2025

A Neo-Federalist View of the Supreme Court's Docket: Analyzing Case Selection and Ideological Alignment

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Abstract

For more than 70 years, scholars have engaged in an intense debate over a core constitutional question: what restraints does the Constitution place on Congress's power to limit the jurisdiction of the federal courts? Far less attention has been given to an equally important real-life question: how does the *operation* of the jurisdiction, as defined by Congress and the Supreme Court, comport with the assigned role of the federal courts in the system of government established by the Constitution? This Article takes a novel approach: it draws on constitutional *theory* to devise a set of tools for addressing the operational question *empirically*.

The theory derives initially from Professor Akhil Reed Amar's landmark article focused on the constitutional debate. In that article, Amar developed and defended a "neo-Federalist view" of Article III. This view emphasizes "the Federalists' reliance on federal judges" to enforce federal law and "the critical role of judicial review in Federalist theory."

The present Article builds on Amar's insights as well as my own empirical studies to offer a neo-Federalist view of the Supreme Court's docket. It also takes account of two key developments that have occurred since the Founding. A century ago, Congress enacted the "Judges' Bill"; in its aftermath, as Robert Post has written, the Supreme Court took on a new role as "the proactive manager of the system of federal law." More recently, the Court has come to be viewed from a perspective that is centered on *ideology*. There is a narrative, and it is framed as a conflict between "liberal" and "conservative" positions.

The purpose of the Article is to provide a set of analytical tools for analyzing the Court's work from both neo-Federalist and post-Founding perspectives. To that end, it outlines an objective, transparent case classification system for empirical research focused on both input (the selection of cases for plenary consideration) and output (the outcomes of the resulting decisions). Such research can show how the Court has carried out its managerial function and thus enable us to reach sound conclusions about current or future proposals for reform – for example, adding new categories of cases to the Court's mandatory jurisdiction. And the system is uniquely well designed to map the ideological divide in the federal courts today. That is

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because, in broad terms, what defines that divide is that both liberals and conservatives embrace a strong commitment to judicial review to protect individuals against government overreaching, but they disagree profoundly over where and how that power should be deployed.

An important contribution of the Article is the distinction it draws between *issue polarity* – for example, did the court rule in favor of the constitutional claim or against it? – and *ideological direction*. Only by recognizing and applying that distinction, the Article argues, can one fully understand the shifts in ideological alignment over time – or the contours of the ideological divide today.

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Contents

* Professor of Law Emeritus, University of Pittsburgh School of Law. This Article draws from, and builds on, my prior writings about the federal courts. Particular works are cited where they are most relevant. For helpful comments and suggestions, I thank Lawrence Baum, Greer Donley, Andy Hessick, Bert Huang, Michael Solimine, and Jim Weinstein.

Introduction

For more than 70 years, scholars have engaged in an intense and often passionate debate over a core constitutional question: what restraints does the Constitution place on Congress's power to limit the jurisdiction of the federal courts?[1] Far less attention has been given to the equally important question of *implementation*: how does the operation of the jurisdiction, within the framework established by Congress and the Supreme Court, comport with the role that the Framers envisioned for the federal courts in the system of government created by the Constitution?

In 1985, Professor Akhil Reed Amar made a major contribution to the constitutional debate with his landmark article *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*.[2] But in that article, Professor Amar did more than address a much-disputed issue of constitutional law.[3] He developed and defended a comprehensive

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[1] Although earlier writers had addressed the question, the modern era of debate began with the classic article, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). For more recent discussion, see Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 230 (2012) (citing many intervening commentaries).

[2] Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

[3] On Amar's contribution to the debate, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE

theory of "[t]he judicial power of the United States" as defined by Article III, section 2 of the Constitution. His aim was "to reorient current understandings of the role of federal courts in the constitutional system our Federalist forefathers bequeathed us."[4]

Professor Amar's "two-tier" thesis has been hotly contested,[5] but core elements of the "neo-Federalist view" are solidly grounded in Founding Era sources,[6] and those elements can therefore serve as a useful starting-point for investigating the real-life question flagged at the outset: how does the implementation of the jurisdiction, as defined by Congress and the Supreme Court, comport with the assigned role of the federal courts in the system of government established by the Constitution? Research of that kind is not simply of academic interest; without it, one cannot reach sound conclusions about whether changes are necessary in the institutional arrangements that now exist or what form those changes should take. For example, today the Supreme Court has almost complete control of its docket and hears only about 60 cases a year;[7] prominent scholars have suggested that Congress should add new categories of cases to the Court's mandatory jurisdiction.[8]

Professor Amar listed eight "hallmarks" of neo-Federalist scholarship.[9] As will be seen, two of these "hallmarks" are central to the version of the neo-Federalist view presented here: "the Federalists' reliance on federal judges" to enforce federal law and "the critical role of

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FEDERAL COURTS AND THE FEDERAL SYSTEM 319–22 (7th ed. 2015) (citing sources) [hereinafter HART & WECHSLER].

[4] Amar, *supra* note 2, at 207.

[5] *See, e.g.*, Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); HART & WECHSLER, *supra* note 3, at 319–22 (citing sources). For Professor Amar's response to Professor Meltzer, see Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990).

[6] These sources include the record of the Framers' statements (particularly during the ratification process) and also of their actions (notably during the Constitutional Convention). *See infra* Section I.A.

[7] *See infra* Subsection I.B.2.

[8] *See infra* note 153 and accompanying text.

[9] Amar, *supra* note 2, at 208–09 n.9.

judicial review" – review of the lawfulness of government action – "in Federalist theory."[10]

But in considering the work of the federal courts – particularly the Supreme Court – and the need for change, it would be both anachronistic and naïve to view the institutional issues solely from the perspective of "our Federalist forefathers." First, anachronistic: a century ago, Congress enacted the "Judges' Bill"; in its aftermath, as Robert Post has written, the Supreme Court ceased to be "a final appellate tribunal whose primary task was to settle disputes between litigants"[11] and "began to inhabit [its] new role" as "the proactive manager of the system of federal law."[12] Second, naïve: as is evident from discussions whenever a vacancy opens up on the Court, the dominant perspective in today's legal environment is one centered on *ideology*.[13] Whether the focus is on individual decisions or on the Court's work as a whole, the narrative is framed as a clash between "liberal" and "conservative" forces.

This Article draws on Professor Amar's insights as well as my own prior studies to offer a set of analytical tools for examining the Court's work from all three perspectives. It outlines a case classification system that is law-based and grounded in basic principles of the American system of government, including: the Federal Government as a government of limited powers; the federal courts as guardians of the Supremacy Clause and the protectors of individuals against constitutional violations by governments at all levels; and the separation of powers within the Federal Government. As such, the system contrasts sharply with the one used in the well-known Spaeth Database.[14] And it can provide a transparent, objective means for empirically analyzing many aspects of the Court's work – two in particular: the selection of

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[10] *Id.* In the quoted passage, Amar does not refer specifically to reliance on federal judges *to enforce federal law*, but he does so later in his article. *See id.* at 251 n.147 (quoting Justice Story).

[11] 1 ROBERT C. POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930 at xxxvii (2024).

[12] *Id.* at 596.

[13] *See infra* Section III.C.

[14] *See infra* Section V.B.

cases for plenary review and the "ideological direction" (liberal or conservative) of the resulting decisions.[15]

An important contribution of the Article is the distinction it draws between *ideological direction* and *issue polarity*. To determine issue polarity, one need only determine the source of the legal rule in dispute (for example, the Free Speech Clause or Title VII) and ask whether the court's decision supported or rejected the claim or defense based on that source.[16] Classifying ideological direction requires something more – an external benchmark.[17] Recognition and application of this distinction, the Article argues, is essential to a full understanding of the shifts in ideological alignment over time – and of the contours of the ideological divide today.

The Article proceeds as follows. Part I outlines the "neo-Federalist view" of Article III and explains the "special significance" that the Framers attached to the federal question jurisdiction – in particular, "the critical role of judicial review."[18] It then describes, in broad strokes, the deployment of that jurisdiction today. Parts II and III describe a system of case classification that provides the basic tools for assessing the way in which that jurisdiction is administered by the Supreme Court and other federal courts; the system can also be used for a wide variety of empirical analyses of the work of the federal judiciary. Part II delineates an issue classification system that reflects the Supreme Court's role as "proactive manager of the system of federal law." Part III outlines the other variables – including issue polarity – that are particularly useful in studying the selection and decision of cases by the Supreme Court.

The focus then shifts to ideology. Part IV sets the stage by briefly exploring the changing meaning of the terms "liberal" and" conservative" as applied to judicial decisions over the past century. Part V explains how the case classification system described in Parts II and III can be used to map the ideological divide in the federal courts today. The primary source of information about the liberal and conservative

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[15] The tools can also be used, with modifications, to study the work of the federal courts of appeals—for example, process of en banc rehearing. *See infra* note 154.

[16] *See infra* Section III.B.

[17] *See infra* Part V.

[18] *See infra* text accompanying note 30; *supra* text accompanying note 10.

positions on the various issues is the record of the Justices' votes during the 26-year period that ended with the death of Justice Ginsburg – a period in which the Court was divided along clear ideological lines, with a liberal bloc of four Justices that retained its unity and its position on the ideological scale. Part V also explains how the system used here differs from that of the Spaeth Supreme Court Database. The Article concludes with some suggestions about how the method can be applied to carry out empirical research that will enhance our understanding of the Court's work and lay a solid foundation for possible reforms.

One final note by way of introduction. Spoiler alert: There is a point of convergence between Federalist theory and a focus on ideology. Just as judicial review plays a critical role in Federalist theory, it is also central to marking the divide between today's "liberal" and "conservative" worldviews. Indeed, more than anything else, what defines the two ideologies is their sharply divergent positions on which rights or interests justify federal courts in exercising the power of judicial review in its most robust forms.[19] And the case classification system described here – transparent, objective, and grounded in constitutional theory – is uniquely designed to illuminate the very different constitutional perspectives that underlie the competing approaches to judicial review.

I. The Federal Question Jurisdiction: Theory and Practice

In his 1985 article and in subsequent writings, Professor Amar expounded and defended his "neo-Federalist view" of Article III.[20] In Section A, I briefly summarize Amar's theory – in particular, his emphasis on the federal question jurisdiction – and explain why the Framers attached special significance to that jurisdiction. Section B measures the deployment of the jurisdiction today against the Framers' expectations.[21]

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[19] *See infra* Part V (introduction) & Conclusion.

[20] *See* Amar, *supra* note 2; Amar, *supra* note 5; Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990).

[21] The origins and operation of the federal question jurisdiction are treated in more detail, and from a different perspective, in Arthur D. Hellman, *The Federal Question Jurisdiction Under Article III: "First in the Minds of the Framers," But Today, Perhaps, Falling Short of the Framers' Expectations*, 104 B.U. L. Rev. ___

A. "First in the Mind of the Framers"[22]

Central to Amar's theory is the idea that Article III provides for two tiers of federal jurisdiction. "In the first tier, … federal jurisdiction is mandatory; the power to hear all such cases must be vested in the federal judiciary as a whole."[23] That tier encompasses three categories of cases: cases "arising under" the Federal Constitution, federal laws, and federal treaties; cases of admiralty and maritime jurisdiction; and cases involving public ministers.[24] "In the second tier, … jurisdiction is discretionary with Congress."[25] The second tier encompasses the other six jurisdictional categories listed in Article III – categories based primarily on the identity of the parties.[26] These include diversity cases[27] and controversies to which the United States is a party.

Listed first among the first-tier categories in Article III is the "arising under" jurisdiction – or, as it is generally called, the "federal question" jurisdiction. This placement is not happenstance. As Chief Justice Marshall observed, federal question cases "are, as was to be expected, the objects which stood first in the mind of the framers of the constitution."[28] Indeed, as Marshall explained, "the primary motive" for creating a "judicial department" for the new national government was "the desire of having a [national] tribunal for the decision of all national questions."[29]

(forthcoming 2024) [hereinafter Hellman, *Federal Question*], and this Part draws on that Article.

[22] *See infra* note 28 and accompanying text.

[23] Amar, *supra* note 2, at 209.

[24] In the language of the Constitution, these are "cases affecting ambassadors, other public ministers, and consuls."

[25] Amar, *supra* note 2, at 209–10.

[26] *See* Cohens v. Virginia, 6 Wheat (19 U.S.) 264, 378 (1821).

[27] The Constitution to refers to these as "controversies … between citizens of different states."

[28] John Marshall, *A Friend of the Constitution* (1819), *in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 204 (Gerald Gunther ed., 1969). For the background of this essay, see Hellman, *Federal Question*, *supra* note 21, at n.x.

[29] Marshall, *supra* note 28, at 203–04.

Amar too notes that the Framers assigned "special significance" to the federal question jurisdiction.[30] Only federal judges would have the "competence and independence" to "uphold the Constitution by denying effect to any purported law inconsistent with it."[31] Only federal judges could be trusted to enforce federal laws and maintain uniformity in their interpretation.[32]

Amar's summary suggests four overlapping but distinct purposes that the Framers expected the federal question jurisdiction to serve.[33] For convenience, we can use labels drawn from the Constitution itself and from the ratification debates: *enforcement*,[34] *supremacy*,[35] *checking*,[36] and *uniformity*.[37]

First and most broadly, the Framers viewed the "arising under" jurisdiction as necessary to *enforce* the federal Constitution, laws, and treaties.[38] This task involves explicating the meaning of federal law[39] and applying it in particular cases.[40] Different participants placed varying

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[30] Amar, *supra* note 2, at 243 n.126.

[31] *Id.* at 247–48. That, of course, is a concise summary of what is encompassed by "judicial review."

[32] *See id.* at 251–52; *see also* Anthony J. Bellia, Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 314–16 (2007).

[33] I do not suggest that the Framers viewed these purposes as separate, and indeed, as some of the quotations in this Section will demonstrate, they did not always draw sharp distinctions among them. But I think the categorization is helpful in delineating the Framers' expectations and analyzing whether the current institutional arrangements allow the federal question jurisdiction to function in accordance with those expectations.

[34] *See* Bellia, *supra* note 32, at 313 (quoting remarks of Edmund Pendleton at the Virginia ratifying convention).

[35] *See* U.S. CONST. art. VI § 2.

[36] *See infra* note 51 and accompanying text.

[37] *See infra* note 55 and accompanying text.

[38] *See* Bellia, *supra* note 32, at 313–15.

[39] In this Article, I shall use "federal law" as a shorthand for the Federal Constitution, federal laws, and federal treaties.

[40] Professor Bellia distinguishes between "enforcing federal laws" and explicating their meaning. *See* Bellia, *supra* note 32, at 315. But he acknowledges that "some writers" in the Founding Era saw the two functions as being "of a piece." *Id.* I think

emphasis on each of the three subjects of the jurisdiction, but the underlying idea was expressed by Madison at the Constitutional Convention: "Confidence cannot be put in the state tribunals as guardians of the national authority and interests."[41] A recurring theme of supporters of the Constitution in the ratification debates was that "the power of [the national] Judiciary should be coextensive with the Legislative power."[42] That and similar statements suggest a concern for enforcing the "laws" of the United States,[43] but other comments by supporters of ratification refer to the enforcement of treaties[44] and of the Constitution itself.[45]

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that the more useful distinction is between enforcement in particular cases and uniformity throughout the nation.

[41] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND, with volume and page]. Here and in other quotations from Founding Era sources, I have modernized spelling, capitalization, and punctuation, and have spelled out abbreviations.

[42] 10 Documentary History of the Ratification of the Federal Constitution 1398 (1993) [hereinafter DHRC] (remarks of Edmund Pendleton at the Virginia ratifying convention); *see also id.* at 1413 (remarks of James Madison) ("With respect to the laws of the Union, it is so necessary and expedient that the Judicial power should correspond with the Legislative, that it has not been objected to."); THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) [hereinafter FEDERALIST NO. 80] ("If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number.").

[43] *See, e.g.*, THE FEDERALIST NO. 81, at 547 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.").

[44] *See, e.g.*, 2 DHRC 518 (remarks of James Wilson at the Pennsylvania ratifying convention) (arguing that the clause will enable federal judges "to carry [treaties] into effect").

[45] *See, e.g.*, 10 DHRC 1432 (remarks of John Marshall at the Virginia ratifying convention) ("Is it not necessary that the Federal Courts should have cognizance of cases arising under the Constitution, and the laws of the United States? … To what quarter will you look for protection from an infringement on the Constitution, if you will not give power to the Judiciary?"). Opponents of ratification argued, in essence, that federal judges would *over-enforce* the Constitution. *See, e.g.*, 15 DHRC 512, 516 (Brutus XI) (arguing that self-interest would lead federal judges to construe Congressional powers broadly and thereby enlarge their own power).

Second, the Framers placed particular emphasis on one context in which the "arising under" jurisdiction would allow federal courts to enforce federal law: protecting the supremacy of that law against encroachment by the states. As Amar puts it, the Framers feared "that unsupervised judicial review by state court judges would be insufficient to protect constitutional liberty."[46] And so, as James Liebman and William Ryan concluded after a painstaking examination of the drafting process at the Constitutional Convention, the Framers "self-consciously and irrevocably forged the constitutional structural link" between the Supremacy Clause and the "arising under" jurisdiction.[47] The state judges, in their "front-line decisionmaking," would be bound by the Supremacy Clause, but if they failed in their obligation, federal judges would correct them through "the supervisory decisionmaking" authorized by the "arising under" jurisdiction.[48] Even opponents of ratification recognized the connection between the Supremacy Clause and the federal question jurisdiction.[49]

Third, the Framers viewed the "arising under" jurisdiction as a mechanism for enforcing the limits of the Federal Constitution on the exercise of power by *Congress*.[50] As Oliver Ellsworth put it at the Connecticut ratifying convention, the federal judiciary would serve as a "constitutional check" on the "general legislature."[51] Ellsworth explained: "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial

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[46] Amar, *supra* note 2, at 248.

[47] James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 747 (1998); *see id.* at 705–73. For a briefer account, see Bellia, *supra* note 32, at 292–304.

[48] Liebman & Ryan, *supra* note 47, at 747. The Framers' goal could also be achieved by vesting federal-question jurisdiction in federal trial courts—an arrangement that the Constitution permitted but did not require. *See* Hellman, *Federal Question*, *supra* note 21, at ___ n.x (discussing the Madisonian compromise).

[49] *See id.* at ___ (summarizing remarks of Luther Martin).

[50] Note, though, that much of the task of enforcing constitutional limits on congressional power could be accomplished by the federal courts through exercise of the jurisdiction over cases to which the United States is a party. *See* text *infra*.

[51] 3 Farrand 240.

power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void."[52] James Wilson spoke in a similar vein at the Pennsylvania ratifying convention. After quoting the "arising under" clause of Article III, he argued that if Congress should pass a law inconsistent with the powers vested in it by the Constitution, "the judges, as a consequence of their independence, … will declare such law to be null and void."[53]

Finally, and perhaps with less emphasis, the Framers viewed the "arising under" jurisdiction as an essential means for securing uniformity in the interpretation of federal law.[54] Probably the best-known expression of this position is found in The Federalist No. 80, in which Hamilton referred to "[t]he … necessity of uniformity in the interpretation of the national laws,"[55] and added: "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."[56]

In sum, one need not accept every jot and tittle of Professor Amar's neo-Federalist view to agree that the Framers attached "special significance" to the federal-question jurisdiction. And scholars need not confine themselves to questions of Congressional power to *limit* federal court jurisdiction; they can, and should, investigate how the federal courts operate within the jurisdiction that Congress *has* conferred – in particular, how the courts carry out the essential roles that the Framers contemplated for them.

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[52] *Id.* at 240–41.

[53] 2 DHRC 517 (remarks of James Wilson at the Pennsylvania ratifying convention). Wilson had made a similar point the previous week. *See id.* at. 450–51.

[54] Professor Amar somewhat denigrates the importance of the uniformity rationale, *see, e.g.*, Amar, *supra* note 2, at 263, probably because one of the planks of his theory is "the structural equality of *all* federal judges." *Id.* at 262 (emphasis added). But elsewhere in his analysis, in explaining why Congress is required to vest federal question jurisdiction in federal courts, he notes that "interpretation [of the national laws] by an impartial and independent judiciary would … ensure even-handed application, thereby promoting the rule of law." *Id.* at 251. For further discussion, see *infra* Subsection I.B.1.

[55] FEDERALIST NO. 80, *supra* note 42, at 535.

[56] *Id.*

One caveat is in order. The federal question jurisdiction, even if "first in the mind of the Framers," is only one of the nine heads of jurisdiction authorized by Article III. The underlying concern is with federal *questions*, and federal questions can often be adjudicated by federal courts under other jurisdictional heads – in particular, in cases to which the United States is a party.[57] Indeed, even the original jurisdiction of the Supreme Court over suits between states may enable the Court to decide federal questions.[58] Thus, in carrying out the investigation contemplated here, scholars must consider the totality of the institutional arrangements now in force. But this broader focus does not change the essence of the neo-Federalist view: that Article III courts must be available to enforce federal law generally and, in particular, to carry out the supremacy and checking functions often encapsulated in the phrase "judicial review."

B. Federal Questions and Article III Courts

Professor Amar's theory emphasizes "the structural equality of *all* [Article III] federal judges,"[59] to the point where, in his view, Congress could give lower federal-court judges "*final* power to decide" federal question cases.[60] Decisions by those judges "could, but need not, be reviewable by the Supreme Court."[61]

However persuasive this theory might be, it does not describe the system that Congress has established, much less the actual role played

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[57] Professor Amar made a similar point. *See* Amar, *supra* note 20, at 1508 (noting that U.S. party suits "are likely to raise federal questions and thereby implicate 'arising under' jurisdiction").

[58] *See, e.g.*, Delaware v. Pennsylvania, 598 U.S. 115 (2023) (original jurisdiction case interpreting federal statute). The Court may also decide federal questions under its original jurisdiction in suits brought by a state against the United States. *See, e.g.*, South Carolina v. Baker, 485 U.S. 505 (1988) (upholding constitutionality of federal tax statute). For further discussion, see *infra* Subsection I.B.2.

[59] Amar, *supra* note 2, at 262 (emphasis added); *see also id.* at 221 (noting "the structural parity of all Article III judicial officers—Supreme Court justices and lower federal judges").

[60] *See id.* at 257 (emphasis added); *see also id.* at 230 ("Lower federal courts may … be trusted with the power to resolve finally federal questions and admiralty issues.").

[61] *Id.*

by the lower federal courts in the administration of the federal question jurisdiction. On the contrary, the system now in place gives an outsized role to the Supreme Court for the adjudication of federal questions.[62] The Supreme Court is the only Article III court that can consider the innumerable federal questions that are litigated initially in state courts.[63] And, with one small exception, only the Supreme Court can resolve federal questions in a way that will provide binding precedent for all lower courts.[64] Yet in an era when the reach of federal law has never been greater, the Supreme Court is deciding fewer cases on the merits than at any time since before the Civil War.[65]

The tension between these two developments underscores the importance of careful assessment of how the Court carries out its stewardship of the federal question jurisdiction. I begin by outlining, in broad strokes, the deployment of the federal question jurisdiction today.

1. Original and removal jurisdiction of the lower federal courts

For the first eight decades of the nation's history, "a single model overwhelmingly predominated: federal questions were litigated initially in state courts, with review by the Supreme Court available as of right if the state court rejected the claim under federal law."[66] Today the lower federal courts have jurisdiction to hear many cases based on the presence of a federal question – but not all. I have traced the evolution of the jurisdiction elsewhere;[67] here it will be sufficient to examine the major

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[62] I refer here to the de jure system established by Acts of Congress and judicial construction of those statutes. As will be seen, because of the way the Supreme Court manages its docket, the federal courts of appeals do have the last word in the vast majority of federal-question cases litigated in the federal courts. But that arrangement does nothing to fill the gaps discussed in the text *infra*.

[63] To be sure, lower federal courts can engage in collateral review of state criminal convictions via habeas corpus. But Congress and the Court have sharply limited the availability of that jurisdiction. *See infra* Part I.B.1.

[64] *See infra* Subsection I.B.1. The exception is patent law, where decisions of the Court of Appeals for the Federal Circuit are binding on all federal district courts.

[65] *See infra* Subsection I.B.2.

[66] Hellman, *Federal Question*, *supra* note 21, at ___.

[67] *See id.* at ___.

elements of the current system that define the ability of the lower federal courts to carry out the purposes of the federal question jurisdiction.[68]

On the positive side, Congress has made the lower federal courts widely available for civil actions in which the *plaintiff* asserts a federal *claim*. Three major classes of cases can be identified.[69] First, 42 U.S.C. § 1983, first enacted as part of the Civil Rights Act of 1871, provides a cause of action for any person deprived, by someone acting under color of state law, of rights "secured by" the federal Constitution or laws.[70] Second, federal statutes that regulate behavior by actors in the private sector typically authorize private civil remedies for persons injured by conduct that violates the particular statute.[71] Plaintiffs in both classes of cases can sue in federal district court under 28 U.S.C. § 1331, the "general federal question" statute.[72] And if the plaintiff files suit in state court, the defendant can remove to federal court under 28 U.S.C. § 1441(a), the general removal statute. Finally, Congress has passed a wide array of laws authorizing private plaintiffs to challenge *federal* official action as violating constitutional or statutory rights.[73]

That is not to say that all cases in which the plaintiff asserts a federal claim can be litigated in federal district court. Statutes and Supreme Court decisions have closed the doors of the federal courts to

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[68] For a much more detailed analysis of the federal question jurisdiction in the district courts, see Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515 (2007).

[69] In addition to the statutes discussed in text, Congress has authorized federal district courts to hear civil actions brought by the United States, irrespective of the basis of the claim. *See* 28 U.S.C. § 1345. This jurisdiction has its origin in sections 9 and 11 of the Judiciary Act of 1789.

[70] 42 U.S.C. § 1983 (codifying, as amended, Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13).

[71] One of the earliest such statutes was the Federal Employers' Liability Act of 1908. *See* Mondou v. N.Y., N.H. & H. R. Co., 223 U.S. 1 (1912) (upholding constitutionality of the Act).

[72] Some federal statutes have their own jurisdictional provisions. *See, e.g.*, 42 U.S.C. § 2000-e-5(f)(3) (giving district courts jurisdiction over "actions brought under" Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment).

[73] *See* HART & WECHSLER, *supra* note 3, at 895–904.

particular kinds of federal claims.[74] For example, the doctrine of qualified immunity effectively denies the § 1983 damages remedy to many individuals whose federal constitutional rights have been violated by persons acting under color of state law.[75] Decisions tightening the requirements for standing to sue in federal court "have led to the anomalous result that a Congressionally created cause of action for violation of federal law may be cognizable only in state court, with the federal court unavailable either originally or through removal."[76] And the Court has narrowed the availability of the damages remedy initially recognized in the 1971 *Bivens* decision for the violation of federal rights by federal employees.[77]

All that said, §§ 1331 and 1441(a) remain broadly available for cases in which the plaintiff is asserting a federal claim. At the same time, current law generally bars removal to federal court by a *defendant* who invokes federal law as a *defense* to a state-law claim in a state-court suit.[78] That prohibition derives from the Supreme Court's 1894 decision

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[74] For additional elaboration of this point, see Hellman, *Federal Question*, *supra* note 21, at ___.

[75] That is because it is not enough to show that the defendant's conduct violated a constitutional right; the plaintiff must also show that the right was "clearly established" at a fairly high level of specificity at the time of the conduct in question. *See, e.g.*, City of Tahlequah v. Bond, 595 U.S. 9, 12 (2021) (per curiam) (citing precedents). The Court's jurisprudence on qualified immunity applies equally when § 1983 suits are litigated in state courts. *See* James v. City of Boise, 577 U.S. 306, 307 (2016) (per curiam) (stating that state courts are "bound by [the Supreme] Court's interpretation of federal law"). So the effect of the Court's qualified immunity decisions is to deny the § 1983 damages remedy in any court. However, state courts are free to reject qualified immunity as a defense in suits under *state* law, and some have done so. *See, e.g.*, Mack v. Williams, 522 P.3d 434, 451 (Nev. 2022). When they do, federal courts must apply that rule when hearing claims created by state law. *See, e.g.*, Evans v. Hawes, 2024 WL 810886 at *12 (D. Nev. Feb. 26, 2024).

[76] Hellman, *Federal Question*, *supra* note 21, at ___.

[77] *Compare* Bivens v. Six Unknown Named Agents of FBI, 403 U.S. 388 (1971) (recognizing judicially created damages remedy for violation of Fourth Amendment by federal agent acting under color of his authority), *with* Egbert v. Boule, 596 U.S. 482, 486 (2022) (noting that in 11 cases spanning 42 years, the Court has consistently "declined … to imply a … cause of action for [various] constitutional violations.").

[78] There are some narrow exceptions. See Hellman, Federal Question, supra note 21, at __, __ (describing federal officer removal statute and complete preemption doctrine).

in *Tennessee v. Union & Planters' Bank*,[79] in which the Court interpreted the Judiciary Act of 1887 as conditioning federal question removal on compliance with the well-pleaded complaint rule.[80] Under that rule, the jurisdiction is available "only when the plaintiff's statement of his own cause of action shows that it is based upon" federal laws, treaties, or the Constitution.[81] There is a good argument that the Court "probably got it wrong when it grafted the [well-pleaded complaint] rule onto defendant removal of cases raising federal defenses."[82] But the construction is well established, and it creates a substantial asymmetry in the assertion of federal rights in federal court.[83]

There was once a possibility that the Court would temper the rule. In 1983, after drafting an opinion for the Court in *Franchise Tax Board v. Construction Laborers Vacation Trust*,[84] Justice William J. Brennan proposed in a memorandum to his colleagues that the Court limit the *Union & Planters Bank* doctrine, at least for declaratory judgment actions. He explained: "Certainly there is much merit in the argument that cases presenting only the issue of federal preemption … are particularly poor choices for limiting federal jurisdiction in favor of state court decisions."[85] But the other Justices expressed no interest in

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[79] 152 U.S. 454 (1894).

[80] *Id.* at 461–62.

[81] Louisville & N.R.R. v. Mottley, 211 U.S. 149, 152 (1908). *Mottley* traced the origin of the rule to *Metcalf v. Watertown*, 128 U.S. 586 (1888).

[82] Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 757 (1986).

[83] *See* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 234 (1948) (arguing for reshaping the statute "in terms of a consistent theory that permits removal by the party who puts forth the federal right").

[84] 463 U.S. 1 (1983).

[85] Memorandum from Justice William J. Brennan, Jr., to the Conference (May 31, 1983) *re* Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Tr. for S. Cal, 463 U.S. 1 (1983) (on file with author), available in Papers of William J. Brennan, Library of Congress, Box __ (No. 82-695).

pursuing Justice Brennan's suggestion.[86] Instead, the Court's opinion entrenched the doctrine even further.[87]

To be sure, there is a workaround. As the editors of the Hart and Wechsler casebook have reminded us, "litigants do not come labeled as 'plaintiffs' and 'defendants' as a matter of preexisting Platonic reality;" rather, "[w]hether one is a plaintiff or a defendant … is itself contingent, a product of our remedial and substantive rules."[88] In this context, one of the relevant remedial rules comes from the 1908 decision in *Ex parte Young*.[89] In *Young*, the Court recognized a federal cause of action to enjoin state officials whose conduct in enforcing state law violates, or threatens to violate, rights under federal law.[90] The effect is to allow an end run around the well-pleaded complaint rule: instead of awaiting an enforcement action in state court, which could not be removed to federal court because the Supremacy Clause argument would be only a defense, the individual subject to state regulation becomes a plaintiff and invokes the federal court's original jurisdiction. The *Ex parte Young* cause of

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[86] I found nothing in Justice Brennan's file on the case to indicate that any Justice responded positively to Justice Brennan's memorandum. It is worth noting that in the 1982 Term the Court handed down 155 plenary decisions, and *Franchise Tax Board* was one of 24 cases argued during the final (April) argument session. It is hardly surprising that, after the circulation of a draft opinion, the Justices would be reluctant to consider a new rationale (and reverse the outcome of the conference vote) in the final month of the Term.

[87] *See Franchise Tax Board*, 463 U.S. at 14 (reiterating "settled law" that a federal defense to a state-law claim is not a basis for removal to federal court "even if both parties admit that the defense is the only question truly at issue in the case"); *id.* at 18 ("extend[ing]" precedent "limited to the Federal Declaratory Judgment Act … to state declaratory judgment actions as well").

[88] HART & WECHSLER, *supra* note 3, at 810.

[89] 209 U.S. 123 (1908).

[90] The opinion is not explicit on this point, but later decisions have cited *Ex Parte Young* as authority for the proposition. *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights."). Recently the Court has emphasized that the *Ex parte Young* cause of action is not grounded in the Supremacy Clause, but in equitable practice "tracing back to England." Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326–27 (2015).

action also avoids the barrier of state sovereign immunity, which would bar suit against the state itself or any of its instrumentalities.[91]

As the Supreme Court has said, the *Ex parte Young* cause of action "gives life to the Supremacy Clause."[92] It has played a central role in the development of constitutional law over the last century.[93] But it does not completely fill the gap created by the prohibition on removal based on a federal defense. To begin, the *Ex parte Young* cause of action is not available at all when state law is enforced through private civil litigation – for example, when an individual invokes the First Amendment as a defense to a state-law defamation claim or when a drug manufacturer asserts that a state tort claim is preempted by federal regulatory law.[94] Even in the realm where it does apply, *Young* allows only forward-looking relief; it does not authorize prospective relief such as recovery of funds wrongfully withheld.[95] The availability of the cause of action is also limited by various statutory restrictions and judicial doctrines designed to channel litigation over federal rights into state court.[96]

Another gap in district court jurisdiction affects state criminal defendants. The governing law has evolved over the years, and some background is required to explain the gap.

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[91] *See* Hans v. Louisiana, 134 U.S. 1 (1890).

[92] Green v. Mansour, 474 U.S. 64, 68 (1985).

[93] *See* Michael E. Solimine, *Congress,* Ex Parte Young*, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 102 (2008) (compiling authorities, judicial and academic, highlighting the importance of *Ex parte Young* to constitutional litigation).

[94] In 2021 the Court gave its blessing to a Texas statutory scheme designed precisely to frustrate the use of the *Ex parte Young* cause of action to challenge a state law that restricted abortion in a way that plainly violated the Federal Constitution as it was then interpreted. The state law accomplished this by explicitly denying enforcement powers to any state official. *See* Whole Women's Health v. Jackson, 595 U.S. 30 (2021); Hellman, *Federal Question*, *supra* note 21, at __, __

[95] *See., e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974).

[96] *See, e.g.*, Tax Injunction Act of 1937, 50 Stat. 738 (codified as 28 U.S.C. § 1341) (limiting federal court remedies for illegal state taxation); Younger v. Harris, 401 U.S. 37 (1971) (generally requiring federal court to defer to pending state criminal proceedings).

One consequence of the Warren Court's criminal procedure revolution is that almost any state criminal prosecution may raise federal constitutional questions.[97] State criminal prosecutions cannot ordinarily be removed to federal district court,[98] but another route is potentially available: collateral review on habeas corpus after conviction. By 1953 if not before, Supreme Court decisions interpreted the 1867 habeas corpus statute to permit state prisoners to obtain "[f]ull-blown constitutional error correction" in federal court.[99] As Professor Amar wrote in 1985, "[i]n criminal cases, the historical expansion of federal habeas corpus has enabled lower federal courts to monitor more closely the decisions of state courts entrenching on federal constitutional rights."[100] However, in 1996 Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), a statute that severely cut back on the availability of federal habeas corpus as a device for collaterally reviewing state-court convictions.[101] The Supreme Court has zealously enforced AEDPA's strictures, both substantive and procedural. In particular, the Court has interpreted a key provision of AEDPA "to bar habeas relief [to persons in state custody] even if the state court's decision was erroneous, as long as it was not 'unreasonably' so."[102] One

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[97] *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 412 (2000) (noting the "series of steps the [Warren] Court took that remade the entire American system of criminal justice"); Daniel J. Meador, *Federal Law in State Supreme Courts*, 3 CONST. COMMENT. 347, 348 (1986) (summarizing statistics that "substantiate the widespread view that in many respects the state criminal process has been federalized as a result of the United States Supreme Court's decisions under the fourteenth amendment.").

[98] The federal officer removal statute provides a narrow exception. *See* 28 U.S.C. § 1442(a); Mesa v. California, 489 U.S. 121 (1989); State v. Meadows, 88 F.4th 1331 (11th Cir. 2023).

[99] Brown v. Davenport, 596 U.S. 118, 130 (2022) (citing Brown v. Allen, 344 U.S. 443 (1953). There is deep disagreement among scholars and judges about the history that preceded *Brown v. Allen*. *See* Carlos M. Vazquez, *Habeas as Forum Allocation: A New Synthesis*, 71 U. MIAMI L. REV. 645, 664–68 (2017) (summarizing debate).

[100] Amar, *supra* note 2, at 267.

[101] *See* Brown v. Davenport, 596 U.S. 118, 137 (2022) ("[I]f AEDPA makes winning habeas relief more difficult, it is because Congress adopted the law to do just that.").

[102] Carlos Vazquez, *AEDPA as Forum Allocation: The Textual and Structural Case for Overruling* Williams v. Taylor, 56 AM. CRIM. L. REV. 1, 2 (2019). The Supreme Court recently confirmed Professor Vazquez' summary of the standard. *See* Shoop v.

federal appellate judge commented that after 20 years on the bench, "I have lost count of the number of erroneous state court convictions I have been required to let stand because of the deference required by AEDPA."[103] Procedural obstacles – some created by AEDPA, others antedating it – also take their toll; four in particular "ensure that most state prisoners' claims are never considered on the merits in federal court."[104]

Two conclusions emerge from this brief review. Federal district courts have a broad jurisdiction to hear cases in which the federal question is raised by the plaintiff in a civil action. That jurisdiction includes many – but not all – cases in which the plaintiff seeks a remedy against state action that is alleged to violate federal law. But two gaps stand out in the current jurisdictional arrangements, and both involve cases in which litigants invoke federal law and the Supremacy Clause in opposition to claims grounded in state law. On the civil side, the "remedial and substantive rules" now in force generally mean that when federal law is raised as a defense, the federal question cannot be litigated in federal court, either initially or on removal. On the criminal side, habeas corpus may allow collateral review in federal court after the completion of state-court proceedings, but the path is a narrow one, and many prisoners' claims will be barred by statute or Court decisions. In both situations, if a federal court is to be available to decide the federal questions, it will have to be the Supreme Court.

Twyford, 596 U.S. 811, 819 (2022) ("The question under AEDPA is … not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable—'a substantially higher threshold' for a prisoner to meet.").

[103] William A. Fletcher, *Symposium Introduction*, 107 CALIF. L. REV. 999, 1003 (2019).

[104] Eve Brensike Primus, *Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions*, 61 ARIZ. L.J. 291, 299 (2019). Professor Primus suggested that "equitable gateways" may offer a route to avoiding these procedural obstacles. *Id.* at 293. However, some of the Supreme Court precedents that she relied on have been narrowed by decisions handed down since her article was published. *See, e.g.*, Shinn v. Martinez Ramirez, 596 U.S. 366, 332 (2022) (Sotomayor, J., dissenting) (stating that Court "all but overrules" Martinez v. Ryan, 566 U.S. 1 (2012)).

There is a second reason why the lower federal courts cannot fully implement the Framers' vision. Recall that Hamilton and other Framers justified the federal question jurisdiction in part by emphasizing "[t]he … necessity of uniformity in the interpretation of the national laws."[105] Hamilton warned that "nothing but contradiction and confusion" would result from having "[t]hirteen independent courts of final jurisdiction" deciding federal questions. Hamilton was referring to the thirteen states in the union that would be created by the Constitution. Today there are thirteen appellate courts in the federal system alone and 50 courts of last resort in the states. Each of those courts decides federal questions independently of the others.[106] The only court that can establish an interpretation binding on all lower courts is the Supreme Court.[107]

What happens until the Supreme Court speaks – if indeed it does? One consequence is that there are conflicts between circuits or between state courts of last resort, and federal law means something different depending on the accident of geography. But as the Commission on Revision of the Federal Court Appellate System (Hruska Commission) observed half a century ago, the absence of a Supreme Court decision can create problems even if no conflict ever develops.[108] As long as there is a recurring issue that the Court has not resolved, there will be uncertainty about the governing legal rule – uncertainty that leads to repetitive litigation, forum shopping, and higher transaction costs to those who must confirm their conduct to federal law.[109]

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[105] *See supra* note 55 and accompanying text.

[106] *See* Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 ST. LOUIS U. L.J. 455, 459 (1995) (noting that judges in each circuit view it as "their duty to independently examine questions of federal law even if the precise point had already been decided by another … court of appeals").

[107] Patent law is an exception. *See supra* note 64.

[108] *See* Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 219–20 (1975) [hereinafter Hruska Commission Report]. The Commission was chaired by Senator Roman L. Hruska of Nebraska.

[109] The Hruska Commission recognized that "[s]ome uncertainty is … inevitable" in a common law system, where the law develops case by case. *Id.* at 217. Here the concern is with the additional uncertainty generated by the existence of 63 "courts of final jurisdiction," each free to decide federal questions independently of the others.

2. Federal questions in the Supreme Court

As explained in the preceding Subsection, the federal district courts have jurisdiction over a wide swathe of federal question cases, both originally and on removal. Those courts are broadly available to litigants who seek to enforce the general run of federal law or to check unlawful action by the federal government. But the only federal court that is available to many litigants invoking the Supremacy Clause against an exercise of state authority is the Supreme Court. The Supreme Court is also the only federal court empowered to provide authoritative national resolution of recurring questions of federal law. Do the current institutional arrangements enable the Court to carry out the supremacy and uniformity functions in accordance with the Framers' vision? In this Subsection, I outline the institutional arrangements in force today.

With respect to federal question cases, Article III provides that the Supreme Court "shall have appellate jurisdiction … with such exceptions, and under such regulations as the Congress shall make."[110] Under current law, the "exceptions" and "regulations" are minimal; what stands out is that Congress has given the Court the *power* to hear almost any federal question decided by the federal courts of appeals or the highest courts of the states – but also (with tiny exceptions) the *discretion* to deny review in any federal question case.[111]

To begin, the Court has jurisdiction to review just about every decision by a federal court of appeals on a federal question (or a non-federal question, for that matter).[112] The Court's jurisdiction is not limited to final judgments or decrees; for example, it can review decisions reversing the grant of summary judgment to the defendant and ordering further proceedings.[113] Indeed, the Court can grant certiorari before the court of appeals has even considered the case, as long as "a notice of

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[110] U.S. CONST. art III, § 2.

[111] For discussion of the exceptions, see *infra* note 126.

[112] The governing statute draws no distinctions among court of appeals cases; thus, the same rules apply to cases arising under the diversity jurisdiction. *See* 28 U.S.C. § 1254.

[113] *See, e.g.*, L.A. Cnty. Flood Control Dist. v. Nat. Res. Def. Council, 568 U.S. 78 (2013).

appeal has been filed and … the case [has been] properly docketed."[114] Moreover, review is available at the behest of "*any party* to any civil or criminal case."[115] In some situations, the Court's jurisdiction may be invoked by the party who prevailed in the court below.[116]

The Court's virtually unlimited jurisdiction to hear federal question cases decided by the federal courts of appeals does nothing to provide a federal forum for litigants whose cases cannot be heard in the first instance by a federal district court. However, the Court's authority to hear federal-question cases litigated in state courts is almost as broad.

The statute – section 1257 of the Judicial Code – imposes three conjunctive requirements; these relate to the court, the judgment, and the case. The court must be "the highest court of [the] State in which review could be had." The judgment must be "final." And the case must be one in which (to simplify) any "right … or immunity" has been "specially set up or claimed" under federal law.[117]

From the Judiciary Act of 1789 to the present day, Congress has required litigants seeking Supreme Court review of state-court judgments to pursue their federal claims to "the highest court of [the state] in which a decision in the suit could be had."[118] But this requirement will rarely be a barrier. In one famous case, the Court reviewed the judgment of a city police court;[119] in another, the Court reviewed the order of a single judge denying release to a state prisoner on habeas corpus.[120] The cases were reviewable by the Supreme Court

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[114] EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 2.4 at 83 (9th ed. 2007).

[115] 28 U.S.C. § 1254 (emphasis added).

[116] *See* Camreta v. Greene, 563 U.S. 692, 700–09 (2011) (qualified immunity case).

[117] In the language of the statute, review is available "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." The statute also specifies two other categories of cases, but those are subsumed in the language just quoted.

[118] Judiciary Act of 1789, 1 Stat. 73 § 25.

[119] *See* Thompson v. City of Louisville, 362 U.S. 199 (1960).

[120] *See* Betts v. Brady, 316 U.S. 455 (1942).

because, under state law, there was no possibility of appellate review within the state system.

The finality requirement – also part of the law since 1789 – has more bite. In contrast to cases litigated in federal courts, a litigant asserting (or resisting) a claim under federal law must wait until the completion of state proceedings – however prolonged or expensive – to present his arguments to the Supreme Court. And that is so even though the Supreme Court is the only Article III tribunal that will ever hear the case. The Court has recognized some exceptions to a literal finality rule, but these are rarely invoked.[121] And there is evidence that the finality requirement may sometimes lead the Court to withhold intervention in cases where a state may have violated a federal right.[122] But the numbers are small, and it is impossible to reach any conclusions about the extent to which the finality rule may allow states to evade their obligations under the Supremacy Clause.

The third requirement is the trickiest, because the statutory language is misleading; it implies that it is sufficient that a litigant has *raised* a claim under federal law. That is not so. Even as the language has changed, the Court has always understood the statute to require that the federal question was "reached and *decided*" by the state court.[123] In essence, the Court interprets the statute to mean that the final judgment must *rest on* a question of federal law. Thus, even where the state court has decided a federal question, Supreme Court review is barred if the state court judgment rests on a non-federal ground that is "independent of the federal ground and adequate to support the judgment."[124] But the Supreme Court decides for itself whether a purported non-federal ground

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[121] The exceptions are summarized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1974).

[122] *See* Hellman, *Federal Question*, *supra* note 21, at __ n.258.

[123] Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (emphasis added). As *Jenkins* makes clear, a showing that the state court decided the federal question is sufficient even if the question was not raised.

[124] Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). The summary in the text is a great simplification of a complex and nuanced body of law. *See* HART & WECHSLER, *supra* note 3, at 488–546.

is adequate and independent, so that states courts cannot evade their obligations under the Supremacy Clause.[125]

In short, the Court's power to review federal-question decisions from state courts is not as all-encompassing as its power to review such cases from federal courts, but it is substantial. At the same time, with exceptions of miniscule applicability, the Court is not *required* to hear any case from either court system.[126] Review is by writ of certiorari; what that means is that the Court has complete discretion whether to grant or deny the writ. Under established practice, four votes are required for a grant.[127]

The grant of review puts the case on what is called the *plenary docket*. "Plenary consideration means that the case will get full briefing,

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[125] *See, e.g.*, Abie State Bank v. Weaver, 282 U.S. 765, 773 (1931) ("[T]he federal ground being present, it is incumbent upon this court, when it is urged that the decision of the state court rests upon a nonfederal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted nonfederal ground independently and adequately supports the judgment.").

[126] Initially the Court's jurisdiction over federal-question cases was limited but mandatory. *See* HART & WECHSLER, *supra* note 3, at 24–25. Today the mandatory jurisdiction includes the few cases heard by three-judge district courts (involving reapportionment or the Voting Rights Act) and occasional special statutes for new legislation that Congress thought should get expedited review. *See* Michael D. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 129–31 (2014). For these cases, the mode of review is appeal rather than certiorari. *See, e.g.*, 28 U.S.C. § 1253.

[127] *See* WILLIAM H. REHNQUIST, THE SUPREME COURT 233 (2001).

oral argument, and, almost invariably, an opinion on the merits."[128] Denial of review means that the decision of the lower court will stand.[129]

How is the Court exercising the discretion conferred by Congress to select cases for the plenary docket? The short answer is: very sparingly, especially in comparison to earlier eras.[130] For example, during the years of the Burger Court (1969–1986), the Court was generally giving plenary consideration to about 150 cases each Term.[131] During the last several years, the number of plenary decisions per Term has seldom gone above

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[128] Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 948 (1985) [hereinafter Hellman, *Case Selection*]. Although the overwhelming majority of cases reach the plenary docket via certiorari, not all do. In addition to appeals under the mandatory jurisdiction, see *supra* note 126, the plenary docket includes a handful of original jurisdiction cases, see text *infra*, and, today, occasional applications for emergency relief that are set for argument without a grant of certiorari, see *infra* Section III.A. This definition of the plenary docket corresponds with the Supreme Court's own "granted & noted" list. *See, e.g.*, Supreme Court of the U.S., Granted & Noted List, October Term 2023 Cases for Argument, Granted/Noted Cases List (supremecourt.gov). It is slightly broader than what some call the "merits docket." *See, e.g.*, STEPHEN VLADECK, THE SHADOW DOCKET xi (2023).

[129] In a small number of cases, the Court will simultaneously grant review and dispose of the case, generally by reversing the decision below. *See* Hellman, *Case Selection*, *supra* note 128, at 955–56. In recent Terms, the summary reversal has almost disappeared from the United States Reports. There was only one in the 2022 Term, and none in 2023. (After the Court recessed for the summer, it issued a summary per curiam opinion rejecting an application for emergency relief and thus effectively affirming the action of the court below. See Dep't of Educ. v. Louisiana, 603 U.S. – (2024).) The Court also makes use of an intermediate form of disposition—the GVR, or "grant, vacate and remand" order. *See* Hellman, Case Selection, supra note 128. at 956 & n.45.

[130] Not only is the Court very selective in granting review; it often limits the grant to the particular questions it wishes to consider. Sometimes these are questions that the Court itself has formulated. See Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 864 (2022) (concluding that "the Court seems to have taken for itself" "the ability to choose what law to declare on its own timetable").

[131] *See id.* at 951–53. Here and in other discussions of the plenary docket, "cases" will be used as a synonym for "decisions." *See id.* at 953.

60.[132] That is a shrinkage of about 60 percent. Currently the Court is deciding fewer cases than at any time since the Civil War era.[133]

The dropoff has been especially pronounced in cases from state courts. During the early Warren Court (1953 through 1961 Terms), the plenary docket included an average of about 27 state-court cases each Term.[134] In the last years of the Burger Court (1981 through 1985 Terms), the average increased, to about 32 per Term. Starting in 1992, the numbers began to decline sharply.[135] In the last five years under Chief Justice Rehnquist (2000 through 2004 Terms), the average was only 12 per Term. And in the four most recent Terms (2020 through 2023), the *total* was only 16.[136]

One other aspect of the Court's work deserves mention. As already noted, the Court may resolve federal questions in suits between states brought under the Court's original jurisdiction.[137] By statute, that jurisdiction is exclusive,[138] yet the Court has construed the statute to "make [the jurisdiction] obligatory only in appropriate cases."[139] Thus, in practice, the jurisdiction operates very much like the certiorari jurisdiction. And the Court has repeatedly exercised its discretion to

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[132] For the 2020 through 2023 Terms, the numbers were, respectively, 57, 63, 57, and 59. (Author's database, checked against Supreme Court's Opinions page.)

[133] *See* Adam Feldman, *Looking Back to Make Sense of the Court's (Relatively) Light Workload*, https://empiricalscotus.com/2018/01/09/light-workload/. Feldman examines several possible explanations for the shrinkage.

[134] Unless otherwise stated, this and the other figures in this paragraph are based on the author's database.

[135] *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 353 (2002).

[136] This figure includes one opinion that decided cases from two state courts. *See* Ford Motor Co. v. Montana 8th District Court, 592 U.S. 351 (2021).

[137] *See supra* note 58 and accompanying text.

[138] *See* 28 U.S.C. § 1251(a).

[139] Arizona v. New Mexico, 425 U.S. 794, 796 (1976) (per curiam) (quotation omitted).

decline to hear state-versus-state cases, even those that appear to present "novel constitutional claims."[140]

The Court's position on this issue is difficult to defend.[141] Cases like *Texas v. California*[142] fall into not one but two of the Article III categories that were of special significance to the Framers. The cases present federal questions. And the parties presenting the federal questions are states, thus putting the cases in one of the only two categories that the Framers placed within the Supreme Court's original jurisdiction. Further, because the federal claims are asserted against another state, that jurisdiction is exclusive, as it has been since the Judiciary Act of 1789.[143] Thus, by exercising a discretion not to hear these cases, the Court is denying sovereign states any federal forum in which to pursue claims that other states are violating federal law or principles of federalism.[144]

In short, the concerns generated by the limitations on the availability of a federal *trial court* for the litigation of federal questions become even more troubling when considered in light of the way in which the *Supreme Court* manages its docket.

II. The Supreme Court's Docket and the Structure of Federal Law

The institutional arrangements described in Part I are the product of a lengthy evolution, but the foundations of the modern Supreme Court were laid a century ago, when Congress, at the urging of Chief Justice William Howard Taft, enacted the "Judges' Bill."[145] The Judges' Bill

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[140] Texas v. California, 141 S. Ct. 1469, 1474 (2021) (Alito, J., dissenting from denial of motion for leave to file complaint).

[141] For a more extended discussion of this point, see Brief of Amici Curiae Federal Courts Scholars in Support of Movants, Alabama v. California (U.S. July 23, 2024) (No. 158 Orig.), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4931923.

[142] *Supra* note 140.

[143] *See* Judiciary Act of 1789, 1 Stat. 73 § 13.

[144] For a defense of the Court's practice, see Steve Vladeck, "Original" Jurisdiction and the Wyandotte Doctrine, 38. "Original" Jurisdiction and the Wyandotte Doctrine (stevevladeck.com).

[145] *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000).

transformed the Court's appellate jurisdiction from one that was largely mandatory into one that was almost entirely discretionary.[146] In the aftermath of that legislation, as Robert Post has written, the Court ceased to be "a final appellate tribunal whose primary task was to settle disputes between litigants"[147] and "began to inhabit [its] new role" as "the proactive manager of the system of federal law."[148] As the preceding pages have demonstrated, two elements are central to that role: maintaining the uniformity of federal law throughout the nation and preserving the supremacy of federal law against encroachments by states.[149]

Even in the era of the 150-case plenary docket, knowledgeable observers expressed concern that the Court could not adequately satisfy "the need for stability and harmony in the national law,"[150] nor could it "maintain more than token supervision of the resolution of federal law questions by the state courts."[151] Today, when the Court typically hears no more than 60 cases a Term from all courts, and no more than a handful from state courts, it is hardly surprising that similar concerns are being voiced.[152] A variety of reforms have been proposed; notably, these include expanding the Court's mandatory jurisdiction.[153]

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[146] The transformation was completed by legislation enacted in 1988. *See* Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 95–96 (1989).

[147] POST, *supra* note 11, at xxxvii.

[148] *Id.* at 596.

[149] I do not minimize the importance of the "enforcement" and "checking" functions, but as Part I has shown, those can generally be carried out by the lower federal courts.

[150] Hruska Commission Report, *supra* note 108, at 212.

[151] Preble Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 959 (1976).

[152] *See, e.g.*, Peter S. Menell & Ryan Vacca, *Breaking the Vicious Cycle Fragmenting National Law*, 2024 U. ILL. L. REV. 353, 364 (2024) (stating that because the Supreme Court fails to resolve circuit splits, "[n]umerous legal issues are left in disarray").

[153] *See, e.g.*, James E. Pfander, *The Supreme Court, Article III, and Jurisdiction Stuffing*, 51 PEPP. L. REV. 433, 464–75 (2024); Steve Vladeck, *Bonus 36: Why Congress*

To determine whether these concerns are justified, and, even more, to evaluate proposals for reform, it is necessary to assess the Court's performance of its role as "manager of the system of federal law." That is an empirical enquiry, but the empirical inquiry requires an analytical framework. Constructing that framework entails two steps. The first step is to define the structure of the "federal law" that the Court superintends. In more prosaic terms, this means classifying federal-law *issues* in a way that reflects the managerial role that the Court has undertaken. That system can then be used as the organizing principle for studying a particular group of *cases* – for example, the cases that received plenary consideration during a particular period. The second step is to identify other case-specific variables that may shed light on the Court's performance of its managerial role. Once those steps have been taken, the empirical work can begin.

This Article provides the necessary framework. It is based on the case classification system that I have used in my studies of the Supreme Court over the years.[154] In this Part, I delineate the structure of federal law – the issue categories – and summarize the protocols for classifying the issues presented by particular cases. Part III outlines the most important of the other variables and explains how the classifications for those variables are shaped by the issue classification system.

A. Organizing Principles and Case Classification

Recognition of the Supreme Court's role as "manager of the system of federal law" tells us that we must look at the operation of that system;

Should Expand the Supreme Court's Docket (Substack, July 20, 2023), www.stevevladeck.substack.com/p/bonus-why-congress-should-expand.

[154] *See, e.g.*, Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1709, 1716, 1737–89 (1978) [hereinafter Hellman, *Plenary Docket*]. That article focused on the unique role of the Supreme Court in providing authoritative guidance for the resolution of disputes nationwide. The federal courts of appeals today play a similar role within the circuit. The parallel is especially striking in the context of en banc rehearing. *Compare* S. Ct. R. 10 (intercircuit conflict and importance as criteria for grant of certiorari), *with* F. R. App. P. 35(a) (uniformity and "exceptional importance" as criteria for grant of en banc rehearing). Thus, the analytical tools described here can also be used, with appropriate modification, to study the en banc process in the federal courts of appeals.

it does not, of itself provide any organizing principle for examining how the Court carries out that role. That organizing principle is supplied by an issue classification system that has three components:

- Four broad (macro) issue categories, each corresponding to one of the major functions of the Supreme Court in the life and law of America, and rank-ordered to reflect the hierarchy in the legal effect of decisions in each area.
- Particularized (micro) issue categories defined by reference to the source of authority for the legal rule in dispute.
- Intermediate groupings that make it easier to organize and identify patterns in the Court's treatment of the micro categories.

In the next two Sections, I describe the macro and micro categories in moderate detail. The third component requires little discussion; as will be seen, the intermediate groupings, like the micro categories, are defined by the source of authority for the legal rule in dispute, but at a higher level of generality.

One preliminary point deserves mention. The structured, law-based approach to issue classification outlined here differs substantially from the approach taken in the well-known Spaeth Database.[155] I believe that this approach is more objective and more transparent, in part because the elements are grounded in basic tenets of the system of government established by the Constitution.

B. Issue Classification: The Macro Categories

The project of defining the structure of federal law begins by dividing issues into four broad categories, each corresponding to one of the major functions of the Supreme Court in the American system of government:

- Individual rights: Delineating the limits of governmental authority against claims of individual liberty.[156] This category includes cases in which litigants seeks redress for, or protection

[155] *See infra* Part V.B.

[156] In this Article, the terms "individual rights," "civil rights," and "civil liberties" are used interchangeably to refer to the category.

against, some act of government (state or federal) which they claim is depriving them of rights guaranteed by those provisions of the Constitution that directly protect individual rights – primarily the Bill of Rights and the Fourteenth Amendment, but also including provisions of the original Constitution such as the Ex post facto clauses.[157] The category also includes remedial and jurisdictional issues uniquely associated with civil rights litigation, e.g. the interpretation of the Voting Rights Act, section 1983, and AEDPA.

- Federalism and separation of powers: Defining the boundaries between state and national power and among the branches of the national government. This category includes preemption cases as well as those involving the structural arrangements created directly or through implication by the Constitution, such as the Dormant Commerce Clause.

- General federal law: Interpreting and applying the body of statutes and regulations through which the national government exercises its sovereign powers and regulates activity in the private sector.

- Jurisdiction and procedure: Supervising the operation of the federal courts.

The first two categories encompass issues that implicate the "supremacy" and "checking" purposes of the federal question jurisdiction outlined in Part I; the third reflects the enforcement function in cases that do not involve constitutional limitations on government action.[158] All four categories are essential to the Supreme Court's role as "manager of the system of federal law."

An important feature of the issue classification scheme is that the four broad categories are *rank-ordered* in the sequence set forth above. That sequence starts with the issues that generate the holdings with the most far-reaching legal effect and works its way down to those of

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[157] I specify "direct" protection of individual rights because, as the Supreme Court has often noted, the principles of federalism and separation of powers embodied in the Constitution also serve to protect individual liberty. *See infra* Part II.C.2.

[158] *See supra* Section I.A.

narrowest legal consequence.[159] If there is room for debate about which category is appropriate for a particular case, the question is resolved by selecting the category that ranks higher in the sequence.

Civil liberties issues are placed at the top of the hierarchy for the simple reason that judicial interpretations of constitutional provisions that directly protect individual rights are supreme over all other law for both state and federal governments.[160] If the Court rules in favor of the constitutional claim, it disables all governments from engaging in the challenged practice.[161]

The civil liberties macro category also includes claims under federal statutes that limit governmental power for the purpose of protecting rights closely analogous to those guaranteed by the Bill of Rights or the Reconstruction Amendments.[162] Prominent examples are the Voting Rights Act, which implements the Fifteenth Amendment, and the Religious Freedom Restoration Act (RFRA), which protects the free exercise of religion from infringement by the Federal Government.[163]

Second in the hierarchy come issues of federalism and separation of powers. Here the question is not whether governments generally can act

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[159] Legal effect is distinct from practical effect, as the explanation of the categories below makes clear.

[160] There are a few exceptions to this generalization. For example, the Contracts Clause limits state governments, but not the Federal Government. The reverse is true of the Suspension Clause. Nevertheless, I see no reason not to include in this category all claims under constitutional provisions that directly protect individual rights against government action.

[161] *See* Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting) (noting that Court decision striking down New York law under the Due Process Clause—in contrast to rulings grounded in federalism—"operates equally as a limitation upon Congressional authority to deal with crime, and, more especially, with juvenile delinquency.").

[162] Where individuals seek redress from government but invoke a statute or doctrine of general applicability, not requiring a finding of state action, the case is not classified as one involving civil rights but rather as one involving general federal law. *E.g.*, Fort Bend Cnty. v. Davis, 139 S. Ct. 1843 (2019) (Title VII).

[163] As originally enacted, RFRA applied to state governments as well as the Federal Government, but the Supreme Court held that Congress's attempt to limit state action exceeded its remedial powers under the Fourteenth Amendment. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

in a particular way towards the individual, but whether the power can be exercised by the level or branch of government that has asserted the authority.[164] If the court rejects the assertion of governmental power, the effect is to disable that unit of government from engaging in the activity – but only that unit. And for federalism cases – which dominate this segment numerically – even that effect is limited; in contrast to the civil rights cases, when courts hold that an exercise of state power is impermissible on federalism grounds, Congress can generally override the rulings and allow states to take similar action in the future.[165]

What remains are issues of federal law that do not involve either constitutional limits on governmental power or the allocation of power in a federal system. These issues have been divided into two groups, roughly equivalent to substance and procedure as those terms are used in delineating the permissible domain of federal law under the Erie doctrine. If the issue involves the regulation of primary conduct, it goes into the third category, labelled "general federal law." This category includes the federal government's exercise of its sovereign powers (e.g., in prosecutions under criminal statutes or control of immigration) as well as Congress's regulation of private ordering, primarily under its commerce power (e.g., labor and antitrust laws). The final category is reserved for issues generated by statutes and rules that bear only on the operation of federal courts.

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[164] The governmental unit whose power is contested will not necessarily be a party to the litigation. Preemption issues in particular often arise in suits between private parties. *See, e.g.*, Wyeth v. Levine, 555 U.S. 555 (2009) (rejecting preemption defense to state-law products liability action). Nevertheless, preemption decisions define the extent of state power to regulate.

[165] That is obviously true when the question involves statutory construction (e.g., preemption), but the point also holds for matters of constitutional interpretation not involving individual rights. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 406 (1946) (holding that Congress could consent to state taxing scheme even if the state law would otherwise be struck down as discriminating against interstate commerce); Mallory v. Norfolk So. Ry. Co., 600 U.S. 122, 157 & n.3 (2023) (Alito, J., concurring in part and concurring in judgment) (stating that federalism concerns presented by personal jurisdiction case are best analyzed under the Commerce Clause rather than the Due Process Clause, in part because Congress has the authority to change the Court's rule "under its own Commerce power"); *see generally* Amar, *supra* note 2, at 246 n.133 (listing and explaining the "types of otherwise-unconstitutional conduct that Congress may cure").

One way of distinguishing between the two categories is to ask whether the Supreme Court's resolution of the issue will provide a rule of decision for state courts. If the answer is yes, the issue is one of general federal law. A good illustration is *Carnival Cruise Lines v. Shute*,[166] a case from the Ninth Circuit in which the Court upheld the validity of a forum selection clause printed on a passenger ticket. The Court remanded a state court case for reconsideration in light of its decision,[167] thus signaling that the rule was not a rule of federal procedure but a rule of substantive maritime law binding on state courts by reason of the Supremacy Clause.[168]

Cases involving the availability and scope of judicial review of executive or administrative action are treated along with other cases arising under the particular statutory scheme, not as federal courts cases. This approach follows from the rank-ordering principle; it also reflects the fact that the procedural and jurisdictional rules in dispute generally are part and parcel of the law that controls the substantive rights of the parties.

C. Issue Classification: The Micro Categories

Within the four broad categories, particular issues or issue areas are defined by reference to *the source of authority for the legal rule in dispute*. This approach derives from the basic precept that the national government is a government of limited powers.[169] Because that is so, any rule of federal law must be grounded in a specific source of authority – ordinarily, the Federal Constitution or an Act of Congress. It follows that all issues of federal law can be classified in accordance with the constitutional or statutory provision that most immediately gives rise to the legal question in dispute.

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[166] 499 U.S. 585 (1991).

[167] Carnival Cruise Lines, Inc. v. Super. Ct., 499 U.S. 972, *on remand to* 286 Cal. Rptr. 323 (Ct. App. 2d Dist. 1991) (distinguishing *Shute* on its facts).

[168] The state court had earlier recognized that federal law controlled, because "a passenger ticket contract for an ocean voyage constitutes a contract under maritime law." Carnival Cruise Lines, Inc. v. Super. Ct., 272 Cal. Rptr. 515, 519 (Ct. App. 2d Dist. 1990).

[169] *See, e.g.*, Bond v. United States, 572 U.S. 844, 854 (2014) (*Bond II*).

In the realm of civil rights litigation, issues may be defined by a clause in the Bill of Rights (e.g. the Takings Clause) or by a line of precedent interpreting a particular provision of the Constitution (e.g. *Miranda*). In the statutory realm, some issues are defined by titles of the United States Code (e.g., bankruptcy); others correspond to particular statutory schemes (e.g. Title VII, FELA, ADEA); still others embrace clusters of statutes (e.g. "banking and finance").

As these examples illustrate, issues can be defined at different levels of specificity. The appropriate level of specificity will be geared in the first instance to the purpose of the research. In most of my Supreme Court studies, I was seeking to identify the forces that shape the size and composition of the plenary docket; for those projects, the level of specificity was determined primarily by the volume of decisions to be analyzed. For example, there was only one category for the Confrontation Clause, but I identified half a dozen different kinds of claims by criminal defendants asserting a denial of due process.[170] There was a category for the general run of equal protection cases challenging discrimination on the basis of race, but I broke out a separate category for school desegregation suits.[171]

The school desegregation example illustrates a second criterion: no one could doubt that *Brown v. Board of Education*[172] had given rise to a distinct line of precedent. So, too, with *New York Times v. Sullivan*[173] on the First Amendment as a limitation on state defamation laws.[174] But elsewhere in the realm of freedom of speech, lines of precedent were much less clear, and a concern for objectivity made me very cautious

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[170] *See* Arthur D. Hellman, *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521, 534 (Table III) (1983) [hereinafter Hellman, *National Law*].

[171] *See* Hellman, *Plenary Docket*, *supra* note 154, at 1748–49 (Table VII). Note that in the 1965–1970 period, there were almost as many cases on school desegregation as there were on all other issues involving racial discrimination.

[172] 347 U.S. 483 (1954).

[173] 376 U.S. 254 (1964).

[174] The category also included other state tort claims like invasion of privacy. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967).

about recognizing additional micro categories, even though the consequence was a large number of "other" decisions.[175]

I continued to follow this approach as the Court's First Amendment jurisprudence evolved. For example, by the time of the *Central Hudson Gas* decision in 1980, it was clear that there was a distinct line of precedent on commercial speech.[176] In contrast, although the Court has referred to "the government-speech doctrine," there is fundamental disagreement over the scope of the doctrine,[177] and the number of cases is small. So if the purpose of the research is to study shifts in the content of the docket, I do not think it would be helpful to add a "government speech" category.[178]

More generally, over the years I have added new micro categories as new lines of precedent have emerged. For example, in my initial studies, I identified a category of cases challenging state electoral districting under the Equal Protection Clause.[179] When *Shaw v. Reno*[180] was decided in 1993, that case was included in the category, though I added a "secondary issue" classification to reflect the fact that the sole claim was that the districting plan unconstitutionally classified citizens on the basis of race.[181] But after some years, it became apparent that *Shaw v. Reno* had given rise to a distinct line of precedent on claims involving race and redistricting.[182] So I created a new issue category

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[175] I did recognize a separate category for challenges to obscenity prosecutions, later expanded to include other cases involving material specifically targeted based on its sexual content, e.g. child pornography.

[176] *See* Central Hudson Gas & Elec. Corp. v. PSC, 447 U.S. 557 (1980).

[177] *See* Walker v. Texas Div., Sons of Confed. Vets, Inc., 576 U.S. 200 (2015).

[178] It may be desirable to recognize the category but code it only as a secondary issue. On secondary issues generally, see *infra* Section II.D.

[179] The line of cases began with *Reynolds v. Sims*, 377 U.S. 533 (1964).

[180] 509 U.S. 630 (1993).

[181] *See id.* at 637.

[182] In fact, the Court has recognized two distinct constitutional claims involving race and redistricting—racial gerrymandering and vote dilution. *See* Alexander v. S.C. State Conf. of NAACP, 602 U.S. ___, ___ (2024) (slip op. at 34); *id.* at ___ (Thomas, J., concurring in part) (slip op. at 2). But I saw no reason to create two separate issue codes for two lines of precedent that are so closely related.

separate from the categories on racial discrimination generally and redistricting generally.

In a more recent project, I analyzed the "ideological direction" of Supreme Court decisions.[183] For that research, I broke out some additional categories where there was reason to think that ideological alignment might be in play – for example, affirmative action.[184] But I limited the categories to those that could be justified within the Court's doctrinal framework; thus there is no category of "abortion-related speech."[185]

In addition to my studies of the Supreme Court, I have examined the workings of the en banc process in the Ninth Circuit Court of Appeals.[186] In the course of that research, I identified a few particularized issue categories that warranted separate treatment because of their prominence in en banc balloting. A noteworthy example emerged in a study of ideology and the en banc process during a 23-year period that ended in 2020. Of the 43 cases on the right to the assistance of counsel under the Sixth Amendment, 18 involved claims of ineffective assistance at the penalty phase of a capital trial.[187] I created a separate category for those cases.

The preceding discussion points to a second generalization. In deciding whether to break out particularized issues from a broader category like equal protection, one must consider not only on the purpose

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[183] *See* Arthur D. Hellman, *The Supreme Court's Two Constitutions: A First Look at the "Reverse Polarity" Cases*, 82 U. PITT. L. REV. 273 (2020) [hereinafter Hellman, *Reverse Polarity*].

[184] *See id.* at 304–06.

[185] I recognize, of course, that some members of the Court believe that the Court *has* created "an entirely separate, abridged edition of the First Amendment applicable to speech against abortion." McCullen v. Coakley, 573 U.S. 464, 497 (2014) (Scalia, J., concurring in judgment). But such assertions, in opinions that do not speak for the Court, do not create a doctrine-based category.

[186] *See, e.g.*, Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425 (2000).

[187] *See* Arthur D. Hellman, *Liberalism Triumphant? Ideology and the En Banc Process in the Ninth Circuit Court of Appeals*, 31 WM. & MARY BILL OF RIGHTS J. 1, 23–34 (2022) (summarizing results of en banc balloting in constitutional criminal procedure cases) [hereinafter Hellman, *Ninth Circuit*].

of the research but also the period to be studied. For example, the Court never heard a large number of cases on "the validity of [governmental] classifications based on illegitimacy,"[188] but in the 1970s, cases of that kind appeared on the plenary docket in almost every Term, and in my research at the end of the decade, I created a separate category for them.[189] But the cases disappeared from the plenary docket after the first Term of the Rehnquist Court. If I were writing about the Court's business in the 21st century, I would not include the category.

One final note. As is evident, the number of micro categories is quite large. To make it easier to identify and discuss patterns in the Court's handling of its docket, I have used intermediate groupings. As already noted, these intermediate groupings are also defined by the source of the legal rule in dispute, but at a higher level of generality. For example, in the realm of individual rights, there is a grouping for constitutional criminal procedure, further divided between "specific" protections (primarily those in the Bill of Rights, but also including provisions of the original Constitution like the Ex Post Facto clause) and Fourteenth Amendment rights (primarily due process). A full list will be made available on the web.

D. Implementing the Issue Classification System

The issue classification system described in the preceding pages provides the organizing principle for evaluating how the Supreme Court carries out its responsibilities as manager of the system of federal law. In practical terms, this means that the researcher would first group cases by issue and then, through filtering and sorting that takes account of other variables, examine the Court's handling of the cases in each group.

For most of the cases that receive plenary consideration today, there is only one possible issue classification. But that is not invariably true. Sometimes the Court decides more than one issue, and the question is which should be designated as the primary issue. In other cases, only a single issue is resolved, and the question is how to best characterize it.

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[188] *See* Arthur D. Hellman, *The Supreme Court and Civil Rights: The Plenary Docket in the 1970's*, 58 ORE. L. REV. 1, 21 (1979).

[189] *See id.* at 20 (Table V), 21–22.

Or, the Court resolves a single issue, but the decision implicates other statutes or lines of precedent.

The case classification system deals with situations like these through three interrelated elements. First, the system allows for identification of up to three issues for each case – the "primary issue" and two secondary issues. These can include issues presented or addressed but not decided.[190] Second, additional coding delineates the relationship between the primary issue and the other issues. Third, search queries are designed to capture the full range of cases in which a particular issue played a part in the Court's decision.

This regime diminishes the significance of the "primary" issue, but it does not eliminate it entirely. Thus, designation of the primary issue is an important step in the analysis of a case. Several protocols are helpful in making that determination.

The rank-ordered macro categories. For many cases, the rank-ordering protocol for macro issues described earlier is dispositive. For example, the Court might interpret a statute, and then decide whether the statute, as interpreted, is constitutional. The case would be classified as one involving the particular constitutional provision.[191]

Extent of disagreement within the Court. Where the Court decides multiple issues, I generally give priority to the issue that generated the largest extent of disagreement among the Justices. For example, in the Boston Marathon bomber case, the First Circuit vacated the defendant's death sentence on two grounds: jury selection and exclusion of evidence proffered by the defense.[192] The Supreme Court reversed both

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[190] For example, in *City and County of San Francisco v. Sheehan*, 575 U.S. 600 (2015), the Court granted certiorari to consider the applicability of Title II of the Americans with Disabilities Act (ADA) to police encounters with "armed, violent, and mentally ill suspect[s]." *Id.* at 608. But the Court ended up deciding only the second question presented: whether qualified immunity protected the petitioning officers from liability from an excessive force claim under the Fourth Amendment. The excessive force claim would be designated as the primary issue (albeit with a notation that reversal of the Ninth Circuit was based on qualified immunity), but the record would also reflect the fact that an issue under the ADA was presented but not decided.

[191] *See, e.g.*, United States v. Hansen, 599 U.S. 762 (2023) (First Amendment freedom of speech).

[192] United States v. Tsarnaev, 908 F.3d 24 (1st Cir. 2020).

holdings,[193] but the dissent was limited to the evidentiary issue.[194] I classified the latter as the primary issue.

The specific versus the general. When a case involves the interaction of two statutory areas, I give preference to the one that is most likely to be affected by the decision. For example, in *Maslenjak v. United States*,[195] the defendant was convicted under § 1425(a) of the criminal code (Title 18) for unlawfully procuring her own citizenship. The Court reversed the conviction, holding that in such a case the Government must prove that "the illegal act … somehow contributed to the obtaining of citizenship."[196] The opinion relied on statutes and precedents governing "the naturalization decision itself."[197] I classify *Maslenjak* as primarily a naturalization case.

One final point. Although I do my best to be consistent and even-handed in applying these protocols, in most instances the choice between issue codes will not affect the next stages of analysis. In particular, whichever issue is designated at the primary issue, the polarity classification (discussed in the next Part) will generally be identical or parallel. For example, in the *Maslenjak* case discussed above, the polarity will be +I (reflecting that the decision is adverse to the Government) whether the case is considered as a naturalization case or as a criminal prosecution. And if I were studying case selection, the search query would assure that *Maslenjak* would be counted both as an immigration/naturalization case and as a decision interpreting the criminal code.

III. Studying the Docket: Input and Output

Although the issue classification system supplies the organizing principle for studying the Supreme Court's performance of its role as manager of the system of federal law, it is only the starting-point. Other variables also contribute to our understanding. These fall into two

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[193] United States v. Tsarnaev, 595 U.S. 302, 312 (2022).

[194] *See id.* at 327–28 (Breyer, J., dissenting).

[195] 582 U.S. 335 (2017).

[196] *See id.* at 342.

[197] *Id.* at 347.

groups: those that define the cases as they come to the Court and those that record various aspects of the decisions that emerge.

A. The Cases As They Come to the Court

Three variables are particularly salient in defining the character of the cases as they come to the Court. They are: the route by which the case was brought to the Court, the type of court whose decision is to be reviewed, and the identity of the party who seeks that review (PSR). For my own database, my practice has been to create a new case record when review is granted and to code these and other "input" variables.

The route. When I began my studies of the Supreme Court's modes of doing business, the mandatory jurisdiction still loomed large in the Court's work,[198] and it was important to specify whether a case came up on appeal (mandatory) or by certiorari (discretionary). Today, the mandatory jurisdiction has been almost completely eliminated, but a small segment remains.[199] Also remaining, as a generator of plenary decisions, is the original jurisdiction.[200] I therefore continue to record the "route" by which a case was brought to the Court.

Indeed, recent Terms have seen the emergence of a new mode of doing business: applications for emergency relief are set for oral argument and are disposed of by full opinions.[201] I have therefore created a new "route" code for cases in which an application for emergency relief receives plenary consideration without a grant of certiorari.[202]

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[198] *See* Hellman, *Plenary Docket*, *supra* note 154, at 1721–23.

[199] *See, e.g.*, Allen v. Milligan, 599 U.S. 1 (2023) (appeal from decision of three-judge district court).

[200] *See supra* note 58 and accompanying text.

[201] *See, e.g.*, Ohio v. EPA, 603 U.S. ___ (2024) (staying enforcement of EPA rule); Biden v. Missouri, 595 U.S. 87 (2022) (per curiam) (upholding HHS vaccine mandate). Although the opinion in the latter case is per curiam, that does not distinguish it from other plenary docket cases, especially those resolved under severe time constraints. *See, e.g.*, Trump v. Anderson, 601 U.S. 100 (2024) (per curiam) (certiorari case).

[202] In some cases, the Court has treated an application for emergency relief as a petition for certiorari before judgment and has simultaneously granted the petition. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 477 (2022) (order granting certiorari). These are treated as certiorari cases.

The type of court. One need not embrace the "neo-Federalist view" in its entirety to recognize that it matters a great deal whether a federal question has been litigated initially in a federal or a state court. In my own classification system, I first specify the "type of court" whose decision is to be reviewed. Here I distinguish between state and federal courts and also between four different types of federal courts: courts of appeals, three-judge district courts,[203] single-judge district courts,[204] and other federal courts.[205] A separate field in the database identifies the particular state, circuit, or district from which the case comes.[206] In original jurisdiction cases, there is by definition no *court* below, but there are some in which the Court rules on exceptions to the report of a Special Master, and that is reflected in the "court" field.[207]

The party seeking review (PSR). The "route" and "type of court" entries are pretty much self-defining. Not so for the "party seeking review" – one of the most important of the "input" variables. But for the most part the PSR codes can readily be deduced from the purposes of the federal question jurisdiction as outlined in Part I. They also fit well with the organizing principles outlined in the discussion of issue classification.

Consider first the "checking" function. This function is directly implicated in constitutional cases to which the United States (or one of its agencies or officers) is a party. Depending on who prevailed in the court below, the PSR would be either the Government or the party

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[203] *See supra* note 126.

[204] *See* Boskey & Gressman, *supra* note 146, at 90, 94–95 (noting repeal of statutes authorizing direct appeals to Supreme Court from two types of district court orders). Occasionally Congress authorizes such appeals for challenges to particular federal statutes. *See* United States v. Eichman, 496 U.S. 310, 313 & n.2 (1990) (challenges to Flag Protection Act of 1989).

[205] Currently, the only such court is the Court of Appeals for the Armed Forces. *See* 28 U.S.C. § 1259; Ortiz v. United States, 585 U.S. 427 (2018).

[206] I do not distinguish between levels or geographic divisions of state courts. From 1789 to the present day, Congress has required that the state court be the highest in which review could be had. *See supra* note 118 and accompanying text. But as long as that requirement is met, all state courts stand on the same footing as far as the Supreme Court is concerned.

[207] *See, e.g.*, Delaware v. Pennsylvania, 598 U.S. 115 (2023).

opposing the Government. It is irrelevant whether the party opposing the Government is asserting an infringement of civil liberties or a claim grounded in constitutional structure. And although the Framers were concerned primarily with checking overreach by Congress, there is no reason not to include challenges to executive action as well, using the same pair of codes.

The same pair of codes is also used for statutory litigation to which the Government is a party. To be sure, these are not "checking" cases in an originalist sense, though the litigant challenging Government action might well view them as such.[208] Indeed, the Court itself sometimes views them that way, notably in decisions invoking the "major questions" doctrine[209] or narrowly interpreting criminal statutes.[210]

Soon after the passage of the Judges' Bill, Felix Frankfurter and James Landis called attention to the Supreme Court's newly enhanced role as "the final authority in adjusting the relationship[] … of the individual to the United States."[211] Assuming that the reference to "the individual" also includes corporations and other entities, the description fits all of the classes of cases described above. And in all of those cases,

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[208] From the Government's perspective, they probably look like "enforcement" cases, especially if the Government has initiated the litigation.

[209] *See, e.g.*, West Virginia v. United States, 597 U.S. 697, 723 (2022) (noting that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation [to an administrative agency] claimed to be lurking there.") (cleaned up). The Court has held that the major questions doctrine applies not only to "agency actions involving the power to regulate," but also to "the provision of government benefits." Biden v. Nebraska, 600 U.S. 477, 505 (2023) (cleaned up). In so doing, the Court explicitly relied on the doctrine's constitutional underpinnings: "It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations." *Id.*

[210] *See, e.g.*, Snyder v. United States, 603 U.S. 1, ___ (slip op. at 10) (2024) (stating that "[i]nterpreting § 666 as a gratuities statute would significantly infringe on bedrock federalism principles."); Ciminelli v. United States, 598 U.S. 306, 315–16 (2023) (reiterating Court's caution that "absent a clear statement by Congress, courts should not read the mail and wire fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the States.") (cleaned up).

[211] FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 308 (1928).

the United States is typically represented in the Supreme Court by the same lawyers – the Solicitor General (SG) and her deputies. Taking all of this into account, there is every reason to use a single pair of PSR codes for all cases to which the Federal Government is a party.[212]

"Supremacy" is a little more complicated. Recall that this category encompasses cases in which a litigant claims the protection of federal law against action under color of state law. If the state is a party to the litigation, the PSR would be either the state (or an agency or officer) or the party opposing the state. But suppose the state is not a party – as in *New York Times v. Sullivan*,[213] for example. In that situation, the PSR will be either the person asserting a "right … or immunity" under federal law,[214] or the adversary of that person. So there is a second pair of codes for the supremacy cases – "claimant" and "opponent." Both sets of codes encompass civil liberties claims and also claims asserting federalism-based limits on state power.

What remains are "enforcement" cases not implicating the supremacy or checking functions, and not involving the United States as a party. These are cases in which one private party seeks to enforce federal rights against another private party – for example, rights under Title VII or the antitrust laws or the securities Acts. Ordinarily, the party seeking review will be either the party asserting the federal claim – the plaintiff – or the party resisting the federal claim – the defendant. And the Court's decision will generally establish a precedent that favors all plaintiffs or all defendants in that type of litigation. So "plaintiff" and "defendant" are the PSR codes for these cases.

The upshot is that four pairs of codes suffice to define the "party seeking review" in the overwhelming majority of cases. And, in those cases, the PSR code will tell us which party prevailed in the court below. "Other" is used for the handful of cases that do not fit any of the patterns just described.

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[212] Well, not quite all. Because of the special status of states in the federal system, see *infra* text accompanying note 235, I have an additional PSR code for cases in which a state (or a subdivision or instrumentality) is the PSR and the opposing party is the Federal Government.

[213] 376 U.S. 254 (1964).

[214] *See supra* note 117 and accompanying text.

One wrinkle deserves mention. For many decades, the Solicitor General's Office has played an outsized role in the Supreme Court's case selection process.[215] For example, when the Government is the respondent, the SG may defend the decision below but agree that the Court should hear the case – typically, to resolve an intercircuit conflict.[216] In a private lawsuit, the Court may ask the SG for her views as to whether review should be granted. I created a set of codes to reflect the SG's position in cases where the United States is not the party seeking review. And if there are multiple petitions in a consolidated set of cases, the United States will be listed as the PSR.

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In the preceding pages, I have discussed the "input" variables that are most important from the neo-Federalist perspective sketched in Part I. Other researchers, with different interests, might add other variables. For example, the Supreme Court distinguishes between paid cases and cases filed in forma pauperis (IFP), and the plenary docket is overwhelmingly drawn from the paid petitions.[217] Within the paid cases, most are filed by counsel, but a substantial number are filed by litigants acting pro se.[218] Pro se petitions are almost never granted. Thus, if one were researching trends in grant rates, one would want to distinguish between paid and IFP cases and between paid counseled cases and paid pro se cases.

I note, too, that "input" continues after the grant of review. Briefs will be filed, including amicus briefs, and the Court will hear oral

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[215] *See* DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 86–92 (1980); Hellman, *Case Selection*, *supra* note 128, at 1020–27.

[216] *See, e.g.*, Brief for Respondent at 12, Bittner v. United States, 598 U.S. 85 (2023).

[217] *See* Hellman, *Case Selection*, *supra* note 128, at 960–62. In recent Terms, the number of IFP cases receiving plenary consideration has diminished almost to the vanishing point. Not a single IFP case was on the plenary docket in the 2022 Term. In the 2023 Term, there were four such cases, two of which were consolidated for argument and decision.

[218] In recent Terms, 25% or more of the paid petitions have been filed by litigants acting pro se. I am indebted to Linda Tashbook of the Barco Law Library, University of Pittsburgh School of Law, for compiling this information.

argument. Some researchers examine those aspects of the Court's processes. I do so only to a limited extent.[219]

B. The Decisions that Emerge: Issue Polarity

When an opinion is handed down in a plenary docket case, I complete the database record that I created when the Court granted review. There are many variables to be recorded. For example: What reason, if any, does the Court give for hearing the case? What is the judgment of the Court – affirmance, reversal, or something else? What is the vote tally? Who wrote the Court opinion? Is there a majority opinion, or only a plurality? How did the other Justices vote, and which Justices wrote or joined separate opinions?

Information about these and other aspects of the plenary docket cases can contribute to our understanding of how the Court is carrying out its responsibilities for managing the national law. But it would be tedious to go into the details of the coding, and, happily, it is unnecessary to do so. Rather, I shall concentrate on one variable that is particularly salient in its own right; it also provides a foundation for the examination of "ideological direction" in Part V. I refer to issue polarity, recorded in plus/minus codes.

These codes describe case outcomes. The code depends on the nature of the issue, but for most cases, the "plus" signifies that the court ruled in favor of the claim or defense *based on the source of the legal rule in dispute*. For all but a small number of cases, five pairs of codes suffice.

An important feature of the system is that the polarity codes closely track the PSR codes, and both, in turn, are keyed in large part to the "supremacy" and "checking" functions of the federal courts. For example: if the PSR is the litigant asserting the violation of federal rights under color of state law, we know that the court below rejected the claim under the Supremacy Clause. The polarity code will tell us whether the Supreme Court ruled in favor of the claim.[220]

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[219] For example, if the Solicitor General does not file a brief at the certiorari stage but does so at the merits stage, I will note that fact.

[220] The polarity codes, unlike the PSR codes, distinguish between civil liberties claims and federalism-based claims. This accords with the macro-category issue classification and the rank ordering. *See supra* Part II.B.

1. Civil liberties

In civil liberties cases, by definition, the legal rule in dispute is grounded in one of the provisions of the Constitution that directly protect individual rights against government action – most often, one of the first eight amendments.[221] If the decision sustained the constitutional claim, the case is coded as +C.[222] If the decision rejected the claim, the case is a –C.[223] The nature of the claim and the identity of the claimant are irrelevant.

Also irrelevant are the values and purposes invoked by the government in defense of its action. That is so even if, in other contexts, those values might support a different kind of civil rights claim. For example, in *Espinoza v. Montana Department of Revenue*,[224] the Supreme Court held that the state violated the Free Exercise Clause by excluding religious schools from a program that provided tuition assistance to parents who send their children to private schools.[225] In defending its program, the state relied on a state constitutional provision that in some respects parallels the Establishment Clause.[226] But the state did not argue that the Establishment Clause *required* the exclusion of religious schools.[227] Only one constitutional claim was before the Court, and the Court sustained that claim. The case is therefore coded as +C.

In rare instances, both sides may argue that the Constitution requires a ruling in their favor. The recent controversial decision in

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[221] The same codes are used for claims under statutes like the Voting Rights Act and the Religious Freedom Restoration Act.

[222] *See, e.g.*, Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (holding that state regulation requiring disclosure by nonprofit organizations violated their freedom of association) (+C).

[223] *See, e.g.*, Ford Motor Co. v. Montana Eighth Jud. District Court, 592 U.S. 351 (2021) (rejecting due process challenge to exercise of state-court jurisdiction over nondomiciliary corporation) (-C).

[224] 591 U.S. 464 (2020).

[225] *Id.* at 487–89.

[226] *See id.* at 532 (Breyer, J., dissenting) (noting "Montana's antiestablishment interests").

[227] *See id.* at 473–74 (Court opinion) (stating that "the parties do not dispute that the scholarship program is permissible under the Establishment Clause.").

Kennedy v. Bremerton School District[228] is illustrative. A public high school football coach was fired for engaging in prayer on the football field immediately after games. He sued the school district alleging violation of his rights to freedom of speech and the free exercise of religion. The school district argued that its actions "were essential to avoid a violation of the Establishment Clause."[229] The Supreme Court held that the school district violated the coach's rights of free speech and free exercise; it rejected the school district's Establishment Clause defense. Because the coach was the party challenging state action, I gave primacy to the +C holding on his claims. But the record also reflects the -C holding on the Establishment Clause issue. In any event, as already stated, cases like *Kennedy* are rare.

Sometimes, in civil rights litigation, the Court does not consider the merits of the constitutional claim; it decides only an issue of procedure or jurisdiction. In these cases I replace "C" with "J," so that the plus or minus records whether the decision favored the party claiming under the Constitution or the party defending government action. Two principal scenarios can be identified. In one, the adjective-law issue is the only one presented to the Court; typically this happens when the lower court has ruled against the claimant on that issue.[230] In the other scenario, the Court is presented with a constitutional claim but declines to decide it based on Article III limitations such as standing or mootness.[231]

2. Federalism and separation of powers

Cases on federalism and separation of powers are similar to civil liberties cases in that they involve a litigant who is challenging an exercise of governmental power on grounds directly or indirectly derived

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[228] 597 U.S. 507 (2022).

[229] *Id.* at 532.

[230] *See, e.g.*, Martinez v. Ryan, 566 U.S. 1, 17 (2012) (reversing lower courts and holding that, under limited circumstances, procedural default "will not bar a federal habeas court from hearing a substantial claim of ineffective assistance [of counsel] at trial") (+J).

[231] *See, e.g.*, Murthy v. Missouri, 603 U.S. ___ (2024) (holding that plaintiffs asserting First Amendment claims lacked standing to seek injunction against any defendant) (-J); *compare id.* at ___ (slip op. at 34) (Alito, J., dissenting) (agreeing with lower court that at least one plaintiff had standing and that she was "likely to prevail on her claim that the White House coerced Facebook into censoring her speech").

from the Constitution. They are different in that the central question is whether the *particular* governmental unit can exercise power. I therefore use two sets of plus/minus codes, one for challenges to federal authority and one for challenges to state authority.

When the dispute centers on *federal* authority, the codes are +/-I, with +I signaling that that the court ruled in favor of the litigant challenging an exercise of federal power. (The "I" stands for "individual," although the party opposing the government can also be a corporation, organization, or other entity.) The +/-I codes thus parallel the +/-C codes used in civil rights cases. The parallel is deliberate; it reflects the idea, frequently emphasized by the Supreme Court, that the principles of federalism and separation of powers embodied in the Constitution serve in important ways to protect individual liberty.[232]

The precise meaning of the +/- codes depends on the nature of the issue. When the question is whether Congress has exceeded its enumerated powers under the Constitution, the +I signals that the decision supported the litigant arguing that federal authority is lacking.[233] In cases involving separation of powers, +I means that the court rejected the assertion of authority by the particular branch of the Federal Government.[234]

Structural challenges to Federal Government action do not arise often, either in the Supreme Court or in the courts of appeals. Far more numerous are cases in which a litigant invokes structural grounds to

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[232] *See, e.g.*, Bond v. United States, 564 U.S. 211, 221–22 (2011) (*Bond I*) (federalism); Seila Law LLC v. Consumer Fin. Protection Bureau, 140 S. Ct. 2183, 2202–03 (2020) (separation of powers). The +/-I codes for separation of powers cases also comport with Professor Amar's insight that "built into the general structure of the Constitution is a libertarian bias based on checks against laws …." Amar, *supra* note 2, at 222–23 n.67; *see also id.* at 258 n.170 ("The genius of the system is that because the several branches must cooperate before individuals may be denied liberty or property, the broadest conception of the rights at stake usually prevails.").

[233] *See, e.g.*, Shelby County v. Holder, 570 U.S. 529 (2013) (holding that coverage formula in § 4 of the Voting Rights Act of 1965 could no longer be justified as an exercise of Congress's power under the Fifteenth Amendment) (+I). If the Federal Government is not a party, as in most sovereign immunity cases, the +/-F codes are used. *See infra* this Section.

[234] *See, e.g.*, Seila Law, *supra* note 232 (holding that structure of Consumer Finance Protection Bureau violates separation of powers) (+I).

challenge an exercise of *state* power. Some of the cases turn on constitutional doctrines (e.g., intergovernmental immunity or the Dormant Commerce Clause); more commonly, the question is one of preemption – whether federal legislation overrides a rule of state law that would otherwise control.

The plus/minus coding for these cases is grounded in basic tenets of the American system of government. As summarized by the Supreme Court:

> When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority "to do all ... Acts and Things which Independent States may of right do." The Constitution limited but did not abolish the sovereign powers of the States, which retained "a residuary and inviolable sovereignty."[235]

Thus, a litigant seeking to use federal law to override state law or state prerogatives must point to something in the Federal Constitution or a validly enacted Congressional statute to support the claim. For these cases the codes are +/-F. The +F means that the court's decision required the subordination of the state law to the federal.[236] If the decision rejected the assertion of federal supremacy, the case is coded as –F.[237]

The same codes are used irrespective of whether the state is a party, and irrespective of whether the litigant seeking to override state law is a corporation, an individual, the Federal Government, or anyone else. For example, in *Mutual Pharmaceutical Co. v. Bartlett*, the Court held that a state-law design defect claim was preempted by federal law.[238] The

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[235] Murphy v. NCAA, 138 S. Ct. 1461, 1475 (2018) (quoting Declaration of Independence para. 32 and THE FEDERALIST NO. 39 at 245 (Clinton Rossiter ed., 1961)).

[236] *See, e.g.*, Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 315, 326 (2016) (holding that "a state law requiring disclosure of payments relating to health care claims" "imposes duties that are inconsistent with the central design of ERISA" and is thus preempted as applied to ERISA plans).

[237] *See, e.g.*, Virginia Uranium, Inc. v. Warren, 587 U.S. 761 (2018) (holding that Virginia law banning uranium mining is not preempted by the Atomic Energy Act).

[238] *See* Mutual Pharm. Co. v. Bartlett, 570 U.S. 472 (2013).

case is coded as +F. So is *Howell v. Howell*, in which the Court ruled that federal law completely preempts states from treating waived military retirement pay as divisible community property.[239] So, too, is *United States v. Washington*, in which the Court found that a state workers' compensation law discriminated against the Federal Government and was not saved by a congressional waiver.[240]

One important area of federalism litigation fits uneasily within the framework I have described: state sovereign immunity. In many of the cases the question is whether *Congress* has acted within its powers in abrogating state immunity.[241] But the Federal Government generally is not a party.[242] And in all of the cases a litigant is seeking relief under federal law from a state entity that is asserting a constitutional immunity.[243] I decided that the cases are analytically similar to preemption cases, and that the +/-F codes are appropriate to record whether the court required the subordination of state prerogatives to federal law.[244] Thus, where the court allows the federal claim to go forward notwithstanding the state's assertion of immunity, the decision is coded as +F.[245]

In structural litigation as in the realm of individual rights, the court may decide only an issue of procedure or jurisdiction. I treated the cases in the same way as the counterpart individual rights cases, using +/-J

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[239] *See* Howell v. Howell, 137 S. Ct. 1400 (2017).

[240] *See* United States v. Washington, 596 U.S. 832 (2022).

[241] *See, e.g.*, Allen v. Cooper, 589 U.S. 248 (2020) (holding that copyright holder could not sue state for infringement because Act of Congress purporting to abrogate state sovereign immunity in copyright infringement cases lacked valid constitutional basis).

[242] In *Allen*, for example, the United States did not even file an amicus brief. *See id.* at 250-51 & n.* (listing amici).

[243] I use the phrase "constitutional immunity" as a convenient shorthand. In the view of the Supreme Court, "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today … except as altered by the plan of the Convention or certain constitutional Amendments." Alden v. Maine, 527 U.S. 706, 713 (1999).

[244] Note the similarly between the language in *Alden*, *supra* note 243, and the passage from *Murphy v. NCAA* quoted earlier, see *supra* text accompanying note 235.

[245] *E.g.*, Torres v. Texas Dep't of Pub. Safety, 597 U.S. 580 (2022).

codes in place of +/-F or +/-I. For example, in *Direct Marketing Association v. Bruhl*, the Supreme Court held that the Tax Injunction Act did not bar a suit in federal court challenging a state law as violative of the Dormant Commerce Clause.[246] The case is coded as +J.

I also use the +/-J codes for statutory cases in which the Court explicitly invokes Article III as the basis for determining whether the claim can be heard by a federal court. Most of these cases involve standing, and the Court has emphasized that "standing is a bedrock constitutional requirement … [that is] built on a single basic idea – the idea of separation of powers."[247]

Finally, there is one small category of federalism cases in which no standard set of plus/minus codes can capture the variety of outcomes – disputes between states, generally under the Court's original jurisdiction. Here I use an arbitrary pair of codes (+/-L), with a text field that identifies what "L" stands for in that particular case.[248]

3. General federal law

Two sets of codes suffice for most of the general federal law cases. One is used for cases to which the Federal Government is a party; the other, for cases involving only private litigants.[249]

For statutory cases involving the Federal Government as a party, I used the same +/-I codes that I used for the structural cases, with +I again signaling that that the court ruled in favor of the litigant challenging government action.[250] Litigants often challenge Federal Government action on both statutory and constitutional grounds, and it makes sense to use the same polarities for both kinds of claims.[251]

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[246] Direct Mktg. Ass'n v. Bruhl, 575 U.S. 1 (2015).

[247] FDA v. All. for Hippocratic Med., 602 U.S. 367, 378 (2024) (cleaned up).

[248] For example, in *New York v. New Jersey*, 598 U.S. 218 (2023), the "+L" signified that it was permissible for a state to quit an interstate compact.

[249] In this context, private litigants include state governmental units if the source of the legal rule in dispute is a law of general applicability not requiring state action. *See supra* note 161.

[250] *See, e.g.*, Ciminelli v. United States, 598 U.S. 306 (2023) (holding that "right to control" theory is not a valid basis for liability under federal fraud statutes) (+I).

[251] *See, e.g.*, Bond v. United States, 572 U.S. 844 (2014) (holding that federal statute did not cover criminal defendant's conduct); *id.* at 873–82 (Scalia, J.,

Beyond this, my general approach was to avoid multiplying codes unnecessarily. Consistent with that approach, the plus/minus coding does not distinguish between cases in which the Government is litigating as a sovereign (e.g., criminal prosecutions) and those in which the Government is regulating the private sector (e.g., civil suits to enforce the securities laws).[252]

Private civil litigation requires a different set of codes. In the vast majority of these cases, the plaintiff is asserting a claim under a federal statute creating a right to relief for a specified class of persons.[253] Familiar examples include Title VII, the securities laws, the antitrust laws, and the Americans with Disabilities Act. In all such cases, the court's decision will favor or disfavor the plaintiff – and, almost invariably, the class of which the plaintiff is a member (employees, purchasers of securities, etc.). The cases are thus coded +/-P, with +P signaling that the court ruled in favor of the plaintiff.[254]

One important area of federal statutory law does not fit within this paradigm: intellectual property. For my docket studies, I used a +/-V pair of codes for these cases, with +V signaling that the court ruled in favor of the litigant asserting a right to intellectual property recognized by federal law.

4. Jurisdiction and procedure

At the bottom of the hierarchy are the cases involving only the jurisdiction and procedure of the federal courts. Two of the code pairs already described can be used for most of the cases.

In criminal cases, I use the same +/-I codes that I use for substantive criminal law. A single pair of codes thus serves for all Federal Government litigation except the cases involving civil liberties claims

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concurring in judgment) (asserting that statute's application to defendant's conduct exceeded Congress's powers under the Constitution).

252 This distinction becomes important in classifying the "ideological direction" of judicial decisions. *See* Hellman, *Ninth Circuit*, *supra* note 187, at 73–74.

253 Thus, the PSR would be either "plaintiff" or "defendant." *See supra* Section III.A.

254 *See, e.g.*, Apple Inc. v. Pepper, 587 U.S. 273 (2019) (antitrust suit) (+P).

and those in which the United States is challenging state laws or practices on federalism grounds.[255]

For civil cases, the default codes are +/-J, the codes used in the realm of constitutional litigation to signal whether the court accepted or rejected an exercise of judicial power. For example, in *Goodyear Tire & Rubber Co. v. Haeger*, the Supreme Court held that the district court exceeded its inherent authority to sanction litigants for bad-faith conduct.[256] The case is coded as -J.[257]

C. Issue Polarity and Ideological Direction

Issue polarity is a valuable tool for studying the Court's superintendence of particular areas of the national law, and that is how I have used it in much of my prior research.[258] But I would be the first to acknowledge that that aspect of the Court's work is of secondary interest today. Although there are many ways of viewing the Court's decisions, the dominant perspective in today's legal environment is one centered on *ideology*. There is a narrative, and it is framed as a conflict between "liberal" and "conservative" positions.

The focus on ideology can be seen most clearly in discussions of changes – actual or potential – in the Court's membership. For example, when President Barack Obama nominated Judge Merrick Garland to fill the vacancy created by the sudden death of Justice Antonin Scalia, a longtime Supreme Court reporter described Garland as "a justice who could create the first liberal majority on the high court in more than 40 years."[259] Four years later, when President Donald Trump nominated Amy Coney Barrett to fill the vacancy created by the death of Justice

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[255] *See supra* note 240 and accompanying text.

[256] Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178 (2017).

[257] At one point I had a separate pair of codes (+/-M) for cases involving the admissibility of evidence. That was on the theory that some such decisions, although supporting one side or the other in the particular case, might benefit the other side in a different case. (For example, in civil cases, defendants as well as plaintiffs may seek to introduce expert testimony.) I decided that because the Supreme Court decides so few evidence cases, the extra pair of codes was not worth the trouble.

[258] *See, e.g.*, Hellman, *Case Selection*, *supra* note 128, at 973–91.

[259] David G. Savage, *A record of restraint, not of activism*, L.A. TIMES, Mar. 18, 2016.

Ruth Bader Ginsburg, commentators in the Washington Post observed that having a Court with "a stout 6-3 conservative majority" rather than a "slimmer 5-4 conservative majority" was "a shift that could have seismic consequences for the country."[260]

No one disputes that the Supreme Court today has a "conservative majority;" that has been true, in the eyes of most Court-watchers, for the last several decades.[261] And everyone who follows the courts even casually has a general sense of what is encompassed by a "liberal" or a "conservative" jurisprudence. But those characterizations are generally based on a small number of hot-button issues. They do not tell us how a "conservative" majority is likely to resolve the full range of issues governed by federal law.[262] That is a question that requires empirical investigation.

It is also important to understand the other side of the ideological divide. Only a tiny fraction of the appellate cases that resolve federal questions are decided by the Supreme Court.[263] On a vast array of federal

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[260] Leah Litman & Melissa Murray, *Shifting from a 5-4 to a 6-3 court majority could be seismic*, WASH. POST, Sept. 27, 2020, 2020 WLNR 27293345.

[261] *See, e.g.*, Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 83 (referring to "the Burger Court's conservative majority"); Christopher E. Smith, *The Supreme Court's Emerging Majority: Restraining the High Court or Transforming Its Role?*, 24 AKRON L. REV. 393, 383 (1990) (stating that "the Reagan appointees have formed the core of an emerging conservative majority on the Court"); David G. Savage, *Docket Reflects Ideological Shifts*, 81 A.B.A.J. 40 (Dec. 1995) (referring to "the Supreme Court's … solidifying conservative majority."

[262] I say "*is likely* to resolve," not "*will* resolve." Notwithstanding the "stout 6-3 conservative majority" that emerged after the appointment of Justice Barrett, the Court has decided some important cases in favor of what is generally regarded as the "liberal" position. *See, e.g.*, Torres v. Texas Dep't of Pub. Safety, 597 U.S. 580 (2022) (state sovereign immunity) (+F); Allen v. Milligan, 599 U.S. 1 (2023) (Voting Rights Act) (+C). That was also true during the preceding decades with a "conservative majority." See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (school prayer) (+C); Atkins v. Virginia, 536 U.S. 304 (2002) (death penalty) (+C); Grutter v. Bollinger, 539 U.S. 306 (2003) (affirmative action) (-C); Miller v. Alabama, 567 U.S. 460 (2012) (juvenile sentencing) (+C); Obergefell v. Hodges, 576 U.S. 644 (2015) (same-sex marriage) (+C); June Med. Servs. LLC v. Russo, 591 U.S. 299 (2020) (regulation of abortion) (+C).

[263] In the 2020 Term, the Supreme Court decided only 57 cases from all of the federal courts of appeals. *See The Supreme Court—The Statistics*, 135 HARV. L. REV.

issues, the law that controls is the law of the circuit. And although the "liberal majority" did not materialize on the Supreme Court in 2016, there are several circuits in which the majority is liberal; these include the super-sized Ninth and the powerful D.C. Circuit.[264] So there is an equal need for determining empirically how a liberal majority resolves various legal questions.

In Part V, I shall outline a process for defining the "liberal" and "conservative" positions on the full array of federal-law issues – what I shall call "mapping the ideological divide."[265] A key step in that process is to identify the *ideological direction* of Court decisions.[266] Ideological direction is distinct from issue polarity, and indeed the separation of the two is a defining feature of the approach I am suggesting. At the same time, issue polarity can be a valuable tool for characterizing judicial decisions as "liberal" or "conservative" and thus for mapping the ideological divide. Before explaining how that process works, it is necessary to provide some historical context.

IV. Judicial Ideology, Past and Present

One important difference between issue polarity and ideological direction is that issue polarity remains a constant over time;[267] that is

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491, 500 (2021). In 2020, the courts of appeals decided more than 32,000 cases on the merits. *See* Administrative Office of U.S. Courts, Judicial Business 2020, tbl. B-10.

[264] *See* Hellman, *Ninth Circuit*, *supra* note 187, at 80–82 (concluding, on the basis of empirical study, that the Ninth Circuit is a predominantly liberal court); Lawrence Hurley, *Obama's judges leave liberal imprint on U.S. Law*, REUTERS, Aug. 26, 2016, https://www.reuters.com/article/us-usa-court-obama-idUSKCN1110BC (noting that President Obama's appointments to the courts of appeals "have tilted the judiciary in a liberal direction" and that he "flipped" the balance of power in the D.C. Circuit). As a result of President Obama's appointments, the Fourth Circuit also has a strong liberal majority. *See id.*

[265] The focus here is on judicial ideology. The terms "liberal" and "conservative" are used in other contexts as well—for example, in referring to political agendas. There is substantial overlap with the judicial context, but any consideration of those other settings is beyond the scope of this Article.

[266] In this Article, I shall use the term "ideological alignment" to refer to the conservative and liberal positions on federal-law *issues*, and "ideological direction" to describe the outcome of individual *cases*.

[267] Thus, *Lochner v. New York*, 198 U.S. 45 (1905), is a +C decision; so is *Roe v. Wade*, 410 U.S. 113 (1973).

not true of ideological direction. On the contrary, the meaning of the terms "liberal" and "conservative," as applied to judges and judicial decisions, has changed considerably from one era to another. Looking at the past 100 years, three periods can be identified: the Progressive Era;[268] the decades that followed President Franklin D. Roosevelt's New Deal (including the Warren Court);[269] and the era that includes the Roberts Court.[270]

A. The Progressive Era

A century ago, in an unsigned editorial for the New Republic magazine, then-Professor Felix Frankfurter canvassed "the issues raised by judicial control over legislation."[271] He commented that "[Theodore] Roosevelt's vigorous challenge of judicial abuses [in 1912] was mainly responsible for *a temporary period of liberalism* which followed in the interpretation of the due process clauses [of the Fifth and Fourteenth Amendments]." The context makes clear that Frankfurter applied the label "liberal" to decisions that rejected challenges based on the Due Process Clauses to economic and social legislation such as minimum wage laws. Equally clear was Frankfurter's own commitment to the liberal position. Indeed, so strongly did Frankfurter oppose decisions like

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[268] For a fascinating account of law and politics in the Progressive Era, see BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT 26–218 (2022).

[269] For an account of the New Deal by one of the key participants, see ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT (2003).

[270] For an earlier treatment of this history, see Hellman, *Reverse Polarity*, *supra* note 183, at 280–91. Additional research has enabled me to substantially enrich the narrative.

[271] Felix Frankfurter, *The Red Terror of Judicial Reform*, NEW REPUBLIC, Oct. 1, 1924, *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT 156, 157 (Philip B. Kurland ed., 1970). Note that this phrase is a somewhat tendentious way of referring to judicial review.

Lochner v. New York[272] and *Adkins v. Children's Hospital*[273] that he proclaimed: "The due process clauses ought to go."[274]

Five years later, Professor Ray A. Brown of the University of Wisconsin wrote at greater length in the *Harvard Law Review* about "liberal" and "conservative" judicial decisions in the Progressive Era. He observed:

> [C]onservative Justices often render so-called liberal opinions, and vice versa. Mr. Justice Brewer, one of the staunchest of conservatives, wrote the Court's opinion in Muller v. Oregon, which paved the way to the factual and scientific consideration of police power cases. On the other hand Mr. Justice Brown, whose opinion in *Holden v. Hardy* is a monument of liberalism, was found with the majority in the much criticized *Lochner v. New York*. And often the Court's opinion is unanimous, including on one side both those denominated liberal and those conservative.[275]

Consistent with Frankfurter's typology, Brown characterized decisions as "liberal" or "conservative" based on whether they upheld or invalidated economic and social legislation supported by the Progressive movement. Liberal decisions sustained the laws; conservative decisions held them unconstitutional.

The ideological divide associated with the Lochner line of cases reflected a broader disagreement over the role of courts in protecting individual rights, as Professor Mark Tushnet has detailed in his recent book on the Hughes Court (1930–1941).[276] On one side, "the Court's conservatives had a jurisprudence that supported some rights-based claims, beyond the property rights on which Progressives focused their

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[272] 198 U.S. 45 (1905).

[273] 261 U.S. 525 (1923). Frankfurter himself had argued this case in support of the minimum wage law.

[274] Frankfurter, *supra* note 271, at 167.

[275] Ray A. Brown, *Police Power—Legislation for Health and Personal Safety*, 42 HARV. L. REV. 866, 869 (1929) (footnotes omitted). The references are to *Muller v. Oregon*, 208 U.S. 412 (1908); *Holden v. Hardy*, 169 U.S. 366 (1898); and *Lochner v. New York*, 198 U.S. 45 (1905).

[276] MARK V. TUSHNET, THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930–1941 at 551–64 (2021).

fire."[277] Conversely, the "best developed thoughts [of the liberals] about constitutional law were deeply skeptical about judicial decisions displacing the considered decisions of democratically elected legislatures."[278]

In Tushnet's account, the conservative side is represented by James M. Beck, a former solicitor general who "was perhaps the leading conservative constitutional theorist of the 1920s and 1930s."[279] Although Tushnet emphasizes Beck's focus on "the machinery of government,"[280] Beck also wrote that "the distinguishing characteristic of American constitutionalism" is the Framers' "conception of individualism, enforced in courts of law against executives and legislatures."[281] In Beck's telling, the Framers "were animated by a sleepless jealousy of governmental power."[282] They therefore created a Constitution that guaranteed individual rights that "even one hundred millions of people cannot rightfully take [away] without amending the Constitution."[283] Furthermore, to protect these "inviolable individual rights," "even against the will of a majority, however large," the Framers established "an independent judiciary" and gave it 'unprecedented powers."[284]

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[277] *Id.* at 552.

[278] *Id.*

[279] *Id.* at 552. Although largely forgotten today, Beck was a prominent figure during the Progressive era. His writings were a frequent target of the Progressives and their friends. For example, in 1911, Frankfurter sent Judge Learned Hand an article in which Beck argued that the Fourteenth Amendment protects America against "Socialism." Hand responded at length, denouncing Beck as one of the "stand-patters" who "want to put the whole weight of government on nine elderly gentlemen at Washington." Letter from Learned Hand to Felix Frankfurter (Feb. 26, 1911), *reprinted in* REASON AND IMAGINATION: THE SELECTED CORRESPONDENCE OF LEARNED HAND 18 (Constance Jordan ed., 2013). *See also* TUSHNET, *supra* note 276, at 552–53 (quoting extensively from The New Republic's "savagely funny" review of Beck's book on the Constitution).

[280] *Id.* at 553.

[281] JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES: YESTERDAY, TODAY—AND TOMORROW? at 213 (1924).

[282] *Id.*

[283] *Id.*

[284] *Id.* at 214.

Beck's paean to "inviolable individual rights," "enforced in courts of law," contrasts sharply with the position of the liberals.[285] Tushnet's account focuses on Herbert Croly as "the political theorist of the Progressive movement" and John Dewey as its philosopher.[286] He points out that neither Croly nor Dewey paid much attention to "developing an account of rights citizens would have *against* state action."[287] On the contrary, they viewed such rights as "precisely what had obstructed the development of the active state they thought modern conditions … required."[288]

In 1939, 15 years after declaring that "[t]he due process clauses ought to go," Professor Frankfurter was appointed to the Court by President Franklin D. Roosevelt and became Justice Frankfurter. Professor Noah Feldman has summed up the "liberal vision" that Frankfurter shared with his fellow Roosevelt appointees Hugo Black, William O. Douglas, and Robert H. Jackson.[289] The "constitutional liberalism" of the four men, Feldman explains, "was defined in opposition to the property-protecting doctrines that had dominated the Court's jurisprudence for three decades."[290] "The conservative Supreme Court," by couching those doctrines "in terms of individual rights," had "given judicial rights activism a bad name."[291] But although Frankfurter and his colleagues could not know it, a new "liberal vision" was about to appear on the judicial scene.

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[285] Note, though, that whatever Beck's views may have been, one should not overstate the commitment of the conservative Justices to "inviolable individual rights." *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931) (upholding First Amendment claim over dissent of four conservative Justices); Herndon v. Lowry, 301 U.S. 242 (1937) (same).

[286] TUSHNET, *supra* note 276, at 558. At least in this chapter, Tushnet seems to refer interchangeably to "liberals" and "Progressives," though he generally uses the former term to characterize the Justices and the latter to refer to writers like Croly and Dewey. *See id.* at 557–58.

[287] TUSHNET, *supra* note 276, at 558 (emphasis in original).

[288] *Id.*

[289] NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREATEST SUPREME COURT JUSTICES 177 (2020).

[290] *Id.*

[291] *Id.* at 179.

B. The Post-New Deal Era

Less than three years after Justice Frankfurter joined the Court, Professor Fred Rodell of Yale Law School published an article in Harpers Magazine with the provocative title "Felix Frankfurter, Conservative."[292] The article's content was no less provocative. Rodell said that the Court was again splitting into two camps – "[a]nd incredible as it may sound to some, the leader of the Court's new *conservative* camp is none other than [Justice Frankfurter]."[293]

How did Rodell justify this remarkable assertion? He proceeded in two steps. He began by pointing out that the issues that had defined the liberal-conservative divide during the preceding three decades – issues centered around the "property-protecting doctrines" noted by Feldman – were now settled in favor of the liberal position. As Rodell put it, by the time Frankfurter joined the Court, "the epoch-making break with the legal past – the break that gave the Constitution a new broad interpretation and put the Court's O.K. on all sorts of government goings-on … had already been made."[294] All that was left "was largely a mopping-up operation."

What then was the basis for saying that the Court was "splitting" into two camps? Rodell refrained from characterizing the nature of the split, but he emphasized two cases in which Frankfurter wrote the Court's opinion rejecting claims under the First Amendment. One was *Gobitis*, the first flag salute case, which Rodell described as "the Court's most anti-liberal decision in years."[295] The other was a case in which the Court upheld "a sweeping labor injunction that forbade all six thousand members of a Chicago union from picketing peacefully or otherwise airing their grievances."[296]

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[292] Fred Rodell, *Felix Frankfurter, Conservative*, 183 HARPERS MAG. 449 (1941).

[293] *Id.* at 449 (emphasis added).

[294] *Id.* at 456. Although Rodell did not cite the cases, the most dramatic "break with the legal past" occurred in *West Coast Hotel v. Parrish*, 300 U.S. 79 (1937), which overruled *Adkins v. Children's Hospital*.

[295] Rodell, *supra* note 292, at 457; *see* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

[296] Rodell, *supra* note 292, at 457; *see* Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

With the benefit of hindsight, we can see that Rodell, in focusing on those two cases, presciently discerned the beginning of a new liberal-conservative divide, one that would continue for the next several decades.[297] The divide centered on civil liberties issues – claims under the Bill of Rights and the Reconstruction Amendments. Decisions supporting the claim were deemed liberal; decisions rejecting the claim were labeled conservative.[298]

The new "liberal vision" was powerfully manifested in the decisions of the Warren Court (1953–1969), which produced "[w]hat can only be described as a constitutional revolution, generated by a group of justices who were perhaps the most liberal in American history."[299] That revolution was accomplished almost entirely through rulings that upheld claims under the Bill of Rights and the Reconstruction Amendments.[300]

Three decades after the retirement of Chief Justice Warren, Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals, viewed by admirers as "Chief Justice of the Warren Court in exile,"[301] undertook to

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[297] Rodell started out as a protégé of Frankfurter's, but he soon "turned on his former professor" and "spent the remainder of his career … engaging in a holy war against Frankfurter, Harvard Law School, and its graduates." SNYDER, *supra* note 268, at 383–84. Some of the speculation in the Harpers article was ill-founded. *See id.* But Rodell was on target in identifying how liberals and conservatives would divide once the legality of Progressive measures had been settled in accordance with the liberal position.

[298] *See, e.g.*, GLENDON SCHUBERT, THE JUDICIAL MIND 103 (1965).

[299] THOMAS G. WALKER & LEE EPSTEIN, THE SUPREME COURT OF THE UNITED STATES: AN INTRODUCTION 19 (1993).

[300] For a brief summary, see Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1118 (1991) (noting that the Warren Court "saw the Bill of Rights and the Civil War Amendments as the embodiment of our highest ideals and soon made them the standard for judging the established order."). For details, see LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 485–501 & passim (2000). The Warren Court's "constitutional revolution" also included decisions that expansively construed Congressional powers. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (Commerce Clause); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (Fifteenth Amendment). In the latter respect, the Warren Court continued and extended a pattern of deference to Congress that began in 1937. *See* POWE, *supra*, at 264–65.

[301] *See In Memoriam: Judge Stephen Reinhardt,* 131 HARV. L. REV. 2097, 2101 (2018) (tribute by Andrew Manuel Crespo); *id.* at 2105–06 (tribute by Michael C. Dorf).

identify the legal positions that define "what a liberal judge is."[302] He wrote:

> How can you tell if a judge is liberal? It's not that difficult. Liberal judges believe in a generous or expansive interpretation of the Bill of Rights. … We believe that the Founding Fathers used broad general principles to describe our rights, terms such as "due process of law," "life, liberty, and property," "unreasonable search and seizure," "freedom of speech," because they were determined not to enact a narrow, rigid code that would bind and limit generations to come. …
>
> Liberal judges tend to take very seriously the idea that the Constitution protects the rights of individuals against arbitrary and oppressive state action, as well as the rights of minorities against a tyrannical majority. … [Laws and voter initiatives] must be strictly tested against the limitations and guaranties contained in the Constitution.[303]

Note that positions of the *liberal* judge, as expressed in the last-quoted paragraph, closely resemble the constitutional views of James Beck, "probably the leading *conservative* constitutional theorist of the 1920s and 1930s."[304]

But the post-New Deal liberal-conservative divide was not limited to civil liberties cases. When Professor Rodell proclaimed Justice Frankfurter "the leader of the Court's new conservative camp," he also adduced as examples two cases in which the Court, with Frankfurter in the majority, held that orders issued by federal agencies exceeded the

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[302] Stephen Reinhardt, *Liberal Judges*, FED. LAW, Feb. 1997, at 46. This article is of special interest because, as far as I am aware, no other federal judge has sought to define either the liberal or the conservative judicial credo.

[303] *Id.* at 47–48. Judge Reinhardt did signal, albeit obliquely, one departure from this general approach. He said that liberal judges "sometimes have trouble interpreting [the post-Civil War constitutional] amendments as barriers to minority advancement." The implication is that liberal judges do not apply "strict[]" tests to government programs that promote affirmative action for minorities. For discussion of Judge Reinhardt's position in affirmative action cases, see Hellman, *Ninth Circuit*, *supra* note 187, at 58–59.

[304] *See supra* text accompanying note 279 (emphasis added).

authority granted to them by Congress.[305] These cases fall within the realm of what has been called "economic liberalism," a sphere distinct from "political liberalism."[306] Rodell assumed what three prominent scholars of judicial ideology made explicit many year later: in the "conventional understandings," "liberal" votes include "those in favor … of unions and individuals over businesses; and of government over businesses. 'Conservative' votes are the reverse."[307]

There is, to be sure, some tension between the "political" and the "economic" components of the post-New Deal liberal and conservative worldviews. Professor C. Herman Pritchett, one of the earliest scholars of judicial ideology, called attention to this phenomenon in 1948, five years before the advent of the Warren Court. He wrote:

> There is a seeming paradox in the liberal's attitude toward the state, for he welcomes its intervention in economic affairs, but seeks to limit very severely its restrictions on individual expression of intellectual and physical freedom. In the former area, liberalism is typically pro-state; in the latter, its fundamental bias is anti-statist. … The same ambivalence of attitude is found in conservatism, operating in reverse.[308]

Notwithstanding the "seeming paradox," Pritchett's characterization of liberal and conservative judicial ideologies remained generally valid for the remainder of the twentieth century.[309]

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[305] *See* Rodell, *supra* note 292, at 458. Rodell did not identify the cases by name, but they were *FTC v. Bunte Bros., Inc.*, 312 U.S. 349 (1941) (holding that FTC has no power to proscribe unfair methods used in intrastate sales even if there is an effect on interstate commerce); and *NLRB v. Express Pub. Co.*, 312 U.S. 426, 433 (1941) (holding that NLRB lacked authority to issue "a blanket order restraining the employer from committing any act in violation of the statute"). As Rodell acknowledged, Justice Frankfurter did not write the Court's opinion in the labor case.

[306] *See* SCHUBERT, *supra* note 298, at 127–28. "Political liberalism" primarily embraces civil liberties issues. *See id.* at 101.

[307] LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 76 (2013) [hereinafter EPSTEIN ET AL., BEHAVIOR].

[308] HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947 at 273 (1948).

[309] A decade before Pritchett wrote, Justice Harlan Fiske Stone attempted to explain the "seeming paradox" in his famous "Footnote Four" in *United States v.*

C. The Roberts Court Era

Pritchett's observation in 1948 that on issues involving "intellectual and physical freedom," the "fundamental bias" of liberalism is "anti-statist" accords with Judge Reinhardt's self-portrait of the liberal judge, written 50 years later. But as federal courts entered the twenty-first century, there was evidence that the "conventional understandings"[310] of liberal and conservative judicial ideologies might have to be reexamined.

Consider, first, the well-known case of *Kelo v. City of New London*, decided in 2005.[311] The Supreme Court held that the city's use of its eminent domain power to acquire property from an unwilling owner for the purpose of economic development by private entities did not violate the "public use" requirement of the Takings Clause of the Fifth Amendment.[312] All four liberal Justices joined the Court's opinion rejecting the constitutional claim; four of the five conservatives dissented.[313]

But perhaps *Kelo* does not really conflict with "conventional understandings." Perhaps it is best viewed as a throwback to the Progressive Era, when "constitutional liberalism was defined in opposition to the property-protecting doctrines" of the pre-Roosevelt Court.[314] Still, *Kelo* is a far cry from *Lochner*. The challenge to the exercise of state power came not from an employer seeking to impose a longer workweek on its employees but from an elderly woman who wanted to live out her remaining years in the house in which she was

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Carolene Prods., 304 U.S. 144, 152 n.4 (1938). Justice Stone, the lone dissenter in the first flag salute case, see *supra* note 295 & accompanying text, explicitly invoked the Carolene Products footnote in explaining why he was voting in favor of the First Amendment claim. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 606 (1940) (Stone, J., dissenting).

[310] *See supra* note 307 and accompanying text.

[311] Kelo v. City of New London, 545 U.S. 469 (2005).

[312] *See id.* at 485–87.

[313] For an explanation of how the "liberal" and "conservative" blocs were identified, see *infra* Part V.A.

[314] *See supra* note 290 and accompanying text.

born.[315] A large corporation did play a role in the litigation – but as the intended beneficiary of the land development the city was pursuing.[316]

In any event, there are other examples closer to the core of "intellectual and physical freedom" – in particular, cases involving First Amendment protection of freedom of speech. A decade into the twenty-first century, the Court had decided more than half a dozen cases in which support for the First Amendment claim came primarily or exclusively from members of the Court's conservative bloc. The cases ranged widely among real-world and doctrinal contexts, including judicial campaign speech,[317] freedom of association,[318] public forums,[319] campaign finance regulation,[320] and commercial speech.[321]

Perhaps the most striking development of the modern era involves the Second Amendment, which guarantees "the right of the People to keep and bear arms." Unusually among constitutional issues, no history or tradition existed to guide either liberal or conservative Justices in their response to Second Amendment challenges to government regulation.[322] But when the *Heller* case came to the Court in 2008, the Justices lined up in unbroken ideological phalanxes, with all of the conservatives supporting the constitutional claim and all of the liberals rejecting it.[323] And when the issue returned to the Court in 2022, that

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[315] *See* Petition for Certiorari at 1–2, Kelo v. City of New London (describing petitioner Wilhelmina Dery).

[316] *See* Kelo v. City of New London, 843 A.2d 500, 508 (Conn. 2004) (noting role of Pfizer, Inc.).

[317] *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

[318] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

[319] *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000).

[320] *See, e.g.*, McConnell v. FEC, 540 U.S. 93 (2003).

[321] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

[322] Only one 20th century case considered a claim under the Second Amendment, and the Court unanimously rejected it. *See* United States v. Miller, 307 U.S. 174 (1939).

[323] District of Columbia v. Heller, 554 U.S. 570 (2008).

alignment persisted, even though five new Justices (two liberals and three conservatives) had joined the Court since the first case.[324]

The implications of decisions like these for the conventional depiction of "liberal" and "conservative" judicial ideologies have not gone unnoticed. For example, in 2008, Professor David Bernstein called attention to numerous instances in which conservative Justices were more supportive than liberal Justices of "individual rights and civil liberties against assertions of government power."[325] In particular, he noted that "[t]he Heller dissent present[ed] the remarkable spectacle of four liberal Supreme Court justices tying themselves into an intellectual knot to *narrow* the protections the Bill of Rights provides."[326]

Decisions like Heller exemplify a phenomenon that I refer to as "reverse polarity."[327] The term is used to characterize cases in which a civil liberties claim receives more support from conservative judges than from liberals, reversing the ideological alignment that generally prevailed during the Warren Court era and for decades thereafter. Cases of that kind are sufficiently numerous and of sufficient importance to warrant a systematic examination of federal-law issues with a view to determining the content of liberal and conservative judicial ideologies today. In the next Part, I explain how that inquiry can be carried out.

V. Benchmarking Ideology

A decade ago, three prominent scholars of judicial behavior outlined what they called the "conventional understandings" of the terms "liberal" and "conservative."[328] They wrote:

> "Liberal" votes [include] those in favor of defendants in criminal cases; of women and minorities in civil rights cases; of individuals in suits against the government in

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[324] *See* N.Y. State Rifle & Pistol Assn, Inc. v. Bruen, 597 U.S. 1 (2022)). As noted in Part III.C., the conservative-liberal split was now 6-3.

[325] David E. Bernstein, Liberals, Conservatives, and Individual Rights, cato.org, June 27, 2008, https://www.cato.org/publications/commentary/liberals-conservatives-individual-rights.

[326] *Id.* (emphasis added).

[327] *See* Hellman, *Reverse Polarity*, *supra* note 183.

[328] EPSTEIN ET AL., BEHAVIOR, *supra* note 307, at 76.

> First Amendment, privacy, and due process cases; of unions and individuals over businesses; and of government over businesses. "Conservative" votes are the reverse.[329]

The emergence of reverse polarity, as described in the preceding section, means that "conventional understandings" of the liberal-conservative divide are no longer completely accurate. But how substantial has the realignment been? Has it affected only a small number of issues, or is each side rethinking its views on a larger scale? Within broadly defined categories, are there particular issues that diverge from the general pattern?[330]

The case classification system described in Parts II and III – particularly the combination of issue categories and plus/minus codes – provides a good starting-point for answering these questions. That is so because the system, although superficially a technical matter of coding, closely tracks the statist/anti-state paradigm identified by Professor Pritchett almost eight decades ago.[331] And that paradigm, in turn, can help in mapping the ideological divide.

The equivalence is most obvious in civil liberties litigation; the +/-C codes correspond exactly to Pritchett's "anti-statist" and "pro-state" positions. Indeed, one can describe reverse polarity in Pritchett's terms by saying that the conservatives have extended their anti-statist position – formerly limited to "economic affairs" – some distance into the realm of "intellectual and physical freedom." Meanwhile, the liberals have correspondingly embraced the pro-state position.

One can see the equivalence even in private litigation under federal statutes. When Congress creates a private right of action for violation of securities laws or antitrust laws or other federal regulatory statutes, it is interposing the power of the state (in particular, the Federal Government) over otherwise private transactions.[332] Thus, in these

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[329] *Id.*

[330] There is of course the question of *why* the realignment has occurred. For some provisional observations, see Hellman, *Reverse Polarity*, *supra* note 183, at 333–46.

[331] *See supra* text accompanying note 308.

[332] To be sure, some of these transactions may have previously been regulated by state law. But the federal regulation typically adds to whatever state regulation may have existed.

cases, the +P code reflects the pro-state position; the -P is anti-statist. Consistent with Pritchett's observation that in "economic affairs," the "fundamental bias" of liberalism is "pro-state," the "conventional understanding[]" is that liberal votes include those "in favor of … individuals over businesses."

Suppose, though, that one wants to test the current validity of the various "conventional understandings." Issue categories and plus/minus codes are not enough. To determine whether a particular combination of issue category and plus/minus code should be categorized as "liberal" or "conservative," it is necessary to take an additional step, and that step requires the use of an objective, empirical benchmark against which to measure case outcomes.

The research project that I carried out to identify "reverse polarity" issues relied on such a benchmark: the record of the votes of Supreme Court Justices during the 26-year period from 1994 to 2020.[333] In this Part, I begin by explaining why this approach is a sound one. I then describe how it differs from the system used in the Spaeth Supreme Court Database.

A. The Supreme Court Blocs

The project of mapping the ideological divide will be greatly facilitated by one of the most striking developments in modern American law: for a period of 26 years, including most of the 21st century, the Supreme Court was divided into two ideological blocs, a liberal bloc of four Justices and a conservative bloc of five.[334] The period began with the appointment of Justice Stephen Breyer by President Clinton in 1994, and it ended with the death of Justice Ruth Bader Ginsburg just before the start of the 2020 Term.[335] The liberal bloc was especially cohesive, but the conservative cohort was not far behind.

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[333] At the time I carried out the research for that project, the period extended over only 25 years.

[334] This methodological explanation is drawn in part from the treatment in Hellman, *Reverse Polarity*, *supra* note 183, at 295–300.

[335] Commentators generally agree that the replacement of Justice Ginsburg by Justice Barrett resulted in a Court with a six-Justice conservative bloc and a three-Justice liberal bloc. *See supra* note 260 and accompanying text. I do not necessarily disagree with that view, but 6-3 Court is sufficiently different from a 5-4 Court that

The division within the Court is vividly depicted in Figure 1.[336] Figure 1 uses Martin-Quinn scores to show the patterns of agreement among the Justices who served on the Court during the 26-year period.[337] Each Justice is represented by a horizontal line. For each Term, the Justices are arrayed on a vertical scale, with the smallest interval reflecting the most frequent agreement and the largest, the least frequent agreement.

What stands out from the graph is that throughout the entire 26-year period, the Justices were divided into two groups, one group of four (the bottom of the graph) and one group of five (top of the graph). The first group included Justices Ginsburg and Breyer, along with Justices John Paul Stevens, David Souter, Sonia Sotomayor, and Elena Kagan. The second group included Chief Justice William H. Rehnquist and his successor, Chief Justice John G. Roberts, Jr., along with Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, Samuel Alito, Neal Gorsuch, and Brett Kavanaugh.

In every Term, the Justices in the bottom group agreed with each other more often than they agreed with any Justice in the top group, and vice versa. (In the graph, none of the lines in the top group ever cross any in the bottom group; none of the lines in the bottom group ever cross into the top group.)

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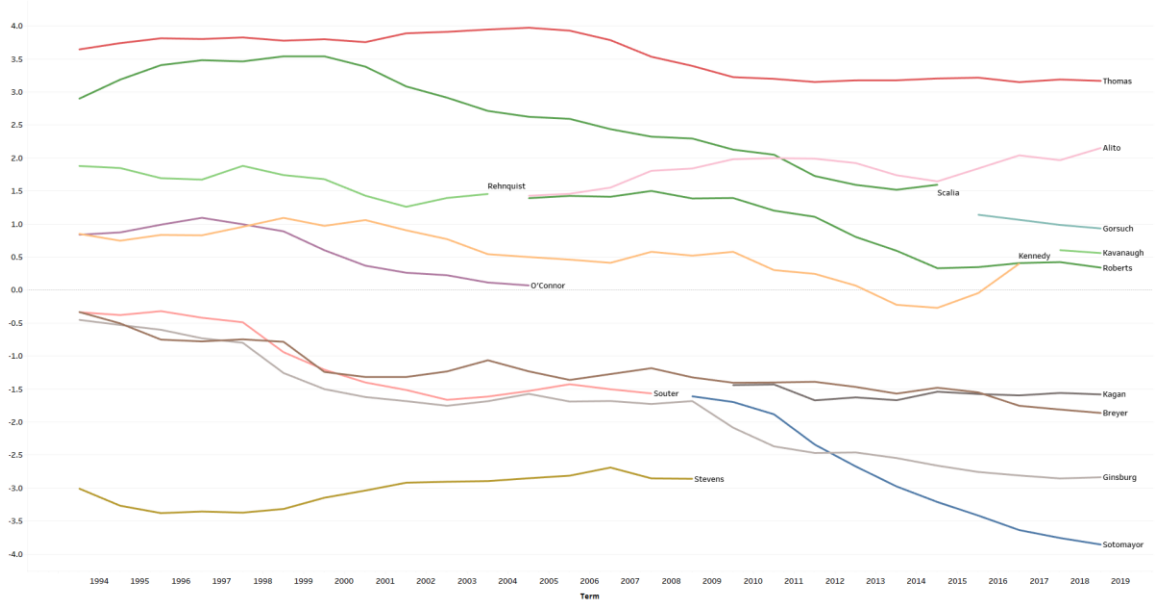
the prudent course is to end the study period with the 2019 Term. That said, in carrying out the research program outlined here, I will consider later decisions for whatever light they shed on ideological alignments.

[336] The graph in Figure 1 was created by Adam Feldman. It was originally published (without the data on the 2019 Term) in *Interesting Meetings of the Minds of Supreme Court Justices*, EMPIRICAL SCOTUS (June 11, 2020), https://empiricalscotus.com/2020/06/11/interesting-meetings-of-the-minds/. It is reproduced with permission.

[337] *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimates via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POLITICAL ANALYSIS 134 (2002). For explanation of the Martin-Quinn scores, see LAWRENCE BAUM, IDEOLOGY IN THE SUPREME COURT 192, 211 (2017); Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79, 111 (2010). For current versions of the scores, see https://mqscores.lsa.umich.edu/measures.php.

Figure 1: Justices' Martin-Quinn Scores, 1994-2019 Terms



Although Martin-Quinn case coding is "agnostic" as to case outcomes,[338] it does not take a Supreme Court expert to identify what unites the members of each group and what distinguishes the bottom group from the top. As Professor Lawrence Baum puts it, "common knowledge, which can hardly be contested," tells us that the Justices in the top group are the conservatives and those in the bottom group are the liberals.[339]

The voting patterns summarized in Figure 1 thus provide the benchmarks for an empirical, objective approach to ideological classification of legal issues. If a particular legal position – defined by a combination of issue category and plus/minus code – regularly receives more support from the liberal Justices than from the conservatives, it is fair to call that the liberal position. If a particular legal position receives more support from the conservatives, we can call that the conservative position.[340]

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[338] *See* Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 185 (2009)

[339] *See* BAUM, *supra* note 337, at 192.

[340] The method outlined here is similar to the one used by Professor Baum in his study of ideology in the Supreme Court. *See* BAUM, *supra* note 337, at 201–26 (describing his method).

For example: on the statutory side of the docket, if the +P position in antitrust cases repeatedly receives more support from liberal Justices than from conservatives, that tells us that the area of antitrust continues to reflect the traditional alignment for "economic liberalism" issues.[341] On the constitutional side, if claims under the Free Exercise Clause consistently receive more support from conservative Justices than from liberal Justices, the issue can be labelled as one reflecting reverse polarity.

These characterizations do not require that every Justice, in every case, votes in accordance with the position attributed to the bloc of which the Justice is a member. For example, it is not difficult to find cases in which Justice Breyer – a member of the liberal bloc – voted to reject a Fourth Amendment claim, while Justice Scalia – one of the conservatives – voted to sustain it.[342] But even in those cases, the Fourth Amendment claim received more support from liberal Justices than from the conservatives.[343] And if that description fits the overwhelming majority of cases, occasional deviations would not negate the conclusion that support for Fourth Amendment claims is properly labeled the liberal position.

At the same time, I do not assume that there *is* a liberal and a conservative position on every issue of federal law. The Justices may divide along other lines, and it is equally important to identify these other divisions – the issues that generate them and the alignments that result.

The Martin-Quinn scores have been criticized on various grounds, but those criticisms, even if valid, do not call into question the method used here.[344] For example, Professor Baum points out that the scores'

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[341] On "economic liberalism," see Hellman, *Ninth Circuit*, *supra* note 187, at 72–77.

[342] *E.g.*, Navarette v. California, 572 U.S. 393 (2014); Maryland v. King, 569 U.S. 435 (2013).

[343] In both of the cases cited in the preceding footnote, Justice Breyer was the only member of the liberal bloc who voted against the constitutional claim; Justice Scalia was the only member of the conservative bloc who supported it.

[344] For discussion of the criticisms, see BAUM, *supra* note 337, at 211–14; Shapiro, *supra* note 337, at 110–20.

"placement of justices on an interval scale is inexact;" in particular, it exaggerates "the distances between justices … at the far end of the ideological spectrum and their colleagues on the same side of that spectrum."[345] But that is problematic only if one is considering the relative positions of individual Justices. Here, the objective is to identify the legal positions taken by the two *blocs*; the positions of individual Justices vis-à-vis one another play no part.

More generally, the criticisms come from scholars who are, in one way or another, trying to understand "what led the Justices to their decisions."[346] That too is not part of the proposed study. I am not trying to discover "the extent to which [cases are] decided on the basis of ideology"[347] or to "test hypotheses about strategic behavior or models that assume strategic behavior."[348] Nor am I comparing ideology with other possible elements of the decisional process. I am focusing on the blocs and their votes on particular issues. The Martin-Quinn scaling enables me to identify the blocs, and the votes enable me to identify the legal positions of the Justices who constitute each bloc.

A few additional words about method are in order. Because Martin-Quinn scores are based on voting alignments rather than outcomes, the scaling excludes cases in which the Court was unanimous in its ruling. That approach is equally appropriate here; unanimous decisions will shed little light on the content of judicial ideologies.[349] For the same reason, I have largely ignored cases in which only a single Justice dissented. A solo dissent is as likely to reflect idiosyncrasy as ideology.

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[345] BAUM, *supra* note 337, at 212.

[346] Shapiro, *supra* note 337, at 120.

[347] *Id.* at 119.

[348] Fischman & Law, *supra* note 338, at 189.

[349] Some decisions that are unanimous in outcome may shed light on ideological divisions because of differences in rationales offered in separate opinions. In my study of reverse polarity, I considered a few such cases. *See* Hellman, *Reverse Polarity*, *supra* note 183, at 324, 326. But when the object is to identify strong patterns, as it is here, disagreements limited to reasoning will generally carry little weight. And any attempt to quantify such differences so would raise concerns about objectivity and transparency, because it would be necessary to distinguish between major and minor disagreements.

One the other hand, cases with as few as two dissents can be very probative – certainly so when the two dissenters are members of the same bloc. Indeed, two-Justice dissents from members of a bloc sometimes presage 5-4 decisions when a variation on the same issue comes before the Court in a later case.[350]

One final note. Subsequent to publishing the study of reverse polarity, I carried out a study of ideology and the en banc process in the Ninth Circuit Court of appeals.[351] I found that, as with the Supreme Court during roughly the same time span, it was possible to identify liberal and conservative cohorts. Further, each of these cohorts paired with one of the blocs on the Supreme Court. The findings of that study can thus be used to supplement the Supreme Court data.

B. Comparison with the Spaeth Supreme Court Database

The most widely used database of Supreme Court decisions is the one originally compiled by Professor Harold Spaeth and now maintained at Washington University Law School.[352] In Field #37, labelled "Decision Direction" (DD), the database "codes the ideological 'direction' of [each] decision."[353] This code records whether the case outcome is (2) ("liberal")

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[350] *Compare* Martinez v. Ryan, 566 U.S. 1, 18 (2012) (Scalia, J., joined by Thomas, J., dissenting), *with* Trevino v. Thaler, 569 U.S. 413 (2014) (5-4 decision); *compare* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2027 (2017) (Sotomayor, J., joined by Ginsburg, J., dissenting), *with* Espinoza v. Montana Dept. of Rev., 140 S. Ct. 2246 (2020) (5-4 decision).

[351] *See* Hellman, *Ninth Circuit*, *supra* note 187.

[352] For the current version of the Database, see Harold J. Spaeth, Lee Epstein et al., 2023 Supreme Court Database, Version 2023 Release 1, http://scdb.wustl.edu/data.php. Professor Spaeth died in 2017, but he is still listed as the lead author, and the introduction to the Code Book contains his first-person discussion of the "decision rules governing the entry into the various variables." The Supreme Court Database, Online Code Book 6, WASH. U. L., http://scdb.wustl.edu/documentation.php [hereinafter Spaeth Code Book]. In this Article, I will refer to the author of the Code Book as Spaeth.

[353] Spaeth Code Book, *supra* note 352, at 50.

or (1) ("conservative").[354] The determination is based on "whether the Court supports or opposes the *issue* to which the case pertains."[355]

Superficially, the system resembles the one described in this Article and applied in my study of reverse polarity. And it may well be that, in a substantial majority of cases, the two systems agree in their characterization of decisions as "liberal" or "conservative."[356] But the Spaeth Database's methods are very different – and, I believe, substantially less objective and less transparent.

To explain this conclusion, it will be useful to look at some cases, starting with *NIFLA v. Becerra*.[357] In *NIFLA*, the Supreme Court held that a California statute requiring crisis pregnancy centers to provide certain notices violated the First Amendment. In the Spaeth Database, the "decision direction" is coded as (1) or "conservative." At first blush, that seems quite wrong. In the traditional alignment, as Judge Reinhardt put it, "a generous or expansive interpretation of the Bill of Rights" is the liberal, not the conservative, position.[358] The Spaeth Code Book takes the same position. It says that "[i]n the context of issues pertaining to … First Amendment, … liberal (2) = pro-civil liberties or civil rights claimant."[359] *NIFLA* ruled in favor of the civil liberties claimant. How then can the decision be coded as "conservative"?

The explanation must be that *NIFLA* is not classified as a First Amendment case. And indeed it is not. *NIFLA*'s issue classification is 50020, which is "abortion." But why is the case classified as one involving abortion rather than freedom of speech?

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[354] *Id.* For each category group, the Code Book provides a detailed definition of a "liberal" outcome, then defines "conservative" as "reverse of above." *Id.* at 50–52. A tiny number of cases are coded as (3) = "unspecifiable." *See infra* this Section.

[355] *Id.* at 50 (emphasis added).

[356] I have not carried out a systematic examination. For discussion of some differences in classifications, see *infra* this Section.

[357] 585 U.S. 755 (2018).

[358] *See supra* text accompanying note 302. Judge Reinhardt specifically included "freedom of speech" as one of the rights that receive a generous interpretation at the hands of liberal judges.

[359] Spaeth Code Book, *supra* note 352, at 50–51.

To understand the basis for the classification, we can turn to the Database's explanatory discussion of the "issue" variable (#35). But that does not give a satisfactory answer. The discussion begins by saying that "the focus here is on the *subject matter* of the controversy (e.g., sex discrimination, state tax, affirmative action) rather than its *legal basis* (e.g., the equal protection clause)."[360] But a few paragraphs later, it adds: "This variable identifies issues on the basis of *the Court's own statements* as to what the case is about. The objective is to categorize the case from a public policy standpoint, a perspective that the legal basis for decision (lawType) commonly disregards."[361] But "the Court's own statements as to what the case is about" will almost never focus on the subject matter; they will discuss the "legal basis." In *NIFLA*, for example, the opening paragraph of the opinion states: "The question in this case is whether these notice requirements violate the First Amendment."[362]

In the end, it is difficult to avoid the conclusion that the reference to "the Court's own statements" just does not fit with the rest of the explanation of how the "issue" variable is coded. The focus really is on "the subject matter of the controversy." But by looking to "the subject matter of the controversy" rather than the legal issue, the Spaeth Database invites issue classifications that are not only subjective but also tendentious.

The "decision direction" codes reinforce those weaknesses. The Code Book says that the DD code is based on "whether the Court supports or opposes *the issue* to which the case pertains."[363] But as the *NIFLA* example demonstrates, many cases (particularly the most contentious) can be seen as "pertain[ing]" to more than one issue. And notwithstanding the disclaimer in the discussion of the "issue" variable, the listing under "Decision Direction" includes some issues defined by reference to law ("First Amendment") and some defined by reference to

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360 *Id.* at 45 (emphasis added).

361 *Id.* (emphasis added).

362 *NIFLA*, 585 U.S. at 761.

363 Spaeth Code Book, *supra* note 352, at 50 (emphasis added).

context ("abortion").[364] There is no obvious criterion for preferring one type of characterization over the other, and none is stated.

Another example is *Janus v. AFSCME*.[365] The Supreme Court held that the state of Illinois violated the First Amendment by compelling nonconsenting public sector employees to pay agency fees to a union, even for collective bargaining purposes. The introduction to the Court's opinion says, "Fundamental free speech rights are at stake."[366] But here too the +C decision is coded as (1) or "conservative."

Again the explanation lies in the issue code, which is 70030, "union or closed shop." In the DD codes, "liberal (2) = pro union" and also "anti-union member vis-à-vis union."[367] But what is the basis for deciding that the issue involves unions rather than free speech? Note, too, that although Spaeth has a First Amendment issue code for loyalty oaths for government employees (30090), he does not have one for the general run of First Amendment claims by government employees.[368]

Janus raises other questions also. What is the basis for assuming that "anti-union member vis-à-vis union" is the liberal position? Does that include *Steele v. Louisville & Nashville Railroad,* in which black employees sued the union for racial discrimination?[369] Or would that be a race case, in which the plaintiffs are "civil rights" claimants rather than "anti-union member[s]," so that a decision in their favor is liberal?

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[364] The reference to "First Amendment" appears in the definition of the broad category group, *see id.* at 49 (specifying issue codes 30010-20). But other codes appear to refer to First Amendment issues as well, *see id.* at (issue codes 30010-30150). "Abortion" (issue code 50020) is one of the specific issues within the group for which liberal and conservative outcomes are defined. *Id.*; *see also infra.*

[365] 585 U.S. 878 (2018).

[366] *Id.* at 885.

[367] In literal terms, this latter category was not implicated, because Mark Janus refused to join the union. But it seems reasonable to assume that any characterization applicable to an "anti-union member" litigating against the union would also apply to an anti-union *nonmember* challenging union rights or privileges.

[368] One of the landmark cases, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that the First Amendment does not protect government employee from discipline based on speech made pursuant to the employee's official duties), is coded as 30010, "First Amendment, miscellaneous."

[369] Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

A look at the database gives the answer; yes, the issue code is 20060, employment discrimination. But why is *Steele* a case about discrimination, while *Janus* is a case about an employee suing a union?

I believe that it is far more objective, and transparent, to take the approach put forward in this Article, which differs from Spaeth's in three important ways: (a) defining issues based on the source of the legal rule in dispute rather than the "subject matter";[370] (b) separately coding issue polarity and ideological direction; and (c) classifying ideological direction by looking to the combination of issue and issue polarity and then using an external, non-manipulable benchmark (such as the votes of the Justices) rather than choosing among a priori labels.

It is true that the particular method suggested here works only when there is a sharp ideological divide in the Supreme Court that can be used as a benchmark. That was true of the 1994–2020 period; I have not researched earlier eras. But that just means that if I want to study earlier years, I might have to look for a different (and probably more complex) benchmark. It does not validate the Spaeth system, which remains ad hoc and subjective.

The reader might ask: does any of that matter if it turns out that both systems generally identify the same decisions as "liberal" or "conservative"?[371] I think it does. One reason is that the Spaeth coding obscures the tensions in both the liberal and conservative ideologies. In particular, I believe that my system adds significantly to our knowledge by distinguishing between the traditional positions on both sides and the reverse-polarity positions. Recall Pritchett's comment about the "seeming paradox[es]" in the liberal and conservative worldviews as of 1948.[372] Pritchett identified the paradoxes by contrasting the two sides'

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[370] Some law-based issue categories are defined in part by subject matter, but only because the law has developed in that direction. For example, there is a line of Supreme Court precedents on the First Amendment rights of government employees. And starting with Roe v. Wade, 410 U.S. 113 (1973), there was a line of precedents limiting state power to regulate abortion under the Due Process Clause. But there has never been a distinct line of precedents applying the First Amendment to abortion-related speech.

[371] As already noted, I have not carried out a systematic study. But I have done some spot checking, and there is certainly a very substantial overlap.

[372] *See supra* text accompanying note 308.

attitudes toward state intervention in "economic affairs" on the one hand with their positions on state restrictions of "individual expression of intellectual and physical freedom" on the other.[373] Today, with the emergence of reverse polarity, the paradoxes are even more prominent; they can be found within the "intellectual and physical freedom" realm itself. But they are much more difficult to see if you do not take the step of coding issue polarity separately– a system in which the codes highlight whether the court decided in favor of the individual or in favor of the government.

In some instances, Spaeth's failure to recognize the emergence of reverse polarity has resulted in ideological characterizations which, although consistent with the traditional typology, will raise eyebrows among present-day Court watchers. For example, he has classified as "conservative" decisions that were rejected by four of the Court's five conservative Justices,[374] and he has classified as "liberal" decisions that were rejected by most or all of the Court's liberals.[375]

More fundamentally, the Spaeth system lacks transparency. In a case like *NIFLA*, there are not even two independent variables, only one. Once Spaeth decides that the "subject matter" of the case is abortion rather than freedom of speech, he will classify it as a conservative decision, presumably because it is adverse to the interests of those promoting abortion.[376] Similarly, once Spaeth decides that *Janus* is a case about unions rather than freedom of speech, he will classify it as conservative in outcome because the Court ruled adversely to the interests of the union, and anti-union (the reverse of "pro-union") is assumed to be the conservative position.

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[373] *Id.*

[374] *See* Walker v. Texas Division, Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015); Christian Legal Society v. Martinez, 561 U.S. 661 (2010).

[375] *See* Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011); Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

[376] Actually, that is not what the Code Book says. It says liberal (2) = "pro-female in abortion." Spaeth Code Book, *supra* note 352, at 51. That seems a strange way of defining the liberal position. I would have said, based on the votes of the Justices, that the liberal position on abortion is to support measures that make abortion easier and to oppose measures that discourage abortion.

In contrast, I proceed in several steps.[377] (1) The issue is one involving free speech, because the First Amendment is the source of the legal rule in dispute. (2) The polarity is +C, i.e. the Court ruled in favor of the First Amendment claim. (3) Traditionally, "[i]n the context of issues pertaining to … First Amendment, … liberal (2) = pro-civil liberties or civil rights claimant." (4) But here the First Amendment claim is supported by conservative Justices and opposed by the liberals. For that reason (and for that reason alone) the outcome is classified as (reverse-polarity) conservative.[378]

This approach is more complicated, to be sure, but every step is there to see (and to contest, if anyone wants to).

For completeness, I should note that in the Spaeth codebook there are two bases for characterizing case outcomes as "liberal" that do not involve either legal issues or subject matter – "pro-underdog" and "pro-economic underdog."[379] No explanation is provided for these terms, nor is there any guidance as to how they relate to other DD codes in classifying cases that might be thought to involve "underdogs."

One other difference between the Spaeth system and mine deserves mention. In the Spaeth database, all but a tiny handful of cases are coded as either "liberal" or "conservative" in outcome.[380] Code (3) = "unspecifiable" comes into play only in very narrow circumstances.[381] In my coding, the proportion of "other" cases is higher. The cases fall into two groups. Sometimes the *issue* lacks ideological valence.[382] Sometimes

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[377] This analysis applies to both *NIFLA* and *Janus*.

[378] In the database, I use the code "C#" for outcomes characterized as reverse-polarity conservative, i.e. the civil liberties claim prevailed, and it received more support from conservative Justices than from the liberals. The code "L#" signals that the outcome is reverse-polarity liberal, i.e. the civil liberties claim was rejected, and it received more support from conservatives Justices than from the liberals. E.g., Williams-Yulee v. Fla. Bar, 575 U.S. 433 (2015).

[379] Spaeth Code Book, *supra* note 352, at 51.

[380] At least that is the practice in recent Terms. For example, the database's 2021 Term includes more than 60 plenary docket cases; all but two (one of which was a dismissal of the writ) were coded as liberal or conservative in the "decision direction" field. I have not gone back to check the "legacy" cases.

[381] *See* Spaeth Code Book, *supra* note 352, at 50.

[382] *See, e.g.*, Hellman, *Ninth Circuit*, *supra* note 187, at 73.

I refrain from characterizing the ideological direction of a *case* because the evidence is conflicting or otherwise insufficient.[383]

The different approaches to identifying "ideological direction" may reflect divergent views of the role of ideology in judicial decision making. Professor Spaeth was a prominent exponent of the "attitudinal model."[384] He summed up his position in memorable language: "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal."[385] To my mind, that gets it exactly backwards. As I see it, we attach the labels "liberal" and "conservative" to judges *based on* their pattern of voting.[386] Thus, Justice Marshall is characterized as a liberal because, in close cases, he generally voted in favor of criminal defendants, employment discrimination plaintiffs, etc.[387]

But the labelling of Justices, judges, and courts as liberal or conservative is generally based on a small number of issues that are important to legal elites at the particular time.[388] What has been lacking is a systematic empirical examination of the realms of federal law with a view to identifying liberal and conservative positions on the broader range of federal issues in the current era. The method described in this Article provides the framework for that research.

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[383] For illustrations, *see id.* at 55–57 (First Amendment).

[384] *See* JEFFREY A. SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL xv–xvi (1993).

[385] *Id.* at 65.

[386] That is the assumption underlying the analysis by Judge Reinhardt quoted earlier. He posed the question, "How can you tell if a judge is liberal?" and answered it by summarizing the positions that liberal judges take on a variety of legal issues. *See supra* text accompanying note 303.

[387] I recognize that my approach does not entirely avoid the problem of circularity. But as explained earlier, both "common knowledge" and the Martin-Quinn scores enable us to identify "liberal" and "conservative" blocs in the Supreme Court during the baseline period. We can then analyze how the two blocs vote on various issues. I do not assume that my approach would work for other periods.

[388] For an insightful treatment that goes beyond hot-button issues, see BAUM, *supra* note 337.

Conclusion

In this Article I have described a case classification system designed for analyzing the work of the Supreme Court – in particular, the selection of cases for the plenary docket and the outcomes of the resulting decisions. Here I call attention to some of the questions that such research can address.

The delegates to the Constitutional Convention disagreed about the need to establish "inferior" federal courts, but even strong advocates of states' rights recognized that the new national government should include a "supreme national tribunal" that would "secure the national rights and [insure] uniformity of judgments."[389] Today the "inferior" federal courts decide thousands of cases a year, but the Supreme Court is the only federal court available to many litigants seeking to enforce a "national right[];" it is also the only court with the authority to establish uniformity in the interpretation of the national law. Yet the Court is deciding no more than about 60 cases each year from all circuits and all state courts. How does that comport with the Framers' vision? How can the Court carry out its role as "proactive manager of the system of federal law"[390] when its interventions in the work of the lower courts are so infrequent?

An empirical study using the case classification system outlined in Parts II and III can help answer these questions. Ideally, the research would include selected groups of cases in which review was denied as well as those that did receive plenary consideration.[391] But even a study limited to cases on the plenary docket could shed light on the questions through comparison with earlier periods.

With respect to ideology, I have already begun the research. That work generated an initial taxonomy of reverse polarity issues.[392] Three

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[389] 1 Farrand 124 (remarks of John Rutledge). *See* Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PENN. L. REV. 157, 161 (1960) (characterizing Rutledge as "a strong states-rights advocate").

[390] *See supra* text accompanying note 148.

[391] *See* Hellman, *National Law*, *supra* note 170, at 525 n.17 (listing categories of review-denied cases that were considered in the study).

[392] *See* Hellman, *Reverse Polarity*, *supra* note 183.

are defined by provisions of the Bill of Rights (the Second Amendment, the Takings Clause, and the Free Exercise Clause), the others by lines of precedent, primarily involving freedom of expression.[393] The study also found that in one major area of federal law – constitutional-criminal procedure – the traditional alignment has continued.[394] But the research was limited to the civil liberties segment of federal law. A current project will complete the task of mapping the ideological divide.

It remains to be seen how far the divide extends beyond the realm of individual liberties. Yet, based on the initial research, there is every reason to accept the continuing validity of Professor Pritchett's observation three-quarters of a century ago: what defines the liberal and conservative ideologies is each side's "attitude toward the state" on broad groupings of issues.[395] That is, do the Justices (and their allies outside the Court) "welcome [the] intervention" of the state, or do they seek to limit its authority? What is different today is that both liberals and conservatives embrace a strong commitment to judicial review. Both believe that it is the responsibility of federal courts to protect individuals against government overreaching. But they disagree profoundly over where and how the review power should be deployed. This generally holds true whether the issues implicate the supremacy or the checking function. And because judicial review plays "a critical role … in Federalist theory,"[396] it is entirely appropriate, in analyzing the Supreme Court's performance of its essential functions in the American legal system, to examine the Court's decisions with a view to mapping the exact contours of the ideological divide.

Case selection and ideological orientation can thus be seen as correlative concepts for framing the inquiry – the first focusing on input, the second on output. The method outlined in this Article – a set of case classifications that is transparent, structured, and, above all, grounded in "the constitutional system our Federalist forefathers bequeathed us" – provides the tools for both tasks.

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[393] *See id.* at 300–19.

[394] *See id.* at 330–33.

[395] *See supra* text accompanying note 308.

[396] *See supra* text accompanying note 10.