


8-9-2018

## Above Politics: Congress and the Supreme Court in 2017

Jason Mazzone

*University of Illinois College of Law, University of Illinois at Urbana-Champaign*

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Constitutional Law Commons](#), [Law and Politics Commons](#), [Legislation Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Jason Mazzone, *Above Politics: Congress and the Supreme Court in 2017*, 93 Chi.-Kent L. Rev. 373 (2018).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol93/iss2/5>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

## ABOVE POLITICS: CONGRESS AND THE SUPREME COURT IN 2017

JASON MAZZONE\*

The composition of the Supreme Court is often an issue that receives attention in presidential elections. In the 2016 election, the Court figured very prominently because Justice Antonin Scalia's death in February of 2016 produced a vacancy on the Court. Soon after Scalia died, Republican Senators, led by Senate Majority Leader Mitch McConnell, announced that they would not hold confirmation hearings on or vote on any nominee to the Court made by President Barack Obama.<sup>1</sup> Rather, Senate Republicans stated, the choice of the next member of the Court should be made by President Obama's successor so that the voters, in electing the new President in November, would have an opportunity to weigh in on the kind of Justice they wanted to replace Scalia.<sup>2</sup> Even after Obama nominated Merrick Garland to the Court in March of 2016, Republican Senators held fast to their plan, with most refusing even to meet with the nominee.<sup>3</sup> Republicans argued they were simply adhering to a longstanding practice of not considering Supreme Court nominations during a presidential election year,<sup>4</sup> though

\* Albert E. Jenner, Jr. Professor of Law, University of Illinois at Urbana-Champaign.

1. See Matt Viser & Annier Linskey, *GOP Leaders Say Obama Must Not Fill Supreme Court Seat*, BOS. GLOBE (Feb. 14, 2016), <https://www.bostonglobe.com/news/politics/2016/02/13/partisan-dispute-breaks-out-immediately-over-antonin-scalia-replacement-process-for-supreme-court/CSPFenWpAZIK8kExPQiY8H/story.html> [<https://perma.cc/ZS5J-E4Y3>].

2. Burgess Everett & Glenn Thrush, *McConnell Throws Down Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016), <http://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248> [<https://perma.cc/3NMT-QA5B>] (“The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president,” McConnell said . . .”).

3. Press Release, Senator Mitch McConnell, McConnell on Supreme Court Nomination (Mar. 16, 2016), <https://www.mcconnell.senate.gov/public/index.cfm/2016/3/mcconnell-on-supreme-court-nomination> [<https://perma.cc/U4VZ-M7S3>] (“The American people may well elect a President who decides to nominate Judge Garland for Senate consideration. The next President may also nominate someone very different. Either way, our view is this: Give the people a voice in the filling of this vacancy.”).

4. See, e.g., Letter from Republican Members of Senate Comm. on the Judiciary to Mitch McConnell, Senate Majority Leader (Feb. 23, 2016), <http://www.nytimes.com/interactive/2016/02/23/us/politics/document-Senate-SCOTUS-Letter.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news> [<https://perma.cc/4YUT-EBCQ>] (“Not since 1932 has the

that claim did not comport with the historical record.<sup>5</sup> With a standoff between the Republican-controlled Senate and the Obama White House, the unfilled vacancy on the Court was repeatedly a theme of the 2016 presidential race. For instance, in their party acceptance speeches, Donald J. Trump and Hillary Rodham Clinton both referred to the Supreme Court as a key campaign issue.<sup>6</sup> Filling the Scalia vacancy was also a topic of the presidential candidate debates.<sup>7</sup> During the course of the election, Trump released two lists of names from which he promised, if elected, to select the next Justice.<sup>8</sup> Both Trump and Clinton referred to the Supreme Court in campaigning and ran advertisements portraying the future composition of the Court as a key election concern.<sup>9</sup>

In the congressional elections of 2016 the Supreme Court was also an important topic. By refusing Obama the opportunity to name a new Justice, Republicans risked voter backlash and, given the already tight Senate races in several states, a loss of their majority control of the Senate after 2016.<sup>10</sup>

Senate confirmed in a presidential election year a Supreme Court nominee to a vacancy arising in that year.”).

5. See generally Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appointment a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016).

6. See Donald J. Trump, Acceptance Speech as Prepared for Delivery at the Republican Nat'l Convention (July 21, 2016), <https://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974> [<https://perma.cc/JF9S-JRJQ>] (“We are . . . going to appoint justices to the United States Supreme Court who will uphold our laws and our Constitution. The replacement for Justice Scalia will be a person of similar views and principles. This will be one of the most important issues decided by this election.”); Hillary Rodham Clinton, Acceptance Speech as Prepared for Delivery at the Democratic Nat'l Convention (July 28, 2016), <https://www.politico.com/story/2016/07/full-text-hillary-clintons-dnc-speech-226410> [<https://perma.cc/N4XS-FCQV>] (“[W]e need to appoint Supreme Court justices who will get money out of politics and expand voting rights, not restrict them.”).

7. In particular, it was the opening topic at the third debate on Oct. 19, 2016. See Donald J. Trump & Hillary Rodham Clinton, Full Transcript of the Third 2016 Presidential Debate (Oct. 20, 2016), <https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063> [<https://perma.cc/B3GX-N4RK>].

8. See Joseph P. Williams, *Trump: Next Supreme Court Nominee Will Come from Conservative List*, U.S. NEWS & WORLD REP. (May 1, 2017, 11:23 AM), <https://www.usnews.com/news/politics/articles/2017-05-01/trump-next-supreme-court-nominee-will-come-from-conservative-list> [<http://perma.cc/3N9W-5E9L>].

9. See, e.g., Gabrielle Levy, *Clinton: 2016 is 'Make or Break' Moment for the Supreme Court*, U.S. NEWS (Mar. 28, 2016), <https://www.usnews.com/news/articles/2016-03-28/clinton-2016-is-make-or-break-moment-for-supreme-court> [<https://perma.cc/B5EN-PNQS>].

10. See, e.g., Bill Theobald, *Supreme Court Vacancy Now Part of Nevada Senate Race*, RENO GAZETTE J., (Feb. 16, 2016, 2:14 PM), <http://www.rgj.com/story/news/2016/02/16/supreme-court-vacancy-now-part-nevada-senate-race/80464886/> [<https://perma.cc/278Y-ZPHZ>] (“If the Senate race in Nevada were not consequential enough already, add the future makeup of the Supreme Court to the list of issues at stake.”); Susan Davis, *Scalia's Death Will Cast a Long Shadow Across This Year's Senate Races*, NPR (Feb. 15, 2016, 6:04 AM), <https://www.npr.org/2016/02/15/466735802/scalia-s-death-and-the-2016-senate-races> [<https://perma.cc/K43Y-RZ9F>] (“[T]he open question is whether Republicans' refusal to consider a Supreme Court nominee will blow back on . . . incumbents McConnell is trying to

At the same time, with the future of the Court as a prominent election issue, there was the possibility of increased voter turnout and unpredictable effects also for Congressional House races—and even for elections for offices at the state and local levels. Commentators called the Supreme Court the “most important issue in the 2016 election,”<sup>11</sup> referred to election day as a “turning point” for the Court,<sup>12</sup> predicted a “historic transformation”<sup>13</sup> as the next President “shape[d] the . . . Court for generations,”<sup>14</sup> and deemed the election a “referendum on the Supreme Court.”<sup>15</sup> A week after the election, with Republicans having secured the White House and control of Congress, Republican Senator (and one-time presidential candidate) Ted Cruz announced that “in a very real respect, Justice Scalia was on the ballot,” and that he had won.<sup>16</sup>

Given all of the attention on the Supreme Court during the 2016 election, this Essay examines the place of the Court in national politics during 2017. In particular, it focuses on activities pertaining to the Court in the first session of the 115th Congress (beginning on January 3, 2017 and ending on January 2, 2018). The most obvious action during 2017 is, of course, the appointment of Neil Gorsuch to the Supreme Court to fill the vacancy left by Justice Scalia. Nominated by President Trump on January 31, 2017,

protect.”); Russell Berman, *A Death That Reshapes U.S. Politics*, ATLANTIC (Feb. 13, 2016), <https://www.theatlantic.com/politics/archive/2016/02/antonin-scalia-death-politics-senate-2016-campaign-obama/462738/> [<https://perma.cc/RQ54-MF57>] (“With a large number of Republican senators in swing states up for reelection, a nomination battle could reshape the fall elections.”).

11. Ari Berman, *The Supreme Court is the Most Important Issue in the 2016 Election*, NATION (Feb. 16, 2016), <https://www.thenation.com/article/the-supreme-court-is-the-most-important-issue-in-the-2016-election/> [<https://perma.cc/LN8N-SFBF>]; Paul Waldman, *The Supreme Court Reminds Everyone Why It’s the Most Important Issue in the 2016 Election*, WASH. POST (June 23, 2016), [https://www.washingtonpost.com/blogs/plum-line/wp/2016/06/23/the-supreme-court-reminds-everyone-why-its-the-most-important-issue-in-the-2016-election/?utm\\_term=.f3290c4f6c38](https://www.washingtonpost.com/blogs/plum-line/wp/2016/06/23/the-supreme-court-reminds-everyone-why-its-the-most-important-issue-in-the-2016-election/?utm_term=.f3290c4f6c38) [<http://perma.cc/QF9L-QZPS>].

12. Noah Feldman, *Election Day is a Turning Point for Supreme Court*, BLOOMBERG VIEW (Nov. 6, 2016), <https://www.bloomberg.com/view/articles/2016-11-06/election-day-is-a-turning-point-for-supreme-court> [<https://perma.cc/K3UH-2G5K>].

13. Richard Wolf, *Supreme Court Faces Historic Transformation After Election*, USA TODAY (Sept. 30, 2016, 6:06 AM), <https://www.usatoday.com/story/news/politics/2016/09/30/supreme-court-liberal-conservative-transformation-clinton-trump-garland/89957976/> [<https://perma.cc/BLL9-PADE>].

14. Mashaun D. Simon, *Analysis: Next President Could Shape Supreme Court for Generations*, NBC NEWS (Nov. 8, 2016, 12:16 AM), <https://www.nbcnews.com/storyline/2016-election-day/analysis-next-president-could-shape-supreme-court-generations-n679326> [<https://perma.cc/9SS5-D79N>].

15. Dylan Matthews, *Antonin Scalia’s Death Makes the 2016 Presidential Election a Referendum on the Supreme Court*, VOX (Feb. 13, 2016, 7:10 PM), <https://www.vox.com/2016/2/13/10987210/antonin-scalia-death-2016-election> [<https://perma.cc/BC8W-GC3D>].

16. Ryan Lovelace, *Cruz: Justice Scalia Won the Election*, WASH. EXAMINER (Nov. 18, 2016, 1:21 PM), <http://www.washingtonexaminer.com/cruz-justice-scalia-won-the-election/article/2607775> [<https://perma.cc/X2D2-A6Q5>].

Gorsuch was confirmed on April 7, 2017 by the Senate following Republicans' repeal of the filibuster for Supreme Court nominations<sup>17</sup> and amidst vigorous complaints by Democrats that a seat on the Court had been stolen.<sup>18</sup> This Essay takes up other activities by members of Congress during 2017 with respect to the Supreme Court. With their control of Congress, one might expect Republicans to have pursued legislation directed at or affecting the Supreme Court in ways that reflect their party's priorities. Similarly, one might expect Democrats, after losing the 2016 electoral battles, to have focused some of their own congressional energies also on the third branch.

Part I examines efforts in Congress during 2017 to respond to disfavored Supreme Court rulings on statutory grounds. Part II conducts a similar analysis with respect to rulings based upon the Constitution. Part III takes up other congressional efforts to regulate the operations of the Court and the work of the Justices. Part IV draws some lessons: it argues that notwithstanding all of the attention to the Supreme Court in the 2016 elections, 2017 was characterized by congressional modesty towards the Court and that, as a result, the Justices have very little to fear from the legislative branch. In other words, the Court is above politics not in the sense of being solely committed to the rule of law but because it operates beyond the reach of the political process.

## I. RESPONSES TO STATUTORY RULINGS

When members of Congress believe the Supreme Court has interpreted a statute incorrectly or in a manner that produces undesirable results, Congress can enact legislation in response. Commentators describe such legislation as “overriding” the Court’s ruling. Overrides take two basic forms. “Restorative” overrides correct a statutory interpretation that members of Congress view as incorrect in light of the statute’s original language, design, and purposes.<sup>19</sup> “Policy” overrides involve the current

17. See Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/52G6-DXXE>].

18. See, e.g., Press Release, Senator Jeff Merkley, Statement on Supreme Court (Jan. 31, 2017), <https://www.merkley.senate.gov/news/press-releases/merkley-statement-on-supreme-court> [<https://perma.cc/SB5E-E33B>] (“This is a stolen seat being filled by an illegitimate and extreme nominee.”).

19. Matthew R. Christiansen & William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1319 (2014) (“[With the view that] the Supreme Court has reneged on historic legislative commitments, Congress ‘restores’ what it considers the correct understanding of the statutory scheme, often the understanding that an agency had implemented before being rejected by the Court.”).

Congress updating a statute that, in light of the Court's interpretation, does not reflect current political preferences.<sup>20</sup>

Congress's ability to override statutory rulings is routinely taken for granted. Responding to questions about the Supreme Court's rulings on voting statutes, Chief Justice John G. Roberts, Jr. stated at his confirmation hearing in 2005: "The final say on a statute is with Congress, and if they don't like the Supreme Court's interpretation of it, they can change it."<sup>21</sup> In practice, however, things are more complicated. Recent studies demonstrate that Congress's ability to override or otherwise respond to a statutory ruling of the Court has varied over time and by circumstance and that overrides have become much less common than they once were. It is useful to briefly summarize the main findings in this area before turning to the use of overrides in the 115th Congress.

#### *A. Empirical Studies of Statutory Overrides*

In a 1991 empirical study of congressional responses to Supreme Court statutory rulings, Professor William Eskridge reported that "Congress and its committees are aware of the Court's statutory decisions, devote significant efforts toward analyzing their policy implications, and override those decisions with a frequency heretofore unreported."<sup>22</sup> Identifying an uptick in overrides from prior years, Eskridge found that the eight Congresses from 1975–1990 overrode an average of twelve Supreme Court decisions per Congress.<sup>23</sup> Eskridge's analysis supported a model of statutory interpretation in which there is an ongoing dialogue between Congress and the Court: Congress legislates, the Court interprets the legislation, and if a later Congress is dissatisfied, it legislates anew. Eskridge's study also identified factors that contribute to the likelihood of Congress overriding a Supreme Court statutory ruling: "Congressional overrides are most likely

20. *Id.* at 1320 (discussing "more routine policy-updating . . . rather than 'correction' of judicial mistakes").

21. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 231 (2005).

22. See William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 334 (1991). Eskridge treated as overriding a Supreme Court decision any statute that:

(1) completely overrules the holding of a statutory interpretation decision, just as a subsequent Court would overrule an unsatisfactory precedent, or (2) modifies the result of a decision in some material way, such that the same case would have been decided differently, or (3) modifies the consequences of the decision, such that the same case would have been decided in the same way but subsequent cases would be decided differently.

*Id.* at 332 n.1.

23. See *id.* at 338.

when a Supreme Court interpretation reveals an ideologically fragmented Court, relies on the text's plain meaning and ignores legislative signals, and/or rejects positions taken by federal, state, or local governments."<sup>24</sup>

In a 2013 article, Professor Richard Hasen updated Eskridge's study and found that over the prior two decades the number of Congressional overrides had "plummeted dramatically."<sup>25</sup> Hasen reported that from 1991–2000, the average overrides per Congress had dropped to 5.8 Supreme Court cases, and then dropped further during 2001–2012 to an average override per Congress of just 2.8 cases.<sup>26</sup> Hasen contended that these declines were a product of increased political polarization that made it more difficult for Congress to act in response to rulings by the Court.<sup>27</sup> Hasen further reported that, whereas in the past override legislation was often a bipartisan effort, overrides now involved party-line voting.<sup>28</sup> Hasen concluded that with the exception of "technical overrides," those that are hidden in larger bills that generate support on other grounds, "[a]s moderates continue to leave Congress, and as members of both Houses become more polarized, the chances of bipartisan overrides diminish."<sup>29</sup> As for partisan overrides themselves, Hasen cautioned that they depend on a specific set of circumstances:

Partisan overrides of Supreme Court statutory decisions remain possible, but only when the conditions are right. . . .

[They] require[ ] an unusual set of events: a [P]resident, House, and Senate majority of the same party; a [P]resident with ample political capital; and enough cross-over votes to beat a filibuster (something which looks unlikely to occur frequently as the remaining Senate moderates retire or are beaten in elections).<sup>30</sup>

Hasen further warned that the decline of overrides—and their now partisan nature—has an important implication for separation of powers among the branches of government. With Congress unable to override judicial decisions, the power of the Court increases, such that it has the final word on statutory questions in the same way it has the last word on the meaning of the Constitution.<sup>31</sup> Hasen thus posited the end of the dialogic model of

24. *Id.* at 334.

25. Richard L. Hasen, *End of the Dialogue?: Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013).

26. *Id.*

27. *Id.*

28. *See id.* at 239–42.

29. *Id.* at 241–42.

30. *Id.* at 238–39.

31. *See id.* at 224.

statutory interpretation in which it is presumed that if courts err, Congress can correct.<sup>32</sup> In other words, Chief Justice Roberts's assurance that Congress can simply correct statutory rulings by the Court did not properly reflect the political realities that make those rulings largely immune to overrides.

Hasen's diagnosis has generated some pushback but his finding that overrides have recently declined has been confirmed. In their responsive article, Eskridge and co-author Matthew Christiansen object to certain aspects of Hasen's analysis and conclusions but agree that overrides have dropped.<sup>33</sup> Christiansen and Eskridge report that while there has indeed been a decline in overrides during the period 2001–2011, the 1990s were actually a "golden age of overrides."<sup>34</sup> According to Christiansen and Eskridge: "As a matter of pure counting, the 102nd through 105th Congresses (1991–1999) overrode eighty-six Supreme Court statutory decisions, an average of more than twenty per Congress."<sup>35</sup> They note also that this era involved periods of divided government, in 1991–1993 and 1995–1999.<sup>36</sup> In contrast to Hasen's analysis, these authors contend:

Congress in the 1990s was much more polarized than it was in the 1980s or 1970s, yet the 1990s was the golden age of overrides. Were polarization the entire story, we would expect overrides to decline as polarization increased, yet we see the opposite: during the 1990s overrides *increased* during a time of increasing polarization.<sup>37</sup>

Nonetheless, Christiansen and Eskridge agree with Hasen that the rate of overrides has dropped: they find that from 1999–2011, "overrides fell off dramatically" (though they report that "every Congress between 1999 and 2011 overrode at least three Supreme Court decisions" and thus overrides have "not been reduced to nothing").<sup>38</sup> They identify a total of thirty-five Supreme Court decisions overridden during the period 1999–2011.<sup>39</sup> They also provide a list of statistically-significant variables they identify as correlating with statutory overrides.<sup>40</sup> In place of Hasen's emphasis upon

32. *See id.* at 226–27.

33. *See generally* Christiansen & Eskridge, Jr., *supra* note 19.

34. *Id.* at 1336–37.

35. *Id.* at 1337.

36. *Id.* at 1338–39.

37. *Id.* at 1344.

38. *Id.* at 1340.

39. *Id.* at 1480–84 app. 1.

40. *Id.* at 1321. The factors identified are as follows:

- a close division (plurality or 5- or 6-Justice majority) among the Justices when deciding the case;



increased political polarization, Christiansen and Eskridge offer a different explanation for the decline:

We do not discount the importance of partisan polarization as a factor in the decline of overrides, especially during the Congresses that met during and right after the impeachment of President Clinton. Nonetheless, our data suggest that polarization alone cannot explain the drop-off in overrides, given that overrides have flourished during the exceedingly polarized stretches of the 1990s. . . . More important, in our view, is the new legislative agenda in the twenty-first century. As a great deal more congressional attention is devoted to the war on terror, macroeconomic tax and spending policy, health care and insurance, and international trade and nuclear proliferation, relatively less congressional attention has been paid to the superstatutes<sup>41</sup> that the Supreme Court has been interpreting, and Congress has been overriding, for the last forty to fifty years.<sup>42</sup>

Christiansen and Eskridge also view the recent drop in overrides as merely a short-term development rather than, as in Hasen's view, indicative of a more enduring change in the allocation of power between Congress and the Court. According to Christiansen and Eskridge, while in the short term, "the combination of the new legislative agenda and the continuing partisan polarization will depress Congress's inclination and capacity to enact override laws," over the longer period, "countervailing pressures from interest groups, agencies, and the states ought to press Congress to update aging superstatutes, with the result being a resurgence of overrides."<sup>43</sup>

Most of the differences between Hasen's study and that of Eskridge and Christiansen result from different methodologies. In identifying overrides, Hasen relied upon congressional committee reports—the same approach Eskridge took in his own 1991 study. In their more recent study, Christiansen and Eskridge also used committee reports, but, with the view that "congressional committee reports provided much less on-point discus-

- judicial rejection of the interpretation offered by a federal agency and usually defended by the Solicitor General;
- judicial narrowing of federal regulation, except in tax and intellectual property cases, where regulation-friendly interpretations are often overridden;
- reliance on plain meaning of statutory texts, especially when such reliance depends critically on whole act and whole code arguments or flies in the face of strong legislative history; and
- invitations for Congress to override, issued by majority, concurring, or even dissenting Justices.

*Id.*

41. "A superstatute is an ambitious law that supersedes common law baselines with a new public norm or structure, such that that norm or structure has become entrenched in American public law." *Id.* at 1364.

42. *Id.* at 1351.

43. *Id.* at 1353.

sion of judicial decisions after the 1980s,”<sup>44</sup> they supplemented those reports with Westlaw statutory and caselaw research.<sup>45</sup> That approach yielded more overrides than did simple reliance upon committee reports (indeed, it required an updating of the number of overrides Eskridge had reported in his own 1991 study).<sup>46</sup> In his further response, Hasen, writing with James Buatti, argues that while the Christiansen–Eskridge study casts a wider net, the modified approach has drawbacks:

Instead of a study of *conscious* overrides, the Christiansen–Eskridge study uses new methodology to study cases in which congressional action *consciously* or *unconsciously* changed the understanding of a congressional statute as the Supreme Court had interpreted it. In other words, the new study includes statutes in which there is no indication Congress knew that it was overriding a Supreme Court decision through a new statute. . . . While unconscious overrides can be important to study for many reasons, they are less relevant for purposes of studying the Congress–Supreme Court dialogue.<sup>47</sup>

In other words, in understanding the relationship between Congress and the Court, it may make more sense to focus—as Eskridge did in 1991—on conscious activity rather than what occurs inadvertently. It is useful to know about statutes that happen to end up overriding a Supreme Court decision but they do not tell us a great deal about how Congress views the Court or what motivates congressional action. Nonetheless, Hasen concludes that the Christiansen–Eskridge study did identify an additional twenty-five conscious overrides to add to the total number of forty-six he had reported in his own earlier study.<sup>48</sup>

44. *Id.* at 1336.

45. Specifically:

We located on Westlaw every Supreme Court decision between 1964 and 2010 and inquired of Westlaw the subsequent citation history of the Supreme Court opinion. For a large number of cases, Westlaw identified the Court’s opinion as having been “superseded by statute,” “superseded by statute/rule,” or “called into doubt by statute” and referred the reader to subsequent legal documents (usually lower court opinions) discussing the legislative response to the Supreme Court decision in question. We read all of those leads and the statutes they cited to determine whether the later mentioned statute was actually an override as we are using the term. About half the time, they were not overrides, but this was still an invaluable source of data because it provided concrete leads that we then investigated and evaluated.

*Id.* at 1328 (footnote omitted).

46. *Id.* (“[N]ot only were a large majority of the overrides after 1990 discovered by this Westlaw method, but we discovered many new overrides for the earlier period as well (1967–1990). Hence, the current study updates and adds to the 1991 Eskridge study.”).

47. James Buatti & Richard L. Hasen, *Response: Conscious Congressional Overriding of the Supreme Court, Gridlock, and Partisan Politics*, 93 TEX. L. REV. SEE ALSO 263, 264–65 (2015) (footnote omitted).

48. *Id.* at 272–73.

### B. Overrides in 2017

Whether the analysis is limited to conscious overrides, as in the Hasen approach, or considers also unconscious overrides, as captured by the Christiansen–Eskridge approach, in 2017, Congress did not override any decision of the Supreme Court.<sup>49</sup> In terms of Hasen’s analysis, the rate of overrides in 2017 is thus the same as that for Congress in 2013, 2012, and 2010. Alternatively, considered in terms of the Christiansen–Eskridge analysis, so far, the 115th Congress has not met the minimum number of three overrides enacted by recent congresses.

Notably, the absence of 2017 overrides arose in a period in which Republicans controlled both Houses of Congress and the White House. Congress’s failure to enact any overrides during 2017 demonstrates that single-party control of government is not by itself sufficient for overrides to occur. Significantly, Republicans had only slim margins in Congress; the relationship between congressional Republicans and the President was rocky; and, reflective of national political divisions, Democrats mounted fierce opposition to the Republican legislative agenda. In an era in which Republicans failed to deliver on legislative campaign promises, most famously, to repeal the Affordable Care Act, it is perhaps little surprise that they were unable to muster majorities for overriding Supreme Court decisions.

### C. Proposed Overrides

Congress’s failure to enact any statutory overrides of Supreme Court decisions does not mean that there was no interest in overrides in 2017. Instead, multiple bills designed to override Supreme Court rulings were introduced into the 115th Congress. These bills involved civil rights claims, arbitration, Indian land trusts, and patents.

#### 1. Civil Rights Claims

Override bills have targeted three Supreme Court cases involving civil rights. The Protecting Older Workers Against Discrimination Act seeks to overturn the Supreme Court’s decision in *Gross v. FBL Financial Services* that mixed-motive claims are not available under the Age Discrimination in Employment Act (ADEA).<sup>50</sup> The bill has bipartisan support: the Senate

49. To generate a list of the 2017 Acts of Congress, visit [Congress.gov](http://Congress.gov) and select “115th Congress,” “Legislation,” and “Became Law”; sort results by “Latest Action—Oldest to Newest;” and scroll down to the last 2017 entry.

50. 557 U.S. 167, 169, 180 (2009).

version is sponsored by Republican Senators Chuck Grassley and Susan Collins and Democratic Senators Bob Casey and Patrick Leahy;<sup>51</sup> the House version is sponsored by Democrats Bobby Scott and Mark Takano and Republicans Jim Sensenbrenner and David Young.<sup>52</sup> Earlier versions of the bill were introduced beginning in 2009.<sup>53</sup>

In *Gross*, the Supreme Court held that, because Congress did not expressly amend the ADEA to address mixed motive claims, such claims were unavailable under the ADEA, and, instead, the complainant bears the burden of proving that a protected characteristic or protected activity was the “but for” cause of an unlawful employment practice.<sup>54</sup> Writing for the majority, Justice Thomas distinguished the ADEA from Title VII, which Congress *had* amended “by explicitly authorizing discrimination claims in which an improper consideration was ‘a motivating factor’ for an adverse employment decision.”<sup>55</sup> Justice Thomas observed that the ADEA did not specifically “provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor,” and that Congress did not “add such a provision to the ADEA” when it added the amending language to Title VII, “even though it contemporaneously amended the ADEA in several ways.”<sup>56</sup> Thus, he concluded, the ADEA did not permit mixed-motive claims.<sup>57</sup>

In dissent, Justice Stevens argued that the Court had disregarded Congress’s command because “[t]he most natural reading of this statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee.”<sup>58</sup> Stevens reasoned that in 1989, in *Price Waterhouse v. Hopkins*, the Court rejected a but-for standard in construing identical language in Title VII, and that Congress also rejected the but-for approach when it later amended Title VII’s language.<sup>59</sup> “Given this unambiguous history,” Stevens wrote, “it is particularly inappropriate for the Court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII.”<sup>60</sup> Stevens accused the majority of “utter disregard of our precedent

51. S. 443, 115th Cong. (2017).

52. H.R. 2650, 115th Cong. (2017).

53. See S. 1756, 111th Cong. (2009).

54. See *Gross*, 557 U.S. at 174–75, 177–78.

55. *Id.* at 174.

56. *Id.*

57. See *id.* at 180.

58. *Id.* (Stevens, J., dissenting).

59. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U. S. 228, 240 (1989)).

60. *Id.* at 180–81.

and Congress' intent" and of an "an unabashed display of judicial lawmaking."<sup>61</sup>

The Protecting Older Workers Against Discrimination Act directly responds to *Gross*. According to the bill's stated purposes, it is designed "to clarify congressional intent that mixed motive claims shall be available, and that a complaining party need not prove that a protected characteristic or protected activity was the 'but for' cause of an unlawful employment practice, under the ADEA and similar civil rights provisions."<sup>62</sup> It thereby "reject[s] the Supreme Court's reasoning in the *Gross* decision that Congress' failure to amend any statute other than [T]itle VII . . . suggests that Congress intended to disallow mixed motive claims under other statutes."<sup>63</sup> Among other things, the proposed bill would amend the ADEA language to provide specifically that, "[i]n establishing an unlawful practice under this Act . . . a complaining party . . . need only produce evidence sufficient for a reasonable trier of fact to find that an unlawful practice occurred under this Act . . . and . . . shall not be required to demonstrate that age . . . was the sole cause of a practice."<sup>64</sup>

A second bill to overturn a civil rights decision is the Equity and Inclusion Enforcement Act.<sup>65</sup> This is a House bill that would overturn the Supreme Court's 2001 holding in *Alexander v. Sandoval* that there is no private right of action to enforce disparate impact regulations promulgated under Title VI.<sup>66</sup> In contrast to the Protecting Older Workers Against Discrimination Act, the Equity and Inclusion Enforcement Act is a purely Democratic undertaking, sponsored by Representative Bobby Scott and fourteen Democratic co-sponsors.<sup>67</sup>

*Sandoval* was a 5–4 decision with a majority opinion by Justice Scalia.<sup>68</sup> Writing that "[w]e . . . begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI," Justice Scalia held that while private individuals could sue to enforce the ban on intentional discrimination in section 601 of Title VI, regulations barring disparate impact could only be adopted under section 602 and, because that

61. *Id.* at 182.

62. H.R. 2650, 115th Cong. § 2(b)(1) (2017).

63. *Id.* § 2(b)(2).

64. *Id.* § 3(a)(2).

65. See H.R. 2486, 115th Cong. (2017).

66. *Id.*

67. *Cosponsors: H.R.2486—115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/2486/cosponsors> [<https://perma.cc/96M3-XQ3W>].

68. *Alexander v. Sandoval*, 532 U.S. 275, 277 (2001).

provision is directed solely at agencies, it does not allow for a private right of action to enforce any resulting regulations.<sup>69</sup>

In its findings, the Equity and Inclusion Enforcement Act states that *Sandoval* “overturned four decades of statutory protections against discrimination by stripping victims of discrimination of the right to bring actions under [T]itle VI.”<sup>70</sup> The bill proposes a simple statutory fix by adding to Title VI a provision reading: “The violation of any regulation relating to disparate impact issued under section 602 shall give rise to a private civil cause of action for its enforcement to the same extent as does an intentional violation of the prohibition of section 601.”<sup>71</sup>

A third bill, sponsored by Democrats in the Senate and the House, is the Fair Employment Protection Act.<sup>72</sup> It responds to the Supreme Court’s decision in *Vance v. Ball State University*.<sup>73</sup> That case concerned the circumstances under which an employer could be held vicariously liable under Title VII for harassment committed by workplace supervisors. The Court held that under Title VII an employee is a “supervisor” only if the employee is empowered by the employer to take “tangible employment actions against the victim.”<sup>74</sup> That is, a supervisor is one with power to “effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’”<sup>75</sup> In other instances, an employer is only liable for harassment of one employee by another if the employer was negligent in controlling working conditions.<sup>76</sup> Writing in dissent in *Vance*, Justice Ginsburg complained that by adopting a limited definition of supervisor for purposes of vicarious liability, the majority “ignores the conditions under which members of the work force labor, and disservices the objective of Title VII to prevent discrimination from infecting the Nation’s workplaces.”<sup>77</sup> She called upon Congress to act: “The ball is . . . in Congress’ court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today.”<sup>78</sup>

69. *See id.* at 288–89.

70. H.R. 2486, 115th Cong. § 2(2) (2017).

71. *Id.* § 3.

72. S. 2019, 115th Cong. (2017); H.R. 4152, 115th Cong. (2017).

73. 133 S. Ct. 2434 (2013).

74. *Id.* at 2439.

75. *Id.* at 2443 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

76. *Id.* 2447–48

77. *Id.* at 2455 (Ginsburg, J., dissenting).

78. *Id.* at 2466.

The Fair Employment Protection Act responds to Justice Ginsburg's call. It would specify that under Title VII, as well as under other federal employment discrimination statutes, an employer may be held vicariously liable for conduct by individuals "authorized by the employer . . . to undertake or recommend tangible employment actions affecting the employee[ ] or . . . to direct the employee's daily work activities."<sup>79</sup>

## 2. Arbitration

The 1925 Federal Arbitration Act (FAA) makes written arbitration agreements enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>80</sup> Although some commentators contend that the FAA originated as a procedural statute governing enforcement of arbitration clauses in federal court,<sup>81</sup> since the early 1980s, the Supreme Court has treated the FAA as reflecting a "national policy favoring arbitration."<sup>82</sup> Accordingly, in a series of decisions, the Court has construed the FAA to enforce consumer and employment contractual provisions mandating arbitration of claims and to preempt state laws protecting a right to sue either individually or as part of a class action.<sup>83</sup>

The Arbitration Fairness Act of 2017 seeks to overturn these rulings by nullifying contractual provisions that impose an arbitration requirement in employment, consumer, antitrust, or civil rights disputes (while permitting the parties, after a dispute arises, to agree to arbitration if they so choose).<sup>84</sup> The Senate bill was originally sponsored by Democrat Al Franken of Minnesota (now resigned) and has twenty-six co-sponsors (twenty-

79. S. 2019, 115th Cong. § 3 (2017).

80. 9 U.S.C. § 2 (2012).

81. See, e.g., Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939 (2014).

82. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

83. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (holding that class action waivers in arbitration agreements are enforceable under the FAA); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012) (holding that "because the [Credit Repair Organizations Act] is silent on whether claims under the Act can proceed in an arbitrable forum," the FAA governs and requires that such claims be enforced according to the arbitration agreement); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that the FAA preempts California prohibition on class-arbitration waivers); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010) (holding that where an agreement to arbitrate includes a provision that the arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that particular provision, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator to resolve); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that arbitration agreements are enforceable with respect to statutory disputes).

84. S. 537, 115th Cong. (2017).

five Democrats plus Bernie Sanders, Independent of Vermont);<sup>85</sup> the House version is sponsored by Georgia Democrat Hank Johnson and it has sixty-three Democratic co-sponsors.<sup>86</sup>

The bill's findings state that the FAA "was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power" but that "[a] series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress."<sup>87</sup> Notably, the bill appeared at a time the Court had on its docket the question of whether an agreement requiring resolution of employment disputes through individual arbitration, and waiver of class and collective proceedings, is enforceable under the FAA.<sup>88</sup> Earlier efforts to enact broad legislation of this sort to limit compelled arbitration have failed,<sup>89</sup> although Congress has in the past enacted some piece-meal arbitration reforms.<sup>90</sup>

In addition to the Arbitration Fairness Act, Democratic members of Congress have introduced legislation to permit Wells Fargo customers who were victims of the bank's fraudulent account scheme to sue the bank in court rather than be required to arbitrate claims under the FAA.<sup>91</sup>

### 3. Indian Land Trusts

The Indian Reorganization Act<sup>92</sup> (IRA) permits the Secretary of the Interior to take land into trust for "Indians," thereby restricting the jurisdiction and sovereignty of the state where the land in question is located.<sup>93</sup> Section 479 of the statute defines "Indians" to include "all persons of Indi-

85. *Cosponsors: S. 537—115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/537/cosponsors> [<https://perma.cc/N63L-GQ55>].

86. *Cosponsors: H.R. 1374—115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1374/cosponsors> [<https://perma.cc/DGU5-3K75>].

87. *Id.* § 2.

88. Petition for a Writ of Certiorari, *Epic Sys. Corp. v. Lewis*, No. 16-285 (U.S. Sept. 2, 2016), 2016 WL 4611259.

89. *See, e.g.*, Arbitration Fairness Act of 2011, S. 987, 112th Congress (2011).

90. *See, e.g.*, Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116, 123 Stat 3409, 3454–55 (the "Franken Amendment") (prohibiting the use of funds for any contract in excess of \$1 million if the contractor requires its employees to arbitrate claims under Title VII of the Civil Rights Act of 1964 or tort claims "related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision or retention"); 48 C.F.R. § 252.222-7006 (2010) (implementing regulation).

91. Justice for Victims of Fraud Act of 2017, H.R. 1414, 115th Cong. (2017); Justice for Victims of Fraud Act of 2017, S. 552, 115th Cong. (2017).

92. 25 U.S.C. §§ 461–79 (2009).

93. *Id.* § 465.



an descent who are members of any recognized Indian tribe now under Federal jurisdiction.”<sup>94</sup>

In its 2009 decision in *Carcieri v. Salazar*, the Supreme Court held that “the term ‘now under Federal jurisdiction’ in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”<sup>95</sup> According to the Court, “Congress left no gap in . . . § 479 for the agency to fill,” but rather, because Congress had “explicitly and comprehensively defined the term” “Indian,” it had limited the Secretary’s authority.<sup>96</sup> In the case before the Court, this meant that the federal government could not take land into trust that was acquired by the Narragansett Tribe because that tribe did not receive federal recognition until 1983.<sup>97</sup>

Given its broad implications, *Carcieri* provoked a strong reaction.<sup>98</sup> Secretary Ken Salazar called it a “devastating ruling which reverses 75 years of precedent.”<sup>99</sup> He emphasized that, “[t]aking land into trust is one of the most important functions that the Department of Interior undertakes on behalf of Indian tribes,” and that, “[t]hese lands allow tribal communities to practice their cultural traditions, to provide housing for tribal members and engage in economic development.”<sup>100</sup> Bills have been introduced into every Congress since *Carcieri* to overturn the decision, but Congress has not enacted any of them.<sup>101</sup> The effort continues in the 115th Congress, with a bill in the House sponsored by Tom Cole (Republican of Oklahoma) with two Democratic co-sponsors.<sup>102</sup> As with prior bills, this bill would amend the Indian Reorganization Act to make it applicable to all federally

94. *Id.* § 479.

95. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

96. *Id.* at 391–92.

97. *See id.* at 384, 391.

98. *See, e.g.*, Loretta Tuell, *The Obama Administration and Indian Law—A Pledge to Build a True Nation-to-Nation Relationship*, FED. LAW., Apr. 2016, at 44, 46–47 (“By calling into question the scope of the authority of the Interior secretary, the Court’s ruling threatened the validity of tribal business organizations, subsequent contracts and loans, tribal reservations and lands, jurisdictional issues, public safety, and provision of services on reservations across the country.”).

99. Press Release, U.S. Dep’t of the Interior, Secretary Salazar Welcomes American Indian Leaders to Second White House Tribal Nations Conference (Dec. 16, 2010), <https://www.doi.gov/news/pressreleases/Secretary-Salazar-Welcomes-American-Indian-Leaders-to-Second-White-House-Tribal-Nations-Conference> [<https://perma.cc/QFR5-4BQT>].

100. *Id.*

101. *See, e.g.*, S. 1703, 111th Cong. (2010); H.R. 1234, 112th Cong. (2011); S. 2188, 113th Cong. (2014); H.R. 407, 114th Cong. (2015) (“To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes.”).

102. H.R. 130, 115th Cong. (2017) (“To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes, and for other purposes.”).

recognized Indian tribes, regardless of when the tribe became recognized; the amendment would apply retroactively.<sup>103</sup>

#### 4. Patents

The STRONGER Patents Act, a Senate bill sponsored by Christopher Coons (Democrat of Delaware) with one Republican and two Democratic co-sponsors, aims to “strengthen the position of the United States as the world’s leading innovator.”<sup>104</sup> Among other things, the bill contains provisions to increase patent enforcement mechanisms, reform the processes of administrative challenges to patents, reduce abusive patent demand notices,<sup>105</sup> and prevent diversion of patent application fees from the Patent and Trademark Office (PTO) to other government programs.

In providing stronger protections for patent-holders, the bill would overturn key Supreme Court cases interpreting existing patent laws. In particular, the bill would overturn *eBay v. MercExchange*<sup>106</sup> and restore the presumption for injunctive relief for patent violations; eliminate a requirement that a single entity practice all steps of a method before finding an entity liable for inducement or contributory infringement of a patent;<sup>107</sup> replace the requirement, adopted in *Global-Tech Appliances v. SEB S.A.*,<sup>108</sup> to show actual knowledge that induced acts constituted infringement with proof merely that the alleged infringer intended to perform the infringing acts; and require the PTO to use the same patent construction standard used in district courts, thereby overturning *Cuozzo Speed Technologies v. Lee*.<sup>109</sup> The bill incorporates provisions of prior, unsuccessful, bills including the STRONG Patent Act of 2015.<sup>110</sup>

103. *Id.* § 1.

104. S. 1390, 115th Cong. (2017).

105. *See id.* § 204; *see also* Targeting Rogue and Opaque Letters Act of 2015, H.R. 2045, 114th Cong. (2015).

106. 547 U.S. 388 (2006) (holding that generally-applicable four-factor test for grant of injunctive relief applies to Patent Act disputes).

107. This provision would thus appear to alter *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111 (2014) (holding that there cannot be induced infringement under 35 U.S.C. § 271(b) (2012) without direct infringement under 35 U.S.C. § 271(a)) and *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020 (Fed. Cir. 2015) (holding that direct infringement under § 271(a) occurs where all steps of a claimed method are performed by or attributable to a single entity).

108. 563 U.S. 754 (2011).

109. 136 S. Ct. 2131 (2016).

110. S. 632, 114th Cong. (2015).

*D. Whistleblowers and the Federal Circuit*

While the focus of this Essay is on the Supreme Court, the Follow the Rules Act, which became law in June of 2017, bears mention.<sup>111</sup> It responds to a ruling of the U.S. Court of Appeals for the Federal Circuit that was in turn based upon a Supreme Court decision.

The Follow the Rules Act amends § 2302(b)(9)(D) of the Whistleblower Protection Act to clarify that government employees are protected from adverse personnel actions for “refusing to obey an order that would require the individual to violate a law, rule, or regulation.”<sup>112</sup> Prior to the amendment, the statutory language referred to protecting government employees who refused to violate “a law;” the Follow the Rules Act added the words, “rule or regulation” to this original statutory provision. It therefore responded to the Federal Circuit’s decision in *Rainey v. Merit Systems Protection Board* that held that because (at the time) § 2302(b)(9)(D) only referred to “law,” it only protected federal employees when they refused to violate a federal statute.<sup>113</sup>

The circuit court case involved a federal contracting officer at the Department of State, Timothy Rainey, who refused to follow his supervisor’s order to direct a contractor to rehire a terminated subcontractor. Rainey contended that following the order would require him to violate the Federal Acquisition Regulation. In response, Rainey’s supervisor relived him of his duties. When the case reached the Federal Circuit, it invoked the Supreme Court’s 2015 decision in *Department of Homeland Security v. MacLean*.<sup>114</sup> That case involved a separate provision of the Whistleblower Protection Act, § 2302(b)(8)(A), which protects government employees who disclose “any violation of any law, rule, or regulation” or “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,” so long as such disclosures are “not specifically prohibited by law.”<sup>115</sup> A federal air marshal, Robert MacLean had disclosed a plan by the TSA to end air travel by air marshals in order to save money. MacLean leaked the plan to MSNBC; TSA quickly abandoned the plan. When TSA officials later determined MacLean was the source of the leak they fired him. MacLean argued that because he had only violated

111. Follow the Rules Act, Pub. L. No. 115-40, § 2, 131 Stat. 861 (2017) (to be codified at 5 U.S.C. § 2302(b)(9)(D)).

112. 5 U.S.C. § 2302(b)(9)(D) (2016).

113. 824 F.3d 1359, 1364 (Fed. Cir. 2016).

114. 135 S. Ct. 913 (2015).

115. 5 U.S.C. § 2302(b)(8)(A)(i)–(ii).

a TSA regulation prohibiting disclosures and not a statutory law, his disclosure was protected. The Supreme Court agreed with MacLean. It explained:

[A] broad interpretation of the word “law” could defeat the purpose of the whistleblower statute. If “law” included agency rules and regulations, then an agency could insulate itself from the scope of Section 2302(b)(8)(A) merely by promulgating a regulation that “specifically prohibited” whistleblowing. But Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks. Thus, it is unlikely that Congress meant to include rules and regulations within the word “law.”<sup>116</sup>

Relying upon that language from *MacLean*, the Federal Circuit in *Rainey* construed § 2302(b)(8)(A) to hold that the term “law” in § 2302(b)(9)(D) was also limited to federal statutes.<sup>117</sup> Thus, Rainey could not invoke the protections of the Whistleblower Act on the ground that his supervisor had directed him to violate a regulation. The circuit court’s use of *MacLean* in this way was curious: in *MacLean* the Supreme Court was interpreting a different statutory provision and did so in a way that *avored* the discharged employee. The circuit court’s approach weakened protections for whistleblowers.

Congress quickly responded to the *Rainey* decision by enacting the Follow the Rules Act. The bill had bipartisan support at the outset: in the Senate, it was sponsored by three Republicans and two Democrats; in the House, it was sponsored by six Republicans and six Democrats.<sup>118</sup> Introduced in January of 2017, the bill passed the House on a unanimous suspension motion and the Senate by unanimous consent and within six months of introduction the President had signed the bill into law. The Committee Reports make clear that the legislation was in direct response to the Federal Circuit’s decision<sup>119</sup> and was designed “to clarify Congress’s original intent” with respect to the Whistleblower Protection Act.<sup>120</sup>

## II. RESPONSES TO CONSTITUTIONAL RULINGS

Congress’s ability to respond to rulings by the Supreme Court on constitutional grounds is more limited than in cases of statutory interpretation. The most obvious response—and the most difficult—is to seek to amend the Constitution. But that is not the only option. In some circumstances,

116. *MacLean*, 135 S. Ct. at 920.

117. *Rainey*, 824 F.3d at 1361.

118. See H.R. 657, 115th Cong. (2017).

119. See S. REP. NO. 115-30, at 1–2 (2017); H.R. REP. NO. 115-67, at 2–3 (2017).

120. H.R. REP. NO. 115-67, at 3.

Congress can also seek through legislation to limit the reach of a constitutional ruling. In other situations, where the Court has invalidated a federal statute on constitutional grounds, Congress can seek to resurrect the statute, or a version of it, in a way that avoids the constitutional deficiency. Both approaches take for granted that on constitutional issues the Court has the decisive word and its rulings are to be accepted. Different approaches involve rejection of the Court's decisions and even of its power to decide. Bills introduced in the 115th Congress reflect each of these forms of responses to constitutional rulings by the Supreme Court. Beyond responding to decisions from the Court, Congress might also act preemptively by enacting a statute that addresses a constitutional issue before the Court weighs in. At least one bill introduced in the 115th Congress takes that approach.

#### A. Constitutional Amendment

When the Supreme Court issues a ruling on constitutional grounds, that ruling can be undone with a constitutional amendment. Article V empowers Congress to "propose Amendments to this Constitution" by a two-thirds vote of both the Senate and the House.<sup>121</sup> Given the arduous requirements of Article V, amending the Constitution in response to a Supreme Court decision (or for other reasons) is difficult. But it is not impossible. The Eleventh Amendment overturned the Court's decision in *Chisholm v. Georgia*;<sup>122</sup> Section 1 of the Fourteenth Amendment overturned *Dred Scott v. Sandford*.<sup>123</sup>

In 2017, Democrats in the House and the Senate sponsored resolutions and bills seeking to amend the Constitution to overturn election law holdings of the Court in *Citizens United v. FEC*,<sup>124</sup> *McCutcheon v. FEC*,<sup>125</sup> and

121. U.S. CONST. art. V.

122. 2 U.S. (2 Dall.) 419, 420 (1793) (relying on the state-citizen diversity clause of Article III as the basis for jurisdiction over an action by a South Carolina citizen to recover a debt from Georgia); see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473 (1987) (explaining that the Eleventh Amendment "was undeniably designed to repudiate the majority analysis in *Chisholm* and overrule its holding").

123. 60 U.S. (19 How.) 393, 406 (1857) (holding that no black person could be a citizen within the meaning of Article III's grant of diversity jurisdiction); see *McDonald v. City of Chi.*, 561 U.S. 742, 807–08 (2010) (Thomas, J., concurring) ("§ 1 of the Fourteenth Amendment . . . unambiguously overruled this Court's contrary holding in *Dred Scott v. Sandford*, that the Constitution did not recognize black Americans as citizens of the United States or their own State" (citation omitted)).

124. 558 U.S. 310, 365–66 (2010) (holding that under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited).

125. 134 S. Ct. 1434, 1462 (2014) (holding that statutory aggregate limits on how much money a donor may contribute in total to all political candidates or committees violated the First Amendment).

*Buckley v. Valeo*.<sup>126</sup> The principal effort is a proposed joint resolution sponsored in the House by Representative Theodore Deutch (Democrat of Florida) with 121 Democratic co-sponsors,<sup>127</sup> and in the Senate by Tom Udall (Democrat of Minnesota) with forty Democratic co-sponsors.<sup>128</sup> The joint resolution proposes a constitutional amendment that reads as follows:

Section 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.

Section 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.

Section 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.<sup>129</sup>

Such efforts are not new. The Court's election decisions have long generated criticism, particularly among Democrats, who have sought similar constitutional amendments in prior congresses.<sup>130</sup> There is no likelihood of any such amendment meeting the two-thirds requirements in the 115th Congress where Republicans exercise control.

### *B. Limiting the Reach of Constitutional Decisions*

Besides seeking to amend the Constitution, Congress has other tools to limit the reach of or blunt the force of Supreme Court rulings based upon the Constitution. For example, following the Court's 1973 decision in *Roe*

126. 424 U.S. 1, 50, 54, 58 (1976)(holding that governmental restrictions of independent expenditures in campaigns, limitations on expenditures by candidates from personal resources, and limitations on total campaign expenditures violate the First Amendment).

127. H.R.J. Res. 31, 115th Cong. (2017) ("Proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections.").

128. S.J. Res. 8, 115th Cong. (2017) ("Proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections.").

129. *Id.*; see also H.R. Res. 377, 115th Cong. (2017) (separate proposed resolution sponsored by Rep. Richard Nolan (Democrat of Minn.) calling for a constitutional amendment but not supplying any proposed text for such an amendment).

130. See, e.g., S.J. Res. 4, 114th Cong. (2015) ("Proposing an amendment to the Constitution of the United States to restore the rights of the American people that were taken away by the Supreme Court's decision in the Citizens United case and related decisions, to protect the integrity of our elections, and to limit the corrosive influence of money in our democratic process."); H.R.J. Res. 34, 113th Cong. (2013) (same).

v. *Wade*,<sup>131</sup> Congress has attached abortion-funding restrictions to numerous appropriations measures. Of particular note are the 1976 “Hyde Amendment,” a funding provision for the Department of Health and Human Services limiting use of Medicaid funds for abortions,<sup>132</sup> and that amendment’s subsequent annual iterations.<sup>133</sup> In a 1980 decision, the Supreme Court held that the Hyde Amendment “does not impinge on the due process liberty recognized in *Wade*.”<sup>134</sup> Similar statutory provisions prohibit the Department of Justice from using federal funds to pay for abortions in federal prisons except in cases of rape or incest or where the life of the mother is at risk;<sup>135</sup> prohibit use of federal funds by the District of Columbia to perform abortions except in cases of rape or incest or to protect the life of the mother;<sup>136</sup> and limit uses of funds by international organizations such as the United Nations Population Fund.<sup>137</sup>

In the 115th Congress there are several pending bills, sponsored by Republicans, that impose restrictions upon uses of federal funds for abortion services,<sup>138</sup> including a bill that has passed the House to make the Hyde Amendment permanent rather than dependent upon annual appropriation measures.<sup>139</sup> From the other side of the political aisle there are also bills to lift past restrictions on federal funding of abortions.<sup>140</sup>

At the same time that Democrats have pursued a constitutional amendment to overturn *Citizens United* and other election decisions, they

131. 410 U.S. 113, 153 (1973) (holding that the Fourteenth Amendment protects the right to obtain an abortion).

132. Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

133. See MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 121–41 (2015) (providing a detailed discussion of the history of the Hyde Amendment).

134. *Harris v. McRae*, 448 U.S. 297, 318 (1980).

135. Consolidated Appropriations Act, 2017, Pub. L. 115-31, §§ 202–03, 131 Stat. 135, 208 (codified in scattered sections of 2, 7, 8, 10, 16, 30, 42, 43, 48, 49, 50 U.S.C.).

136. *Id.* § 810, 131 Stat. at 393.

137. *Id.* § 7082, 131 Stat. at 717.

138. See, e.g., No Abortion Bonds Act, H.R. 4131, 115th Cong. (2017); H.R. 2019, 115th Cong. (2017) (“To amend the Internal Revenue Code of 1986 to exclude certain abortions from the definition of qualified medical expenses for purposes of distributions from health savings accounts.”); Title X Abortion Provider Prohibition Act, H.R. 217, 115th Cong. (2017).

139. See No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017, H.R. 7, 115th Cong. § 101 (2017) (providing that “[n]o funds authorized or appropriated by Federal law, and none of the funds in any trust fund to which funds are authorized or appropriated by Federal law, shall be expended for any abortion,” unless “the pregnancy is the result of an act of rape or incest,” or “a woman suffers from a physical disorder, physical injury, or physical illness that would, as certified by a physician, place the woman in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself”).

140. See, e.g., Equal Access to Abortion Coverage in Health Insurance (EACH Woman) Act of 2017, H.R. 771, 115th Cong. § 3(a) (2017) (“The Federal Government shall . . . ensure coverage for abortion care in public health insurance programs including Medicaid, Medicare, and the Children’s Health Insurance Program . . .”).

have also proposed legislation to limit the effects of those decisions. For example, the Democratic-sponsored We the People Democracy Reform Act of 2017 offers a long list of electoral reforms including: the creation of a small-donor, public matching funds system for presidential and congressional elections; requiring forty-eight-hour disclosure for contributions to candidates and parties of \$1000 or more; prohibiting individual-candidate Super PACs; creating nonpartisan redistricting commissions to draw congressional districts; establishing a system of automatic voter registration; providing for same-day voter registration; and requiring the President to divest assets that create potential conflicts of interest into a blind trust and to disclose personal income tax returns.<sup>141</sup> Democrats have also sponsored a variety of other bills regulating elections and electoral spending.<sup>142</sup>

While Democrats have focused their energies on the Court's election cases, some Republicans have sought to address the reach of the Court's controversial *Kelo v. City of New London*<sup>143</sup> decision. The Private Property Protection Act of 2017, sponsored by James Sensenbrenner (Republican of Wisconsin), would prohibit the federal government and any state or local government that receives federal economic development funds from exercising eminent domain "over property to be used for economic development."<sup>144</sup> Representative Sensenbrenner has sponsored similar legislation on multiple prior occasions.<sup>145</sup> *Kelo* has also been a popular target for prior Congresses.<sup>146</sup>

Finally, in December of 2017, Senator Tammi Duckworth (Democrat of Illinois) and Representative Mark Takano (Democrat of California) introduced the Korematsu–Takai Civil Liberties Protection Act.<sup>147</sup> The bill

141. H.R. 3848, 115th Cong. (2017); S. 1880, 115th Cong. (2017). Notably, the Act purports to give individual members of Congress the right to challenge any provision of the law on constitutional grounds and to intervene in any action in which any provision of the constitutionality of the Act is challenged.

142. See, e.g., Conflicts from Political Fundraising Act of 2017, S. 1184, 115th Cong. (2017); Conflicts from Political Fundraising Act of 2017, H.R. 2493, 115th Cong. (2017).

143. 545 U.S. 469, 484 (2005) (holding that a city's taking of private property to sell to private developers pursuant to an economic development plan qualified as a "public use" within the meaning of the Takings Clause).

144. H.R. 1689, 115th Cong. § 2(a) (2017).

145. See H.R. 3013, 114th Cong. (2015); H.R.1944, 113th Cong. (2014); H.R.1433, 112th Cong. (2011).

146. See, e.g., Protection of Homes, Small Businesses, and Private Property Act of 2012, S. 3334, 112th Cong. § 2 (2012); H.R. Res. 329, 112th Cong. (2011) ("Expressing support for the private property rights protections guaranteed by the 5th Amendment to the Constitution on the 6th anniversary of the Supreme Court's decision of *Kelo v. City of New London*."); H.R. Res. 880, 109th Cong. (2006) ("Expressing the sense of the House on the occasion of the first anniversary of the Supreme Court's decision in *Kelo v. City of New London*.").

147. S. 2250, 115th Cong. (2017); H.R. 4680, 115th Cong. (2017).



honors Fred Korematsu, the U.S. citizen of Japanese ancestry whose conviction for violating military evacuation orders following the attack on Pearl Harbor was upheld by the Supreme Court,<sup>148</sup> and the late U.S. Representative Mark Takai of Hawaii. The bill states in its findings that although the Court's *Korematsu* ruling has been generally repudiated, the "case is still used as a justification for discrimination under the guise of national security."<sup>149</sup> Accordingly, the proposed legislation provides that "[n]o individual may be imprisoned or otherwise detained based solely on an actual or perceived protected characteristic of the individual."<sup>150</sup> It defines "protected characteristic" to include race, ethnicity, national origin, religion, gender, gender identity, and sexual orientation.<sup>151</sup>

### C. Resurrecting Invalidated Statutes

When the Supreme Court invalidates a statute on constitutional grounds, Congress might also seek to resurrect the law by repairing the constitutional deficiency. For example, in response to the Court's 1995 decision in *United States v. Lopez*,<sup>152</sup> Congress in 1996 amended the invalidated Gun-Free Schools Zone Act by adding an interstate commerce element.<sup>153</sup> After the Court's ruling in *United States v. Alvarez* that a prohibition on making false claims about receiving military honors violated the First Amendment,<sup>154</sup> Congress enacted a more limited prohibition making it a crime to make false claims about military honors for financial gain or other profit.<sup>155</sup>

In response to the Supreme Court's decision in *Shelby County v. Holder*, invalidating the coverage formula of the Voting Rights Act,<sup>156</sup> there have been repeated efforts in Congress to adopt a new formula that would satisfy judicial review.<sup>157</sup> Such bills have been sponsored mostly by

148. See *Korematsu v. United States*, 323 U.S. 214 (1944).

149. S. 2250 § 2(31).

150. *Id.* § 3.

151. *Id.*

152. 514 U.S. 549, 551 (1995) (invalidating the federal Gun-Free School Zones Act as beyond Congress's power under the Commerce Clause).

153. See 18 U.S.C. § 922(q)(2)(A) (2016) ("It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.").

154. 567 U.S. 709, 729–30 (2012).

155. See 18 U.S.C. § 704(b) (2016) ("Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal . . . shall be fined under this title, imprisoned not more than one year, or both.").

156. 133 S. Ct. 2612, 2630 (2013).

157. See, e.g., Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3 (2014); Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. § 3 (2014).

Democrats but have attracted also some modest Republican support, particularly in the House.<sup>158</sup> The Voting Rights Advancement Act of 2017 was introduced by Senator Leahy (Democrat of Vermont) with forty-six co-sponsors (no Republicans). Among other things, it would subject a state (and all of its political subdivisions) with fifteen or more voting rights violations during the previous twenty-five years, or ten or more violations during the previous twenty-five years, at least one of which was committed by the state itself (as opposed to a political subdivision within it), to ten years of federal oversight.<sup>159</sup> Representative Terri Sewell (Democrat of California) sponsored a companion bill in the House with 188 Democrats as co-sponsors.<sup>160</sup> Meanwhile, Representative James Sensenbrenner sponsored a different bill that would subject a state to oversight if, during the prior fifteen years, there were five or more voting rights violations, at least one of which was committed by the state itself.<sup>161</sup> The same bill would also subject to oversight political subdivisions with either three or more voting rights violations or with one or more voting rights violations and low minority turnout during the previous fifteen years.<sup>162</sup> Of the bill's seventy-nine co-sponsors, nine are Republicans.<sup>163</sup>

To be sure, when Congress resurrects invalidated legislation it remains possible that the Supreme Court will also find the modified statute invalid. Thus, even if Congress succeeds in adopting a new formula for the Voting Rights Act—something Chief Justice Roberts had signaled was needed four years before he authored *Shelby County*<sup>164</sup>—there is no guarantee that the Court will rule it constitutional just because it has been enacted by a new Congress.

158. See *Cosponsors: H.R.3899—113th Congress (2013–2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/3899/cosponsors> [https://perma.cc/893Y-ANM4].

159. S. 1419, 115th Cong. § 4(a)(1) (2017).

160. See *Cosponsors: H.R.2978—115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/2978/cosponsors?overview=closed> [https://perma.cc/V9SL-6ZCT].

161. Voting Rights Amendment Act of 2017, H.R. 3239, 115th Cong. § 3(a)(1) (2017).

162. *Id.*

163. See *Cosponsors: H.R.3239—115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/3239/cosponsors> [https://perma.cc/L86J-E3CB].

164. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009) (“More than 40 years ago, this Court concluded that ‘exceptional conditions’ prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. . . . Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.” (citation omitted)).

### D. Defiance

Congress might also defy the Court. Defiance can take various forms. On the softer end of the spectrum, Congress might issue resolutions announcing the Court is wrong about the Constitution. Stronger forms of defiance might involve legislation that affirms an invalidated statute to see if the Court will strike it down the next time around. At the far extreme, Congress might adopt jurisdiction-stripping measures to prevent the Court from deciding a contested issue, punish the Court (e.g., through budgetary measures), or even just ignore a ruling.

In 2017, various resolutions criticize rulings of the Court, particularly its election cases.<sup>165</sup> At the same time, other resolutions applaud what the Court has done and seek to draw upon its decisions for other purposes.<sup>166</sup>

The issue of abortion has generated concrete efforts to defy the Court. The Pain-Capable Unborn Child Protection Act, approved by the House in October 2017, would criminalize abortions “if the probable post-fertilization age . . . of the unborn child is 20 weeks or greater.”<sup>167</sup> The legislation is based on “substantial medical evidence that an unborn child is capable of experiencing pain at least by 20 weeks after fertilization, if not earlier.”<sup>168</sup> While the bill contains exceptions where an abortion is necessary to save the life of the mother or where the pregnancy has resulted from rape or, in the case of minors, incest,<sup>169</sup> it lacks the maternal health exception required by the Court’s cases.<sup>170</sup> So, too, the proposed Prenatal Non-

165. See, e.g., H.R. Res. 389, 115th Cong. (2017) (“[T]he case of *Citizens United v. FEC* . . . opened the door to the corrupting influence of money in politics . . .”). In the year in which the Court heard *Gill v. Whitford*, 137 S. Ct. 2268 (2017), Rep. Alan Lowenthal (Democrat of Cal.), joined by sixteen Democratic and one Republican colleague, sponsored a resolution reading: “That it is the sense of the House of Representatives that congressional redistricting should be reformed to remove political gerrymandering.” H.R. Res. 283, 115th Cong. (2017).

166. H.R. Res. 12, 115th Cong. (2017) (endorsing the Court’s decision in *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015), that messages on state license plates constitute “‘government speech,’ not private speech protected by the First Amendment,” and calling on government actors to avoid speech that “promotes or displays symbols, signs, and vestiges of racism, oppression, and intimidation”); H.R. Res. 405, 115th Cong. (2017) (expressing support for the designation of June 26, 2017, as “LGBT Equality Day,” in light of the date of the Court’s decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)); S. Res. 202, 115th Cong. (2017) (also expressing support for “LGBT Equality Day,” and referencing the same Court decisions).

167. H.R. 36, 115th Cong. § 3(a) (2017).

168. *Id.* § 2(11).

169. *Id.* § 3(a). Where an exception applies, “a physician terminating or attempting to terminate a pregnancy . . . may do so only in the manner which, in reasonable medical judgment, provides the best opportunity for the unborn child to survive.” *Id.*

170. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992) (“[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical

discrimination Act,<sup>171</sup> deemed by its Republican sponsors to promote equality for women,<sup>172</sup> criminalizes—without any exceptions—abortions performed because of the sex of the fetus.<sup>173</sup>

A separate abortion-related bill is the proposed Sanctity of Act Life of 2017. Sponsored by Representative Walter B. Jones, Jr. (Republican of North Carolina), this bill states in its findings that: “Congress finds that uncontroverted scientific evidence has always shown that actual human life exists from the moment of conception” and that “each State has a compelling interest in protecting the lives of those within the State’s jurisdiction whom the State rationally regards as human beings.”<sup>174</sup> The bill prohibits review by the Supreme Court and by federal district courts of government action that, among other things, “(1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision of public expense of funds, facilities, personnel, or other assistance for the performance of abortions.”<sup>175</sup> Similar jurisdiction-stripping bills have been regularly introduced in Congress for many years.<sup>176</sup>

Finally, one member of the House, Steve King (Republican of Iowa) has introduced a bill barring the Supreme Court from ever citing three cases it decided involving the Affordable Care Act.<sup>177</sup> The bill is a curious proposal: besides raising an obvious issue of separation of powers, the bill includes in its targets both *National Federation of Independent Business v.*

judgment, for the preservation of the life or health of the mother.” (quoting *Roe v. Wade*, 410 U.S. 113, 164–65 (1973)). *But see* *Gonzales v. Carhart*, 550 U.S. 124, 166–67 (2007) (upholding federal “Partial-Birth Abortion Ban Act” despite lack of health exception where “there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures that are considered to be safe alternatives”).

171. H.R. 4660, 115th Cong. (2017).

172. *Id.* § 2

173. *Id.* § 3.

174. H.R. 3676, 115th Cong. §§ 2(a)–(b) (2017).

175. *Id.* §§ 3(a), 4.

176. *See, e.g.*, Sanctity of Life Act of 2013, H.R. 2764, 113th Cong. (2013); Sanctity of Life Act of 2007, H.R. 2597, 110th Cong. (2007); Sanctity of Life Act of 1995, H.R. 2087, 104th Cong. (1995); A Bill to Provide That Human Life Shall Be Deemed to Exist from Conception, S. 158, 97th Cong. (1981).

177. H.R. 177, 115th Cong. (2017). The bill’s only section provides:

Under Article 3, Section 2, which allows Congress to provide exceptions and regulations for Supreme Court consideration of cases and controversies, the following cases are barred from citation for the purpose of precedence in all future cases after enactment: *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573, 183 L. Ed. 2d 450 (2012) and *King v. Burwell*, 135 S. Ct. 2480, 2485, 192 L. Ed. 2d 483 (2015) and *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751, 2782, 189 L. Ed. 2d 675 (2014).

*Id.*

*Sebelius*, which upheld the individual mandate,<sup>178</sup> and *Burwell v. Hobby Lobby Stores*, which applied broadly the Religious Freedom Restoration Act.<sup>179</sup> The bill also only prohibits citing the identified prior decisions but evidently leaves the Court free to rely upon the reasoning of those decisions. No other members of Congress have signed on as sponsors of this bill.

### *E. Going First*

Congress can also weigh in on constitutional questions before they reach the Supreme Court. The Protecting Data at the Border Act would do that.<sup>180</sup> Sponsored by Democrats, this bill aims to extend full Fourth Amendment protections to digital devices and digital content at U.S. borders. Citing the Court's 2014 ruling in *Riley v. California* that a warrantless search of cellphone data following an arrest violates the Fourth Amendment,<sup>181</sup> the bill asserts that:

Accessing the digital contents of electronic equipment, accessing the digital contents of an online account, or obtaining information regarding the nature of the online presence of a United States person entering or exiting the United States, without a lawful warrant based on probable cause, is unreasonable under the Fourth Amendment to the Constitution of the United States.<sup>182</sup>

Accordingly, the bill provides that absent exigent circumstances border officers must obtain a warrant before searching electronic equipment and it prohibits officers from denying or delaying entry by U.S. persons into the United States based upon their refusal to provide access to their devices or online accounts.<sup>183</sup> The Supreme Court has not addressed whether *Riley* extends to border searches, a context where, in prior cases the Court has held that the government has considerable leeway to conduct searches.<sup>184</sup>

178. 567 U.S. 519, 574 (2012).

179. 134 S. Ct. 2751, 2785 (2014) (holding that as applied to closely held corporations, Department of Health and Human Services regulations imposing a contraceptive mandate violate RFRA).

180. S. 823, 115th Cong. (2017).

181. 134 S. Ct. 2473, 2485 (2014).

182. S. 823 § 2(4).

183. *Id.* § 5.

184. *See, e.g.*, *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (upholding a warrantless border search of a vehicle, including removal and disassembly of the gas tank, despite the lack of reasonable suspicion for the search); *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (“[S]earches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.”); *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976) (rejecting Fourth Amendment challenge to stops by border control officers at checkpoints on highways within the vicinity of the U.S.–Mexico border).

With reports that border agents increasingly search cellphones and digital devices at the borders,<sup>185</sup> the Court is likely to have a challenge to these practices on its docket in the near future. It is possible that the Court will take a different view of the Fourth Amendment issue than do members of Congress who support the pending legislation. In this instance, however, disagreement need not mean invalidation of a statute: even if Congress is wrong on what the Fourth Amendment requires, it can, as a statutory matter, impose upon federal border agents stronger restrictions than what the Constitution itself demands.

### III. REGULATING THE COURT

In addition to responding to rulings by the Supreme Court in specific cases or specific areas of the law, Congress can also seek to regulate the Court in various ways. In 2017, members of Congress proposed legislative measures requiring the Court to adopt a code of judicial ethics and to permit cameras in the Courtroom.

#### A. Judicial Ethics

The Justices of the Supreme Court are the only members of the federal judiciary who are not bound by the detailed Code of Conduct for United States Judges, promulgated by the Judicial Conference of the United States. Many commentators have expressed the view that the Justices should be bound by the same rules of ethics that apply to judges of lower federal courts.<sup>186</sup> Although the Code of Conduct covers a range of issues, the lack of an ethical code for the Court receives most attention when the Justices

185. See Ron Nixon, *Searches of Devices Increasing at Border*, N.Y. TIMES, Jan. 6, 2018, at A14.

186. See, e.g., Elizabeth Warren, *The Supreme Court Has an Ethics Problem*, POLITICO MAG. (Nov. 1, 2017), <https://www.politico.com/magazine/story/2017/11/01/supreme-court-ethics-problem-elizabeth-warren-opinion-215772> [<https://perma.cc/2HVG-5FQD>] (“It is time to begin rebuilding American’s confidence in the court by establishing a formal code of conduct.”); Letter from Mark N. Aaronson, Professor of Law, Univ. of Cal., Hastings Coll. of Law et al., to Chief Justice Roberts & Assoc. Justices of the Supreme Court (Mar. 5, 2012), <https://www.afj.org/wp-content/uploads/2013/09/law-prof-letter-to-scotus-3-5-12.pdf> [<https://perma.cc/ABG3-JT92>] (“We write to encourage the Supreme Court to initiate the process of formally adopting the Code of Conduct for U.S. Judges, and to implement a mechanism for reviewing a Justice’s decision whether or not to recuse from a case.”); Editorial, *The Court’s Recusal Problem*, N.Y. TIMES (Mar. 16, 2011), <http://query.nytimes.com/gst/fullpage.html?res=9C0DE6DE113EF935A25750C0A9679D8B63> [<https://perma.cc/UV5S-4G45>] (“The court’s lack of a recusal policy leaves each justice to decide whether he or she is meeting that standard. That plainly violates the age-old legal principle: *Nemo iudex in causa sua*—no one should be a judge about his or her own case. It damages the justices’ credibility and the court’s authority.”); Caprice L. Roberts, *The Fox Guarding the Henhouse? Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 182 (2004) (“[T]he Supreme Court’s historic recusal practice of solely individual decision-making warrants a procedural overhaul.”).

recuse—or do not recuse—themselves from particular cases. Like other federal judges, the Justices are governed by the federal recusal statute. It provides that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>187</sup> The statute also sets out some specific circumstances in which recusal is required, including where the judge has a “personal bias or prejudice concerning a party,” “served as lawyer in the matter in controversy” while in private practice, or “knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy.”<sup>188</sup> However, the more detailed recusal rules of the Code of Conduct and the advisory opinions the Judicial Conference issues based upon those rules do not apply to the Supreme Court and, in contrast to recusal decisions of lower-court judges, which may be appealed,<sup>189</sup> nobody reviews recusal decisions by the Justices. Individual Justices decide for themselves whether recusal is appropriate and with rare exception they do not publicly disclose their reasons for their decisions even when litigants have filed recusal motions.<sup>190</sup>

In his 2011 Annual Report, Chief Justice Roberts responded to calls for a code of conduct to apply to members of his Court.<sup>191</sup> He explained first that “[b]ecause the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body.”<sup>192</sup> Nonetheless, Roberts emphasized, it is a “misconception[ ]” to think that “the Supreme Court is exempt from the ethical principles that lower courts observe.”<sup>193</sup> He reported that “[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations,” because “[e]very Justice seeks to follow high ethical standards, and the Judicial Conference’s Code of Conduct provides a current and uniform source of guidance designed with specific reference to the needs and obligations of the federal judiciary.”<sup>194</sup> In

187. 28 U.S.C. § 455(a) (2016).

188. *Id.* § 455(b).

189. On appeal, denial of a recusal motion is reviewed for abuse of discretion. *See, e.g.*, Gwynn v. Walker (*In re Walker*), 532 F.3d 1304, 1308 (11th Cir. 2008).

190. One recent exception is Justice Scalia’s response to a recusal motion by the Sierra Club in *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913 (2004), following his duck-hunting trip with Vice President Cheney.

191. JOHN G. ROBERTS JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/CF8W-GZS4>].

192. *Id.* at 4.

193. *Id.*

194. *Id.* at 4–5.

addition, Roberts stated that the Justices also rely upon other sources of ethical guidance: “They may turn to judicial opinions, treatises, scholarly articles, and disciplinary decisions. They may also seek advice from the Court’s Legal Office, from the Judicial Conference’s Committee on Codes of Conduct, and from their colleagues.”<sup>195</sup>

With respect to recusal, however, Roberts explained why the Supreme Court necessarily operates differently than other courts. He observed that there could be no appellate review of a Justice’s recusal decision because under the Constitution there is only one Supreme Court; members of the Court also cannot determine whether their colleagues should recuse because that process would produce “an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.”<sup>196</sup> Further, in contrast to the lower courts where recusal results in a different judge participating, at the Supreme Court, “if a Justice withdraws from a case, the Court must sit without its full membership” and thus “[a] Justice accordingly cannot withdraw from a case as a matter of convenience or simply to avoid controversy.”<sup>197</sup> Noting that “the limits of Congress’s power to require recusal have never been tested,”<sup>198</sup> Roberts asserted that he has “complete confidence in the capability of [his] colleagues to determine when recusal is warranted.”<sup>199</sup>

Since 2013, Representative Louise Slaughter (Democrat of New York) has sponsored the Supreme Court Ethics Act, legislation requiring the Court to adopt a code of ethics.<sup>200</sup> Joined by eighty Democrats, Representative Slaughter sponsored the same bill in 2017.<sup>201</sup> A companion bill was sponsored by Senator Chris Murphy (Democrat of Connecticut) with ten Democratic co-sponsors in the Senate.<sup>202</sup> The proposed legislation provides:

The Supreme Court of the United States shall, not later than 180 days after the date of the enactment of this Act, promulgate a code of ethics for the Justices of the Supreme Court that shall include the 5 canons of the Code of Conduct for United States Judges adopted by the Judicial Conference of the United States, with any amendments or modifications thereto that the Supreme Court determines appropriate.

195. *Id.* at 5.

196. *Id.* at 9.

197. *Id.*

198. *Id.* at 7.

199. *Id.* at 10.

200. H.R. 2902, 113th Cong. (2013).

201. H.R. 1960, 115th Cong. (2017).

202. S. 835, 115th Cong. (2017).



As to the source of congressional power to enact this legislation, the bill states that “Congress has the authority to regulate the administration of the Supreme Court of the United States” and gives as examples congressional control of the number of Justices and the number required for a quorum, the dates of the Court’s terms, and the salaries of the Justices.<sup>203</sup> The bill also references as precedent the requirement, in the 1978 Ethics in Government Act, that members of the Court (like other federal officials) file annual financial disclosure statements.<sup>204</sup>

### B. Cameras in the Courtroom

Many people would like the oral arguments at the Supreme Court to be televised. The Justices have never permitted real-time broadcasting of their arguments. Instead, after oral argument the Court makes available same-day transcripts<sup>205</sup> and releases audio recordings at the end of the argument week.<sup>206</sup> On rare occasions, and without explanation, the Court has released audio recordings on the same day an argument occurs.<sup>207</sup> Members of the Court have offered various justifications for these practices.<sup>208</sup>

203. *Id.* § 2(a)(3).

204. *See* 5 U.S.C. app. §§ 101–111 (2016) (requiring federal judges to file annual personal financial statements).

205. *See* *Argument Transcripts*, SUPREME COURT OF THE U.S., [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcript/2017](https://www.supremecourt.gov/oral_arguments/argument_transcript/2017) [https://perma.cc/Y7WQ-PFFK] (“[O]ral argument transcripts . . . are posted on this website on the same day an argument is heard by the Supreme Court. Same-day transcripts are considered official but subject to final review.”).

206. *See* *Argument Audio*, SUPREME COURT OF THE U.S., [https://www.supremecourt.gov/oral\\_arguments/argument\\_audio/2017](https://www.supremecourt.gov/oral_arguments/argument_audio/2017) [https://perma.cc/YKR7-23SB] (“The audio recordings of all oral arguments heard by the Supreme Court of the United States are available to the public at the end of each argument week. The audio recordings are posted on Fridays after Conference.”).

207. For example, the Court released audio on the same day it heard *United States v. Windsor*, 570 U.S. 744 (2013); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *District of Columbia v. Heller*, 554 U.S. 570 (2008); and *Bush v. Gore*, 531 U.S. 98 (2000).

208. *See, e.g.*, A Bill to Permit the Televising of Supreme Court Proceedings, S. REP. NO. 110-448, at 6 (2008) (“The discussions that the Justices have with the attorneys during oral arguments is a splendid dynamic. If you introduce cameras, it is human nature for me to suspect that one of my colleagues is saying something for a soundbite. Please don’t introduce that insidious dynamic into what is now a collegial court. Our court works.” (quoting *Financial Services and General Government Appropriations for Fiscal Year 2008: Hearing Before the Subcomm. of the H. Comm. on Appropriations*, 110th Cong. (2007) (statement of Justice Anthony Kennedy)); *id.* at 8 (“It runs the risk of undermining the manner in which we consider the cases. Certainly it will change our proceedings. And I don’t think for the better.” (quoting *Departments of Transportation, Treasury, HUD, the Judiciary, District of Columbia, and Independent Agencies Appropriations for 2007: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 109th Cong. 225 (2006) (statement of Justice Clarence Thomas)); *id.* (“The best reason against it is the problem that we could become a symbol since we are the Supreme Court, and if it was in our court, it would be in every court in the country, criminal cases included.” (quoting Interview by Brian Lamb, C-SPAN, with Stephen Breyer, Assoc. Justice, Supreme Court of the U.S. (Dec. 4, 2005) (statement of Justice Breyer)); Alex Swoyer, *Justice Sotomayor Says Cameras Intrude on the Supreme Court’s Process*, WASH. TIMES (Sept. 21, 2017),

As in prior years, in 2017, members of Congress introduced legislation to increase public access to the Court's arguments. One bill, the Cameras in the Courtroom Act, is sponsored in the House by Gerald Connolly (Democrat of Virginia) joined by ten Democratic and one Republican colleague<sup>209</sup> and in the Senate by Dick Durbin (Democrat of Illinois) joined by three Democrats and one Republican.<sup>210</sup> It is a straightforward measure that provides as follows:

The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of 1 or more of the parties before the Court.<sup>211</sup>

A separate Democratic-sponsored House bill, the Eyes on the Courts Act of 2017, would require the presiding judge of all federal appellate courts, including the Supreme Court, to "permit the photographing, electronic recording, audio-visual coverage, broadcasting, televising, or streaming in real time or near-real time on the Internet" of all courtroom proceedings unless doing so would "violate the due process rights of a party to the proceeding or is otherwise not in the interests of justice."<sup>212</sup> A bill backed by Republicans and Democrats in the Senate, the Sunshine in the Courtroom Act of 2017, would "authorize" federal courts, including the Supreme Court, to permit photographing, electronic recording, broadcasting or televising of proceedings, leaving the decision to do these things in the "discretion" of the presiding judge.<sup>213</sup>

In September of 2017, four Democratic members of the House who sponsored the Cameras in the Courtroom Act sent a letter to Chief Justice Roberts requesting that the Court provide for live audio streaming via its website of the argument in *Gill v. Whitford*, a case involving claims of unconstitutional partisan gerrymandering.<sup>214</sup> Jeffrey P. Minear, Counselor to the Chief Justice, responded:

<https://www.washingtontimes.com/news/2017/sep/21/sonia-sotomayor-cameras-intrude-supreme-courts-pro/> [<https://perma.cc/7JKK-GAX4>] ("Cameras change the institution and education is not unimportant, but it's not the answer for ensuring that there is actually a discussion going on that can be looked at by others in writing." (quoting Justice Sonia Sotomayor)).

209. H.R. 464, 115th Cong. (2017).

210. S. 649, 115th Cong. (2017).

211. *Id.* § 2(a).

212. H.R. 1025, 115th Cong. § 2(b)(1) (2017).

213. S. 643, 115th Cong. § 2(b)(1) (2017).

214. See Letter from Gerald E. Connolly, U.S. Congressman, et al. to John G. Roberts, Jr., Chief Justice of the U. S. (Sept. 29, 2017), [https://connolly.house.gov/uploadedfiles/9292017\\_joint\\_letter\\_to\\_chief\\_justice\\_roberts\\_live\\_audio\\_gill\\_v\\_whitford.pdf](https://connolly.house.gov/uploadedfiles/9292017_joint_letter_to_chief_justice_roberts_live_audio_gill_v_whitford.pdf) [<https://perma.cc/425L-PVTW>].

The Chief Justice appreciates and shares your ultimate goal of increasing public transparency and improving public understanding of the Supreme Court. I am sure you are, however, familiar with the Justices' concerns surrounding the live broadcast or streaming of oral arguments, which could adversely affect the character and quality of the dialogue between the attorneys and Justices.<sup>215</sup>

The request was, accordingly, denied.

#### IV. CONGRESSIONAL MODESTY

A review of Congress's activities in 2017 shows that members of the federal legislative branch are quite modest when it comes to the Supreme Court. No legislation Congress enacted in 2017 overrides any statutory decision of the Supreme Court. The one successful statutory override targeted not the Supreme Court, but the United States Court of Appeals for the Federal Circuit for an erroneous use of a Supreme Court precedent.

With respect to Supreme Court decisions based upon the Constitution, a review of congressional activities in 2017 shows that members of Congress sometimes protest what the Court has done but, with rare exception, they accept the Court's rulings and the power of the Court to rule. Members of Congress therefore see their practical options as mostly limited to blunting the effect of constitutional decisions (such as in the election, abortion, and property takings areas) while taking for granted that the Court retains power to decide whether legislation is or is not consistent with the Constitution.

Similarly, with respect to regulating the Court itself, Congress is not particularly ambitious. Regulatory proposals in 2017 took the form of increased access to oral arguments and adoption of a code of ethics. But even in those two instances the proposed measures leave a good deal of discretion in the hands of the Justices.

Congressional modesty is not inevitable. One could imagine a Republican-controlled Congress, particularly when there is a Republican President, targeting any number of Supreme Court decisions from recent years: the affirmative action cases;<sup>216</sup> the same-sex marriage cases;<sup>217</sup> *Lee v.*

215. Letter from Jeffrey P. Minear, Counselor to the Chief Justice, to Gerald E. Connolly, U.S. Congressman, et al. (Oct. 2, 2017), <https://arstechnica.com/wp-content/uploads/2017/10/scotusletter.pdf> [<https://perma.cc/PN9G-2MW3>].

216. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 341–43 (2003) (rejecting Equal Protection challenge to admissions practices at University of Michigan Law School where race of a candidate may be a factor in generating a diverse class).

217. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (holding state-law bans on same-sex marriages invalid under the Fourteenth Amendment); *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (invalidating, with respect to same-sex marriages sanctioned by state governments, the

*Weisman*;<sup>218</sup> *Miller v. Alabama*;<sup>219</sup> *Dickerson v. United States*;<sup>220</sup> and *Texas v. Johnson*,<sup>221</sup> among others. So, too, it is possible to imagine a whole series of legislative overhauls, instead of a little tinkering around the edges with respect to broadcasting oral arguments and new ethical rules. Compared to the sorts of proposals that academics have put forth—changing the size of the Court;<sup>222</sup> term limits for the Justices;<sup>223</sup> altering the Court’s docket;<sup>224</sup> requiring the Justices to ride circuit again;<sup>225</sup> overhauling the selection and confirmation process;<sup>226</sup> “taking the Constitution away from”

provision of the Defense of Marriage Act recognizing for purposes of federal law only marriages between a man and a woman).

218. 505 U.S. 577, 598 (1992) (holding that inclusion of invocation and benediction prayers at graduation ceremonies at public middle schools and high schools violates the Establishment Clause).

219. 567 U.S. 460, 489 (2012) (holding that mandatory life imprisonment without parole for defendants under eighteen at the time they committed their crimes violates the Eighth Amendment).

220. 530 U.S. 428, 444 (2000) (holding that *Miranda v. Arizona*, 384 U.S. 436 (1966), was a constitutional decision that cannot be superseded by an Act of Congress).

221. 491 U.S. 397, 420 (1989) (holding that criminal prosecution for desecrating the U.S. flag violates the First Amendment).

222. See, e.g., Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439 (2009) (proposing an increase in the size of the Supreme Court from nine to fifteen Justices in order to increase the Court’s capacity).

223. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769 (2006) (recommending a constitutional amendment to institute a system of staggered, eighteen-year term limits for Supreme Court Justices).

224. See, e.g., Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009) (recommending the creation of a “certiorari division” of Article III judges to select cases for the Supreme Court); Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2928275](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2928275) [<https://perma.cc/76VQ-YLR4>] (proposing supplementing the Supreme Court’s caseload with a “lottery docket” of cases selected at random from final judgments of the circuit courts in order to have the Court hear run-of-the-mill disputes); Amanda L. Tyler, *Setting the Supreme Court’s Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310 (2010) (proposing that federal courts be permitted to certify questions to the Supreme Court).

225. See, e.g., David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1712 (2007) (“A modern form of circuit riding would ensure that Justices gain exposure to a wider array of legal issues, the laws of various states, and the difficulties faced by lower courts in implementing the Court’s sweeping (and sometimes confounding) rulings.”).

226. See, e.g., RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS 170–78* (2005) (proposing a constitutional amendment to provide for the election of Supreme Court Justices); CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT’S APPOINTMENT PROCESS 187* (2007) (urging Senators to confirm only “moderate” nominees to the Court and to focus their questions on uncovering extremism); Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960 (2007) (proposing a series of possible statutory reforms to regulate the processes of judicial selection and confirmation); Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004) (proposing the selection of Supreme Court Justices based upon a competition among appellate judges with the winner selected by objective criteria such as opinion publication rates and the number of citations by other judges and academics); Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 OHIO ST. L.J. 1087, 1105 (1993) (proposing a role for the House of Representatives in the appointments process).

the Court;<sup>227</sup> and even “eliminat[ing] the position of Supreme Court Justice”<sup>228</sup> altogether— Congress’s thinking is small.

Absent, too, in the modern Congress is any real sense that the Supreme Court can be brought to heel: say, by constitutional amendment, by stripping the Court of funding, by hauling in members of the Court to justify their rulings before congressional investigatory committees, by appointing special counsels to review and report back on what the Court does, by impeaching the Justices (or locking them up), or by simply ignoring or defying judicial rulings. Perhaps the Court does not rule in ways that offend enough members of Congress (or their constituents) for them to invest the energy—and political capital—required to generate these sorts of measures. Perhaps, instead, members of Congress do not consider such measures appropriate in our constitutional system. In either case, modesty on the part of Congress is the result, even in an era when a single party controls both the Congress and the White House. The lesson for the Court is that so long as it continues doing—more or less—what it has done in recent years, it has very little to fear from the Congress.

#### CONCLUSION

After President Trump nominated Neil Gorsuch to fill the vacancy on the Supreme Court left by the death of Justice Scalia, fifteen House Republicans sponsored a Resolution that “the House firmly supports the nomination of Neil Gorsuch to the Supreme Court” and “the Senate should hold a swift confirmation of this nomination.”<sup>229</sup> The proposed resolution died, without further action, in the Committee on the Judiciary. While Gorsuch was, of course, confirmed, the failure of the Republican-controlled House to pass a simple resolution supporting the nomination is telling. After an election season in which the Supreme Court figured very prominently, aside from the Senate’s confirmation of a new Justice, Congress in 2017 accomplished nothing with respect to the Supreme Court. Various bills and resolutions—some sponsored by Republicans, others by Democrats, and some garnering bipartisan support—targeted statutory and constitutional rulings by the Court and sought also to impose new regulations upon the Court’s activities. Even the most modest of these proposals failed to advance through the legislative process and become law. We like to think that the Supreme Court, guided solely by the rule of law, is above politics. The

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

228. John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541 (1999).

229. H.R. Res. 181, 115th Cong. (2017).

experience of 2017 suggests that the Court may also be above politics in the quite different sense that its rulings and activities are largely immune to political response and redress.