

THE LANGUAGE OF LEGITIMACY: THE U.S. SUPREME COURT'S HIDDEN CULTURAL BINARIES IN THE AMERICAN CIVIL SPHERE

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Abstract

*How does the U.S. Supreme Court establish its legitimacy? Over the last two hundred years, the Court has interpreted the U.S. Constitution on watershed issues such as segregation, abortion, and marriage equality. And yet the Constitution is just 7,591 words. A puzzle thus emerges: how does the Court intelligibly interpret this short text for American society? This article develops a new theoretical and empirical account of such Supreme Court decisionmaking. Using Jeffrey Alexander's civil sphere theory, it shows how the Court consistently and inevitably draws on the American cultural discourse of liberty, thus rendering Constitutional values intelligible to the broader civil sphere. This article shows this through historical two case studies. First, it explores the cases guaranteeing and then overturning the right to abortion, from *Roe v. Wade* (1973) to *Dobbs v. Jackson Women's Health Organization* (2022). Second, it reviews the cases guaranteeing the right to bear arms, beginning with *District of Columbia v. Heller* (2008). The two sets of cases, at first blush, appear diametrically opposed: *Roe* is a triumph for the left, *Heller* a victory for the right. But, in fact, these cases will show that the discourse shares the same pattern: the Court's defenders hailed the decisions as a restoration of the Constitution or a guarantee of liberty, while opposing justices and commentators draw on the discourse of repression to accuse the Court of "creating a Constitutional right out of nowhere." This article thus unveils a hidden Supreme Court meta-language, contributing a new cultural sociological understanding of the Supreme Court as a societal institution with unique legal authority and symbolic power.*

Introduction

Over two hundred years, the Supreme Court has interpreted the Constitution on watershed issues such as slavery, abortion, and marriage equality. In the eyes of American society, the Court enjoys the ultimate power to definitively deliver the Constitution's meaning, thus commanding other branches of government, states, police, and lay people. And yet the Constitution is just 7,591 words—about 25 short pages. A puzzle thus emerges: how does the Court establish its legitimacy?

To understand this puzzle, consider the following. The Supreme Court lacks physical, material authority in the world. It consists of just nine people sitting in a single office building. A few dozen times a year, they post on their website a PDF text document opining on some dispute. Afterwards, the nine never personally do anything physical to enforce their decisions. The image is almost laughably bizarre: imagine, in the wake of the Court's *Roe v. Wade* decision, the nine justices fanning out around the country, knocking on hospital doors to personally ensure that a clinic is guaranteeing the right to abortion.

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In fact, the Court engages *symbolic power* to establish authority and foster *legitimacy* within American society. They are not people, but “justices,” embodying the very principle they rule on. They sit not in a sterile office building, but instead a columned, elevated courthouse designed resembling a Greco-Roman temple, situated in the nation’s capital just steps from the Capitol Building in Washington, D.C. Inside the judicial temple sits a single palatial courtroom, where the justices periodically appear to hear oral arguments. At such public hearings, the judges wear sacred black robes, entering and exiting the courtroom separately from the profane litigants and public audience members. In rendering their decisions the justices do not post PDFs on their website, but instead “issue legal opinions” that are numbered to show continuity to the earliest rulings of the Court from the 1700s. Each decision is codified in hardcover, leather-bound “official reporters” than then lines the wall of innumerable legal institutions in the country. Finally, the justices themselves do not enforce their opinions: lower courts, agencies, attorneys general, and U.S. marshals “carry out the Court’s order.” All such symbolic power legitimates the Court in its Constitutional rulings.

But such sources of symbolic power do not solely legitimate the Court: the rulings *themselves* must also do so. Each year, the Supreme Court justices apply Constitutional principles to new cases, both drawing from prior legal precedent and establishing new legal precedent for future cases. In doing so, they must be intelligible not only to courts and legal actors, but also to the American public writ large. This ensures that the Court will continue to enjoy legal authority in the future, as it issues tens of thousands of pages of written opinions.

Hence the puzzle: how does the Court establish legitimacy? This article will show that the Court’s most critical source of legitimation is its legal decisions. This legitimation occurs *communicatively*, through the text of the opinions rendered in cultural codes that resonate with American society, ensuring public trust and compliance. When done correctly, such communication interprets the Constitution and legitimates the Court’s authority, endowing them with performative power. And this arises through the Court’s performance, which must be “felicitous”—in the language of philosopher J.L. Austin. This then maintains legitimacy over centuries—as the Court has issued tens of thousands of pages of written opinions.

This article will thus unveil a hidden Supreme Court meta-language, contributing a new cultural sociological understanding of the Supreme Court as a societal institution with unique legal authority and symbolic power. Specifically, it will show how the Court engages in judicial review (issuing opinions that strike down legislation conflicting with the Constitution) by drawing on the American cultural discourse of liberty, part of the broader American cultural discourse proposed in Jeffrey Alexander’s civil sphere theory. In doing so, the Court renders Constitutional values intelligible to the broader civil sphere. When it does so, however, it may trigger a backlash: the countervailing discourse of repression. This article shows this by examining two case studies. First, it explores the cases guaranteeing and then overturning the right to abortion, from *Roe v. Wade* (1973) to *Dobbs v. Jackson Women’s Health Organization* (2022). Second, it reviews the cases guaranteeing the right to bear

arms, beginning with *District of Columbia v. Heller* (2008). The two sets of cases, at first blush, appear diametrically opposed: *Roe* is a triumph for the left, *Heller* a victory for the right. But, in fact, these cases will show that the discourse shares the same pattern: the Court's defenders hailed the decisions as a restoration of the Constitution or a guarantee of liberty, while opposing justices and commentators accused the Court of "creating a Constitutional right out of nowhere." Public newspaper editorials, legal commentators, and interviews with Supreme Court justices show other instances of this broader communicative discourse within the American civil sphere.

This article explores this question at an important time for the Court and for the country. The contemporary Roberts Court is undergoing a fundamental political shift rightwards—overturning the rights to abortion and prohibiting affirmative action under the Constitution while at the same time recognizing and expanding the right to bear arms.² Such transformation results from a change in the members on the bench: since the election of President Donald Trump in 2016, Justices Amy Coney Barrett, Neil Gorsuch, Ketanji Brown Jackson, and Brett Kavanaugh have replaced Justices Stephen Breyer, Ruth Bader Ginsburg, Anthony Kennedy, and Antonin Scalia, enshrining on the bench what is often seen as a conservative 6-3 vote "supermajority." Headlines now point to a "loss of legitimacy" for the Court, noting that the Court's approval ratings are at historic lows. Others on the left even call for an end to our Constitutional framework for democracy on the ground that "the Constitution is broken and should not be reclaimed" (Doerfler and Moyn 2022).

Below, I first review the sociological literature regarding the Supreme Court, showing that such literature emphasizes law through a central *critical* and *individual* vein—thus overlooking solidaristic, institutional analysis of the Court as an institution in American society with unique legal authority and symbolic power. Second, this article reviews data and methods. Third, it introduces two cases studies—the establishment of the right to abortion in *Roe v. Wade* and the right to bear arms in *District of Columbia v. Heller*—which both established an individual right within the Constitution but cut in opposite political directions. Finally, this Article concludes with analysis by considering the longer-term trend for shared civil discourse, frontlash and backlash trends, and the danger of anti-civil rhetoric.

In doing so, this Article makes several contributions. First, it establishes a new front in sociological understanding of the Supreme Court, clarifying its regulative and communicative role in contemporary American society. Second, it uses civil sphere theory to show how the Supreme Court justices, elected politicians, and media institutions all draw from the same discourse—thus offering a novel, solidaristic angle at the intersection of law and policy at a time when the American public is debating Supreme Court dramatic reform. And third, this Article expands civil sphere theory to address the Supreme Court, a regulative institution that has been heretofore overlooked in civil sphere scholarship.

² In the American legal tradition, eras of Supreme Court history are marked by the last name of the Chief Justice. The contemporary Court is thus named the "Roberts Court" after Chief Justice John Roberts, who succeeded Chief Justice William Rehnquist in 2005.

Literature Review

Sociological analysis of law is primarily preoccupied with the problems of social stratification, racial and gender disparities, and criminal justice, (Skolnick 2012) as well as, to a lesser degree, globalization (Halliday and Osinsky 2006)(Seron and Munger 1996).

Most law and society scholarship is distinguished by two characteristics. First, law and society scholarship is *critical*. In this sense, “sociological scholarship on law is powerfully influenced by neo-Marxist and critical perspectives, which are theoretically committed to a particular treatment of law, namely as ideology and coercive hegemonic discourse.”(Owens and Ford 2019) In particular, law and society scholarship is “less concerned with what the law *is* than with what the law *does*.” This “critical enterprise” conceives of itself as having “confirmed Weber’s hypothesized iron cage of bureaucratic, legal, and technological rationalization.” (Silbey 2005) Such scholarship thus opens the possibility for alternative theoretical frameworks which yield important perspectives on the Supreme Court’s function and power in society.

Second, much of the law and society tradition is rooted in *individuals’* legal experience “before the law,” “with the law,” and “after the law.” From this perspective, law is immanent in individuals’ lives until it becomes salient in legal dispute. (Ewick and Silbey 1998) One notable area of sociological research in law with a strong institutional focus is work on collective memory, which considers how law and law-like institutions (e.g., courts or truth and reconciliation commissions) shape shared knowledge of the past. (Savelsberg and King 2007) The other is the vast study of American criminal justice. This vast field has theorized criminal justice institutions such as prisons, courts, and police, through the lens of Foucauldian social control or Bourdieusian field theory. (Foucault 2012)(Garland 2002) (Smith 2008) (Wacquant 2009) And some recent work has considered judicial social theorizing (Owens and Ford 2019), the structure of oral arguments (Gibson 2024), and the nature of judicial decisionmaking (Feldman 2005). But even such work neglects the Supreme Court, focusing instead on truth and reconciliation commissions, lower court decisionmaking, and other bureaucratic institutions. (Savelsberg and King 2007) (Kohler-Hausmann 2013)

Such critical and institutional scholarly emphasis opens the door to new theoretical frameworks regarding the role of legal institutions in society. Legal institutions are not solely bureaucratic institutions that resolve disputes between individuals or merely “focus attention on issues and provide impetus for social movement mobilization.” (Meyer and Staggenborg 1996) They are the seat of a tremendous source of formal legal authority and, thus, symbolic power. And the discourses within such institutions yield tremendous insight into culture and society. Sociological study of legal institutions will thus recast sociological understandings of law itself. In sum, “[i]f classical and modern social science has often made little headway in understanding this democratic side of law, there has been a similar gap in legal theory, whose most influential traditions, or schools, have tended to bracket out the law’s moral and civil role.” (Alexander 2006)

Civil sphere theory is ideally suited for such study. Resisting individualistic, political philosophical accounts of democracy that focus on associational rights, civil sphere theory emphasizes democracy’s ability to symbolize fellow citizens as ones with whom we have civic bonds of solidarity. This is of course a challenge: America is a large, pluralist, capitalist democracy wherein citizens lack the ties of kinship as in the pre-modern times of mechanical solidarity. (Alexander 2006)

In doing so, civil sphere theory redresses the critical and individualistic posture by which sociology views law. First, it is overtly institutional. On this account, legal institutions concretize collective civil values. This occurs via two steps. First, communicative institutions (e.g., media, social groups, public opinion and its polling) engage in continuous, robust, and ephemeral discourse regarding “everything from income disparities, race relations, gender, and generation gaps to sports, food, fashion, film, literature, historiography, and celebrity.” In this quotidian discourse, communities gauge what comports with collective life—what is “civil” versus “anti-civil.” Then, second, regulative institutions (e.g., courts, public officeholders, and political parties) concretize the civil and anti-civil views with sanctions and rewards. (Alexander 2006) This may include, for example, Vice President Kamala Harris and former President Donald Trump, the leaders of today’s Democratic and Republican parties. And it includes the nine justices of the Supreme Court, today the Roberts Court.

Second, civil sphere theory is neither critical nor Weberian, drawing instead on the late Durkheimian tradition and the “strong program” in cultural sociology. This perspective emphasizes cultural autonomy within society, offering a thick description of culture that shows causality, namely, how culture influences institutional and individual societal actors. (Alexander and Smith 2001) As part of this program, Alexander and Smith have shown that the discourse of American civil society has often invoked a democratic code creating a “discourse of liberty”—associating social institutions with “law,” the “impersonal,” and the “rule regulated”—whereas the counter-democratic code associates such institutions with a “discourse of repression”—authoritarianism dominated by “power,” “arbitrariness,” and the “personal” (Alexander and Smith 1993). The discursive structure of *actors* presents a democratic code characterized by being “active,” “rational,” and “controlled,” contrasted with a “counter-democratic code” that is “passive,” “irrational,” and “excitable.” The discursive structure of *social relationships* highlights a “democratic code” marked by being “open,” “trusting,” and “truthful,” as opposed to a “counter-democratic code” that is “secret,” “suspicious,” and “deceitful.” Finally, the discourse of *social institutions* is most relevant here, and should be recreated in full:

The discursive structure of social institutions

Democratic code	Counter-democratic code
Rule regulated	Arbitrary
Law	Power
Equality	Hierarchy
Inclusive	Exclusive

Impersonal Contractual Groups Office	Personal Ascriptive Factions Personality
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(Alexander and Smith 1993) While this work has offered new insights into culture and the American civil sphere, it is also poised for new research trajectories. First, such scholarship on American civil discourse has only focused on two of the three branches of government—the executive and legislative branches—without analysis of the judiciary. For example, Alexander and Smith have considered sacred/profane binaries in historical political attacks on President Ulysses S. Grant, or discourse regarding the Watergate crisis or Iran-Contra Affair. (Alexander and Smith 1993) Second, as noted above, civil sphere theory emphasizes two types of societal institutions—communicative and regulative—but up until now has only focused on the former, leaving open the question of courts’ role in the civil sphere.

Data and Methods

This paper uses archival data sources to show cultural binaries both within Supreme Court legal discourse and in public commentary about the Court when it issues decisions.

As an empirical data source, the Court issues thousands of pages of written decisions annually. The Court decides 60–80 cases a year, and each individual case results in a legal opinion consisting of up to three distinct parts.(Statista 2024) A majority opinion is the definitive statement of law, states the court’s “holding” (legal conclusion) alongside material reasoning for its decision. On the opposite side, justices in the minority may “dissent,” writing individually or as a block to critique the majority’s decision—though such dissent holds no formal binding legal precedent. Third and finally, justices may also pen individual “concurrences,” wherein they add additional commentary or depart from the majority opinion’s reasoning—though such concurrences also lack binding legal authority.

The most important and canonical opinions that the Supreme Court issues are those in which the court engages in *judicial review*. The Supreme Court—often called “the highest court in the land”—holds the trump card in the American legal system because it wields the power to “strike down” federal and state legislation that conflicts with the text of the Constitution. This is comparatively strong judicial authority—many other legal systems in the world lack such judicial review power or split authority between a Supreme Court and a Constitutional Court. The Court will engage in such judicial review when deciding “controversies” before the courts, i.e., adjudicating disputes between parties in lawsuits. Once they have done so, in the U.S. common law system, cases are *sources of law*—binding precedent that courts must subsequently follow in future cases with similar facts.

Judicial review is, by definition, a highly interpretive enterprise. The text of the entire Constitution constitutes just 7,591 words. In any given case of judicial review, the

Court will be interpreting one phrase, such as “the equal protection of the laws.” While most judges recognize that they are “interpreting the Constitution,” such interpretation is infused with positivism: judicial disagreement is wholly rooted in the claim “my interpretation is correct, while yours is incorrect.” Both sides claim “rightful” meaning of text, history, and values. Thus, the composition of the Supreme Court justices is highly consequential. Depending on political temperament and/or judicial philosophy, the justices will interpret the meaning of a phrase to certain ends.

Meanwhile, other public officials, such as U.S. presidents, legislators, and political candidates, issue press releases, give interviews, and campaign on the workings of the Court. At times, Supreme Court justices even engage in such commentary, appearing in public fora for interviews about their biographies and reiterating their prior viewpoints in cases.

Beyond this, millions of pages of public commentary are issued annually about the workings of the Court—in legal analyses written by law professors and practitioners for legal audiences, but also in media coverage when a high-profile case is decided throughout the Supreme Court’s term.

This Article analyzes two canonical moments of contemporary judicial review: the right to abortion (*Roe v. Wade* (1973)) and the right to bear arms (*District of Columbia v. Heller* (2008)). The two cases are chosen because, at first blush, they appear diametrically opposed: *Roe* is a triumph for the left, *Heller* a victory for the right. Thus, depending on one’s political viewpoint, each line of cases is claimed to be a sign of the Court’s acting through “law” vs. “power,” acting “impersonally” vs. “personally,” or acting through “office” vs. “personality.” But, in fact, these cases will show that the discourse shares the same pattern: in both instances, justices and commentators accused the Court of “creating a Constitutional right out of nowhere,” while the Court’s defenders hailed the decisions as a restoration of the Constitution or a guarantee of liberty.

Furthermore, this Article draws on public newspaper editorials, legal commentators, and interviews with Supreme Court justices to show the broader communicative discourse within the American civil sphere. In doing so, it will show the same underlying binaries animating all such actors.

Two Case Studies of Judicial Review

Below, I analyze two lines of Supreme Court cases—first, regarding the right to abortion, and second, the right to bear arms. In both, I show the shared discourses of liberty and repression both in the Supreme Court jurisprudence and in the broader political and media discourse. This emerges based on this Article’s new proposed discursive structure of the Supreme Court:

The discursive structure of the Supreme Court

Democratic code	Counter-democratic code
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Rule regulated Law	Arbitrary Power
Constitutional Liberty Continuity Tradition Ordered liberty Rights Judicial restraint/neutralty	Unconstitutional Tyranny Contingency Deviation Selective liberty Repression Judicial activism/imposition

These binaries will emerge in the cases below. As the abortion and gun cases will show, terms like “constitutional,” “liberty,” “ordered liberty,” “judicial restraint,” or “judicial neutrality” are not cemented in fixed legal meaning. Nor are the critiques of “unconstitutional,” “selective liberty,” “judicial activism” or “judicial imposition.” Instead, left-wing and right-wing justices draw on these principles at different times; the application of both discourses is more arbitrary.

Case I: The Right to Abortion

The Cases: Griswold and Its Progeny

Neither the right to privacy nor the right to abortion are affirmatively codified in the Constitution. Over the past half-century, Supreme Court justices have differed on whether such rights may be found in the due process clause of the 14th Amendment, which prohibits “any State depriv[ing] any person of life, liberty, or property, without due process of law.”

Three turning points were critical for discourse regarding the rights to privacy and abortion under the 14th Amendment due process clause. The left-leaning Warren Court first recognized the right to privacy in *Griswold v. Connecticut* (1965), a case in which the Court ruled that “the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,” and such guarantees create “zones of privacy” leading judicial recognition of a right to privacy “older than the Bill of Rights—older than our political parties, older than our school system.” Since that time, the Court has rarely invoked the doctrine of penumbras. But the right to privacy has gone on to become the foundation for the right to interracial and gay marriage.

Just eight years later, the Court ruled in *Roe v. Wade* that the Constitution protects a right to abortion. In doing so, it again invoked the right to privacy and the concept of penumbras from *Griswold*. The Court interpreted the due process clause of the 14th Amendment as protecting a right to abortion based on a trimester framework, with the state having a greater regulatory interest with each passing trimester. The trimester framework was replaced by *Planned Parenthood v. Casey* in 1992, which asked whether a state law or regulation placed an “undue burden” on those who are pregnant.

Since the dawn of the Roberts Court in 2005 and the aforementioned rightward shift after the Trump Administration, the Supreme Court appeared poised to overturn *Roe* and its progeny. The decision was handed down in the 2022 *Dobbs v. Jackson Women's Health Organization* case, with the conservative majority overruling *Roe* and *Casey*. The Court ruled 6-3 that no Constitution right to abortion exists because the Constitution does not expressly or implicitly reference and protect abortion.

1973–2021: Left-Wing Discourse of Liberty, Right-Wing Discourse of Repression

The *Roe* opinion, authored by Justice Harry Blackmun, began by brief technical recitation of the states laws and procedural history of the abortion statutes at issue. It then proceeded to acknowledge the “sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires.” The Court also recognized that “[o]ne's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.” It then invoked the discourse of liberty and social institutions to assert that the Court’s “task . . . is to resolve the issue by constitutional measurement, *free of emotion and of predilection*.” The Court is recognizing the pluralism of views on abortion in a diverse civil sphere, and thus emphasizing its duty to establish neutral rules based on cross-temporal reason, not individual passion.

To affirm this task, the Court affirms that it is drawing on the impersonal “medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure *over the centuries*.” And it invoked a famous prior dissenting opinion from legendary Justice Oliver Wendall Holmes that the Court’s “judgment upon the question whether statutes embodying them conflict with the Constitution of the United States” should not turn on the contingent “accident” of judges personally “finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”

The Court then recited facts sympathetic to a discourse of liberty. Litigants Jane Roe and John and Mary Doe are described as a “pregnant single woman” a “childless couple, with the wife not pregnant,” and James Hubert Hallford, a “licensed practicing physician” who had been arrested for violating Texas’s laws criminalizing abortion. All sued in Texas, and on appeal to the Supreme Court argued that “the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy.”

At the outset of the heart of its analysis, the Court analyzes the statutes as being of “recent vintage” and thus contingent, rooted neither in “ancient” or “common law” traditions. It then reviews five categories—“ancient attitudes” (Greece and Rome permitted abortion), the Hippocratic oath (which included a minority-held “Pythagorean manifesto” that doctors will not give women “an abortive remedy”), the

common law tradition (no criminal penalties before the “quickening” at 16–18 weeks), English statutes (culminating in a 1967 law that permits abortion), and American law (which endowed women with a “substantially broader right to terminate a pregnancy than she does in most States today”). It then reviewed the positions of the American Medical Association, American Public Health Association, and the American Bar Association, which cumulatively show evolution toward some approval of abortion in contemporary law and policy.

This review then leads the Court to ask why contingent abortion laws were enacted in the 19th century. At this point, the discourse of liberty has already set up the enduring tradition of continuity as one of relative freedom to have an abortion, with the 19th century being the intervening period of oppression. The Court dismisses two reasons as outmoded—“Victorian social concern to discourage illicit sexual conduct” and older concerns about the safety of the medical procedure itself—as well as the claimed interest in “theory that a new human life is present from the moment of conception.” Regarding the latter, the Court affirms that a “State may assert interests beyond the protection of the pregnant woman alone” even under a “less rigid claim” than that wherein “life is present from the moment of conception.”

The Court then reaffirmed the Constitutional right to privacy, which it had previously recognized, and as well as the “personal rights” that are “fundamental” or “implicit in the concept of ordered liberty.” The Court then recognized that such right to privacy is “broad enough to encompass” the right to abortion. The Court lists the harms that pregnant mothers would endure should this not be the case—including medical diagnoses arising during pregnancy, the mental and physical burdens of child care, and the “stigma of unwed motherhood.” In sum, the Court is recognizing a liberty within a broader liberty it has already established.

The Court then stated that such right is “not unqualified,” and is to be balanced against the “important state interests in regulation.” According to the Court, there comes to be some threshold past which state compelling interests become paramount “as to protection of health, medical standards, and prenatal life.” It balances arguments on each side—toward absolute rights for the pregnant mother and the absolute right of the state to regulate abortion from conception—the Court. The Court frames this in terms of dual liberty: the State has “an important and legitimate interest in preserving and protecting the health of the pregnant woman,” and “in protecting the potentiality of human life.” The Court then decides the famously trimester framework. In the first trimester, the doctor and patient are “free” to determine whether an abortion should occur. Only at the beginning of the second semester may the states regulate abortion procedure, as long as it “reasonably relates” to the preservation and protection of maternal health. Finally, at the point of “viability,” a state may go so far as to proscribe abortion.

At the time *Roe* was decided, critics invoked the discourse of repression. In his dissenting opinion, Justice Rehnquist, the future Chief Justice, many times invoked the profane notions such as the majority opinion being “sweeping” and engaging in moral,

political “legislative” as opposed to impartial, neutral “judicial” judgment. Justice Byron White (joined by Justice Rehnquist) also dissented, arguing that:

I find nothing in the language or history of the Constitution to support the Court's judgment. The Court *simply fashions and announces a new constitutional right* for pregnant mothers and, *with scarcely any reason or authority* for its action, invests that right with sufficient substance to override most existing state abortion statutes. [T]he *people and the legislatures of the 50 States are constitutionally disentitled* to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. *As an exercise of raw judicial power*, the Court perhaps has authority to do what it does today; but in my view its judgment is *an improvident and extravagant exercise of the power of judicial review* that the Constitution extends to this Court.

Later that year, Professor John Hart Ely made similar claims in a now famous article appearing in the *Yale Law Journal*:

"[D]ue process" generally guarantees only that the inhibition be procedurally fair and that it have some "rational" connection—though plausible is probably a better word—with a permissible governmental goal. What is unusual about *Roe* is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus's existence is unable to overcome it *What is frightening about Roe is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure.* (Ely 1973).

Subsequent criticisms of *Roe* were not wholly from the right, nor solely from men. As one legal scholar has noted, “it is frequently said that even liberals believe that Justice Blackmun’s majority opinion was poorly written and reasoned.” (Chemerinsky 2007) In a 1992 lecture, Ruth Bader Ginsburg (a year before becoming a Supreme Court Justice) stated about *Roe* that “[d]octrinal limbs too swiftly shaped may prove unstable.” Her concern was that *Roe* focused on the wrong argument: the Court based the *Roe* decision on the fact that restricting a woman’s access to abortion violated privacy, whereas Ginsburg believed that the Court should have decided on the basis of gender equality. She felt that it would have been better defended under the equal protection clause, providing a better shield from future attacks. (Gupta 2020). Years later, in 2013, Justice Ginsburg publicly stated her other concern that *Roe* stopped gradual legislative and judicial recognition of the right to abortion, stating “[m]y criticism of *Roe* is that it seemed to have stopped the momentum on the side of change,” Ginsburg said. (Heagney 2013).

In 1992, Justice O’Connor’s *Casey* plurality opinion framed *Roe* as a question of liberty, beginning her opinion with the claim:

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her

pregnancy in its early stages, *Roe v. Wade*, . . . that definition of liberty is still questioned.

From her perspective, the foundational concept of liberty to have an abortion is under threat. She then proceeds to affirm—or arguably, reinterpret and recast—*Roe*’s “essential holding”:

First is a recognition of *the right of the woman to choose to have an abortion* before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of *the State’s power to restrict abortions after fetal viability*, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that *the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child*. These principles do not contradict one another; and we adhere to each.

In other words, for Justice O’Connor, the central question is affirming liberty, which must be “unquestioned” because such a sacred value can never be clouded by profane “doubt.” She invokes a quadruple discourse of liberty, rooted in *Roe*: an affirmation of women’s rights, of the State’s legitimate interests in protecting human life, of women’s health, and of the fetus’s life. In her contention, such affirmative rights and interests are mutually complementary.

Outside of the legal community, pro-*Roe* commentators squarely framed the decision as inextricably linked with the discourse of liberty. Democratic candidates for public office fully supported *Roe*, as it became a campaign issue inextricably linked with the appointment of future Supreme Court justices. In 2007, while running for the U.S. Presidency, Senator Hillary Clinton stated that *Roe* affirmed that “the rights and lives of women must be taken into account,” and warned that a Supreme Court decision striking down a partial-birth abortion law constituted “the erosion of our constitutional rights that I warned against when I opposed the nominations of Chief Justice Roberts and Justice Alito.” (Clinton 2007) Shortly after taking office, President Obama similarly framed *Roe* alongside other liberties: “On the 36th anniversary of *Roe v. Wade*, we are reminded that this decision not only protects women’s health and reproductive freedom, but stands for a broader principle: that government should not intrude on our most private family matters.” (White House 2009)

2022: Inversion of the Two Discourses

When the Roberts Court overturned *Roe* in 2022, how did it do so? The *Dobbs* majority invoked the discourse of liberty. Instead of focusing on the liberty of women’s privacy however, it focused on the rights of the states to decide the issue, rooted in American tradition and federalism. The Court centered its analysis on “whether the right to obtain an abortion is rooted in the Nation’s history and tradition and whether it is an essential component of ‘ordered liberty.’” In holding that the Constitution does not

guarantee a right to abortion, the Court frames the question as one where the presumption is *against* the Court and in favor of the states:

Our Nation’s historical understanding of ordered liberty *does not prevent the people’s elected representatives from deciding* how abortion should be regulated.

In the majority opinion, Justice Alito (joined by Justices Thomas, Gorsuch, Kavanaugh, Barrett, as well as Chief Justice Roberts in the judgment) emphasized elections and democracy:

It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives. “The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.” That is what the Constitution and the rule of law demand.

This is also a question of judicial restraint:

In interpreting what is meant by the Fourteenth Amendment’s reference to “liberty,” we must guard against the natural human tendency to *confuse what that Amendment protects with our own ardent views* about the liberty that Americans should enjoy. That is why the Court has long been “reluctant” to recognize rights that are not mentioned in the Constitution.

From this conception, the conservatives are the ones acting impartially and impersonally, separating personal, “ardent views” from the reality of the absence of any Constitutional text guaranteeing abortion. They thus share a commitment to liberty, but are loath to recognize liberty interests that do not appear in the Constitution, for this would usurp the legislative authority of the states:

Roe and Casey must be overruled, and the authority to regulate abortion *must be returned to the people and their elected representatives.*

Furthermore, the justices saw this not as a hostile takeover, but instead as a “restoration” of rules after a prior hostile takeover by justices who imposed their own views onto the Constitution. In his *Dobbs* concurrence, Justice Kavanaugh invoked the language of rule-based restoration:

Instead of adhering to the Constitution’s neutrality, the Court in *Roe* took sides on the issue and unilaterally decreed that abortion was legal throughout the United States up to the point of viability. . . . The Court’s decision today *properly returns the Court to a position of neutrality and restores the people’s authority* to address the issue of abortion through *the processes of democratic self-government* established by the Constitution.

When *Roe* and *Casey* were overturned in 2022, the discourses of repression and liberty inverted: the left invoked the discourse of repression, and the right invoked the discourse of liberty. *Dobbs* featured a vigorous dissent from Justices Breyer, Sotomayor,

and Kagan, who leveraged the discourse of repression to critique the majority opinion as “cavalier” in overturning *Roe* and *Casey*:

Roe and *Casey* have been the law of the land for decades, shaping women’s expectations of their choices when an unplanned pregnancy occurs. . . . The Court reverses course today *for one reason and one reason only: because the composition of this Court has changed*. *Stare decisis*, this Court has often said, “contributes to the actual and perceived integrity of the judicial process” by ensuring that decisions are “founded in the law rather than in the proclivities of individuals.” *Today, the proclivities of individuals rule*. The Court *departs from its obligation to faithfully and impartially apply the law*. We dissent.

For these justices, *Dobbs* is wholly “personal,” a hostile takeover of the Court arising from a shift in the personnel of the Supreme Court justices. As such, it is a dereliction of the Court’s duty to apply “law,” which exists and must be applied impersonally—with “faith” and “impartiality.”

Communicative institutions reflected the same. The day after *Dobbs*, both *The Wall Street Journal* and *The New York Times* published dueling editorials. The *Journal* invoked the discourse of liberty in its editorial, “Abortion Goes Back to the People,” with a sub-heading that “the Supreme Court finally corrects its historic mistake.” The *Journal* framed the decision as “settling political conflicts democratically, and peacefully,” wherein states must make determinations on the moral question of abortion through “democratic assent.” The editorial described *Roe* in the terms of Justice White’s *Roe* dissent, as “the exercise of raw judicial power,” and praised the decision as one where “[b]oth sides of the abortion debate will now have to achieve their policy goal the old-fashioned way—through persuasion, not judicial fiat” (WSJ Editorial Board 2022). Meanwhile, the *Times* editorial levied the discourse of repression. Entitled “The Ruling Overturning *Roe* Is an Insult to Women and the Judicial System,” it decried the decision as one that “will be devastating, throwing America into a new era of struggle over abortion laws—an era that will be marked by chaos, confusion and human suffering.” The *Times* also stated that *Dobbs* constitutes the “overt rejection of a well-established legal standard that had managed for decades to balance and reflect Americans’ views on a fraught topic” (NYT Editorial Board 2022).³

In sum, while the Supreme Court’s abortion decisions cut in opposite directions—the initial cases guarantee the right to abortion, while the last one removes the right to abortion—the justices rely on the same civil binaries. The discourses of liberty and repression first emerged in *Roe* in 1973, wherein some conservatives invoked the discourse of repression while liberals invoked the discourse of liberty. *Roe* was either an “extravagant exercise of the power of judicial review” set against safeguarding “the right of the woman to choose to have an abortion.” When *Roe* was overturned by *Dobbs* in 2022, this inverted: liberals invoked the discourse of repression and

³ Law professors also joined in this discourse. For example, in June 2022, Constitutional law expert Erin Chemerinsky penned an op-ed in the *Los Angeles Times* called “Ending *Roe* Is A Pure Exercise Of Republican Power, Wielded To Reduce Women’s Freedom And Equality.” (Chemerinsky 2022)

conservatives the discourse of liberty. At that time, the left argued that “the proclivities of individuals rule,” whereas the conservatives announced the “time to heed the Constitution and return the issue of abortion to the people’s elected representatives.” Communicative media institutions echoed such binaries.

Case II: The Right to Bear Arms

The Cases: Heller and Its Progeny

The 2nd Amendment states that “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The interpretive question is the relationship between the two clauses (the first being the “prefatory” and the second being the “operative”). Those believing that the Amendment codifies a right to bear arms argue that the prefatory does not limit the operative, but rather is used to clarify the purpose of the Amendment and should not limit or expand the scope of the second clause (Siegal 2008–2009). Those arguing against it argue that the first clause narrows the Amendment significantly, thus concentrating the right in “the people” generally—with a focus on the historical militias (Lund 2009).

While, generally speaking, the 2nd Amendment was long seen as “dormant” in Constitutional Law, in 2008, the Court decided *District of Columbia v. Heller*, which reads the Second Amendment as “guarantee[ing] an individual right to possess and carry weapons in case of confrontation.” Since that time, the Court has affirmed the ruling and expanded it to many circumstances, including recognizing its applicability to the states through the Fourteenth Amendment, extending protection to all instruments that constitute bearable arms, and limiting gun regulations to only statutes that “accord” with supposed historical understanding. For example, in the 2022 *New York State Rifle and Pistol Association v. Bruen*, the Court ruled that the Second Amendment guarantees a right to keep and bear arms in public for most self-defense purposes—states are not permitted to Constitutionally condition firearm licenses on a showing of a “special need for self-protection distinguishable from that of the general community.”

2008–Present: Right-Wing Discourse of Liberty, Left-Wing Discourse of Repression

Heller frames its ruling in terms of the discourse of liberty. The Court begins by noting that the District of Columbia prohibited possession of handguns in most cases. It reviews the case of Dick Heller, a special police officer who was denied a certificate to possess a handgun in his home. Justice Scalia’s majority opinion frames the *Heller* decision as one in which the Court steps aside from “judge-empowering,” arbitrary infringements on individual rights that Justice Breyer’s dissent argued for with an interest-balancing approach. It then moved on to interpretive aforementioned prefatory and operative clauses, beginning with analysis of the 2nd Amendment’s phrase “the right of the people.” The Court notes that the phrase arises three other times in the Bill of Rights and guarantees individual rights (First Amendment assembly and petition, Fourth Amendment search and seizure, and Ninth Amendment rights retained by the people). After historical review, the Court concludes that all such

“textual element . . . guarantee the individual right to possess and carry weapons in case of confrontation.” Furthermore, the majority finds that the meaning of “bear arms” in the Constitution was broader than simply serving in a militia—and accuses the dissent’s narrower interpretation as being a “[g]rotesque” half-reading of the plain language of the phrase at the time of the Constitution’s drafting. By contrast, for the majority, the reference to militia was rooted in liberty: “tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents.”

In Justice Scalia’s conceptualization, his opinion is elevating the Constitutional rights “enshrined” in the sacred Constitutional document:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. *The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.* Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

The discourse here is of a liberty derived from the Constitution at the founding, free from the presentist whims of the judiciary, the so-called “third branch of government” that the sacred Founders designed to be the “least dangerous branch” in the Constitution. Justice Scalia then compares the Second Amendment to other Constitutional freedoms—the First Amendment and other Bill of Rights guarantees:

The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. *Like the First, it is the very product of an interest-balancing by the people*—which Justice Breyer [according to his dissent] would now conduct for them anew. And whatever else it leaves to future evaluation, *it surely elevates above all other interests the right of law-abiding, responsible citizens* to use arms in defense of hearth and home.

In Justice Scalia’s view, the Court is not only deferring to the text of the Constitution. It is also a conduit to affirm the rights of rational citizens to defend their cherished values.

The *Bruen* majority extended this analysis, stating that “[t]he constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’” On this account, “[t]he burden then falls on respondents to show that New York’s proper-cause requirement is consistent with this Nation’s historical tradition of firearm regulation.”

On the opposite side of the binary, the liberal justices in *Heller* invoked the discourse of repression to critique the majority opinion. In his dissent, Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer) accused the majority of bucking the long history of Second Amendment interpretation and intent of the Framers:

The Court concludes its opinion by declaring that it is not the proper role of this Court to change the meaning of rights “enshrine[d]” in the Constitution. But the right the Court announces was not “enshrined” in the Second Amendment by the Framers; *it is the product of today’s law-changing decision*. The majority’s exegesis has *utterly failed to establish that as a matter of text or history*, “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” is “elevate[d] above all other interests” by the Second Amendment.

The story that Justice Stevens tells is one of deviation: as a matter of text and history, the Court’s interpretation is a distortion of the Second Amendment, grotesquely creating a new right that prioritizes guns over legitimate individual interests. Meanwhile, in his *Bruen* dissent, Justice Breyer (joined by Justices Sotomayor and Kagan) invoked the discourse of repression to accuse the majority of violating principles of procedural justice, misreading history, ignoring public policy, and usurping state authority:

New York’s Legislature considered the empirical evidence about gun violence and *adopted a reasonable licensing law* to regulate the concealed carriage of handguns in order to keep the people of New York safe. The Court today *strikes down that law based only on the pleadings*. It gives the State *no opportunity to present evidence* justifying its reasons for adopting the law or showing how the law actually operates in practice, and it does not so much as acknowledge these important considerations. Because I cannot agree with the Court’s decision to strike New York’s law down without allowing for discovery or the development of any evidentiary record, without considering the State’s compelling interest in preventing gun violence and protecting the safety of its citizens, and *without considering the potentially deadly consequences of its decision*, I respectfully dissent.

Communicative institutional commentary has echoed such binaries. For example, in the wake of *Bruen* in 2022, *The New York Times* ran an editorial entitled “The Supreme Court Puts Gun Rights Above the Human Life,” which levied the same discourse of repression. The *Times* editorial board argues that the decision was lawless and reckless—“profoundly at odds with precedent and the dangers that American communities face today”—and undermined notions of federalism—“upending the longstanding practice of letting states decide for themselves how to regulate gun possession in public.” It accused the six justices in the majority of being “Republican-appointed” “ideologues” and criticized their “highly selective reading of history.” The editorial board also accused the Court of having “divined an individual right to bear arms hidden somewhere in the 27 words of the Second Amendment.” In doing so, it cited to its 2008 *Heller* editorial, entitled “Lock and Load,” which called the decision “wrongheaded and dangerous,” a “radical break from 70 years of Supreme Court precedent.” By contrast, the *Wall Street Journal* invoked the discourse of liberty in its

editorial, “The Supreme Court Vindicates the Second Amendment.” It praised the Court for finally “sett[ing] straight” the lower court judge’s misapprehension that the Second Amendment right to keep and bear arms “disappear[s] when you walk out your front door.” The editorial board praised *Bruen* as a “landmark holding,” finally vindicating the Second Amendment liberty after the Court standing by “as appeals courts upheld gun restrictions that eroded *Heller*.”

The Future: An Inversion?

Unlike the right to abortion, the right to bear arms has not undergone a discursive inversion—the conservative majority that ruled in favor of an individual right to bear arms has moved even further to the right since *Heller* was decided.

But such inversion is almost certain to occur: the composition of the Supreme Court will inevitably swing to the left, enshrining a new liberal majority in the Court. When it does, this liberal majority will inevitably curtail the right to bear arms. At that time, liberal justices will invoke the discourse of liberty, a restoration of Constitutional values. The liberal justices, in overturning such an interpretation of the Second Amendment, will claim that their decision “properly returns the Court to a position of neutrality and restores the people’s authority to address the issue of [gun regulation] through the processes of democratic self-government established by the Constitution” (Justice Kavanaugh, *Dobbs* concurrence). Meanwhile, conservatives will decry the decision, claiming that “[t]he Court reverses course today for one reason and one reason only: because the composition of this Court has changed” and that “the proclivities of individuals rule,” flagrantly contravening the judicial “obligation to faithfully and impartially apply the law” (Justices Breyer/Sotomayor/Kagan, *Dobbs* dissent).

The Supreme Court’s gun cases share the legal posture of the abortion cases: the Court, for the first time, recognizes a right that has, until then, not been recognized in the Constitution. This time, the right is championed by conservatives—the right to bear arms—and criticized by liberals. As such, it inverts *Roe*. The liberals accuse the conservatives of creating a right outside of “text or history,” just as the conservatives accused the liberals of doing over the course of the 20th century regarding abortion. Meanwhile, the conservatives see the decision as “tak[ing] out of the hands of government . . . the power to decide on a case-by-case basis whether the right is really worth insisting upon.” And communicative media institutions echo the same discourses, on both sides. Unlike *Roe*, the *Heller* line of cases has yet to be overturned, but the grounds for such reversal are already embedded in the Court’s discourse.

Discussion

Shared Discourse, Civil Solidarity

What do the case studies above reveal? Supreme Court justices are civil sphere actors who embrace a shared civil discourse—even as they believe they are in fierce opposition. Each side demonstrates the same commitment: to the core, sacred

principles (reason, liberty, and impartiality), while rejecting the same profane principles of (coercion, irrationality, and bias). Their divergent and confrontational opinions actually assert a common discourse sustaining civil solidarity. A deeper, reiterative pattern binds them. They swear to a symbolically sacred Constitutional oath, just as executive branch and Congressional members do (Alexander 2023).

- The President's oath is, in fact, explicitly guaranteed in the Constitution (Article II, Section 1, Clause 8), whereas the oath for Supreme Court justices is prescribed under federal statute (28 U.S.C. § 453). From this perspective, officeholders have a deeper allegiance to the state that transcends simple application of left-wing or right-wing political viewpoints. Their interpretive decisions may be in furtherance of such viewpoints—officeholders inevitably vary from one to another. But this also includes loyalty to the Constitution, just as Vice President Pence stated that his oath required that he certify the 2020 election in the wake of what he recognized as a loss for the Trump-Pence campaign (Alexander 2023).

Furthermore, the Court clearly signals other commitment to civil solidarity. The justices wear the same robes, follow the same rituals in the courtroom, structure their opinions in the same way. And they go to great lengths to say, informally, that they are often friends with one another despite their opinions—consider the famous friendship between conservative Justice Antonin Scalia and liberal Justice Ruth Bader Ginsburg.

The Return of the Left: Frontlash/Backlash

Furthermore, this shared solidarity allows for the structure of left-wing justices to take control in the future, reinstating the right to abortion or overturning the right to bear arms. Sociologists often incorrectly assume social change to be linear. In fact, it is marked by a dialectic of “frontlash” and “backlash” in the civil sphere. On this account, social movements gain victories that widen the civil sphere, promoting cosmopolitanism and inclusion in a broader sphere of solidarity. In response, a “backlash” emerges amongst those whose vested material and ideal interests are threatened. Such backlash is not simply a matter of individuals being “anti-modern, irrational, or even unusually bigoted.” Instead, it arises from social symbolic displacement. (Alexander 2019)

Phenomenologically, frontlash and backlash are highly polarizing, triggering anxiety that civil solidarity is disintegrating. In this space, communicative institutions (e.g., the enterprising, ambitious journalist) or regulative institutions (e.g., voting, elections). This includes “most of all, the precedent-bound and rights-based rule of law.” (Alexander 2019)

What the two case studies above show is that such frontlash/backlash is also playing out *within* the regulative institutions of law. Judicial interpretive disagreements are, in fact, a frontlash/backlash phenomenon that inevitably arises within the civil sphere. The liberal justices are socially and symbolically displaced on the Court, fostering their discourse of repression. Communicative media institutions then reflect such anxiety,

claiming the disintegration of the rule of law in the Court. As noted above, such interpretive fights include many American law professors, who do not stand *outside* the legal sphere but actively work *within it* to move the Court in various directions—engaging in work that Paul Kahn has referred to as more “theological” than the work of “religious studies”(Kahn 1999).

Supreme Court decisions and legal commentary thus mirror the same discourse that Alexander identifies, i.e., that elections trigger rival candidate claims of rightful representation of the civil sphere, leading to polarized political campaigning and, sometimes, dangerously anti-democratic language (Alexander 2010, Alexander 2023). Something similar happens within the discourse around the Supreme Court, albeit on a different time domain: political, legal, and lay commentators claim rightful representation of the civil sphere through debate about the Constitution and the authority of the Supreme Court to interpret it.

But such shared discourse lays the foundation for a return of the left. At some point, the pendulum will inevitably return once more left-wing Supreme Court justices sit on the Court. And in such a moment, they will be the ones to engage in their own talk of restoration while the conservatives are displaced. This dialectic will be ongoing as long as the structure of the Court holds.

The Dangers of Anti-Civil Discourse

The frontlash/backlash phenomenon can trigger something much worse: dangerously anti-democratic language that threatens the integrity of the American civil sphere and the entire system of judicial authority in the United States. The darkest specter cuts to the heart of American democracy—the risk that anti-civil discourse will overwhelm the American civil sphere, unspooling the legitimacy of the judicial system and, possibly, catalyzing a Constitutional crisis. Civil sphere theory shows that binary discourse leads to a potential narrowing, wherein each side accuses the other side of “dark anti-virtues that endanger democracy’s very existence,” seeing the other side as a polluted ideology that is irrational, unfair, enslaving, immoral, dishonest, and aggressive. At the extreme, some who view themselves as representatives of “the people” may fight so that the pendulum does not swing back the other way (Alexander 2023). Thus, the deepest concern of this Constitutional moment is the anti-civil, leading to Constitutional crisis.

The case studies above reveal a lack of any such language in the Court’s opinions. Neither liberal nor conservative justices appeal to “[p]atrimonialism, deference, and the king’s mystical body” as “alternatives to civil power, to constitutionally regulated office and critical, independent mediation.”(Alexander 2019) The language by which they criticize each other is still the shared discourse of civil solidarity. This affirms the civil sphere’s integrity.

But some public commentary is engaging in such rhetoric. Some have used language of *Dobbs* being “lawless” (Lithwick and Siegel 2022) or even a “right-wing political jihad” (Daniels 2022; Coan 2024). As noted above, a prominent Harvard Law

professor and Yale Law professor have called for an end to our Constitutional framework for democracy, on the ground that “the Constitution is broken and should not be reclaimed” (Doerfler and Moyn 2022). Most concretely, some have insisted that President Biden “pack the Court”: placing more justices onto the bench in order to overturn the nine-justice structure that has existed since 1869. President Biden resisted this, opting instead for a bipartisan commission to consider Supreme Court reform (White House 2021; Otterbein and Montellaro 2023). Historically, President Franklin Delano Roosevelt had also threatened to do so after the Court blocked key components of his New Deal plan in a series of decisions. While most Americans at the time supported President Roosevelt’s initiative, they objected to his court-packing plan—a sign of a healthy civil sphere (Glock 2019). Again, some on the left—including American law professors—have called for this proposal (Roosevelt 2021).

The danger of such rhetoric could, in the worst case scenario, provoke a Constitutional crisis. While definitions may vary, Constitutional crises can include political officials announcing they will no longer abide by the Constitution; abide by the Constitution to the point of disaster; or engage in violence, secession, or civil war. (Balkin 2020)

Conclusion

The Roberts Court is threatening a Constitutional crisis, but not for the reason often claimed. Civil sphere theory and cultural binaries help to understand this moment of American societal reaction to the rightwards movement in the Supreme Court. Just as elections trigger rival, polarized candidate claims of rightful representation of the civil sphere, discourse within and regarding the Supreme Court may also trigger divergent claims about the Court’s legitimacy. And just as elected officials’ political campaigning may drift into dangerously anti-democratic language, similarly discourse about the Roberts Court may threaten its recognition as a regulative institution.

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