinions in every case.[320] When judges write unpublished opinions, they can dispose of more cases in a shorter period. They need not devote the same amount of energy to each statement in an unpublished decision as they would do for a published opinion. In addition to efficiency, judges may seek to further goals related to the integrity of the legal process in issuing unpublished decisions. Unpublished decisions help judges to avoid issuing opinions that have the force of binding precedent but are barely reasoned or poorly reasoned. Further, judges can issue unpublished opinions when the lawyering or briefing is sufficiently problematic that they are concerned about making "bad law" in light of the record created by the adversarial process.

Unpublished opinions, however, provoke controversy. Indeed, a panel of the Eighth Circuit once ruled that unpublished opinions were unconstitutional to the extent they were not precedential, because the doctrine of precedent is implicit in the federal judicial power (though the Eighth Circuit panel decision was vacated as moot by the full appellate court).[321] No statute or constitutional provision explicitly authorizes unpublished opinions. The criteria for issuing unpublished opinions are found in each circuit's rules or internal operating procedures. These rules often provide that opinions will be published when: the decision establishes a new rule of law, modifies existing law, creates or resolves a circuit conflict,

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317 FED. R. APP. P. 32.1 (court may not prohibit citation of unpublished opinions issued after January 1, 2007).

318 *See* Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix*: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 4, 9–16 (2002).

319 Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 726 (2008).

320 *See* Hart v. Massanari, 266 F.3d 1155, 1177 (9th Cir. 2001); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 168–69 (1996).

321 *See, e.g.*, Anastasoff v. United States, 223 F.3d 898, 903 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

or discusses an issue of public interest.[322] In practice, these criteria leave judges with a fair amount of discretion as to when to publish an opinion. The Second Circuit appears to make such discretion explicit, stating that "[w]hen a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by an opinion (i.e., a ruling having precedential effect), the panel may rule by summary order."[323] In the Second Circuit, judges apparently decide whether a published opinion would serve a "jurisprudential purpose."

From an institutionalist perspective, the leeway built into unpublished opinions is a feature rather than a bug of the system. Unpublished opinions further the interest in legitimacy in a manner that bears some similarities to the Supreme Court's certiorari docket.[324] Judges can designate an opinion "unpublished" when they believe that doing so would damage public confidence in the courts. They can delay the ultimate determination of a politically contentious issue by declining to issue an opinion that will create binding precedent across the circuit. In addition, judges on a panel can speak with one voice more frequently—if one judge says, "I'll join you but only if [it is] unpublished."[325]

The proposal that unpublished opinions are an appropriate tool for promoting legitimacy will raise hackles. If a decision would create controversial precedent, would it not make new law, and thus need to be published? Put differently, how can appellate judges arrogate to themselves discretion not granted by law?

There may be some wiggle room with respect to the permissible degree of discretion. The question of whether a decision breaks new legal ground can be answered differently. Judges can err on the side of answering "no" when they believe that a published opinion would damage the court's legitimacy. More fundamentally, the institutionalist approach results in identifying sources of discretion that would not otherwise exist. The claim is that judges are justified in downplaying decisions

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322 *See, e.g.*, D.C. CIR. R. 36(c)(2); 4TH CIR. LOC. R. 36(a); 6TH CIR. I.O.P. 32.1(b)(1); 9TH CIR. R. 36–2.

323 2D CIR. I.O.P. 32.1.1(a).

324 *See Hart*, 266 F.3d at 1177 (describing unpublished memorandum dispositions and certiorari review as "achiev[ing] the same end").

325 Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 VA. L. REV. 1315, 1329 (2022) (quoting Interview with Judge, Court of Appeals for the Fourth Circuit (Feb. 8, 2021)) (alteration in original).

that would impair public confidence even when the decision would warrant publication in the absence of institutionalist considerations.[326]

The institutionalist defense of unpublished opinions has limits. First, the institutional interests of the federal judiciary as a whole must truly be at issue. A judge's desire for herself—or even the circuit—not to be reversed does not justify assigning unpublished status. Judges should not forgo publication for certain categories of cases simply because they find them tedious. Second, even if the institutional interests of the federal judiciary are at issue, they can be overridden. If the failure to create published precedent in an immigration case, for example, would leave standing an agency rule that advances judicial economy but turns away a large number of otherwise-deserving asylum seekers, then institutional factors should not take precedence. Third, judges should be sensitive to the distributional impact of unpublished opinions; for instance, they should be open to publishing *pro se* cases. In my view, these recommendations would result in more (perhaps many more) published opinions than at present. This is one example of ways in which the Article's institutionalist proposal could lead to less, rather than more, judicial behavior that is deemed suspect.

To be sure, permitting unpublished opinions creates the risk that judges will act based on self-regarding factors or will shortchange certain types of litigants. But the focus should be on promoting the informed use of judgment with respect to publication decisions, rather than condemning the practice generally. Overall, unpublished opinions properly function as an institutionalist tool for federal appellate judges.

C. Stare Decisis

This section continues the practical application of institutionalism by addressing the relationship between institutionalism and stare decisis. In addition to identifying institutionalist reasons for a robust doctrine of stare decisis, I argue that it can be beneficial for judges to greatly narrow a precedent rather than overruling it (so-called "stealth overruling").[327]

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326 For discussion of whether courts should list clear criteria for publication if they are not going to adhere to them, see *infra* Part IV.F.

327 *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 3 (2010); Richard M. Re, Essay, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1864 (2014).

Stare decisis is often considered a core focus of judging that is oriented toward legitimacy,[328] and for good reason. Stare decisis contributes to a perception among the public that the law is stable over time.[329] Public policy changes depending on the party in power, but the law is expected to be longer lasting and more resilient in the face of shifting political majorities.[330] This is not to say precedents must never be overruled. Yet courts that rapidly shift position risk losing public confidence in the stability of the law.

Stare decisis also benefits efficient administration. A change in precedent could create a surge in litigation as lower courts "digest" the ruling. Further, a stable legal landscape allows parties to plan their affairs without litigation. As then-Judge Benjamin Cardozo explained, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before."[331]

The criteria the Supreme Court has cited for overruling a case leave room for consideration of institutional interests. The factors referenced in *Dobbs*, for example, are "the nature of [the earlier Court's] . . . error, the quality of [the earlier decisions'] . . . reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[332] Both legitimacy and efficient administration influence workability, disruption of other areas of law, and reliance. To be sure, institutional interests could favor overruling. The prior precedent may undermine public confidence in the courts or

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328 Metzger, *supra* note 14, at 373; Hellman, *supra* note 10, at 1115–20.

329 Payne v. Tennessee, 501 U.S. 808, 827 (1991) (stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process").

330 *See* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1503 (2013).

331 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

332 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022). For a critique of the Court's stare decisis analysis in *Dobbs*, see Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023). Of course, there are multiple accounts of stare decisis; for Justice Thomas, for example, the Court should not adhere to "demonstrably erroneous precedent" regardless of other stare decisis factors. Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring). But the factors the Supreme Court currently enumerates permit consideration of institutional issues.

engender costly litigation.[333] That recognition is consistent with the Supreme Court's admonishment that stare decisis is "not an inexorable command."[334] On the whole, however, institutional factors provide reason for judges to hesitate seriously before overruling a case, especially in an area of law highly salient to the public.

Institutionalism informs, in particular, the practice of "stealth overruling"—here understood as significantly narrowing a precedent (even to the vanishing point) rather than overruling it outright.[335] For example, the Supreme Court has greatly restricted the circumstances in which a person injured by federal officers can allege a violation of constitutional rights pursuant to the *Bivens* doctrine.[336] Still, the Court has not overruled *Bivens*, despite calls from some Justices to do so.[337] Similarly, the Court has substantially confined though not overruled "taxpayer standing," a doctrine that permits certain challenges to Establishment Clause violations.[338]

At times, the Supreme Court has chosen to overrule outright after a narrowing process. For example, the Supreme Court in the 1989 case *Teague v. Lane* indicated that a new rule of criminal procedure could be applied retroactively if the rule had "watershed" status.[339] In ensuing years, the Court read this doctrine extremely narrowly,[340] and in the 2021 case *Edwards v. Vannoy*, the Court eliminated the "watershed" exception.[341] The *Vannoy* Court explained: "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law,

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333 The Supreme Court made both arguments in *Dobbs*. *See* 142 S. Ct. 2228, 2272–75, 2279 (2022).

334 Pearson v. Callahan, 555 U.S. 223, 233 (2009) (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

335 *See* Friedman, *supra* note 327, at 3; Re, *supra* note 327, at 1864.

336 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971); *see* Egbert v. Boule, 142 S. Ct. 1793, 1803 (2022) ("If there is even a single 'reason to pause before applying *Bivens* in a new context,' a court may not recognize a *Bivens* remedy.") (quoting Hernández v. Mesa, 140 S. Ct. 735, 743 (2020)).

337 *See Egbert*, 142 S. Ct. at 1810 (Gorsuch, J., concurring in the judgment); *Hernández*, 140 S. Ct. at 750–53 (2020) (Thomas, J., concurring).

338 *See* Hein v. Freedom from Religion Found., 551 U.S. 587, 603–09 (2007) (plurality opinion) (narrowly reading the recognition of taxpayer standing in Flast v. Cohen, 392 U.S. 83 (1968)).

339 489 U.S. 288, 311–12 (1989) (plurality opinion).

340 *See, e.g.*, Whorton v. Bockting, 549 U.S. 406, 417 (2007).

341 141 S. Ct. 1547, 1560 (2021).

misleads judges, and wastes the resources of defense counsel, prosecutors, and courts."[342]

The *Vannoy* Court's statement about wasting "the resources of . . . courts" suggests that there may be institutionalist reasons to overrule outright rather than to engage in stealth overruling. Indeed, this may be true for the efficiency interest; a clear rule eliminates incentives to litigate.[343] But legitimacy may pull in the opposite direction—that is, in favor of "stealth overruling." Keeping precedents formally on the books helps to maintain the public impression that the Court is staying the course. One might protest that the Court is being disingenuous and limiting opportunities for democratic dialogue between the courts and the public. Transparency concerns are discussed below.[344] For now, I note that "stealth overruling" still reflects some actual fidelity to a stable legal system. First, the precedent remains operative in some factual circumstances, even if only those in which the rule was initially recognized. Second, a precedent that stays on the books could be revived and made broader by a new set of judges. Third, declining to overrule outright could contribute to a legal culture in which requests to reverse precedent are made less frequently.

Moreover, "stealth overruling" has expressive benefits that should carry weight, even if transparency concerns are on the other side. According to expressive theories of law, legal acts have *meanings* in addition to *consequences*.[345] A judicial opinion that narrows but does not overrule precedent can send the message that the court values continuity even when it makes changes. Retaining a doctrine while changing it in meaningful ways allows the legal system to reconcile flexibility with constancy. This common-law-like approach helps change occur in a stable manner.[346]

Of course, sometimes the expressive meaning of staying the course should be repudiated. In fact, the expressive perspective provides an affirmative reason for the Supreme Court

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342 *Id.*

343 However, if judges rapidly reject claims for which substantial narrowing has already occurred, then the efficiency gains for courts resulting from overruling outright would be reduced (although litigants would still expend fewer resources if the precedent were overruled outright).

344 *See infra* Part IV.F.

345 Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597 (1996).

346 *Cf.* Strauss, *supra* note 179, at 914 ("It is valuable to society that people who disagree sharply on important issues can have, as common ground, an acceptance of the text.").

to reverse morally repugnant precedents such as *Plessy v. Ferguson*[347]—to say "no" to racial segregation in a publicly resounding way. In many cases, however, the legitimacy interest counsels in favor of maintaining precedent even if it is necessary to narrow its range of application greatly.

D. Institutionalism and "The Merits"

This section addresses the impact of institutionalism on matters more squarely encompassed in the "merits" of a case. There may not be a stark distinction between the merits and some applications of institutionalism addressed earlier, such as the scope of equitable remedies or the doctrine of stare decisis. Nonetheless, this section's prescriptions may be viewed as more "aggressive" than some of the institutionalist options presented earlier. I argue that it is acceptable for judges to stretch the facts or the contours of precedent to arrive at a narrower holding or one less likely to inflame public sentiment. More broadly, even if the balance of noninstitutionalist considerations about how to interpret a constitutional or statutory provision leads one way, a judge could still be justified in ruling the other way for institutionalist reasons.

An example of institutionalist judging that (in my view) was a "stretch" is the Supreme Court's 2018 decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[348] A Colorado baker named Jack Phillips refused to bake a cake for a same-sex wedding, and Colorado's civil rights commission found it a violation of state antidiscrimination law.[349] The Supreme Court confronted the question whether the commission's order violated the First Amendment.[350] The Court, in an opinion joined by six Justices (including Justices Kagan and Breyer), held that the commission's actions had violated the Free Exercise Clause because the commission had subjected the baker to "clear and impermissible hostility" toward his religious beliefs.[351]

What was the evidence of hostility? The most notable one was the following comment from a Colorado commissioner:

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347 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

348 584 U.S. 617 (2018). For further discussion of the Supreme Court's "exit ramp" in *Masterpiece*, see Greene, *supra* note 87, at 121–24.

349 *Masterpiece*, 584 U.S. at 626–27.

350 *Id.* at 623–24.

351 *Id.* at 634.

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[352]

The Court also pointed to the "difference in treatment" between Phillips' case and those of other bakers who refused to create cakes with images disapproving of same-sex marriage alongside religious text.[353] The commission had found the other bakers "acted lawfully in refusing service."[354]

The Court's identification of "clear and impermissible hostility" was a reach. The commissioner's remarks were critical, and it is possible that they reflected underlying hostility. Yet it is also quite possible that the commissioner was identifying what she saw as the logical consequences of ruling in favor of the baker. Though the *Masterpiece* Court stated that the commissioner "describe[d] a man's faith as 'one of the most despicable pieces of rhetoric that people can use,'"[355] the commissioner actually characterized the *use* of religion to hurt others as despicable.[356] Further, the commissioners were not the only decisionmakers in the proceedings that led to the Supreme Court case.[357] To the extent the evidence for and against hostility was equivocal, the commissioners did not evince "clear and impermissible hostility."[358]

The difference in treatment of Phillips and other bakers, which the Court also cited as evidence of hostility, went to a complex question in the case: how to apply the distinction

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352 *Id.* at 635 (quoting Transcript of Colorado Civil Rights Commission Meeting at 11–12, *In re Craig v. Masterpiece Cakeshop, Inc.*, (No. P20130008X, CR2013-0008) (July 25, 2014) (accessed from https://www.yalejreg.com/nc/a-lemon-cake-ascribing-religious-motivation-in-administrative-adjudications-a-comment-on-masterpiece-cakeshop-part-ii/) [https://perma.cc/97JA-VNMP]).

353 *Id.* at 636.

354 *Id.*

355 *Masterpiece*, 584 U.S. at 635 (quoting Transcript of Colorado Civil Rights Commission Meeting at 11–12, *In re Craig v. Masterpiece Cakeshop, Inc.*, (No. P20130008X, CR2013-0008) (July 25, 2014) (accessed from https://www.yalejreg.com/nc/a-lemon-cake-ascribing-religious-motivation-in-administrative-adjudications-a-comment-on-masterpiece-cakeshop-part-ii/) [https://perma.cc/97JA-VNMP]).

356 Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 141 (2018).

357 *Masterpiece*, 584 U.S. at 673 (Ginsburg, J., dissenting).

358 *Id.* at 634 (majority opinion).

between denying service based on identity and denying service based on disagreement with a message. According to the commission, Phillips refused service based on identity, whereas the other bakers refused service based on their objection to an offensive message.[359] Even if the commission was wrong, it seems possible to diverge from the Court on the best way to conceptualize refusals of service for legal purposes without evincing hostility toward religion.

Thus, the Supreme Court in *Masterpiece* gave the facts an interpretation that was not the most reasonable one to reach the legal conclusion that there was a violation of the Free Exercise Clause. The Court likely did so, however, in service of an institutionalist goal: to craft a relatively narrow holding by focusing on the facts of the specific case.[360] The conflict between antidiscrimination law and religious liberty was brewing. *Masterpiece* represents an effort to evade direct confrontation with the question of when religiously motivated service providers may decline to perform services, in violation of state antidiscrimination law.

True, the Court did not escape this question for long.[361] In 2023, the Court held in *303 Creative v. Elenis* that a religious website designer could refuse to create a website for same-sex weddings on free-speech grounds.[362] Still, a time lag could have been salutary in allowing the public to "digest" the Supreme Court's 2015 holding in *Obergefell v. Hodges* that there was a constitutional right to same-sex marriage.[363] From an institutionalist perspective, the goal of avoiding a head-on conflict between important legal principles in a highly visible case justified the *Masterpiece* Court's slippery approach.

The more general point is that institutionalism can help to determine the merits of a case. Even if the balance of noninstitutional factors tilts one way, institutionalism could justify ruling the other way. Here is an example from a less charged context than *Masterpiece*. New York Judiciary Law § 487, a

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359 *See id.* at 636–37; *id.* at 672–73 (Ginsburg, J., dissenting) (Phillips refused service based on identity, whereas other bakers refused service based on objection to "demeaning message").

360 *See* Greene, *supra* note 87, at 122.

361 Moreover, *Masterpiece* may well have had real-world effects in the interim. *See* Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from* Masterpiece Cakeshop, 50 J. LEGAL STUD. 75, 77 (2021) (indicating that *Masterpiece* reduced the willingness of businesses to serve same-sex couples).

362 143 S. Ct. 2298, 2313 (2023).

363 576 U.S. 644, 681 (2015).

state law, creates a private cause of action against an attorney who "[i]s guilty of any deceit or collusion, . . . with intent to deceive the court or any party."[364] Several federal courts (adjudicating state-law claims under *Erie*) have interpreted § 487 to require "'extreme' or 'egregious'" deceit.[365] Although other courts have questioned whether the "extreme or egregious" requirement is compatible with the statute's text,[366] the requirement could be justified on efficiency grounds. A higher threshold for deceit discourages parties from bringing collateral litigation attacking the conduct of opposing counsel. Such litigation causes delays and frustrates relief.

In other words, even if a statute should be interpreted in X way absent institutionalist considerations, institutional factors could justify ruling Y. This approach does not support an institutionalist result when the balance of other factors weighs heavily in the other direction. But institutionalism can tip scales pointed against it.

There is a limit to what institutionalism can justify. For example, an appellate judge should not vote to hold an error harmless in a criminal case simply because reversal would result in a time-consuming trial. The stakes for the individual criminal defendant are too high.

One might protest: are the stakes of institutionalism for the individual litigant not always too high? In response, courts must keep an eye out for systemic consequences. As Richard Fallon and Daniel Meltzer have argued, courts have the dual role of providing remedies in individual cases and of ensuring that government generally acts within legal bounds.[367] The latter goal, from my perspective, may require judges to take the long view and consider which rules will ultimately serve the public at large. In Bickel's words, "[i]t will not do to exalt an individual claim to particular justice over all other problems that adjudication may have to solve and over all other consequences that it entails."[368] There is no formula that judges can use to decide when institutionalist considerations can be outweighed by the "individual claim to particular justice." The search for a formula in judging generally, however, is elusive.

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364 N.Y. JUD. LAW § 487(1) (McKinney 2024).

365 *See, e.g.*, Seagrape Invs. LLC v. Tuzman, No. 19-CV-9736 (RA), 2020 WL 5751232, at *24 (S.D.N.Y. Sept. 25, 2020) (collecting cases).

366 *See, e.g.*, Dupree v. Voorhees, 959 N.Y.S.2d 235, 236 (App. Div. 2013).

367 Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79, 1787 (1991).

368 BICKEL, *supra* note 278, at 173.

E. Retail and Wholesale Institutionalism

The foregoing discussion has treated institutionalism as an approach that judges can apply on a case-by-case basis. It may be questioned, however, why judges should adopt such a "retail" version of institutionalism when they could instead apply institutionalism at the "wholesale" level.[369] "Wholesale" might mean using institutionalism to guide the choice of interpretive theory, like textualism or purposivism.[370] Or it could mean baking institutionalism into legal doctrines that apply across a variety of cases. For instance, rational-basis review plausibly reflects an institutionalist interest in avoiding excessive judicial intervention. As another example, the "act of state" doctrine, according to which "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory,"[371] suggests an institutionalist reluctance for judges to enter the fray of foreign affairs. Adopting institutionalism on a "wholesale" level—to guide either the choice of legal theory or the structure of a general legal doctrine—might accommodate institutionalist intuitions while limiting the ad hoc exercise of judicial discretion.

In response: as an initial matter, this Article's endorsement of retail institutionalism does not imply a rejection of wholesale institutionalism—that is, institutionalism informing the choice of judicial philosophy or the formulation of legal doctrines. Both wholesale and retail institutionalism could be salutary. This Article has discussed only selected examples of institutionalism, but future work could adduce more.

Moreover, the considerations motivating the adoption of wholesale institutionalism do not disappear simply because retail institutionalism is at issue. To the extent one approves of wholesale institutionalism, one should recognize at least some reason to be an institutionalist at the retail level. A strict dichotomy between wholesale and retail institutionalism is especially dubious when wholesale institutionalism involves judge-made doctrines such as the tiers of scrutiny or the act-of-state principle, which themselves raise questions about the grounding of judicial authority. More generally, jurisprudential theories and legal doctrines cannot always be applied mechanically. To the extent judges must exercise their judgment in particular cases,

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369 I thank Tara Grove and Ernie Young for engagement on this point.

370 *See* Grove, *supra* note 189, at 270.

371 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

why should they shut their eyes to institutional considerations if those factors are advisable in selecting a judicial philosophy or in formulating general legal doctrines?

Most fundamentally, part of retail institutionalism's value lies in its flexibility and adaptability to specific cases. These qualities make institutionalism susceptible to misuse, but other approaches to judging can be misused as well.[372] Responsiveness to the circumstances of a particular dispute is actually a beneficial aspect of judicial institutionalism.

Wholesale institutionalists might be inclined to strike a different balance between institutional concerns and other values, such as judicial restraint. But one should be skeptical of a stark distinction between "good" wholesale institutionalism and "bad" retail institutionalism. The normative bases for these practices are not so readily disentangled.

F. Institutionalism and Transparency

The value of transparency may be thought to pose a serious problem for the institutionalist.[373] If judges acknowledge that they are considering the interests of their own institution, then the public might lose faith in the courts. If institutionalist judges do not wish their theory to become self-defeating, then they must (on this view) hoodwink the public.

The "transparency objection" is a significant point, but it does not provide sufficient reason to jettison institutionalism. First, the objection relies on the empirical premise that people will lose trust in the courts if they believe that judges are deciding cases based partially on popular perceptions. That empirical premise warrants interrogation, especially if one is inclined to underscore the complexity of public opinion and the challenges of ascertaining it.[374] There is evidence that "members of the public tend to support the Court if it rules 'their way' in salient cases."[375] If people are gratified by a decision that accords with their moral and political views, they may not be critical of the courts for considering their reaction; indeed, such consideration might be received positively. Those who believed the Affordable Care Act needed to be "saved" in 2012 may not

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372 *See supra* Part II.B.2.

373 *See* Metzger, *supra* note 14, at 379.

374 Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2348 (1999).

375 Grove, *supra* note 14, at 2252; *see also* Bartels & Johnson, *supra* note 14, at 185.

have resented Chief Justice Roberts for voting to preserve it even if they thought (consistent with much public reporting) that he acted in the interests of his institution.[376] It is also not clear that the public would respond negatively to the revelation that judges take into account their own resource constraints. Judges openly appeal to considerations of judicial economy,[377] and people are familiar with managerial imperatives from their own lives.

Second, just as the public may not resent consideration of popular reaction, the public may not expect full transparency.[378] Judicial rulings are social acts; they are not necessarily windows into judges' souls. People may care less about the contents of a judge's heart than that the judge has shown them respect by ruling in the direction they favor. People may also expect judges to adhere to the common organizational practice of economizing in the face of resource constraints. They may not find it surprising or troubling that a judge would sign onto an opinion, even though there is some language in the opinion with which the judge disagrees, because the judge believes that a unified opinion would further the court's interests in legitimacy or efficient administration.[379]

Third, judicial transparency, and its absence, may be difficult to identify. The desire to avoid cognitive dissonance, or the practice of "motivated reasoning," may make it rare for judges to acknowledge—even to themselves—that they are ruling for institutionalist reasons but pretending in their opinion to rule for other reasons. Thus, the suggestion that judges should act in "good faith"[380] may not rule out much judicial conduct. Sometimes it might not even be ascertainable why a judge acted a certain way; the springs of human motivation are complex and multifarious. The challenge of measuring or attaining full transparency militates in favor of caution about elevating this value in the judicial calculus.

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376 *See* sources cited *supra* note 2.

377 *See supra* notes 49–56 and accompanying text.

378 *See* Wells, *supra* note 14, at 1052–53; David E. Pozen, *Seeing Transparency More Clearly*, 80 PUB. ADMIN. REV. 326, 328 (2019).

379 *See* Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2295 (2017) ("A judge does not breach her obligation of candor by joining an opinion that includes arguments that she regards as weak or possibly even fallacious, provided that the opinion also advances arguments that the judge believes adequately support the judgment.").

380 *See* FALLON, *supra* note 14, at 140–41.

Nevertheless, there may be a genuine conflict between the interest in promoting institutionalism and the interest in explaining one's reasons faithfully to the public. In these circumstances, judges should use their judgment about the importance of institutional goals and the degree of dissimulation they sense is required. Transparency, in other words, should not be treated as an absolute imperative.[381] It is also important for the public to have confidence in the judiciary and for the judiciary to function well.

This conclusion might strike some readers as unpalatable, particularly if one takes the view that citizens in a democracy are owed a true explanation for the way they are treated by the law.[382] That objection should be given weight, and it supports a judicial duty to take transparency seriously. For example, judges should attempt to say less in their opinions rather than providing an explanation that is clearly a false statement of their reasons. Further, if judges are ruling based on considerations X and Y and do not wish to cite Y, they should at least cite X. And judges should keep in mind that a persistent disjunction between proffered and genuine reasons may be detected by the public, with detrimental consequences for the institution.[383] In these ways, the conflict between transparency and institutionalism can be made less stark, though not fully eliminated.

Above all, judges should consider the approach of "transparency about transparency." That is, judges can make clear that they are not going to reveal all the reasons for their actions. The rules surrounding unpublished opinions provide an example. The Ninth Circuit states in its rules that it will publish opinions that establish a new rule of federal law.[384] Other circuits are more equivocal. The Second Circuit explains (as earlier noted) that the panel may rule by summary order if the decision is unanimous and "each panel judge believes that no jurisprudential purpose is served by an opinion."[385] The "belief"

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381 *See* Wells, *supra* note 14, at 1069.

382 *See* Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987, 1001–05 (2008).

383 *See* Shapiro, *supra* note 39, at 737.

384 *See* 9TH CIR. R. 36-2; *see also* D.C. CIR. R. 36(c)(2) (an opinion first resolving a "substantial" legal issue will be published). These rules also list other criteria that will trigger publication, such as criticizing existing law or involving "a legal or factual issue of unique interest or substantial public importance." 9TH CIR. R. 36-2(d).

385 2D CIR. I.O.P. 32.1.1(a); *see also* 6TH CIR. I.O.P. 32.1(b)(1) (identifying factors that panels "consider" when deciding on publication).

of each judge about "jurisprudential purpose" is a broad standard. But that standard likely reflects actual decision making with respect to unpublished opinions more accurately—and hence transparently—than a simple rule that opinions breaking new legal ground must be published.

More generally, acknowledging the presence of judicial discretion allows judges to be more up front with the public without providing full transparency. This is not a perfect solution; after all, some members of the public might resent the exercise of such discretion. But in tackling the challenging task of being sensitive to transparency issues while advancing institutional interests, clarity about the absence of transparency is a fruitful approach.

CONCLUSION

The federal courts today are at a point of inflection. The country is experiencing intense social and political conflict. Judicial institutions, along with other branches of government, face the question of how to respond.

This Article has argued that a philosophy of institutionalism should be an important part of the response. Judges ought to adopt an approach to deciding cases that meaningfully takes into account the aim of maintaining the court's effective authority. Effective authority, in turn, can be broken down into the concepts of legitimacy, understood in terms of public confidence in the courts; and efficient administration, understood as the smooth working of the court system given resource constraints.

Judicial institutionalism, the Article has contended, is valuable to the project of delivering justice. Institutionalism helps to maintain a system in which judicial rulings are publicly accepted and enforced, in which courts create fewer "permanent losers," and in which courts have an administrative infrastructure adequate to rule deliberatively and without unreasonable delay. Institutionalism in some forms is compatible with several theories of judicial interpretation. Textualists and originalists—among others—should not rule it out. The Article has presented several options for implementing institutionalism in the real world. Even those generally skeptical of institutionalism should find at least some of them congenial. These practical suggestions cover such areas as the certiorari process, equitable remedies, precedent, unpublished opinions, justiciability, stare decisis, and the "merits" of a case.

Institutionalist considerations are hard to ignore; indeed, a fair amount of institutionalist judging is already taking place. Far from encouraging lawlessness, the Article's suggestions would discipline and guide the practice of institutionalism, thereby promoting regularity and consistency in judging. To be sure, the defense of institutionalism presented here has not been unqualified. Institutionalism carries risks, such as that of empowering judges to promote self-interest at the expense of the public good. Nonetheless, attention to institutionalism as a significant but not absolute goal is a salutary way to support our societal commitment to the peaceful and lawful resolution of disputes.